SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2243-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSE MIRANDA,

Defendant-Appellant.

Argued November 9, 2022 – Decided June 12, 2023

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 19-02-0368.

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

Nancy A. Hulett, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex County Prosecutor, attorney; Nancy A. Hulett, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Jose Miranda of all eleven counts charged in a Middlesex County indictment that alleged multiple acts of sexual abuse upon his two stepdaughters during an overlapping eight-year period when the family lived together in Perth Amboy. The first seven charges asserted defendant sexually abused S.H. (Sara),[1] born in March 2001, when she was between the ages of nine and fifteen:

- Count one: first-degree aggravated sexual assault by sexual penetration on diverse dates between March 27, 2010 and March 26, 2014, when S.H. was less than thirteen years old, N.J.S.A. 2C:14-2(a)(1);

- Count two: first-degree aggravated sexual assault on diverse dates between March 27, 2014 and March 26, 2016, when S.H. was at least thirteen but less than sixteen years old, and defendant stood in loco parentis within the household, N.J.S.A. 2C:14-2(a)(2)(c);

- Count three: second-degree sexual assault by sexual contact on diverse dates between March 27, 2010 and March 26, 2014, when S.H. was less than thirteen years old, N.J.S.A. 2C:14-2(b);

- Count four: second-degree sexual assault by sexual penetration on diverse dates between March 27, 2014 and March 26, 2016, when S.H.

[1] We use and initials and pseudonyms to protect the identities of the victims of sexual offenses. R. 1:38-3(c)(12); see also R. 1:38-3(c); N.J.S.A. 2A:82-46.

was at least thirteen but less than sixteen years old, and defendant stood in loco parentis within the household, N.J.S.A. 2C:14-2(c)(4);

- Count five: third-degree aggravated criminal sexual contact on diverse dates between March 27, 2014 and March 26, 2016, when S.H. was at least thirteen but less than sixteen years old, and defendant stood in loco parentis within the household, N.J.S.A. 2C:14-3(a);

- Count six: fourth-degree criminal sexual contact on diverse dates between March 27, 2014 and March 26, 2016, when S.H. was at least thirteen but less than sixteen years old, and defendant was more than four years older, N.J.S.A. 2C:14-3(b); and

- Count seven: second-degree endangering the welfare of a child by sexual conduct on diverse dates between March 27, 2014 and March 26, 2016, defendant having assumed responsibility of the care of S.H., N.J.S.A. 2C:24-4(a)(1).

The remaining four charges alleged defendant sexually abused K.H. (Kim), born April 2007, when she was between the ages of seven and eleven:

- Count eight: first-degree aggravated sexual assault by sexual penetration on diverse dates between April 17, 2013 and May 14, 2014, when K.H. was less than thirteen years old, N.J.S.A. 2C:14-2(a)(1);

- Count nine: first-degree aggravated sexual assault by sexual penetration on diverse dates between May 15, 2014 and April 12, 2018, when

K.H. was less than thirteen years old, N.J.S.A. 2C:14-2(a)(1);[2]

- Count ten: second-degree sexual assault by sexual contact on diverse dates between April 17, 2013 and April 12, 2018, when K.H. was less than thirteen years old and defendant was more than four years older., N.J.S.A. 2C:14-2(b); and

- Count eleven: second-degree endangering the welfare of a child by sexual contact on diverse dates between April 17, 2013 and April 12, 2018, regarding K.H., defendant having assumed responsibility of the care of K.H., N.J.S.A. 2C:24-4(a)(1).

Finding aggravating factors one, two, three, four, and nine, N.J.S.A. 2C:44-1(a)(1)(2)(3)(4) and (9), substantially outweighed mitigating factor seven, N.J.S.A. 2C:44-1(b)(7), the trial court sentenced defendant to an aggregate prison term of ninety years with twenty-five years of parole ineligibility, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

On appeal, defendant raises the following points for our consideration:

[2] Count nine charged defendant with acts that occurred after the enactment of the Jessica Lunsford Act (JLA), L. 2014, c. 7, § 1. Effective May 15, 2014, the Act "significantly enhanced the sentencing exposure of defendants convicted of the aggravated sexual assault of a child under thirteen years of age." State v. A.T.C., 239 N.J. 450, 462-63 (2019).

POINT I

THE TRIAL COURT ERRED IN DENYING THE SEVERANCE MOTION AND FAILING TO PROVIDE A LIMITING INSTRUCTION THAT THE SEPARATE CHARGES COULD NOT BE USED TO INFER PROPENSITY.

A. Severance was Required Because the Separate Charges were not Relevant to a Material Issue and Because any Possible Probative Value of the Separate Charges was Outweighed by the Undue Prejudice of a Joint Trial.

B. The Trial Court Committed Plain Error by Failing to Provide a Limiting Instruction that the Separate Charges Could not be Used to Infer Propensity.
(Not Raised Below)

POINT II

THE TRIAL COURT COMMITTED PLAIN ERROR BY QUESTIONING PROSPECTIVE JURORS REGARDING THEIR VIEWS ON PHYSICAL EVIDENCE IN A MANNER THAT PREDISPOSED JURORS TO FAVOR THE STATE'S POSITION.
(Not Raised Below)

POINT III

THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO PROVIDE A LIMITING INSTRUCTION THAT TESTIMONY ABOUT S.H.'S DISCLOSURE TO HER THERAPIST COULD NOT BE USED AS PROOF THAT HER ALLEGATIONS WERE TRUTHFUL.
(Not Raised Below)

POINT IV

THE CUMULATIVE EFFECT OF THE AFOREMENTIONED ERRORS DEPRIVED DEFENDANT OF DUE PROCESS AND A FAIR TRIAL.
(Not Raised Below)

POINT V

THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE TRIAL COURT PENALIZED DEFENDANT FOR EXERCISING HIS RIGHT AGAINT SELF-INCRIMINATION AND FAILED TO CONSIDER THE OVERALL FAIRNESS OF CONSECUTIVE SENTENCES TOTALING NINETY YEARS.

A. The Trial Court Violated Defendant's Constitutional Right Against Self-Incrimination by Penalizing [H]im for Maintaining His Innocence During Sentencing and Declining to Discuss the Instant Offenses During a Psychological Evaluation.

B. Resentencing is Required Because the Court Imposed Multiple Lengthy Consecutive Sentences Without Explicitly Considering the Overall Fairness of the Aggregate Sentence, as Required by State v. Torres, [246 N.J. 246 (2021)].

Unconvinced by the contentions raised in point I, we affirm the court's order denying defendant's severance motion. However, we are persuaded by the argument raised in point II and, as such, reverse and remand for a new trial. We find no merit in the contentions raised in point III that warrant discussion in a

written opinion, R. 2:11-3(e)(2); our disposition makes it unnecessary to consider the arguments raised in points IV and V.

I.

The multi-day trial was held during the first two weeks of October 2019. The State presented the testimony of seven witnesses: Sara and Kim; their brother, D.H. (Darren); their maternal uncle, F.M. (Fred); Sara's best friend and fresh complaint witness, E.R. (Erica); Detective Linda Infusino of the Middlesex County Prosecutor's Office (MCPO); and Detective Jeremy Harris of the Perth Amboy Police Department (PAPD). The State also introduced into evidence Infusino's videorecorded forensic interview of Kim pursuant to the tender-years exception to the hearsay rule, N.J.R.E. 803(c)(27). Defendant did not testify at trial but called three witnesses: a family friend who testified to his good character; the owner of the limousine company, Jason Messinger, who employed defendant and testified about defendant's work schedule; and a Division of Child Protection and Permanency (DCPP) caseworker, who acknowledged Sara's credibility was "called into question" by her mother, F.M. (Fay), and Darren. At the close of all evidence, the court read the following stipulation between the parties: "During the investigation of these allegations by the [MCPO] and the

[PAPD], no physical evidence was collected, and no items were submitted for laboratory testing to locate any scientific or biological evidence."

Defendant began dating Fay in April 2011; the following year he moved into the family home. Eighteen years old at the time of trial, Sara testified that the sexual abuse commenced one week after defendant moved in when she was nine years old. Sara detailed the first encounter, stating defendant entered her bedroom in the middle of the night and inserted his "hard" penis into her mouth, awaking her. She "started straining a little bit," and defendant "ran out the room [sic]." Sara considered screaming or telling her grandmother. But Sara had never seen her mom so happy, recalling her biological parents "always argued over everything" when they were together. So, Sara "decided to sacrifice for her" mother because Fay "sacrificed everything for [Sara]."

Frequently thereafter, defendant entered Sara's bedroom at night and required she orally or manually stimulate him. Defendant also inappropriately touched Sara. Sometimes the acts occurred in her mother's room after defendant gave her siblings "a list of chores to do in order to keep them out of [her] mom's room." Sara said defendant's work schedule was "very flexible" and he generally arrived home before Fay.

At other times, the acts occurred in defendant's car, such as when he picked up Sara from dance class – "anytime that no one [was] around, really." Sara considered the abuse a "transaction" explaining that defendant frequently said, "if you give, you take." This meant if Sara wanted lunch money, food, "random stuff, anything" she was required to provide defendant sexual favors, including "sucking on his penis, or [a] hand job – anything he wanted at the time."

Around the time she entered middle school, Sara realized the nature of defendant's sexual abuse. She "started saying, 'no,'" but "that didn't work at all." Sara testified that to give her "a sense of control," defendant said she could use the "key word . . . alligator" when she wanted him to visit her room at night. But when Sara "stopped using the word and flat out said, 'no,'" defendant entered her bedroom "more often." The frequency of the abuse varied with defendant's "mood."

Sometime during middle school, Sara told Erica about the abuse. But Sara did not want anyone else to know, and urged Erica to promise she would not tell. Sara stated she feared her disclosure would "destroy" the family.

One night during her first year in high school, Sara was awakened by defendant's attempt to anally penetrate her. Sara ran to her mom's room to tell

Fay, but "defendant started whispering yelling at [her], saying: 'Do you want your mom to be unhappy? What are you guys gonna do without me? Do you forget who pays for everything?'"

The final encounter occurred just before Sara turned sixteen years old, when she woke up and found defendant peeking under her nightgown. Around this time, Darren overheard Sara's "very aggressive conversation with God" that she was "raped," and felt "lost." Despite Sara's request otherwise, Darren eventually told Fay. When confronted by an emotional Fay, Sara denied the allegations.

Shortly thereafter, in March 2018, Sara moved out of the family home and into her biological father's house in Perth Amboy. Later that year, Sara disclosed the abuse to Sallyann Mead, the therapist recommended by Fred because she believed her disclosure was confidential. After the appointment, Mead urged the family to contact the authorities.

Sara initially denied the abuse to the DCPP workers but eventually disclosed "everything." During her October 24, 2018 interview with police, Sara described the years of abuse. Police also took statements from Darren, Kim, and Mead. Kim told police she had seen defendant place his hand under Sara's shirt. At that time, however, Kim did not disclose defendant's sexual abuse of her.

Defendant was arrested on November 28, 2018 and charged with the offenses alleged by Sara.

One month later, the case was reopened when Fay contacted police and advised of Kim's disclosure. Eleven years old when interviewed by Infusino on December 19, 2018, Kim relayed similar acts of sexual abuse by defendant with the assistance of anatomical drawings.

Kim thought the first act occurred when she was in the second grade. While watching a movie with her family members asleep in the room, defendant made Kim go under the covers and perform oral sex on him. Kim discussed "a lot" of incidents where defendant anally penetrated her, believing those acts began when she was in third grade. She described defendant's use of "lube" and that "sperm" came out of his penis. Kim recalled defendant's sperm in her mouth. Afterward she "would run to the kitchen sink . . . and grab a paper towel and [wash] her mouth." Kim recalled defendant entered the bathroom while she was showering and performed oral sex on her. Kim said the abuse occurred at home in her mother's bedroom and Sara's bedroom, and in defendant's car in the parking lots outside Walgreens, Wegmans, and ShopRite.

Kim was twelve when she testified at trial, elaborating on the statements she made to Infusino. Kim also testified that she saw defendant "put his hand

in [Sara]'s shirt." At the time, Kim was standing in the doorway of Fay's bedroom and defendant and Sara were lying on the floor "in front of the chair next to the bed." Defendant claimed Sara "just wanted [him] to pop a pimple."

Kim acknowledged that when she was interviewed about Sara's allegations, she did not tell police about defendant's acts against her because she "was scared and . . . so worried," and "focused on . . . what happened to [Sara]." Because Fay did not believe Sara, Kim did not disclose the abuse to her mother. Eventually, Kim confided in Darren, who told Fay, who, in turn, contacted the police.

Darren testified about the disclosures made by his sisters. "A long time after" Sara made her disclosure, Darren saw defendant "grab Kim by the face and kiss her . . . on the lips." Darren recalled being "confused . . . because [he] wasn't really sure if that's what [he] saw or not. . . . [He] couldn't really believe it."

II.

Prior to trial, defendant moved pursuant to Rule 3:15-2(b) to sever the counts of the indictment containing Sara's allegations from those predicated on Kim's assertions. The State opposed the motion and concurrently moved to

admit Kim's statements to police under the tender-years exception to the hearsay rule, N.J.R.E. 803(c)(27).

During oral argument, both parties primarily relied on their submissions to the trial court.[3] Defense counsel highlighted that joinder of the charges unduly prejudiced defendant because "presenting the second [set of] charges . . . would almost in any juror's mind automatically find [defendant] guilty." Defense counsel further contended:

> I think that it would take away his ability to also put on different defenses which would also then be confusing for the jury. This is a case in which we have an older sister who made her complaints and then, after a little bit more investigation and more conversation, a younger sister made very similar complaints. Although from a defense perspective, without going into fully what our defense is, . . . we do have a . . . defense essentially for . . . both of the cases, but our defenses differ. And so, presenting two trials essentially in one I think would unduly prejudice Mr. Miranda and his ability, not just . . . for me to put on a good trial, but his ability for the jurors to really sparse out the finer details of what our defense is.

The State argued "the crimes alleged would be admissible at separate trials pursuant to N.J.R.E. 404(b)" because "each sister's testimony will go to motive,

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[3] The parties did not provide their trial court submissions in support of their positions. See R. 2:6-1(a)(2). We glean their arguments from the motion transcript, as framed in the court's ensuing written opinion, and from oral argument before us.

method and/or absence of mistake." Noting the alleged offenses occurred in the same location during overlapping time periods, the State argued relevance outweighed prejudice.

Following oral argument on the severance motion and an N.J.R.E. 104 hearing on the admissibility of Kim's tender-years statement, the trial court reserved decision. The court thereafter issued a single written decision, denying defendant's severance motion and granting the State's tender-years motion.[4]

Recognizing the test for assessing prejudice in support of a motion to sever is whether the offenses sought to be severed would be admissible under N.J.R.E. 404(b) in a trial of the remaining issues, see State v. Sterling, 215 N.J. 65, 73 (2013), the court considered the four factors established in State v. Cofield:

> 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] Defendant neither appeals from the court's decision admitting into evidence Kim's tender-years statement nor its ensuing decision to admit the fresh complaint testimony of Sara's friend, Erica. We therefore confine our review to the court's severance decision.

> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
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> [127 N.J. 328, 338 (1992).]

By its own acknowledgement, the court "briefly addressed" the Cofield factors concluding evidence underlying each victim's allegations would have been admissible in separate trials, stating:

> 1. The evidence of abuse inflicted on each victim is relevant to motive, opportunity, intent[,] and/or absence of mistake by the defendant,
>
> 2. The testimonial evidence is similar in kind and occurred during the same time frame at the same location,
>
> 3. Upon review of the presented evidence and the forensic interview of K.H., the court finds that the evidence is clear and convincing for the reasons discussed [in its decision granting the State's tender-years motion], and
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> 4. Although prejudice is apparent, all negative evidence is prejudicial. The standard is one of substantial prejudice that would be balanced against the probative value of the evidence. As the evidence goes to . . . defendant's motive, opportunity, intent, and/or absence of mistake, it is not outweighed by the prejudice, particularly since an instruction can be provided to the jury as to the proper use of the evidence to avoid diverting jurors from a reasonable and fair evaluation of the basic issue of guilt or innocence.

The court concluded it "w[a]s not persuaded that a jury will confuse two defenses for two victims. With proper jury instructions, the court is confident in the jury's ability to properly consider the two, separate defenses."

During its final jury charge, prior to explaining the law for each of the eleven offenses charged in the indictment, the court issued the following instruction:

> Now, I will begin the third part of the instructions, that being the portions of the Criminal Code that you must apply to the facts that you . . . find to determine whether the State has proven beyond a reasonable doubt that Jose Miranda violated a specific criminal statute. The statutes read together with the indictment identifies [sic] the elements which the State must prove beyond a reasonable doubt to establish the guilt of Jose Miranda on each of the counts in the indictment.
>
> There are eleven offenses charged in the indictment against Jose Miranda. They are separate offenses by separate counts in the indictment. In your determination of whether the State has proven . . . that the defendant is guilty of the crimes charged in the indictment beyond a reasonable doubt, the defendant is entitled to have each count considered separately by the evidence which is relevant and material to that particular charge based on the law as I will give it to you.
>
> Each offense alleged by the victims in this indictment should be considered by you separately. The fact that you find the defendant either guilty or not guilty of a particular crime against one victim should

> not control your verdict as to any other offense charged against the defendant by that victim or another victim. You must find that each of the elements are met in each count for each victim.

Defendant posed no objection to this charge or any aspect of the court's final instructions.

Defendant maintains the motion judge erroneously denied his motion to sever the trial of the charges involving Sara from those regarding Kim. For the first time on appeal, he claims the court failed to issue sua sponte a limiting instruction that the jurors "could not consider the allegations from separate complainants to find that defendant had the propensity to molest girls."

While defendant's appeal was pending, we issued our decision in State v. Smith, 471 N.J. Super. 548, 575 (App. Div. 2022). The following day, defendant filed a letter pursuant to Rule 2:6-11(d), arguing our decision supported severance. The State filed a responding letter, contending our "reversal in Smith was based on its facts."

Although we conclude the trial court did not properly apply the governing legal principles, following our de novo review of the Cofield factors, see State v. Rose, 206 N.J. 141, 158 (2011), we affirm the severance order for reasons other than those expressed by the motion judge, see State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011) (stating that an appellate court is "free to

affirm the trial court's decision on grounds different from those relied upon by the trial court"). Nor are we convinced that the unobjected-to jury instruction issued was so deficient as to warrant reversal.

A.

Well-established principles guide our review. Pursuant to Rule 3:7-6: "Two or more offenses may be charged in the same indictment . . . if the offenses charged are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together or constituting parts of a common scheme or plan." Joinder is permitted if there is a connection between the charges, such that evidence on one charge would be probative of another. Sterling, 215 N.J. at 91-92.

"'Charges need not be identical to qualify as "similar" for purposes of joinder under Rule 3:7-6,' but they must be 'connected together,' or be 'parts of a common scheme or plan.'" Smith, 471 N.J. Super. at 575 (first quoting Sterling, 215 N.J. at 91; then quoting ibid.; and then quoting id. at 72). "The preference is for joinder of the offenses in a single trial unless the defendant demonstrates prejudice." Ibid. (citing State v. Chenique-Puey, 145 N.J. 334, 341 (1996)); see also R. 3:15-2(b).

"Rule 3:15-2(b) vests a trial court with discretion to order separate trials if joinder would prejudice unfairly a defendant." Chenique-Puey, 145 N.J. at 341 (citing State v. Oliver, 133 N.J. 141, 150 (1993)). Recently, we reiterated:

> To avoid prejudicial joinder, the court must conclude the proffered evidence for each set of charges would be admissible in a separate trial on the other set of charges because the "N.J.R.E. 404(b) requirements [are] met, and the evidence of other crimes or bad acts [is] 'relevant to prove a fact genuinely in dispute and the evidence is necessary as proof of the disputed issue.'"
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> [Smith, 471 N.J. Super. at 567 (alterations in original) (quoting Sterling, 215 N.J. at 73).]

Appellate courts apply a deferential standard when reviewing a trial judge's evidentiary rulings, which should be 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 157-58). "The granting of a motion for severance is discretionary with the trial court and denial of such a motion will not result in reversal, absent an abuse of discretion." State v. Cole, 154 N.J. Super. 138, 143 (App. Div. 1977). But that standard is circumscribed "where the trial court did not apply Rule 404(b) properly to the evidence at trial; in those circumstances, to assess whether admission of the evidence was appropriate, an appellate court may engage in its own 'plenary review' to determine its

admissibility." Rose, 206 N.J. at 158 (quoting State v. Barden, 195 N.J. 375, 391 (2008)).

In Smith, the defendant was charged in the same indictment with sexually abusing two children: his biological daughter, "Karen," and his girlfriend's daughter, "Sara." 471 N.J. Super. at 554-55. Unlike defendant in the present matter, Smith gave a statement to police. Id. at 557. In the State's brief opposing the defendant's motion, the prosecutor claimed the defendant "denied intentionally touching [Sara] in a sexual manner and claimed he only touched her to move her over on the bed." Ibid. "The State argued a single trial was appropriate, because [the] defendant's assaults were against 'female children to whom . . . defendant [wa]s a father figure,' and the crimes 'occurred when the children were staying at . . . defendant's home.'" Ibid. (second alteration in original).

The trial judge in Smith denied the defendant's severance motion finding, in part, the defendant's intent was at issue. Id. at 558-59. We reversed, reiterating where "a defendant contends the alleged assault did not occur, intent and absence of mistake are not at issue." Id. at 569-70 (quoting State v. J.M., 225 N.J. 146, 159 (2016)). We recognized the trial judge relied on the State's proffer, which misstated the proffered evidence and "extensively cited Karen's

statement to [police]" that "was never introduced at trial." Id. at 577-78. We further observed that in most cases when defendant moves for severance of offenses, "the court does not conduct a Rule 104 hearing to put the State to its proofs" relying, instead, on the State's proffer. Id. at 576.

Against that legal backdrop, we turn to the court's analysis of the Cofield factors in this case. The court did not engage in a complete N.J.R.E. 404(b) analysis in issuing this brief opinion – and applied the wrong standard on the fourth prong – thereby permitting this court to "engage in its own plenary review." Rose, 206 N.J. at 158.

As to the first factor, we part company with the court's decision that the proffered evidence was relevant to motive, intent, or absence of mistake in view of defendant's general denial of all charges. See Smith, 471 N.J. Super. at 569-70. We agree with the court, however, that the evidence was relevant to opportunity, which was a material issue in dispute.

Although the trial court failed to state the basis of its conclusion, the motion record demonstrated defendant's opportunity to commit the crimes was common to the abuse of both girls. Sara and Kim disclosed the abuse occurred in the family's residence when other family members were home. And defendant squarely placed opportunity in issue through Messinger's testimony. See Oliver,

133 N.J. at 153 (permitting joinder of offenses against four sexual assault victims because "the other-crime evidence would be admissible to show the feasibility of the proposition that [the] defendant could sexually assault women in his room without other household members hearing or seeing anything unusual"); State v. Krivacska, 341 N.J. Super. 1, 41 (App. Div. 2001) (recognizing evidence that the defendant, a school psychologist, separately sexually assaulted two students in his office was "relevant to a material issue in dispute, i.e., [the] defendant's opportunity to commit acts of sexual assault in his office").

We disagree with defendant that because both girls alleged the acts occurred in various locations, the decisions in Oliver and Krivacska are inapposite. Instead, the similarities in location partially supported the court's finding on the second Cofield prong. Further, as to that prong, the assaults occurred within the same time frame and were similar in nature.

We also agree with the trial court's assessment of the third Cofield prong. The court conducted an N.J.R.E. 104 hearing on the State's tender-years motion and viewed Kim's forensic interview in addition to the evidence presented by the State in opposition to defendant's motion. We discern no error in the court's finding that the evidence was clear and convincing.

Turning to the fourth prong, the inquiry is "distinct from the familiar balancing required under N.J.R.E. 403," which requires courts to consider whether the probative value of the evidence sought to be admitted is "substantially outweighed" by its potential for undue prejudice. Green, 236 N.J. at 83-84 (quoting N.J.R.E. 403). Instead, under N.J.R.E. 404(b), the court need only determine whether "the probative value of such evidence is outweighed by [that] potential." Id. at 83. As stated, the trial court misapplied the standard in its assessment of the fourth Cofield prong. Based on our de novo review, we nonetheless conclude the probative value of the evidence outweighed the potential for prejudice.

Indeed, the evidence was intertwined. The allegations against defendant involved the sexual assault of his two stepdaughters who were under his care and control. The acts were overlapping in time, similar in nature, and committed in the same or similar locations. Both girls disclosed the abuse to Darren. Kim witnessed one act of abuse against Sara. Fay's initial disbelief of Sara's disclosure contributed to the delay of Kim's disclosure for fear Fay would not believe her. Thus, most of the same witnesses would have been called by the State to testify in separate trials. In addition, Messinger's trial testimony about defendant's work schedule was relevant to the contentions of both girls. Even

on appeal, defendant has failed to demonstrate that joinder of the charges hamstrung his purported "different defenses." Because the overlapping facts and evidence would have been admissible at separate trials, any potential prejudice to defendant would have been the same had the offenses been severed. See Chenique-Puey, 145 N.J. at 341.

B.

Nor are we persuaded by defendant's belated argument that the court failed to issue a non-propensity limiting instruction. Because defendant failed to object to the jury charge issued, we review for plain error. R. 1:7-2; see also State v. Funderburg, 225 N.J. 66, 79 (2016).

As we stated in Smith, the admission of other crime evidence under N.J.R.E. 404(b) requires the trial court issue a limiting instruction when the evidence is introduced and repeat the instruction in its final charge. 471 N.J. Super. at 576. The instruction must identify "the prohibited and permitted purposes of the evidence." Ibid. (quoting State v. Hernandez, 170 N.J. 106, 131 (2001)). We noted, however, the lack of authority "requir[ing] similar instructions be given when two different sets of charges are tried together." Id. at 577.

Here, the instruction closely followed the model jury charge for multiple offenses charged in an indictment. See Model Jury Charges (Criminal) "Final Charge" (rev. Sept. 1, 2022). The charge directed the jurors that they "must find each of the elements [we]re met in each count for each victim" and that their verdict for "a particular crime against one victim should not control [their] verdict as to any other offense charged against the defendant by that victim or another victim." Because the charge "state[d] specifically the purpose for which the evidence may be considered and, to the extent necessary for the jury's understanding, the issues on which such evidence [w]as not to be considered," State v. Gillispie, 208 N.J. 59, 92 (2011) (quoting State v. Fortin 162 N.J. 517, 534 (2000)), we conclude the charge issued was not deficient. Moreover, we presume the jury followed the court's instructions. See State v. Vega-Larregui, 246 N.J. 94, 126 (2021).

III.

Prior to trial, both parties proposed open-ended questions in addition to the model voir dire questions. For the first time on appeal, defendant claims error in the court's third of three open-ended question to the prospective jurors seated in the jury box, who had answered all model voir dire questions and were otherwise "qualified" to serve as jurors in this case. Pursuant to the prosecutor's

pretrial request, without objection from the defense, the court initially posed the following question to the prospective jurors at sidebar:

> [D]o you believe that in cases alleging sexual assault the State must produce physical or biological evidence in order to prove its case? Please explain why you believe that?

The first juror answered: "I think so, to be sure that the person did it," prompting the following exchange with the court:

> THE COURT: Okay. But if it doesn't exist, does that mean that you wouldn't find the person – you wouldn't think that the State could prove their [sic] case?
>
> [FIRST JUROR]: They can prove, yeah, even if it's (indiscernible). Yes.
>
> THE COURT: All right. How about if we're talking about just . . . testimony; testimony of the victim?
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> [FIRST JUROR]: Yeah. If they don't have the biological thing the testimony can (indiscernible).
>
> THE COURT: The testimony can prove it too?
>
> [FIRST JUROR]: Yes.
>
> THE COURT: Depending on if you believe it?
>
> [FIRST JUROR]: Yeah. Depending on the case and the testimony put forward.

As voir dire continued, the court thus revised its inquiry, asking variations of the following question:

> Do you believe that in cases alleging sexual assault the State must produce physical or biological evidence in order to prove its case, or in cases where they don't have physical or biological evidence is it possible that testimony could be enough to convince you beyond a reasonable doubt?

Most jurors expressed the evidence would depend upon the credibility of the witnesses; others indicated they would, indeed, require physical evidence. One juror acknowledged testimony "could . . . be enough to satisfy [her] . . . because unfortunately a lot of people that [sic] have been assaulted don't come forward until much later." Some jurors expressed confusion about the court's clarification that testimony was evidence. One such juror asked the court, "you don't need physical –?" The court responded: "Well, that's the question. Do you believe . . . that you need it in order to convince you?"

Relying on our Supreme Court's decision in State v. Little, 246 N.J. 402 (2021), issued after the trial in the present matter, defendant argues he was denied a fair trial because the court's unbalanced question failed to convey that the potential jurors "could consider the lack of physical evidence in determining whether the State met its burden to prove the allegations beyond a reasonable

doubt." Defendant contends the State exercised six peremptory challenges for jurors who expressed concern about the lack of physical evidence.[5]

Because defendant did not object to the trial court's voir dire, the plain error standard applies. See State v. Winder, 200 N.J. 231, 252 (2009). Defendant must therefore establish the error was "clearly capable of producing an unjust result." R. 2:10-2. "We review the trial court's conduct of voir dire . . . in accordance with a deferential standard." Little, 246 N.J. at 413. "[A] trial court's decisions regarding voir dire are not to be disturbed on appeal, except to correct an error that undermines the selection of an impartial jury." Ibid. (quoting Winder, 200 N.J. at 252).

A defendant is entitled to be tried "before an impartial jury," State v. Loftin, 191 N.J. 172, 187 (2007). "Our case law consistently endorses voir dire questions that 'probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially.'" Little, 246 N.J. at 417 (quoting State v. Erazo, 126 N.J. 112, 129 (1991)). "[I]nquiring about a juror's ability to follow the trial judge's instructions or to deliberate with an open mind," is entirely appropriate, "so long

[5] In total, the State exercised ten of its twelve peremptory challenges; defendant exercised sixteen of his twenty peremptory challenges.

as the questions do not indoctrinate prospective jurors about the issues that the jury will decide." Ibid.

In Little, the defendant was charged with aggravated assault and weapons offenses. Id. at 406. The gun allegedly used in commission of the crimes was never recovered. Id. at 407. Over the objection of defense counsel, and after modifying the question as first proposed by the prosecutor, the judge agreed to ask prospective jurors the following: "The law does not require that the State recover a gun, even though the defendant has been charged with weapons-related offenses. If the State does not produce the physical firearm allegedly used in this case will this affect your ability as a juror?" Id. at 409.

Although most prospective jurors answered in the negative, three expressed some reservations. Id. at 410. The prosecutor used peremptory challenges to excuse all three jurors. Id. at 410-11. Thereafter for further clarification, the judge subtly modified the question as follows:

> The law does not require that the State produce a gun at trial even though the defendant has been charged with weapons offenses. If the State did not recover and does not produce the gun allegedly used in this case, but presents evidence in the form of testimony, how will this affect your ability as a juror?
>
> [Id. at 411.]

"In response to the revised question, the majority of the prospective jurors stated that the State's inability to produce a gun would not affect their ability to serve as jurors. Several commented that they would consider all the evidence in deciding the case." Ibid. The State exercised peremptory challenges for two jurors who expressed some reservations in responding to the revised inquiry. Ibid.

The Court noted it had "not previously considered the propriety of voir dire questions addressing the State's inability to produce a particular category of evidence at trial," but held "[i]n appropriate cases, the State's inability to present a particular category of evidence can be a legitimate subject for the trial judge to address in voir dire." Id. at 417. Referencing the relevant elements of the weapons offense charged, the Court noted "the State was entitled to rely on the testimony of eyewitnesses who stated that they saw [the] defendant in possession of a handgun during their encounter with him." Id. at 419. The Court explained:

> Accordingly, a prospective juror unwilling to consider finding a defendant guilty if the State failed to produce the weapon – no matter what other evidence the State presented that the defendant possessed that weapon – may be a biased juror. The trial court correctly recognized that the absence of the weapon allegedly possessed by defendant was a legitimate area of inquiry in voir dire.

> A jury, however, would be permitted to consider the State's inability to produce the handgun at issue as a factor when it decided whether the State had met its burden to prove beyond a reasonable doubt the elements of each offense. That aspect of the governing law was not explained in either version of the question asked to prospective jurors in this case. Neither question posed by the trial court presented the issue to the jurors in a balanced manner. . . .
>
> The questions posed to prospective jurors about the weapon . . . improperly suggested that jurors should not consider the absence of a handgun as a factor when they evaluated the State's proofs.
>
> [Ibid. (emphasis added).]

The Court thus held: "If a trial court inquires during voir dire about the absence of evidence, it should pose a balanced question." Id. at 420. Where "the issue is the absence of a weapon," the Court proposed the trial court ask the following question:

> The State is not legally required to produce a gun if a defendant is charged with weapons offenses, but you as a juror may choose to consider the absence of any evidence in deciding whether the State has met its burden of proving defendant guilty beyond a reasonable doubt. If the State did not recover and does not produce the gun allegedly used in this case, but presents evidence in the form of testimony, will you be able to be a fair and impartial juror and decide whether the State has proven that defendant is guilty beyond a reasonable doubt of the offenses charged?
>
> [Ibid. (emphasis added).]

To prove the sexual assault offenses in the present matter, the State was not required to present physical or biological evidence. As the testimony suggested in this case, that evidence is not conclusive if the victim delays reporting. When pressed on cross-examination, Infusino testified that a sexual assault examination is usually conducted within five days of the sexual assault. Infusino further acknowledged when "there's a size disparity" between the perpetrator and victim, the examiner "would look for evidence of . . . either a rip or tear." The testimony adduced at trial revealed Sara and Kim delayed reporting and did not submit to forensic medical examinations. As with all testimony, however, the jury was free to accept or reject the trial testimony here.

Similar to the trial judge's open-ended question in Little, the court in this case did not advise the prospective jurors they could consider the lack of physical or biological evidence when "decid[ing] whether the State had met its burden to prove beyond a reasonable doubt the elements of each [sexual] offense." 246 N.J. at 419. Thus, as in Little, the court's question here failed to "present[] the issue to the jurors in a balanced manner." Ibid. Indeed, the question "improperly suggested that jurors should not consider the absence of [physical or biological evidence] as a factor when they evaluated the State's

proofs." Ibid. That suggestion was critical here, because as in Little, the case turned primarily on the testimony of the witnesses.

Moreover, unlike the trial court's question in Little, the court in this case asked the jurors about their opinion on the quality of the State's proofs instead of advising the State was not required to produce physical or biological evidence to prove the sexual allegations. In its preliminary remarks to the jury pool, which largely tracked the model jury charge, the court had expressly cautioned the prospective jurors: "You will have to apply the law as I give it to you at the end of the case regardless of your own personal feelings about what the law is or what you think the law should be." See Model Jury Charges (Criminal) "Preliminary instructions to the Jury" (rev. Sept. 1, 2022). Thus, the question, as posed, was unnecessarily confusing.

We recognize the State's argument that Little was decided after the trial in this case and, unlike Little, defendant did not object to the inquiry here. However, our jurisprudence has long recognized the importance of appropriate, impartial juror voir dire in "protecting a defendant's right to a fair trial." Winder, 200 N.J. at 251; see also State v. Manley, 54 N.J. 259, 280-81 (1969) ("eliminating . . . efforts to indoctrinate, to persuade, to instruct by favorable explanation of legal principles that may or may not be involved," and prohibiting

"the hypothetical question intended and so framed as to commit or to pledge jurors to a point of view or a result before they have heard any evidence, argument of counsel or instructions of the court").

Because the question posed to prospective jurors in this case sought to ensure they could convict defendant despite the absence of physical or biological evidence, but failed to inquire whether jurors understood a reasonable doubt could be raised by the lack of that evidence, it was not balanced as the Court required in Little. Instead, before hearing any evidence, the chosen jurors committed themselves to a one-sided proposition that inured to the State's benefit. We are therefore constrained to reverse and remand for a new trial.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.