

 KeyCite Yellow Flag - Negative Treatment
Disagreed With by State v. Aaron L., Conn., February 15, 2005

170 N.J. 106

Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Appellant,

v.

David HERNANDEZ,
Defendant–Respondent.

Argued Sept. 10, 2001.

|

Decided Nov. 21, 2001.

Synopsis

Defendant was convicted in the Superior Court, Law Division, Passaic County, of third-degree possession of crack cocaine with intent to distribute within 1,000 feet of school property, and was sentenced to eight years' imprisonment. Defendant appealed. The Superior Court, Appellate Division, Pressler, P.J.A.D., 334 N.J.Super. 264, 758 A.2d 1139, reversed and remanded, and state appealed. The Supreme Court, LaVecchia, J., held that: (1) per se ban upon uncorroborated testimony of a cooperating co-defendant concerning other-crime evidence was unwarranted; (2) testimony of defendant's accomplice satisfied clear and convincing standard of proof applicable to other-crimes testimony; (3) other-crimes testimony of defendant's accomplice was more prejudicial than probative; (4) erroneous admission of such testimony was capable of producing an unjust result; and (5) failure of jury charge specifically to advise jury of limited use it was permitted to make of such testimony raised reasonable doubt as to reliability of defendant's conviction.

Affirmed as modified; remanded.

Verniero, J., filed separately concurring opinion.

West Headnotes (20)

[1] Criminal Law

Showing bad character or criminal propensity in general

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by
Accused

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

110k368.3 Purposes for Admitting
Evidence of Other Misconduct

110k368.5 Showing bad character or
criminal propensity in general

(Formerly 110k369.1)

Evidence of an accused's other crimes or acts is inadmissible where it is offered for purposes of showing the propensity of the person to commit a crime. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

2 Cases that cite this headnote

[2] Criminal Law

 Relevancy

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

110k368.9 Relevancy

(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

110k368.15 Necessity for evidence

(Formerly 110k369.2(1))

Other-crime evidence is admissible when relevant to a material issue in genuine dispute, and the evidence is necessary as proof of the disputed issue.

N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

3 Cases that cite this headnote

[3] Criminal Law

 Other Misconduct as Evidence of Offense Charged in General

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

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

110k368.1 In general

(Formerly 110k369.1)

Other-crime evidence is highly inflammatory, having the unique tendency to turn a jury against the defendant, and trial courts are required to make a careful and pragmatic evaluation of such evidence based on the specific context in which it is offered. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

13 Cases that cite this headnote

[4] Criminal Law

 Other Misconduct as Evidence of Offense Charged in General

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

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

110k368.1 In general

(Formerly 110k369.2(1))

To be admissible, other-crime evidence must have the following characteristics: (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. 404(b).

20 Cases that cite this headnote

[5] Criminal Law

 Degree of proof

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 110k374)

State must produce clear and convincing evidence of other-crime conduct before such evidence may be admitted. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

2 Cases that cite this headnote

[6] Criminal Law

 Degree of proof

Criminal Law

 Findings and statement of reasons

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)13 Proof and Effect

110k374.15 Preliminary Evidence

110k374.20 Proof of Defendant's Commission of or Connection with Other Misconduct

110k374.20(2) Degree of proof

(Formerly 110k374)

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)13 Proof and Effect

110k374.21 Determination of Admissibility

110k374.24 Findings and statement of reasons

(Formerly 110k374)

Under federal evidentiary rules, other-crimes evidence may be admitted if there is proof to support a possible jury finding by a preponderance of the evidence that the defendant committed the act; the court does not make its own preliminary finding that it is persuaded by a preponderance of the evidence that the government has proved the other act sought to be admitted. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

Cases that cite this headnote

[7] **Criminal Law**

🔑 Degree of proof

Criminal Law

🔑 Degree of proof

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 110k374)

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)13 Proof and Effect

110k374.15 Preliminary Evidence

110k374.20 Proof of Defendant's Commission of or Connection with Other Misconduct

110k374.20(2) Degree of proof
(Formerly 110k374)

Trial judge is required to serve as gatekeeper to the admission of other-crime evidence, finding that proof of the other-crime evidence is clear and convincing; the court must thus ensure that the jury hears only clear and convincing proof that the other crime or bad act occurred and that the defendant was responsible for the conduct. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

7 Cases that cite this headnote

[8] **Criminal Law**

🔑 Evidence calculated to create prejudice against or sympathy for accused

110 Criminal Law

110XVII Evidence

110XVII(D) Facts in Issue and Relevance

110k338 Relevancy in General

110k338(7) Evidence calculated to create prejudice against or sympathy for accused

Per se ban on a certain category of testimony results in such testimony being effectively withheld from the trier of fact, notwithstanding its relevance to the truth, because of other overriding societal policy concerns; such a ban precludes the fact-finder from engaging in the familiar weighing of the probative value of the evidence against the danger of undue prejudicial effect, and instead imposes a blanket prohibition of any consideration of the testimony's worth to the search for truth.

1 Cases that cite this headnote

[9] **Criminal Law**

🔑 Degree of proof

Criminal Law

🔑 Manner of proving other misconduct

Criminal Law

🔑 Necessity

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 110k369.1)

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by
Accused
110XVII(F)13 Proof and Effect
110k374.26 Manner of proving other
misconduct

(Formerly 110k369.1)

110 Criminal Law

110XVII Evidence

110XVII(S) Testimony of Accomplices
and Codefendants

110XVII(S)2 Corroboration

110k510 Necessity

Per se ban upon uncorroborated testimony of a cooperating co-defendant concerning other-crime evidence was unwarranted; combination of requirement of clear and convincing proof of relevant other-crime evidence, coupled with weighing of probative value against danger of undue prejudice, provided adequate standard for court's exercise of its gatekeeping function. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

5 Cases that cite this headnote

[10] **Criminal Law**

🔑 Necessity

110 Criminal Law

110XVII Evidence

110XVII(S) Testimony of Accomplices
and Codefendants

110XVII(S)2 Corroboration

110k510 Necessity

Uncorroborated accomplice testimony may support a guilty verdict beyond a reasonable doubt.

Cases that cite this headnote

[11] **Criminal Law**

🔑 Degree of proof

Criminal Law

🔑 Presence of jury during inquiry as
to admissibility

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 110k374)

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k671 Presence of jury during inquiry
as to admissibility

(Formerly 110k374)

Trial court, acting as gatekeeper to the admission of other-crime evidence, must conclude that proffered testimony concerning the other crime or act satisfies the clear and convincing standard of proof; ordinarily that fact-finding is made after the court conducts a hearing outside the presence of the jury. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 104, 404(b).

3 Cases that cite this headnote

[12] **Criminal Law**

🔑 Hearing

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by
Accused

110XVII(F)13 Proof and Effect

110k374.21 Determination of
Admissibility

110k374.23 Hearing

(Formerly 110k374)

In a hearing on the admissibility of other-crimes testimony, the trial court hears the specific content of the testimony and assesses its relevance to an issue in dispute and its necessity to the proof of that issue, determining as an integral part of that assessment whether it finds the proof of the other crime to be clear and convincing; finally, the court employs the appropriate balancing test, incorporating the traditional test balancing the probative value of the

evidence against the undue prejudice to the defendant, and decides whether the jury should hear the other-crime evidence. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 104, 404(b).

13 Cases that cite this headnote

[13] **Criminal Law**

🔑 Sufficiency

Criminal Law

🔑 Necessity

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)13 Proof and Effect

110k374.15 Preliminary Evidence

110k374.20 Proof of Defendant's Commission of or Connection with Other Misconduct

110k374.20(3) Sufficiency
(Formerly 110k374)

110 Criminal Law

110XVII Evidence

110XVII(S) Testimony of Accomplices and Codefendants

110XVII(S)2 Corroboration

110k510 Necessity

Uncorroborated testimony of drug defendant's accomplice satisfied clear and convincing standard of proof applicable to other-crimes testimony, despite accomplice's admissions that he was accustomed to lying under oath, was hostile to defendant, and was testifying in exchange for favorable plea bargain; fact-finder could have concluded that accomplice was simply being honest about his character on cross-examination, accomplice's damaging acknowledgments occurred primarily on direct examination, and accomplice's demeanor and overall candor were observed by the trial court. 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**

🔑 Other offenses

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1153 Reception and Admissibility of Evidence

110k1153.5 Other offenses
(Formerly 110k1153(1))

Abuse of discretion standard of review applies to a trial court's determination concerning the admissibility of other-crime evidence. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

2 Cases that cite this headnote

[15] **Criminal Law**

🔑 Controlled substance offenses

Criminal Law

🔑 Limiting effect of evidence of other offenses

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

110k373.9 Controlled substance offenses

(Formerly 110k369.1)

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k673 Effect of Admission

110k673(5) Limiting effect of evidence of other offenses

Other-crimes testimony of drug defendant's accomplice concerning approximately 20 drug sales in which he participated with defendant over two-month period prior to their arrests was more prejudicial than probative, especially in light of trial court's failure to provide limiting instruction with respect to such testimony. N.J.S.A.

2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

1 Cases that cite this headnote

[16] Criminal Law

🔑 Evidence of other offenses and misconduct

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence

110k1169.11 Evidence of other offenses and misconduct

Erroneous admission of other-crimes testimony of drug defendant's accomplice concerning approximately 20 drug sales in which he participated with defendant over two-month period prior to their arrests was capable of producing an unjust result and was harmful; prejudicial impact of such testimony was sufficient to raise reasonable doubt about whether it led to defendant's conviction. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b); R. 2:10–2.

Cases that cite this headnote

[17] Criminal Law

🔑 Purpose and effect of evidence; excluding evidence from consideration

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1173 Failure or Refusal to Give Instructions

110k1173.2 Instructions on Particular Points

110k1173.2(9) Purpose and effect of evidence;excluding evidence from consideration

Failure of jury charge in drug prosecution specifically to advise jury of limited use it was permitted to make of other-crimes testimony of defendant's accomplice raised

reasonable doubt as to reliability of defendant's conviction, requiring reversal and new trial, where only evidence against defendant was accomplice's testimony and arresting officer's arguably equivocal observations; instruction failed to focus jury properly on purposes for which evidence at issue was offered, in context of facts of the case and issues genuinely in dispute. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b); R. 2:10–2.

7 Cases that cite this headnote

[18] Criminal Law

🔑 Limiting effect of evidence of other offenses

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k673 Effect of Admission

110k673(5) Limiting effect of evidence of other offenses

Carefully crafted limiting instruction must explain to the jury the limited purpose for which other-crime evidence is being offered. 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

🔑 Purpose and Effect of Evidence

110 Criminal Law

110XX Trial

110XX(G) Instructions:Necessity, Requisites, and Sufficiency

110k783 Purpose and Effect of Evidence

110k783(1) In general

In setting forth the prohibited and permitted purposes of other-crimes evidence, the trial court must include within the jury instruction sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to

which it is required to adhere; mere reference to the illustrative exceptions contained in the applicable rule is not sufficient. N.J.S.A. 2A:84A, App. A, Rules of Evid., N.J.R.E. 404(b).

5 Cases that cite this headnote

[20] Criminal Law

 Objections in General

110 Criminal Law

110XXIV Review

110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review

110XXIV(E)1 In General

110k1038 Instructions

110k1038.1 Objections in General

110k1038.1(1) In general

Under the plain error rule, errors in a jury instruction not objected to at trial should be disregarded unless clearly capable of producing an unjust result. R. 2:10-2.

Cases that cite this headnote

Attorneys and Law Firms

****1227 *111** Marc A. Festa, Assistant Prosecutor, argued the cause for appellant (****1228** Boris Moczula, Acting Passaic County Prosecutor, attorney; ***112** Michelle Katich, Assistant Prosecutor, of counsel and on the briefs).

Edward T. Ehler, Glen Rock, argued the cause for respondent.

Bennett A. Barlyn, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey, (John J. Farmer, Jr., Attorney General, attorney).

Lawrence S. Lustberg, Newark, argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Gibbons, Del Deo, Dolan, Griffinger & Vecchione, attorneys; Mr. Lustberg and Risa E. Kaufman, on the brief).

Opinion

The opinion of the Court was written by

LaVECCHIA, J.

This appeal presents an opportunity for the Court to consider whether uncorroborated, “other-crimes” testimony provided by a co-defendant cooperating with the prosecution should be banned *per se* because it cannot satisfy the “clear and convincing” standard of proof required for the admission of other-crime evidence. Prior to trial, defendant David Hernandez sought to limit the testimony of George Gerardi, who, although indicted with defendant for certain drug offenses, agreed to give testimony against defendant in exchange for a more lenient sentence. Defendant sought to exclude Gerardi's testimony concerning the business relationship between the two men in the two months preceding defendant's arrest. The trial court admitted the testimony, and ultimately, the jury convicted defendant.

The Appellate Division reversed and remanded for a new trial. State v. Hernandez, 334 N.J.Super. 264, 274, 758 A.2d 1139 (2000). The panel held that Gerardi's uncorroborated testimony could not satisfy the clear and convincing standard of proof that is a prerequisite to the admission of other-crime evidence under State v. Cofield, 127 N.J. 328, 605 A.2d 230 (1992):

We are satisfied, however, that the uncorroborated testimony of a co-defendant testifying against defendant pursuant to a favorable plea agreement, and particularly ***113** the testimony of this co-defendant, falls so far short of clear and convincing evidence as to mandate the exclusion of his other-crimes evidence.

[State v. Hernandez, *supra*, 334 N.J.Super. at 271, 758 A.2d 1139.]

We granted certification, 167 N.J. 88, 769 A.2d 1051 (2001). Although it is not clear that the Appellate Division adopted a *per se* exclusionary rule concerning accomplice testimony in respect of other crimes, the issue is squarely presented and in

our view should be addressed. We now reject the application of a *per se* rule excluding other-crime evidence provided through the uncorroborated testimony of a co-defendant cooperating with the prosecution. Nonetheless, we affirm the Appellate Division's reversal and remand for a new trial because of the unduly prejudicial nature of a portion of Gerardi's testimony, and because the limiting instruction was inadequate to counsel the jury appropriately on the permissible uses of Gerardi's other-crime testimony.

I.

Defendant and Gerardi were indicted on charges of possession of a controlled dangerous substance (crack-cocaine), contrary to *N.J.S.A. 2C:35-10a(1)* (Count One); possession with intent to distribute, contrary to *N.J.S.A. 2C:35-5a(1)* and *b(3)* ****1229** (Count Two); and possession with intent to distribute within 1,000 feet of school property, contrary to *N.J.S.A. 2C:35-7* and *2C:35-5a* (Count Three). Gerardi was given a favorable plea bargain on his agreement to testify for the State at defendant's trial. At a pre-trial hearing, defense counsel moved to exclude Gerardi's testimony concerning the alleged details of his business relationship with defendant during the two months that preceded their arrest on February 11, 1997. The assistant prosecutor represented Gerardi's testimony at the pretrial hearing as follows:

Now, Mr. Gerardi also said that he would testify as to his relationship, his prior relationship, with Mr. Hernandez; that they had known each other in school; that on 12/12/96, December 12th of 1996 when Mr. Gerardi got out of prison, he went looking for Mr. Hernandez knowing that he could make money with him selling for him and, in fact, that's what he began to do at that time and that's when the business relationship was started where he got 30 dollars for every hundred dollars in sales and also the way this was done exclusively was that Mr. Gerardi would ***114** always hand the money over to Mr. Hernandez and Mr. Gerardi would always hold the crack, reason being Mr. Hernandez if they were arrested wouldn't have any drugs on him.

Also that Mr. Gerardi said that he had—he was aware that Mr. Hernandez went into he said around 140th Street in New York or in Manhattan to buy crack. He had actually gone with him on one run in this period sometime between 12/12/96 and 2/11/97.

Defense counsel objected to that testimony noting that there was no conspiracy count in the complaint and no counts concerning any action other than the events that occurred on February 11, 1997. Accordingly, he asserted that the proffered testimony was more prejudicial to defendant than it was probative of the events that took place on the day of arrest. The trial court disagreed, stating:

THE COURT: Doesn't the Prosecutor—I mean you don't—it won't necessarily be very unusual for somebody to meet somebody on the street and say do you want to start dealing drugs with me.

There's almost always some kind of prior relationship and these things allegedly—and these are all allegations, this is entirely up to the jury, but two people don't allegedly start dealing together on [sic] a vacuum on that day. There has to be some type of prior coming together, normally.

How does the Prosecutor explain their association; why one trusts one another, et cetera, if he can't go into some sort of background? I don't know how he's to present his case, that day, we were doing this and, before this, it was our arrangement, this is what he paid me. I would be asking him to try his case in a two-by-four vacuum.

[Defense counsel]: I don't agree with that, but I respect your Honor's statement. If we're going to deal with that, I would ask for a hearing outside the presence of the jury

....

The following facts were adduced at trial. Officer Henry Morales testified that he and his partner set up a surveillance of the corner of River Street and Sixth Avenue in the City of Paterson on February 11, 1997. The area was known for its high incidence

of drug trafficking. The surveillance vantage point was an elevated position **1230 within twenty feet of a pool hall that was the focus of the surveillance. Officer Morales observed a woman, later identified as Martha Sanchez, approach defendant and Gerardi. Both were standing in front of the pool hall. Officer Morales saw Sanchez hand paper currency to Gerardi while defendant, who was *115 paying attention to what was transpiring, stood a few feet away. The officer observed defendant and Gerardi engage in conversation before Gerardi pulled a paper bag from the right sleeve of his jacket and removed an object from the bag. He handed the object to Sanchez. Officer Morales then observed Gerardi hand the paper currency to defendant. Following that transaction, Officer Morales and his partner arrested Gerardi and defendant. A search revealed that Gerardi had in his possession a paper bag containing eleven baggies filled with suspected crack-cocaine. He also possessed a glassine envelope containing suspected heroin. A search of defendant produced a total of \$363 in cash in denominations of twenty dollar bills or smaller.

Gerardi testified next. He stated that a few days after he was released from Yardville Youth Correctional Facility on December 12, 1996, he ran into defendant, a long-time acquaintance. During their brief exchange, defendant asked whether Gerardi was interested in “making a little money here and there.” Gerardi understood that to mean selling drugs and agreed. He testified that he began selling crack-cocaine for defendant sometime around the 1996 Christmas holidays. The arrangements were that for every twenty baggies he would sell for \$5 per bag, defendant would pay him \$30. Gerardi testified that he sold crack-cocaine for defendant on approximately twenty occasions between December of 1996 and February 11, 1997, when he was arrested. He stated that defendant would remain in close proximity while Gerardi would make a sale because defendant did not trust him with the sale proceeds. Gerardi had once used drug sale proceeds to purchase heroin for his personal habit. Gerardi also testified that it was his understanding that defendant purchased his drugs in New York City. On one occasion between the end of December 1996 and February 11, 1997,

he accompanied defendant to New York where defendant purchased a block of crack cocaine for between \$300 and \$400.

Gerardi testified that on February 11, 1997, he met defendant on River Street some time between 6:00 and 6:30 p.m. Defendant *116 asked him if he was “alright,” which Gerardi understood as an inquiry concerning whether he needed heroin before beginning to sell for defendant. After he told defendant he needed a bag of heroin, defendant gave him \$10, told him to “get straight,” and that when he returned he could sell the crack-cocaine. Gerardi left the area and purchased a bag of heroin. He then returned to River Street to rejoin defendant. At 6:45 p.m. a police car pulled along the sidewalk where Gerardi was standing and the officer instructed him to leave the corner. Gerardi complied, but returned once the police left the area. He and defendant then went into a nearby restaurant on River Street, and while they were waiting for the food defendant had ordered, defendant handed Gerardi a plastic bag containing approximately twenty-five baggies filled with crack-cocaine. Gerardi placed the plastic bag into a paper bag and then put the bag into the right sleeve of his jacket.

Gerardi exited the restaurant to sell the drugs. Defendant followed him outside and sat in a nearby doorway. A man approached Gerardi and inquired whether **1231 he could purchase nine bags for \$40. Gerardi explained that this was known as a “play” or discount, and because he was not authorized to “give play,” he consulted defendant who authorized the sale. Gerardi remained outside the restaurant and engaged in a few more transactions, immediately giving all proceeds to defendant after each sale. The two then returned to the restaurant. Gerardi testified that he had to eat before he could take the heroin he had purchased earlier.

Once they finished eating, Gerardi and defendant returned to the sidewalk on River Street. Gerardi stood directly in front of the pool hall located at 591 River Street and defendant stood approximately ten feet away. Gerardi was approached by a woman he knew by the name of “Candy Sanchez.”

