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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1646-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TAQUAN D. FLOYD,

Defendant-Appellant.

Submitted January 29, 2018 – Decided April 12, 2018

Before Judges Messano and Accurso.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
13-08-1128.

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

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Susan Berkow, Special
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

The juvenile complaints against defendant Taquan D. Floyd
were waived from the Family Part, see N.J.S.A. 2A:4A-26.1, and the

grand jury charged defendant with an armed robbery (first robbery) and related weapons offenses committed on April 23, 2013 (counts one through three), and an armed robbery (second robbery) and related offenses committed on April 25, 2013 (counts four through eight). The judge denied defendant's motion to sever counts one through three, and the jury convicted defendant on all counts. After denying defendant's motion for acquittal notwithstanding the verdict or alternatively for two new trials, the judge imposed an aggregate sentence of twenty-five years' imprisonment with an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Defendant raises the following points on appeal:

POINT I

THE CONVICTIONS MUST BE REVERSED BECAUSE THE STATE FAILED TO PROVE IDENTIFICATION BEYOND A REASONABLE DOUBT. (NOT RAISED BELOW)

POINT II

THE TRIAL COURT'S REFUSAL TO GRANT RELIEF FROM THE PREJUDICIAL JOINDER OF THE TWO ROBBERIES VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

POINT III

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY, WITH RESPECT TO THE FIRST ROBBERY, THAT IT COULD ONLY USE THE EVIDENCE OF THE SECOND ROBBERY TO ESTABLISH THE IDENTITY OF THE FIRST ROBBER, AND THAT IT COULD NOT USE THE EVIDENCE OF EITHER ROBBERY TO INFER THAT DEFENDANT HAD

A PROPENSITY TO COMMIT ROBBERY, VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL. (NOT RAISED BELOW)

POINT IV

THE SENTENCE OF 25 YEARS, WITH A PAROLE TERM OF MORE THAN 21 YEARS, WAS IMPOSED AFTER THE COURT FAILED TO FIND RELEVANT MITIGATION AND IS EXCESSIVE FOR THIS DEFENDANT WHO WAS A JUVENILE AT THE TIME OF THE OFFENSE.

Having considered the arguments in light of the record and applicable legal standards, we affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I.

The State alleged the first robbery took place around 9:00 p.m., after the victim withdrew money from an ATM and was walking back to his disabled car nearby. An African-American man armed with a handgun confronted the victim, made a demand, and the victim surrendered his wallet. The robber fled. When police responded, the victim provided a description of his assailant, including that he wore a striped shirt.

Two nights later, between approximately 11:00 and 11:30 p.m., the second victim withdrew money from the same ATM as his girlfriend waited in a nearby-parked car. An African-American man armed with a handgun demanded the victim's money, the victim surrendered his wallet and the robber fled. Police responded and the victim provided a description of his assailant. Police saw a

group of people approximately one block away, one of whom fit the general description. Upon approaching, one of the men, later identified as defendant, fled, throwing a gun over some fencing before he was apprehended.

Shortly thereafter, the victim and his girlfriend identified defendant during a "show up." While being processed, defendant made several incriminating statements. Police ultimately recovered the gun and the second victim's wallet, which included his identification and ATM card, near the scene. In defendant's pocket was a clip of ammunition that fit the gun. Underneath his hooded sweatshirt, defendant wore a striped shirt.

On April 29, police conducted a photographic identification procedure with the first victim. He told police he was nearly certain that a photograph of defendant was that of his assailant.

Defendant moved to suppress the out-of-court identifications. Following a Wade¹ hearing at which both victim[s] testified, the judge suppressed the photographic identification, but not the "show up" identification made by the second victim and his girlfriend.²

¹ United States v. Wade, 388 U.S. 218 (1967).

² Neither ruling is challenged on appeal.

The judge took no testimony during the hearing on defendant's severance motion. The State argued that pursuant to N.J.R.E. 404(b), "[t]he evidence of robbery number two would be admissible to prove the identity of the robber on robbery number one." Recognizing the "two crimes have to be very similar," the prosecutor explained

we've got . . . two robberies that . . . occurred within two days at the same ATM, at the same bank. Both were committed by young black males. Both robbers possessed semiautomatic handguns, both used the similar phrase and both . . . wore a striped shirt.

[V]ictim number one . . . will identify I believe the striped shirt worn by [defendant] when he was arrested in robbery number two.³

The judge properly framed the issue as whether evidence of the second robbery would be admitted at a separate trial on the first robbery "and vice versa . . . pursuant to [N.J.R.E.] 404(b)." Applying the four prong test set out in State v. Cofield, 127 N.J. 328, 338 (1992), the judge reasoned the evidence would be relevant on the material issue of identity regarding the first robbery. He noted there were "two pieces of evidence discovered in the [second]

³ At the Wade hearing, victim one acknowledged that he identified defendant's photograph because of the striped shirt defendant was wearing. The fact that none of the other photographs included a man wearing a striped shirt was the reason the judge suppressed the out-of-court identification.

robbery . . . that connect defendant to the [first] robbery," namely "a similar striped shirt . . . and the same type of handgun." The judge also concluded the evidence met Cofield's second prong, i.e., the second robbery was similar in kind and reasonably close in time to the first robbery. Ibid.

Here both robberies occurred in the evening at the Chase ATM machine on the corner of Nielsen and Richmond Streets in New Brunswick. In both robberies, the assailant approached the victim from behind, pointed a gun at the victim, and demanded [using] the same phrase, "give me everything." The victims in both cases describe the assailant as a young black male wearing a striped shirt armed with a semiautomatic handgun.

Defense counsel immediately pointed out that the second victim never said his assailant wore a "striped shirt." The judge concluded, however, that defendant was wearing a striped shirt two days after the first robbery, and the first victim could identify the shirt, which "is a similarity that's enough to let it in." He denied the severance motion.

Although the court suppressed the first victim's out-of-court identification of defendant, at trial the victim identified defendant in court as the person who robbed him. No other witness identified defendant as the perpetrator of the first robbery.

Both the victim of the second robbery and his girlfriend identified defendant in court. Several police witnesses who chased

and apprehended defendant and retrieved the gun and other evidence also identified him in court.

II.

A.

In Point I, defendant argues we must reverse his convictions because the State failed to prove identification beyond a reasonable doubt. He notes that neither victim said his assailant had facial tattoos, but, it was undisputed defendant had such tattoos at the time of the robberies. The argument lacks sufficient merit to warrant discussion. R. 2:11-3(e)(2). Both victims identified defendant in court, and the eyewitness identifications and circumstantial evidence linking defendant to the second robbery was overwhelming.

B.

In Point II, defendant argues the judge erred in denying his motion to sever counts one through three from the remaining counts. He contends this error requires reversal of his convictions on all counts. While we agree the judge erred in not granting the severance motion, and that the error prejudiced the jury's consideration of the evidence as to counts one through three, given the overwhelming evidence of defendant's guilt on the remaining charges, the error did not deny defendant a fair trial on counts four through eight.

Rule 3:7-6 allows the State to charge multiple offenses in a single indictment "if the offenses . . . are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together." "Although joinder is favored, economy and efficiency interests do not override a defendant's right to a fair trial." State v. Sterling, 215 N.J. 65, 72-73 (2013) (citing State v. Chenique-Puey, 145 N.J. 334, 341 (1996); State v. Coruzzi, 189 N.J. Super. 273, 298 (App. Div. 1983)). Rule 3:15-2(b) provides relief from prejudicial joinder. Id. at 73.

"The test for assessing prejudice is 'whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges.'" Ibid. (quoting Chenique-Puey, 145 N.J. at 341). "If the evidence would be admissible at both trials, then the trial court may consolidate the charges because 'a defendant will not suffer any more prejudice in a joint trial than he would in separate trials.'" Chenique-Puey, 145 N.J. at 341 (emphasis added) (quoting Coruzzi, 189 N.J. Super. at 299).

"[E]vidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith," but such evidence "may be admitted for other purposes, such as proof of . . . identity . . .

[if] relevant to a material issue in dispute." N.J.R.E. 404(b). The Court has established a four-prong "rule of general application in order to avoid the over-use of extrinsic evidence of other crimes or wrongs" pursuant to N.J.R.E. 404(b). Cofield, 127 N.J. at 338.

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.

[Ibid.]

We review the court's severance decision and evidentiary ruling on 404(b) evidence for an abuse of discretion. Sterling, 215 N.J. at 73; State v. Rose, 206 N.J. 141, 157-58 (2011). However, we conduct a plenary review "[i]f the trial court acts [on the severance motion] under a misconception of the applicable law," State v. Brown, 118 N.J. 595, 604 (1990), or fails to analyze properly the admissibility of the proffered 404(b) evidence. State v. Lykes, 192 N.J. 519, 534 (2007).

Initially, in deciding defendant's severance motion, the judge contemplated only one-half of the prejudice equation, i.e., he considered whether evidence of the second robbery would have

been admitted at a separate trial of the first robbery, but he never contemplated whether evidence of the first robbery would have been admitted at a separate trial of the second robbery. Based on the trial evidence briefly outlined above, we are hard-pressed to see how the first victim's testimony would have provided any evidence relevant to a material issue in dispute as to the second robbery.

We also conclude that the judge erred in deciding evidence of the second robbery was admissible under Cofield to prove identity in the first robbery. In general, our courts have found other-crime evidence probative of identity in two types of cases: 1) when specific evidence connects multiple offenses; or 2) when the crimes are "signature crimes." See generally Sterling, 215 N.J. at 92-93 (discussing the different types of identity evidence under 404(b)). Our decision in State v. Pierro, 355 N.J. Super. 109 (App. Div. 2002), is a good example of the first species. There, we affirmed the joinder of two home burglaries committed four days apart at different houses because police found specific items stolen during the first burglary when they arrested defendant for the second burglary. Id. at 117. The Court has also said that "[o]ther-crimes evidence may . . . be admitted on the issue of identity when a particular weapon or disguise used in one crime

connects a defendant to another offense." Sterling, supra, 215 N.J. at 93.

In deciding evidence of the second robbery was admissible under 404(b) on the issue of the identity of the first robber, the judge premised his consideration of the Cofield factors upon two items – the striped shirt and the handgun. Although the prosecutor represented to the judge that the victim of the first robbery would identify the shirt worn by his assailant, he failed to do so at trial. When the prosecutor showed the victim the striped shirt defendant wore when arrested, the victim said it looked similar, but recalled it was of different colors and had a distinctive insignia. When the prosecutor showed him the gun recovered after the second robbery, the victim said it was very similar but he could not say with certainty it was the same gun. He recalled the gun used by his assailant was a different color.⁴ In short, the evidence from the second robbery was not probative of the issue of identification because it was not "specific evidence" that clearly and convincingly linked both robberies.

In addition, the State has never asserted, nor could it, that the two robberies were "signature crimes." Sterling, 215 N.J. at

⁴ In fact, during the charge conference, the judge suggested but ultimately did not provide a curative instruction so the jury understood that the gun recovered after the second robbery was not the gun described by the victim in the first robbery.

94-95 (noting the "high burden that would be required when other-crimes evidence is admitted to prove identity through the use of a signature-crime analysis"). In discussing signature crimes, the court explained,

the prior criminal activity with which defendant is identified must be so nearly identical in method as to earmark the crime as defendant's handiwork. The conduct in question must be unusual and distinctive so as to be like a signature, and there must be proof of sufficient facts in both crimes to establish an unusual pattern.

[State v. Gillispie, 208 N.J. 59, 87 (2011) (quoting State v. Fortin, 162 N.J. 517, 532 (2000)).]

Especially in the context of joinder of separate crimes, the Court recognized nearly thirty years ago

[t]here is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all.

[State v. Pitts, 116 N.J. 580, 601 (1989) (quoting United States v. Lotsch, 102 F.2d 35, 36 (2d Cir. 1939)).]

Here, the only identification of the perpetrator of the first robbery was the victim's in-court identification made years after the events. That evidence would not have been admissible at a separate trial on the second robbery. More importantly, in

deciding whether defendant was the person who committed the first robbery, jurors received substantial prejudicial testimony that defendant robbed a different victim on a different night at gunpoint, even though there was no clear and convincing specific evidence linking the two crimes. It was error for the judge to deny defendant's motion to sever the counts involving the first robbery from the remaining counts of the indictment.⁵

We must now evaluate the consequences of that error. The Court has repeatedly recognized the "inherent prejudice in the admission of other-crimes evidence." State v. Barden, 195 N.J. 375, 390 (2008). However, where the trial court errs by improperly joining offenses, the reviewing court must assess whether the error "led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached.'" Sterling, 215 N.J. at 101 (citation omitted). This requires "an independent analysis of the quality of the evidence of defendant's guilt on a conviction-by-conviction basis." Id. at 102.

⁵ For the first time on appeal, the State argues the evidence was admissible under 404(b) as proof of defendant's "common scheme or plan" to rob users of the ATM. That argument is unavailing, because this exception requires crimes that are part of an "integrated plan, of which the other crimes . . . are components." State v. Stevens, 115 N.J. 289, 305-06 (1989).

Here, the evidence of defendant's guilt as to the second robbery is overwhelming. Police found defendant a block from the robbery minutes after it took place, standing several feet away from where officers later found the victim's wallet and credentials. The State also introduced another officer's dashboard recording confirming testimony that defendant discarded a gun as he ran. The victim positively identified the gun as the robbery weapon at trial. The victim and his girlfriend both positively identified defendant at the out-of-court show-up identification and again in court. Finally, the State introduced admissions defendant made at police headquarters describing the gun, how much he had paid for it, and that he would have shot the victim if the gun had been loaded.

In Sterling, 215 N.J. at 104, the Court affirmed the defendant's conviction regarding one of the assaults, despite improper joinder of other assaults, because of "the strong, independent proof of [the] defendant's guilt." See also Gillispie, 208 N.J. at 93 (finding no harmful error from wrongful admission of 404(b) evidence due to the "overwhelming proof submitted by the State throughout each trial of [the] defendants' guilt, independent of the other-crimes evidence").

In this case, the proof of defendant's guilt of the second robbery was overwhelming. The improper admission of evidence of

the first robbery did not lead the jury to an unjust result as to counts four through eight. Therefore, we reverse defendant's convictions on counts one, two and three of the indictment, but affirm his convictions on the remaining counts.

C.

Without objection, the judge instructed the jury that "the events of April 23[], 2013 cannot be used as evidence regarding the events of April 25[], 2013, and the events of April 25[], 2013 cannot be evidence regarding the events of April 23[], 2013." The judge reiterated later, "I caution and remind you each date stands and falls on its own merits. April 23[] and April 25[] are separate and distinct counts." Defendant did not ask for, and the judge did not provide, the instructions contained in Model Jury Charge (Criminal), "Proof of Other Crimes, Wrongs, or Acts" (September 12, 2016).

Defendant contends "the court was obligated to charge, with respect to the first robbery, that the other-crime evidence could only be used as evidence of the identity of the perpetrator, and could not be used as evidence that [defendant] had a disposition to commit robbery." Defendant argues the error in the charge requires reversal on all counts.

"When dealing with other-crimes evidence, a court must precisely instruct the jury that the proper use of such evidence

is to prove a relevant issue in dispute and not to impugn the character of the defendant." State v. Blakney, 189 N.J. 88, 92 (2006). The court must "narrowly focus the jury's attention on the specific use of other-crime evidence," rather than "reference only to the generalities of the Rule." Cofield, 127 N.J. at 341. Obviously, the judge's instructions were inadequate. The judge twice told the jury it must consider the evidence of each crime separately – that the evidence of the first robbery was not to be considered at all when weighing the evidence of the second robbery, and vice versa. Those instructions were, of course, contrary to the raison d'etre for admitting 404(b) evidence in the first place, and more restrictive than the model charge, which explains the permissible use of other-crimes evidence. He did not tell the jury of the prohibited uses of other-crimes evidence.

The Court has said that

[i]n the context of a jury charge, plain error requires demonstration of "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result."

[State v. Burns, 192 N.J. 312, 341 (2007) (second alteration in original) (emphasis added) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).]

The allegation of error must be assessed in light of "the totality of the entire charge, not in isolation." State v. Chapland, 187 N.J. 275, 289 (2006) (citing State v. DiFrisco, 137 N.J. 434, 491 (1994)). While an erroneous jury charge may be a "'poor candidate[] for rehabilitation' under the plain error theory," Jordan, 147 N.J. at 422 (quoting State v. Simon, 79 N.J. 191, 206 (1979)), we nonetheless consider the effect of any error in light "of the overall strength of the State's case." Chapland, 187 N.J. at 289.


As already noted, the evidence of defendant's guilt of the second robbery was overwhelming. The Court has recognized that even in the context of errors in the jury charge on other-crimes evidence, the overall strength of the State's case must be considered in deciding whether there was plain error in the charge. See, e.g., State v. Marrero, 148 N.J. 469, 497 (1997); State v. G.S., 145 N.J. 460, 475 (1996); Stevens, 115 N.J. at 309. We affirm defendant's convictions in counts four through eight.

We reverse defendant's conviction on counts one through three, vacate the sentences imposed on those counts and, should the State decide to retry defendant on counts one through three, remand for a new trial on those counts. We affirm the judgment of conviction as to counts four through eight, and remand the matter to the Law Division for further proceedings should the

State choose not to retry defendant on counts one through three. See State v. Young, 379 N.J. Super. 498, 508 (App. Div. 2005) (citing State v. Espino, 264 N.J. Super. 62, 70-71 (App. Div. 1993) ("[W]hen the conviction on one or more counts is vacated on appeal, the sentencing court should be able to review what remains of its original sentence plan and to reconstruct the sentence to ensure that the punishment fits both the crime and the criminal."). As a result, we need not consider the sentencing argument defendant raises in Point IV.

Affirmed in part; reversed in part; remanded. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION