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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-0029-22

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

MICHAEL A. DISPORTO, JR.,

Defendant-Respondent.

Submitted January 19, 2023 – Decided February 24, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 21-03-0631.

Grace C. MacAulay, Camden County Prosecutor, attorney for appellant (Jason Magid, Assistant Prosecutor, of counsel and on the brief).

Domers Bonamassa, PC, attorneys for respondent (Timothy S. Farrow, on the brief).

PER CURIAM

By leave granted, the State appeals from a July 18, 2022 Law Division order denying its motion in limine to admit certain video footage into evidence at trial. The footage showed defendant alone in an interrogation room purportedly masturbating and pinching his nipples three hours after being shown photos of the two-year-old hospitalized victim about whose sexual assault and murder defendant was being interrogated. On appeal, the State argues the judge erred in ruling the evidence was not admissible as intrinsic evidence, or, in the alternative, as N.J.R.E. 404(b) evidence to prove motive, intent, or identity. We reject the State's contention and affirm substantially for the reasons set forth in Judge Edward J. McBride, Jr.'s thoughtful and well-reasoned written opinion.

We glean these facts from the record. On the evening of July 3, 2016, emergency medical personnel received a report of an unresponsive child. Upon their arrival at the residence, responders found the child, A.S.,¹ with her mother. Defendant, A.S.'s mother's boyfriend, was also present at the scene. A.S., who had been in the care of her mother and defendant, was breathing but unresponsive and reportedly "had bruising from head to toe, [a] lump on her head and . . . red bruising on her vagina." A.S. was transported to Cooper University Hospital, where she underwent emergency surgery for a brain injury.

¹ We use initials in accordance with Rule 1:38-3(d)(10).

A.S. died from her injuries two days later. A.S. was twenty-three months old at the time of her death.

Following an investigation by the Camden County Prosecutor's Office (CCPO), during which detectives interrogated defendant on July 4 and 5, 2016, defendant was charged in connection with A.S.'s sexual assault and murder notwithstanding the fact that defendant denied any involvement during the interrogation. After a 2019 jury trial resulted in a hung jury, defendant was charged in a superseding indictment with first-degree murder of a child under the age of fourteen, N.J.S.A. 2C:11-3(a)(1) and (2), and N.J.S.A. 2C:11-3(b)(4)(k) (count one); second-degree sexual assault, N.J.S.A. 2C:14-2(b) (count two); first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (count three); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (count four); first-degree murder of a child less than eighteen years old, N.J.S.A. 2C:11-3(a)(1) and (2), and N.J.S.A. 2C:11-3(b)(3) (count five); and first-degree murder while engaged in the commission of sexual assault, N.J.S.A. 2C:11-3(a)(1) and (2), and N.J.S.A. 2C:11-3(b)(4)(g) (count six). The original indictment did not contain the sexual assault offense charged in count two.

Prior to the second trial, the State moved to admit video footage of defendant's July 5, 2016 interrogation depicting defendant's actions while he

was alone in the interrogation room after he had been questioned about A.S.'s death.² Judge McBride described the footage as follows:

The police interrogation of defendant on July 5 began at around 10:45 [a.m.] During the interrogation, police showed defendant several graphic photos of A.S. in the hospital. At about 1:07 [p.m.], when detectives briefly left the interrogation room, the video recording system installed in the room captured defendant apparently speaking to one of the photographs, placing his necklace on the photo, and kissing it. Detectives then re-entered the room, removed the photos, and transported defendant to a second interrogation room to interview A.S.'s mother in the first interrogation room.

This second interrogation room, although not being used to question defendant, was also equipped with video recording equipment. After being left alone in this room for approximately three hours, defendant began to engage in unusual behavior captured by the recording equipment. The video depicts defendant pinching his nipples, reaching under his shirt, and then reaching his hand into his pants. The State argues that this was clearly the defendant masturbating, but defendant argues that masturbation is only one of several plausible descriptions of the conduct depicted on video.

Judge McBride entered an order on July 18, 2022, denying the State's motion. In his accompanying written opinion, the judge first considered the State's argument that the video footage constituted intrinsic evidence of the

² Defendant had successfully moved to bar admission of the footage prior to the first trial.

charged offenses "because the evidence show[ed] that defendant was sexually aroused by A.S. and images of A.S. in distress, making it more likely both that defendant committed the charged offenses and that he did so with the intent to achieve, and for the purpose of, his sexual gratification." Citing State v. Rose, 206 N.J. 141 (2011), and United States v. Green, 617 F.3d 233 (3d Cir. 2010), upon which Rose relied, the judge rejected the State's argument, explaining:

The court finds the video recording evidence cannot reasonably be considered intrinsic evidence. Moreover, even if the evidence were treated as intrinsic evidence, it is inadmissible under N.J.R.E. 403 because its minimal probative value is substantially outweighed by the risk that presenting it will confuse the issues by creating a mini-trial on defendant's conduct in the interrogation room and by the risk that it will be perceived as propensity evidence and thereby unduly prejudice . . . defendant.

In addressing the State's argument, the judge distinguished State v. Santamaria, 236 N.J. 390, 409-11 (2019), where the Supreme Court held that explicit photographs of the defendant engaging in sexual acts with the victim, taken shortly after she turned eighteen, constituted intrinsic evidence of charges that the defendant had sexually abused the victim as a minor because it was "proof of the ongoing relationship between [the victim] and defendant." The Santamaria Court reasoned that the photographs constituted intrinsic evidence because they demonstrated "the control defendant had over [the victim], and

suggested defendant groomed her over their years-long sexual relationship beginning shortly after [the victim's] fourteenth birthday." Id. at 411.

Judge McBride found that here, unlike in Santamaria, "any connection between the alleged sexual assault of A.S. some time prior to the evening of July 3 and the conduct of defendant days later while alone in a police interrogation room . . . could be established only through a long, indirect series of inferences." The judge observed that for a fact finder to draw a connection between the two events,

[f]irst, the fact finder would need to find that defendant was in fact masturbating. Second, the fact finder would have to conclude that defendant was masturbating to the thought of the images of the injured victim. Given that defendant spent about three hours isolated in a small room between viewing the photos and allegedly masturbating, this is by no means the only plausible inference. Finally, if the jury accepted that defendant felt sexually aroused by those images, it would further have to infer that his attraction showed that he assaulted the victim.

For similar reasons, the judge distinguished State v. B.A., 458 N.J. Super. 391, 412-13 (App. Div. 2019), in which a defendant indicted for stalking based on his conduct between January and May 2013 challenged the admission of evidence of his conduct before January 2013. In B.A., we affirmed the trial court's decision to admit the pre-indictment evidence, explaining that it was intrinsic evidence that "showed the relationship that ended and the conduct that

ensued after; it offered direct proof of defendant's motive" for his stalking-like conduct. Id. at 413. Judge McBride explained that the contested evidence in B.A. "consisted largely of similar acts . . . and evidence of the defendant's motive to stalk the victim," whereas in this case, "the relevance of the evidence require[d] multiple overlapping and contested inferences, and the underlying conduct b[ore] no similarity to any of the acts charged in the indictment."

Turning to the State's argument that the video footage was admissible under N.J.R.E. 404(b) as evidence of motive, intent, and identity, after conducting a Cofield³ analysis as required by Rule 404(b), the judge concluded that "the minimal relevance of the video to those issues [was] outweighed by the substantial risk of undue prejudice" described in the judge's N.J.R.E. 403 analysis. Regarding motive and intent, the judge reasoned that "[t]he surrounding circumstances, if proven, could provide ample support to findings of prohibited motive and intent, thereby decreasing the probative value of the video evidence whose connection to the sexual assault of A.S. require[d] multiple levels of contested inferences." As to identity, the judge concluded that the video footage was not relevant to identity because "there [was] no common

³ State v. Cofield, 127 N.J. 328, 338 (1992).

object and the alleged other acts of defendant in the interrogation room ha[d] no similarity to the charged conduct."

On appeal, the State raises a single point for our consideration:

POINT I: REVERSAL IS WARRANTED BECAUSE THE LAW DIVISION NOT ONLY ABUSED ITS DISCRETION, IN RELATION TO COUNT TWO CHARGING SEXUAL ASSAULT, WHEN IT DENIED THE STATE'S MOTION SEEKING PERMISSION TO PRESENT, AT TRIAL, A VIDEO OF DEFENDANT PLEASURING HIMSELF FOLLOWING A LENGTHY DISCUSSION OF THE SEVERE AND DEADLY INJURIES SUFFERED BY A.S.[,] BUT ALSO, FAILED TO ADDRESS THE STATE'S POSITION [THAT] THIS EVIDENCE WAS APPLICABLE TO THE OTHER COUNTS OF THE INDICTMENT, IN PARTICULAR, COUNT FIVE, WARRANTING PLENARY REVIEW ON APPEAL.

"We defer to a trial court's evidentiary ruling absent an abuse of discretion," and "will not substitute our judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" State v. Garcia, 245 N.J. 412, 430 (2021) (first citing State v. Nantambu, 221 N.J. 390, 402 (2015); and then quoting State v. Medina, 242 N.J. 397, 412 (2020)). "In addition, sensitive admissibility rulings regarding other-crimes evidence made pursuant to Rule 404(b) are reversed '[o]nly where there is a clear error of judgment.'" State v. Green, 236 N.J. 71, 81 (2018) (alteration in original)

(quoting Rose, 206 N.J. at 158). "However, we accord no deference to the trial court's legal conclusions." Nantambu, 221 N.J. at 402.

Applying those principles, we discern no abuse of discretion in Judge McBride's evidentiary ruling. Contrary to the State's assertions, the judge's fact-findings are supported by sufficient credible evidence in the record and his legal conclusions are unassailable. See id. at 402-03 ("[W]e uphold the facts found by the motion judge to the extent they are supported by sufficient credible evidence in the record . . ."). We add only the following comments.

Rule 404(b) prohibits the use of "evidence of other crimes, wrongs, or acts . . . to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." N.J.R.E. 404(b)(1). The rule does, however, permit the use of such evidence for other purposes, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute." N.J.R.E. 404(b)(2).

"The four-part Cofield test governing the admissibility of other-crimes evidence is a well-settled feature of New Jersey's evidence jurisprudence." Green, 236 N.J. at 82. Under that standard:

1. The evidence of the other crime must be admissible as relevant to a material issue;

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

[Cofield, 127 N.J. at 338.]

Like Judge McBride, we focus our analysis on the first and fourth prongs.⁴ "The first prong requires that 'the evidence of the prior bad act, crime, or wrong . . . be relevant to a material issue that is genuinely disputed.'" State v. Willis, 225 N.J. 85, 98 (2016) (alteration in original) (quoting State v. Covell, 157 N.J. 554, 564-65 (1999)). Evidence is relevant when it has a "tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. "Relevancy consists of probative value and materiality." State v. Buckley, 216 N.J. 249, 261 (2013). "Probative value concerns the tendency of evidence to establish the proposition that it is offered to prove," and

⁴ Application of the second prong "is 'limited to cases that replicate the circumstances in Cofield'" and "may be eliminated where it 'serves no beneficial purpose.'" Green, 236 N.J. at 83 (quoting State v. Williams, 190 N.J. 114, 131 (2007)). Citing Williams, Judge McBride concluded that the second prong did not apply in this case. As to prong three, the judge pointed out that, in an earlier opinion, he had already found the evidence of defendant's masturbation to be clear and convincing, obviating any need for further discussion. The State does not challenge either determination on appeal.

"[m]ateriality concerns the relation between the propositions for which the evidence is offered and the issues in the case." State v. Hutchins, 241 N.J. Super. 353, 359 (App. Div. 1990).

Evidence need not be dispositive, or even strongly probative, to be relevant; rather, "the primary focus in determining the relevance of evidence is whether there is a 'logical connection between the proffered evidence and a fact in issue.'" Willis, 225 N.J. at 98 (quoting Covell, 157 N.J. at 565). However, to satisfy Cofield's first prong, "the material fact sought to be proved must be one that is actually in dispute, and cannot merely be offered to indicate that because the defendant is disposed toward wrongful acts generally, he is probably guilty of the present act." Willis, 225 N.J. at 98 (citation omitted) (first citing Cofield, 127 N.J. at 338; and then citing State v. Nance, 148 N.J. 376, 386 (1997)).

The fourth Cofield prong "recognizes that the 'inflammatory characteristic of other-crime evidence . . . mandates a careful and pragmatic evaluation by trial courts, based on the specific context in which the evidence is offered, to determine whether the probative worth of the evidence outweighs its potential for undue prejudice.'" Id. at 99 (alteration in original) (quoting State v. Stevens, 115 N.J. 289, 303 (1989)).

When analyzing prejudice under N.J.R.E. 404(b), courts should also consider the factors presented in N.J.R.E. 403, which states that "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence." . . . However, because "[o]ther-crimes evidence . . . necessitates a more searching inquiry than that required by N.J.R.E. 403," "the potential for undue prejudice need only outweigh probative value to warrant exclusion" of other-crime evidence.

[Willis, 225 N.J. at 99-100 (second and third alterations in original) (first quoting N.J.R.E. 403; and then quoting State v. Reddish, 181 N.J. 553, 608 (2004)).]

"Because evidence of a defendant's previous misconduct 'has a unique tendency' to prejudice a jury," id. at 97 (quoting Reddish, 181 N.J. at 608), "Rule 404(b) is viewed 'as a rule of exclusion rather than a rule of inclusion.'" Green, 236 N.J. at 84 (quoting Reddish, 181 N.J. at 609). "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.'" Willis, 225 N.J. at 97 (quoting State v. Weeks, 107 N.J. 396, 406 (1987)). For that reason, "[i]f other less prejudicial evidence may be presented to establish the same issue, the balance in the weighing process will tip in favor of exclusion." Green, 236 N.J. at 84 (quoting Rose, 206 N.J. at 161). Ultimately, "the party seeking to admit other-crimes evidence bears the

burden of establishing that the probative value of the evidence is not outweighed by its apparent prejudice." Reddish, 181 N.J. at 608-09.

"[I]f evidence is found to be intrinsic to the crime at issue, it does not constitute other-acts evidence and is subject only to the limits of Rule 403." Santamaria, 236 N.J. at 410. Consequently, "[t]he threshold determination under Rule 404(b) is whether the evidence relates to 'other crimes,' and thus is subject to continued analysis under Rule 404(b), or whether it is evidence intrinsic to the charged crime, and thus need only satisfy the evidence rules relating to relevancy, most importantly Rule 403." Rose, 206 N.J. at 179 (emphasis omitted). To determine if evidence is "intrinsic," our Supreme Court has adopted the test articulated in Green, which "'reserve[s] the 'intrinsic' label for two narrow categories of evidence.'" Rose, 206 N.J. at 180 (quoting Green, 617 F.3d at 248). "First, evidence is intrinsic if it 'directly proves' the charged offense.'" Ibid. (quoting Green, 617 F.3d at 248). "Second, 'uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime.'" Ibid. (quoting Green, 617 F.3d at 249).

We agree with Judge McBride's application of these principles and determination that the video evidence is neither admissible under Rule 404(b) nor as intrinsic evidence. The State asserts that the judge focused only on count

two (sexual assault) and failed to address count five (serious bodily injury murder). However, the judge's reasoning applies with equal force to both counts.

The State maintains that the video evidence falls within the first category of intrinsic evidence because "defendant's conduct" of "pinching [his] nipples and masturbat[ing] was a climax of the stimulation of discussing and viewing the grave injuries suffered by A.S. and therefore, direct evidence of his purposeful/knowing conduct," which is the state of mind required for both counts two and five. However, while courts may "admit circumstantial evidence that has a tendency 'to shed light on [defendant's mental state] or which tend[s] fairly to explain [a defendant's] actions,' notwithstanding that the evidence relates" to post-crime conduct, Williams, 190 N.J. at 125 (alterations in original), such evidence must "support a logical connection to a desired inference about mental state in specific and non-specific intent crimes." Id. at 128. Here, as the judge observed, any connection between the offenses and defendant's conduct in the interrogation room days later "requires multiple overlapping and contested inferences." As such, the video cannot fairly be described as direct evidence of the charged offenses.

We also reject the State's contention that the judge's application of Rule 403 was flawed. On the contrary, the judge correctly determined the

probative value of the evidence was "substantially outweighed by the risk of confusion of the issues and the risk of undue prejudice," explaining:

First, admission of the video would pose a significant risk of diverting the jury's attention into essentially a mini-trial over the defendant's conduct and intent in the interrogation room. . . .

Second, the possibility of a mini-trial over defendant's state of mind in the interrogation room poses a significant risk of undue prejudice to defendant. The court finds that such a mini-trial would pose an unacceptably high risk of focusing the jury on the abstract question of whether defendant was sexually attracted to photos of a severely injured child rather than his conduct and intent in this specific case. Such a focus in turn would create a significant danger that the evidence would be viewed as propensity evidence, specifically, that the jury would judge defendant not based on the evidence but based on a view that he must be guilty of the sexual assault of a young child because he has traits that society finds repulsive.

We further discern no error in the judge's application of the Cofield factors. Because defendant has denied involvement in causing A.S.'s injuries and has not challenged the assertion that whoever caused A.S.'s grievous injuries did so purposely or knowingly, neither motive nor intent is actually in dispute to satisfy the first Cofield prong. See State v. J.M., Jr., 225 N.J. 146, 159 (2016) ("In a case in which a defendant contends the alleged assault did not occur, intent and absence of mistake are not at issue[,] . . . other-crime evidence is irrelevant[,] and the first Cofield prong cannot be satisfied."); State v. Skinner,

218 N.J. 496, 519-20 (2014) (holding that Cofield's first prong was not satisfied because intent was not in dispute where the defendant "did not advance any evidence calling into question that [the victim's] shooter had intended to kill him," the injuries inflicted "provided the State with strong evidence of an intent to kill," and the defendant "merely asserted that he was not the shooter"). While there is a genuine dispute as to identity, we agree with the judge that the video cannot satisfy Cofield's first prong because it has little to no probative value on the issue of identity. See State v. Williams, 240 N.J. 225, 237 (2019) (underscoring the requirement to establish a "'logical connection' . . . for relevance purposes" between the evidence the party seeks to admit and the facts of the case).

Finally, we reject the State's contention that in applying the fourth Cofield prong, the judge erroneously "blurred the line" between his Rule 403 and Rule 404(b) analysis. On the contrary, our Supreme Court has expressly instructed that "[w]hen analyzing prejudice under N.J.R.E. 404(b), courts should also consider the factors presented in N.J.R.E. 403." Willis, 225 N.J. at 99. We conclude that even if the video was relevant to a disputed issue, its minimal probative value is so outweighed by the identified risks of prejudice to defendant that the video is inadmissible.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION