



KeyCite Yellow Flag - Negative Treatment

Distinguished by State v. R.S., N.J.Super.A.D., January 28, 2015

202 N.J. 232

Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Respondent,

v.

P.S., Defendant–Appellant.

Argued Feb. 1, 2010.

|

Decided June 7, 2010.

Synopsis

Background: Defendant was convicted by jury in the Superior Court, Law Division, Passaic County, of first-degree aggravated sexual assault, second-degree sexual assault, and second-degree endangering the welfare of a child. Defendant appealed. The Superior Court, Appellate Division, affirmed convictions and sentences for first-degree aggravated sexual assault and second-degree sexual assault, but remanded for reconsideration of sentence on conviction for endangering the welfare of a child. Defendant filed petition for certification.

Holdings: The Supreme Court, Long, J., held that:

[1] alleged child victim's out-of-court statements to interviewer were trustworthy, such that they were admissible under rule setting forth tender years exception to rule against hearsay;

[2] there is no per se rule that in the absence of a video or audio recording of an alleged child sexual abuse victim's out-of-court statement, such statement is inadmissible under rule setting forth tender years exception to rule against hearsay;

[3] evidence that defendant had previously sexually abused a three-year-old boy was not admissible other crimes evidence;

[4] trial court's error in ruling that other crimes evidence was admissible was not harmless; and

[5] admission of hospital record suggesting that child sexual abuse victim “had sex three months ago one time” was barred by rape shield law.

Judgment of Appellate Division reversed; matter remanded for new trial.

Rivera–Soto, J., concurred in part and dissented in part, with opinion, in which Hoens, J., joined.

West Headnotes (25)

[1] Infants

🔑 Other hearsay exceptions; trustworthiness and reliability

Sex Offenses

🔑 Admissibility of Victim's Complaints, Statements, and Declarations

211 Infants

211XII Criminal Acts Against Children

211XII(F) Evidence Issues Particular to Offenses Against Children

211XII(F)2 Sex Offenses

211k1732 Admissibility

211k1740 Declarations, Admissions, and Statements by Child

211k1740(5) Other hearsay exceptions; trustworthiness and reliability

(Formerly 211k20)

352H Sex Offenses

352HVI Evidence

352HVI(E) Admissibility of Victim's Complaints, Statements, and Declarations

352Hk241 In general

(Formerly 211k20)

Rule setting forth tender years exception to rule against hearsay, which allows the out-of-court statement of a child sexual abuse victim to be admitted into evidence, requires the trial judge to conduct a preliminary hearing to determine whether an out-of-court statement is sufficiently reliable, based on the time, content, and circumstances of the statement and then decide what

is the probability that the statement is trustworthy; in determining whether the statement satisfies that standard, the judge should consider the totality of the circumstances. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 104(a), 803(c)(27).

12 Cases that cite this headnote

[2] **Infants**

🔑 Other hearsay exceptions; trustworthiness and reliability

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211XII Criminal Acts Against Children
211XII(F) Evidence Issues Particular to Offenses Against Children

211XII(F)2 Sex Offenses

211k1732 Admissibility

211k1740 Declarations, Admissions, and Statements by Child

211k1740(5) Other hearsay exceptions; trustworthiness and reliability

(Formerly 211k20)

352H Sex Offenses

352HVI Evidence

352HVI(E) Admissibility of Victim's Complaints, Statements, and Declarations

352Hk241 In general

(Formerly 211k20)

Under the rule setting forth tender years exception to rule against hearsay, which allows the out-of-court statement of a child sexual abuse victim to be admitted into evidence, admissibility of a child victim's statement is conditioned upon the state's prior notice of its intention to introduce the child victim's statement, a pre-trial judicial finding of trustworthiness, and an opportunity to cross-examine the child at trial. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 803(c)(27).

8 Cases that cite this headnote

[3] **Infants**

🔑 Other hearsay exceptions; trustworthiness and reliability

Sex Offenses

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211 Infants

211XII Criminal Acts Against Children

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211k1740 Declarations, Admissions, and Statements by Child

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352HVI Evidence

352HVI(E) Admissibility of Victim's Complaints, Statements, and Declarations

352Hk241 In general

(Formerly 211k20)

Factors to determine whether an interview technique used by interviewer with alleged child sexual abuse victim has the requisite indicia of reliability, for purposes of determining trustworthiness of child victim's out-of-court statements to interviewer, which is prerequisite to admission of these out-of-court statements under tender years exception to rule against hearsay, include lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what happened to the child, the use of leading questions, and a lack of control for outside influences on the child's statements; the analysis is flexible and does not require a mechanical approach. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 803(c)(27).

8 Cases that cite this headnote**[4] Criminal Law** Evidence110 Criminal Law110XXIV Review110XXIV(L) Scope of Review in General110XXIV(L)4 Scope of Inquiry110k1134.49 Evidence110k1134.49(1) In general

Regarding admissibility of an alleged child sex abuse victim's out-of-court statements under rule setting forth tender years exception to rule against hearsay, which allows the out-of-court statement of a child sexual abuse victim to be admitted into evidence, the judge's factual findings are entitled to deference by a reviewing court. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 803(c) (27).

1 Cases that cite this headnote**[5] Criminal Law** Evidence wrongfully obtained110 Criminal Law110XXIV Review110XXIV(O) Questions of Fact and Findings110k1158.8 Evidence110k1158.12 Evidence wrongfully obtained

An appellate court reviewing a motion to suppress evidence must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record.

3 Cases that cite this headnote**[6] Criminal Law** Hearsay110 Criminal Law110XXIV Review110XXIV(N) Discretion of Lower Court110k1153 Reception and Admissibility of Evidence110k1153.10 Hearsay

In reviewing a trial judge's finding that an alleged child sexual abuse victim's statement meets the trustworthiness requirement of rule setting forth tender years exception to rule against hearsay, which allows the out-of-court statement of a child sexual abuse victim to be admitted into evidence, appellate courts affirm unless the judge's determination amounted to an abuse of discretion. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 803(c) (27).

3 Cases that cite this headnote**[7] Criminal Law** Questions of Fact and Findings110 Criminal Law110XXIV Review110XXIV(O) Questions of Fact and Findings110k1158.1 In general

A trial court's determination of reliability or trustworthiness sufficient to allow admission of evidence should not be disturbed unless, after considering the record and giving the deference owed to the court's credibility findings, it is apparent that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction; only in those circumstances may an appellate court appraise the record as if it were deciding the matter at inception and make its own findings and conclusions.

8 Cases that cite this headnote**[8] Infants**

 Other hearsay exceptions; trustworthiness and reliability

Sex Offenses**🔑 Admissibility of Victim's Complaints, Statements, and Declarations**211 Infants211XII Criminal Acts Against Children211XII(F) Evidence Issues Particular to Offenses Against Children211XII(F)2 Sex Offenses211k1732 Admissibility211k1740 Declarations, Admissions, and Statements by Child211k1740(5) Other hearsay exceptions; trustworthiness and reliability
(Formerly 211k20)352H Sex Offenses352HVI Evidence352HVI(E) Admissibility of Victim's Complaints, Statements, and Declarations352Hk241 In general

(Formerly 211k20)

Alleged child victim's out-of-court statements to interviewer were trustworthy, such that they were admissible under rule setting forth tender years exception to rule against hearsay, which allows the out-of-court statement of a child sexual abuse victim to be admitted into evidence, in prosecution for first-degree aggravated sexual assault and other offenses, despite fact that no video or audio recording of statements existed, as interviewer took notes during the interview and used those notes to prepare a full report of the interview two months later, she testified that material in her report reflected the contemporaneous notes, and trial court believed interviewer, concluding that even in the absence of a recording or the contemporaneous notes, which had been discarded some two months after interview, there was enough evidence to find child victim's out-of-court statements trustworthy. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 803(c)(27).

8 Cases that cite this headnote**[9] Infants****🔑 Other hearsay exceptions; trustworthiness and reliability****Sex Offenses****🔑 Admissibility of Victim's Complaints, Statements, and Declarations**211 Infants211XII Criminal Acts Against Children211XII(F) Evidence Issues Particular to Offenses Against Children211XII(F)2 Sex Offenses211k1732 Admissibility211k1740 Declarations, Admissions, and Statements by Child211k1740(5) Other hearsay exceptions; trustworthiness and reliability
(Formerly 211k20)352H Sex Offenses352HVI Evidence352HVI(E) Admissibility of Victim's Complaints, Statements, and Declarations352Hk241 In general

(Formerly 211k20)

There is no per se rule that in the absence of a video or audio recording of an alleged child sexual abuse victim's out-of-court statement, such statement is inadmissible under rule setting forth tender years exception to rule against hearsay, which allows the out-of-court statement of a child sexual abuse victim to be admitted into evidence; rather, the presence or absence of such a recording is a factor to be considered in the totality of the circumstances analysis that determines the admissibility of a tender years statement. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 803(c)(27).

1 Cases that cite this headnote**[10] Infants****🔑 Other hearsay exceptions; trustworthiness and reliability**

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352HVI Evidence

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352Hk241 In general

(Formerly 211k20)

Simultaneous notes of an interview with an alleged child sexual abuse victim should not be destroyed, but should be maintained through trial for use in a case in which the videotape or audiotape of the interview is lost or, for some reason, unusable; such notes are invaluable in assessing the circumstances of the child victim's statements and in establishing the substance thereof, for purposes of determining trustworthiness of child victim's out-of-court statements to interviewer, which is prerequisite to admission of these out-of-court statements under tender years exception to rule against hearsay. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 803(c)(27).

3 Cases that cite this headnote

[11] **Criminal Law**

🔑 Sex offenses, incest, and prostitution

Criminal Law

🔑 Sex offenses, incest, and prostitution

Criminal Law

🔑 Sex offenses, incest, and prostitution

Criminal Law

🔑 Sex offenses

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)2 Admissibility in Prosecutions for Particular Offenses in General

110k368.37 Sex offenses, incest, and prostitution

(Formerly 110k369.2(5))

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)5 Other Misconduct Part of Plan Embracing More Than One Act

110k370.25 Sex offenses, incest, and prostitution

(Formerly 110k372(7))

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)6 Other Misconduct Showing Motive

110k371.22 Sex offenses, incest, and prostitution

(Formerly 110k371(12))

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

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

110k373.7 Similarity to Crime Charged

110k373.10 Sex offenses

(Formerly 110k372(7), 110k371(12))

Evidence that defendant had previously sexually abused a three-year-old boy was not admissible under rule governing admissibility of other crimes, wrongs, or acts, in prosecution for first degree aggravated sexual abuse and other offenses; child victim was an 11-year-old girl, no evidence of a common pattern or motive was

proffered, nor were issues of access or feasibility raised, and the unrelated alleged prior incident of sexual abuse was linked to bias of child victim and her mother only by the notion that if defendant had done it before, he likely did it again, thus supporting the credibility of child victim and her mother, which was improper basis for admission of other crimes evidence. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

1 Cases that cite this headnote

[12] **Criminal Law**
 🔑 Purposes for Admitting Evidence of Other Misconduct

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

110k368.3 Purposes for Admitting Evidence of Other Misconduct

110k368.4 In general

(Formerly 110k369.1)

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

(Formerly 110k369.1)

Under rule governing admissibility of evidence of other crimes, wrongs, or acts, such evidence must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to defendant, and must be coupled with a limiting

instruction; a proper application of these rules balances the state's interest in presenting such evidence against the possibility of unfair prejudice to defendant. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 104, 404(b).

8 Cases that cite this headnote

[13] **Criminal Law**

🔑 Purposes for Admitting Evidence of Other Misconduct

Criminal Law

🔑 Plan or scheme in general

Criminal Law

🔑 Nature and Circumstances of Other Misconduct Affecting Admissibility

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

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

110k368.3 Purposes for Admitting Evidence of Other Misconduct

110k368.4 In general

(Formerly 110k371(12), 110k369.1)

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)5 Other Misconduct Part of Plan Embracing More Than One Act

110k370.2 Plan or scheme in general

(Formerly 110k372(1))

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

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

110k373.1 In general

(Formerly 110k369.1)

The limited purposes for which evidence of other crimes, wrongs, or act may be admitted include, but are not limited to, establishment of a common scheme or plan, a signature

crime, motive, and most frequently, to impeach the accused who takes the witness stand, but only through a conviction. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

Cases that cite this headnote

[14] Criminal Law

🔑 Showing bad character or criminal propensity in general

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

110k368.3 Purposes for Admitting Evidence of Other Misconduct

110k368.5 Showing bad character or criminal propensity in general
(Formerly 110k369.2(1))

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
(Formerly 110k369.2(1))

The underlying danger of admitting evidence of other crimes, wrongs, or acts is that the jury may convict defendant because he is “bad” person in general; hence, even if the other crimes evidence is relevant to prove some legitimate trial issue, the trial court must still exclude it unless its probative value outweighs its prejudicial impact. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 104, 404(b).

3 Cases that cite this headnote

[15] Criminal Law

🔑 Similarity to Crime Charged

Criminal Law

🔑 Close temporal proximity

Criminal Law

🔑 Degree of proof

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

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

110k373.7 Similarity to Crime Charged

110k373.8 In general
(Formerly 110k369.2(1))

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

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

110k373.18 Temporal Relation of Events

110k373.20 Close temporal proximity
(Formerly 110k369.2(1))

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)13 Proof and Effect

110k374.15 Preliminary Evidence

110k374.19 Proof of Other Misconduct

110k374.19(2) Degree of proof
(Formerly 110k369.2(1))

Because rule governing admissibility of other crimes, wrongs, or acts is a rule of exclusion rather than a rule of inclusion, the proponent of other crimes evidence must satisfy a four-part test: (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. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 104, 404(b).

15 Cases that cite this headnote

[16] Criminal Law

🔑 Purposes for Admitting Evidence of Other Misconduct

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

110k368.3 Purposes for Admitting Evidence of Other Misconduct

110k368.4 In general

(Formerly 110k369.2(1))

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

(Formerly 110k369.2(1))

For evidence of other crimes, wrongs, or acts to be relevant, it must bear on a subject that is at issue at the trial, for example, an element of the offense or some other factor such as motive, opportunity, intent, or plan. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

6 Cases that cite this headnote

[17] 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

110k368.10 Materiality

(Formerly 110k369.2(1))

In determining whether evidence of other crimes, wrongs, or acts bears on a material issue, the court should consider whether the matter was projected by the defense as arguable before trial, raised by the defense at trial, or was one that the defense refused to concede. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

6 Cases that cite this headnote

[18] Criminal Law

🔑 Necessity for evidence

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

110k368.15 Necessity for evidence

(Formerly 110k369.2(1))

Evidence of other crimes, wrongs, or acts must be necessary for the proof of the disputed element in order to be admissible. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

1 Cases that cite this headnote

[19] Criminal Law

🔑 Necessity for evidence

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

110k368.15 Necessity for evidence

(Formerly 110k369.2(1))

In weighing probative value of other crimes evidence, court should consider

whether the matter can be proved adequately by other evidence. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 104, 404(b).

2 Cases that cite this headnote

[20] Witnesses

🔑 Corroboration of unimpeached and uncontradicted witness

410 Witnesses

410IV Credibility and Impeachment

410IV(A) In General

410k318 Corroboration of unimpeached and uncontradicted witness
Evidence of other crimes, wrongs, or acts should not be admitted solely to bolster the credibility of a witness against defendant. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

6 Cases that cite this headnote

[21] Criminal Law

🔑 Witnesses

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1170.5 Witnesses

110k1170.5(1) In general

(Formerly 110k1169.11)

Trial court's error in ruling that evidence that defendant had previously sexually abused a three-year-old boy was admissible other crimes evidence to bolster credibility of child victim and to rebut claims of bias, but only after cross-examination if defendant challenged credibility of child victim and her mother by placing their bias in issue, was not harmless, in prosecution for first degree aggravated sexual abuse and other offenses, even though the evidence was never actually admitted, as defendant paid a price to keep this evidence out, in that he was forced to alter trial strategy completely and was

effectively precluded from presenting a vendetta theory, which was central to his defense. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b); R. 2:10–2.

6 Cases that cite this headnote

[22] Criminal Law

🔑 Prejudice to rights of party as ground of review

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1162 Prejudice to rights of party as ground of review

“Harmful error” is one that is clearly capable of producing an unjust result. R. 2:10–2.

2 Cases that cite this headnote

[23] Witnesses

🔑 Cross-Examination to Discredit Witness or Disparage Testimony in General

410 Witnesses

410IV Credibility and Impeachment

410IV(A) In General

410k330 Cross-Examination to Discredit Witness or Disparage Testimony in General

410k330(1) In general

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.

Cases that cite this headnote

[24] Infants

🔑 Prior sexual history, experience, or abuse;rape shield

Sex Offenses

🔑 Minor victims

211 Infants

211XII Criminal Acts Against Children

[211XII\(F\)](#) Evidence Issues Particular to Offenses Against Children
[211XII\(F\)2](#) Sex Offenses
[211k1732](#) Admissibility
[211k1737](#) Conduct, Circumstances, and Character of Child
[211k1737\(2\)](#) Prior sexual history, experience, or abuse;rape shield
[352H](#) Sex Offenses
[352HVI](#) Evidence
[352HVI\(D\)](#) Admissibility of Victim's Sexual History;Rape Shield
[352Hk227](#) Particular Matters
[352Hk234](#) Minor victims

(Formerly 321k40(5) Rape)

Admission of hospital record suggesting that child sexual abuse victim “had sex three months ago one time” was barred by rape shield law, in prosecution for first-degree aggravated sexual assault and other offenses, as there was no clear proof that prior sexual incident occurred, nor did notation in record include any specific facts about the alleged incident, and there was no way to tell whether alleged prior sexual contact was similar to defendant's alleged abuse of child victim, or even separate from it, in that notation might have been to defendant's abuse of child victim. N.J.S.A. 2C:14–7.

3 Cases that cite this headnote

[25] Sex Offenses

🔑 [Admissibility of Victim's Sexual History;Rape Shield](#)

Sex Offenses

🔑 [Purposes for Admitting in General](#)

[352H](#) Sex Offenses
[352HVI](#) Evidence
[352HVI\(D\)](#) Admissibility of Victim's Sexual History;Rape Shield
[352Hk221](#) In general
 (Formerly 321k40(1) Rape)
[352H](#) Sex Offenses
[352HVI](#) Evidence
[352HVI\(D\)](#) Admissibility of Victim's Sexual History;Rape Shield

[352Hk223](#) Purposes for Admitting in General

[352Hk224](#) In general

(Formerly 321k40(1) Rape)

The purpose of the rape shield law is to protect the privacy interests of the victim while ensuring a fair determination of the issues bearing on the guilt or innocence of the defendant; the statute protects against unwarranted and unscrupulous foraging for character assassination information about the victim, but if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled. N.J.S.A. 2C:14–7.

6 Cases that cite this headnote

Attorneys and Law Firms

****167** Alison S. Perrone, Designated Counsel, argued the cause for appellant (Yvonne Smith Segars, Public Defender, attorney).

Jeanne Screen, Deputy Attorney General, argued the cause for respondent (Paula T. Dow, Attorney General, attorney); Ms. Screen and Marisa Slaten, Deputy Attorney General, on the brief.

Opinion

Justice LONG delivered the opinion of the Court.

***240** In this appeal we address several recurring issues in criminal law. The first is what standard to apply where a child sex abuse victim's taped statement is lost. In particular, defendant asks us to establish a per se rule of exclusion in such circumstances, a request that we decline. Instead we reaffirm the totality of circumstances standard as the appropriate benchmark for the admissibility of a tender years statement under N.J.R.E. 803(c)(27). In addition, we reiterate our holdings in State v. Cook, 179 N.J. 533, 847 A.2d 530 (2004), and State v. Branch, 182 N.J. 338, 865 A.2d 673 (2005), to the effect that simultaneous notes taken of a child sex

abuse victim's interview should not be destroyed but should be maintained through trial.

The second issue centers on the proper use of other-crimes evidence under *N.J.R.E.* 404(b). Like the Appellate Division, we conclude that a defendant's invocation of the so-called vendetta defense does not permit the prosecutor to bolster the credibility of a sex abuse victim by adducing evidence of another molestation. To be sure, such evidence could be offered to negate accident; to establish motive, pattern, or design; or for a myriad of other legitimate reasons under the rule. What is interdicted is its admission to show that because the defendant committed a bad act before, he is likely to have committed one again, thus making the victim's story more believable.

I.

Defendant Peter Scott was indicted in the Superior Court of Passaic County for first-degree aggravated sexual assault, contrary to *N.J.S.A.* 2C:14-2(a) (1) (Count One); second-degree sexual assault, contrary to *N.J.S.A.* 2C:14-2(b) (Count Two); and second-degree endangering the welfare of a child, contrary to ****168 *241** *N.J.S.A.* 2C:24-4(a) (Count Three), all allegedly perpetrated on his stepdaughter, Katie Jones.¹

¹ Both names are pseudonyms.

Prior to trial, a preliminary hearing pursuant to *N.J.R.E.* 104(a) was held to determine whether Giselle Henriquez, a child interview specialist with the Passaic County Prosecutor's Office, could testify regarding statements made to her by Katie. At the hearing, Henriquez, who interviewed Katie on April 24, 2003, described Katie's statements to her as follows:

[Katie] referenced an incident where [defendant] put a pillow over her head. She was laying on the bed. He turned her over. He—these again were his—her words. And he put a pillow over her head because she was trying to call her brother or something to that degree.

....

She was very specific in saying he turned her—she was on her back, to—so, she—he turned her onto her stomach.

He put his private, which she referred to as his private in her butt.

[The second time] was pretty much the same. Him putting his private in her butt.

He pulled—he pulled it out and yellow stuff came out ... either he urinated or ejaculated.

On the third incident, I think that was the one that she describes where he not only put his private in her butt but also in her front part, I think she uses—she refers to her vagina? ... [a]nd put his private into her—into her front part.

Henriquez testified that she had extensive experience interviewing child sex abuse victims and had been well-trained in interview techniques. According to Henriquez, she “stressed the importance of telling the truth,” and Katie agreed to do so. Henriquez testified that she did not promise Katie anything during the interview, that she never suggested any answers to her, and that Katie was the one who first brought up defendant's name.

The judge held that Katie's statements to Henriquez were admissible under the tender years exception to the hearsay rule, *N.J.R.E.* 803(c)(27). In ruling, the judge found that the interview was not suggestive and that there was a probability that the statements were trustworthy.

***242** The State then moved, pre-trial, pursuant to *N.J.R.E.* 404(b), to adduce evidence of defendant's “other crime,” namely, an allegation that defendant had sexually abused a three-year-old boy, I.B., in 1997, while defendant was a resident at a halfway house.

An evidentiary hearing was held at which I.B.'s mother testified that she left I.B., then three years old, to play on the porch of the halfway house unsupervised, and that defendant was on the porch with him. She further testified that after they left the halfway house, I.B. told her that defendant had

touched him. Pointing to places on his body, the mother determined that defendant had touched I.B. on his buttocks and rectum. Charles H. Parks, a supervisor at the halfway house, testified that he had told I.B.'s mother on March 24, 2007, and on previous visits, not to let I.B. out of her sight; she had ignored his requests. Parks also testified that defendant and I.B. were alone on the porch, and that he heard defendant tell I.B. to hold the back of his pants. Parks explained that in prison culture, that meant that I.B. was defendant's "woman." Finally, Dr. Mary Grace Ponce testified that she had examined I.B. on March 24, 1997, and that I.B. had told her that defendant put medicine or cream in I.B.'s behind. When Dr. ****169** Ponce examined I.B.'s rectum, I.B. said, "[defendant] did that." Dr. Ponce noted two superficial fissures, or cuts, in I.B.'s rectal area, and said that the fissures could "be caused by constipation but [that she could not] entirely rule out fondling or sexual abuse."

The judge found that the other-crimes evidence satisfied the four-factor test articulated in *State v. Cofield*, 127 N.J. 328, 338, 605 A.2d 230 (1992): the evidence was relevant because the credibility of the victim would likely be placed at issue; the other crime was "similar in kind" and "reasonably close in time" as both I.B. and Katie were child victims; evidence of the other crime was clear and convincing; and the probative value would not be outweighed by the prejudicial effect of the evidence because the judge would give the jury a limiting instruction. Thus, the judge held that evidence of defendant's sexual assault of I.B. would be admissible to bolster the credibility of Katie and to rebut claims of ****243** bias, but only after cross-examination, if defense counsel challenged the credibility of Katie and her mother by placing their bias in issue.

The State also made a motion in limine to preclude defendant from mentioning that Katie's uncles assaulted and blinded him on June 3, 2003, after Katie's allegations surfaced. Defense counsel represented that the uncles were convicted of attempted murder for the assault and argued not only that Katie's mother, Ursula Jones,² may have influenced Katie to fabricate her allegations to get defendant out of the house, but also that Ursula

became more invested in the case against defendant after her brothers were sentenced to "15 and 12 years" in prison. The judge rejected defendant's arguments and granted the State's motion, ruling that defendant could not bring up the 2003 assault.

² The name is a pseudonym.

At trial, Katie testified that she was "raped three times" by her stepfather on three separate occasions, all of which occurred when she was nine or ten years old. She described one incident wherein he "pushed [her] and then turned [her] over onto [her] stomach," and then "put his private part in [her] butt"; a second incident wherein he "pushed [her] back on the bed and put his private in [her] butt" and "something—yellow stuff came out"; and a third incident wherein he "came in [her] room and he put his private in [her] front and in [her] back." Katie further testified that on April 24, 2003, she went to her grandmother's house after school. Katie told her grandmother that her "private was hurting," because she "felt like that was [her] way to tell" her grandmother about the abuse.

Ursula testified that when she picked Katie and her brother up from their grandmother's house that day, the grandmother informed Ursula that Katie's "bottom was hurting" and that Katie had something to tell Ursula. After bringing Katie home, Ursula asked her what happened and if someone had touched her. Katie said that it was defendant who touched her. At that point, Ursula ****244** brought Katie to the hospital to be examined. Katie testified that when she returned home from the hospital, her stepfather whispered to her, "lie so we can be a family."

During trial, defendant sought to introduce evidence that Katie had disclosed prior sexual activity when she went to the hospital with her mother. The evidence consisted of a notation in the hospital record reading: "11 year old female [] burning sensation when she urinate [sic] and also frequency of urination had sex 3 ****170** months ago one time [] vaginal discharge." Defense counsel argued that the introduction of the report was necessary for three reasons: to explain Katie's mother's statement that she had looked at Katie's vaginal opening and that it "looked bigger than ... a

normal child's at that time"; because it shed light on Katie's credibility and the consistency of the story she told; and to explain how a twelve-year-old girl would know about ejaculation. The State argued that that evidence was barred by the Rape Shield Law, *N.J.S.A. 2C:14-7*.

