



Analysis
As of: Dec 07, 2011

STATE OF NEW JERSEY, Plaintiff-Respondent, v. JUSTIN A. SCOTT, Defendant-Appellant. STATE OF NEW JERSEY, Plaintiff-Respondent, v. DAMIAN FREE, Defendant-Appellant. STATE OF NEW JERSEY, Plaintiff-Respondent, v. HERBERT MAYS, Defendant-Appellant.

DOCKET NO. A-4147-05T4, A-4591-05T4, A-5237-05T4

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2009 N.J. Super. Unpub. LEXIS 1901

**January 5, 2009, Argued
July 20, 2009, Decided**

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Certification denied by State v. Scott, 2009 N.J. LEXIS 1370 (N.J., Nov. 9, 2009)

Certification denied by, Sub nomine at State v. Free, 2009 N.J. LEXIS 1299 (N.J., Nov. 9, 2009)

Certification denied by, Sub nomine at State v. Mays, 2009 N.J. LEXIS 1297 (N.J., Nov. 9, 2009)

Certification denied by State v. Scott, 2009 N.J. LEXIS 1362 (N.J., Nov. 9, 2009)

PRIOR HISTORY: [*1]

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 04-02-0153.

COUNSEL: Steven M. Gilson, Designated Counsel, argued the cause for appellant, Justin A. Scott (Yvonne Smith Segars, Public Defender, attorney; Mr. Gilson, on the brief).

Alison Perrone, Designated Counsel, argued the cause for appellant, Damian Free (Yvonne Smith Segars, Public Defender, attorney; Ms. Perrone, on the brief).

Alan I. Smith, Designated Counsel, argued the cause for appellant, Herbert Mays (Yvonne Smith Segars, Public Defender, attorney; Mr. Smith, on the brief).

Steven E. Braun, Assistant Prosecutor, argued the cause for respondent, State of New Jersey in A-4147-05T4 and

A-5237-05T4 (James F. Avigliano, Passaic County Prosecutor, attorney; Jason F. Statuto, Assistant Prosecutor, of counsel and on the briefs).

Mary E. McAnally, Deputy Attorney General, argued the cause for respondent, State of New Jersey in A-4591-05T4 (Anne Milgram, Attorney General, attorney; Ms. McAnally, of counsel and on the brief).

JUDGES: Before Judges R. B. Coleman, Sabatino and Simonelli.

OPINION

PER CURIAM

These back-to-back appeals involve the murder of Ramod "Lamet" Gilchrist on October 4, 2003. A grand jury indicted [*2] co-defendants Justin Scott, Damian Free and Herbert Mays, who are cousins, for first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count one); first-degree robbery, N.J.S.A. 2C:15-1(a)(1) or (3) and N.J.S.A. 2C:2-6 (count two); third-degree possession of a weapon (knife) for an unlawful purpose, N.J.S.A. 2C:39-4d (count three); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count four). The grand jury also indicted Scott and Free for third-degree¹ tampering with a witness, N.J.S.A. 2C:28-5(a)(1) and/or (2) and N.J.S.A. 2C:2-6 (counts five, six and seven). The State maintained that jealousy motivated the murder because Gilchrist was dating Zwwiyya Moore, the mother of Free's two children.

¹ Although the indictment has this as a second-degree charge, the State indicated at trial that it is a third-degree charge.

A jury acquitted defendants of murder, robbery, and witness tampering, and convicted them of the lesser included offense of first-degree aggravated manslaughter, *N.J.S.A. 2C:11-4(a)*. Additionally, the jury convicted Scott and Mays, but acquitted Free, of the weapons offenses. The trial judge merged the weapons offenses into the aggravated manslaughter offense [*3] and sentenced each defendant to a thirty-year term of imprisonment with an eighty-five percent period of parole ineligibility pursuant to the No Early Release Act, *N.J.S.A. 2C:43-7.2*. The judge also imposed the appropriate assessments and penalties.

On appeal, all three defendants challenge (1) the trial judge's substitution of a juror with an alternate juror after deliberations began, based on juror misconduct, instead of granting a mistrial; (2) the admission of certain statements made by Gilchrist as a dying declaration and an excited utterance; and (3) their sentences. Separately, Scott challenges the admission of evidence that he possessed the knife used in the attack on Gilchrist, and Scott and Free challenge the jury charge on flight. Mays challenges the trial judge's finding that he voluntarily waived his *Miranda*² rights. Mays also challenges the jury charge on accomplice liability, and the denial of his motion for acquittal on the murder charge. Because we conclude that the trial judge should have granted a mistrial due to juror misconduct, we are constrained to reverse and remand for a new trial on the charges that resulted in convictions.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The [*4] following relevant facts are adduced from pre-trial and trial testimony. Moore had a dating relationship with Free "off and on" for seven years. Gilchrist had been Moore's boyfriend "[f]or like three years off and on" and they had been together exclusively as of October 4, 2003.

Latonya Jackson knew Gilchrist for the period he dated Moore. She had known Free and Scott for about ten years and Mays for a few years less than that. According to Jackson, at 8:30 p.m., on October 4, 2003, she was at her apartment in the Alabama Housing Projects (AHP) in Paterson with Gilchrist and other friends, including Diamond Free (Diamond). Diamond is Free's brother and Scott's and Mays's cousin. The group was drinking alcohol and playing cards. According to Moore, Gilchrist was wearing a Yankees cap and a gold chain with "a Jesus head" on it that he wore everyday, which cost approximately \$ 1500.

Jackson continued that at one point, Free and Scott came into her apartment and went into her bathroom with Diamond to talk. According to Diamond, Free asked him

questions about what Gilchrist was "doing with" Moore. Because Free "did not go with [Moore] no more" and because Free already had a new girlfriend, [*5] Diamond replied to Free, "just leave that alone, it's over with." Jackson said that as Free and Scott left her apartment, Scott raised his shirt to show Gilchrist the handle of a knife he was carrying but said nothing to Gilchrist. Jackson saw a leather case with a knife inside it that had a black handle with a "little grip thing." She did not see the blade. She testified that the knife she saw that night was similar to the replica knife the State used as an exhibit at trial.

Diamond testified that after Scott and Free left Jackson's apartment, he left "[r]ight away" to get Mays. After finding Mays, Diamond said to him, "if they thinking about doing something stupid, don't get involved because it wasn't worth it." Mays said he wasn't "gonna do nothing." The two men then went downstairs and met Free and Scott in the first floor hallway. Diamond saw Mays pull a black-handled knife from his front pocket and say, "Yo, come on, I'm ready to do this now." Diamond told Mays to "chill." Mays then put the knife back in his front pocket.

Gilchrist left Jackson's apartment after Scott and Free had left. He saw the men in the hallway and continued heading in their direction. No one said anything [*6] to Gilchrist right away. According to Diamond, as Gilchrist approached the men, Diamond noticed that Scott "had his hand on his back pocket" grabbing for "the end of the knife" in his pocket. Diamond did not see the blade of the knife but he "recognized that knife as being a knife [he] had seen [Scott] with on other occasions." Diamond grabbed Scott's arm, but Scott pushed him away saying either "get off," or "[g]et out, move out the way." Diamond said, "yo, chill," and then "hopped on the elevator" because he "wanted to get help." At some point from inside the elevator, Diamond heard Free say to Gilchrist, "[w]hat's going on between you and my babies' mother?" Gilchrist replied, "[w]hy you can't ask me outside, and why do you have to ask me in front of your boys." When Diamond reached the third floor, he heard Free say to Gilchrist, "[i]f you run, I'll kill you."

Diamond went to another apartment and said to those inside, "[y]o, come downstairs right now. I think that they did something to [Gilchrist]. Come on, hurry up. Come, we have to go help him." Adrian Tuck, a resident of the AHP and the boyfriend of Cameen Free,³ was in the apartment with other friends and family members when [*7] Diamond "busted in the door." According to Tuck, Diamond was stuttering and "talking real fast and real loud." Diamond said, "[c]ome break up the fight between Ramod Gilchrist and Damien Free." Diamond and Tuck ran down the stairs, arriving at around 9:15 p.m. No one was in the hallway, but Diamond saw on the

floor a Yankees cap like the one Gilchrist was wearing that night.

3 Cameen Free is the sister of Kellisha Free, who lived in that apartment.

Tuck testified that he and Diamond walked outside the front of the building and looked in "[b]oth directions." They remained outside for about five minutes but did not see Gilchrist or any of the defendants. They also looked down in the basement of building three for two or three minutes. After not seeing anyone, they returned to the apartment.

According to Jackson, Gilchrist called her about three or four minutes after he left her apartment and said, "come get me." The phone was then disconnected. Jackson called back "[i]mmediately" and Gilchrist again asked her to come get him, that he was "outside in between the buildings" and that "Damien and them stabbed me," which he repeated "[a] couple of times." Gilchrist's voice was "dragging a little [*8] bit" and he sounded "weak, like he was tired." Jackson kept him on the phone while she ran outside to find him.

