

Superior Court of New Jersey

Appellate Division

Docket No. A-1580-11T4

CRIMINAL ACTION

STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	On Appeal from a Final Judgment
v.	:	of Conviction of the Superior
	:	Court of New Jersey,
STEPHEN SCHARF,	:	Law Division, Bergen County.
Defendant-Appellant.	:	

Sat Below:
Hon. Patrick J. Roma, J.S.C.,
and a jury.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

FILED
APPELLATE DIVISION

SEP 30 2013



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COUNTER-STATEMENT OF PROCEDURAL HISTORY

Bergen County Indictment No. 09-08-01485-I, filed August 13, 2009, charged defendant, Stephen Scharf, with murder, contrary to N.J.S.A. 2C:11-3a(1) and (2). (Da1).

On April 5 and 6, 2011, a hearing was held before the Honorable Patrick J. Roma, J.S.C., on defendant's motion to suppress his statements to police. In an opinion dated April 18, 2011, Judge Roma denied the motion. (Pa1 to 14).

On April 7, 2011, the court heard argument on the defense motion to preclude: 1) evidence of defendant's relationship with other women and abuse of the victim; 2) statements of the victim regarding her fear of defendant and of heights, and 3) statements of the victim to her therapist. In an opinion dated April 11, 2011, Judge Roma denied the motion. (Da6 to 18).

Defendant was tried before Judge Roma and a jury from April 19 to May 27, 2011, and was convicted of the charge. (23T4-4 to 5; Da2).

On October 21, 2011, defendant's motions for a new trial on the ground that the verdict was against the weight of the evidence and/or because of newly discovered evidence were denied. (24T3-20 to 24; 24T4-5 to 7). That same day, Judge Roma sentenced defendant to life imprisonment, 30 years without parole, and ordered him to pay \$100 to the Victims of Crimes Compensation Board, \$75 to the Safe Neighborhoods Services Fund

and \$30 to the Law Enforcement Officers Training and Equipment Fund. (24T22-13 to 15; Da3 to 4).

A Notice of Appeal was filed on defendant's behalf. (Da5).

COUNTER-STATEMENT OF FACTS

In June 1992, Jody Ann Scharf told Jonathan, her 10 year old son, that she was going to file for divorce from defendant, Stephen Scharf, and broached the subject of who Jonathan wanted to live with after the divorce. Jonathan, who was well aware of defendant's infidelity, having been introduced to his father's lovers, and who had witnessed his abusive conduct toward Jody Ann, emphatically told Jody Ann that he wanted to live with her. (7T100-19 to 24; 7T102-10 to 17; 7T103-17 to 21). They discussed Jody Ann's plan for them to move to California, where Jody Ann's brother lived. (7T 7T104-11 to 24). Sadly, their plans never came to fruition. Within three months, Jody Ann would be dead, murdered by defendant.

In July 1990, Jody Ann began therapy sessions with Patricia Teague, a licensed clinician,¹ because of severe depression. (9T69-17 to 20; 9T76-20 to 77-1). Jody Ann discussed her feelings of abuse, both mental and physical, at defendant's hands which was causing her depression. (9T79-23 to 80-9). According to Jody Ann, defendant made her feel worthless, was punitive, and struck her when she did not comply with his expectations of what she should do. (9T80-10 to 15). With regard to his extramarital affairs, defendant never kept them a secret. There was a

¹Ms. Teague was licensed in New York in 1983 and in New Jersey in 1994. (9T75-24 to 76-4; 9T76-9 to 11).

telephone in the bedroom, where his paramours constantly called him, and he kept photographs of nude women. (9T80-16 to 81-5).

In 1989, during a blood drive at his company, GEC-Marconi in Wayne, New Jersey, defendant met Terri Schofield, a nurse with the Community Blood Service of Paramus. Defendant was the last donor of the day and came to her station, introducing himself as "Russ." But when Terri reviewed his documentation, she noticed that his name was Stephen; defendant explained the discrepancy by acknowledging his legal name as Stephen but claiming that he was called Russ. (8T87-18 to 21; 8T90-10 to 11; 8T90-21 to 22; 8T91-8 to 92-2).

During the process, which took about 15 minutes, defendant and Terri engaged in small talk. Because she did not wear a wedding band, defendant asked Terri if she was married. Terri answered that she was a widow. (8T93-8 to 21). When the blood donation was concluded, defendant shook Terri's hand and said, "nice to meet you," and left. (8T93-23 to 94-3). Two weeks later, defendant called her at home, having learned where she lived during their conversation. He initially identified himself as "Russ," then "Steve," then as the person from the GEC-Marconi blood drive. (8T94-5 to 18). Defendant invited Terri out for a drink, but she declined, feeling uncomfortable because they had met during a business related matter. (8T94-22 to 95-5).

But that didn't stop defendant. For the next year, he

telephoned her once a month asking if she had changed her mind. After talking to her girlfriends about it, the next time defendant called her, which was in June 1990, and invited her out, Terri said, "yes." (8T95-9 to 96-2; 8T96-18 to 22). They met at a pub in the Holiday Inn near Wayne. A few weeks later, defendant telephoned again, and she agreed to go out with him to the movies. From there, the relationship progressed. (8T97-1 to 5; 8T97-18 to 98-1).

When Terri asked defendant if he was married, he replied that his wife had died in a car accident in Georgia 10 years earlier. He had a son named Jonathan, whose mother he described as a career woman who wanted a child but not marriage. They lived in the same complex, shared joint custody, and he paid alimony. (8T99-11 to 24; 8T100-1 to 14; 8T100-20 to 23).

About six months after their first date, defendant telephoned Terri and asked if he could stay overnight, since he was working late and his home was about a one hour drive away, while Terri's house was only about 20 minutes away. Terri agreed, and within a short period of time, defendant was staying over three nights a week. (8T102-3 to 16; 8T102-21 to 103-2). He moved his clothes into a guest bedroom closet and also kept a truck in Terri's driveway. (8T103-6 to 16). In 1991, defendant started talking about marriage, claiming that he needed to "settle down," but Terri was not interested, both because she had

no desire to move her children from their home and because she did not want to disrupt Jonathan's relationship with his "mother." (8T105-8 to 21).

While defendant was professing undying love to Terri, he was involved with yet another woman. In July 1990, Kathleen Scanlon, who lived in Bricktown, answered defendant's newspaper ad, which was listed in a dating site for singles. As a result, defendant called her and they met at McLoone's restaurant in Long Branch. (8T152-11 to 14; 8T153-23 to 154-1; 8T154-15 to 22; 8T154-13 to 24; 8T156-4 to 7; 8T156-12 to 16). Shortly afterward, defendant, who was in the Army Reserves, was involved in maneuvers at Fort Dix for several weeks. When he returned, they started to date. (8T157-13 to 21).

Defendant told Kathleen that he was a major in the Army, that he was divorced and that he had a son. A few months into the relationship, defendant admitted he was married, but claimed that he and his wife lived separate lives, and that he was going to get a divorce. (8T157-24 to 158-5; 8T158-7 to 24). To convince Kathleen that his marriage was over, defendant asked Jody Ann to speak to Kathleen and convince her that a divorce was imminent. (8T159-12 to 22).

Jody Ann told Kathleen that she had not shared a bedroom with defendant since 1989, that defendant must care for her to ask Jody Ann to talk to Kathleen, that her only concern was for

the safety of Jonathan, and that she hoped that Kathleen had a better life with defendant than had Jody Ann. (8T159-23 to 160-10). Notwithstanding Jody Ann's "intervention," Kathleen ended the relationship with defendant on Labor Day 1990 because he was married. (8T160-16 to 25). Despite Kathleen's decision and her involvement with another man named Michael, defendant continued to call her at home and at work through the latter part of 1990 and all of 1991. (8T161-14 to 18; 8T161-20 to 162-2; 8T162-11 to 16).

Meanwhile, things were not improving for Jody Ann. In 1990, Jody Ann and Marion Hilferty, who both worked in the Basking Ridge area, frequented the Stove Restaurant in Basking Ridge and the Somerset Hills Hotel in Warren for lunch. Because the restaurants were always crowded, the servers would ask people to share tables. The women did so and became friends. (9T3-18 to 20; 9T6-3 to 17; 9T7-8 to 8-9). Over the years, Jody Ann discussed with Marion her troubled marriage, defendant's infidelities, and her fear of defendant, even showing Marion a photograph of defendant so that Marion could recognize him if he ever showed up. Marion advised Jody Ann to stand up for herself. (9T3-18 to 20; 9T6-3 to 17; 9T8-1 to 25; 9T9-13 to 10-4 9T16-1 to 5).

Finally, Jody Ann decided to take some action. In March 1991, she met with Benjamin Michel, the head of the family law

department at Riker, Danzig, Scherer, Hyland and Perretti to discuss divorcing defendant. After obtaining some background information and interviewing Jody Ann to establish a cause for the divorce,² Mr. Michel asked Jody Ann to complete a case information statement, which she did not return until 1992. (9T12-13 to 20). In February 1992, Mr. Michel sent defendant a letter to inform him that Riker Danzig represented Jody Ann in a divorce action. (9T23-19 to 24).

In March 1992, Kathleen ended her relationship with Michael. Defendant contacted her and asked Kathleen to start dating again, stating that Jody Ann was going to file for divorce and promising Kathleen that a divorce would take place. (8T162-23 to 163-20). Kathleen agreed to take defendant back and believed that she was falling in love with him. (8T163-24 to 164-6; 8T164-18 to 24; 8T165-2 to 4).

With the documentation needed to file for divorce completed, on June 15, 1992, Mr. Michel filed a complaint for divorce. On or about August 26, 1992, a summons was sent to defendant advising him of the divorce action. (10T17-6 to 13; 10T18-9 to 14). However, on the form sent by Mr. Michel with the summons, there was no signature by defendant acknowledging service of the complaint. So, Mr. Michel sent the summons and complaint to the

²At the time, the only recognized causes of action for divorce were extreme cruelty, separation for a period of time and desertion. (9T11-7 to 12-1).

Sheriff's Office to have defendant served at his office. A receipt was issued by the Sheriff's Office that defendant was served on September 8, 1992. (10T16-4 to 7; 10T14-21 to 15-17; 10T18-18 to 23). At no time prior to or after the filing of the complaint did Jody Ann instruct Mr. Michel to withdraw the complaint or indicate a desire to reconcile with defendant. (10T19-5 to 13).

Having received the divorce complaint from Jody Ann, defendant started to put his plan to end her life into action. In 1991, defendant, with Jody Ann's knowledge, took out a life insurance policy on Jody Ann's life, with defendant as the primary beneficiary and Jonathan as the secondary beneficiary. The plan was for defendant to use the policy to purchase a condominium, allowing Jody Ann to stay in the family residence with Jonathan, but the plan fell through. (9T116-13 to 117-3; 9T117-9 to 22).

