SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3924-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

SALAAM LEEKS,

Defendant-Respondent.

Submitted June 6, 2023 – Decided June 21, 2023

Before Judges Messano, Gilson and Rose.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 16-06-1828.

Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney for appellant (Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

Respondent has not filed a brief.

PER CURIAM

We granted the State's motion for leave to appeal from a July 1, 2022 Law Division order that severed sexual assault and related charges allegedly committed by defendant Salaam Leeks upon three different women during an eight-month time frame at defendant's residence in Newark. The decision to sever was based on the motion judge's terse determination that the offenses were neither similar in kind nor overlapping, and that joinder of all charges would be "devastating." Because the judge failed to properly assess the State's proffered evidence in view of the governing law, and the record provided on appeal impedes our review of that evidence, we vacate the severance order and remand for further proceedings.

I.

We summarize the State's allegations and procedural history from the minimal record provided on appeal.[1] The State asserts that between May 2015 and January 2016, defendant sexually assaulted three women, C.D., K.M., and A.J.[2] Allegedly, defendant separately convinced each victim that – unless she

[1] The State's moving brief cites the statement of facts contained in the parties' trial briefs, which were included in its appellate appendix pursuant to Rule 2:6-1(a)(2).

[2] We use initials and pseudonyms to protect the identities of the alleged victims of sexual offenses. R. 1:38-3(c)(12).

engaged in sexual relations with him – gang members would rape and beat or kill her because her ex-boyfriend or child's father had angered the gang in some unspecified manner (the ruse).

The allegations against defendant first came to light on May 15, 2015, when C.D. reported to police she was sexually assaulted by "Abdul Salaam." According to the State, C.D. asserted the day after she met defendant, he called asserting the ruse. When she refused to engage in sexual relations, defendant allegedly claimed her family members also were in danger.

At some point thereafter, C.D. acquiesced and defendant allegedly twice sexually assaulted C.D. by penile-vaginal penetration. Defendant then called C.D. "numerous times asking her to come over to his apartment." C.D. reported because she feared the potential consequences if she did not comply, she went to defendant's home. While there, "C.D. grew suspicious"; "took [defendant]'s phone"; and viewed text messages that implied only defendant was "behind the threats." C.D. claimed they argued then defendant sexually assaulted her by penile-vaginal penetration. After this final incident, defendant repeatedly texted C.D., implying gang members had "'jumped' [him] because of her."

Six months later, in November 2018, defendant allegedly employed the same ruse against K.M. According to the State, K.M. knew defendant as "Rah"

and considered him "a really good friend." After defendant visited her on November 18, 2015, K.M. received a call from a private number, asserting the ruse. The following night, K.M. received another call from a private number asking whether she were "ready to have sex with Rah because he stuck his neck out for her" with the gang members.

The State asserts that when K.M. arrived at defendant's apartment, he initially claimed he did not know why she was there. Later, defendant allegedly said he had "vouched for her and she would no longer be a target [of the gang] because of what her child's father had done." Defendant then allegedly engaged in penile-vaginal intercourse with K.M. "After thirty minutes [K.M.] received a call and was told that she could leave." Thereafter defendant "showed up at her house with what appeared to be blood on his shirt saying that he had taken a beating on her behalf because he had vouched for her."[3]

Two months later, on January 9, 2016,[4] defendant allegedly called A.J., identified himself as "Abe," and employed the same ruse. At some point, defendant placed A.J. on a three-way phone call with "Murda" who confirmed

[3] We glean from the record that K.M. reported the allegations after reading "a news article about the other victims."

[4] Portions of the State's appellate and trial brief reflect the date as January 19, 2016.

the ruse and claimed "because [defendant] had vouched for A.J. he would have to be physically assaulted on her behalf." Both men "described [A.J.]'s son and where she was living." A.J. went to defendant's apartment, where he allegedly claimed "he was really doing this to protect her." Defendant allegedly sexually assaulted A.J. by penile-vaginal penetration.

The State asserts two victims reported defendant was wearing an ankle monitoring bracelet, which led to defendant's apprehension and identification by all three women. It is unclear from the record which victims reported that information. A search of defendant's cell phone revealed calls to two victims but, again, the record does not reveal their identities. The State further asserts a DNA sample recovered from C.D.'s sexual assault kit was consistent with defendant's DNA sample.

Following defendant's arrest, in June 2016, he was charged in a twenty-two count Essex County indictment with similar offenses regarding the allegations. The first nine counts charged defendant with offenses committed upon C.D. between April 1, 2015 and May 14, 2015:

- first-degree aggravated sexual assault by vaginal penetration by force or coercion, while aided or abetted by another, N.J.S.A. 2C:14-2(a)(5);

- second-degree conspiracy to commit aggravated sexual assault by promoting or facilitating the

commission of the crime with an unknown co-conspirator, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:14-2(a)(5);

- second-degree conspiracy to commit sexual assault with the purpose of promoting or facilitating the commission of the crime of sexual assault with an unknown co-conspirator, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:14-2(c)(1);

- three counts of second-degree sexual assault by vaginal penetration by force or coercion, N.J.S.A. 2C:14-2(c)(1);

- third-degree criminal coercion, N.J.S.A. 2C:13-5(a)(1);

- third-degree terroristic threats, N.J.S.A. 2C:12-3(a);

- and third-degree criminal restraint, N.J.S.A 2C:13-2(b).

Counts ten through fifteen charged defendant with offenses committed upon K.M. between November 18, 2015 and November 27, 2015:

- first-degree aggravated sexual assault by vaginal penetration by force or coercion, while aided or abetted by another, N.J.S.A. 2C:14-2(a)(5);

- second-degree conspiracy to commit aggravated sexual assault by promoting or facilitating the commission of the crime with an unknown co-conspirator, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:14-2(a)(5);

- second-degree conspiracy to commit sexual assault with the purpose of promoting or facilitating the commission of the crime of sexual assault with an unknown co-conspirator, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:14-2(c)(1);

- second-degree sexual assault by vaginal penetration by force or coercion, N.J.S.A. 2C:14-2(c)(1);

- third-degree criminal coercion, N.J.S.A. 2C:13-5(a)(1); and

- third-degree criminal restraint, N.J.S.A 2C:13-2(b).

The remaining six counts charged defendant with offenses committed upon A.J. on January 9, 2016[5]:

- first-degree aggravated sexual assault by vaginal penetration by force or coercion, while aided or abetted by another, N.J.S.A. 2C:14-2(a)(5);

- second-degree conspiracy to commit aggravated sexual assault by promoting or facilitating the commission of the crime with an unknown co-conspirator, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:14-2(a)(5);

- second-degree conspiracy to commit sexual assault with the purpose of promoting or facilitating the commission of the crime of sexual

[5] Count twenty sets forth the incident date as April 9, 2016. There is no evidence in the record provided on appeal to support that date and it may be a scrivener's error.

assault with an unknown co-conspirator, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:14-2(c)(1);

- third-degree criminal coercion, N.J.S.A. 2C:13-5(a)(1);
- third-degree terroristic threats, N.J.S.A. 2C:12-3(a); and
- third-degree criminal restraint, N.J.S.A 2C:13-2(b).

Contending "each fact pattern [was] unique," defendant's retained counsel moved to sever the counts into three sets of charges, grouped by the offenses allegedly committed upon each victim. The State countered the offenses were properly joined under Rule 3:7-6.[6] Alternatively, the State claimed evidence of the sexual assaults against each victim would be admissible in separate trials under N.J.R.E. 404(b). Citing the four-part Cofield test,[7] the State argued: (1)

[6] Rule 3:7-6 provides: "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."

[7] State v. Cofield, 127 N.J. 328, 338 (1992) (establishing the four-prong test for the admission of N.J.R.E. 404(b) evidence: (1) the "evidence of the other crime must be admissible as relevant to a material issue," (2) "must be similar in kind and reasonably close in time to the offense charged," (3) the other-crime evidence "must be clear and convincing," and (4) "[t]he probative value of the evidence must not be outweighed by its apparent prejudice"). Cofield's temporal requirement is "not universally required." State v. Rose, 206 N.J. 141, 163 (2011).

the evidence was relevant to prove defendant's identity; (2) the assaults were similar and occurred within less than one year; (3) the evidence was clear and convincing based on the victims' accounts and telephone records; and (4) the probative value was strong while the prejudice to defendant was no different than any other case.

Immediately following oral argument, the judge granted defendant's motion. The judge's decision spanned one transcript page and stated in full:

> The test for [N.J.R.E.] 404(b) is generally the same test for a motion to sever counts, just the opposite side of it . . . . The standard is the same. And it is true that there are parallels, but they are not signature crimes. And they're, therefore, not similar in kind. They bear some likenesses, some parallels, but they are not similar in kind. And I don't believe a hearing would change that. What you seek to establish at a hearing is not sufficient to make them signature crimes.
>
> Furthermore, the evidence is different for each one. None of the evidence is overlapping. You would have to present different evidence for each one because each is a separate crime. Therefore, there's no economy for the court or the State, and the (indiscernible) – the defendants [sic] have three people get up in the courtroom and point a finger at him as their rapist in the presence of the same jury is devastating. It's . . . beyond overwhelming, devastating.

The State promptly moved for leave to appeal from the memorializing order, reprising its arguments raised before the motion judge.

II.

"Rule 3:15-2(b) vests a trial court with discretion to order separate trials if joinder would prejudice unfairly a defendant." State v. Chenique-Puey, 145 N.J. 334, 341 (1996). "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." State v. Smith, 471 N.J. Super. 548, 567 (App. Div. 2022). The court must therefore consider whether 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.'" Ibid. (alterations in original) (quoting State v. Sterling, 215 N.J. 65, 73 (2013)).

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)).

Because the motion judge failed to properly conduct an N.J.R.E. 404(b) analysis in the present matter, we are permitted to conduct our own review. In view of the circumstances presented in this interlocutory appeal, however, we decline to do so.

Our review is hampered by the record provided on appeal. Even were we to conclude the modus operandi in all three incidents is sufficient to satisfy the first and second Cofield prongs, it is unclear on this record whether the evidence meets the clear and convincing standard under the third prong. Indeed, the State generally contends the third prong is satisfied by the victims' testimony and defendant's cell phone records. Put another way, the State summarized each of the victims' account without appending their statements. Further, it is unclear from the record which of the two victims' phone numbers were captured in defendant's phone records.

Accordingly, it is unclear on this record, how the motion judge made the conclusory declaration that a single jury's consideration of all the charges would

be "devastating," presumably under Cofield's fourth prong. Our Supreme Court has long recognized the fourth prong is "generally the most difficult part of the test." Barden, 195 N.J. at 389. "Because of the damaging nature of such evidence, the trial court must engage in a 'careful and pragmatic evaluation' of the evidence to determine whether the probative worth of the evidence is outweighed by its potential for undue prejudice." Ibid. (quoting State v. Stevens, 115 N.J. 289, 303 (1989)). The judge made no such assessment here and the evidence presented on appeal does not permit de novo review.

Moreover, we are mindful that defendant was not represented by counsel on this appeal. Because he failed to file a timely response, we suppressed defendant's answering brief. Defendant failed to move to vacate the order. Instead, his retained attorney moved to withdraw as counsel. We dismissed the motion for failure to file supporting papers or proof of service.

We conclude the issues presented on appeal have not been sufficiently aired to permit the proper assessment of the probative value of all other-crime evidence and its weight when compared to any resulting prejudicial effect. These issues would best be resolved by a remand for a new proceeding, where defendant will have the opportunity to retain new counsel. On remand, the trial court shall consider the evidence adduced by the State under the Cofield factors.

Further, it is entirely possible that a proper assessment of the Cofield prongs could lead to the conclusion that some but not all evidence would be admissible under N.J.R.E. 404(b) at a single trial, or some but not all charges should be tried together. That assessment requires closer examination of the particular facts that the State seeks to adduce.

We leave to the scope of the remand proceeding to the court's discretion. We do not suggest any outcome.

Reversed and remanded. We do not retain jurisdiction.