
STATE OF NEW JERSEY,	:	SUPERIOR COURT OF NEW JERSEY
		APPELLATE DIVISION
Plaintiff-Appellant,	:	
		DOCKET NO. A-1589-24
v.	:	
OTWAY GARLAND	:	
	:	<u>CRIMINAL ACTION</u>
Defendant-Respondent.	:	
	:	On Leave to Appeal an Order
		granting Severance of Counts,
		entered in the Superior Court,
		Law Division, Essex County.
		Sat Below:
		Hon. Lorie E. Grifa, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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¹ The State’s brief from below has been included because it provides the most complete statement of the facts in this case. The transcript does not lay out all the necessary facts for this case.

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Statement of Procedural History

Initially, defendant was charged under three separate indictments.

Indictment No. 24-01-00061-I was returned on January 16, 2024, and charged defendant with one count of third-degree burglary and one count of third-degree theft from the October 23, 2023 incident.

Indictment No. 24-01-00062-I was returned on January 18, 2024, and charged defendant with one count of second-degree eluding, one count of third-degree receiving stolen property (the GMC Terrain), one count of fourth-degree obstruction, one count of third-degree resisting arrest, one count of fourth-degree unlawful possession of a weapon (vehicle), one count of third-degree possession of a weapon for unlawful purpose (vehicle), and two counts of second-degree aggravated assault by eluding related to the October 27, 2023 incident.

Indictment No. 24-01-102-I was returned on January 24, 2024, and charged defendant with two counts of third-degree burglary for the October 25, 2023 Valley Fair Mall burglary, and one count of first-degree robbery related to the October 27, 2023 robbery.

Superseding Indictment No. 24-06-01195-I was returned on June 24, 2024, which incorporated all the charges on the previous three indictments. On November 15, 2024, defendant filed a motion to sever counts 9 and 10

(October 23, 2023 burglary) and Counts 11 and 12 (October 25, 2023 burglary) from Counts 1-8 & 13 (October 27, 2023 eluding and robbery).

On November 25, 2024, a second superseding Indictment, No. 24-11-2439-I, was presented to the grand jury and returned on December 3, 2024. That indictment included counts for conspiracy, criminal mischief, and burglary tools for the October 23, 2023 incident (Counts 1-5), unlawful possession of a weapon (machete) and possession of a weapon for unlawful purpose (machete) for the October 25, 2023 burglary (counts 6-9), and unlawful possession of a weapon (handgun) and possession of a weapon for unlawful purpose (handgun) for the October 27, 2023 robbery and eluding incident (counts 10-20). (Pa1-21).

On December 11, 2024, defendant's motion to sever was granted in part wherein counts 1-9 relating to the October 23, 2023, and October 25, 2023, burglaries were severed from the remaining counts on Indictment 24-11-2439-I relating to the October 27, 2023, robbery and eluding. (T34:13-35; Pa22-23).

Statement of Facts²

On October 23, 2023, a commercial burglary report was taken by Newark Police officers at Always Home Care located at 60A Ferry Street. Officers met Ms. Xiomara Cabrera-Pena (“Cabrera-Pena”) and Ms. Ivonne Aguirre-Ortiz (“Aguirre-Ortiz”). Aguirre-Ortiz stated that on Friday, October 20, 2023, she closed Always Home Care at approximately 5:00 p.m. They returned on Monday, October 23, 2023, at around 8:00 a.m. and found the premises ransacked. They searched the location and found that two Samsung Tablets and approximately \$300.00 in U.S. currency was taken. (Pa27-28)

On October 23, 2023, Detective Brandon Ortiz obtained and reviewed surveillance footage from Always Home Care. Being in black and white, it showed a male suspect (later identified as Otway Garland (“defendant”)) wearing a light-colored sweater, light-colored pants and light-colored sneakers with dark markings on the heel inside the location on October 23, 2023, at around 1:49 a.m. (Pa28). Defendant had two visible tattoos on his face; one appears to be the outline of a heart on his left cheek, and the other appears to be two lines above his left eyebrow. Also visible on the surveillance footage are tattoos on the back of each of his hands. (Pa28). The surveillance footage shows defendant wearing a neck chain that can be seen dangling at various

² These are adopted from the State’s brief below, (Pa27-54)

points throughout the video. Defendant can be seen going through the different desks and taking the tablets and money that were reported missing. (Pa28).

Two days later, Irvington Police officers were dispatched to Valley Fair Mall (“the mall”) located at 468 Chancellor Avenue on a burglary call. Upon arrival, officers noticed the main entrance of the mall was open. (Pa30). They entered the mall and saw the doors to Value Zone, a store within the mall, were open. A check of Value Zone revealed three cash registers opened and emptied. Officers also located several ten-dollar bills on the floor of the store next to the counter. (Pa30). On the second floor, officers discovered the main office window had been smashed out. Officers noted several keys at the doorway to the main office and that the camera surveillance system had been damaged. (Pa30).

Detective Edwin Pierre was assigned to investigate the burglary. On October 26, 2023, he met with superintendent Carlos, who directed him to video footage starting in the afternoon of Tuesday, October 24, 2023. (Pa30-31).

The video showed at 5:59 p.m., a blue GMC SUV with a specific New Jersey registration entered Wendy’s parking lot traveling northbound towards the Valley Mall Plaza. (Pa31). The driver was wearing a beige top, and he

parked the vehicle in a parking space located in front of the main entrance of the mall. (Pa31). The front passenger exited the vehicle wearing all black clothing with a “security” logo on the back of his hooded sweater, and walks towards the Wendy’s restaurant. Meanwhile, the driver (later identified as defendant) remained in the vehicle. (Pa31).

Shortly after, defendant exited the blue GMC wearing a beige hooded sweater, blue jeans, and white and blue/black “Air Jordan 12 Retro” sneakers and a dark-colored baseball cap. (Pa31). He walks towards the mall via the front entrance at 6:01 p.m. At 6:02, defendant runs back to the GMC carrying a bag. Detective Pierre also reviewed another camera angle with a closer view of patrons entering and exiting the mall’s front entrance. (Pa31). From this angle defendant can be seen entering the mall and exiting a few minutes later with the black bag. (Pa31).

At around 11:30 p.m., defendant returned to the mall wearing the same exact clothing from earlier that day. He was accompanied by another unknown suspect. (Pa31). The second suspect was wearing all black clothing, a black face mask, and black gloves. (Pa32). Then, defendant appeared in front of the Value Zone store and began to tamper with the door with a machete in his hand. (Pa32). He opened the door with the machete and hopped over the register counter and removed \$750 dollars from three registers. The unknown

accomplice stood by as a lookout. (Pa32). Defendant was wearing the same Retro 12 Jordan sneakers and his hand tattoos are plainly visible as he removes the money from the register. (Pa32). At one point defendant looks up and you can see his face clearly. He was also wearing a similar chain and light-colored hoodie as that of the October 23, 2023 burglary of Always Home Care. (Pa32).

Two days after the mall burglary on October 27, 2023, officers responded to the Gasorama gas station located at 919 Springfield Avenue. (Pa35). Upon their arrival they met the victim. He informed them a known individual, later identified as defendant, approached him and asked him to use his cell phone as a flashlight to look for an item inside his vehicle. (Pa35). Because the victim knew defendant from previous interactions at the gas station, he felt comfortable enough to loan him the cell phone. However, defendant placed the cell phone in his pocket. (Pa35).

When the victim asked for his phone back, defendant punched him in the arm. The victim also stated that he saw a black handgun in defendant's front right pocket, and due to him being assaulted he did not further engage. The cell phone which was taken was a Samsung Galaxy valued at between \$400-\$500. (Pa35).

Cameras are present at the gas station, but none are by the gas pumps, only inside the convenience store. Defendant had been operating the same

GMC Terrain, blue in color, with the same New Jersey registration; a confirmed stolen vehicle which was also involved the Valley Fair Plaza burglary. (Pa35).

Detective Pierre responded to the scene and had the victim transported to police headquarters to give a statement. (Pa35-36). The victim showed Detective Pierre and Police Officer Muhammed pictures, and both were able to immediately identify defendant as the robbery suspect. (Pa36). Officer Muhammad explains to the other officers on scene how he knows defendant and how he had even seen him driving the same GMC Terrain earlier in the day. (Pa36).

