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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5557-17

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KARL SMITH, a/k/a
CARL SMITH,

Defendant-Appellant.

**APPROVED FOR PUBLICATION**

**April 19, 2022**

**APPELLATE DIVISION**

Submitted November 8, 2021 – Decided April 19, 2022

Before Judges Messano, Rose and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 18-01-0178.

Joseph E. Krakora, Public Defender, attorney for appellant (Richard Sparaco, Designated Counsel, on the brief).

Jill S. Mayer, Acting Camden County Prosecutor, attorney for respondent (Nancy P. Scharff, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

MESSANO, P.J.A.D.

A Camden County grand jury returned a twenty-count indictment against defendant Karl Smith. The judge granted the State's pretrial motion to dismiss six of the first eighteen counts alleging defendant committed sexual offenses against his daughter, K.W. (Karen), born August 2003; the last two counts alleged he committed sexual offenses against S.E. (Sara), the daughter of defendant's girlfriend, born June 2008.[1]

The remaining twelve counts involving Karen charged defendant with two counts of first-degree aggravated sexual assault committed between November 2015 and August 2016, N.J.S.A. 2C:14-2(a)(1) (counts one and two); two counts of second-degree sexual assault committed during the same dates, N.J.S.A. 2C:14-2(b) (renumbered counts three and four); two counts of first-degree aggravated sexual assault committed between August 2016 and January 2017, N.J.S.A. 2C:14-2(a)(2)(a) (renumbered counts five and six); two counts of third-degree aggravated sexual contact committed during the same dates, N.J.S.A. 2C:14-3(a) (renumbered counts seven and eight); and four

[1] We use initials and pseudonyms pursuant to Rule 1:38-3(c)(9). Apparently the six dismissed counts were added to the original indictment via a superseding indictment. Although insignificant to the issues presented, the judge considered certain pre-trial motions, including defendant's motion to sever, under the original indictment and prior to the filing of the superseding indictment.

counts of second-degree endangering the welfare of a child committed between November 2015 and January 2017, N.J.S.A. 2C:24-4(a)(1) (renumbered counts nine, ten, eleven and twelve). The two counts involving Sara alleged defendant committed second-degree sexual assault between October 2015 and August 2016, N.J.S.A. 2C:14-2(b) (renumbered count thirteen); and second-degree endangering the welfare of a child between the same dates, N.J.S.A. 2C:24-4(a)(1) (renumbered count fourteen).

Prior to trial, defendant moved to sever the two counts involving Sara for a separate trial. He also sought a ruling that admission of evidence regarding Sara's precocious sexual knowledge did not violate the Rape Shield Law, N.J.S.A. 2C:14-7. The judge denied both motions. At trial, the jury acquitted defendant of counts one through four, could not reach a verdict on the remaining eight counts as to Karen, and found defendant guilty of counts thirteen and fourteen alleging offenses against Sara.

After granting the State's motion to impose an extended term of imprisonment on defendant as a persistent offender, N.J.S.A. 2C:44-3(a), the judge sentenced defendant to eighteen years' imprisonment on the sexual assault conviction with an eighty-five percent period of parole ineligibility

under the No Early Release Act, N.J.S.A. 2C:43-7.2, and a concurrent ten-year term on the child endangerment conviction.[2]

Before us, defendant raises the following points for our consideration:

> POINT I — DEFENDANT'S MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED, AND AS A RESULT OF IMPROPER JOINDER OF OFFENSES HE WAS DENIED THE RIGHT TO A FAIR TRIAL.
>
> POINT II — DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL DUE TO THE COURT'S ERROR IN PRECLUDING DEFENDANT FROM INTRODUCING EVIDENCE OF THE VICTIM'S PREVIOUS FAMILIARITY WITH SEXUALITY.
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> POINT III — DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL DUE TO MULTIPLE HEARSAY STATEMENTS OF THE VICTIM ALLOWED INTO EVIDENCE. (Not raised below.)
>
> POINT IV — THE DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS, WHERE THE STATE SUGGESTED THAT THE DEFENDANT HAD THE PROPENSITY TO COMMIT CRIMES. (Not raised below.)

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[2] Ten days later, defendant entered a conditional guilty plea to renumbered count twelve as amended to charge third-degree child endangerment of Karen, preserving his right to appeal the denial of his severance motion. The State recommended a concurrent five-year term of imprisonment, which the judge imposed, and dismissed the remaining counts of the indictment on which the jury did not reach a unanimous verdict.

POINT V — THE SENTENCE OF EIGHTEEN YEARS [IN] NEW JERSEY PRISON WAS EXCESSIVE.[3]

I.

The State contended defendant's sexual abuse of the two children first came to light on August 20, 2016. At that time, defendant lived in a two-bedroom apartment in Camden with Sara, her mother and defendant's girlfriend, K.D. (Kate), Kate's twelve-year old son, A.E. (Anthony), and defendant's and Kate's infant daughter, D.S. (Donna). The charges involving Karen surfaced in early 2017 when doctors examined Karen and discovered she had gonorrhea. During further questioning, Karen said defendant had sexually assaulted her on several occasions beginning in 2015 and continuing until two months before her exam.

A.

The Pre-trial Severance Motion

Defendant moved to sever the two counts charging him with crimes committed against Sara from trial of all other counts in the indictment. He asserted that trying the two sets of charges together would be unduly prejudicial. In her brief opposing the motion, the prosecutor extensively

[3] We have deleted the subpoints in defendants' brief.

summarized Sara's statement to Detective Daniel Choe on August 21, 2016.[4] She also summarized Kate's statement to the detective, in which Kate said she confronted defendant after Sara's disclosure, and "defendant denied touching [Sara] inappropriately." The prosecutor wrote: "[Kate] stated the defendant said, 'Maybe she might [have] thought I grabbed her when I picked the blanket off of her and put it on [Donna].'" In her brief, the prosecutor summarized defendant's statement to the detective, also given on August 21, noting defendant "denied intentionally touching [Sara] in a sexual manner and claimed he only touched her to move her over on the bed." The prosecutor then summarized the case regarding Karen's allegations in detail, extensively quoting portions of Karen's statement to Detective Choe.

The State argued a single trial was appropriate, because defendant's assaults were against "female children to whom . . . defendant [wa]s a father figure," and the crimes "occurred when the children were staying at . . . defendant's home." Citing State v. Covell, 157 N.J. 554 (1999), the prosecutor contended a wider range of Rule 404(b) evidence is admissible when "motive or intent of the accused . . . is material." Regarding the two counts of the indictment charging offenses against Sara, the prosecutor said,

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[4] Because the judge cited the briefs in rendering his decision on the motion, we obtained the filed briefs from the trial court record.

> The State is required to prove defendant's intent and knowledge in touching [Sara's] vagina. The defendant's state of mind is a material issue in dispute. The significance of this material issue is magnified by the fact that the defendant provided a statement to police, and [Sara's] mother provided a statement to police, claiming that [Sara] may have been confused regarding the sexual assault . . . by . . . defendant mistakenly touching her while he was trying to move the blanket covering her. Thus, it is abundantly clear that absence of mistake and defendant's intent are material issues in dispute at trial.
>
> [(Emphasis added).]

At oral argument, the judge indicated he had read the briefs.[5] Defense counsel began by arguing defendant's "intent or motive" was not material. The judge asked if "intent [was] a question based upon what [defendant] said in his statement," to which counsel responded, "it may very well be." In the colloquy that followed, the judge acknowledged he had not read defendant's statement, but said,

> Going on what's in the briefs, [defendant] indicated that . . . he was moving the blanket . . . and there was an inadvertent touching if you will —
>
> Defense counsel: Correct.
>
> Judge: — versus a purposeful act. And that seems to me goes directly to intent.

[5] There is no indication that Kate's statement to police was reviewed by the judge, and the statement is not in the appellate record.

[(Emphasis added).]

Defense counsel changed tack, arguing that trying the counts charging offenses against Karen and those charging crimes against Sara in the same trial would "create an overwhelming . . . prejudice . . . with regard to the other two counts."

The prosecutor argued the State had to prove "defendant's intent in touching [Sara]." She said, "Obviously, the fact that he was doing this to his other child during the same time frame and that those behaviors began exactly the same way . . . would obviously go to intent . . . ." The judge asked: "[W]ith reference to [Sara], apparently because she complained immediately[,] . . . it got no further . . . than the first touching incidents. Is that a fair statement . . . [?]" The prosecutor replied, "That is a fair statement."[6]

Reviewing the State's proffer, the judge noted that in his statement to Detective Choe, defendant "suggested that [Sara] may have mistakenly thought he grabbed her when he picked the blanket off her and put it on her sister." Applying the Cofield[7] analysis, the judge denied the severance motion, concluding as to the first prong, "there [wa]s relevance in the testimony

[6] Actually, in her statement to Detective Choe and her later testimony at trial, Sara said defendant sexually touched her vagina more than once and before August 20, 2016.

[7] State v. Cofield, 127 N.J. 328, 338 (1992).

regarding these two incidents." Considering the fourth prong, and quoting State v. Garrison, 228 N.J. 182, 197–98 (2017), the judge concluded, "Some types of evidence . . . require a very strong showing of prejudice to justify exclusion. One example is evidence of motive or intent." The judge said "intent is the issue" in this case, and he denied the motion for severance.

The Rape Shield Motion

Defendant sought to introduce evidence that when Sara was four years old, her teacher notified the Division of Child Protection and Permanency (the Division) that she observed the child on several occasions lying on her back with her legs spread and her hands down the front of her pants. The Division discovered from Kate that Sara had a urinary tract infection and her physician prescribed vaginal cream for relief.

Additionally, Sara told a Division caseworker that she and her three-year-old male cousin would play a game wherein whenever she said "ice cream vanilla," her cousin touched her vaginal area with a pen. The Division referred the family to CARES Institute (CARES), described later during trial as "a medical clinic that sees children when there are concerns for abuse or neglect of those children." Dr. Stephanie Lanese examined Sara during the referral and also four years later, when the August 2016 incident arose. Knowing Dr. Lanese was a probable State's witness at trial, defendant sought to question the

doctor about Sara's first involvement with CARES and the sexually-related matters the child discussed. Defense counsel argued the evidence was relevant to rebut any "assumption that [Sara] could not possibly know about [sexual conduct] unless . . . defendant . . . committed the act."

The prosecutor countered by arguing the evidence was strictly prohibited by the Rape Shield Law. Moreover, she contended Sara was now eight years old, i.e., old enough to know what was inappropriate touching; her complaints about defendant's sexual contact did not demonstrate precocious sexual knowledge.

After considering arguments and relying on the Court's decision in State v. P.S., 202 N.J. 232 (2010), the judge barred defendant from questioning the doctor about the earlier incidents.[8]

B.

Trial Evidence Regarding Sara's Allegations of Abuse

Sara was the first witness at trial, which began in February 2018. Late on the evening of August 20, 2016, she was watching television with Donna asleep next to her on the bed in a bedroom defendant shared with Kate and the newborn baby. Sara said defendant came into the bedroom, touched her

[8] The judge's oral decision did not specifically bar defendant from calling the Division caseworker who investigated the school's referral, but it clearly barred both defense proffers pursuant to the Rape Shield Law.

"private part" in the front and "rubbed it." This happened on other occasions when, before he went to work, defendant would come into the bedroom Sara shared with Anthony and touched her as she slept. Sara said she would "close [her] legs" to try to avoid this. On August 20, after defendant left the bedroom and went into the bathroom, Sara decided for the first time to tell Kate.

The jury saw a videotaped statement Detective Choe took from Sara on August 21, 2016.[9] Sara initially said defendant only touched her private part once, but then, as questioning continued, she told the detective it happened "more than once." Showing reluctance to provide any particular dates or times of previous incidents, Sara eventually said defendant "did it today and he do[es] it every time when he go[es] to work."

Kate testified she was dating defendant for about one year prior to August 2016, first living together with the children in a different apartment before moving two or three months earlier into the apartment where the incident occurred. Kate was not working at the time, but defendant worked weekdays from 4:00 a.m. to 5:00 p.m. Late on the evening of August 20, Kate and defendant were watching television in the living room; Sara and Donna

[9] The statement was admitted pursuant to N.J.R.E. 803(c)(27), the "tender years" exception to the hearsay rule, after the judge held a pre-trial Michaels hearing. See State v. Michaels, 136 N.J. 299, 320–21 (1994) (requiring the State to demonstrate the reliability of the child's statement, and that it was not the product of suggestive or coercive interview techniques).

were in Kate's bedroom. When the baby began crying, defendant left the living room to give her a pacifier. Kate heard defendant go into the bathroom; then Sara came out of the bedroom and said defendant touched her private part. Kate immediately took Sara to the hospital.

Dr. Lanese, an expert in "child abuse pediatrics," examined Sara on September 1, 2016, at CARES. Sara told her defendant touched her private part over her clothing on more than one occasion.[10] Dr. Lanese found no physical signs of sexual abuse. The doctor explained she saw Sara again six months later, in March 2017, because defendant's daughter Karen was "found to be positive for gonorrhea." Dr. Lanese said Sara did not have gonorrhea and could not have contracted the disease from the "touching" she described.

Trial Evidence Regarding Karen's Allegations of Abuse

The balance of the trial focused on Karen's allegations. On February 13, 2017, Dr. Monica Burton, a pediatrician, saw Karen for a "well child examin[ation]" because an earlier "lab result" was concerning. Dr. Burton told

[10] The judge conducted a hearing outside the presence of the jury and ruled Dr. Lanese could testify about statements Sara made to her pursuant to N.J.R.E. 803(c)(27).

Karen she had gonorrhea. The doctor said Karen first denied having sexual relations, but ultimately admitted having sex with someone for some time.[11]

Dr. Monique Higginbotham, also affiliated with CARES, testified as an expert child abuse pediatrician. She first saw Karen on February 21, 2017. The doctor recounted in exacting detail Karen's descriptions of sexual assaults by "an adult male" that began when she was twelve years old, and last occurred two months earlier.[12] The doctor found nothing "abnormal" when she physically examined Karen, who was then negative for gonorrhea.

Karen's mother, K.W. (Kylie) testified. She and defendant dated until approximately one year after Karen's birth in 2003. Kylie and Karen moved to Oklahoma, and defendant was not in his daughter's life until 2015, when she and her mother returned to Camden. Kylie said after they returned, they would

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[11] At one point, the doctor testified Karen told her it was her "father." However, apparently understanding the hearsay nature of the statement and attempting to forestall any further objectionable testimony, the prosecutor limited her direct examination by asking only a few leading questions. The doctor did not repeat Karen's accusation of defendant.

[12] There was an initial hearsay objection by defense counsel. Much of the sidebar that ensued is "indiscernible," but it appears the prosecutor or judge asserted the doctor's hearsay testimony was admissible as a "[m]edical exception." See N.J.R.E. 803(c)(4) (excepting from the hearsay rule, "[a] statement . . . made in good faith for purposes of, and is reasonably pertinent to, medical diagnosis or treatment; and . . . describes medical history; past or present symptoms or sensations; their inception; or their general cause"). This ruling is not challenged on appeal.

do things together as a family with defendant's oldest daughter, T.S. (Tara), who lived with defendant along with her children. In October 2015, Karen and her younger brother[13] began overnight visits with defendant at his home, and Karen spent every weekend with defendant, Tara and her children. The visits continued after defendant began living with Kate, but ended after Karen saw Dr. Burton in February 2017. Karen never told Kylie about defendant's sexual abuse.

Detective Kevin Courtney testified briefly on direct. On cross-examination, however, defense counsel questioned the detective extensively about the investigation. Courtney acknowledged defendant was not arrested until March 1, 2017, based on Karen's allegations and after the detective spoke with Kylie and Dr. Burton. The detective never spoke with Tara and never secured a search warrant for defendant's home.[14]

Karen was fourteen years old when she testified. She stopped visiting defendant and Kate in February 2017, after the doctor told her she had gonorrhea; she told the doctor "it was from" her father. Karen initially

[13] Karen's brother was not defendant's child.

[14] In her statement to police, apparently Karen alleged defendant forced her to watch pornography at his house using an Xbox video gaming console. The statement is not in the record, but defense counsel asked Karen if she recalled telling detectives that defendant made her watch things on the Xbox; she could not recall.

testified she did not remember anything her father did to her. As the prosecutor continued direct examination and asked whether her father "tr[ied] to have sex with [her], Karen responded, "Yes." Karen described how defendant penetrated her vagina with his finger and penis and inserted his penis in her mouth. Karen said this always happened at defendant's house, sometimes when they were alone, but not every time she visited.

On cross-examination, Karen admitted telling Dr. Higginbotham some things she failed to tell detectives. Defense counsel probed other inconsistencies between Karen's testimony and her prior statement.

After admitting by stipulation defendant's jail medical records for the year after his arrest in February 2017, the State rested.

Defense case

Tara testified as the first defense witness. She was living with her children and defendant — her father — in his home when she first met Karen, who came to visit defendant on weekends, sometimes with her brother, and stayed in the house. At the time, defendant worked every day except Sunday, and Tara babysat all the children.

Before defendant testified, the judge conducted a Rule 104(c) hearing regarding the recorded video statement defendant made to Detective Choe on August 21, 2016, the day after Sara's accusation. The judge ruled the State

could use the statement during cross-examination for impeachment purposes. The judge also conducted a Sands/Brunson[15] hearing and ruled all of defendant's prior convictions were admissible for impeachment purposes.

Defendant's testimony was surprisingly brief; direct examination comprises seventeen pages of transcript and cross-examination only five. There are less than two pages each of re-direct and re-cross. Defendant had six prior convictions and was last released from a halfway house in 2015, when he returned to Camden, his hometown. Defendant described how he met Kate while he was in the halfway house, and how he became reacquainted with his daughter, Karen. Karen began to visit when Tara and her children were living in the house with him. When Tara moved out, and Kate and her children moved in, Karen continued to visit and stay overnight. Defendant said he never lived in a third house since his release and never lived alone in the house. This explicitly rebutted Karen's testimony that defendant sometimes sexually assaulted her on weekends when he was alone in the house, and that she visited him in three different houses.

[15] State v. Sands, 76 N.J. 127 (1978); State v. Brunson, 132 N.J. 377 (1993). Defense counsel specifically requested that defendant's prior convictions not be "sanitized." Id. at 380.

Defendant said on the night of August 20, 2016, he was with Kate watching television when Donna began to cry. He took the pacifier and went into the bedroom where Sara was watching television, pretending to be asleep, next to the baby. After getting the baby back to sleep, defendant told Sara to move over on the bed, but "she didn't move." Defendant "pushed [Sara] over to move her over on the bed and . . . laid [his] daughter down." Defendant put a blanket over his daughter and left for the bathroom.

When Kate confronted him at the bathroom door, defendant told her to take Sara to the hospital "[t]o have her checked to prove that she was lying." Defendant denied ever "rub[bing Sara's] vagina" and also denied all of Karen's accusations.

On cross-examination, the prosecutor reviewed defendant's prior convictions: two for distribution of CDS in a school zone in 1995; possession of CDS in 2002; resisting arrest and eluding police in 2002; distribution of CDS in a school zone in 2004; and possession of a firearm during a CDS offense in 2012.[16] The prosecutor asked defendant to confirm that he "pushed" Sara on the night of August 20, but asked no further questions about those

[16] Only the last conviction was within ten years of the start of trial in 2018. The other convictions were presumptively inadmissible. See N.J.R.E. 609(b). There is no appeal from the judge's ruling admitting all the convictions for impeachment purposes.

events or any questions about the accusations made by Karen. She did not confront defendant with his prior statement to Detective Choe.

Defendant called Kate as the trial's final witness. She confirmed details about when she and defendant first began living together, where they lived, and when Karen first started visiting. Kate also said she contracted chlamydia, not gonorrhea, from defendant sometime after the birth of their daughter Donna in 2015.

Summations

Defense counsel stressed that defendant's medical records revealed he tested negative for gonorrhea shortly after his arrest and could not have been the source of Karen's infection. He criticized the lack of investigation of Karen's allegations, noting Detective Courtney "fail[ed] to gather . . . corroborating evidence." Counsel suggested Karen's brief testimony was incredible.

As to Sara, defense counsel highlighted that although the events allegedly took place in August 2016, and Sara gave a statement the next day, detectives did not arrest defendant until March 2017, when Karen's allegations surfaced. Counsel acknowledged defendant admitted pushing Sara across the bed, but only to make space on the bed for Donna.

The prosecutor recounted Karen's testimony and the findings of Drs. Burton and Higginbotham. She reviewed defendant's medical records, which demonstrated he tested negative for chlamydia and gonorrhea at the jail. She noted the records reflected that defendant kept asking jail officials to administer the test, and she asserted, despite the lack of any evidence, that by then defendant had already been "tested and treated." Defense counsel objected. Although the judge sustained the objection, he only told jurors their recollection of the evidence controlled.

The prosecutor picked up the argument immediately, telling the jury:

> [I]t's clear from the testimony that . . . gonorrhea and chlamydia . . . go hand in hand, there's enough there for you to make the very logical inference that the defendant was treated. That the defendant had chlamydia and gonorrhea. . . . Again, chlamydia and gonorrhea go hand in hand. Even if you test positive for only one the doctors said you get treated for both.

Citing testimony that anonymous testing was available in the county, defendant's knowledge as of August 2016 that he was under investigation, and that adult males "experience symptoms more readily than females," the prosecutor urged the jury to "conclude . . . defendant had gonorrhea, gave gonorrhea to [Karen]" and was treated for it prior to his post-arrest negative test.

The prosecutor asserted that "just as was the case with [Karen]," defendant's abuse of Sara "was a matter of opportunity." She said that unlike those occasions when defendant molested Sara before going to work, on August 20, 2016, it happened at night, and Sara's mother, Kate, was awake in the next room. In urging jurors to find Sara and Karen more credible than defendant, the prosecutor said defendant was "essentially a career criminal who has six prior convictions, has spent a good deal of his adult life in prison, clearly showing contempt for the balance and rules of society." There were no objections.

II.

Defendant contends it was reversible error to deny his motion to sever the two counts of the indictment involving Sara's allegations from the remaining counts involving Karen because the evidence regarding Sara would be inadmissible at a separate trial of counts involving Karen "and vice versa." The State contends the severance motion was properly denied because the "charged offenses . . . were the same or similar offenses, and constituted a pattern of ongoing and overlapping criminal activity." We find defendant's argument persuasive.

A.

Rule 3:7-6 permits the State to charge multiple offenses in a single indictment "if the offenses charged are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together." (Emphasis added). "Although joinder is favored, economy and efficiency interests do not override a defendant's right to a fair trial." State v. Sterling, 215 N.J. 65, 72–73 (2013).

Rule 3:15-2(b) provides "[r]elief from prejudicial joinder," and states: "If for any . . . reason it appears that a defendant . . . is prejudiced by a permissible or mandatory joinder of offenses . . . in an indictment . . . the court may order . . . separate trials of counts . . . or direct other appropriate relief." "A court must assess whether prejudice is present, and its judgment is reviewed for an abuse of discretion." Sterling, 215 N.J. at 73 (citing State v. Chenique-Puey, 145 N.J. 334, 341 (1996)).

"The test is whether the evidence from one offense would have been admissible N.J.R.E. 404(b) evidence in the trial of the other offense . . . ." Id. at 98. "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.'" Chenique-Puey, 145 N.J. at 341 (emphasis added) (quoting State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div. 1983)). To avoid prejudicial joinder, the court must conclude

the proffered evidence for each set of charges would be admissible in a separate trial on the other set of charges because the "N.J.R.E. 404(b) requirements [are] met, and the evidence of other crimes or bad acts [is] 'relevant to prove a fact genuinely in dispute and the evidence is necessary as proof of the disputed issue.'" Sterling, 215 N.J. at 73 (first citing Cofield, 127 N.J. at 338; and then quoting State v. Darby, 174 N.J. 509, 518 (2002)).

In State v. Green, the Court succinctly explained:

> Rule 404(b) bars "evidence of other crimes, wrongs, or acts" when used "to show that [a] person acted in conformity therewith." However, evidence of prior "crimes, wrongs, or acts" may be used to show intent, . . . knowledge, . . . or absence of mistake or accident." Because evidence of a defendant's other crimes "has a unique tendency" to prejudice the jury, other-crimes evidence proffered under Rule 404(b) "must pass [a] rigorous test."
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> [236 N.J. 71, 81 (2018) (alterations in original) (first quoting N.J.R.E. 404(b); then State v. Reddish, 181 N.J. 553, 608 (2004); and then Garrison, 228 N.J. at 194).]

That "rigorous test" is the four-part Cofield test. Id. at 81–82 (citing Cofield, 127 N.J. at 338).[17]

[17] "The evidence of the other crime must be admissible as relevant to a material issue . . . similar in kind and reasonably close in time to the offense charged; . . . clear and convincing; and [its] probative value . . . must not be outweighed by its apparent prejudice." Cofield, 127 N.J. at 338 (quoting Abraham P. Ordover, Balancing The Presumptions Of Guilt And Innocence:

We apply a deferential standard of review to the trial judge's evidential rulings. Id. at 81. "In addition, sensitive admissibility rulings regarding other-crimes evidence made pursuant to Rule 404(b) are reversed '[o]nly where there is a clear error of judgment.'" Ibid. (alteration in original) (quoting State v. Rose, 206 N.J. 141, 157–58 (2011)). However, "[t]hat deferential approach does not fit in cases where the trial court did not apply Rule 404(b) properly to the evidence at trial; in those circumstances, to assess whether admission of the evidence was appropriate, an appellate court may engage in its own 'plenary review' to determine its admissibility." Rose, 206 N.J. at 158 (quoting State v. Barden, 195 N.J. 375, 391 (2008)).

With these guideposts in mind, we consider the trial evidence here.

B.

Construing the State's proffer as admissions by defendant to Kate and Detective Choe of "inadvertently" touching Sara's vaginal area when he "pushed" her to make room for Donna on the bed, the judge seemingly concluded evidence that defendant sexually assaulted Karen by vaginally penetrating her with his penis and finger, and orally penetrating her with his

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Rules 404(b), 608(b), And 609(a), 38 Emory L.J. 135, 160–61 (1989) (footnote omitted)). See State v. Gillispie, 208 N.J. 59, 88–89 (2011) (noting second Cofield prong need not receive universal application).

penis, was admissible to prove defendant intended to touch Sara's vagina for his sexual gratification or to disprove a potential defense that the touching was "inadvertent" or by mistake. See, e.g., P.S., 202 N.J. at 256 ("In determining whether 404(b) evidence bears on a material issue, the Court should consider whether the matter was projected by the defense as arguable before trial, raised by the defense at trial, or was one that the defense refused to concede." (citing State v. Stevens, 115 N.J. 289, 301–02 (1989))); State v. Cusick, 219 N.J. Super. 452, 465–66 (App. Div. 1987) (admitting evidence of the defendant's sexual abuse of two different victims to rebut his claim of inadvertent sexual contact). The judge never explained, however, why the alleged touching of Sara's vagina was relevant to prove a material fact in dispute regarding Karen's allegations.

More importantly, defendant's intent in rubbing Sara's vaginal area, or that it did not occur by mistake, was never an issue because defendant denied touching Sara's vaginal area at all, inadvertently or otherwise. In State v. J.M., the defendant, a massage therapist, was charged with sexually assaulting a client during a massage. 225 N.J. 146, 151–53 (2016). The defendant denied any sexual contact occurred when interviewed after his arrest. Id. at 153. The trial court ruled the State could introduce evidence that the defendant was accused of similar conduct with a massage client in Florida six years earlier.

Id. at 153–54. We granted leave to appeal and reversed, finding the evidence was inadmissible under Cofield. Id. at 150–51 (citing State v. J.M., 438 N.J. Super. 215, 240 (App. Div. 2014)).[18]

The Court agreed, clearly stating: "In a case in which a defendant contends the alleged assault did not occur, intent and absence of mistake are not at issue. In the absence of a genuinely contested fact, other-crime evidence is irrelevant and the first Cofield prong cannot be satisfied." Id. at 159 (emphasis added).[19] The Court explained:

> Defendant does not argue that the alleged sexual assault of [the victim] was consensual or accidental; rather, he maintains that the sexual assault never occurred. As such, [the Florida victim's] testimony is inadmissible to establish motive, intent, or absence of mistake because defendant's state of mind is not a "genuinely contested" issue in this case. The testimony is also inadmissible for proof of plan, because it is insufficient to establish the existence of a larger continuing plan of which the crime on trial is a

[18] We also concluded that because defendant was acquitted of the Florida charges, that evidence was always inadmissible under Rule 404(b) unless the jury was convinced beyond a reasonable doubt the other crimes occurred. Id. at 153. The Court specifically refused to adopt that "bright-line" rule. Id. at 151.

[19] The Court tempered this by noting that it could "envision certain circumstances in which motive evidence may be admissible in the face of a denial by the defendant that the charged act did not occur. A fact-sensitive evaluation of the proffered evidence would be required to determine if the defendant's motive is a genuine issue in the case." Ibid. n.1 (citing Rose, 206 N.J. at 162–63).

> part[.] A "strong factual similarity" between the two sexual assaults is not enough to reveal a plan. Because the proposed testimony does not serve any of the permitted purposes of other-crime evidence set forth in N.J.R.E. 404(b), the testimony is inadmissible under the first Cofield requirement.
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> [Id. at 160 (emphasis added) (first quoting State v. Willis, 225 N.J. 85, 98 (2016); and then quoting Stevens, 115 N.J. at 306).]

In Garrison, the issue was whether evidence the defendant played strip poker with the minor daughters of his girlfriend was admissible under Rule 404(b). 228 N.J. at 186–88. Even though the defendant denied sexually assaulting the victimized daughter, he "insisted that any inappropriate actions originated with [the victim]. For example, defendant testified that [the victim] would grab him and try to pull his face to her chest and that she touched his penis while he was sleeping on a chair." Id. at 195. The Court distinguished these facts from those presented in J.M., noting, "Unlike the defendant in J.M., defendant in this case has not merely denied that a sexual assault took place. Defendant has repeatedly asserted that any inappropriate actions originated with the victim." Id. at 196. The Court held evidence of the strip poker game met all four Cofield prongs and was properly admitted. Id. at 200.

Even when the defendant's intent or state of mind is at issue, the Court has recognized the admission of other crimes evidence is highly prejudicial and courts must proceed with caution. For example, in Willis, the Court

considered whether evidence of an earlier sexual assault against a different victim should have been admitted at the defendant's trial for sexual assault. 225 N.J. at 87. The Court noted the "central issue in th[e] case was not whether defendant and [the victim] had sexual relations . . . . The issue was whether the sexual relations were consensual." Id. at 100. Acknowledging the two assaults "had certain common elements," the Court nonetheless held,

> Great care must be taken . . . whenever evidence of prior sexual assaults are introduced purportedly to illuminate a defendant's state of mind to assure that such evidence cannot be used, even inadvertently, by a jury as evidence of a propensity to commit criminal acts. To that end, the logical connection between the prior bad act and the contested issue must be clear and strong.
>
> [Ibid.]

In addition, the Court noted that "the quality and quantity of the other-crime evidence introduced at trial," which was extensive and consumed almost as much trial time as the evidence of the charged crime, "could have been interpreted by the jury only as evidence that defendant had a propensity to commit sexual offenses against young women he encountered on the street." Id. at 102.

Here, the evidence at trial regarding crimes allegedly committed against Sara consisted of her brief live testimony, her recorded statement to Detective Choe, Kate's very brief testimony, and the testimony of Dr. Lanese. The

State's case regarding Karen included her brief and frequently contradictory testimony, extensive testimony from Dr. Higginbotham about Karen's allegations of sexual abuse at the hands of an unidentified adult male, and lots of testimony about venereal disease, its diagnosis and treatment, and whether gonorrhea was frequently comorbid with chlamydia.

It is obvious to us that evidence regarding Karen's allegations would not have been properly admitted at a separate trial of the crimes alleged by Sara because they were not relevant to a material disputed fact under Cofield's first prong. Defendant never said he touched Sara in her vaginal area, much less that it was by accident, mistake or inadvertence.

Similarly, the evidence adduced at trial regarding Sara's allegations would not have been properly admitted at a separate trial of the crimes alleged by Karen. The prosecutor contended there were common threads between the two sets of allegations, namely that defendant was a "father figure" to Sara and Karen and the molestations occurred in his home during the same timeframe. Yet, there was no "clear and strong" logical connection between Sara's allegation that defendant repeatedly sexually touched her vaginal area before he went to work at 4 a.m., and Karen's explicit claims of sexual penetration during the same timeframe and sometimes in the same house.

Admission of other crimes evidence to bolster Karen's or Sara's credibility was inappropriate. See P.S., 202 N.J. at 259. Simply put, the judge denied defendant's severance motion without conducting the "kind of carefully-focused analysis . . . required by N.J.R.E. 404(b)." Ibid. The judge should have granted defendant's motion for severance and tried the two sets of allegations separately.

In State v. Orlando, the defendant was convicted of separate counts in an indictment charging him with impairing the morals of two girls who were his neighbors, ages nine and seven, one in April and one in June. 101 N.J. Super. 390, 391 (App. Div. 1968). The trial court denied a motion for severance without explanation, despite "circumstances indicating, at least prima facie, serious prejudice to defendant and tactical advantage to the State if the two charges were tried together." Id. at 393. Noting the lack of evidence beyond the testimony of each child, we held:

> in reality, although the jury was told to consider each count separately, the effect of the joinder was to give the State two witnesses instead of one to overcome defendant's denial of either offense and, in view of the abhorrent nature of the offense, to multiply the chances that defendant would be convicted. Further, the prejudice to be anticipated from joint trial of the two offenses was confirmed by what in fact did occur at the trial.
>
> There was no compelling valid reason why the State should insist, over defendant's objection, that the

> two charges, involving offenses allegedly committed some two months apart, be tried at one time. No appreciable saving of time resulted from the joinder of the two distinct offenses for trial rather than offering the proofs specifically applicable to each offense at separate trials, each of which would be of short duration.
>
> [Id. at 394.]

The failure to sever the two sets of charges in this case resulted in the jury hearing evidence that our courts historically have recognized "has a unique tendency to turn a jury against the defendant." Stevens, 115 N.J. at 302. Where the trial court errs by improperly joining offenses, the reviewing court must assess whether the error "led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." Sterling, 215 N.J. at 101 (alteration in original) (quoting State v. Lazo, 209 N.J. 9, 26 (2012)). This requires "an independent analysis of the quality of the evidence of defendant's guilt on a conviction-by-conviction basis." Id. at 102.

In Sterling, the Court affirmed the defendant's conviction regarding one sexual assault, despite improper joinder with another sexual assault and a separate burglary, because of "the strong, independent proof of [the] defendant's guilt" of that assault. 215 N.J. at 104. Notably, the Court found

the incontrovertible DNA evidence as to that one assault rendered the improper joinder harmless error as to that conviction. Id. at 105.[20]

In this case, the jury convicted defendant of only the two counts involving Sara. It either acquitted defendant or could not reach a verdict on all the counts charging him with crimes allegedly committed against Karen. Nonetheless, the jury heard evidence of defendant's alleged repeated assaults of his daughter, her treatment for a sexually transmitted disease, and a doctor's detailed recitation of Karen's allegations. The State's proofs against defendant on the charges involving Sara consisted of her testimony, her video recorded statement, and Kate's very brief "fresh complaint" testimony. Dr. Lanese added little to the State's case. Trying these two sets of allegations together before a single jury clearly implied defendant had "a propensity to commit crimes, and, therefore, that it [wa]s 'more probable that he committed the crime[s] for which he [was] on trial,'" Willis, 225 N.J. at 97 (quoting State v. Weeks, 107 N.J. 396, 406 (1987)). The improper joinder clearly had the capacity to bring about an unjust result. R. 2:10-2. We therefore reverse

[20] We note that evidence adduced as to the other sexual assault in Sterling also included DNA evidence that was "less-precise," and "simply did not exclude [the] defendant as the perpetrator." Id. at 105. Nevertheless, the Court concluded the stronger evidence as to the one assault may have "influenced the jury in its assessment of the offenses involving" the victim of the other assault and led to its guilty verdicts on both assaults. Ibid.

defendant's convictions, vacate the sentences imposed, and remand for a new trial.[21]

C.

While we disagree with the trial judge's application of Cofield's test, his ruling that evidence regarding both sets of charges would be admissible at each trial if the counts were tried separately, and his denial of defendant's severance motion, we appreciate the trial attorneys did little to assist him in the required "carefully-focused analysis" whenever Rule 404(b) evidence is involved. P.S., 202 N.J. at 259. Moreover, the trial here demonstrates several challenges posed by the analytic paradigm set out in Chenique-Puey and its progeny. We raise these concerns, which are implicated every time a single indictment alleges two or more distinct sets of offenses, and a defendant brings a severance motion.

Rule 3:7-6 permits the joinder of offenses in a single indictment for a single trial if they are of a "same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together

[21] Although defendant specifically reserved his right to appeal the judge's denial of his pre-trial severance motion when he pled guilty to endangering Karen, he makes no argument in his brief regarding the effect our reversal on those grounds would have on his guilty plea. Pursuant to Rule 3:9-3(f), if a defendant prevails on appeal after entering a conditional guilty plea, "defendant shall be afforded the opportunity to withdraw his or her plea." The issue should be addressed by the trial court on remand.

or constituting parts of a common scheme or plan." (Emphasis added). "Charges need not be identical to qualify as 'similar' for purposes of joinder under Rule 3:7-6," Sterling, 215 N.J. at 91 (citing State v. Baker, 49 N.J. 103, 105 (1967)), but they must be "connected together," id. at 91, or be "parts of a common scheme or plan," id. at 72. "Rule 3:7-6 expressly permits joinder when there is some connection between separate counts rendering the evidence probative of a material issue in another charge." Id. at 91. A similar standard applies when the State proffers evidence of an uncharged crime or bad act at trial pursuant to Rule 404(b). See Green, 236 N.J. at 82 ("[T]he 'proffered evidence must be "relevant to a material issue genuinely in dispute."'" (emphasis added) (quoting Gillispie, 208 N.J. at 86)).

The preference is for joinder of the offenses in a single trial unless the defendant demonstrates prejudice. Chenique-Puey, 145 N.J. at 341. Yet, in proffering Rule 404(b) evidence at trial, the State bears the burden of proof, and "[u]nder the third Cofield prong, [the State] must establish that the other crime 'actually happened by "clear and convincing" evidence.'" Green, 236 N.J. at 83 (quoting Rose, 206 N.J. at 160).

Perhaps most importantly, prior to the introduction of Rule 404(b) evidence at trial, the judge's fact-finding on the crucial issues of material relevancy and quality of the State's proofs

> 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.
>
> [State v. Hernandez, 170 N.J. 106, 127 (2001) (emphasis added).]

Usually, when a defendant seeks severance from allegedly prejudicial joinder of "same or similar crimes," or separate crimes "connected together" in one indictment, the court does not conduct a Rule 104 hearing to put the State to its proofs. As in this case, the judge often relies upon proffers of evidence the prosecutor intends to adduce at trial for a permitted use under Rule 404(b), or to rebut an asserted or anticipated defense at trial; the judge rarely hears the actual testimony before deciding if the evidence meets Cofield's rigorous test, in which case, severance should be denied.

Lastly, if Rule 404(b) evidence is admitted at trial, the judge is required to provide a "carefully crafted limiting instruction . . . explain[ing] to the jury the limited purpose for which the other-crime evidence is being offered," Hernandez, 170 N.J. at 131 (citing State v. Fortin, 162 N.J. 517, 534 (2000)), and "setting forth the prohibited and permitted purposes of the evidence." Ibid. The charge is given when the evidence is received and again in the

court's final instructions. State v. Williams, 190 N.J. 114, 133–34 (2007). The model jury charge unambiguously provides this guidance and further advises the jury that before giving any weight to the other crimes evidence, it "must be satisfied that the defendant committed the other [crime]." Model Jury Charges (Criminal), "Proof of Other Crimes, Wrongs, or Acts (N.J.R.E. 404(b))" (rev. Sept. 12, 2016). We know of no reported case that requires similar instructions be given when two different sets of charges are tried together.[22]

The case before us also raises the issue of what should happen when the prosecutor misstates the proffered evidence, or the State never introduces some of the very evidence it proffered in opposing the severance motion at trial. For example, here, in opposing the severance motion, the prosecutor said defendant made statements to Kate and Detective Choe that Sara may have been "confused" about his touch on the night of August 20, 2016. However, in his statement to Detective Choe the very next day, it was the detective who suggested Sara could have "minsinterpret[ed]" or "misunderst[ood]" something from the night before; he suggested "maybe [defendant] touched her genital area – her vagina"; he suggested defendant "may have thought [he] touched her

[22] In State v. Krivacska, writing for our court, Judge Baime implied that such instructions were necessary when two sets of sexual assaults against two victims, one set charged in an indictment and the second in an accusation, were joined in a single trial. 341 N.J. Super. 1, 37 (App. Div. 2001).

vagina" when he pushed his daughter over on the bed. To these repeated entreaties defendant simply responded that he did not know or that he simply pushed the child.

At trial, the prosecutor understandably never sought to introduce in the State's case-in-chief the exculpatory statement defendant provided. During defendant's trial testimony, the prosecutor never asked defendant if, in moving Sara to make room for Donna on the bed, he touched the child's vaginal area. Indeed, contrary to the proffer made in opposition to the severance motion, it was obvious defendant never suggested in his statement that Sara was confused about his touch and never asserted he inadvertently touched or rubbed Sara's vaginal area.

The State's pre-trial proffer also cited Kate's statement to detectives as support for defendant's "suggestion" that Sara was confused about the nature of his touch. Kate's statement is not in the record, yet, when Kate testified, the prosecutor never asked a single question about what defendant said to her after Sara's accusation.

In opposing severance, the prosecutor extensively cited Karen's statement to Detective Choe about defendant's sexual abuse, providing significant details about the assaults. It suffices to say that statement was never introduced at trial, and Karen's testimony before the jury was relatively

brief, with few specific details and short answers to leading questions. The jury apparently rejected claims that defendant sexually assaulted Karen before August 2016, i.e., before Sara's allegations arose, because it acquitted defendant of the four counts charging sexual offenses against Karen alleged to have occurred prior to August 2016.

As a court of intermediate appellate jurisdiction, we are bound by the Court's precedent in Chenique-Puey, as was the trial judge. Our courts, however, have recognized the ability of the trial court to address the denial of an earlier severance motion when events at trial require reconsideration because of prejudice to a defendant.

We have recognized the court's inherent authority to sua sponte order a severance of defendants tried together when it is apparent the bulk of the trial evidence was inculpatory only as to one. Long ago, in State v. Hall, we said,

> Where a significant portion of the evidence to be adduced at a trial is admissible only as to one defendant, the probability of harm to the other may be so great that the trial judge should, as a matter of fair practice, exercise his [or her] discretion in favor of a severance. If, however, the potential for prejudice was not measurable at the pretrial hearing but becomes evident during the trial, the trial judge is again required to exercise his [or her] discretion when the subject evidence is offered by the State. Should [the judge] at that point determine that . . . protective instructions will be plainly ineffective, the better course will require [the judge] to grant the severance initially denied.

[55 N.J. Super. 441, 451 (App. Div. 1959).]

In State v. Hudson, we agreed with the trial judge's decision to sua sponte declare a mistrial when the prosecutor inadvertently failed to reveal his intention to offer a statement made by one defendant at a joint trial of both. 139 N.J. Super. 360, 362–63 (App. Div. 1976). Of course, declaring a mistrial is never a preferred course. See, e.g., State v. Smith, 224 N.J. 36, 47 (2016) ("A mistrial should only be granted 'to prevent an obvious failure of justice.'" (quoting State v. Harvey, 151 N.J. 117, 205 (1997))).

In Baker, the Court considered Rule 3:4-7, the predecessor to Rule 3:7-6, which contained the same language as our current rule. We held that joinder of two separate sales of heroin on different dates to different buyers was "plain error." Baker, 49 N.J. at 104 (quoting State v. Baker, 90 N.J. Super. 488 (App. Div. 1966)). In reversing, the Court held, "The two offenses here involved are 'of the same or similar character' within the meaning of the . . . rule." Id. at 105. The Court concluded there was no plain error, but noted, "We are not indifferent to the possibility of harm, and we do not suggest that a motion for severance . . . of unrelated offenses should be regarded lightly." Ibid.

Between our decision in Baker and the Court's reversal, a tentative draft of Rule 3:7-6 was proposed by the Supreme Court's Coordinating Committee on the Revision of the Rules of Court. The Coordinating Committee's report

recommended that the Rule permit the joinder of offenses that were "of the same or similar character and are based on the same act or transaction or on [two] or more acts or transactions connected together or constitution parts of a common scheme or plan." Sup. Ct. Coordinating Comm. on the Revision of the Rules of Ct., Proposed Revision of the Rules Governing the Courts of the State of New Jersey R. 3:7-6 (1966) (emphasis added). The Coordinating Committee's commentary was striking:

> This rule makes one major change in the source rule, namely, it requires as a prerequisite to joinder not only that the offenses be of the same or similar nature but that they are also based either on the same transaction or on transactions constituting part of a common scheme. The Committee is of the view that it is essentially unfair to join two or more like but unrelated crimes.
>
> [Id. R. 3:7-6 cmt.]

The Court rejected the Coordinating Committee's recommendation, adopting the Rule essentially without change, and with the disjunctive "or," thereby permitting joinder of offenses that are of the "same or similar character" without necessarily being "based on the same . . . transaction" or "part[] of a common scheme." R. 3:7-6.

