SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5356-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LATIMAR BYRDSELL,

Defendant-Appellant.

Argued June 6, 2017 – Decided December 1, 2017

Before Judges Messano, Suter, and Grall.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 07-02-0162.

Joshua D. Sanders, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Al Glimis, Assistant Deputy Public Defender, of counsel and on the brief).

Jane C. Schuster, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Ms. Schuster, of counsel and on the brief).

PER CURIAM

Defendant Latimar Byrdsell was convicted of crimes committed on July 10, 2006, against his fiancée's daughter, who was three years old. He challenges the denial of his motion to suppress statements he made to investigating officers the next day, the jury instruction on consideration of the unrecorded portions of his custodial interrogation and his sentence.[1] Defendant did not testify or present evidence at the suppression hearing or trial.

The jury found defendant guilty of aggravated manslaughter, N.J.S.A. 2C:11-4(a),[2] felony murder in the commission of sexual assault, N.J.S.A. 2C:11-3(a)(3) (count two); and first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a) (count three).[3]

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[1] Four judges of the Superior Court were involved in this case. A hearing on defendant's motion to suppress commenced on April 11, 2011. On May 3, 2011, the suppression hearing was started anew before a different judge. That judge took testimony and listened to audio-recorded interviews on May 3, 4, 5 and 17, 2011, and that judge issued a written opinion dated November 4, 2011. A third judge presided over defendant's jury trial, which commenced on April 24, 2013, and a fourth judge sentenced defendant on November 15, 2013.

[2] In count one, the grand jury charged murder, N.J.S.A. 2C:11-3(a)(1)-(2), and the judge submitted aggravated manslaughter to the jury as a lesser included offense.

[3] The jurors did not consider counts four or five, charging second-degree sexual assaults as defined in N.J.S.A. 2C:14-2(b) and (c). Count five was dismissed at trial, and the verdict sheet directed the jurors not to consider count four if they found defendant guilty of first-degree sexual assault.

The court merged defendant's convictions for felony murder and first-degree sexual assault but not his convictions for felony murder and aggravated manslaughter. As mandated by N.J.S.A. 2C:11-3(b)(3) for felony murder involving sexual assault involving a child less than fourteen years old, the court sentenced defendant to life imprisonment without parole. For aggravated manslaughter, the court imposed a concurrent twenty-seven years' imprisonment subject to periods of parole ineligibility and supervision required by the N.J.S.A. 2C:43-7.2. The court also ordered restitution and imposed monetary sanctions and assessments for the homicides and the sexual assault.

I.

When the crimes were committed, defendant, his fiancée, and her child were living, as they had been for several months, in a motel-apartment in Millville. On July 10, the child was alone in defendant's care from about 1:45 p.m., when her mother left for work, until the EMTs arrived in response to 911 calls defendant placed at 9:38 and 9:43 p.m. The child's mother had directed defendant to call 911, because she had called him from work and he told her the child was gasping for air.

The child's pulse was weak when the EMTs got to the apartment and became undetectable during the trip to the

hospital. Despite the efforts of EMTs, the paramedics who joined them en route to the emergency room (ER), and ER staff, the child's heartbeat was not restored. She was pronounced dead at 10:38 on July 10. The ER-doctor examined the child's body for trauma and saw injuries to her vaginal and anal areas. Consequently, law enforcement was notified.

The next afternoon Detectives O'Neill and Roman of the Cumberland County Prosecutor's Office (CCPO) interviewed the child's mother at her mother's home. Defendant arrived while they were there, and he agreed to accompany the detectives to the police station in Millville and give a statement.

Defendant's interview commenced at 4:00 p.m., and from 4:00 until 8:58, which is when defendant asked a detective to "cut" the recording device "off for a second," his interviews were recorded.[4] After that, there were no recordings. Defendant's interview ended at 11:53, which is when he signed a statement the detectives had composed and typed. The statement he signed is the detectives' typed summary of defendant's statements: "I was asked to voluntarily give a taped statement or written

[4] There were pauses in the recording to change its memory card and other pauses where one or both officers left the interview room. At the hearing on defendant's motion to suppress, the defense stipulated that nothing of import occurred during those breaks.

statement regarding my involvement in this investigation, but I refused after having been advised that I'm not obligated to give a taped or written statement." Because the recording had not been re-activated when the statement was prepared, neither defendant's refusal to give a recorded statement nor the admissions it includes were recorded.

The statement, which was read to defendant before he signed it and to the jury at trial, includes these admissions. Defendant started drinking brandy between 3:00 and 4:00 in the afternoon on July 10. He had purchased the brandy the day before and hidden it in a pocket of pants in their hamper, because his fiancée thought he acted crazy when drinking. Around 8:30, the child acted up, and he told her to be quiet. Upset by her crying, he let the alcohol take over. He picked the child up from her bed, laid her on the other bed on her stomach and put a pillow over her head. When she moved and tried to take the pillow off, he pushed it down. After she was quiet, he removed the pillow and noticed she was not breathing normally. The injuries to the child's vagina and anus "were caused" when he had her head covered, but he did not put anything inside her or touch her vagina or anus. No one else had come into their apartment that day. Defendant was sorry, did not mean to do it and would take it back if he could.

Following an autopsy, the medical examiner (M.E.) concluded the child died as a consequence of asphyxia due to smothering. The M.E. found internal and external bruising of the child's neck and back. Among other injuries, the M.E. found a one-half inch long rectal tear caused by a "forceful stretching," an abraded bruise inside the child's labia minora, and, a hymen that was not intact, "very red" and had a "scrape." The M.E. concluded those injuries were sustained no earlier than twenty-four hours before the child's death.

Although the child had been with relatives the day before she died, she, her mother and defendant returned to their apartment together at about 11:00 p.m. that night. That was about twenty-three hours and thirty-eight minutes before she was pronounced dead. During the early part of his interview, defendant agreed to provide and provided a DNA sample, but the results disclosed nothing significant. There were no witnesses to the crime.

Defendant raises these issues on appeal:

> POINT I
>
> THE POLICE VIOLATED DEFENDANT'S FIFTH AMENDMENT AND STATE COMMON LAW RIGHT TO COUNSEL BY QUESTIONING HIM AFTER HE INVOKED HIS RIGHT TO COUNSEL. SINCE DEFENDANT'S RIGHTS WERE NOT SCRUPULOUSLY HONORED, HIS SUBSEQUENT STATEMENTS AT VINELAND POLICE

HEADQUARTERS MUST BE SUPPRESSED. (U.S. CONST. AMENDS. V; XIV; N.J. CONST. ART. I, ¶ 1).

POINT II

BECAUSE BYRDSELL'S ORAL AND WRITTEN STATEMENTS AT THE VINELAND POLICE DEPARTMENT WERE NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE, AND BECAUSE THREE HOURS OF BYRDSELL'S INTERROGATION AT VINELAND POLICE HEADQUARTERS WAS UNRECORDED BY THE POLICE, CONTRARY TO R. 3:17, THE TRIAL COURT'S REFUSAL TO GRANT HIS MOTION TO SUPPRESS THOSE STATEMENTS DEPRIVED HIM OF DUE PROCESS OF LAW AND VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION. (U.S. CONST., AMEND V, XIV; N.J. CONST. (1947) ART. I, PAR. 1).

A. VOLUNTARINESS.

B. FAILURE TO RECORD STATEMENT PURSUANT TO R. 3:17.

POINT III

A CRITICAL SECTION OF [THE] COURT'S CHARGE ON THE FAILURE OF THE POLICE TO RECORD DEFENDANT'S STATEMENT, THAT PORTION WHICH INFORMED THE JURY OF THE EVIDENCE IN THE CASE THAT IT COULD CONSIDER IN DECIDING WHETHER BYRDSELL'S STATEMENTS WERE CREDIBLE, WAS OMITTED. (NOT RAISED BELOW)

POINT IV

IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED FOR RESENTENCING BECAUSE THE SENTENCING JUDGE WRONGLY FOUND SEVERAL AGGRAVATING FACTORS AND FAILED TO FIND AS MITIGATING FACTORS THE FACT THAT BYRDSELL HAS NO PRIOR CRIMINAL RECORD AND THE FACT THAT HE HAS SUBSTANTIAL COGNITIVE IMPAIRMENTS.

II.

Defendant's challenges to his convictions all concern the admission of statements he made to officers investigating the crimes. Review of such rulings is narrow. Where factual findings are "supported by sufficient credible evidence in the record" deference is required. State v. S.S., 229 N.J. 360, 374 (2017) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)); see id. at 381. "Corrective action" is appropriate only "when factual findings are so clearly mistaken — so wide of the mark — that the interests of justice demand intervention." Id. at 381. Only review of legal issues is de novo. Id. at 380.

A.

Defendant claims he invoked the right to counsel "for a limited purpose (the polygraph exam)" and detectives failed to scrupulously honor his invocation.[5] This argument rests on a segment of the interview that was recorded.

[5] The brief submitted on defendant's behalf states:

> Because Mr. Byrdsell requested counsel for a limited purpose (the polygraph exam), the police could continue to question him at the Millville Police headquarters without having counsel present. See Connecticut v. Barrett, 479 U.S. 523 (1987) (where defendant told the officer that he would not give a written statement unless his lawyer was present, but had no problem talking

(footnote continued next page)

When defendant's interview with Detectives O'Neill and Roman commenced at 4:00 p.m., O'Neill posed preliminary questions. Defendant was twenty-three years old and a high school graduate, could read and write the English language and had never been arrested or convicted of a crime. O'Neill then delivered Miranda[6] warnings. Defendant does not challenge the clarity or adequacy of the warnings or the validity of his waiver of his Miranda rights, which the judge found the State established beyond a reasonable doubt. State v. Adams, 127 N.J. 438, 447 (1992). Accordingly, there is no reason to address the warnings.

After defendant signed the waiver of his Miranda rights, O'Neill questioned defendant about his living arrangements, his relationship with the child, and the events of July 10 and the previous day; Roman primarily observed. Defendant initially told the detectives he had been alone with the child from the time her mother went to work. O'Neill told defendant the M.E.

(footnote continued)
about the offense, this was only a limited request for counsel, and the police could continue to question him).

[emphasis added].

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

had found damage to the child's vagina and anal areas, and he and Detective Roman had to determine how they were caused. Defendant answered O'Neill's questions, and at 5:12 p.m., he agreed to give and provided a sample of his DNA.[7]

O'Neill had to pause the recording device to change the disc at 5:27. At that point, he and defendant had been discussing the case for nearly an hour and one-half. Five minutes later, the interview resumed.[8]

The first question O'Neill posed when the recording was resumed at 5:32 was whether the detectives and he had talked about the case while the tape was off. Defendant said, "I asked you one question." O'Neill asked him to repeat it, and defendant did: "Alright, what can I do to clear my name out of this because I didn't do anything."

O'Neill asked defendant to speak a little louder. Instead of repeating his question, defendant commenced the colloquy he claims was his invocation of the right to counsel.

> [Defendant]: I'll take a lie detector test to clear my name because I didn't do any such thing.
>
> [Detective]: So you want to take a lie detector test?

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[7] The DNA testing did not yield any significant information.

[8] See footnote 4 above.

> [Defendant]: If that's what it comes down to, like for that part I will request a lawyer because now I feel like I'm being accused of something that I didn't do.
>
> [Detective]: Okay. Well, uh . . . .
>
> [Defendant]: I tell you everything I know, everything I know, I told you. I have not told you no lie. I'm not going to tell you no lie. And now I feel as though like (indisc.) like thinking I'm the suspect when I didn't do anything wrong. I'm saying, tell you from the bottom of my heart, I never lied to you since we begin this interview, I never lie to you. I'm not going to start now but you, you all is looking at me like I'm the one doing all this and I'm not. I'm telling you, I'm not. I never done (indisc.), that's not me. I don't do things like that. I don't get no satisfaction out of that. There's nothing for me there. I don't do that. It never crossed my mind. It never will. And it hurt to be in a situation like this knowing that I didn't do no such thing. I can tell you and I can tell anybody that and I will keep saying it, keep saying it because I did not do it.
>
> [Detective]: Okay.

At the suppression hearing, defense counsel asked O'Neill whether he responded by asking "do you want a lawyer present?" The detective, who had not asked that question, responded:

> Let me make it clear to you. [Defendant] said that he would be willing to take a lie detector test, which I wasn't expecting him to say it because it wasn't even part of the conversation. He said he felt like he was being accused now, but for that part of it he will request an attorney, referring to

> the polygraph test, if it was available to him. That was clearly my understanding.

Defense counsel then asked O'Neill whether he agreed that accusations of sexual assault against a child would be distressing and lead someone to ask for an attorney about speaking to the police. O'Neill responded: "But, that wasn't the case in this particular investigation. He didn't ask to speak to an attorney regarding speaking with me. He was referring to the polygraph test."

The judge found defendant had not invoked his right to counsel. He explained, defendant

> indicated that for the upcoming polygraph examination, he would request a lawyer, stating "for that part (the polygraph examination) I will request a lawyer." . . . [Defendant's] statement here is nothing more than an indication that the defendant reserved his right to request an attorney at some future point in time.
>
> [emphasis in original.]

That finding is "supported by sufficient credible evidence in the record" and deference is required. S.S., supra, 229 N.J. at 374, 381. After the recorder was reactivated, defendant said he had asked O'Neill how he could clear his name, and when asked to repeat the question he asked, gave his own answer: "I'll take a lie detector test to clear my name because I didn't do any such thing." Viewed in that context, his stated intention "I

will request a lawyer" if "it comes down to" a polygraph, suggests his confidence that he would be able to convince the detectives by talking to them. Defendant demonstrated that by launching into the monologue professing his truthfulness, sincerity and disdain for sexual abuse of children, which he did without waiting for O'Neill to complete what he was saying.

Defendant's reliance on Connecticut v. Barrett, 479 U.S. 523, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987), is misplaced. In Barrett, the Court determined that "defendant's refusal to give a written statement without his attorney present was a clear request for the assistance of counsel to protect his rights in his dealings with the police," for that limited purpose. Id. at 527, 107 S. Ct. at 831, 93 L. Ed. 2d at 926. The difference between this case and Barrett is that defendant did not say he would not take a polygraph without a lawyer present. He said, I "will request" an attorney if it comes to that.

The New Jersey Supreme Court's decision in State v. Gerald, 113 N.J. 40 (1988), highlights that statements like defendant's require a two-step analysis. In Gerald, the Court was confronted with what it termed an "alleged invocation of the right to counsel." Id. at 114. The defendant had confessed to the police chief and was then "asked to make a taped statement." Ibid. "Defendant replied that he was willing to answer the

officers' questions but that he wanted to consult with counsel before making a taped statement." Id. at 114-15. "The officers then offered to cease questioning, but the defendant indicated that he would feel better if he talked about the incident." Id. at 115. The Court concluded Gerald's statement raised "two possible issues: first, [the threshold question] whether defendant's statement constituted an assertion of the right to counsel, and if so, whether the police properly honored that assertion." Ibid. The Court concluded: Gerald's "statement was equivocal at best. His indication that he would answer all questions, but would not make a taped statement unless he had seen a lawyer, was unclear regarding his invocation of his right to counsel." Id. at 116 (emphasis added).

In this case, the defendant did not say he would not take a polygraph without counsel. He said if it comes down to a polygraph, "I will request a lawyer." In short, there was no equivocation or ambiguity. As the trial court aptly put it, his statement was "nothing more than an indication that the defendant reserved his right to request an attorney at some future point in time." (emphasis in original). Stated differently, the statement was the equivalent of an acknowledgment of his right to request counsel at any time.

In State v. Alston, 204 N.J. 614, 624 (2011), the Court directed that when a suspect's "statements are so ambiguous that they cannot be understood to be the assertion of a right, clarification is not only permitted but needed." As there was no ambiguity or equivocation here, that rule had no application.

The judge properly resolved the threshold question identified in Gerald – whether defendant invoked the right to counsel – in the negative. For that reason, defendant's claim that officers failed to scrupulously honor his invocation of the right necessarily fails.

We address the events that followed defendant's first reference to counsel, because Detectives O'Neill and Roman did eventually bring defendant from the Millville to the Vineland police station so that Detective Negron, of the Vineland Police Department, could administer a polygraph. Defendant made all of his unrecorded and his most incriminating statements during subsequent interrogations conducted by Negron and O'Neill at the Vineland station.

When defendant first mentioned the polygraph to O'Neill and Roman, the detectives did not know if there was a qualified officer available to administer one. Minutes after defendant mentioned the polygraph, at 5:36, O'Neill and Roman left the

interview room. At 5:45, O'Neill returned with his superior Sergeant Chopek.

Chopek told defendant he had just spoken to the M.E., and he gave defendant an account of what he knew about the case. Defendant asked Chopek if he could ask Chopek a question, and Chopek said, "Sure." Defendant asked, "What can I do [sic] able to prove that I did no such thing?" In response, Chopek mentioned that the DNA defendant had provided could help, but not necessarily, and that another thing would be a polygraph, which could be helpful or harmful depending upon whether it showed deception. Defendant said, "Okay."

Chopek responded by reminding defendant of his prior mention of counsel for a polygraph, thereby presenting defendant with an opportunity to make the request he said he would make if it came to that. The colloquy was brief:

> [Chopek]: Okay, but I understand earlier you told the detective that if you were, if, uh, you'd be willing to take a polygraph . . . if you were to take a polygraph, you'd want an attorney for that.
>
> [Defendant]: I'm trying to do anything to prove my innocence because I did not do anything. Whatever it takes to prove my innocence. Because I have not done anything but care for that child like (indisc.).

After that exchange, defendant continued to deny any inappropriate touching of the child and asked twice if he could

go and see his family. O'Neill told defendant they needed a few minutes to discuss it, and then Chopek expressed appreciation for his cooperation. Defendant asked again to go see his family. Chopek asked, "When we're done here?" Defendant said "Yeah," and then Chopek said, "Hell, yeah." Defendant said, "I just want to be with my fiancée this time like this." The officers left him at 5:56.

After that there was a significant break. At 6:01, O'Neill returned and offered defendant something to drink, a bottle of water, pizza or anything. Defendant said "I just want to see my family, that's all." O'Neill and defendant each assured the other he was doing the best he could. Defendant declined a second offer of food and said, "I just want this to all be over with." He declined another offer of something to eat or drink, and O'Neill left the room at 6:02.

At 6:23, O'Neill returned to let defendant know he was still waiting for a phone call. Defendant declined another offer of food or beverage, and he restated his desire to see his family. At 6:46, defendant asked O'Neill when he could go to see his family, and O'Neill said he was still waiting for a call. Defendant asked if O'Neill was waiting for the buccal swab results. O'Neill said, "a couple of them" and told

defendant he would be able to tell him what was "going on and then we go right from there."

Three minutes later, O'Neill told defendant they could offer him a polygraph if he wanted one and if he chose to do that. O'Neill then knew Detective Negron could do a polygraph. O'Neill told defendant he could go home if he passed but if it came out that he was being deceptive they would have to sit down and talk.

At 6:50, O'Neill left the room again. When he returned at 7:00, he told defendant they were going to give him the opportunity to take the polygraph. He asked if defendant had any questions, and defendant said: "Let's get it over with."

O'Neill introduced Negron to defendant at 7:37 in an interview room at the Vineland station. Negron started by telling defendant he wanted to advise him of his rights. Defendant again acknowledged his understanding and waived his rights. This colloquy on the right to counsel followed:

> [Detective]: Do you still, uh, want to proceed to speak with me?
>
> [Defendant]: It's okay by me.
>
> [Detective]: Huh?
>
> [Defendant]: Yes, to prove my innocence, yes.

[Detective]: Okay. Now, uh, you have the right to proceed our conversation with the tape recorder on or you can have it shut it off. What do you, how do you, how do you want to continue this?

[Defendant]: (Indisc.) (Indisc.) make a difference to me because I don't got nothing to hide.

[Detective]: Okay. No problem. I need you to put your initials here and sign your name.

[Defendant]: Think a lawyer necessary?

[Detective]: That is up to you. That's, it, it says here you have the right to have an attorney present if you so desire. You understand that right?

[Defendant]: Yeah, I understand.

[Detective]: Do you want an attorney?

[Defendant]: What's an attorney going to do?

[Detective]: Well, I want you to understand something. Okay, this is a, uh, an investigation which is being handled by the Prosecutor's Office here. You've come into this, the Vineland Police Department because you volunteered to take a polygraph. Okay. Before I give you the polygraph, I have to advise you of your rights. I want you to be aware of your rights. Okay? If you, you mentioned that . . . you said, if I feel, if a lawyer's necessary, that is a decision that you must make yourself. I can't make that decision for you. I advised you of your rights. Your [r]ights says that you have the right to consult with an attorney at any time, okay, and have him present before and during questions. That's one of

> your rights. If you, if you wish to proceed without an attorney, let me know. If you don't want to proceed and you want to contact an attorney, that's . . . .
>
> [Defendant]: I just want this over with. I just want to prove my innocence.
>
> [Detective]: But I'm just saying, what do you want to do?
>
> [Defendant]: Just give me the test.
>
> [Detective]: You want to proceed without an attorney?
>
> [Defendant]: Yes. Let's get it over with.
>
> [Detective]: Is that "yes"?
>
> [Defendant]: Yes.

The judge addressed defendant's interactions with Chopek and Negron set forth above in his written decision.

> Later on in the interrogation here, when an officer [Chopek] referred to [defendant's] earlier statement that he wanted a lawyer for the polygraph, [defendant] reiterated his desire to prove his innocence. Finally, shortly before the [intended] administration of the polygraph, [defendant] again received Miranda warnings, and asked what a lawyer would do for him. Upon clarification by police, [defendant] repeatedly indicated his desire to proceed . . . . Here, as required by Alston, the police clarified the defendant's arguably ambiguous request for counsel; in response, defendant indicated that he wished to proceed without counsel. Although [defendant] asked if needed a lawyer when he was read his Miranda rights, this is not an ambiguous request for counsel under Alston, but merely a request for

> advice from a police officer [on] a known right.
>
> [See Alston, supra, 204 N.J. at 624.]

Those findings are supported by sufficient credible and undisputed evidence and entitled to deference. Substantially for the reasons the judge stated in his written opinion, as supplemented above, we reject defendant's first claim.

Because defendant had not invoked his right to counsel for a polygraph, the rule established in Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378, reh'g denied, 452 U.S. 973, 101 S. Ct. 3128, 69 L. Ed. 2d 984 (1981), that would require cessation of all questions about a polygraph if defendant had invoked his right to counsel for that limited purpose, did not apply. For the same reason, this court's decision in State v. Shelton, 344 N.J. Super. 505 (App. Div. (2001), is inapplicable. In that case, we found error in the denial of a suppression motion because the defendant invoked his right to counsel for the limited purpose of making a written statement and the officers' attempts to convince him to put his oral admissions in writing violated their obligation to honor his invocation.

Chopek, by reminding defendant of his statement of future intention to request counsel, and Negron, by re-administering

Miranda warnings, were presenting defendant with opportunities to act upon his previously stated future intention.

B.

Defendant's remaining challenges to his convictions involve the question whether his admissions were knowingly, intelligently and voluntarily made, especially those that were not recorded. "[T]he voluntariness of a confession [must] be demonstrated beyond a reasonable doubt." State v. Cook, 179 N.J. 533, 552 (2004). In State v. Cook, the Supreme Court initiated the process of developing a court rule addressing recordation of custodial interrogations. Id. at 562; see State v. Anthony, 443 N.J. Super. 553 (App. Div.) (discussing the development and application of Rule 3:17 pursuant to Cook), certif. denied, 224 N.J. 529 (2016).

Rule 3:17, which requires electronic recordation of custodial interrogations of persons suspected of designated crimes, had been in effect with respect to homicide investigations for a little over six months when defendant was interviewed on July 11, 2006. Anthony, supra, 443 N.J. Super. at 566. Where the Rule requires recording, a failure to record has two implications. It is a factor for consideration by the judge, "in determining the admissibility of a statement," and for consideration by the jury, "in determining whether the

statement was made, and if so, what weight, if any, to give to the statement." R. 3:17(d).

A violation of the Rule "does not require suppression of a defendant's statement." Anthony, supra, 443 N.J. Super. at 566. In that respect, the Rule follows prior law holding "that whether a statement is memorialized or not is but a factor contributing to the overall determination of a statement's voluntariness." Cook, supra, 179 N.J. at 552. Rule 3:17 makes it clear that the Court must consider that factor where there is a violation.

In this case, the judge who decided the suppression motion fully considered and properly applied Rule 3:17. He found a violation of the recording requirement and weighed that violation in determining whether defendant's statements were knowingly, intelligently and voluntarily made and cited paragraph (d) of Rule 3:17. The judge assigned "limited" weight to that factor "because the only evidence before the court [with respect to unrecorded statements] was the testimony of the police, which [the judge] found credible." Given the deference this court owes to credibility findings of a judge who had the opportunity to hear and observe the testimony, we have no basis for substituting our assessment of the weight assigned.

Defendant also argues that "the findings of the trial court are not supported by sufficient credible evidence in the record," because the trial court's findings did not acknowledge the substantial evidence in the record that "[defendant's] statements at the Vineland Police Headquarters were not voluntarily made, that [defendant's] will was overborne."

Defendant points to the length of the interrogation; his mental exhaustion; his crying; his multiple references to wanting to see and be with his family; the officer's use of psychological coercion; Detective Negron's appeals to defendant's Christian beliefs; the officers' misrepresentations regarding the time the child sustained the injuries (a reference to the officers' misstating the M.E.'s window for child's injuries as twenty-four hours within the interview rather than the child's death; and the officers' reference to another suspect who avoided the death penalty because of cooperation.

The judge addressed each of those matters in his decision. He found: the defendant was going through an "emotionally upsetting experience" and "likely fatigued"[9]; the "untruthful

[9] Because the portions of the interview that were recorded were audio-recordings, not video-recordings, we take the court's references to defendant's appearance, body movements and facial expressions as based on the testimony of the detectives at the suppression hearing, which the judge credited.

representations" as to the time of injuries were insufficient to overcome his will; the reference to the death penalty case was neither a threat nor a promise but "an example of what happened in other cases"; and that the appeal to defendant's religious beliefs was one way to appeal to defendant's conscience and sense of morality and right and wrong, and it was not enough to overcome defendant's will.

In this case, "the trial court's decision was a close call," but it is supported by the testimony of the officers the judge found credible, not "clearly mistaken and therefore entitled to deference." S.S., supra, 229 N.J. at 374.

For all of the foregoing reasons, we reject defendant's challenges to the denial of his suppression motion, and affirm the denial.

Defendant's objection to the jury instruction given as required by Rule 3:17 has insufficient merit to require discussion beyond the brief comments that follow. R. 2:11-3(e)(2). Where a recording is required but not made, "the court shall, upon request of the defendant, provide the jury with a cautionary instruction." R. 3:17(e). In this case, the instruction was given, and the instruction on the essential principles guiding the jurors' consideration of the recordation-violation, mirrored the Model Jury Charge (Criminal),

"Statements of Defendant (When Court finds Police Inexcusably Failed to Electronically Record Statement)" (Approved 2005).

For the first time on appeal, defendant objects to the court's omission of a discussion of the trial evidence pertinent to the circumstances, conditions and the officers' conduct and methods during the interview. Because defendant did not raise the objection at the time, review is for plain error.

Plain error in a jury instruction is "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970). The risk must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Taffaro, 195 N.J. 442, 454 (2008).

The trial court conducted a charge conference on the record, and neither of the two attorneys representing defendant requested the court to include references to the evidence and factors pertinent on this point. Moreover, one of defense counsel's closing arguments focused on the circumstance that attorney deemed important to the questions the jurors had to

consider under the model charge in evaluating the officers' testimony reciting statements defendant made during the unrecorded portion of the interrogation.

After the court instructed the jury, the court asked counsel if there were any objections. One of the two attorneys representing defendant had an objection to the court's instruction on an unrelated portion of the instruction. Defendant's second attorney had no objection. When there is a "failure to object" to a jury instruction at the time it is given, it is "fair to infer . . . that in the context of the trial the error was actually of no moment." State v. Macon, 57 N.J. 325, 333 (1971).

We recognize the importance of guidance related to the proofs presented at trial. Nevertheless, in the context of this case involving a myriad of pertinent circumstances, defense counsel's closing argument highlighting all of the circumstances favorable to defendant; the silence of both defense attorneys on this point at the charge conference and after the court's delivery of the instruction; and the fact that paragraph (e) of Rule 3:17 requires a cautionary instruction only "upon request of the defendant," we have no reasonable doubt about whether additional guidance on the pertinent evidence would have changed the outcome. Even assuming the omission was error, that error

was, beyond a reasonable doubt, not one with capacity to change the outcome and produce an unjust result.

III.

Defendant contends that the judge who sentenced him "improperly found and weighed" aggravating and mitigating factors. There is no reason to address the judge's consideration of aggravating and mitigating factors.

The sentence imposed for felony murder was statutorily mandated. N.J.S.A. 2C:11-3(b)(3). Accordingly, the identification and weighing of aggravating and mitigating factors was immaterial to that sentence. Defendant should not have received any sentence for aggravated manslaughter. His "aggravated manslaughter conviction should have merged into the felony murder as there cannot be two homicide convictions for the death of one victim." State v. Pantusco, 330 N.J. Super. 424, 444-45 (App. Div. 2000). The sentence that was imposed must be vacated. Finally, the judge properly merged defendant's conviction for aggravated sexual assault with his conviction for felony murder, and no sentence was imposed for that crime. In sum, there is no reason to ponder the judge's exercise of sentencing discretion.

A remand is required to correct the judgment of conviction to reflect merger of defendant's convictions for felony murder

and aggravated manslaughter. Ibid. In addition, the judgment reflects a conviction for a crime that the jury did not consider, sexual assault in violation of N.J.S.A. 2C:14-2. That crime was charged in counts four and five. The jurors did not return a verdict on count four, which charged a violation of N.J.S.A. 2C:14-2(b), because the verdict sheet directed the jurors not to consider that offense if they found defendant guilty of first-degree sexual assault. The judgment and amended judgment of conviction, which were entered, respectively, on December 3 and 23 of 2013, erroneously reflect merger of a conviction on count four and that error must be corrected. Count five charged a crime in violation of, N.J.S.A. 2C:14-2(b), and that count was dismissed at trial. We remand for amendment of the judgment of conviction to merge defendant's homicide convictions, vacate his sentence for aggravated manslaughter and dismiss count four. The mergers will require a new sentencing proceeding to address the fines, penalties and assessments imposed in light of the convictions.

Affirmed and remanded for amendment of the judgment of conviction and resentencing in conformity with this opinion. Jurisdiction is not retained.