At approximately 2:30 a.m. on October 27, 2023, patrol units were advised that a robbery occurred at 919 Springfield Avenue. (Pa36). Preliminary details of the robbery were disseminated and Detective James Dorval learned that the suspect was operating a blue GMC Terrain with a specific New Jersey registration. During roll call, Detective Dorval learned that the vehicle was reported stolen out of Jersey City on October 24, 2023, and that the vehicle was seen circling the area of Ellis Avenue and 19th Avenue in Irvington earlier in the day. (Pa36).

While patrolling near 18th Avenue and 21st Street, Detective Dorval observed a dark SUV flicking his high beams traveling south on 21st Street

towards him. Detective Dorval noticed the license plate on the vehicle was the same as that of the stolen GMC Terrain. (Pa36). He made a U-Turn and the driver of the GMC began accelerating at a high rate of speed, disregarding stop signs and preventing the detective from conducting a lawful traffic stop. (Pa36).

A vehicle pursuit ensued throughout Irvington and Newark and terminated on Coit Street in Irvington after the GMC crashed head-on into a police vehicle. (Pa37). At the time of his arrest, defendant was wearing multiple chains around his neck including ones similar to those he wore while committing the two burglaries. (Pa37). A search of the vehicle was conducted and detectives retrieved black clothing that matched clothing worn by the second suspect during the night at Vally Fair Plaza, and the stolen phone. (Pa44-45).

The Severance Hearing

At the December 11, 2024 severance hearing, the State argued that there are multiple factors that demonstrated a nexus between the three incidents, specifically: (1) defendant wore the same hooded sweatshirt during both burglaries; (2) when arrested, defendant was wearing the same chains he wore during the first two burglaries and the same or similar shoes he wore during the first burglary; (3) when arrested, defendant was driving the same vehicle

that was seen on surveillance footage involved in the October 25, 2023 burglary; (4) in surveillance video of the first two burglaries, defendant's face and hand tattoos are clearly visible; and (5) the black clothing found inside the vehicle matches the clothes of the unknown co-conspirator in the first burglary. The State argued all of this evidence is admissible to prove, in part, identity. Furthermore, all of this evidence overlaps and connects all three crimes, which all occurred within a few days of each other. (T13:13-33:16).

The judge disagreed. First, she mistakenly opined that the only link between these crimes is a hooded sweatshirt and a necklace. (T17:21-25). Then, she disagreed that the car held much evidentiary value because it was "just a vehicle" with no characteristics attached to it because the officers did not know it was stolen until later. (T19:23-20:4). However, the car involved in the burglary was the same make and model and had the same registration as the one used to elude the police after the robbery. The judge later told the prosecutor that the black clothing found in the car could just be clothing or laundry, even if a jury could conclude it was that of a co-conspirator. (T30:11-16). The prosecutor had to explain that the clothing was unique and matched that of the co-conspirator. (T30:17-31:13).

Then the judge asked the prosecutor how defendant could have a fair trial if a jury hears about three different indictable offenses that took place

over four days. (T26:18-21). The court noted that the State had a good argument that the burglaries constituted a common scheme but disagreed that the robbery should be tried with them. (T27:20-23). The court stated that defendant being apprehended with the same face tattoos and chains are indicia of reliability as to the identification of who committed the burglaries, but that is not enough to “claw” the robbery into a superseding indictment with the burglaries. (T29:14-30:1).

The judge found:

As to the motion to sever only. I am satisfied that the defendant has raised some serious concerns that require severance as to the burglaries from the events of October 27th which are the robbery of the gas station attendant and the eluding.

I find that the only common thread is the unlawful taking of property. In the Court’s view, there is a serious risk that this will be presented or perceived, even if that is not the overt presentation of the -- of the prosecution, that this is a crime spree perpetrated by one person and an unknown individual or individuals.

I believe that this creates a risk that the prejudice will outweigh the probative value of the linkage of these events. And that there is a risk that the defendant would be simply seen as a bad guy by the jury. And that is inappropriate under both the court rules and the case law.

I am not satisfied that although the court rule and case law point to judicial economy and expedience. That

they are sufficient to outweigh what I believe is a potential due process violation.

So, I'm gonna [sic] sever the two burglaries from the robbery and the eluding. And so, they will be tried as one case. And the robbery and eluding which all happened on the same day will be tried as a second case.

However, to be clear, I am also satisfied that the two burglaries can be linked on one indictment. They are basically a day apart. They involve forced entry into a commercial premises. They involve the taking of property from that premises.

And I am satisfied under [N.J.R.E.] 404B that elements of what is sometimes known as the mimic rule are met here. In particular intent, absence of mistake and common scheme of plan.
[(T34:13-35:24)].

The judge severed the two burglaries from the robbery and eluding, ordered the burglaries to be tried as one case, and the robbery and eluding to be tried together as a second case.

Nowhere in the court's decision does she mention Cofield³, or any of its factors until ruling the two burglaries can be tried together. While she did opine the risk of prejudice outweighs the probative value, she fails to mention any of other factors in her decision. During the back and forth with the prosecutor she brings up that the burglaries and robbery are four days apart, but that is the extent of her consideration of the second Cofield factor.

³ State v. Cofield, 127 N.J. 328 (1992).

Legal Argument

The motion judge erred in severing the two burglaries from the robbery and eluding and ordering they be tried as two separate cases. The connection between the separate events renders the evidence probative of the material issue of identity in all three incidents. The evidence of the neck chains, the GMC Terrain being driven by defendant during the mall burglary and then the robbery and eluding incidents, defendant's clothes, and the clothes recovered from the vehicle would be admissible in both cases to prove identity, and thus the counts should not have been severed. Moreover, the incidents occurred within only four days of each other.

First, on October 23, 2023, defendant was wearing a light-colored hoodie and a neck chain when he burglarized the Always Home Care. Two days later, on October 25, defendant arrived at the mall in a stolen GMC Terrain wearing the same hoodie and steals a bag from the security desk. Later that night he returns, wearing the same hoodie and the same neck chain from the first burglary, with an accomplice wearing all black clothing.

Then, at 2:00 a.m. on October 27, he robs a gas station attendant of his phone and flees from the police in the same blue GMC Terrain. All black clothing was recovered from the GMC Terrain, matching the clothing worn by defendant's accomplice during the mall burglary. When he was arrested,

defendant was in the same vehicle used during the mall burglary and the robbery, the stolen cell phone is located within the vehicle, and he is wearing the same neck chains seen in all the videos of him committing these crimes.

Point I

The trial court abused its discretion in granting severance. (T34:13-35:24).

The trial court abused its discretion in granting the defendant's motion for severance. Severance isn't required upon a bare allegation that some prejudice may develop at a joint trial. The judge's decision failed to consider that the evidence is admissible in both cases on the basis of identity, which is a permissible use of other-crimes evidence. Additionally, the judge's concerns about prejudice are overly general and do not go beyond the inherent danger whenever several crimes are tried together.

The following principles inform this Court's analysis. Rule 3:7-6 permits joinder of offenses in one indictment if they are "of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan...." Rule 3:15-2(b) permits a defendant to seek relief from prejudicial joinder.

"Charges need not be identical to qualify as 'similar' for purposes of

joinder under Rule 3:7-6.” State v. Sterling, 215 N.J. 65, 91 (2013). The rule “expressly permits joinder when there is some connection between separate counts rendering the evidence probative of a material issue in another charge.” Ibid. The rules are therefore construed to create a preference for joint trials when “the crimes charged arise from the same series of acts” or when “much of the same evidence is needed to prosecute each defendant.” State v. Brown, 118 N.J. 595, 605 (1990).

