

# **RECORD IMPOUNDED**

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### **SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2360-19**

**STATE OF NEW JERSEY  
IN THE INTEREST OF J.B.,  
a juvenile.**

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Submitted October 26, 2022 – Decided March 3, 2023

Before Judges Accurso and Vernoia.

On appeal from the Superior Court of New Jersey,  
Chancery Division, Family Part, Hudson County,  
Docket No. FJ-09-0956-19.

Joseph E. Krakora, Public Defender, attorney for  
appellant J.B. (Alison Gifford, Assistant Deputy Public  
Defender, of counsel and on the briefs).

Esther Suarez, Hudson County Prosecutor, attorney for  
respondent State of New Jersey (Colleen Kristan  
Signorelli, Assistant Prosecutor, on the brief).

**PER CURIAM**

J.B. (Jack)<sup>1</sup> appeals from the trial court's order adjudicating him a juvenile delinquent for conduct which if committed by an adult would constitute the fourth-degree crime of criminal sexual contact, N.J.S.A. 2C:14-3(b). Jack also claims the court's disposition — an eighteen-month period of probation and a requirement he comply with Megan's Law, N.J.S.A. 2C:7-1 to -23 — should be reversed. Based on our review of the record, we discern no basis to reverse defendant's adjudication, but we reverse the court's disposition and remand for further proceedings.

## I.

The complaint against Jack alleged he committed acts which if committed by an adult would constitute the crimes of third-degree criminal restraint, N.J.S.A. 2C:13-2(b), and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b). More particularly, the complaint alleged that on or about December 1, 2018, thirteen-year-old Jack grabbed ten-year-old Z.D. (Zoe) by the arm and took her into the kitchen of his residence, where he touched Zoe's "vagina on

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<sup>1</sup> We use pseudonyms to refer to J.B. and his mother to protect his privacy and because court records pertaining to juveniles are protected from public disclosure under N.J.S.A. 2A:4A-60. We use pseudonyms to refer to the victim of the offenses charged, and her mother, to protect the victim's privacy and because the names of victims or alleged victims of sexual offenses are not subject to public disclosure under Rule 1:38-3(d)(10).

her skin with his penis," touched the skin of Zoe's breasts, and touched Zoe's vagina with his hand on top of her clothes.

### The State's Motion To Admit Fresh Complaint Evidence

Prior to trial, the State moved for admission of testimony from Zoe's mother, D.P. (Dana), as fresh complaint evidence. The court conducted a hearing during which Dana testified concerning Zoe's initial report she had been sexually assaulted by Jack. During the hearing, the State also argued Dana's testimony concerning Zoe's report should be admitted as substantive evidence a sexual assault occurred under the tender years exception, N.J.R.E. 803(c)(27), to the hearsay rule, N.J.R.E. 802.

The court granted the State's motion, finding Dana's testimony admissible as fresh complaint evidence and expressly limiting admission of the testimony for use "solely . . . for the purposes" for which "fresh complaints are permitted." The court further determined Dana's testimony concerning Zoe's report could not be used to bolster Zoe's credibility at trial.

The court also rejected the State's request for admission of Dana's testimony as substantive evidence of the alleged sexual assault under the tender years exception, N.J.R.E. 803(c)(27), to the rule barring admission of hearsay evidence, N.J.R.E. 802. The court determined the State did not present

sufficient evidence supporting admission of Zoe's report, as recounted by Dana, under N.J.R.E. 803(c)(27). The court, however, ruled the State could renew its request for admission of Dana's testimony under N.J.R.E. 803(c)(27) at trial. The court entered an order granting the State's motion to admit Dana's testimony as "[f]resh [c]omplaint" evidence.

#### The State's Motion To Admit Tender Years Evidence Under N.J.R.E. 803(c)(27)

The State separately moved to admit a recorded statement made by Zoe during an interview with detective Allison Dixon as substantive evidence under N.J.R.E. 803(c)(27). The court conducted a hearing on the State's motion. The State presented the testimony of detective Dixon and introduced the recording of the interview in evidence.

The court made detailed findings and concluded the State satisfied its burden supporting admission of Zoe's recorded statement, and detective Dixon's testimony regarding it, under N.J.R.E. 803(c)(27). The court entered an order permitting admission of Zoe's statement to detective Dixon as "[t]ender [y]ears" evidence under N.J.R.E. 803(c)(27).

#### The Trial

At trial, the State first informed the court it intended to call Dana to present fresh complaint testimony pursuant to the order entered following the

N.J.R.E. 104 hearing. During her direct testimony, and without any objection, Dana explained that on January 23, 2019, Zoe reported Jack sexually assaulted her at his home "right before" the previous Christmas. Dana further testified Zoe said Jack pulled his and Zoe's pants down, held Zoe's mouth, and put his penis "on her butt, and then in her vagina." Dana also testified: she had a close relationship with Zoe; she confronted Jack's mother, L.P. (Lynn), after Zoe made the report; Zoe never previously accused anyone of sexual assault; and she called the police following Zoe's report.

Following Dana's direct testimony, the State also sought admission of the testimony as substantive evidence under N.J.R.E. 803(c)(27). The court reserved decision on the State's request, finding "cross-examination is necessary" before it could determine if the testimony was properly admissible under N.J.R.E. 803(c)(27).

During cross-examination, defense counsel questioned Dana concerning the details provided by Zoe during her initial report about the alleged sexual offense. Defense counsel asked Dana about statements purportedly made by Zoe during her initial report that went beyond the details of Zoe's initial report brought out by the State during Dana's direct examination. During cross examination of Dana, defense counsel also attempted to establish there were

inconsistencies between Dana's statements to the police about Zoe's initial report and Dana's trial testimony concerning the report.

Zoe also testified at trial. Prior to her direct testimony, the court instructed Zoe the attorneys would take turns asking her questions, and all she had to do was "tell the truth when they're asking [her] those questions." The court further instructed, "If you don't know the answer to something you can tell [the lawyers] you don't know. If you want them to say the question[] again, you can ask them to repeat the question." Zoe indicated she understood the instructions.

Shortly after the direct examination of Zoe began, the court again instructed the child, "all you had to do was get up here and tell the truth[.] That's all you have to do." Zoe then answered a series of questions that led to an inquiry about whether anything ever happened to her while she was in Jack's apartment. In response, Zoe stated that something had happened to her in the apartment, and the State asked her to describe what happened. When Zoe failed to respond that query, the court asked Zoe questions concerning her knowledge about the proceeding and court.

The court further instructed Zoe she was required to "speak and . . . tell everybody the answers to the questions." The court engaged in a colloquy with Zoe, during which the court explained Zoe must answer the questions posed

verbally because the proceeding was being recorded. The court also repeatedly advised Zoe that her only obligation as a witness was to tell the truth in response to the questions posed.

Before allowing the questioning of Zoe to continue, the court explained to counsel that it had engaged in the colloquy with Zoe because she was "crying" when answering "generic questions," and Zoe then began "not to respond" when she was "asked specifically about other detailed questions."

Defense counsel stated she had an objection to the colloquy, and the court further explained it "took deliberate caution not to address the child with regards to how she should testify, other than telling the truth," and the court noted Zoe had to "verbalize her answers." Defense counsel then voiced a series of objections, but none was directed to the substantive comments the court directed to Zoe about her obligation to testify.

In response to the State's direct examination, Zoe testified that while she played with Jack's sister at their apartment, Jack told his sister to leave the room. When Jack's sister left the room, Jack pulled Zoe by her arm into the kitchen, pulled her pants down, and "put his — his private part on [her] butt." She later identified the body part Jack put on her butt as his "pee-pee," and testified the contact was "skin to skin." Zoe testified the incident occurred before Christmas

and she first told her mother, Dana, about it after Christmas. Defense counsel did not cross-examine Zoe.

The State also called detective Dixon, who explained the process she followed in conducting Zoe's interview. Detective Dixon authenticated the recording of the interview, which was played at trial and admitted in evidence.

During the interview, Zoe defined the words she used to describe male and female body parts, identifying Jack's penis as a "chair" and her vagina as a "wall." According to the account provided by Zoe to detective Dixon, while playing with Jack's sister in their apartment, Jack forced Zoe into the kitchen, and placed his "chair" on the skin of her "wall." Zoe explained Jack's sister was not present in the kitchen when the incident occurred because Jack directed her out of the room. Zoe also told detective Dixon that Jack's mother, Lynn, and her boyfriend were in another room in the apartment when the incident took place. Defense counsel cross-examined detective Dixon concerning the questions she asked during the interview and Zoe's responses to some of the questions.

Following the presentation of the State's evidence, defense counsel moved for dismissal of the charges. The court denied the motion as to the fourth-degree



criminal sexual contact charge, but the court dismissed the criminal restraint charge.

Jack called his mother, Lynn, as a witness. Lynn testified she lives with her boyfriend, her young daughter, and Jack in the apartment in which Zoe alleged the incident took place. However, Lynn testified Jack was not present in the apartment during the weeks prior to Christmas in 2018 because he was staying at his father's home during that time. Lynn also testified Zoe did not visit the apartment prior to Christmas when she alleged the incident occurred.

Lynn further explained that on the occasions Zoe actually had visited the apartment, Lynn's daughter and Zoe were not permitted to play in the kitchen or with Jack in his room. Lynn testified she could see into all the rooms in the apartment from her bedroom, but she acknowledged she could see only "half of the kitchen" from her bedroom.

Lynn also testified that on January 19, 2019, Dana appeared at the apartment and said Jack "touched" Zoe. Lynn also testified that Zoe had returned to her apartment "[l]ike four times" in January and never voiced any concerns about Jack during those visits.

During closing arguments, defense counsel first focused on Dana's testimony about Zoe's initial report of the incident. Counsel also suggested the

details provided by Zoe in the initial report were the product of Dana's statements to Zoe. Counsel also argued the details provided by Zoe in the initial report conflicted with Zoe's statements to detective Dixon and Zoe's trial testimony. The gravamen of defense counsel's argument was Zoe was not credible because she was a reluctant witness who provided conflicting versions of Jack's actions that had their genesis, at least in part, in Zoe's response to Dana's reaction when Zoe awakened her to make the initial report. Defense counsel urged the court to accept Lynn's testimony and asserted Zoe's testimony was not sufficiently credible to support a finding Jack committed the charged offenses beyond a reasonable doubt.

The State challenged defense counsel's claim Zoe fabricated her allegations because Dana yelled at Zoe when Zoe awoke Dana to make the initial report. The State relied on Zoe's statement to detective Dixon, explaining that any hesitancy on Zoe's part, or inconsistency in the responses she provided to the questions asked, was the result of the nervousness and reluctance of a very young victim of a sexual offense. The State urged the court to accept Zoe's testimony as credible.

In a decision delivered from the bench, the court found Zoe's testimony credible, first observing Zoe "indicated" the sexual contact "three times" — once

to Dana, once to detective Dixon, and last during her testimony. The court immediately corrected itself, stating it did not consider Dana's testimony about Zoe's initial report "for the truth of the matter asserted," and, as such, the court found Zoe provided her version "two times, once" to detective Dixon and once during her testimony.

The court rejected defense counsel's claim Zoe's testimony was not credible. The court found that any inconsistencies in Zoe's description of where Jack touched her body were explained by Zoe's age and lack of knowledge concerning intimate body parts. The court explained Zoe was consistent in asserting Jack touched her in the "area between her legs." The court noted Zoe's reluctance to answer certain questions but concluded Zoe was uncomfortable discussing the incident and wanted to "hurry up and get off the stand." The court also found that although Zoe was uncomfortable, "she told her mother the truth," in an apparent reference to her initial report. The court found Lynn's testimony was not credible, finding she was motivated by an interest in protecting her son.

The court also found Zoe went to Lynn's apartment to play with Lynn's daughter, and Lynn directed that Jack remain in his room. While Lynn was in her bedroom with her boyfriend, Jack told his sister to go to her room, and he pulled Zoe into the kitchen by her arm. The court determined that once in the

kitchen, Jack was not wearing pants or underwear, and he removed Zoe's pants. The court further found Jack then placed his penis between Zoe's legs for the purpose of his own sexual gratification.

The court found Jack's touching of Zoe constituted an act which if committed by an adult constituted fourth-degree criminal sexual contact, and the court adjudicated Jack a juvenile delinquent on that basis. At a later disposition hearing, the court placed Jack on eighteen-months' probation with the attendant requirement he comply with the requirements of Megan's Law, N.J.S.A. 2C:7-1 to -23. This appeal followed.

Jack presents the following arguments for our consideration:

POINT I

THE FRESH COMPLAINT TESTIMONY WAS IMPERMISSIBLY DETAILED AND DENIED J[ACK] A FAIR TRIAL.

