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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3638-20**

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

TRAVIS FLOOD,

Defendant-Respondent.

Argued March 23, 2022 – Decided April 21, 2022

Before Judges Hoffman, Whipple, and Susswein.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-11-1521.

Patrick Galdieri, II, Assistant Prosecutor, argued the cause for appellant (Yolanda Ciccone, Middlesex County Prosecutor, attorney; Patrick Galdieri, II, of counsel and on the brief).

John P. Flynn, Assistant Deputy Public Defender, argued the cause for respondent (Joseph E. Krakora, Public Defender, attorney; John P. Flynn, of counsel and on the brief).

PER CURIAM

By leave granted, the State appeals from a Law Division order granting defendant's motion to sever the trial of counts charging controlled dangerous substance (CDS) offenses allegedly committed on August 22, 2018—including strict liability for drug-induced death—from counts charging CDS offenses allegedly committed the day after the victim's overdose death. The State also appeals from an order, issued by another Law Division judge, denying the prosecutor's motion for reconsideration. After carefully reviewing the record in light of the applicable legal principles, including the deferential standard of appellate review we apply to trial court severance decisions, we affirm the trial court's decision to grant defendant's severance motion.

I.

We discern the following facts from the grand jury record, mindful that this matter has not yet been tried and that defendant is presumed innocent. Iqbal Singh arranged to purchase CDS from an individual he knew as "Kevin D" and from whom he had previously purchased narcotics on several occasions. The meeting took place on August 22, 2018 at a motel in Sayreville. Iqbal's¹ friend,

¹ Because two participants in these events share the same last name, we use their first names to avoid confusion. We mean no disrespect in doing so.

Jazveer Singh, drove Iqbal to the motel. There, Iqbal met "Kevin D" in the parking lot and purchased a quantity of cocaine in exchange for \$200. Jazveer observed the transaction. After the drug deal was consummated, Iqbal and Jazveer drove to a residence in Old Bridge, where Iqbal distributed the cocaine to his waiting friends.

Jazveer, the only one who did not ingest the cocaine, stepped outside to take a telephone call. When he reentered the residence, he saw all six of his friends on the floor, unconscious. Jazveer called 9-1-1 and reported the emergency.

An officer from the Old Bridge Police Department responded to the 9-1-1 call and found six individuals unconscious from a suspected drug overdose. Police administered Narcan and five of the six regained consciousness. The sixth individual could not be revived and was pronounced dead at the scene.

Police found dollar bills with white, powdery residue near where the six individuals had been found unconscious. Believing these bills may have been used to ingest CDS, police conducted a field test on the bill that appeared to have the most residue. The test showed the presence of fentanyl. The autopsy report by the Medical Examiner later attributed the cause of death to acute

cocaine, fentanyl, and ethanol toxicity, caused by the combination of cocaine, fentanyl, and alcohol found in the victim's system.

Later that night at the hospital, Iqbal told Middlesex County Prosecutors Office (MCPO) Detective Joe Celentano that he had purchased cocaine from an individual he knew as "Kevin D." Iqbal provided to police "Kevin D's" phone number, stored in the contact list on his cell phone. Police determined that the telephone number was associated with defendant. The MCPO then assembled a photo array that included defendant's photo and five filler photos. Another detective with the MCPO administered the photo array identification procedure to Iqbal. Iqbal selected defendant's photo from the array, positively identifying him as the person from whom he had purchased the cocaine just before the overdose event. Iqbal agreed to cooperate and to assist police in their investigation.

The following day, Iqbal arranged to meet "Kevin D" again, this time on police instructions. They set the meeting place at a hotel in West Windsor. When defendant arrived for the meeting, waiting officers placed him under arrest. A search of defendant's vehicle revealed suspected CDS. State Police laboratory tests positively identified methamphetamine and cocaine.

In November 2018, a Middlesex grand jury returned an indictment charging defendant with third-degree distribution of cocaine, N.J.S.A. 2C:35-5(a)(1), (b)(3) (count one); third-degree distribution of fentanyl, N.J.S.A. 2C:35-5(a)(1), (b)(5) (count two); first-degree strict liability for drug-induced death, N.J.S.A. 2C:35-9 (count three); second-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1), (b)(2) (count four); and second-degree possession of methamphetamine with intent to distribute, N.J.S.A. 2C:35-5(a)(1), (b)(9)(a) (count five). The indictment alleged that counts one, two and three were committed on August 22, 2018, and that counts four and five were committed on August 23, 2018.

In September 2020, defendant filed a motion to sever the counts related to the alleged August 22 offenses—including the strict liability homicide—from the counts pertaining to the alleged August 23 offenses, arguing prejudicial joinder.²

² Defendant also moved to dismiss part of the indictment claiming certain alleged offenses were improperly venued in Middlesex County. Although defendant's appeal brief raises that issue, defense counsel at oral argument acknowledged that defendant did not cross-appeal the denial of his venue motion. Accordingly, that issue is not properly before us and we decline to address it.

On January 14, 2021, Judge Joseph L. Rea heard oral arguments and granted defendant's motion to sever the August 22 charges from the August 23 charges for purposes of trial.

On February 2, 2021, the State filed a motion for reconsideration of the grant of severance. The reconsideration motion was heard by a different judge. On June 17, 2021, Judge Thomas J. Buck heard oral arguments and made findings on the record in an oral opinion. On June 22, 2021, Judge Buck issued an order denying the State's motion for reconsideration.

The State thereafter filed a motion for leave to appeal the grant of severance and denial of reconsideration, which we granted. The State raises the following contention for our consideration:

POINT I

THE TRIAL COURT'S SEVERANCE RULING
AMOUNTED TO AN ABUSE OF DISCRETION
REQUIRING REVERSAL.

More specifically, the State argues that both Law Division judges misapplied Rules 3:7-6 and 3:15-2(b). The State contends that the August 22 and August 23 charges were sufficiently similar to justify permissive joinder, asserting there was at least "some connection between [the] separate counts rendering the evidence probative of a material issue in [the] other charge."

Recognizing that Rule 3:15-2(b) prohibits joinder when "it appears that a defendant or the State is prejudiced," the State argues that because it bears the burden of proving identity, and because defendant refuses to stipulate to being the person who distributed CDS to Iqbal, "defendant's identity was a material issue at trial and proof of defendant's identity was essential" to the State's ability to prove that defendant was the person who sold fentanyl-laced cocaine to Iqbal on August 22. The State adds that any danger of prejudice can be cured with a limiting jury instruction.

We begin our analysis by acknowledging the legal principles governing this appeal.³ The scope of our review is limited. We afford deference when reviewing a trial court's decision whether to try a defendant on multiple counts simultaneously or to sever counts. State v. Sterling, 215 N.J. 65, 73 (2013). Additionally, "[t]he decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." State v. Scott, 229 N.J. 469, 479 (2017) (quoting In re Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383–84 (2010)). We thus apply "a deferential standard in reviewing a trial court's evidentiary rulings and uphold its determinations 'absent a showing of an abuse

³ Because we affirm Judge Rea's initial decision to grant defendant's suppression motion, we need not review the rigorous legal standard for granting a motion for reconsideration. See R. 2:11-3(e)(2).

of discretion." Ibid. (quoting State v. Perry, 225 N.J. 222, 233 (2016)). Relatedly, "[a] reviewing court must not 'substitute its own judgment for that of the trial court's unless there was a 'clear error in judgment'—a ruling 'so wide of the mark that a manifest denial of justice resulted.'"" Ibid. (quoting State v. Marrero, 148 N.J. 469, 484 (1997)). We add that deference is especially appropriate when, as in this case, two judges have examined the facts and reached the same conclusion. Cf. State v. Locurto, 157 N.J. 463, 474 (1999) ("Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error.") (citing Midler v. Heinowitz, 10 N.J. 123, 128–29 (1952)).

Defendant argues that for purposes of strict liability for drug-induced death, the possession-with-intent-to-distribute offenses alleged to have occurred after the overdose death constitute "other crimes." The law is well-settled that evidence of other crimes is generally excluded at trial and is admissible only for the limited purposes set forth in N.J.R.E. 404(b). The general rule excluding other crimes evidence is based on the well-recognized potential for such evidence to prejudice a defendant by suggesting to a jury that he or she has a propensity to commit crimes. See State v. Weeks, 107 N.J. 396, 406 (1987).

Because of the dangers its admission risks, "evidence proffered under Rule 404(b) 'must pass [a] rigorous test.'" State v. Garrison, 228 N.J. 182, 194 (2017) (alteration in original) (quoting State v. Kemp, 195 N.J. 136, 159 (2008)).

In State v. Cofield, the Court adopted a four-part test to determine the admissibility of other bad acts and crimes evidence. 127 N.J. 328, 338 (1992). To be admissible under N.J.R.E. 404(b), the evidence: (1) must be relevant to a material issue which is genuinely disputed; (2) the other conduct must be similar in kind and must have occurred reasonably close in time to the events at issue in the criminal trial; (3) evidence of the other conduct must be clear and convincing; and (4) its probative value must not be outweighed by prejudice to the defendant. Ibid.; accord State v. Green, 236 N.J. 71, 81–82 (2018).

In this case, the State argues that the alleged August 23 crimes are relevant to prove the identity of the person who sold CDS to Iqbal on August 22. In Sterling, the Court recognized that "evidence of a later crime may be admitted on the issue of identity when defendant's connection to the first crime was established by specific evidence discovered during the second crime." Sterling, 215 N.J. at 92. Such evidence "may also be admitted on the issue of identity when a particular weapon or disguise used in one crime connects a defendant to another offense." Id. at 93 (citing State v. Gillispie, 208 N.J. 59, 88 (2011))

(admitting evidence of prior crime where defendant used same gun); State v. Hardaway, 269 N.J. Super. 627, 630 (App. Div. 1994) (allowing limited evidence of later robbery to prove defendant's presence at killing because same gun was used in both crimes); and State v. Porambo, 226 N.J. Super. 416, 423–24 (App. Div. 1988) (permitting evidence of separate robbery where distinctive mustache disguise connected defendant to both robberies)).

As a general matter, "[t]he 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.'" Sterling, 215 N.J. at 73 (alteration in original) (quoting State v. Chenique-Puey, 145 N.J. 334, 341 (2013)). It is "[t]he admissibility of the evidence in both trials [that] renders inconsequential the need for severance." State v. Davis, 390 N.J. Super. 573, 591 (App. Div. 2007) (citation omitted). We emphasize that the Court in Sterling held that "[a] court must assess whether prejudice is present, and its judgment is reviewed for an abuse of discretion." 215 N.J. at 73 (citing Chenique-Puey, 145 N.J. at 341).

We add that under Rule 3:7-6, two or more offenses may be tried in the same proceeding "if the offenses charged are [(1)] of the same or similar character or [(2)] are based on the same act or transaction or [(3)] on two or

more acts or transactions [either] [(a)] connected together or [(b)] constituting parts of a common scheme or plan." However, if such joinder would be prejudicial, the Rules allow for relief under Rule 3:15-2. Ibid. Under that rule, if "it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation the court may order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief." R. 3:15-2(b). As the Court explained in Sterling,

The relief afforded by Rule 3:15-2(b) addresses the inherent "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)).

[Sterling, 215 N.J. at 73.]

Applying these foundational principles to the record before us, we do not believe that either Law Division judge committed an abuse of discretion in balancing the need for joinder against the risk of unfair prejudice to defendant. As our Supreme Court explained in State v. Darby, the evidence must be both "relevant to prove a fact genuinely in dispute" and "necessary as proof of the

disputed issue." 174 N.J. 509, 518 (2002). Judge Rea determined that although defendant has not agreed to stipulate that he was the person who sold drugs to Iqbal on August 22, the true disputed issue in this case is not identity but rather whether the State can prove the causation element of the strict-liability-for-drug-induced death offense. Further, the judge noted that if, in the course of trial, identity did present itself as a genuinely disputed issue, the State would retain the right to request a Cofield hearing to introduce the barred evidence in rebuttal. Because the trial court explicitly left the door open for the State to assert at trial that evidence pertaining to the August 23 is needed to establish identity, if it turns out identity is genuinely disputed, we do not believe the State has been prejudiced by the decision to try the two sets of charges separately.

Furthermore, in balancing the State's need to present such evidence against the risk of unfair prejudice to defendant, Judge Rea reasoned that the State "[has] a lot of evidence of identity,⁴ and . . . the [potential] prejudice of counts four and five, particularly with regard to drug-induced death, . . . is monumental." Judge Rea expressed concern that "if it's a close call on [the strict

⁴ We note that, in assessing whether and to what extent defendant's identity was at issue, Judge Rea remarked that the State had "evidence that Mr. Iqbal knew defendant from three or four prior times when he brought drugs from [defendant]."

liability for drug-induced death] count, I think there's a serious danger that a jury could say [']ah, he's just a drug dealer anyway. Find him guilty on count three.['] . . . [T]he potential prejudice of four and five mandate that . . . they be severed." We decline to second-guess either Judge Rea's assessment of the State's ability to prove identity or his assessment of the risk that evidence of post-overdose-death drug crimes would prejudice defendant with respect to the jury's consideration of the homicide.

Nor are we persuaded by the State's argument that any potential for unfair prejudice could be eliminated by proper jury instructions limiting how the jury might consider the August 23 offenses to prove that defendant committed the August 22 crimes. In rejecting the State's argument in this particular application, we accept that juries are presumed to follow a trial court's instructions. See State v. Burns, 192 N.J. 312, 335 (citing State v. Nelson, 155 N.J. 487, 526 (1998)) ("One of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions."). But, as the State acknowledged at oral argument, many convictions have been reversed in cases where trial courts permitted prosecutors to present other crimes evidence under the rubric of N.J.R.E. 404(b). We add that the rigorous test devised under N.J.R.E. 404(b), would not be necessary if all that were needed was a limiting

instruction to mitigate the potential for prejudice. The Court's firm admonition in Sterling that a trial court "must assess whether prejudice is present," 215 N.J. at 73, would ring hollow if such prejudice in any event could be addressed by a limiting instruction. The Law Division judges appropriately accounted for all relevant circumstances, including the degree to which identity is likely to be genuinely contested and the other proofs of identity available to the State. Accordingly, we do not believe the Law Division judges abused their discretion in concluding that, in this case, the two sets of charges are better tried separately.

We likewise reject the State's argument that we should overturn the trial court's severance ruling because it will be a waste of resources to convene two trials. Trial judges, no less than the parties and victims, have a keen interest in avoiding unnecessary trials. We decline to rely on notions of judicial economy to second-guess the severance decision in this case. We also decline to speculate on the outcome of the first trial or the impact that outcome might have on the resolution of the remaining counts, especially given the prevalence of negotiated dispositions.

In sum, we do not believe both Law Division judges abused their discretion in assessing the potential for prejudice if both sets of charges were to be tried together. See Sterling, 215 N.J. at 73 ("A court must assess whether

prejudice is present, and its judgment is reviewed for an abuse of discretion."). While we might not have reached the same conclusion were it our decision to make in the first instance, we see no basis for appellate intervention applying an abuse-of-discretion standard. In view of our holding that Judge Rea did not abuse his discretion in granting defendant's severance motion, we need not address whether Judge Buck erred in denying the State's motion for reconsideration applying the rigorous standard for such applications. See supra note 2. To the extent we have not specifically addressed them, any remaining arguments raised by the State lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirm.

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



CLERK OF THE APPELLATE DIVISION