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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1574-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARRELL SCOTT,

Defendant-Appellant.

Submitted February 1, 2023 - Decided March 13, 2023

Before Judges Currier and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment No. 11-12-1229.

Joseph E. Krakora, Public Defender, attorney for appellant (Ruth E. Hunter, Designated Counsel, on the brief).

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Colin J. Rizzo, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the January 28, 2013 order granting the State's motion to admit certain evidence under N.J.R.E. 404(b) and as intrinsic to the conspiracy charge. We affirm.

In 2011, defendant was charged in an indictment, along with three other individuals—Henry Kidd, Anthony Kidd,¹ and Antonio Merritt, with multiple offenses related to the killing of Kendra Degrasse. The charges included conspiracy to murder Degrasse; first-degree murder and felony murder, robbery, and weapons-related offenses. Defendant and the Kidd brothers were cousins.

The charges arose after Anthony was convicted in 2003 of aggravated assault on a police officer after he shot at several officers. Following the shooting, Degrasse—Anthony's ex-girlfriend—implicated Anthony in a statement to police, which she later recanted. Anthony was sentenced to serve more than forty years in prison.

We derive our facts from the evidence presented during the Rule 404(b) hearing. After the trial and while Anthony was incarcerated, he began a romantic relationship with Kimberly Douglass. Douglass smuggled cell phones into the prison for Anthony to use in conducting his narcotics business and to

¹ Because Anthony and Henry Kidd share the same last name, we refer to them by their first names.

communicate with others. She also brought drugs into the prison and laundered money for Anthony. At some point, Anthony told Douglass he felt betrayed by Degrasse, and he wanted to have her killed in retaliation for her statement to police and to prevent her from testifying at a retrial, if he succeeded on appeal.

In early 2005, Douglass wired defendant money so he could travel from Alabama to New Jersey to kill Degrasse. He would be paid \$1,000 for the murder. However, after defendant arrived in Trenton, and learned the money was not available, he left after staying a few days. According to Douglass, as she drove defendant to the train station, he told her she should "keep [her] mouth shut."

Defendant returned to New Jersey in March 2005. Douglass gave the promised money to Henry, Anthony's brother. Douglass did not meet defendant on this visit and did not know the ultimate recipient of the money. Degrasse was found dead on March 24, 2005 in her car with three bullet wounds to the head. Douglass stated Anthony and Henry told her defendant killed Degrasse.

Douglass was indicted on charges relating to her illegal prison activities. She subsequently pleaded guilty. She testified that in an argument with Henry before she went into custody, he told her that defendant wanted her killed and Henry was the only reason she was still alive. Henry said defendant was

concerned that Douglass "knew too much." Douglass also testified that Anthony told her over the phone that defendant wanted her dead.

Bernadette Humphrey also testified at the hearing. Humphrey was Henry's girlfriend and became acquainted with Anthony. She visited Anthony in prison and became involved in his narcotics business. Humphrey testified she heard Henry tell Douglass that defendant wanted Douglass dead. And that Anthony also told her that defendant wanted to kill Douglass.

Relevant to this appeal, the State sought to admit the following evidence during defendant's trial: that defendant sought to kill Douglass and Ebony McNeil, another potential witness against Anthony; regarding defendant's first trip to Trenton in 2005 for the purpose of killing Degrasse; of calls between Anthony and Humphrey discussing Anthony's plans to use defendant for other killings; about Anthony's plan to use defendant to retaliate against individuals who had harmed Anthony's father.

On January 28, 2013, the motion judge issued a comprehensive well-reasoned seventy-two-page written opinion and accompanying order admitting the evidence pursuant to a limiting instruction under Rule 404(b) and State v. Cofield, 127 N.J. 328 (1992).

Thereafter, defendant pleaded guilty to the downgraded charge of first-degree aggravated manslaughter. He reserved the right to appeal the order admitting certain evidence under Rule 404(b). He was sentenced to an aggregate term of twenty-nine years in prison subject to an eighty-five percent period of parole ineligibility.

On direct appeal, defendant did not challenge the order permitting Rule 404(b) testimony from Douglass and Humphrey regarding statements made to them by Henry and Anthony concerning defendant's desire to kill Douglass. State v. Scott, No. A-2045-13 (App. Div. Mar. 1, 2017) (slip op at 9). Instead, defendant argued the proffered statements were inadmissible hearsay. Ibid.

During the suppression hearing, defendant asserted the evidence was inadmissible under Rule 404(b) and under the hearsay rules. However, the motion judge only considered the admissibility of the evidence under Rule 404(b), stating defendant could renew the hearsay arguments at trial, if appropriate. Because the judge did not substantively rule on the hearsay objection and there was no trial, on direct appeal we found defendant's argument meritless as there was no adverse ruling to review. Id., slip op. at 10. We affirmed defendant's convictions and sentence. Id., slip op. at 11, 13.

Defendant subsequently filed a petition for post-conviction relief, asserting trial and appellate counsel provided ineffective representation on various grounds, including appellate counsel's failure to challenge the trial court's Rule 404(b) rulings. The PCR court found defendant had demonstrated ineffective assistance of counsel in not raising the Rule 404(b) claims on direct appeal. Therefore, the court permitted defendant to file an appeal of the Rule 404(b) rulings. The remainder of the petition was dismissed without prejudice.

On appeal, defendant raises a sole point for our consideration:

POINT I
PURSUANT TO N.J.R.E. 404(b) AND STATE v. COFIELD, 127 N.J. 328, 336 (1992), THE TRIAL COURT ERRED IN ADMITTING EVIDENCE ABOUT DEFENDANT'S ALLEGED, OTHER BAD ACTS.

We "defer to a trial court's evidentiary ruling absent an abuse of discretion." State v. Garcia, 245 N.J. 412, 430 (2021). "We will not substitute our judgment unless the evidentiary ruling is 'so wide of the mark' that it constitutes 'a clear error in judgment.'" Ibid. (quoting State v. Medina, 242 N.J. 397, 412 (2020)). However, an evidentiary decision is reviewed de novo "whe[n] the trial court fails to apply the proper legal standard in evaluating the admissibility of evidence." State v. Trinidad, 241 N.J. 425, 448 (2020).

Our Supreme Court has stated that "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 State v. Rose, 206 N.J. 141, 157–58 (2011)).

Under Rule 404(b)(1), "evidence of other crimes, wrongs, or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." Subparagraph (2) provides an exception to this rule, stating "[t]his evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute." R. 404(b)(2). Other crimes, wrongs, and acts can be defined as anything for which a defendant is not on trial. See State v. Darby, 174 N.J. 509, 518 (2002) (finding testimony about a robbery different from the one the defendant was currently facing charges for constituted other-crimes evidence). This type of propensity evidence is generally prohibited because of its "inflammatory characteristic" and thus "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." Cofield, 127 N.J. at 334 (quoting State v. Stevens, 115 N.J. 289, 303 (1989)).

In Cofield, the Court established a four-part test to use in a case-by-case analysis to determine the admissibility of such evidence:

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;²
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.

[Id. at 338.]

We turn then to a consideration of the trial court's application of the Cofield test to each delineated category of evidence.

Defendant's desire to kill Douglass

The court found Humphrey testified to hearing a verbal altercation between Henry and Douglass the night before Douglass was to turn herself in to federal prison for crimes she claimed to have committed at Anthony and Henry's

² In a subsequent case, the Court stated that "[t]emporality and similarity of conduct is not always applicable, and thus not required in all cases." Rose, 206 N.J. at 160.

command. Humphrey testified she heard Henry say defendant wanted to kill Douglass to "tie up all the loose ends"; Douglass had seen his face and knew who he was. Humphrey also stated she heard Henry tell Douglass that she was "only alive because of him."

In addition, Douglass testified that Henry said she "was only alive because of him." Douglass further stated Humphrey was present during the argument with Henry. The court also found Anthony told Douglass on the phone, while she was at dinner with Humphrey, that defendant wanted her killed.

The court found the evidence satisfied the first Cofield prong because it was probative of defendant's consciousness of guilt. Since the testimony of Douglass and Humphrey was only being offered relative to defendant's state of mind, his desire to kill Douglass, the court found it did not need to analyze the second Cofield prong. In addressing the third prong, the court found Douglass and Humphrey were credible and the State had established by "clear and convincing evidence" defendant desired to kill Douglass.

Lastly, the court found the testimony was "highly probative" of defendant's consciousness of guilt and it did not have the "probable capacity" to prevent the jurors from undertaking a reasonable and fair evaluation of the case.

Therefore, the State had satisfied the fourth Cofield prong and the evidence was admissible.

On appeal, defendant asserts the trial court erred in finding the State met its burden of proof on the first Cofield prong "because defendant's state of mind in regard to killing [Degrasse] was not genuinely in dispute." And the evidence regarding defendant's state of mind towards Douglass had nothing to do with defendant's motive in killing Degrasse.

Under State v. Williams, 190 N.J. 114, 128 (2007), the Court found "post-crime consciousness of guilt evidence can support a logical connection to a desired inference about mental state in specific and non-specific intent crimes." Here, the court heard credible testimony from two individuals that Henry told Douglass that defendant wanted her killed because she knew defendant had killed Degrasse. The testimony was relevant to defendant's consciousness of guilt. The testimony was also consistent in time, place, and information, satisfying the second Cofield prong. Furthermore, the court, having observed and listened to the witnesses, found their testimony clear and convincing. We defer to that finding. And as the trial judge stated, the testimony was highly probative of defendant's state of mind, outweighing any prejudicial impact. There was no error in permitting the testimony.

The plan for defendant to kill Ebony McNeil, another witness against Anthony

Humphrey testified that Anthony was planning to kill McNeil, an ex-girlfriend, because he believed she was a "secret witness" against him resulting in his conviction. Humphrey stated that, during a March 5, 2006 phone call, Anthony told her that McNeil was "[going to] pay." His plan was to bait McNeil by telling her he had money for her and when she came to pick it up, defendant would kill her. In June 2006, Anthony informed Humphrey that defendant needed to come to town "in and out so nobody knew he was here."

The court found the evidence relevant under the first Cofield prong because "[t]here [was] a commonality between the plan to kill [McNeil] and the plan to kill [Degrasse], such that they are part of a course of conduct by defendant." In addition, if Anthony succeeded on appeal, the witnesses could not testify against him in a re-trial. In addressing the second prong, the court found the fifteen-months between Degrasse's death and Anthony's conversations about McNeil was not too remote.

In turning to the third prong, the court found the evidence of Anthony's intention to use defendant to kill McNeil was clear and convincing because Humphrey identified Anthony's voice on the phone calls where he discussed his plan. Although the court found the evidence would create some prejudice, it

reasoned that the plan to kill McNeil was "highly probative of Anthony['s] . . . motive and the common plan or scheme to ensure that should he be granted another trial, the State would be unable to present witnesses to testify against him." Therefore, the court concluded the evidence was admissible.

On appeal, defendant asserts the proffered evidence did not specifically link him to a plan to kill McNeil and therefore, it was not relevant. According to defendant, the court erred in admitting this evidence to show the commonality of a plan because it was Anthony's plan, not his. Defendant contends the court had to connect this plan to the motive to kill Degrasse, and its failure to do so was an abuse of discretion. We again disagree.

The Cofield Court stated that Rule 404(b) evidence may be admitted to establish a common scheme or plan. 127 N.J. at 336; see R. 404(b)(2). Humphrey's testimony that Anthony wanted McNeil killed because he believed she was a secret witness and the phone calls in which Anthony mentioned defendant are relevant to the common scheme of retributive killings and Anthony's use of defendant to execute Anthony's plans. In addition, the baiting scheme discussed regarding McNeil was the same plan used to entice Degrasse to the place of her murder. The second prong was met as the judge found the conversations were not too remote in time. And since Humphrey identified

Anthony on the phone, the court's finding of clear and convincing evidence on the third prong cannot be disturbed. We discern no error in the court's finding on the fourth Cofield prong as the evidence was highly probative of Anthony's intent and plan involving defendant to eliminate any witnesses that could testify against Anthony if he were granted a second trial.

Defendant's First Trip to Trenton

Douglass testified that she picked up defendant from the train station in Trenton on his first trip to New Jersey from Alabama. On this trip, defendant did not kill Degrasse because the agreed-upon sum of money was not transferred to him. Douglass testified that, on the way back to the train station, defendant told her "that he didn't want to keep coming up here for nothing and that [Douglass] better keep [her] mouth shut about what [she] know[s]." The court found the evidence was intrinsic to the charge of conspiracy. Because it was not evidence of another crime, it was not subject to a Rule 404(b) and Cofield analysis.

On appeal, defendant asserts the court erred in finding this evidence intrinsic to the crime of conspiracy because "[it] did not have 'probative value' of any element of the conspiracy crime." Defendant contends there was no

evidence that his first trip to Trenton had anything to do with Degrasse's killing.

We find this argument meritless.

A person is guilty of conspiracy if they

(1) Agree[] with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) Agree[] to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

[N.J.S.A. 2C:5-2(a).]

The court found this testimony was intrinsic to the charge of conspiracy and did not require a Rule 404(b) analysis. Defendant has not demonstrated any error in this ruling. Defendant's actions were proffered as evidence of conspiracy to commit murder. Defendant came to New Jersey to kill Degrasse. The trip was coordinated by co-conspirators Anthony and Henry who both told Douglass the purpose of defendant's visit was to kill Degrasse. If the agreed-upon payment had been in place, defendant would have proceeded with the plan. The evidence is admissible as intrinsic to the crime of conspiracy.

Phone calls between Anthony and Humphrey discussing his plans for other killings

The court noted there was testimony and evidence of phone calls between Humphrey and Anthony in which Anthony discussed plans for defendant to kill people who crossed or betrayed him, such as McNeil. Anthony also mentioned Degrasse's murder. A three-way call between Anthony, defendant, and Humphrey resulted in a voicemail in which Anthony used the words "perform," "put work in," and "get [someone] pushed." Humphrey testified that "get pushed" meant "[g]et killed."

The court found the phone call evidence met the first Cofield prong because it was relevant "to show Anthony['s] . . . plan or scheme to eliminate other potential witnesses." In discussing the second prong, the court found the evidence was similar in kind and close in time to the evidence linking Anthony to Degrasse. As to the third prong, the court stated there was clear and convincing evidence that the calls were made by Anthony, as identified by Douglass and Humphrey. Lastly, the fourth Cofield prong was satisfied because the calls were "highly probative of Anthony['s] . . . motive and the common plan or scheme to ensure that should he be granted another trial, the State would be unable to present witnesses to testify against him." The court found the prejudice did not substantially outweigh the probative value of the evidence.

On appeal, defendant contends the phone conversations were not relevant to defendant's motive; they were only relevant to Anthony's motive. He states the conversations "did not even involve [him], were not relevant to [his] charged crimes as they did not involve the murder of [Degrasse,] and . . . [his] state of mind regarding killing other persons was not genuinely in dispute." Defendant's contentions lack merit.

The three-way calls with defendant, Anthony, and Humphrey were relevant to proving the common scheme of eliminating enemies and potential witnesses. Defendant was on the phone calls and he was designated to carry out Anthony's planned crimes. The phone calls took place within a reasonable time after Degrasse was killed, and the speakers were authenticated by Humphrey. In addition, the calls were highly probative of establishing the common scheme and plan of eliminating any incriminating witnesses. Defendant has not demonstrated it was a clear error of judgment to admit the calls under Rule 404(b).

The plans to retaliate against those who had harmed Anthony's father

The State sought to admit two letters written by Anthony to Douglass, dated September 4, and September 15, 2005 that stated Henry and defendant would be in Trenton in September to retaliate against some young boys who had

assaulted and injured Anthony's father. Douglass testified she was not sure what Anthony's plans for retribution were.

The court found the letters were relevant as required under Cofield's prong one because they established a pattern where Anthony used defendant to eliminate or retaliate against people who "cross[ed]" Anthony or members of his family. Furthermore, the court found the letters were written six months after Degrasse's death; the two events were reasonably close in time, satisfying the second Cofield prong. And the acts were similar as the letters discussed using defendant to harm people who had attempted to harm Anthony's father. In addressing prong three, the court found Douglass produced and identified the letters as written by Anthony. The court stated the evidence was "clear and convincing that [Anthony] planned to retaliate against individuals who had assaulted his father." As to the fourth prong, the court found the probative value of the evidence was "strong," and outweighed any prejudicial effect.

On appeal, defendant asserts the two letters were irrelevant to defendant's motive because they only established Anthony's intent, not defendant's. We are not persuaded.

The letters were relevant under the first Cofield prong because they demonstrated the common scheme in which Anthony used defendant to carry

out Anthony's plans. The letters advised that defendant and Henry would be in Trenton to retaliate against the individuals who had harmed Anthony's father. They corroborated the continuing plan to eliminate or retaliate against people who displeased Anthony.

Douglass authenticated the letters. And the probative value of showing Anthony was orchestrating retributive acts from his prison cell with the help of defendant outweighed any prejudice. The court admitted the evidence for the limited purpose of showing the common scheme of using defendant to carry out Anthony's plans. There was no error in permitting the testimony for this use under Rule 404(b).

Defendant has not demonstrated any clear error of judgment in the admission of the specific evidence.

Affirmed.

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



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