

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3164-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT G. MOSS, JR.,

Defendant-Appellant.

Submitted for April 9, 2018 – Decided May 24, 2018

Before Judges Sabatino and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
15-07-1990.

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

Gurbir S. Grewal, Attorney General, attorney
for respondent (Evgeniya Sitnikova, Deputy
Attorney General, of counsel and on the
brief).

PER CURIAM

Defendant Robert G. Moss, Jr. appeals from his conviction after a jury trial, following the Law Division's denial of his motion for a severance of offenses. We affirm.

I.

In July 2015, defendant, and his ex-girlfriend, co-defendant Elizabeth Padilla, were charged in a Camden County indictment with third-degree endangering the welfare of a child ("EWC"), N.J.S.A. 2C:24-4(a) (count one); second-degree unlawful possession of an assault firearm, N.J.S.A. 2C:39-5(f) (count two); and fourth-degree possession of a large-capacity magazine, N.J.S.A. 2C:39-3(j) (count three) (collectively, "weapons-related offenses"). Defendant was charged alone in count four with third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7), against Padilla.

The charges stem from defendant's assault of Padilla on the evening of March 26, 2015. At that time, defendant and Padilla were no longer romantically involved, but lived together in the house she rented in Camden. The household also included Padilla's three daughters and two sons of her nephew, Jonathan Martinez. The children ranged in age from seven to sixteen years old.

Immediately following a "scuffle" with defendant on a public street in Camden, Padilla called the police, who responded and arrested defendant. On the way to the precinct, in an apparent attempt to retaliate against Padilla for summoning the police,

defendant spontaneously stated "there was a gun in the bedroom [where he and Padilla] resided and that the gun specifically had bodies attached to it." Concerned that the weapon "was used in an assault situation or possibly a homicide," the officer relayed defendant's statement to the lead detective.

After obtaining Padilla's consent to search the house, police seized the assault rifle, and a high-capacity magazine loaded with twenty-six rounds, from her bedroom. Because defendant and Padilla resided in the home together, they were both charged with possession of the rifle and magazine.¹ Prior to trial, Padilla pled guilty to EWC pursuant to a negotiated plea agreement with the State, requiring her to testify against defendant at trial.²

Defendant moved to sever the assault charge from the remaining counts in the indictment because Padilla was charged as his co-defendant on the weapons-related charges, but was named as the victim on the assault charge. The trial judge denied defendant's motion, deeming the assault charge was "necessary background" to the remaining charges. In particular, the judge reasoned evidence about the assault bore upon motive and the jury's understanding

¹ The assault rifle was owned by Martinez. Charges filed against Martinez for the present weapons-related offenses were ultimately dismissed.

² Padilla was sentenced to a probationary term. Her appeal is not before us.

about how the police learned the location of the weapon. Otherwise, the jury might speculate that the police were "just walking down the street whistling and all of a sudden they said, 'Well, let's take [defendant] into custody[,]' . . . and then when they put him in the car . . . he blurts out [about] . . . the weapons." The judge indicated he might have been more inclined to sever the assault charge if Padilla were facing a joint trial with defendant.

Pursuant to the terms of her plea agreement, Padilla testified about the circumstances of the assault, and that defendant was fully aware the weapon was located in her bedroom. In particular, after Martinez was incarcerated, defendant found the rifle and magazine in a guitar case in the basement of Padilla's house. Defendant moved the case containing the gun and magazine to the bedroom to safeguard it from the children. At the time of the incident, defendant and Padilla were no longer dating, but defendant still resided at her residence. Padilla stated she slept on a couch in a separate room while defendant slept in the bedroom where the gun was located.

On cross-examination, defendant attempted to discredit Padilla's testimony, claiming she was lying to avoid jail time. The crux of his defense was that Padilla, alone, permitted Martinez

to store the weapon in her home and, as such, she alone possessed the weapon.

At the conclusion of the two-day trial, the jury found defendant guilty on the weapons-related offenses, and the lesser included offense of simple assault. He was sentenced to an aggregate five-year term of imprisonment, with three-and-one-half years of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6(c).³

Defendant raises the following arguments for our consideration:

POINT I

THE FAILURE TO SEVER THE ASSAULT FROM THE UNRELATED GUN CHARGES VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL AND N.J.R.E. 404(b).

POINT II

THE ABSENCE OF AN INSTRUCTION ON THE LIMITED USE OF THE OTHER-CRIME EVIDENCE OF THE ASSAULT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.
(Not Raised Below)

³ As part of his aggregate sentence, defendant was sentenced to a concurrent one-month prison term for the simple assault offense at issue in this appeal.

II.

A.

The decision to grant or deny a motion for severance rests within the sound discretion of the trial court. State v. Sanchez, 143 N.J. 273, 283 (1996) (citing State v. Brown, 118 N.J. 595, 603 (1990)). A trial judge's decision will not be reversed absent a clear abuse of discretion. State v. Mance, 300 N.J. Super. 37, 53 (App. Div. 1997). A reviewing court's analysis "does not end with the conclusion that it was error to have joined the . . . crimes [and] . . . [the court] must assess whether the error 'led to an unjust result.'" State v. Sterling, 215 N.J. 65, 101 (2013) (quoting State v. R.B., 183 N.J. 308, 330 (2005)). "In doing so, [reviewing courts] conduct an independent analysis of the quality of the evidence of defendant's guilt on a conviction-by-conviction basis." Id. at 102.

As provided in Rule 3:7-6, "Two or more offenses may be charged in the same indictment . . . if the offenses charged are of the same or similar character or are based on the same act or transaction . . . connected together or constituting parts of a common scheme or plan." Indeed, Rule 3:15-1(b) bars "separate trials for multiple criminal offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement

of the first trial." However, pursuant to Rule 3:15-2(b), the court may order separate trials if "it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses." See State v. Moore, 113 N.J. 239, 274 (1988).

On appeal, defendant renews his argument that the trial judge should have severed the assault charge from the weapons-related charges pursuant to N.J.R.E. 404(b) and State v. Cofield, 127 N.J. 328 (1992).⁴ We disagree.

Evidence of the events pertaining to the assault, occurring shortly before defendant's spontaneous statement about the assault

⁴ While not admissible to prove propensity to commit crime, other crimes evidence "may be admitted for other purposes, such as proof of motive . . . [and] knowledge." N.J.R.E. 404(b). Pursuant to that rule, our courts apply the well-established four-part test enunciated in Cofield, 127 N.J. at 338. Evidence is admissible under this test if:

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.]

However, the Court has also explained that the second Cofield prong "need not receive universal application in [N.J.R.E.] 404(b) disputes." State v. Williams, 190 N.J. 114, 131 (2007).

weapon, was "intrinsic" to the weapons-related offenses. Evidence that is "intrinsic" to the charged crime, is not "other crimes" evidence, and therefore not subject to N.J.R.E. 404(b). Evidence may be intrinsic to the charged crime in two ways, i.e., where it: (1) "directly proves" the charged offense; or (2) "facilitate[s] the commission of the charged crime." State v. Rose, 206 N.J. 141, 180 (2011) (citations and internal quotation marks omitted). However, even intrinsic evidence is subject to N.J.R.E. 403, which permits exclusion of "relevant evidence . . . if its probative value is substantially outweighed by the risk of . . . undue prejudice." Id. at 177.

Here, evidence of the assault was relevant to the weapons-related offenses and its probative value was not "substantially outweighed" by prejudice to the defendant. In particular, Padilla's actions in summoning the police to arrest defendant following the assault implicated his motive to retaliate against her by telling police the assault rifle was located in the bedroom of her house. The assault offense, therefore, was "connected together" with the weapons-related offenses. R. 3:7-6. The prosecutor argued as much in his summation:

On the way to the police station, nobody asked him any questions. Nobody said anything to him. Angry, heated, he just got arrested. His girl called 911. He got caught up in some mess. He hit her, he choked her. What's he

say? "There's a gun in that house. It's got bodies on it." I submit that's payback, ladies and gentlemen. If I'm going down, you're coming down with me.

That's knowledge. He knew there was a gun in that house. If he didn't know there was a gun in that house, he wouldn't have that ability to say that.

Defendant's argument that his arrest for assault may have been his motive for informing the police the rifle was stored in Padilla's residence, but it was not his motive for possessing the gun, is misplaced. His statement directly proves his knowledge of the weapon in the bedroom of a residence he shared with Padilla. Stated differently, the police response to the assault, and defendant's unprompted, contemporaneous statement to the responding officers, "directly proves," and hence is intrinsic to, the weapons-related offenses.

In this regard, the trial judge aptly observed that defendant's assault of Padilla provided "necessary background" for defendant's statement and the resultant seizure of the weapon. Without evidence of the assault, the jury likely would have speculated why defendant was in police custody and why he would spontaneously utter there was a weapon in Padilla's home. For

example, if the assault arrest were "sanitized,"⁵ i.e., the jury was informed defendant was charged with "an offense" or a "third-degree offense," the jury would be left to speculate about the nature of the offense. This would have been especially detrimental to defendant where, as here, his statement included the rifle "had bodies attached to it." Thus, the jury may have otherwise speculated defendant was somehow involved with the more serious offense of homicide. The probative value of the assault evidence, therefore, was not substantially outweighed by prejudice to defendant.

Defendant's reliance on State v. Branch, 182 N.J. 338, 352 (2005), to address potential jury confusion, is also misplaced. In Branch, the Court determined the "phrase 'based on information received' may be used by police officers to explain their actions, . . . to rebut a suggestion that they acted arbitrarily." Ibid. In Branch, however, the Court sought to avoid the introduction of inadmissible hearsay evidence, not an inculpatory statement of a defendant or the circumstances under which it was uttered.

Having found evidence of the assault was intrinsic to the weapons-related charges and did not violate N.J.R.E. 403, we need

⁵ See State v. Brunson, 132 N.J. 377, 391 (1993) (requiring sanitization of a prior criminal conviction to lessen the risk the defendant will be prejudiced, particularly if the prior offense is similar to the one for which the defendant is being tried).

not reach defendant's argument pursuant to N.J.R.E. 404(b). Nevertheless, we find the evidence would have been admissible pursuant to that Rule and the four-prong Cofield test. In sum, (1) evidence of the assault was material to defendant's motive and knowledge of the weapon; (2) while not similar in kind, the assault and weapons-related offenses were committed close in time; (3) evidence of the assault is clear and convincing, based on Padilla's unrefuted testimony and corroborating photographs; and (4) the probative value of evidence of the assault outweighs its prejudice to the defendant. See Cofield, 127 N.J. at 338. Indeed, as we discussed supra, the circumstances of defendant's arrest for the assault prevented the jury from speculating why he was in police custody when he gave a statement about the location of the assault rifle.

Finally, we find the trial court properly distinguished the "wildly disparate" facts of State v. Sterling, 215 N.J. 65 (2013) from those of the present case. In Sterling, the severance issue "arose out of one burglary and three other burglary and sexual assault episodes, which occurred over a span of three years." Id. at 71. Defendant was tried on two burglaries and the related sexual assaults and a standalone burglary episode in one trial. In the second trial, the defendant was tried on a third burglary and related sexual assault incident. Ibid. We reversed the

defendant's subsequent convictions in both trials because joinder caused him undue prejudice. Id. at 72. The Court agreed the trial court erroneously joined the charges in trial one and prejudicially admitted evidence of the standalone burglary in trial two. Ibid.

In Sterling, however, the Court's analysis did not end after concluding joinder of several crimes in the same trial was error. Instead, the Court "assess[ed] whether the error 'led to an unjust result.'" Id. at 101 (quoting R.B., 183 N.J. at 330). "In doing so, [the Court] conduct[ed] an independent analysis of the quality of the evidence of defendant's guilt on a conviction-by-conviction basis." Id. at 102. In sum, our review must determine the error was harmless beyond a reasonable doubt. Ibid.

Here, even if joinder of the assault and weapons-related offenses in one trial was error, such error was harmless. The State's proofs against defendant were strong: defendant did not present any evidence at trial either denying he assaulted Padilla or claiming an affirmative defense. Further, her injuries were corroborated by photographs taken by the police taken shortly after the incident.

Moreover, defendant's post-arrest statement establishes he knowingly possessed the rifle. Padilla's testimony, which the jury apparently credited, established Martinez asked defendant to

hold his gun while he was in prison, defendant moved the guitar case containing the gun and magazine from the basement to the bedroom, and defendant resided with her. This evidence supports the jury's verdict that defendant had knowledge of the weapon. Because he exercised control over the weapon, the evidence also supports the jury's verdict that defendant had joint, constructive possession of the rifle.

B.

Because we reject defendant's claims that the assault charge was other-crime evidence, we need not address his newly-minted argument that the trial judge failed to give a limiting instruction pursuant to N.J.R.E. 404(b). We do so, briefly, for the sake of completeness.

Failure to give a limiting instruction is reviewed using the plain error standard where the issue was not raised at trial. See State v. Burns, 192 N.J. 312, 341 (2007). 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 (App. Div. 2008) (alteration in original) (citations and internal quotation marks omitted).

Defendant claims the court should have instructed the jury on the proper use of the assault crime, when the evidence was received and again in its final charge, to avoid branding him as a "bad person" in the minds of the jury. However, a defendant's decision not to request a curative or limiting instruction for an alleged N.J.R.E. 404(b) violation suggests defendant "was making a strategic decision to his advantage" and any possible error was of no consequence. State v. Yough, 208 N.J. 385, 400-01 (2011); R. 2:10-2. For example, as the judge observed, evidence of the assault could be viewed by the jury as the motive for Padilla to inculcate defendant on the weapons-related offenses.

Moreover, the trial judge conducted the proper inquiry of defense counsel, requesting whether he sought any specific jury charges, but counsel did not request a limiting instruction regarding the assault. Given the applicable plain error standard, the lack of such a limiting instruction was not "clearly capable of producing an unjust result." R. 2:10-2.

In sum, the trial judge properly concluded evidence of the assault, committed shortly before defendant's spontaneous statement to the police regarding the whereabouts of the rifle was "necessary background" to the weapons-related offenses. We conclude, therefore, that the judge did not abuse his discretion in denying defendant's motion to sever the assault charge.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION