SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0730-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK W. HARPER,

Defendant-Appellant.

Argued May 21, 2024 – Decided June 28, 2024

Before Judges Enright and Whipple.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 19-04-0909.

Leon Grauer, Assistant Deputy Public Defender, argued the cause for defendant (Jennifer Nicole Sellitti, Public Defender, attorney; Leon Grauer, of counsel and on the brief).

Stephen A. Pogany, Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens, II, Essex County Prosecutor, attorney; Stephen A. Pogany, on the brief).

PER CURIAM

Defendant Mark Harper appeals from his October 25, 2022 judgment of conviction (JOC), after a jury found him guilty of second-degree endangering the welfare of a child in his legal care, N.J.S.A. 2C:24-4(a)(2). We affirm.

I.

The facts leading to defendant's trial and conviction are gleaned from the motion and trial record. In January 2019, M.J. (Mia) was living in an apartment in Newark with her seven-year-old son, A.B. (Alex) and her twelve-year-old daughter, Z.J. (Zoe).[1] Mia had been dating defendant for several months and defendant spent overnights at her apartment approximately four nights a week. At times, defendant's friend and cousin, Samir Rice,[2] also stayed at Mia's home.

Defendant frequently watched Alex when the child was home from school or when Mia was absent from the home. Defendant also took Alex "out of the house without [Mia] being a part of that outing." In the early morning hours of January 20, 2019, Alex was out with defendant when Mia texted defendant to "[b]ring [her] son home." Defendant responded, "[s]top texting me goofy shit. You[are] the reason he [is] confused now. When I . . . come [home,] he'll

[1] We use initials and pseudonyms to protect the privacy of the child victim and his family. R. 1:38-3(c)(9).

[2] Rice is also referenced in the record as "Ali Kwan."

come." Defendant also texted he had not seen his "own son in two weeks," because he was "spend[ing] time with [Alex] and showing him different shit." He added, "this [is] the thanks I get. [Others] calling me a deadbeat [be]cause I've been with your son." Defendant also texted, "[f]uck this[. Y]ou don't even ask about my fucking kids, but I got time to waste with yours."

On the evening of January 20, 2019, defendant was out again with Alex, joined by Rice, and Rice's friend. According to Rice, defendant "got angry" with the child at one point and told him "to watch his mouth." That same evening, Alex said he was having trouble breathing, so Rice bought the child a soda at a gas station, which "seem[ed] to help" "[a] little bit." However, Rice noted Alex "was still having shortness of breath."

Defendant brought Alex home at approximately 11:30 p.m. that night. By then, Zoe had gone to a friend's house for a sleepover. Mia asked Alex if he had "a nice day" and whether he ate. Alex answered, "[Y]es," to both questions. Before Mia returned to her bedroom to sleep, she told Alex "to get ready to get in the shower and go to bed." During this exchange, Mia saw no "visible injuries" on Alex, except for "a little bruise on his cheek where [her three-year-old] nephew hit [Alex] in the face with a basketball" one day earlier.

Defendant and Rice stayed overnight at Mia's apartment on the night of January 20, 2019. According to Rice, after Alex retreated to his bedroom, defendant went into the child's room and "was angry at [Alex] for something." Rice testified defendant was "grabbing [Alex] and . . . talking to him," and "holding onto [Alex's] collars as if . . . he was trying to restrain him and . . . . trying to chastise him." Rice "made [defendant] stop" "yelling at [Alex]." Rice "told [defendant] to sit down" and "to chill and not to do that." The two men then returned to the living room to watch television and "went back to . . . smoking." Rice fell asleep in the living room; defendant stayed awake.

Mia woke up around 5:30 a.m. on January 21, 2019, and got dressed for work. She asked defendant to help her take out the trash and "went to [Alex's] room and . . . looked in." Mia "turned the light on" and told Alex, "[M]ommy's going to work, I'll be back at ten," to which Alex responded, "okay." Mia turned the light back off and left the apartment at approximately 6:30 a.m., leaving Alex, defendant, and Rice behind.

Mia "punched in" at work at 6:48 a.m. At approximately 7:57 a.m., she received a phone call from defendant, telling her he thought Alex was having "an asthma attack." Although Alex had not had an asthma attack in close to two years, defendant asked where Alex's inhaler was. Mia told him she kept one in

her car and another one in a particular box near the bathroom in her apartment. The two ended their conversation at that point but soon after, defendant called Mia back and told her he put Alex "in the shower because [Alex] pooped himself." Defendant also stated Alex was no longer talking and was "just staring at [defendant]." Mia told defendant to "call [9-1-1]," and immediately left her office. On her way home, Mia called 9-1-1 to report Alex's condition. The dispatcher told her "somebody had already called."

At 8:12 a.m., paramedics from University Hospital EMS and Detective Joseph Rosa from the Newark Police Department, as well as other police units were dispatched to Mia's home, based on a report of an "unresponsive" child. Detective Rosa was the first to arrive on scene. He testified that when he entered Mia's apartment, only Rice and Alex were there.

After Rice directed Rosa to where Alex was laying on the floor, Rosa immediately "checked [Alex] for a pulse and did[not] have anything." Rosa determined Alex was not breathing and felt "cold" to the touch, so he "began to do chest compressions." While performing CPR, he noticed the child "had bruising through his whole body."

As soon as Mia reached the apartment, she got out of her car, left it unlocked and running, and entered the apartment. She saw three police officers

and Rice, but not defendant. Mia began "crying and . . . yelling" when she saw Alex.

Once the paramedics arrived on scene, they relieved Rosa and began administering CPR and other treatment to Alex. Because Alex remained unresponsive, he was transported by ambulance to the hospital. When Rosa and Mia left for the hospital, Mia noticed her car was missing. Rosa stayed with Mia at the hospital until Alex was pronounced dead at 9:05 that morning.

Detectives John Manago and Donald Stabile from the Essex County Prosecutor's Office investigated Alex's death. Manago spoke to Mia and Rice and retrieved surveillance video from the nearby area. According to Manago, Mia and Rice cooperated with law enforcement and gave consent for their cell phones to be searched.

On January 21, 2019, at approximately 7:30 p.m., defendant was arrested on outstanding municipal warrants. He was transported that night to Newark's Homicide Task Force Office, where he was interviewed by Detectives Manago and Stabile. The jeans he was wearing at the time of his interview had a blood stain on them.

The custodial interview commenced at 8:54 p.m. and was audio and video recorded. At the start of the interview, defendant received Miranda[3] warnings. He stated he understood the warnings and agreed to speak with the detectives. He also initialed and signed a Miranda waiver form.

For the next several minutes, defendant answered the detectives' questions. However, the interrogation ceased at 9:01 p.m., after Detective Manago stated he was "a little confused," and asked defendant to "clear . . . up" a statement defendant made that he "might want to speak to a lawyer." Defendant responded that he did not "want to implicate [him]self," and would "like to have a lawyer present because [he did not] know what[was] going on." At that point, the interrogation ended, and defendant was arrested for endangering the welfare of a child.

In April 2019, an Essex County Grand Jury returned a two-count indictment against defendant charging him with first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2); and second-degree endangering the welfare of a child in his legal care. Following his indictment, the State moved to admit defendant's statements from his custodial interview.

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

On February 16, 2022, the motion judge addressed the motion at an N.J.R.E. 104(c) hearing (104 hearing). The State called Manago, who by then was promoted to Sergeant, to testify at the hearing. Defendant called no witnesses.

During Sergeant Manago's testimony, the assistant prosecutor played the audio and video-recorded statement of defendant's custodial interview for the court. The recording began with a reading of defendant's Miranda rights, as well as requests for defendant's personal information, such as his date of birth. The recording then revealed the following exchange from defendant's custodial interview:

> STABILE: . . . . This morning, the Newark Police were called to the house. Okay? Because you had called, I believe.
>
> DEFENDANT: I didn't call.
>
> STABILE: Who called? . . . .
>
> DEFENDANT: Somebody else called.
>
> STABILE: Who is it that called?
>
> DEFENDANT: It was somebody else that was at the house.
>
> STABILE: Okay. And who was that?
>
> DEFENDANT: I don't want to implicate nobody else.

MANAGO: Well . . . . Let's start like this. Where did you wake up this morning?

DEFENDANT: I didn't go to sleep.

STABILE: You were up all night?

DEFENDANT: Yeah.

STABILE: Okay.

MANAGO: Okay[,] . . . what did you do yesterday? . . . . [W]hat time did you get up yesterday?

STABILE: Let's do this. . . . [T]his morning—were you up when [Mia] went to work?

DEFENDANT: Yes.

STABILE: Okay. Where were you?

DEFENDANT: In the living room.

STABILE: Okay. Who were you with?

DEFENDANT: I was with another gentleman.

STABILE: Okay. If I understand, that's the same gentleman that was there overnight, correct?

DEFENDANT: Yes.

STABILE: Okay. You're not impl[icat]ing everyone. You're telling us what happened because we—

DEFENDANT: I don't want to put him in— . . . . (indiscernible) or myself in a situation. Like I understand everything that's going on right now.

MANAGO: Okay.

STABILE: Okay.

DEFENDANT: I understand my rights. I understand you all['s] job.

MANAGO: Okay.

STABILE: Okay.

DEFENDANT: But I don't know—like this shit is—I'm freaked out still—

. . . .

—because I don't want you all to think I'm just this fucking asshole, nothing is bothering me, nothing—like—

STABILE: Okay.

DEFENDANT: —I'm freaked the fuck out.

STABILE: . . . [A]nd rightfully so.

DEFENDANT: Okay.

MANAGO: So, . . . just listen. Relax a second. Okay? I don't think you're an asshole. My partner doesn't think you're an asshole. We don't know you. I don't know anything about you. We just want you to tell us what happened this morning. Just tell us what happened this morning.

You said you didn't sleep, so how come you didn't sleep?

DEFENDANT: Yeah.

STABILE: How come you didn't sleep?

DEFENDANT: (Indiscernible).[4] Like I don't want to—it's—I don't want to say anything and I don't want to do anything that is going to hurt me or help me. But I don't—because I don't know everything. I haven't even spoke to her yet. I didn't even know [Alex] died until 1:00 this afternoon.

MANAGO: Okay.

DEFENDANT: Because she told me he was cool, so I didn't know what was going on.

MANAGO: Okay.

DEFENDANT: So, this is why—I mean, this shit freaked me out. This is why I just left because I was just like, what do you mean he died? She just told me he was okay. So, this—

MANAGO: Okay. You—I'm a little confused here. I just need you to clear this up for me. We read you your rights and you said you wanted to talk to us. And then, I don't know—can you—(indiscernible) you made a

[4] Although this portion of the transcript was initially deemed "indiscernible" by the transcriber, the parties subsequently agreed defendant stated, "I need a lawyer with me," at this point in the interview. The State argues this phrase was "barely perceptible."

statement that you said you might[5] want to speak to a lawyer. I don't understand. Do you want—

DEFENDANT: I don't want to implicate myself. I just—I want to have—I'd like to have a lawyer present because I don't know what's going on. (Indiscernible).

STABILE: Okay. I see. Not a problem.

MANAGO: It's—I just needed you to clear that up.

DEFENDANT: No. I want to—I want to try to think—trying to be—like I said—

MANAGO: No, no—

DEFENDANT: —that's what—I just need to know what's going on.

STABILE: That's your right though.

MANAGO: Okay. Listen—listen—listen to me. I just need[ed] you to clear it up and you cleared it up for me. We're not going to ask you any more questions. Okay?

DEFENDANT: Okay.

MANAGO: Okay. The time is 9:01 p.m.

DEFENDANT: And (indiscernible).

MANAGO: It's—you don't have to—

---

[5] After crediting Detective Manago's testimony from the 104 hearing, the motion judge corrected the initial transcript of this portion of the interview, which previously read, "[y]ou made a statement that you only want to speak to a lawyer" to then read, "[y]ou made a statement that you might want to speak to a lawyer." (Emphasis added).

STABILE: It's okay.

DEFENDANT: I just want to just—

STABILE: If—

DEFENDANT: In fact, I want to be done with—I'm fucked up. Like I said, I never even knew that he passed until about 1:00 this afternoon because when I spoke to her at 11-something, she said he was good.

STABILE: Okay.

MANAGO: It's 9:01 p.m. We're [ending] this.

STABILE: Uh-huh.

MANAGO: Let me mark it down here that you're speaking to a lawyer. Okay?

STABILE: Okay. Good luck to you.

Although the State stopped the playback of the audio and video recording at that point, it replayed a portion of defendant's interview to address "a few minor typo[graphical] errors that were in the transcript" of defendant's custodial interview. Detective Manago testified the original transcript failed to properly capture his question to defendant about whether defendant stated he "might" want to speak with counsel. On cross-examination, Sergeant Manago agreed with defense counsel that "at no time during the interview did [defendant] implicate himself in [Alex]'s death."

At the conclusion of the 104 hearing, the motion judge credited Sergeant Manago's unrefuted testimony and found the State met its burden in establishing the portion of defendant's custodial statement that it played for the court should be admitted. In explaining this decision, the judge concluded defendant: (1) was in custody during his interrogation; (2) was properly Mirandized; (3) understood and waived his Miranda rights voluntarily, knowingly, and intelligently; and (4) was not coerced to do so. The judge also found defendant "did not request an attorney until 9:01" p.m. on January 21, 2019, and that after "defendant clearly assert[ed] his right to counsel[,] . . . the interrogation . . . concluded."

Additionally, the judge found "the fact that [defendant] did assert his right to counsel at 9:01 indicate[d] . . . he clearly understood his rights and understood that he could, at any point, make any such assertion and . . . he did." Thus, she ordered that any custodial statements defendant made up to 9:01 p.m. were admissible at trial, but the balance of his custodial statement would be "suppressed and . . . not admissible at trial." She entered a conforming order that day.

Defendant's trial commenced in April 2022. During her opening statement, defense counsel stated, Alex's "death was unnecessary. . . . [Alex]

was beaten to death. There is no way around that. When he was beaten, how often he was beaten, that's a little unclear."

The State called numerous witnesses to testify, including Mia, Rice, Detective Rosa, one of the paramedics who responded to Mia's apartment to provide emergency medical treatment to Alex on January 21, 2019, and Sergeant Manago. Additionally, the State called expert witnesses, including Dr. Gregory Conti, a Medical Examiner for the State of New Jersey, and Margaret Paul and Linnea Schiffner, forensic scientists from the New Jersey State Police (NJSP) Office of Forensic Science. Defendant did not call any witnesses at trial.

Mia and Rice provided testimony about the events leading up to Alex's death, consistent with statements they provided to law enforcement after Alex died. During Mia's testimony, she stated she had been dating defendant for approximately six months when Alex died. She also testified about the text messages she exchanged with defendant on January 20 and 21, 2019, including the text message she sent defendant on the night of January 20, 2019, telling defendant to "[b]ring [Alex] home." Additionally, Mia stated she saw no visible injuries on Alex that night when defendant brought Alex home at 11:30 p.m., other than a "little bruise on his cheek" where Mia's nephew hit him with a basketball.

Mia also testified that while she was at the hospital with Alex, she saw bruises on his face that he did not have the night before. Further, she recalled defendant did not "say anything about [Alex] having any sort of bruises on . . . . his face or body" and never "mention[ed] any sort of bleeding . . . . anywhere on [Alex]'s body" when defendant called her at work on the morning Alex died. She also testified that when she left her apartment to go to the hospital to be with Alex, she noticed her car was no longer parked where she left it, and no one else had permission to take her car that day. Additionally, Mia stated defendant texted her later that day to tell her where her car was.

During Mia's testimony, the State played a limited audio recording from a bodycam worn by a police officer who responded to Mia's home on the morning of January 21, 2019, during which Mia was heard screaming and crying. Mia confirmed it was her voice on the recording.

When the assistant prosecutor asked Mia if she hit Alex on the morning of January 21, 2019, or the night before, she answered, "[n]o." Similarly, when asked if she "hit [Alex] any time in the week leading up to his death," Mia responded, "[n]o."

On direct examination, Rice testified he did not hit Alex the night before nor the morning Alex died. Rice also confirmed he was never "physical with

[Alex] in any way." Rice admitted he sent Instagram messages to a friend early in the morning on the day Alex died, stating defendant "was going crazy" and "beating on [Alex]." Rice acknowledged he also messaged his friend that Rice "might need an Uber when . . . the morning time c[a]me to get home," explaining that when Mia "w[o]ke up[,] [Rice] m[ight] need an Uber [be]cause there[was] going to [be] World War III." Moreover, Rice testified he later told his friend "to delete all these messages."

On redirect examination, Rice testified he did not see Mia hit Alex "at all" on the night of January 20, 2019, nor on the morning of January 21, 2019. When asked if what he said in his Instagram messages to his friend about defendant were "the truth," Rice stated, "[t]hey were—yes. They were the truth based on what I thought, yes."

When describing what occurred before first responders arrived at Mia's apartment on the morning of January 21, 2019, Rice testified he woke up briefly when Mia left for work but "went right back to sleep." Thereafter, defendant "woke [him] up to help [defendant] give [Alex] CPR." Rice stated:

> [a]t first[, defendant] . . . was just basically telling me to help him[,] like . . . he was just like in shock. At the time[,] he was already giving [Alex] CPR, ... [a]nd then I started helping him. I think he . . . told me that he was . . . washing [Alex] because . . . he had dooded . . . on himself. And when [Alex] was in the

> tub[, he] had passed out so [defendant] was giving him CPR.
>
> . . . .
>
> I just immediately started helping him. I mean, . . . there wasn't much I could do, like, automatically[,] I had to start helping him.

Rice also testified that after attempting the Heimlich maneuver on Alex and "trying to help . . . do CPR," he and defendant decided "to call the ambulance [be]cause [Alex] wasn't waking up."

When asked to describe what Alex looked like after defendant woke Rice up and asked for his help, Rice answered, "[h]e looked pretty bad. . . . [H]e had a lot of bruises on him, bruises on his face, bruises on his chest, his stomach[,] and he seemed like he was . . . unconscious. Oh, yeah, he was definitely unconscious." In response to the State asking Rice if Alex had "those injuries on him when [Rice] saw him the night before," Rice testified, "[w]ell, I only seen his face the night before. I wasn't looking at []his chest or his stomach or anything like that. So[,] I couldn't have known if he did, but I know he didn't have . . . many bruises on his face if he had any."

According to Rice, he and defendant "decided that [Rice] would be the one to call 9-1-1" and that defendant would not be at the apartment when the police arrived. Rice explained,

> we both knew . . . who was more at risk [for] losing everything at the time. So even if . . . we didn't know what . . . really happened[,] . . . it was still in our best interest for [defendant] to leave and for me to call the cops and . . . call 9-1-1 because I didn't have really too many cases open or anything like that. So[,] . . . I would still be there and they wouldn't initially blame it on him . . . if he was there. So[,] we had both planned for . . . me to call 9-1-1 and for [defendant] to leave at the time.

Rice testified that shortly before defendant left Mia's apartment on January 21, 2019, defendant stated, "what did I do, what did I do?" and apologized to Rice "for what he got [Rice] into."

When Rice called 9-1-1 at 8:10 a.m., he told the dispatcher Alex "woke up sick," was "in distress," and "stopped breathing." The police and first responders arrived shortly thereafter and "took over the CPR." Mia came home next and Rice admitted he ran from the apartment after Mia asked, "[w]hat did you[]all do to my child?" Rice subsequently called defendant "a couple of times" and met defendant later that day. Defendant was sitting in Mia's car when Rice found him.

Margaret Paul, who was qualified as an expert in forensic serology, testified about the analysis she conducted on the jeans and sweatshirt defendant was wearing on the date of his arrest. She identified a "red/brown stain" on the

cuff of defendant's sweatshirt sleeve and two such stains on his jeans. After tagging these items, she submitted them "to DNA for further analysis."

Linda Schiffner, who worked in the DNA Unit at the NJSP Office of Forensic Science and was qualified as an expert in the field of forensic DNA analysis, provided testimony about the DNA analysis she performed on samples taken from defendant's jeans and sweatshirt. She also had "a DNA reference from [Alex]." Schiffner opined that Alex was "the source of the . . . DNA profile obtained from . . . [defendant's] jeans." Likewise, she determined Alex was "the source of the . . . DNA profile obtained from . . . [defendant's] sweatshirt."

The last expert witness for the State, Dr. Conti, was qualified as an expert in forensic pathology. He testified he performed Alex's autopsy on January 22, 2019, and found the child had "many injuries throughout multiple body surfaces." Dr. Conti also observed "a large amount of bruising and abrasions" on Alex's face and noted the boy's face appeared "swollen." Additionally, Dr. Conti observed some "healing wounds" on Alex which he believed were "a few weeks" old when Alex died, as well as wounds which were months old. But after microscopically viewing some thirty tissue samples taken from Alex's body, Dr. Conti opined several injuries Alex sustained were inflicted between one and four hours before his death.

Such injuries included an acute subdural hemorrhage on Alex's brain. Dr. Conti also found multiple bruises on Alex's neck and bleeding in his anterior neck muscles, as well as multiple bruises on Alex's chest and abdomen. Dr. Conti opined the neck injury occurred about "an hour or so" before Alex died, and the bleeding in Alex's chest tissue happened "within a few hours" of his death. Similarly, the doctor found bleeding in Alex's back occurred "within an hour or so" of his death and a wound on the left side of the child's torso "was a few hours old" before Alex died. Further, Dr. Conti found the bruises on Alex's extremities all showed hemorrhaging and those injuries were "an hour or so old" before Alex died.

Additionally, Dr. Conti found Alex's spleen was torn, and the child had "hemorrhaging in multiple areas of soft tissue of the abdomen around the liver, . . . small intestine, . . . pancreas, . . . [and] kidneys." The doctor also found "bleeding within the diaphragm," and "bleeding within a portion of the large intestine," as well as "bleeding within the cords leading to the testicles." Dr. Conti noted that because he found "either no inflammation or at most[,] mild acute inflammation" in tissue samples taken from Alex's chest and abdomen, the information led him "to think that [the] majority of those wound[s] were only within an hour to a few hours old" when Alex died.

Dr. Conti also determined Alex had several older rib injuries, based on the fact the child had "bony calluses o[n] multiple ribs." But the doctor also testified Alex had thirty-three "different rib fractures as well as five areas where the ribs were dislocated from the vertebral column." He believed those rib fractures "came about with force" and it was not likely they were caused by anyone administering CPR before Alex died because the rib fractures Alex suffered "were on the back of the ribs and on the back sides of the ribs," whereas fractures resulting from CPR were "usually on the front of the body or . . . the front side of the chest."

He also found there were "no changes" in Alex's lungs "to indicate that there was ongoing asthma or an acute attack" prior to Alex's death. Moreover, Dr. Conti found no evidence of Alex having suffered "a terminal allergic reaction." The doctor testified even if he considered that Alex had trouble breathing the night before and morning of his death, this would not have altered his conclusions.

When Dr. Conti was asked if Alex's older, prior injuries "had some effect on [the doctor's] determination regarding [the] cause of . . . death in this case," Dr. Conti answered, "[n]o." Dr. Conti explained that in his expert opinion, Alex's death was a "homicide" and "[t]he cause of death [wa]s blunt force

injuries." The doctor clarified "there were no specific grossly obvious fatal injur[ies,]" but instead, "the totality of the extent of all of the injuries that were present . . . led to [his] determination that the cause of death [wa]s blunt force injuries."

The State called Detective Manago as its last witness. During his direct examination, the detective testified consistent with his testimony at the 104 hearing, noting that when he first investigated Alex's death, he went to Mia's home and found no "sort of signs of forced entry" on Mia's doors or windows. He also stated he canvassed the neighborhood "to talk to people to see if they had any information" about Alex's death, and spoke with Mia, Rice, and defendant during his investigation.

On cross-examination, he agreed with defense counsel that during defendant's custodial interview, defendant "did not confess" to any criminal conduct against Alex and "did[not] implicate himself in any way." Defense counsel next played almost two minutes of defendant's recorded custodial interview while Detective Manago was on the stand. Although the trial transcript refers to certain portions of the video as "indiscernible" while it was played by defense counsel, the transcript reflects the video included defendant stating, "I understand my rights," before stating, "I don't want to do anything

that is going to hurt me or help me, [be]cause I don't know everything." Defense counsel also played the following exchange from defendant's custodial interview:[6]

> SERGEANT MANAGO: I'm a little confused here. I just need you to clear this up for me. We read you your rights and you said you wanted to talk to us. And then, I don't know—can you—(indiscernible) you made a statement that you said you might want to speak to a lawyer. I don't understand. Do you want—
>
> DEFENDANT: I don't want to implicate myself. . . . I'd like to have a lawyer present because I don't know what's going on. (Indiscernible).

After the State rested and defendant elected not to testify or call any witnesses, counsel provided closing statements. During her summation, defense counsel referred to defendant's recorded custodial interview and statements he made to the police, stating defendant

> ha[d] a very short conversation with them in which everything he t[old] them [wa]s the truth. . . . Detective [Manago] admitted he did[not] lie to him once. [Defendant] told [Manago] he was there [at Mia's home]. . . .

---

[6] This portion of the trial transcript also included multiple references to the video being "indiscernible." We have addressed those gaps by relying on other transcribed versions of the video from the trial and motion record, including the transcript of the video from the 104 hearing and when the State played it for the jury during Detective Manago's direct examination.

> And[] then, the conversation took a little bit of a turn. And I think anyone in that situation would have felt the same. [Defendant] was[not] there about Union County [m]unicipal warrants . . . . He was there because he was going to be arrested for [Alex]'s death or in connection with [Alex]'s death. Because there is nothing in his statement that he said that inculpated him or anyone else. There[is] nothing that he said that was [not] true. But[] then, he asked to stop the interview.

During the State's summation, and without objection from defense counsel, the assistant prosecutor also referred to defendant's custodial interview statements, stating:

> The defendant in his statement, also, says, ["]I don't want to say anything that would hurt me or help me.["] He was concerned. He said he had[not] talked to [Mia] yet. I want you to ask yourself[,] if he had nothing to hide why [wa]s he worried about getting his story straight with [Mia]? What does that show you about what's in his head? Guilty mind. Legally [it is] call[ed] . . . consciousness of guilt. It's a guilty mind.
>
> And[] then, at the end of that statement[,] he says, ["]I don't want to implicate myself.["] His words show he was angry. His words show he had that guilty mind. Ladies and gentlemen, you have the pieces of this puzzle. You have the direct evidence showing . . . defendant did it. You can rule out the only other two people in the house. And you have a full picture of that medical evidence. You have the evidence to be firmly convinced of . . . defendant's guilt on these charges.

The judge subsequently instructed the jury, consistent with the jury charges agreed upon between counsel. When charging the jury on the second-

degree offense of endangering the welfare of the child, the judge appropriately instructed the jury:

> To find the defendant guilty of this crime[,] the State must prove the following elements beyond a reasonable doubt: 1) [Alex] was a child[;] 2) [d]efendant knowingly caused the child harm that would make the child abused or neglected[;] 3) . . . defendant knew that such conduct would cause the child harm that would make a child abused or neglected[; a]nd[] 4) [d]efendant had a legal duty for the care of the child or had assumed responsibility for the care of the child.[7]

The judge further explained:

> An abused or neglected child means that the defendant inflicts upon such a child[] physical injury by other than accidental means[,] which causes or creates a substantial risk of death or serious or protracted disfigurement, or a protracted impairment of physical or emotional [health] . . . . [o]r a protracted loss or impairment of the function of any bodily organ.

Before concluding his charge, the judge also instructed the jury that "[a]rguments[,] . . . openings[,] and summations of counsel are not evidence."

---

[7] A person is guilty of second-degree endangering the welfare of a child if that person: "(1) had 'a legal duty for the care of a child,' and (2) harmed the child, such that the child would qualify as an 'abused or neglected' child under the law." State v. Nieves, 476 N.J. Super. 609, 655 (App. Div. 2023) (quoting N.J.S.A. 2C:24-4(a)(2)).

The jury deliberated for two days before finding defendant not guilty of murder and the lesser included offenses first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), and second-degree reckless manslaughter, N.J.S.A. 2C:11-4(b)(1). However, the jury found defendant guilty of second-degree endangering the welfare of a child while "having a legal duty for the care of [the] child" "or . . . ha[ving] assumed responsibility for the care of [the] child," pursuant to N.J.S.A. 2C:24-4(a)(2). On October 12, 2022, the trial judge sentenced defendant to a ten-year prison term, subject to a five-year period of parole ineligibility. The judge entered a conforming JOC on October 25, 2022.

II.

For the first time on appeal, defendant raises the following argument:

> POINT I
>
> THE COURT DENIED DEFENDANT A FAIR TRIAL BY FAILING TO EXCISE ALL OF DEFENDANT'S CONSTITUTIONAL INVOCATIONS FROM THE STATEMENT PLAYED BEFORE THE JURY AND THE STATE EXPLOITED THE INVOCATIONS IN SUMMATION BY ARGUING THAT THEY WERE PROOF OF CONSCIOUSNESS OF GUILT.

As a threshold matter, we will generally refuse to consider an issue not raised and addressed at the trial court level unless it is jurisdictional or "substantially implicate[s] public interest." State v. Walker, 385 N.J. Super.

388, 410 (App. Div. 2006) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). However, we may consider an issue not raised to the trial court "if it meets the plain error standard or is otherwise of special significance to the litigant, to the public, or to achieving substantial justice, and the record is sufficiently complete to permit its adjudication." Ibid.

When reviewing an issue not raised to the trial court, we examine the issues presented under a plain error standard. See R. 2:10-2. That standard looks to whether, "in light of the overall strength of the State's case," State v. Sanchez-Medina, 231 N.J. 452, 468 (2018) (quoting State v. Galicia, 210 N.J. 364, 388 (2012)), such an "unchallenged error . . . was 'clearly capable of producing an unjust result,'" State v. Clark, 251 N.J. 266, 287 (2022) (quoting R. 2:10-2); see also State v. Singh, 245 N.J. 1, 13 (2021); State v. R.K., 220 N.J. 444, 456 (2015). "The possibility of an unjust result 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.'" Clark, 251 N.J. at 287 (quoting State v. Melvin, 65 N.J. 1, 18-19 (1974)).

"The right against self-incrimination[, encompassing the right to remain silent and the threshold required to waive that right] is guaranteed by the Fifth Amendment to the United States Constitution and this [S]tate's common law,

now embodied in statute, N.J.S.A. 2A:84A-19, and evidence rule, N.J.R.E. 503." State v. S.S., 229 N.J. 360, 381-82 (2017) (quoting State v. Nyhammer, 197 N.J. 383, 399 (2009)). Our Supreme Court has "reaffirmed time and time again that '[t]he privilege against self-incrimination . . . is one of the most important protections of the criminal law' and has afforded the [S]tate privilege broader protection than its Fifth Amendment counterpart." Clark, 251 N.J. at 292 (first alteration and omission in original) (quoting State v. Presha, 163 N.J. 304, 312 (2000)).

As we recently observed, "Miranda made clear that if the accused 'indicates in any manner and at any stage of the process that [they] wish[] to consult with an attorney before speaking[,] there can be no questioning.'" State v. Dorff, 468 N.J. Super. 633, 646 (App. Div. 2021) (quoting Miranda, 384 U.S. at 444-45). But we also cautioned that

> [n]ot every reference to a lawyer . . . requires a halt to questioning. Reviewing courts must determine on a case-by-case basis whether the mention of counsel constitutes an invocation of the right to counsel. In making this determination, reviewing courts consider the totality of the circumstances, "including all of the suspect's words and conduct."
>
> [Id. at 647 (quoting State v. Diaz-Bridges, 208 N.J. 544, 569 (2011)).]

Under New Jersey common law, contrary to the Federal practice, defendants in New Jersey need not be clear and unambiguous when invoking the right to remain silent. Compare Berghuis v. Thompson, 560 U.S. 370, 381 (2010) ("[A]n accused who wants to invoke [their] right to remain silent [is required] to do so unambiguously.") with S.S., 229 N.J. at 382 ("[A] request, however ambiguous, to terminate questioning . . . must be diligently honored.") (omission in original) (quoting State v. Bey (Bey II), 112 N.J. 123, 142 (1988)). Therefore, in New Jersey, once a defendant indicates, even ambiguously, that they want to invoke their right to remain silent, the interrogator is required to cease questioning immediately and—if the invocation was ambiguous—"inquire of the suspect as to the correct interpretation." S.S., 229 N.J. at 383 (quoting State v. Johnson, 120 N.J. 263, 283 (1990)).

Our Supreme Court recently provided guidance on how trial courts should address, at trial, a defendant's invocation of the right to counsel, instructing:

> [i]n situations in which a suspect has waived [their] Miranda rights and agreed to speak to law enforcement, but later invoked the right to counsel during the interrogation, . . . "trial courts should endeavor to excise any reference to a criminal defendant's invocation of his right to counsel" from the statement that the jury hears. "[A] trial court's failure to follow the . . . stricture of excision or a cautionary instruction does not necessarily equate to reversible or plain error"; rather, a harmful error analysis is warranted to

> determine whether the defendant was deprived of a fair trial.
>
> [Clark, 251 N.J. at 292 (third alteration in original) (emphasis added) (first quoting State v. Feaster, 156 N.J. 1, 75-76 (1998) and second quoting State v. Tung, 460 N.J. Super. 75, 94-95 (App. Div. 2019)).]

The Court also previously held a jury should be instructed "a defendant's invocation of his right to counsel or right to remain silent may not in any way be used to infer guilt," thereby "guarding against any impermissible inferences that could undermine a defendant's fundamental right to a fair trial." Feaster, 156 N.J. at 76.

Turning to defendant's newly raised argument that "the State exploited [his] invocations in summation," it is well settled that "prosecutors are given wide latitude in making their summations and may sum up 'graphically and forcefully.'" State v. Garcia, 245 N.J. 412, 435 (2021) (quoting State v. Johnson, 31 N.J. 489, 510 (1960)). In fact, the State is "afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. McNeil-Thomas, 238 N.J. 256, 275 (2019) (quoting State v. Frost, 158 N.J. 76, 82 (1999)). We also recognize a "prosecutor's summation is best reviewed within the context of the trial as a whole." Feaster, 156 N.J. at 64.

Next, we are mindful "[t]he trial court has broad discretion in the conduct of the trial, including the scope of counsel's summation." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 392 (2009). "The abuse of discretion standard applies to the trial court's rulings during counsel's summation." Id. at 392-93. When no objection is made at trial to statements made in summation, we review belated challenges to those statements under the plain error standard. R. 2:10-2; State v. Santamaria, 236 N.J. 390, 405 (2019). We also are cognizant that "a clear and firm jury charge may cure any prejudice created by counsel's improper remarks during opening or closing argument." City of Linden, Cnty. of Union v. Benedict Motel Corp., 370 N.J. Super. 372, 398 (App. Div. 2004). And we presume a jury follows a trial judge's instructions. State v. Gonzalez, 249 N.J. 612, 635 (2022).

Guided by these standards, we are constrained to conclude the jury was mistakenly permitted to hear that portion of defendant's custodial statement where he invoked his right to counsel. However, given the unique facts of this case, we are satisfied the error did not constitute plain error. R. 2:10-2.

In reaching this conclusion, we note both the State and defense counsel played portions of defendant's custodial statement at trial, consistent with the motion judge's ruling. The portions of the recording they chose to play for the

jury included: (1) defendant's statement that he did not "want to do anything that [wa]s going to hurt [him] or help [him]"; (2) Sergeant Manago's request for clarification as to whether defendant stated he "might want to speak to a lawyer"; and (3) defendant repeating he did not want to implicate himself. But the jury also heard Manago's candid admission that defendant did not "implicate himself in any way" during the custodial interview. Therefore, notwithstanding the Court's holding in Clark, which issued after defendant's trial, we are satisfied any error in allowing the jury to hear defendant's invocation of his right to counsel was not "clearly capable of producing an unjust result." R. 2:10-2.

We also are persuaded this case is distinguishable from the facts in Clark. In that case, the Court observed that during the defendant's recorded statement to law enforcement officers, he invoked his right to counsel three times before the interrogation ceased, and "that entire exchange [was] played for the jury," amounting to harmful error, which was "compounded when the prosecutor commented on that portion of the statement that should have never been before the jury in the first place." Clark, 251 N.J. at 275. In contrast, here, all questioning of defendant ceased after he ambiguously invoked his right to counsel. Further, the interrogation ended immediately upon defendant clarifying his invocation, and as already mentioned, Manago admitted on cross-

examination, without any evidence to the contrary, that defendant never implicated himself throughout his custodial interview.

We also decline to find plain error here, considering the significant, unrefuted evidence presented by the State against defendant. In fact, the State produced numerous witnesses who confirmed defendant was one of three people who was with Alex shortly before his death. Moreover, defendant admitted in his custodial interview that he was at Mia's home on the morning Alex died, and he knew "somebody else . . . at the house" called 9-1-1 that morning.

The State also presented unrefuted testimony from Dr. Conti, who opined the child sustained multiple serious injuries within a few hours of his death, and that those injuries—not prior injuries that Alex sustained weeks or months before his death—caused Alex's death. Importantly, Mia and Rice also provided uncontroverted testimony that neither one of them hit the child the night before or the morning of his death, nor in the week leading up to his death. Additionally, Rice admitted he sent an Instagram message to a friend hours before Alex was pronounced dead, stating defendant "was going crazy" and "beating on" Alex. In sum, given these facts, we cannot conclude the trial court's failure to excise defendant's invocation of his right to counsel from his custodial interview constituted plain error.

Finally, we briefly address the challenged statements made by the State in summation, which we also review for plain error, considering the defense did not object to them. R. 2:10-2. In the assistant prosecutor's summation, while he did not specifically reference defendant's custodial statements at the point defendant invoked his right to counsel, counsel did refer to defendant telling the detectives he did not "want to say anything that would hurt [him] or help [him]," that he had not yet spoken to Mia, and that he did not "want to implicate [him]self." The assistant prosecutor argued this showed defendant had a "guilty mind" and demonstrated defendant's "consciousness of guilt."

Importantly, after counsel summed up, the judge instructed jurors:

> [a]rguments, statements, remarks, openings[,] and summations of counsel are not evidence and must not be treated as evidence. . . . Whether or not . . . defendant has been proven guilty beyond a reasonable doubt is for you to determine based on all the evidence presented during the trial. Any comments by counsel are not controlling.

We presume the jury followed the judge's explicit instructions. See Gonzalez, 249 N.J. at 635.

Additionally, for the reasons we already stated, and considering the significant unrefuted evidence the State presented at trial, even if we determined the trial court mistakenly allowed the assistant prosecutor to make these

statements in summation, notwithstanding defense counsel's lack of objection to same, we would not conclude the statements were "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2.

To the extent we have not addressed any other arguments raised by defendant, we are persuaded they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.