Sanchez wanted to purchase three baggies for \$13. Unauthorized to make the sale without defendant's approval, Gerardi told Sanchez to ask defendant. Sanchez then called over to defendant to ask whether he would agree to the "play." Defendant, speaking directly to *117 Sanchez, agreed to the sale. Gerardi gave three bags of crack to Sanchez after she handed him \$13. He then handed the money to defendant. Immediately after that transaction, police arrested both Gerardi and defendant.

On direct examination, Gerardi testified that while he was in jail awaiting trial, defendant offered to pay him between \$50 and \$100 per week for the entire period of his incarceration if Gerardi would testify that defendant had no involvement in the drug transaction and that the drugs and money belonged solely to Gerardi. He asked Gerardi to testify that when Gerardi handed the money to defendant it was because defendant owed him money. Gerardi agreed to defendant's terms. However, when a few weeks went by and defendant, who was out on bail, did not pay the promised money, Gerardi decided against "taking the weight" for defendant. He subsequently entered into a plea agreement that was conditioned on his cooperation with the State in the criminal case against defendant.

As might be expected, defense counsel engaged in a withering cross-examination of Gerardi designed to attack his character. Defendant never testified, but the defense theory was that defendant had nothing to do with Gerardi's drug sale on February 11, 1997. According to that theory, Gerardi handed defendant cash on February 11, 1997, because he owed defendant money. Nonetheless, the jury convicted defendant of Counts Two and Three, the possession with intent to distribute charges. The jury acquitted defendant on Count One, simple possession. The trial court refused to mold the verdict to dismiss Counts Two and Three on the basis of an inconsistent verdict, and sentenced defendant to eight years with a four-year period of parole ineligibility.

On appeal, the Appellate Division reversed the conviction and remanded for a new trial. The

panel stated that it need not decide the first prong of the *Cofield* analysis, that is, whether Gerardi's testimony was probative of a fact in issue that was directly involved in the proof of the crime, although it expressed some doubt on the subject. The panel concluded that the other-crime *118 evidence presented through Gerardi's testimony was incapable of meeting the clear and convincing standard of proof required under the third prong of *Cofield* because it was "uncorroborated testimony of a co-defendant testifying against [the] defendant pursuant to a favorable plea agreement." *State v. Hernandez*, **1232 *supra*, 334 N.J. Super. at 271, 758 A.2d 1139.

The Appellate Division, however, went on to address the specifics of Gerardi's testimony. Noting that Gerardi "admitted that he lies under oath with impunity," felt "hostility to defendant," and testified against defendant as a "required term of the lenient plea bargain" he had struck, the court concluded that Gerardi's testimony fell far short of the clear and convincing standard. *Id.* at 272, 758 A.2d 1139. Arguably, then, the Appellate Division was not adopting a *per se* rule, but deciding the case on the facts before it and on its view of the credibility of Gerardi's testimony. The State and the Attorney General, however, claim that the court adopted a *per se* rule and urge us to address the propriety of such a rule. The parties and *amicus curiae* have briefed thoroughly the question whether this Court should adopt a *per se* exclusionary rule when uncorroborated other-crime testimony is offered by a cooperating co-defendant. We will therefore address both that question and, because we reject a *per se* rule, the application of *Cofield* to the specific evidence in the record before us.

II.

[1] New Jersey Rule of Evidence 404(b) excludes evidence of an accused's other crimes or acts offered for purposes of showing the propensity of the person to commit a crime. N.J.R.E. 404(b) states:

Evidence of other crimes,
wrongs, or acts is not

admissible to prove the disposition of a person in order to show that he 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.

[2] [3] [4] Pursuant to *N.J.R.E.* 404(b), as it was under predecessor Rule 55, other-crime evidence is admissible when relevant to a *119 material issue in genuine dispute, and the evidence is necessary as proof of the disputed issue. *State v. Stevens*, 115 N.J. 289, 300–01, 558 A.2d 833 (1989). But because New Jersey adheres to the widespread view that other-crime evidence is highly inflammatory, having the “unique tendency to turn a jury against the defendant,” *id.* at 302, 558 A.2d 833, trial courts are required to make a “careful and pragmatic evaluation” of the evidence based on the specific context in which it is offered. *Id.* at 303, 558 A.2d 833. To assist in that deliberative exercise, a “screen” for admissibility was established in *Cofield*. *State v. Fortin*, 162 N.J. 517, 539, 745 A.2d 509 (2000) (Long, J., concurring in part and dissenting in part); *State v. Marrero*, 148 N.J. 469, 483, 691 A.2d 293 (1997) (stating that *Cofield*’s four-part test distilled years of decisional law determining when other-crime evidence is admissible). The decision in *Cofield* established a rule of general applicability designed “to avoid the over-use of extrinsic evidence of other crimes or wrongs.” 127 N.J. at 338, 605 A.2d 230. To be admissible, the other-crime evidence must have the following characteristics:

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.

**1233 [*Id.* at 338, 605 A.2d 230 (citations omitted).]

[5] The requirement that the State must produce “clear and convincing evidence” of other-crime conduct before such evidence may be admitted is firmly rooted in New Jersey case law. This Court articulated the requirement in *State v. Stevens*, *supra*, 115 N.J. at 289, 558 A.2d 833. In *Stevens*, the defendant, a police officer, was indicted for official misconduct. The admissibility of three other instances of misconduct by the defendant became an issue in the case. The victims of the alleged misconduct provided testimony concerning the other incidents that had not been the bases of criminal charges. 115 N.J. at 297, 558 A.2d 833. This *120 Court affirmed the Appellate Division, noting that the trial court had conducted a hearing to determine the admissibility of the three other instances of alleged misconduct, and that the trial court had concluded there was “clear and convincing evidence” that on three prior occasions the defendant used his position to intimidate women sexually. *Ibid.* In *State v. Harvey*, 121 N.J. 407, 581 A.2d 483 (1990), the Court reiterated the *Stevens* rule, noting “[t]he State bears the burden of proving other crimes by clear and convincing evidence.” *Id.* at 433, 581 A.2d 483.

In *Cofield* then, when adopting the current four-prong test concerning other-crime evidence, the Court adhered to the settled preference for requiring “clear and convincing evidence that the crime did in fact occur.” *State v. Oliver*, 133 N.J. 141, 151, 627 A.2d 144 (1993). The *Cofield* decision questioned the more lenient approach to the admissibility of other-crime evidence taken by the federal courts, noting that the federal approach has not been without a price in trial management. 127 N.J. at 334–35, 605 A.2d 230. The Court observed that the admissibility of uncharged misconduct has been described as “the single most important issue in contemporary criminal evidence law.” *Ibid.* (quoting Edward J. Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines of*

Which Threatens to Engulf the Character Evidence Prohibition, 51 *Ohio St. L.J.* 575, 576 (1990)). The Court also observed that Federal Rule of Evidence 404(b) has “generated more published opinions than any other subsection of the Federal Rules ... [and] errors in the introduction of uncharged misconduct are the most frequent basis for reversal in criminal cases.” *Cofield, supra*, 127 *N.J.* at 335, 605 *A.2d* 230 (quoting Imwinkelried, *supra*, 51 *Ohio St. L.J.* at 577). Accordingly, the *Cofield* decision rejected application of the federal model for admissibility of other-crime evidence and articulated our four-prong standard. 127 *N.J.* at 334–35, 605 *A.2d* 230. See also 22 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5239, at 427 (1978) (stating that “[t]here is no question of evidence more frequently litigated in the appellate courts than the admissibility of evidence *121 of other crimes, wrongs, or acts”); *Evidence—The Emotional Propensity Exception: State v. Treadaway*, 1978 *Ariz. St. L.J.* 153, 156 n. 29 (discussing criticism of other crimes or misconduct evidence). That determination included rejection of the federal standard concerning the level of proof required for admission of other-crime evidence. *Cofield, supra*, 127 *N.J.* at 334–35, 605 *A.2d* 230 (referencing more lenient standard of proof permitted by *Huddleston v. United States*, 485 *U.S.* 681, 108 *S.Ct.* 1496, 99 *L.Ed.2d* 771 (1988)).

**1234 In *Huddleston v. United States*, the United States Supreme Court addressed whether the district court must make a preliminary finding that the Government proved the “other act” under Federal Rule of Evidence 404(b) by a preponderance of the evidence. 485 *U.S.* at 682, 108 *S.Ct.* at 1497, 99 *L.Ed.2d* at 778. *Huddleston* resolved a split among circuit courts. *Id.* at 685, 108 *S.Ct.* at 1499, 99 *L.Ed.2d* at 779. Prior to *Huddleston*, the First, Fourth, Fifth, and Eleventh Circuits allowed the admission of similar act evidence if the evidence was sufficient to allow the jury to find that the defendant committed the act. *Id.* at 685 n. 2, 108 *S.Ct.* at 1499 n. 2, 99 *L.Ed.2d* at 779 n. 2. See, e.g., *United States v. Ingraham*, 832 *F.2d* 229, 235 (1st Cir.1987); *United States v. Beechum*, 582 *F.2d* 898, 914 (5th Cir.1978), *cert. denied*, 440 *U.S.* 920, 99 *S.Ct.* 1244, 59 *L.Ed.2d* 472

(1979). The Sixth and Second Circuits prohibited the introduction of similar act evidence unless the trial judge found that the defendant committed the act by a preponderance of the evidence. *Huddleston, supra*, 485 *U.S.* at 685 n. 2, 108 *S.Ct.* at 1499 n. 2, 99 *L.Ed.2d* at 779 n. 2. See, e.g., *United States v. Leonard*, 524 *F.2d* 1076, 1090–91 (2d Cir.1975). The Seventh, Eighth, Ninth, and District of Columbia Circuits required the Government to prove by clear and convincing evidence that the act occurred. *Huddleston, supra*, 485 *U.S.* at 685 n. 2, 108 *S.Ct.* at 1499 n. 2, 99 *L.Ed.2d* at 779 n. 2. See, e.g., *United States v. Leight*, 818 *F.2d* 1297, 1302 (7th Cir.), *cert. denied*, 484 *U.S.* 958, 108 *S.Ct.* 356, 98 *L.Ed.2d* 381 (1987); *United States v. Weber*, 818 *F.2d* 14, 15 (8th Cir.1987); *United States v. Vaccaro*, 816 *F.2d* 443, 452 (9th Cir.1987).

*122 [6] The Supreme Court held that the district court need not make a finding that the prosecution proved the act by a preponderance of the evidence. Rather, the trial court must examine all the evidence and decide whether the jury could reasonably conclude by a preponderance of the evidence that the other crime, wrong, or bad act occurred and that the defendant was the actor. *Huddleston, supra*, 485 *U.S.* at 689–90, 108 *S.Ct.* at 1501, 99 *L.Ed.2d* at 782–83. In other words, such evidence may be admitted if there is proof to support a possible jury finding by a preponderance of the evidence that the defendant committed the act. The court does not make its own preliminary finding that it is persuaded by a preponderance of the evidence that the Government has proved the other act sought to be admitted under Federal Rule of Evidence 404(b). *Id.* at 690, 108 *S.Ct.* at 1501, 99 *L.Ed.2d* at 782–83. Without discussing the merits of the “clear and convincing” standard, the Court turned to the legislative history of Federal Rule of Evidence 404(b) to support its holding. *Id.* at 687–689, 108 *S.Ct.* at 1500–01, 99 *L.Ed.2d* at 780–82. See *United States v. Gonzalez-Lira*, 936 *F.2d* 184, 190 n. 3 (5th Cir.1991) (noting that there had been division among Circuit Courts concerning applicable standard of proof for introduction of evidence of prior bad acts, but *Huddleston* resolved that conflict).

Despite *Huddleston's* interpretation of the standard of proof required by the Federal Rule of Evidence governing other crime evidence, many jurisdictions have rejected a preponderance of the evidence standard and instead require “clear and convincing” proof for the admission of other-crime evidence. The Supreme Court of Arizona, in *State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997), has observed that the State of Arizona is not alone in requiring a higher standard of proof of an ****1235** other crime or wrong, citing *Johnson v. United States*, 683 A.2d 1087, 1093 (D.C.App.1996), cert. denied, 520 U.S. 1148, 117 S.Ct. 1323, 137 L.Ed.2d 484 (1997); *Phillips v. State*, 591 So.2d 987, 989 (Fla.App.1991); *Ayers v. State*, 335 Md. 602, 645 A.2d 22, 37 (1994); *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn.1996); *State v. Wilson*, 5 Neb.App. 125, 556 N.W.2d 643, 652 (1996); ***123** *State v. Smith*, 300 S.C. 216, 387 S.E.2d 245, 247 (S.C.1989); *State v. McCary*, 922 S.W.2d 511, 514 (Tenn.1996); *State v. Cohen*, 634 A.2d 380, 386 (Del.Super.1992); *State v. Howell*, 557 N.W.2d 908, 911 (Iowa App.1996); *Winiarz v. State*, 107 Nev. 812, 820 P.2d 1317, 1321 (1991); *State v. Michaud*, 135 N.H. 723, 610 A.2d 354, 356 (1992). See also *Welch v. State*, 2 P.3d 356, 365 (Okla.Crim.App.2000) (requiring clear and convincing evidence); *State v. Strain*, 190 Mont. 44, 618 P.2d 331, 337 (1980) (same).

In adopting the “clear and convincing” proof requirement, the *Terrazas* court stated that “there are important reasons to apply a clear and convincing standard, rather than some lesser standard, to evidence of prior bad acts.” 944 P.2d at 1198. Such evidence is “capable of having an impact beyond its relevance to the crime charged and may influence the jury's decision on issues other than those on which it was received, despite cautionary instructions from the judge.” *Ibid.* (citing Note, *Winship on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 Harv. L. Rev. 1093, 1103 (1990)). The court further stated:

Studies confirm that the introduction of a defendant's prior bad acts “can easily tip the balance against the defendant.” Edward J. Imwinkelried, *Uncharged Misconduct Evidence*, 1 SUM Crim. Just. 6, 8 (1986). Because of the high probability of prejudice from the admission of prior bad acts, the court must

ensure that the evidence against the defendant directly establishes “that the defendant took part in the collateral act, and [] shield the accused from prejudicial evidence based ‘upon highly circumstantial inferences.’ ” Vivian M. Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(B): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. Miami L.Rev. 451, 457 (1993).

[944 P.2d at 1198.]

The court concluded that “[t]o allow a lesser standard in a criminal case is to open too large a possibility of prejudice.” *Ibid.*

[7] The third prong of our *Cofield* test requires that the judge serve as gatekeeper to the admission of other-crime evidence. The trial court must make the finding that proof of the other-crime evidence is clear and convincing. Thus, the third prong of *Cofield* requires the trial court to ensure that the jury hears only clear and convincing proof that the other crime or bad act ***124** occurred and that the defendant was responsible for the conduct. *State v. G.V.*, 162 N.J. 252, 275, 744 A.2d 137 (2000) (Coleman, J., concurring in part and dissenting in part). That rule is a necessary component of the fortification against the possibility of unfair prejudice when a court determines whether relevant other-crime evidence should be admitted in the trial of an accused.

III.

A.

We first address whether uncorroborated testimony of other-crime evidence ****1236** offered by a cooperating co-defendant requires special treatment different from that accorded the assessment of other evidence of other crimes. Defendant and *amicus curiae* Association of Criminal Defense Lawyers of New Jersey urge us to adopt a *per se* rule banning such testimony.

[8] A *per se* ban on accomplice testimony in support of other-crime evidence seeks, in effect, to place that testimony with those categories of testimony that are withheld from the trier of fact, notwithstanding their relevance to the truth, because of other overriding societal policy concerns. For example, privilege accomplishes the same end for certain communications, and so does the exclusionary rule of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In their own spheres, each example precludes the factfinder from engaging in the familiar weighing of the probative value of the evidence against the danger of undue prejudicial effect, and instead imposes a blanket prohibition of any consideration of the testimony's worth to the search for truth. There are other bright-line rules, adopted for policy purposes, that forego any individualized assessment of the reliability of the evidence and simply preclude the evidence from the finder of fact in all instances. See also *State v. Reed*, 133 N.J. 237, 261–62, 627 A.2d 630 (1993) (imposing bright-line rule barring admissibility of confession when suspect is not informed that attorney is present and is asking to speak with him); *125 *State v. Hartley*, 103 N.J. 252, 267–68, 511 A.2d 80 (1986) (imposing “‘bright-line,’ inflexible, minimum requirement” that *Miranda* warnings be freshly administered to previously-warned suspect prior to resumption of custodial interrogation).

[9] We do not view uncorroborated testimony of a cooperating co-defendant concerning other-crime evidence as being analogous to those other categories of evidence from which the trier of fact must be automatically shielded. The combination of the requirement of clear and convincing proof of relevant other-crime evidence, coupled with the weighing of probative value against the danger of undue prejudice, provides an adequate standard for a court's exercise of its gatekeeping function. We note that the parties cite to no jurisdiction that imposes an absolute ban on uncorroborated accomplice testimony concerning other-crime evidence, and our research has discovered none. Defendant and *amicus curiae*, Association of Criminal Defense Lawyers of New Jersey, urge this Court to take that first step, but we decline to ban the use of uncorroborated

accomplice testimony as evidence of other crimes or acts admissible under *N.J.R.E.* 404(b) provided a full *Cofield* analysis is conducted.

[10] Indeed, such a step would be inconsistent with our precedent concerning the use of uncorroborated accomplice testimony. Because our case law allows uncorroborated accomplice testimony to support a guilty verdict beyond a reasonable doubt, it would be incongruous to hold that uncorroborated accomplice testimony of other-crime evidence is, *per se*, incapable of satisfying the clear and convincing standard of proof under *Cofield*. See *In re Seaman*, 133 N.J. 67, 82–83, 627 A.2d 106 (1993); *State v. Zwillman*, 112 N.J.Super. 6, 12, 270 A.2d 284 (App.Div.1970), *certif. denied*, 57 N.J. 603, 274 A.2d 56 (1971); *State v. Burgess*, 97 N.J.Super. 428, 435, 235 A.2d 231 (App.Div.1967). We are not alone in allowing uncorroborated accomplice testimony to support a conviction. See, e.g., **1237 *People v. Young*, 128 Ill.2d 1, 131 Ill.Dec. 86, 538 N.E.2d 461, 472 (1989); *State v. Bey*, 217 Kan. 251, 535 P.2d 881, 888 (1975); *126 *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420, 426 (1991); *State v. Brooks*, 49 N.C.App. 14, 270 S.E.2d 592, 597 (1980); *State v. Claassen*, 131 Wash. 598, 604, 230 P. 825 (1924). And, although no jurisdiction has imposed a *per se* ban on uncorroborated accomplice testimony of other-crime evidence, several jurisdictions have held that such accomplice testimony is sufficient to meet the clear and convincing standard for evidence of other crimes. *United States v. Curry*, 79 F.3d 1489 (7th Cir.1996) (allowing accomplice testimony, noting that witnesses' motives for testifying do not render their testimony inherently unreliable); *United States v. Dolliole*, 597 F.2d 102 (7th Cir.), *cert. denied*, 442 U.S. 946, 99 S.Ct. 2894, 61 L.Ed.2d 318 (1979) (allowing uncorroborated testimony from accomplice); *United States v. Trevino*, 565 F.2d 1317 (5th Cir.), *cert. denied*, 435 U.S. 971, 98 S.Ct. 1613, 56 L.Ed.2d 63 (1978) (allowing accomplice to testify despite fact that immunity was provided and testimony was uncorroborated; because testimony was sufficient for conviction, it was also sufficient under clear and convincing standard). The four-prong test established under *Cofield* provides the appropriate framework for assessing whether other-crime evidence should be

admitted for the jury's consideration. We value the individualized assessment that a case-by-case approach allows concerning the threshold question of admissibility of other-crime evidence. The jury ultimately will determine whether the other-crime evidence is persuasive to convict a defendant beyond a reasonable doubt. Accordingly, we hold that a *per se* ban on uncorroborated other-crime testimony of a cooperating co-defendant is unwarranted.

B.

The Appellate Division found that Gerardi's testimony, and in particular his cross-examination, demonstrated overwhelmingly that it could not satisfy a clear and convincing standard of proof. *Hernandez, supra*, 334 N.J.Super. at 271–72, 758 A.2d 1139. The court referred to Gerardi's admission that he lies under oath with impunity, that he was hostile to defendant because defendant had reneged on a deal with Gerardi, and that he testified in exchange *127 for a favorable plea bargain. The court observed that no fact-finder could come to a conclusion that the clear and convincing standard was satisfied concerning the truthfulness of Gerardi's testimony. We disagree.

[11] [12] The standard of proof referred to as “clear and convincing” was described recently as follows:

Clear and convincing “evidence is that which ‘produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,’ evidence ‘so clear, direct and weighty and convincing as to enable (the factfinder) to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.’ ” *In re Boardwalk Regency Corp.*, 180 N.J.Super. 324, 339, 434 A.2d 1111 (App.Div.1981) (alteration in original) (quoting *Aiello v. Knoll Golf Club*, 64 N.J.Super. 156, 162, 165 A.2d 531 (App.Div.1960)), modified, 90 N.J. 361, 447 A.2d 1335 (1982), appeal dismissed sub nom., *Perlman v. Attorney Gen.*, 459 U.S. 1081, 103 S.Ct. 562, 74 L.Ed.2d 927 (1982); see *In re Purrazzella*, 134 N.J. 228, 240, 633 A.2d 507

(1993); Biunno, *Current N.J. Rules of Evidence*, comment 6 on N.J.R.E. 101(b)(1)(2000). The clear and **1238 convincing standard may be satisfied by uncorroborated testimonial evidence. *In re Seaman*, 133 N.J. 67, 84, 627 A.2d 106 (1993).

[*In re Samay*, 166 N.J. 25, 30, 764 A.2d 398 (2001)].

Pursuant to *Cofield*, the trial court, acting as gatekeeper to the admission of other-crime evidence, must conclude that the testimony concerning the other crime or act satisfies the clear and convincing standard of proof. Ordinarily that fact-finding is made after the court conducts a *Rule 104* hearing outside the presence of the jury. In a *Rule 104* hearing the trial court would hear the specific content of the other-crime testimony and be able to assess its relevance to an issue in dispute and its necessity to the proof of that issue. As an integral part of that assessment, the court also would determine whether it finds the proof of the other crime to be clear and convincing. Finally, the court would employ the balancing test of *Cofield*'s fourth prong that incorporates the traditional balancing test of Rule 403. The court would balance the probative value of the evidence against the undue prejudice to the defendant and decide whether the jury should hear the other-crime evidence.

[13] [14] Here, no *Rule 104* hearing was conducted. Nonetheless, contrary to the Appellate Division, we find that a trial court *128 performing the gatekeeper role required by *Cofield* could determine that the clear and convincing standard of proof was met by Gerardi's testimony. A fact-finder could conclude that in the tough cross-examination of Gerardi, he was brutally honest in answering defense counsel's searching questions. A fact-finder could further conclude that despite Gerardi's answers to theoretical questions about lying under oath, his testimony was truthful concerning his relationship with defendant, including going to New York to purchase crack and their sales together. On direct examination, Gerardi made it no secret that he intended originally to take full responsibility for the drug sale that led to his and defendant's

arrest on February 11, 1997. He explained why he changed his statement concerning defendant's role, and that his agreement to testify was critical to the plea bargain he struck with the State. Those "admissions" were readily acknowledged by Gerardi, not wrested from him on cross-examination. Most importantly, his demeanor and overall candor were observed by the trial court. An abuse of discretion standard of review applies to a trial court's determination concerning the admissibility of other-crime evidence. See *State v. Marrero, supra*, 148 N.J. at 483–84, 691 A.2d 293 (stating that determinations on admissibility of other-crime evidence are best left to trial court's discretion; trial court's decision is entitled to deference and is to be reviewed under abuse of discretion standard). Applying the abuse of discretion standard, we conclude that a trial court could find that the clear and convincing prong of *Cofield*, as applied to the specific facts of this case, was met.

The lack of a *Rule 104* hearing record and express trial court findings is nonetheless troubling. We do not have the benefit of the trial court's analysis of each *Cofield* prong concerning the multiple other-crime statements testified to by Gerardi. Gerardi's testimony addressed 1) his long acquaintance with defendant and how he became engaged in drug sales with or for defendant during the period from the 1996 Christmas holiday time to February 11, 1997; 2) the trip Gerardi took with defendant to New York when defendant purchased a block of cocaine; 3) the reason ****1239** why ***129** Gerardi held the drugs during drug sales but did not retain the cash received for each sale; 4) the explanation for needing defendant's approval to discount the price per bag of crack cocaine when multiple bags were purchased; 5) the assertion that Gerardi and defendant sold drugs together, as Gerardi described, twenty times during the two-month period preceding the day of arrest; and 6) details of Gerardi's and defendant's actions, including drug sale transactions, preceding their arrest on the evening of February 11, 1997. Broken down into its component parts, it would appear that much of Gerardi's testimony could have been found relevant and necessary to a material issue in dispute.

Defendant declined to testify and maintained Gerardi only was paying him back for a loan when Gerardi handed defendant cash after the Sanchez sale. As a result of that trial strategy, it fell to the jury to decide one essential issue: whether the exchange of money between Gerardi and defendant was a legitimate financial transaction or a drug deal. Some of the prior dealings between Gerardi and defendant were relevant to the inquiry. For example, Gerardi's testimony regarding a trip with defendant to New York to buy a \$300–\$400 block of crack cocaine, if close in time to February 11, 1997, could establish the opportunity for a drug deal. Similarly, temporally proximate drug sales could be admitted to counter Hernandez's suggestion that Gerardi's "motive" or "state of mind" in giving him money and his "motive" or "state of mind" in receiving it on February 11, 1997 was repayment of a loan. On the present record, those are the only "other crime" uses that appear legitimate. However, we leave open the possibility that on a complete record after a *Rule 104* hearing and full exposition by the parties of their legal positions regarding temporally proximate other-crime evidence, that some other use might be proper. That is for the trial court to determine. In short, if fully analyzed, a trial court could find that portions of Gerardi's testimony could pass the *Cofield* four-part analysis. However, a reviewing court should have a record in which the trial court's analysis and findings are expressly stated.

***130 [15]** Having said that, the record does not demonstrate any basis for concluding that *Cofield*'s fourth prong balancing test could be satisfied in respect of Gerardi's statement that he and defendant sold drugs in the manner described twenty times during the two months prior to their arrest. That extremely prejudicial testimony smacks of prohibited "propensity" evidence. To be sure, the question of defendant's constructive possession of the drugs held by Gerardi the evening of February 11, 1997, was genuinely in issue at trial. But, the probative value of the reference to twenty earlier sales over a two-month period appears to be outweighed by its obvious prejudicial effect. And, even if one could hypothesize some weighty probative value to attribute to that troubling testimony that would outweigh its undue

prejudicial affect, it is difficult, if not impossible, to divine the limiting instruction that could offset its “propensity” impact. In fact, no aspect of the trial court’s charge concerned itself with that specific testimony.

[16] We note that the prosecutor’s proffer did not inform the trial court of that portion of Gerardi’s testimony concerning the twenty prior sales. Had a Rule 104 hearing been held we presume that that portion of his testimony would have been revealed. Also, there was no ****1240** objection at the time Gerardi testified. Nonetheless, the prejudicial impact of Gerardi’s testimony that he engaged in drug sales with or for defendant twenty times in the approximately two-month period preceding his arrest is sufficient to raise reasonable doubt about whether it led to defendant’s conviction. Its admission was capable of producing an unjust result based on the record as presented in this appeal. *R. 2:10–2*.

C.

[17] Although the Appellate Division based its decision to reverse defendant’s conviction on the failure of Gerardi’s other-crime testimony to satisfy the third prong of the *Cofield* test, the panel also stated that it was “constrained to note that the charge ***131** to the jury failed to meet the requirement of *Cofield* that the jury be specifically advised of the limited use it may make of other-crimes evidence.” *Hernandez, supra*, 334 N.J. Super. at 273, 758 A.2d 1139. The panel faulted the instruction for failing to focus the jury properly on the purposes for which the evidence was offered and for failing to provide the jury with a sufficient factual basis to assist it in understanding the limited applicability of the evidence. *Ibid.* We agree with the Appellate Division that the deficiency in the jury charge requires reversal and a new trial. We also note that the Attorney General informed the Court at oral argument that he agrees that the instruction was flawed, parting company with the prosecutor on that issue.

[18] **[19]** A carefully crafted limiting instruction must explain to the jury the limited purpose for

which the other-crime evidence is being offered. *Fortin, supra*, 162 N.J. at 534, 745 A.2d 509. “[T]he inherently prejudicial nature of such evidence casts doubt on a jury’s ability to follow even the most precise limiting instruction.” *Stevens, supra*, 115 N.J. at 309, 558 A.2d 833. In setting forth the prohibited and permitted purposes of the evidence the trial court must include within the instruction “sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere.” *Id.* at 304, 558 A.2d 833. Mere reference to the illustrative exceptions contained in the *Rule* is not sufficient. *Id.* at 305, 558 A.2d 833.

At the close of trial, the court instructed the jury as follows:

All right. Now, ladies and gentlemen, in this particular case the State has introduced testimony through the witness, George Gerardi, as to alleged prior acts allegedly concerning drug distribution by Mr. Hernandez and by Mr. Gerardi himself allegedly working for and with Mr. Hernandez.

Now, ladies and gentlemen, normally such evidence of prior alleged wrongs or uncharged crimes or acts are not permitted under the Rules of Evidence. This is because our Rules of Evidence specifically exclude evidence that a defendant has committed uncharged crimes or wrongs or acts if it is offered only to show that he had a disposition or tendency to do wrong and therefore must be or is likely guilty of the instant charges.

***132** However, our rules do permit evidence of uncharged crimes, wrongs or acts when the evidence is used for some other purpose.

In this case, again, evidence has been admitted through the testimony of Mr. ****1241** Gerardi regarding past alleged acts of drug distribution by Mr. Hernandez.

Ladies and gentlemen, you may consider such evidence when considering factors such as Mr. Hernandez’ state of mind on the day in question, February 11, 1997, and his motive, if any, for allegedly participating in the charged offenses.

You may also consider such evidence as it may relate to the alleged *modus operandi*, meaning method of operation, of drug distribution as testified to by Mr. Gerardi allegedly involving Mr. Gerardi and Hernandez.

You should consider this evidence when considering these factors, but you may not use this evidence as substantive evidence. For example, you may not say that if he engaged in such activities before February 11, 1997, then, he must be guilty of the offenses charged on that date. Again, you may only use the evidence as I have just explained it herein and not for any other purpose.

[20] The trial court informed counsel of the proposed instruction in advance and gave defense counsel additional time to consider whether objections would be made. Defendant did not object to the charge. Defendant asserted that the instruction was flawed only when the case reached the Appellate Division. Thus, under the plain error rule, errors in the instruction should be disregarded unless “clearly capable of producing an unjust result.” *R. 2:10–2*. “Under that standard the issue becomes whether the instruction created a possibility of injustice, defined to mean ‘one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.’” *Marrero, supra*, 148 N.J. at 494, 691 A.2d 293.

As the charge reflects, the jury was instructed on the prohibited uses of the evidence. The flaw in the instruction lies in its failure to focus the jury precisely on the permissible uses of the other-crime evidence in the context of the facts of this case and those issues genuinely in dispute. Without expressing a view on the permissibility of all uses cited by the trial court, we note that the instruction did not explain how the evidence was to be legitimately examined without being considered as propensity evidence. The trial court did not tie the various aspects of Gerardi's other-crime evidence to issues in the case that genuinely were disputed when counseling the jury on the precise, and limited, permissible use of *133 the evidence as required by *State v. G.S., supra*, 145

N.J. 460, 472, 678 A.2d 1092 (1996). Although the court did caution the jury against considering the testimony as evidence of defendant's propensity to commit the charged crimes, the Appellate Division correctly concluded that the trial court did not explain specifically its permissible use in connection with the facts of this case. That shortcoming in the charge requires reversal of defendant's conviction because the only evidence of defendant's guilt was Gerardi's testimony and Officer Morales's arguably equivocal observations that, standing alone, could leave the jury with a reasonable doubt. *State v. Bragg*, 295 N.J. Super. 459, 468–69, 685 A.2d 488 (App.Div.1996). The flaw in the charge is acute in respect of the testimony that Gerardi and defendant sold drugs as he described on twenty other occasions during the two months prior to their arrest. Accordingly, the deficiency in the instruction is sufficient to raise reasonable doubt about the reliability of defendant's conviction and accordingly is error capable of producing an unjust result. *R. 2:10–2*.

IV.

The judgment of the Appellate Division is affirmed as modified and the matter is **1242 remanded to the Law Division for further proceedings consistent with this opinion. In a retrial, the court should conduct a *Rule 104* hearing on all aspects of the precise other-crime testimony, if any, to be offered by Gerardi or any other witness.

VERNIERO, J., concurring.

I join the Court's disposition substantially for the reasons expressed in its comprehensive opinion. I write separately to express my view that the adequacy of the jury instruction is a close question, especially when considered under the plain-error standard. The critical language in the charge given in this case is similar to language found in the model charge, and in charges sustained in other cases. See *134 *State v. G.S.*, 145 N.J. 460, 678 A.2d 1092 (1996); *State v. Cusick*, 219 N.J. Super. 452, 530 A.2d 806 (App.Div.), *certif. denied*, 109 N.J. 54, 532 A.2d 1118 (1987). I resolve my doubts in favor of defendant principally because

the other-crimes evidence broadly admitted below warranted a particularly forceful instruction “to enable the jury to comprehend and appreciate the fine distinction to which it [was] required to adhere.” *State v. Cofield*, 127 N.J. 328, 341, 605 A.2d 230 (1992) (quoting *State v. Stevens*, 115 N.J. 289, 304, 558 A.2d 833 (1989)).

Additionally, as noted by the majority, the Attorney General acknowledged at oral argument that the jury charge was inadequate. By statute and as recognized in decisional law, the Attorney General is the chief law enforcement officer and supervises all prosecutors. *N.J.S.A. 52:17B-98*, – 103; *Wright v. State*, 169 N.J. 422, 451–52, 778 A.2d 443 (2001). In this narrow setting, the Attorney General's acknowledgment arguably constitutes a withdrawal of the jury instruction issue from

this appeal, notwithstanding the contrary position advanced by the county prosecutor.

Under all the circumstances, the Appellate Division's determination in respect of the jury charge should not be disturbed.

For affirmance as modified, remand—Chief Justice PORITZ and Justices STEIN, COLEMAN, LONG, VERNIERO, LaVECCHIA, and ZAZZALI—7.

Opposed—none.

All Citations

170 N.J. 106, 784 A.2d 1225

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

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)
Disagreed With by	 1. <u>State v. Aaron L.</u> MOST NEGATIVE 865 A.2d 1135 , Conn. CRIMINAL JUSTICE - Evidence. Sufficient evidence of defendant's prior uncharged misconduct existed to be admissible to common scheme in sexual assault trial.	Feb. 15, 2005	Case		—

Citing References (97)

Treatment	Title	Date	Type	Depth	Headnote(s)
Discussed by	 1. State v. Skinner ” 95 A.3d 236, 247+ , 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		4 5 7 A.2d
Discussed by	 2. State v. Gillispie ” 26 A.3d 397, 415+ , 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		4 7 9 A.2d
Discussed by	 3. State v. Barden ” 949 A.2d 820, 826+ , N.J. CRIMINAL JUSTICE - Evidence. Probative value of evidence that co-defendant bought cocaine from defendant 30 times was outweighed by prejudicial effect.	June 24, 2008	Case		15 17 A.2d
Discussed by	4. State v. Lykes ” 933 A.2d 1274, 1287+ , N.J. CRIMINAL JUSTICE - Witnesses. Rule regarding inadmissibility of other crimes evidence did not bar limited impeachment use of defendant's earlier admission.	Nov. 05, 2007	Case		11 12 A.2d
Discussed by	5. State v. Holmes ” 2013 WL 1663280, *7+ , N.J.Super.A.D. Defendant Omar Holmes appeals from his conviction by a jury for murder and weapons offenses. The charges arose from the shooting of a young man outside a club in Elizabeth after a...	Apr. 18, 2013	Case		4 18 19 A.2d
Discussed by	6. State v. Scott ” 2010 WL 135106, *7+ , N.J.Super.A.D. Following a jury trial, defendant Kevin Scott was convicted of possession of cocaine, N.J.S.A. 2C:35-10(a)(1). The trial judge also convicted defendant of the disorderly persons...	Jan. 15, 2010	Case		4 12 A.2d
Disagreed With by 	 7. State v. Aaron L. 865 A.2d 1135, 1153 , Conn. CRIMINAL JUSTICE - Evidence. Sufficient evidence of defendant's prior uncharged misconduct existed to be admissible to common scheme in sexual assault trial.	Feb. 15, 2005	Case		—
Cited by	 8. State v. Rose 19 A.3d 985, 999 , 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		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	 9. State v. Reddish 859 A.2d 1173, 1207 , N.J. CRIMINAL JUSTICE - Counsel. A defendant has the right to appear pro se during both guilt and penalty phases of a capital prosecution.	Nov. 10, 2004	Case		17 A.2d
Cited by	 10. State v. Darby  809 A.2d 138, 143+ , N.J. CRIMINAL JUSTICE - Robbery. Evidence of other crime was inadmissible in robbery prosecution.	Nov. 19, 2002	Case		2 A.2d
Cited by	 11. State v. Long  801 A.2d 221, 235 , N.J. CRIMINAL JUSTICE - Evidence. Victim's statements to her mother that defendant's mother had fallen and died were part of the res gestae.	July 15, 2002	Case		12 A.2d
Cited by	12. State v. Santamaria 2017 WL 2859468, *9 , N.J.Super.A.D. On October 1, 2010, a Middlesex County grand jury returned Indictment No. 10–10–1436, charging defendant, formerly a middle school science teacher, with various counts of sexual...	June 30, 2017	Case		4 12 A.2d
Cited by	13. State v. C.W.  156 A.3d 1088, 1104+ , N.J.Super.A.D. CRIMINAL JUSTICE - Bail. General standard of review of an order granting or denying pretrial detention, under state's Bail Reform Act, is abuse of discretion.	Mar. 21, 2017	Case		5 A.2d
Cited by	14. State v. Bethea  2016 WL 6440654, *4+ , N.J.Super.A.D. Defendant appeals from his June 12, 2014 convictions for swindling and cheating at casino gaming, N.J.S.A. 5:12–113(a). We affirm. On August 15, 2013, a craps dealer at the Borgata...	Nov. 01, 2016	Case		19 A.2d
Cited by	15. State v. Prall 2015 WL 11438112, *13 , 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		—
Cited by	16. State v. Terrell 173 A.3d 194, 237 , N.J.Super.A.D. CRIMINAL JUSTICE - Jury. Trial court did not abuse its discretion by releasing juror during deliberations based on determination that she suffered emotional distress.	May 03, 2016	Case		4 A.2d
Cited by	 17. State v. Garrison 2015 WL 5009222, *4 , N.J.Super.A.D. Defendant, Carl J. Garrison, appeals his conviction for aggravated sexual assault, sexual assault, and endangering the welfare of a child. Since we conclude that the court's ruling...	Aug. 17, 2015	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	18. State v. Battles 2015 WL 3767483, *2, N.J.Super.A.D. Defendant, Raheem Battles, appeals from his conviction for carjacking and theft, arguing the trial court erred in presenting "other crimes" evidence and in barring defendant from...	June 18, 2015	Case		—
Cited by	19. State v. A.E.H. 2015 WL 2473155, *4, N.J.Super.A.D. Tried by a jury, defendant A.E.H. was convicted of disorderly persons simple assault, N.J.S.A. 2C:12–1(a), a lesser-included offense of the original charge of second-degree...	June 02, 2015	Case		—
Cited by	20. State v. Gatti 2014 WL 5460827, *2, N.J.Super.A.D. Defendant appeals from her conviction and sentence following a jury verdict finding her guilty of two counts of third-degree uttering a forged instrument, N.J.S.A. 2C:21–1(a)(3),...	Oct. 29, 2014	Case		3 4 A.2d
Cited by	21. State v. Dawson 2014 WL 3818685, *3, 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		3 A.2d
Cited by	22. State v. Careno 2014 WL 3557696, *7, N.J.Super.A.D. Defendant Marcus Zapata Careno was convicted of first-degree kidnapping, N.J.S.A. 2C:13–1(b), and simple assault, N.J.S.A. 2C:12–1(a)(1), a lesser-included offense of second-degree...	July 21, 2014	Case		4 12 A.2d
Cited by	23. State v. Lindsey 2014 WL 2971236, *5, N.J.Super.A.D. Defendant Lloyd Lindsey appeals from denial of his petition for post-conviction relief (PCR) alleging ineffective assistance of counsel. The court did not conduct an evidentiary...	July 03, 2014	Case		—
Cited by	24. State v. Smith 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		3 A.2d
Cited by	25. State v. Hernandez 2014 WL 714715, *3, 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		3 A.2d
Cited by	26. State v. Kearney 2014 WL 103228, *5, N.J.Super.A.D. Tried by a jury, defendant Latisha M. Kearney was convicted of second-degree aggravated assault, N.J.S.A. 2C:12–1B(1), and third-degree possession of a weapon for an unlawful...	Jan. 13, 2014	Case		3 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	27. <u>State v. Sudlow</u> 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		14 A.2d
Cited by	28. <u>State v. Eubanks</u> 2013 WL 1830804, *5 , N.J.Super.A.D. Tried by a jury following the denial of his motion to suppress, defendant Timothy Eubanks was convicted of third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1) (count one);...	May 02, 2013	Case		2 A.2d
Cited by	29. <u>State v. Grant</u> 2012 WL 3000346, *6 , N.J.Super.A.D. Following a four day trial in January 2008, a jury convicted defendant Lamont Grant of third-degree aggravated assault, N.J.S.A. 2C:12-1b(7); disorderly persons simple assault,...	July 24, 2012	Case		3 4 A.2d
Cited by	30. <u>State v. Willis</u> 2012 WL 2603614, *5 , N.J.Super.A.D. On leave granted, the State appeals from the trial court's September 15, 2011 order that denied the State's pre-trial motion to admit at defendant Robby Willis's trial evidence of...	July 06, 2012	Case		3 A.2d
Cited by	31. <u>State v. Franklin</u> 2012 WL 2344602, *6 , 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		4 A.2d
Cited by	32. <u>State v. Carlucci</u> 2011 WL 3611323, *4 , N.J.Super.A.D. Defendant appeals from her conviction for third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (crack cocaine), and a violation of probation...	Aug. 18, 2011	Case		—
Cited by	33. <u>State v. D.M.</u> 2011 WL 2321226, *6 , 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		14 A.2d
Cited by	34. <u>State v. Dennis</u> 2011 WL 709721, *11+ , N.J.Super.A.D. Following a jury trial, defendants Kevin Barnes and Dewan Dennis were convicted of conspiracy, N.J.S.A. 2C:5-2; three counts of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2),...	Mar. 02, 2011	Case		12 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	35. <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		9 A.2d
Cited by	36. <u>State v. Hester</u> 2011 WL 13844, *8 , N.J.Super.A.D. After execution of a personal search warrant upon defendant, Darryl Hester, failed to disclose drugs, but a residential search warrant, executed upon the residence of Theresa...	Mar. 18, 2010	Case		4 A.2d
Cited by	37. <u>State v. J.I.F.</u> 2011 WL 9340, *15+ , N.J.Super.A.D. Defendant J.I.F. appeals from a final judgment convicting him of the lesser-included offense of assault, a disorderly persons offense, contrary to N.J.S.A. 2C:12-1a(1);...	Mar. 04, 2010	Case		2 12 A.2d
Cited by	38. <u>State v. Gillispie</u> 2009 WL 2496683, *8 , N.J.Super.A.D. In these back to back appeals, defendants Dwayne Gillispie and Gregory Buttler, appeal their convictions for offenses arising out of a double homicide that occurred in Barnegat,...	Aug. 18, 2009	Case		—
Cited by	39. <u>State v. J.F.G.</u> 2009 WL 2168681, *11 , N.J.Super.A.D. Defendant J.F.G. appeals from his March 20, 2006 conviction on thirteen counts of endangering the welfare of a child, consisting of: two first-degree convictions under N.J.S.A....	July 22, 2009	Case		19 A.2d
Cited by	40. <u>State v. R.F.</u> 2009 WL 1347396, *8 , N.J.Super.A.D. On February 1, 2006, a Bergen County Grand Jury indicted defendant, R.F., charging him with multiple counts of aggravated sexual assault against his daughter, A.G., born in May...	May 15, 2009	Case		17 19 A.2d
Cited by	41. <u>State v. Cowan</u> 2009 WL 196187, *5 , N.J.Super.A.D. Tried by a jury, defendant Herbert Cowan was convicted of conspiracy to commit robbery in the first degree, N.J.S.A. 2C:5-2a and 2C:15-1; four counts of robbery in the first...	Jan. 29, 2009	Case		7 A.2d
Cited by	42. <u>State v. McCall</u> 2008 WL 5331730, *4 , N.J.Super.A.D. Defendant, Michael McCall, appeals from his conviction in the Law Division following a jury trial in November 2005, of second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2...	Dec. 23, 2008	Case		7 9 11 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	43. State v. Taylor 2008 WL 3164718, *7 , N.J.Super.A.D. Background: Defendant was convicted in a jury trial in the Superior Court, Law Division, Passaic County, of second-degree reckless manslaughter, second-degree possession of a...	Aug. 08, 2008	Case		7 A.2d
Cited by	44. State v. Daniels 2008 WL 2122359, *4 , N.J.Super.A.D. Background: Following a jury trial, defendant was convicted in the Superior Court, Law Division, Atlantic County, of first-degree armed robbery, first-degree conspiracy to commit...	May 21, 2008	Case		17 A.2d
Cited by	45. State v. Baker 945 A.2d 723, 736 , N.J.Super.A.D. CRIMINAL JUSTICE - Extradition and Detainers. Court orders were not equivalent of "detainers" triggering anti-shuttling provisions of Interstate Agreement on Detainers.	Apr. 14, 2008	Case		17 A.2d
Cited by	46. State v. Alvarado 2008 WL 596856, *3 , N.J.Super.A.D. After a trial by jury, defendant, Jorge Alvarado, was found guilty of the murder of seventeen-month-old Jan Carlos Torres, the son of his girlfriend, in violation of N.J.S.A....	Mar. 06, 2008	Case		—
Cited by	47. State v. Cucolo 2007 WL 1518303, *7 , N.J.Super.A.D. Defendant, Frederick Cucolo, was employed as a drug counselor for the Superior Court of New Jersey, Family Division and for the Municipal Court of Belleville. The State alleged...	May 25, 2007	Case		12 A.2d
Cited by	48. State v. Dunns 2007 WL 1452226, *3+ , N.J.Super.A.D. Defendant, Howard L. Dunns, appeals from his convictions relating to two separate burglaries and from the sentences imposed. We affirm but remand for a technical correction to the...	May 18, 2007	Case		—
Cited by	49. State v. Burden 2007 WL 1452228, *3+ , N.J.Super.A.D. Defendant, William J. Burden, appeals from his convictions relating to two separate burglaries and from the sentences imposed. We affirm the convictions and remand for further...	May 18, 2007	Case		—
Cited by	50. State v. Parker 2007 WL 1425486, *9 , N.J.Super.A.D. Background: Defendant was convicted by a jury in the Superior Court, Law Division, Passaic County, of second-degree endangering the welfare of a child. A ten-year term of...	May 16, 2007	Case		19 A.2d
Cited by	51. State v. Risko 2007 WL 737788, *12+ , N.J.Super.A.D. Background: Defendant was convicted in the Superior Court, Law Division, Middlesex County, of fourth-degree possession of a firearm by a person not permitted to have weapons....	Mar. 13, 2007	Case		3 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	52. <u>State v. Collins</u> 2007 WL 107876, *2, N.J.Super.A.D. Following a three day trial, a jury found defendant, Raheem Collins, guilty of: possession of heroin in the third degree in violation of N.J.S.A. 2C:35-10a(1) (count one);...	Jan. 18, 2007	Case		—
Cited by	53. <u>Qualian v. Irwin Seating Co.</u> 2007 WL 92362, *5, N.J.Super.A.D. Background: Race patron brought action against seat manufacturer and the New Jersey Sports and Exposition Authority (NJSEA), alleging product defect and negligence. The Superior...	Jan. 16, 2007	Case		12 A.2d
Cited by	54. <u>State v. Neilsen</u> 2006 WL 3017979, *6, N.J.Super.A.D. Following a jury trial, defendant Brian T. Neilsen was convicted of second degree burglary, contrary to N.J.S.A. 2C:18-2a(1) (Count Five); two counts of second degree aggravated...	Oct. 25, 2006	Case		—
Cited by	55. <u>State v. Lowe</u> 2006 WL 2135810, *5, N.J.Super.A.D. Defendant John C. Lowe, III appeals from a final judgment of conviction and sentence. A jury found him guilty of criminal restraint under circumstances exposing another to risk of...	Aug. 02, 2006	Case		17 A.2d
Cited by	56. <u>State v. Becheam</u> 2006 WL 1995135, *5, N.J.Super.A.D. Background: Defendant was convicted by jury in the Superior Court, Law Division, Essex County, of robbery, felony murder, possession of assault firearm without a permit, possession...	July 19, 2006	Case		1 A.2d
Cited by	57. <u>State v. Ashley</u> 2006 WL 1735951, *8+, N.J.Super.A.D. A Passaic County grand jury indicted defendant Vancleve Ashley for various offenses against three victims: first-degree felony murder of Javier Ramos, N.J.S.A. 2C:11-3a(3) and...	June 27, 2006	Case		—
Cited by	58. <u>State v. Lipinski</u> 2006 WL 1449988, *3, N.J.Super.A.D. Background: Defendant was convicted in the Superior Court, Law Division, Union County, of fourth-degree lewdness. Defendant appealed. Holding: The Superior Court, Appellate...	May 26, 2006	Case		1 A.2d
Cited by	59. <u>State v. McNeil</u> 2006 WL 1320068, *4, N.J.Super.A.D. Defendant Steven McNeil was charged under Indictment 2000-11-0946 with several drug-related offenses committed on two separate occasions. Counts one through five describe offenses...	May 16, 2006	Case		3 A.2d
Cited by	60. <u>State v. Malone</u> 2005 WL 3970693, *8, N.J.Super.A.D. Background: Defendant was convicted in the Superior Court, Law Division, Essex County, of first-degree possession of cocaine with intent to distribute, third-degree possession of...	Apr. 25, 2006	Case		3 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	61. State v. Rehkamp 2006 WL 941861, *6+ , N.J.Super.A.D. Defendant Joseph Rehkamp appeals from a final judgment of conviction and sentence. We affirm the multiple convictions but remand for merger and reconsideration of defendant's...	Apr. 13, 2006	Case		17 A.2d
Cited by	62. State v. Evans 2005 WL 3500583, *10+ , N.J.Super.A.D. Following a jury trial, defendant was convicted of aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), as a lesser included offense of first-degree murder; first degree felony murder,...	Dec. 23, 2005	Case		4 12 A.2d
Cited by	63. McNutt v. Estate of McNutt 2009 WL 3756907, *6 , D.N.J. ESTATE PLANNING AND PROBATE - Claims. Brother and wife (brother) failed to provide sufficient evidence to establish the elements of their breach of contract claim against deceased...	Nov. 06, 2009	Case		8 A.2d
Cited by	64. Ayagarak v. State 2003 WL 1922623, *5+ , Alaska App. A jury convicted Jonathan J. Ayagarak of fourth-degree assault for squeezing his wife behind a door during an argument. For several independent reasons, Ayagarak argues that the...	Apr. 23, 2003	Case		9 A.2d
Cited by	65. State v. Nadzak 2010 WL 3516776, *4 , N.J.Super.A.D. CRIMINAL JUSTICE - Appeals. Testimony of a state expert related to an element the state had the burden to prove and thus was not an improper legal opinion regarding defendant's...	Sep. 03, 2010	Case		—
Mentioned by	66. State v. Vallejo 965 A.2d 1181, 1189 , N.J. CRIMINAL JUSTICE - Instructions. Curative instruction was inadequate to cure error in admitting prejudicial evidence of prior bad acts.	Mar. 10, 2009	Case		—
Mentioned by	67. State v. Grant 2017 WL 2774421, *8 , N.J.Super.A.D. Defendant James E. Grant, Jr. appeals his convictions for the attempted murder of two police officers sitting in their patrol car and weapons charges following a jury trial. Among...	June 27, 2017	Case		3 A.2d
Mentioned by	68. State v. Terrell 2015 WL 10760626, *37 , N.J.Super.A.D. Defendant Rolando Terrell appeals from convictions under two indictments. The first, Indictment No. 09–07–2029, charged him with numerous crimes regarding the September 8, 2008...	May 03, 2016	Case		3 4 A.2d
Mentioned by	69. State v. Gaskins 2016 WL 1637208, *7 , N.J.Super.A.D. Defendant appeals from his convictions for second-degree conspiracy to distribute cocaine, N.J.S.A. 2C:5–2 and 2C:35–5(a)(1) and (b)(2); third-degree conspiracy to distribute...	Apr. 26, 2016	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Mentioned by	70. <u>State v. Norwood</u> 2015 WL 1943841, *2 , N.J.Super.A.D. Defendant Victor Norwood appeals from his conviction by a jury on charges of eluding and resisting arrest and his sentence of ten years imprisonment. We affirm the convictions and...	May 01, 2015	Case		4 A.2d
Mentioned by	71. <u>State v. Gregorio</u> 2015 WL 1860802, *5 , N.J.Super.A.D. Defendant Romulo Gregorio appeals from his conviction by a jury on charges including murder and arson and his sentence of fifty years imprisonment. We affirm. On September 1, 2009,...	Apr. 24, 2015	Case		4 A.2d
Mentioned by	72. <u>State v. Barry</u> 2014 WL 7723570, *4 , N.J.Super.A.D. On December 11, 2009, while alone in her family's home, defendant Keri J. Barry gave birth on a bathroom floor. Four days later, the police found the baby's body wrapped in towels...	Feb. 02, 2015	Case		4 A.2d
Mentioned by	73. <u>State v. Daidone</u> 2014 WL 4288811, *2 , N.J.Super.A.D. Following a jury trial, defendant Charles J. Daidone was convicted of third-degree eluding, N.J.S.A. 2C:29-2b, and fourth-degree hindering apprehension or prosecution, N.J.S.A....	Sep. 02, 2014	Case		4 7 11 A.2d
Mentioned by	74. <u>State v. Minitee</u> 2013 WL 322519, *4 , N.J.Super.A.D. The appeal of defendant Alnesha Minitee returns to us following the Supreme Court's reversal of this court's prior decision suppressing evidence and granting her a new trial. State...	Jan. 29, 2013	Case		4 A.2d
Mentioned by	75. <u>State v. Harris</u> 2012 WL 671927, *4 , N.J.Super.A.D. We granted the State leave to appeal the Law Division's order barring it from using previously-taken photographs of defendant Daysoun Harris holding a sawed-off shotgun at his...	Mar. 02, 2012	Case		—
Mentioned by	76. <u>State v. Goodman</u> 1 A.3d 767, 778 , N.J.Super.A.D. CRIMINAL JUSTICE - Evidence. Other bad act evidence, namely evidence of defendant's gang membership, was admissible in murder prosecution.	Aug. 09, 2010	Case		—
Mentioned by	77. <u>State v. Salter</u> 2009 WL 4981169, *7 , N.J.Super.A.D. CRIMINAL JUSTICE - Evidence. A defendant's conviction for charges of aggravated sexual assault, criminal sexual contact, and endangering a child was reversed due to the...	Dec. 24, 2009	Case		12 A.2d
Mentioned by	78. <u>State v. Cibelli</u> 2009 WL 1635250, *8 , N.J.Super.A.D. Defendant Paul Cibelli, Jr., was convicted of first degree murder, N.J.S.A. 2C:11-3 (count one), third degree hindering apprehension or prosecution, N.J.S.A. 2C:29-3(b) (count...	June 12, 2009	Case		3 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Mentioned by	 79. State v. Castagna 946 A.2d 602, 612 , N.J.Super.A.D. CRIMINAL JUSTICE - Conspiracy. Other crimes evidence was relevant and material to state's theory of motive in prosecution for conspiracy to commit murder.	May 12, 2008	Case		12 A.2d
Mentioned by	80. State v. Bennett 2007 WL 3239199, *5 , N.J.Super.A.D. Defendant Jacob Bennett (Bennett) appeals from his conviction on robbery, aggravated assault, possession of a weapon, and conspiracy charges and the sentence imposed. We affirm....	Nov. 05, 2007	Case		4 A.2d
Mentioned by	 81. State v. Townsend 863 A.2d 380, 390 , N.J.Super.A.D. CRIMINAL JUSTICE - Indictment and Information. More than 20 year delay between incident and issuance of murder indictment did not violate due process.	Jan. 03, 2005	Case		4 A.2d
Mentioned by	82. State v. Anastasia  813 A.2d 601, 606 , N.J.Super.A.D. FAMILY LAW - Child Custody. Defendant did not violate statute prohibiting interference with child custody.	Jan. 16, 2003	Case		—
Mentioned by	83. State v. Putman 848 N.W.2d 1, 9 , Iowa CRIMINAL JUSTICE - Evidence. Court did not abuse its discretion in admitting prior bad act evidence, namely that defendant possessed child pornography.	June 13, 2014	Case		7 9 A.2d
Mentioned by	84. State v. Hunt 2007 WL 4355487, *3 , N.J.Super.A.D. Tried to a jury, defendant was convicted of murder, N.J.S.A. 2C:11-3(a); possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and unlawful possession of a weapon,...	Dec. 12, 2007	Case		12 A.2d
—	85. RECONSIDERING THE STANDARDS OF ADMISSION FOR PRIOR BAD ACTS EVIDENCE IN LIGHT OF RESEARCH ON FALSE MEMORIES AND WITNESS PREPARATION 40 Fordham Urb. L.J. 1493 , 1537+ Introduction. 1494 I. Prior Bad Acts Admissibility and the Incentives It Creates. 1498 A. Origins of the Bar Against Prior Bad Acts Evidence and Its Exceptions. 1498 B. Modern...	2013	Law Review	—	4 A.2d
—	86. Federal Evidence s 4:29, Prior acts in criminal cases-Procedure for admitting and excluding; standard of proof; pretrial notice Federal Evidence	2017	Other Secondary Source	—	—
—	87. Handbook of Federal Evidence s 404:5, Rule 404(b)(2): crimes, wrongs or other acts Dennis enters a Wal-Mart. He brings a television set to the checkout counter. When the clerk scans the television a \$285 price appears. Dennis hands the clerk fifteen \$20 bills....	2017	Other Secondary Source	—	4 7 9 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	88. 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	—	16 17 A.2d
—	89. 2B N.J. Prac. Series F.R.E. 104, Preliminary Questions N.J. Prac. Series Subdivision (a). The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose...	2017	Other Secondary Source	—	11 12 A.2d
—	90. 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	—	9 13 17 A.2d
—	91. 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	—	19 A.2d
—	92. 47 N.J. Prac. Series s 9:5, Restricting use of admitted evidence N.J. Prac. Series N.J.R.E. 105 provides that where relevant evidence is admissible as to one party or for one purpose, but not as to other parties or for other purposes, the judge must restrict the...	2017	Other Secondary Source	—	4 A.2d
—	93. 55 N.J. Prac. Series s 7:19, Opposing authorities-Facts at issue N.J. Prac. Series Character evidence of specific acts that are relevant to basic facts at issue are generally admissible. Evidence Rule 404(b) provides that "[e]xcept as otherwise provided by Rule...	2017	Other Secondary Source	—	12 A.2d
—	94. 55 N.J. Prac. Series s 7:37, Opposing authorities-Relevant to material issue N.J. Prac. Series Evidence Rule 404(b) states as follows: Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a...	2017	Other Secondary Source	—	12 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	95. 55 N.J. Prac. Series s 10:132, Opposing authorities-Relevant to issues N.J. Prac. Series N.J.R.E. 404(b) states as follows: 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...	2017	Other Secondary Source	—	12 A.2d
—	96. Uncharged Misconduct Evidence s 2:10, Act by defendant-Standard or measure of proof required to establish defendant's identity as actor-Types of evidence sufficient to satisfy the standard In § 2:9, we discussed the division of authority over the measure of proof of the defendant's identity. Assume arguendo that we know what standard our jurisdiction employs. The...	2017	Other Secondary Source	—	—
—	97. Winning Evidence Arguments s 404:5, Rule 404(b)(2): crimes, wrongs or other acts Dennis enters a Wal-Mart. He brings a television set to the checkout counter. When the clerk scans the television a \$285 price appears. Dennis hands the clerk fifteen \$20 bills....	2018	Other Secondary Source	—	4 7 9 A.2d