Jackson also testified that Gilchrist did not know Scott "by name" and she did not ask Gilchrist who he meant by "them" when he told her on the phone that "Damien and them stabbed me." She also said that after finding Gilchrist, she stood as close as "right over the top of him" and heard him repeat three to five times that "Damien and them stabbed me."

Diamond testified that after he ran outside, he found Jackson but they did not see Gilchrist. After Jackson told him about the phone call, the two went to find Moore. Moore testified that she was at Juanita Dunn's apartment when Jackson and Diamond "bust in the door[,] they looked "[l]ike shocked like or scared like" and said, "[h]elp us find [Gilchrist]. Damien had stabbed him." They then went to the parking lot area by building five where they saw police and medical personnel.

Officer Jose Valentin of the Paterson Police Department testified that he was the first officer to arrive on the scene. When he arrived, he saw "a crowd" of five to ten people standing at the scene, and a man "laying on the ground" "bleeding heavily from [*9] the T-shirt that he was wearing underneath a green leather Army coat." The officer tried to "get as much information as [he] could, not knowing whether [the victim] was going to make it or not." The victim was "going in and out of consciousness," his eyes were "kind of squinting," and he was having trouble speaking because "he was in agony and pain." The victim was not able to respond to questions about who stabbed him; he only told the officer that his name was Ramod and that the incident happened in building three.

Valentin continued that he spoke to Jackson at the scene and she "seemed overly excited" and "had alcohol protruding from her breath." He felt that Jackson "appeared to be intoxicated, but she knew what she had been saying." Jackson testified that she was not intoxicated when she spoke to the police that night.

Detective Akram Abdellatif, the lead detective, testified that he spoke to Jackson and Moore separately at the scene. He did not detect the odor of alcohol on Jackson's breath or observe her being "under the influence" of alcohol or other "type of substance."

Officer Frank Belton testified that he was also dispatched to the scene and that other officers and medical [*10] personnel were there when he arrived. He saw blood on Gilchrist's "jacket area" and that Gilchrist appeared to "be conscious but in a lot of pain." During the ten-minute period after Belton arrived on the scene, he did not hear Gilchrist say anything.

Jackson testified that police and paramedics surrounded Gilchrist. She saw "a lot" of blood around Gilchrist's stomach area. Gilchrist's voice was "kind of low" and Jackson thought he was going to die because she had never seen that much blood. She also testified that Gilchrist was not wearing his gold chain.

Moore testified that she saw Gilchrist "laying down in the bushes[]" and went right up to the yellow crime scene tape and stood about four to six feet from him. Jackson, Diamond, and Dunn were with her until an ambulance took Gilchrist away. Moore did not see Gilchrist's injuries until the paramedics cut away his shirt. She described the wounds as "deep, and like you could see some of his meat out of him." Moore heard one of the police officers ask Gilchrist if he knew who stabbed him. She heard Gilchrist respond, "Damien," "Damien did it."

Desiree Griffin, an E.M.S. worker with the Paterson Fire Department who treated Gilchrist in [*11] the ambulance, testified as an expert witness in emergency medical services. Griffin noted that Gilchrist had sustained several stab wounds to his right arm, abdomen, and the area right below the breastbone; and that a "trauma dressing" was used because of the heavy bleeding. During treatment, Gilchrist's blood pressure was dropping and his heart rate was increasing, indicating significant blood loss. Griffin also administered oxygen to Gilchrist. She testified that she "would assume that any stab wound to the torso would be life threatening" because "[t]here's vital organs there." She opined that Gilchrist sustained life threatening injuries, especially to his torso.

Griffin also testified that she heard Gilchrist talk to the police during treatment and mentioned "names" but

she did not recall what he said or what names he used. She said that although Gilchrist was wearing an oxygen mask that covered his mouth and nose at the time, the mask would not muffle his voice, and that "[y]ou can speak and we can understand with a mask on." During treatment, Griffin reassured Gilchrist and did not mention his chances of survival.

Joanne Thompson, an emergency medical technician and paramedic [*12] who also treated Gilchrist in the ambulance, testified as an expert in advanced life support. Thompson noted that Gilchrist was "alert and oriented times three," which means that he was able to talk and was aware of everything that happened. Gilchrist was administered "100 percent oxygen" using a "non re-breather which is a face mask with a reservoir bag." No medication was administered during transport. Thompson also described the various "dressings" and care provided to Gilchrist before he reached the hospital.

Upon arriving at the hospital, Gilchrist was rushed into the trauma room area. According to hospital records, he was responsive, oriented, and conscious at the time of treatment. Belton testified that he saw Gilchrist within ten minutes of his arrival at the hospital, and also saw eight or nine individuals treating him. Belton observed "a couple of stab wounds in [Gilchrist's] stomach area." Gilchrist also "appeared to be in severe pain with his face frowning," and his "eyes opening and closing."

Belton asked Gilchrist his name and who stabbed him. According to Belton, Gilchrist said three times that "Damian Freeman" stabbed him, that there were "three other guys there[,] and [*13] that one of them took his gold chain. Belton had to lean down to less than an inch from Gilchrist in order to hear him because he was speaking in a "low tone." Based on his experience with stomach injuries, Belton believed that Gilchrist's injuries were severe. He testified that an individual, who he believed was a doctor, said that abdomen wound was "life-threatening" and that Gilchrist was ten to fifteen feet away when this individual made the statement. Gilchrist was taken to the operating room, where he died during surgery. The medical examiner's report listed the cause of death as "[m]ultiple stab wounds" and the manner of death as "[h]omicide."

Dr. Chase Blanchard, an associate medical examiner, testified as an expert in forensic, anatomy, and clinical pathology. Dr. Blanchard described that the "paired defects" on Gilchrist's clothing corresponded to the wounds on his right forearm. The doctor opined that two of the paired wounds were caused by "a paired or double blade [knife] with a space in between the blade of a quarter of an inch" and that the various stab wounds to the abdomen were "life-threatening" injuries. In total, the doctor noted eight stab wounds but cautioned that [*14]

some of the "paired wounds" could be two separate wounds or one wound. To a reasonable degree of medical certainty, the doctor concluded that at least two separate knives were used in the attack on Gilchrist, that the double-bladed knife caused the wounds on his right forearm, and that the single-bladed knife caused most of the other wounds.

I.

We first address defendants' contentions relating to juror misconduct. Because of the consequences of our decision on this issue, we detail what occurred.

Before deliberations began, the judge spoke in chambers to juror number fourteen (juror 14) because he noticed that she was leaning forward in the jury box, she appeared to be crying or sobbing and another juror was comforting her. Juror 14 apologized and said that she was "just a little anxious" but was "able to proceed" and felt "well enough to deliberate." Having previously observed juror 14 leave the courtroom numerous times with obvious back pain, and having observed her using a heating pad during the trial, the judge also asked if she was in pain. The juror responded, "No."

The State requested juror 14's removal due to her anxiety. Free's counsel agreed. Scott's and Mays's counsel saw no [*15] grounds for removal. The judge did not remove the juror at that point because of his understanding of case law on the issue of replacing a deliberating juror, and because the juror had not expressed a desire not to deliberate.

The next day, after deliberations began, Mays' counsel reported to the judge that during a break, he saw juror 14 leave the jury room and that her "eyes were swollen, her face was red, indicating [that] she was crying." The judge accepted counsel's representations but, without more, decided not to "put any added pressure upon [juror 14]" by asking her how she was doing.

After a weekend break, the judge reported to counsel that juror number two (juror 2), the foreperson, left a message in chambers over the weekend, which he played for counsel. After hearing the message, Free's counsel argued that the entire panel was tainted. The judge then summarized the message on the record as follows:

But in effect she said I'm nervous; I'm not sure if I should be calling you; it's Saturday morning at 10:30 a.m. and I want to tell you that I need to step down, I don't want to serve on the jury anymore due to some of the actions taken by another juror prior to the commencement [*16] of deliberations. So she's saying

there's a juror who did something before the deliberations began.

She went on to say we have all invested a lot of time, but I cannot continue to deliberate with people who may have taken these actions. She said she wasn't sure if it was the right thing to call me or not, but she felt she had to tell me. She said it has nothing to do with differences of opinions. She says it's just that I don't feel I should be deliberating with jurors where these actions have been taken.

The judge also advised counsel that he called juror 2, instructed her to report on Monday, and asked her which juror she referred to in her message. The juror 2 said she was referring to juror 14.

On Monday, juror 2 reported under oath that that juror 14 said that she went on the internet and looked up defendants' and the victim's names and what defendants' sentence would be if they were convicted. Juror 2 also reported that juror 14 said before the start of deliberations, that "I can tell you right now what . . . my verdict is" and she held up a piece of paper with her verdict written on it. Juror 2 also saw juror 14 reading a newspaper in the jury room and then she hid it. Juror 2 [*17] did not hear juror 14 tell anyone what she had learned from the internet or the newspaper. Juror 2 stated that she could still be "a fair and impartial juror" and was willing to continue deliberating.

The judge was most concerned that juror 14 had violated her oath and his instructions by looking up information on the internet. He calculated that the jury had been deliberating for about two-and-a-half hours at that point. Free's counsel continued to argue that the entire panel was tainted.

Under oath, juror 14 denied looking up information on the internet. She admitted reading a headline in the newspaper about the case, but not the article itself. She also admitted to holding up a piece of paper with "something written on it" but claimed that she was "told to" do that "specific thing."

The State again requested juror 14's removal. Scott's counsel found the situation problematic but did not request a mistrial. After a lengthy discussion with counsel about how to proceed, the judge decided to voir dire the entire jury panel. All counsel agreed to a "very limited" voir dire "just to make sure nothing occurred that would prevent [the panel] from going on and being fair and impartial[.]"

The [*18] judge then questioned each juror under oath about whether "anything occur[ed] which in [his or her] opinion has infected or affected [his or her] thinking so that [he or she] could not be able to reach a fair and impartial verdict in this case based on the facts and law[.]" and whether he or she could continue deliberating. All jurors said that they could continue to deliberate and be impartial.

When specifically asked if a juror said something about researching the internet, jurors number four (juror 4), five (juror 5), eight (juror 8) and twelve (juror 12) confirmed that juror 14 said either that she knew you could obtain, or that she had obtained information about the case on the internet. Jurors 4, 5, and 12 did not hear juror 14 say what she learned from her internet search; however, juror 8 heard juror 14 say that "you can get 30 years to life." Juror number six (juror 6) heard someone, but he did not remember who, say that you could go on a website to read about the case; however, this juror "followed [the court's] instructions" and did not do so. Other jurors said that they did not hear anything.

After this initial questioning, the judge found that, of the ten other deliberating [*19] jurors, none had expressed a problem with continuing to deliberate, that they did not feel well, or that anything occurred that would prevent them from being fair and impartial. The judge saw no need to further question juror 8, who heard about the possible thirty-year sentence. Instead, he decided to give a curative instruction.

The State continued to press for juror 14's removal. Scott's counsel took no specific position but argued that if the judge removed juror 14, he should remove juror 2 as well. Free's counsel agreed with juror 14's removal but again requested a mistrial, claiming the entire jury was tainted. Mays' counsel requested a mistrial.

The judge found juror 2 credible and determined that juror 14 violated his instructions. The judge would have permitted juror 14 to continue if she had admitted to what she had done; however, he decided to remove her and replace her with an alternate because she disregarded and violated his instructions, because she tried to pass the outside information she obtained to other jurors, and because she lied under oath. When combined with her emotional reactions during and after the trial, and based on the totality of the circumstances, the [*20] judge concluded that juror 14 could no longer be fair and impartial. He also denied a mistrial, concluding that the rest of the panel showed no evidence of taint.

The judge then instructed the remaining jurors about their obligation to render a fair and impartial verdict. He also advised them of juror 14's removal, added one of the alternate jurors to the deliberating panel, and instructed the newly configured jury panel to begin their delibera-

tions anew. The reconstituted jury then rendered their verdict several days later.

Defendants contend that the judge erred in substituting juror 14 with an alternate juror after deliberations began, and should have declared a mistrial. Separately, Free contends that the integrity of the deliberative process was compromised; Scott contends that he was deprived of his right to an impartial jury; and Mays contends that it is improper to remove a deliberating juror when the removal is in any way related to the deliberative process.

The State counters that the judge took appropriate remedial measures to ensure defendants' right to a fair and impartial verdict; that it was within the judge's discretion to deny a mistrial; that the judge voir dired the [*21] entire panel and avoided any questions that would reveal the status of the deliberations, which had not yet proceeded too far; that the judge removed juror 14 after the voir dire revealed that she had lied under oath; and that there was no juror taint as evidenced by the fact that the jury acquitted defendants of the most serious charges of murder, robbery and witness tampering.

The Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution "ensure that 'everyone charged with [a] crime has an absolute constitutional right to a fair trial in an atmosphere of judicial calm, before an impartial judge and an unprejudiced jury.'" State v. Tyler, 176 N.J. 171, 181, 821 A.2d 1139 (2003) (quoting State v. Marchand, 31 N.J. 223, 232, 156 A.2d 245 (1959)). "Trial judges in their gatekeeping role have a duty 'to take all appropriate measures to ensure the fair and proper administration of a criminal trial,' including 'preserv[ing] the jury's impartiality throughout the trial process.'" Ibid. (quoting State v. Williams, 93 N.J. 39, 62, 459 A.2d 641 (1983)). "If juror bias is discovered or the jury's deliberations have been tainted by the introduction of extraneous material, the correct remedy [*22] depends on the stage of the proceedings that has been reached." State v. Adams, 320 N.J. Super. 360, 366, 727 A.2d 468 (App. Div.), *certif. denied*, 161 N.J. 333, 736 A.2d 526 (1999).

"Substitution of an alternate juror during deliberation does not in and of itself offend a defendant's constitutional guarantee of a trial by jury." State v. Williams, 171 N.J. 151, 162, 793 A.2d 594 (2002) (citing State v. Miller, 76 N.J. 392, 406-07, 388 A.2d 218 (1978)). However, removal may be used only in limited circumstances. State v. Hightower, 146 N.J. 239, 253, 680 A.2d 649 (1996). "Because juror substitution poses a clear potential for prejudicing the integrity of the jury's deliberative process, it should be invoked only as a last resort to avoid the deplorable waste of time, effort, money, and judicial resources inherent in a mistrial." Williams, su-

pra, 171 N.J. at 162 (quoting Hightower, supra, 146 N.J. at 254).

"Substitution of an alternate for a deliberating juror involves two distinct inquir[ies]." State v. Banks, 395 N.J. Super. 205, 215, 928 A.2d 842 (App. Div.), *certif. denied*, 192 N.J. 598, 934 A.2d 639 (2007). "The [*23] first question is whether there are grounds for removal of the deliberating juror. [] The second is whether substitution of an alternate or grant of a mistrial is required." Ibid. (internal citations omitted). Once, as here, the case has been submitted to the jury for deliberation, "a deliberating juror may be replaced with an alternate juror only in specifically defined circumstances." State v. Jenkins, 182 N.J. 112, 123-24, 861 A.2d 827 (2004). "Rule 1:8-2(d)(1) and case law delineate the circumstances in which juror substitution will not undermine the sanctity of the jury's deliberative process." Id. at 124. Specifically, Rule 1:8-2(d)(1) provides, in relevant part:

If the alternate jurors are not discharged and if at any time after submission of the case to the jury, a juror dies or is discharged by the court because of illness or other inability to continue, the court may direct the clerk to draw the name of an alternate juror to take the place of the juror who is deceased or discharged. When such a substitution of an alternate juror is made, the court shall instruct the jury to recommence deliberations and shall give the jury such other supplemental instructions as may be appropriate.

[(Emphasis [*24] added).]

Because juror 14 did not die and was not discharged because of illness, we focus on whether there existed "other inability [for her] to continue." The inability-to-continue standard "must be narrowly construed and sparingly applied." Hightower, supra, 146 N.J. at 254 (citing State v. Valenzuela, 136 N.J. 458, 468, 643 A.2d 582 (1994); State v. Trent, 157 N.J. Super. 231, 240, 384 A.2d 888 (App. Div. 1978), *rev'd on other grounds*, 79 N.J. 251, 398 A.2d 1271 (1979)). The phrase "inability to continue" has been "restrictively interpreted . . . to protect a defendant's right to a fair jury trial, forbidding juror substitution when a deliberating juror's removal is in any way related to the deliberative process." Jenkins, supra, 182 N.J. at 124. *See also Williams, supra*, 171 N.J. at 163.

"A deliberating juror may not be discharged and replaced with an alternate unless the record 'adequately establish[es] that the juror suffers from an inability to

function that is personal and unrelated to the juror's interaction with the other jury members." *Jenkins, supra*, 182 N.J. at 124-25 (quoting *Hightower, supra*, 146 N.J. at 254). A deliberating juror may not be removed under the inability-to-continue standard merely because he or [*25] she has a different position than other jurors or if he or she has a problem that is both personal and related to interactions with the rest of the panel; "the reason must be exclusively personal." *Hightower, supra*, 146 N.J. at 255. "Conversely, the standard may be invoked to remove a juror when the record reveals that the juror's emotional condition renders him or her unable to render a fair verdict." *Ibid.* (citing *Miller, supra*, 76 N.J. at 406-07; *Trent, supra*, 157 N.J. Super. at 240).

In deciding to replace juror 14, the judge relied on *State v. Holloway*, 288 N.J. Super. 390, 672 A.2d 734 (App. Div. 1996), *overruled in part by, Jenkins, supra*, 182 N.J. at 133 n.2.. There, we found that the trial judge properly removed a juror after the jury announced its verdict because the removed juror had a "conversation with a relative [that] patently influenced [her]" and who, as such, "disregarded the court's unambiguous admonitions [not to talk about the case with others]." *Id.* at 404. However, the *Jenkins* Court disapproved "of that part of the holding in [*Holloway, supra*], that allowed a substitute juror to join a jury that had announced its verdict to convict." *Jenkins, supra*, 182 N.J. at 133 n.2. Instead, [*26] the Court concluded that "judicial economy had to bow to defendant's fair trial rights and a mistrial should have been declared." *Id.* at 133.

The case here is analogous to *Hightower, supra*, 146 N.J. at 244-52. There, the Court reversed a death penalty verdict, holding that the trial judge should have declared a mistrial rather than substitute a juror who had brought in extraneous information that the victim had three children. The Court held that "the trial court improperly expanded the scope of *Rule 1:8-2(d)*'s inability-to-continue standard when it removed Juror Number 7 from the deliberating jury." *Id.* at 255. The Court explained:

Although the juror did not follow the trial court's instructions to report to the court any information he overheard outside of the courtroom, and violated his oath by informing other jurors that the victim had children, that misconduct does not fall within the scope of *Rule 1:8-2(d)*'s inability-to-continue standard. That standard requires exclusively personal circumstances to justify removal of a deliberating juror. Juror Number 7 did not satisfy that standard because his misconduct was related to the case and to his interactions with the other jurors.

[*Ibid.*]

Similarly, [*27] although juror 14 denied conducting outside research, her misconduct in using the internet to research and obtain extraneous information, as the judge found had occurred, was related to the case and to her interactions with her fellow jurors, with whom she shared that information. Thus, juror 14's conduct did not fall within the inability-to-continue standard, and she should not have been singularly removed from the panel for her behavior.

Also, there is no evidence that juror 14 was too ill, anxious, or otherwise unable to continue for any reason exclusively personal to her. Although she suffered back pain and anxiety during the trial, that was not the reason for her removal. Nor did she ever indicate an inability or unwillingness to continue. The problem was not personal, but pervasive, i.e., juror 14's misconduct tainted the jury as a whole. Accordingly, a mistrial should have been declared. Failure to do so constitutes reversible error. The error requires a new trial.

II.

Although we need not do so, we address the other substantive issues raised on appeal so as to provide guidance on the retrial.

Admission of Gilchrist's Statements As A Dying Declaration and Excited Utterance

Defendants [*28] contend that the judge improperly admitted as a dying declaration Gilchrist's statement to Belton in the hospital that "Damien Freeman" and three other males had stabbed him. They argue that there was no evidence that Gilchrist believed he was dying. Separately, Free contends that dying declarations are no longer admissible under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); and Mays contends that the police induced the statement and it was not voluntarily made.

The judge admitted Gilchrist's statement to Belton as a dying declaration under *N.J.R.E. 804(b)(2)*, finding that although no one told Gilchrist that he was going to die, and although Gilchrist did not acknowledge a belief that he was about to die, under the totality of circumstances Gilchrist was aware at the hospital of his imminent or impending death.

We review a trial court's evidentiary determinations under an abuse of discretion standard. *State v. Buda*, 195 N.J. 278, 294, 949 A.2d 761 (2008) (citing *Hisenaj v. Kuehner*, 194 N.J. 6, 12, 942 A.2d 769 (2008)). An abuse of discretion only arises on demonstration of "manifest

error or injustice." *Hisenaj, supra*, 194 N.J. at 20 (citations omitted). An abuse of discretion [*29] occurs when the trial judge's "decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *United States v. Scurry*, 193 N.J. 492, 504, 940 A.2d 1164 (2008) (citations omitted). Applying these standards, we continue our analysis.

"In a criminal proceeding, a statement made by a victim unavailable as a witness is admissible if it was made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death." *N.J.R.E.* 804(b)(2). See also *State v. Graham*, 59 N.J. 366, 370, 283 A.2d 321 (1971). In evaluating the admissibility of a dying declaration, the trial court should consider "all the attendant circumstances . . . including the weapon which wounded [the declarant], the nature and extent of the [the declarant's] injuries, [the declarant's] physical condition, [the declarant's] conduct, and what was said to and by [the declarant]." *State v. Hegel*, 113 N.J. Super. 193, 201, 273 A.2d 383 (App. Div.), cert. denied, 58 N.J. 596, 279 A.2d 681 (1971) (citation omitted). To ensure reliability, "the statement must have been made while the declarant believed his death was imminent." Biunno, *Current N.J. Rules of Evidence*, comment [*30] 3 on *N.J.R.E.* 804(b)(2) (2008). Also, although "[a] statement is clearly inadmissible if it was the product of undue pressure" and "voluntariness will depend upon the pertinent facts of the case . . . the mere fact that a statement is made in response to police interrogation will not render the statement inadmissible." *Ibid.*

Further, "[i]n *Crawford* . . . the United State Supreme Court . . . [rendered] unconstitutional the admission of an out-of-court 'testimonial' statement permitted by state hearsay rules, unless the person who made the statement is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine that person." *State v. J.A.*, 195 N.J. 324, 328, 949 A.2d 790 (2008) (citing *Crawford, supra*, 541 U.S. at 50-52, 124 S. Ct. at 1363-64, 158 L. Ed. 2d at 192-93). In a footnote, the Supreme Court recognized dying declarations as an exception and that "[t]he existence of that exception as a general rule of criminal hearsay law cannot be disputed." *Crawford, supra*, 541 U.S. at 56, 124 S. Ct. at 1367, 158 L. Ed. 2d at 196. Indeed, in *State v. Townsend*, 186 N.J. 473, 490, 897 A.2d 316 (2006), decided after *Crawford*, our Supreme Court concluded that the trial court properly admitted [*31] as a dying declaration the victim's testimony that purported to exonerate the defendant. Further, the United States Supreme Court, albeit in dicta, observed in *Giles v. California*, U.S. , 128 S. Ct. 2678, 2683, 171 L. Ed. 2d 488, 495 (2008) that the dying

declaration hearsay exception does not violate the Confrontation Clause or the *Crawford* precepts.

Based on our careful review of the record, we are satisfied that the judge properly admitted Gilchrist's statement to Belton as a dying declaration, and that the statement was voluntary and not the result of undue pressure. All of the attendant circumstances indicated that Gilchrist was aware of the imminence of his impending death when he spoke to Belton. Notwithstanding that Gilchrist did not verbally state his awareness, and that no medical personnel specifically told him that he was about to die, the totality of circumstances and nature and extent of Gilchrist's injuries support the judge's conclusion that Gilchrist believed his death was imminent when he told Belton who stabbed him. Under our limited scope of review, we conclude that the judge did not abuse his discretion in admitting Gilchrist's statement to Belton as a dying [*32] declaration.

Defendants also contend that the judge improperly admitted as an excited utterance Gilchrist's statement to Jackson on the phone that "Damien and them stabbed me." Separately, Scott and Free argue that Gilchrist's weak voice failed to satisfy the requisite stress of excitement under the excited utterance rule; Free and Mays argue that the circumstances surrounding the statement demonstrate their unreliability because it was not established whether Gilchrist had the opportunity to deliberate; Free argues that the statement implicating him should be viewed with skepticism because of the previous conflict between him and Gilchrist; and Mays argues that the judge failed to account for Jackson's inebriated state at the time of the phone call, and that the statement was an unreliable identification without the opportunity for cross-examination.

The judge admitted Gilchrist's statement to Jackson as an excited utterance under *N.J.R.E.* 803(c)(2). He found credible Jackson's recollection of the phone call. He also found Gilchrist's statement to Jackson highly trustworthy because Gilchrist was "crying out for help," and "not reflecting upon what he was saying in terms of who stabbed [*33] him." The judge emphasized that the phone call came within moments of a "highly alarming, frightening, terrifying ordeal."

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and without opportunity to deliberate or fabricate." *N.J.R.E.* 803(c)(2); see also *Buda, supra*, 195 N.J. at 293. Such hearsay statements are admissible because the excitement created by the startling event "minimize[s] the possibility that the utterance will be influenced by self interest and therefore rendered unreliable." *State v. Long*, 173 N.J. 138, 158, 801 A.2d 221 (2002).

See also State v. Cotto, 182 N.J. 316, 328, 865 A.2d 660 (2005). "An essential inquiry as to the admissibility of a statement as an excited utterance is whether the declarant had the opportunity to deliberate, reflect or misrepresent before making the statement or whether it was made spontaneously and in a state of excitement so as to negate fabrication." *State v. Clark*, 347 N.J. Super. 497, 506, 790 A.2d 945 (App. Div. 2002). *See also State v. Branch*, 182 N.J. 338, 365, 865 A.2d 673 (2005).

We are satisfied that the record amply supports the judge's discretionary ruling that [*34] Gilchrist's statement to Jackson was an excited utterance. Gilchrist called Jackson within minutes of leaving her apartment and said that "Damian and them" stabbed him. Thus, the phone call was very close in time, if not immediately after, the stabbing, indicating little or no time for Gilchrist to deliberate, reflect, misrepresent or fabricate his statement.

