SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court. In the interest of brevity, portions of any opinion may not have been summarized.)

State v. Danyell Fuqua (A-4-17) (079034)

Argued April 10, 2018 -- Decided August 9, 2018

TIMPONE, J., writing for the Court.

In this case, the Court considers whether the State must prove actual harm to a child to convict a defendant under N.J.S.A. 2C:24-4(a), endangering the welfare of children.

In September 2011, the Middlesex County Prosecutor's Office opened a narcotics investigation into Tyrell Johnson that later swept in defendant Danyell Fuqua. In the early morning hours of December 10, 2011, after obtaining a search warrant, officers entered a motel room. There, the officers found defendant, Johnson, and six children between the ages of one and thirteen -- three were defendant's children, one was Johnson's child, and two were defendant's relatives. The small room had a kitchenette, two beds, and a bathroom. On the kitchen table, officers found marijuana, a grinder containing marijuana residue, an open box of clear plastic bags, and a white, unlabeled pill bottle holding various, multicolored pills. Between the two beds, officers discovered three loose packets of heroin, a separate plastic orange bag holding 653 packets of heroin, and one large bag of cocaine. Below the rear wall window, officers found an exposed black plastic bag holding 201 packets of heroin and fourteen plastic bags containing cocaine next to children's shoes and a toy. Officers also discovered a digital scale covered in white cocaine residue on a nearby windowsill. Johnson subsequently pled guilty to drug distribution charges, and a jury convicted defendant of endangering the welfare of children, contrary to N.J.S.A. 2C:24-4(a).

The trial court denied defendant's motion for a judgment of acquittal, finding that the State need not prove actual harm to children to convict under N.J.S.A. 2C:24-4(a). The Appellate Division affirmed, and the Court granted certification. 230 N.J. 560 (2017).

HELD: The trial court and Appellate Division correctly determined that a conviction under N.J.S.A. 2C:24-4(a) can be sustained by exposing children to a substantial risk of harm.

1. N.J.S.A. 2C:24-4(a)(2) provides, in pertinent part: "[a]ny person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who causes the child harm that would make the child an abused or neglected child as defined in [N.J.S.A.] 9:6-1, [N.J.S.A.] 9:6-3 and . . . [N.J.S.A. 9:6-8.21] is guilty of a crime of the second degree." N.J.S.A. 9:6-3 delineates, in relevant part, that "[a]ny parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall abuse, be cruel to or neglectful of any child shall be deemed to be guilty of a

crime of the fourth degree." (emphasis added). N.J.S.A. 9:6-8.21, in pertinent part, defines "[a]bused or neglected child" as including: "a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof . . . or by any other acts of a similarly serious nature requiring the aid of the court." (emphases added). (pp. 8-9)

2. N.J.S.A. 2C:24-4(a)(2) is clearly and readily capable of comprehension. The Court sees no ambiguity in the Legislature incorporating a "substantial risk" of harm from N.J.S.A. 9:6-8.21 into N.J.S.A. 2C:24-4(a), so the appellate panel here properly concluded that "[a]pplying this rule of construction would seemingly result in an uncomplicated interpretation of the statutory offense." N.J.S.A. 2C:24-4(a)(2) defines "harm" by expressly incorporating N.J.S.A. 9:6-8.21, which proscribes exposing a child to a substantial risk of harm. No extrinsic evidence is necessary, nor is resort to the doctrine of lenity which is only pertinent if an analysis of statutory language fails to resolve a statutory ambiguity. (pp. 10-11)

3. New Jersey appellate courts for decades have unanimously held that the State is not required to prove actual harm to a child to convict under N.J.S.A. 2C:24-4(a)(2). Instead, they have concluded that proof of a child's exposure to a substantial risk of harm is sufficient to sustain a conviction. See, e.g., State v. N.A., 355 N.J. Super. 143, 150–51 (App. Div. 2002); State v. M.L., 253 N.J. Super. 13, 31 (App. Div. 1991) (collecting cases). Not one published appellate opinion holds otherwise. The Court finds no reason to disturb that decades-old sound precedent predicated on the plain language of the statute and notes that the legislative branch is presumed to be aware of judicial constructions of statutory provisions. Had the Legislature chosen to insist on proof of actual harm to a child to convict under N.J.S.A. 2C:24-4(a)(2), it was free to amend the statute, as it did in other aspects of the statute, in the nearly three decades since M.L. The statute expressly subsumes the Title 9 provisions signaling a legislative intent to broaden the statutory definition of "harm." It would show little respect for the legislature were courts to suppose that the lawmakers meant to enact an irrational scheme. (pp. 11-14)

4. In this case the State successfully proved that defendant exposed the children in her care to imminent danger and a substantial risk of harm pursuant to N.J.S.A. 2C:24-4(a). Six underage children, ranging in age from one to thirteen, were housed in a confined space. Drugs hauntingly surrounded children's toys and clothing. The ease of access to cocaine, heroin, and marijuana, and the attraction of brightly colored pills, all created a potentially lethal trap for the children that could have been easily sprung at any moment. (pp. 14-15)

5. The Court considers the concerns of giving prosecutors too much discretion in choosing to charge under N.J.S.A. 2C:24-4(a)(2), a second-degree crime, over Title 9, a fourth-degree offense. Criminal statutes can overlap in prohibiting the same basic act, and in those situations the proper prosecuting authority in the sound exercise of the discretion committed to him or her may proceed under either act. Prosecutorial discretion, however, is not unlimited, and judicial oversight is mandated to protect against arbitrary and capricious prosecutorial decisions. A defendant who proves that a prosecutor's exercise of discretion was arbitrary and capricious

would be entitled to relief. Here, there is no evidence that the prosecutor abused her discretion in choosing to charge defendant under N.J.S.A. 2C:24-4(a)(2) instead of Title 9. Defendant bears the burden of proving that the prosecutor acted arbitrarily and capriciously but provided no reasonable justification as to why the prosecutor should have charged her under Title 9 instead of N.J.S.A. 2C:24-4(a)(2). Rather, defendant claims generally that prosecutors retain too much discretion in choosing whether to charge defendants under N.J.S.A. 2C:24-4(a)(2) or Title 9. That contention, however, is directly contrary to precedent that provides prosecutors such discretion. Defendant has similarly not provided any evidence that the prosecutor's decision to charge under N.J.S.A. 2C:24-4(a) was discriminatory or predicated on prejudice. Indeed, the record here provided the prosecutor ample justification for her decision to charge defendant under N.J.S.A. 2C:24-4(a)(2). (pp. 15-18)

AFFIRMED.

JUSTICE ALBIN, dissenting, expresses the view that a sensible textual construction of the endangering statute -- consistent with its language and legislative intent -- would be to require harm as a precondition to the examples given in the abuse-and-neglect statutes. Justice Albin adds that the majority's position is at odds with the legislative history of the endangering statute; that even if N.A. and M.L. were "sound" precedent, they are factually distinguishable; that legislative acquiescence is a slender reed on which to justify a mistaken Appellate Division interpretation of a statute; and that when two reasonable interpretations can be given to a statute riddled with ambiguity, the doctrine of lenity instructs that the interpretation favoring the defendant must prevail. According to Justice Albin, by removing the harm requirement from the endangering statute, the majority has criminalized the civil abuse-and-neglect statute.

CHIEF JUSTICE RABNER, dissenting, is of the view that the meaning of the endangering law is ambiguous and should therefore be read narrowly. Chief Justice Rabner notes the State's strong argument that the phrase "causes the child harm" cannot be read separately from the words that follow, and that defendant sensibly emphasizes that "harm" means "harm" -- not "risk" of harm. Observing that the legislative history does not resolve the debate and that, in this case, the trial court noted "the absence of any direct evidence of actual harm to the children," Chief Justice Rabner reasons that, because defendant's conviction is based on the more expansive reading of the statute, it should not stand.

JUSTICES PATTERSON, FERNANDEZ-VINA, and SOLOMON join in JUSTICE TIMPONE's opinion. JUSTICE ALBIN filed a dissent, in which JUSTICE LaVECCHIA joins. CHIEF JUSTICE RABNER filed a dissent.

SUPREME COURT OF NEW JERSEY
A-4 September Term 2017
079034

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANYELL FUQUA,

Defendant-Appellant.

Argued April 10, 2018 – Decided August 9, 2018

On certification to the Superior Court, Appellate Division.

Matthew Astore, Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Matthew Astore, of counsel and on the briefs, and John A. Albright, Designated Counsel, on the brief).

Nancy A. Hulett, Assistant Prosecutor, argued the cause for respondent (Andrew C. Carey, Middlesex County Prosecutor, attorney; Nancy A. Hulett, of counsel and on the briefs).

Sarah D. Brigham, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Gurbir S. Grewal, Attorney General, attorney; Sarah D. Brigham, of counsel and on the brief).

JUSTICE TIMPONE delivered the opinion of the Court.

In this case, the Court considers whether the State must prove actual harm to a child to convict a defendant under

N.J.S.A. 2C:24-4(a), endangering the welfare of children. Because the trial court and Appellate Division correctly determined that a conviction under N.J.S.A. 2C:24-4(a) can be sustained by exposing children to a substantial risk of harm, we affirm their denial of defendant Danyell Fuqua's motion for a judgment of acquittal.

I.

We marshal these facts from the record.

In September 2011, the Middlesex County Prosecutor's Office opened a narcotics investigation into Tyrell Johnson that later swept in defendant Fuqua. Defendant checked into a Studio Motel 6 in late September 2011. That December, in conjunction with the ongoing investigation, a task force began surveillance of the Studio Motel 6. In the early morning hours of December 10, 2011, after obtaining a search warrant, officers entered room 205. There, the officers found defendant, Johnson, and six children between the ages of one and thirteen -- three were defendant's children, one was Johnson's child, and two were defendant's relatives. The small room had a kitchenette, two beds, and a bathroom. Upon their entry, officers smelled the lingering odor of raw and burnt marijuana.

On the kitchen table, officers found marijuana, a grinder containing marijuana residue, an open box of clear plastic bags, and a white, unlabeled pill bottle holding various, multicolored

pills. Between the two beds, officers discovered a lockbox with key inserted containing several items of jewelry, three loose packets of heroin, a separate plastic orange bag holding 653 packets of heroin, and one large bag of cocaine. Below the rear wall window, officers found an exposed black plastic bag holding 201 packets of heroin and fourteen plastic bags containing cocaine. To the immediate left and right of the drug-laden black plastic bag were children's shoes and a "little puppy dog" toy. Officers also discovered a digital scale covered in white cocaine residue on a nearby windowsill. In addition to the narcotics and related paraphernalia, officers came upon five cell phones, more than $2000 in cash located in a purse on the kitchen table, and around $1700 belonging to Johnson.

Johnson subsequently pled guilty to drug distribution charges, and a jury convicted defendant of endangering the welfare of children, contrary to N.J.S.A. 2C:24-4(a).

The trial court denied defendant's motion for a judgment of acquittal, finding that the State need not prove actual harm to children to convict under N.J.S.A. 2C:24-4(a). Rather, relying on ample appellate precedent, the court held that the State needed only prove, and did prove, that a child faced a "risk" of harm sufficient to convict under N.J.S.A. 2C:24-4(a).

The Appellate Division affirmed, holding that the phrase "causes harm" in N.J.S.A. 2C:24-4(a) refers not only to one who

causes actual harm, but also to one who "unreasonably allows a substantial risk of harm." The panel concluded that the children here were in "imminent danger" and exposed to a "substantial risk of harm" given the small motel room, the number of children present, and the large quantity of accessible drugs to which they were exposed and which they could easily have ingested.

We granted certification. 230 N.J. 560 (2017). We also granted amicus curiae status to the Attorney General of New Jersey.

II.

A.

Defendant urges us to reverse the Appellate Division's conclusion that exposing a child to a substantial risk of harm is sufficient to convict under N.J.S.A. 2C:24-4(a).

Defendant maintains that under N.J.S.A. 2C:24-4(a)'s plain language a conviction may be based only on evidence establishing actual harm, and that the statute also includes the requisite elements for a finding of abuse or neglect under Title 9. Defendant proposes that N.J.S.A. 2C:24-4(a)'s reference to Title 9 is convoluted, resulting in the Appellate Division's erroneous conclusion that "risk of harm" equals "harm."

Defendant also raises fears that if the Appellate Division's holding is left undisturbed, prosecutors will retain

unbridled discretion in choosing between a second-degree prosecution under N.J.S.A. 2C:24-4(a) and a fourth-degree prosecution under Title 9.

B.

The State stresses that we should affirm the Appellate Division's conclusion that a conviction under N.J.S.A. 2C:24-4(a) can be sustained by proving a risk of harm to a child without proof of actual harm.

The State notes that its proposition is bolstered by numerous appellate opinions, all holding that N.J.S.A. 2C:24-4(a), in all its incarnations, subsumed exposing a child to a substantial risk of harm into the statute through Title 9. The State maintains that "risk of harm" is apparent from the plain language of the statute.

The State reasons that if conduct violates more than one statute, prosecutors retain discretion in deciding which charge to pursue provided that they do not discriminate against any class of defendants and that their choice is not arbitrary, capricious, or a patent or gross abuse of discretion.

C.

The Attorney General also argues that both the plain language and legislative history of N.J.S.A. 2C:24-4(a) indicate the Legislature's intent to include "risk of harm." The Attorney General notes that the title of the statute --

Endangering Welfare of Children -- connotes legislative intent to include the risk of harm. The Attorney General counters with specific references defendant's notion of linguistic gymnastics by the Appellate Division, with respect to its finding that "causes harm" equals "risk of harm." The Attorney General notes that "endanger" is defined as "put[ting] (someone or something) at risk or in danger." (quoting New Oxford American Dictionary 561 (1st ed. 2001)). The Attorney General cites numerous appellate cases that interpret N.J.S.A. 2C:24-4(a)(2) to encompass a substantial risk of harm. Taking the precedent and common definitional usage together, the Attorney General maintains that defendant knowingly subjected the six children in her care to a substantial risk of harm because the children had easy access to a large quantity and variety of drugs intermingled among their toys and clothing. The Attorney General underscores the likely physical danger to the children of unwittingly ingesting the openly displayed drugs and the potential emotional damage stemming from a child's exposure to drugs and drug trafficking.

Lastly, the Attorney General maintains that prosecutors historically retain broad prosecutorial discretion when a defendant's action violates more than one statute. With the defendant having proffered no proofs that the prosecutor abused her discretion or acted arbitrarily or capriciously, the

Attorney General argues that the Appellate Division decision should be affirmed.

III.

A.

In reviewing the grant or denial of a motion for a judgment of acquittal, we apply the same standard as the trial court. State v. Sugar, 240 N.J. Super. 148, 153 (App. Div. 1990) (citing State v. Moffa, 42 N.J. 258, 263 (1964)). That standard is the same whether the motion is made at the close of the State's case, at the end of the entire case, or after a jury returns a guilty verdict under Rule 3:18-2. State v. Kluber, 130 N.J. Super. 336, 341 (App. Div. 1974). We will deny a motion for a judgment of acquittal if

> the evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, is sufficient to enable a jury to find that the State's charge has been established beyond a reasonable doubt.
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> [Id. at 341–42 (citing State v. Mayberry, 52 N.J. 413, 436–37 (1968); State v. Reyes, 50 N.J. 454, 458–59 (1967)).]

Questions pertaining to statutory interpretation are legal in nature, State v. S.B., 230 N.J. 62, 67 (2017) (citing State v. Revie, 220 N.J. 126, 132 (2014)), so "[w]e review such decisions de novo, 'unconstrained by deference to the decisions

of the trial court or the appellate panel,'" ibid. (quoting State v. Grate, 220 N.J. 317, 329 (2015)).

In interpreting a statute, we "give words 'their ordinary meaning and significance,'" acknowledging that the "statutory language is 'the best indicator of [the Legislature's] intent.'" Tumpson v. Farina, 218 N.J. 450, 467 (2014) (alteration in original) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). At the same time, "[w]e will not presume that the Legislature intended a result different from what is indicated by the plain language or add a qualification to a statute that the Legislature chose to omit." Id. at 467-68. We only resort to extrinsic evidence, such as legislative history and committee reports, in the event that the statutory language at issue is ambiguous. Id. at 468.

B.

N.J.S.A. 2C:24-4(a)(2) provides, in pertinent part:

> [a]ny person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who causes the child harm that would make the child an abused or neglected child as defined in [N.J.S.A.] 9:6-1, [N.J.S.A.] 9:6-3 and . . . [N.J.S.A. 9:6-8.21] is guilty of a crime of the second degree.

The three subsections of Title 9 incorporated by the Legislature into N.J.S.A. 2C:24-4(a)(2) are linchpins to the statute's applicability to the facts before us.

N.J.S.A. 9:6-1 includes eight actions that constitute child abuse, none of which are germane here.

N.J.S.A. 9:6-3 delineates, in relevant part, that

> [a]ny parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall abuse, be cruel to or neglectful of any child shall be deemed to be guilty of a crime of the fourth degree.
>
> [(emphasis added).]

See also the second dissent,[1] post at ___ (slip op. at 4) (Rabner, C.J., dissenting) ("[N.J.S.A. 9:6-3] also covers behavior that places a child at substantial risk of harm.").

N.J.S.A. 9:6-8.21, in pertinent part, defines "[a]bused or neglected child" as including:

> a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof . . . or by any other acts of a similarly serious nature requiring the aid of the court.
>
> [(emphases added).]

[1] For convenience, we refer to Justice Albin's dissenting opinion as "the first dissent" and Chief Justice Rabner's dissenting opinion as "the second dissent."

As a consequence, N.J.S.A. 2C:24-4(a)(2) "is clearly and readily capable of comprehension." State v. M.L., 253 N.J. Super. 13, 30 (App. Div. 1991). We see no ambiguity in the Legislature incorporating a "substantial risk" of harm from N.J.S.A. 9:6-8.21 into N.J.S.A. 2C:24-4(a), so the appellate panel here properly concluded that "[a]pplying this rule of construction would seemingly result in an uncomplicated interpretation of the statutory offense." N.J.S.A. 2C:24-4(a)(2), plainly, does not delineate two distinct elements -- proof of actual harm and harm qualifying as abuse or neglect under Title 9. Rather, the statute defines "harm" by expressly incorporating N.J.S.A. 9:6-8.21, which proscribes exposing a child to a substantial risk of harm.

We agree with the first dissent that "[w]ords make a difference," post at ___ (slip op. at 5) (Albin, J., dissenting), and as such, we are bound to uphold the Legislature's express incorporation of N.J.S.A. 9:6-8.21 into N.J.S.A. 2C:24-4, prohibiting the exposure of children to a substantial risk of harm. Those principal purposes then become the statute's principal commands. No extrinsic evidence is necessary, rendering the first dissent's analysis of legislative history unnecessary. Since the plain language of the statute is clear in its incorporation of N.J.S.A. 9:6-8.21, we similarly need not resort to the "doctrine of lenity" which is only

pertinent "if an analysis of statutory language . . . fails to resolve a statutory ambiguity." State v. McDonald, 211 N.J. 4, 18 (2012) (citing State v. Gelman, 195 N.J. 475, 482 (2008)).

C.

In light of the statute's plain language, our appellate courts for decades have unanimously held that the State is not required to prove actual harm to a child to convict under N.J.S.A. 2C:24-4(a)(2). Instead, they have concluded that proof of a child's exposure to a substantial risk of harm is sufficient to sustain a conviction. See, e.g., State v. N.A., 355 N.J. Super. 143, 150–51 (App. Div. 2002); M.L., 253 N.J. Super. at 31 (collecting cases).

In M.L., after police arrested the defendant for shoplifting, she conveyed that her fifteen-month-old child, C.L., was with a babysitter. 253 N.J. Super. at 17. Police later entered the defendant's apartment and discovered C.L. asleep, unattended in a playpen. Id. at 18. C.L. was sweating in the ninety-degree heat, and the apartment was littered with dirty diapers and laundry, plates of spoiled food, and dog feces. Ibid. A jury later found the defendant guilty of endangering the welfare of children under N.J.S.A. 2C:24-4(a)(2). Ibid. On appeal, the defendant argued that "the trial court misinterpreted the statute as not requiring the State to show that the child suffered physical harm." Id. at 29. The

Appellate Division disagreed and affirmed, concluding that "[w]e do not read [N.J.S.A. 2C:24-4(a)] as calling for a demonstration of actual physical harm." Id. at 31.

Over ten years later, in N.A., a jury convicted the defendant under N.J.S.A. 2C:24-4(a) for having severely beaten her two-year-old son (actual harm). 355 N.J. Super. at 145, 146. The Appellate Division affirmed the conviction, holding that N.J.S.A. 2C:24-4(a)(2) and the Title 9 offense of cruelty and neglect of children each "criminalizes the same harm or risk of harm to the child." Id. at 153. Specifically, the Appellate Division concluded that the incorporation by reference of N.J.S.A. 9:6-8.21 in N.J.S.A. 2C:24-4(a)(2), "does not require that any act or omission of the parent result in specific harm to the child. The focus is on the conduct of the parent which exposes the child to a 'substantial risk' of death or physical harm." Id. at 150–51.

As is apparent, our appellate courts have been unanimous over several decades in interpreting N.J.S.A. 2C:24-4(a)(2), through all its iterations, as not requiring proof of actual harm to the child. N.A., 355 N.J. Super. at 150–51; M.L., 253 N.J. Super. at 31. Not one published appellate opinion holds otherwise. We find no reason to disturb that decades-old sound precedent predicated on the plain language of the statute.

In conjunction we note, "the legislative branch is presumed to be aware of judicial constructions of statutory provisions." State v. Singleton, 211 N.J. 157, 180 (2012) (citing White v. Township of North Bergen, 77 N.J. 538, 556 (1978)). It is eminently fair to observe that "where a statute has been judicially construed, the failure of the Legislature to subsequently act thereon evidences legislative acquiescence in the construction given the statute." White, 77 N.J. at 556.

Had the Legislature chosen to insist on proof of actual harm to a child to convict under N.J.S.A. 2C:24-4(a)(2), it was free to amend the statute, as it did in other aspects of the statute, in the nearly three decades since M.L. In 1992, the Legislature amended N.J.S.A. 2C:24-4(a) to elevate the offense of child endangerment from a third- and fourth-degree crime to a second- and third-degree crime, but it conspicuously did not amend the statute to require proof of actual harm. L. 1992, c. 6, § 1; State v. Galloway, 133 N.J. 631, 657–58 (1993) (noting 1992 amendment elevating offense levels). After that amendment, an Appellate Division panel once again upheld the precedent of interpreting N.J.S.A. 2C:24-4(a) as including the exposure of a child to a substantial risk of harm. N.A., 355 N.J. Super. at 150-51. In 2013, the Legislature broadened the scope of N.J.S.A. 2C:24-4(a) by raising the age of statutorily protected children from sixteen to eighteen. L. 2013, c. 51, § 13. And

again, the Legislature chose not to add language that could undercut precedent by requiring the State to prove actual harm in order to convict under the statute.

The first dissent insists that "[a] sensible textual construction of the endangering statute" would "require harm as a precondition to the examples given in the abuse-and-neglect statutes." Post at ___ (slip op. at 5) (Albin, J., dissenting). The statute, however, delineates nothing about the use of preconditions, but instead expressly subsumes the Title 9 provisions signaling a legislative intent to broaden the statutory definition of "harm." "It would show little respect for the legislature were courts to suppose that the lawmakers meant to enact an irrational scheme." State v. Livingston, 172 N.J. 209, 228 (2002) (Long, J., dissenting) (quoting Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 135 (1995) (Ginsburg, J., concurring)).

Based on the statutory construction, the Legislature's incorporation of Title 9 provisions into N.J.S.A. 2C:24-4(a), and thirty years of ample judicial precedent, we agree with the Appellate Division's decision in this case that the State successfully proved that defendant exposed the children in her care to imminent danger and a substantial risk of harm pursuant to N.J.S.A. 2C:24-4(a).

Children are naturally curious and inquisitive. Here, we had six underage children, ranging in age from one to thirteen, housed in a confined space. Drugs hauntingly surrounded children's toys and clothing. The ease of access to cocaine, heroin, and marijuana, and the attraction of brightly colored pills, all created a potentially lethal trap for the children that could have been easily sprung at any moment.

With this evidence developed by the State at trial, the Appellate Division properly concluded that N.J.S.A. 2C:24-4(a), incorporating Title 9, includes exposing a child to a substantial risk of harm.

D.

We briefly consider the concerns of giving prosecutors too much discretion in choosing to charge under N.J.S.A. 2C:24-4(a)(2), a second-degree crime, over Title 9, a fourth-degree offense.

We have previously held that criminal statutes can "overlap in prohibiting the same basic act," and in those situations "the proper prosecuting authority in the sound exercise of the discretion committed to him [or her] may proceed under either act." State v. States, 44 N.J. 285, 292 (1965). The United States Supreme Court has similarly held that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate

against any class of defendants." United States v. Batchelder, 442 U.S. 114, 123-24 (1979). "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." Id. at 124. Prosecutorial discretion, however, is not unlimited, and "[j]udicial oversight is mandated to protect against arbitrary and capricious prosecutorial decisions." State v. Vasquez, 129 N.J. 189, 196 (1992). A defendant who proves that a prosecutor's "exercise of discretion was arbitrary and capricious would be entitled to relief." Ibid.

In Batchelder, the defendant was sentenced to five years' imprisonment in violation of a federal statute prohibiting previously-convicted felons from receiving firearms via interstate commerce. 442 U.S. at 116. The Seventh Circuit remanded for resentencing given that a separate federal statute proscribed identical conduct and allowed no more than a two-year sentence. Id. at 116-17. The Supreme Court reversed, finding that prosecutors retain discretion to "prosecute under either [act]," barring discrimination, when criminal conduct triggers more than one statute. Id. at 123-24.

In an analogous proceeding concerning the availability of disparate penalties under separate statutory schemes, in State v. Reed, the defendant was sentenced to two to three years' imprisonment under the Drug Act for unauthorized possession of

narcotics. 34 N.J. 554, 556 (1961). The Appellate Division remanded, citing to another act which made unauthorized use of narcotics a disorderly persons offense, taking it out of the Drug Act's purview. Ibid. Responding to the defendant's arguments of unconstitutionally broad prosecutorial discretion, we held that when criminal conduct violates both statutes, "the decision to proceed under either or both of the statutes is traditionally the State's." Id. at 573.

Here, there is no evidence that the prosecutor abused her discretion in choosing to charge defendant under N.J.S.A. 2C:24-4(a)(2) instead of Title 9. Defendant bears the burden of proving that the prosecutor acted arbitrarily and capriciously, Vasquez, 129 N.J. at 196, but provided no reasonable justification as to why the prosecutor should have charged her under Title 9 instead of N.J.S.A. 2C:24-4(a)(2). Rather, defendant claims generally that prosecutors retain too much discretion in choosing whether to charge defendants under N.J.S.A. 2C:24-4(a)(2) or Title 9. That contention, however, is directly contrary to our precedent that provides prosecutors such discretion. See States, 44 N.J. at 292.

Defendant has similarly not provided any evidence that the prosecutor's decision to charge under N.J.S.A. 2C:24-4(a) was discriminatory or predicated on prejudice. Indeed, the record here provided the prosecutor ample justification for her

decision to charge defendant under N.J.S.A. 2C:24-4(a)(2). As we have recently underscored in the Title 9 context, "a court need not sit idly by until a child is actually impaired by parental inattention or neglect." DCPP v. A.B., 231 N.J. 354, 370 (2017) (citing DYFS v. A.L., 213 N.J. 1, 23 (2013)). In short, danger awaited the six children at every turn in the motel room given their easy access to heroin, cocaine, marijuana, and pills, and for that reason, we find that the prosecutor did not abuse her discretion in choosing to charge defendant under N.J.S.A. 2C:24-4(a) instead of Title 9.

IV.

We affirm the judgment of the Appellate Division upholding the trial court's denial of defendant's motion for a judgment of acquittal.

JUSTICES PATTERSON, FERNANDEZ-VINA, and SOLOMON join in JUSTICE TIMPONE's opinion. JUSTICE ALBIN filed a dissent, in which JUSTICE LaVECCHIA joins. CHIEF JUSTICE RABNER filed a dissent.

SUPREME COURT OF NEW JERSEY
A-4 September Term 2017
079034

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANYELL FUQUA,

Defendant-Appellant.

JUSTICE ALBIN, dissenting.

The majority's opinion violates cardinal principles of statutory interpretation in the service of upholding defendant's conviction for a crime greater than the one she committed. Criminal statutes should not be pliable things, however disturbing the facts of a case. Defendant surely is no innocent. Based on the State's proofs, had defendant been charged with abuse and neglect, she could have been convicted of that fourth-degree offense, N.J.S.A. 9:6-3. But based on the proofs, she did not commit the second-degree offense of endangering the welfare of a child, N.J.S.A. 2C:24-4, for which she received a six-year prison term.

The majority construes the second-degree endangering statute, N.J.S.A. 2C:24-4, to criminalize the civil definition

of abuse and neglect in N.J.S.A. 9:6-8.21.[1] It arrives at that conclusion by failing to apply the endangering statute's requirement that a child suffer harm for a defendant to be guilty of that second-degree offense. Thus, according to the majority, a defendant is guilty of endangering if the child is exposed to a substantial risk of harm. In the end, the majority makes no distinction between harm and substantial risk of harm.

To reach this result -- a result the Legislature could not have intended -- the majority ignores the common usage of words, fails to acknowledge the textual differences between the two statutes, disregards the endangering statute's legislative history, pays no heed to the doctrine that criminal statutes are to be narrowly construed, accepts as "sound precedent" wrongly reasoned Appellate Division decisions, and forgets that this Court's role is to correct and not to perpetuate lower court errors.

I therefore respectfully dissent.

I.

A.

Under the endangering statute, N.J.S.A. 2C:24-4(a)(2), a parent or guardian "who causes the child harm that would make

[1] Under the civil abuse-and-neglect statute, a parent or guardian who violates the statute is placed on the abuse-and-neglect registry. See N.J.S.A. 9:6-8.11.

the child an abused or neglected child as defined in [N.J.S.A.] 9:6-1, [N.J.S.A.] 9:6-3 and . . . [N.J.S.A.] 9:6-8.21 is guilty of a crime of the second degree." (emphasis added). The endangering statute incorporates the criminal definition of abuse and neglect, N.J.S.A. 9:6-1, and the civil definition of abuse and neglect, N.J.S.A. 9:6-8.21. But harm is an essential element of the endangering statute. If not, the endangering statute merely criminalizes the civil definition of abuse and neglect.

The civil abuse-and-neglect statute does not necessarily require the element of harm. See N.J.S.A. 9:6-8.21. A parent or guardian engages in civil abuse and neglect when a child "is in imminent danger of becoming impaired as the result of the failure of his parent or guardian . . . to exercise a minimum degree of care" and when the child is placed in "substantial risk" of harm. N.J.S.A. 9:6-8.21. Other examples of abuse and neglect in the civil statute do punish harm, such as when a parent or guardian "commits or allows to be committed an act of sexual abuse against the child," and "the infliction of excessive corporal punishment." N.J.S.A. 9:6-8.21(c).

Most categories of abuse and neglect in the fourth-degree criminal statute, N.J.S.A. 9:6-3, encompass harm, but not all, see N.J.S.A. 9:6-1. Into the harm category, for example, falls such conduct as "habitually tormenting, vexing or afflicting a

child;" a "willful act of omission or commission whereby unnecessary pain and suffering, whether mental or physical, is caused or permitted to be inflicted on a child;" "using excessive physical restraint on the child under circumstances which do not indicate that the child's behavior is harmful to himself, others or property;" and "inflicting unnecessarily severe corporal punishment upon a child." N.J.S.A. 9:6-1. A parent or guardian also commits the crime of neglect, whether or not the child suffers harm, by "willfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home"; "the habitual use . . . in the hearing of such child, of profane, indecent or obscene language;" "the performing of any indecent [or] immoral . . . deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child;" and exposing a child to "moral risk without proper and sufficient protection." Ibid.

If the endangering statute's harm requirement does not modify the civil and criminal definitions of abuse and neglect, then exposing a child to a substantial risk of harm (the civil definition) or risk of harm under the fourth-degree definition is a second-degree crime. The majority's approach equates harm with substantial risk of harm. As a result, the majority gives

the word "harm" a wholly different meaning than its customary, well-understood, and common-sense definition. Ante at ___ (slip op. at 8-10); see also Webster's Third New International Dictionary 1034 (1981) (defining harm as "physical or mental damage" and "a material and tangible detriment or loss to a person"). The majority reads the word "harm" caused to a child, a necessary predicate to an endangering conviction, to mean a substantial risk of harm to a child. There is a difference, however, between a child who is permitted to run through traffic (substantial risk of harm) and a child who is struck while doing so (harm). Words make a difference.

A sensible textual construction of the endangering statute -- consistent with its language and legislative intent -- would be to require harm as a precondition to the examples given in the abuse-and-neglect statutes. Thus, the statute would punish "harm that would make the child an abused or neglected child" for purposes of endangering a child under N.J.S.A. 2C:24-4(a)(2) (emphasis added). Exposing a child to a substantial risk of harm, however, does not satisfy the definition of harm and is not sufficient to constitute a violation of the second-degree endangering statute. In this way, the endangering statute can be reconciled with the Legislature's grading of the fourth-degree offense of abuse and neglect and the civil statutory violation of abuse and neglect.

B.

The majority's position is also at odds with the legislative history of the endangering statute. The original draft language of the endangering statute, N.J.S.A. 2C:24-4, read:

> Any person who shall abuse, be cruel to or neglectful of any child shall be guilty of a crime of the fourth degree. Any parent, guardian or person having the care, custody or control of any child, who shall abandon such child shall be guilty of a crime of the fourth degree.
>
> [1 The New Jersey Penal Code: Final Report § 2C:24-4, at 91 (Criminal Law Revision Comm'n 1971).]

Noticeably absent from this draft is any mention of the word "harm." In its Commentary, the New Jersey Criminal Law Revision Commission expressed its criticism of this version and reluctantly endorsed it. The Commission stated:

> We are not happy with the breadth of, nor the precision of the definitions of, abuse, abandonment, cruelty[,] and neglect in N.J.S.[A.] 9:6-1. The conduct which is appropriately prevented by non-criminal sanctions need not always also be made criminal. Further, provisions of Chapter 6 of Title 9 show the basic thrust of it not to be to provide a criminal sanction but rather a strong remedy to compel support and/or proper conduct toward the child. Pending a re-examination of those definitions for civil purposes, we do not believe we should tamper with them for criminal purposes which might destroy the most effective sanction to stop the misconduct. We do believe that reconsideration of this entire field of law

> would be appropriate. With hesitancy, then, we simply recommend continuation of existing law.
>
> [2 The New Jersey Penal Code: Final Report § 2C:24-4, at 260 (Criminal Law Revision Comm'n 1971) (citations omitted).]

The Legislature evidently was not satisfied with the breadth of the proposed endangering statute and adopted a much narrower version of N.J.S.A. 2C:24-4 by explicitly including a "harm" requirement. Thus, the final version, as codified, reads:

> Any person having a legal duty for the care of a child or who has assumed responsibility for such care, who causes such child such harm as would make such child an abused or neglected child as defined in [L.] 1974, c. 119, § 1 ([N.J.S.A.] 9:6-8.21) shall be guilty of a crime of the third degree.
>
> [L. 1978, c. 95 (emphasis added); N.J.S.A. 2C:24-4 (1979).]

The Appellate Division cases relied on by the majority as "decades-old sound precedent," ante at ___ (slip op. at 11), have labored under a misunderstanding of the statute's legislative history. A number of panels -- including the one in this case below -- attributed the Law Revision Commission's 1971 note to the current endangering statute when, in fact, the Commission was referring to the draft proposal. See, e.g., State v. N.A., 355 N.J. Super. 143, 153-54 (App. Div. 2002). The Commission observed that the

> [proposed § 2C:24-4] incorporates into the Code the existing law as to abuse, abandonment, cruelty and neglect of children by making such conduct criminal under the definitions of those terms in Title 9. The intent is to incorporate the crime now defined in N.J.S.[A.] 9:6-3 without substantial change except for the penalty provisions.
>
> [2 The New Jersey Penal Code: Final Report § 2C:24-4, at 259 (Criminal Law Revision Comm'n 1971) (citations omitted), cited in N.A., 355 N.J. Super. at 153.]

As discussed, the current endangering statute enacted in 1979 differs from the Commission's draft proposal. Most critically, the 1971 proposal did not incorporate a harm requirement into the statute, but spoke only generally in terms of abuse, cruelty, and neglect. See 1 The New Jersey Penal Code: Final Report § 2C:24-4, at 91 (Criminal Law Revision Comm'n 1971). Thus, the Appellate Division has repeatedly erred by imputing the Commission's commentary to the current statute. In short, the Criminal Law Revision Commission's commentary refutes and does not support the Appellate Division's interpretation of N.J.S.A. 2C:24-4 on which the majority is so dependent.

We are not required to perpetuate mistakes made by the Appellate Division, even when they have been on the books for many years. In particular, the majority cites to N.A., 355 N.J. Super. at 150–51, and State v. M.L., 253 N.J. Super. 13, 31 (App. Div. 1991), as support for the notion that proof of "harm"

and "risk of harm" have the same meaning. Ante at ___ (slip op. at 10-13)

Even if N.A. and M.L. were "sound" precedent, they are factually distinguishable. In both cases, the distinction between "harm" and "risk of harm" was not necessary to their outcomes, because the State had provided sufficient evidence to prove actual harm. See N.A., 355 N.J. Super. at 145-47; M.L., 253 N.J. Super. at 31. In N.A., as the majority concedes, "a jury convicted the defendant under N.J.S.A. 2C:24-4(a) for having severely beaten her two-year-old son (actual harm)." Ante at ___ (slip op. at 11) (emphasis added) (citing 355 N.J. Super. at 145-46). In M.L., the defendant's infant child was left unattended in an apartment "littered with dirty diapers and laundry, plates of spoiled food and dog feces." 253 N.J. Super. at 18. The infant was found sleeping in a playpen sweating in 90-degree heat and "in desperate need of a diaper change." Ibid.

The majority also suggests that the Legislature acquiesced to the interpretation given to the endangering statute by the Appellate Division by not amending the statute after the N.A. and M.L. decisions. Ante at ___ (slip op. at 12-13). Legislative acquiescence is a slender reed on which to justify a mistaken Appellate Division interpretation of a statute. The Legislature understands that, within our judicial system, the

New Jersey Supreme Court has the last word on the interpretation of a statute and has the obligation to correct mistakes made by lower courts.

C.

At the very least, there are two reasonable interpretations of the endangering statute, and therefore the one more favorable to defendant should prevail. The majority ignores our jurisprudence's command that criminal statutes are to be construed narrowly. State v. Shelley, 205 N.J. 320, 328 (2011) ("[W]e must strictly construe the language of [a penal statute] where there is some uncertainty as to its application."). Our citizens should not have to guess about the meaning or the breadth of a criminal statute. Cf. State v. Morrison, 227 N.J. 295, 314 (2016). When two reasonable interpretations can be given to a statute riddled with ambiguity, the doctrine of lenity instructs that the interpretation favoring the defendant must prevail. State v. Fortin, 178 N.J. 540, 608 (2004) ("[W]hen a criminal statute is at issue, 'we are guided by the rule of lenity' and 'interpret ambiguous language in favor of a criminal defendant.'" (quoting State v. Livingston, 172 N.J. 209, 218 (2002))); see also State v. Gelman, 195 N.J. 475, 482 (2008). Here, the majority disregards those principles by broadly construing N.J.S.A. 2C:24-4(a) and giving the State the benefit of any ambiguities.

If uncertainty abounds concerning whether the Legislature intended the expanded definition of harm in the endangering statute, the doctrine of lenity should prevail.

D.

Finally, by declaring that the second-degree endangering statute applies to conduct that creates a substantial risk of harm to a child, the majority has erased all distinctions between the criminal and civil statutes. Thus, now a parent or guardian who commits civil abuse and neglect is also guilty of the Title 2C, second-degree crime of endangering, which carries a maximum prison exposure of ten years. In short, by removing the harm requirement from the endangering statute, the majority has criminalized the civil abuse-and-neglect statute.

The Legislature surely did not intend that absurd result.

II.

For the reasons expressed, I respectfully dissent.

SUPREME COURT OF NEW JERSEY
A-4 September Term 2017
079034

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANYELL FUQUA,

Defendant-Appellant.

CHIEF JUSTICE RABNER, dissenting.

A straightforward question lies at the center of this appeal: to prove the crime of endangering the welfare of a child, set forth at N.J.S.A. 2C:24-4, must the State present evidence of actual harm to a child, or is it enough to show a substantial risk of harm?

To answer the question, the starting point is the language of the statute. State v. Twiggs, ___ N.J. ___ (2018) (slip op. at 20); DiProspero v. Penn, 183 N.J. 477, 493 (2005). The endangering law reads as follows:

> Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who causes the child harm that would make the child an abused or neglected child as defined in [N.J.S.A.] 9:6-1, [N.J.S.A.] 9:6-3 and . . . [N.J.S.A. 9:6-8.21] is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree.

[N.J.S.A. 2C:24-4(a)(2) (emphasis added).]

The State presents a strong argument that the phrase "causes the child harm" cannot be read separately from the words that follow: "that would make the child an abused or neglected child as defined in" three specific laws. Read that way, "harm" incorporates various kinds of behavior listed in the cross-referenced statutes. Because those statutes encompass both actual harm and substantial risk of harm, see N.J.S.A. 9:6-8.21(c), the word "harm" in the endangering law does as well.

Defendant sensibly emphasizes that "harm" means "harm" -- not "risk" of harm. And the words of the endangering statute make it a crime for a person to "cause[] [a] child harm." N.J.S.A. 2C:24-4(a)(2).

The legislative history cited by my colleagues does not appear to resolve the debate. See ante at ___ (slip op. at 6-8) (Albin, J., dissenting). And this Court has not addressed the issue before today. But see State v. N.A., 355 N.J. Super. 143, 150-51 (App. Div. 2002) (observing in dicta that statute encompasses substantial risk of harm); State v. M.L., 253 N.J. Super. 13, 31 (App. Div. 1991) (same).

Faced with alternative reasonable interpretations of a criminal statute, the rule of lenity applies. That doctrine calls on courts "to construe penal statutes strictly and

interpret ambiguous language in favor of a criminal defendant." State v. Livingston, 172 N.J. 209, 218 (2002); see also State v. Sumulikoski, 221 N.J. 93, 110-11 (2015); State v. D.A., 191 N.J. 158, 164 (2007). Here, because it is not clear whether the Legislature intended a narrow definition of actual harm or a broader meaning that includes substantial risk of harm, lenity requires a narrow reading of the law as drafted. See Livingston, 172 N.J. at 218. Going forward, the Legislature, of course, could amend and clarify the statute if it wished to.

In this case, the trial court noted "the absence of any direct evidence of actual harm to the children." Because defendant's conviction for second-degree endangering rests on risk of harm to children and is based on the more expansive reading of the statute, the conviction should not stand.

I respectfully dissent because I believe the meaning of the endangering law is ambiguous and should therefore be read narrowly.