POINT II

THE COURT ISSUED INAPPROPRIATELY LEADING INSTRUCTIONS TO J[ACK]'S ACCUSER, AND THE COURT'S ERROR DENIED J[ACK] A FAIR TRIAL.

POINT III

A REMAND FOR RESENTENCING IS REQUIRED.

A. J[ack] Was Never Given The Opportunity To Address The Court At His Disposition Hearing.

B. The Court Erred In Imposing A Probationary Sentence, And On Remand, The Court Should Impose A Deferred Disposition.

## II.

In our review "of a juvenile delinquency adjudication," the "standard of review is narrow and is limited to evaluation of whether the trial judge's findings are supported by substantial, credible evidence in the record as a whole." State in Interest of D.M., 238 N.J. 2, 15 (2019) (quoting State in Interest of J.P.F., 368 N.J. Super. 24, 31 (App. Div. 2004)). By contrast, "a trial judge's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." State in the Interest of S.B., 333 N.J. Super. 236, 241 (App. Div. 2000).

## A.

Following a N.J.R.E. 104 hearing, the court granted the State's request to allow Dana to provide fresh complaint evidence — testimony about Zoe's initial report concerning Jack's alleged offenses. At trial, Dana testified without objection about Zoe's initial report, including the details Zoe provided concerning Jack's actions. On appeal, Jack argues he was denied a fair trial

because the court allowed Dana to testify about details beyond those permitted under the fresh complaint doctrine. We are unpersuaded.

Jack raises his challenge to the admission of Dana's testimony concerning the details of Zoe's initial report for the first time on appeal. We therefore must determine whether admission of the testimony constituted plain error; that is, whether the error "possess[ed] a clear capacity to bring about an unjust result and which substantially prejudiced the [juvenile's] fundamental right to have the [fact-finder] fairly evaluate the merits of his defense." State v. Timmendequas, 161 N.J. 515, 576-77 (1999) (quoting State v. Irving, 114 N.J. 427, 444 (1989)); see also R. 2:10-2. "[A]ny finding of plain error depends on an evaluation of the overall strength of the State's case." State v. Chapland, 187 N.J. 275, 289 (2006).

The fresh complaint doctrine is a common-law exception to the rule against hearsay. State v. C.W.H., 465 N.J. Super. 574, 599-600 (App. Div. 2021). It "allows witnesses in a criminal trial to testify to a victim's complaint of sexual assault." Id. at 599 (quoting State v. Hill, 121 N.J. 150, 151 (1990)). "[T]o qualify as fresh-complaint evidence, the victim's statement must have been made spontaneously and voluntarily, within a reasonable time after the alleged

assault, to a person the victim would ordinarily turn to for support." State v. R.K., 220 N.J. 444, 455 (2015).

"[F]resh complaint evidence serves a narrow purpose. It allows the State to negate the inference that the victim was not sexually assaulted because of her [or his] silence." Hill, 121 N.J. at 163. "[T]he purpose of the rule is to prove only that the alleged victim complained, not to corroborate the specifics of the victim's allegations." State v. P.H., 178 N.J. 378, 393 (2004) (quoting State v. Bethune, 121 N.J. 137, 146 (1990)). Thus, fresh complaint evidence is limited to "[o]nly the facts that are minimally necessary to identify the subject matter of the complaint." R.K., 220 N.J. at 456; see Hill, 121 N.J. at 163 (explaining under the fresh complaint doctrine "[o]nly the fact of the complaint, not the details, is admissible"). Accordingly, fresh complaint evidence may not "corroborate the victim's allegations concerning the crime," ibid. (quoting Bethune, 121 N.J. at 146), and the court must "assess . . . whether repeated testimony of the victim's complaint is irrelevant or prejudicial to the defendant," Hill, 121 N.J. at 169.

The court admitted Dana's testimony about Zoe's initial report as fresh complaint evidence, but during the State's direct examination Dana testified about details Zoe provided concerning Jack's actions beyond the mere fact Zoe

complained she had been the victim of a sexual offense. Dana testified Zoe reported Jack "sexually assaulted her," and then explained Zoe said Jack pulled his and her pants down, held his hand over her mouth, and put his "thing" — "his penis" — "on her butt, and then in her vagina." Admission of that testimony concerning those details exceeded the permissible scope of fresh complaint evidence because it went beyond the fact Zoe complained to Dana. R.K., 220 N.J. at 456; Hill, 121 N.J. at 163. It was error for the court to allow its admission.

We are persuaded the court's error in admitting the testimony does not constitute plain error. The testimony was not clearly capable of producing an unjust result because Zoe otherwise provided details concerning Jack's actions during her interview with detective Dixon and during her testimony at trial. Thus, the State's case was supported by other substantial competent evidence independent of Zoe's initial report to Dana. Chapland, 187 N.J. at 289. For that reason alone, we do not find admission of the details in Zoe's initial report during Dana's direct testimony warrants a reversal of Jack's delinquency adjudication.

Moreover, when viewed in the context of the other evidence presented at trial, we are convinced defense counsel did not object to Dana's otherwise inadmissible testimony as part of a well-planned strategy to challenge Dana's



and Zoe's veracity and credibility. Indeed, defense counsel not only opted to allow Dana's testimony on direct examination without objection, on cross-examination defense counsel further explored the details of Zoe's report to Dana, asking questions about what Zoe said about Jack's actions during the initial report, for the purpose of discrediting both Dana and Zoe.

Based on our review of the record, defense counsel clearly intended to use the details provided in Zoe's initial report to Dana as means of challenging the veracity of the statements Zoe later made to detective Dixon and during Zoe's testimony at trial. That is, defense counsel utilized the details Zoe provided to Dana during the initial report to show Zoe later provided differing and inconsistent details of the incident, first in her statement to detective Dixon and later at trial. Defense counsel also elicited the details of Zoe's initial report during her cross-examination of Dana in an attempt to challenge Zoe's credibility by suggesting the details were prompted by Dana's reaction to Zoe's effort to make the report. And, defense counsel's primary argument in support of Jack's defense was that Zoe was not a credible witness because she provided inconsistent versions of the details of the incident.

Through defense counsel's questioning and argument, Jack effectively used Dana's testimony about Zoe's initial report of the details as evidence of a

prior inconsistent statement under N.J.R.E. 803(a)(1).<sup>2</sup> See State v. Caraballo, 330 N.J. Super. 545, 556 (App. Div. 2000) (explaining N.J.R.E. 803(a)(1) "allows the admission of a witness's inconsistent statement as substantive evidence"). Under those circumstances, and for that reason, we conclude any error in the admission of Dana's testimony did not constitute an error clearly capable of producing an unjust result. Rather, any error in the admission of Dana's testimony about the details of Jack's actions was invited by Jack because defense counsel used Dana's testimony about Zoe's report as a basis to attack the credibility of the only witness, Zoe, to the charged offenses. Jack therefore cannot properly rely on the court's error as grounds for his appeal, see, e.g., State v. Corsaro, 107 N.J. 339, 345 (1987) (internal citations and quotation marks omitted) ("Trial errors which were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal[.]"), and admission of Dana's testimony that exceeded the bounds of permissible fresh complaint evidence was not plain error, see R. 2:10-2.

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<sup>2</sup> "N.J.R.E. 803(a)(1) generally makes admissible as proof of the truth of the matter contained therein a prior inconsistent statement of a witness, providing that the statement would have been admissible if made by the witness while testifying at the hearing." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1(a) on N.J.R.E. 803 (2021-2022).

We are also unconvinced by Jack's claim the court improperly relied on Dana's testimony to support Zoe's credibility. To be sure, the court first stated it found Zoe credible because she detailed Jack's actions "three times," one of which was the initial report to her mother. But the court immediately corrected itself, stating affirmatively it did not consider Dana's testimony about Zoe's report as either substantive evidence or as evidence supporting its determination of Zoe's credibility.

We observe, however, that later in its decision, the court referred to Zoe's initial report to Dana as a basis for its determination Zoe was a credible witness. More particularly, in its findings concerning Zoe's credibility, the court noted Zoe "was reluctant or hesitant . . . on all three occasions, to tell specifically what happened," but "ultimately she told her mother the truth."

We note the court otherwise supported its determination Zoe was a credible witness without regard to Zoe's initial report to Dana, and, for that reason, the court's reference to Zoe's report to her mother is not plain error requiring a reversal of Jack's adjudication. We also find the court's apparent reliance in part on Dana's testimony about Zoe's initial report to support its credibility finding is not error because, as we have explained, Jack relied on Dana's testimony about Zoe's initial report as an admissible prior inconsistent

statement under N.J.R.E. 803(a)(1). And Jack relied on Dana's testimony to support his claim Zoe was not credible. Thus, although a factfinder may not consider fresh complaint evidence in an assessment of a victim's credibility, Bethune, 121 N.J. at 149, Jack's use of Dana's testimony about Zoe's initial report as a basis to challenge Zoe's credibility, N.J.R.E. 803(a)(1), allowed the court to properly consider the testimony to assess Zoe's credibility as well, see State v. Hammond, 338 N.J. Super. 330, 342-344 (App. Div. 2001) (explaining prior inconsistent statements are admissible as substantive evidence and as a basis for assessing a witness's credibility); see also Model Jury Charges (Criminal), "Prior Contradictory Statements Of Witnesses (Not Defendant)" (Approved May 23, 1994) (same).

For those reasons, we reject Jack's claim that any error in allowing Dana to testify about the details of Jack's actions provided in Zoe's initial report constituted plain error warranting a reversal of his delinquency adjudication.<sup>3</sup>

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<sup>3</sup> We note the court never ruled on the State's request that Dana's testimony about Zoe's initial report be admitted as evidence under the tender years exception, N.J.R.E. 803(c)(27), to the hearsay rule, N.J.R.E. 802. See Bethune, 121 N.J. at 146 (explaining the error is harmless where the record establishes that testimony improperly used under the fresh complaint doctrine was otherwise admissible under "the tender years exception to the hearsay rule"). Because we reject Jack's claim he is entitled to a reversal of his adjudication based on Dana's fresh complaint testimony, it is unnecessary to address the State's claim the testimony was admissible under N.J.R.E. 803(c)(27).

## B.

Jack also claims the delinquency adjudication should be reversed because the court provided inappropriately leading instructions to Zoe during her testimony. More particularly, Jack claims that during the State's direct examination of Zoe, the court erred by encouraging Zoe to testify after she did not provide responses to the State's questions. Jack argues the court's questions and instructions — including its declaration that by remaining silent Zoe was not telling the truth — created a risk Zoe provided false testimony and deprived him of a fair trial. Jack further claims we should consider his argument under the harmless error standard because counsel objected to the court's instructions at trial.

As we have explained, "[a] reviewing court may reverse on the basis of unchallenged error only if it finds plain error clearly capable of producing an unjust result." State v. Scott, 429 N.J. Super. 1, 5 (App. Div. 2012) (alteration in original) (quoting State v. Bunch, 180 N.J. 534, 541 (2004)). However, when an alleged error was raised before the trial court, the error "will not be grounds for reversal [on appeal] if it was 'harmless.'" State v. J.R., 227 N.J. 393, 417 (2017). "An . . . error will not be found 'harmless' if there is a reasonable doubt as to whether the error contributed to the verdict." Ibid.

An objection at trial captures "the trial judge's attention" and merits harmless error review, ibid., when it satisfies Rule 1:7-2, which instructs:

to preserve a question for review 'relating to rulings or orders of the court . . . , a party, at the time the ruling or order is made or sought, shall make known to the court specifically the action which the party desires the court to take or the party's objection to the action taken and the grounds therefor.'

[Wymbs ex rel. Wymbs v. Twp. of Wayne, 163 N.J. 523, 545 (2000) (omission in original) (quoting R. 1:7-2).]

See also State v. Farrell, 61 N.J. 99, 106 (1972) (noting a timely objection "alert[s] the trial judge to the improprieties and giv[es] him [or her] an opportunity to rectify the situation").

Here, shortly after Zoe was sworn, the court instructed her as follows:

[T]here [are] two attorneys sitting at the table. Okay? Those attorneys are going to take turns and they're gonna be asking you questions. You have to tell the truth when they're asking you those questions. Okay?

If you don't know the answer to something you can tell them you don't know. If you want them to say the question, again, you can ask them to repeat the question.

Jack did not object to those instructions.

The State proceeded with its direct examination, and when Zoe did not respond when asked what she said to her mother during her initial report on

January 19, 2021, the court asked the following questions and provided additional instructions:

You okay? [Zoe], remember what I told you, the [lawyer] was going to ask you some questions, and then all you had to do was get up here and tell the truth? That's all you have to do.

Take a deep breath and tell us what happened. Do you want to stand? You want to stand up? No? Take a deep breath, and if can just tell us what happened on January 19.

Jack did not object to the court's questions or instructions.

The State continued its direct examination. At some point, the State asked Zoe if "anything ever happened to [her] when [she] visited [Jack's sister's] apartment," and Zoe answered, "Yes." The State then asked Zoe, "What happened to you when you visited [the] apartment?" but Zoe did not respond.

The State then instructed Zoe as follows:

[Zoe], you remember you swore you would tell the truth. Right? And that means you have to tell the whole truth. You have to tell the [c]ourt everything that happened. Right?

So what happened in [the] apartment?

Jack did not object to the State's instructions or question. But Zoe did not respond to the State's question, and the court then engaged in a colloquy with Zoe.

During the colloquy, the court asked Zoe questions about her knowledge of the court proceedings, explained the proceedings were being recorded, and explained she must answer the questions posed verbally so her answers could be recorded. The court further explained that when Zoe shook or nodded her head in response to a question, the court "can't hear anything" and the recorder "can't pick it up." The court further instructed Zoe, "So you have to speak and you have to tell everybody the answers to the questions."

The court continued, reminding Zoe "all . . . any witness" must do is "tell the truth." The court further instructed Zoe, "So if you're going to tell what happened then you have to tell the truth. If you're not going to say anything then you're not telling us what happened and you're not telling the truth. So you have to be able to answer the questions" based on "what you know and what's true to you." The court asked Zoe if she was ready to answer questions and if she wanted to sit or stand to do so. Zoe stated she would prefer to sit and answer the questions, and the court again advised her, "All you gotta do is take a deep breath and you tell the truth, whatever it is."

The court then directed its attention to counsel, explaining it engaged in the colloquy with Zoe because she was "crying" and answering generic questions, but then began "not to respond" when asked to provide details. The



court explained it addressed Zoe "to familiarize her with the [c]ourt setting, to get her more comfortable." The court further noted it explained the court's recording system so the child understood she needed to provide verbal responses. The court explained it "took deliberate caution not to address the child with regard to how should she testify, other than telling the truth."

The court asked if there was an objection to any part of the colloquy. Defense counsel entered a general objection "to the discussion the [c]ourt had with the witness." More specifically, defense counsel noted Zoe "was unfamiliar with the setting of the court" and should have been made familiar with the court setting prior to trial. The court overruled the objection, finding there was no requirement that a witness be brought into a courtroom prior to a trial.

Defense counsel also objected to the court's statement Zoe nodded in response to questions during her testimony, arguing counsel had not seen "any nodding from the witness." The court overruled the objection, stating it observed Zoe nodding in the affirmative to a series of questions posed by the State.

The court then pressed defense counsel to provide any other specific grounds for the objection to the questions it posed, and instructions it provided, to Zoe. The court noted it had not "heard an[] objection as it relates to the

[c]ourt's interaction with the child," and again explained it took "specific and deliberate cautionary" steps to avoid influencing the child's testimony, and it had attempted "to simply remind [Zoe] that she's here to testify, and she has to speak verbally, and she has to tell the truth." In response to the court's comments and request for the specific grounds supporting Jack's objection to the court's colloquy with Zoe, defense counsel stood silent.

Because the record shows Jack did not interpose an objection to the court's colloquy based on any of the arguments it now asserts for the first time on appeal, we consider Jack's claims under the plain error standard. We therefore may not reverse Jack's delinquency adjudication unless the court's colloquy was clearly capable of producing an unjust result. Timmendequas, 161 N.J. at 576-77; R. 2:10-2. We find no such error here.

We consider the court's questioning and instructions to Zoe in context. At the time of trial, Zoe was ten years old and was asked questions about her allegations she was forcibly pulled into the kitchen, had her pants pulled down, and had Jack's penis touch the skin between her legs. When the court began the colloquy about which Jack now complains, Zoe had responded affirmatively to the State's inquiry about whether anything had ever happened to her at Jack's

apartment. That is, she testified something happened, but she cried and did not answer when requested to describe what had occurred.

The court's subsequent colloquy was not clearly capable of producing an unjust result because the court did not suggest to Zoe that anything happened and the court did not urge her to say something happened; she had already testified something occurred at the apartment. The court's statements about the recording equipment and the court's processes constituted little more than an appropriate instruction to a young child that verbal responses are required in a proceeding that is recorded.

Otherwise, the court repeatedly and appropriately reminded the ten-year-old witness that her singular obligation was to tell the truth as she knew it. That oft-repeated instruction did not suggest any responses to Zoe or suggest she do anything other than tell the truth in response to the questions posed.

Jack's claim the court inappropriately suggested to Zoe that she would not be telling the truth if she did not say something happened in the apartment is belied by the record and the context in which the court's statement, "If you're not going to say anything then you're not telling us what happened and you're not telling the truth," was made. Again, the court's statements to Zoe followed her affirmative testimony something happened at the apartment. It was Zoe's

failure to respond to the request for her to describe what happened that caused the court to engage in the colloquy. Thus, given Zoe had already testified something happened at the apartment, it was accurate and appropriate for the court to inform Zoe her failure to describe what happened constituted a failure to tell the truth.

Moreover, and as noted, the court did not suggest to Zoe that something happened at the apartment. Rather, throughout the colloquy the court repeatedly reminded Zoe the only requirement was that she tell the truth.

We find no error in the court's colloquy with Zoe, let alone plain error. A court is permitted to examine a witness, N.J.R.E. 614(b), and has discretion over the mode of interrogation to "make the procedures effective for determining the truth," N.J.R.E. 611(a)(1). The court's colloquy with Zoe was consistent with the exercise of its authority under those rules and its "broad discretion over the mode of interrogation" to ascertain the truth and protect witnesses from harassment or embarrassment. State v. Bueso, 225 N.J. 193, 206-07 (2016) (quoting State v. T.E., 342 N.J. Super. 14, 29-30 (App. Div. 2001)).

Moreover, "it is proper, and even encouraged, for a trial judge to step in . . . when a witness appears to be in distress or is having trouble articulating his/her testimony." State v. O'Brien, 200 N.J. 520, 534 (2009); see also State v.

Riley, 28 N.J. 188, 201-03 (1958) (finding the trial court acted appropriately by asking questions and "calm[ing] the witness" in a sexual assault trial where the witness "was anguished and sorely distressed" by the need to testify, and "[t]he reassurance of the trial judge was required to enable [the witness] to continue to the . . . end of her story"). That is precisely what the court did here during its colloquy with ten-year-old Zoe. We find no error in the court's questions or instructions. We reject Jack's claims to the contrary.

### III.

Jack argues the court erred by failing to offer him the opportunity to address the court at the disposition hearing. Jack also claims the court erred by placing him on probation and failing to order a deferred disposition, and by ordering his compliance with the requirements of Megan's Law as a condition of his probationary sentence.

In pertinent part, Rule 3:32-1(b) provides that "[b]efore imposing sentence the court shall address the defendant personally and ask if the defendant if he or she wishes to make a statement in his own behalf and to present any information in mitigation of punishment." The Rule is made "applicable to the Family Part by [Rule] 5:1-1." State in the Interest of J.R., 244 N.J. Super. 630, 639 (App. Div. 1990). A failure to comply with the Rule requires a resentence "without

regard to . . . prejudice." State v. Jones, 232 N.J. 308, 319 (2018); see also J.R., 244 N.J. Super. at 639 ("[F]ailure to comply with the allocution requirement warrants a remand for resentencing on direct appeal.").

The court did not offer Jack an opportunity to make a statement at the disposition hearing. The State does not dispute the court erred by failing to provide Jack with that opportunity as required under Rule 3:32-1(b). We therefore vacate the court's disposition and remand for a new disposition hearing at which Jack shall be provided with an opportunity to make a statement on his own behalf and present any information pertinent to his disposition. See J.R., 244 N.J. Super. at 639 (remanding for a new disposition hearing where the juvenile "was denied the opportunity to address the judge directly" at the initial hearing).

Because we vacate the disposition order and remand for a new disposition hearing, it is unnecessary to address Jack's additional claims the court erred by imposing probation and requiring that he comply with the requirements of Megan's Law.

In sum, we affirm Jack's delinquency adjudication, vacate the court's disposition, and remand for further proceedings in accordance with this opinion. Any arguments made on Jack's behalf that we have not expressly addressed are

without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed in part, vacated in part, and remanded for further proceedings.

We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION