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January 26, 2018

Honorable Robert G. Malestein, J.S.C.
Superior Court of Cumberland County
60 W. Broad Street
Bridgeton, New Jersey 08332

**Re: State v. Jeffrey Profitt
Indictment No. 17-0200118-I**

Dear Judge Malestein:

Please accept this letter brief in lieu of a more formal submission in opposition to the State's motion for reconsideration of the Court's Order severing Count Eight of the Indictment.

PROCEDURAL HISTORY

On February 8, 2017, Officer Profitt was indicted on eight counts. Count One was Second Degree Aggravated Assault, in violation of N.J.S.A. 2C:12-1(b)(1); Count Two was Third Degree Aggravated Assault, in violation of N.J.S.A. 2C:12-1(b)(7); Count Three was Third Degree Tampering With Public Records, in violation of N.J.S.A. 2C:28-7(a)(2); Count Four was Third Degree Tampering With Public Records, in violation of N.J.S.A. 2C:28-7(a)(3); Count Five was Fourth Degree Tampering With Physical Evidence, in violation of N.J.S.A. 2C:28-6(1); Count Six was Fourth Degree Obstructing Administration of Law, in violation of N.J.S.A. 2C:29-1(a);

Count Seven was Second Degree Official Misconduct, in violation of N.J.S.A. 2C:30-2; and Count Eight was Second Degree Pattern of Official Misconduct, in violation of N.J.S.A. 2C:30-7.

Following the indictment, Defendant filed a Motion to Dismiss the Indictment, or, alternatively, to Sever Count Eight of the Indictment. The Court heard oral argument on December 11, 2017. On that date, the Court denied the Motion to Dismiss and granted the Motion to Sever Count Eight of the Indictment.

In granting the Motion to Sever, the Court determined that the history of alleged conduct incorporated by Count Eight, Pattern of Official Misconduct, is not intrinsic to proving counts One through Seven, which deal entirely with alleged events that occurred on April 11, 2016. (Transcript of Motion, State's Exhibit 6, p. 12, line 13 – p. 13, line 3). The Court also recognized that each of the alleged acts pertinent to Count Eight were discrete acts not relevant to a material issue regarding the events of April 11, 2016. (State's Exhibit 6, p. 13, line 23 – p. 14, line 10).

At oral argument, the State asserted the pre-2016 events are relevant because they form a pattern. (State's Exhibit 6, p. 14, line 20). The State also argued that those prior acts evidence intent and absence of mistake. (State's Exhibit 6, p. 16, lines 10 – 17). The Court recognized those arguments and that they might have some minimal relevance to those issues, but ultimately concluded that they did not rise to the standard of clear and convincing. (State's Exhibit 6, p. 32, lines 2 – 22). Rather, and even if the evidence was clear and convincing, the pre-2016 alleged acts are so prejudicial that they will divert the minds of the jury from the material issues implicated by counts One through Seven. (State's Exhibit 6, p. 32, line 22 – p. 33, line 4).

The State now moves for Reconsideration of the Court's Order to Sever Count Eight on the basis that the Court failed to consider that the pre-2016 acts are necessary to demonstrate proof of Defendant's state of mind.

STATEMENT OF FACTS

April 11, 2016

On April 11, 2016, Alfonzo Williams, Sr. called police for assistance at City Liquor in Millville, New Jersey, regarding an issue with an unidentified woman. Millville Police Officer Jeffrey Profitt was dispatched to City Liquor. When Officer Profitt arrived, Mr. Williams, Sr. was intoxicated and belligerent. He told Officer Profitt that he called police “because of dat hoe ass bitch.” However, Mr. Williams, Sr. would not clarify what the problem was because he only wanted to speak with one particular police officer. The situation devolved into Mr. Williams, Sr. yelling, screaming, and cursing, to the point of causing public alarm. At that point, Officer Profitt made the decision to arrest Mr. Williams, Sr. for disorderly conduct. When Officer Profitt attempted to arrest and handcuff him, he pulled away from Officer Profitt. Mr. Williams continued to be uncooperative, and Officer Profitt had to assist him into the vehicle. In his report, Officer Profitt did not indicate that he had to use any force to get Mr. Williams into the vehicle. Officer Profitt’s arrest report indicates that the arrest was made 3:45 p.m. (Exhibit A of Defendant’s September 13, 2017 brief, Officer Profitt’s Investigation Report).

Mr. Williams, Sr. was then transported to the Millville Police Station. At the station, his handcuffs were removed and he was processed for Disorderly Conduct and Resisting Arrest. After he was processed, Officer Profitt determined that Mr. Williams, Sr. could not safely be released due to his high level of intoxication. Therefore, Officer Profitt called for an ambulance to transport Mr. Williams, Sr. to the hospital. (Exhibit A of Defendant’s September 13, 2017 brief).

As per Officer Profitt’s investigation report, when the ambulance arrived, Mr. Williams, Sr. refused to go to the hospital. Officer Profitt escorted Mr. William’s to the sallyport where the ambulance and two rescue squad members, Joseph Greensmith and Freddie Mora, were

waiting. While in the sallyport, Mr. Williams, Sr. started to pull away from Officer Profitt and flailed his arms. Officer Profitt then decided to handcuff Mr. Williams, Sr. again. Officer Profitt was able to get a handcuff on one of Mr. Williams, Sr.'s arms, but Mr. Williams, Sr. was pulling away, so it was difficult for Officer Profitt to get the other cuff on. Fearing that Mr. Williams, Sr. could use the single cuffed arm as a weapon, Mr. Williams, Sr. took him down to the ground. After being taken to the ground, Mr. Williams, Sr. was taken to the hospital. (Exhibit A of Defendant's September 13, 2017 brief).

Immediately after the incident in the sallyport, Officer Profitt reported to his supervisor, Lt. Cranmer, that he took Mr. Williams, Sr. to the ground. He also told Lt. Cranmer that there was blood in the sallyport that needed to be cleaned up because Mr. Williams, Sr. hit his head. Lt. Cranmer then called a city employee to have the blood cleaned up. (Exhibit E of Defendant's September 13, 2017 brief; Transcript of Lieutenant Harrison Cranmer's Interview; p. 21, line 35 – p.26, line 29).

Dispatch records indicate that the incident in the sallyport took place between 4:24 and 4:26 p.m. After the incident was over, Officer Profitt created a Use of Force Report. The Use of Force Report documents that Mr. Williams, Sr. was injured while resisting police control at 4:30 p.m. It also indicates that Mr. Williams, Sr. was hospitalized for the same injuries. On the Use of Force Report, the location of the incident is written as 640 North High Street, Millville, which was the City Liquor Officer Profitt initially responded to, rather than the Millville Police Station. (Exhibit B of Defendant's September 13, 2017 brief, Officer Profitt's Use of Force Report).

A few hours after Mr. Williams, Sr. left on the ambulance and Officer Profitt's shift was over, Millville Police received a call from Mr. Williams, Sr.'s son, Mr. Williams, Jr. He complained about injuries that his father received while in police custody. His call prompted an

investigation by the Cumberland County Prosecutor's Office into the use of force on Mr. Williams, Sr. The investigation began about four hours after the incident in the sallyport. By then, blood from Mr. Williams, Sr.'s injuries in the sallyport had been cleaned up by maintenance personnel, and Officer Profitt had gone home and washed his uniform.

On July 27, 2016, Mr. Williams, Sr. pled guilty to Resisting Arrest in the City of Millville Municipal Court. The Disorderly Persons charge was dismissed the same day.

Pre-2016 Allegations

The State has identified eleven other cases involving the use of force that Officer Profitt was involved with in which Officer Profitt allegedly did not adequately document the incident. The cases identified span between February 5, 2013 and December 12, 2015. The alleged misconduct identified by the State varies significantly between each of those incidences.

For instance, in the Paris Johnson case, the State alleges that Officer Profitt checked that Mr. Johnson had a weapon in his Use of Force Report, but failed to document a weapon his Investigation Report. The State does not allege that Mr. Johnson suffered any injury. (p. 15 of the State's Brief).

In contrast, in the case of Harry Gatanis, the State alleges Officer Profitts failed by not sufficiently describing Mr. Gatanis's injury. In his Investigation Report and Use of Force Report, Officer Profitt accurately documented that he used force on Mr. Gatanis, that Mr. Gatanis was injured, and that Mr. Gatanis went to the hospital because his head hurt. However, the State alleges that Mr. Profitt violated MPD policy by not including a description of alleged blood and redness on Mr. Gatanis's face. (p. 17 of the State's Brief).

The State alleges that Officer Profitt utilized excessive force in each of these cases. However, it is not clear how the State has arrived at the conclusion that Officer Profitt used

excessive force. The State has not offered any explanation as to why each of these incidences constitute excessive force, rather than acceptable force. The State has only expounded upon the documentation errors. A number of these incidences have been administratively investigated, but there have been no findings that Officer Profitt used excessive force.

LEGAL ARGUMENT

POINT I: THE STATE'S MOTION FOR RECONSIDERATION SHOULD BE DENIED.

Reconsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996); Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257, 263 (App. Div. 1987), certif. denied 110 N.J. 196 (1988). A litigant should not seek reconsideration merely because of dissatisfaction with a prior decision of a court. Id. Rather, reconsideration is appropriate only in those cases that fall within the “narrow corridor” where: (1) the court has expressed its decision based upon a palpably incorrect or irrational basis; or, (2) the court obviously failed to consider or appreciate the significance of probative, competent evidence. D’Atria v. D’Atria, 242 N.J. Super. 392, 401-402 (Ch. Div. 1990).

As the D’Atria court reminded, “if repetitive bites at the apple are allowed, the core will swiftly sour.” Id. at 401-02. In Cummings, the Appellate Division rejected a plaintiff’s motion for reconsideration because it was premised only on a new theory of liability, but not on any newly discovered factual predicates. Cummings, supra, 295 N.J. Super. at 384. The fact that, “[i]t was only when plaintiff’s counsel, an associate, discussed the matter with a senior partner in the same law firm, that plaintiff’s counsel concluded that plaintiff was an invitee,” did not rescue the motion from the requirement that the trial judge misapplied or overlooked law, or that new relevant facts had been uncovered. Ibid. Reconsideration cannot be used to expand the record and reargue a

motion. Capital Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008).

The State has already had its bite at the apple. The State's motion for reconsideration is simply a rehashing of its prior failed arguments with an expanded record. The State is asserting the same arguments that the Court has already considered and rejected. The significance of those arguments is not improved by newly submitted color photographs. As the Court previously determined, the alleged pre-2016 conduct is a series of independent, finite, discrete acts. The acts alleged in Count Eight are not clear and convincing evidence that Defendant is guilty of the other seven counts of the Indictment. And the probative value of the evidence is outweighed by its apparent prejudice, as it is likely that a jury will be distracted from real material issues and likely to consider that the Defendant had a propensity to act in conformity with his alleged history. The State's Motion for Reconsideration should be denied.

A. DEFENDANT'S ALLEGED PRE-2016 ACTS ARE NOT ADMISSIBLE TO PROVE COUNTS ONE THROUGH SEVEN.

R. 3:7-6 permits that "[t]wo or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged are of the same or similar character" However, counts in an indictment may be severed if joinder would serve to prejudice the defendant. R. 3:15-2(b).

Central to the inquiry of whether prejudice exists is "whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges." State v. Pitts, 116 N.J. 580, 601-02 (1989). If the evidence would be admissible at both trials, then the trial court may consolidate the charges because "a defendant will not suffer any more prejudice in a joint trial than he would in separate trials." State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div.), certif. denied, 94 N.J. 531 (1983).

Under N.J.R.E. 404(b), other bad acts are not admissible to show conformity with that prior conduct, but they may be admitted for other purposes such as proof of motive, opportunity, intent, preparation or plan, knowledge, identity, or absence of mistake. N.J.R.E. 404(b). To determine whether other bad acts may be admitted, or in this case, whether Count Eight should be tried with counts One through Seven, the Court must consider the factors set forth in State v. Cofield, 127 N.J. 328, 338 (1992). These factors are:

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.

Ibid. (citation omitted).

Generally, in order to be admissible, the proffered prior bad acts must meet all four of these tests.

It has been said that N.J.R.E. 404(b) is a rule of exclusion rather than inclusion. State v. P.S., 202 N.J. 232, 255 (2010). Alleged bad acts are not admissible when such evidence is used to prove a defendant's alleged criminal propensity. Id. at 263. Here, joinder of Count Eight would only serve to prejudice Officer Profit. A joint trial would subject Officer Profit to significantly more prejudice than separate trials trial. Coruzzi, supra, 189 N.J. Super. at 299. None of the matters relevant to Count Eight would be admissible in a trial on the remaining counts as the proffered evidence does not pass any of the four Cofield test factors.

1. THE ALLEGED PRE-2016 ACTS ARE NOT RELEVANT TO ANY ISSUES MATERIAL TO COUNTS ONE THROUGH SEVEN.

“The first part of the Cofield test states that the evidence of the prior bad act, crime or wrong must be relevant to a material issue that is genuinely disputed.” State v. Covell, 157 N.J. 554 564-65 (1999). Evidence is relevant if it tends to prove or disprove any fact of consequence to the determination of the action. N.J.R.E. 401. There must be a logical connection between the proffered evidence and a fact at issue. State v. Hutchins, 241 N.J. Super. 353, 358 (App. Div. 1990). It is not enough that the evidence be relevant to a material fact; it must relate to an issue actually in dispute. See State v. Stevens, 115 N.J. 289, 301-02, 307 (1989). The proffered reason for the admittance of the alleged bad acts must be an intellectually honest one, not a mere excuse. State v. G.V., 162 N.J. 252, 259 (2000).

While New Jersey courts have expressly barred prior bad acts from being used to show that a person acted in conformity with that history, the evidence may be used for a limited number of other purposes. Prior bad acts could potentially be used to show proof of motive, opportunity, intent, preparation or plan, knowledge, identity, or absence of mistake. N.J.R.E. 404(b).

Here, the State argues that the prior acts are being proffered to show Defendant’s state of mind on April 11, 2016. However, the State has not articulated how exactly the pre-2016 acts show motive, opportunity, intent, plan, or knowledge, or absence of mistake or accident. Rather, the State repeatedly, but merely, states that the prior acts are necessary to prove those elements.

In the context of assaults, the Appellate Division has held that the fact that a defendant previously assaulted one person cannot be used as evidence that a defendant intended to assault a different person. In State v. Sanders, the defendant was on trial for beating his infant daughter to death. State v. Sanders, 320 N.J. Super. 574, 576 (App. Div. 1999) The State sought to introduce evidence that the defendant had assaulted the infant’s mother on prior occasions for the purpose

of demonstrating that the defendant intentionally or knowingly killed his daughter. Id. at 581. The Appellate Division held that it was reversible error for the trial to admit the prior assault evidence as there was no logical connection to any present material issues. Ibid. The court found that:

Defendant's prior assaults upon [the victim's mother] were simply evidence of defendant's assaultive personality and were offered by the State for the jury to conclude that defendant's assaultive personality demonstrated his actual intent to murder his daughter. By offering evidence of defendant's prior bad acts, the State sought to introduce evidence violative of N.J.R.E. 404(b), i.e., the "disposition of a person in order to show that he acted in conformity therewith."

Id. at 584.

Similarly, in a sexual assault case, the Supreme Court held that evidence of a prior alleged sexual assault committed by the defendant was not relevant to show proof of a plan. State v. J.M., 225 N.J. 146, 160 (2016). The testimony was not sufficient to "establish the existence of a larger continuing plan of which the crime on trial is a part[.]" Ibid. (quoting Stevens, supra, 115 N.J. at 306. "A 'strong factual similarity' between the two sexual assaults is not enough to reveal a plan." Ibid.

There are, however, other scenarios in the assault context during which a defendant's state of mind can permissibly be evidenced through prior bad acts. For example, prior threats by a defendant against the victim are admissible to show that a defendant intended to and purposely assaulted the victim. State v. Ramseur, 106 N.J. 123, 266-67 (1987), cert. den. 508 U.S. 947 (1993). A mother's previous extreme disciplinary measures, which occurred five years prior to the acts charged as child endangerment, are relevant to her intent to inflict harm on her son and her malice towards him. State v. T.C., 347 N.J. Super. 219, 232-33 (App. Div.), cert. den. 177 N.J. 222 (2003). Additionally, in a prosecution for ethnic terrorism, the State has been permitted to introduce evidence of the defendant's past acts harassing his victims and remarks disparaging

their race to prove the defendant's intent and motive. State v. Davidson, 225 N.J. Super. 1, 10-3 (App. Div.), cert. den. 111 N.J. 594 (1988).

Here, except for impermissible propensity purposes, the State has failed to enunciate the exact manner in which the pre-2016 alleged acts are relevant to the April 11, 2016 incident. The link between the pre-2016 allegations and the April 11, 2016 allegations is analogous to that of the prior bad acts in Sanders. Those prior uses of force offer nothing other than, perhaps, to show that Defendant had an "assaultive personality." Sanders, supra, 320 N.J. Super. at 584. Barring propensity, there is no logical link between the alleged April 11, 2016 assault and the prior uses of force.

In fact, the link between the acts proffered here is even more tenuous than that in Sanders. In Sanders, the prior assaults occurred in the same household as the events in issue and between related parties. Here, none of the parties had any relationship to each other. All of the alleged uses of excessive force occurred at diverse times and places. They were all independent and discrete events. They were not part of a larger and continuing plan. None of the relationships or similarities that existed between the alleged past bad acts in Ramseur, T.C., or Davidson exist here to demonstrate Defendant's April 11, 2016 state of mind.

The State also argues that the pre-2016 events are relevant because they show the absence of mistake. However, there is no actual logical link to the prior alleged bad acts. At best, they only show a potential general propensity to engage in the alleged misconduct. In State v. Marshall, the defendant alleged that the prosecutor committed a Brady violation by intentionally withholding exculpatory evidence. State v. Marshall, 123 N.J. 1, (1991). The defendant sought to show that the prosecutor did not merely make a mistake in failing to disclose the exculpatory material by

introducing evidence that the prosecutor had withheld exculpatory material in other cases. Id. at 186.

On appeal, the Supreme Court affirmed that the trial court correctly excluded evidence of the prosecutor's prior failure to release exculpatory evidence. Id. at 188. It held that the only relevance of the prior conduct was to show a general propensity on the part of the prosecutor to willfully withhold exculpatory matter from the defense. Ibid.

The Marshall case is directly on point here. The State is attempting to argue that because there are inconsistencies in prior reports written by Defendant, that any errors in his April 11, 2016 report could not have been a mistake and was intentional. However, just as the Marshall prosecutor's prior inaccurate discovery disclosure was not indicative of a present lack of mistake, prior reporting discrepancies do not speak to whether the error in the April 11, 2016 reports were inadvertent. If Defendant was sloppy while creating reports on April 11, 2016, it is also likely that he did not always diligently complete his reports before that date. Admission of the pre-2016 alleged acts will not help a jury distinguish between whether Defendant was just sloppy with his paperwork or intentionally created inaccurate reports on April 11, 2016. Regardless, all it shows is that Defendant had a general propensity to submit reports with errors, a purpose for which the prior alleged acts are not admissible. Marshall, supra, 123 N.J. at 188.

The State advances one other purpose for the pre-2016 alleged bad acts. It seeks to demonstrate that Defendant used a certain *modus operandi* in the past, so it is likely that he acted consistently with that *modus operandi* on April 11, 2016. (p. 28 of the State's brief). However, that is the very definition of impermissible propensity evidence. Prior bad acts cannot be used to suggest that because a defendant acted one way in the past, it is likely he acted in conformity with those prior acts. No court has ever held that prior bad acts can permissibly be used to establish

modus operandi. (Though *modus operandi* could conceivably be used to show identity if identity is a material issue). In fact, *modus operandi* is more correctly viewed as a limiting factor to determine whether prior acts are sufficiently similar to permissibly draw conclusion about a defendant's state of mind. See State v. Atkins, 151 N.J. Super. 555, 565 (App. Div. 1977), rev'd in part on the grounds that admission of the other-crimes evidence was harmless error, 78 N.J. 454 (1979).

Finally, the State argues that admission of the pre-2016 alleged acts is necessary to prove counts One through Seven. It fears that if the pre-2016 acts are not introduced to the jury, counts One through Seven will hinge on Defendant's credibility. That concern does not speak to whether the pre-2016 acts are relevant, but rather to the weakness of the charges against Defendant. As the State explains in its brief, it can potentially show Defendant's intent on April 11, 2016 through the "brutality of smashing the victim's head to the concrete floor." (p. 29 of the State's brief). The alleged prior bad acts are not relevant or necessary to show that Defendant allegedly knew harm would befall Mr. Williams if he "smashed Williams' face like a pumpkin on the concrete floor," as the State is so fond of saying. (p. 28 of the State's brief). Ordinary human experience would have imparted that knowledge to Defendant. Rather, the State seeks to bolster their case by using the pre-2016 alleged acts to show that Defendant was an assaultive person and "bad guy."

"The prejudice of other-crime evidence is its tendency to demonstrate a criminal predisposition; therefore, it poses a distinct risk that it will distract a jury from an independent consideration of the evidence that bears directly on guilt itself." G.S., supra, 145 N.J. at 168 (Stevens, supra, 115 N.J. at 302 (citing Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 *Vill.L.Rev.* 1465, 1487 (1985) (observing that the effect of other-crime evidence is to

persuade the jury to believe that defendant is guilty because "once a crook, always a crook"). Here, the only relevant use of the pre-2016 alleged acts is to show that Defendant had a propensity to act in a particular way. That is an explicitly impermissible use of the evidence. Therefore, the State's motion does not pass the first prong of the Cofield test.

2. THE ALLEGED PRE-2016 ACTS ARE NOT SIMILAR IN KIND OR CLOSE IN TIME TO THE EVENTS OF APRIL 11, 2016.

The State's motion also fails to satisfy the second prong of Cofield. The second Cofield factor requires a showing that the other conduct is similar in kind and reasonably close in time to the offense charged. Cofield, supra, 127 N.J. at 338. As the Court recognized during oral argument, each of the proffered acts was a discrete and finite event. They occurred sporadically over a significant period of time. The alleged victims of those acts bore no relationship to each other. Defendant's alleged misconduct is substantially different in the various acts charged. The pre-2016 alleged acts are dissimilar in both kind and time.

This factor has not been universally applied and is only really utilized where there is logical reason to expect or require similarity between or among the other acts. See State v. Williams, 190 N.J. 114, 131-34 (2007). However, here, there is a logical reason to require similarity between the proffered acts. Even though propensity is an impermissible use, the State argues that the pre-2016 alleged acts are necessary to show that Defendant acted in conformity with a state of mind evidenced by the prior acts. Conformity between the various acts is a necessary part of such an argument, despite its other faults. Since, the pre-2016 alleged acts are not alike in kind or close in time, the second factor of Cofield does not permit introduction of the pre-2016 alleged acts.

3. **THE ALLEGED PRE-2016 ACTS DO NOT MEET THE CLEAR AND CONVINCING STANDARD.**

The State cannot clearly and convincingly prove its allegations regarding Defendant's pre-2016 conduct. Part three of the Cofield test provides that the other-crime or conduct evidence must be clear and convincing. Cofield, supra, 127 N.J. at 338. Where there is a dispute, the Court may have to hold a preliminary hearing in which the State bears the burden to demonstrate that the defendant is responsible for the prior offense or other conduct. State v. Stevens, 222 N.J. Super. 602, 614 (App. Div.), *aff'd* 115 N.J. 289 (1989); see also State v. Hernandez, 170 N.J. 106, 128-29 (2001); State v. Harvey, 121 N.J. 407, 433 (1990). The clear and convincing standard requires direct evidence, not incompetent hearsay. State v. Bass, 221 N.J. Super. 466, 480 (App. Div. 1987).

The State misstates the clear and convincing standard. It is not just a showing of some evidence. "[C]lear and convincing evidence, is a higher standard of proof than proof by a preponderance of the evidence but a lower standard than proof beyond a reasonable doubt." Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2006).

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 Samay, 166 N.J. 25, 30 (2001) (quoting In re Boardwalk Regency Corp., 180 N.J. Super. 324, 339 (App. Div. 1981))

The State is not just alleging that Defendant made mistakes in his paperwork. It is asserting that Defendant used excessive force and filed false police reports. If the State wishes to make these claims regarding the pre-2016 acts, it needs to show that not only was Defendant involved in these incidences, but that he used excessive force and filed false police reports by clear and

convincing evidence. However, at no point in these proceedings has the State even examined excessive force versus the appropriate force that Defendant allegedly should have used. Further, the allegations of excessive force are based almost entirely on hearsay. A preliminary hearing, in which the State will have the burden of persuasion, regarding the alleged uses of excessive force prior to 2016 will be necessary if the Court finds that the State's motion ostensibly satisfies the Cofield factors. Stevens, supra, 222 N.J. Super. at 614. By itself, the fact that the alleged victims suffered some injury is not sufficient to demonstrate excessive force by clear and convincing evidence. The same concerns apply to the State's allegations that Defendant filed false police reports prior to 2016.

Many of the pre-2016 alleged bad acts have already been administratively investigated and closed. The State cannot clearly and convincingly prove the allegations of excessive use of force and false police reports with competent evidence. The State cannot meet the third prong of Cofield.

4. THE PROBATIVE VALUE OF THE PRE-2016 ALLEGED ACTS IS OUTWEIGHED BY ITS APPARENT PREJUDICE.

The probative value of the pre-2016 alleged acts in regard to the events of April 11, 2016 is significantly outweighed by its apparent prejudice. The fourth Cofield factor requires that the probative value of the evidence must not be outweighed by its apparent prejudice. Cofield, supra, 127 N.J. at 338. "The fourth prong of the Cofield test is typically considered the most difficult to overcome." State v. Rose, 206 N.J. 141, 160 (2011). As the Court previously found, the pre-2016 alleged acts are so prejudicial to Defendant, that whatever relevancy they may have is outweighed.

The fourth Cofield factor is so difficult to overcome because it "is more exacting than Rule 403, which provides that relevant evidence is admissible unless its probative value is **substantially** outweighed by the risk of undue prejudice." State v. Rose, 206 N.J. 141, 161 (2011) (emphasis

added). In contrast, Cofield only requires that the probative value be outweighed by apparent prejudice. Ibid.

"Prior-conduct evidence has the effect of suggesting to a jury that a defendant has a propensity to commit crimes, and, therefore, that it is 'more probable that he committed the crime for which he is on trial.'" State v. Willis, 225 N.J. 85, 97 (2013) (quoting State v. Weeks, 107 N.J. 396, 406 (1987)). "Because evidence of a defendant's previous misconduct 'has a unique tendency' to prejudice a jury, it must be admitted with caution." Ibid. (quoting State v. Reddish, 181 N.J. 553, 608 (2004)). In conjunction with the lack of relevancy discussed above, it is more than apparent that the probative value of the pre-2016 alleged acts is outweighed by its prejudicial effect. It is highly likely a jury's attention will be diverted from the real issues and merely conclude that Defendant has an assaultive personality so he must be guilty.

Further, "[i]f other less prejudicial evidence may be presented to establish the same issue, the balance in the weighing process [under the fourth prong] will tip in favor of exclusion." Id. at 161 (quoting State v. Barden, 195 N.J. 375, 392 (2008)). As discussed above, and by the State in its brief, the allegations that Defendant's actions against Mr. Williams were unnecessarily brutal is an avenue available to the State to show Defendant's intent. While that assertion is disputed by the Defense, it demonstrates an alternative less prejudicial type of evidence that the State may potentially use to prove the same issue.

As the Court previously held, the apparent prejudice of the pre-2016 alleged bad acts outweighs their probative value. Accordingly, the fourth Cofield factor cannot be satisfied. Since the fourth factor, as well as the other Cofield factors, have not been satisfied, the State's Motion for Reconsideration must be denied.

CONCLUSION

In light of the above, it is respectfully requested that the State's Motion for Reconsideration of the Court's Order Severing Count Eight of the Indictment be DENIED. Alternatively, if the Court finds that the four Cofield factors are satisfied prima facie, the Defense requests a preliminary hearing to dispute that the pre-2016 allegations are provable by clear and convincing evidence.

TESTA HECK TESTA & WHITE, P.A.

DATED: January 26, 2018

BY: _____



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