The trial judge ruled that that evidence was inadmissible. In particular he noted that there was no suggestion in the notation that ejaculation was involved in the prior incident, that the evidence was "too speculative," and that its "probative value ... [was] not there." The trial judge also noted that Katie "didn't use any age inappropriate language that she may [not] have gotten from some other place to describe this."

According to the testimony at trial, after leaving the hospital, Ursula and Katie reported the incident to the police, who took them to see Henriquez. Henriquez testified that, in interviewing Katie, she followed a specific protocol known as "Finding Words," which is designed to gather information from a young child in a short period of time while avoiding intimidating or suggesting responses to the child. First she built a rapport with Katie; then she inquired as to the terms Katie used to refer to different parts of the male and female anatomy. Next, she questioned Katie as to what Katie considered to be "positive and negative touches." Katie volunteered that her stepfather sometimes touched her in a *245 way she did not like, describing several incidents of sexual abuse. Henriquez recounted those statements as follows:

[Katie] told me about a time where she was lying down and her stepfather came into the room and turned her over. She was lying on a bed. He turned her over, put a pillow over her head, and put his private in her private—or in her butt.

....

[Katie] talked about another time where he only had underwear on and he pulled his penis out of the front hole of the underwear and put—I'm sorry—put his private in her butt and her vagina—her private—her private ... And she said—she describes something coming—stuff coming out of his private.

....

[S]he described what can be assumed is ejaculation.

....

[Katie] told me about another incident that occurred in her Mom's bedroom. Her Mom had—she said she was sleeping in bed with her Mom. Her Mom had gotten up to go to work. And she heard steps. She heard someone walking. Her Mom had already left for work. Her stepfather came into the bedroom, took—taken off his clothes, and gotten into bed with her. And she specifically said she was holding onto a pillow and he rolled her over, put his private in her—in her private and in her butt.

Henriquez further testified that she had intended to videotape the interview, and believed that the interview was being recorded; however, after the interview, she discovered that the video equipment had failed. To avoid traumatizing Katie, Henriquez declined to re-interview her; instead, she immediately made notes of everything she recalled of her questions and Katie's responses. Those notes formed the basis for a report that Henriquez wrote and submitted to her supervisor. The report was filed on June 26, 2003, approximately two months after the interview, **171 and Henriquez's notes were discarded.

Defendant originally intended to present a vendetta defense to the jury by demonstrating that Katie, with Ursula's help, fabricated her allegations in order to get defendant out of the house. At trial, defense counsel elicited testimony from Ursula confirming that, in 1999, Ursula hit Katie and the authorities became involved. The judge allowed the question under the theory that because Katie was afraid of her mother, Ursula would be able to coerce Katie into lying about the sexual abuse. Katie confirmed on cross-examination that her mother had hit her before, and that *246 she was afraid that her mother would hit her if she told her about the abuse.

Defense counsel also questioned Ursula regarding her statement to a Prosecutor's Office investigator that her "marriage was a mess." In his summation, defense counsel alluded to some minor inconsistencies in Katie's, Ursula's, and Henriquez's testimony, and argued that Ursula did not behave the way a reasonable mother would in response to allegations of sexual abuse against her daughter. However, presumably to avoid opening the door to the admission of evidence of defendant's prior alleged assault of I.B., defense counsel declined to attack the credibility of either witness directly and did not overtly suggest the vendetta theory. Instead, he said the following:

Now, I know what's in everyone's questions—questions in everyone's mind and I'm sure the [p]rosecutor is going to want to come up and say this is why would [Katie] say something like this? That's on everybody's mind. Why would she say this? And the [p]rosecutor—she's going to say she said this because it happened.

And my job, and it's not my job or my burden or responsibility to tell you why [Katie] did this. You have to understand something here. The State has the burden to prove this. The evidence that you were shown, a lot of things can be deduced from what happened.

[Katie], through her testimony, asked if she was scared of her mother. She said, yes, I'm scared of my mother. She said her mother hits her. I asked her if she ever got hit by her and she said yes.

Her mother, [Ursula], testified there were times that she did beat her—her daughter. And she said even on direct—direct examination she would beat her if she didn't tell her what happened when she asked her in reference to why her private was hurting. She said it pretty vigorously. She admitted in cross-examination that she hit her so bad at one point that the authorities had to be called.

The child here—it seems that she's petrified of her mother and she had a right to because she had—had hit her at one point and the authorities had to come.

On direct examination, when the [p]rosecutor asked [Ursula] about the relationship between her and [Peter], she said it was a mess. She said it wasn't good. Here's an impressionable young girl who's scared of her mother.

The jury convicted defendant on all counts. On the sexual assaults, he was sentenced to a custodial term of twenty years with ten years of parole ineligibility. A consecutive sentence of ten years with five years of parole ineligibility was imposed on the endangering count.

*247 Defendant appealed, raising a series of arguments, including that Katie's statements to Henriquez were inadmissible because there was no videotape; that the statements were not sufficiently reliable; **172 that the other-crimes evidence was improperly ruled admissible; and that the Rape Shield Law did not bar the evidence he offered regarding Katie's alleged prior sexual experience. He also challenged his sentence.

The Appellate Division affirmed defendant's conviction on all counts, and his sentence on Counts One and Two. The panel remanded defendant's sentence on Count Three because of its consecutive nature, which the panel held violative of *State v. Yarbough*, 100 N.J. 627, 498 A.2d 1239 (1985), cert. denied, 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed.2d 308 (1986), superseded by statute, N.J.S.A. 2C:44–5. The panel rejected defendants' remaining arguments. Although it agreed with defendant that the N.J.R.E. 404(b) evidence was inadmissible, the panel ruled that because the evidence was not, in fact, admitted, any error by the court was harmless.

Defendant filed a petition for certification, which we granted. 200 N.J. 369, 982 A.2d 457 (2009).

II.

Defendant argues that Katie's out-of-court statements to Henriquez were improperly admitted because the interview was not electronically recorded and asks this Court to adopt a per se

rule barring the admission of such statements. Defendant further contends that Katie's statements to Henriquez were not sufficiently reliable because Henriquez had a "preconceived notion of what had supposedly happened." Regarding the other-crimes evidence, defendant maintains that the judge's ruling deprived him of a fair trial even though the evidence was never admitted. Finally, defendant argues that the judge's barring of the evidence of Katie's prior sexual experience deprived him of his rights under the Confrontation Clause, *U.S. Const. amend. VI*.

***248** The State maintains that the trial court's factual findings regarding Katie's interview were supported by sufficient credible evidence and that Katie's statements were properly deemed reliable. Noting this Court's prior rejection of a per se rule barring unrecorded statements, the State objects to defendant's proposal that the Court adopt such a rule. The State further argues that the trial court correctly ruled on the other-crimes evidence, and that regardless, any error was harmless because the evidence was not actually admitted. Finally, the State argues that the Rape Shield Law precludes evidence of the victim's previous sexual conduct and that, in any event, defendant did not have sufficient evidence of Katie's alleged prior sex acts, even if they were relevant.

III.

The tender years exception to the hearsay rule, which allows the out-of-court statement of a child sexual abuse victim to be admitted into evidence, provides:

A statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement ...; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or

(ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse....

[*N.J.R.E.* 803(c)(27).]

The rule was this Court's response to the proof problems that inhere in the prosecution ***173** of child sex abuse—in particular, the absence of witnesses and physical evidence, the ambivalence of the victim about discussing sexual matters, and the victim's fear of naming a close friend or relative. *State v. D.R.*, 109 N.J. 348, 358–60, 537 A.2d 667 (1988). Although we recognized in *D.R.* that a spontaneous out-of-court statement by a child can be "highly credible," we were also concerned with the defendant's need for confrontation and particularly for cross-examination. *Id.* at 359, 369, 537 A.2d 667. Thus, sufficient indicia of reliability or trustworthiness ***249** became the focus of the rule, originally *Evid. R.* 63(33), in order to avoid Confrontation Clause conflicts. *Idaho v. Wright*, 497 U.S. 805, 822, 110 S.Ct. 3139, 3150, 111 L.Ed.2d 638, 657 (1990).

[1] *N.J.R.E.* 803(c)(27) requires the trial judge to conduct a preliminary hearing pursuant to *N.J.R.E.* 104(a) to determine whether an out-of-court statement is sufficiently reliable, based on the "time, content and circumstances of the statement" and then decide what is the "probability that the statement is trustworthy." *State v. D.G.*, 157 N.J. 112, 128, 723 A.2d 588 (1999). In determining whether the statement satisfies that standard, the judge should consider "the totality of the circumstances." *State v. Roman*, 248 N.J. Super. 144, 152, 590 A.2d 686 (App.Div.1991).

In *Idaho v. Wright*, the United States Supreme Court summarized a non-exclusive list of factors relevant to evaluating the reliability of out-of-court statements made by child victims of sexual abuse, including spontaneity, consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate. *Wright, supra*, 497 U.S. at 821–22, 110 S.Ct. at 3150, 111 L.Ed.2d at 656 (citations omitted).

[2] *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), “has entirely changed the Confrontation Clause landscape, rendering ‘defunct’ the reliability test set out in *Wright*.” *State v. Burr*, 392 N.J.Super. 538, 569–70, 921 A.2d 1135 (App.Div.2007), *aff’d and modified*, 195 N.J. 119, 948 A.2d 627 (2008). Under the new rule, admissibility of a child victim’s statement is conditioned upon the State’s prior notice of its intention to introduce the child’s statement, “a pre-trial judicial finding of trustworthiness, and [an] opportunity to cross-examine the child at trial [.]” *State v. R.B.*, 183 N.J. 308, 318, 873 A.2d 511 (2005). Nonetheless, there remains a “need for a trustworthiness analysis ... under *N.J.R.E.* 803(c)(27), and the same factors identified in *Wright*, and endorsed by *D.G.*, are appropriate for *250 guidance in that context.” *Burr*, *supra*, 392 N.J.Super. at 570, 921 A.2d 1135 (citations omitted).

[3] Further, in *State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (1994), we outlined factors to determine whether an interview technique has the requisite indicia of reliability. Relevant to the analysis are details such as “lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what happened to the child, the use of leading questions, and a lack of control for outside influences on the child’s statements[.]” *Id.* at 309, 642 A.2d 1372. The analysis is flexible and does not require a mechanical approach. *D.G.*, *supra*, 157 N.J. at 125, 723 A.2d 588. In *Michaels*, we also underscored the importance of videotaping child interviews and held that such videotapes should be considered in any trustworthiness analysis. *Michaels*, *supra*, 136 N.J. at 313–14 n. 1, 642 A.2d 1372.

[4] [5] Regarding admissibility under *N.J.R.E.* 803(c)(27), the judge’s factual findings are entitled to deference by a **174 reviewing court. *State v. Robinson*, 200 N.J. 1, 15, 974 A.2d 1057 (2009); *State v. Locurto*, 157 N.J. 463, 474, 724 A.2d 234 (1999); *State v. Johnson*, 42 N.J. 146, 160–61, 199 A.2d 809 (1964). “[A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court’s decision so long as those findings are ‘supported by sufficient credible

evidence in the record.’ ” *State v. Elders*, 192 N.J. 224, 243, 927 A.2d 1250 (2007) (citations omitted).

[6] [7] Specifically, in reviewing a trial judge’s finding that a child’s statement meets the trustworthiness requirement of *N.J.R.E.* 803(c)(27), appellate courts affirm unless the judge’s determination amounted to an abuse of discretion. *State v. Nyhammer*, 197 N.J. 383, 411, 963 A.2d 316, *cert. denied*, — U.S. —, 130 S.Ct. 65, 175 L.Ed.2d 48 (2009). A trial court’s determination of reliability or trustworthiness sufficient to allow admission of evidence should not be disturbed unless, after considering the record and giving the deference owed to the court’s credibility *251 findings, it is apparent that the finding is “clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction [.]” *Locurto*, *supra*, 157 N.J. at 471, 724 A.2d 234 (internal quotation marks and citations omitted). Only in those circumstances may “an appellate court ‘appraise the record as if it were deciding the matter at inception and make its own findings and conclusions.’ ” *Elders*, *supra*, 192 N.J. at 244, 927 A.2d 1250 (quoting *Johnson*, *supra*, 42 N.J. at 162, 199 A.2d 809).

In respect of the admissibility of Henriquez’s trial testimony, the trial judge concluded:

The Court has heard testimony from Ms. Giselle Henriquez. She’s a Child Interview Specialist. Her job is to interview children under the age of 12 who were allegedly sexually abused.

She said she’s conducted approximately 600 to 700 of these interviews and she—they use—she, in conjunction with the Passaic County Prosecutor’s Office, uses a technique known as the Corner House Forensic Interview Approach. These interviews are conducted at a Child Advocacy Center....

....

The process of the—interview was explained to the mother and then Ms. Henriquez took the alleged child victim to the interview room. She and the young child were the only ones in the interview room. She told the child to tell the truth

and did not—gave the child the admonition that the child did nothing wrong and she shouldn't feel in any way that she was creating a problem for others.

She reviewed the anatomy with the child. The child used age-appropriate language. And then when she, when describing body parts she then on both males and females she then talked about good hugs and bad hugs. She knew the difference between good hugs and bad hugs and she said that allegedly the defendant in this case gave her bad hugs which is something that she did not like, a touching that she did not like.

....

These interviews are normally video taped but the video tape malfunctioned. There's no requirement under the law that they be video taped. And there was a reasonable reason given for not re-interviewing the child—to re-traumatize the child. The child was able to provide a—a clear account of what she says happened.

Now, a report was prepared by Ms. Henriquez and this was done based on notes that she had taken. When that **175 final report was—perhaps it was two months before the final report was issued because others had to review it.

There's no suggestion in this case with this child. There's nothing—the child was not spoken to in front of her mother. There's no evidence that the mother influenced the child at all. The child, according to Ms. Henriquez, who I find to be *252 credible and competent and capable in these types of issues, acted appropriately, discussed the matter appropriately.

And I'm going to permit the ... statement of the child.... I'm satisfied that the reliability is trustworthy.

On appeal, the Appellate Division stated:

The judge had the opportunity to observe and assess the credibility of Henriquez, who testified fully

and was subject to extensive cross-examination. The judge applied appropriate reliability factors under the totality of circumstances test. *See ... Michaels, [supra,] 136 N.J. ... [at] 306[, 642 A.2d 1372]....* These factors include, for example, whether the child's statement was made spontaneously without prompting, whether the account was repeated with consistency, the mental state of the declarant, lack of motive to fabricate, use of age-appropriate terminology, interrogation, and potential manipulation by adults. *See ... D.G., [supra,] 157 N.J. ... [at] 125[, 723 A.2d 588]....* The judge's credibility assessment and finding of trustworthiness is well supported by the evidence presented at the *Rule 104(a)* hearing, and we defer to that finding.... *Locurto, [supra,] 157 N.J. ... [at] 474[, 724 A.2d 234]....*

We have carefully reviewed this record and, like the Appellate Division, have determined that the trial judge's conclusions are fully supported by the evidence and legally unassailable.

[8] [9] We turn then to defendant's claim that we should establish a per se rule that in the absence of a tape recording, a child victim's statement should be deemed inadmissible under *N.J.R.E. 803(c)(27)*. Of that contention, the Appellate Division stated:

We can dispose of defendant's argument urging a per se rule of exclusion quite summarily. Defendant acknowledges that no State or federal court has adopted such a rule. Further, defendant did not raise this issue in the trial court, and it is not properly before us. *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234[, 300 A.2d 142] (1973). We nevertheless address the issue substantively.

In *Michaels*, the Court identified video taping as a “sound interviewing methodology,” endorsed by “nearly all experts,” which courts should consider in determining trustworthiness. *Michaels, supra*, 136 N.J. at 313–14 n. 1[, 642 A.2d 1372]. The [C]ourt did not impose a recording requirement or even afford that procedure more weight than other desirable interviewing procedures and techniques. See *id.* at 312–15[, 642 A.2d 1372.] Further, the Court stated, “We have recognized generally that the existence of a video or sound recording of a statement elicited through pretrial interrogation is a factor bearing on its reliability.” *Id.* at 314 n. 1[, 642 A.2d 1372] (citing *State v. Gross*, 121 N.J. 1, 10[, 577 A.2d 806] ... (1990)). It is thus clear that the presence or absence of electronic recording is only one factor in the totality of the circumstances that determines the admissibility of a tender years statement. There is no basis for adoption of a per se rule of exclusion.

****176 *253** Again we are in agreement with the Appellate Division's conclusions.

We have no doubt, nor did we in *Michaels*, of the benefits of tape recording the statements of child sex abuse victims. Indeed, the videotape “convey[s] not only the exact words spoken by the child, but their finer shades of meaning through facial expressions, body movements and inflections of voice.” *State v. Donegan*, 265 N.J.Super. 180, 185–86, 625 A.2d 1147 (App.Div.1993). In addition, a video recording creates an objective, reviewable record, enhances the reliability of confessions, protects police officers from false allegations, improves the overall quality of police work, and may well “preserve judicial resources” by discouraging defendants from raising frivolous pre-trial challenges to the admission of the child's statement. *Cook, supra*, 179 N.J. at 551–62, 847 A.2d 530. If no video equipment is available, some of the same purposes, though not all, can be served by audio recording.

As we understand it, prosecutors across the state have voluntarily undertaken to tape record the statements of child sex abuse victims for all of those stated reasons. Thus it would be redundant for us

to order them to do so. We presume that they will continue such recording because it is a factor in the totality of circumstances analysis that determines the admissibility of a tender-years statement.

In this case, we are asked to consider the effect of tape machine malfunction. Because the tape is only one factor in the totality of circumstances analysis we established regarding trustworthiness, it follows that the absence of a tape, standing alone, is not dispositive. It is to be considered along with all the other factors we have previously set forth in *Michaels* and *D.G.* as relevant to trustworthiness.

[10] What is important, however, as we indicated in *Cook*, is that simultaneous notes of an interview should not be destroyed but should be maintained through trial for use in a case in which the tape is lost or, for some reason, unusable. We reiterated that principle in *Branch*:

***254** We register our displeasure that police officers engage in the seemingly routine practice of destroying their contemporaneous notes of witness interviews after the preparation of formal reports.... We expressed our disapproval of the practice of destroying contemporaneous notes in ... *Cook, [supra]*, 179 N.J. [at] 542 n. 3[, 847 A.2d 530] ..., and do so again here.

[*Branch, supra*, 182 N.J. at 367 n. 10, 865 A.2d 673.]³

³ The events in this case preceded *Cook* and *Branch*.

Obviously, such notes will be invaluable in assessing the circumstances of the victims' statements and in establishing the substance thereof. See *Michaels, supra*, 136 N.J. at 321, 642 A.2d 1372 (noting interviewer's “failure to videotape or otherwise document the initial interview sessions” as factor weighing against trustworthiness (emphasis added)).

Here, the investigator took notes during the interview and used those notes to prepare a full report of the interview two months later. She testified that the material in her report reflected the contemporaneous notes, and the judge believed her,

thus concluding that even in the absence of the tape or the contemporaneous notes, there was enough evidence to find that Katie's out-of-court statement was trustworthy. That is all that is required.

IV.

[11] [12] [13] [14] We turn next to defendant's claim that the trial judge improperly ruled ****177** regarding the admissibility of other-crimes evidence in this trial. *N.J.R.E. 404(b)* governs other crimes, wrongs, or acts evidence:

Except as otherwise provided by Rule 608(b), evidence 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.

[N.J.R.E. 404(b).]

Under the rule,

[t]he evidence must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair ***255** prejudice to the defendant, and must be coupled with a limiting instruction. A proper application of those rules balances the State's interest in presenting the evidence of "other crimes or wrongs" against the possibility of unfair prejudice to the defendant.

....

The limited purposes for which other-crime evidence may be admitted include, but are not limited to, "establishment of a common scheme or plan, a signature crime, motive, and most frequently, to impeach the accused who takes the witness stand, but only through a conviction." ...

The underlying danger of admitting other-crime evidence is that the jury may convict the defendant because he is "a 'bad' person

in general." ... Hence, even if the other-crime evidence is relevant to prove some legitimate trial issue, the trial court must still exclude it unless, under Evidence Rule [104], its probative value outweighs its prejudicial impact....

[Cofield, supra, 127 N.J. at 334, 336, 605 A.2d 230 (citations omitted).]

[15] Because *N.J.R.E. 404(b)* is a rule of exclusion rather than a rule of inclusion, the proponent of other-crimes evidence must satisfy a four-part test:

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.

*[Id. at 338, 605 A.2d 230 (citation omitted).]*⁴

⁴

As we have stated, the evidence of similarity and temporality

is not one that can be found in the language of *Evidence Rule 404(b)*. *Cofield's* second prong, therefore, need not receive universal application in *Rule 404(b)* disputes. Its usefulness as a requirement is limited to cases that replicate the circumstances in *Cofield*.

[State v. Williams, 190 N.J. 114, 131, 919 A.2d 90 (2007).]

[16] [17] [18] [19] It is the relevance prong that is the focus in this case. Relevance means "having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." *N.J.R.E. 401*. Consequently, to be relevant, the other-crimes evidence must bear on a subject that is at issue at the trial, for example, an element of the offense or some other factor such as motive, opportunity, intent, or plan. *State v. Brown, 138 N.J. 481, 533, 651 A.2d 19 (1994), overruled on **178 other grounds, State v. *256 Cooper, 151 N.J. 326, 377, 700 A.2d 306 (1997)*. In determining whether 404(b) evidence bears on a material issue,

the Court should consider whether the matter was projected by the defense as arguable before trial, raised by the defense at trial, or was one that the defense refused to concede. *State v. Stevens*, 115 N.J. 289, 301–02, 558 A.2d 833 (1989). Further, the other-crimes evidence must be necessary for the proof of the disputed element. *State v. Marrero*, 148 N.J. 469, 482, 691 A.2d 293 (1997) (citing *Stevens*, *supra*, 115 N.J. at 301, 558 A.2d 833). Indeed, in assessing the fourth prong, courts should consider whether the matter can be proved adequately by other evidence. *Stevens*, *supra*, 115 N.J. at 303, 558 A.2d 833.

[20] Importantly, other-crimes evidence should not be admitted solely to bolster the credibility of a witness against a defendant. *State v. Darby*, 174 N.J. 509, 520, 809 A.2d 138 (2002). “If other-crime evidence is admissible merely to support the credibility of a witness, then the *Cofield* standard designed to severely limit the use of such highly inflammatory evidence becomes meaningless.” *Id.* at 521, 809 A.2d 138. See also *Stevens*, *supra*, 115 N.J. at 306, 558 A.2d 833 (holding other-crimes evidence not admissible as basis for inference that victim's version of events is true).

Two cases relied upon by the trial judge in declaring the other-crimes evidence admissible in this case are instructive. In *State v. G.S.*, 145 N.J. 460, 469, 678 A.2d 1092 (1996), we held that evidence of a prior allegation that a defendant had sexually abused his stepdaughter was admissible at a trial wherein she newly alleged the same type of abuse. The rationale for the admission of the evidence was that an issue at trial was the victim's delay in reporting the abuse charged. *Id.* at 464–68, 678 A.2d 1092. Because the victim's mother did not believe or support her the first time she claimed sexual abuse by the defendant, the victim initially recanted her first accusation. *Id.* at 463–66, 678 A.2d 1092. Thus the evidence regarding her first allegation was relevant to explain the victim's delay in reporting the new accusation, *257 which could have led the jury to believe that her claim was not true. *Id.* at 469, 678 A.2d 1092.

More recently, we considered whether a claim of previous molestation of an older daughter by her father, the defendant, was admissible in a trial

for sexual offenses against the defendant's younger daughter, allegedly occurring years later. *State v. G.V.*, 162 N.J. 252, 744 A.2d 137 (2000). There the stories told by the girls were remarkably similar, including the age the molestation began, how and when it proceeded to intercourse, and that it always occurred when the mother worked nights. *Id.* at 256, 744 A.2d 137.

Although we rejected the admissibility of the evidence based on the reasons advanced by the trial court (intent or absence of mistake), we recognized that the evidence was potentially admissible on material issues such as access and feasibility. We also recognized that that evidence could be used to counter a claim of bias—the so-called “vendetta defense.” In connection with the latter, we noted that the bias of the victim against the defendant was an issue materially in dispute, and that other-crimes evidence to prove or disprove it was putatively admissible, subject to the application of the remainder of the *Cofield* test. *Id.* at 264–65, 744 A.2d 137.

Citing *G.S.* and *G.V.*, the trial judge in this case held that evidence of I.B.'s sex assault would be admissible for the narrow purpose of bolstering the credibility of Katie and Ursula, if defense counsel insinuated on cross-examination that they had fabricated *179 the allegations due to bias. He said:

In *G.S.*, the Supreme Court said that evidence of prior sexual abuse was admissible as other crimes in evidence pursuant to R. 404(b) as relevant to the defendant's motive, absence of mistake, or accident, and to the victim's credibility.

....

Again, in *State [v.] G.V.*, the court allowed prior abuse allegations to bolster victim's credibility and to show lack of bias on the part of the victim.

....

... I'm going to permit it only after cross-examination.... Depending on what [defense counsel's] cross-examination is.

***258** The Appellate Division disagreed and distinguished this matter from *G.S.*, declaring that “neither of the purposes for which the other crimes evidence was admitted in *G.S.* appl[ied].” In ruling, the panel noted that in *G.S.* the previous accusation had been made by the same victim, and was admitted for the purpose of explaining the delay in her reporting the abuse and in responding to attacks on her credibility based on the delay. *G.S.*, supra, 145 N.J. at 469, 678 A.2d 1092. Accordingly, in *G.S.*, “[t]here was a logical nexus between the prior course of conduct with a recantation and the assertion that the new allegations were also made up, in each case for some specific purpose for which evidence was presented.”

Regarding *G.V.*, the panel stated:

We do not read *G.V.* as a blank check for the admission of evidence that a defendant sexually molested another person in any trial for a sexual offense in order to bolster the credibility of the victim in that trial and to refute any claim of bias by the victim against the defendant.

The panel noted that this case bears no resemblance to *G.V.*, which involved two similar sets of accusations by sisters living in the same household, which were likely admissible for other relevant purposes. Here, I.B. was a three-year-old boy, Katie an eleven-year-old girl,⁵ and no evidence of a common pattern or motive was proffered. Nor were issues of access or feasibility raised. The panel emphasized:

⁵ Katie was eleven when first interviewed by Henriquez in April 2003.

[t]he only manner in which the I.B. incident could serve to bolster [Katie]’s credibility and refute any allegation of bias by her against defendant would be from an inference that [Katie] must be telling the truth because defendant engaged in sexual misconduct against a child before, and thus he has a propensity to engage in such conduct and

must have done so with [Katie.] This, of course, is the precise purpose for which other crime evidence is not permitted.

We agree with the panel’s analysis in respect of both cases. The reasons for which the other-crimes evidence was admitted in *G.S.* were finely honed and directed at specific issues in the case—in particular, to explain a delay in reporting and to counter the natural inference that such delay is an indicator of the falseness of ***259** the challenge. *G.S.*, supra, 145 N.J. at 469, 678 A.2d 1092. That kind of carefully-focused analysis is what is required by *N.J.R.E.* 404(b). See, e.g., *State v. Oliver*, 133 N.J. 141, 153, 627 A.2d 144 (1993) (permitting evidence of assaults on women at defendant’s home where others were present downstairs to prove feasibility of occurrence in case being tried); *State v. Cusick*, 219 N.J. Super. 452, 464–65, 530 A.2d 806 (App.Div.) (holding other sex assaults admissible at trial to prove lack of ****180** mistake where defendant argued sexual contact with victim was inadvertent), *certif. denied*, 109 N.J. 54, 532 A.2d 1118 (1987).

Likewise, we do not read *G.V.* as an automatic basis for the admission of other-crimes evidence to counter a vendetta defense. Indeed, in *G.V.*, we specifically ruled on the unique facts before us, which left open the possibility that the evidence could be admitted for legitimate purposes, such as access and feasibility. Further, plan or scheme might have provided potential grounds for admission in that case as well. Thus we have no quarrel with the ultimate holding in *G.V.* that the evidence was admissible subject to the remainder of the *Cofield* analysis.

[21] However, as the Appellate Division here aptly observed, any interpretation of *G.V.* “as a blank check for the admission of” other-crimes evidence in a bias case is a misreading of the opinion. Indeed, such a reading would confound the well-established rule that other-crimes evidence is not admissible solely to bolster the credibility of a witness against the defendant, *Darby*, supra, 174 N.J. at 520, 809 A.2d 138, or as the basis for an inference that the victim’s version of the events is true, *Stevens*, supra, 115 N.J. at 306, 558 A.2d 833. Rather, the evidence may only be admitted if it satisfies the requirements

of *N.J.R.E.* 404(b) and is not offered “to prove the disposition” of the defendant toward criminality. Here, what was proffered was an unrelated sex crime, which was only linked to the bias of the State’s witnesses by the notion that if defendant did it before, he likely did it again, thus supporting the credibility of Katie and Ursula. Indeed, when questioned at oral argument, the State was unable to suggest any other basis on *260 which the crime against I.B. could be considered to bear on the bias of Katie and Ursula. Because the admission of such propensity evidence is unmoored from the principles informing *N.J.R.E.* 404(b), the abuse of I.B. had no purpose in this case. We are thus in full accord with the Appellate Division’s analysis of that issue and its conclusion that the evidence was inadmissible here.

[22] [23] However, we part company from that court insofar as it held that the trial judge’s error was harmless. An error is harmful if it was “clearly capable of producing an unjust result.” *R.* 2:10–2; *State v. Nero*, 195 N.J. 397, 409, 949 A.2d 832 (2008). Although the improper other-crimes evidence was never actually admitted here, defendant paid a price to keep it out. Indeed, the threat of its admission forced defendant to alter his trial strategy completely and effectively precluded him from presenting the vendetta theory, which was his central, if not sole, defense. Defense counsel did not overtly refer to bias during his opening or summation, nor did he directly confront Katie or Ursula on that point on cross-examination. Even if, as suggested by the appellate panel, Ursula and Katie would have “undoubtedly denied” their bias if cross-examined on the issue, the jury still would have had the opportunity to evaluate their tone, manner, and body language, and accordingly, to assess their credibility. “Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested [.]” *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347, 353 (1974), and defendant was denied a complete opportunity to utilize that essential tool. This was a credibility case from stem to stern. As such, we cannot say that an erroneous ruling diluting defendant’s ability to challenge the credibility of the victim and her

mother was harmless. We therefore reverse the Appellate Division’s contrary conclusion.

****181 V.**

[24] We turn finally to defendant’s contention that the trial judge erred in invoking the Rape Shield Law, *N.J.S.A.* 2C:14–7, to *261 bar admission of the hospital record suggesting that Katie “had sex 3 months ago one time.”

The Rape Shield Law provides that in prosecutions for various sexual offenses, “evidence of the victim’s previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except” in certain limited circumstances enumerated in the statute. *N.J.S.A.* 2C:14–7(a). The statute provides that when a defendant seeks to introduce evidence of the victim’s previous sexual contact, the trial “court shall conduct a hearing in camera to determine the admissibility of the evidence.” *Ibid.*

[25] The purpose of the Rape Shield Law “is to protect the privacy interests of the victim while ensuring a fair determination of the issues bearing on the guilt or innocence of the defendant.” *State v. Garron*, 177 N.J. 147, 165, 827 A.2d 243 (2003), *cert. denied*, 540 U.S. 1160, 124 S.Ct. 1169, 157 L.Ed.2d 1204 (2004). The statute protects against “unwarranted and unscrupulous foraging for character-assassination information about the victim.” *Ibid.* However, “if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled.” *Id.* at 171, 827 A.2d 243 (citation omitted).

In *State v. Budis*, 125 N.J. 519, 593 A.2d 784 (1991), we articulated a two-step process for determining the admissibility of such evidence. The first step is to “ascertain, apart from the Rape Shield Statute, whether the evidence was relevant to the defense[.]” *Budis*, *supra*, 125 N.J. at 532, 593 A.2d 784:

The probative value of the prior acts depends on clear proof that they occurred, that the acts are relevant to a material issue in the case, and

that they are necessary to the defense.... When evidence is offered to show a child's knowledge of sexual acts, its relevance also depends on whether the prior abuse closely resembles the acts in question.

[*Id.* at 532–33, 593 A.2d 784 (citations omitted).]

In this case, defendant argues that evidence of Katie's previous sexual contact was “critical to defendant's right to confront the charge against him by explaining how a 12-year-old girl might know enough about sexual penetration and sexual ejaculation to *262 make the claims she did[.]” as well as explaining Ursula's statement that Katie's vaginal opening “looked bigger than ... a normal child's at that time[.]” If there were clear proof that Katie had engaged in sexual contact with another person, and that the contact included vaginal and/or anal intercourse, and ejaculation, that might well be relevant to the defense. As in *Budis*, a jury might wonder how an eleven-year-old would be familiar with such actions unless she had been victimized. *But see State v. Schnabel*, 196 N.J. 116, 131, 952 A.2d 452 (2008) (in light of present day realities, rejecting defense's assertion that two girls, aged fourteen and seventeen, would lack sufficient knowledge to describe sexual abuse without prior sexual experience).

However, as the trial court and Appellate Division found, the proffered evidence was simply too thin. It consisted of a single notation in a medical report that stated: “11 year old female [] burning sensation when she urinate [sic] and also frequency of urination had sex 3 months ago one time [] vaginal discharge.” That notation does not satisfy the requirement that there be “clear proof” that the prior **182 acts occurred. *Budis*, *supra*, 125 N.J. at 532–33, 593 A.2d 784. The Appellate Division noted that that reference may have been a typographical error, meant to signify three years, not three months, which was approximately when Katie said defendant abused her. Moreover, the notation does not include any specific facts about the incident. *Cf. id.* at 527, 534, 593 A.2d 784 (finding, where State conceded occurrence and similarity of previous sexual abuse, evidence relevant to “rebut [] inference that [victim] acquired the knowledge to describe sexual matters from

her experience with defendant”). Thus, there is no way to tell from the evidence defendant proffered whether the alleged prior sexual contact was similar to defendant's alleged abuse, or even separate from it; the reference may well have been to defendant's abuse of Katie.

Accordingly, the Appellate Division correctly ruled that evidence sufficient to counter the Rape Shield Law had not been adduced.

*263 VI.

Recapping, we decline to adopt a per se rule of exclusion in a case in which a child sex abuse victim's taped statement is lost. We reiterate that the totality of circumstances standard is the appropriate benchmark for the admissibility of a tender-years statement under *N.J.R.E.* 803(c)(27). We likewise reaffirm our holdings in *Cook*, *supra*, 179 N.J. 533, 847 A.2d 530, and *Branch*, *supra*, 182 N.J. 338, 865 A.2d 673, to the effect that simultaneous notes taken of a child sex abuse victim's interview should not be destroyed but should be maintained through trial.

We likewise decline to interpret our decisions in *G.S.*, *supra*, 145 N.J. 460, 678 A.2d 1092, and *G.V.*, *supra*, 162 N.J. 252, 744 A.2d 137, as providing an automatic basis for the admission of other-crimes evidence to counter a bias or vendetta defense. Rather, such other-crimes evidence may only be admitted if it satisfies *N.J.R.E.* 404(b) and is not offered to prove the defendant's criminal propensity.

VII.

The judgment of the Appellate Division is reversed. The matter is remanded for a new trial consistent with the principles to which we have adverted.

Justice RIVERA–SOTO, concurring in part and dissenting in part.

The majority reaches five separate conclusions in which I concur: (1) that the admission of the child victim's statement under *N.J.R.E.* 803(c)(27) was “fully supported by the evidence and legally unassailable[.]” *ante* at 252, 997 A.2d at 175; (2) that the per se rule advanced by defendant that would bar any child statement not videotaped should be rejected, and that “the absence of a tape, standing alone, is not dispositive[as i]t is to be considered along with all the other factors we have previously set forth ... as relevant to trustworthiness[.]” *264 *ante* at 253, 997 A.2d at 176; (3) that witness interview notes should be preserved, *ante* at 253–54, 997 A.2d at 176; (4) that *State v. G.S.*, 145 N.J. 460, 678 A.2d 1092 (1996) (holding that evidence of uncharged prior sexual assaults on same victim are admissible in respect of victim's credibility), is not controlling here, *ante* at 258–59, 997 A.2d at 179–80; and (5) that the Rape Shield Law, *N.J.S.A.* 2C:14–7, barred the admission of the child victim's alleged prior sexual acts, *ante* at 260–63, 997 A.2d at 180–82. Each of those conclusions dovetails with the Appellate Division's decision below.

I must part company with both the Appellate Division and the majority in one **183 fundamental respect: in my view, the trial court's evidentiary determination that the State would be permitted to rebut defendant's “vendetta defense” with proof of defendant's prior sexual assault on another child was proper and entirely in accord with *State v. G.V.*, 162 N.J. 252, 263–65, 744 A.2d 137 (2000). I also part company with the majority in its rejection of the Appellate Division's separate conclusion—that, even assuming the trial court's evidentiary determination that the State would be permitted to rebut defendant's “vendetta defense” with proof of defendant's prior sexual assault on another child was in error, such error was harmless—thereby requiring a new trial, *ante* at 258–60, 263, 997 A.2d at 179–80, 182.

I.

In *G.V.*, this Court held that proof of a defendant's prior but uncharged sexual assaults is admissible to rebut a “vendetta defense,” that is, that the victim/witness fabricated the allegations against defendant

as a means of “getting back at” defendant. *G.V.*, *supra*, 162 N.J. at 263–65, 744 A.2d 137. As *G.V.* explains, if it is a theory of the defense that the victim's assertion of a sexual assault was fabricated “as revenge” against the defendant, *id.* at 263, 744 A.2d 137, then the evidence of a defendant's prior similar acts can be deemed relevant as it “tends ‘to prove or disprove any fact of consequence to the determination of the action.’” *Ibid.* (quoting *N.J.R.E.* 401). Particularly where, as here, a defendant *265 in a sexual assault prosecution claims that the victim's accusations are motivated by revenge, proofs that the defendant previously committed similar sexual assaults is and rightly should be admissible to rebut the claim of bias the defendant has raised against his accuser. *Id.* at 264, 744 A.2d 137 (“It is only when defendant puts the bias of the witness (on account of a vendetta) into issue that the evidence would be admissible.”). *G.V.* also sets forth the procedure to be followed:

If, at the hearing prior to trial under *Evidence Rule* 104, defendant disclaims the use of the vendetta defense, the State would have no basis for admitting the evidence. On the other hand, if defendant renews the vendetta defense, it appears to us that the testimony of the [prior, uncharged sexual assaults] is relevant to show that the testimony of [the child victim] is not the product of bias. Of course, the trial court would have to ... balance the probative worth of the evidence against its prejudicial effect.

[*Id.* at 264–65, 744 A.2d 137.]

That is precisely what occurred here. When defendant asserted a “vendetta defense,” the State sought and was granted a *Rule* 104 hearing to determine the admissibility of *rebuttal* proofs that defendant had sexually assaulted another child before he committed the acts for which he stood charged. As the majority correctly notes, the trial court performed a *Cofield*¹ analysis and, applying *N.J.R.E.* 404(b), ruled that “evidence of defendant's [prior] sexual assault of [another child] would be admissible to bolster the credibility of [the victim] and to rebut claims of bias, but only after cross-examination, if defense counsel challenged the

credibility of [the victim] and her mother by placing their bias in issue.” *Ante* at 242–43, 997 A.2d at 169.

¹ State v. Cofield, 127 N.J. 328, 338, 605 A.2d 230 (1992).

The majority rejects that ruling, asserting without explanation that *G.V.* does not provide “an automatic basis for the admission of other-crimes evidence to counter a vendetta defense.” *Ante* at 259, 997 A.2d at 180. Without overruling or otherwise ***184** rejecting *G.V.*’s clear holding, the majority nevertheless repeats the Appellate Division’s reasoning and asserts that “any interpretation of *G.V.* ‘as a blank check for the admission of other-crimes evidence ***266** in a bias case is a misreading of the opinion.” *Ante* at 259, 997 A.2d at 180. Tagging the evidence of defendant’s prior sexual assaults with the death warrant of “propensity evidence,” *ante* at 260, 997 A.2d at 180, the majority declares that those proofs “had no purpose in this case.” *Ante* at 260, 997 A.2d at 180.²

² As a practical matter, the majority has engaged in an exercise in misdirection: without expressly admitting its purpose, it has incorporated that portion of the majority writer’s earlier dissent in *G.V.*, which rejected *G.V.*’s “separate determination that [the prior bad acts] testimony may be relevant, and therefore possibly admissible on another basis—to refute the so-called ‘vendetta defense.’ ” *G.V.*, *supra*, 162 N.J. at 265, 744 A.2d 137 (Long, J., concurring in part and dissenting in part). In effect, while not outright reversing *G.V.*, the majority has made it irrelevant.

If *G.V.*’s recognition that a defendant’s vendetta defense can be rebutted by proof of prior similar acts retains any vitality, then the majority’s conclusion clearly is in error. If the State is to be barred from rebutting a vendetta defense through competent and relevant proofs of prior similar acts, then how can that defense ever be rebutted? Under the majority’s now emasculated view of *G.V.*, a defendant may assert willy-nilly that the accusations against him were manufactured by the victim solely to exact revenge, yet the prosecution is powerless to use plainly probative evidence to demonstrate that the claimed vendetta defense

is without foundation. The effect is to sanction, in favor of defendant, an unfettered license to fabricate charges of a victim’s bias and ill motive, a result that neither achieves justice nor makes any sense.

The better reasoned and more impartial view was earlier recognized by this Court in *G.V.*, which specifically informed and guided the conditions on admissibility the trial court imposed: a defendant should remain free to assert a vendetta defense, but he may not do so with utter impunity; that defense can be rebutted by otherwise relevant proofs that the accusations made against defendant are “not the product of bias.” *G.V.*, *supra*, 162 N.J. at 264, 744 A.2d 137.

***267** Thus, to the extent both the Appellate Division and the majority conclude otherwise and *sub silentio* overrule *G.V.*, I respectfully dissent.

II.

Even if the majority correctly concludes that the trial court abused its discretion in allowing the State—but only in rebuttal—to introduce proof of defendant’s prior sexual assaults to rebut his “vendetta defense,” it nonetheless incorrectly concludes that a new trial is warranted here. In my view, the Appellate Division correctly analyzed this question when it reasoned that

the other crime evidence was never presented to the jury. Thus, the severe prejudice that would have resulted had it been presented did not occur. [D]efendant was not denied the opportunity to mount a defense based upon his assertion that [the child victim] and her mother fabricated these charges to get him out of the house. The assertion is completely unfounded and unsubstantiated. Had the judge ruled that the other

crime evidence was not admissible, and if defense counsel would have asked [the child victim] and her mother whether they concocted this story to get him out of the house, they would have undoubtedly denied it, consistent with their unwavering testimony and pretrial statements **185 throughout this case. [D]efendant proffered no other evidence (unlike in *G.S.* and *G.V.*) to support his assertion. [T]herefore, ... the erroneous ruling did not affect the outcome of the trial. Accordingly, the error was harmless and does not warrant reversal of defendant's convictions.

The only substantive difference between the majority's view and the Appellate Division's decision lies in whether the trial court's ruling concerning the admission of the "other crimes" evidence under *N.J.R.E.* 404(b) and the four-prong test of *Cofield*, *supra*, was harmless. Because I agree with the Appellate Division that, in the context of

this case, the trial court's ruling, even if in error, was harmless, I further respectfully dissent.

III.

In the circumstances presented, there is no basis for determining that the trial court abused its discretion in allowing the use of prior bad acts evidence to rebut any claimed "vendetta defense." In any event and based on the facts in this case, that evidentiary determination, even if in error, was harmless. For those reasons, *268 the judgment of the Appellate Division should be sustained and defendant's conviction and sentence affirmed. Because the majority fails to do so, I must dissent.

Justice HOENS joins in this opinion.

For reversal and remandment—Chief Justice RABNER and Justices LONG, LaVECCHIA, ALBIN and WALLACE—5.

Concurrence in part; dissenting in part—Justices RIVERA-SOTO and HOENS—2.

All Citations

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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. R.S.</u>  MOST NEGATIVE 2015 WL 345620 , N.J.Super.A.D. Tried before a jury on a four-count indictment, defendant R.S. was convicted of two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a (counts one and two);...	Jan. 28, 2015	Case		<u>11</u> <u>21</u> A.2d

Citing References (111)

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by NEGATIVE	1. State v. R.S. ¶ 2015 WL 345620, *6+ , N.J.Super.A.D. Tried before a jury on a four-count indictment, defendant R.S. was convicted of two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2a (counts one and two);...	Jan. 28, 2015	Case		11 21 A.2d
Examined by	2. State in Interest of A.R. ¶ 149 A.3d 297, 314+ , N.J.Super.A.D. FAMILY LAW - Juvenile Justice. Out-of-court accusations, admitted pursuant to tender-years hearsay exception, were inadmissible under Confrontation Clause in delinquency...	Nov. 09, 2016	Case		2 8 10 A.2d
Discussed by	3. State v. Scott ¶ 163 A.3d 325, 334+ , N.J. CRIMINAL JUSTICE - Witnesses. Evidence that defendant's mother had lied to police in order to cover for defendant in two prior instances exceeded permissible inquiry into mother's...	June 28, 2017	Case		21 A.2d
Discussed by	4. State v. J.D. ¶ 48 A.3d 1031, 1037+ , N.J. CRIMINAL JUSTICE - Witnesses. Testimony regarding sexual assault victim's alleged sexual encounters was properly excluded.	Aug. 09, 2012	Case		24 25 A.2d
Discussed by	5. State v. Rose ¶ 19 A.3d 985, 996+ , N.J. CRIMINAL JUSTICE - Evidence. Trial court was required to rely on the Rules of Evidence, rather than res gestae, when making evidentiary rulings.	June 08, 2011	Case		15 16 17 A.2d
Discussed by	6. State v. Prall ¶ 2015 WL 11438112, *10+ , N.J.Super.A.D. Defendant Tormu Prall was convicted of murder, attempted murder and aggravated arson after a jury found he set fire to the bedroom where his brother and his brother's girlfriend...	Aug. 12, 2016	Case		16 20 A.2d
Discussed by	7. State v. J.H. ¶ 2014 WL 7466558, *3+ , N.J.Super.A.D. Tried before a jury on a five-count indictment, defendant J.H. was convicted of first-degree aggravated sexual assault (sexual penetration upon X.W. when X.W. was less than 13...	Jan. 06, 2015	Case		1 3 5 A.2d
Discussed by	8. State v. Perry ¶ 2014 WL 4212435, *10+ , N.J.Super.A.D. Following a jury trial, defendant was found guilty of second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1) (count two), and third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7)...	Aug. 27, 2014	Case		25 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Discussed by	9. <u>State v. M.P.</u> 2014 WL 1225375, *6+ , N.J.Super.A.D. A jury found defendant, M.P., guilty of eight crimes involving sexual abuse of his stepdaughter, A.A., and one weapons offense. The abusive conduct commenced in February 2004, when...	Mar. 26, 2014	Case		2 3 A.2d
Discussed by	10. <u>In re K.S.</u> 2013 WL 3387753, *1+ , N.J.Super.A.D. K.S. was adjudicated a delinquent for child abuse, N.J.S.A. 9:6-3, an offense which, had he been an adult would have constituted a crime of the fourth-degree. The trial judge...	July 09, 2013	Case		1 6 7 A.2d
Discussed by	11. <u>State v. A.B.M.</u> 2012 WL 4344152, *3+ , N.J.Super.A.D. Defendant Arturo M. appeals from his conviction by a jury of second-degree sexual assault, N.J.S.A. 2C:14-2(b), and third-degree endangering the welfare of a child, N.J.S.A....	Sep. 25, 2012	Case		1 7 A.2d
Discussed by	12. <u>State v. Hayes</u> 2011 WL 2472690, *7+ , N.J.Super.A.D. Defendant Ronald Hayes appeals from an order entered November 21, 2008, denying his petition for post-conviction relief (PCR) without an evidentiary hearing. He argues that he was...	June 23, 2011	Case		3 8 9 A.2d
Discussed by	13. <u>State v. McCoy</u> 2011 WL 1466143, *7+ , N.J.Super.A.D. Defendant Gino McCoy, a/k/a Geno McCoy, appeals from the judgment of conviction and sentence imposed following a jury trial at which he was found guilty of first-degree robbery,...	Apr. 18, 2011	Case		17 20 21 A.2d
Discussed by	14. <u>State v. A.G.</u> 2010 WL 4570195, *4+ , N.J.Super.A.D. CRIMINAL JUSTICE - Confrontation. A trial court failed to consider the totality of the circumstances surrounding a child victim's out-of-court statements.	Nov. 15, 2010	Case		1 3 6 A.2d
Cited by	15. <u>State v. Perry</u> 137 A.3d 1130, 1137 , N.J. CRIMINAL JUSTICE - Sex Offenses. Unidentified semen stain on shorts worn by victim on night of assault was inadmissible to support third-party guilt theory.	May 17, 2016	Case		25 A.2d
Cited by	16. <u>State v. Bass</u> 132 A.3d 1207, 1219 , N.J. CRIMINAL JUSTICE - Homicide. Trial court's error in limiting defense counsel's cross-examination of state witness warranted reversal.	Mar. 07, 2016	Case		1 A.2d
Cited by	17. <u>State v. Skinner</u> 95 A.3d 236, 248+ , N.J. CRIMINAL JUSTICE - Homicide. State's introduction of violent, profane, and disturbing rap lyrics that defendant had written was unduly prejudicial.	Aug. 04, 2014	Case		17 20 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	18. State v. Carlucci  85 A.3d 965, 972 , N.J. CRIMINAL JUSTICE - Evidence. Defendant's statement to police that she had recently used drugs was inadmissible extraneous offense evidence.	Mar. 13, 2014	Case		12 15 18 A.2d
Cited by	19. State v. Herrera  48 A.3d 1009, 1028 , N.J. CRIMINAL JUSTICE - Searches and Seizures. Exclusionary rule did not preclude evidence that defendants violently attacked police officer following investigatory stop.	Aug. 07, 2012	Case		12 15 A.2d
Cited by	20. State v. J.A.C.  44 A.3d 1085, 1094 , N.J. CRIMINAL JUSTICE - Sex Offenses. Child victim's sexually explicit instant messages (IM) to adult men constituted "sexual conduct," for rape shield statute purposes.	June 14, 2012	Case		25 A.2d
Cited by	 21. State v. Gillispie  26 A.3d 397, 416 , N.J. CRIMINAL JUSTICE - Evidence. Erroneous admission of details of prior robbery under other-crimes rule was harmless in murder trial.	June 09, 2011	Case		21 A.2d
Cited by	 22. State v. W.B.  17 A.3d 187, 198+ , N.J. CRIMINAL JUSTICE - Discovery. Appropriate sanction is warranted whenever a police officer's written notes are not preserved as required by rule.	Apr. 27, 2011	Case		8 A.2d
Cited by	23. STATE OF NEW JERSEY, Plaintiff-Respondent, v. W.B., Defendant-Appellant. , N.J.	Apr. 27, 2011	Case		8 A.2d
Cited by	24. State v. Richardson   171 A.3d 1270, 1276+ , N.J.Super.A.D. CRIMINAL JUSTICE - Discovery. State's pre-indictment failure, despite defendant's request, to preserve booking room videotape warranted adverse-inference instruction.	Oct. 04, 2017	Case		8 A.2d
Cited by	25. State v. Richardson  2017 WL 4456359, *4+ , N.J.Super.A.D. The opinion of the court was delivered by Lacking a valid driver's license, defendant was caught giving a false name during a traffic stop for a motor vehicle violation. The...	Oct. 04, 2017	Case		8 A.2d
Cited by	26. E.S. v. H.A. 2017 WL 3622798, *4+ , N.J.Super.A.D. The opinion of the court was delivered by Plaintiff E.S. and defendant H.A. are the parents of R.A. (Richard), born in 2004. The parties separated in December 2008, and after a...	Aug. 15, 2017	Case		1 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	27. <u>New Jersey Division of Child Protection and Permanency v. T.U.B.</u> 161 A.3d 132, 152 , N.J.Super.A.D. FAMILY LAW - Child Protection. Hearsay exception for minors' corroborated statements of abuse does not apply in rights termination cases under particular statutory title.	May 22, 2017	Case		2 A.2d
Cited by	28. <u>State in Interest of N.C.</u> 2017 WL 1046247, *3 , N.J.Super.A.D. N.C. appeals from the Family Part's March 5, 2015 order of disposition, adjudicating him delinquent for conduct that, if committed by an adult, would constitute first-degree...	Mar. 20, 2017	Case		2 A.2d
Cited by	29. <u>State v. Tedesco</u> 2017 WL 876339, *7+ , N.J.Super.A.D. Defendant Giuseppe Tedesco appeals from the judgment of conviction entered after a jury found him guilty of first-degree murder, N.J.S.A. 2C:11-3(a), second-degree unlawful...	Mar. 06, 2017	Case		12 15 A.2d
Cited by	30. <u>State v. J.M.S.</u> 2017 WL 84249, *9+ , N.J.Super.A.D. The opinion of the court was delivered by Defendant appeals from his 2010 conviction of two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a), and two counts of...	Jan. 03, 2017	Case		1 A.2d
Cited by	31. <u>State v. O.C.Q.</u> 2016 WL 7212409, *5+ , N.J.Super.A.D. After a two-day jury trial, defendant O.C.Q. was convicted of second-degree attempted sexual assault, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:14-2(b), and third-degree endangering the...	Dec. 13, 2016	Case		1 2 3 A.2d
Cited by	32. <u>State v. Campbell</u> 2016 WL 4916961, *8+ , N.J.Super.A.D. Following a jury trial, defendant Terry E. Campbell was convicted of first-degree attempted murder, N.J.S.A. 2C:5-1 and 2C:11-3(a)(1) (count one); two counts of second-degree...	Sep. 15, 2016	Case		12 15 16 A.2d
Cited by	33. <u>State v. Khan</u> 2016 WL 4575710, *5 , N.J.Super.A.D. The Bergen County Grand Jury returned an indictment against defendant, charging him with second-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(1) (Count One);...	Sep. 02, 2016	Case		—
Cited by	34. <u>State v. Thompson</u> 2016 WL 1931288, *4 , N.J.Super.A.D. A jury found defendant Craig Thompson guilty of third-degree receiving stolen property, N.J.S.A. 2C:20-7; he was sentenced to four years in prison. Defendant appeals his conviction...	May 04, 2016	Case		—
Cited by	35. <u>State v. Hurt</u> 2016 WL 937166, *3 , N.J.Super.A.D. Defendant appeals from an August 8, 2013 conviction for aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1) after entering a guilty plea. We affirm. R.W. died after being stabbed on...	Mar. 14, 2016	Case		15 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	36. <u>New Jersey Div. of Child Protection and Permanency v. T.V.W.</u> 2016 WL 902057, *7, N.J.Super.A.D. In these three appeals, which we have consolidated for purposes of this opinion, defendants T.V.W. (Tara), M.A. (Mark), and A.S. (Andy), appeal from the Family Part order of...	Mar. 10, 2016	Case		—
Cited by	37. <u>State v. Fortin</u> 2015 WL 6132920, *7+, N.J.Super.A.D. The opinion of the court was delivered by Following a guilt-phase retrial, defendant Steven Fortin was convicted of first-degree purposeful and knowing murder of M.P. (Mary), ...	Oct. 20, 2015	Case		12 15 16 A.2d
Cited by	38. <u>State v. A.R.</u> 2015 WL 5446690, *6, N.J.Super.A.D. Defendant A.R. appeals his sentence and convictions for second degree sexual assault, second degree endangering the welfare of a child, and offensive touching. After carefully...	Sep. 14, 2015	Case		—
Cited by	39. <u>State v. C.D.</u> 2014 WL 10212770, *17, N.J.Super.A.D. On May 23, 2008, a Union County Grand Jury returned indictment number 08–05–00459–I charging defendant, C.D., with first degree aggravated sexual assault, N.J.S.A. 2C:14–2a(1),...	Aug. 12, 2015	Case		3 10 A.2d
Cited by	40. <u>State v. Forchion</u> 2015 WL 4661507, *12, N.J.Super.A.D. In these consolidated appeals, defendant Edward R. Forchion appeals from the judgment of conviction and sentence imposed following a jury trial, as well as the judgment of...	Aug. 07, 2015	Case		—
Cited by	41. <u>State v. Zisa</u> 2015 WL 4577723, *7, N.J.Super.A.D. Defendant Charles K. Zisa appeals from his conviction for second-degree official misconduct, N.J.S.A. 2C:30–2(a), and insurance fraud, N.J.S.A. 2C:21–4.6(a), both relating to...	July 31, 2015	Case		20 A.2d
Cited by	42. <u>State in Interest of W.M.</u> 2015 WL 4508640, *6, N.J.Super.A.D. W.M., who was twenty-four years old when tried, appeals his adjudications of delinquency and January 9, 2014 sentence. Four separate juvenile complaints, consolidated for a single...	July 23, 2015	Case		15 A.2d
Cited by	43. <u>State v. I.P.</u> 2015 WL 4164814, *4+, N.J.Super.A.D. A jury convicted defendant, I.P., of one count of first-degree aggravated sexual assault, two counts of second-degree sexual assault, and two counts of child endangerment against...	July 13, 2015	Case		1 7 A.2d
Cited by	44. <u>State v. Cordero</u> 105 A.3d 1129, 1138, N.J.Super.A.D. CRIMINAL JUSTICE - Larceny. Trial court did not abuse its discretion in postponing its ruling on the admissibility of video depicting defendant's prior alleged shoplifting until...	Dec. 29, 2014	Case		19 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	45. <u>State v. J.M., Jr.</u> ¶ 102 A.3d 1233, 1237+ , N.J.Super.A.D. CRIMINAL JUSTICE - Evidence. Evidence of alleged prior sexual assault was not admissible under other-crimes rule at trial for sexual assault.	Nov. 21, 2014	Case		12 14 15 A.2d
Cited by	46. <u>State In Interest of J.O.</u> ¶ 2014 WL 4926270, *3 , N.J.Super.A.D. Following a bench trial, J.O. was adjudicated delinquent of offenses which, if committed by an adult, would constitute second-degree sexual assault, N.J.S.A. 2C:14-2b, and...	Oct. 01, 2014	Case		2 A.2d
Cited by	47. <u>State v. Sheppard</u> ¶ 97 A.3d 699, 710 , N.J.Super.A.D. CRIMINAL JUSTICE - Assault and Battery. Admission of witness testimony that defendant made derogatory verbal references about Hispanic persons was reversible error.	Sep. 03, 2014	Case		20 21 A.2d
Cited by	48. <u>State v. Dawson</u> 2014 WL 3818685, *5 , N.J.Super.A.D. Following a three-day trial, a jury convicted defendant Andre M. Dawson, Jr. of third-degree attempted burglary, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:18-2 (count one), and fourth-degree...	Aug. 05, 2014	Case		22 A.2d
Cited by	49. <u>In re E.B.</u> ¶ 2014 WL 2117444, *3+ , N.J.Super.A.D. E.B. (Eddie) appeals from juvenile adjudications finding him guilty of offenses which, if committed by an adult, would constitute first-degree aggravated sexual assault, N.J.S.A....	May 21, 2014	Case		3 7 A.2d
Cited by	50. <u>State v. Oprihory</u> 2014 WL 1796361, *7 , N.J.Super.A.D. Defendant Francene Oprihory appeals a judgment of conviction and sentence entered on an indictment charging her with two third-degree crimes committed against Bergen County...	May 07, 2014	Case		14 A.2d
Cited by	51. <u>State v. Smith</u> 2014 WL 1757881, *5 , N.J.Super.A.D. Following a jury trial, defendant was found guilty of the following controlled dangerous substance (CDS) offenses set forth in Middlesex County indictment 08-09-01543: third-degree...	May 05, 2014	Case		15 A.2d
Cited by	52. <u>State v. A.W.</u> ¶ 2014 WL 902148, *6+ , N.J.Super.A.D. Tried by a jury, defendant A.W. was convicted of three counts of endangering the welfare of a child, N.J.S.A. 2C:24-4, and one count of aggravated criminal sexual contact, N.J.S.A....	Mar. 10, 2014	Case		24 25 A.2d
Cited by	53. <u>State v. Hernandez</u> 2014 WL 714715, *4 , N.J.Super.A.D. The opinion of the court was delivered by This direct appeal arises from a criminal trial in which defendant Angel Hernandez was convicted of a number of charges stemming from his...	Feb. 26, 2014	Case		15 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	54. State v. P.L.M. 2014 WL 349478, *4 , N.J.Super.A.D. Defendant P.L.M. appeals from an order, entered April 16, 2011, denying his petition for post-conviction relief (PCR) without an evidentiary hearing. He argues that he was denied...	Feb. 03, 2014	Case		—
Cited by	55. State v. Prunty 2014 WL 289403, *18+ , N.J.Super.A.D. Defendant Kareem Prunty appeals his conviction for first-degree murder and related weapons offenses, urging evidentiary errors that he claims denied him a fair trial. Defendant...	Jan. 28, 2014	Case		12 A.2d
Cited by	56. State v. L.J.A. 2013 WL 6817640, *5+ , N.J.Super.A.D. Defendant was charged with first-degree aggravated sexual assault, N.J.S.A. 2C:14–2(a) (count one); second-degree sexual assault, N.J.S.A. 2C:14–2(b) (count two); second-degree...	Dec. 27, 2013	Case		2 3 10 A.2d
Cited by	57. State v. Pena 2013 WL 6637178, *9+ , N.J.Super.A.D. Defendant Andrew Pena was tried before a jury and found guilty of first-degree aggravated sexual assault, criminal restraint and other offenses. He appeals from the judgment of...	Dec. 18, 2013	Case		15 A.2d
Cited by	58. State v. Wright 71 A.3d 212, 231 , N.J.Super.A.D. CRIMINAL JUSTICE - Searches and Seizures. Warrantless search of apartment was justified under third-party intervention exception to warrant requirement.	July 25, 2013	Case		7 A.2d
Cited by	59. M.J.T. v. A.V.B. 2013 WL 3744050, *7 , N.J.Super.A.D. At the time this matter, filed pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25–17 to –35, was presented to the court, the parties were married, living in...	July 18, 2013	Case		7 A.2d
Cited by	60. State v. Sudlow 2013 WL 2986983, *2 , N.J.Super.A.D. Following a three-day trial, a jury found defendant Ricardo M. Sudlow guilty of second-degree eluding an officer, N.J.S.A. 2C:29–2(b); third-degree aggravated assault on a police...	June 18, 2013	Case		16 A.2d
Cited by	61. State v. Bianco 2013 WL 2257696, *7+ , N.J.Super.A.D. Defendant, Joseph Bianco, appeals from a Law Division order denying his petition for post-conviction relief (PCR). He contends the attorney who filed his direct appeal was...	May 24, 2013	Case		8 A.2d
Cited by	62. State v. L.V. 2013 WL 1748449, *5 , N.J.Super.A.D. Defendant L.V. (Larry) appeals his conviction on two counts of first-degree aggravated sexual assault (N.J.S.A. 2C:14–2(a)), two counts of second-degree aggravated sexual assault...	Apr. 24, 2013	Case		25 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	63. <u>State v. T.J.D.</u> 2012 WL 4815145, *5+ , N.J.Super.A.D. Defendant T.J.D. was tried before a jury and found guilty of various offenses, including sexual assault upon his two minor children, endangering the welfare of the children and...	Oct. 11, 2012	Case		7 A.2d
Cited by	64. <u>State v. Skinner</u> ” 2012 WL 3762431, *5 , N.J.Super.A.D. The first jury to hear this case was unable to reach a verdict. A second jury found defendant Vonte L. Skinner guilty of attempted murder, N.J.S.A. 2C:5–1a(3), 2C:11–3a(1);...	Aug. 31, 2012	Case		14 20 21 A.2d
Cited by	65. <u>State v. Silvers</u> ” 2012 WL 3021004, *3 , N.J.Super.A.D. Following a jury trial, defendant, Phillip S. Silvers, was convicted of third-degree theft by unlawful taking, N.J.S.A. 2C:20–3; and third-degree conspiracy with co-defendant...	July 25, 2012	Case		15 17 A.2d
Cited by	66. <u>State v. Franklin</u> 2012 WL 2344602, *8 , N.J.Super.A.D. A jury found defendant Darryl Franklin guilty of third-degree possession of a weapon, a knife, for an unlawful, purpose, N.J.S.A. 2C:39–4d, and fourth-degree unlawful possession...	June 21, 2012	Case		22 A.2d
Cited by	67. <u>State v. Aruanno</u> ” 2012 WL 1948670, *3 , N.J.Super.A.D. Defendant Joseph Aruanno appeals from the November 30, 2009 order denying his post-conviction relief (PCR) petition. Defendant was convicted by a jury of second-degree sexual...	May 31, 2012	Case		1 6 A.2d
Cited by	68. <u>State v. Deemi</u> 2012 WL 685889, *2 , N.J.Super.A.D. Defendant was charged with and found guilty by a jury of engaging in sexual relations with a person detained in an institution over whom defendant had supervisory or disciplinary...	Mar. 05, 2012	Case		—
Cited by	69. <u>State v. Peterson</u> ” 2012 WL 86876, *5 , N.J.Super.A.D. Defendant Norvil Peterson appeals from the judgment of conviction and sentence imposed following a jury trial at which he was found guilty of: one count of third-degree conspiracy...	Jan. 12, 2012	Case		17 A.2d
Cited by	70. <u>State ex rel. D.B.</u> 2011 WL 5118597, *2 , N.J.Super.A.D. The Supreme Court has held, in the criminal context, that “it is the responsibility of a defendant's counsel, not the trial court,” to advise defendant about the right to testify,...	Oct. 28, 2011	Case		—
Cited by	71. <u>State v. Dabas</u> 2011 WL 5061161, *10 , N.J.Super.A.D. Defendant Samander S. Dabas appeals from his conviction for the purposeful or knowing murder of his wife Renu Dabas, in violation of N.J.S.A. 2C:11–3(a)(1) or (2) (count one), and...	Oct. 26, 2011	Case		8 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	72. <u>State v. A.M.</u>  2011 WL 3107797, *5, N.J.Super.A.D. Pursuant to defendant A.M.'s motion, the first five counts of a thirty-count indictment returned by the Bergen County grand jury were severed for purposes of trial. In those five...	July 27, 2011	Case	   	24 A.2d
Cited by	73. <u>State v. Evans</u> 2011 WL 2496243, *6, N.J.Super.A.D. Defendant Christopher Evans appeals from his conviction on four counts of first-degree robbery, N.J.S.A. 2C:15-1, and one count of conspiracy to commit robbery, N.J.S.A. 2C:5-2,...	June 24, 2011	Case	   	—
Cited by	74. <u>State v. D.M.</u> 2011 WL 2321226, *15, N.J.Super.A.D. Defendant—now sixty-four years old—appeals from his 2009 conviction and fifty-five-year sentence for numerous sexual offenses involving three children: his two granddaughters—Eve...	May 24, 2011	Case	   	1 A.2d
Cited by	75. <u>State ex rel. J.L.F.</u> 2011 WL 1687621, *7, N.J.Super.A.D. J.L.F. appeals from her December 2, 2008 adjudication of delinquency on charges that, if committed by an adult, would constitute the crimes of first-degree aggravated sexual...	May 05, 2011	Case	   	1 A.2d
Cited by	76. <u>State v. Johnson</u> 2010 WL 4180019, *4, N.J.Super.A.D. CRIMINAL JUSTICE - Searches and Seizures. Citizen informant's tip did not provide officer's with a sufficient basis to conduct an investigatory stop of defendant.	Oct. 26, 2010	Case	   	7 A.2d
Cited by	 77. <u>New Jersey Div. of Youth and Family Services v. I.H.C.</u> 2 A.3d 1138, 1150, N.J.Super.A.D. FAMILY LAW - Child Protection. Evidence from father's ex-wife was admissible in protective custody proceeding to prove that he posed risk of harm to children.	Aug. 05, 2010	Case	   	15 A.2d
Cited by	78. <u>State v. Foglia</u> 1 A.3d 703, 714, N.J.Super.A.D. CRIMINAL JUSTICE - Evidence. Defendant's testimony could not be attacked through specific instances of defendant's bad conduct.	July 16, 2010	Case	   	16 17 19 A.2d
Cited by	79. <u>Evans v. D'Illo</u> 2016 WL 3219874, *10, D.N.J. Presently before the Court is the petition for a writ of habeas corpus of Christopher Evans ("Petitioner") brought pursuant to 28 U.S.C. § 2254 challenging Petitioner's state court...	June 06, 2016	Case	   	—
Mentioned by	80. <u>State v. Brown</u> 83 A.3d 45, 66, N.J. CRIMINAL JUSTICE - Searches and Seizures. Trooper's assumption that defendant's home was abandoned such that he could properly conduct a warrantless search was not objectively...	Jan. 29, 2014	Case	   	5 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Mentioned by	81. <u>State v. M.C.</u> 2016 WL 1079488, *2+ , N.J.Super.A.D. On leave to appeal, the State challenges a June 17, 2015 pre-trial order conditionally granting its motion to admit testimony and a video-recorded statement under the hearsay...	Mar. 21, 2016	Case		2 4 A.2d
Mentioned by	82. <u>State v. Roberts</u> 2014 WL 3843153, *16 , N.J.Super.A.D. Defendant Veanzeil Roberts was tried before a jury and convicted of first degree attempted murder of Monica Penalba, N.J.S.A. 2C:5-1 and 2C:11-3(a); first degree conspiracy to...	Aug. 06, 2014	Case		15 A.2d
Mentioned by	83. <u>State v. Brown</u> 2014 WL 1923375, *2 , N.J.Super.A.D. Defendant Vanessa Brown awaits trial on charges of aggravated manslaughter, N.J.S.A. 2C:11-4, and vehicular homicide, N.J.S.A. 2C:11-5a. Based on the percentage of alcohol in her...	May 15, 2014	Case		12 A.2d
Mentioned by	84. <u>State v. Sirmans</u> 2011 WL 849708, *1 , N.J.Super.A.D. Defendant was charged with second-degree possession of a controlled dangerous substance (CDS), heroin, with the intent to distribute within 500 feet of a public housing complex,...	Mar. 14, 2011	Case		5 A.2d
—	85. <u>Validity, construction, and application of child hearsay statutes</u> 71 A.L.R.5th 637 This annotation collects and analyzes those cases in which the courts have considered the validity, construction, and application of state child hearsay statutes which admit...	1999	ALR	—	4 8 A.2d
—	86. <u>Jones on Evidence--Civil and Criminal s 17:6.31, New Jersey</u> N.J. R. Evid. 404(b) (N.J.R.E. 404(b)) provides: (b) Other Crimes, Wrongs, or Acts. Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not...	2017	Other Secondary Source	—	15 A.2d
—	87. <u>Modern Scientific Evid.: L. & Science Exp. Test. s 16:4, Out-of-court statements of child witnesses-Hearsay exceptions for child statements in abuse cases</u> The traditional exceptions to the hearsay rule apply in the same way to all out-of-court statements, whether made by a child or an adult. Some trial courts appear to read the...	2017	Other Secondary Source	—	2 4 6 A.2d
—	88. <u>New Jersey Model Criminal Charges NON 2C CHARGES, FAILURE OF POLICE TO PRESERVE NOTES (effective May 27, 2011) (FN2)</u> New Jersey Model Criminal Charges You have heard testimony that _ failed to preserve (his/her/their) original notes in this case. Law enforcement officers are required to preserve contemporaneous notes of their...	2012	Other Secondary Source	—	—

Treatment	Title	Date	Type	Depth	Headnote(s)
—	89. 1A N.J. Prac. Series R 2:10-2, 2:10-2. Notice of Trial Errors N.J. Prac. Series 1. This is a single rule applying to both criminal and civil and to judicial and administrative appeals, and replacing the more particularized provisions of the source rules with...	2017	Other Secondary Source	—	21 A.2d
—	90. 2B N.J. Prac. Series N.J.R.E. 104, Preliminary Questions N.J. Prac. Series The subject matter covered by paragraph (a) of Fed.R.Evid. 104 is substantially the same as that covered by N.J.Evid.R. 8(1). Rule 104 uses the New Jersey formulation with some...	2017	Other Secondary Source	—	1 A.2d
—	91. 2B N.J. Prac. Series N.J.R.E. 404, Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes; Evidence 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	—	—
—	92. 2B N.J. Prac. Series N.J.R.E. 412, [Not Adopted] N.J. Prac. Series Fed.R.Evid. 412 was not adopted since this subject is covered by N.J.S.A. 2C:14-7, the Rape-Shield Law. Note that the two categories of admissible prior sexual conduct prescribed...	2017	Other Secondary Source	—	24 25 A.2d
—	93. 2D N.J. Prac. Series N.J.R.E. 803(c)(27), Statements by a Child Relating to a Sexual Offense N.J. Prac. Series This rule was originally slated to be deleted. However, on March 2, 1999 the order deleting this rule was vacated. Until further notice, therefor, the rule remains intact...	2017	Other Secondary Source	—	8 A.2d
—	94. 32 N.J. Prac. Series s 21:26, Hearsay-Exception for statement by child of tender years N.J. Prac. Series The tender years exception deals with whether a child's statement about a sexual assault may be testified to by a third person to whom the statement was made. Typically, the...	2016	Other Secondary Source	—	8 10 A.2d
—	95. 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 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	—	—

Treatment	Title	Date	Type	Depth	Headnote(s)
—	96. 40 N.J. Prac. Series s 4.6, Mistaken exercise of discretion N.J. Prac. Series The "mistaken exercise of discretion" or "abuse of discretion" standard is quite similar to the clearly erroneous standard. This standard is applied to issues that are...	2017	Other Secondary Source	—	6 A.2d
—	97. 47 N.J. Prac. Series s 35:10, Competency of child to testify N.J. Prac. Series A child is competent to testify if he can "understand questions and ... frame and express intelligent answers" and has "moral responsibility," i.e., understands the difference...	2017	Other Secondary Source	—	1 A.2d
—	98. 55 N.J. Prac. Series s 2:3, Supporting authorities-Exclusion of prejudicial evidence 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	—	—
—	99. 55 N.J. Prac. Series s 3:3, Supporting authorities-Definition of "relevant evidence" N.J. Prac. Series State v. P.S., 202 N.J. 232, 997 A.2d 163 (2010) (for other bad act evidence to be admissible evidence must first be relevant to a material issue in trial, such as to prove an...	2017	Other Secondary Source	—	17 A.2d
—	100. 55 N.J. Prac. Series s 3:4, Supporting authorities-Exclusion of irrelevant evidence, generally 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	—	8 A.2d
—	101. 55 N.J. Prac. Series s 7:32, Supporting authorities-Exclusion of improper character evidence 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	—	17 A.2d
—	102. 55 N.J. Prac. Series s 7:62, Motion to exclude improper character evidence (marital infidelity) N.J. Prac. Series This case arises out of an employment dispute concerning the alleged breach of a non-compete clause. Defendant had been employed by plaintiff corporation for a period of 15 years....	2017	Other Secondary Source	—	—

Treatment	Title	Date	Type	Depth	Headnote(s)
—	103. 55 N.J. Prac. Series s 7:64, Motion to exclude improper character evidence (juvenile adjudication) N.J. Prac. Series This case arises out of an automobile accident in which the plaintiff was a passenger in defendant's vehicle. The defendant's vehicle rear-ended another vehicle that had been...	2017	Other Secondary Source	—	—
—	104. 55 N.J. Prac. Series s 4:131, Motion to exclude demonstration of defendant's tattoo N.J. Prac. Series PLEASE TAKE NOTICE THAT defendant hereby moves this Court for an order excluding any and all evidence, references to evidence, testimony, or argument relating to the demonstration...	2017	Other Secondary Source	—	—
—	105. 55 N.J. Prac. Series s 10:239, Motion to exclude evidence of defendant's prior DUI N.J. Prac. Series This is a tort case arising out of automobile accident that occurred when plaintiff was struck by the defendant's automobile while plaintiff was riding on his bicycle. On April 30,...	2017	Other Secondary Source	—	—
—	106. 55 N.J. Prac. Series s 10:240, Motion to exclude evidence of prior traffic citations N.J. Prac. Series This case arises out an automobile accident in which Plaintiff's vehicle was struck by Defendant. On February 23, 2014, Plaintiff was stopped at a traffic light at the corner of...	2017	Other Secondary Source	—	16 A.2d
—	107. Am. Jur. 2d Witnesses s 714, Generally Am. Jur. 2d Witnesses A witness who testifies on direct examination before a jury must be subject to cross-examination before that jury. Cross-examination has many purposes. The opposing party may...	2018	Other Secondary Source	—	23 A.2d
—	108. THE ELIMINATION OF MRE 803A? PEOPLE V. GURSKY AND ITS QUALIFICATION OF SPONTANEOUS STATEMENTS 20 J.L. & Pol'y 267 , 296+ On multiple occasions in 2005 and 2006, Jason Gursky sexually molested his girlfriend's daughter, who was six and seven years old at the time of the offenses. The police did not...	2011	Law Review	—	1 2 9 A.2d
—	109. THE UNITED NATIONS COMPENSATION COMMISSION AND THE TRADITION OF INTERNATIONAL CLAIMS SETTLEMENT 27 N.Y.U. J. Int'l L. & Pol. 1 , 42 It is the waning days of war. The united coalition is moving inexorably closer to victory over the forces of aggression and lawlessness. Friendly nations that had succumbed to...	1994	Law Review	—	—

Treatment	Title	Date	Type	Depth	Headnote(s)
—	110. <u>SAY WHAT?? CONFUSION IN THE COURTS OVER WHAT IS THE PROPER STANDARD OF REVIEW FOR HEARSAY RULINGS</u> 18 Suffolk J. Trial & App. Advoc. 1 , 54 I. Introduction. 2 II. Standards of Review. 6 A. De Novo. 8 B. Clearly Erroneous. 9 C. Abuse of Discretion. 10 D. Problems with Defining and Applying Standards of Review....	2013	Law Review	—	—
—	111. <u>27 NO. 15 West's Criminal Law News 71, Child victim's out-of-court statements to interviewer were admissible under rule setting forth tender years exception to rule against hearsay</u> The Supreme Court of New Jersey has held that an alleged child victim's out-of-court statements to an interviewer were trustworthy, such that they were admissible under the rule...	2010	Law Review	—	—