STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

B'DOUR MOHAMMED-ALI AL-YASARI,

Defendant-Appellant.

UNPUBLISHED
February 25, 2021

No. 353478
Ingham Circuit Court
LC No. 19-000220-FC

Before: M. J. KELLY, P.J., and RONAYNE KRAUSE and REDFORD, JJ.

PER CURIAM.

In this interlocutory appeal, defendant, B'Dour Al-Yasari, appeals by leave granted the trial court's order denying several of her motions to suppress or exclude evidence. This matter arises out of the murder of defendant's husband, Ammar Al-Yasari.[1] Defendant found Ammar's body and called the police. Although the police initially regarded defendant as a victim, they began to suspect her of concealing important evidence, whereupon they seized and searched her phone. Defendant is accused of conspiring with a boyfriend, Jacob Ficher,[2] to carry out the murder. Defendant seeks to suppress evidence arising out of her phone, and also to exclude certain other references from being mentioned at trial. We affirm.

I. BACKGROUND

On the night of February 4, 2019, Ingham County Sheriff's Deputies were dispatched to defendant's home on the basis of a call defendant had placed to 911 at approximately 8:05 p.m. On the call, defendant reported that she had arrived home from work, with her children, at approximately 7:50. She reported that she and her husband usually entered through the garage, but she had entered through the front door and found it unlocked. She then found her husband "on the ground." She attempted to talk to him, but became concerned about her children and the

[1] We will refer to defendant's husband as "Ammar" to avoid confusion.

[2] Ficher was convicted by a jury of murder and conspiracy to commit murder arising out of Ammar's death, and his appeal is currently pending in Docket No. 352991.

possibility that someone else was inside the house. She also noted that she was calling from the garage, that she was scared, and that a friend had already picked up the children. She hung up when the deputies arrived.

The deputies entered the house and discovered Ammar lying in a hallway, surrounded by a large pool of blood and a clear liquid that smelled of bleach. Ammar was wearing a jacket that appeared to have been bleach-stained. Ammar had considerable "trauma to his face, neck, and head area," and there was blood splattered on the walls and in the general area.[3] Ammar was not wearing shoes, but his shoes were near his body. The deputies initially believed defendant was a victim, and one of them invited her to sit in the front seat of his vehicle while deputies examined the scene. Defendant remained in the vehicle intermittently for possibly as long as three hours; in the meantime, the deputy left the vehicle to coordinate with other officers, and defendant got out of the vehicle to stretch her legs or coordinate with family members. Defendant used her phone and talked to the deputy about herself, her marriage, and how she found Ammar.

A. DEFENDANT'S POLICE INTERVIEW

As the night went on, the deputies began to find defendant's statements odd. In particular, they found her statements about the garage door inconsistent, they found it strange that she left her children in her vehicle when she entered the front door, and they regarded as suspicious some other statements she made "out of the blue." Deputies further noted that, although the interactions between defendant, her family members, and Ammar's family members were largely in a language they did not understand, there was clearly some kind of "family drama" ongoing. As would later become relevant, defendant and Ammar are from Iraq and are Muslim. The deputies had no other leads, but they believed defendant might have information from which they could at least establish a timeline and other leads. The deputies invited defendant to an interview at the police station, and defendant accepted. She was driven to the station by two family members, who remained in the station's waiting area while defendant was invited to an interview room. Defendant was interviewed by Detective William Lo.

We have reviewed the video recording of defendant's interview, which provides some nuance not apparent from the interview's transcript. The recording begins at just after 10:30 p.m. on February 4, 2019, and it continues until 1:10 a.m. on February 5, 2019. Defendant was present in the room by herself, unrestrained, with her phone and some other possessions. Defendant was seated with her back to the door, which had a small window, a lever-type doorknob, and no obvious locking mechanism. During the interview, there was a table between Lo and defendant; she would not have needed to go past or through Lo to exit. At times during the interview, Lo left the room and clearly did not need to operate any lock. Lo testified that the door was not, in fact, lockable, although this was not expressly communicated to defendant. Defendant was not restrained at any time. Lo entered the room and asked defendant a few preliminary questions, but left shortly thereafter to bring water for defendant. After he returned, Lo read defendant her *Miranda*[4] rights, noting that he did so only due to the seriousness of the matter. Defendant asked whether she could

[3] It would later be determined that Ammar was killed with an ax.

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

change her mind, which Lo confirmed she could, and whether she was in trouble, which Lo denied. Defendant signed a waiver form and agreed to talk.

Defendant explained that she had been at work all day, but she had texted with Ammar throughout the day. She left work at 4:40 p.m., picked up her and Ammar's children, ran several errands, and continued communicating with Ammar. While she was waiting in line to get food at her last stop before going home, she made several attempts to call or text Ammar, but she received no response. When she got home, she found that the garage door would not open with its remote. She indicated that she may have spent as long as ten minutes trying to get the door to open, including by entering a code into the garage door's external keypad. She explained that she had only encountered difficulty with the door once before, and that the door worked fine that morning. She eventually left the children in her vehicle and went to the front door of her house, which she found unlocked. The interior of the house was not illuminated, but she saw Ammar "on the ground." Defendant called his name, but became concerned about her children and the possibility of someone still being in the house; she also noted that she "didn't want to see." She noted that the interior of the house smelled like bleach. She returned to her vehicle and called a friend to pick up the children. While waiting for the friend to arrive, she continued playing with the garage door remote, and eventually the garage door opened. She then pulled her vehicle into the garage, despite not knowing if someone was in Ammar's truck, which was also in the garage. After the friend retrieved the children, defendant called 911.

Defendant generally had access to her phone throughout the interview. She silenced it several times when she received calls. At one point while she was left alone in the interview room, she appeared to watch several video recordings, at least one of which seemingly featured a child, kissing the screen several times and appearing distressed. She also accessed her phone to show Lo several text messages or call logs reflecting her communications with Ammar during the day, and her attempted communications with Ammar shortly before she arrived home. Defendant placed a phone call to Ammar at 6:46 p.m., and the call lasted 50 seconds. That was the last time she successfully communicated with Ammar. Defendant attempted to call Ammar at 7:49 p.m., while she was turning onto the street for their house. She called her friend at 7:59 p.m., and she called 911 at 8:05 p.m.

Lo inquired into whether anyone might be upset with Ammar or want to harm him. Defendant explained that Ammar was "very private" and did not socialize very much. Ammar liked his job, and he was apparently well-liked by everyone. Ammar had been planning to return to Iraq at some point to visit his father, but he had not purchased tickets. Defendant noted that she and Ammar had a considerable amount of debt, which Ammar found stressful despite efforts not to show that stress, but Ammar handled all of the bills and budget. She emphasized that Ammar was a kind, law-abiding person who was loved by everyone, including her. However, as the interview progressed, defendant divulged that Ammar sometimes spoke hurtfully to her; additionally, despite her education and employment, Ammar expected her to "be a wife" and was not very emotionally supportive. She had recently had a miscarriage and was still struggling, and Ammar reacted poorly to her lack of cheer. She denied any physical abuse, but felt that he might

have been emotionally and verbally abusive. She conceded that it might be "a cultural thing," and she indicated that she was the more "westernized" of the two.[5]

Defendant further disclosed that their marriage had been "kind of arranged," but she "learned to love" Ammar. She opined that in the preceding month, Ammar had been making improvements at being more sensitive. Lo asked whether Ammar might have sought out support or comfort elsewhere, to which defendant responded that Ammar was not a very social person but had recently downloaded social media apps Snapchat and Instagram, which she thought might be out of character. Defendant did not appear concerned by this, and she explained that she and Ammar knew each others' phones' passcodes. Although she denied seeing any "red flags," she noted that Ammar would sometimes tell her about pretty girls at work to see if she got jealous, which she opined was "like emotional abuse and verbal abuse." She further disclosed that although Ammar knew her Facebook password and had sometimes required her to delete her own social media accounts, Ammar had multiple Facebook accounts for different groups of friends and family, and defendant did not know Ammar's Facebook passwords. When Lo inquired further into the possibility that Ammar might have been cheating on her, defendant appeared to alternate between laughing and looking sad, and she stated that she "might be stupid and not seeing it." Defendant also noted that Ammar always demanded to know where she was going and with whom she was associating; and he did not want her to go out with her friends unless she took the children with her.

During the interview, defendant asked if there had been blood, which Lo confirmed. At one point, Lo commented that he did not "think [Ammar] had a heart attack," to which defendant responded that "he did tell me he was tired, but you're saying there was blood." She appeared to express surprise at the blood, and she also asked if Ammar had drunk any bleach. Lo also explained that Ammar's death was puzzling in part because in his experience as a police officer, if someone had broken into the house to steal something, he would have expected a door or window to be broken. Defendant responded that they had an alarm system, and no other people had keys to the house. She also noted that Ammar would remind defendant to check the house and door when he worked on weekends. She also noted that Ammar was usually the last person to leave the house and would turn the lights off before doing so; she speculated that "apparently he didn't get a chance to turn any of the lights on" because the lights were off when she went in.

About an hour and a half into the interview, Lo asked defendant how she knew it was Ammar on the ground, to which defendant replied, "from his shoes." Lo appeared confused, whereupon defendant clarified, albeit seemingly also with some confusion, that Ammar's shoes were "off" like "they slid from his body." She denied being able to see Ammar's condition or face because it was dark. However, she pointed out that Ammar's truck had been parked in the garage and the body was Ammar's body type. Lo expressed the opinion that if defendant saw Ammar's body, then she necessarily saw that there was a lot of blood. Defendant pointed out that the lights

[5] Defendant explained that although she had been born in Iraq, and she briefly returned to Iraq with Ammar shortly after Ammar finished his educational degree, she actually grew up in Dearborn and Ann Arbor. In contrast, Ammar grew up in Iraq, and they met through her father's practice of helping provide transportation for students who did not know English or how to drive.

were off and she did not have a flashlight, and Lo admitted that he did have a flashlight and one of the other officers who preceded him into the house apparently had turned on the lights. Lo explained that "somebody" had passed away in the house and he wanted to confirm that person's identity. Defendant then showed Lo a couple of pictures on her phone, from which Lo confirmed that "it is him." Defendant asked whether Ammar was hurt in his face, which Lo confirmed.

Lo expressed to defendant that he did not believe defendant physically harmed Ammar, but he reminded defendant that she mentioned their marriage going "cold" after the miscarriage, and he asked whether there was any place where defendant "went and found comfort" outside of Ammar. Defendant replied that she had friends, to which Lo clarified he was specifically talking about male friends to whom she spoke about "personal stuff." Defendant responded that she got emotional support from many friends, whereupon Lo reiterated that he was specifically talking about male friends she might open up to more than others—especially if they might have "construed" her friendliness as something more. Defendant denied that possibility, and then also denied that Ammar had any gambling or drug debts.

Shortly thereafter, Lo asked defendant if she would like some more water, and defendant accepted. As Lo was leaving the room, defendant said, "I need to go back." Lo asked her to repeat what she said, and defendant replied, "I need to go back to him." Lo did not acknowledge that statement, and instead promised to be back as soon as he could, noting that he had "just a couple more things I want to ask you, okay?" Defendant did not respond. Lo was out of the room for approximately thirteen minutes, and defendant spent much of that time scrolling through her phone, watching a couple of videos (at least one of which, based on what can be heard of its audio portion, may have involved one or more of her children), and occasionally kissing the screen.

When Lo returned, he brought both water and a "form," explaining that he wanted to preserve evidence with which to prove that defendant and Ammar had been texting each other independent of defendant's say-so. Lo specifically asked to download defendant's phone to confirm what defendant had told him. Defendant objected that she had pictures and videos on her phone that "shouldn't be seen," because they depicted her without her head scarf. Defendant offered to delete those pictures or upload them to her computer. Lo speculated that the forensic software might be able to selectively download only the message logs. Defendant offered to show Lo her phone so he could read her messages, an offer she repeated several times. However, when Lo asked defendant whether she would permit him to extract only the text messages and call logs, but not the pictures and videos, defendant remained reluctant and instead asked whether such a partial download was possible. She eventually also admitted that there were nude pictures of herself on the phone. Lo offered to let defendant attend the download from the phone, which would take "a couple hours," following which the downloaded contents would "not go[] anywhere other than for our own evidence purposes." Defendant still refused, protesting that Lo was male.

Lo returned to the topic of her and Ammar's relationship having gone "cold" for a time, whereupon defendant backtracked and indicated that "cold" may have been too strong a word. After hinting a few times, Lo finally outright asked defendant whether Ammar might have cheated on defendant, explaining that a person on the side might have been upset with him. Defendant admitted that the possibility came to her mind sometimes, but she did not observe Ammar acting suspiciously. Lo then asked defendant whether *she* had seen anyone "intimately" outside of her husband. Defendant, after a pause, admitted that she was seeing friends with benefits at one point,

but it "was a long time ago." Lo asked about "anything recently," in response to which defendant again paused, and then whispered "no" and then "I don't know." Lo suggested that he understood it might be embarrassing, whereupon defendant laughed and asked why it would be embarrassing, saying that it was, rather, "uncomfortable." Lo asked defendant whether the other person might have killed Ammar, to which defendant responded that the other person did not know Ammar, she did not think the other person knew where she lived, and the other person "recently" knew she was married. She clarified that "recently" meant "a few months ago," which she further clarified meant the summer. Lo asked the person's name, following which defendant again paused and quietly refused. Lo asked how they met, and defendant replied "online."

Defendant then interrupted Lo and stated that anything she said was confidential, and she did not give permission to anyone. In response, Lo said, "absolutely, everything we talk about in here stays right here" and promised that he would not tell her family anything. Defendant then said, "I think it's time for me because I mean I don't know what's going on." Lo responded by repeating that he wanted to find out what happened to Ammar. Defendant did not clarify what she meant by "it's time for me."

Defendant explained that she had last met the other person "a few weeks ago" when they either went out to eat or went to his apartment. She seemed uncertain when she had last seen him, but noted that he came "from the Lansing area" and implied that they might have some mutual friends. Defendant then further disclosed that she "met a lot of guys like on and off," but initially denied that any of them would have wanted to "push it further" into a relationship. However, she then admitted that "a couple probably" might have wanted a longer-term relationship with her. Lo asked whether any of them might have wanted to kill Amar, which she denied because they did not know Ammar. However, she then further admitted that there had been one person who had been more forceful, but she had "walked out of it" in June. She again refused Lo's request to disclose that person's name, explaining that she did not want him to get in trouble if he had nothing to do with the murder, and speculated that he might come after her if the police questioned him. Nevertheless, she admitted that "he wanted a relationship, yes." Incongruously, she repeated that she "ended it in June," but also that she last spoke with him in August. Thereafter, she again further admitted that despite having given that person a false name, he had found her Facebook page, Ammar's Facebook page, and their address; however, she insisted again that she did not want to provide Lo with his name if he did not do anything.

Upon further questioning, defendant then disclosed that the other person had raped her the last time she saw him, which resulted in "a big argument," and she had not seen him since. She explained that she believed that occurred in August. She also revealed that one time while she was at work, this person began texting her screenshots of her Facebook page and Ammar's Facebook page. Lo asked her if that does not alarm her, to which defendant responded that she "freaked out at the moment," laughing, and then said it was months ago and she confronted the person immediately thereafter. Lo suggested that this person's behavior was "obviously not normal" and that her children might possibly be in danger, to which defendant responded that she left the person because of the possibility of him showing up while her children were around. Lo repeated that he was trying to figure out what happened to Ammar, and defendant protested that she was also trying to find out what happened to Ammar. Lo again asked, "what is this guy's name?" In response, defendant grinned, laughed, and asked why. She then said she did not "want to be the one to say his name."

Lo asked defendant whether the other person had ever been saved in her phone, in response to which defendant replied that he had been deleted, blocked, and removed. She reluctantly admitted that he had texted her, but she insisted that her last communications had been in "maybe August." She agreed with Lo that his behavior had been creepy, and she even described it as "psycho." Lo suggested that "psycho" might be why the person might harm Ammar "months later," in response to which defendant laughed and said "this is crazy." Lo again asked for the person's name, in response to which defendant said she did not know and laughed. Lo asked if defendant was really trying to help; defendant said she was, but repeated, "what if he didn't do anything." Lo asked, "what if he did?" Defendant then said, "I need to talk to a lawyer."

Lo immediately said okay, and he promised he would not ask her any more questions unless she sought him out. Defendant asked what would happen next, to which Lo explained that they were treating Ammar's death as a homicide, so they were going to get a search warrant for her house and call her when they were done. Lo also explained the process for how Ammar's body would be autopsied. Defendant asked to use the restroom, and Lo offered to walk her there. Defendant removed her coat, leaving it in the room, along with her phone and other personal items. After she returned, Lo explained that he was going to seize her phone, then get a search warrant to download the phone's contents. Defendant asked if she could delete some pictures, which Lo refused; another officer who joined them[6] promised that nothing on the phone would be "used in a way that exploits you." Defendant again protested that the officers were male, and stated that she did not care about the call history or text messages, but she did care about the pictures. Defendant refused to disclose the passcode to her phone. The interview ended shortly thereafter.

B. FURTHER PROCEEDINGS

Defendant's phone was searched pursuant to a search warrant.[7] Information from defendant's phone led police to the discovery that one of defendant's partners was Jacob Ficher. Further investigations into Ficher revealed that Ficher had apparently purchased Ammar's murder weapon with defendant's assistance, defendant had disabled her home's alarm system on the day of the murder, and Ficher's roommate disclosed Ficher and defendant orchestrating Ammar's murder. Ficher was tried and convicted for Ammar's murder. The same trial judge as in this matter presided over Ficher's trial.[8]

In this matter, defendant sought to exclude several items of evidence. Most relevant to this appeal, defendant sought to exclude all evidence derived from her phone. Defendant argued that Lo's promise of confidentiality violated defendant's constitutional rights in violation of *Miranda*, the police lacked probable cause and exigent circumstances to seize defendant's phone without a warrant, and the affidavit supporting the search warrant for the phone was both facially insufficient and contaminated by false or reckless statements. Defendant also moved to preclude the term "Violent Crime Impact Team," the title of a particular police taskforce involved in surveilling Ficher, from being used in front of the jury. Finally, defendant sought to exclude any reference to

[6] This was apparently the same deputy who had shared his car with defendant at the scene.

[7] The contents of the affidavit supporting the warrant will be discussed below.

[8] Some additional details of Ficher's prosecution will be discussed below.

Ficher's arrest. The trial court denied defendant's motions, following which this Court granted defendant's application for leave to appeal.

II. STANDARDS OF REVIEW

This Court reviews de novo questions of constitutional law. *People v Hughes*, ___ Mich ___, ___; ___ NW2d ___ (2020, Docket No. 158652), slip op at p 8. The trial court's factual findings when ruling on a motion to suppress evidence are reviewed for clear error. *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993). Likewise, the trial court's findings whether the police established exigent circumstances sufficient to excuse a warrantless search or seizure. See *People v Smith*, 191 Mich App 644, 647; 478 NW2d 741 (1991). The trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo; it is necessarily an abuse of discretion to admit legally inadmissible evidence. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

The Fourth Amendment protection against unreasonable searches and seizures applies to cellphones. *Hughes*, ___ Mich at ___, slip op at pp 8-11. Unlike many other personal items, a person retains a privacy interest in his or her phone against searches even after the phone is validly seized. *Id*. at ___, slip op at pp 13-21. Thus, "as with any other search conducted pursuant to a warrant, a search of digital data from a cell phone must be 'reasonably directed at uncovering' evidence of the criminal activity alleged in the warrant." *Id*. at ___, slip op at pp 21-22 (citation omitted). " '[P]robable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.' " *Id*. at ___, slip op at p 22, quoting *Warden, Maryland Penitentiary v Hayden*, 387 US 294, 307; 87 S Ct 1642; 18 L Ed 2d 782 (1967). Such evidence may include "items [that] would aid in the identification of the culprit." *Hayden*, 387 US at 307. In addition,

> When reviewing courts assess a magistrate's conclusion that probable cause to search existed, courts are to consider the underlying affidavit in a common-sense and realistic manner. Reviewing courts must also pay deference to a magistrate's determination that probable cause existed. This deference requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. [*People v Adams*, 485 Mich 1039, 1039; 776 NW2d 908 (2010) (quotations and citations omitted).]

However, the magistrate's decision must be based only upon facts alleged in the supporting affidavit, rather than upon conclusions drawn by the affiant. *People v Sloan*, 450 Mich 160, 167-169; 538 NW2d 380 (1995), overruled in part on other grounds in *People v Wager*, 460 Mich 118, 123-124; 594 NW2d 487 (1999).

A "*Franks* hearing" is essentially an evidentiary hearing, pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), inquiring into the validity of a search warrant's affidavit. See *People v Martin*, 271 Mich App 280, 309; 721 NW2d 815 (2006). "Whether to hold an evidentiary hearing based upon a challenge to the validity of a search warrant's affidavit is committed to the discretion of the trial court." *Id*. "However, this Court reviews the facts supporting the denial of the evidentiary hearing for clear error and reviews the application of those facts to the law de novo." *Id*. "The defendant has the burden of showing, by a preponderance of

the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001). "The invalid portions of an affidavit may be severed, and the validity of the resultant warrant may be tested by the information remaining in the affidavit." *Id*.

"The ultimate question whether a person was 'in custody' for purposes of *Miranda* warnings is a mixed question of fact and law, which must be answered independently by the reviewing court after review de novo of the record." *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). This Court reviews for clear error whether, under the totality of the circumstances surrounding a defendant's statement, that statement was made freely and voluntarily. See *People v Sexton*, 461 Mich 746, 752-753; 609 NW2d 822 (2000).

III. WHETHER DEFENDANT WAS IN CUSTODY DURING HER INTERVIEW

Some of the analysis in this matter turns on whether defendant was "in custody" during her police interview. Whether a person is "in custody" for Fifth Amendment purposes depends on whether, under the totality of the circumstances, a reasonable person would not believe he or she was at liberty to leave. *People v Barritt*, 325 Mich App 556, 562; 926 NW2d 811 (2018). Multiple factors should be considered, although no individual factor is controlling. *Id*. at 563. Considerations include the location and duration of questioning, statements at the interview, the degree of physical restraint imposed during the interview, and whether the interviewee is permitted to leave after the interview. *Id*. at 62-563.

Defendant's interview took place in a police station, which is well-established as a "police-dominated atmosphere." *Barritt*, 325 Mich at 563 (citation omitted). However, defendant went to the station voluntarily, accompanied by family. She was not physically restrained, and she was permitted to keep her phone. Notably, defendant was seated next to the door, where she would not have needed to pass by or through Lo to exit. Defendant did make some vague statements that could have suggested a desire to leave, which Lo ignored, and it would arguably not be unreasonable for a person from defendant's cultural background to believe that police stations were not places that one can freely exit at will. Conversely, the trial court made an apt observation that defendant would have been able to see that Lo did not need to unlock the door to open it, so it is immaterial that Lo never specifically said the door was unlocked. Defendant was permitted to leave freely after the interview, albeit after surrendering her phone. Notwithstanding defendant ostensibly coming from a male-dominated culture, she opined that she was "westernized," and she came across as fairly assertive in her interview, especially for someone in such traumatic circumstances, and she repeatedly told the police "no." Furthermore, Lo explicitly told her several times when asking her questions that she did not need to answer. Defendant never made any clear request to leave or to end the interview, nor did any of her statements that might have suggested a desire to leave occur in unambiguous contexts.

Under the totality of the circumstances, the fact that defendant was questioned in a police station is not sufficient, by itself, to establish that she was "in custody." *Barritt*, 325 Mich App at 563-565. We are unable to find anything in our review of the interview to suggest other indications that defendant was "in custody." At most, she made an ambiguous statement that might have been a request. To the extent defendant suggests that she would not have felt free to leave because of

her Iraqi heritage, we reiterate that the standard is whether a reasonable person would feel free to leave. *Id*. at 562. In any event, any intimidation defendant might personally have felt is not apparent from the video. We conclude that the trial court properly found defendant was not "in custody" during her police interview.

IV. WHETHER DEFENDANT'S STATEMENTS WERE INVOLUNTARY

Although we conclude that defendant was not "in custody," we recognize defendant's argument that a noncustodial statement may still be considered involuntary if it was the product of sufficiently egregious police misconduct. *Beckwith v United States*, 425 US 341, 347-348; 96 NW2d 1612; 48 L Ed 2d 1 (1976). We do not find any such egregious misconduct here, nor do we find defendant's statements involuntary.

The gravamen of defendant's argument is that her *Miranda* rights include informing her that any statement she makes "may be used as evidence against [her]." *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). At the commencement of her interview, Lo read defendant her rights, including telling her, "anything you say can and will be used as evidence in a court of law." However, defendant argues that a promise of confidentiality is the opposite of a warning that her statements could be used against her. Defendant argues that although the police are allowed to lie about facts to interviewees, the police are not allowed to engage in deceptions that "deprive[] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran v Burbine*, 475 US 412, 423-424; 106 S Ct 1135; 89 L Ed 2d 410 (1986). In principle, we wholeheartedly agree: the police cannot simultaneously warn an interviewee that his or her statements will be used as evidence in court *and* promise that nothing the interviewee says will leave the room. At that point, the interviewee would have been given irreconcilably conflicting information about the nature of his or her constitutional rights, which in turn undermines the interviewee's ability to understand those rights.

Nevertheless, context is always of the utmost importance. Defendant accurately asserts that the words "anything," "anyone," and "everything" are absolute in nature, allowing for no exceptions. However, the totality of the circumstances necessarily entails more than a few words extracted piecemeal. Defendant brought up confidentiality immediately after saying her family should not know, and Lo's promise of confidentiality is closely intertwined with his promise not to tell defendant's family about her affairs. It is not clear that, *in context*, the request for confidentiality or the promise of confidentiality were intended or expected to be absolute. In contrast, as the interview progressed thereafter, it did become clear that defendant believed the police would act on any disclosure she made of her boyfriend's identity, and she repeated that she is trying to help the police to the best of her ability. Such statements are inconsistent with an expectation that nothing she said would leave the room.

The *Miranda* warnings are measures to ensure that a defendant's right against involuntary self-incrimination is protected, rather than rights in themselves. *Moran*, 475 US at 424-425. We agree that a promise of confidentiality by the police could, under the right circumstances, render an interviewee's statement involuntary. However, under the totality of the circumstances in this case, we cannot find that Lo's promise of confidentiality actually undermined defendant's ability to understand and assert her rights. We therefore reject defendant's argument that her statements during the interview were involuntary.

V. WHETHER THE POLICE LEGALLY SEIZED DEFENDANT'S PHONE

Defendant argues that the seizure of her phone without a warrant was unsupported by probable cause and was without exigent circumstances. We disagree.

A. PROBABLE CAUSE

The gravamen of defendant's argument turns on various discrete details of her disclosures or aspects of her demeanor not being inherently suspicious on their own. For example, she reasonably points out that she consistently maintained that it was dark when she was in the residence, whereas Lo admitted that he had a flashlight and that another officer had turned the light on. However, although probable cause may be found on the basis of a single factor under some circumstances, it generally entails consideration of the totality of the circumstances. *People v Kazmierczak*, 461 Mich 411, 423 n 11; 605 NW2d 667 (2000). Thus, it is not dispositive if any particular fact, standing alone, might be insufficient. Importantly, defendant's disclosures became progressively more concerning, suspicious, inappropriate, and bizarre throughout the interview. Under the totality of the circumstances, and after reviewing the recording of the interview, we find it completely reasonable to have deemed defendant's increasingly-suspicious disclosures to accumulate and ultimately culminate in probable cause to seize the phone.

Notably, defendant initially dodged Lo's inquiries into other male friends in whom she might have taken comfort, before eventually disclosing extramarital affairs. Her internally-inconsistent statements about when she had last seen any of her boyfriends, ranging from June to August to "a few weeks" ago, was a suspicious detail. Her demeanor when discussing the topic conflicted with her fairly matter-of-fact attitude throughout much of the preceding interview. Importantly, defendant repeatedly refused to answer Lo's questions about whether any of her boyfriends might have killed Ammar, stating that they did not know him. She also repeatedly refused to name her boyfriend, citing the possibility that he might not have been involved.

Defendant accurately argues that probable cause requires a basis for believing "that a search would uncover evidence of wrongdoing." *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000) (quotation omitted). However, "evidence of wrongdoing" need not be direct. Identification of a perpetrator is included under its penumbra. *Hayden*, 387 US at 307. Likewise, it is enough if the evidence would aid a specific investigation. *Hughes*, ___ Mich at ___, slip op at p 22.

Although the possibility that defendant's supposed ex-boyfriend might have killed Ammar was at first merely a possibility, albeit the only lead available, defendant's refusal to identify the person and avoidance of questions about the person significantly elevated that possibility. Furthermore, defendant had established that she used communications software beyond what would be recorded in her phone's call and messaging logs; thus, merely showing the police those logs would not provide them with the entirety of defendant's communications. Additionally, defendant's demeanor changed significantly at the mention of her affairs, despite her protestation that she was not embarrassed. The police would have rightly suspected that defendant was not being honest with them, that there was more than a mere possibility that one of defendant's boyfriends was involved in the murder, and that the phone would contain evidence from which that boyfriend cold be identified.

After defendant's request for confidentiality, her disclosures became progressively even more disturbing. Lo pressed the issue of when defendant last had contact with any of her affairs, to which she gave noncommittal answers. She admitted that some of those individuals might have wanted a deeper relationship with her. As defendant points out, at one point she stated that there was "no chance" any of them would have harmed Ammar. Critically, however, she emphasized that there was "no chance" because none of those individuals knew Ammar. It then transpired that one of the individuals was more forceful; described as "creepy," "crazy," and "psycho;" and had gone to the trouble of discovering defendant's and Ammar's Facebook pages despite defendant providing him with a false name. This directly contradicted her suggestion that none of her boyfriends knew Ammar. Defendant nevertheless repeatedly refused to identify this individual, citing the possibility that maybe he did not actually do it or, inconsistently, that he would come after her if he did not do it. Defendant stated that she "ended it in June" with that person, but last had contact with him in "maybe August," at which time he actually raped her, and she only "lost contact" with him after that. Furthermore, the interview took place in February, and she also claimed to have last met up with at least one of her boyfriends—in person—only a few weeks previously. Defendant even admitted that the person might pose a risk to her children, and she speculated that Ammar's murder may have been intended to hurt her.

The police would have reasonably had grave concerns about the individual's involvement in Ammar's murder and about why defendant was refusing to provide the person's name. Furthermore, her strange refusal to name the person, coupled with her reluctance to permit even a partial download of her phone, would have cast doubt on whether she really had deleted him from her phone. Although defendant's proffered reason for not wanting the police to download the contents of her phone is plausible, it would not be unreasonable for the police to deduce that defendant might have other reasons. Thus, the police would have had every reason to make defendant's boyfriend an immediate prime suspect in Ammar's murder and to believe that defendant's phone would allow them to identify that person. By the time the police actually seized the phone, they unambiguously had probable cause to do so.[9]

B. EXIGENT CIRCUMSTANCES

Because the police seized the phone without a warrant, they were required to "show the existence of an actual emergency and articulate specific and objective facts which reveal a necessity for immediate action." *People v Blasius*, 435 Mich 573, 594; 459 NW2d 906 (1990). Whether an exigency exists is highly case-specific and may turn on a number of factors, including the seriousness of the offense, the clarity of probable cause, the risk of destruction of evidence, ensuring the safety of other people, and the ability to obtain a warrant. *People v Oliver*, 417 Mich 366, 384; 338 NW2d 167 (1983). A mere possibility that evidence might be destroyed is insufficient in the absence of an objectively reasonable basis for concluding that such destruction is actually imminent and leaves no time to obtain a warrant. *Blasius*, 435 Mich at 594.

[9] We decline to address the prosecution's alternative argument that the police had probable cause to seize the phone solely to confirm defendant's contacts with Ammar throughout the day. Likewise, we need not consider whether probable cause might have been established even before defendant raised her concerns about confidentiality.

We agree with defendant that an exigency does not exist solely because the target of the search is a phone. The fact that the target is a phone means it is possible to delete critical information, but a mere possibility is insufficient. *Blasius*, 435 Mich at 594. However, more facts are present here. As noted, defendant refused to identify her boyfriend. Although she gave the police full permission to look through her call and messaging logs, she continued to refuse to permit the police to conduct a download, even when Lo suggested that they might be able to download only the logs and that defendant could attend the download. The police could reasonably conclude from defendant's responses that she might not have told them the truth about deleting the boyfriend from the phone, that information about the boyfriend was likely present on the phone but not necessarily in an obvious location, and that defendant was motivated to promptly purge her phone of any such information if allowed to leave with the phone. Finally, notwithstanding the possibility of obtaining a warrant outside of normal business hours, defendant was preparing to leave the station and could have walked out at any time—or, in fact, deleted any evidence right in front of the police.

We agree with the trial court that the police had probable cause to seize defendant's phone and that exigent circumstances existed to permit the police to seize the phone without a warrant.

VI. WHETHER THE SEARCH WARRANT AFFIDAVIT WAS FATALLY DEFECTIVE

Defendant argues that the search warrant should not have been issued because the four corners of the supporting affidavit did not establish probable cause for the search, and because the supporting affidavit was tainted by falsely or recklessly omitted material information. We disagree.

A. THE AFFIDAVIT

In relevant part, the affidavit in support of the search warrant stated as follows:

> C. Affiant states has been advised that Ingham County Sheriff's Office was called at 2005 hrs. on 2/4/19 for a suspicious death that occurred at 4558 Glenberry St, Delhi Township.
>
> 1. Wife of the victim Bdour Alyasari [sic], 9/30/90, called 911 and stated she got home and her husband was on the ground.
> 2. Bdour Alyasari stated on the 911 call that she is scared someone is still inside the house.
> 3. Bdour Alyasari stated she got home around 1950 hours and went inside and saw her husband laying on the ground and she tried to talk to him but he didn't answer.
> 4. Bdour Alyasari stated she went back outside and got her kids and called a friend to come and get the kids before she called 911.
> 5. Bdour Alyasari stated there was up to a 20 minute delay between discovering her husband on the floor and to call 911.
> 6. Dispatch asked Bdour Alyasari if there appeared to be any forced entry and Bdour Alyasari stated they usually use the garage door but she couldn't get in that door when she got home so she went to the front door and noticed it was left unlocked.

D. Affiant states D/SGT Shattuck and Det Lo of ICSO went to the scene once it was secured and the victim Ammar Alyasari, 5/8/1983, had been pronounced deceased by Delhi Township Fire.

1. D/SGT Shattuck stated Ammar Alyasari appeared to have been struck with an object in the face causing massive trauma.
2. D/SGT Shattuck stated the body of the [sic] Ammar Alyasari was found lying in a pool of blood in the hallway of the residence.
3. D/SGT Shattuck stated there appears to be blood in several areas of the house.
4. D/SGT Shattuck stated there is a strong odor of bleach around the body and liquid that appears to be bleach dumped all around the house.
5. D/SGT Shattuck stated that it appeared that a wall in the kitchen was wiped in an attempt to clean blood.

E. Affiant states initial investigation of the crime scene does not indicate robbery as a motive due to nothing appearing to have been gone through or stolen.

F. Affiant states he monitored an interview conducted on February 4th, 2019, by Det Lo who was interviewing Bdour Alyasari at the Delhi Office of the Ingham County Sheriff's Office.

1. Bdour Alyasari advised her marriage with Ammar Alyasari was an arranged marriage where she only knew Ammar Alyasari for a few months before they got married.
2. Bdour Alyasari stated she "learned to love" Ammar Alyasari.
3. Bdour Alyasari said that her relationship has been "distant" and "cold" with Ammar Alyasari since September of 2018 when they had a miscarriage.
4. Bdour Alyasari confessed to having affairs with several other men while being married to Ammar Alyasari.
5. Bdour Alyasari stated she had talked with Ammar Alyasari several times throughout the day including just a short time before Ammar Alyasari was discovered to be murdered.
6. Bdour Alyasari stated she had affairs with men that she met online.
7. Bdour Alyasari stated her last contact with one of the men that she dated was a few weeks ago.
8. Bdour Alyasari refused to provide the name of any of her prior boyfriends.
9. Bdour Alyasari stated "a couple" of her boyfriends wanted to be in a long term relationship with her.
10. Bdour Alyasari stated one of the men she dated went "psysco" [sic] and stated to send her pictures of her and the victims Facebook account's [sic] which she had not shared with him along with a screen shot of her address which she also didn't share with him.
11. Det. Lo seized Bdour Alyasari's cell phone at the conclusion of the interview.

G. Affiant, through his experience and personal knowledge, knows the following:

1. People who have affairs can end up with violent love triangles.

2. People often use many different apps to communicate.
3. Call detail records will identify previous boyfriends that Bdour Alyasari has contacted recently.
4. People often store names and phone numbers on their phones.
5. People often have hidden apps on their phones that can hide private conversations they have.

Based upon the foregoing information, Affiant believes that there is probable cause to believe the items sought to be seized will be located at the above described locations.

B. SUFFICIENCY OF AFFIDAVIT

As we will discuss below, there is an error in the affidavit, but as defendant observes, whether the affidavit establishes probable cause must be determined by looking within the affidavit's four corners. The error therefore does not affect whether the affidavit establishes probable cause.

Paragraph D of the affidavit clearly establishes probable cause to believe a homicide occurred. Paragraph E is partially an impermissible conclusion, but it nevertheless states as a fact that nothing appeared to have been "gone through or stolen." A reasonable, common-sense reading of the two paragraphs in conjunction gives probable cause to believe that the homicide was targeted rather than incidental to some other crime. Paragraph C establishes that defendant was the person who discovered Ammar's body, that there had apparently been no forced entry into the house, and that she delayed calling 911. Paragraph F includes several averments from which it is possible to infer that defendant's relationship with Ammar was troubled. It also includes averments from which it is possible to infer that at least one of defendant's boyfriends was potentially dangerous, some boyfriends wanted more than just an affair with her, and she had recent contact with at least one of them. From this, it is reasonable to infer that one of the boyfriends may have wished to remove Ammar from defendant's life. Finally, defendant's refusal to—rather than *inability* to—identify any of those boyfriends raises a strong inference that she may be still involved with one of them and desirous of protecting him from a murder investigation.

Paragraph G contains the affiant's personal experience and knowledge. Defendant takes particular exception to the averment that "people who have affairs can end up with violent love triangles." However, defendant does not seriously dispute the truth of that averment, but rather its relevance. More specifically, defendant concedes that such occurrences happen, but argues that they are exceedingly rare. We hope and presume defendant is right, but this misses the point. The preceding averments raise an inference that defendant was likely still involved with at least one boyfriend, and at least one boyfriend had displayed a tendency towards being "psycho" and stalking. In combination, the probability that a "violent love triangle" occurred in this matter was drastically elevated. The remainder of Paragraph G consists of facts that are essentially obvious to anyone with knowledge of how phones are now used by much of the mainstream public.

A realistic and common-sense reading of the affidavit shows that defendant's husband was murdered in an individually targeted manner, defendant was having relationship issues with her husband, defendant appeared to be still (or at least recently) involved with at least one extramarital boyfriend who she might be trying to protect, at least one boyfriend had gone "psycho" and stalked

both her and her husband's social media, a boyfriend was an obvious suspect for the murder, defendant was refusing to disclose any of these boyfriends, and any recent contact defendant had with that boyfriend would be found on her phone. Keeping in mind the deference due to the magistrate, a reasonably cautious person would have concluded that there was good reason to believe defendant's phone would contain evidence essential to facilitate the murder investigation. The trial court did not err in upholding the magistrate's finding of probable cause.

C. VALIDITY OF AFFIDAVIT

An affidavit supporting a search warrant may be challenged upon " 'a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause.' " *Martin*, 271 Mich App at 311, quoting *Franks*, 438 US at 155-156. "The rule from *Franks* is also applicable to material omissions from affidavits." *Martin*, 271 Mich App at 311. A challenge to the validity of the affidavit requires deliberate falsity or reckless disregard by the affiant, and "[a]llegations of negligence or innocent mistake are insufficient." *Franks*, 438 US at 171. Consequently, the fact that a statement in an affidavit is incorrect will not, by itself, undermine the validity of that portion of the affidavit.

As alluded to above, the affidavit includes an averment that "[defendant] stated there was up to a 20 minute delay between discovering her husband on the floor and to call 911." However, defendant arrived home at 7:50 p.m., spent some time attempting to open the garage door, called her friend at 7:59 p.m., and called 911 at approximately 8:05 p.m. Thus, there could not have actually been a twenty-minute delay. During the 911 call, defendant stated at one point that she had been home for "about twenty minutes, ten, fifteen minutes" at that point before being cut off by the operator. In other words, she had *been home* for perhaps as long as twenty minutes. During her interview, defendant consistently estimated that it might have been twenty minutes from when she *arrived home* and when *the police arrived*. At no time did defendant ever indicate that she waited up to twenty minutes *after discovering Ammar's body* to call the police. Indeed, the call logs she apparently showed Lo during her interview prove no such delay was possible. Rather, she was consistent that she spent some time after she got home trying to get the garage to open, and only then discovered Ammar's body.

Nevertheless, defendant did mention a twenty-minute timeframe on two occasions. Furthermore, she admittedly did delay calling the police. The police seemed to be genuinely confused about defendant's discussion of her garage door problems. The affiant was almost certainly acting on memory when the affidavit was typed up. Clearly, his recollection that defendant discussed a twenty-minute delay was actually accurate. The exact nature of that delay was not. Defendant only argues that, because the affiant monitored the interview, he must have made the misstatement deliberately or recklessly. We find that conclusion too tenuous. There *was* a twenty-minute delay of some kind, and under the circumstances, including the sometimes difficult-to-follow timelines defendant provided, it would make sense that the affiant honestly and reasonably misremembered the nature of that delay. We therefore do not agree with defendant that she has made the requisite preliminary showing of deliberateness or recklessness.

Defendant also argues that the affidavit fails to recite that defendant had denied any contact with the "psycho" boyfriend since August of 2018 and had insisted that there was "no chance" any of her boyfriends killed Ammar. Both of these arguments are somewhat disingenuous.

The affidavit states that the last time defendant had "contact with one of the men that she dated was a few weeks ago," without specifying which boyfriend. Defendant did, in fact, say that she last met up with a boyfriend "a few weeks" previously, and the context of that discussion suggests she might have been referring to the "psycho" boyfriend. The statement in the affidavit is therefore actually correct, and it would be reasonable even if it was linked directly to the "psycho" boyfriend. The fact that defendant *also* stated that she last had contact with one of the boyfriends in August is indeed omitted. However, we agree with the prosecution that if the affiant had included all of defendant's shifting and sometimes-inconsistent timelines, she would have seemed even more suspicious.

Defendant's statement that there was "no chance" any of the boyfriends would kill Ammar was based on her protestation that they did not know him. However, defendant's further statements established that this was not true. In fact, the "psycho" boyfriend *did* know Ammar, or at least was able to find his Facebook profile and home address even though defendant gave him a false name. The prosecution aptly points out that defendant's statement was self-serving and her veracity had been somewhat undermined. More importantly, however, if her statement had been included in its entirety (i.e., including her explanation of *why* there was "no chance"), that would have bolstered probable cause, because it would have appeared even more strongly that defendant was covering for a boyfriend.

We conclude that despite the erroneous averment regarding how long defendant delayed before calling 911, it is not unreasonable that the affiant might have genuinely remembered defendant making such a statement; otherwise, defendant's stated omissions from the affidavit are piecemeal extractions that would have actually bolstered the affidavit had they been included.

We therefore agree with the trial court that the search warrant for defendant's phone was properly issued.

VII. WHETHER TO EXCLUDE OTHER REFERENCES AT TRIAL

Finally, defendant argues that she would be unfairly prejudiced by the introduction of evidence referring to Ficher's arrest and by referring to the "Violent Crime Impact Team." We disagree.

Apparently, the prosecution does not intend to introduce evidence of Ficher's conviction. However, the prosecution contends that some testimony regarding Ficher's arrest is necessary to explain how the police obtained certain important evidence implicating defendant's involvement in orchestrating Ammar's murder. We agree with the prosecution. Defendant only superficially cites the unremarkable proposition that a person's arrest is not evidence that the person actually committed a crime. See *People v Bass*, 88 Mich App 793, 798; 279 NW2d 551 (1979). However, that means Ficher's arrest would not prove that Ficher committed Ammar's murder. Importantly, it does not preclude a person's arrest from being relevant to something else. We note that the investigation into Ammar's murder was, seemingly, convoluted and extensive. The prosecution

asserts that defendant's involvement was revealed in part by evidence that was discovered as a result of following up on other evidence found on Ficher's person when Ficher was arrested.

We note that the trial judge in this matter presided over Ficher's trial, so it would have been uniquely well-placed to evaluate the truth and relevance of the prosecution's argument—even more so than the deference ordinarily given to trial courts. See *McGonegal v McGonegal*, 46 Mich 66, 67; 8 NW 724 (1881). Even if we were inclined to interfere with that deference, which we are not, we find the prosecution's argument reasonable. Furthermore, Ficher's arrest, by itself, would not naturally tend to cast any aspersion upon some other person entirely. Thus, we simply cannot find any reason to accept defendant's argument that the fact of Ficher's arrest could possibly create unfair prejudice to defendant. MRE 403. We find no abuse of discretion in the trial court's refusal to exclude evidence of Ficher's arrest.

The term "Violent Crime Impact Team" is undisputedly a reference to the actual name of a real police taskforce. The prosecution intends to call as a witness a member of that taskforce to explain his assistance in surveilling Ficher. The prosecution contends that identifying the name of that taskforce is necessary to help explain why a different police department was involved in an investigation otherwise conducted by the Ingham County Sheriff's Department. We think the relevance is small, but not nonexistent; importantly, the term is not expected to be repeated and is not being introduced gratuitously. Also of importance, defendant is charged with murder, and it will undoubtedly be disclosed to the jury that Ammar was killed by multiple blows to the head with an ax. Thus, the fact that this matter involves a violent crime would be inescapably obvious. It is simply not plausible that the jury would be inflamed by a single mention of the word "violent" during a trial for what was obviously an exceedingly violent crime. We again find that the trial court did not abuse its discretion by declining to exclude the term "Violent Crime Impact Team" at trial.

VIII. CONCLUSION

We agree with defendant that, under appropriate circumstances, a police promise of confidentiality could undermine an interviewee's understanding of his or her rights such that any statements made must be deemed involuntary. However, we do not find the circumstances of this case to warrant exclusion of defendant's statements. The police unambiguously had probable cause to seize defendant's phone when they did, and they would have had probable cause even before defendant raised the issue of confidentiality. The search warrant was supported by a sufficient and valid affidavit. Finally, the trial court did not abuse its discretion in refusing to exclude the evidence of which defendant complains.

Affirmed.

/s/ Michael J. Kelly
/s/ Amy Ronayne Krause
/s/ James Robert Redford