Further, we find no merit in Scott's contention that Gilchrist's "weak" or "dragging" voice failed to satisfy the requisite 'stress of excitement' under *N.J.R.E. 803(c)(2)*. To the contrary, the weakness of Gilchrist's voice supports the conclusion that he made the statement to Jackson immediately after the startling or shocking event of being stabbed several times by Damien and others.

Admission of Other Crimes Evidence

Scott contends for the first time on appeal that the judge improperly admitted other-crimes or wrongs evidence that he possessed a double-bladed knife, like the one used in the attack, prior to Gilchrist's stabbing. Scott posits that the State failed to satisfy three of the four *Cofield*⁴ criteria. We review Scott's contention under the plain error standard of review. *See R. 1:7-2* and *R. 2:10-2*; *see also State v. Macon*, 57 N.J. 325, 336, 273 A.2d 1 (1971). [*35] Under that standard, "we must disregard any error unless it is 'clearly capable of producing an unjust result.' Reversal of defendant's conviction is required only if there was error 'sufficient to raise a reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached.'" *State v. Atwater*, 400 N.J. Super. 319, 336, 947 A.2d 175 (App. Div. 2008) (quoting *State v. Daniels*, 182 N.J. 80, 95, 861 A.2d 808, (2004)); *Macon, supra*, 57 N.J. at 333; *R. 2:10-2*.

⁴ *State v. Cofield*, 127 N.J. 328, 605 A.2d 230 (1992).

Diamond testified about a picture he had drawn for the police of a double-bladed knife that he claimed Scott possessed. He described an image on the knife's handle as "something on a card, like a Dungeons and Dragons[.]" explaining that he used to play the Dungeons and

Dragons game and the type of dragon from the game, a "Griffendor," was on the handle of Scott's knife. He also said that the knife had "[t]wo blades going straight up, sharp. Dragon emblem, handle with circles, twisted."

Moore testified that she had drawn a picture for the police of "[a] crazy looking knife" with "two tips" that she had seen on Scott and Free prior to Gilchrist's stabbing. Moore drew only a single blade with two [*36] tips but not the handle. She also testified that Free carried different kinds of knives, one of which had a black handle and an eight-inch blade.

Detective Michael Ventrella, another investigator, testified that about two months before the trial he decided to research the internet for "a double blade or a fantasy type like dragon-style knife." He printed out seven color pictures of his search results to show to Diamond. The detective said that after looking at the pictures for "about a minute," Diamond "stopped on one picture and . . . said that's the knife." Diamond was "pretty upset" but he showed no doubt about the knife he identified. Ventrella purchased that knife from Ebay.

Diamond identified the knife that Ventrella had purchased as the one he saw Scott possess. Although the handle of Scott's knife was a little different, the blades were the same. Diamond also testified that he had seen Scott with a double-bladed knife on at least three occasions prior to Gilchrist's stabbing, and that Scott had teased him with that knife.

Moore testified that she had seen Free carrying a double-bladed knife, similar to the replica, on several occasions prior to Gilchrist's stabbing.⁵

⁵ At trial, [*37] Dr. Blanchard examined the replica knife and opined that it was, "to a reasonable degree of medical certainty, consistent with the weapon that caused the paired wounds on [Gilchrist's] right forearm."

In finding the replica knife admissible, the judge concluded that there was no suggestibility, that Diamond looked at the photograph and identified the knife, and that Diamond reaffirmed his identification of the style of blade. The judge also ruled that Moore could be asked to identify the replica knife at trial and could be questioned about knives she had seen on Free in the past.

Defense counsel did not specifically object pursuant to *N.J.R.E. 404(b)* to testimony that Scott had been previously seen with a knife. As such, the judge conducted no *Cofield* hearing, he did not apply the *N.J.R.E. 403* balancing test, and he did not make any findings on those grounds. Nonetheless, the judge gave the jury the following limiting instruction:

There was testimony or evidence in this case that on dates other than the date in question one or more of the defendants carried a knife or was seen carrying a knife. This was admitted so that you could decide if the defendant possessed a knife on October 4th, [*38] 2003, with the specific purpose to use it unlawfully as a weapon against Ramod Gilchrist and for no other purpose.

Normally such evidence is not permitted under our rules of evidence. Our rules specifically exclude evidence that a defendant may have committed other wrongs or acts when it is offered only to show that he has a disposition or tendency to do wrong and therefore must be guilty of the charged offense.

Before you can give any weight to this evidence, meaning that the defendant may have carried a knife on prior occasions, you must be satisfied that the defendant committed the other wrong, carrying the knife. In your determination if you are not so satisfied, you may not consider it for any purpose.

However, our rules do permit evidence of other wrongs or acts when the evidence is used for a certain specific, narrow purpose. And in this case, as I said, this was admitted so that you could decide if the defendant possessed the knife on October 4th, 2003, with the specific purpose to use it unlawfully as a weapon against Ramod Gilchrist and, again, for no other purpose.

Whether this evidence does, in fact, demonstrate the point for which it was offered is for you to decide. You may [*39] decide that the evidence does not demonstrate that purpose and is not helpful to you at all. In that case you must disregard the evidence.

On the other hand, you may decide that the evidence does demonstrate the lack of a specific purpose to carry a knife on 10/4/03 with the purpose to use it unlawfully as a weapon against Ramod Gilchrist and use it for that specific purpose.

However, you may not use this evidence to decide that the particular defen-

dant has a tendency to commit crimes or that he is a bad person; that is, you may not decide that just because the defendant has carried a knife in the past, that he must be guilty of the present crime or crimes. I have admitted this evidence only to help you decide the specific question of whether the defendant carried the knife on October 4th, 2003, with the specific purpose to use it unlawfully against Ramod Gilchrist. You may not consider it for any other purpose and may not find a defendant guilty now simply because the State or defense has offered evidence that he carried a knife in the past.

After the judge read this instruction, Free's counsel objected, arguing that there had to be a showing that Free and Scott had carried the knife [*40] previously for an unlawful purpose and not simply just to carry it. The judge responded that he modified the instruction because "more came from the defense side, brought out from witnesses that on prior occasions particular defendants were seen with knives." The judge had also modified the instruction because of Scott's counsel's closing statements that the State had to prove that defendants possessed a knife not just for an unlawful purpose, but for the specific and unlawful purpose to use it as a weapon against Gilchrist; and counsel's closing statement that the jury could not conclude that Scott carried the knife on the night of the incident with the specific purpose to use it as a weapon against Gilchrist, but that he instead carried it "for his own protection, almost as a self-defense item in case he was ever attacked in this dangerous neighborhood he's living in." Counsel also stated in summation that "the State does not have enough information for you to draw the inference that because Mr. Scott may have had a knife on his person at some point in time that evening that that meant that he was one of the people that stabbed Ramod Gilchrist[.]"

The judge invited Free's counsel [*41] to submit different language so that he could recharge the jury because he was "trying to prevent, the prejudice that would flow from this information" and "[h]ad there been an objection, [he] could have strongly considered sustaining the objection and saying what difference does it make if someone carried a knife on a prior occasion other than to prejudice the jury." Finally, the judge stated:

[N]o one said I'd like to get this knife business in under [N.J.R.E.] 404(b), then I make a ruling and give the charge. It just went in.

And now looking back on it, I said the only theory under which it could have gone in--actually I didn't say that. I said I have to remove the prejudice. Then when [Scott's counsel] argued it, what he was in effect convincing me was if--and let me digress.

It's defense [N.J.R.E.] 404(b) material. In other words, I don't think you were seeking to put in carrying a knife on prior occasion to show intent and what have you. If that were the case, I wouldn't allow it in, because one of the prongs under *Cofield/Marrero*⁶ is that the prejudicial effect cannot outweigh the probative value.

Here it was the defense seeking [N.J.R.E.] 404(b) material saying I'd like to put [*42] in the fact that my client had a habit or custom of engaging in a bad act, i.e., carrying a knife to show that he didn't arm himself on October 4th for the first time with a knife with the specific intent to use it as a weapon against Ramod Gilchrist; he always carries a knife, therefore he's not guilty--he may be guilty of unlawful possession of a weapon, but not possession of a weapon for an unlawful purpose, . . . he always carried it; more for a lawful purpose, such as self-protection. So we didn't develop it during the trial. But it hit me that if we had developed it that way, that charge would have went in, should go in anyway.

⁶ *State v. Marrero*, 148 N.J. 469, 691 A.2d 293 (1997).

The [*43] record reveals no further discussion of this issue, and the judge did not recharge the jury with any alternate language. Instead, the judge instructed the jury on the elements of unlawful possession of a weapon and possession of a weapon for an unlawful purpose, repeating that the State must prove whether the weapon was possessed for use against Gilchrist. Significantly, Scott's counsel did not object to the charge and did not comment on Free's objection to the limiting instruction or the judge's explanation thereof.