The policy, which became effective on June 4, 1991, was obtained from USAA Life Insurance Company (hereafter USAA). It was for a basic amount of \$300,000 and an accidental death benefit of \$200,000. (15T6-3 to 4; 15T6-15 to 22; 15T8-23 to 9-7; 15T10-2 to 9). Murder was designated an "accident," and therefore, recoverable under the policy, unless the beneficiary was the murderer. (15T12-2 to 13-9).

In August 1992, Jody Ann, who was still in therapy with Ms.

Teague, recounted a conversation with defendant. Defendant came home and told her about having climbed the Palisades in Englewood Cliffs, which overlooked a beautiful view, and suggested they pack a lunch and enjoy a picnic there. (9T81-23 to 82-16). Jody Ann told Ms. Teague that she had never been to the Cliffs. When asked whether she intended to take defendant up on his offer, Jody Ann said "no," having told defendant that he was crazy. (9T82-17 to 22).

Jody Ann's response was understandable, not only because of her pending divorce, but because of her life long fear of heights. While her father was stationed in Germany with the Army, the family quarters were on the third floor. The apartment contained a balcony, which Jody Ann never stepped onto during her father's deployment in Germany. (16T16-5 to 11; 16T18-11 to 13; 16T18-15 to 23; 16T19-19 to 23; 16T20-11 to 21-6; 16T21-20 to 22-2). In 1989, when her brother and his family visited the New York area, Jody Ann would not go with them to the World Trade Center. (16T22-11 to 19).

When Jonathan was in the first grade, Jody Ann was on the back porch and wanted to hang a plant above the door. She could not reach the hook that would hold the plant so she retrieved a stepladder. After climbing up about four feet, she turned ghostly white. When Jonathan asked what was wrong, Jody Ann said she felt lightheaded and sick. (7T110-3 to 111-14).

That August, defendant planned a getaway to the beach with Terri, her children and another couple, during Labor Day weekend.³ Early that weekend, however, defendant telephoned and said he would meet her there later, but did not arrive until the early morning hours of Sunday, claiming to have been helping someone. After a few hours sleep, and knowing that Terri was angry, he suggested a walk on the beach, where he said that he would have to leave again. (8T106-16 to 18; 8T107-1 to 25).

Defendant kept apologizing, stating that he was under a lot of pressure from his job and because Jonathan's mother was suing for full custody, which he was not going to let happen. (9T109-5 to 18). When Terri remained intractable, defendant said, "Please, no. Just give me to the end of September and everything will be okay . . . a lot of the stress will be gone." With that, he left. (8T109-20 to 110-1). On the Tuesday and Wednesday following Labor Day, defendant came to Terri's house, apologized again, and pleaded with her to give him until the end of the month when a lot of the "pressure" would be off. (8T113-7 to 24).

Jody Ann still feared defendant. She told Marion that once defendant was served with the divorce complaint, she was frightened of what he would do, stating that defendant "wants me gone." During her conversations with Marion, all she talked about

³That year, Labor Day was September 7.

was Jonathan and her fear of defendant hurting her, often breaking into tears. She told Marion that if anything happened to her, Marion would know who was responsible. (9T11-3 to 8; 9T16-8 to 20). Throughout her conversations about defendant, Jody Ann was visibly shaken and very nervous. (9T65-18 to 66-1; 9T66-11 to 13; 9T66-24 to 25).

In mid-September, defendant and Kathleen were discussing marriage. On September 18, defendant stayed over at Kathleen's house, but left early the next morning to go to Fort Dix for maneuvers most of the weekend, and promised to be in touch. (8T166-1 to 8; 8T166-14 to 22; 8T167-7 to 17). The next time Kathleen talked to defendant would be to learn of Jody Ann's death.

Jody Ann also confided in Anna Rolfson, a bartender whom she had known since 1990 and who had become a friend. (9T155-9 to 11; 9T155-22 to 156-21). Anna knew, from discussions with Jody Ann, that she did not have a good marriage, that defendant was abusive and was unfaithful, coming and going as he pleased, and that she was scared. (9T157-2 to 15).

Shortly after filing for divorce, Jody Ann showed Anna a photograph of defendant and asked Anna to contact her should defendant come to the restaurant. (9T157-17 to 24). On Friday September 18, Jody Ann went to the hotel and talked to Anna. She was very upset and when Anna asked what was wrong, Jody Ann said

she was afraid that defendant would kill her because of the divorce. (9T158-14 to 22).

On September 19, in the latter part of the afternoon, Jody Ann went to Schooley's Mountain Inn, a small, neighborhood restaurant where her friends Maureen Glennon and Maureen Durante worked as servers. (9T118-23 to 25; 9T120-14 to 21; 9T121-14 to 21). Jody Ann tried to speak to Maureen Glennon about what was going on in her life, but because Maureen was busy with customers, she could not talk to her. Instead, Jody Ann slipped her a note. (9T123-9 to 124-7). At the end of her shift, Maureen read the note. It said that her husband had been served with divorce papers the day before, he was very unhappy, she was afraid and all she wanted was defendant out of her life, which was not going to happen. Jody Ann asked Maureen to call her later, but she never did, throwing away the note. (9T124-8 to 22).

As for Maureen Durante, she was a customer in the restaurant that day and had a conversation with Jody Ann about defendant. Jody Ann told Maureen Durante that she had filed for divorce but defendant had refused to sign the divorce papers and threatened her life, stating that he would see her dead before he signed off. (9T142-16 to 20; 9T145-7 to 19; 9T145-24 to 146-3).

On September 20, Jonathan heard defendant ask Jody Ann if she wanted to go out. Jody Ann responded, "if I wanted to go out

with you, I wouldn't be divorcing you." (7T95-6 to 11). Later that day, Jonathan approached Jody Ann and said, "oh you guys are going out? . . . I can go stay at my friend's house. It'll be great." Jonathan's enthusiasm may have persuaded Jody Ann to change her mind, because she and defendant went out that night. They had plans to go to dinner and to a comedy club, Rascals, in New York City. (7T95-17 to 20). Jody Ann wore a striped jacket and shorts, with a white crocheted sweater vest and a blue sleeveless tank top. (17T17-23 to 18-6). Defendant and Jody Ann drove Jonathan to his friend C.J. Jackson's house, located about 15 minutes away, and then took off. (7T99-5 to 12; 7T99-20 to 22). Jonathan never saw his mother alive again.

At 8:08 p.m. that evening, a man rushed into Palisades Interstate Parkway (PIP) Headquarters and stated that he was at the Rockefeller Lookout (Lookout) on the Cliffs when defendant flagged him down and said that his wife had fallen from the cliffs. Sergeant Nelson Pagan, the tour commander, dispatched Patrolmen Paul Abbott and Lowell Tamayo to the scene while he and Patrolman Walter Siri rushed to the maintenance center to procure a rescue vehicle. (11T4-13 to 17; 11T5-9 to 6-6; 11T6-9 to 14; 15T25-3 to 6; 15T27-20 to 2802; 15T28-22 to 29-6). Sergeant Pagan drove the rescue vehicle to the Lookout while Patrolman Siri drove an unmarked Chevy Caprice. (11T7-8 to 20).

The Lookout, which has no artificial lighting, is located on

the northbound section of the PIP, across the Hudson River from New York City. There are parking slots along a concrete area curving to the northern end. In addition, large binoculars are provided which allow a view of the George Washington Bridge and northern Manhattan. (10T34-20 to 35-3; 10T37-21 to 38-1; 10T38-9 to 39-13).

Within minutes of being dispatched, both Patrolman Abbott and Patrolman Tamayo arrived at the Lookout. (10T32-2 to 3; 10T32-25 to 33-4; 10T36-7 to 37-1; 10T151-20 to 24; 10T153-24 to 154-11). Because of the hour, it was pitch black. Patrolman Abbott saw defendant, who was dressed in a dark colored tee shirt, blue jeans and sneakers, walking slowly toward his patrol car with his hands extended out to the side. There was nothing in his hands. (10T43-23 to 44-10; 10T44-14 to 15; 10T45-4 to 9; 11T12-6 to 9).

Patrolman Abbott got out of his patrol car and walked over to defendant, who said, "my wife just fell off the cliff." (10T45-16 to 20; 10T154-18 to 155-2). When defendant told Patrolman Abbott where Jody Ann "fell," which was past the northern end of the Lookout, Patrolman Abbott asked defendant to sit in the patrol car and they drove there, followed by Patrolman Tamayo. (10T46-24 to 47-23; 10T155-12 to 18). Defendant's demeanor was calm and controlled, with no visible displays of emotion. In Patrolman Abbott's experience, defendant's reaction

was unusual. (10T48-6 to 19; 10T49-5 to 50-10).

Once at the northern end of the area, about 75 feet from the Lookout, Patrolmen Abbott and Tamayo and defendant exited the cars. Defendant guided the officers off of the paved lot and into a wooded area which led to the cliff face. Patrolman Abbott led the way, followed by defendant and Patrolman Tamayo. Because of the darkness, which was even more pronounced in the wooded area, the officers used flashlights to illuminate the way. They walked down a trail created by hikers which, given the time of year, was overgrown with foliage, bushes and branches; tree limbs blocked portions of the path. (10T50-17 to 51-22; 10T52-15 to 22; 10T52-25 to 54-3; 10T156-21 to 157-17; 14T17-1 to 16).

When the three men arrived at a green cable fence which ran along the cliff face and was intended to keep visitors from getting too close to the edge, Patrolman Abbott asked defendant to point out where Jody Ann fell from the cliffs. Defendant pointed to a rock formation shaped like a bench seat. (10T54-6 to 15; 10T54-21 to 55-6; 10T158-13 to 22). Defendant was ordered to stand behind the fence while the two officers walked through the fence to the edge of the bench seat and called out "Jody Ann" numerous times, but there was no response. (10T55-7 to 21; 10T159-2 to 16). There was no view of the George Washington Bridge or of the northern Manhattan skyline from that location. (14T19-17 to 20).

Patrolman Abbott radioed headquarters with the precise location of Jody Ann's fall so that emergency equipment and personnel could respond. (10T56-22 to 56-2). Patrolman Tamayo accompanied defendant back to the Lookout while Patrolman Abbott stayed on the scene. (10T57-14 to 18; 10T160-4 to 7; 10T160-21 to 24). While he was there, Patrolman Abbott noticed a pocketbook on a small ledge below the bench seat, which he did not recover at the time. (10T56-25 to 9; 10T56-21 to 22).

When defendant and Patrolman Tamayo arrived at the officer's patrol car, Patrolman Tamayo asked defendant what happened. Defendant said that he and Jody Ann were sitting on the rock by the cliff's edge, hugging and kissing, when he stood up, intending to go back to his car to retrieve wine and a blanket. When he turned around, Jody Ann was gone. (10T159-23 to 161-11). Defendant was nervous but in charge of his emotions. (10T162-4 to 7). Patrolman Tamayo asked defendant to sit in the back seat of the patrol car and relax, which he did, although intermittently, he would exit the car, walk around, and go back inside. (10T162-13 to 25). One time, defendant said Jody Ann's name, another time he kneeled by the car and seemed to be praying, but he never cried. (10T163-2 to 9).

At about 8:15 p.m., Sergeant Pagan and Patrolman Siri arrived at the Lookout. Because the rescue vehicles which were responding to the scene were large, Sergeant Pagan instructed

Patrolman Siri to close and secure the Lookout and order all civilians to leave. (11T9-10 to 22; 15T32-11 to 24). Sergeant Pagan walked to the trail and arrived at the bench seat where Patrolman Abbott briefed him on defendant's statement about Jody Ann's fall. (10T57-19 to 58-11; 15T31-16 to 32-10).

At 8:22 p.m., the Englewood Cliffs Fire Department arrived at the Lookout. One of the responders was Officer Michael Cioffi, who was both an Englewood Cliffs police officer and fireman and was extremely experienced in cliffs rescue efforts. (14T5-20 to 22; 14T6-6 to 8; 14T7-14 to 18; 14T14-16 to 15-15).

Officer Cioffi proceeded to the bench seat, where, along with Sergeant Pagan, another experienced climber, they would rappel down the mountain face searching for Jody Ann. It was much darker in the wooded area and the cliff edge than at the Lookout. A generator was brought in for lighting and the men also carried hand lights provided by the fire department. (14T17-20 to 25; 14T20-16 to 25; 15T25-14 to 36-3).

The men walked backward down the cliff, with Officer Cioffi in the lead and to the right of Sergeant Pagan. (14T24-19 to 24; 15T37-10 to 11; 15T37-18 to 38-2). About 10 feet down, they saw Jody Ann's pocketbook and its loose contents. Sergeant Pagan placed the items into the pocketbook and threw it up to Patrolman Abbott. (10T59-10 to 18; 14T26-14 to 15; 14T26-19 to 25; 14T39-2 to 20; 15T40-8 to 25).

As they rappelled down, both officers looked for signs, like broken branches or rock slides, which would indicate that a body had passed through, but saw nothing. (14T25-22 to 26-9; 15T38-22 to 39-17; 15T39-24 to 40-7). Because there was no path, the climb was extremely difficult, as the terrain on the cliff was rugged and thick with trees, both fallen and upright, brambles, brush and rocks. The thickness and coarseness of this vegetation impeded the progress of the two officers. During their descent downward, the officers were unable to locate the path of descent that the victim's body would have traveled. (14T39-23 to 40-15; 15T43-7 to 19).

After 45 minutes, the men arrived at the base of the cliffs and still there was no sight of Jody Ann. They instituted a grid search, using their flashlights, and finally, about 30-40 feet north of the rappel lines, Sergeant Pagan found Jody Ann's body. She was wedged, face down, between a tree and a large rock, with massive head and chest injuries. (14T44-7 to 23; 14T48-23 to 49-6; 15T44-18 to 45-10). Her location in the tree was 119.3 vertical feet from the bench seat and 52 horizontal feet from the cliff. (16T45-6 to 9; 16T45-15 to 19; 16T53-16 to 19).⁴ Sergeant Pagan found blood and tissue about six to eight feet up on the tree; the blood was draining downward. The officers moved

⁴The engineer testified that 119 feet is about the height of a 20 storey building, while 52 feet is about the width of a road from sidewalk to sidewalk. (16T54-3 to 17).

the rock to retrieve the victim and placed her in a basket. They then started their descent to the lower road, arriving there about 11:30 p.m. (14T45-12 to 25; 14T50-5 to 22; 15T45-13 to 24).

Once the body was recovered, Patrolman Abbott left the bench seat and returned to the Lookout. He noticed a Ford Taurus at the northern end of the Lookout; a license plate check confirmed that the car belonged to defendant. (10T60-11 to 25). He shined a flashlight inside the car and saw a wine cooler bottle on the floor and a plastic cooler. After advising headquarters, he was directed to stay with the Taurus. (10T61-3 to 14; 10T62-14 to 63-7; 10T63-11 to 25).

Before beginning the rescue attempt, Sergeant Pagan had instructed Patrolman Siri to transport defendant to PIP headquarters. At about 8:20 p.m., Patrolman Siri found defendant in Patrolman Tamayo's patrol car, with his hands covering his face. (11T11-7 to 10; 11T23 to 12-5). After introducing himself, Patrolman Siri explained that he would be bringing defendant to PIP headquarters. During the drive, defendant was reciting the Hail Mary. He also spontaneously said, "we were walking and she said to me to go back to the car and get the blanket and she slipped and I didn't see her anymore." (11T14-5 to 14; 11T14-19 to 15-7). At 8:30 p.m., Patrolman Siri and defendant arrived at headquarters. (11T17-20 to 18-2).

Meanwhile, Detective Ronald Karnick, who was off duty at the

time, was asked to come to headquarters to investigate a "cliff case." (11T53-19 to 22; 11T54-19 to 55-3; 11T55-8 to 56-3).

After driving to the scene to familiarize himself with the area, at about 10:00 p.m., Detective Karnick arrived at headquarters to interview defendant. (11T56-5 to 11; 11T56-14 to 24; 11T57-5 to 10; 11T58-6 to 15; 11T59-5 to 60-19; 11T62-23 to 63-8; 11T63-17 to 22; 11T67-6 to 9).

They went to the Detective Bureau where Detective Karnick asked defendant what happened. He stated that they were going to a comedy show in New York City and wound up at the Lookout, which was "their spot." They had been drinking in the car and walked to the cliff's edge, climbing through the fence, where they sat on the bench seat. They were kissing and hugging when defendant said he was uncomfortable and told Jody Ann that he was going to get a blanket and wine from the car. They both stood up, with Jody Ann saying, "no, don't go," when she fell forward. He called out her name but received no reply. (11T65-23 to 66-25; 11T67-2 to 4).

At Detective Karnick's request, at 10:22 p.m., defendant provided a handwritten statement describing what transpired:

Jody and I were kissing and hugging on the flat rock by the trail overlooking the river about 7:30 and I was uncomfortable when I asked Jody or told her I was going to get the blankets and the wine. She said no don't go as I got up to get the wine and blankets she got up and then fell forward and I didn't see her anymore. She didn't answer me.
[11T70-13 to 71-4].

While giving the statement, defendant asked whether Jody Ann was alive or dead. Detective Karnick answered that he did not know. Once the written statement was completed, Detective Karnick returned to the Cliffs, where Jody Ann's body was being brought to the lower road. He was present when Jody Ann was officially pronounced dead. (11T73-11 to 74-2; 1T74-15 to 17; 11T74-19 to 25; 11T76-8 to 16; 11T78-3 to 5).

Detective Karnick returned to headquarters, where defendant asked if Jody Ann was alive or not. Detective Karnick said, "no, she didn't make it." Defendant did not seem very upset by the news, with only a slight emotional response and no tears. (11T78-23 to 79-9; 11T79-17 to 19; 11T80-23 to 81-6).

Early in the morning on September 21, defendant executed consent forms to be photographed and for a search of the Taurus. Detective Karnick left headquarters for the Lookout, where he photographed the exterior and interior of the Taurus and searched the interior. (11T82-13 to 23; 11T83-21 to 23; 11T87-16 to 19; 11T90-13 to 23; 11T90-24 to 91-7).

On the back seat was a red nylon bag with a blue nylon bag inside it, a Coleman cooler and a full bottle of wine. Inside the cooler was a wine glass, one full and one empty bottle of Bartles and Jaymes wine cooler, and a steak knife. (11T93-22 to 94-2; 11T101-19 to 22). Inside the blue bag was a green blanket, ace bandages, two white towels, a candle, a plastic bag with

receipts,⁵ one box of wine crackers, and a small jewelry box containing a chain and gold cross. At the bottom of the bag was a claw hammer. (11T94-3 to 10). When Detective Karnick returned to headquarters, defendant was not there, having been picked up. (11T105-11 to 18).

On September 21 at 8:00 a.m., Jonathan was still C.J.'s house, unaware of what had happened to his mother, when defendant and his Great Aunt Dolly arrived and told him it was time to go. Once they arrived home, defendant took him to the back yard and broke the news of Jody Ann's death, saying "cry with me." Jonathan could tell that defendant's emotion was not real or genuine. Defendant explained that he and Jody Ann were hugging and kissing on a ledge when he got up to get wine and a blanket. When he turned around, Jody Ann was gone. (7T106-5 to 107-5; 7T107-7 to 108-2).

That same day, defendant telephoned Kathleen and said he had some bad news. When she asked what was wrong, defendant said, "Jody's dead." Kathleen became very upset and he explained that they had gone to dinner, she had been drinking, and they decided to talk about the divorce at the Palisades. (8T167-23 to 168-11). Not being familiar with the area, she asked what was there. He stated, "well there's an area where we used to go when we used

⁵One of the receipts was from the Shop Rite in Hackettstown, dated September 20 at 3:28 p.m. for cheese. (11T101-2 to 8).

to date and she felt very comfortable." Defendant then explained that Jody Ann fell, and added that there were rocks and a barrier, which they went beyond and walked on the rocks. One minute she was there and the next minute she was gone. (8T168-12 to 21). As she pressed him for more answers, defendant became upset and said he was going to stay with his parents. (8T168-22 to 169-5).⁶

In mid-afternoon on September 21, defendant arrived at PIP headquarters to retrieve the Taurus. At that time, defendant met with Detective James Lyman of the PIP and agreed to be interviewed the following day at the Bergen County Prosecutor's Office. (11T157-5 to 8; 11T173-7 to 174-1). On September 22, defendant met with Detective Lyman and Detective Terence Alver of the Bergen County Prosecutor's Office at the Linden Street Annex. (11T174-15 to 23; 11T175-6 to 24).

During this interview, defendant claimed that he and Jody Ann were planning to go to a comedy club in New York called Caroline's for the 8:30 p.m. show. They also called Rascals in West Orange, but did not like the performer scheduled to appear

⁶Defendant never bothered to telephone Terri. Her father, who lived in Bergen County, mentioned reading about Jody Ann's death in the newspaper. Terri talked to defendant the next day and asked that "what the heck is going on; you're married." He hung up the telephone. (8T115-12 to 25; 11T117-4 to 5; 8T117-10 to 22; 8T118-19 to 24). Almost seven months later, Terri was in defendant's home when she saw notes and cards from other women, and listened to messages on the answering machine from other women. She ended the relationship. (8T119-18 to 121-8).

there, so they decided to go to New York City. (11T181-23 to 182-10). They also decided to eat at the Plaza Diner in Fort Lee either before or after the show. (11T182-23 to 183-2). They packed a cooler with two Bartles and Jaymes wine coolers, a blanket, cheese and a bottle opener. There was also a Bartles and Jaymes wine cooler which was not placed in the cooler. (11T184-8 to 21).

As for the Cliffs, defendant explained that he and Jody Ann had been there 30-40 times, and had "their spot" at the site. Their last visit was in May 1992. (11T185-5 to 20). On September 20, they left their home at about 5:00 p.m. and arrived at the Lookout at approximately 7:00 p.m., which was at "dusk." They parked the Taurus and remained in the parking area for about 15 minutes where Jody Ann had some wine and he drank some of hers. (11T185-22 to 186-7). After 15 minutes they went for a walk down a path to a fence separating the path from the cliff face, stopping several times along the way to kiss. (11T187-6 to 14).

When they arrived at the cliff's edge, defendant sat on the bench seat and Jody Ann sat between his legs facing south. At some point, defendant stood up because he was sitting on his wallet, which made him uncomfortable. After zipping up his pants, he told Jody Ann that he was going back to the car to get wine and a blanket. She turned to him and said, "No, don't go,"

fell to her knees and rolled forward off the cliff, neither screaming nor crying out as she fell. Defendant was about two to three feet away from Jody Ann when this happened. (11T188-14 to 23; 11T189-2 to 16). After calling her name about 10 times without an answer, he ran to the Taurus, got a flashlight and returned to the bench seat, called out her name and received no response. (11T190-14 to 191-1). He then waved down a passing motorist, said his wife had fallen off the cliff and to go to the police for help. (11T191-4 to 9).

When asked about his marriage, defendant said that it was in decline and had been for some time. His wife had served him with divorce papers two weeks earlier, alleging abuse and infidelity. Defendant denied being abusive except for one episode. (12T4-2 to 15; 12T5-16 to 23). According to defendant, they had an "open marriage" for the past 13 years. He would place personal ads in magazines to meet other women and estimated that he had been with 50 to 60 women during the course of his marriage. (12T6-9 to 23).

At the time of Jody Ann's death, defendant admitted being involved with two women, Kathleen and Terri, but claimed that he was breaking up with them, and that the trip to the Lookout was an attempt on his part to reconcile with Jody Ann. He alleged that he told Terri on Labor Day that their relationship was over. (12T7-18 to 22; 12T8-4 to 22).

When the detectives asked defendant about the claw hammer found in the nylon bag, he claimed to have used it to fix a drawer in the kitchen and intended to leave it in the garage. Instead, he threw it into the nylon bag with the picnic things. During the interview, defendant consented to a search of his Morris County home. (12T10-11 to 13; 12T13-6 to 11; 12T13-18 to 21; 12T15-18 to 22).

Later that day, defendant was interviewed by Detective Joseph Hornyak of the Bergen County Prosecutor's Office. During that interview, Detective Hornyak asked defendant for a step by step account of his activities on the day of Jody Ann's death. (12T68-4 to 7; 12T69-20 to 70-1; 12T70-9 to 12; 12T70-24 to 71-11). In this version, defendant claimed that he and Jody Ann left their house at about 6:00 p.m. and drove to the Cliffs. On the way they discussed their pending divorce. Once at the Lookout, they parked and kissed before walking to the bench seat. Once there, they began kissing until defendant said he was uncomfortable and wanted to return to the Taurus to get the blanket and the bottle of wine. Jody Ann asked him not to go and tried to get up, got into a squatting position where she tripped forward and fell over the Cliffs. (12T77-16 to 78-5).

As for the marriage, defendant claimed the relationship was improving but that they were still distant, because he was seeing other women and he believed that Jody Ann was seeing someone as

well. As for Terri and Kathleen, he was attempting to break up with them earlier in the month because he loved Jody Ann and was looking to reconcile. (12T78-12 79-6; 12T79-12 to 18).

Later that evening, defendant drove to his Washington Township, Morris County, home along with Detectives Alver and Lynam to conduct the consent search. Also present were Washington Township Lieutenant Ted Ehrenberg and Sergeant William Gundersdorf. (12T102-6 to 8; 12T110-5 to 18; 12T111-21 to 23; 12T112-5 to 10; 12T140-11 to 14; 12T27-5 to 13).

While the search was conducted by Bergen County personnel, defendant sat down with Lieutenant Ehrenberg and Sergeant Gundersdorf. Lieutenant Ehrenberg, a very religious man, was trying to provide solace to defendant when defendant said, "you don't believe me." Lieutenant Ehrenberg, who had asked no questions, said, "I believe an accident happened. It was an accident." Defendant said, "no," and put his head down before asking to speak to a priest. (12T114-1 to 18; 12T145-8 to 16; 12T147-1 to 19; 12T148-4 to 10; 12T148-15 to 20).

On September 21, 1992, Dr. Maryann Clayton, of the Bergen County Medical Examiner's Office, conducted Jody Ann's autopsy. (17T4-12 to 14; 17T4-23 to 5-1; 17T10-7 to 10). After removing and photographing Jody Ann's clothes, (17T11-20 to 12-8), Dr. Clayton conducted an external and internal examination. The external examination revealed lacerations on the scalp, including

a large one that spanned the top of Jody Ann's head, and intersecting skull fractures on the right side of the face. There were abrasions and scrapes on both sides of the face, a fracture of the right eye socket, nose and cheek and a tear in the eyeball. (17T19-15 to 18; 17T19-23 to 20-7; 17T20-11 to 14; 17T20-21 to 21-19).

The upper chest area included a large laceration on the right upper part which was nine inches long and four inches wide. The large, gaping opening extended from the armpit down and across the left breast. The skin on top of the laceration was scraped. (17T22-23 to 22-9). There were scrapes on the arms, legs and a few bruises on the lower legs and hand. The right shoulder was dislocated and her ribs were fractured. There were no injuries to the upper or lower back. (17T22-15 to 23-7). The significant finding during the external examination was that the serious head injuries seemed to be more prominent on the right side and that the chest injury was on the right upper chest wall. (17T23-10 to 14).

As for the internal injuries, every rib on both sides of the body was fractured in the front and back. The sternum and collarbones also were fractured. (17T24-4 to 9). After removing the chest plate and sternum, Dr. Clayton found that the sac around the heart was torn, the lungs were bruised and the upper lobe of the left lung had suffered a tear. (17T24-16 to 25-8).

The aorta was torn. On the right side of the abdomen, there was superficial tearing of the liver tissue and the spleen was torn. (17T25-17 to 20; 17T25-24 to 26-4).

There was bleeding on the surface of the brain. After the skull was removed, Dr. Clayton saw on the undersurface tears of the brain tissue. There were extensive fractures at the base of the skull in the front and middle compartments. The back of the ribs were fractured. Dissection of the heart revealed lacerations in several chambers. (17T26-16 to 17; 17T26-21 to 27-11; 17T28-6 to 8; 17T31-19 to 24).⁷

Dr. Clayton concluded that the cause of death was multiple fractures and injuries. As for the manner of death, she could not determine it to a reasonable degree of medical certainty. (17T33-15 to 25). The portion of the death certificate which asked for a manner of death was filled out as "pending investigation." (17T34-1 to 14). In January 1993, because a death certificate cannot be left open if there is a pending investigation, Dr. Clayton amended the manner of death to "unable to be determined." (17T45-11 to 22).

When USAA received notification of Jody Ann's death from the Bergen County Prosecutor's Office in September 1992, they sent defendant claim forms to fill out so that the policy could be

⁷Toxicological results indicated that Jody Ann's blood alcohol level was .120 (blood) .121 (brain). (17T43-6 to 24).

paid. (15T13-16 to 14-13). Four times the company sent defendant claim forms, and four times none were returned. (17T14-5 to 15-2).

Because Jody Ann's death occurred within two years of the policy being obtained, it was considered a contestable claim. The insurance company, to validate the claim, was in contact with the Bergen County Prosecutor's Office. (15T15-8 to 16-5). Since defendant never filed a claim and a death occurred, USAA was required to pay the policy. The investigation was completed in 1995 and payment was withheld for five years. Since the beneficiary refused to accept the payment, USAA was statutorily required to turn over the payment as unclaimed funds. (15T16-17 to 17-4; 15T17-13 to 24; 15T18-13 to 14; 16T4-24 to 5-5).

On April 30, 2001, the New Jersey Department of Treasury, Unclaimed Property Unit, received a check in the amount of \$730,154.27 in defendant's name. The Unit does not conduct any investigation; rather, it makes payment once identity and ownership is verified. (16T3-14 to 16; 16T5-16 to 6-2). After the check was deposited, the Unit sent defendant a letter about the unclaimed property. It received a response from defendant, and on April 16, 2003, the claim was satisfied and payment made of \$770,650.83. Defendant cashed the check. (16T9-1 to 8; 16T9-19 to 20; 16T10-2 to 11; 16T11-8 to 13; 11T11-17 to 20; 11T12-8 to 12).

It seemed as if defendant had gotten away with murder. But in the summer of 2005, Dr. Clayton was contacted by the Bergen County Prosecutor's Office, which was conducting a comprehensive review of the circumstances of Jody Ann's death. (17T48-6 to 13). Dr. Michael Baden, a pathologist, was participating in the review. In August 2005, Dr. Baden came to the Medical Examiner's Office and reviewed the autopsy report as well as all photographs in the file from the scene. He also discussed, with Dr. Clayton and John DeSimone, a medical examiner's investigator who was present when Jody Ann's body was recovered, information in the files regarding Jody Ann's death. (17T9-4 to 17; 17T48-15 to 49-5). Part of the review included statements by defendant that suggested a "passive fall" from the cliff edge. (17T49-to 17).

On January 27, 2006, Dr. Clayton returned to the Cliffs with detectives from the Bergen County Prosecutor's Office, as well as Sergeant Pagan and Officer Cioffi. Dr. Clayton walked the roadway up the rocky terrain to the site of the tree next to where the body was recovered with Sergeant Pagan and Officer Cioffi. This was the first time she had visited the recovery site. (17T49-19 to 50-12).

The climb was difficult but enlightening, as it provided Dr. Clayton with a perspective unavailable from the upper level. Viewing the scene as a whole from that perspective gave Dr. Clayton an ability to understand the relationship between the

bench seat above her and the tree where the body was wedged, and gave her a better sense of the dynamics that may or may not have been involved in Jody Ann's death. The lack of vegetation at that time of year also aided her view. (17T50-13 to 51-16; 17T51-22 to 25). Sergeant Pagan and Officer Cioffi showed Dr. Clayton where they had seen the blood and hair on the tree. (17T53-22 to 54-4).

Moreover, when Dr. Clayton conducted her autopsy of Jody Ann, it was her first autopsy of a death connected with the Cliffs. By 2006-07, she had examined a number of cliff deaths. (17T57-2 to 15). Armed with this new perspective and information, Dr. Clayton reviewed her autopsy report. The injuries Jody Ann received were sustained by forceful conduct with no fixed object. The most serious injuries were in the head and chest and showed a right handed predominance. The localization and severity was unique, and the pattern was different than other cliff deaths she had examined. (17T56-8 to 24; 17T57-16 to 58-14).

The lack of injuries on the back and lack of fractures on the extremities suggested forceful contact in a localized area with a fixed object which caused dissipation of force into the body, more especially in the head and chest area. (17T58-17 to 25). The pattern of injury or distribution of force in Jody Ann's chest was so extreme that it caused the chest wall to

compress, fracturing the breastbone and all the ribs, lacerating the aorta, fracturing the thoracic vertebral body and causing fine tears on the inner surface of the heart. These injuries were not consistent with a patient who passively rolled down the Cliffs to the bottom. For Jody Ann to get to the tree and establish contact with it six feet above the base, she had to be propelled out. (17T59-24 to 60-6; 17T60-16 to 62-3). On January 4, 2007, Dr. Clayton amended the manner of death on Jody Ann's death certificate to homicide. (17T62-21 to 63-1).

Dr. Michael Baden, a forensic pathologist, was tasked with deciding whether, from the available evidence, Jody Ann's death could be an accident, homicide or suicide. (17T139-5 to 8; 17T148-8 to 14). After reviewing the autopsy report of Dr. Clayton, he agreed that the cause of death was multiple fractures and injuries. (17T147-16 to 21; 17T148-2 to 20). As for the manner of death, in his career as a medical examiner in both New York City and New York State, he had often been confronted with deaths from heights, including from and from mountains and cliffs. (17T149-21 to 150-1; 17T150-7 12). In his experience, the manner of death depended in large part on the distance from the point of fall. An accidental death usually resulted in impact within three to five feet from the base of the structure. (17T150-17 to 151-14).

After reviewing the file, Dr. Baden observed the scene, both

from the bench seat and after climbing up toward where Jody Ann was found. It helped him to see and touch the outcroppings and all the growths. (17T152-20 to 153-5; 17T155-10 to 21). There was no smooth area where the body could just roll down from the top to the bottom and end up where it did, without being stopped by vegetation or rocks along the way. (17T156-15 to 19; 17T157-18 to 158-7).

The injuries Jody Ann suffered were not consistent with a passive fall down a cliff face from the bench seat. (17T158-24 to 159-4). The lack of injuries on the back was significant, given her light clothing. If her descent was passive, she would have struck and rubbed against rocks and vegetation; if she rolled or tumbled down, there would have been a great many marks from the impact injuries and the brambles on all parts of the body, not just one impact site against the tree. (17T158-25 to 159-24).

Given the distance from the peak to the impact point, Jody Ann would have had to strike the tree with sufficient force to create extensive fractures and internal injuries. She could not have developed that much propulsion, even if she jumped, and no facts supported a passive fall, including the lack of injuries on the back, and she would have not struck with such force to cause right sided impact injuries. (17T161-9 to 162-18). In Dr. Baden's opinion, the manner of death, to a reasonable degree of

medical certainty, was homicide. (17T161-2 to 8).

Based on these facts, defendant was charged with murder. He did not testify, but Robert Hernest, an investigator with the Bergen County Prosecutor's Office who was one of the officers who executed the consent search at defendant's home, testified that defendant told him about the drawer that he fixed. (18T7-14 to 16; 18T8-4 to 23; 18T19-17 to 19; 18T9-24 to 10-13). On cross-examination, Investigator Hernest said that when he looked at the drawer, nothing looked broken or recently fixed. (18T13-19 to 14-3).

Stephen Schorr, an engineer, was asked to answer the question of whether an object could fall unimpeded from the bench seat on the Cliffs to the bottom before striking the tree. (18T16-17 to 20; 18T23-21 to 24-7). He concluded that for a body to fall from the Cliffs without hitting anything on the way down before it landed on an object 52 feet from the base of the cliffs would require that person to leave the cliff at 13 miles per hour. (18T39-22 to 42-5; 18T42-18 to 20). There was no way to hit the tree unimpeded at that speed even if pushed, thrown or tossed. (18T46-7 to 20). On cross-examination, Mr. Schorr conceded that his premise was based on the assumption that Jody Ann fell from the bench seat. (18T53-23 to 54-2).

Dr. Cyril Wecht, a pathologist, concluded that Jody Ann's injuries were not caused by a single impact when the body hit the

tree at the base of the cliff. Rather, he concluded that Jody Ann's chest wound was caused when she lost her balance and was impaled on the crest of the rock about 10 feet below the bench seat. The body flipped over and the head was compressed between rock, which caused multiple skull fractures. Her legs flipped out and she catapulted into the air, where the body disengaged, the head was pulled out of the crevice and hurtled down and came to rest in the tree. (18T3-15 to 18; 18T4-2 to 11; 18T18-10 to 14; 18T42-13 to 43-13). Her death was accidental. (18T51-8 to 15).

On cross-examination, Dr. Wecht conceded that his conclusion that Jody Ann died from an accidental fall was based upon his assumption that she fell from the bench seat. (18T61-20 to 26; 18T62-19 to 15).

After considering all the evidence, the jury convicted defendant of murder. This appeal follows.

LEGAL ARGUMENT

POINT I

STATEMENTS BY THE VICTIM, WHICH
EXPRESSED HER FEAR OF DEFENDANT,
AND HIS ABUSE DURING THEIR
MARRIAGE, WERE RELEVANT TO HER
STATE OF MIND AND TO COUNTER THE
DEFENSE OF ACCIDENT.

Defendant claims that statements made by the victim to various friends and her therapist about her fear of defendant, and his abuse during their marriage were inadmissible hearsay, irrelevant and/or not made in the course of treatment. The State submits that these statements were highly relevant and admissible under the state of mind exception to the hearsay rule, and as statements made in the course of treatment.

After extended argument on the issue, Judge Roma ruled that the State would be permitted to offer into evidence Jody Ann's statements regarding her fear of defendant. Those statements were relevant and admissible because defendant claimed that Jody Ann's fall from the Cliffs was accidental. (Da9 to 11). As for statements about defendant's abusive conduct, general statements of such conduct were admissible as relevant to Jody Ann's state of mind.⁸ (Da11). As for statements made to Ms. Teague about a

⁸The court ruled that if the State provided specific accounts of abuse, the court would allow such testimony under a N.J.R.E. 404b analysis. (Da11). During trial, such evidence was admitted and the court charged the jury on the limited use of such evidence. (20T161-1 to 163-3).

month before her death regarding defendant's "invitation" to accompany him to the Cliffs and her statement that she had never been to the Cliffs, these statements directly related to the mosaic of the event, and the totality of her relationship with defendant. (Da11 to 12).

Finally, the court ruled that these statements to Ms. Teague were admissible under the medical treatment exception to the hearsay rule because Jody Ann's discussions with Ms. Teague about the source of her depression, namely, defendant, were "inextricably intertwined and necessary to present . . . an accurate picture of [Jody Ann's] relationship with the defendant to her treating therapist," (Da13), and because the statements were inherently reliable, as Jody Ann necessarily believed that effective treatment for her depression was "largely dependent" upon the accuracy of her information. (Da13 to 14).

In charging the jury regarding this testimony, Judge Roma noted that,

Testimony has been admitted into evidence regarding statements purportedly made by [Jody Ann] to various individuals about her fear of defendant, her abuse by the defendant, her intention to divorce the defendant, and her fear of heights. You must first determine whether or not [Jody Ann] made these statements. If you find that she made these statements then you may consider them only for the purpose of determining her state of mind at the time those statements were made and for no other reason. [20T15-20 to 156-5].

Among the exceptions to the hearsay rule is the state of mind exception, N.J.R.E. 803(c)(3), which is

a statement made in good faith of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health).

The state of mind exception to the hearsay rule "is of a proud and long lineage" in this State. It allows admission of extrajudicial statements to show the state of mind of the declarant when it is at issue in a case. State v. McLaughlin, 205 N.J. 185, 205 (2011); State v. Long, 173 N.J. 138, 153 (2002); State v. Benedetto, 120 N.J. 250, 255-56 (1990); State v. Machado, 111 N.J. 480, 485 (1988).

All evidence must be relevant to be admissible. It must have a tendency in reason to prove or disprove any fact of consequence to the determination of the action. N.J.R.E. 401. To be relevant to state of mind, the evidence must provide a "causal link" between the identity of the hearsay declarant and the party or issues at trial." State v. McLaughlin, 205 N.J. at 205-06. That is, the "declarant's state of mind must be in issue." Id. at 206.

Usually, a victim's state of mind is not at issue in a case, and, therefore, out of court statements expressing fear of the defendant are inadmissible under the rule. State v. Benedetto, 120 N.J. at 256-27. Nonetheless, our courts recognize that when

a defendant claims that he acted in self defense, or that the victim committed suicide, or that the victim's death was accidental, then the victim's state of mind becomes relevant and the victim's statements of fear become admissible. Id. at 260 (victim's statements of fear not admissible under state of mind exception because defendant was not claiming that the victim's death was accidental); State v. Downey, 206 N.J. Super. 382, 391-92 (App. Div. 1986). See also State v. Chavies, 345 N.J. Super. 254, 273 (App. Div. 2001) (victim's state of mind not relevant, even though defense argued self-defense).

Because defendant raised the defense of accident, the victim's state of mind clearly was relevant. Cases from other jurisdictions show that this testimony properly was admitted. In State v. Singh, 586 S.W.2d 410 (Mo. Ct. App. 1979), defendant claimed that he killed his wife after she pointed a gun at him, which he took from her, and hit him with a piece of wood. When the victim reached into his pocket to take the gun, they struggled and the gun fired several times, killing her. Id. at 413-14.

The State over objection was allowed to present testimony from a neighbor that the victim told him she was afraid of defendant, was afraid of guns, heard defendant carried a gun and would not let defendant into the house. On appeal, the Missouri Court of Appeals affirmed, finding that the evidence was

admissible because the defense argued self-defense and/or accident. In these circumstances, "the need for such statements [by the victim] overcomes almost any possible prejudice." Id. at 418. To the contention that the testimony was irrelevant, the Court of Appeals noted that defendant's defense of self-defense and/or accident made the victim's statements of fear of guns or of defendant relevant, in that they tended to rebut the defense. Id. at 419.

Similarly, in State v. Aesoph, 647 N.W.2d 743 (S.D. 2002), the defendant and victim were involved in a tumultuous marriage during which the victim left the defendant before reconciling. The victim again left the family home with her youngest child and contacted her attorney to reinstate divorce proceedings. At that point, unbeknownst to the victim, Aesoph had two life insurance policies on his wife, which were payable in the event of her death by accident. On the day of her death, the victim returned to the farm with Aesoph to telephone their daughter, who was in school out of the country. A few hours later, the defendant called the police to tell them that the victim had fallen down the stairs and was dead. Id. at 749.

Before her death, the victim made statements to her children, sister-in-law, priest, close friends and co-workers that she was afraid that Aesoph would kill her, that if he killed her he would make it look like an accident, that she felt

threatened by Aesoph and that Aesoph verbally abused her and shoved her around. The trial court, finding that the statements were relevant and probative, ruled them admissible to rebut Aesoph's claim of accidental death. Id. at 756-57.

On appeal, the South Dakota Supreme Court affirmed, finding that the statements regarding the victim's fear of Aesoph were probative because, by arguing that the death was accidental, Aesoph placed the victim's state of mind at issue and made the testimony admissible to rebut his claim of accidental death. Id. at 757. Moreover, the trial court instructed the jury that the statements were to be considered only for the purpose of ascertaining "whether the victim's death was an accident" and not in determining whether Aesoph was guilty. Id.

Similarly, in State v. Voits, 64 P.3d 1156, 1164-68 (Or. Ct. App. 2003), defendant claimed that his estranged wife committed suicide. At trial, the State was allowed to introduce the deceased victim's letters as well as testimony from her attorney and sister in law to show that she looked forward to her life with her paramour, and to refute defendant's contention, made to the police and others, that the victim had abandoned her plans to dissolve the marriage.

The Oregon Court of Appeals ruled that the evidence was relevant on both issues and properly admitted. Moreover, the trial court provided limiting instructions making clear that the

evidence was relevant only to the victim's state of mind, and to her intent and plans.

See also People v. Romero, 56 Cal. Rptr.3d 678 (Ct. App. 2007) (because defendant raised self-defense, victim's statements about threats defendant made to him relevant and admissible under state of mind exception); People v. Cardenas, 25 P.3d 1258, 1263 (Colo. Ct. App. 2001) (same); Peterka v. State, 640 So.2d 59, 69-70 (Fla. 1994) (evidence that victim would not confront defendant about theft because defendant carried weapon relevant to defense of accidental shooting); State v. Crawford, 472 S.E.2d 920, 927-28 (N.C. 1996) (statements that defendant threatened to kill victim, had physically abused her, and that victim feared defendant admissible under state of mind exception when defendant claimed self-defense and accident, rejecting defendant's claim that they seriously damaged his defense and portrayed him as the aggressor); West v. Commonwealth, 407 S.E.2d 22, 24 (Va. App. 1991) (testimony from victim's divorce attorney and her psychologist that the victim told them that defendant threatened to shoot victim if she gained custody of the children, and from a friend that the victim asked to keep a suitcase in her house should she decide to leave defendant, *would* have been relevant and admissible had defendant, who told people after her death that victim committed suicide, raised that defense at trial, but improperly admitted when defense at trial was alibi).

As this recitation shows, evidence of Jody Ann's state of mind was relevant to this case because defendant claimed that her death was accidental, that they were reconciling, that they often went to the Cliffs, and that he was not abusive toward her during their marriage. As such, witnesses properly were permitted to testify about her fear of defendant, his abusive conduct toward her, and that she never had been to the Cliffs, as all of these areas countered the defense assertions. Moreover, the need for such statements by the victim overcame almost any possible prejudice to the defendant, since these statements reflected the true nature of the couple's relationship and were necessary for the jury to deliberate fairly. Finally, we note that a limiting instruction was provided to the jury, making clear that the evidence was admitted solely to show the victim's state of mind and her intent and plans.

Defendant also complains that Ms. Teague improperly was permitted to testify about statements made by Jody Ann during their therapy sessions, during which she mentioned defendant's "invitation" to go with her to the Cliffs, and her statement that she had never been there before. She also said that she declined defendant's invitation.

Those statements were admissible under the state of mind exception to the hearsay rule as background to establish the nature of the relationship between defendant and Jody Ann. When

the behavior of the victim and the defendant are part of the mosaic of the criminal event, their statements which relate to the quality of their acts or their state of mind are part of the scene and admissible. State v. Benedetto, 120 N.J. at 257-58; State v. Machado, 111 N.J. at 489 State v. Baldwin, 47 N.J. 379, 394, cert. denied, 385 U.S. 980 (1966); State v. Dreher, 251 N.J. Super. 300, 318 (App. Div. 1991), certif. denied, 127 N.J. 564 (1992).

Here, testimony that Jody Ann refused defendant's invitation to go to the Cliffs and indicated that she had never been there before was part of the mosaic of Jody Ann's and defendant's relationship, refuted defendant's claim that the couple was reconciling, and contradicted defendant's contention that the victim willingly accompanied him to the Cliffs.

Moreover, statements made by Jody Ann to Ms. Teague were admissible as statements made for purpose of medical diagnosis or treatment.

N.J.R.E. 803(c)(4) provides in relevant part that

statements made in good faith for purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof to the extent that the statements are reasonably pertinent to diagnosis or treatment.

This exception to the hearsay rule is based on the

assumption that the declarant is more interested in obtaining a diagnosis and treatment culminating in medical recovery than in obtaining a favorable medical opinion culminating in a legal recovery. White v. Illinois, 502 U.S. 346, 355-56, 112 S.Ct. 736, 742-43 (1992); Matter of C.A., 146 N.J. 71, 99 (1996). Such statements have inherent reliability because the patient believes that the effectiveness of treatment received depends largely upon the accuracy of the information provided the practitioner. R.S. v. Knighton, 125 N.J. 79, 87 (1991).

New Jersey cases that apply the exception "demonstrate an unwavering adherence to that rationale." Id. Under the rule, the statements do not have to be made to a physician, but must be made for purposes of diagnosis or treatment and must be reasonably pertinent to either diagnosis or treatment, i.e., must be the type of statements relied upon by practitioners in the field in rendering a diagnosis or treatment.

Defendant claims that any statements made by Jody Ann to Ms. Teague which identify defendant as the source of her difficulties or conditions were inadmissible hearsay. Not so.

While it is generally true that statements made in the course of treatment which identify the person who allegedly harmed a victim are inadmissible, courts have allowed psychologists and physicians to testify about the identity of the perpetrator if such statements were medically necessary for

treatment or diagnosis of sexual abuse and other psychiatric or emotional disorders. See State v. Roberts, 622 A.2d 1225, 1233 (N.H. 1993) (victim's statements identifying defendant descriptive of cause/source of victim's symptoms and pertinent to doctor's treatment decision); State v. Grey, 491 S.E.2d 538, 552 (N.C. 1997) (victim's statement identifying defendant as person who tried to choke her admissible); State v. Moen, 786 P.2d 111, 120 (Or. 1990) (victim's statements to physician identifying defendant as source of her anxiety and depression); Vallinoto v. DiSandro, 688 A.2d 830, 841-41 (R.I. 1997) (victim's statements about sexual activity with defendant were relevant to diagnosis of mental state and treatment she was receiving for the alleged mental anguish); State v. Saunders, 132 P.3d 743, 751 (Wash. App. 2006) (victim's statement identifying boyfriend as perpetrator properly admitted because relevant to potential treatment in domestic violence incident).

As the Oregon Supreme Court noted in rejecting a similar claim in a murder case, the evidence rule authorizes statements made by the patient to the treating practitioner concerning "the inception or general character of the cause or external source thereof." The homicide victim in Moen gave her physician information concerning the cause of her depression, which was defendant's moving into her house, and in doing so, identified defendant. That information was necessary to diagnose and treat

the victim. State v. Moen, 786 P.2d at 120.

So too, in this case, Jody Ann described the person, defendant, who was causing her depression. That information was of the type that Ms. Teague needed to diagnose and treat Jody Ann. As such, testimony about defendant's identity was relevant to treatment and admissible into evidence.

In sum, the trial court properly allowed testimony about statements made by Jody Ann regarding her fear of defendant and his abusive conduct because her state of mind was at issue in this case, where defendant claimed that the death was accidental, that the victim and he were reconciling and that they often went to the Cliffs. Similarly, her statements to Ms. Teague identifying defendant as the source of her depression were relevant to treatment and diagnosis. Finally, the jury was charged on the limited purpose for which the statements could be used, namely, to determine Jody Ann's state of mind at the time those statements were made. Defendant's well deserved conviction must be affirmed.

POINT II

THE TRIAL COURT WAS UNDER NO
OBLIGATION SUA SPONTE TO CHARGE
THE JURY ON RECKLESS MANSLAUGHTER.

Defendant claims, for the first time on appeal, that his conviction must be reversed because the trial court failed sua sponte to charge the jury on reckless manslaughter. We submit that this contention is meritless. The defense was accident and there was nothing in the record which would justify charging the jury on a lesser offense which would have devastated the defense's case. Because defendant cannot show that the error complained of was clear, obvious, affected defendant's substantial rights and possessed the clear capacity to bring about an unjust result, State v. Torres, 183 N.J. 554, 564 (2005); R. 2:10-2, his claim must fail.

In the absence of a request to charge a lesser included offense, only if the record "clearly indicates" that a defendant could be acquitted of the greater charge and convicted of the lesser charge is the trial court obligated to instruct the jury on the lesser charge. State v. Walker, 203 N.J. 73, 86 (2010). When trial counsel fails to ask for a lesser offense, the trial court is not obligated to "sift meticulously through the record in search of any combination of facts supporting a lesser-included charge." Id. at 86-87 (citation omitted). The need for the charge must "jump off" the page. State v. Denofa, 187 N.J.

24, 42 (2006).

In addition, even if there is evidence in the record to support a charge, the court must take additional factors into account. They include whether counsel is surprised, how the case was tried, and whether submitting the lesser offense would be so inconsistent with the defense as to undermine the fairness of the proceedings. State v. Garron, 177 N.J. 147, 180-81 (2003), cert. denied, 540 U.S. 1160 (2004); State v. Perry, 124 N.J. 128, 158-64 (1991).

Contrary to defendant's appellate assertion, reckless manslaughter did not "jump off" the page and would have been inconsistent with, and devastating to, the defense. From the opening statement to the summation, the defense contention was that Jody Ann accidentally fell off the Cliffs. In his opening, defense counsel stressed, "So there is no misunderstanding [what] my defense is here, I'm going to tell you exactly where I am coming from. My client, [defendant], is not guilty. He's innocent. He did not throw his wife off the cliff. And I submit to you, ladies and gentlemen, that the evidence will bear that out." (7T52-9 to 14).

Similarly, in his summation, defense counsel returned to that theme: "this case is an accident, nothing more, nothing less. Tragically a large number of people have fallen and died from these cliffs over the years. . . . The vast majority of

those cases are accidents. That's why they're called accidents. You don't rush to place blame or pass judgment unless blame is rightfully deserved." (20T5-17 to 25). To have charged the jury on reckless manslaughter, by asserting that defendant brought an intoxicated Jody Ann to the Cliffs, in the darkness, knowing that she was afraid of heights, would have devastated that defense and made a murder conviction more likely.

Moreover, the evidence in support of reckless manslaughter was lacking as well. While the toxicological report indicated that Jody Ann was legally intoxicated, there was no proof in the case that her faculties were prostrated. Indeed, defendant's statements never asserted that Jody Ann was intoxicated; all he indicated was that she had some drinks during the day. No State's witness testified that Jody Ann was intoxicated; Jonathan, who was the last person other than defendant to see her, did not mention his mother being inebriated.

Similarly, while Jonathan and McCauliffe testified that Jody Ann was afraid of heights, McCauliffe conceded that she flew in airplanes often both to California to visit her brother and to Georgia when defendant was stationed there. (16T31-1 to 22). Moreover, the defense argued that Jody Ann often went to the Cliffs with defendant and that they had their spot in that location.

What this demonstrates is that nothing in the record

"clearly indicated" that reckless manslaughter was in this case. This case was either accident or murder, and was tried as such. Even defendant's appellate assertion - - that defendant "took" an obviously inebriated woman who was afraid of heights in the dark and brought her over a fence and onto a bench seat high over the Cliffs - - hardly bespeaks recklessness, rather than knowing or purposeful behavior.

In sum, the trial court was under no obligation sua sponte to charge reckless manslaughter since there was no evidence to support giving a lesser charge and it would have devastated the defense. Defendant's well deserved conviction must be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment below be affirmed.

Respectfully submitted,

JOHN L. MOLINELLI
BERGEN COUNTY PROSECUTOR
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY: *Catherine A. Foddai*
Catherine A. Foddai
Senior Assistant Prosecutor

DATED: September 26, 2013

CATHERINE A. FODDAI
SENIOR ASSISTANT PROSECUTOR
OF COUNSEL AND ON THE BRIEF

SUPERIOR COURT OF NEW JERSEY

PATRICK J. ROMA
JUDGE



BERGEN COUNTY JUSTICE CENTER
HACKENSACK, NJ 07601
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THE STATE OF NEW JERSEY,

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY

vs.

INDICTMENT # S-1485-09

**ORDER DENYING MOTION TO
SUPPRESS**

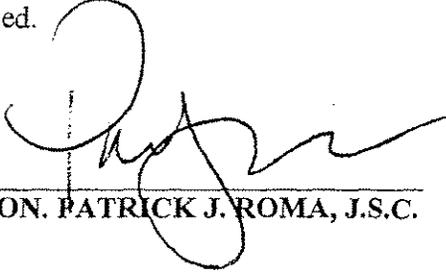
STEPHEN SCHARF,

Defendant.

THIS MOTION, coming before the Honorable Patrick J. Roma, J.S.C., on April 5, 2011, April 6, 2011, and April 7, 2011, Assistant Bergen County Prosecutor Wayne Mello appearing on behalf of the State, and Mr. Edward Bilinkas, Esq. representing defendant Stephen Scharf, the Court having considered the oral and written arguments of the parties, for good cause shown and for the reasons stated in the written opinion dated April 18, 2011:

IT IS on this 18th of April 2011.

ORDERED that the motion to suppress is denied.



HON. PATRICK J. ROMA, J.S.C.

Pa 1

April 18, 2011

Mr. Edward J. Bilinkas, Esq.
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A.P. Wayne Mello
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INTRODUCTION

This is a motion to suppress brought by Mr. Edward Bilinkas, Esq., on behalf of the defendant, Stephen Scharf. The defendant was indicted with first-degree murder contrary to the provisions of N.J.S.A. 2C:11-3a(1) and 2C:11-3a(2). This Court heard oral arguments as to the motion to suppress on Tuesday, April 5, 2011, Wednesday, April 6, 2011, and Thursday, April 7, 2011.

STATEMENT OF THE FACTS

On September 20, 1992, Officer Paul Abbot ("Abbot") of the Palisades Interstate Parkway ("PIP") Police arrived at Rockefeller Lookout. Officer Lowell Tamayo

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("Tamayo") of the Palisades Interstate Parkway Police arrived shortly thereafter. These officers were dispatched for a "cliff case."

Upon arriving, the defendant approached and stated, "my wife fell off the cliff." The defendant then pointed and indicated the area where the incident occurred. Then, the defendant led Abbot and Tamayo through a wooded area, through a chain fence, and to the cliff's edge. The defendant told the officers that he and his wife had been sitting on a flat rock formation.

Abbot and Tamayo approached the edge and called for Ms. Scharf. They received no response but did notice contents of a woman's pocketbook were scattered about a lower ledge. After these unsuccessful efforts to make contact with Ms. Scharf, the three men returned to the parking lot to wait for police and rescue personnel.

Back in the lot, Tamayo asked the defendant what happened. The defendant explained that he and his wife had been sitting on the edge. However, when he stood up to retrieve a blanket and wine from his car, he turned back and then noticed that Ms. Scharf was gone. At about this time, the defendant was told to sit in one of the police cars and wait as rescue efforts continued. The defendant's Ford Taurus was not available since it was secured. Specifically, per the Abandoned Vehicle Report, the car was part of the "Cliff Case Investigation."

At approximately 8:20 p.m., as this was a rescue effort, Officer Walter Ciri ("Ciri") of the PIP Police transported the defendant to PIP Headquarters. While in transport, the defendant, with his hands over his face, volunteered, "We were walking and she said for me to go back to the car and get the blanket and she slipped and I didn't

see her anymore.” Further, the defendant asked if doctors and paramedics would be at the scene. Ciri did not ask any questions.

Upon arrival at headquarters, the defendant sat in the desk room before speaking with Detective Ronald Karnick (“Karnick”) of the PIP Police. The defendant gave a review of that night’s events and then memorialized that in a handwritten statement (SM-6). Further, Karnick asked the defendant if he would consent to a search of the defendant’s upper torso and car. This was memorialized in consent to search forms in evidence as SM-7 and SM-8. Then, the defendant volunteered that he would take a polygraph test. During this time entire time at headquarters, the defendant was not restrained and free to leave and sat calmly on a bench. There at headquarters the defendant remained as efforts continued to recover Ms. Scharf’s body. He was not questioned and left when a family friend arrived to take him home.

The following day, September 21, 1992, the defendant returned to PIP Headquarters to pick up his car. Then, he spoke with Det. James Lynam (“Lynam”) about the polygraph test the defendant previously volunteered to take. This test was to be conducted the morning of September 22, 1992.

On September 22, 1992, prior to the polygraph, the defendant spoke with Det. Lynam and Lt. Terrence Alver (“Alver”) of the Bergen County Prosecutor’s Office. During this time, the defendant engaged in a conversation with the officers. They discussed events of that previous Saturday and Sunday as well as general background information. At this time, he defendant stated there was only one instance in which he was physically abusive towards his wife and later spoke about his open marriage.

As for his open marriage, the defendant spoke of two women he was involved with. However, he stated that he broke off the relationship with these women in early September 1992 in order to reconcile with his wife

Further, during this conversation, the detectives inquired about the claw hammer found in the tote bag on the rear seat of the defendant's vehicle. The defendant stated that he had used the hammer during the day of September 20, 1992 and simply threw it into the bag in his car.

Finally, before taking the polygraph test, the defendant gave consent to search his Morris County home. According to Detective Lynam, during this entire conversation, the defendant was free to go at any time.

Subsequently, the defendant participated in the polygraph exam and gave another version of the events at the cliffs. After the test was administered, the defendant returned to his house in Morris County while Alver and Lynam picked up Detective Robert Hernest ("Hernest") of the Bergen County Prosecutor's Office so they could go to Morris County to effectuate the consent search.

Upon arrival at the defendant's home, all parties were met by Ted Ehrenberg ("Ehrenberg"). As a member of the Washington Township Police Department in Morris County, Ehrenberg was there simply in a cross-jurisdictional supportive fashion.

During the search, the defendant spontaneously pointed out to Hernest the drawer he had worked on earlier that week with the claw hammer.

The State submits that while the search took place, the defendant was free to move about the house, so long as he did not interfere with the officers. However, according to Ehrenberg, he chose to sit at a table with him. There, the two men engaged

in idle conversation. They spoke of the defendant's son, the difficulties of being a single parent, and of religion. According to Ehrenberg, the two men developed a rapport.

The men spoke in the defendant's home for approximately an hour. During this discussion the defendant stated, "You don't believe me." Ehrenberg replied, "I believe an accident happened. It was an accident?" The defendant replied, "no" and then lowered his head, telling Ehrenberg he wished to talk with a priest.

OPINION

It is well settled that when a person is subject to a "custodial interrogation" that the police are obliged to administer certain warnings and advise certain rights. Miranda v. Arizona, 384 U.S. 436 (1966). Custodial interrogation is questioning after a person has been deprived of his freedom of action in a significant way. Miranda, 384 U.S. at 444. These rights are not implicated when the detention and questioning are part of an investigatory procedure. State v. Timmendequas I, 161 N.J. 515 (1999).

Custody arises only after police conduct constitutes the functional equivalent of a formal arrest based on an objective evaluation of the totality of the circumstances. Berkemer v. Carty, 468 U.S. 420 (1984) (emphasis added). Thus, the question of custody is fact specific. State v. Stott, 171 N.J. 343 (2002). Among factors to consider are the time and place of the interrogation, the status of the suspect, the duration, the nature and degree of pressure applied to detain the suspect, and whether the suspect knew that he was a focus of a police investigation. State v. P.Z., 152 N.J. 86 (1997).

Further, "unless the officer's beliefs are conveyed in some way to the person being interrogated or interviewed, they do not affect the *Miranda* custody inquiry; a law enforcement officer's beliefs are relevant only to the extent they influence [] the

objective conditions surrounding [the] interrogation' and 'would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.'" State v. Pearson, 318 N.J. Super. 123 (1999).

Warnings are not required simply because an interview occurs in a coercive environment. California v. Beheler, 463 U.S. 1121 (1983).

In the present case, the Court highlights some points that run throughout the series of events. It is undisputed that officers never officially apprised the defendant of his Miranda rights. Further, the defendant is an educated individual, an engineer specifically, who throughout days following the incident seemed anxious and willing explain his side of the story.

With all the above statements, the question before this Court is whether the defendant was subject to custodial interrogation and entitled to Miranda warnings before speaking with law enforcement officers.

As for the statements to Abbot and Tamayo on September 20, 1992 at the Rockefeller Lookout, this Court finds that those statements were spontaneous, unsolicited and volunteered. Therefore, this Court finds no violation of the defendant's Miranda rights. It was also necessary to protect family members, in this case a husband, from taking any action which could have imperiled his safety. Thus, the reason for placing the defendant in the patrol car was to prevent a second fall.

Police responded after an individual called in a "cliff case." This was a rescue and recovery effort. During this time, the defendant volunteered several statements including a version of how the accident occurred. As the three individuals went from the

Lookout to the cliffs edge and back again, it was imperative to ascertain as much information as possible in order to maximize the possibility of a successful recovery.

Further, this Court finds that the defendant being told to sit in a police car does not automatically implicate Miranda. Lynam testified that, based on his experience with recovery efforts, Rockefeller Lookout would soon be crowded with rescue personnel and, out of safety for the defendant, the defendant was told to stay in the car while officers worked. This was not done in an effort to constrain the freedom or liberty of the defendant but rather was a decision to ensure the safety of rescue personnel as well as the defendant himself. While the defendant initially seemed collected and coherent, based on the officers' training and experience, this could have drastically changed in an instant.

Next, as for the statements in the patrol car and at PIP Headquarters, this Court finds that the defendant spontaneously volunteered these statements. Thus, no Miranda warnings were required.

As stated above, the events of this night were rescue efforts. The dangers of the cliffs were self evident and the defendant was transported in a car with no cage as a safety precaution. Further, this Court finds that the fact that the defendant was transported to PIP headquarters by law enforcement personnel is of no moment. Rescue personnel were fervently working to save the life of the defendant's wife. At that time it was equally logical that officers would be as concerned for the well being of the defendant as they were for Ms. Scharf. A traumatic incident had occurred but a few hours earlier and a decision was made not to force the defendant to stay at the scene of his wife's accident while rescue efforts were underway. Transporting the defendant to headquarters, a calmer and less dangerous location, rather than talking with the defendant

at the scene was reasonable given the totality of all of the circumstances that had transpired.

Similarly, this Court finds that when the defendant arrived at headquarters and sat unrestrained while officers prepared to take a statement about the accident, the defendant was not in custody and the statements were given for a general investigative procedure. Therefore, both the oral and handwritten statements volunteered by the defendant were not the product of a custodial interrogation in violation of the defendant's Miranda rights.

Further, the Court notes that the fact that the consent to search forms utilize the term "criminal investigation" does not change the underlying nature of the events. It is a "form" statement used in all matters. By all accounts, this "cliff case" was being treated as an accident and the standard form used to memorialize consent for these searches contains the term "criminal investigation¹." The questioning at headquarters was neither prolonged nor intrusive. After authorities had the necessary information for this accident investigation, the defendant was left alone and was not questioned any further.

Moreover, this Court finds that just because the defendant did not have the use of his own vehicle at the headquarters does not alter the analysis. While the defendant had to wait for family member to arrive, the defendant was left alone, was free to walk out of the headquarters, and was not restrained. Thus, these statements are admissible.

Next, on September 22, 1992, the defendant drove himself to Hackensack to participate in the polygraph test. However, prior to the actual administration of the test, the defendant spoke with Lynam and Alver

¹ Moreover, the Court notes that even if one was to overanalyze the use of the term "criminal investigation" on the forms, the fact is that the question of whether Miranda warnings are required is not if questioning was part of a criminal investigation, but rather if the suspect was subject to a custodial interrogation. A criminal investigation alone is not sufficient to implicate Miranda.

This Court finds that the defendant was not subject to custodial interrogation at this time. Objectively viewing the situation, the facts reveal that the defendant drove himself to Hackensack and, based on all the events prior to this day, seemed eager to tell his side of the story. While this conversation was for more than a brief period, this was due in part to the defendant's own desire to talk and explain what happened.

Further, Lynam testified that the defendant was free to leave at any point. "In determining whether the defendant would have felt free to leave, the court should consider the nature and degree of pressure applied to detain the suspect, the duration of the questioning, the physical surroundings, and the language used by police." Timmendequas, 161 N.J. at 614 (citing State v. Smith, 307 N.J. Super. 1 (App. Div. 1997)).

Here, this Court finds that there was no pressure or coercion applied to detain the defendant. Indeed, the defendant drove to the station and initiated this conversation. Further, the Court acknowledges that at this point, the officers had gathered personal information about the defendant, Ms. Scharf, and circumstances surrounding the incident which, taken as a whole, is best characterized as "suspicious." However, these subjective concerns of the police were not conveyed to the defendant and, thus, do not affect the Miranda custody inquiry.

Moving forward, after the defendant conversed with Alver and Lynam, the defendant participated in a polygraph test. The defendant voluntarily agreed to take this examination. This is evidenced by Exhibit SM-17 and SM-18. Of interest is within the body of this form the defendant acknowledges that he has been advised of his right to refuse this test, he has the right to remain silent, he has the right to refuse to answer any

questions, he has the right to consult with an attorney and if he cannot afford an attorney, one would be appointed to represent him, and that he has the right to leave or terminate the examination at any time. Moreover, by signing this form, the defendant acknowledges that he waived those rights and then proceeded with the examination. The Court opines that the defendant was advised of his rights when he read and signed SM-17 and SM-18. This fact further emphasizes how the police scrupulously honored the defendant's rights.

The Court finds that these rights almost mirror exactly those guaranteed under Miranda. Arguably, even if this were considered a custodial interrogation, which it was not, the defendant voluntarily, intelligently, and knowingly waived his rights. Thus, the Court notes that the defendant was effectively apprised of all his rights at this time and waived them².

Following the polygraph, all parties traveled to the defendant's home to conduct the consent search. While the defendant argues that custody can be inferred from officers and the defendant arriving at the home together, this Court disagrees. The defendant mischaracterizes this arrival as the defendant being escorted to his house. These individuals were leaving from the same general area to go to the same destination. Thus, it follows that the law enforcement officers would arrive approximately at the same time as the defendant. Further, as this was a consent search, it was proper for the officers only to initiate the search when the defendant was present with them³.

² However, given this, the Court stresses that simply because the defendant was effectively apprised of his Miranda warnings does not lead to the conclusion that these warnings were necessary at this time or any earlier or subsequent time.

³ The Court notes that if the officers had entered while the defendant was still on route, undoubtedly the defendant would have been arguing that they should have waited until he was present to beginning the consent search.

While in the house, the defendant made statements to Robert Hernest and Ted Ehrenberg.

As for the statement the defendant volunteered to Robert Hernest about the drawer, it is clear that this statement was not the product of any questioning on the part of law enforcement. As a matter of fact, Hernest testified that the discussion of the drawer was strange due to the defendant spontaneously pointing out the drawer to him.

Thus, this Court finds that the statement to Hernest was not the product of custodial interrogation. Therefore, Miranda was not implicated and the statements are admissible.

Finally, the defendant had a conversation with Ehrenberg while officers conducted the consent search. This Court finds that the circumstances surrounding the defendant's conversation with Ehrenberg fail to demonstrate a "coercive atmosphere and restraint on freedom that comprises a custodial interrogation." State v. P.Z. 152 N.J. at 103.

Viewing this situation objectively, the facts show that the defendant was in his own home and free to roam so long as he did not interfere with the search. Further, the defendant conversed with an individual who held no official capacity in the search of the house or in this case, namely Ehrenberg. Ehrenberg was not in uniform and was at the house purely in a supportive capacity. While the search was conducted the defendant and Ehrenberg spoke of innocent matters such as the defendant's son, being a single

parent, and religion⁴. Eventually, the defendant steered the conversation to the incident at the cliffs which led to the statements that are the subject of this motion.

Based on the testimony it is clear that the defendant was not subjected to a coercive atmosphere with Ehrenberg. This is particularly clear based on the testimony that when officers who were conducting the consent search entered the kitchen, the defendant grew quiet and was not as open with Ehrenberg.

Thus, this Court finds that the defendant was neither in custody nor the subject of interrogation. Again, because of this, no Miranda warnings were required and the defendant's statements to Ehrenberg are admissible.

Simply stated, Miranda requires custody plus interrogation. The majority of the statements here were either volunteered by the defendant and thus not the subject of an interrogation or were initially elicited for a general investigation into the "cliff case." Moreover, subsequent statements on September 22, 1992 are admissible because they also lack the prerequisite that they were the product of a custodial interrogation. Again, many of these statements were unsolicited and not in response to any questioning on the part of law enforcement. Further, the question of custody is fact-specific and the facts in this case do not reveal that the defendant was denied of his freedom of action in any significant way.

⁴ This Court pauses to note the distinguishing nature between the present case and the famous case of Brewer v. Williams, 430 U.S. 387 (1977). That United State Supreme Court case stands for the idea that when a suspect is in custody, Miranda warnings are required when the suspect is subjected to express questioning or its "functional equivalent." There, the defendant was arrested and arraigned before being transported. It was known to the officers in that case that the defendant had psychological issues and was deeply religious. The "Christian Burial Speech" in that case was found to rise to the "functional equivalent" of interrogation since the defendant was clearly in custody and his religious beliefs and psychological issues were known to the officers. Such facts are absent in the present case. Here, the defendant was not in custody and there is nothing to suggest that Ehrenberg was actually aware that this defendant, an individual he met but one hour prior, was peculiarly susceptible to an appeal to his conscious through religious discussion.

Thus, based upon the totality of the circumstances and the uncontroverted testimony adduced in court, this Court finds that all the defendant's statements are admissible as they were not given in violation of Miranda v. Arizona. Further, the Court finds beyond a reasonable doubt that the defendant freely and voluntarily gave these statements and, for the most part, had initiated these spontaneous admissions.

Accordingly, the defendant's motion to suppress is DENIED.

A handwritten signature in cursive script, appearing to read "Patrick J. Roma", written in black ink.

HON. PATRICK J. ROMA, J.S.C.