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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0462-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

QUINN M. LATNEY, a/k/a
SANYIKA BLACKMAN,
QUINTON BLACKMON,
QURAS MUHAMMAD, and
KAREEM WILLIAMS,

Defendant-Appellant.

Submitted January 19, 2023 – Decided May 18, 2023

Before Judges Accurso, Vernoia, and Firko.

On appeal from the Superior Court of New Jersey, Law
Division, Union County, Indictment No. 20-02-0123.

Joseph E. Krakora, Public Defender, attorney for
appellant (Laura B. Lasota, Assistant Deputy Public
Defender, of counsel and on the briefs).

William A. Daniel, Union County Prosecutor, attorney
for respondent (Michele C. Buckley, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Quinn Latney was tried before a jury, which found him guilty of second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a)(1) and (2), and N.J.S.A. 2C:15-1(a)(1) and (2) (count one); second-degree eluding law enforcement, N.J.S.A. 2C:29-2(b) (count two); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(6) (count three); and fourth-degree resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2) (count four). He appeals from his September 14, 2020 judgment of conviction and sentence.

Defendant raises the following points for our consideration:

POINT I

THE DENIAL OF DEFENDANT'S MOTION TO PROCEED PRO SE VIOLATED HIS CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION BECAUSE HIS REQUEST TO WAIVE HIS RIGHT TO COUNSEL WAS KNOWINGLY AND VOLUNTARILY MADE.

POINT II

THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE TO PRESENT EVIDENCE THAT DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF CRIMES INVOLVING THE USE OF IMITATION HANDGUNS AS PROOF OF HIS STATE OF MIND AS TO THE CONSPIRACY TO COMMIT SECOND-DEGREE ROBBERY OFFENSE.

POINT III

THE TRIAL COURT ERRED WHEN IT DISMISSED, OVER DEFENSE OBJECTION, JUROR [NUMBER] [THIRTEEN] FOR SLEEPING DURING PARTS OF WITNESS'S TESTIMONY, BUT PERMITTED ANOTHER JUROR, WHO SLEPT THROUGH PORTIONS OF THE SAME TESTIMONY, TO REMAIN ON THE PANEL. DISMISSAL OF THE JUROR DEPRIVED DEFENDANT OF HIS RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND AN IMPARTIAL JURY OF HIS PEERS.

POINT IV

DEFENDANT'S AGGREGATE [TWENTY-EIGHT]-YEAR SENTENCE SUBJECT TO AN [EIGHTY-FIVE PERCENT] PAROLE DISQUALIFIER, IS EXCESSIVE AND THE PRODUCT OF SEVERAL SENTENCING ERRORS.

- A. The Sentencing Court Erred When It Double Counted Defendant's Prior Criminal Record By Relying On It To Apply Both A Discretionary Persistent Offender Extended Term And Aggravating Factors Three and Six.
- B. The Sentencing Court Erred By Failing To Find Applicable Mitigating Factors.
- C. The Court Erred By Imposing A Consecutive Sentence For Defendant's Aggravated Assault By Eluding Conviction And Did Not Consider The Overall Fairness Of The Sentence It Imposed.
- D. The Sentencing Court Erred When It Imposed Fines For A Merged Conviction.

Because we conclude the trial court abused its discretion and erred in admitting evidence regarding defendant's prior crimes under N.J.R.E. 404(b), we reverse and vacate defendant's conviction and sentence, and remand for a new trial. In light of our decision, we do not address defendant's remaining arguments related to dismissal of a juror, or challenges to his sentence. We briefly address the denial of defendant's motion to proceed pro se.

I.

A. The Attempted Robbery

On December 13, 2018, at 10:30 p.m., the female victim was walking to her home in Elizabeth. She observed a "light" colored Honda Accord parked near her in front of a neighbor's house. The victim saw a tall man wearing a "fluffy hoodie" and smoking a cigarette exit the passenger side door and walk towards her. The man "attacked" her by "grabbing her jacket" and "hitting her over and over on her head." He threw the victim to the ground and her eyeglasses fell off her face. The victim covered her face with her hands and screamed for help. The man kicked her and tried to take her purse, but only ripped the purse instead. He went back to the Accord, which was still running, and the driver, who was later identified as defendant, sped away.

