SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5552-17

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL P. MARRARA, a/k/a PETER MICHAEL MARRARA, JR.,

Defendant-Appellant.

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Argued October 17, 2022 — Decided November 10, 2022

Before Judges Mawla, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 14-05-0559.

Peter W. Till argued the cause for appellant (Law Offices of Peter W. Till, attorneys; Peter W. Till, of counsel and on the briefs; Louis J. Keleher, on the briefs).

William P. Miller, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; William P. Miller, of counsel and on the brief).

PER CURIAM

Defendant Michael P. Marrara was tried before a jury, which found him guilty of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a); two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a); and third-degree hindering apprehension, N.J.S.A. 2C:29-3(b)(4). He appeals from his May 14, 2018 judgment of conviction. We affirm.

Defendant and Lindsey Whitman are the parents of a son, Andrew, born January 13, 2012, who according to the testimony of the child's pediatrician, Dr. Joanne Aranoff, was born a healthy baby. On February 27, 2012, defendant and Whitman took the child to Dr. Aranoff because Whitman noticed "marks or [a] rash" on his body. Dr. Aranoff examined Andrew and found "superficial" "black-and-blue marks or bruising" across his upper shoulder blade area, on his upper arms to forearm, and some on his shins and the back of his legs, which appeared to be fresh. Dr. Aranoff testified she had "never seen anything like that before[,]" so she consulted with another pediatrician in the office. Defendant explained the bruises were caused by a swaddling technique and demonstrated by "pull[ing the child's blanket] extremely tightly, like a rubber band, over the back of [his] shoulders onto the forearms . . . ." Dr. Aranoff stopped the demonstration.

Two days later, Whitman advised Dr. Aranoff the family was having significant trouble feeding Andrew due to heartburn and because he was "arching his back when [he] feeds and crying when lying flat." Dr. Aranoff diagnosed the child with gastroesophageal reflux disease (GERD). Approximately two weeks later, on March 13, 2012, Whitman called Dr. Aranoff about the ongoing feeding difficulties, "concerned that the baby was crying more with [defendant] than with her." On March 15, 2012, Whitman called the doctor stating the child "was fussy, not feeding normally, [and had] . . . a slight injury to his tongue . . . ." Because the call was placed afterhours, the on-call physician prescribed Tylenol for the child's pain and suggested feeding him with a syringe. During a doctor's visit a few days later, Whitman again voiced concern the child was crying more with defendant than with her and said he cannot lie on his back because it upsets him.

On a March 24, 2012, Andrew was examined by Dr. Michael Smith, who practiced with Dr. Aranoff. He testified he discovered a healing hemorrhage under the child's tongue and had never seen an infant with such an injury. Dr. Smith asked about the injury because defendant did not mention it, and defendant responded "he was feeding [the baby] by bottle and the baby lurched [his] head forward and he cut underneath the tongue . . . ." Dr. Smith thought

defendant's explanation was "interesting" and a little "strange" because "babies that are two months old don't have really amazing head control yet . . . ."

Whitman testified that on March 26, 2012, around 6:30 a.m., she woke up and assisted defendant who was having difficulty feeding Andrew, and then tried to go back to sleep, but was unable, because the baby was crying. At approximately 7:45 a.m., defendant came into the bedroom screaming "he's not breathing, he's not breathing." Whitman grabbed the child from defendant and started "bumping him viciously like trying to get the formula out" and "was trying to do whatever [she] could." She heard defendant call 9-1-1 and noticed the child had "started to turn purple when [she] got him[,]" he was not choking or making any sound, and then his lips "start[ed] to turn blue."

When paramedics took the child from Whitman, formula fell out of his mouth; they tried to clear the rest of the formula from his airway and restore his breathing. Whitman accompanied the paramedics to the hospital and defendant followed, riding with a police detective.

Timothy Thoman, an emergency medical technician (EMT), testified he arrived at defendant's residence within five minutes of the 9-1-1 call and found the child unresponsive, not breathing, and without a pulse. Thoman overheard defendant tell another EMT the last time he saw the child alive was when he fed

him at "approximately 7:00 [a.m.]" before putting him down to sleep, and he "found the baby unconscious and not moving" approximately forty-five minutes later.

Fort Lee Police Detective Vincent Buda responded to defendant's home the morning of the incident. The detective was acquainted with defendant and the family and drove defendant to the hospital. He testified defendant was "understandably upset," and the detective "basically just asked him, what the heck happened?" Defendant told the detective Andrew had awoken at 6:15 a.m. with a fever and he fed him formula. While burping the child, "all of the sudden, the baby's head flailed back and he started choking." He "brought the child over the sink and held him upside[ ]down" and then called 9-1-1. Detective Buda asked defendant if the child "hit his head or anything[,]" and defendant responded: "[Y]eah, yesterday, I fell into a rocking chair . . . ." The detective testified defendant's response was "vague" and he "didn't really know what that meant . . . ."

Detective Buda testified as he and defendant approached the hospital, defendant kept saying, "I'm not doing this, I'm not doing this, I can't get out." "I'm not doing this[,] . . . I can't go in there." When they arrived, Detective Buda exited the car, but noticed defendant was not with him. He returned to the car

and saw defendant on the ground, crying and moaning, and saying, "I'm not doing this, I'm not going in . . . ." The detective persuaded defendant to enter the hospital. The State played video surveillance from the hospital parking lot, which showed, according to the trial judge, "defendant refusing to exit the police vehicle, eventually getting out of the vehicle then proceeding to bang his head on the trunk, and finally dropping to his knees and remaining on the ground for approximately one minute."

Dr. Olivia Owusu-Boahen, a pediatric hospitalist, testified that attempts to resuscitate Andrew were unsuccessful and he was pronounced dead. Defendant told her he fed the child at 6:15 a.m. and put him to bed at 7:00 a.m., which was the last time he saw the child alive. She noted the EMT advised her they received the emergency call at 7:45 a.m.

Bergen County Prosecutor's Office (BCPO) Detective James McMorrow testified he responded to the hospital at 10:50 a.m. Defendant told the detective he fed Andrew between 6:10 a.m. and 6:20 a.m. and attempted to feed him with a bottle, but he "didn't want the bottle[,]" so he gave him a pacifier and changed his diaper. Then defendant fed the child from the bottle and using a syringe. "At one point [defendant] said that he felt aggravated by the feeding" and the baby was crying and began to turn red. At that point, defendant wiped the child

with a wet wipe, noticed he stopped breathing, and yelled for Whitman. "He then brought the baby over to the sink and pressed his belly. . . . [H]e then . . . brought the baby into the bedroom and turned [him] over to Whitman."

Rachel Pelissier, a Division of Child Protection and Permanency (Division) intake worker, testified she was assigned to investigate the child's death. She arrived at defendant's apartment at approximately 4:00 p.m. and spoke separately with Whitman, and then defendant. Defendant told her he and Whitman both fed the child between 6:30 and 6:45 a.m., giving him four ounces of formula using a dropper, but he was "very fussy" and vomited it up. Defendant stayed with the child in the living room, and Whitman went back to bed. At 7:00 a.m., defendant "woke [the child] up because he thought Andrew was choking" and "must have had some formula or breast milk stuck in his throat[,]" so he "push[ed] on his stomach to try to get some of it out." Defendant went to the bedroom, woke up Whitman, and "they both tried to get the formula out . . . ."

While talking to defendant, Pelissier noticed a hole in the bedroom door. Defendant told her that a few days prior he "punched the door because [he] was stressed out because Andrew was crying." She noted defendant "seemed to get

a lot more upset, and becoming inconsolable, crying[,]" so she stopped the interview.

Dr. Jennifer Swartz, a forensic pathologist with the Bergen County Medical Examiner Office (BCMEO), testified she performed the autopsy on March 27, 2012. She contacted Whitman and defendant to inquire about the circumstances of the child's death, and he told her he fed Andrew between 6:10 a.m. and 6:20 a.m. He was trying to feed the child with a bottle but had difficulty, and the child "had been crying the whole time he was trying to feed him that morning." Defendant said "Andrew had been inconsolable the last few weeks" and two weeks earlier, "had gotten a little cut on his upper gum and under his tongue from flailing while eating." Defendant told Dr. Swartz he later noticed "whitish stuff" in the child's mouth and when he rubbed it off, it started bleeding. Dr. Swartz believed defendant rubbed off healing tissue from a prior injury.

Defendant told Dr. Swartz he tried feeding Andrew using a syringe when he noticed his "face went red and he became unresponsive and stopped breathing." He put the child "over his shoulder, patted his back, and then [his] head snapped back and he had a blank stare and was not breathing." Defendant

started to push on the child's belly and then called for Whitman, who came over and attempted CPR while defendant called 9-1-1.

Dr. Swartz testified a skeletal x-ray showed three healing posterior rib fractures on the child's right side. She explained the fact "callous" had formed indicated the fractures were "at least a couple of weeks old" and "[t]he fact that we can still see the fracture through the bone . . . indicates that it's probably less than or . . . around a month or so." Dr. Swartz stated because young "children's ribs are still very flexible, . . . it takes a significant amount of force" to cause posterior rib fracture, and if caused by accidental trauma, "it's usually trauma that is equivalent of a motor vehicle accident." She opined the location of the factures indicated that the injuries were probably caused by "squeezing, . . . as the ribs get [compressed,] the bones of the spine act as a kind of fulcrum. And as the ribs get squeezed and pushed over . . . it causes them to break posteriorly."

Dr. Swartz found no evidence Andrew had GERD or suffered death by asphyxia; testifying she "did not see any[thing] obstructing the airway. There was nothing in the mouth. There was nothing in the throat. The airways down to the lungs were all clear. . . . [T]he child did not choke on anything."

The autopsy revealed an acute hemorrhage of the upper frenulum, "the thin tissue . . . connect[ing the] upper lip to the gum . . . ." Dr. Swartz also found

whitish granulation under his tongue; evidence he suffered a prior hemorrhage that had begun to heal. She also diagnosed an acute hemorrhage on the forehead, under the scalp. She testified both of the injuries were rare for infants and consistent with "inflicted trauma."

Dr. Swartz observed pools of blood on the surface of the child's brain, indicating he sustained significant hemorrhaging, acute subdural hemorrhage, and multiple acute subarachnoid hemorrhages. He also suffered an "optic nerve sheath hemorrhage," a form of hemorrhage to the nerves connecting the eyes and the brain. When Dr. Swartz informed defendant and Whitman of her findings, defendant suggested the bleeding on the brain may have been caused by the child "thrashing side to side" while struggling to eat. Dr. Swartz opined the child could not inflict these injuries on himself.

On March 27, defendant gave Detective McMorrow a formal statement. He said he started feeding Andrew at 6:20 a.m., Whitman woke up from the child crying sometime between 7:00 and 7:15 a.m. to comfort the child and returned to bed. Defendant then fed the child with a syringe and "got rid of it." Then he "saw [Andrew's] face turn really red and the formula pool by his mouth." He "put [Andrew] over [his] shoulder . . . and then his head came back and he just had this blank stare on his face." He "eventually . . . stopped

breathing" and defendant "stood him up by the sink and [he] kind of like squeezed his little belly . . . to try to get it out and a little bit did . . . ." He then screamed for Whitman and ran into the bedroom. Defendant "held [Andrew] by the sternum and . . . tapped him on the back and a little came up but he was just completely unresponsive[,]" so he called 9-1-1. Although defendant had CPR training, he was too "flustered" to perform it on Andrew.

Dr. Frederick DiCarlo, a board-certified pediatric pathologist, the BCMEO medical examiner, and a member of the New Jersey Child Fatality and Near Fatality Review Board (CFRB), testified he performed an additional examination on materials Dr. Swartz preserved from the autopsy. Representative samples of Andrew's brain were placed on microscope slides and tested with a specialized stain to help identify damaged "axons" within the nerve cells. Andrew's brain showed injuries in various locations, including the medulla, pons, and corpus callosum, which were the cause of death. Dr. DiCarlo concluded the child would have become symptomatic immediately. He stated: "You're going to know that something is very seriously wrong with the baby[;]" he would have cried, become unresponsive, and his breath would have gradually slowed and eventually stopped.

Dr. DiCarlo opined Andrew's other injuries, namely, the extensive subdural, subarachnoid, and optic-sheath hemorrhages; the frenulum hemorrhage; and the bruised forehead, were not fatal, but showed he suffered significant trauma. Testing indicated he had survived a previous traumatic brain injury. He concluded the cause of death was a closed head injury, and the manner of death was homicide.

Defense expert Dr. Michael Baden, a board-certified forensic pathologist and medical examiner, testified Andrew died from choking on formula, and simultaneously suffered two fatal blood clots in his brain. He explained "two ounces [of formula] would completely obstruct the vocal cord area, the trachea, the back of the mouth and this had gone on for five or [ten] minutes before the EMS people were able to suck anything out." He opined "if an obstruction of the airway goes on for five minutes or so, then that causes brain damage and can be the cause of death." He found it significant the child was described as "blue around the face[,]" which he said was "a sign of lack of oxygen." He explained the blood clots in the brain occurred because

> the formula in the windpipe doesn't permit air to come into the lungs, that blood clot in the vein or in the dural sinus prevents blood from going past it back to the heart and it backs up and causes rupture of little blood vessels—the capillaries and little blood vessels that can

> cause a subdural hemorrhage and can cause hemorrhage in the tissue, be it in the lungs or be it in the brain.

Dr. Baden further opined the blood clots could cause subdural hemorrhages. He concluded "the immediate cause of death was whatever happened while eating, the baby choked on the formula and that the underlying reason that the death occurred was the venous thrombosis in the brain."

On cross-examination, the State presented Dr. Baden with a photograph like the one he used during direct examination, but without markers indicating the two blood clots. He could not locate either blood clot, which he identified on direct examination, despite his testimony they were visible to the naked eye. He also could not explain the cause of the child's prior injuries, which he acknowledged were markers of child abuse.

The defense also called Dr. Zhongxue Hua, a board-certified neuropathologist and medical examiner, who testified there was no "meaningful or significant autopsy evidence of Shaken Baby Syndrome" or blunt fatal trauma. He concluded Andrew had cerebral venous thrombosis (CVT), which was a very "rare disease," that can cause potentially fatal clotting in the brain, evidenced by "two or three" blood clots in the child's brain. CVT causes an "infarction" or "dead tissue" in the brain, which is the "pathological manifestation of a clinical stroke." Dr. Hua noted there was a question of

whether the child had a coagulation problem, which could have caused the bruises described by Dr. Aranoff and is seen in a small amount of CVT cases. Dr. Hua could not definitively conclude CVT caused the child's death and, because he could not explain the child's prior injuries, he could only conclude the cause of death was "undetermined."

The State called Dr. Lucy Rorke-Adams, a board-certified neuropathologist, who testified CVT was inconsistent with the autopsy results because it cannot cause the subdural hemorrhages or optic sheath hemorrhages, injuries Andrew suffered. She opined "[s]ubdural hemorrhages are in [ninety-five] percent of the cases consequent to a head trauma." While CVT could cause subarachnoid hemorrhages, it would be in "a specific spot overlying the intracerebral hemorrhage[,]" and disbursed in the different locations found in the child's brain. Further, the defense experts were mistaken about the presence of blood clots in the child's brain, and even if there were small clots, "they [we]re not in any place . . . vital to the function of the brain."

Defendant raises the following points for our consideration:

> I. THE COURT FAILED TO ACKNOWLEDGE AND CURE IRREGULARITIES WITH RESPECT TO THE SELECTION OF THE PETIT JURY AND THE STATE'S CONSTITUTIONALLY IMPERMISSIBLE EXERCISE OF PEREMPTORY CHALLENGES

OTHERWISE WARRANTING REVERSAL AND REMAND FOR A NEW TRIAL.

A. THE STATE'S EXERCISE OF ITS [THIRD, FOURTH, AND FIFTH] PEREMPTORY CHALLENGE TO REMOVING THE ONLY SEATED HISPANIC MALE JURORS – [#3 . . . , #5 . . . AND #12 . . .] VIOLATED . . . DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY DRAWN FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY PURSUANT TO STATE V. GILMORE, 103 N.J. 508 (1986).

B. THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO PROPERLY CONSIDER . . . DEFENDANT'S REQUEST FOR SUPPLEMENTAL VOIR DIRE, OTHERWISE SEEKING TAILORED INQUIRIES RELEVANT TO THE PROVABLE SPECIFIC FACTS.

II. THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO PRECLUDE DR. DICARLO'S PREVIOUSLY UNANNOUNCED EXPERT OPINION THAT ANDREW HAD SURVIVED AN EARLIER TRAUMATIC BRAIN INJURY, IN COMBINATION WITH THE CHANGE OF THAT EXPERT OPINION FROM HIS GRAND JURY TESTIMONY, DR. DICARLO'S TESTIMONY WAS UNDULY PREJUDICIAL AND UNCONTROVERTED EVIDENCE OF THE STATE'S ABJECT WILLINGNESS TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT.

III. DR. . . . HUA, AN EXPERT ORIGINALLY ENGAGED ON BEHALF OF . . . DEFENDANT,

WHO AT THE TIME OF HIS TRIAL TESTIMONY HAD BECOME THE ACTING MEDICAL EXAMINER FOR THE COUNTY OF BERGEN, WHICH CIRCUMSTANCES ESTABLISHED THE APPEARANCE OF A DIVIDED LOYALTY AND IRREPARABLE PREJUDICIAL CONFLICT, WHICH AS A MATTER OF LAW CANNOT BE WAIVED, AND WHICH UNDULY PREJUDICED AND DEPRIVED . . . DEFENDANT OF A FAIR TRIAL, OTHERWISE WARRANTING REVERSAL AND REMAND FOR A NEW TRIAL.

IV. SUPPRESSION OF DEFENSE TESTIMONY REGARDING THREATS BY LAW ENFORCEMENT CONSTITUTES REVERSIBLE ERROR.

> A. FAILURE TO ADMIT . . . DEFENDANT'S MOTHER'S TESTIMONY REGARDING HER OBSERVATIONS OF LAW ENFORCEMENT AT DEFENDANT'S APARTMENT AND OTHER COLLATERAL MATTERS.
>
> B. THE COURT AGAIN ERRED IN THE SUPPRESSION OF THE ULTIMATUM THREATS MADE BY DETECTIVES TO . . . WHITMAN ADDRESSING THE CONDITIONS FOR RELEASE OF THE DECEASED CHILD'S BODY FOR HIS FUNERAL THE NEXT DAY.

V. THE SCURRILOUS COMMENTARY BY THE STATE IN ITS SUMMATION WENT BEYOND THE EVIDENCE AND LEGITIMATE INFERENCES THEREFROM AND OTHERWISE CONSTITUTED REVERSIBLE ERROR.

A. CLOSING ARGUMENT BY THE STATE, MORE PARTICULARLY THE INTENTIONAL AND UNSUPPORTED REFERENCES TO AN "UNPLANNED PREGNANCY", AND THAT . . . DEFENDANT'S FAMILY CONSPIRED TO COVER-UP THE CRIME, ABSENT ANY EVIDENCE, CONSTITUTED PREJUDICE OF SUCH MAGNITUDE THEREBY STRIPPING . . . DEFENDANT OF HIS PRESUMPTION OF INNOCENCE.

B. CLOSING ARGUMENT BY THE STATE WAS RIDDLED WITH UNSUBSTANTIATED CLAIMS AND AN INACCURATE RECITATION OF THE FACTS AS TESTIFIED TO AT TRIAL.

VI. THE COURT ALLOWED NUMEROUS DISCOVERY VIOLATIONS, WHICH UNDULY PREJUDICED AND DEPRIVED . . . DEFENDANT OF A FAIR TRIAL, EACH INDIVIDUALLY WARRANTING REVERSAL.

A. THE COURT'S FAILURE TO GRANT . . . DEFENDANT'S MOTION FOR SUPPLEMENTAL DISCOVERY, CONSTITUTED REVERSIBLE ERROR.

B. THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO PRECLUDE ADMISSION OF [DIVISION] RECORDS[,] WHICH WERE ILLEGALLY OBTAINED BY THE STATE.

VII. THE COURT COMMITTED NUMEROUS EVIDENTIARY ERRORS CONSTITUTING AN ASTONISHING OVERREACHING.

A. THE COURT'S DECISION TO PRECLUDE . . . DEFENDANT'S RECORDED STATEMENT TO DETECTIVE MCMORROW AND DETECTIVE YOUNG ON OR ABOUT MARCH 27, 2012, UNDULY PREJUDICED AND DEPRIVED . . . DEFENDANT OF A FAIR TRIAL.

B. THE COURT'S FAILURE TO PERMIT AN ATTEMPT TO LINK-UP OR THE FAILURE TO OTHERWISE PRECLUDE TESTIMONY ADDRESSING THE ALLEGATION OF . . . DEFENDANT HAVING DAMAGED A BEDROOM DOOR, CONSTITUTED REVERSIBLE ERROR.

C. THE COURT'S FAILURE TO PRECLUDE ADMISSION OF THE . . . HOSPITAL VIDEOTAPE, (IN CONCERT WITH TESTIMONY OF THE STATE'S WITNESS POLICE DETECTIVE . . . BUDA), PURPORTEDLY OFFERED TO ADDRESS THE ALLEGATION OF . . . DEFENDANT'S RELUCTANCE TO ENTER THE . . . HOSPITAL.

D. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO PRECLUDE THE ADMISSIBILITY OF THE UNRECORDED STATEMENTS BETWEEN . . . DEFENDANT AND . . . PELISSIER[], WHERE THE [DIVISION] RECORDS AND ASSOCIATED TESTIMONY UNDULY PREJUDICED AND DEPRIVED . . . DEFENDANT OF A FAIR TRIAL.

E. THE COURT FAILED TO PRECLUDE THE STATE'S USE OF DR. . . . RORKE-ADAMS' EXPERT WITNESS TRIAL TESTIMONY BECAUSE OF THE STATE'S FAILURE TO DISCLOSE HER ANTICIPATED TESTIMONY AND LAST-MINUTE ARRIVAL AS AN EXPERT WITNESS.

F. THE COURT COMMITTED REVERSIBLE ERROR IN FAILING TO PRECLUDE EVIDENCE AND PROCEED WITH A R[ULE] 104 HEARING AS TO THE ADMISSIBILITY OF AN ALLEGED ADMISSION BY . . . DEFENDANT TO DR. . . . OWUSU-BOAHEN AND THE STATE'S FAILURE TO DISCLOSE HER TESTIMONY AND LAST-MINUTE ARRIVAL TO TRIAL.

G. THE COURT FAILED TO PRECLUDE TESTIMONY OR PURPORTED EVIDENCE THAT THE INJURIES TO ANDREW'S FRENULUM/TONGUE, AS WELL AS BRUISING TO ANDREW WAS SUFFICIENT EVIDENCE TO PROVE ENDANGERING, WHICH ALLEGATION WAS ONLY ADVANCED BY THE STATE FOR THE VERY FIRST TIME DURING OPENING STATEMENT.

H. THE COURT FAILED TO PRECLUDE TESTIMONY AND EVIDENCE THAT THE MARCH 27, 2012 INTERVIEW OF . . . DEFENDANT COULD CONSTITUTE REQUISITE FALSE INFORMATION TO PROVE THE HINDERING CHARGE.

I. THE COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY WITH

RESPECT TO THE LEGAL INSUFFICIENCY OF CERTAIN CHARGES, WITH PARTICULAR RESPECT TO THE ADMISSION OF THE STATE'S UNBRIDLED CROSS-EXAMINATION OF DR. . . . BADEN.

J. THE COURT'S FAILURE TO ALLOW DEFENSE COUNSEL A FULL OPPORTUNITY TO EXAMINE THE PROBITY OF THE STATE'S INVESTIGATION, WITH SPECIFIC SCRUTINY OF THE SEARCH WARRANT AFFIDAVIT FILED BY DETECTIVE FRAZIER AND THE STATEMENT OF PROBABLE CAUSE FILED BY DETECTIVE PERA.

VIII. THE CUMULATIVE EFFECT OF THE NUMEROUS ERRORS BY THE COURT.

IX. THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT AND THEREFORE CANNOT SUPPORT THE GUILTY VERDICT.

I.

In Point I, defendant contends the State exercised its peremptory challenges to remove the only seated Hispanic male prospective jurors and violated his constitutional right to fair trial pursuant to Gilmore and State v. Andujar, 247 N.J. 275 (2021). He further asserts the court erred when it rejected his requests for a supplemental voir dire.

A.

"The right to a fair and impartial jury is . . . 'fundamental . . . .'" In re Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 40 (2009) (second alteration in original) (quoting Wright v. Bernstein, 23 N.J. 284, 294 (1957)). "T[he] right to trial by an impartial jury, in our heterogeneous society where a defendant's 'peers' include members of many diverse groups, entails the right to trial by a jury drawn from a representative cross-section of the community." Gilmore, 103 N.J. at 524. While a defendant is not entitled to have a jury composed "in whole or in part of persons of his own race[,]" a defendant does have the right to have members of the jury selected in a non-discriminatory manner. Batson v. Kentucky, 476 U.S. 79, 85 (1986). The United States and New Jersey Constitutions prohibit the use of peremptory challenges to strike a juror based on their race. Id. at 96; Gilmore, 103 N.J. at 508. Other protected classifications include ancestry, national origin, and gender. Id. at 524.

In Andujar our Supreme Court explained the exercise of peremptory challenge as follows: "The court can excuse jurors 'for cause' when it appears that they would not be fair and impartial, that their beliefs would substantially interfere with their duties, or that they would not follow the court's instruction or their oath." 247 N.J. at 296. When a party contests the use of a peremptory

challenge, the court's analysis begins "with the rebuttable presumption that the prosecution has exercised its peremptory challenges on grounds permissible under Article I, paragraphs 5, 9, and 10 of the New Jersey Constitution." Gilmore, 103 N.J. at 535. This step requires the defendant to establish a "prima facie showing that the prosecution exercised its peremptory challenges on constitutionally-impermissible grounds." Ibid. "If the trial court finds that the defendant has established a prima facie case, this in effect gives rise to a presumption of unconstitutional action that it is the burden of the prosecution to rebut." Id. at 537 (citing Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

Under the second step, "[t]he burden shifts to the prosecution to come forward with evidence that the peremptory challenges under review are justifiable on the basis of concerns about situation-specific bias." Ibid. "To carry this burden, the State must articulate 'clear and reasonably specific' explanations of its 'legitimate reasons' for exercising each of the peremptory challenges." Ibid. (quoting Burdine, 450 U.S. at 258).

"The trial court must decide whether" the prosecutor's reasons are "genuine and reasonable grounds for believing that potential jurors might have situation-specific biases that would make excusing them reasonable and

desirable, given the aim of empanelling a fair and impartial petit jury . . . ." Id. at 537-38. The court "must judge the defendant's prima facie case against the prosecution's rebuttal to determine whether the defendant has carried the ultimate burden of proving, by a preponderance of the evidence, that the prosecution exercised its peremptory challenges on constitutionally-impermissible grounds of presumed group bias." Id. at 539. "[T]he court must assess, among other things, whether the State has applied the proffered reasons 'even-handedly to all prospective jurors'; the 'overall pattern' of the use of peremptory challenges; and 'the composition of the jury ultimately selected to try the case.'" State v. Thompson, 224 N.J. 324, 343 (2016) (quoting State v. Osorio, 199 N.J. 486, 506 (2009)).

We review a trial court's decision whether a prosecutor made impermissible discriminatory use of peremptory challenges for an abuse of discretion. State v. Pruitt, 438 N.J. Super. 337, 343 (App. Div. 2014). Further, because the trial judge observed voir dire and "had the opportunity to hear the prosecutor's explanation first-hand, we owe some deference to [the judge's] ability to gauge the credibility of the explanation." Ibid.

Here, during the jury selection process, juror number five responded in the jury questionnaire that a family member had been the victim of a crime.

When asked about his response at sidebar, he said his father was mugged while working in New York City a long time ago, and the juror did not know what happened because he was in elementary school at the time. Thereafter, he answered additional questions about his responses to the jury questionnaire, and the State used a peremptory challenge to excuse him.

Juror number three responded in the jury questionnaire he had previously served on a jury; he did not remember if it was a criminal or civil trial, but believed it was a criminal case. He also responded his father-in-law had previously been falsely accused of committing a crime—"touching a minor[,]" arrested, and put in jail, but those allegations were quickly dismissed. He explained he was employed as a bus driver through "an arm of [the Division]," and had been trained on the procedure for reporting suspected child abuse, as required by his employment.

When juror number three was asked if the criminal justice system was fair and effective, he responded, "I think it's fair." When asked why, he said: "It's the one we have, it works. It's not perfect but we make it work." He was then asked if he thought he would make a good juror and why, and he responded: "Most likely," because "I think I'm definitely impartial, no matter what I'm

doing, until I see everything otherwise . . . ." The State then used its peremptory challenge to excuse the juror.

Juror number twelve handed in an incomplete jury questionnaire, failing to answer questions regarding law enforcement, namely: "[W]ould you put greater or lesser weight on a witness' testimony merely because they're a law enforcement officer?"; and "[w]ould you be able to evaluate the testimony of a police officer in a fair and impartial way?" When the trial judge asked if there was a reason why he did not answer those questions, he responded: "No, I just forgot it, I think. The way it was worded, it's kind of vague because it's not really a yes or no question." When asked if he thought he would be a good juror and why, he responded: "Yeah," because "I usually try to be unbiased, in most circumstances." The State exercised a peremptory challenge and excused the juror.

The following day, defense counsel made an oral application, pursuant to Gilmore, challenging the State's use of its peremptory challenges, arguing the State improperly excluded prospective jurors three, five, and twelve. Although defense counsel was not certain, he believed those jurors were Hispanic based on their surnames. Counsel argued the jurors were excused based on an "impermissible group bias." The trial judge stated she "was a little surprised at

the challenge. Not for any reason other than [the court] wasn't particularly aware that [defendant] was of Hispanic de[s]cent." Defense counsel clarified defendant was not of Hispanic descent, stating: "The challenge is based upon the fact that my perception . . . is that Hispanic males are being excluded from this jury because they are Hispanic males." The judge acknowledged a successful Gilmore challenge did not depend on whether defendant was a member of the group that was allegedly improperly excluded, but noted Gilmore specifically addressed a situation where the defendant belonged to the same group as the improperly excluded jurors.

The State denied it challenged the jurors for a discriminatory reason and argued defendant had not made a prima facie showing under Gilmore. The State explained it excluded juror five because he was "highly distracted" throughout the whole process, "was not paying attention to what was going on," was not "answering the questions that were directly made to him[,]" and was too "inattentive for a case that requires attentiveness."

The State expressed concern juror three drove for the Division and noted he had problems with recollection and comprehension because he could not recall if his prior jury service was in a civil or criminal case. The State also noted the juror said the legal system "wasn't perfect" and claimed his relative

was falsely accused of a crime, which the judge stated "was of course a red flag . . . ."

The State pointed out juror twelve failed to properly fill out the questionnaire, and as a result "[w]e know very little about [him] because he has no answers on his sheet." Further, the State believed the juror "was a bit evasive" in his responses and "too indecisive." "He . . . appeared inattentive, . . . meek, [and] . . . unready to sit . . . for this case . . . in the State's opinion." The judge commented the juror's questionnaire answers were "very sketchy and very limited."

The trial judge rejected defendant's Gilmore challenge and found the State's exclusion of the jurors "appropriate and legitimate." She found no proof jurors five and twelve were of Hispanic descent, and even if juror three was Hispanic, defendant did not make a prima facie showing of a Gilmore violation. The judge was "satisfied based upon the presentation of the State that there are legitimate reasons for having excused . . . all three jurors" and there was no "purposeful discrimination" by the State.

We reject defendant's challenge to the State's exercise of its peremptory challenges. At the outset, we note the discussion regarding the ethnic background of the prospective jurors, and whether defendant was of a similar

background, was irrelevant to whether there was a valid Gilmore challenge. "[I]t is not necessary for the defendant and the excluded juror to be of the same race in order to assert a Batson challenge, . . . and . . . a defendant has standing to raise equal protection claims on behalf of jurors who are excluded because of their race . . . ." Andujar, 247 N.J. at 298 (citations omitted). Rather, as the judge correctly noted, the State rebutted defendant's claims by offering genuine and reasonable explanations related to the case for excusing the jurors that were not pretextual.

B.

Defendant contends the trial judge erred when she denied his application to submit supplemental voir dire questions "targeting specific aspects of the case." He argues his proposed supplemental voir dire questions "were presented to elicit information concerning the juror's knowledge, experiences, relationships and/or associations bearing upon their ability to be fair and impartial" and he was prejudiced by not being able to ask prospective jurors his questions.

"The trial court's duty 'to take all appropriate measures to ensure the fair and proper administration of a criminal trial' must begin with voir dire." State v. Fortin, 178 N.J. 540, 575 (2004) (quoting State v. Williams, 93 N.J. 39, 62

(1983)). Trial courts are "allotted reasonable latitude when conducting voir dire and, therefore, a reviewing court's examination should focus only on determining whether 'the overall scope and quality of the voir dire was sufficiently thorough and probing to assure the selection of an impartial jury.'" State v. Winder, 200 N.J. 231, 252 (2009) (quoting State v. Biegenwald, 106 N.J. 13, 29 (1987)). "Generally, a trial court's decisions regarding voir dire are not to be disturbed on appeal, except to correct an error that undermines the selection of an impartial jury." Ibid.

In February 2018, the trial judge held an off-record, in-chambers conference with counsel regarding outstanding pretrial issues, including defendant's proposed supplemental voir dire questions. On the record, the judge marked defendant's list[1] of proposed questions as an exhibit and explained why she granted and rejected certain supplemental questions. Defense counsel did not object to the ruling.

In March 2018, a similar process occurred during another in-chambers conference with counsel to discuss the remaining proposed supplemental voir dire questions on defendant's list. When the matter resumed on the record, the

[1] The marked list of proposed supplemental voir dire questions is not part of the appellate record.

judge denied some of the supplemental questions and advised counsel "if there are any objections you can place the objections on the record to preserve the record." Defense counsel did not place any objection on the record. On March 28, 2018, during jury selection, the judge provided the prospective jurors with the standard voir dire questions, followed by the court-approved supplemental questions.

We reject defendant's contention the failure to include the supplemental voir dire questions constituted reversible error. As we noted, the trial judge twice provided defense counsel the opportunity to create a record and to object to her ruling regarding the excluded questions and twice the defense failed to do so. We decline to entertain issues on appeal not properly presented to the trial court in the first instance. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Regardless, we are unconvinced there was an abuse of discretion. The voir dire questions explored potential juror bias, and the judge included many of defendant's proposed supplemental questions.

II.

In Point II, defendant contends the trial judge erred by failing to bar Dr. DiCarlo's expert testimony Andrew had survived a prior traumatic brain injury. Defendant asserts Dr. DiCarlo rendered a new opinion not contained in his

original report and, the State violated its discovery obligations by not pre-identifying this aspect of his testimony. Further, the judge erred because the testimony constituted other bad acts or crimes evidence, and the State failed to move for its admission before trial, under N.J.R.E. 404(b). In Point IV, defendant argues the judge erred by suppressing testimony from his mother and Whitman regarding an alleged threat by Detective McMorrow. Point VII raises several other evidentiary errors defendant believes were committed.

We afford substantial deference to a trial court's evidentiary rulings. State v. Morton, 155 N.J. 383, 453 (1998). As a result, we review evidentiary rulings, including rulings on the admissibility of expert testimony, for an abuse of discretion. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011). Therefore, the trial court's evidentiary rulings must be upheld, "unless it can be shown . . . that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

A.

Dr. DiCarlo testified his review of the medical evidence using a more powerful microscope than the one used to prepare the original report showed Andrew had survived a previous brain injury, which occurred at least twelve hours prior to his death. Defense counsel objected, arguing neither Dr. DiCarlo's

report nor his grand jury testimony mentioned the prior injury and the State provided no notice Dr. DiCarlo would opine as such.

The trial judge overruled the objection, finding the State had provided notice of the changed evidence, and once defense counsel learned about it, they could have inquired about its significance with the defense expert. She also denied defendant's motion for a mistrial on the grounds other crimes evidence had been admitted without a N.J.R.E. 404(b) hearing. Notwithstanding the evidentiary ruling, the judge granted the defense an adjournment to prepare a cross-examination. The following day, the judge inquired whether the defense was prepared to proceed with cross-examination or needed more time. Counsel advised they were ready.

"When an expert's report is furnished, 'the expert's testimony at trial may be confined to the matters of opinion reflected in the report.'" McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 171 (App. Div. 1987) (quoting Maurio v. Mereck Constr. Co., 162 N.J. Super. 566, 569 (App. Div. 1978)). However, experts may testify to "the logical predicates for and conclusions from statements made in the report . . . ." Ibid. Even when an expert's testimony exceeds the bounds of their report, the trial court should not exclude the testimony where there was no intent to mislead, and the admission does not

prejudice or surprise the objecting party. Congiusti v. Ingersoll-Rand Co., 306 N.J. Super. 126, 132 (App. Div. 1997). Indeed, "the sanction of preclusion is a drastic remedy and should be applied only after alternatives are explored[,]" such as the granting of a continuance. State v. Washington, 453 N.J. Super. 164, 190 (App. Div. 2018) (quoting State v. Scher, 278 N.J. Super. 249, 272 (App. Div. 1994)).

We are satisfied the trial judge did not abuse her discretion. Dr. DiCarlo's testimony was consistent with his grand jury testimony that evidence of brain injury would be visible microscopically approximately twelve hours after the injury occurred. Moreover, as the judge noted, there was no discovery violation by the State not highlighting the significance of the information revealed by the more powerful microscope, because the information was not withheld from the defense. Furthermore, the court provided the defense an adjournment to address the issue, which the defense declined.

B.

The trial judge rejected defendant's objections to Dr. DiCarlo's testimony regarding the prior injuries and denied the defense's motion for a mistrial. She held the injury was not evidence of prior bad acts under N.J.R.E. 404(b), but "part and parcel of the alleged ongoing and continuing child endangerment and

abuse . . . ." The judge found the State was not limited to the grand jury testimony because its task there was only to demonstrate probable cause. She ruled the evidence was relevant.

The trial court determines whether the evidence concerns prior bad acts, under N.J.R.E. 404(b), or is intrinsic to the charged offense, and therefore relevant under N.J.R.E. 403. State v. Rose, 206 N.J. 141, 179 (2011). It is "more likely that evidence of uncharged misconduct will be admitted . . . if it is considered intrinsic to the charged crime and subject only to [N.J.R.E.] 403 than if it is not considered intrinsic evidence and subject to both [N.J.R.E.] 404(b) and [N.J.R.E.] 403." Id. at 178. Intrinsic evidence "directly proves" the crime charged or if the other wrongs or bad acts in question were performed contemporaneously with, and facilitated, the commission of the charged crime. Id. at 180 (quoting U.S. v. Green, 617 F.3d 233, 248-49 (3d Cir. 2010)).

The trial judge's ruling the prior head injury was part of a continuum of abuse and therefore intrinsic to the charged offense was not an abuse of discretion. She did not err in admitting Dr. DiCarlo's testimony, declining to hold a N.J.R.E. 404(b) hearing, or denying the motion for a mistrial.

C.

Defendant argues his mother would testify Detective McMorrow threatened not to release Andrew's body unless defendant agreed to provide a statement to the police. He asserts the judge erred by suppressing this testimony because the jury was unaware "of law enforcement's prejudgment of guilt and otherwise inexorable and mercenary attempts to prove an unsubstantiated theory." Defendant contends the judge erred by precluding Whitman's testimony about the voluntariness of her statement to police and Detective McMorrow's alleged threat not to release Andrew's body.

Defendant's mother testified at a hearing related to the voluntariness of defendant's recorded statement at police headquarters. She stated on the evening of Andrew's death, Detective McMorrow said to defendant: "We'd like you to come back down to headquarters with us. We need . . . to finish the [interview] we started in the hospital yesterday. And, we just want to get this wrapped up and get it over." According to her, the detective also said: "We have your son's body. We . . . will not release it for burial until you come down." However, defendant's mother testified she called the funeral home and learned the child's body had been released and was in the funeral home's possession. She informed Whitman, who responded, "I know where my son is." She also told defendant

and asked him not to go to police headquarters, but he responded, "I've got nothing to hide mom, I'm going."

At the hearing, Detective McMorrow "unequivocally denie[d]" making a threat. The court found him more credible than defendant's mother and found "defendant's action and statements before being taken to the BCPO and his videotaped statement at the BCPO belie [his mother]'s testimony that he was coerced into going to the BCPO to give a statement and support Detective McMorrow's testimony that defendant accompanied [the detective] freely and voluntarily[,]" and denied the motion to suppress defendant's statement.

At trial, during defense counsel's direct examination of defendant's mother, the State objected when it appeared she might testify about Detective McMorrow's alleged threat. The defense proffered as follows: "The relevance of this line of questioning is that they were lied to in order to try to get [defendant] and [Whitman] to go down to headquarters." The trial judge sustained the objection on grounds of relevance, noting the court had already determined defendant's statement to the police was voluntary.

We discern no reversible error. Detective McMorrow's alleged statement was not evidence of a prejudgment of guilt because, even if he made that statement, the testimony at the suppression hearing was that defendant knew the

statement was incorrect before he went to the station and he told his mother he was going give a statement because he had nothing to hide. Therefore, Detective McMorrow's alleged statement, as well as any alleged bias, was irrelevant to proving defendant's guilt.

When Whitman testified, defense counsel attempted to elicit testimony Detective McMorrow also threatened her. The State objected and noted the court already ruled on this issue. Defense counsel argued the court had ruled with respect to defendant's mother testifying about the alleged threat but "never made [a] legal determination as to whether or not [Whitman]'s agreement . . . to go [to the police station] was voluntary." The judge noted defense counsel did not proffer Whitman as a witness regarding the voluntariness of her statement. The judge sustained the objection, finding the testimony was prejudicial and would undermine the pretrial ruling because "[i]t creates an impression in the juror's minds that the statement was not voluntary. . . . And by extension, they'll infer through [Whitman]'s testimony that if [her] statement wasn't voluntary . . . defendant's statement wasn't voluntary."

The trial judge did not abuse her discretion. We affirm this ruling substantially for the reasons expressed by the trial judge.

D.

In Point VII of his brief, defendant argues the court erred by: 1) denying his motion to suppress his recorded statement to police; 2) admitting other bad acts evidence—that defendant punched and damaged a door; 3) failing to exclude the video showing his behavior upon arrival at the hospital and Detective Buda's related testimony; 4) denying his application to preclude his statement to Pelissier; 5) failing to preclude Dr. Rorke-Adams from testifying because her expert report was filed late and was a net opinion; 6) failing to preclude Dr. Owusu-Boahen from testifying because she was added late to the witness list and not conducting a N.J.R.E. 104(c) hearing; 7) not instructing the jury on a lesser-included charge; 8) limiting the evidence permitted to prove the hindering charge and improperly instructing the jury on the charge; 9) permitting improper cross-examination of Dr. Baden; and 10) not allowing defense counsel a full opportunity to examine the probity of the State's investigation.

i.

Defendant's argument the court erred by denying the motion to suppress his statement to police lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). As we noted, defendant's statement was admissible because it was voluntary and uncoerced.

ii.

The trial judge's decision to admit the evidence defendant punched the door was not an abuse of discretion. The judge found the State met all four Cofield prongs[2] noting: there was "a logical connection between evidence that defendant punched a door hard enough to make an indentation after becoming frustrated with . . . Andrew, and the fact in issue that defendant caused physical harm to the baby while feeding him[;]" the violent reaction of punching the door and harming Andrew occurred close in time and during feedings; there was clear and convincing photographic evidence of the damage; and the evidence was more probative than prejudicial because it showed motive and knowledge, and was permissible under N.J.R.E. 404(b).

Evidence of prior bad acts demonstrating a defendant's hostility toward a particular individual is highly relevant with respect to the issue, and generally its probative value far outweighs its potential for undue prejudice. State v. Engel, 249 N.J. Super. 336, 372-74 (App. Div. 1991). This is particularly true in child abuse cases. See State v. Moorman, 286 N.J. Super. 648, 662 (App. Div. 1996) ("[P]hysical abuse most often occurs while the child is in parental custody beyond public view and cannot be proven without evidence of a pattern

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

or history of abuse."). For these reasons, we affirm the trial judge's decision on this issue.

iii.

Defendant argues it was improper to admit evidence related to his conduct in the hospital parking lot because it was an expression of his grief, not guilt. He asserts Detective Buda's testimony stating: "As a father and police officer, nothing would stop me from running into the emergency room[,]" was also prejudicial because it was improper opinion testimony.

The trial judge admitted the video over defendant's objection, finding it had "incredibly high" probative value. "It tends to show consciousness of guilt and defendant's mental state shortly after his son is taken into the hospital."

"When an individual's state of mind is at issue, a greater breadth of evidence is allowed." State v. Williams, 190 N.J. 114, 125 (2007). Our Supreme Court has "[s]pecifically . . . recognized the relevance of post-crime conduct to a defendant's mental state when the conduct demonstrates consciousness of guilt." Ibid. Pursuant to these principles, we affirm for the reasons expressed by the trial judge.

We likewise reject defendant's argument Detective Buda gave improper opinion testimony at trial. Although defendant's brief fails to point us to the

relevant portion of the trial record, our review of the transcripts reveals Detective Buda made this statement before the grand jury and not at trial. This argument lacks merit. R. 2:11-3(e)(2).

iv.

Defendant challenges the admission of his statement to Pelissier. He asserts the doctrine of fundamental fairness was violated because there was no urgency to interview him so close to the time of Andrew's death.

Following a N.J.R.E. 104(c) hearing, the trial judge found defendant's statement was voluntary because the testimony showed he was not reluctant to speak with Pelissier, never objected to speaking with her, or asked her to terminate the interview. Moreover, she interviewed defendant as part of her duties as a Division worker, not as law enforcement, and there was no evidence of coercion, as defendant was not in custody and gave the interview in his home.

"New Jersey's doctrine of fundamental fairness 'serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily.'" State v. P.Z., 152 N.J. 86, 117 (1997) (quoting Doe v. Poritz, 142 N.J. 1, 108 (1995)). The doctrine applies "[i]n those rare cases where government action does not comport with 'commonly accepted standards of decency of conduct to which

government must adhere,' . . . and where existing constitutional protections do not provide adequate safeguards . . . ." Ibid. (internal citation omitted).

We affirm for the reasons expressed by the trial judge. Defendant's interview with Pelissier contains none of the hallmarks of arbitrariness or violations of decency of conduct to convince us his rights were violated.

v.

The arguments raised regarding Dr. Rorke-Adam's report and testimony lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). As the judge noted, although Dr. Rorke-Adam's report was served after the court-ordered deadline, it was provided thirty days before trial as required by Rule 3:13-3. Additionally, our review of the record convinces us the trial judge correctly found the report was not a net opinion.

vi.

We reject defendant's challenge to the admission of his statement to Dr. Owusu-Boahen. We are unconvinced the State's late identification of Dr. Owusu-Boahen was prejudicial because the defense had her report for years prior to trial and knew the nature of her testimony, which was to recount what defendant told her happened prior to Andrew's admission to the hospital. Indeed, defendant's knowledge of the nature of her testimony explains why

defense counsel sought the N.J.R.E. 104(c) hearing, to address whether his statement was voluntary.

The purpose of the doctor's testimony was to show defendant inconsistently recounted the facts and times of the incident. Thus, defense counsel sought the N.J.R.E. 104(c) hearing regarding the voluntariness of the statement, arguing as follows:

> [R]emember the circumstances under which this is allegedly taking place, . . . my client is there in the hospital. His son is in serious distress. I don't know exactly when that interview took place relative to the pronouncement, but certainly it had to be close in time one way or the other and . . . the emotions are certainly what they are. I think under the circumstances we should be entitled to a voluntariness hearing on that basis as to that statement.

The trial judge denied the request, reasoning a hearing regarding voluntariness may have been appropriate with Pelissier because she represented the Division, whose investigation was "parallel" to the police investigation, but it was unnecessary with Dr. Owusu-Boahen. If the judge granted the hearing regarding the statement to the doctor, she would have to hold a hearing "with everyone who ha[d] heard everything that day."

"Voluntariness of a confession or other inculpatory statement by an accused must always be established at a N.J.R.E. 104(c) hearing before it can be

introduced into evidence at trial." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 6 on N.J.R.E. 104 (2022) (citing State v. Miller, 76 N.J. 392, 404-05 (1978)). The admissibility of a statement made by a criminal defendant is subject to N.J.R.E. 104(c). N.J.R.E. 803(b). "[I]t is uncertain whether all statements to non-police witnesses may evade the 104(c) hearing requirements or only such statements . . . which the court finds to have been made 'under circumstances which provide strong assurances' of probative value." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 6 on N.J.R.E. 104 (2022) (citing State v. Baldwin, 296 N.J. Super. 391 (App. Div. 1997)).

> Where there is any question regarding the admissibility or scope of admissibility of an alleged statement of a defendant offered in a criminal trial, the better practice appears to be to conduct a preliminary hearing to assess the totality of circumstances regarding the alleged statement and to provide the defendant an opportunity to testify on that limited issue.
>
> [Id. cmt. 6 on N.J.R.E. 803(b).]

In State v. Gorrell, we held a hearing was necessary where a defendant smiled after a witness called him a butcher, shortly after he slashed another person with a knife. 297 N.J. Super. 142, 152 (App. Div. 1996). However, Gorrell concerned an adoptive admission and is inapposite. In State v. Huff, we

held, without discussion, no N.J.R.E. 104(c) hearing was necessary where defendant stated he had a gun during a robbery. 292 N.J. Super. 185, 191-92 n.2 (App. Div. 1996). But there again, the facts were different because the defendant was not being questioned by another witness.

The totality of the circumstances presented here do not compel us to remand for a N.J.R.E. 104(c) hearing regarding defendant's statement to Dr. Owusu-Boahen. There is no evidence the doctor was interrogating defendant; her purpose was to gather information to treat Andrew. Unlike the police or the Division, there was no government action in the form of an investigation. We are convinced there was no question about the admissibility of the statement or the scope of admissibility.

vii.

Defendant contends the court erred when it refused to charge cruelty and neglect of children, N.J.S.A. 9:6-3, as a lesser-included offense to the endangering charge, N.J.S.A. 2C:24-4. He also alleges the judge erred by failing to preclude "purported evidence that the injuries to Andrew's frenulum/tongue, as well as bruising . . . was sufficient evidence to prove endangering, which allegation was only advanced by the State for the very first time during [the] opening statement."

These arguments lack merit. N.J.S.A. 9:6-3 is not a lesser-included offense of N.J.S.A. 2C:24-4. State v. N.A., 355 N.J. Super. 143, 153-54 (App. Div. 2002).

"A criminal charge need only sufficiently identify the event for which criminal accountability is sought so as to enable the accused to defend, to preclude substitution by a jury of an offense for which no indictment was returned, and to defeat a subsequent prosecution for the same offense." State v. Lawrence, 142 N.J. Super. 208, 215 (App. Div. 1976). "As long as the proofs substantially support the charge, a minor variance between the proofs and the charge will be deemed immaterial." Ibid. A defendant cannot be "tried for an offense substantially different from the one recited in the indictment." Ibid.

The indictment charged defendant with child endangerment for the harm he caused Andrew "during and between February 26, 2012, and March 25, 2012." The evidence the State presented was within these parameters. His argument to the contrary lacks merit.

viii.

Defendant contends the court erred when it "allowed the State to argue that anything [he] said during his statement to authorities could be used as proof he hindered his own apprehension." At the charge conference, the defense

argued the court should limit the factual basis for the instruction on hindering to the fact defendant attempted to blame the child's injuries on the swaddling technique, which was the evidence the State presented to the grand jury. The trial judge rejected the argument, noting the State was not limited to the evidence presented to the grand jury and charged the jury as follows:

> Count five of the indictment charges defendant with the offense of hindering his own apprehension or prosecution by giving false information to detectives during his interview on March 27, 2012. Count five states that on or about March 27th, . . . [defendant] with purpose to hinder his own detention, apprehension, investigation, prosecution, conviction or punishment for conduct that would have constituted a crime of the second degree or greater gave false information to a law enforcement officer.
>
> The statute upon which this count of the indictment is based states — in pertinent part; a person commits an offense if, with purpose to hinder his own detention, apprehension, investigation, prosecution, conviction or punishment for an offense he gives . . . false information to a law enforcement officer. . . .
>
> . . . .
>
> Here the State alleges that the defendant lied to . . . investigators about how [Andrew] died on the morning of March 26, 2012. The State also alleges that defendant lied to investigators about how [Andrew]'s other injuries were caused prior to his death.

"An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. Afanador, 151 N.J. 41, 54 (1997). "Correct jury instructions are 'at the heart of the proper execution of the jury function in a criminal trial.'" Ibid. (quoting State v. Alexander, 136 N.J. 563, 571 (1994)). The trial judge must explain the law as it relates to the facts and issues of the case. State v. Baum, 224 N.J. 147, 159 (2016). Erroneous jury instructions on "material" aspects are assumed to "possess the capacity to unfairly prejudice the defendant." Ibid. (quoting State v. Bunch, 180 N.J. 534, 541-42 (2004)). "The charge as a whole must be accurate." State v. Singleton, 211 N.J. 157, 182 (2012). However, a defendant is not "entitled to have the jury charged in his or her own words; all that is necessary is that the charge as a whole be accurate." State v. Jordan, 147 N.J. 409, 422 (1997). A reviewing court must evaluate the jury charge in its entirety to determine its overall effect. State v. Savage, 172 N.J. 374, 387 (2002).

Pursuant to these principles, we discern no error with the jury charge. The State was not limited to the evidence presented to the grand jury. Lawrence, 142 N.J. Super. at 215.

ix.

Defendant contends the cross-examination of Dr. Baden was improper because it elicited testimony, over the defense's objection, Andrew's prior injuries were "classic markers of child abuse." He notes the judge sustained his objections when the State attempted to elicit similar testimony on child abuse from Drs. Swartz and DiCarlo.

During Dr. Baden's cross-examination, the prosecutor asked if one of the classic signs of "trauma and child abuse" was broken ribs. Defense counsel objected arguing the parties agreed, and the court ordered, "child abuse" was not a term to be used in the case, and Dr. Baden never used the term in his report or testified to it. In response, the State argued Dr. Baden's report opined there was no "abusive head trauma," but he agreed abusive pediatric head trauma is a marker of child abuse. The judge overruled the objection.

"The scope of cross-examination rests within the sound discretion of the trial judge[,]" and "[w]e will not interfere with the trial judge's authority to control the scope of cross-examination 'unless clear error and prejudice are shown.'" State v. Messino, 378 N.J. Super. 559, 583 (App. Div. 2005) (quoting State v. Gaikwad, 349 N.J. Super. 62, 87 (App. Div. 2002)). Having considered the record pursuant to these principles, we are satisfied the judge did not abuse

her discretion. The State's inquiry related to whether Andrew's injuries were accidental or inflicted. Those questions were within the scope of Dr. Baden's direct examination and his report, which discounted the State's theory of abusive pediatric head trauma.

x.

Defendant argues he was not permitted to fully examine the probity of the State's investigation, particularly as it pertained to the search warrant affidavit and the statement of probable cause. He "was unduly limited in demonstrating and highlighting numerous misstatements in these documents and denied a full opportunity to impeach the overall credibility of the investigation."

This argument lacks merit. R. 2:11-3(e)(2). Setting aside defendant's failure to explain how the defense was limited, the record shows the judge permitted inquiry into these matters.

III.

In Point III defendant contends he was deprived of a fair trial because Dr. Hua was named Acting Medical Examiner for Bergen County. He argues the resultant conflict of interest caused Dr. Hua not to zealously represent defendant's interests at trial.

Because defendant did not raise this issue at trial, we review for plain error and ask whether the alleged error was "of such a nature as to have been clearly capable of producing an unjust result . . . ." R. 2:10-2. "Waiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). "The party waiving a known right must do so clearly, unequivocally, and decisively" with "full knowledge of his legal rights and intent to surrender those rights." Ibid.

Prior to trial, the BCMEO hired Dr. Hua as an interim medical examiner. The State expressed concern regarding the potential conflict of interest, noting the BCPO does not make hiring decisions for the BCMEO. The parties agreed defendant should be advised of the consequences of retaining Dr. Hua as his expert and could not proceed without waiving the alleged conflict of interest. The trial judge conducted a thorough examination of defendant, advising him of the possible conflict of interest, the consequences of retaining Dr. Hua, and his ability to obtain a new expert. Defendant advised he wished to retain Dr. Hua and expressly waived the potential conflict.

We conclude there was no reversible error. Defendant's waiver was express, knowing, and voluntary. Moreover, the defense highlighted Dr. Hua's

employment credentials with the BCMEO during its opening to the jury. This argument lacks merit and does not warrant further discussion. R. 2:11-3(e)(2).

IV.

In Point V, defendant contends the prosecutor's comments during summation amounted to prosecutorial misconduct warranting a new trial. He claims the prosecutor made the following unsubstantiated and prejudicial statements to the jury: 1) Andrew was an unplanned pregnancy; 2) defendant attempted to cover up the child's death by pumping him full of baby formula; 3) Whitman and the paternal grandparents attempted to cover up defendant's crime; 4) Whitman woke up on the day of the incident because defendant beat Andrew; 5) Thoman and Dr. Owasu-Boahen did not know each other; and 6) an "[a]xonal injury will take the life out of you in about an hour." We address these arguments in turn.

Generally, "[p]rosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." State v. Patterson, 435 N.J. Super. 498, 508 (App. Div. 2014) (quoting State v. R.B., 183 N.J. 308, 332 (2005)). Reversal is appropriate only where the prosecutor's actions are "clearly and unmistakably improper" to

"deprive defendant of a fair trial." Ibid. (quoting State v. Wakefield, 190 N.J. 397, 437-38 (2007)).

"In deciding whether prosecutorial conduct deprived a defendant of a fair trial, 'an appellate court must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred.'" State v. Williams, 244 N.J. 592, 608 (2021) (quoting State v. Frost, 158 N.J. 76, 83 (1999)). "Factors to be considered in making that decision include: '(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them.'" Ibid. (quoting Frost, 158 N.J. at 83). "In reviewing closing arguments, we look, not to isolated remarks, but to the summation as a whole." State v. Atwater, 400 N.J. Super. 319, 335 (App. Div. 2008).

At the outset, we note the defense failed to object to any of the six comments now raised on appeal during summation. Therefore, our review is for plain error. R. 1:7-2; R. 2:10-2.

A.

We reject defendant's argument related to the prosecutor's statement that "Andrew came into this world as an unplanned pregnancy" because Whitman

testified she and defendant were not trying to get pregnant when they had Andrew. Furthermore, a review of the totality of the prosecutor's statement shows the comment was not made to inflame the jury as defendant claims. Indeed, the prosecutor's stated:

> Let's talk about some of the evidence that the State has brought here today. We begin with the fact that Andrew came into this world as a product of an unplanned pregnancy. They had been dating for years and there it is, we're having a baby. And that is not to suggest that the baby was not supported.
>
> That's not to suggest that the Whitmans and the Marraras anxiously awaited the baby, as did the defendant and as did . . . his girlfriend at the time. And they prepared, you saw photographs, and they made the preparations. They built the room, she went to all of her visits, he attended with her.

B.

Defendant contends the prosecutor improperly commented he covered up Andrew's death by pumping formula into the child. We are unpersuaded because there was testimony to support the prosecutor's comment, which was also conceded by the defense.

Indeed, Thoman's testimony there was a significant amount of fluid in Andrew's mouth; the autopsy report indicating there was no fluid in Andrew's lungs; defendant's statement explaining he used a large syringe to feed Andrew

and got rid of it; and the diverging accounts about the timing and what had happened to Andrew, support the inference the prosecutor drew in summation. Moreover, the day after the summation, defense counsel told the court while he did not draw the same inference from the evidence as the prosecutor, he agreed a jury could find those statements were fair inferences from the evidence, which is why he did not object. The trial judge noted Thoman testified "there was quite a bit of formula that came out of [Andrew's] mouth" and, while she might not have drawn the same inference as the prosecutor, she concluded the prosecutor's statement was not made "out of thin air."

C.

Defendant contends the prosecutor improperly commented "Andrew's mother and paternal grandparents were part of a conspiracy to cover up the real facts . . . ." He cites the following passage from the prosecutor's summation:

> [Whitman], the neurotic mother as [c]ounsel would say, does she immediately call the pediatrician? No and that's curious because she called the pediatrician every time [Andrew] peed and pooped. Now we are not suggesting that she was in on it, obviously, but listen, she's a college grad, she's about [twenty-eight] years old and she's got bruising on her kid. You think she's going to call that pediatrician that quickly? This wasn't [fifty] years ago, folks, this is today. You call the pediatrician with bruising, you better have a reason.

> And [Whitman] testified right here[,] and I asked her, what time did you call? We called immediately. Remember, we called immediately. I saw them, I called immediately. She didn't call immediately. She wants you to believe she called immediately because that's consistent with the pattern she [h]as presented throughout his life. What did she do? She texted her mom, she texted other people and she sent those photos to others. She was trying to figure it out. She was trying to figure out, what are we going to say, what are we going to do? What happened?

Defendant also argues the prosecutor "claimed during summation that Andrew's paternal grandparents took Andrew the weekend before he passed away because '[t]hey knew something was going on, they stepped in to give the parents a break. More evidence to the fact that yes, everybody was aware that something was going on.'" Defendant asserts this statement was improper because it was "in direct contradiction to [defendant's mother]'s direct testimony," that "she had watched Andrew the weekend of St. Patrick's Day, . . . and that there was no 'problem' with Andrew other than his parents needed some time to sleep."

A prosecutor's remarks may be harmless if they are only a response to remarks made by defense counsel. State v. DiPaglia, 64 N.J. 288, 297 (1974). Here, defense counsel argued the following in summation: "There's an awful lot of reasonable doubt in this case. . . . [Whitman], this baby's mother who has

stood by [defendant] from March . . . 26th of 2012 up to and including today is reasonable doubt. [Defendant's] family, [Whitman's] family, all of them uniformly stand behind him, all reasonable doubt." Given these comments, the prosecutor's remarks that the actions of Whitman and defendant's family prior to Andrew's death demonstrated concerns about the way defendant was treating Andrew, was a reasonable inference to make from the evidence and a proper response to the defense's summation. We discern no reversible error.

D.

We also reject defendant's argument the evidence did not support the prosecutor arguing Whitman was awoken by Andrew's crying the night of the incident. During summation, the prosecutor stated: "[Andrew]'s crying, of course he's crying. He just took a beating from this guy. He's crying. The baby is crying, that's what . . . causes [Whitman] to get up. It causes [her] to get up because the baby is inconsolable. He's inconsolable for a reason." These remarks were reasonable inferences drawn from the evidence. The medical evidence established the child sustained significant trauma to his head, and Whitman's testimony and defendant's statement to police established she woke up because Andrew was crying.

E.

Defendant contends the prosecutor's statement Thoman and Dr. Owusu-Boahen did not know each other was improper because it lacked evidentiary support. In summation, the prosecutor emphasized defendant told these witnesses the same version of what happened to Andrew, which differed from the versions he told Detectives Buda and McMorrow, Dr. Swartz, and Pelissier, and in doing so, mentioned "Thoman and [Dr.] Owusu[-Boahen] don't know each other."

The day after summation, defense counsel raised a concern over the prosecutor's comment and argued "[i]t [wa]s not a fair inference to draw based on the testimony that they've given" and requested "some type of instruction with regard to that." The prosecutor responded "there's no evidence that they knew each other," and the inference they did not know each other was reasonable because "[t]hey work at different times[,] at different places[,] for different people[,] in different things." The trial judge determined that no specific instruction on the issue was necessary because "[t]he evidence speaks for itself." Further, she would instruct the jurors counsel's statements in summation were not evidence and their recollection of the evidence is controlled.

Undoubtedly, the prosecutor's comment was intended to underscore that Thoman's and Owusu-Boahen's testimony about what defendant said was based on their own recollection and independent of the other. This was a fair argument to make because there was no evidence either witness knew the other, as they did not work together. We are unconvinced the comment deprived defendant of a fair trial.

F.

Defendant contends the prosecutor misstated the facts when he claimed that "axonal injury will take the life out of you in about an hour." He argues the statement was unsupported by the evidence, "abjectly false," and "buttress[ed] the State's claim that the fatal injury was inflicted at approximately 6:15 a.m., but in so doing it evinced such a high degree of disregard for Andrew's welfare that it provided the basis for an [a]ggravated [m]anslaughter conviction."

The prosecutor's comments, in context, were as follows:

> Remember, [the defense] wants you to believe [Andrew] died in [defendant's] arms while [he] was feeding him. That's what he wants you to believe but the evidence says something else. Axonal injury will take the life out of you. In about an hour, you will start to see signs of the baby losing energy, could present that he's sleeping after prolonged crying and then he's out.

Defense counsel requested a curative instruction the day after summations, arguing the prosecutor's statement was inaccurate because an axonal injury caused death immediately. The prosecutor responded his comment related specifically to the facts and the evidence, which established Andrew died about an hour after suffering an axonal injury. The judge denied the defense's request. We likewise affirm the judge's ruling because the prosecutor's statements were tied to Dr. DiCarlo's testimony Andrew died about an hour after suffering axonal injuries, and thus had a basis in the evidence presented.

V.

In Point VIII, defendant urges us to reverse because the errors raised on this appeal, individually and cumulatively, prove he was deprived of a fair trial. In Point IX, he asserts his conviction was against the weight of the evidence and the court should have granted his motion for a judgment of acquittal because the State's evidence did not show he caused Andrew's death and failed to show where and how the fatal injury occurred.

We reject both arguments. We have identified no error that either individually or cumulatively casts doubt on the sufficiency of the verdict to warrant reversal. State v. Jenewicz, 193 N.J. 440, 473 (2008).

On a motion for acquittal, we "must view the totality of evidence, be it direct or circumstantial, in a light most favorable to the State. . . . [W]e must give the government . . . 'the benefit of all its favorable testimony as well as of the favorable inferences [that] reasonably could be drawn therefrom[.]'" State v. Perez, 177 N.J. 540, 549 (2003) (third and fourth alterations in original) (quoting State v. Reyes, 50 N.J. 454, 459 (1967)).

"[T]he applicable standard is whether such evidence would enable a reasonable jury to find that the accused is guilty beyond a reasonable doubt of the crime or crimes charged." Ibid. The court "is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." State v. Kluber, 130 N.J. Super. 336, 342 (App. Div. 1974). However, providing the State with all reasonable inferences does not lessen its "burden of establishing the essential elements of the offense [or offenses] charged beyond a reasonable doubt." State v. Martinez, 97 N.J. 567, 572 (1984). On appeal, we apply the same standard. State v. Kittrell, 145 N.J. 112, 130 (1996). "[A] jury verdict will not be set aside unless it clearly and convincingly appears that there was a miscarriage of justice under the law." State v. Johnson, 203 N.J. Super. 127, 134 (App. Div. 1985).

Contrary to defendant's contention, there was sufficient evidence, both direct and circumstantial, to support the guilty verdict for manslaughter, including: The medical evidence detailing the numerous injuries Andrew suffered; the expert testimony showing the cause of death; the factual testimony including that defendant was alone with Andrew when he died; the relative lack of medical evidence supporting defendant's theory of how the child died; the video evidence of defendant's consciousness of guilt; and defendant's varying statements about how Andrew suffered the fatal and non-fatal injuries.

VI.

In Point VI of his brief, defendant contends numerous discovery violations deprived him of a fair trial. He argues there should be a new trial because the court failed to grant his motion for supplemental discovery to compel the State to turn over the findings of the CFRB, which could have exculpated him, or in the case of an inconclusive finding, sowed reasonable doubt in the jury's minds. He also asserts the State illegally obtained Division records, admitted them on the eve of trial, and violated Brady v. Maryland, 373 U.S. 83 (1963).

Rule 2:6-1 states: "The appendix . . . shall contain . . . the judgment, order or determination appealed from or sought to be reviewed . . . ." Rule 2:6-2 states: "It is mandatory that for every point, the appellant shall include in

parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located . . . ." "Without the necessary documents, we have no basis for determining" the issues on appeal. Soc'y Hill Condo. Ass'n v. Soc'y Hill Assocs., 347 N.J. Super. 163, 177 (App. Div. 2002).

Defendant neither provides us with a copy of the order he challenges nor a citation in the record regarding the supplemental discovery issue to enable us to address his argument related to the CFRB. For these reasons, we decline to further discuss this issue.

The Division substantiated defendant for child abuse. On March 13, 2018, the State sent the Division a letter requesting a copy of its file. On March 24, the State provided the records it obtained from the Division to the defense. Defense counsel confirmed receipt of the documents during a March 27 hearing and advised the court he had previously received the substantiation letter from the Division. However, the Division had denied counsel's request for its records.

The trial judge expressed concern regarding how the State was able to access the records. In response, the State produced a Deputy Attorney General (DAG) who explained the Division could provide its records to the State without a court order. However, the DAG explained the documents were confidential,

and the State should not have turned them over to the defense without the court conducting an in-camera review.

The trial judge noted both parties had turned over the Division records for an in-camera review and concluded the State had not acquired them improperly. On April 2, 2018, following the judge's in-camera review, the judge identified and released the documents relevant to the trial to the parties.

Defense counsel argued the State should be precluded from relying on the Division's records because it waited until the eve of trial to request the records from the Division. The judge rejected the request noting both sides were aware of the Division's involvement and knew "there was a file out there somewhere and either side could've made the motion for discovery." Further, she found no prejudice because she released only sixty pages of documents, "an amount of information that the defense can easily review and easily be prepared to cross examine [Pelissier] . . . ."

We reject defendant's argument the Division documents were obtained illegally. N.J.S.A. 9:6-8.10a(b) states the Division "may and upon written request, shall release the records and reports . . . to: . . . (2) [a] . . . law enforcement agency investigating a report of child abuse or neglect." Further, the judge's finding defendant had sufficient time to review the documents and

was not prejudiced by their admission was supported by the record and was not an abuse of discretion. State v. Medina, 242 N.J. 397, 411 (2020); State v. Prall, 231 N.J. 567, 580 (2018). Finally, there was no Brady violation because the State did not withhold the evidence in its possession.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION