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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0427-24

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DEVOYNE A. SANFORD,

Defendant-Appellant.

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Argued December 17, 2024 – Decided January 6, 2025

Before Judges Firko and Augostini.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 24-01-0134.

Maura Hallisey, Assistant Deputy Public Defender, argued the cause for appellant (Jennifer N. Sellitti, Public Defender, attorney; Maura Hallisey, of counsel and on the brief).

Colleen Kristan Signorelli, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Colleen Kristan Signorelli, on the brief).

PER CURIAM

On leave granted, defendant Devoyne A. Sanford appeals from a September 9, 2024, Law Division order and written opinion granting the State's motion to admit his statement from a Union County Indictment involving seizure of a BB gun on April 23, 2022, in connection with a Hudson County indictment involving a shooting incident that occurred three days earlier on April 20, 2022, at the time of trial. After considering all his contentions in context of the record and the applicable law, we are satisfied there was sufficient credible evidence supporting the court's findings that defendant's statement was made knowingly, voluntarily, and intelligently, law enforcement provided him with all the information available at the time of his interview, and the court conducted the appropriate Cofield<sup>1</sup> analysis. Accordingly, we affirm.<sup>2</sup>

I.

A. The April 20, 2022 Hudson County Incident

The events leading to defendant's arrest were described at the May 15, 2024 hearing during which Detective Andrew McCory testified on behalf of the

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<sup>1</sup> State v. Cofield, 127 N.J. 328, 338 (1992).

<sup>2</sup> Defendant moved for leave to appeal only the court's ruling pertaining to admission of his statement. He does not challenge the court's decision to admit the victim's 9-1-1 calls at the time of trial.

State. On April 20, 2022, New Jersey State Police received a 9-1-1 call, where the victim, a truck driver, traveling on the New Jersey Turnpike, reported that another vehicle fired five gunshots at his truck<sup>3</sup>. The victim reported that the shooting came from a white Honda Accord bearing New Jersey license plate N83-NKM.<sup>4</sup>

In the 9-1-1 call, the victim immediately gave a description of the vehicle and requested that the police stop the vehicle "before he does something wild." The victim further stated in the 9-1-1 call that the Honda Accord had cut him off and someone had waived something that looked like a gun out the window. Further,

as [the victim] spoke with dispatch, he updated them saying the individual was now shooting at his car. He did not know what it was exactly. [Victim] initially said "yeah" when dispatch asked if it was the driver, but then clarified it was someone in the backseat of the vehicle. Dispatch advised him to pull over and sent officers.

During the first 9-1-1 call, the victim got disconnected and had to call back. There were two calls. The second call came five minutes later, after the

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<sup>3</sup> The record refers to the victim's vehicle as a "car" and a "truck." We refer to the vehicle as a truck in this opinion.

<sup>4</sup> The record refers to the license plate number as a registration number.

victim had pulled over to the side of the road and the Honda Accord had left the scene. When the State Troopers arrived on the scene, the "[victim] explained that he believed he was shot at five times with a firearm. [The victim] stated that he observed a firearm within a Honda vehicle." The State Troopers observed that the truck's rear windshield was cracked. The victim claimed the rear windshield was not cracked before the incident. There were no surveillance footage or witnesses. The State Troopers did not find any shell casings, bullets, or bullet fragments.

#### B. The April 23, 2022 Union County Incident

On April 23, 2022, Union Township Police observed the Honda Accord traveling on U.S. Route 22 in Union County. The police officers conducted a motor vehicle stop because the Honda Accord was listed as a "felony vehicle" after the April 20, 2022, incident and was registered with the National Crime Information Center. The officers subsequently identified two occupants in the vehicle, the driver, Darryl Sanford, who is defendant's cousin, and defendant. The Honda Accord was impounded at the New Jersey State Police Barracks in Newark (Newark Barracks).

The State Police investigation identified the driver's mother, Deneter Sanford,<sup>5</sup> as the owner of the Honda Accord. She consented to a search of her vehicle, which resulted in a black UMAREX .177 semi-automatic BB handgun being seized. Also recovered were cell phones, a wallet, a dash camera, and BB rounds. Deneter was informed of the findings and agreed to turn her son (Darryl) and her nephew (defendant) over to the State Police.

Upon their arrests, defendant and Darryl gave statements to the police. Defendant admitted to being an occupant of the same vehicle that was used during the shooting incident that occurred on April 20, 2022, in Hudson County. Defendant also denied owning a BB gun and claimed he did not know who owned the BB gun recovered from the vehicle.

The next day, on May 2, 2022, Darryl arrived at the Newark Barracks where he voluntarily surrendered and was formally interviewed by law enforcement after being read his Miranda rights.<sup>6</sup> Darryl

stated he was on the New Jersey Turnpike on [April 20, 2022] and was driving the vehicle at the time. The front seat passenger was . . . Alexis Hallway and the back seat passenger was [d]efendant. He also stated that [victim] threw an unknown object at his vehicle and he

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<sup>5</sup> Parties who share a last name with other parties are referred to by their first names for ease of reference. By doing so, we intend no disrespect.

<sup>6</sup> Miranda v. Arizona, 384 U.S. 436 (1996).

tried to honk his horn to get [victim's] attention. [Darryl] confirmed that [d]efendant was the only occupant in the back seat. [Darryl] disclosed to officers at this time that he owned a BB gun.

The next day, May 3, 2022, defendant arrived at the Newark Barracks with his attorney, where he voluntarily surrendered on Union County Indictment Number 22-11-860. Officers advised defendant he was charged with unlawful possession of a BB gun. At the hearing, Detective McCoy testified about defendant's arrival at the Newark Barracks on May 3, 2022,

So the reason why [defendant] was brought into . . . or voluntarily surrendered himself . . . had to be . . . Union County was because of that one isolated stop . . . that was ultimately the discovery of the . . . gun inside the vehicle. The incident that occurred on the Turnpike, he was charged later on for those crimes and subsequently after that our . . . unit was contacted and he was apprehended later on . . . .

Detective McCoy advised defendant of his Miranda rights at the beginning of the interview and had defendant sign a Miranda waiver form. The form stated the following in both English and Spanish<sup>7</sup>:

- (1) You have the right to remain silent and refuse to answer any questions. Do you understand?
- (2) Anything you say may be used against you in a court of law. Do you understand?

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<sup>7</sup> From the record, it appears defendant reads and writes English.

(3) You have the right to consult with an attorney at any time and have him/her present before and during questioning. Do you understand?

(4) If you cannot afford an attorney, one will be provided if you so desire prior to any questioning. Do you understand?

(5) A decision to speak to us is not final and you may stop talking to us at any time. Do you understand?

In bold print, the form states, "[i]f the member is aware of any criminal complaint that has been filed against the subject relating to the questions asked, the member must advise the subject of the charges." Under the heading "Waiver of Miranda Rights," the form states,

I, [defendant], have been read the above statement of my rights aloud. I understand each of my rights and at this time I am willing to give up my right to remain silent and speak to you without a lawyer present. No promises or threats have been made to me.

Defendant wrote his name in the blank space where it indicated and signed the form on May 3, 2022, at 3:19 p.m. Detective McCoy also signed the form.

Defendant was then questioned by the detectives with his attorney present. Defendant did not want to discuss the Hudson County incident but did speak about the Union Township motor vehicle stop. Defendant stated Darryl was operating the vehicle that day and he was the passenger. At the time he gave

the statement, defendant had not yet been charged in the Hudson County incident.

At the hearing, Detective McCoy was cross-examined by defense counsel about the interview:

[Defendant's attorney]: You also testified that [defendant] was charged in relation to that Union County stop.

[Detective McCoy]: . . . yes.

. . . .

[Defendant's attorney]: . . . both charged in relation to the Union County stop. And that was a separate complaint, you testified, than the Hudson County matter.

[Detective McCoy]: Yes.

[Defendant's attorney]: You also testified that [defendant] came in to give you a statement.

[Detective McCoy]: Yes.

[Defendant's attorney]: And that date was May 3rd, 2022?

[Detective McCoy]: Yes.

[Defendant's attorney]: And on that date you had already spoken to other individuals involved in the case, is that correct?



[Detective McCoy]: When you say other individuals . . . .

[Defendant's attorney]: You interviewed [victim].

[Detective McCoy]: Oh, okay, yes, yes.

[Defendant's attorney]: And that was on April 20th, 2022?

[Detective McCoy]: Yes.

[Defendant's attorney]: You also interviewed the driver . . . ?

[Detective McCoy]: Yes.

[Defendant's attorney]: And that was on May 2nd, 2022?

[Detective McCoy]: Yes.

[Defendant's attorney]: So you interviewed both of those individuals before speaking to [defendant] seated here[?]

[Detective McCoy]: Yes.

[Defendant's attorney]: Detective, you also testified that you read [defendant] his charges.

[Detective McCoy]: Yes.

[Defendant's attorney]: You said that was out in the lobby?

[Detective McCoy]: Yes.

[Defendant's attorney]: It was not in the secure interview room.

[Detective McCoy]: Correct.

[Defendant's attorney]: And it was not recorded on any body camera or any audio recording device.

[Detective McCoy]: No . . . .

[Defendant's attorney]: When you testified that your read him his charges you mean the Union County charges, correct?

[Detective McCoy]: Correct. Union County charges, yes.

[Defendant's attorney]: You did not mention anything in regard to any Hudson County incidents.

[Detective McCoy]: Correct.

[Defendant's attorney]: And, in fact, when you started the interview you heard that you told [defendant] this was about what took place in Union Township.

[Detective McCoy]: Yes.

[Defendant's attorney]: And at the end of the interview you affirmed again that this was about the weapons charge out of Union Township in Union County.

[Detective McCoy]: Yes.

[Defendant's attorney]: And then you testified that ultimately [defendant] was charged in Hudson County.

[Detective McCoy]: Yes, ultimately eventually there . . . , yes.

[Defendant's attorney]: That took place after the interview that we just watched and that you're testifying about.

[Detective McCoy]: Correct, yes.

During the May 3, 2022, interview, the following exchange transpired between Detective McCoy and defendant:

[Defendant's attorney]: All right. . . . [S]o the reason why you're here today is we wanted to discuss an incident . . . that happened in . . . Union Township, in . . . Union County. . . . [C]an you just please describe in your own detail what occurred that day on that motor vehicle stop?

[Defendant]: . . . I got pulled over, and was it [U.S. Route] 22? Like by where . . . is.

[Defendant's attorney]: Yeah, after [U.S. Route] 20.

[Defendant]: Yeah. . . . [A]s far as what I know . . . I knew that we were driving and I was gonna go . . . see my daughter. And . . . after we were driving, we noticed that a . . . black truck was kinda like, I seen him try to get over.

[Detective McCoy]: Okay.

[Defendant]: . . . [S]o there was a little traffic, so it wasn't really too much movement and by the time we knew it, the . . . car got behind us. They . . . put their lights on and we pulled over. . . . [T]hey told us to . . . throw the keys out the window.

[Detective McCoy]: Okay.

[Defendant]: . . . [W]e threw . . . the keys out the window. He told him to put his hands out the window. Put his hands out the window. . . . I don't think they knew I was in the car yet.

[Detective McCoy]: Okay.

[Defendant]: At that time. . . . I was in the car, and I just put my hands up.

[Detective McCoy]: Okay.

[Defendant]: Just 'cause . . . anything, so.

[Detective McCoy]: Yeah.

[Defendant]: I just put my hands up. He said get out the car. I had my phone in my lap. I dropped my phone on the floor. . . . [H]e told me get out the car and I got out the car and that was it.

[Detective McCoy]: Okay. And then . . . who . . . was driving in that car that day?

[Defendant]: . . . [M]y cousin . . . [Darryl].

[Detective McCoy]: [Driver]? Does he have the same last name as you?

[Defendant]: Yes.

[Detective McCoy]: Okay. All right. And then where were you sitting in the car?

[Defendant]: . . . [I]n passenger.

. . . .

[Detective McCoy]: Okay. So then . . . you know, we're gonna speed up a little bit. When—once you guys pull over and your hands were up, did anybody give you any information of what was going on?

[Defendant]: Nah, they, they got me on warrants. They said you got warrants.

[Detective McCoy]: Okay.

[Defendant]: . . . that time.

[Detective McCoy]: Okay. So you . . . had a warrant. All right. . . . [D]o you remember what the warrants were for?

[Defendant]: Traffic warrants, like old traffic warrants.

[Detective McCoy]: All right.

[Defendant]: You know, just not paying fines and stuff like that.

[Detective McCoy]: Okay. Do you . . . normally drive a car?

[Defendant]: No.

[Detective McCoy]: You don't . . . drive anymore?

[Defendant]: No.

[Detective McCoy]: Okay. When was the last time you drove?

[Defendant]: A long time, I can't even remember.

[Detective McCoy]: That long ago that you don't remember?

[Defendant]: Yeah.

[Detective McCoy]: Okay.

....

[Detective McCoy]: You think it's better to just not drive?

[Defendant]: Yeah.

[Detective McCoy]: All right. . . . [A]fter we, you know, we processed the car, I do wanna let you know, we did find a, a BB gun in the car, which as we discussed before . . . you are being charged with that. . . . [W]ho owns that BB gun?

[Defendant]: . . . I honestly don't know.

[Detective McCoy]: You don't know who?

[Defendant]: I honestly do not, yes.

[Detective McCoy]: Okay.

[Defendant]: I don't know.

[Detective McCoy]: All right. So there's, I mean there's, you know, two of you in the car. Is it, I mean, who do you think?

[Defendant]: . . . I really...

[Detective McCoy]: Okay.

[Defendant]: I don't know who is the owner of...

[Detective McCoy]: Okay.

[Defendant]: You know, of . . . yeah.

[Defendant's attorney]: Let's just say this. Do you own the BB gun?

[Defendant]: No.

[Defendant's attorney]: Okay.

[Detective McCoy]: Okay. All right. So does [Darryl] own the BB gun?

[Defendant]: Um, I have no clue if, if he owns it.

[Detective McCoy]: Have you ever seen him with it?

[Defendant]: I mean . . . we had did . . . videos. [H]e's a photographer, so I have seen props before.

. . . .

[Detective McCoy]: Okay.

[Defendant]: But . . . I'm not sure if it was, you know.

[Detective McCoy]: Okay. So you have seen him with the, that BB gun, a BB gun?

[Defendant]: Nah, I'm not saying, I'm not saying with a BB gun. I'm just saying that we have props, so . . .

[Detective McCoy]: And what props are those?

[Defendant]: I mean, like . . . smoke bombs and stuff like that, you know, stuff that we get for props . . .

[Detective McCoy]: Okay. Any firearms, like imitation firearms?

[Defendant]: No.

[Detective McCoy]: No? You've never seen it?

[Defendant]: No.

[Detective McCoy]: Okay. All right.

Defendant and Darryl were both charged under a Union County Indictment Number 22-11-860, with possession of the BB gun. The Union County indictment was dismissed against defendant and Darryl after defendant pled guilty to a disorderly person's offense of obstruction and Darryl was admitted into the Pretrial Intervention Program.

On January 30, 2024, a Hudson County grand jury indicted defendant, charging him with second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count one); second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(2) (count two); and fourth-degree aggravated assault, pointing, N.J.S.A. 2C:12-1(b)(4) (count three).

On April 5, 2024, the State moved to admit defendant's May 3, 2022, statement from the Union County interview under other acts evidence pursuant



to N.J.R.E. 404(b) and Miranda, and requested a N.J.R.E. 104(c) hearing. The State also moved to admit the 9-1-1 calls that the truck driver made on April 20, 2022, under N.J.R.E. 803(c)(1) and N.J.R.E. 803(c)(2), which are not challenged on appeal. Defendant did not testify at the hearing and did not present any witnesses or testimony. On August 27, 2024, the court heard oral arguments from counsel and reserved decision.

In its written opinion, the court granted the State's motions and allowed defendant's statement to be admitted under Miranda:

Here the evidence produced at the testimonial hearing supports the finding that the police provided . . . [d]efendant with all of the information available as of the time of the interview and there is no evidence submitted to suggest that the detective knew that charges were pending in Hudson County. In fact, . . . defendant was not charged in Hudson County for several months after this interview.

Further, the court allowed defendant's statement to be admitted under N.J.R.E. 404(b):

In the instant case, [d]efendant's statements as to his presence in the suspect's car and his denial of knowledge as to the ownership of the BB gun and the Honda are relevant to the alleged shooting incident on April 20, 2022. Further, the statement was made merely days after the incident in question, is clear as to . . . defendant's knowledge of the ownership of the BB gun and the Honda. Its probative value does not outweigh any perceived prejudice. Additionally, the

evidence may be offered for admission under [N.J.R.E.] 404(b)(2): "such as proving opportunity, knowledge, identity, absence of mistake, or lack of accident."

Finally, if this case goes to trial, the court "must instruct the jury on the limited use of the evidence . . . 'with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere.'" Cofield, 127 N.J. at 341 (quoting [State v. Stevens, 115 N.J. 289, 304 (1989)]). This is to ensure there is added protection against any undue prejudice that may result from the admission of the evidence.

This interlocutory appeal followed.

Defendant presents the following arguments for our consideration:

POINT I

THE . . . COURT ERRED BY ADMITTING [DEFENDANT'S] STATEMENT FROM THE UNION COUNTY INDICTMENT BECAUSE IT IS NOT ADMISSIBLE UNDER ANY EXCEPTION TO [N.J.R.E.] 404(b).

POINT II

THE . . . COURT ERRED BY ADMITTING [DEFENDANT'S] STATEMENT BECAUSE IT CANNOT BE SANITIZED BY ANY JURY INSTRUCTION OR REDACTION.

II.

We review the trial judge's factual findings in support of granting or denying a motion to suppress to determine whether "those findings are supported

by sufficient credible evidence in the record." State v. Gamble, 218 N.J. 412, 424 (2014). Generally, on appellate review, a trial court's factual findings on a motion to suppress a defendant's statement to the police will be upheld when they are supported by sufficient credible evidence in the record. State v. S.S., 229 N.J. 360, 374 (2017).

We do not disturb the motion court's factual findings unless those findings are so clearly mistaken as to demand intervention in the interests of justice. Ibid. This is particularly true where the findings of the trial judge "are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). However, we owe no deference to the motion court's conclusions of law, which are reviewed de novo. State v. A.M., 237 N.J. 384, 396 (2019).

"[T]he Fifth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, guarantees the right against self-incrimination[.]" State v. W.B., 205 N.J. 588, 604 (2011) (footnote and citations omitted). "Inherent in every Fifth Amendment analysis is the question of whether the statement was voluntary, and, independently, whether the law enforcement officers taking it complied with Miranda." Id. at 605.

The State has the affirmative duty to prove beyond a reasonable doubt, "both that . . . defendant's statement was voluntary and, if custodial, that . . . defendant was advised of his rights and knowingly, voluntarily and intelligently waived them." Id. at 602 n.3.

A reviewing court "should engage in a 'searching and critical' review of the record to ensure protection of a defendant's constitutional rights." State v. L.H., 239 N.J. 22, 47 (2019) (quoting State v. Hreha, 217 N.J. 368, 381-82 (2014)). "Subject to that caveat," reviewing courts "generally will defer to a trial court's factual findings concerning the voluntariness of a confession that are based on sufficient credible evidence in the record." Ibid.

Any evidence obtained in violation of Miranda must be suppressed at trial. State v. Hartley, 103 N.J. 252, 262 (1986). New Jersey's application of Miranda stems from our common law and is "treated . . . as though it were of constitutional magnitude, finding that it offers broader protection than its Fifth Amendment federal counterpart." State v. O'Neill, 193 N.J. 148, 176-77 (2007).

If the suspect consents to proceed with the interrogation, the rights must be "knowingly and intelligently waived." Miranda, 384 N.J. at 475; Hartley, 103 N.J. at 261. The State must prove the waiver was valid beyond a reasonable doubt. State v. Burris, 145 N.J. 509, 534 (1996). If the suspect invokes the right

to remain silent, that invocation must be "scrupulously honored." Hartley, 103 N.J. at 255-56 (citing Michigan v. Mosley, 423 U.S. 96 (1975)).

A court evaluates whether the State has satisfied its burden by considering the "totality of the circumstances." A.M., 237 N.J. at 398, (citing State v. Presha, 163 N.J. 304, 313 (2000)). Under the totality of the circumstances analysis, a court considers factors such as defendant's "age, education and intelligence, advice as to constitutional rights, length of detention, whether the questioning was repeated and prolonged in nature and whether physical punishment or mental exhaustion was involved." Ibid. (quoting State v. Miller, 76 N.J. 392, 402 (1978)). We next apply these fundamental principles to the matter before us.