Judge Pressler's comments to the revision shortly after enactment explained:

> Because of the evident high degree of prejudice to a defendant inherent in a single trial of two entirely separate offenses of the same nature, the tentative draft rule . . . proposed [an] amendment . . . to prohibit joinder in a single indictment of two separate offenses of the same nature unless they were based on the same act or transaction or on acts or transactions connected together or constituting part of a common scheme or plan.
>
> [Pressler, Current N.J. Court Rules, cmt. on R. 3:7-6 (1969).]

Judge Pressler noted the proper "technique" for a defendant to avoid prejudice was "to employ . . . pretrial motion for severance . . . ." Ibid. Further, "[a]s . . . the possibility of harm [wa]s generally substantial, the motion for severance or other suitable relief should be readily granted." Ibid. (citing collected cases).

In Orlando, we noted that "[t]he problem of joinder and severance of offenses . . . in criminal cases" was recently subject to study and a report by the American Bar Association's Advisory Committee on the Criminal Trial (ABA Tentative Draft). 101 N.J. Super. at 392 n.*. In particular, the Advisory Committee recommended that "when . . . two or more offenses had been joined 'solely on the ground that they are of the same or similar character,' defendant [should have] an absolute right to a severance on demand." Ibid.

The ABA Tentative Draft specifically noted that "joinder together for one trial of two or more offenses of the same or similar character when the

offenses are not part of a single scheme or plan has been subjected to severe criticism over the years." ABA Minimum Standards for Crim. Just. § 2.2(a) at 29 (Tentative Draft Copy 2, 1967). It noted that "joinder of offenses not part of a single scheme or plan [wa]s difficult to justify" on the grounds of "avoiding duplicitous, time-consuming trials in which the same factual and legal issues must be litigated." Ibid. The ABA Tentative Draft cited one of the "most compelling reasons for granting the defendant this right of severance without any specific showing of prejudice," id. at 31, was the "introduction of evidence which fails to meet the other crimes test," id. at 32.

In 1980, the ABA published its Approved Report on Criminal Justice Standards that included an earlier report from its "Task Force on Joinder and Severance" (Task Force Report). Section 13-1.2 of the Task Force Report recommended different procedures to employ when a single "accusatory instrument" included "[r]elated offenses," defined as "[t]wo or more offenses . . . based upon the same conduct, upon a single criminal episode, or upon a common plan[,]" ABA Standards for Crim. Just. Standard 13.1.2 at 8–9 (1978), and "[u]nrelated offenses," defined in section 13-1.3, as "offenses which are not 'related' offenses," id. at 10. In its commentary, the Task Force Report noted, "Offenses committed at different times and places are not 'related' merely because they are of the same or similar character." Id. at 11.

Notably, the Task Force Report recommended, "Whenever two or more unrelated offenses have been joined for trial, the prosecuting attorney or the defendant shall have a right to a severance of the offenses." Id. at 29.

The trial here suggests it may be time to revisit the rules regarding joinder at trial of "same or similar" offenses that are not part of a "common plan or scheme," and a defendant's ability to seek relief from prejudicial joinder through a pretrial motion for severance. Also, it may require the revisiting of the Chenique-Puey analytic framework to ensure unfair prejudice will not seep into a trial when the State contends two different sets of offenses are "connected together" by N.J.R.E. 404(b). We shall serve a copy of this opinion on the Supreme Court's Committee on Criminal Practice for its consideration of possible amendment to Rule 3:7-6, or Rule 3:15-2(b).

III.

We address the balance of defendant's arguments because they raise issues that may occur if there is a retrial.

We agree with the judge's pre-trial decision that barred defendant from adducing evidence of Sara's supposed precocious sexual knowledge through testimony of Dr. Lanese or the Division's caseworker. The purpose of the Rape Shield Law "is to protect the privacy interests of the victim while ensuring a fair determination of the issues bearing on the guilt or innocence of

the defendant." State v. Garron, 177 N.J. 147, 165 (2003). While the statute protects against "unwarranted and unscrupulous foraging for character-assassination information about the victim," id. at 165, "if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled," id. at 171.

To be admissible, the probative value of the prior acts must rest on clear proof that they occurred, they must be relevant to a material issue in the case, and the evidence must be necessary to the defense. State v. Budis, 125 N.J. 519, 533 (1991). The Court in Budis announced a two-step analysis. First, the judge should "ascertain, apart from the Rape Shield Law, whether the evidence [i]s relevant to the defense." Id. at 532. Second, the judge must consider if the prior sexual conduct would "create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim." Id. at 538 (quoting N.J.S.A. 2C:14-7).

Here, we agree with the State that Sara's allegations about defendant did not reveal a precocious knowledge of sexual activities; the child clearly understood what was permitted touching and what was inappropriate. See State v. Schnabel, 196 N.J. 116, 131 (2008) (rejecting defense's assertion that two teenage girls would lack sufficient knowledge to describe sexual abuse without prior sexual experience). Evidence of the game Sara said she played

with her cousin, if true, was of such attenuated relevance to the sexual contact defendant allegedly committed that the judge properly ruled it was inadmissible. In each instance, the judge appropriately applied the first step of the Budis test.

Defendant next contends there was excessive hearsay admitted about Sara's allegations, noting her statement to Detective Choe was admitted, Kate was permitted to recount what the child told her, and Dr. Lanese testified about Sara's claims. The judge found the statements to the detective and the doctor were admissible under N.J.R.E. 803(c)(27) after conducting an appropriate hearing.

On appeal, defendant does not challenge the admissibility of these hearsay statements; instead, he objects to the cumulative nature of similar evidence and contends it was only an attempt to bolster Sara's credibility. Defendant never objected at trial, and, so, we consider the claim for plain error. R. 2:10-2.

We have held that even when evidence is admissible under the tender years exception, "the trial court 'should be cognizant of its right under N.J.R.E. 403 to exclude evidence, if it finds in its discretion, that the prejudicial value of that evidence substantially outweighs its probative value.'" State v. Burr, 392 N.J. Super. 538, 572 (App. Div. 2007) (quoting State v. D.G., 157 N.J.

112, 128 (1999)). Certainly, we reject defendant's argument as it applies to Sara's statements to her mother and Detective Choe, because both were close in time to the alleged events, and the statement to the detective was in far greater detail. We offer no opinion about the propriety of permitting the doctor to repeat Sara's allegations as made to her, except to say that if the case is retried, the judge should consider whether the probative value of that evidence is substantially outweighed by the prejudicial nature of repeated hearsay testimony, even if it falls within an exception to the hearsay rule.

Lastly, the prosecutor's fleeting reference to defendant as a "career criminal" was improper, but there was no objection at trial, and, more importantly, we do not think it was so egregious as to have required reversal. It should not be repeated if there is a retrial.

In light of our decision, we do not address defendant's sentencing arguments.

Reversed. We vacate defendant's sentence and remand for a new trial.