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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0653-12T4

STATE OF NEW JERSEY,

Plaintiff-Respondent/
Cross-Appellant,

v.

CHARLES K. ZISA,

Defendant-Appellant/
Cross-Respondent,

and

K.T.,[1]

Defendant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES K. ZISA,

Defendant-Appellant,

and

MARY J. MCMORROW,

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[1] We use initials for co-defendant K.T. in order to protect the privacy of her minor children. She was tried together with defendant and was convicted of insurance fraud. However, she is not a party to this appeal, and her name is irrelevant to the disposition of the case.

Defendant/Intervenor-
Respondent.

Argued April 21, 2015 – Decided July 31, 2015

Before Judges Reisner, Koblitz, and Higbee.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 10-10-01812 (criminal action) and Docket No. 1687-10 (forfeiture action).

Paul B. Bergman of the New York bar, admitted pro hac vice, argued the cause for appellant (Abby P. Schwartz, and Paul B. Bergman, attorneys; Ms. Schwartz and Mr. Bergman, on the briefs).

Catherine A. Foddai, Senior Assistant Prosecutor, argued the cause for respondent State of New Jersey (John L. Molinelli, Bergen County Prosecutor, attorney; Ms. Foddai, of counsel and on the brief).

DeFuccio Clancy & Esposito, L.L.C., attorneys for respondent Mary J. McMorrow (Sharon Clancy, on the brief).

PER CURIAM

Defendant Charles K. Zisa appeals from his conviction for second-degree official misconduct, N.J.S.A. 2C:30-2(a), and insurance fraud, N.J.S.A. 2C:21-4.6(a), both relating to events that occurred in 2008.[2] The State cross-appeals from a September

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[2] Defendant's notice of appeal, and that of his ex-wife, intervenor Mary J. McMorrow, also purported to challenge a December 19, 2012 forfeiture order; however, neither of them (continued)

21, 2012 order granting defendant's motion for acquittal notwithstanding the verdict (NOV) as to the following: second-degree official misconduct, N.J.S.A. 2C:30-2(b), with respect to events occurring in 2004; second-degree official misconduct as to events that occurred in 2008; and second-degree engaging in a pattern of official misconduct, N.J.S.A. 2C:30-7(a), as to events occurring in 2004 and 2008. We reverse defendant's conviction on his appeal, and affirm on the State's cross-appeal.

I

A brief summary will suffice to put the issues in this case in perspective. In 2010, the Bergen County Prosecutor's Office (State) charged defendant, who at the time was the Hackensack Police Chief, with crimes relating to events that occurred in 2004 and 2008. The allegations against defendant did not come to light until 2010, and they arose in this context. In late January 2010, Hackensack's Labor Counsel wrote a letter to the Bergen County Prosecutor stating that allegations of official misconduct against defendant, Hackensack's Chief of Police since 1995, had arisen during a departmental disciplinary hearing

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(continued)
briefed the issue. In light of our disposition of this appeal, reversing defendant's conviction, the forfeiture order must be vacated pending further proceedings on remand.

involving Hackensack Police Officer Anthony Ferraioli, who also was president of the local police union. Defendant had filed those administrative charges against Ferraioli. In February 2010, the attorney who represented Ferraioli at the disciplinary hearing wrote the prosecutor a similar letter. That attorney also represented two of the witnesses who would later appear at defendant's 2012 trial, Patrol Officers Joseph Al-Ayoubi and John Herrmann.

According to Raymond Wiss, counsel to the departmental hearing officer, during a break in the disciplinary hearing, Ferraioli's attorney had told Wiss and others that he had information from Al-Ayoubi and Herrmann about an inaccurate police report and some alleged wrongdoing by defendant. The attorney said that he would not disclose that report to the press or to the Bergen County Prosecutor's Office if defendant agreed to dismiss the disciplinary charges against Ferraioli. Wiss testified that defendant had refused the deal, and Ferraioli's disciplinary hearing continued.[3]

After receiving the two letters, the Prosecutor's Office began an investigation into defendant's actions in 2004 and 2008, which eventually led to an indictment.

[3] According to Wiss, an ethics complaint was later filed against Ferraioli's attorney for attempting to influence the outcome of a civil matter by threatening to file a criminal complaint.

The State alleged that in 2004, defendant interfered in a criminal investigation of his live-in girlfriend's son, who was a juvenile. The State also alleged that in 2008, defendant interfered in the investigation of an incident in which the girlfriend, K.T., was involved in a one-car accident while, allegedly, driving under the influence of alcohol. According to Officers Al-Ayoubi and Herrmann, K.T. was visibly intoxicated, but defendant came to the accident scene and whisked her away in his car before they could test her for intoxication. The witnesses asserted that defendant also stated to them that K.T. must have swerved to avoid an animal in the roadway, and they wrote their police reports to conform to what they believed he wanted them to say. The State further alleged that defendant and K.T. committed insurance fraud with respect to that incident.

There were significant weaknesses in the State's case. The 2004 allegations were based on an incident that was resolved to the satisfaction of the victim and his family after they received restitution. The State did not present any legally competent direct evidence that defendant influenced the way the police handled the case. Essentially, the State's case was that defendant and K.T. came to police headquarters after her minor son was brought there on suspicion of being involved in beating

up another teenager;[4] one or more supervising police officers told a subordinate to remove K.T.'s son's name from her police report; and defendant appeared at headquarters the next day when the police were questioning the son.

There was no testimony from any police officer that defendant told anyone to change a police report or told anyone else to have the report changed, or that he otherwise interfered in the processing of the case. The son came to police headquarters the day after the incident, received Miranda[5] warnings, and gave a statement admitting to his involvement in the incident. All of that was documented in police records.

Officer Campos, one of the central police witnesses in the 2004 incident, destroyed a journal that she claimed contained notations about the day she allegedly saw defendant at the police station. She then, admittedly, lied to the Prosecutor's Office and to a Superior Court judge about the journal's continued existence and claimed to have consulted the journal

[4] The trial evidence indicated that the son and the victim had a dispute over a girl they both knew. During the incident, one of the son's friends punched the victim in the mouth and knocked out a tooth. The victim declined to cooperate with the police, and he and his family declined to file a criminal complaint. The parents of the three teenage perpetrators, including K.T.'s mother, paid restitution to the victim's father for $3000 in dental expenses.

[5] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

long after she had destroyed it. She also changed her story several times about which of her superior officers allegedly told her to delete the son's name from the initial police report about the incident.[6] Not surprisingly, Campos, whom the State presented as a key witness respecting the 2004 incident, was savaged on cross-examination. A dispatcher, Mr. Connolly, the State's other witness to defendant's alleged presence at the police station on the night of the 2004 incident, was also significantly impeached on cross-examination.

Respecting the 2008 charges, none of the contemporaneous reports filed by any of the three involved law enforcement officers, including Sheriff's Officer Arosemowicz who arrived first on the scene and did not work for defendant, reflected that K.T. was intoxicated at the time of the 2008 accident. None of the key police witnesses in either matter came forward with their incriminating information about defendant until after they had filed civil suits against him arising out of unrelated disciplinary matters. Arosemowicz was active in the PBA, whose president was the subject of the 2010 disciplinary hearing. On cross-examination, Arosemowicz admitted having numerous telephone conversations with Herrmann about the case against

[6] Campos had filed a civil lawsuit against one of the superior officers. After defendant's trial, both officers whom she accused were indicted, tried, and acquitted.

defendant, although he claimed to have no relationship with Herrmann.

During the defense case, three retired former Prosecutor's detectives testified that the lead investigator on the case had directed them to destroy their handwritten investigation notes after defense counsel had filed a demand that all notes be preserved. The lead investigator denied that allegation, but in his final charge to the jury the judge instructed that they could draw a negative inference if they found that the State destroyed evidence.

After a lengthy trial, the jury acquitted defendant of official misconduct by affirmatively interfering in the 2004 juvenile case, but convicted him of official misconduct based on his alleged failure to "recuse" himself from the juvenile matter. The trial judge later acquitted defendant NOV on the latter charge. The jury acquitted defendant of conspiracy to commit official misconduct.

The jury acquitted defendant of tampering with witness John Herrmann, one of the police officers involved in the 2008 incident. Herrmann had claimed that the day after the accident, defendant instructed him not to tell anyone that it had

occurred. Evidently, the jury did not find that credible.[7] That was the only count of witness tampering in the indictment. The jury convicted defendant of insurance fraud and multiple counts of official misconduct with respect to the 2008 incident, and convicted him of engaging in a pattern of official misconduct based on the 2004 and 2008 incidents.

The trial judge dismissed NOV the conviction for one count of 2008-related official misconduct, based on defendant's failure to recuse himself from the auto accident investigation. The judge also dismissed NOV the conviction for a pattern of official misconduct. The judge let stand defendant's conviction on one count of 2008-related official misconduct for affirmatively interfering in the investigation, and one count of 2008-related insurance fraud.

II

On defendant's appeal, he raises the following issues:

POINT I THE PROSECUTOR'S OPENING [STATEMENT] VIOLATED FUNDAMENTAL CONSTRAINTS AGAINST PROSECUTORIAL EXCESS BY ARGUING, WITHOUT ANY FACTUAL BASIS, THAT DEFENDANT ZISA HAD TAMPERED WITH THE LAW ENFORCEMENT WITNESSES AGAINST HIM AND, WORSE, MADE THE CLAIM WITHOUT PROVIDING THE COURT OR COUNSEL WITH PRIOR NOTICE THAT HE INTENDED TO MAKE ZISA'S PROPENSITY TO ABUSE HIS OFFICIAL

[7] The defense presented significant evidence casting doubt on whether Herrmann was even present at the accident scene.

POSITION THE CENTERPIECE OF HIS OPENING.

1. The Unsupported Witness Tampering Claim With Respect to the State's Law Enforcement Witnesses for the 2008 Charge.

2. The Recusal Motion And The Perfunctory Denial Of The Renewed Mistrial Motion.

3. The Compelling Need For The Declaration of a Mistrial Following The Prosecutor's Opening Could Not Have Been Alleviated By Any Curative Instruction, Much Less The Two That Were Given.

POINT II THE COURT COMMITTED REVERSIBLE ERROR, WHEN, INSTEAD OF CORRECTLY ANSWERING "NO" TO THE JURY'S DELIBERATION QUESTION OF WHETHER THE "OATH OF OFFICE CONSTITUTE[D] A MINISTERIAL DUTY," IT TOLD THEM IT WAS A QUESTION OF FACT TO BE DETERMINED UNDER ITS PRIOR INSTRUCTION DEFINING A MINISTERIAL ACT, WHICH IT WAS NOT, THEREBY EFFECTIVELY DIRECTING A VERDICT OF GUILT IN VIOLATION OF DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL. U.S. CONST. AMEND. XIV; N.J. CONST. (1947) ART. I, PARS. 1, 9, 10.

POINT III THE DEFENDANT'S CONVICTION ON COUNT 12 FOR INSURANCE FRAUD MUST BE SET ASIDE BECAUSE THE PROSECUTION, HAVING PROVIDED NO EVIDENCE THAT PAYMENT OF THE DAMAGE CLAIM COULD OR EVEN WOULD BE DENIED BECAUSE OF EVIDENCE OF INTOXICATION, FAILED TO SHOW THE REQUIRED ELEMENT OF MATERIALITY NECESSARY FOR CONVICTION.

POINT IV THE CONVICTION ON COUNT 9 SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH ZISA'S

KNOWLEDGE EITHER THAT A SOBRIETY TEST HAD NOT ALREADY BEEN CONDUCTED ON [K.T.] OR THAT ONE WAS INTENDED TO BE CONDUCTED.

POINT V THE PROSECUTOR'S MISREPRESENTATIONS TO THE COURT AND COUNSEL THAT WITNESS INTERVIEW NOTES HAD NOT BEEN DESTROYED, WHEN IN FACT THEY WERE ORDERED DESTROYED BY THE PROSECUTOR'S CHIEF INVESTIGATOR, WORKING UNDER HIS IMMEDIATE SUPERVISION, WAS A VIOLATION OF A CLEAR LEGAL RESPONSIBILITY, AN UNPRECEDENTED BETRAYAL TO THE ADMINISTRATION OF JUSTICE, AND A VIOLATION OF THE APPELLANT ZISA'S DUE PROCESS RIGHT TO A FAIR TRIAL; HIS CONVICTIONS SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

1. Attempted Discovery of the Investigators' Handwritten Interview Notes.

2. The Applicable Law.

POINT VI THE SO-CALLED "JUST TELL THE TRUTH" IMMUNITY AGREEMENTS BETWEEN THE PROSECUTOR AND HIS WITNESSES SERVED TO DEPRIVE ZISA OF A FAIR TRIAL.

POINT VII THE INCLUSION IN THE INDICTMENT OF THE 2004 CHARGES WAS FOR THE SOLE PURPOSE OF CLOTHING IN APPARENT RESPECTABILITY WHAT AMOUNTED TO NOTHING LESS THAN THE PROSECUTOR'S KNOWING ENDORSEMENT OF LAURA CAMPOS' PERJURIOUS TESTIMONY THEREBY ENABLING HIM TO PARADE BEFORE THE JURY FORBIDDEN "OTHER CRIMES" EVIDENCE; THE 2004 CHARGES SHOULD HAVE BEEN SEVERED BY THE COURT ONCE CAMPOS HAD BEEN CONCLUSIVELY DEMONSTRATED BY THE DEFENSE TO BE A PERJUROR.

POINT VIII SHOULD THIS COURT NOT FIND REVERSIBLE ERROR IN ANY ONE POINT ADVANCED, THE CUMULATIVE ERRORS IN THIS CASE REQUIRE REVERSAL.

POINT IX SHOULD A NEW TRIAL BE ORDERED BY THE COURT, THE ORDER OF REMAND SHOULD REQUIRE THE TRIAL COURT TO FIRST DETERMINE WHETHER THE DOUBLE JEOPARDY CLAUSE PROTECTS THE DEFENDANT FROM A RET[RI]AL.

In its cross-appeal, the State presents this point of argument:

> THE TRIAL COURT ERRED WHEN IT USURPED THE JURY'S FUNCTION AND OVERTURNED THE GUILTY VERDICTS ON COUNTS THREE, TEN AND THIRTEEN.

A.

Defendant first contends that the prosecutor's opening statement contained improper and prejudicial comments, and that a mistrial was required. Having read the prosecutor's opening, we must agree with defendant that it was riddled with impropriety.

The prosecutor began by giving the jury extensive inadmissible information about defendant's family and their political activities. In that connection, the prosecutor essentially told the jury that defendant's family was like royalty who thought they were above the law, but they were not. All of those comments were improper and prejudicial. Defendant

was not on trial for being politically connected, and his family was not on trial.[8]

The prosecutor then set forth a litany of alleged bad acts, all of which were inadmissible under N.J.R.E. 404(b) and were highly prejudicial. See State v. Cofield, 127 N.J. 328, 336 (1992). He repeatedly accused defendant of attempting to intimidate witnesses and fomenting administrative reprisals against witnesses in the case. Defendant was indicted with witness tampering as to one witness, John Hermann. That event allegedly occurred in 2008. Defendant was not charged with tampering with any other witness. Nor was he charged with official misconduct with respect to any of the alleged events the prosecutor described in his opening statement.

However, the prosecutor injected accusations that defendant tampered with several other witnesses and implied that defendant abused his office by arranging for unjustified administrative disciplinary actions to be filed against trial witnesses. He implied that defendant was responsible for, among other things, one of the witnesses, Officer Campos, having to retire early and losing her health insurance and other witnesses losing pension

[8] The prosecutor also touched on this theme in his summation, telling the jury that we don't have "dictatorships and kings" in this country and that the law was the same for everyone, even if "you're . . . a Zisa."

benefits. Defendant was not charged with any of that conduct. All of those references to extraneous administrative proceedings were improper. See State v. Jackson, 211 N.J. 394, 412 (2012).

The prosecutor also made unfavorable, inappropriate comments about an attorney who was representing defendant in civil litigation filed by several of the State's witnesses, and posited that the attorney arranged with a high-ranking officer in the sheriff's department, Captain Bradley, to have disciplinary charges filed against Arosemowicz. He also strongly implied to the jury that there was an omnibus conspiracy among various county and municipal law enforcement agencies to assist defendant and persecute the witnesses against him.

Those astonishingly improper remarks were not brief or made in passing. They were central themes of the prosecutor's opening, and comprised many pages of the transcript. Although at some point during this prosecutorial tirade defense counsel objected, the judge did not intervene. Moreover, the jury was permitted to go home shortly after the prosecutor finished his opening, without being given any curative instructions.

On the next trial day, counsel for both defendants moved for a mistrial. The prosecutor insisted that the matters he had just put before the jury were not "bad acts" but were an

anticipatory response to impeaching cross-examination questions he expected defense counsel to ask the State's witnesses about their civil actions against defendant and their disciplinary records.

In denying the mistrial motions, the judge essentially conceded that a curative instruction was going to be inadequate, because defense counsel would have to respond to the prosecutor's improper comments in their openings. However, with virtually no additional explanation, he stated that he would not declare a mistrial.

> The Court was surprised by the tenor and the statements made by the prosecutor during the opening statement. That was something that the Court did not anticipate, especially the attacks on Captain Bradley and the attacks on Mr. Zisa as to things happening after he was suspended. And somehow that has to be resolved by way of a [N.J.R.E. 404(b)] hearing with all of those witnesses before they testify as to other bad acts.
>
> But the Court is denying both requests for a mistrial. I put together I think what may be a curative instruction that may suffice in this case. Of course the defense is going to have to open dealing with the same issues raised by [the prosecutor] in his opening and almost in a way defending against people they're not even representing.
>
> So the mistrial will be denied. I put together a curative instruction based upon the arguments yesterday. . . . I'll let you see it before we read it to them.

[(Emphasis added).]

The judge then gave the jury the following curative instruction, which we quote in full:

> Let me start and indicate to you that during the trial the attorneys are allowed to make opening statements and summations. Opening statements are not evidence. The evidence will come from the witnesses who testify and whatever documents or tangible items [are] marked into evidence. So the attorneys are not witnesses and what they say is not evidence.
>
> During the prosecutor's opening statement, you had heard that there are civil cases pending, whereas certain witnesses are suing Mr. Zisa in his capacity as Chief of the Hackensack Police Department, as well as a previous and pending investigation pertaining to a Bergen County Sheriff's Officer and other Hackensack police officers who will be testifying in this trial.
>
> In reference to the civil cases, I'm instructing you that you may hear a little bit about the civil matter[s], but the civil matters in and of itself are not before you and you're not to consider the substance of the allegations in civil matters in determining whether or not the state has met its burden of proof.
>
> Citizens are entitled to bring civil actions, but they're mere allegations. Further, this is not a civil case. It is a criminal matter. And, again, I'm instructing you that the allegation or allegations in the civil matter or civil matters are not relevant to your deliberations and you may not consider them.

The fact that a witness brought a civil action in and of itself does not make that witness a truthful or untruthful witness. You may, however, consider whether or not the fact that a witness's status as a civil plaintiff created a bias or motivation to lie in this matter before you.

Again, this is not an automatic assumption, but it may be a circumstance that factors into your evaluation of the witness's credibility. It's up to you to determine the impact upon their credibility, if any, based upon the evidence you hear in this trial. Similarly, you may or may not hear prior statements from those civil matters attributed to the witness or witnesses before you.

You are the judges of the facts. As we discussed in my initial charge, you should use reason and common sense in determining what the truth is. You may consider all prior statements, whether under oath or not under oath, should you hear any in the evidence presented before you, in determining whether or not the witness before you is now telling the truth.

In fairness to both parties, both sides, the state and defense, I want you to understand that I made prior rulings that the attorneys will follow pertaining to how far they may go into the questioning of various witnesses concerning the civil activity. You should not hold the fact that you got information or did not get information against the defendant or the state. However, I'm again reminding you that you may base your conclusions only on the evidence before you in this courtroom.

Further, in reference to previous and pending investigations pertaining to a sheriff['s] officer and police officers, I'm instructing you that you may hear about the

> investigations and may have already heard about the investigation[s] in the state's opening statement, but you must realize that you are not to consider [the] substance of the allegations or any theories behind the investigation in determining whether or not the state has met its burden of proof. You may consider all prior statements by those subject to the investigations or executing the investigations, whether or not under oath or not under oath, should you hear any of the evidence presented before you, in also determining whether or not a witness before you is now telling the truth.
>
> As I said, you are the judges of the facts. This case involves indictment charges against two parties; Mr. Zisa and [K.T.] And that's what you'll be determining at the end of this trial, as to the state meeting the burden of proof pertaining to those two individuals on trial based upon that indictment.