Defendant argues that his waiver of Miranda could not have been knowing because he had no knowledge of the Hudson County indictment when the waiver was made. In finding defendant's waiver was "knowing and voluntary," the court stated the following,

Here the court is satisfied that . . . [d]efendant's statement was made knowingly and voluntarily. The testimony of Detective McCoy was credible and established that . . . defendant willingly attended questioning at approximately 3:20 [p.m] with his lawyer present. Defendant was advised that there were Union Township charges against him, and reviewed the Miranda rights with . . . defendant. . . . [D]efendant

signed that waiver in the presence of his attorney and that signed waiver was admitted into evidence at the hearing.

On appeal, defendant reprises his argument that his statement constitutes inadmissible propensity evidence in violation of N.J.R.E. 404(b). Defendant contends his statement at issue does not concern the case at bar—the Hudson County case—but the separately "charged, indicted, and disposed of" case in Union County. The State counters the statement was properly admissible under the four Cofield prongs, which the court analyzed in its ruling.

#### The Cofield Analysis

Under N.J.R.E. 404(b), evidence of "other crimes, wrongs, or acts" is inadmissible as evidence of a person's bad character or criminal predisposition; however, such evidence is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b); see Stevens, 115 N.J. at 300-01.

In order to justify admission, the evidence must (1) "be admissible as relevant to a material issue"; (2) "be similar in kind and reasonably close in time to the offense charged"; (3) "be clear and convincing" evidence of the other

crime or bad act; and (4) have probative value that is not "outweighed by its apparent prejudice." Cofield, 127 N.J. at 338 (citation omitted).

### Prong One

#### Relevance to a Material Issue

The first Cofield prong requires the evidence be "relevant to a material issue genuinely in dispute," ibid., which only requires the offering party to establish that "the evidence makes a desired inference more probable than it would be if the evidence were not admitted." State v. Garrison, 228 N.J. 182, 195 (2017) (quoting State v. Williams, 190 N.J. 114, 123 (2007)).

Here, in regard to prong one, the court stated, "[i]n the instant case, [d]efendant's statements as to his presence in the suspect's car and his denial of knowledge as to the ownership of the BB gun and the Honda [Accord] are relevant to the alleged shooting incident on April 20, 2022." We agree prong one is clearly satisfied as defendant's denial of knowledge of ownership of the gun and his presence in the Honda Accord are directly relevant to the question of who is the owner of the gun and the likelihood that he was in the Honda Accord on the day of the shooting.

## Prong Two

### Similar in Kind, Close in Time

The second Cofield factor "requires that the 'other acts' be 'similar in kind and reasonably close in time to the offense charged.'" State v. Green, 236 N.J. 71, 83 (2018) (quoting Cofield, 127 N.J. at 338). However, that factor is "limited to cases that replicate the circumstances in Cofield." Williams, 190 N.J. at 131; see also Cofield, 127 N.J. 328 (holding a past conviction of conspiracy to distribute drugs was admissible in a subsequent case for conspiracy, unlawful possession and unlawful possession with intent to distribute).

In regard to prong two, the court stated, "the statement was made merely days after the incident in question . . . ." Hence, this factor is clearly met in this instance as the acts occurred close in time to one another, while the same BB gun and Honda Accord were involved in both incidents.

## Prong Three

### Clear and Convincing

Under the third Cofield prong, the prosecution must establish that the other crime "actually happened by 'clear and convincing' evidence." Green, 236 N.J. at 83 (quoting State v. Rose, 206 N.J. 141, 160 (2011)). This has been done



by showing a judgment of conviction, ibid., by the act not being disputed at trial, Garrison, 228 N.J. at 197, or, when a Cofield hearing is not held, by the circumstances and documentation adequately supporting the assertion, Rose, 206 N.J. at 163-64.

In regard to prong three, the trial court determined, "the statement . . . is clear as to . . . defendant's knowledge of the ownership of the BB gun and the Honda [Accord]." We are convinced this factor is clearly met in this instance because it was defendant's statement to Detective McCoy that provided clear and convincing evidence that he was involved in the incident in Union County. Moreover, the statement was knowingly, intelligently, and voluntarily given in the presence of defendant's attorney.

#### Prong Four

##### Probative Value not Outweighed by Apparent Prejudice

Finally, the fourth Cofield prong requires the court to determine "whether the probative value of the evidence is outweighed by its apparent prejudice—'generally the most difficult part of the test.'" Garrison, 228 N.J. at 197 (quoting State v. Barden, 195 N.J. 375, 389 (2008)).