Our Supreme Court has explained that absent “substantial” prejudice to a defendant’s right to a fair trial, joinder of offenses is preferred; some “potential” for prejudice to the defense may exist, but, “if separate offenses were required to be tried separately in all circumstances, the multiplicity of trials would disserve the State and defendant alike.” State v. Manney, 26 N.J. 362, 366 (1958). Our courts have therefore long recognized that joinder furthers the important interests of judicial economy and efficiency. Sterling, 215 N.J. at 72-73; State v. Chenique–Puey, 145 N.J. 334, 341 (1996); State v. Urcinoli, 321 N.J. Super. 519, 543 (App. Div.), certif. denied, 162 N.J. 132 (1999); State v. Coruzzi, 189 N.J. Super. 273, 298 (App. Div. 1983). While those interests cannot outweigh a defendant’s right to a fair trial, “[t]he interests of economy and efficiency may require that similar or related offenses be joined for a single trial, so long as the defendant’s right to a fair

trial remains unprejudiced.’” Sterling, 215 N.J. at 73 (quoting Coruzzi, 189 N.J. Super. at 298). And while there is always some “inherent ‘danger when several crimes are tried together,’” ibid. (quoting State v. Pitts, 116 N.J. 580, 601 (1989)), more is required for there to be separate proceedings; a defendant must show substantial prejudice will befall him, and joinder would deny him a fair trial. Manney, 26 N.J. at 366; State v. Lado, 275 N.J. Super. 140, 149 (App. Div.), certif. denied, 138 N.J. 271 (1994).

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.” Sterling, 215 N.J. at 73. The “N.J.R.E. 404(b) requirements must be met, [as set forth in] State v. Cofield, 127 N.J. 328, 338 (1992), and the evidence of other crimes or bad acts must be relevant to prove a fact genuinely in dispute and the evidence is necessary as proof of the disputed issue.” Sterling, 215 N.J. at 73.

Cofield sets forth a four-prong test for admissibility: 1) the evidence must be relevant to a material issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or identity; 2) it must be similar in kind or reasonably close in time to the offense charged; 3) evidence of the other

crime must be clear and convincing; and 4) the probative value of the evidence must not be outweighed by prejudice to the accused. 127 N.J. at 338.

The fourth 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 of such evidence is outweighed by its potential for undue prejudice, not whether it is substantially outweighed by that potential....” State v. Green, 236 N.J. 71, 83-84 (2018).

Appellate courts typically review decisions on severance motions for an abuse of discretion. State v. Weaver, 219 N.J. 131, 149 (2014). To “establish an abuse of discretion the defendant must demonstrate that without severance he was unable to receive a fair trial and that he suffered compelling prejudice against which the trial court could offer no protection.” State v. Morant, 241 N.J. Super. 121, 139 (App. Div. 1990) (quoting United States v. Magdaniel–Mora, 746 F.2d 715, 718 (11th Cir. 1984)). However, “when a trial court does not analyze the admissibility of other-crimes evidence under Cofield, we may conduct a plenary review to determine its admissibility.” State v. Barden, 195 N.J. 375, 391 (2008) (citing State v. Lykes, 192 N.J. 519, 534 (2007)).

Turning to the facts of this case, the judge below did not conduct a Cofield analysis when deciding whether to grant defendant’s motion to sever. During her oral opinion, the judge found, “the only common thread is the

unlawful taking of property” between the first two burglaries and the robbery, and that “there is a serious risk that this will be presented or perceived, even if that is not the overt presentation of the – of the prosecution, that this is a crime spree perpetrated by one person and an unknown individual or individuals.” (T34:19-25). The judge then goes on to hold that this creates a risk that the prejudice will outweigh the probative value of allowing the incidents to remain joined, and that she was not satisfied judicial economy and expedience outweigh what she believed was a potential due process violation. (T35:1-10).

The court failed to take into account that the evidence the State proffered, including the matching face and hand tattoos, the matching clothing and neck chains, the fact that he was the driver of the blue GMC Terrain during the second burglary and the robbery, and the clothing found in the GMC Terrain all establish defendant’s identity – which is a material issue in dispute. Had the court performed a proper Cofield analysis, the judge would have denied defendant’s severance motion.

Looking at the Cofield factors, severance of this case into two trials was unwarranted. The evidence of each incident was relevant to prove identity. The crimes were committed over a short period of time and included overlapping evidence that coalesced upon defendant’s arrest.

The first prong of Cofield requires that the evidence be relevant “to a material issue in dispute, such as motive, intent, or an element of the charged offense.” State v. Rose, 206 N.J. 141, 160 (2011). “Identity is a material issue when a defendant claims he was not the perpetrator of the charged crime.” See Sterling, 215 N.J. at 99; State v. Baluch, 341 N.J. Super. 141, 192 (App. Div. 2011). The New Jersey Supreme Court explained “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.

As noted by the motion court, the first and second burglaries were properly kept on the same indictment. But the robbery case’s evidence establishes defendant’s identity as the driver of the Blue GMC at the Valley Fair Mall. Here, defendant’s connection to the second burglary is established by his operation of the Blue GMC, his neck chains, and his face and hand tattoos. The black clothing found inside the vehicle matches the description of the unknown co-conspirator in the Vally Fair Mall burglary and thus is relevant in proving defendant’s identity as well.

It also established defendant as the perpetrator of the first burglary at Always Home Care. The defendant’s connection to the Always Home Care burglary is his face and hand tattoos, his neck chain, and his sneakers. The fact

that the defendant was arrested while driving the same car used in the second burglary, containing the same clothes worn by his co-conspirator, wearing the same neck chains, and bearing the same tattoos as the suspect of both burglaries is all evidence of the identity of who committed those burglaries. This evidence is clearly relevant to the material issue of identity.

The second prong of Cofield is whether the evidence is similar in kind and reasonably close in time to the offense charged. The second prong of Cofield is not universally applied. See State v. Williams, 190 N.J. 114, 131 (2007). Proof of the second prong is limited to those that replicate the circumstances in Cofield, where “evidence of drug possession that occurred subsequent to the drug incident that was the subject of the prosecution was relevant to prove possession of the drugs in the charged offense.” State v. Barden, 195 N.J. 375, 389 (2008) (citing Williams, 190 N.J. at 131).

Even so, both the burglaries and the robbery and eluding took place within a few days of each other. The first burglary took place on October 23, the second on October 25, and the robbery and eluding happened in the early morning on October 27. To the extent this prong applies, it favors joinder of these offenses.

The third prong, that the evidence of the other crime must be clear and convincing, has been met. The State can prove all the crimes charged in the

indictment beyond a reasonable doubt, and the crimes are supported by overwhelming evidence, as described above.

Lastly, the probative value of the evidence vastly outweighs any potential for undue prejudice. The determination is “whether the evidence was unfairly prejudicial, that is whether it created a significant likelihood that the jury would convict defendant on the basis of the uncharged misconduct because he was a bad person, and not on the basis of the actual evidence adduced against him.” Rose, 206 N.J. at 164.

While the court below believed that the presentation of the evidence from all three events together would create a “risk” that the defendant “would be simply seen as a bad guy,” the allegation that defendant committed two burglaries, where no one was injured, two days before he robbed a gas station attendant, is not so inherently inflammatory that it would divert the finder of fact from a reasonable and fair evaluation of the basic issues of the case. As noted, a defendant must show prejudice that negated his right to a fair trial beyond the inherent dangers associated with a single trial, not just the “mere possibility of such harm.” Manney, 26 N.J. at 366; Lado, 275 N.J. Super. at 149. A strong jury instruction will eliminate the possible prejudice that concerned the motion judge.

Furthermore, the availability of less inflammatory sources of evidence of equally probative value is not available. There were no eyewitnesses to either incident. Establishing the defendant's identity by establishing the nexus between his tattoos, neck chains and his presence in and possession and control over the vehicle is crucial to the State's case. It is clear that, in this case, the probative value is not outweighed by its prejudicial effect and does not create a significant likelihood that the fact-finder would convict defendant on the basis of the other-crimes evidence because he is a bad person, and not on the basis of the actual evidence adduced against him.

Additionally, severing this trial into two separate ones is uneconomical and a waste of precious judicial and law enforcement resources. The judge and at least two attorneys would have had to try two cases in front of two different juries with much of the same evidence admitted to prove each crime in the indictment. The order granting severance must be reversed and the matter remanded for one single trial.

Conclusion

For these reasons this Court must reverse the severance order under review, and remand for a single trial.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1589-24
INDICTMENT NO. 24-11-02439-I

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Appellant/ Cross-Respondent,	:	On Leave to Appeal from an Order Granting Severance of the
v.	:	Superior Court of New Jersey, Law Division, Essex County
OTWAY GARLAND,	:	
Defendant-Respondent/ Cross-Appellant.	:	Sat Below:
	:	Hon. Lori E. Grifa, J.S.C

**BRIEF ON BEHALF OF DEFENDANT-
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DEFENDANT IS NOT CONFINED

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¹ No witness testimony was presented at the motion for severance. The trial court relied solely on the parties' trial briefs to establish the relevant facts. The State/appellant included its motion brief in its appendix on appeal, and the respondent's motion brief is also appended to aid the Court in understanding the factual basis of the trial court's decision. R. 2:6- 1(a)(2).

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PROCEDURAL HISTORY

Otway Garland was initially charged under three separate indictments with offenses relating to three separate incidents occurring on different dates: an October 23, 2023 burglary, an October 25, 2023 burglary; and an October 27, 2023 robbery and eluding. (1T 4-14 to 18)²

The State then sought and obtained a superseding indictment, Indictment No. 24-06-01195-I, returned on June 24, 2024, which combined the three separate indictments. (1T 4-10 to 20) The defendant moved to sever the charges, seeking to separate trial for each set of charges.

While defendant's motion was pending, the State sought a second superseding indictment, which added additional counts for each of the three incidents. (Pa 1) Therefore, superseding Indictment 24-11-2439-I, charges Mr. Garland with:

October 23, 2023 incident (counts 1-5)

- Third-degree conspiracy to commit burglary, N.J.S.A. 2C:5-2; 18-2
- Third-degree burglary, N.J.S.A. 2C:18-2
- Third-degree theft, N.J.S.A. 2C:29-3(a)
- Fourth-degree possession of burglary tools, N.J.S.A. 2C:5-5A(l)
- Fourth-degree criminal mischief, N.J.S.A. 2C: 17-3(a)(1)

² Pa – refers to the appendix of the State's appellate brief

Pb – refers to the State's appellate brief

Da – refers to the appendix of Defendant's respondent brief

1T – December 11, 2024 transcript of the motion hearing

October 25, 2023 burglary (counts 6-9)

- Two counts of third-degree burglary, N.J.S.A. 2C:18-2
- Fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d)
- Third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d)

October 27, 2023 incident (counts 10-20)

- First-degree robbery, N.J.S.A. 2C: 15-1
- Second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5b
- Second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)
- Second-degree eluding, N.J.S.A. 2C:29-2(b)
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- Third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d)
- Two counts of second-degree aggravated assaulted by eluding, N.J.S.A. 2C: 12-1b(6)

(Pa 1-21)

On December 11, 2024, following oral arguments on defendant's severance motion, the Honorable Lori E. Grifa, J.S.C., granted the motion in part, severing counts 1-9 (the two burglary incidents) from counts 10-20 (the robbery and eluding). (1T 39-10 to 36-13)

The State subsequently moved for leave to appeal the judge's decision on the motion and the defendant filed a cross-motion for leave to appeal on the

judge's decision denying severance of the two burglaries. Both the State's motion and the defense's cross-motion were granted.

STATEMENT OF FACTS

Given that Mr. Garland has not yet been adjudicated on the charges, the subsequent facts represent allegations drawn from the trial briefs submitted by both the State and the Defendant.

October 23, 2023 Allegations

The State alleges that Mr. Garland burglarized a business at 60 Ferry Street in Newark on October 23, 2023, shortly after midnight. As captured on the store's surveillance footage, the suspect took two computer tablets and money before leaving. (Da 2) Because the surveillance footage is in black and white, the color of the suspect's sweater, pants and shoes is unknown. (Pa 28) The State claims at various points in the video, as the suspect enters and goes through the store, his tattoos are visible, including an outline of a heart on his left cheek, two lines above the left eyebrow, and tattoos on the left and right hands. The suspect was also wearing a necklace during the burglary. (Pa 28)

A police officer later made an identification of Garland as the perpetrator after comparing his recent mugshot in an unrelated matter to the image on the surveillance footage. (Pa 29)

October 25, 2023 Allegations

The State alleges that Garland was involved in two burglaries on October 25, 2023 at the Valley Fair Mall. Surveillance footage showed the following. At around 4 p.m., a blue GMC SUV, with two occupants, parked by the entrance of the Mall. The State posits that Garland was the driver. The passenger, who was never identified, was wearing all black, including a sweatshirt displaying "security" on the back. The State alleges that Garland got out of the car, walked to the front lobby of the plaza, removed a black handbag from the desk, and left. (Pa 31) Close to midnight, the State alleges that Garland returned to the Valley Mall accompanied by another person.³ He broke into the Value Zone department store using a machete and took \$750 from the three registers. (Da 2)

The investigating detective Edwin Pierre “had past dealings” with Garland and identified him in the surveillance footage. There is extensive surveillance footage, capturing the suspects movements in and around the mall and the State asserts that “at one point, defendant looks up and you can see his face clearly.” (Pa 32) According to the State, surveillance footage from both mall burglaries shows Garland wearing a chain and the same clothing: Air Jordan Retro 12 sneakers,

The record doesn't clearly establish if this was the same person involved in the earlier mall burglary.

jeans, a beige/cream hoodie, and a hat with a white logo. The State further asserts that Garland's hand tattoos are "clearly visible" in the footage. (Pa 33)

October 27, 2023

On October 27, 2023, gas station attendant Sarukhan Sarukhan reported to the police that a customer, with whom he was familiar, asked to borrow his phone and he agreed. However, the customer refused to return the phone, putting it in his pocket. When Sarukhan tried to get his phone back by opening the customer's car door, the customer punched him in the arm and drove off. The customer was driving a GMC SUV. (Da 3)

At the police station, Sarukhan identified Garland as the person who took his phone. Subsequently, the police initiated a search for the GMC SUV, which they discovered had been reported stolen earlier. Later that day, they located the GMC being driven on the road. When the GMC failed to stop, the police pursued it, ultimately ending in a motor vehicle accident, in which two officers and the driver, Garland, were injured. (Pa 36-38)

LEGAL ARGUMENT

BECAUSE THE ROBBERY/ELUDING CHARGES HAVE MINIMAL PROBATIVE VALUE IN ESTABLISHING IDENTITY IN THE TWO EARLIER BURGLARIES, THE COURT APPROPRIATELY EXERCISED ITS DISCRETION IN GRANTING SEVERANCE. (1T 34-13 to 35-2; Pa 22-23)

The trial court correctly rejected the State's attempt to join charges from three disparate offenses in one trial. Recognizing the tenuous probative value of the evidence for identity when weighed against the significant risk of prejudice, the trial court rightly expressed concern about "'how this defendant could possibly get a fair trial when the State's is going to open and then talk about what's effectively a crime spree that takes place over a four day period.'" (1T 26-3 to 6)

The decision to sever the two burglaries from the robbery/eluding, which is entitled to deference on appeal, should be affirmed. See State v. Pitts, 116 N.J. 580, 601 (1989) ("A trial court is accorded ample discretion in determining whether to grant relief from joinder of offenses because of the potential for prejudice.").

New Jersey's procedural rules permit the joinder of offenses that "are of the same or similar character or are based on the same act or transaction or 2 or more acts or transactions connected together or constituting parts of a common scheme or plan." R. 3:7-6; see also R. 3:15-1(a). However, Rule 3:15-2(b) provides that "if

it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses . . . the court may order an election or separate trials of counts . . .” Under this rule, a court may sever multiple charges in a single indictment when it appears that a party would suffer prejudice if the counts were all disposed of in a single trial. State v. Krivacska, 341 N.J. Super. 1, 38 (App. Div. 2001) (internal quotation marks omitted); see State v. Chenique-Puey, 145 N.J. 334, 341 (1996)(separate trials appropriate if joinder would unfairly prejudice defendant). 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.” State v. Sterling, 215 N.J. 65, 73 (2013)(citation omitted).

N.J.R.E. 404(b) sharply limits the admission of evidence of other crimes or wrongs. This limitation is essential to guard against the risk “that the jury may convict the defendant because he is a ‘bad’ person in general” rather than because of the evidence adduced at trial. State v. Cofield, 127 N.J. 328, 336 (1992). Prior-conduct evidence “has the effect of suggesting to a jury that a defendant has a propensity to commit crimes, and, therefore, that it is more probable that he committed the crime for which he is on trial.” State v. Willis, 225 N.J. 85, 97 (2016) (internal quotation marks omitted). “Because evidence of a previous

misconduct ‘has a unique tendency’ to prejudice a jury, it must be admitted with caution.” Ibid.

To safeguard against the improper use of 404(b) evidence to prove a defendant’s propensity to commit crime, evidence of prior bad acts must surmount the four prongs of the Cofield test:

- (1) the evidence of the other crime must be relevant to a material issue in dispute;
- (2) it must be similar in kind and reasonably close in time to the offense charged;
- (3) the evidence must be clear and convincing; and,
- (4) the evidence’s probative value must not be outweighed by its apparent prejudice.

Cofield, 127 N.J. at 338. N.J.R.E. 404(b) is a rule of exclusion, not a rule of inclusion. Willis, 225 N.J. at 100. Thus, admission of prior bad act evidence is the exception, not the rule.

In this case, the State seeks to consolidate the three incidents for trial, arguing that each is individually probative of identity in separate trials. However, because the probative value of this evidence for identity is low and substantially outweighed by its potential prejudice, the State cannot satisfy prongs 1 and 4 of the Cofield test and therefore cannot prevail.

In Sterling, 215 N.J. 65, the New Jersey Supreme Court outlined the specific circumstances in which 404(b) evidence may be probative of identity. The

overarching principle is that “evidence of a later crime may be admitted on the issue of identity when the defendant’s connection to the first crime was established by specific evidence discovered during the second crime.” Id. at 92. (emphasis added). For instance, in State v. Gillispie, 208 N.J. 59, 88 (2011), during the defendant's murder trial, evidence that the same handgun was used in a barbershop robbery twenty days prior was properly admitted to establish identity. Similarly, in State v. Hardaway, 269 N.J. Super. 627, 630 (App. Div. 1994), the court properly admitted evidence of a subsequent robbery to prove that defendant was present at the homicide, as the same gun was used in both crimes. Separate crimes may also be joined to prove identity when “evidence of the defendant’s possession and use of the exact items obtained during the commission of one crime linked him to the other crime.” Sterling, 215 N.J. at 92. In State v. Pierro, 355 N.J. Super. 109, 114 (App. Div. 2002), defendant’s two burglaries were joined to prove identity because defendant was apprehended at the scene of the second burglary sitting on top of the social security card and credits cards that were stolen during the first burglary. See also State v. Loftin, 146 N.J. 295, 321, 394 (1996) (the defendant conceded the admissibility of the credit card fraud evidence at his trial for murder, given that the credit cards in question belonged to the victim of the homicide)(cited approvingly in Sterling).

Across these precedents, the highly probative value of the identity evidence stems from strong evidence linking the defendant to both crime A and crime B through specific and unique evidence found in either crime. That is not so here. In this case, there is no specific evidence from the robbery/eluding that connects Mr. Garland to the two earlier burglaries, or vice versa. In contrast to the defendants in Pierro and Loftin, when Mr. Garland was arrested for the robbery/eluding, he was not in possession of any of the proceeds from the burglaries. Nor is there an allegation that the same weapon was used in the burglaries and the robbery/eluding, which gives rise to the inference that the same person participated in both offenses.

The State attempts to use Mr. Garland's arrest following the robbery/eluding to bolster its identification evidence in the burglaries, rather than demonstrating a genuine connection. The State argues for the probative value of these offenses based on: (1) Mr. Garland's arrest in the GMC SUV following the robbery/eluding; (2) the GMC's involvement in the October 25th Valley Plaza Mall burglary; and (3) the shared clothing and tattoo characteristics between the October 25th perpetrator and the individual in the lower-quality surveillance of the October 23rd burglary.

First, even by its own logic, no link exists between the October 23rd burglary and the robbery/eluding.⁴ At a separate trial for the October 23rd burglary, the robbery/eluding evidence would be inadmissible to prove identity due to the complete lack of connection between the two crimes. The State's attempt to bridge the preceding burglary (October 23rd) and the succeeding robbery/eluding by using the October 25th robbery as an intermediary ultimately underscores the lack of genuine probative value as it relates to identity.

With respect to the October 25th burglary and the robbery/eluding, the State asserts that the primary link between this burglary and the robbery/eluding is that the same GMC SUV was driven by the perpetrator in both offenses. The State also points to the suspect's tattoos and the wearing of chains/necklaces as commonalities across the three offenses. However, neither of these tangible items possesses significant probative value.

Although the fact that the same GMC SUV was used in both offenses may bear some indicia of identity, its probative value is significantly lower than the

⁴ The standard for severance requires that each set of charges be admissible in a separate trial. See Sterling, 215 N.J. at 98 (reasoning that if evidence from each offense was admissible at both trials, a defendant would not be prejudiced by the joinder of separate offenses). Therefore, to join the October 23rd burglary with the robbery/eluding charges, the State must demonstrate that evidence of the October 23rd burglary would be independently admissible at the robbery/eluding trial and vice versa. They have failed to do so and have not even attempted to make this showing.

evidence in Pierro and Loftin. In those cases, the subsequent crime's evidence strongly identified the defendant because it was highly likely that only the perpetrator of crime A would possess the victim's specific items while committing crime B. Here, the GMC SUV was not stolen during this burglary, i.e., it is not a proceed of the burglary. Thus, the defendant's use of that car in the robbery/eluding, while potentially relevant, does not establish the same kind of unique link to the burglary as possessing the burglary victim's personal property would. See also United States v. Two Eagle, 633 F.2d 93 (8th Cir.1980) (allegations that defendant attacked the victim and stole the car provided a basis for admitting later sightings of the defendant in the stolen vehicle to identify the person who fled the crime scene).

Even if the evidence has some probative value for identity, this is ultimately outweighed by the significant prejudicial impact under the fourth prong of Cofield. The standard under fourth Cofield prong is “more exacting than” the standard under N.J.R.E. 403. State v. Rose, 206 N.J. 141, 161 (2011). N.J.R.E. 403 excludes relevant evidence only if “its probative value is substantially outweighed by the risk of undue prejudice,” but the fourth Cofield prong excludes evidence if its probative value is merely outweighed by its potential for undue prejudice. Id. at 160-161. The fourth-prong balancing requires the court to engage in a “careful and pragmatic evaluation of the evidence” and to “consider the availability of other

evidence that can be used to prove the same point.” State v. Gillispie, 208 N.J. 59, 89–90 (2011).

Evidence that defendant is alleged to have committed a robbery and eluding involving the same SUV is not necessary to prove identity in the burglary case. The State itself asserts that, in the burglary case, there is copious surveillance footage of the perpetrator arriving and leaving the mall twice that day and at one point, “Garland looks up and you can see his face clearly.” This surveillance footage is certainly far more probative of identity and less prejudicial than evidence that two days later Garland was allegedly driving the same car and committed another crime. Likewise, at a separate trial for the robbery/eluding, evidence of the earlier burglary is utterly unnecessary to prove identity. There is an identification from the gas station attendant, the victim of the robbery, and police arrested Garland following the eluding. With that evidence, there is little probative value to also introducing evidence that Garland committed a burglary and drove the same car two days earlier.

But, most significant, to the 404(b) analysis is that the State does not need to introduce evidence of the robbery/eluding to connect Garland to the car in the burglary. Rule 404(b) requires that such evidence be sanitized. Thus, the State could introduce evidence that the GMC SUV was involved in the burglary, and that Garland was arrested days later in the SUV. The jury need not hear evidence

about the eluding and robbery preceding his arrest on the 27th for the sole purpose of establishing identity in the burglary. See State v. Gillispie, 208 N.J. 59, 91 (2011)(finding error in admitting “unduly prejudicial evidence of the details” of a prior robbery to prove identity when the fact that the same gun was gun in both the robbery and the murder would have sufficed).

Garland’s hand tattoos and his necklace chains are also not probative of identity in separate trials. The State argues that because the perpetrator's tattoos are visible in surveillance footage of the two burglaries, evidence from the robbery/eluding incident is probative of identity in the burglary trials due to this shared tattoo characteristic.

However, introducing evidence of other criminal conduct to prove identity based solely on tattoos is gratuitous and prejudicial. Less prejudicial and more probative evidence is readily available: Mr. Garland will be present at trial, allowing the jury to observe his tattoos directly. Furthermore, a properly authenticated photograph of his facial and hand tattoos can be admitted for comparison with the perpetrator in the video.⁵

As for the necklace/chain, the record is not entirely clear about how many necklaces the perpetrator wore during the burglaries. At the motion hearing, the

⁵ To that point, the State asserts that Mr. Garland's facial tattoos are clearly visible in the mugshot used to identify him as the perpetrator of the October 23rd burglary. (Pa 30)

prosecutor stated that the perpetrator in the first commercial burglary wore a necklace with either an “R” or a “D” pendant. The perpetrator at the mall wore a necklace with an “R” or a “D.” However, upon Mr. Garland's apprehension after the eluding incident, the prosecutor said that he was wearing both an “R” and a “D” necklace, along with another heart necklace. (1T 16-16 to 20) The presence of necklaces with the letters "R" and "D," and even a heart, are not sufficiently distinctive to reliably identify Mr. Garland as the perpetrator. The State has not presented any evidence to suggest these necklaces are unique or possess any unusual characteristics that would make them highly probative of identity.⁶

Concerning the potential for prejudice, the State disputes the very foundation of Cofield, arguing that the jury would not perceive the defendant as inherently bad simply because he allegedly committed two burglaries, robbed a gas station attendant, and eluded the police. However, this assertion directly contradicts the core concern articulated in Cofield: “The underlying danger of admitting other-crime evidence is that the jury may convict the defendant because he is ‘a bad

⁶ Assuming, for the sake of argument, that the necklaces had some probative value in identifying Mr. Garland in the burglary trial, the State still bears the burden of satisfying the legal standard for joining the two burglaries and the robbery/eluding. This requires demonstrating that evidence of the two burglaries would be admissible in the separate robbery/eluding trial. The State has failed to meet this burden. Mr. Garland’s arrest for robbery/eluding while wearing necklaces does not make evidence that suspects in two earlier burglaries also wore necklaces probative of his identity as the robber/eluder.

person in general.” Cofield, 127 N.J. at 336 (citation omitted). See also The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence, 303 Vill. L. Rev. 1465, 1487-89 (1985)(finding that once jurors become aware of a defendant’s association with criminality, they “employ an entirely different . . . calculus of probabilities to determine the defendant’s guilt or innocence.”).

With keen insight, the trial judge recognized the difficulty Mr. Garland would face in receiving a fair trial if the jury were exposed to evidence portraying a potential crime spree. (1T 26-1 to 6) A trial involving 20 counts stemming from three separate incidents would depict the defendant as an unabashed criminal, making it difficult for the jury to separately consider the evidence for each count. This is especially true because the quality of the State’s proofs varies significantly across the incidents, creating a risk that the jury would find guilt on those stronger charges and then retroactively infer guilt on the weaker ones.

Given the potential for significant prejudice to the defendant were the three offenses tried jointly, the trial judge concluded that the interests of judicial economy and expediency should not supersede the defendant's due process right to a fair trial. (1T 28-7 to 10) The State criticizes the trial judge’s decision for failing to conduct an explicit 404(b) analysis on all four prongs. See (Pb 11). However, this does not negate the deference due to the court’s decision. N.J.R.E. 404(b) is a

conjunctive test; if the State, as the proponent of the evidence, fails to satisfy any prong, the evidence is inadmissible. The trial judge's discussion regarding the severance motion centered on prongs one and four, which are the most critical to the analysis under these facts.

During oral argument, the trial court pressed the State to demonstrate the probative value of the evidence. When the State's explanation amounted to the same car being involved in two offenses and similarities in clothing and necklace, the judge expressed skepticism regarding the evidence's probative value, and ultimately found that there was a “risk that the prejudice will outweigh the probative value of the linkage of these events,” under the fourth prong. (1T 35-3 to 6)

Because the trial court correctly exercised its discretion in granting severance, the decision should be affirmed.

POINT II:

**THE TRIAL COURT'S DENIAL OF SEVERANCE
OF THE OCTOBER 23 AND 25 BURGLARIES
CONSTITUTED ERROR BECAUSE THE SECOND
BURGLARY OFFERS NO PROBATIVE VALUE IN
IDENTIFYING THE PERPETRATOR FROM THE
OBSCURED SURVEILLANCE FOOTAGE OF THE
FIRST BURGLARY.**

The initial burglary on October 23 was captured on black-and-white surveillance footage showing a man in white or light-colored clothing, possibly sweatpants. His face is almost entirely obscured throughout the video due to the overhead camera angle and the hood he is wearing. While the State claims the person is wearing a chain, the item's nature is not clearly discernible on the video.

The State asserts that the surveillance video from the second burglary, on October 25, is of better quality. That video is in color and although it depicts the perpetrator with a hood concealing their face, the camera angle provides a clearer view. The perpetrator is wearing jeans and a white/cream hoodie. An object is visible around their neck, but it is unclear if it is similar or matches the item worn in the October 23 robbery video. The State seeks to combine these two burglaries, on the grounds that the allegedly similar clothing and chain(s) worn by the perpetrator in both incidents are probative of identity.

In its assertion of probativeness, the State is wrong; and the trial court's decision joining the October 23 and 25 burglaries should be reversed. Neither burglary is probative of identify in the other. Thus, under prongs 1 and 4 of Cofield, at separate trials on the burglaries, the October 23 burglary would not be admissible at the trial on the October 25 burglary and vice versa.

The joinder of the October 23 and October 25 burglaries for purposes of proving identity is precisely the type of "propensity evidence" that N.J.R.E. 404(b) is designed to exclude. The State's argument relies solely on alleged similarities in clothing and chain(s) worn by the perpetrator in both videos. This falls far short of the "specific evidence discovered during the second crime" that establishes a defendant's connection to the first crime, as required by Sterling. The previously cited precedents, Gillispie and Hardaway, involved the same unique weapon used in both offenses, directly linking the perpetrator. Similarly, Pierro and Loftin involved the actual stolen proceeds from one crime being found in the defendant's possession during the second. These are tangible, unique evidentiary connections, not mere observations of common apparel that could be worn by any number of individuals.

The surveillance videos themselves underscore the weakness of the State's position. The October 23 video is particularly problematic, with its overhead angle, black-and-white format, and the perpetrator's face obscured by

a hood, rendering identification "extremely difficult." While the October 25 video may offer a "clearer view" from a different angle, it still depicts a hooded figure. The State's attempt to conflate general similarities in clothing with the highly specific, distinctive evidence required by Sterling would permit the jury to draw an impermissible inference of propensity – that because Mr. Garland might have committed one hooded burglary, he must have committed the other. This risks unfair prejudice, as the jury could use the "better quality" video from the second burglary to bolster the weak identification from the first, without any independent, specific linkage as mandated by the Supreme Court. Therefore, the probative value of this "identity" evidence is substantially outweighed by its highly prejudicial effect.

The State's approach to identity evidence would dangerously permit joining offenses based on even the most tenuous similarities in surveillance footage. The State possesses surveillance footage from both burglaries. To determine the identity of the perpetrator in each burglary, the State can play the footage and ask the jury to decide as the trier of fact, whether it has established beyond a reasonable doubt whether Mr. Garland is the person depicted in each surveillance video. Because the October 25 burglary is not probative of the identity of the perpetrator in the October 23 burglary, the jury would inevitably

use this evidence for the improper purpose of inferring propensity. The trial court's decision joining these two offenses should be reversed.

CONCLUSION

For the reasons stated in Point I, the court properly exercised its discretion in severing the charges relating to the two burglaries from the charges relating to the robbery/eluding. This Court should affirm. For the reasons stated in Point II, the Court should reverse the trial court's decision joining the October 23 and October 25 burglaries, and order separate trials for each burglary.

Respectfully submitted,

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Dated: June 4, 2025

STATE OF NEW JERSEY, : SUPERIOR COURT OF NEW JERSEY
Plaintiff-Appellant/ : APPELLATE DIVISION
Cross-Respondent, : DOCKET NO. A-1589-24
v. :

OTWAY GARLAND :
Defendant-Respondent/ : CRIMINAL ACTION
Cross-Appellant. :

On Leave to Appeal an Order
granting Severance of Counts,
entered in the Superior Court,
Law Division, Essex County.

Sat Below:
Hon. Lorie E. Grifa, J.S.C.

REPLY/CROSS-RESPONDENT BRIEF ON BEHALF OF THE
STATE OF NEW JERSEY

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Statement of Procedural History

The State adopts and incorporates the procedural history as recited in its appellant's brief. (Pb1-2)

Statement of Facts

The State adopts and incorporates the procedural history as recited in its appellant's brief. (Pb3-11).

Legal Argument

The motion judge erred in severing the two burglaries from the robbery and eluding and ordering they be tried as two separate cases. The connection between the separate events renders the evidence probative of the material issue of identity in all three incidents. The evidence of the neck chains, the GMC Terrain being driven by defendant during the mall burglary and then the robbery and eluding incidents, defendant's clothes, and the clothes recovered from the vehicle would be admissible in both cases to prove identity, and thus the counts should not have been severed. Moreover, the incidents occurred within only four days of each other.

However, the motion court correctly denied severance of the two burglaries and ordered they be tried together. Not only are they "basically a day apart," (T35:18), they of the same or similar character and the evidence of both burglaries is relevant to intent, absence of mistake, scheme of plan, and identity.

Point I

The trial court abused its discretion by severing the robbery/eluding charges from the two burglary charges. (T34:13-35:15).

Like the motion court, defendant minimizes the State's argument, asserting the evidence is simply the link between the GMC SUV's involvement in the second burglary and his subsequent arrest following his eluding the police in the same vehicle, as well as the shared clothes and tattoos between the perpetrator of the burglaries and defendant.

The State argued that multiple factors linked these cases together on the basis of identity, including: (1) defendant wore the same hooded sweatshirt during both burglaries; (2) when arrested, defendant was wearing the same chains he wore during the first two burglaries and the same or similar shoes he wore during the first burglary; (3) when arrested, defendant was driving the same vehicle that was seen on surveillance footage involved in the October 25, 2023 burglary; (4) in surveillance video of the first two burglaries, defendant's face and hand tattoos are clearly visible; and (5) the black clothing found inside the vehicle matches the clothes of the unknown co-conspirator in the first burglary.

Defendant argues the State did not even attempt to demonstrate new evidence of the October 23 burglary would be independently admissible at the

robbery/eluding trial and vice versa. (Db11 n.4). However, the State has already noted “the robbery case’s evidence . . . also established defendant as the perpetrator of the first burglary at Always Home Care. The defendant’s connection to the Always Home Care burglary is his face and hand tattoos, his neck chain, and his sneakers.” (Pb18).

“Charges need not be identical to qualify as ‘similar’ for purposes of joinder under Rule 3:7-6.” State v. Sterling, 215 N.J. 65, 91 (2013). The rule “expressly permits joinder when there is some connection between separate counts rendering the evidence probative of a material issue in another charge.” Ibid (emphasis added).

Defendant asserts that the State “disputes the very foundation of Cofield,” regarding the potential for prejudice. (Db15). However, since the court has already found that the first two burglaries should be tried together, the additional charge of robbing a gas station attendant and then fleeing is not so inherently inflammatory that it would divert the finder of fact from a reasonable and fair evaluation of the basic issues of the case.

A defendant must show prejudice that would negate his right to a fair trial beyond the inherent dangers associated with a single trial, not just the “mere possibility of such harm.” Manney, 26 N.J. at 366; State v. Lado, 275 N.J. Super. 140, 149 (App. Div. 1994). Severance isn’t required upon a bare

allegation that some prejudice may develop at a joint trial, and a strong jury instruction will eliminate the possible prejudice that concerned the motion judge.

While defendant argues that the court's failure to conduct a N.J.R.E. 404(b) analysis under Cofield "does not negate the deference due to the court's decision," our case law refutes this. See State v. Barden, 195 N.J. 375, 391 (2008) ("[W]hen a trial court does not analyze the admissibility of other-crimes evidence under Cofield, we may conduct a plenary review to determine its admissibility.").

The judge below did not conduct a Cofield analysis when deciding whether to grant defendant's motion to sever. Defendant argues that the motion court's "discussion regarding the severance motion centered on prongs one and four," establishes the court conducted a proper Cofield analysis. (Db17). Nowhere in the court's decision does she mention Cofield or any of its factors. The court does not even mention N.J.R.E. 404(b) until finding that the two burglaries can stay linked in one indictment. (T35:21-24).

Nothing in the court's discussion or decision mentions anything having to do with the first factor.¹ In fact, defendant can only argue "the judge

¹ The evidence must be relevant to a material issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or identity. Cofield, 127 N.J. at 338.

expressed skepticism regarding the evidence's probative value, and ultimately found that there was a 'risk that the prejudice will outweigh the probative value of the linkage of these events,' under the fourth prong." (Db17). That, without anything more, is insufficient to argue the court below conducted a Cofield analysis. Thus, this Court should conduct a plenary review to determine whether these cases should have been severed. Barden, 195 N.J. at 391.

Contrary to defendant's argument, the State does not have the availability of less inflammatory sources of evidence of equally probative value to prove identity. To simply inform the jury that defendant was arrested in the same GMC Terrain only establishes his presence in the vehicle at the time of arrest, but his possession and control over the vehicle is crucial to the State's case since the State alleges he was the driver of the GMC Terrain during the second burglary. The facts of the robbery and eluding incident show not only that he was present in the vehicle at the time of arrest, but that he was in fact in possession of and had control over it.

Having already laid out why this Court should find that severance of this case into two trials was unwarranted, it is unnecessary for it to be repeated here. Had the court performed a proper Cofield analysis, the judge would have denied defendant's severance motion. The evidence of each incident was

relevant to prove identity. The crimes were committed over a short period of time and included overlapping evidence that coalesced upon defendant's arrest.

For these reasons, as well as those set forth in the State's appellant's brief, this Court should reverse the order severing counts of the indictment.

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Point II

The trial court properly denied severance of the two burglary charges. (T35:16-36:13).

The trial court properly denied the defendant's motion for severance of the first two burglaries. Severance isn't required upon a bare allegation that some prejudice may develop at a joint trial. The judge's decision considered that the evidence is admissible in both cases to prove intent, absence of mistake, and scheme of plan. (T35:21-24). Additionally, the evidence of each burglary is admissible to prove identity, which is another permissible use of other-crimes evidence. N.J.R.E. 404(b)(2)

As set forth in the State's appellant's brief, the following principles inform this Court's analysis. Rule 3:7-6 permits joinder of offenses in one indictment if they are "of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan..." Rule 3:15-2(b) permits a defendant to seek relief from prejudicial joinder.

"Charges need not be identical to qualify as 'similar' for purposes of joinder under Rule 3:7-6." State v. Sterling, 215 N.J. 65, 91 (2013). The rule "expressly permits joinder when there is some connection between separate counts rendering the evidence probative of a material issue in another charge." Ibid. The rules are therefore construed to create a preference for joint trials

when “the crimes charged arise from the same series of acts” or when “much of the same evidence is needed to prosecute each defendant.” State v. Brown, 118 N.J. 595, 605 (1990).

Our Supreme Court has explained that absent “substantial” prejudice to a defendant’s right to a fair trial, joinder of offenses is preferred; some “potential” for prejudice to the defense may exist, but, “if separate offenses were required to be tried separately in all circumstances, the multiplicity of trials would disserve the State and defendant alike.” State v. Manney, 26 N.J. 362, 366 (1958). Our courts have therefore long recognized that joinder furthers the important interests of judicial economy and efficiency. Sterling, 215 N.J. at 72-73; State v. Chenique–Puey, 145 N.J. 334, 341 (1996); State v. Urcinoli, 321 N.J. Super. 519, 543 (App. Div.), certif. denied, 162 N.J. 132 (1999); State v. Coruzzi, 189 N.J. Super. 273, 298 (App. Div. 1983). While those interests cannot outweigh a defendant’s right to a fair trial, “[t]he interests of economy and efficiency may require that similar or related offenses be joined for a single trial, so long as the defendant’s right to a fair trial remains unprejudiced.” Sterling, 215 N.J. at 73 (quoting Coruzzi, 189 N.J. Super. at 298). And while there is always some “inherent ‘danger when several crimes are tried together,’” ibid. (quoting State v. Pitts, 116 N.J. 580, 601 (1989)), more is required for there to be separate proceedings; a defendant

must show substantial prejudice will befall him, and joinder would deny him a fair trial. Manney, 26 N.J. at 366; State v. Lado, 275 N.J. Super. 140, 149 (App. Div.), certif. denied, 138 N.J. 271 (1994).

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.” Sterling, 215 N.J. at 73. The “N.J.R.E. 404(b) requirements must be met, [as set forth in] State v. Cofield, 127 N.J. 328, 338 (1992), and the evidence of other crimes or bad acts must be relevant to prove a fact genuinely in dispute and the evidence is necessary as proof of the disputed issue.” Sterling, 215 N.J. at 73.

Cofield sets forth a four-prong test for admissibility: 1) the evidence must be relevant to a material issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or identity; 2) it must be similar in kind or reasonably close in time to the offense charged; 3) evidence of the other crime must be clear and convincing; and 4) the probative value of the evidence must not be outweighed by prejudice to the accused. 127 N.J. at 338.

The fourth 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 of such evidence is outweighed by its potential for

undue prejudice, not whether it is substantially outweighed by that potential....” State v. Green, 236 N.J. 71, 83-84 (2018).

Appellate courts typically review decisions on severance motions for an abuse of discretion. State v. Weaver, 219 N.J. 131, 149 (2014). To “establish an abuse of discretion the defendant must demonstrate that without severance he was unable to receive a fair trial and that he suffered compelling prejudice against which the trial court could offer no protection.” State v. Morant, 241 N.J. Super. 121, 139 (App. Div. 1990) (quoting United States v. Magdaniel–Mora, 746 F.2d 715, 718 (11th Cir. 1984)).

Turning to the facts of this case, the State proffered evidence to prove defendant’s identity as the perpetrator of the first two burglaries, including security footage from both burglaries that show matching face and hand tattoos and matching clothing and neck chains. Looking at the Cofield factors, severance of these burglaries into two trials is unwarranted. As stated by the motion court, evidence of each incident was relevant to prove intent, and common scheme or plan in addition to identity. The crimes were committed less than two days apart and included overlapping evidence that goes to material issues in the case.

The first prong of Cofield requires that the evidence be relevant “to a material issue in dispute, such as motive, intent, or an element of the charged

offense.” State v. Rose, 206 N.J. 141, 160 (2011). “Identity is a material issue when a defendant claims he was not the perpetrator of the charged crime.” See Sterling, 215 N.J. at 99; State v. Baluch, 341 N.J. Super. 141, 192 (App. Div. 2011). As the New Jersey Supreme Court has explained, “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.

Here, the evidence of defendant’s identity as the perpetrator of both burglaries is established through defendant’s appearance and clothing. First, on October 23, 2023, defendant was wearing a light-colored hoodie and a neck chain when he burglarized Always Home Care. In the security footage from the Always Home Care burglary, which is in black and white, defendant had two visible tattoos on his face; one appears to be the outline of a heart on his left cheek, and the other appears to be two lines above his left eyebrow. Also visible on the surveillance footage are tattoos on the back of each of his hands. (Pa28).

Two days later, on October 25, defendant arrives at the mall in a stolen GMC Terrain and steals a bag from the security desk. His hand tattoos are plainly visible as he removes the money from the register. (Pa32). Later that night he returns, wearing the same hoodie and the same neck chain from the

first burglary, with an accomplice wearing all black clothing. At one point defendant looks up and you can see his face clearly. (Pa32).

Defendant's tattoos and the clothing and neck chains worn during both burglaries would be admissible in both cases to prove identity. As would the fact that, after the robbery and eluding incident, defendant was ultimately arrested wearing multiple chains around his neck including ones similar to those seen in the surveillance footage from the burglaries.

As for common scheme or plan, the prosecutor noted that defendant was "engaged in burglaries," with the court stating, "why aren't the burglaries a common scheme? So, the -- like, I think your argument on a common scheme for burglary is a pretty good argument." (T27:8-23). As our New Jersey Supreme Court has noted, charges do not need to be identical to qualify as similar for joinder under Rule 3:7-6. Sterling, 215 N.J. at 9. There must be "some connection" rendering the evidence "probative of a material issue in another charge." Ibid. That standard is more than met here.

The second prong of Cofield is whether the evidence is similar in kind and reasonably close in time to the offense charged. The second prong of Cofield is not universally applied. See State v. Williams, 190 N.J. 114, 131 (2007). Proof of the second prong is limited to those that replicate the circumstances in Cofield, where "evidence of drug possession that occurred

subsequent to the drug incident that was the subject of the prosecution was relevant to prove possession of the drugs in the charged offense.” Barden, 195 N.J. at 389 (citing Williams, 190 N.J. at 131).

Even so, both burglaries took place less than two days apart, on October 23 and October 25. And as noted by the motion court, “[t]hey are basically a day apart. They involve forced entry into a commercial premises. They involve the taking of property from that premises.” (T35:18-20). To the extent this prong applies, it favors joinder of these offenses.

The third prong, that the evidence of the other crime must be clear and convincing, has been met. The State can prove all the crimes charged in the indictment beyond a reasonable doubt, and the crimes are supported by overwhelming evidence, as described above.

Lastly, the probative value of the evidence vastly outweighs any potential for undue prejudice. The determination is “whether the evidence was unfairly prejudicial, that is whether it created a significant likelihood that the jury would convict defendant on the basis of the uncharged misconduct because he was a bad person, and not on the basis of the actual evidence adduced against him.” Rose, 206 N.J. at 164.

Defendant cannot show prejudice that would negate his right to a fair trial beyond the inherent dangers associated with a single trial, or go beyond

the “mere possibility of such harm.” Manney, 26 N.J. at 366; Lado, 275 N.J. Super. at 149. A strong jury instruction will eliminate any possible prejudice.

Additionally, while defendant argues joining the burglaries to prove identity is inadmissible as propensity evidence, N.J.R.E. 404(b) permits other crimes evidence to prove identity when it is a material issue in dispute. Defendant’s assertion that “[t]he State’s argument relies solely on alleged similarities in clothing and chain(s) worn by the perpetrator in both videos,” is misleading. The State’s argument, in part, is the videos from the second robbery, showing a clear view of defendant’s face while wearing the same clothes and neck chains, as well as displaying the same tattoos, is evidence of his identity in the first robbery.

Furthermore, less inflammatory sources of evidence of equally probative value are not available. Defendant even noted, “[t]he October 23 video is particularly problematic, with its overhead angle, black-and-white format, and the perpetrator's face obscured by a hood, rendering identification ‘extremely difficult.’” (Db19-20). Thus, the video from October 25, which has a clear view of defendant’s face while wearing the same clothing and sporting the same tattoos of the perpetrator of the October 23 robbery, is highly probative of identity. (Pa32).

Finally, severing this trial into two separate ones is uneconomical and a waste of precious judicial and law enforcement resources. The judge and at least two attorneys would have had to try two cases in front of two different juries with much of the same evidence admitted to prove each crime in the indictment. The order denying severance must be affirmed.

Conclusion

For these reasons, this Court should reverse the trial court's decision severing the burglary charges from the robbery/eluding charges. But the Court properly exercised its discretion when denying the severance of the charges relating to the two burglaries, and this Court must affirm that decision.

Respectfully submitted,

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