Unfortunately, even assuming that a mistrial could have been avoided, this curative instruction was weak and inadequate to cleanse the taint the prosecutor created in his opening. See State v. Frost, 158 N.J. 76, 86-87 (1999). While usually a judge should avoid actually repeating an attorney's improper prejudicial comment, here the judge failed to identify for the jury with any specificity the parts of the opening statement that they were to disregard. The judge did not forcefully tell the jury that the prosecutor's remarks as to those matters were improper, and he did not unequivocally tell them that the improper information must be disregarded.

The judge's references to disregarding the substance of "civil cases" filed against defendant were inadequate. The judge did not even mention the prosecutor's improper allegations that defendant had conspired to persecute the State's witnesses by having meritless disciplinary actions brought against them, or the assorted prejudicial comments about the witnesses losing pensions and health benefits.[9] Nor did he address the prosecutor's improper remarks about defendant's family. In short, the trial was tainted from the outset, and the judge's comments were ineffective to purge the taint.

Moreover, this was not a particularly strong case in many respects, and much of the State's case hinged on the credibility of its witnesses. The State's case with respect to the 2008 incident depended on its ability to prove that, contrary to all of the contemporaneous police reports, K.T. was intoxicated at the time of the accident. Testimony about her alleged intoxication came from three witnesses, each of whom had a demonstrable bias against defendant; two of them had filed civil suits against defendant, and the third was an ally of the PBA president against whom defendant had filed disciplinary charges.

[9] The judge repeated the same vague and inadequate instruction in his final charge to the jury.

It is well understood that "other-crimes evidence should not be admitted solely to bolster the credibility of a witness against a defendant." State v. P.S., 202 N.J. 232, 256 (2010) (citing State v. Darby, 174 N.J. 509, 520 (2002)). The prosecutor's comments aimed at bolstering the credibility of the State's witnesses, and inferring that defendant must be guilty of the charged crimes because of his propensity to abuse his office, were "clearly and unmistakably improper" and had the clear capacity to produce an unjust result. State v. Wakefield, 190 N.J. 397, 438 (2007) (citation and internal quotation marks omitted), cert. denied sub nom., Wakefield v. New Jersey, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008); Frost, supra, 158 N.J. at 88-89. The prosecutor's references to information allegedly within the knowledge of persons who never testified were also completely improper. See State v. Land, 435 N.J. Super. 249, 250 (App. Div. 2014). The trial court's ineffective response to the improprieties added to the unfairness of the trial. See id. at 270-71.

To make matters worse, the prosecutor persisted in presenting the same type of prejudicial and improper evidence during the trial, requiring defense counsel to respond to it by attempting to show that no witness-tampering had occurred. The

judge acknowledged that the trial was going off-course, but failed to take effective corrective action.

Finally, during the testimony of Arosemowicz, the judge stated to the prosecutor: "[Y]ou're putting everyone else on trial except the parties that should be on trial. And you're creating a nightmare of this case as far as these accusations of witness tampering against the sheriff's department. . . . And you have no proof to show other than what you think happened."

The judge put the prosecutor "on notice to get off this train you're on as far as accusing other people of tampering with witnesses. It's not appropriate. . . . There's nothing in this you have shown to this Court that anyone is involved in witness tampering other than in your feeling that there is. So you need to get off that." However, by this time, Arosemowicz had been on the witness stand for several days, and the judge did not issue any curative instruction to the jury. Moreover, the prosecutor continued the same pattern of questioning during the testimony of Officer Al-Ayoubi.

On April 16, 2012, a week after the trial started, the judge held a N.J.R.E. 104 hearing concerning Herrmann's proposed testimony. After that hearing, he found the State had no evidence of witness tampering with respect to disciplinary actions filed against Herrmann; he found that to the extent they

might be relevant, they were far more prejudicial than probative; he concluded that raising the internal affairs investigations would involve mini-trials on those issues; and he barred both sides from questioning Herrmann about those investigations.

At the very end of the trial, right before summations, the judge gave the jury the following instructions:

> During the opening statement the prosecutor made mention of alleged personnel problems of various witnesses in this case. You are hereby instructed that those allegations made by the State are not issues in this case and must not be considered by you at any time in any manner in determining whether the State has proven the charges in the indictment beyond a reasonable doubt and you must disregard them. What attorneys say in opening statements is not evidence and they're not witnesses. You may consider all the testimony you've heard from the witnesses that was not stricken from the record by the Court.

However, we conclude that this brief instruction, coming at the end of a several-week trial, was too little too late. "Our dedication to a criminal justice system that values an accused's right to a fair trial requires nothing less than a new trial." Land, supra, 435 N.J. Super. at 271-72. We conclude that

defendant's conviction must be reversed. In the next sections, we consider what charge or charges may be retried.[10]

B.

We begin with defendant's challenge to his conviction for insurance fraud. To put the issue in perspective, we briefly recount the relevant evidence. As previously noted, there was evidence that K.T., who had been driving defendant's car, was intoxicated at the time of the accident. On February 11, 2008, defendant submitted a claim to his insurer, Palisades Safety and Insurance Association (Palisades). In connection with the claim, both defendant and K.T. signed the insurer's "OPERATOR QUESTIONNAIRE." That form advised:

> FRAUD NOTICE - NEW JERSEY WARNING
>
> ANY PERSON WHO KNOWINGLY FILES A STATEMENT OR CLAIM CONTAINING ANY FALSE OR MISLEADING INFORMATION IS SUBJECT TO CRIMINAL AND CIVIL PENALTIES.

Defendant's insurance policy, which was in evidence, stated:

> **FRAUD/MISREPRESENTATION/CONCEALMENT**
>
> We do not provide coverage for any person who qualifies as an insured under this policy who has made fraudulent statements, engaged in fraudulent conduct, or made any

[10] We do not decide here whether a retrial would be barred by double jeopardy principles. Defendant may present that issue to the trial court on remand.

> material misrepresentation or intentionally concealed any material fact or circumstance in connection with . . . any accident or loss for which coverage is sought under this policy.

In describing how the accident occurred, defendant and K.T. wrote on the questionnaire that K.T. "was traveling South on Moore St. approximately 15 miles an hour when a cat ran in front of [the] car," and she "swerved to the right [and] hit a telephone pole." They noted that "[n]obody was at fault, [she] simply swerved to avoid hitting the cat." One of the questions on the form asked, "Was there any evidence of intoxication?" They checked the box "NO". Palisades paid the claim, issuing checks to defendant and the auto body shop that repaired his car, totaling $11,391.88, which was the cost of the repairs minus a $500 deductible.

On the insurance fraud issue, the critical inquiry on this appeal is whether the State presented evidence as to all elements of the offense. If the State failed to present evidence on one or more elements of the offense, defendant was entitled to a judgment of acquittal. State v. Cuccio, 350 N.J. Super. 248, 256-57 (App. Div.), certif. denied, 174 N.J. 43 (2002).

The crime of insurance fraud is defined in relevant part as follows:

> A person is guilty of the crime of insurance fraud if that person knowingly makes, or causes to be made, a false, fictitious, fraudulent, or misleading statement of material fact in, or omits a material fact from, or causes a material fact to be omitted from, any . . . claim or other document, in writing, electronically, orally or in any other form, that a person . . . submits, causes to be submitted, or attempts to cause to be submitted as part of, in support of . . . or in connection with: (1) a claim for payment, reimbursement or other benefit pursuant to an insurance policy, or from an insurance company . . . .
>
> [N.J.S.A. 2C:21-4.6(a) (emphasis added).]

From the plain language of the statute, not just any false or fraudulent statement constitutes a crime; the statement must be "of material fact." In construing the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1 to -30, which is the civil analog to N.J.S.A. 2C:21-4.6, we addressed a similar issue. In Selective Insurance Co. v. McAllister, 327 N.J. Super. 168, 175 (App. Div.), certif. denied, 164 N.J. 188 (2000), the defendant insured had been convicted of theft by deception for submitting a false medical bill, after which the insurer filed a civil action to recoup all of the PIP benefits paid to her on the theory that she was not injured in the accident. As the State does here, in Selective the insurer relied on the language of its policy that it would not provide coverage for an insured "'who has made fraudulent statements

. . . in connection with any accident or loss for which coverage is sought under this policy.'" Id. at 171. We concluded that was insufficient to prove insurance fraud under the Act.

> We recognize that the insurance policy appears on its face to preclude any coverage in the event of a fraudulent submission. However, the statute which supports this cause of action, the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1 to -30, requires that the "false or misleading information concerning any fact or thing [be] material to the claim." N.J.S.A. 17:33A-4(a)(1) (emphasis added).
>
> The language of the policy, while not explicit, implicitly requires materiality as it requires a showing of "fraudulent statements." Fraud consists of "'a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely [on the misstatement], resulting in reliance by that party to his detriment.'"
>
> [Id. at 174-75 (alterations in original) (footnote and final citation omitted).]

Because materiality was not an element of theft by deception, the criminal conviction could not be given collateral estoppel in the civil action; rather "the question of materiality of the alleged fraudulent submissions is for the jury in the civil trial to determine." Id. at 176. Thus "[t]he jury must assess, as an element of materiality, whether plaintiff would have changed its course of action in assessing

the claims upon learning of the fraudulent conduct." Id. at 178.

The reasoning of Selective is persuasive here. Based on the plain language of N.J.S.A. 2C:21-4.6(a), the State must prove beyond a reasonable doubt that the false or fraudulent information was "material" to the insurance claim. That is even clearer here than in Selective, because defendant's insurance policy actually referred to the materiality requirement: "We do not provide coverage for any person . . . who has made . . . any material misrepresentation or intentionally concealed any material fact or circumstance in connection with . . . any accident or loss for which coverage is sought under this policy."

The issue of materiality cannot be left to the jury's speculation. Rather, the State must prove materiality through legally competent evidence. In this case, the State produced no proof of materiality, apparently because it had none.

In arguing the motion for acquittal NOV, defense counsel stated on the record that during the trial she had interviewed the State's insurance company witness outside the courtroom and the witness had told her that whether K.T. was intoxicated would not have affected the company's decision whether to pay the insurance claim. According to defense counsel, immediately

after that conversation, the prosecutor told her that he would not call the insurance company representative as a witness. The prosecutor did not deny any of that.

The judge denied the defense motion for acquittal NOV on the insurance fraud conviction premised on the judge's assumption that the information about K.T.'s alleged intoxication would have made a difference to the insurance company's handling of the claim. That was legally erroneous, because it was the State's burden to prove materiality with legally competent evidence, not with speculation and assumptions. Moreover, since the insurance policy had no exclusion for intoxication, and the insurance witness told defense counsel the information would not have precluded payment of the claim, it appears that the judge's assumption was also factually inaccurate.

Because the State failed to present legally competent evidence as to an element of the offense, defendant was entitled to a judgment of acquittal NOV. Cuccio, supra, 350 N.J. Super. at 256-57. In fact, the court should have granted defendant's motion for a directed verdict of acquittal after the State presented its case-in-chief. Accordingly, the conviction for insurance fraud is reversed and on remand, the court shall enter a judgment of acquittal on that count.

C.

Next, we address the State's cross-appeal from the judgment of acquittal NOV, pursuant to Rule 3:18-2, on official misconduct charged under N.J.S.A. 2C:30-2(b), and on committing a pattern of misconduct. The official misconduct statute has two pertinent provisions, each of which applies, in relevant part, when a "public servant" acts "with purpose to obtain a benefit for himself or another." N.J.S.A. 2C:30-2.

Section (a) refers to affirmative conduct. It applies when the public servant "commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner." N.J.S.A. 2C:30-2(a).

Section (b) refers to a knowing omission to perform a required duty. This section applies when a public servant "knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office." N.J.S.A. 2C:30-2(b).

In prosecuting defendant for the 2004 incident, the State's theory was that defendant violated section (a) by affirmatively interfering in the investigation of K.T.'s son, and violated section (b) by failing to recuse himself from involvement in the matter. The jury acquitted defendant of violating section (a),

but convicted him under section (b). With respect to the 2008 charges, the State's theory was that defendant violated section (a) by affirmatively interfering in the investigation of K.T.'s auto accident and violated section (b) by failing to recuse himself from involvement. The jury convicted defendant of violating both sections (a) and (b).

In a lengthy oral opinion issued on September 12, 2012, the trial judge began by reviewing the trial evidence, noting the significant weaknesses in the State's case. He then turned to the motion for acquittal on the charges under N.J.S.A. 2C:30-2(b).

In granting the motion, the judge reasoned that it was the State's burden to prove that defendant failed to perform a duty that was either specifically required by law or clearly inherent in the nature of defendant's office. He found:

> There's no duty of recusal placed upon Mr. Zisa or upon any other member of the Hackensack Police Department by law or rule, and as such the defendant could only be found guilty under 2C:30-2(b) for failing to recuse himself [if] such a duty could be clearly found in the inherent nature of his office.

Citing State v. Grimes, 235 N.J. Super. 75, 89-90 (App. Div.), certif. denied, 118 N.J. 222 (1989), the judge considered whether recusal was so "clearly inherent" in the nature of defendant's office that he "could be on notice that a violation

could be considered a crime under the official misconduct statute."

Addressing the 2004 incident, the judge found there was no evidence "to establish that Mr. Zisa injected himself in the 2004 investigation, and as such no duty was triggered or violated." The judge found that, even giving the State the benefit of all favorable inferences from the testimony, defendant "was still only merely present at headquarters." There was no testimony at all as to what defendant said to anyone at headquarters and there was "no evidence that Mr. Zisa directed anyone to do anything. There's a lack of circumstantial evidence to infer, let alone based upon a totality of the evidence to establish beyond a reasonable [doubt] that Mr. Zisa's involvement triggered a duty of recusal" based on his "mere presence in the station house."

The judge noted that the only empirical evidence concerning the alleged deletion of the son's name from a report came from a defense computer expert, John Lucci. The judge recounted that Lucci, who had been permitted to examine the police department computer system, testified that "there was no evidence of any information in this case being deleted."

Noting the discretion that police officers had to make a station house adjustment in lieu of filing criminal charges, the

judge noted there was no evidence that defendant influenced the decision of the investigating officers as to how to handle his girlfriend's son's case. The judge further noted that the victim and his father did not press charges, the three accused teenagers promptly admitted their wrongdoing and paid restitution, and "all three as well as the victim's father were in agreement as to restitution."

The judge further found based on the evidence, that defendant did not have a duty to refrain from going to the station house where K.T.'s son, a teenager who lived in defendant's household, was present. The judge reasoned that defendant was like a step-father to the teenager, who had lived in his household for years, and "[a]ny parent has the right to be present with their children or loved ones, and as such it is clear a duty to refrain from such actions [as going to the station house] is not inherent in the office of a police officer."

Citing State v. Thompson, 402 N.J. Super. 177, 198-99 (App. Div. 2008), the judge reasoned that, absent other illegal conduct, "[a] mere conflict of interest is not enough to find a violation of [N.J.S.A.] 2C:30-2." In this case, the judge found there was "no additional wrongful act in furtherance or in

connection with Mr. Zisa's alleged failure to recuse himself." See id. at 195.

Our standard of review of the trial court's decision is de novo. See State v. Williams, 218 N.J. 576, 593-94 (2014).

> On a motion for judgment of acquittal, the governing test is: whether the evidence viewed in its entirety, and giving the State the benefit of all of its favorable testimony and all of the favorable inferences which can reasonably be drawn therefrom, is such that a jury could properly find beyond a reasonable doubt that the defendant was guilty of the crime charged.
>
> [State v. D.A., 191 N.J. 158, 163 (2007) (citing State v. Reyes, 50 N.J. 454, 458-59 (1967)).]

Having reviewed the record in light of that standard, we completely agree with the trial judge on this point. As the judge acknowledged, the State's evidence against defendant on the 2004 incident was woefully inadequate. The mere fact that he appeared at the station house while K.T.'s son was present did not constitute a crime.

We also agree with the judge that construing N.J.S.A. 2C:30-2(b) to criminalize conflicts of interest would not give "'fair notice of what is prohibited,'" and would violate due process. State v. Pomianek, 221 N.J. 66, 84-85 (2015) (citation omitted); see also Thompson, supra, 402 N.J. Super. at 201-03.

We affirm substantially for the reasons stated by the trial judge.

The judge next addressed the 2008 charge that defendant violated the statute by failing to "recuse himself" and "failing to ensure that a proper investigation was done into the accident." The judge found that there were "no facts surrounding the 2008 accident to trigger a duty of recusal. The State['s] evidence established that Mr. Zisa merely responded to a call from [K.T.] following her car accident." The judge found no evidence that defendant was told that K.T. "was suspected to be under the influence of alcohol." There was no testimony from the officers that they had "any conversation with [defendant] about [her] condition." The judge did not find "as a matter of law that the inherent nature of Mr. Zisa's office requires a recusal to such a degree, that he cannot even arrive to [the] scene of a companion['s] car accident involving his own car."

On the other hand, the judge found that, if the jury credited the State's evidence, defendant violated N.J.S.A. 2C:30-2(a) when he affirmatively removed K.T. from the car she had been driving, helped her into his vehicle, and removed her from the scene, "thereby interfering with a criminal investigation." He found that, viewing the evidence in the light most favorable to the State, the jury could reasonably

have concluded that defendant "actions amounted to an unauthorized act." The judge concluded that defendant's actions were unauthorized regardless of whether K.T. was intoxicated, because he interfered with the on-scene officers' investigation of the accident. The judge also found that defendant used his position as police chief to enable him to remove K.T. from the scene.

However, as that was the only act of official misconduct that survived the acquittal motion, the judge dismissed defendant's conviction for a pattern of official misconduct, because that conviction required the commission of "two or more acts that violate the provisions of the official misconduct statute." N.J.S.A. 2C:30-7(a).

Again, reviewing the judge's decision in light of the applicable legal standards, we affirm for the reasons stated in his opinion.

D.

Turning to defendant's additional arguments, his Point IX, contending that there was insufficient evidence to support his conviction for official misconduct under N.J.S.A. 2C:30-2(a) with respect to the 2008 incident, is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Addressing defendant's Point V concerning the destruction of the detectives' notes, we conclude that on this record the judge did not abuse his discretion in giving the jury an adverse inference charge rather than dismissing the indictment. See State v. Dabas, 215 N.J. 114, 141 (2013). However, defendant may raise the issue again on remand and may seek any relief that may be appropriate in light of the evidence available at that time.

In light of the Court's emphatic language in Dabas, we agree with defendant that the trial judge should not have softened the adverse inference charge by telling the jury that "[a]t the alleged time the notes were destroyed [in October 2010], law enforcement officers were not required to preserve contemporaneous notes of their interviews . . . even after producing their final report." That part of the instruction was incorrect and should not be included in any adverse inference charge given at the re-trial. See id. at 135-36.

In light of our disposition of the appeal, we need not address defendant's remaining points, except to the following limited extent. For purposes of the remand, we remind the trial court of the Court's admonition in State v. Silverstein, 41 N.J. 203 (1963):

> [A]n indictment for misconduct in office which merely alleged breach of the oath

> would be palpably deficient. Although the oath prescribed is a necessary condition to assumption of the office, of itself it creates no particular duty, transgression of which would constitute the indictable crime charged here. The criminal offense arises from unlawful behavior which violates specific official duties inherent in, or attached to, the public office involved.
>
> [Id. at 205.]

Therefore, under no circumstances should the jury be given the misimpression (either by the court's instructions or the prosecutor's comments) that the oath creates a duty, ministerial or otherwise, for purposes of the misconduct in office statute.

To summarize, we affirm the order granting a judgment of acquittal NOV on defendant's conviction on two counts of official misconduct under N.J.S.A. 2C:30-2(b). We reverse defendant's conviction for insurance fraud, and on remand the court shall enter a judgment of acquittal on that count.[11]

We reverse defendant's conviction for official misconduct in violation of N.J.S.A. 2C:30-2(a), and remand for re-trial on that count. However, as previously noted, prior to the re-trial defendant may present to the trial court his argument that a re-

[11] It is unclear whether K.T. ever filed an appeal from her conviction for insurance fraud. However, upon issuance of this opinion, the Clerk's Office shall provide a copy to the head of the Office of the Public Defender's (OPD) appellate section and to K.T.'s former OPD trial attorney.

trial is barred by double jeopardy principles. We intimate no view on the merits of that argument.

Lastly, we remind all concerned that "the primary duty of a prosecutor is not to obtain convictions, but to see that justice is done." Frost, supra, 158 N.J. at 83 (1999) (citations and internal quotation marks omitted). We trust that the improprieties noted herein will not recur on remand.

Affirmed in part, reversed in part, remanded in part.