The victim did not see the man's face because it was dark outside, and her eyeglasses came off. She also did not observe the interior of the Accord and could not determine what the driver looked like. The victim testified she never saw a gun during the attack. Her screams were heard by her partner and a neighbor. The neighbor testified she heard the victim scream, looked outside her window, and observed a silver Accord driving away "fast." The neighbor saw two people in the car when it drove away. According to the neighbor, she ran outside to tend to the victim, who was "crying," "a mess," and appeared confused. The neighbor thought she saw "what looked like a gun on the ground," and she called 9-1-1.

During her 9-1-1 call, which was played for the jury, the neighbor informed the operator that a "tall black guy," "in a black jacket, black hooded sweatshirt" and "jeans" who "had a fake gun" in a "silver Honda Accord" tried to "rob a girl walking." The neighbor stated the suspects were headed towards Acme Street. The neighbor, who did not witness the attack, provided the police with her home surveillance video recording, which captured the incident. The video recording was played for the jury.

The victim's partner similarly testified he heard her scream and saw her crying on the ground while she looked for her eyeglasses. The victim told her

partner, "somebody had me, somebody tried to rob me." Her partner noticed a gun on the ground, which he thought was an actual gun that turned out to be an imitation handgun. The partner did not witness the attack. The victim went to a hospital for an evaluation and treatment for her injuries, which have not resolved.

B. The Police Pursuit

Patrol sergeant Gerson Jean-Marie began a pursuit of the suspects in his marked police car, and he was later joined by officers Liam Kiniery, Eduardo Andino, and Steven Lazo, who were in separate cars. Based on the description provided, Jean-Marie intended to drive to the crime scene, but observed a silver Accord driving in the opposite direction with "two black males" inside. Jean-Marie pursued them and activated his lights and siren after coming directly behind the Accord, but defendant "just started taking off."

A police pursuit of the Accord—involving three police vehicles—lasted over twelve minutes and spanned across six municipalities in addition to Elizabeth. Jean-Marie and Kiniery testified that defendant drove in a "very erratic" manner, "driving fast, going through stop signs . . . red lights, . . . against a one-way street," and "crossing double lanes on the other side of approaching other traffic."

During the pursuit, defendant braked abruptly twice, causing Kinyery to "rear end the Accord." The pursuit continued to a cul-de-sac resulting in Kinyery's vehicle striking the front passenger side of the Accord. Defendant and the other suspect, D.M.¹, ran off. Ultimately, defendant fell and laid on the ground until he was arrested. D.M. was never apprehended. Defendant claimed D.M. was his friend.

On March 19, 2019, defendant was charged with second-degree eluding an officer, N.J.S.A. 2C:29-2(b); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(6); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2). On January 7, 2020, defendant, who was represented by a public defender, filed a motion to proceed as a self-represented litigant.

C. Defendant's Motion to Proceed as a Self-Represented Litigant

On January 24, 2020, the court conducted oral argument on defendant's motion. The court questioned defendant about his knowledge of the law and defendant's prior representation of himself at a criminal trial fourteen years earlier. Following the hearing, the court reserved decision on the motion. On February 5, 2020, the court rendered its decision denying defendant's motion.

¹ We use initials to avoid repeating what may be a baseless accusation against any individual who shares the name with the person that defendant referenced.

The court found defendant lacked a "fundamental knowledge" and "understanding of the law, evidence, and procedural rules." Therefore, the court found defendant could not, for that reason, knowingly and voluntarily waive his right to counsel.

The court also determined defendant made misrepresentations concerning his purported self-representation in a prior criminal proceeding. Defendant's "falsehoods" and disclosure that he caused "disruptions" during his previous trial also served as a basis to deny the motion. Shortly after issuing its decision during a court appearance on February 14, 2020, the court noted defendant had withdrawn his application and confirmed he wanted counsel to continue representing him.² Thus, defendant was represented by counsel during the entirety of his trial.

On February 11, 2020, in a superseding indictment, defendant was charged with second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a)(1) and (2), and N.J.S.A. 2C:15-1(a)(1) and (2) (count one); second-degree eluding law enforcement, N.J.S.A. 2C:29-2(b) (count two); second-degree

² It is unclear from the record whether defendant's decision to withdraw his motion occurred before or after the court denied the motion. On appeal, defendant's counsel asserts "it is likely defendant withdrew the application because he had lost the motion." Counsel also states there is no record of the motion being withdrawn on PROMIS/Gavel or on eCourts.

aggravated assault, N.J.S.A. 2C:12-1(b)(6) (count three); and fourth-degree resisting arrest by flight, N.J.S.A. 2C:29-2(a)(2) (count four).

D. Trial Testimony and Evidence

Defendant testified December 30, 2018 was his birthday. D.M. came to his house in the afternoon, and the two drank and talked. Afterwards, they drove to a liquor store, with defendant sitting in the passenger seat, and then to a park, where they drank some more. D.M. told defendant he had financial problems and was facing eviction. In addition, D.M. revealed to defendant that he planned "to go [to] the Elmora section [of Elizabeth] to break into some . . . abandoned houses . . . to get like metals and things[,] . . . sinks and stuff."³ Defendant offered to drive D.M. to the Elmora section, explaining he "felt sorry for him."

After leaving the park, defendant drove D.M. to the Elmora section. D.M. got out of the car, put a pair of gloves on, grabbed his crowbar and wrench, and left. He returned, complaining that he could not enter the house he had in mind because someone was outside. Next, D.M. advised defendant he wanted to see a friend who "owed him some money." Defendant drove D.M. to a residential area, which was unfamiliar to defendant. D.M. went to meet his friend, but

³ The court permitted defendant to testify regarding D.M.'s statements to him and instructed the jury that these statements were not being admitted for their underlying truth, but for the effect they had on defendant.

shortly thereafter, defendant heard a scream. After D.M. got back into the car, he told defendant to "pull off." Based on D.M.'s changed demeanor—becoming "irate and aggressive"—defendant complied with his command.

Thereafter, the officers pulled up behind defendant and D.M. Defendant asked D.M., "what the F did you do?" D.M. told defendant to drive, pointed a gun at him, and told defendant, "be cool[;]" he "did some bullshit back there[;]" and he dropped something that could "link back" to D.M. He told defendant he was "not going to jail" and to "fucking drive," otherwise he would "kill" him. D.M. told defendant to drive towards Newark.

When the police pursuit started, defendant testified D.M. had a gun on him, so he kept driving. D.M. told defendant to slow down so he could get out, but they were rear-ended by one of the officers. Defendant claimed his face hit the steering wheel; he felt dizzy; and he proceeded to drive when the officers "hit the car again." Defendant continued to drive because D.M. had a gun pointed at him and "there wasn't much he could do."

Defendant acknowledged his careless driving during the police pursuit; he braked twice, causing two collisions; and he ignored traffic signs. Defendant testified he was trying to escape from D.M. and did not want to get him "locked up." Defendant did not see where D.M. went. The gun found at the cul-de-sac

where the attempted robbery occurred was identified by defendant as belonging to D.M. Defendant stated the wrench, crowbar, and gloves found inside the Accord belonged to D.M.

At trial, defendant acknowledged his criminal history included first-, second-, third-, and fourth-degree crimes dating back to 2005. He also admitted two of his first-degree convictions involved imitation firearms. He also acknowledged being convicted of a third-degree crime in 2016. The court allowed the State to introduce defendant's two prior first-degree convictions involving the use of imitation handguns to counter his testimony that D.M. held him at gunpoint, with a fake gun—which he believed was a real gun—and forced him to drive away from the scene of the crime. Defendant also denied any knowledge of D.M.'s plan to rob the victim or that he had an imitation firearm on him.

The State played two excerpts from recorded telephone conversations between defendant and his girlfriend. During one conversation, defendant admitted he was the driver and "everything else" was "on" D.M. Defendant explained D.M. "didn't know this chick" and got "nothing from her." In the second conversation, defendant told his girlfriend he "was trying to cut off into Newark," but they ended up on a "dead-end street" and he "had to jump out."

Officer Joseph Garcia collected evidence from the scenes of the attempted robbery and where the pursuit concluded. None of the fingerprints he collected from the interior of the Accord were identifiable. Regarding the other physical evidence, Monica Ghannam, who was qualified by the court as an expert in the field of DNA forensic analysis, testified the evidence collected from the scene of the attempted robbery contained an insufficient amount of DNA to test, and the results were too limited for comparison purposes. Notably, she reached the same conclusion as to the imitation guns found at the scene of the attempted robbery and underneath the driver seat of the Accord. Nevertheless, she testified there was "very strong support" that defendant contributed to the DNA mixture found on the black fleece hood on the front passenger floor, key fob from the driver seat, and imitation gun wrappers underneath the front passenger seat.

The jury found defendant guilty on all four counts. The court granted the State's application for an extended term because defendant was a persistent offender. He was sentenced to an aggregate term of twenty-eight years' imprisonment.

II.

We begin our analysis with defendant's contention that the court erred in allowing the State to present evidence defendant had been convicted previously

of crimes involving the use of imitation handguns as proof of his state of mind as to the conspiracy to commit second-degree robbery. Defendant asserts the court abused its discretion under N.J.R.E. 404(b)(1) and (2) and State v. Cofield, 127 N.J. 328 (1992), in admitting the other bad acts evidence, thereby depriving him of his rights to due process and a fair trial.

We afford great deference to the trial court's admission of other-crimes evidence. State v. Gillispie, 208 N.J. 59, 84 (2011). We disturb the court's decision only "where there is a clear error of judgment." State v. Rose, 206 N.J. 141, 157-58 (2011) (quoting State v. Barden, 195 N.J. 375, 391 (2008)). "The admissibility of such evidence is left to the sound discretion of the trial court, as that court is in the best position to conduct the balancing required under Cofield due to its 'intimate knowledge of the case.'" Gillispie, 208 N.J. at 84 (quoting State v. Covell, 157 N.J. 554, 564 (1999)).

N.J.R.E. 404(b)(1) 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)(2), however, permits 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."

"Because evidence of a defendant's previous misconduct 'has a unique tendency' to prejudice a jury, it must be admitted with caution." State v. Willis, 225 N.J. 85, 97 (2016) (quoting State v. Reddish, 181 N.J. 553, 608 (2004)).

"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.

To "avoid the over-use of extrinsic evidence of other crimes or wrongs," courts must utilize a four-prong case-by-case analysis to determine admissibility:

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.]

As for prong one, the "proffered evidence must be 'relevant to a material issue genuinely in dispute.'" Gillispie, 208 N.J. at 86 (quoting State v. Darby, 174 N.J. 509, 519 (2002)). Evidence is relevant if it tends "to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. "The analysis can include all evidentiary circumstances that tend to shed light on a defendant's motive and intent, or which tend fairly to explain [their] actions, even though they may have occurred before the commission of the offense." State v. Skinner, 218 N.J. 496, 515 (2014) (citations omitted). "The main focus 'in determining the relevance of evidence is whether there is a logical connection between the proffered evidence and a fact in issue.'" State v. Garrison, 228 N.J. 182, 195 (2017) (quoting State v. J.M., 225 N.J. 146, 160 (2016)).

The second prong "requires that the other-crime evidence be similar in kind and reasonably close in time to the alleged crime, [but the second prong] is implicated only in circumstances factually similar to Cofield." Skinner, 218 N.J. at 515. In Cofield, "the State sought to introduce evidence establishing the defendant's constructive possession of drugs during an illegal-drug street encounter [which] occurred subsequent to the drug incident that was the subject of the prosecution." State v. Williams, 190 N.J. 114, 131 (2007). "The State sought to admit that similar and close-in-time other-crimes evidence as relevant

to prove the defendant's possession of drugs in the charged offense, an element that was hotly contested." Ibid.

The third prong requires the evidence of the other crime to be clear and convincing. Cofield, 127 N.J. at 338. The clear and convincing standard may be satisfied by uncorroborated testimonial evidence. State v. Hernandez, 170 N.J. 106, 127 (2001) (citations omitted). Additionally, the trial court may consider the surrounding circumstances to find adequate "support that the third prong of Cofield was satisfied." Rose, 206 N.J. at 163.

The fourth prong is a balancing test between the risk of prejudice and the probative value of the evidence. Case law instructs the trial court to consider "if other less prejudicial evidence may be presented to establish the same issue." Id. at 161 (alteration in original) (quoting Barden, 195 N.J. at 392). The court should exclude the evidence if there is another way to establish the same issue. Ibid. While the fourth prong is a stringent balancing test, "our courts have not frequently excluded highly prejudicial evidence under the fourth prong of Cofield." Garrison, 228 N.J. at 198 (quoting State v. Long, 173 N.J. 138, 162 (2002)).

Moreover, the court must sanitize other-crimes evidence, Barden, 195 N.J. at 390, and give a limiting instruction to the jury, Skinner, 218 N.J. at 516.

Sanitizing evidence "accommodates the right of the proponent to present relevant evidence and the right of the objecting party to avoid undue prejudice." Barden, 195 N.J. at 390 (citations omitted). Courts sanitize other-crimes evidence by "confining its admissibility to those facts reasonably necessary for the probative purpose." State v. Fortin, 318 N.J. Super. 577, 598 (App. Div. 1999), aff'd, 162 N.J. 517 (2000).

"[T]he court's [limiting] instruction 'should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere.'" Barden, 195 N.J. at 390 (alteration in original) (quoting Fortin, 162 N.J. at 534). The limiting instruction "should be given when the evidence is presented and in the final charge to the jury." Ibid. (citing Fortin, 162 N.J. at 534-35).

Here, during a pretrial conference, both counsel agreed that a sanitized version of defendant's recent criminal history could be introduced at trial, limited to the degree of the offense, the date of conviction, and the length of the sentence. The State intended to use defendant's recent criminal history for two distinct reasons regarding defendant's state of mind. First, if defendant testified

and claimed duress as a defense—that he fled from the police because he was held at gunpoint by D.M. and under imminent threat of violence—then the State intended to admit his prior convictions involving the use of an imitation handgun to impeach his credibility. In addition, the State advised it would seek to admit these prior convictions to demonstrate defendant's "intent and knowledge" of the attempted robbery, which also involved an imitation handgun, refuting his claim that he "didn't know the robbery was about to take place."

In a preliminary ruling on this issue, based upon its analysis of the Cofield factors, the court "presume[d] that [defendant's] going to say that his friend, unbeknownst to him, pulled out a gun, pointed it at him and threatened his life and said drive and where to go." When weighing the Cofield factors, the court considered all the charges against defendant—conspiracy to commit armed robbery, eluding, aggravated assault, and resisting arrest. The court, however, did not apply the factors to each underlying charge separately. Rather, the court considered all the charges collectively when making its Cofield assessment.

The court concluded the Cofield factors were met because: (1) defendant's duress defense and D.M.'s threat to kill him with what "he believed to be a

genuine gun" implicated defendant's "state of mind;"⁴ (2) the second factor relating to time proximity was inapplicable; and (3) the third factor was established because the prior crime was supported by clear and convincing evidence. As to the fourth factor, the court found the prejudice did not outweigh the probative value of the evidence. While the court found the State, "as it stands now," satisfied its burden under Cofield, the court reserved final decision until it had the ability to hear and consider defendant's testimony.

Following defendant's testimony that he fled from the police because D.M. threatened him with the imitation handgun, the State moved to admit defendant's past convictions involving imitation handguns under N.J.R.E. 404(b). The State argued defendant's testimony "made highly relevant the issue of whether this defendant knew or did not know about [D.M.'s] actions and about the imitation handgun." Thus, the State sought to introduce defendant's prior crimes evidence to show that his intent was to conspire for the robbery. The State sought to "un-sanitize" two of defendant's convictions to show he had been previously

⁴ At the pretrial conference, the court highlighted it would be "perfectly appropriate and consistent" with case law for the State to introduce prior crimes evidence if defendant disputes his knowledge of the robbery at trial, regardless of his duress defense to the eluding charge. The court noted, however, it must "await what [defendant] says" since the admission of his prior convictions must be evaluated on a "fact-sensitive basis."

"convicted of two robberies with imitation firearms."⁵ Defense counsel objected on the basis defendant had committed a robbery thirteen years earlier with a different individual, and the State's proffer was not relevant to show defendant's knowledge of the robbery in this case because it constituted "impermissible propensity purposes."

The court granted the State's application, ruling under N.J.R.E. 404(b), the State could admit this evidence "for count [one] only, the conspiracy to commit robbery." The court explained it would instruct the jury to consider defendant's prior offenses involving imitation handguns as to his state of mind only as to the conspiracy to commit robbery count. Considering that defendant stated he knew "he was conspiring to commit a burglary," but not a robbery, the court noted it would instruct the jury to consider defendant's prior offenses for the purposes of evaluating his intent and knowledge.

Nevertheless, "concerned with an argument of propensity," the court "further sanitized" this evidence. Instead of allowing the State to question

⁵ Counsel previously agreed that a "sanitized" version of defendant's criminal history from the past ten years could be introduced at trial. Before allowing questioning about defendant's criminal history, the court instructed the jury that his past convictions could only be used to consider his credibility, meaning whether he was "more likely to ignore the oath of truthfulness while testifying," but could not be used as evidence of his propensity to commit crimes.

defendant on the two robberies involving imitation handguns, for which he had been previously convicted, the State was only permitted to question defendant as to evidence that on two separate occasions, within the dates of the offenses specified, defendant committed a first-degree offense using an imitation firearm. A similar instruction was included in the final jury charge.

We first address the other-crimes evidence. At the N.J.R.E. 404(b) hearing, the court initially examined the Cofield factors. During the hearing, the State sought to introduce prior crimes evidence—defendant's two prior convictions for first-degree offenses committed with imitation firearms—in connection with both the conspiracy to commit robbery and the eluding charges as evidence of defendant's state of mind. However, at trial, the State sought to introduce the prior crimes evidence relative to the conspiracy to commit robbery charge only, and the jury was so instructed.⁶

While the court admitted defendant's prior convictions as to the conspiracy to commit robbery charge, the court failed to properly conduct a prong one Cofield analysis for this charge after hearing defendant's testimony. We conclude the court erred in admitting this evidence to show defendant's

⁶ In a similar vein, the State did not seek to admit the past crimes evidence to rebut defendant's defense of duress, which defendant asserted as to the eluding charge only.

intent and knowledge of the conspiracy under N.J.R.E. 404(b), warranting reversal and a new trial.

The State argues the court's oversight is harmless because defendant's past use of imitation handguns undermines his claim that he was unaware of the attempted robbery until after the fact and was relevant to establishing his knowledge that D.M. had planned to commit a robbery using an imitation "firearm." This argument, however, is flawed because it fails to connect defendant's prior use of imitation handguns to his knowledge of D.M.'s actions. Instead, defendant's prior convictions could be logically used by the jury only for the prohibited purpose of establishing defendant's propensity to commit crimes with imitation firearms, as there was an imitation firearm recovered from the scene of the attempted robbery. The evidence of defendant's prior offenses is also irrelevant to any of the elements for conspiracy to commit robbery. The State need not show that defendant possessed an imitation firearm to prove the conspiracy charge.

Furthermore, although an imitation handgun was found at the crime scene, there was no proof an imitation firearm was used during the attempted robbery. The victim did not recall seeing a handgun or being threatened with one, and none of the other witnesses who viewed the attack saw the perpetrator brandish

any type of gun. Moreover, defendant himself testified that he was unaware of the presence of any guns until he and D.M. drove away from the crime scene. The evidence collected from the scene of the attempted robbery either had an insufficient amount of DNA to test, or the results were too limited for comparison purposes.⁷ The obvious prejudicial effect of the prior crimes evidence is substantially outweighed by its non-existent probative value. Thus, the evidence should have been excluded under N.J.R.E. 404(b) because it had the clear capacity to bring about an unjust result.

In addition, the prejudicial nature of defendant's prior crimes "led the jury to a result it otherwise might not have reached," State v. Daniels, 182 N.J. 80, 95 (2004), because the evidence showed the robbery was not committed by defendant. Consequently, absent the evidence concerning defendant's prior convictions for offenses committed with imitation firearms, his claim he did not know D.M. intended to commit a robbery until after the robbery occurred might

⁷ In State v. Prall, 231 N.J. 567, 587-588 (2018), while cautioning it to be a "rare case," our Supreme Court found "there was overwhelming fact and expert evidence properly offered against defendant[;]" thus, the State's impermissible use of prior bad act evidence was harmless error. In contrast, here, although Ghannam testified there was "very strong support" that defendant contributed to the DNA mixture found on the black fleece hood, key fob, and imitation gun wrappers, which were found inside the Accord, defendant's DNA was unidentifiable at the crime scene or on any of the recovered imitation guns.

have been persuasive. And, any chance of defendant succeeding on that claim ended when evidence showing he had prior convictions for offenses involving imitation firearms—like the one recovered at the crime scene—was admitted. We hold the court abused its discretion in admitting defendant's other-crimes evidence. Therefore, we reverse the conviction and order a new trial.

III.

We briefly address defendant's claim that the denial of his motion to proceed pro se violated his constitutional right to self-representation because he knowingly and voluntarily waived his right to counsel. Defendant contends the court improvidently assessed his proficiency in the law instead of whether he knowingly and voluntarily waived his right to counsel. According to defendant, the court's error was "compounded" by its reliance on defendant's misunderstanding about a prior criminal matter. Although we have reversed in favor of a new trial, and defendant arguably withdrew his motion to proceed pro se, we address this issue because it is likely to arise again.

We review a trial court's decision regarding self-representation for an abuse of discretion. State v. Outland, 245 N.J. 494, 507 (2021). Our Supreme Court has held "the United States Constitution and our New Jersey Constitution grant defendants charged with a criminal offense the right to have the assistance

of counsel." State v. King, 210 N.J. 2, 16 (2012) (citing U.S. Const. amend. VI; N.J. Const. art. I, ¶ 10). "The corollary to the right of a criminal defendant to be represented by an attorney is the defendant's right to represent himself." Ibid. (citing Faretta v. California, 422 U.S. 806, 814 (1975)).

"The right [of self-representation] is either respected or denied; its deprivation cannot be harmless." Id. at 22 (alteration in original) (quoting McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984)). "A [d]efendant may have been represented by a skilled attorney, the evidence against [the defendant] may have been substantial, and the verdict may find strong support in the record; that matters not." Ibid.; see State v. Thomas, 362 N.J. Super. 229, 244 (App. Div. 2003).

Our Supreme Court recently reiterated that a trial court must address a series of topics with a defendant seeking to represent themselves. Outland, 245 N.J. at 506. Trial courts must inform defendants seeking to proceed as self-represented litigants about:

- (1) the nature of the charges, statutory defenses, and possible range of punishment;
- (2) the technical problems associated with self-representation and the risks if the defense is unsuccessful;
- (3) the necessity that defendant comply with the rules of criminal procedure and the rules of evidence;
- (4) the fact that the lack of knowledge of the law may impair defendant's ability to defend [themselves];
- (5) the impact that the

dual role of counsel and defendant may have; (6) the reality that it would be unwise not to accept the assistance of counsel; (7) the need for an open-ended discussion so that the defendant may express an understanding in [their] own words; (8) the fact that, if defendant proceeds pro se, [they] will be unable to assert an ineffective assistance of counsel claim; and (9) the ramifications that self-representation will have on the right to remain silent and the privilege against self-incrimination.

[Ibid. (quoting State v. DuBois, 189 N.J. 454, 468-69 (2007)).]

The purpose of providing this information is not for the trial court to determine whether a defendant has "technical legal knowledge;" it is to inform the defendant "of the dangers and disadvantages of self-representation, so that the record will establish that [they] know what [they are] doing and [their] choice is made with eyes open." Ibid. (quoting Faretta, 422 U.S. at 835). However, a defendant's right to self-representation "is about respecting a defendant's capacity to make choices for [themselves], whether to [their] benefit or to [their] detriment." Reddish, 181 N.J. at 585; see also State v. Rose, 458 N.J. Super. 610, 627 (App. Div. 2019). Even if the decision is "fraught with risk," a defendant should not be denied the choice to proceed self-represented. King, 210 N.J. at 17.

During its colloquy with defendant, the court asked defendant to explain the elements of eluding, aggravated assault while eluding, and resisting arrest. Defendant was also queried about the State's burden of proof and sentencing exposure, including concurrent and consecutive sentencing, and extended term sentencing. The court also queried defendant about his familiarity with the Rules of Evidence and hearsay evidence, the Rules of Court, jury selection, direct and cross-examination, and opening and closing statements. On appeal, defendant asserts the court did not inform him of the nature and consequences of his waiver of counsel to ensure the waiver was knowing and intelligent, in violation of Outland⁸ and Crisafi/Reddish.⁹

Our review of the record supports defendant's argument that the court erred in denying his request to proceed pro se at trial because the court did not focus on the pertinent inquiry—whether defendant made a knowing and voluntary decision to proceed without counsel. A trial court is not required to confirm that defendant understands "technical legal knowledge," but rather must "ascertain whether he actually understands the nature and consequences of his waiver." Reddish, 181 N.J. at 594. The trial court erroneously denied the

⁸ Outland, 245 N.J. at 508.

⁹ State v. Crisafi, 128 N.J. 499, 511-12 (1992) and Reddish, 181 N.J. at 594-95.

motion on the basis defendant lacked an "understanding of the law, evidence, and procedural rules."

Here, the court's questions were not geared towards ascertaining whether defendant understood the "perils of self-representation." Outland, 245 N.J. at 508. Moreover, the court did not fully apprise defendant of the risks and consequences of pro se representation and did not review fundamental information about the offenses charged against him. See Reddish, 181 N.J. at 553. The record is also unclear as to whether defendant presented "falsehoods" about his purported representation of himself in a prior criminal proceeding. Defendant was vague about the details of this representation, causing the court to conduct independent research on defendant's criminal history and court appearances.

Although defendant initially stated he was self-represented in the prior case, he amended his answer to clarify the court had permitted him to act as "primary counsel" on his own behalf while his attorney "stood by as co-counsel." As primary counsel, defendant claimed he questioned witnesses and presented arguments. His attorney in that case gave a summation. Defendant explained he was unhappy with his attorney's representation in that case and disagreed with his attorney regarding the questioning of witnesses.

Ultimately, the court found there was no indication that defendant proceeded pro se or engaged in any form of hybrid representation in the previous case. Thus, on February 3, 2020, the court denied defendant's application to represent himself in the current matter. However, during a court appearance on February 14, 2020, the court noted that defendant had since withdrawn his application. Defendant acknowledged he "changed [his] mind" about proceeding pro se, without any suggestion he did so based on the court's decision to deny his motion.

Thus, if on remand defendant requests to proceed as a self-represented litigant, the court shall question him anew about the decision under the standards explained by the Court in Outland, 245 N.J. at 508, Crisafi, 128 N.J. at 511-12, and Reddish, 181 N.J. at 594-95. The court shall also make appropriate findings of fact and conclusions of law in its decision based on the record presented at that time. R. 1:7-4.

In light of our decision to reverse and remand for a new trial, defendant is free to file another motion to proceed as a self-represented litigant. In that event, the court will conduct a hearing that comports with all the requirements in Outland and Crisafi/Reddish.

Defendant's convictions and sentence are vacated, and the matter is remanded for a new trial consistent with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION