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225 N.J. 146

Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Appellant,
v.
J.M., JR., Defendant–Respondent.

Argued Jan. 19, 2016.

Decided May 26, 2016.

Synopsis

Background: After defendant was charged with second-degree sexual assault and fourth-degree criminal sexual contact, State sought to present evidence of an alleged prior sexual assault by defendant, for which a jury had acquitted him. The Superior Court, Law Division, ruled that other-crimes evidence would be admissible as proof of defendant's motive, intent, plan, and absence of mistake. The Superior Court, Appellate Division, 438 N.J.Super. 215, 102 A.3d 1233, granted leave to appeal and subsequently reversed and remanded.

[Holding:] The Supreme Court, Cuff, Judge (temporarily assigned), granted State leave to appeal and subsequently held that witness's testimony about defendant's alleged prior sexual assault was inadmissible.

Affirmed as modified.

West Headnotes (14)

[1] **Criminal Law**

 Necessity and scope of proof

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k661 Necessity and scope of proof

Admission or exclusion of evidence at trial rests in sound discretion of trial court.

Cases that cite this headnote

[2] **Criminal Law**

 Necessity and scope of proof

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k661 Necessity and scope of proof

Trial court's discretion in admission or exclusion of evidence at trial is not unbounded; rather, it is guided by legal principles governing admissibility of evidence which have been crafted to assure that jurors receive relevant and reliable evidence to permit them to perform their fact-finding function and that all parties receive a fair trial.

1 Cases that cite this headnote

[3] **Criminal Law**

 Prejudicial effect and probative value

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General

110k368.7 Factors Affecting Admissibility

110k368.13 Prejudicial effect and probative value

Because evidence of a defendant's previous misconduct has a unique tendency to prejudice a jury, it must be admitted with caution. N.J. R. Evid. 404(b).

Cases that cite this headnote

[4] **Criminal Law**

 Prejudicial effect and probative value

Criminal Law

 Burden of proof110 Criminal Law110XVII Evidence110XVII(F) Other Misconduct by
Accused110XVII(F)1 Other Misconduct as
Evidence of Offense Charged in General110k368.7 Factors Affecting
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probative value110 Criminal Law110XVII Evidence110XVII(F) Other Misconduct by
Accused110XVII(F)13 Proof and Effect110k374.15 Preliminary Evidence110k374.17 Burden of proof

Party seeking to admit other-crimes evidence bears burden of establishing that probative value of evidence is not outweighed by its apparent prejudice. N.J. R. Evid. 404(b).

1 Cases that cite this headnote**[5]** Criminal Law Limiting effect of evidence of other offenses110 Criminal Law110XX Trial110XX(C) Reception of Evidence110k673 Effect of Admission110k673(5) Limiting effect of evidence
of other offenses

Ultimately, if a party seeking to admit other-crimes evidence demonstrates necessity of evidence to prove a genuine fact in issue and court has carefully balanced probative value of evidence against possible undue prejudice it may create, court must instruct jury on limited use of the evidence. N.J. R. Evid. 404(b).

1 Cases that cite this headnote**[6]** Criminal Law Sex offenses, incest, and prostitution110 Criminal Law110XVII Evidence110XVII(F) Other Misconduct by
Accused110XVII(F)2 Admissibility in
Prosecutions for Particular Offenses in
General110k368.37 Sex offenses, incest, and
prostitution

Other-crimes evidence may be admissible in sexual assault cases in which victim's consent is a genuine and material issue, but such evidence should be admitted with restraint. N.J. R. Evid. 404(b).

Cases that cite this headnote**[7]** Criminal Law RelevancyCriminal Law Prejudicial effect and probative value110 Criminal Law110XVII Evidence110XVII(F) Other Misconduct by
Accused110XVII(F)1 Other Misconduct as
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Admissibility110k368.9 Relevancy110 Criminal Law110XVII Evidence110XVII(F) Other Misconduct by
Accused110XVII(F)1 Other Misconduct as
Evidence of Offense Charged in General110k368.7 Factors Affecting
Admissibility110k368.13 Prejudicial effect and
probative value

To be admissible, other-crimes evidence must be relevant to a genuinely contested fact and probative value of proffered evidence must be critically evaluated in order to properly balance relevance of evidence and prejudice its admission will cause. N.J. R. Evid. 404(b).

Cases that cite this headnote**[8] Criminal Law**

🔑 Relevancy

Criminal Law

🔑 Sex offenses, incest, and prostitution

Criminal Law

🔑 Sex offenses, incest, and prostitution

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General

110k368.7 Factors Affecting Admissibility

110k368.9 Relevancy

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)7 Other Misconduct Showing Intent

110k371.49 Sex offenses, incest, and prostitution

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)9 Other Misconduct Showing Absence of Mistake or Accident

110k372.23 Sex offenses, incest, and prostitution

In a case in which a defendant contends alleged sexual assault did not occur, intent and absence of mistake are not at issue, for purposes of determining whether other-crimes evidence is admissible; in the absence of a genuinely contested fact, other-crimes evidence is irrelevant and a prong of test for admissibility of that evidence, that it must be admissible as relevant to a material issue, cannot be satisfied. N.J. R. Evid. 404(b).

1 Cases that cite this headnote**[9] Criminal Law**

🔑 Sex offenses, incest, and prostitution

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)3 Other Misconduct

Inadmissible Under Any of Several Theories

110k368.63 Sex offenses, incest, and prostitution

Witness's testimony about defendant's alleged prior sexual assault, for which he was acquitted, was inadmissible in prosecution for second degree assault and fourth degree criminal sexual conduct; testimony did not constitute evidence of motive, intent, absence of mistake, or plan, as defendant did not argue that prior assault was consensual or accidental, but, rather, maintained that assault never occurred, and, even if probative value could have been found in testimony, it was so greatly outweighed by prejudicial effect as to render it inadmissible. N.J.S.A. 2C:14-2(c)(1), 2C:14-3(b); N.J. R. Evid. 404(b).

1 Cases that cite this headnote**[10] Criminal Law**

🔑 Relevancy

Criminal Law

🔑 Materiality

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General

110k368.7 Factors Affecting Admissibility

110k368.9 Relevancy

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General
110k368.7 Factors Affecting Admissibility

110k368.10 Materiality

First factor of test used to determine whether other-crimes evidence should be admitted requires that evidence of prior bad act, crime or wrong be relevant to a material issue that is genuinely disputed; moreover, material fact sought to be proved must be one that is actually in dispute. N.J. R. Evid. 404(b).

2 Cases that cite this headnote

[11] **Criminal Law**

🔑 **Relevancy**

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General
110k368.7 Factors Affecting Admissibility

110k368.9 Relevancy

Primary focus in determining relevance of other-crimes evidence is whether there is a logical connection between proffered evidence and a fact in issue. N.J. R. Evid. 404(b).

1 Cases that cite this headnote

[12] **Criminal Law**

🔑 **Other Misconduct as Evidence of Offense Charged in General**

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General
110k368.1 In general

Rule governing admissibility of other act evidence is a rule of exclusion rather

than a rule of inclusion. N.J. R. Evid. 404(b).

1 Cases that cite this headnote

[13] **Criminal Law**

🔑 **Prejudicial effect and probative value**

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General
110k368.7 Factors Affecting Admissibility

110k368.13 Prejudicial effect and probative value

Given inflammatory characteristic of other-crimes evidence, trial court must conduct a careful and pragmatic evaluation to determine whether probative worth of the evidence outweighs its potential for undue prejudice. N.J. R. Evid. 404(b).

Cases that cite this headnote

[14] **Criminal Law**

🔑 **Acquittal**

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)12 Nature and Circumstances of Other Misconduct Affecting Admissibility

110k373.27 Subsequent Circumstances

110k373.29 Acquittal

Acquitted-act evidence may only be admitted after a vigorous analysis.

1 Cases that cite this headnote

Attorneys and Law Firms

****491** Laurie P. Cimino, Chief of Grand Jury Section, argued the cause for appellant (Sean F. Dalton, Gloucester County Prosecutor, attorney).

Jennifer L. Gottschalk, Cherry Hill, argued the cause for respondent (Law Offices ****492** of Richard Sparaco, attorney; Mr. Sparaco, on the brief).

Joseph A. Glyn, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (John J. Hoffman, Acting Attorney General, attorney).

Susan C. Green, First Assistant Deputy Public Defender, argued the cause for amicus curiae Office of the Public Defender (Joseph E. Krakora, Public Defender, attorney; Ms. Green and Tamar Y. Lerer, Assistant Deputy Public Defender, of counsel and on the brief).

Opinion

Judge CUFF (temporarily assigned) delivered the opinion of the Court.

***150** The Court granted leave to appeal to consider whether the State may introduce in defendant's trial for sexual assault evidence of a prior sexual assault of which defendant was acquitted. Defendant, a massage therapist, was charged with sexually assaulting a customer while giving her a massage. Prior to defendant's trial, the State moved to admit evidence that defendant had committed a similar sexual assault while working as a massage therapist in Florida. The trial court found the evidence admissible under N.J.R.E. 404(b), even though defendant had been acquitted of the prior crime.

On leave granted, the Appellate Division reversed the trial court's decision, finding the evidence inadmissible. State v. J.M., 438 N.J.Super. 215, 240, 102 A.3d 1233 (App.Div.2014). The appellate panel also held that, when a defendant has been acquitted of a prior crime, evidence pertaining to that crime "should never be admitted pursuant to N.J.R.E. 404(b)." *Id.* at 230, 102 A.3d 1233. In

addition, the appellate panel held that, when other-crime evidence plays a "pivotal role" in the State's case against a ***151** defendant, the jury should be instructed that it must find beyond a reasonable doubt that a defendant actually committed the prior offense before that evidence may receive any weight. *Id.* at 237–38, 102 A.3d 1233.

We affirm the Appellate Division's judgment insofar as it held that the evidence of defendant's prior sexual assault in Florida is inadmissible under N.J.R.E. 404(b) because it fails to satisfy the four-factor test established in State v. Cofield, 127 N.J. 328, 605 A.2d 230 (1992). We decline to adopt, however, the appellate panel's bright-line rule that evidence of a prior crime for which a defendant was acquitted is always inadmissible. We also decline to adopt the appellate panel's reformulation of the instruction provided to jurors governing the circumstances under which it may give any weight to acquitted-crime evidence. Accordingly, we affirm as modified the judgment of the Appellate Division.

I.

Defendant J.M., Jr., was a massage therapist at a Washington Township spa. On July 5, 2012, E.S. and her aunt went to the spa for massage therapy. This was E.S.'s first massage. When E.S. and her aunt entered the spa, they were directed to the locker room and instructed to remove their clothes, place their belongings in a locker, and don spa-provided robes. E.S. then exited the locker room and was escorted to a private massage room. The spa assigned defendant to perform the massage. E.S.'s aunt received a massage from another massage therapist in a separate room.

Before E.S.'s massage, defendant informed her that he would wait outside the massage room while she disrobed, got under a privacy cover, and laid face down. A couple of minutes later, defendant knocked and, with E.S.'s permission, entered the ****493** room. Defendant massaged E.S.'s back. When he finished, defendant asked E.S. to turn over and lay on her back, lifting the privacy cover as E.S. turned beneath it. Defendant then began massaging E.S.'s front side.

***152** While massaging E.S.'s right thigh, defendant asked if he could continue to massage E.S. further up her leg. E.S. became uncomfortable and told him no. Defendant continued to massage the area, rubbing slightly higher than the location E.S. had told him was high enough. E.S. flinched and was "a little freaked out" by defendant's proximity to her vagina during that portion of the massage, but attributed her discomfort to her own inexperience with massages.

Defendant switched to E.S.'s left leg, and again worked his way progressively from the calf muscles to the thigh muscles. This time, however, defendant did not wait for permission before massaging E.S.'s upper thigh. Instead, he asked aloud "can I get closer?" and immediately answered his own question with "I'm [going to] get closer." Moments later, defendant placed his hand underneath E.S.'s upper thigh and digitally penetrated her vagina. Defendant repeated the action, at which point E.S. opened her eyes. When E.S. opened her eyes, defendant had one hand on her head, one hand in her vagina, and was exposing himself to her. Defendant asked E.S. to perform oral sex on him, which E.S. refused.

E.S. told investigators that defendant looked puzzled when she refused his advances, and his demeanor indicated that he had propositioned clients on other occasions. Defendant then commenced the standard pleasantries of concluding a massage, telling E.S. that he hoped she enjoyed the massage and would revisit the spa. Defendant then handed E.S. her robe and left the room.

When E.S. exited the massage room, defendant was waiting right outside the door to provide her with a glass of water. Defendant followed E.S. to the reception area, and, as they walked, emphasized his personal relationship with her aunt, who worked for the spa. Defendant then sat in the reception area, preventing E.S. from immediately disclosing the assault to her aunt. Defendant stayed with E.S. while her aunt left for another treatment. At that point, E.S. fled to the women's locker room. While E.S. was in a dressing room within the women's locker ***153** room, a female spa employee entered

and noticed that E.S. had left personal effects unattended. The spa employee asked E.S. if she was all right, and E.S. said no. Soon thereafter, E.S. reported the sexual assault to a spa manager.

After E.S. reported the sexual assault, her aunt took her to the hospital, where a sexual assault nurse examiner examined her for evidence of sexual assault. The nurse observed trauma to E.S.'s vagina, which she concluded was caused by digital penetration.

II.

Defendant was arrested and taken to the Washington Township Police Headquarters to be interviewed. He denied any sexual contact with E.S., stating that "nothing out of the ordinary happened during [the] massage."

A grand jury charged defendant with one count of second-degree sexual assault, *N.J.S.A. 2C:14-2(c)* (1), and one count of fourth-degree criminal sexual contact, *N.J.S.A. 2C:14-3(b)*. Defendant pled not guilty.

Before trial, the State moved under *N.J.R.E. 404(b)* to admit extrinsic evidence of a prior incident in which defendant had been charged with, but ultimately acquitted ****494** of, sexually assaulting a female spa customer. The trial court conducted a hearing on this motion at which A.W., the alleged victim of the prior assault, testified.

A.W. testified that she visited a spa in Orlando, Florida, on August 26, 2006, where she received a massage from defendant. A.W., an experienced spa patron, testified that, during the massage, defendant moved his hand up her thigh higher than was normal, massaged her clitoris, and digitally penetrated her vagina without her consent. After A.W. told defendant to stop, defendant removed his finger from A.W.'s vagina and stated that "I just want to make sure the guests are happy."

A.W.'s description of the alleged assault shared certain similarities with E.S.'s experience. For example, A.W. testified that ***154** defendant lifted

the sheet as she turned from lying face down to lying on her back, just as he did with E.S. A.W. explained that this practice was effective but unique—massage therapists usually “tell you to turn” and the customer “just kind of flip[s] underneath the sheet.”

The trial court found A.W.'s testimony credible and ruled it admissible, finding that the proposed testimony satisfied each prong of the *Cofield* test. The court stated that the proposed testimony was relevant to establish motive, intent, plan, and/or absence of mistake; that the acts alleged by A.W. were similar in kind and reasonably close in time to the acts alleged by E.S.; and that, despite defendant's acquittal, A.W.'s testimony clearly and convincingly provided evidence that defendant touched A.W. inappropriately. The court also determined that the probative value of the proposed testimony outweighed the potential for prejudice to defendant, given the need for reliable evidence of defendant's state of mind.

The Appellate Division granted defendant's motion for leave to appeal and reversed the trial court's evidentiary ruling. *J.M., supra*, 438 N.J.Super. at 240, 102 A.3d 1233. The appellate panel held that the testimony was inadmissible because A.W.'s proposed testimony failed to satisfy any of the four *Cofield* factors. *Id.* at 221–30, 102 A.3d 1233. Moreover, the panel held that evidence of a prior crime of which a defendant was acquitted “should never be admitted in a later prosecution when offered to show that the prior charged offense actually occurred.” *Id.* at 240, 102 A.3d 1233. In so holding, the Appellate Division explicitly limited the holdings of two previous Appellate Division decisions, *State v. Yormark*, 117 N.J.Super. 315, 284 A.2d 549 (App.Div.1971), *certif. denied*, 60 N.J. 139, 286 A.2d 512 *cert. denied*, 407 U.S. 925, 92 S.Ct. 2459, 32 L.Ed.2d 812 (1972), and *State v. Schlue*, 129 N.J.Super. 351, 323 A.2d 549 (App.Div.) *certif. denied*, 66 N.J. 316, 331 A.2d 16 (1974), which permitted acquitted-act evidence to be used in a subsequent proceeding in certain circumstances. *J.M., supra*, 438 N.J.Super. at 230–33, 102 A.3d 1233. Finally, the panel held *155 that, where “other-crimes evidence will play a pivotal role in the adjudication of guilt[.]” the

jury should be instructed that it must find beyond a reasonable doubt that the other crime actually occurred in order for the other-crime evidence to receive any weight. *Id.* at 237–38, 102 A.3d 1233.

We granted the State's motion for leave to appeal. *State v. J.M.*, 221 N.J. 216, 110 A.3d 929 (2015).

III.

A.

The State contends that the Appellate Division opinion should be reversed, and the trial court's ruling reinstated, because **495 the proposed testimony satisfies each of the four *Cofield* requirements and is therefore admissible under *N.J.R.E.* 404(b). The State also argues that the appellate panel's conclusion that acquitted-act evidence is per se inadmissible “runs far afield of established interpretations of *N.J.R.E.* 404(b)” because it usurps the third prong of the *Cofield* test—that other-crime evidence be established clearly and convincingly.

Defendant maintains that the Appellate Division properly determined that the other-crime evidence offered by the State constituted propensity evidence expressly barred by *N.J.R.E.* 404(b). In service of that argument, defendant encourages the Court to take an exacting approach to the relevance and materiality considerations of *Cofield*'s first prong, and he contends that the trial court erred in finding that the proposed testimony was admissible to prove motive, intent, plan, or absence of mistake. Defendant maintains that the motive and intent commensurate with the commission of sexual assault are obvious, and that the jury does not need the benefit of the contested evidence to determine the motivation and intent behind the alleged crimes. Defendant also argues that, because he flatly denied assaulting E.S. and did not offer mistake as a defense, his state of mind is not a contested issue. Defendant also argues that two similar instances of alleged *156 conduct, separated by six years and over one thousand miles, are insufficient to serve as evidence of a plan for the purposes of *N.J.R.E.* 404(b). Defendant urges affirmance of

the Appellate Division's holding that acquitted-act evidence should never be admissible.

B.

The Attorney General, as amicus curiae, focuses on two portions of the Appellate Division opinion: exclusion of acquitted-act evidence when offered to show that the prior offense actually occurred; and, when other-crime evidence is admitted, the need for a jury instruction that the jury must be satisfied beyond a reasonable doubt that the other crime actually occurred. The Attorney General argues that the Appellate Division's decision is “destructive and unsound,” running afoul of well-established precedent regarding the admissibility of evidence under *N.J.R.E.* 404(b).

The Attorney General contends that the appellate panel's ruling deprives the jury of its traditional truth-seeking function. The Attorney General also argues that the panel's decision to impose new jury instructions when other-crime evidence will play a pivotal role in the adjudication of guilt represents “an improper advisory opinion” because the panel was only asked to consider whether the 404(b) evidence at issue was admissible. The Attorney General argues that this holding is harmful because it will force trial judges to make the subjective determination of which evidence is “pivotal,” induce the State to introduce voluminous proof of other-crime evidence, and create fertile ground for appeals and reversals.

The Office of the Public Defender, as amicus curiae, contends that the proposed testimony fails to satisfy the *Cofield* factors and argues that acquitted-act evidence should never be admitted in a later prosecution if it is being offered to show that the prior offense actually occurred. Reviewing the approaches of other states, the Public Defender identifies “three schools of thought” *157 about the admissibility of acquitted-act evidence: (1) nine states completely bar the admission of acquitted-act evidence; (2) twenty-one states follow the federal rule set forth in *Dowling v. United States*, 493 U.S. 342, 349–50, 110 S.Ct. 668, 672, 107 L.Ed.2d 708, 718–19 (1990), which held that

acquitted-act evidence **496 may be admissible due to the lower standard of proof required under *Fed.R.Evid.* 404(b); and (3) ten states follow a fact-sensitive approach which allows the admission of acquitted-act evidence in some instances, but bars the admission of evidence that was “conclusively rejected by a jury in the previous trial.” The Public Defender urges the Court to adopt the first approach, because a more fact-sensitive approach would be “hyper-technical” and “unworkable,” and would fail to recognize the force of an acquittal.

IV.

[1] [2] The admission or exclusion of evidence at trial rests in the sound discretion of the trial court. *State v. Gillispie*, 208 N.J. 59, 84, 26 A.3d 397 (2011). “That discretion is not unbounded. Rather, it is guided by legal principles governing the admissibility of evidence which have been crafted to assure that jurors receive relevant and reliable evidence to permit them to perform their fact-finding function and that all parties receive a fair trial.” *State v. Willis*, 225 N.J. 85, 96, 137 A.3d 452, 2016 WL 2681363 (2016).

[3] This appeal focuses on the admission of other-crime evidence—specifically, the testimony of a female spa customer who alleged that she had been sexually assaulted by defendant, a crime for which defendant had been tried and ultimately acquitted. *N.J.R.E.* 404(b) governs the admissibility of such evidence, and provides:

[E]vidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such 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.

***158** “Because evidence of a defendant's previous misconduct ‘has a unique tendency’ to prejudice a jury, it must be admitted with caution.” *Willis, supra*, 225 N.J. at 97, 137 A.3d 452 (quoting *State v. Reddish*, 181 N.J. 553, 608, 859 A.2d 1173 (2004)). “Prior-conduct evidence has the effect of suggesting to a jury that a defendant has a propensity to commit crimes, and, therefore, that it is ‘more probable that he committed the crime for which he is on trial.’ ” *Id.* at 97, 137 A.3d 452 (quoting *State v. Weeks*, 107 N.J. 396, 406, 526 A.2d 1077 (1987)).

In *Cofield, supra*, this Court established a four-prong test designed “to avoid the over-use of extrinsic evidence of other crimes or wrongs” pursuant to a 404(b) exception. 127 N.J. at 338, 605 A.2d 230. The *Cofield* test requires that:

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.

[*Ibid.* (citation omitted).]

[4] [5] “[T]he 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, supra*, 181 N.J. at 608–09, 859 A.2d 1173. Ultimately, if the party seeking to admit the evidence “demonstrate[s] the necessity of the other-crime evidence to prove a genuine fact in issue ****497** and the court has carefully balanced the probative value of the evidence against the possible undue prejudice it may create, the court must instruct the jury on the limited use of the evidence.” *Cofield, supra*, 127 N.J. at 340–41, 605 A.2d 230 (citation omitted).

[6] [7] As we recently held in *Willis, supra*, other-crime evidence may be admissible “in sexual assault

cases in which the victim's consent is a genuine and material issue[.]” 225 N.J. at 98, 137 A.3d 452, but such evidence should be admitted with “restraint[.]” *id.* at 102, 137 A.3d 452. In many cases, “the unrestrained use of evidence of another marginally relevant and arguably remote-in-time sexual assault [will have] so clear a capacity to ***159** distract the jury from the evidence in support of the State's case-in-chief that it should [be] excluded.” *Ibid.* Importantly, “other-crime evidence must be relevant to a genuinely contested fact and ... the probative value of the proffered evidence must be critically evaluated in order to properly balance the relevance of the evidence and the prejudice its admission will cause[.]” *Id.* at 99, 137 A.3d 452 (citing *State v. Stevens*, 115 N.J. 289, 302, 558 A.2d 833 (1989)).

[8] In a case in which a defendant contends the alleged assault did not occur, intent and absence of mistake are not at issue. In the absence of a genuinely contested fact, other-crime evidence is irrelevant and the first *Cofield* prong cannot be satisfied.¹

¹ We can envision certain circumstances in which motive evidence may be admissible in the face of a denial by the defendant that the charged act did not occur. A fact-sensitive evaluation of the proffered evidence would be required to determine if the defendant's motive is a genuine issue in the case. See *State v. Rose*, 206 N.J. 141, 162–63, 19 A.3d 985 (2011) (permitting evidence of earlier attempt to kill victim as evidence of motive in defendant's trial for purposeful murder as accomplice and felony murder of same victim).

When other-crime evidence, including acquitted-act evidence, is admitted at trial, and before the trial court instructs the jury on the limited and specific purpose for which the evidence has been admitted, the court must advise the jury as follows:

Normally, such evidence is not permitted under our rules of evidence. Our rules specifically exclude evidence that a defendant has committed other crimes, wrongs or acts when it is offered only to show that he/she has a disposition or tendency to do wrong and therefore must be

guilty of the charged offenses. *Before you can give any weight to this evidence, you must be satisfied that the defendant committed the other [crime, wrong, or act]. If you are not so satisfied, you may not consider it for any purpose.*

[*Model Jury Charges (Criminal)*, “Proof of Other Crimes, Wrongs, or Acts (*N.J.R.E.* 404(b))” (June 4, 2007) (emphasis added).]

V.

A.

[9] We affirm the Appellate Division's determination that A.W.'s testimony is inadmissible under *N.J.R.E.* 404(b) substantially *160 for the reasons asserted in its opinion. *J.M., supra*, 438 *N.J. Super.* at 221–30, 102 *A.3d* 1233. We add the following comments.

[10] [11] The first *Cofield* factor requires that “the evidence of the prior bad act, crime or wrong ... be relevant to a material issue that is genuinely disputed.” *State v. Covell*, 157 *N.J.* 554, 564–65, 725 *A.2d* 675 (1999). Under *N.J.R.E.* 401, evidence is relevant if it “[has] a tendency in **498 reason to prove or disprove any fact of consequence to the determination of the action.” “[T]he primary focus in determining the relevance of evidence is whether there is a ‘logical connection between the proffered evidence and a fact in issue.’” *Willis, supra*, 225 *N.J.* at 98, 137 *A.3d* 452 (quoting *Covell, supra*, 157 *N.J.* at 565, 725 *A.2d* 675). “Moreover, the material fact sought to be proved must be one that is actually in dispute[.]” *Ibid.* (citing *Cofield, supra*, 127 *N.J.* at 338, 605 *A.2d* 230).

Here, the trial court erroneously found that A.W.'s testimony satisfied the first *Cofield* factor as evidence of motive, intent, absence of mistake, or plan. Defendant does not argue that the alleged sexual assault of E.S. was consensual or accidental; rather, he maintains that the sexual assault never occurred. As such, A.W.'s testimony is inadmissible to establish motive, intent, or absence of mistake because defendant's state of mind is not a “genuinely contested” issue in this case.

Id. at 98–99, 137 *A.3d* 452 (citing *Stevens, supra*, 115 *N.J.* at 302, 558 *A.2d* 833). The testimony is also inadmissible for proof of plan, because it is insufficient to “establish the existence of a larger continuing plan of which the crime on trial is a part [.]” *Stevens, supra*, 115 *N.J.* at 306, 558 *A.2d* 833 (quoting *State v. Louf*, 64 *N.J.* 172, 178, 313 *A.2d* 793 (1973)). A “strong factual similarity” between the two sexual assaults is not enough to reveal a plan. *Id.* at 305, 558 *A.2d* 833. Because the proposed testimony does not serve any of the permitted purposes of other-crime evidence set forth in *N.J.R.E.* 404(b), the testimony is inadmissible under the first *Cofield* requirement.

*161 [12] [13] For similar reasons, the proposed testimony fails to satisfy the fourth *Cofield* requirement that “[t]he probative value of the evidence must not be outweighed by its apparent prejudice.” *Cofield, supra*, 127 *N.J.* at 338, 605 *A.2d* 230. As we explained in *Willis, supra*, *N.J.R.E.* 404(b) is “a rule of exclusion rather than a rule of inclusion.” 225 *N.J.* at 100, 137 *A.3d* 452 (quoting *State v. Marrero*, 148 *N.J.* 469, 483, 691 *A.2d* 293 (1997)). Given the “inflammatory characteristic of other-crime evidence [.]” the trial court must conduct a “careful and pragmatic evaluation ... to determine whether the probative worth of the [other-crime] evidence outweighs its potential for undue prejudice.” *Ibid.* (quoting *Stevens, supra*, 115 *N.J.* at 303, 558 *A.2d* 833). We agree with the Appellate Division that, “even if probative value could be found in A.W.'s testimony, it is so greatly outweighed by the prejudicial effect—namely, the jury's inevitable assumption that defendant has a propensity to engage in such conduct—as to render it inadmissible.” *J.M., supra*, 438 *N.J. Super.* at 229–30, 102 *A.3d* 1233.

B.

Having determined that evidence of the Florida sexual assault was not admissible under the *Cofield* factors, it was not necessary to discuss, much less impose, a bright-line rule prohibiting the admission of acquitted-act evidence in other cases. A bright-line bar on acquitted-act evidence is inappropriate, and we decline to adopt it here. As illustrated by

the Appellate Division's decisions in *Schlue*, *supra*, 129 N.J. Super. 351, 323 A.2d 549, and *Yormark*, *supra*, 117 N.J. Super. 315, 284 A.2d 549, there are certain limited circumstances in which such evidence should be admitted.

In *Schlue*, *supra*, the defendant was charged with obstruction of justice for attempting to induce a member of an alleged bribery scheme to conceal the scheme from police. 129 N.J. Super. at 352–53, 323 A.2d 549. In an earlier proceeding, the **499 defendant had been acquitted of the underlying bribery charge, but the State sought to admit evidence of the alleged bribery in order to prove *162 the defendant's motive for obstruction. *Id.* at 353, 323 A.2d 549. The Appellate Division held that the evidence of the alleged bribery was admissible, even though the defendant had been acquitted of that crime, because “none of the issues of ultimate fact in the prosecution for obstruction of justice were involved or decided in the trial on the bribery charge [.]” *Id.* at 355, 323 A.2d 549. Therefore, the acquitted-act evidence could be admitted as evidence of the defendant's motive for obstruction without raising collateral estoppel or double jeopardy concerns. *Ibid.*

In *Yormark*, *supra*, four defendants were convicted of a conspiracy to obtain money under false pretenses. 117 N.J. Super. at 323, 284 A.2d 549. At trial, the State produced evidence of a previous conspiracy with many similar characteristics, even though two of the defendants had been acquitted of the prior conspiracy. *Id.* at 334–35, 284 A.2d 549. The Appellate Division held that the evidence of the prior conspiracy was admissible, notwithstanding the acquittals, as evidence of the defendants' plan, motive, prior course of dealing with each other, and knowledge relevant to committing the conspiracy with which they were presently charged. *Id.* at 336–37, 284 A.2d 549. The panel also found that the acquitted-act evidence did not implicate double jeopardy or collateral estoppel because the underlying conspiracies arose from separate operative facts. *Id.* at 333–34, 284 A.2d 549.

[14] As *Schlue* and *Yormark* reflect, there are limited circumstances in which acquitted-act evidence is both highly probative and not unduly

prejudicial to a defendant, and therefore may be admissible. As with all other-crime evidence, acquitted-act evidence may only be admitted after a vigorous *Cofield* analysis. With respect to the third prong of the *Cofield* test—the “clear and convincing evidence” requirement—the fact that a defendant was acquitted of the prior crime will often weigh heavily against a finding that the evidence of that crime is “clear and convincing.” See *Cofield*, *supra*, 127 N.J. at 338, 605 A.2d 230. On the other hand, an acquittal will not always vitiate the “clear and convincing evidence” requirement, especially when the State is not seeking to *163 prove that a defendant actually committed the prior crime. For example, when the State seeks to prove that a prior criminal trial of a defendant provides a motive for subsequent criminal conduct, whether the defendant committed the prior act has no bearing on his motive. The mere fact that he was subject to a criminal charge suffices.²

² In the limited circumstances in which acquitted-act evidence is admissible, a defendant should have the option to request that the trial court inform the jury that a jury had acquitted the defendant of that charge.

C.

In the third section of its opinion, the appellate panel directed that, in the event other-crime evidence is admitted, the defendant had been acquitted of that charge, and the acquitted-act evidence is pivotal to the State's case, the jury should be instructed that it must be satisfied beyond a reasonable doubt that the defendant actually committed the prior offense. We do not adopt this portion of the opinion. Having determined that the six-year-old other-crime evidence should not have been admitted, the appellate panel addressed an issue that had no bearing on the disposition of the appeal. It effectively rendered **500 an advisory opinion. See *G.H. v. Twp. of Galloway*, 199 N.J. 135, 136, 971 A.2d 401 (2009) (declining to reach question of limits of statutory preemption of municipal action in context of challenge to viability of existing ordinances).

Furthermore, as illustrated in *Willis*, *supra*, were we to require a jury to determine whether the State established beyond a reasonable doubt that a defendant committed the other alleged crime, we would effectively require a trial-within-a-trial, with its attendant capacity to distract the jury from the case-in-chief and to inject the prohibited inference of the defendant's propensity to commit similar offenses. 225 N.J. at 101–02, 137 A.3d 452. Such an instruction also minimizes the role of the trial judge, who is charged in the first instance with determining whether such *164 evidence should be admitted. See *Gillispie*, *supra*, 208 N.J. at 84, 26 A.3d 397 (holding that admission or exclusion of other-crime evidence “is left to the sound discretion of the trial court”).³

³ In addition, conditioning the text of a jury instruction on whether acquitted-act evidence is “pivotal” to the State's case introduces an unacceptable measure of unpredictability into the task of formulating a jury instruction that must contain a correct statement of the law. We anticipate many instances in which the parties and/or the trial court will disagree on the significance of the proffered evidence to the State's case.

We emphasize once again that *N.J.R.E.* 404(b) is a rule of exclusion and that the trial judge bears

the burden of scrutinizing the proffered evidence to determine if it satisfies the *Cofield* rule. In the end, assuming the trial court finds that the proffered evidence is relevant, similar in kind, not remote in time, and does not cause undue prejudice, the other-crime evidence cannot be admitted unless the judge finds that the State has presented clear and convincing evidence that the defendant committed the offense. *State v. Koskovich*, 168 N.J. 448, 483–85, 776 A.2d 144 (2001).

VI.

For the foregoing reasons, the judgment of the Appellate Division is affirmed as modified.

For modification and affirmance—Chief Justice RABNER and Justices LaVECCHIA, ALBIN, PATTERSON, SOLOMON and Judge CUFF (temporarily assigned)—6.

Not Participating—Justice FERNANDEZ–VINA —1.

All Citations

225 N.J. 146, 137 A.3d 490

Negative Treatment

Negative Citing References (1)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by	1. <u>State v. Garrison</u>  MOST NEGATIVE 155 A.3d 996 , N.J. CRIMINAL JUSTICE - Evidence. Evidence of defendant's involvement in game of strip poker with minor victim was admissible other-crimes evidence in sexual-assault prosecution.	Mar. 20, 2017	Case		8 10 11 A.3d

Citing References (23)

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Distinguished by NEGATIVE	1. State v. Garrison 155 A.3d 996, 1002+ , N.J. CRIMINAL JUSTICE - Evidence. Evidence of defendant's involvement in game of strip poker with minor victim was admissible other-crimes evidence in sexual-assault prosecution.	Mar. 20, 2017	Case		8 10 11 A.3d
Discussed by	2. State v. Ortiz 2016 WL 7338783, *6+ , N.J.Super.A.D. Defendant Jose Ortiz appeals from a judgment of conviction for third-degree terroristic threats, N.J.S.A. 2C:12-3(b), second-degree burglary, N.J.S.A. 2C:18-2(b)(1), and...	Dec. 16, 2016	Case		2 5 10 A.3d
Cited by	3. Shtutman v. Carr 2017 WL 4402045, *12 , N.J.Super.A.D. These appeals arise from a Ponzi scheme involving defendant Everett Charles Ford Miller. Plaintiff Oleg Shtutman claimed he invested over a million dollars in promissory notes (CM...	Oct. 04, 2017	Case		4 9 A.3d
Cited by	4. State v. P.M. 2016 WL 5759456, *5 , N.J.Super.A.D. Tried by a jury in April 2014, defendant P.M. was found guilty of second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1) (count one), and fourth-degree criminal sexual contact,...	Oct. 03, 2016	Case		—
Cited by	5. In re D.F.S. 141 A.3d 324, 334 , N.J.Super.A.D. Background: Following completion of sentence for aggravated sexual assault, sex offender was adjudicated Tier Two offender in the Superior Court, Law Division, Hudson County, and...	July 01, 2016	Case		—
Cited by	6. State in Interest of J.F. 140 A.3d 564, 577 , N.J.Super.A.D. FAMILY LAW - Juvenile Justice. Law that barred waiver to adult court for juveniles whose unlawful behavior occurred before their fifteenth birthday applied retroactively.	June 16, 2016	Case		12 14 A.3d
Cited by	7. People v. Hoskins 2017 WL 3090592, *5 , Mich.App. Defendant is charged with assault with intent to commit murder, MCL 750.83, intentional discharge of a firearm from a motor vehicle causing physical injury to another person, MCL...	July 20, 2017	Case		—
Mentioned by	8. State v. Torres 2017 WL 2351078, *5 , N.J.Super.A.D. Defendant Edgar Torres was charged in a single superseding indictment with five armed bank robberies on different dates between 2006 and 2011. His motion to exclude statements to...	May 31, 2017	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Mentioned by	9. <u>State v. Butler</u> 2017 WL 1179845, *8, N.J.Super.A.D. Following a joint trial, a jury convicted defendants Ahmar D. Butler and Jonathan P. Thomas of murder, N.J.S.A. 2C:11-3(a)(1), (2); aggravated assault, N.J.S.A. 2C:12-1(b)(1),...	Mar. 30, 2017	Case		—
—	10. <u>Handbook of Federal Evidence s 404:5, Rule 404(b)(2): crimes, wrongs or other acts</u> Dennis enters a Wal-Mart. He brings a television set to the checkout counter. When the clerk scans the television a \$285 price appears. Dennis hands the clerk fifteen \$20 bills....	2017	Other Secondary Source	—	14 A.3d
—	11. <u>2B N.J. Prac. Series N.J.R.E. 404, Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes; Evidence</u> N.J. Prac. Series Rule 404 generally follows Fed.R.Evid. 404 and replaces N.J.Evid.R. 46, 48, and 55. It also incorporates a portion of N.J.Evid.R. 47. Paragraph (a) of Rule 404 is almost identical...	2017	Other Secondary Source	—	7 8 9 A.3d
—	12. <u>32 N.J. Prac. Series s 21:57, The prosecutor should, if possible, save evidence of "other bad acts" committed by the defendant for rebuttal</u> N.J. Prac. Series Except when a defendant raises the defense of entrapment, evidence that the defendant committed "other bad acts" (i.e. crimes, wrongs or other acts other than those at issue...	2016	Other Secondary Source	—	8 A.3d
—	13. <u>55 N.J. Prac. Series s 2:3, Supporting authorities-Exclusion of prejudicial evidence</u> N.J. Prac. Series N.J.R.E. 403 states as follows: Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by...	2017	Other Secondary Source	—	9 A.3d
—	14. <u>55 N.J. Prac. Series s 3:4, Supporting authorities-Exclusion of irrelevant evidence, generally</u> N.J. Prac. Series N.J.R.E. 402 states that "[e]xcept as otherwise provided in these rules or by law, all relevant evidence is admissible." Relevant evidence is defined by N.J.R.E. 401 as "having...	2017	Other Secondary Source	—	9 A.3d
—	15. <u>55 N.J. Prac. Series s 7:32, Supporting authorities-Exclusion of improper character evidence</u> N.J. Prac. Series Evidence Rule 404(a) states as follows: Evidence of a person's character or character trait, including a trait of care or skill or lack thereof, is not admissible for the purpose...	2017	Other Secondary Source	—	9 A.3d
—	16. <u>Winning Evidence Arguments s 404:5, Rule 404(b)(2): crimes, wrongs or other acts</u> Dennis enters a Wal-Mart. He brings a television set to the checkout counter. When the clerk scans the television a \$285 price appears. Dennis hands the clerk fifteen \$20 bills....	2018	Other Secondary Source	—	14 A.3d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	17. <u>Wright & Miller: Federal Prac. & Proc. s 5242, General Rule</u> Wright & Miller: Federal Prac. & Proc. Federal Rule of Evidence 404(b) will give the reader a good illustration of Wigmore's sarcastic Rule of Codification that the "always conceded principle should frequently be found...	2017	Other Secondary Source	—	12 A.3d
—	18. <u>Wright & Miller: Federal Prac. & Proc. s 5248, To Prove Motive</u> Wright & Miller: Federal Prac. & Proc. The first of the illustrative uses of evidence of other crimes, wrongs, or acts listed in Federal Rule of Evidence 404(b) is to prove "motive." Since the Advisory Committee did...	2017	Other Secondary Source	—	9 A.3d
—	19. <u>Wright & Miller: Federal Prac. & Proc. s 5250, To Prove Intent</u> Wright & Miller: Federal Prac. & Proc. The third purpose explicitly authorized by Federal Rule of Evidence 404(b)(2)—intent—differs from some of the others because it constitutes an ultimate issue in most cases. So in...	2017	Other Secondary Source	—	9 A.3d
—	20. <u>Wright & Miller: Federal Prac. & Proc. s 5252, To Prove Plan</u> Wright & Miller: Federal Prac. & Proc. The fifth permissible use listed in Federal Rule of Evidence 404(b)(2) makes other crimes, wrongs, or acts admissible to prove the charged crime by showing it formed part of a...	2017	Other Secondary Source	—	9 A.3d
—	21. <u>Wright & Miller: Federal Prac. & Proc. s 5257, Procedure</u> Wright & Miller: Federal Prac. & Proc. Because Federal Rule of Evidence 404(b) requires a delicate balance between the legitimate probative value of evidence of other crimes and the desire of prosecutors to use the...	2017	Other Secondary Source	—	—
—	22. <u>Wright & Miller: Federal Prac. & Proc. s 5258, Appellate Review</u> Wright & Miller: Federal Prac. & Proc. Appellate review plays an important, if sometimes misunderstood, role in enforcing the Advisory Committee's view of the proper use of evidence of other crimes, wrongs, or acts....	2017	Other Secondary Source	—	—
—	23. <u>Wright & Miller: Federal Prac. & Proc. s 5259, Federal Rule of Evidence 403 and Discretionary Exclusion of Rule 404(b) Evidence</u> Wright & Miller: Federal Prac. & Proc. We begin this section with an analysis of the importance and process of Federal Rule of Evidence 403 exclusion of evidence of other crimes, wrongs or acts. At the end of this...	2017	Other Secondary Source	—	4 A.3d