On appeal, however, Scott now specifically objects to Diamond's and Moore's testimony about seeing Scott with a double-bladed knife prior to Gilchrist's stabbing.

Interestingly, Scott does not include in his list of objectionable testimony Jackson's testimony that she saw him lift his shirt to reveal to Gilchrist the handle of a knife as Scott was leaving her apartment just before the stabbing occurred, or her testimony that she had seen Scott with that same knife on prior occasions.

The State counters that the evidence was properly admitted as *res gestae* because it was part of the "total criminal conduct that occurred during the incident." It points to the medical examiner's [*44] testimony about wounds caused by a distinct double-bladed weapon. Accordingly, the State concludes that testimony of Scott's previous and repeated possession of the double-bladed knife, including that he possessed a knife just moments before the attack, established a continuous course of conduct that linked him to the murder weapon and the fatal stabbing, and served as a foundation for admission of the replica knife. The State maintains that the judge properly admitted the evidence without applying the four-prong *Cofield* test. Alternatively, it argues that the evidence was properly admitted under *N.J.R.E. 404(b)* and the judge properly gave a lengthy and detailed limiting instruction.

N.J.R.E. 404(b) "prohibits the introduction of evidence of past acts of misconduct as a basis for an inference that defendant committed the acts for which he or she is then standing trial." *State v. Martini*, 131 N.J. 176, 240, 619 A.2d 1208 (1993), cert. denied, 516 U.S. 875, 116 S. Ct. 203, 133 L. Ed. 2d 137 (1995). However, the prohibition under *N.J.R.E. 404(b)* does not apply to acts or misconduct that are components of the crime that is the subject of the trial. *Long, supra*, 173 N.J. at 161; *Martini, supra*, 131 N.J. at 240-42. [*45] Specifically,

where the alleged bad act is part of the full picture of the crime charged it has sometimes been considered *res gestae* evidence to which *N.J.R.E. 404(b)* is not applicable.

"Other crimes" evidence which relates directly to the crimes for which the defendant is on trial is admissible if it "serves to paint a complete picture of the relevant criminal transaction," "furnishes part of the context of the crime," or "is necessary to a full presentation of the case."

[*State v. Burden*, 393 N.J. Super. 159, 169, 922 A.2d 844 (App. Div. 2007) (quoting *State v. Torres*, 313 N.J. Super. 129, 160-61, 713 A.2d 1 (App. Div.), *certif. denied*, 156 N.J. 425, 719 A.2d 1023 (1998)), *certif. denied*, 196 N.J. 344, 953 A.2d 763 (2008) (other internal citations omitted).]

See also *State v. Pierro*, 355 N.J. Super. 109, 118, 809 A.2d 804 (App. Div. 2002), *certif. denied*, 175 N.J. 434, 815 A.2d 479 (2003); *State v. Cherry*, 289 N.J. Super. 503, 522, 674 A.2d 589 (App. Div. 1995).

Determination as to the admissibility of other crimes, wrongs or acts evidence is ordinarily left to the discretion of the trial court and, as such, is reviewed under an abuse of discretion standard. *Torres, supra*, 313 N.J. Super. at 160. However, when the trial court fails to analyze the admissibility of other crime [*46] evidence, where such analysis is called for, under the test set forth by the Court, no discretion is afforded and the trial court's determination is subject to *de novo* review. *State v. Reddish*, 181 N.J. 553, 609, 859 A.2d 1173 (2004).

"[R]es gestae evidence is subject to Rule 403 balancing." *State v. Jenkins*, 356 N.J. Super. 413, 429, 812 A.2d 1143 (App. Div. 2003), *aff'd and remanded*, 178 N.J. 347, 840 A.2d 242 (2004). Because Scott did not raise the issue or object to the knife testimony pursuant to *N.J.R.E. 404(b)*, the trial judge did not make any findings as to the balancing test or a finding that the testimony was admissible as res gestae evidence. "The burden is on the party urging exclusion of the evidence to convince the court that the *N.J.R.E. 403* considerations control." *Ibid*.

Scott also does not address the res gestae issue here. Rather, he argues that three of the four *Cofield* criteria were not satisfied. However, we do not conclude that the judge would have been obligated to exclude the testimony to which Scott now objects as unduly prejudicial. First, as previously noted, Scott did not object to the knife testimony. Therefore, the information that Scott possessed such a double-bladed knife, similar to the replica [*47] knife, was already before the jury.

Second, Scott's counsel highlighted on cross-examination much of the testimony Scott now challenges and, therefore invited the error. *Jenkins, supra*, 178 N.J. at 358 (invited error is "error that defense counsel has 'induced'"). For example, on cross-examination by Scott's counsel, Diamond again testified that he knew what Scott's knife looked like because he saw it on Scott at least three times prior to Gilchrist's stabbing, and that Scott had teased him with the knife. Similarly, on cross-

examination by Scott's counsel, Moore testified that she saw Scott with the double-bladed knife on other occasions prior to Gilchrist's stabbing. Over Free's objection, but on cross-examination by Scott's counsel, Moore also testified that Free carried "different kinds of knives" and that she had seen Free carrying the knife described as Scott's "a couple of times."

Indeed, Scott's counsel acknowledged that it had been "well-developed" in the case that the AHP was a "high crime area, high drug area" and that "it's very customary for individuals to carry knives." As previously noted, Scott's counsel argued in summation that Scott carried a knife all the time for [*48] protection, and that there was no evidence that he carried the knife that night in order to stab Gilchrist. In that context, the fact that the jury heard that Scott had carried a knife on several occasions prior to the stabbing cannot be considered unduly prejudicial.

Further, the jury learned about the knife from other witnesses and the trial judge gave a specific and appropriate limiting instruction on the use of that testimony. There is no indication that the jury failed to follow that instruction.

Traditionally, res gestae evidence has been deemed admissible if it "serves to paint a complete picture of the relevant criminal transaction," describes part of the context of the case, or is otherwise needed to fully present the case. *Martini, supra*, 131 N.J. at 242. See also *State v. Cherry*, 289 N.J. Super. 503, 522, 674 A.2d 589 (App. Div. 1995) ("Evidence of events that take place during the same time frame as the crime charged in the indictment will not be excluded if the evidence establishes the context of the criminal event, explains the nature of, or presents a full picture of the crime to the jury."); *State v. Byard*, 328 N.J. Super. 106, 114, 744 A.2d 1213 (App. Div.) (holding that evidence that paints a complete [*49] picture of events is admissible res gestae evidence, rather than *N.J.R.E. 404(b)* evidence), *certif. denied*, 165 N.J. 490, 758 A.2d 649 (2000).

We recognize that some members of our Supreme Court view res gestae as "the moldy cardboard box in the basement, whose contents no longer have any utility but which we nevertheless fear discarding." *State v. Kemp*, 195 N.J. 136, 163, 948 A.2d 636 (2008) (Albin, J. concurring). However, unless and until a majority of the Court repudiates res gestae, it remains a viable doctrine under the present law of New Jersey.

In any event, with or without the res gestae label, we find that testimony about the double-bladed knife was relevant pursuant to *N.J.R.E. 401*, as it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." See *State v. Deatore*, 70 N.J. 100, 116, 358 A.2d 163 (1976) (noting that our

courts' test of relevance is "broad and favors admissibility"). Nor do we find that this evidence was unduly prejudicial under *N.J.R.E. 403*.

The Flight Charge

The next issue concerns the jury charge on flight. Free and Scott had turned themselves in to the Greenville County Sheriff's Department in South Carolina three days after the murder. They contend [*50] that the judge improperly charged the jury on flight because there was no evidence that their departure to South Carolina reasonably justified an inference that they did so with a consciousness of guilt and to avoid an accusation of that guilt. They argue that there was no evidence that they knew that the police were looking for them and that, upon learning police were searching for them, they turned themselves in thereby effectively extinguishing a viable flight charge. Scott also contends that the prosecutor's statements in his summation about the consciousness of guilt exacerbated the error.

Significantly, in his opening statement, Scott's counsel stated the following regarding flight:

As [the prosecutor] mentioned already, Mr. Scott surrendered sometime after the incident in South Carolina and not here in New Jersey. I am sure that [the prosecutor] will argue to you that that was evidence that Mr. Scott was involved in this matter.

Well, again, ladies and gentlemen, that's an interpretation. I think the evidence is going to show and I think you will hear Mr. Scott *stayed around this area for sometime after the incident happened, and it was only after he learned he was actually being* [*51] *charged with murder--falsely, I submit to you, charged with murder--that he left.* At some point in time I will ask you, when you deliberate regarding that specific issue, to look within yourselves and ask yourselves what exactly would I do in a situation like that?

You see, ladies and gentlemen, I have a lot of trust in our system of justice and confidence that it works most of the time[.]. Obviously, not all of the time[.], because no system is perfect. So far, luckily, I've only dealt with the criminal justice system standing in this position here and not sitting there. I wonder how strong a trust or confidence I would have if I

found out that I was falsely being charged with a crime, especially a crime of such magnitude, and whether or not it's understandable that an initial reaction might be made to run away from it. Don't we all many times run away from our problems? Perhaps, and again this will be something for you to consider the perspective of some individuals as to the criminal justice system is because of experiences and stories they have heard from others.

[(Emphasis added).]

In his summation, the prosecutor stated the following, to which Free and Scott now object:

You're confronted [*52] with two different scenarios in terms of what happens after October the 4th of 2003. And I submit to you, ladies and gentlemen, they are two directly opposed scenarios, one which I'm going to term the smarter scenario, and one which I'm going to term the flag-in-the-air scenario.

In the law, you're going to be charged on this concept of flight . . . if you find that the defendant or defendants fearing that an accusation or arrest would be made against him took refuge in flight then you may consider such flight as consciousness of guilt. If there is flight you may infer consciousness of guilt. It's part of something that you can consider in the law. And in this case, you have the smarter approach and you've got the flag of consciousness-of-guilt approach.

Because of the three defendants, two of them have this consciousness of guilt, flowing from their hands as they leave the State of New Jersey, flee down south to South Carolina because they know, they know that their families are giving statements on them. They know it's not a secret. They know they are going to be found. They know they're going to be charged. They know one day there is going to be people like you deciding this case. [*53] And they took refuge in flight. They tried to run.

And after a few days, they realized they couldn't get away. Their families' houses, their girlfriends, everybody is be-

ing interviewed, everybody is being talked to. All of their locations are being sought. And then consciousness of guilt by running is abundantly clear.

During the charge conference, the prosecutor had requested a flight charge as to all three defendants. Scott's counsel did not object because, as he admitted, flight was "fairly in the case." Free's counsel objected. The judge ruled that flight was "in the case clearly" as to Free and Scott. Free's counsel agreed that the judge should include in the charge defendants' claim that their acts did not constitute flight. The judge then gave the following instruction on flight:

There has been some testimony in this case from which you may infer that the defendants Justin Scott and/or [Damian] Free fled shortly after the alleged commission of the crime. The defense position is that these acts do not constitute flight.

The question of whether the defendants or a defendant fled after the commission of the crime is another question of fact for your determination.

Mere departure from [*54] a place where a crime has been committed does not constitute flight. If you find that one or more of the defendants fearing that an accusation or arrest would be made against him on the charges involved in this case took refuge in flight for the purpose of evading the accusation or arrest, then you may consider such flight in connection with all the other evidence in this case as an indication or proof of consciousness of guilt. Flight may only be considered as evidence of consciousness of guilt if you should determine that the defendant's purpose in leaving was to evade accusation or arrest or for the purpose of avoiding the charges that would be brought in the indictment.

....

On the other hand, if you find the defendant's attorney's explanation for the defendant's action in this regard to be credible, you should not draw any inference of the defendant's consciousness of guilt from the defendant's departure.

This charge follows the model jury charge on flight, except it did not include the last sentence: "It is for you as judges of the facts to decide whether or not evidence of flight shows a consciousness of guilt and the weight to be given such evidence in light of all the other [*55] evidence in the case." *Model Jury Charge (Criminal), Flight* (2000).

Scott's and Free's argument that the record does not support the flight charge lacks merit. First, Scott's counsel's admission that flight was "fairly in the case[.]" and his opening statement that his client knew about the murder and fled, belies Scott's and Free's claim that there was no evidence of flight or that they were unaware that the police were looking for them. Further, it was undisputed that Scott and Free surrendered to the police in South Carolina after police searched for them in New Jersey.

The Court's holding in *State v. Ingram*, 196 N.J. 23, 951 A.2d 1000 (2008) does not change this result. There, the Court discussed whether a defendant's voluntary but unexplained absence from trial, without more, should give rise to a jury charge that the absence constitutes evidence of consciousness of guilt. *Id.* at 47. The Court concluded that a "flight charge should not lie when a defendant absents himself from trial unless separate proofs are tendered to sustain the claim that the defendant's absence was designed to avoid detection, arrest, or the imposition of punishment." *Ibid.* Here, the action giving rise to the flight charge [*56] occurred prior to trial and did not involve any defendant voluntarily absents himself from the trial.

We are satisfied from our careful review of the record that sufficient evidence existed to support the flight charge. The charge, as given, closely followed the model charge and appropriately instructed the jury that Scott and Free claimed that their acts did not constitute flight, and that if the jury agreed, then they could not infer guilt. In any event, the charge was not likely to cause an unjust verdict, given other compelling evidence of Scott's and Free's guilt.

Mays' Waiver of Miranda Rights

Mays contends that the judge improperly admitted an oral statement he gave to the police without a proper foundation from the State as to the specific rights he had waived. We disagree.

Abdellatif testified that he interviewed Mays on October 7, 2003, after Mays turned himself in to the police. Abdellatif advised Mays of the charges he was facing relating to Gilchrist's murder, he read to Mays each sentence of a *Miranda* form advising him of his rights, and he read to Mays the waiver of rights section. The detective also testified that Mays "clearly stated that he under-

stood these rights" [*57] and read each right out loud before initialing each line indicating that he understood them. Mays also signed the *Miranda* form in two places.

Abdellatif continued that Mays then gave a recorded statement and that he did not request an attorney at any time. Mays first denied any involvement in the crime and indicated that he wanted to cooperate with investigators. He stated that he was not at AHP the night of the murder, and was at work the entire evening. When told that witnesses saw him at AHP moments before the stabbing, and identified him as one of the three males involved, Mays admitted being there but claimed he was visiting family members and was not involved in the stabbing. When confronted with his time card from work, which showed that he did not "punch in" until 10:56 p.m., Mays stated that he was at home with his fiancée, Bridgette Freeman, at 9:10 p.m. When informed that Bridgette was on her way to the police station and would be asked to corroborate his story, Mays asked to speak with her when she arrived. Abdellatif intended to allow the two to speak privately after Bridgette gave a written statement to the police but she "said she had nothing to say to [Mays] and wanted [*58] to leave[,] and "wanted nothing to do with" him. After being told that Bridgette refused to speak with him, Mays "became nervous" and "upset."

The judge found Abdellatif's testimony credible. Based on that testimony, the judge found that the detective read Mays his *Miranda* rights, that Mays read his rights before initialing and signing the *Miranda* form, that Mays knowingly and intelligently waived his rights, and that he had knowledge of his rights by virtue of the *Miranda* form. Based on the circumstances surrounding Mays' voluntary decision to turn himself in, the judge also found that giving the oral statement was a voluntary decision, and that Mays "was well-aware of the fact that he did not have to speak." Accordingly, the judge ruled the oral statement admissible.

It has long been settled that warnings about a person's constitutional rights are required when a person is subject to custodial interrogation. *Miranda, supra*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706. A valid waiver of those rights must be made voluntarily, knowingly, and intelligently. *Id.* at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 707; *State v. Bey*, 112 N.J. 123, 134, 548 A.2d 887 (1988). The State bears the burden [*59] of proof in this regard beyond a reasonable doubt. *Bey, supra*, 112 N.J. at 134.

The trial court must look into the totality of the circumstances to ascertain whether the accused in fact knowingly and voluntarily decided to forego his or her rights. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 103 S. Ct. 2830, 2834, 77 L. Ed. 2d 405, 412 (1983); *State v.*

Miller, 76 N.J. 392, 402, 388 A.2d 218 (1978). Courts consider the characteristics of the accused, as well as the details of the interrogation. *Bey, supra*, 112 N.J. at 134-35; *Miller, supra*, 76 N.J. at 402. Relevant factors include the defendant's age, education, intelligence, previous encounters with the law, advice concerning his or her constitutional rights, length of detention, whether the questioning was repeated or prolonged, and whether physical punishment or mental exhaustion was involved. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 2047, 36 L. Ed. 2d 854, 862 (1973); *Bey, supra*, 112 N.J. at 135; *Miller, supra*, 76 N.J. at 402. A "waiver of the right against self-incrimination which, by all subjective indicia, appears knowing, intelligent, and voluntary, may still be deemed invalid when elicited in an atmosphere of coercion." *State v. Reed*, 133 N.J. 237, 256, 627 A.2d 630 (1993). [*60] We must determine whether there was sufficient credible evidence to uphold the fact-finders made by the trial court. *State v. Johnson*, 42 N.J. 146, 162, 199 A.2d 809 (1964).

Mays misapplies *State v. Elkwisni*, 384 N.J. Super. 351, 894 A.2d 1180 (App. Div. 2006), *aff'd*, 190 N.J. 169, 919 A.2d 122 (2007), to support his argument that the record was insufficient to establish a knowing and voluntary waiver of rights. In that case, we remanded because we were "unable to discern from the phrases 'I read him his rights,' or 'I advised him of his rights,' what information [the police officer] conveyed to the handcuffed defendant when [the police officer] began to question him in the back of the police car." *Id.* at 366. Here, Abdellatif advised Mays of his *Miranda* rights and used a written *Miranda* form, which is included in the record. A review of the form clearly indicates exactly what rights the detective conveyed to Mays. Mays initialed each right and signed the form indicating that he understood them. Also, Mays had an extensive juvenile record as well as four prior arrests as an adult. He was no stranger to the criminal justice system at the time he received his *Miranda* rights in this case.

Based upon our review of the record, we [*61] are satisfied that the judge properly concluded that Mays voluntarily waived his *Miranda* rights before giving the oral statement to police.

The Accomplice Liability Charge

Mays contends for the first time that the judge improperly instructed the jury on accomplice liability by failing to incorporate the facts of the case and by failing to charge that each defendant may have a different mental state and/or criminal culpability. Mays argues that the judge failed to adequately clarify for the jury that it could find him not guilty of aggravated manslaughter, and/or guilty of reckless manslaughter, even if it found his co-defendants guilty of aggravated manslaughter.

Just before giving the *Model Jury Charge (Criminal)*, "Liability for Another's Conduct" (1995), the judge instructed the jury as follows:

In this case the defendants are charged as direct defendants or principals and alternatively as accomplices. A principal or direct defendant is someone who actually performed the act.

If you find, for example, that one, two or all three defendants directly committed the acts constituting a crime, meaning if all elements are proven beyond a reasonable doubt, that defendant can be found guilty as [*62] a direct defendant.

Now, again, considering the following charges, in these charges the defendants can be considered as an accomplice to one another, and that would now include murder, passion/provocation manslaughter, aggravated manslaughter, reckless manslaughter, robbery, theft.

The judge did not repeat the elements of each crime charged but noted that he had already explained the elements of the crimes. The judge twice stated that "[a]ccomplice status must be considered separately as to each defendant as to each charge[]" and that "[m]ere presence at or near the scene does not make one a participant in the crime."

The judge twice included the following language from the model charge, "[r]emember that a defendant can be held to be accountable with equal responsibility only if you find as a fact that he possessed the criminal state of mind that is required to be proved against the person who actually committed the criminal act." Significantly, the judge also stated:

Our law recognizes that two or more persons may participate in the commission of an offense, but each may participate therein with a different state of mind. The liability or responsibility of each participant for any offense [*63] is dependent upon his own state of mind and not anyone else's.

Guided by these legal principles, if you find a defendant as an accomplice to be not guilty of a specific crime charged, you should then consider whether the defendant is guilty or not guilty as an ac-

complice on another charge or the lesser charge.

I want to read that back to you again. Guided by these legal principles, if you find that a defendant--starts off confusing. I want to make sure you understand it. Guided by these legal principles, if you find a defendant not guilty as an accomplice of a specific crime charged, you should then consider whether the defendant is guilty or not guilty as an accomplice on another charge or the lesser charge.

For example--I'm going to just briefly paraphrase something--you'll recall what I told you earlier, that murder would require a showing that the defendant purposely or knowingly caused death or caused serious bodily injury resulting in death while not acting in the heat of passion resulting from reasonable provocation.

Passion/provocation manslaughter would be a situation where you find that a defendant purposely or knowingly caused death or caused serious bodily injury resulting [*64] in death while acting in the heat of passion resulting from reasonable provocation.

Aggravated manslaughter would be where a defendant recklessly causes death under circumstances manifesting an extreme indifference to the value of human life. And then reckless manslaughter would be where a defendant recklessly causes death. Now that's not to substitute for the full charge that I gave you; I'm just paraphrasing.

You could, when you go through your deliberation process, conclude that a particular defendant, for example--I'm only giving you this an example--a particular defendant could be guilty of murder and yet another defendant could be guilty of not murder, but as an accomplice to the defendant that you found guilty of murder, this other defendant could be found guilty as an accomplice but only to the level of aggravated manslaughter; if you find that the one defendant, the direct defendant, had the state of mind that's required to be found guilty of murder, but the accomplice did not have that state of

mind, that the accomplice's state of mind was only for that state of mind that would be necessary for the charge of aggravated manslaughter.

The point I'm trying to make, if you find [*65] the defendant guilty of a particular crime and then you find another defendant guilty as an accomplice, it doesn't have to be to the same level if that accomplice's state of mind was of a different level than that of the direct participant.

Finally, the judge gave one additional example of the differing states of mind possible under the theory of accomplice liability:

For example, you would have to find that the direct defendant committed the crime of, for example, murder or passion/provocation manslaughter as alleged in the indictment or the lesser included or different offense of aggravated manslaughter; that the defendant who's the accomplice solicited the direct defendant to commit the lesser included offense and/or did agree to aid or attempt to aid him in committing the lesser included offense, like, for example, say reckless manslaughter; and that this defendant, the accomplice's purpose was to promote or facilitate the commission of only the lesser included offense--against the example I'm giving you would be like, say, reckless manslaughter; and that this defendant, meaning this accomplice defendant, possessed only the state of mind that is required for the lesser offense.

During [*66] deliberations, the jury sent a note asking whether "[t]o find any defendant guilty as an accomplice, do we need to find a defendant guilty of the crime." Because "the law does not require them to declare whether they found someone guilty as either a principal or an accomplice," the judge chose not to answer the question with a yes or no. Instead, he recharged the jury using the model charge, to which Mays agreed.

"When a prosecution is based on the theory that a defendant acted as an accomplice, the trial court is required to provide the jury with understandable instructions regarding accomplice liability." State v. Savage, 172 N.J. 374, 388, 799 A.2d 477 (2002). "By definition an accomplice must be a person who acts with the pur-

pose of promoting or facilitating the commission of the substantive offense for which he is charged as an accomplice." State v. White, 98 N.J. 122, 129, 484 A.2d 691 (1984). We have found proper jury instructions on accomplice liability to be "particularly important where multiple participants engage in a violent attack with the potential for differing states of mind." State v. Harrington, 310 N.J. Super. 272, 278, 708 A.2d 731 (App. Div. 1998) (quoting State v. Cook, 300 N.J. Super. 476, 486, 693 A.2d 483 (App. Div. 1996)), [*67] *certif. denied*, 156 N.J. 387, 718 A.2d 1216 (1998). "In such cases, [t]he liability of each participant for any ensuing crime is dependent on his own state of mind, not on anyone else's." *Ibid.* (quoting State v. Bridges, 254 N.J. Super. 541, 566, 604 A.2d 131, (App. Div. 1992), *aff'd in part, rev'd in part on other grounds*, 133 N.J. 447, 628 A.2d 270 (1993)).

Further, under the standard set forth in State v. Bielkiewicz, 267 N.J. Super. 520, 632 A.2d 277 (App. Div. 1993), "jury instructions on accomplice liability must include an instruction that a defendant can be found guilty as an accomplice of a lesser[-]included offense even though the principal is found guilty of the more serious offense." Ingram, *supra*, 196 N.J. at 39.

Here, defendants were charged with murder and robbery but not with the lesser-included offenses of each. Accordingly, the judge was required to give proper jury instructions on the elements of the crimes and that accomplices can have different mental states. In the context of the entire charge given here, we are satisfied that the judge properly instructed the jury on the elements of accomplice liability. He instructed them to separately consider each defendant and each crime, and said that the three defendants could [*68] have different mental states. The judge also gave several lengthy examples whereby one defendant could be found guilty as a direct defendant of one offense requiring one mental state, and the other one or two defendants could be found guilty as accomplices to that direct defendant, but of a lesser included offense requiring "only the state of mind that is required for the lesser offense." Accordingly, we discern no error in the accomplice liability charge.

Mays' Motion for Judgment of Acquittal

Mays contends that the judge improperly denied his motion for a judgment of acquittal on the murder charge. He argues that there existed only speculative proofs, which do not satisfy the reasonable inference of guilt standard. Mays' contention lacks merit.

The well-established standard to be applied in determining a motion for a judgment of acquittal at the conclusion of the State's case, as set forth in State v. Reyes, 50 N.J. 454, 458-59, 236 A.2d 385 (1967):

[R]equires the trial court to determine "whether, viewing the State's evidence in its entirety . . . and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a [*69] reasonable jury could find guilt . . . beyond a reasonable doubt."

[*State v. Wilder*, 193 N.J. 398, 406, 939 A.2d 781 (2008) (quoting *State v. Reyes, supra*, 50 N.J. at 459).]

We "will apply the same standard as the trial court to decide if a judgment of acquittal was warranted." *State v. Felsen*, 383 N.J. Super. 154, 159, 890 A.2d 1029 (App. Div. 2006).

Viewing the State's evidence in its entirety, and giving the State all favorable inferences which could be reasonably drawn therefrom, we are satisfied that the judge properly denied the motion.

Having concluded that this matter must be reversed and remanded for a new trial, we need not address defendants' challenge to their sentences.

Affirmed in part, reversed in part and remanded for a new trial.