That prong requires an inquiry distinct from the familiar balancing required under [N.J.R.E.] 403: the trial court must determine only whether the probative value . . . is outweighed by its potential for undue

prejudice, not whether it is substantially outweighed by that potential as in the application of [N.J.R.E.] 403. [Green, 236 N.J. at 83-84 (citation omitted).]

"Given the 'inflammatory characteristic of other-crime evidence[,] the trial court must conduct a 'careful and pragmatic evaluation . . . to determine whether the probative worth of the [other-crime] evidence outweighs its potential for undue prejudice.'" State v. J.M., 225 N.J. 146, 161 (2016) (alterations in original) (quoting State v. Willis, 225 N.J. 85, 100 (2016)) (holding that prejudicial effect of evidence of another sexual assault outweighed the probative value).

In regard to prong four, the court stated,

Its probative value does not outweigh any perceived prejudice. Additionally, the evidence may be offered for admission under [N.J.R.E.] 404(b)(2): "such as proving opportunity, knowledge, identity, absence of mistake, or lack of accident."

Finally, if this case goes to trial, the court "must instruct the jury on the limited use of the evidence . . . 'with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere.'" [Cofield, 127 N.J.] at 341 (quoting Stevens, 115 N.J. at 304). This is to ensure there is added protection against any undue prejudice that may result from the admission of the evidence.

We conclude the fourth prong was met. The probative value of defendant's statement is not outweighed by the fact that he was charged with another crime in Union County and those charges were dismissed. Rather, the statement clearly goes to show defendant's presence in the vehicle, and his knowledge regarding ownership of the vehicle and BB gun, which are relevant as to "knowledge, identity, absence of mistake, [and] lack of accident." N.J.R.E. 404(b)(2). Further, the court correctly stated that the jury will be properly instructed on the limited use of the evidence, which will serve to prevent the statement from becoming unduly prejudicial. We discern no error.

Defendant relies on our Supreme Court's holdings in State v. A.G.D., 178 N.J. 56 (2003) and State v. Vincenty, 237 N.J. 122 (2019) for the proposition that his statement could not have been made knowingly or intelligently. The court cited A.G.D., where our Supreme Court held a defendant must have all critical information to make a knowing and intelligent waiver. A.G.D., 178 N.J. at 68. Our Supreme Court stated:

The government's failure to inform a suspect that a criminal complaint or arrest warrant has been filed or issued deprives that person of information indispensable to a knowing and intelligent waiver of rights . . . a criminal complaint and arrest warrant signify that a veil of suspicion is about to be draped on the person, heightening his risk of criminal liability. Without advising the suspect of his true status when he

does not otherwise know it, the State cannot sustain its burden to the Court's satisfaction that the suspect has exercised an informed waiver of rights, regardless of other factors that might support his confession's admission.

[Ibid.]

The trial court addressed Vincenty:

More recently, the Supreme Court reaffirmed this holding in Vincenty. In that case, [d]efendant was first read his Miranda rights and then given a form detailing those rights, which he signed, acknowledging he had been advised of his rights. Vincenty, 237 N.J. at 127. Subsequently, "a few moments later, Detective Mera mentioned that they had charges against Vincenty. Vincenty then stated that he did not get a letter from a judge about the charges and asked detectives what the charges were." Id. at 128.

The Court held that "Vincenty's interrogation illustrates that suspects cannot knowingly and intelligently determine whether to waive their right against self-incrimination if, when making that determination, they have not been informed of the charges filed against them." Id. at 134. New Jersey case law requires that law enforcement officials "make a simple declaratory statement at the outset of an interrogation that informs a defendant of the essence of the charges filed against him." [Ibid.] The State must assure that "defendants are aware of the charges pending against them before they are asked to waive the right to self-incrimination." [Ibid.]

Here the evidence produced at the testimonial hearing supports the finding that the police provided . . . [d]efendant with all of the information

available as of the time of the interview and there is no evidence submitted to suggest that the detective knew that charges were pending in Hudson County. In fact, . . . defendant was not charged in Hudson County for several months after this interview.

In State v. Sims, 250 N.J. 198 (2022), our Supreme Court instructed "[t]he rule announced in A.G.D. is clear and circumscribed. If a complaint-warrant has been filed or an arrest warrant has been issued against a suspect whom law enforcement officers seek to interrogate, the officers must disclose that fact to the interrogee" before beginning their questioning. Id. at 213 (citing A.G.D., 178 N.J. at 134). "The officers need not speculate about additional charges that may later be brought or the potential amendment of pending charges." Id. at 214. Our Supreme Court directed that trial judges are to consider a defendant's claim that police delayed lodging charges in order to avoid having to advise him or her of the charges faced "as part of the totality-of-the-circumstances test." Id. at 216.

Here, Detective McCoy correctly informed defendant of his Miranda rights and reviewed them with his attorney present. In addition, Detective McCoy properly informed defendant of the Union County charges pending against him. We conclude the court aptly determined that the Detective McCoy was not required to inform defendant about the Hudson County indictment

because defendant was not indicted in Hudson County until January 30, 2024, over twenty months after the subject interview took place.

The record is devoid of any evidence that Detective McCoy was aware of any charges pending against defendant in Hudson County at the time of the interview. The court's decision to admit defendant's statement was based upon substantial credible evidence in the record. The court correctly considered the statement was admissible and its ruling was not unduly prejudicial to defendant.

### III.

Finally, we address defendant's argument that the court erred by admitting his statement because it cannot be sanitized by any jury instruction or redaction. According to defendant, there is no limiting instruction or redaction that could sanitize the prejudice inherent in his statement, specifically being arrested and charged with possession of a BB gun in Union County. We are unpersuaded.

If a trial court admits evidence of other crimes or bad acts under N.J.R.E. 404(b), it "must provide a limiting instruction that 'inform[s] the jury of the purposes for which it may, and for which it may not, consider the evidence of defendant's uncharged misconduct, both when the evidence is first presented and again as part of the final jury charge.'" Garrison, 228 N.J. at 200 (alteration in original) (quoting Rose, 206 N.J. at 161). As such, a trial court's admission of

bad act evidence and subsequent failure to provide a limiting instruction after the evidence was presented and as part of the final jury charge is an error.

A "court's [limiting] instruction [concerning other-crime evidence] 'should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere.'" Barden, 195 N.J. at 390 (quoting State v. Fortin, 162 N.J. 517, 534 (2000)). The limiting instruction "should be given when the evidence is presented and in the final charge to the jury." Ibid. (citing Fortin, 162 N.J. at 534-35).

Here, defendant contends the court failed to address exactly how the jury will be instructed about the Union County statement and left unanswered whether the jury will be instructed that defendant's charges stemming from his Union County statement were dismissed.

In State v. Smith, we discussed the model jury charges for other crimes:

The model jury charge unambiguously provides this guidance and further advises the jury that before giving any weight to the other crimes evidence, it "must be satisfied that . . . defendant committed the other [crime]." Model Jury Charges (Criminal), "Proof of Other Crimes, Wrongs, or Acts (N.J.R.E. 404(b))" (rev. Sept. 2016). We know of no reported case that requires

similar instructions be given when two different sets of charges are tried together.

[State v. Smith, 471 N.J. Super. 548, 576-77 (App. Div. 2022).]

In the matter under review, the court has made clear that it or the trial court will provide the requisite jury charge as stated in the court's opinion:

Finally, if this case goes to trial, the court "must instruct the jury on the limited use of the evidence . . . 'with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere.'" [Cofield, 127 N.J.]at 341 (quoting Stevens, 115 N.J. at 304). This is to ensure there is added protection against any undue prejudice that may result from the admission of the evidence.

The court is obligated to craft a jury charge consistent with the evidence adduced at trial. Here, the court has stated the jury will be charged with the model jury charge for other crimes. The court is not required to provide jury instructions in advance of trial as defendant suggests. Indeed, such a request is premature and speculative. Moreover, defendant, through counsel, will have an opportunity to make suggestions and comments on all the instructions to be given at trial. Thus, we are satisfied the court did not err by not providing a jury instruction relative to defendant's Union County statement at this pre-trial juncture.



Affirmed and remanded. We do not retain jurisdiction.

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

A handwritten signature in black ink, appearing to be 'JLD', is written over the text 'file in my office.' and partially over the title 'CLERK OF THE APPELLATE DIVISION'.

CLERK OF THE APPELLATE DIVISION