

 KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Lisa, N.J.Super.A.D., April 4, 2007

221 N.J.Super. 466
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,
v.

Allen BASS, Defendant-Appellant.*

*
— Editors Note: This opinion was originally published at 220 N.J.Super. 187, 531 A.2d 1045. It is published here as corrected.

Argued June 2, 1987.

|

Decided Sept. 22, 1987.

Synopsis

SYNOPSIS

Defendant was convicted in the Superior Court, Law Division, Essex County, of aggravated manslaughter and endangering welfare of child and he appealed. The Superior Court, Appellate Division, O'Brien, J.A.D., held that: (1) evidence was sufficient to sustain conviction; (2) defendant's conviction could be predicated on failure to act in view of evidence that he was child's father; (3) evidence of hearsay statements made by victims brother was properly admitted; and (4) trial court's instruction on shared intent was accurate.

Affirmed.

West Headnotes (20)

[1] Criminal Law

 Discretion in general

Criminal Law

 Preliminary proceedings

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k622 Joint or Separate Trials of
Codefendants

110k622.6 In General

110k622.6(3) Discretion in general
(Formerly 110k622.1(2))

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower
Court

110k1148 Preliminary proceedings

Motion for severance of defendants from prejudicial joinder is within the sound discretion of the trial judge whose ruling will not be reversed absent clear showing of abuse of discretion. R. 3:15-2(b).

2 Cases that cite this headnote

[2] Criminal Law

 Evidence admissible only
against codefendant;spillover or
compartmentalization

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k622 Joint or Separate Trials of
Codefendants

110k622.7 Grounds for Severance or
Joinder

110k622.7(8) Evidence admissible
only against codefendant;spillover or
compartmentalization

(Formerly 110k622.2(8))

Defendant did not show abuse of discretion in denial of his motion for severance from prejudicial joinder in prosecution of him and child's mother for homicide of child despite claim that he was prejudiced by the substantial evidence of the mother's repeated abusive conduct towards the child and by fact that psychiatrists called in mother's defense attributed much of her conduct to isolation and despair which reflected unfavorably upon defendant. R. 3:15-2(b).

Cases that cite this headnote

[3] Criminal Law

🔑 Special types of photographs; enlargements, motion and sound pictures, X-rays

110 Criminal Law

110XVII Evidence

110XVII(P) Documentary Evidence

110k431 Private Writings and Publications

110k438 Photographs and Other Pictures

110k438(8) Special types of photographs;enlargements, motion and sound pictures, X-rays

Trial court did not err in permitting jury to view tape recording of child's testimony in prosecution of child's father for homicide of the child's brother where the child's treating psychologist concluded that the testimony of the child should not be given in the presence of his parents and where parents were able to view and hear the child while he testified and to communicate with counsel in the judge's chambers where the testimony was taken. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, par. 10; N.J.S.A. 2A:84A-32.4.

2 Cases that cite this headnote

[4] Infants

🔑 Complaint;outcry

Sex Offenses

🔑 Fresh or prompt complaint; outcry

211 Infants

211XII Criminal Acts Against Children

211XII(F) Evidence Issues Particular to Offenses Against Children

211XII(F)2 Sex Offenses

211k1732 Admissibility

211k1740 Declarations, Admissions, and Statements by Child

211k1740(6) Complaint;outcry
(Formerly 211k20)

352H Sex Offenses

352HVI Evidence

352HVI(E) Admissibility of Victim's Complaints, Statements, and Declarations

352Hk242 Fresh or prompt complaint; outcry

(Formerly 211k20)

Testimony that child told witness that defendant had burned him with a light when she asked what had happened to his buttocks was not admissible as a fresh complaint.

Cases that cite this headnote

[5] Criminal Law

🔑 Manner of proving other misconduct

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)13 Proof and Effect

110k374.26 Manner of proving other misconduct

(Formerly 110k374)

Evidence of other crimes is not admissible to show intent or absence of mistake or accident if it is otherwise excludable as hearsay; other crimes must be proven by direct evidence, not by incompetent hearsay.

1 Cases that cite this headnote

[6] Criminal Law

🔑 Incriminating accused

110 Criminal Law

110XVII Evidence

110XVII(E) Res Gestae

110k362 Res Gestae;Excited Utterances

110k366 Acts and Statements of Person Injured

110k366(4) Incriminating accused

Testimony that, when child was asked by witness what had happened to his buttocks, he responded by stating that defendant had burned him with a light was admissible under the excited utterance exception to the hearsay rule

as enhanced by a specific tender years or naivete concept, especially where child shortly thereafter spontaneously asked witness not to burn him when the witness lit her cigarette lighter. Rules of Evid., N.J.S.A. 2A:84A, Rule 63(4).

8 Cases that cite this headnote

[7] **Criminal Law**

🔑 Admissions, declarations, and hearsay; confessions

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1169 Admission of Evidence

110k1169.2 Curing Error by Facts Established Otherwise

110k1169.2(6) Admissions, declarations, and hearsay; confessions

Any error in admitting testimony that child stated that defendant had burned his buttocks when he was asked what had happened to his buttocks was harmless in view of the child's testimony as to defendant's conduct toward his brother, with whose death defendant was charged. R. 2:10–2.

Cases that cite this headnote

[8] **Criminal Law**

🔑 Length of time elapsed as affecting admissibility

110 Criminal Law

110XVII Evidence

110XVII(E) Res Gestae

110k362 Res Gestae; Excited Utterances

110k366 Acts and Statements of Person Injured

110k366(6) Length of time elapsed as affecting admissibility

Testimony by witness that child stated that defendant had walked on homicide victim's back was admissible as a spontaneous utterance where it was made approximately six hours after the incident, which led to death of the

victim, and was made when case worker was attempting to persuade child to go into hospital emergency room. Rules of Evid., N.J.S.A. 2A:84A, Rule 63(4).

13 Cases that cite this headnote

[9] **Criminal Law**

🔑 Remoteness of evidence

110 Criminal Law

110XVII Evidence

110XVII(H) Materiality

110k384 Remoteness of evidence

Testimony by defendant's neighbor that, some two and one-half years before death of defendant's young child, defendant stated that his wife could treat child as she wished was not so remote as to require exclusion. Rules of Evid., N.J.S.A. 2A:84A, Rule 63(4).

1 Cases that cite this headnote

[10] **Criminal Law**

🔑 Exclusion of improper evidence

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k674 Exclusion of improper evidence

Party seeking to preclude admission of evidence must convince the court that factors favoring exclusion substantially outweigh its probative value.

Cases that cite this headnote

[11] **Criminal Law**

🔑 Reception and Admissibility of Evidence

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1153 Reception and Admissibility of Evidence

110k1153.1 In general

(Formerly 110k1153(1))

Decision of trial court to admit evidence must stand unless it can be shown that the trial court palpably abused its discretion, i.e., that its finding was so wide of the mark that a manifest denial of justice resulted.

2 Cases that cite this headnote

[12] Criminal Law

🔑 Evidence calculated to create prejudice against or sympathy for accused

110 Criminal Law

110XVII Evidence

110XVII(D) Facts in Issue and Relevance

110k338 Relevancy in General

110k338(7) Evidence calculated to create prejudice against or sympathy for accused

Trial court did not abuse its discretion in determining that probative value of testimony of defendant's neighbor that, when she asked defendant why he allowed child's mother to treat the child as she did, he stated that the child's mother could do what she wanted to do outweighed its prejudicial effect in prosecution of defendant for homicide of the child.

Cases that cite this headnote

[13] Witnesses

🔑 Former statements corresponding with testimony

410 Witnesses

410IV Credibility and Impeachment

410IV(F) Corroboration

410k414 Competency of Corroborative Evidence

410k414(2) Former statements corresponding with testimony

Cross-examination of child indicating that he had remembered certain incidents only when helped to remember them by detective was calculated to imply that child fabricated his account of the murder of his brother

so that evidence of prior consistent statements made to detectives by the child was admissible.

1 Cases that cite this headnote

[14] Criminal Law

🔑 Community of unlawful intent

110 Criminal Law

110VII Parties to Offenses

110k59 Principals, Aiders, Abettors, and Accomplices in General

110k59(4) Community of unlawful intent

Shared intent is prerequisite to accomplice liability. N.J.S.A. 2C:2-6, subd. b(3).

1 Cases that cite this headnote

[15] Homicide

🔑 Aiding, abetting, or other participation in offense

203 Homicide

203XII Instructions

203XII(D) Parties

203k1466 Aiding, abetting, or other participation in offense

(Formerly 203k305)

Trial court's instruction on shared intent in prosecution of defendant and child's mother for homicide of their child was accurate.

Cases that cite this headnote

[16] Homicide

🔑 Nature of act or omission causing death

Homicide

🔑 Omission or failure to act

203 Homicide

203II Murder

203k565 Nature of act or omission causing death

(Formerly 203k15)

203 Homicide

203IV Manslaughter

203k710 Omission or failure to act

(Formerly 203k15, 203k75)

Omission to act can form the basis of a murder or manslaughter conviction. N.J.S.A. 2C:5-1, subd. a(3).

Cases that cite this headnote

[17] Criminal Law

🔑 Criminal act or omission

110 Criminal Law

110I Nature and Elements of Crime

110k26 Criminal act or omission

Liability for commission of an offense may not be based on an omission unaccompanied by action unless a duty to perform the omitted act is otherwise imposed by law. N.J.S.A. 2C:2-1, subd. b(2).

Cases that cite this headnote

[18] Homicide

🔑 Omission or failure to act

203 Homicide

203IV Manslaughter

203k710 Omission or failure to act

(Formerly 203k75)

Defendant who was shown to be father of murder victim or to have assumed responsibility in part for the care of the child on the fatal day could be convicted of manslaughter on the basis of failure to act in face of mother's actions towards the child. N.J.S.A. 2C:24-4, subd. a.

3 Cases that cite this headnote

[19] Homicide

🔑 Eyewitness identification

203 Homicide

203IX Evidence

203IX(G) Weight and Sufficiency

203k1176 Commission of or Participation in Act by Accused; Identity

203k1181 Eyewitness identification

(Formerly 203k234(1))

Defendant's conviction for murder of his son was sustained by testimony of the victim's brother that defendant stepped on the victim's back, punched him in the eye, and threw him into a tub full of water.

Cases that cite this headnote

[20] Criminal Law

🔑 Merger of offenses

110 Criminal Law

110I Nature and Elements of Crime

110k30 Merger of offenses

Defendant's convictions for endangering welfare of child and aggravated manslaughter did not merge where there was evidence that defendant had failed to obtain medical treatment for the child sometime in the six days prior to the child's death. N.J.S.A. 2C:11-4, subd. a, 2C:24-4, subd. a.

3 Cases that cite this headnote

Attorneys and Law Firms

****2 *470** Michele A. Adubato, Designated Counsel, Bayonne, for defendant-appellant (Alfred A. Slocum, Public Defender of New Jersey, atty.; Michele A. Adubato, of counsel and on brief).

Janet Berberian, Asst. Pros., for plaintiff-respondent (George L. Schneider, Essex County Pros., atty.; Janet Berberian, of counsel and on brief).

Before Judges MICHELS, O'BRIEN and SKILLMAN.

****3** The opinion of the court was delivered by

O'BRIEN, J.A.D.

Defendant appeals from his conviction of aggravated manslaughter (*N.J.S.A. 2C:11-4a*),¹ upon which he was sentenced to a term of 20 years

with a ten-year period of parole ineligibility, and third degree endangering the welfare of a child (*N.J.S.A.* 2C:24-4a), upon which he was sentenced to a concurrent term of five years with a two and one-half year period of parole ineligibility. A penalty of \$1,025 payable to the Violent Crimes Compensation Board was also imposed. We affirm.

¹ Although defendant was charged with purposely or knowingly murdering the victim by his own conduct (*N.J.S.A.* 2C:11-3a(1), (2) and c.), a capital offense, he was found not guilty of that offense but guilty of the included offense of aggravated manslaughter (*N.J.S.A.* 2C:11-4a).

Defendant is 25 years of age. He met codefendant Renee Nicely (Nicely) when they were both about 14 years of age. Although unmarried, they had an ongoing relationship which produced five children. Their first child, Davell, was born in *471 December 1977, and their second, Shawn, was born on February 19, 1979.² On September 26, 1982, Shawn was brutally beaten to death. Defendant and Nicely³ were charged with his murder. In addition, defendant was charged with having, on or about September 26, 1982, caused Shawn harm that would make him an abused or neglected child, defendant having a legal duty to care for him (*N.J.S.A.* 2C:24-4a).

² The additional children are Allen, Michael and Stephen, the last of whom was left in a hospital to be placed in a foster home.

³ In a separate unpublished opinion filed today, *State v. Nicely*, Docket No. A-799-83T4, we are affirming the conviction of Renee Nicely of murder, aggravated assault and endangering the welfare of a child.

Testimony at the joint trial of defendant and Nicely revealed a variety of acts of mistreatment of Shawn by Nicely. During a period when Nicely and her two children were residing with defendant's mother, Nicely conceived the idea, upon the suggestion of defendant's mother, that Shawn was not her

child. It was suggested that the wrong child had been delivered to her by the Division of Youth & Family Services (DYFS). There was substantial testimony from friends and neighbors that Nicely abused Shawn and had a conception that she could treat him as she saw fit. However, the friends and neighbors also indicated that, before the murder, defendant treated Shawn as he did the other children and was not cruel or abusive to him. One exception was testimony⁴ that defendant burned Shawn on his buttocks sometime between April and July 1982. In addition, Davell testified that defendant killed his brother. He said:

⁴ It is argued on this appeal that this testimony was hearsay which was improperly admitted into evidence.

He (defendant) took him (Shawn) by his hand and jumped on him and then stepped on his back with 2 feet. He took one foot then put his other foot, stepped on him.

Davell also testified that defendant punched Shawn in the eye and "then he threw him in the tub with full of water trying to drown him." Davell further testified that defendant had *472 injured Shawn on a prior occasion when pushing him through a door on "a little horse" with wheels. Furthermore, according to Davell, defendant got Shawn drunk on occasions by giving him liquor and beer.

On the day of his death, Shawn was beaten unmercifully. The extensive injuries which he suffered were testified to by the medical examiner and included subcutaneous hemorrhage on the back of the head, hemorrhage on both sides of the head, ecchymosis of the left eye, lacerations and cuts involving both ears and subcutaneous hemorrhage involving the chin. Shawn's brain was swollen as a result of concussion. There was hemorrhage on both sides of his buttocks, recent injuries of his left shoulder and left upper back, right middle back, lesions of the exterior chest, left shoulder, middle area of the chest, right upper chest, abrasions of the right side of the abdomen, bruise of the anterior portion of the left thigh, contusion and abrasion of the left genital, three burn marks on the chest

and **4 a burn mark on the left shoulder. He had sustained a painful fracture of the distal end of the elbow, between six days and 24 hours before his death. There were many internal injuries, as well as a recent fracture of the eighth rib. Due to the substantial number of injuries Shawn sustained, it was impossible to accurately pinpoint the particular blow that caused his death. The medical examiner described it as a homicide by assault.

After defendant's indictment on December 20, 1982, a number of proceedings were conducted by the trial judge, productive of an extensive record.⁵ It is only necessary for us to refer to those proceedings involving the issues raised on this appeal, which are as follows:

⁵ See *State v. Bass*, 189 N.J.Super. 445, 460 A.2d 214 (Law Div.1983); *State v. Bass*, 189 N.J.Super. 461, 460 A.2d 223 (Law Div.1983); *State v. Bass*, 191 N.J.Super. 343, 466 A.2d 976 (Law Div.1983); *State v. Bass*, 191 N.J.Super. 347, 466 A.2d 978 (Law Div.1983), rev'd by Appellate Division, rev'd *sub nom. State v. Nicely*, 94 N.J. 550, 468 A.2d 198 (1983).

***473 POINT I THE DEFENDANT'S MOTION TO PROHIBIT DEATH QUALIFICATION OF PROSPECTIVE JURORS AS VIOLATIVE OF THE CONSTITUTION SHOULD HAVE BEEN GRANTED BY THE COURT.**

POINT II THE DEFENDANT'S MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED BY THE COURT.

POINT III THE ADMISSION OF THE TESTIMONY OF A WITNESS TAKEN OUTSIDE THE PRESENCE OF THE DEFENDANT AND THE JURY DENIED THE DEFENDANT HIS RIGHT OF CONFRONTATION.

POINT IV IT WAS ERROR FOR THE COURT TO ADMIT THE TESTIMONY OF DOLORES MORTON AND LYNNE

LEIBERMAN PURSUANT TO EVID.R. 63(4).

POINT V THE TESTIMONY OF JANIE BENNETT SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

POINT VI THE TESTIMONY OF PROSECUTOR DETECTIVES CONCERNING PRIOR STATEMENTS OF DAVELL NICELY SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE.

POINT VII THE JURY CHARGE CONCERNING ACCOMPLICE LIABILITY AND OMISSION TO ACT WAS ERRONEOUS.

POINT VIII THE DEFENDANT'S MOTIONS FOR JUDGMENT N.O.V. AND FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED BY THE COURT.

POINT IX THE FAILURE OF THE COURT TO MERGE THE OFFENSES OF AGGRAVATED MANSLAUGHTER AND ENDANGERING THE WELFARE OF A CHILD AT SENTENCING WAS ERROR.

POINT X DEFENDANT WAS INDICTED, TRIED AND CONVICTED BY A GRAND AND PETIT JURY SYSTEM IN ESSEX COUNTY WHICH WAS UNREPRESENTATIVE IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS AND THE APPLICABLE NEW JERSEY STATUTES.

We address these issues separately.

A. COMPOSITION, DEATH QUALIFICATION AND SELECTION OF JURY

Initially, by order dated February 12, 1986, we suspended decision on the issues raised in Point I as to "death qualification" of prospective jurors and Point X concerning the alleged unrepresentative composition of juries in Essex County, pending resolution of those issues by the Supreme Court. However, by order of February 5, 1987, we vacated our order of February 12, 1986, and directed the State to file a responding brief as to those issues, which it has done.

*474 Among the pretrial motions filed by defendant was an application to have the court preclude "death qualification" of prospective jurors. In a written opinion, the trial judge denied defendant's motion. *State v. Bass*, 189 N.J.Super. 461, 460 A.2d 223 (Law Div.1983). The issue has since **5 been decided adversely to defendant's position by the New Jersey Supreme Court in *State v. Ramsey*, 106 N.J. 123, 248-261, 524 A.2d 188 (1987), see also *Lockhart v. McCree*, 476 U.S. 162, 163-65, 106 S.Ct. 1758, 1760, 90 L.Ed.2d 137, 142 (1986).

Defendant filed his notice of appeal on October 27, 1983. On his motion we remanded the case, by order dated August 8, 1984, for a ruling on his challenge to the jury composition. Defendant was one of 13 defendants who joined in Thomas Ramsey's motion challenging the jury selection system in Essex County. Defendant sought to reverse his conviction. After a lengthy evidentiary hearing, Judge Richard Newman denied the motions. *State v. Ramsey*, 197 N.J.Super. 565, 485 A.2d 708 (Law Div.1984). Defendant's motion to the Supreme Court for direct certification to join in the appeal in *State v. Ramsey* on the sole issue of jury selection was denied by the Supreme Court on March 5, 1985.

The Law Division decision in *Ramsey* was affirmed by the Supreme Court on March 5, 1987. *State v. Ramsey*, 106 N.J. at 212-239, 524 A.2d 188. There is no merit to defendant's contention concerning excuses to students and teachers which were based largely on statutory requirements. The decision of the Supreme Court in *State v. Ramsey* is dispositive of Points I and X urged by defendant on this appeal.

B. SEVERANCE

[1] [2] Defendant's motion for severance from prejudicial joinder under R. 3:15-2(b) was denied. Such a motion is entrusted to the sound discretion of the trial judge. See *State v. Scioscia*, 200 N.J.Super. 28, 42, 490 A.2d 327 (App.Div.1985), and the cases cited therein. We will not reverse the denial of such a motion *475 unless there is a clear showing of abuse of discretion. See *State v. Moriarty*, 133 N.J.Super. 563, 569, 338 A.2d 14 (App.Div.1975), certif. den.68 N.J. 172, 343 A.2d 459 (1975). Relying upon *State v. Pickles*, 46 N.J. 542, 218 A.2d 609 (1966), defendant contends that his incrimination of Nicely in order to exculpate himself caused the jury to react unfavorably to him. In addition, he contends that the substantial evidence of Nicely's repeated abusive conduct towards Shawn and the court's repeated admonition to the jury that such testimony could only be used against Nicely was prejudicial to him. Further, he contends the prejudice to him was greatly enhanced by Nicely's defense of diminished capacity, since the psychiatrists attributed much of her conduct to her isolation and despair which reflected unfavorably upon defendant. For this proposition he relies upon *State v. Sinclair*, 49 N.J. 525, 231 A.2d 565 (1967), where, although the Court found that the trial judge had not abused his discretion in denying a severance, it nonetheless concluded that on retrial justice would be better served by a severance, if requested by either defendant. *Id.* at 550, 231 A.2d 565. We have thoroughly reviewed defendant's contentions concerning the denial of his motion for severance in light of the applicable law and affirm the denial substantially for the reasons given by Judge Edwin H. Stern in his oral opinion of May 16, 1983.

C. CONFRONTATION

[3] As noted, the victim's five year old brother, Davell, was an eyewitness to the murder. After hearing the testimony of a clinical psychologist who examined Davell at the request of the defense, and Davell's treating psychologist, the trial judge made findings based upon those opinions and

concluded that the testimony of Davell should not be given in the presence of his parents, the defendant and Nicely. He further concluded that the jury need not, in all instances, physically observe the witness. Therefore, the trial judge held that a video observation is constitutionally adequate and there is no constitutional *476 right to face-to-face confrontation between the witness and the accused.

The procedure ultimately used was that Davell testified on closed circuit television in the judge's chambers, in the presence of his foster mother, the trial judge, counsel for defendant, and one of Nicely's attorneys. This live testimony was simultaneously transmitted audibly and visually to **6 both the jury and defendants, with the camera focused on the witness. Defendant and Nicely, and Nicely's second attorney, were located in the chambers library with a two-way telephone communication system to secure the right of cross-examination. At the request of defendant, the jury was given the impression that defendants were physically present in chambers.

Defendant contends that this procedure violated his right to be confronted with the witness, as guaranteed by both the Sixth Amendment to the United States Constitution and Article 1, par. 10 of the New Jersey Constitution. We disagree, substantially for the reasons given by Judge Stern in his oral opinion of May 13, 1983.

At a pretrial competency hearing, Dr. Edward Arnow, a psychologist called by the defense, testified that it would be "disastrous" for Davell to testify in the presence of his parents. Dr. Walter Duryea, the treating psychologist, agreed that confronting his parents in court would have "a serious negative effect" on Davell, although he may be able to do it. Not only did the murder involve extensive physical abuse to Shawn, but the psychologist's testimony revealed substantial psychological trauma suffered by Davell in witnessing this tragic event. The trial judge's decision, based upon the opinion of the psychologists, was clearly warranted. To the extent that United States v. Benfield, 593 F.2d 815 (8th Cir.1979), and Herbert v. Superior Court of California, 172 Cal.Rptr 850, 117 Cal.App.3d 661

(Cal.Ct.App.1981), relied upon by defendant, are inconsistent with our ruling, we disapprove of them in this jurisdiction.

We held recently that admission of an "unavailable" witness' videotaped deposition in a criminal trial did not violate defendant's *477 right of confrontation under the United States and New Jersey Constitutions. See State v. Washington, 202 N.J.Super. 187, 494 A.2d 335 (App.Div.1985), where we said:

The right of an accused 'to be confronted with the witnesses against him' is protected in New Jersey not only by the application of the Sixth Amendment to the United States Constitution to the States through the Fourteenth Amendment, but by a parroting of that language in the Constitution of New Jersey. N.J. Const. (1947), Art. I, par. 10. Distilled in the relatively recent case of Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the purposes of the constitutional protection afforded by the confrontation clause are 'a preference for face-to-face confrontation at trial' and a securing of the right of cross-examination. 448 U.S. at 63, 100 S.Ct. at 2537. At the outset we observe that the United States Supreme Court thereby distinguishes between the desirability, expressed in terms of 'preference,' of face-to-face courtroom confrontation and the 'secured' right of cross-examination. This alone suggests that the confrontation guaranteed by the clause is not necessarily one in a courtroom. But see California v. Green, 399 U.S. 149, 157-158, 90 S.Ct. 1930, 1934-1935, 26 L.Ed.2d 489 (1970). But the matter was not left to inference in Ohio v. Roberts. There it is expressly held that 'competing interests, "if closely examined," [citation omitted], may warrant dispensing with confrontation at trial.' 448 U.S. at 64, 100 S.Ct. at 2538.

... We hold there was no error in granting leave to take the deposition and no error, insofar as the confrontation clauses of the Constitutions of both the United States and New Jersey are concerned, in the admission of the deposition in evidence. A case bearing a remarkable similarity

to the matter before us in the respect with which we are here concerned reached the same result. United States v. Tummell, 667 F.2d 1182 (5 Cir.1982). [202 N.J.Super. at 191–193, 494 A.2d 335.]

We further note N.J.S.A. 2A:84A–32.4, adopted by the Laws of 1985, c. 126, § 1, effective April 11, 1985, authorizes a similar procedure to that used in this case in prosecutions for aggravated sexual assault, sexual assault, aggravated criminal sexual assault, criminal sexual contact, or *7 child abuse, or in any action alleging an abused or neglected child. N.J.S.A. 9:6–8.21. We perceive no error in the procedure used for Davell's testimony at trial.

D. EVIDENTIAL RULINGS

(1) *Testimony of Dolores Morton*

Points IV, V and VI concern evidential rulings. The first deals with the testimony of Dolores Morton. Shawn had lived *478 with Mrs. Morton from May 1981 until April 1982 and a close relationship developed between them. Shawn returned to the Nicely household in April 1982 where Mrs. Morton visited with him occasionally. In July 1982, Mrs. Morton, her husband and a girlfriend, went to Paterson where Mr. Morton was going to repair Mrs. Morton's bible instructor's refrigerator. Nicely granted permission for Shawn to go with them. In Paterson while helping Shawn go to the toilet, Mrs. Morton observed “what appeared to be burns on his buttocks.” In response to her question, “Shawn, tell Momma what happened to your heiney,” Shawn replied, “Allah (defendant) burned me with the light Momma.”⁶ Not long after, Shawn climbed on to Mrs. Morton's lap. When she flicked a lighter to light a cigarette he asked her “to please not burn him with the lighter.”

⁶ In a statement to the police, quoted in the presentence report, Nicely said, “A long time ago Allen burned Shawn twice on his butt (each buttocks) with a lightbulb in a lamp.” However, this was not part of the evidence received at trial.

After a Rule 8 hearing, the trial judge ruled this testimony admissible as an exception to the hearsay rule under *Evid. R.* 63(4). He explained the reasons for his ruling as follows:

I do so because there was apparently a very close strong relationship with Ms. Morton on the one hand and Shawn Nicely on the other. Shawn remained in the Morton home for approximately 11 months, and that relationship was fostered and developed in that context.

Shawn had no such marks on him when returned to the Nicely home in April, and we're talking about a period of approximately three months or so. Ms. Morton did have an opportunity to talk to Shawn once between April and July, but it was in the Nicely home and there of course was no physical observations of the buttocks area or questions relating to the buttocks at that time and, in any event, it was in the hearing or proximity of Ms. Nicely and within her home.

On Friday afternoon of last week, I cited the annotation concerning the declarant's age as affecting admissibility of a *res gestae* statement,.... I at that time cited a good number of cases indicating that the tender age of the declarant has been noted as a basis for relaxing traditional rules concerning contemporaneous statements. This because of the fact that children are less likely to employ reflective powers to fabricate. And it seems to me that under the circumstances, given the relationship between Ms. Morton and Shawn Nicely, their lack of opportunity to talk and any prior observations between *479 April, when Shawn was returned in good condition to the Nicely home, and in July, when the observations were made, that the exception to the hearsay rule under *Evid. R.* 63(4) is applicable, and I will allow admissibility of the statement.

Defendant claims that the admission of this testimony was error. He argues that it was highly prejudicial since it was the only evidence of his purported abuse of Shawn, whereas “all of the other evidence clearly demonstrated Mr. Bass loved and cared for Shawn.”⁷

⁷ Defendant ignores the testimony of Davell as to the occasion when Shawn was injured when pushed by defendant on the “horsey” with wheels, and that defendant got Shawn drunk by giving him beer and liquor.

[4] The State responds that the evidence was offered by it “under three different theories: (1) as an excited utterance pursuant to *Evid.R.* 63(4); (2) pursuant to the fresh complaint rule, and (3) to demonstrate the culpability or intent of defendant pursuant to *Evid.R.* 55.” Clearly, the evidence was not admissible as a “fresh complaint.”

****8** That rule is applied widely in rape and morals cases and permits proof that the violated victim complained within a reasonable time to someone he or she would ordinarily turn to for sympathy, protection and advice. *State v. Balles*, 47 N.J. 331, 338, 221 A.2d 1 (1966), cert.den. and appeal dismissed 388 U.S. 461, 87 S.Ct. 2120, 18 L.Ed.2d 1321 (1967). The rationale of that rule was explained in *Balles* as follows:

If no testimony were offered with respect to the complaint the jury might naturally assume that none was made and that it is only just that the prosecution be permitted to forestall this natural assumption by showing that a complaint was in fact made.
Ibid.

In response to an objection that testimony of the fresh complaint was given before the testimony of the victim, the *Balles* court noted that the only significant question is whether in fact the complaining witness does give testimony at the trial. See *Balles*, *supra* at 340–341, 221 A.2d 1; see also *State v. Hummel*, 132 N.J.Super. 412, 422, 334 A.2d 52 (App.Div.1975), certif. den. 67 N.J. 102, 335 A.2d 54 (1975). In this murder case the victim obviously did not testify. ***480** Thus, the rationale for the admissibility of fresh complaint testimony is not present.

[5] This testimony did constitute “other crimes evidence” to which the exception as to admissibility

to prove some other fact in issue such as intent, or absence of mistake or accident may apply. However, such testimony may not be admitted if otherwise excludable as hearsay. It must be proven by direct evidence, not incompetent hearsay. See *State v. Ingenito*, 87 N.J. 204, 224, 432 A.2d 912 (1981) (Schreiber, J., concurring).

The only basis upon which this evidence could be properly admitted is *Evid.R.* 63(4) upon which the trial judge based his decision. The rule reads as follows:

A statement is admissible if it was made (a) while the declarant was perceiving an event or condition which the statement narrates, describes or explains, or (b) while the declarant was under the stress of a nervous excitement caused by such perception, in reasonable proximity to the event, and without opportunity to deliberate or fabricate.

From the evidence and the fact that the burns had healed, it is obvious that substantial time had elapsed between the alleged event (*i.e.*, when defendant burned Shawn) and the statement by Shawn to Mrs. Morton as to how he received the burns. The trial judge recognized that the event occurred some time between April 1982, when Shawn was returned to the Nicely household without these marks, and July 1982, when they were observed by Mrs. Morton. The questions then presented are: (1) whether Shawn was still under the stress of a nervous excitement caused by perceiving the event, and (2) whether the statement was in reasonable proximity to the event such as to be without opportunity to deliberate or to fabricate. The trial judge, relying upon a series of out-of-state cases, recognized that “the tender age of the declarant has been noted as a basis for relaxing traditional rules concerning contemporaneous statements.” However, as we noted in *State in the Interest of C.A.*, 201 N.J.Super. 28, 33, 492 A.2d 683 (App.Div.1985):

A court may make allowances for a child's youth and naivete in extending the time during which the nervous excitement continues to enhance the reliability of the statement.

***481** *State v. Padilla*, 110 Wis.2d 414, 417, 329 N.W.2d 263, 266 (Wis.Ct.App.1982).

A child's youth and naivete, however, are not substitutes for the stress of a nervous excitement, which is the basis for the hearsay exception.

We have recently expanded the hearsay exceptions contained in our Rules of Evidence to include a "naivete" or "tender years" exception in sexual abuse cases when a child relates events of the abuse to a parent, health professional, or other confidant.⁸ *State v. D.R.*, 214 N.J.Super. 278, ****9** 518 A.2d 1122 (App.Div.1986), certif. granted 107 N.J. 104, 526 A.2d 127 (March 3, 1987). We there noted that in *N.J.S.A. 9:6-8.46a*, the Legislature enacted an evidential rule for application in proceedings for the termination of parental rights. In such hearings:

⁸ We distinguished the admission of this evidence from fresh complaint evidence which, as we noted, is corroboration of a victim's testimony concerning a sexual attack. Such testimony negates an inference that, had no such complaint to a confidant been made, the credibility of the victim would be questioned. It is not substantive evidence of the crime. *See* 214 N.J.Super., 295-296 n. 10, 518 A.2d 1122.

... previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence; provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect.

[6] We conclude that in this case the evidence was properly admitted under *Evid.R. 63(4)*, as enhanced by a specific tender years or naivete concept.

Although the sequence of the two events testified to by Mrs. Morton are reversed, it is evident that Shawn's reaction when she took out her cigarette lighter preparatory to lighting a cigarette was an excited utterance while Shawn was perceiving the event. Such a reaction demonstrated that the stress of the nervous excitement of being burned by defendant previously was still present in the mind of this three and one-half year old child when he made the statement, "Allah burned me with the light Momma." By itself, testimony as to Shawn's reaction when Mrs. Morton took out her lighter would be irrelevant, except that it was tied in to defendant through Shawn's answer when Mrs. Morton asked him how he got the burn marks on his "heiney." Shawn's ***482** reaction to the lighter and his statement to Mrs. Morton were in close proximity to each other and reflect continuance of the stress of nervous excitement sufficient to enhance the reliability of Shawn's statement.

[7] Furthermore, we conclude that, even if the statement was improperly admitted, it was harmless error in view of Davell's testimony as to defendant's conduct towards Shawn, both before and on the day of his death. *R. 2:10-2*; *see State v. Macon*, 57 N.J. 325, 337-338, 273 A.2d 1 (1971). We recognize that, as between defendant and Nicely, testimony from the other witnesses revealed that Nicely substantially abused Shawn, but that defendant was pictured as treating Shawn with love and affection. Mrs. Morton testified that, although Nicely did not visit Shawn while he was living with her, defendant did visit and displayed affection to, and received affection from, Shawn. Defendant even brought him a present at Christmas. Nevertheless, we cannot conceive that any error in admitting this testimony was so prejudicial as to bring about an unjust result. By their verdict, the jury appears to have clearly recognized the difference in the way Shawn was treated by Nicely as opposed to his treatment by defendant. Furthermore, the testimony was admitted as going to defendant's intent, *i.e.*, that he acted purposely or knowingly, whereas he was convicted of aggravated manslaughter, *i.e.*, acting recklessly. The trial judge specifically told the jury that the evidence was admitted only as it related to defendant's conduct on September 26, 1982.

(2) *Testimony of Lynn Lieberman*

[8] The second evidential ruling about which defendant complains concerns the admission of the testimony of Lynn Lieberman, a casework supervisor for DYFS, who first saw Davell on the day of the murder at approximately 11:30 a.m. His demeanor at that time was described as quiet and withdrawn. Subsequently, when Davell and the other children were brought to the hospital, upon entering the lobby, Davell stiffened, *483 backed into the windows and would not move, as he was “really terrified.” When Ms. Lieberman attempted to persuade him to go into the emergency room, she asked Davell if he was afraid that the same thing would happen to him. He shook his head and said “and, anyway, Allen walked on Shawn's back.” The trial judge admitted this testimony under *Evid.R.* 63(4) as a spontaneous and contemporaneous statement. Noting that the interval **10 from perception to declaration was approximately six hours, he found:

Under the circumstances, I have no doubt by any standard or any burden of proof that Davell Nicely was under nervous excitement as a result of what he perceived approximately six hours earlier and that the stress caused by his perception or the nervous excitement caused by the perception continued until the time he made the declaration, including the declaration concerning being asleep, and that he had no opportunity to deliberate or fabricate, and, therefore, I will allow the statement to be introduced as an exception to the hearsay rule and, therefore, substantively.

We agree. This statement by Davell was truly spontaneous and made solely under the stress of the

nervous excitement of having observed his younger brother brutally beaten to death.

(3) *Testimony of Janie Bennett*

[9] The next evidential ruling about which defendant complains is the admission of testimony by Janie Bennett, a neighbor, as to statements made by defendant approximately two to two and one-half years before trial. At a Rule 8 hearing, the witness testified as follows:

A. I asked Allen (defendant) why would he allow Renee (Nicely) to treat Shawn like that, and he said she can do what she want to do.

Q. Now, did you ask at that time either Renee or Allen if you could do anything with Shawn?

A. I asked them if I could have him.

Q. And who did you ask that of?

A. I asked Renee, and I also asked Allen, and he said it's up to Renee.

Before the jury, the witness testified as follows:

A. I asked—I had asked Renee about letting me have Shawn and I—Allen come and I asked Allen why do you let Renee do that to Shawn, and he said—he said Renee do what she want to do.

*484 Q. And did you ask Renee Nicely at that time whether you could have Shawn, keep Shawn?

A. I asked both of them.

Q. What did she say?

A. Allen say something to Renee, and Renee say yes.

Defendant concedes that, on its face, the statement attributable to defendant is admissible under *Evid.R.* 63(7), but contends that the trial judge should have excluded it under *Evid.R.* 4. As one of the arguments in support of exclusion he contends that Ms. Bennett's testimony at the Rule 8 hearing was dissimilar to her testimony before the jury. He argues, “the use of the different words, vastly

altered the meaning conveyed to listeners.” We disagree with this factual contention by defendant. Moreover, we agree with Judge Stern that the evidence was not so remote as to require exclusion under *Evid.R.* 4.

[10] **[11]** **[12]** Whether the probative value of evidence is outweighed by the potential for prejudice is a decision left to the discretion of the trial judge. See *Stoelting v. Hauck* 32 N.J. 87, 159 A.2d 385 (1960). The party seeking to preclude the admission of evidence must convince the court that the factors favoring exclusion substantially outweigh its probative value. Cf. *State v. Sands*, 76 N.J. 127, 368 A.2d 378 (1978) (whether prior convictions may be excluded as prejudicial). On appellate review, the decision of the trial court must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted. See *State v. Rogers*, 19 N.J. 218, 229, 116 A.2d 37 (1955); see *State v. Carter*, 91 N.J. 86, 106, 449 A.2d 1280 (1982). We find no abuse of discretion in the admission of Janie Bennett's testimony.

(4) *Prior Consistent Statements of Davell Nicely*

[13] The last evidential ruling complained of deals with the admission of prior statements made by Davell through testimony of prosecutor's detectives. Davell testified that his younger brother Shawn was killed when defendant stepped on his back and Nicely hit him across the head **11 with a broom. Davell went *485 on to explain that defendant also punched Shawn in the eye and threw him in a tub of water. During cross-examination of Davell by defendant's attorney, the following testimony was elicited:

MR. GLAZER: Did you tell—Davell, did you tell the big guy with the beard [apparently referring to Investigator Gold] that only Renee hit Shawn?

D. NICELY: I forgot to tell—I forgot to tell them that Allen did it, too.

MR. GLAZER: Oh. When you forgot, did the detective help you remember that Allen hit him, too?

D. NICELY: Yeah.

MR. GLAZER: Did Mr. Monaco, the man here, Shawn—Davell, did he help you remember that Allen hit him, too?

D. NICELY: I don't know.

MR. GLAZER: But Mr. Gold did?

(Witness nodding.)

D. NICELY: He did. Because he told me that he forgot.

MR. GLAZER: Did you say to someone that one time that only Allen hit Shawn?

D. NICELY: Huh?

MR. GLAZER: Did you ever say that only Allen hit Shawn?

D. NICELY: I told the man what you had said.

MR. GLAZER: Did you say only Renee hit Shawn?

D. NICELY: I told the Gold that.

MR. GLAZER: You told the Gold only Renee hit Shawn?

D. NICELY: Because I forgot to tell him that Allen did it, too.

MR. GLAZER: When you saw—when they put you on television, Davell—

D. NICELY: I was on the television.

MR. GLAZER: Well, remember they had a camera? And you were talking to the black man (apparently referring to Investigator Thompson)? Who did you tell him hit Shawn?

D. NICELY: I didn't tell him nothing. I didn't tell him nothing.

MR. GLAZER: You didn't tell him anything?

(Witness shaking head.)

D. NICELY: Only told him and that—there's another man, another man, he got hair like you.

MR. GLAZER: Got hair like me? Nice?

D. NICELY: And he said—he said he might take me fishing.

MR. GLAZER: He might take you fishing? And, Davell, when you forget things about what happened at the apartment, did they help you remember? They do?

(Witness nodding.)

***486** It is clear that this cross-examination of Davell was an attack on his credibility and was calculated to imply that Davell fabricated his account of the murder of his brother pertaining to defendant at the urging of the prosecutor's investigators. In order to rebut this charge of recent fabrication, it was therefore proper for Detectives Gold and Thompson to testify regarding prior statements made to them by Davell under *Evid.R.* 20.

In *State v. King*, 115 N.J.Super. 140, 146, 278 A.2d 504 (App.Div.1971), certif. den. 59 N.J. 268, 281 A.2d 530 (1971), we said:

A 'charge' of recent fabrication can be effected through implication by the cross-examiner as well as by direct accusation of the witness. In fact that is the usual way in which the charge is made. For present purposes, it is the impression the cross-examiner makes upon the jury in the heat of the trial rather than what an appellate court would discern from a coldly analytical study of the testimony which must control review of the somewhat discretionary

exercise of judgment made by the trial judge in the matter.

We find no merit to defendant's contentions concerning the various evidential rulings referred in Points IV, V and VI.

E. JURY CHARGE

Defendant contends in Point VII that the charge as to accomplice liability and omission to act were erroneous and deprived him of a fair trial. It is claimed that the charge on accomplice liability was erroneous in two areas: (1) "the court failed to ****12** charge that defendant must share a community of purpose for accomplice liability," and (2) "the court mistakenly charged the defendant had a duty imposed by law to prevent the homicidal act."

[14] **[15]** A shared intent is a prerequisite to accomplice liability under *N.J.S.A. 2C:2-6(b)(3)*. See *State v. White*, 98 N.J. 122, 129, 484 A.2d 691 (1984). In *State v. Fair*, 45 N.J. 77, 95, 211 A.2d 359 (1965), the Court said:

To render both defendants guilty it is essential that they shared in the intent which is the crime's basic element, and at least indirectly participated in the commission of the criminal act. ...

***487** While each participant may be guilty 'as a principal' *N.J.S.A. 2A:85-14*, he is not necessarily guilty in the same degree. If both parties enter into the commission of a crime with the same intent and purpose each is guilty to the same degree; but each may participate in the criminal act with a different intent. Each defendant may thus be guilty of a higher or lower degree of crime than the other, the degree of guilt depending entirely upon his own actions, intent and state of mind.

While defendant correctly states the necessity for a shared intent, he incorrectly contends that the jury was not so instructed. The trial judge charged the jury in part as follows:

In this case, it is unnecessary for you, the jury, to determine which defendant actually caused each of the injuries to Shawn Nicely. Rather, you must decide whether each of the defendants actively participated in the events leading to the death of Shawn Nicely. In the event that you are unable to determine which of the two defendants caused the death, but you are satisfied that it was one of the two and that both defendants actively participated in injuring or striking Shawn with a common purpose to cause him serious bodily injury or to kill him, then you must find both defendants guilty of murder by their own conduct. If you find that only one defendant so acted or actually caused the death, you may find the other guilty of murder as well if you find that he or she was an accomplice.

A person is guilty of an offense if it is committed by his own conduct or by the conduct of another for which he is legally accountable or both.

A person is legally accountable for the conduct of another when he is an accomplice of such other person in the commission of an offense. A person is an accomplice of another person in the commission of an offense if *for the purpose of promoting or facilitating the commission of the offense* he aids or agrees or attempts to aid such other person in planning or committing it, or, if having a legal duty to prevent the commission of the offense, he fails to make a proper effort to do so.

I've already defined for you the term with purpose or purposely. An attempt to aid occurs *when acting with the same type of culpability or state of mind required for the offense...* [Emphasis supplied.]

This charge was repeated in the context of manslaughter.

A reading of the charge clearly refutes defendant's contention. The trial judge's charge as to accomplice liability was in the language of N.J.S.A. 2C:2-6 and clearly enunciated the shared intent requirement. See e.g., State v. Hakim,

205 N.J.Super. 385, 387 n. 1, 501 A.2d 159 (App.Div.1985). As recognized by the judge at the hearing on defendant's motion for a new trial, defendant has ignored the clear and plain language of the *488 charge as to accomplice liability. At that hearing, the judge pointed out:

What you find to be missing I believe was included in the charge at the outset with respect to accomplice liability, I think in the murder section and then restated and incorporated in the aggravated manslaughter section.

Next, defendant argues that the trial judge instructed the jury that if a defendant purposely did nothing to stop the other from beating the decedent, his inaction alone was sufficient to constitute culpability **13 for murder or aggravated manslaughter. He contends the court never addressed the jury regarding the requirement of shared intent with the actual perpetrator. According to defendant, the judge informed the jury that purposely "doing nothing," without more, was sufficient for a finding of guilt of murder or aggravated manslaughter. An examination of the charge in its entirety, State v. Wilbely, 63 N.J. 420, 422, 307 A.2d 608 (1973), reveals the inaccuracy of defendant's contentions. As to omission to act, the trial judge charged the jury as follows:

Ladies and gentlemen, I also instruct you that if only one person committed the acts causing Shawn's death, the other can be deemed an accomplice to murder if you find that he or she *was a natural parent or person having custody or control of the child or who otherwise assumed responsibility for him and that he or she purposely did nothing to stop the beating and did nothing with purpose or knowledge that the beatings by the other would result in Shawn's death or in serious bodily injury resulting in death.*

Moreover, if you find that Renee Nicely caused Shawn's death but Allen Bass was a father or a person who assumed responsibility for Shawn with the purpose of [*sic*] knowing that the

result would lead to his death or seriously [sic] bodily injury resulting in death, he must be found guilty of murder as an accomplice even if you find that Miss Nicely was not capable of forming the requisite state of mind or did not have the requisite intent to commit murder herself. [Emphasis supplied.]

[16] **[17]** Defendant contends that an omission to act cannot form the basis of a murder or manslaughter conviction. This argument is untenable. Initially, the trial judge observed that he included omissions because of the definition of "conduct" in *N.J.S.A.* 2C:1-14d which includes an omission, but that it must be coupled with the requisite state of mind. The judge also noted that the definition of a criminal attempt in ***489** *N.J.S.A.* 2C:5-1a(3) refers to purposely doing or omitting to do something. Moreover, a person is accountable as an accomplice if, having a legal duty to prevent the commission of an offense, he fails to make a proper effort so to do. *N.J.S.A.* 2C:2-6c(1)(c). Liability for the commission of an offense may not be based on an omission unaccompanied by action unless a duty to perform the omitted act is otherwise imposed by law. *N.J.S.A.* 2C:2-1b(2).

[18] Notwithstanding defendant's argument to the contrary, we are satisfied that there was sufficient evidence in the record to infer that defendant was the father of Shawn,⁹ or at least that on the fatal day he had assumed responsibility in part for the care of Shawn. *N.J.S.A.* 2C:24-4a provides:

⁹ Defendant testified that he thought Shawn was his child and he loved him. In response to a question on cross-examination, "This is your son we're talking about now, right?" defendant replied, "Right."

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

N.J.S.A. 9:6-1 in pertinent part reads as follows:

Cruelty to a child shall consist in any of the following acts: (a) inflicting unnecessarily severe corporal punishment upon a child; (b) inflicting upon a child unnecessary suffering or pain, either mental or physical; (c) habitually tormenting, vexing or afflicting a child; (d) *any willful act of omission or commission whereby unnecessary pain and suffering, whether mental or physical is caused or permitted to be inflicted on a child;* (e) or exposing a child to unnecessary hardship, fatigue or mental or physical strains that may tend to injure the health or physical or moral well-being of such child. [Emphasis supplied.]

In light of our holding in ****14** *State v. Muniz*, 150 *N.J.Super.* 436, 375 *A.2d* 1234 (App.Div.1977), certif. den. 77 *N.J.* 473, 391 *A.2d* 488 (1978), it is clear that pursuant to *N.J.S.A.* 9:6-1, 9:6-3 and 9:6-8.21, defendant had a duty to prevent Shawn's painful death. In *Muniz* we said:

Within these definitions and within the framework of the evidence it was appropriate for the jury to consider whether under the circumstantial evidence adduced before it either one or both defendants were guilty of cruelty or neglect as defined for them and whether the evidence was sufficient to permit ***490** the jury to determine that either one or both inflicted the injuries upon the child, or, if only one was responsible, *that the other either permitted the same to be done without sufficient effort to prevent the assault or failed 'to do or permit to be done any act necessary for the child's physical * * * well-being.'* This

latter definition could include a failure to complain to the proper authorities, failure to call the hospital and ask for emergency help or even failure to have sought medical care sooner. It could also include neglect as indicated by the physical conditions in addition to or separate from the traumatically initiated physical condition of the child. [*Id.* at 444, 375 A.2d 1234.] [Emphasis added.]

We find no merit to defendant's contention as to the accuracy or sufficiency of the judge's charge concerning accomplice liability and omission to act.

F. MOTIONS FOR ACQUITTAL OR NEW TRIAL

Defendant's motion for dismissal at the end of the State's case and his motion for a judgment n.o.v., on the basis of insufficiency of evidence, as well as his motion for a new trial, were properly denied by the trial judge. Defendant based his motion for a new trial on essentially the same grounds as are presented on this appeal, in addition to a contention that the verdict was against the weight of the evidence. We have heretofore discussed the other points raised by defendant and are satisfied that the trial judge appropriately dealt with the sufficiency and the weight of the evidence supporting the jury's guilty verdict. See *State v. Martinez*, 97 N.J. 567, 571–572, 483 A.2d 117 (1984), and *State v. Reyes*, 50 N.J. 454, 236 A.2d 385 (1967). See also *State v. Martin*, 213 N.J.Super. 426 (App.Div.1986).

[19] Davell clearly testified that defendant stepped on Shawn's back, punched him in the eye and threw him into a tub full of water. Davell consistently implicated defendant in his various statements, specifically that defendant stepped on Shawn's back. This was consistent with the findings of the pathologist that Shawn had suffered two recent lesions on the upper back and right middle portion of the back. Likewise, ample evidence was produced by the State to support the jury's guilty verdict of endangering the welfare of a child. *N.J.S.A. 2C:24–4(a)*. In denying defendant's first acquittal motion, the trial judge properly found sufficient evidence that defendant *491 either had a legal duty to

care for Shawn or had assumed that responsibility as required under *N.J.S.A. 2C:24–4(a)*. Defendant's motion for a new trial was properly denied. It does not clearly appear that there was a miscarriage of justice under the law. *R. 2:10–1*; see *State v. Sims*, 65 N.J. 359, 373–374, 322 A.2d 809 (1974). Appellate review is limited to the correction of injustice resulting from a plain and obvious failure of the jury to perform its function. *State v. Johnson*, 203 N.J.Super. 127, 134, 495 A.2d 1367 (App.Div.1985), certif. den. 102 N.J. 312, 508 A.2d 195 (1985).

G. MERGER

[20] Defendant contends that his conviction for endangering the welfare of a child under *N.J.S.A. 2C:24–4a* should have merged into his conviction for aggravated manslaughter under *N.J.S.A. 2C:11–4a*. Although expressing some reservations initially,¹⁰ the trial judge ultimately concluded:

¹⁰ At one point, in discussing the proposed charge with the attorneys, the trial judge said: “Under the facts and with the consent of the State, I may easily tell the jury not to consider the fourth count (charging endangering the welfare of the child) against Mr. Bass, if they find him guilty of murder, aggravated manslaughter or manslaughter.”

**15 I think that as part of a single prosecution, there is no merger either constitutionally or statutorily required. I do not believe that *N.J.S.A. 2C:1–8a(4)* applies.

However, for reasons which he expressed, the trial judge imposed a concurrent sentence on the endangering conviction. The State notes that the endangering count charged that the offense was committed “on or about” September 26, 1982. Proofs at the trial established that on September 25, 1982, the day before Shawn's death, defendant had taken responsibility for watching the children while Nicely underwent an abortion at the hospital. Although defendant took Nicely to the hospital, Shawn was left at home alone where he was to be looked in on

by Kerry White, the child who lived upstairs. When defendant returned from the hospital he noticed that Shawn's arm was swollen. Shawn told him that he had fallen and his arm hurt.

*492 Defendant rubbed alcohol on the arm. Defendant also observed belt marks on Shawn's back and bruises on his chest. The autopsy revealed that Shawn had sustained an extremely painful fracture of the distal end of his left elbow, by the infliction of a tremendous amount of force estimated to have occurred between six days and 24 hours before his death. Yet, when defendant returned to the hospital to pick up Nicely after her abortion, with Shawn in the car, he made no effort to obtain medical attention for these injuries. When he returned from the hospital with Nicely, he went out with his friends and remained out until the early morning hours. As the prosecutor noted in his summation, "A loving father tends to the medical needs of his son. Allen Bass let Shawn suffer with a broken and swollen arm for a whole day while he went joyriding." This failure to provide medical attention for the child's injuries was harm sufficient to make Shawn an abused or neglected child within the meaning of N.J.S.A. 2C:24-4(a), quite apart from the testimony as to the events on September 26 resulting in Shawn's death.

In *State v. Hofford*, 169 N.J.Super. 377, 386-387, 404 A.2d 1231 (App.Div.1979), we rejected the view that child cruelty, under N.J.S.A. 9:6-1 and 9:6-3, is a lesser included offense of manslaughter. We held, however, that the cruelty and manslaughter convictions and sentences, based upon defendants giving paregoric to their children, should have

merged "since the same conduct resulted in both convictions." *Id.* at 385, 404 A.2d 1231. In this case, unlike *Hofford*, defendant cannot claim the benefit of the so-called "same transaction" test. He committed two separate and distinct crimes, notwithstanding their proximity to each other. *Cf. State v. Fraction*, 206 N.J.Super. 532, 536-540, 503 A.2d 336 (App.Div.1985). Although the treatment of Shawn by defendant on September 26, 1982, or his omission to act in the face of Nicely's conduct toward Shawn that day, might also be sufficient for conviction on the endangering count and may have warranted merger, we cannot say that the trial judge erroneously concluded that there was no merger either constitutionally or statutorily required. *493 Compare *State v. Miller*, 108 N.J. 112, 527 A.2d 1362 (1987), where the Court said as to the merger of convictions for aggravated sexual assault and child endangerment:

[T]he offenses are different because the crime of endangering the welfare of a child is aimed not only at specific conduct but also at the violation of the duty that a parent owes to a child. [at p. 118, 527 A.2d 1362.]

Affirmed.

All Citations

221 N.J.Super. 466, 535 A.2d 1

Negative Treatment**Negative Citing References (1)**

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by	 1. <u>State v. Lisa</u>  MOST NEGATIVE 919 A.2d 145 , N.J.Super.A.D. CRIMINAL JUSTICE - Indictment and Information. Dismissal was warranted for indictment for reckless manslaughter based on failure to call emergency services for companion.	Apr. 04, 2007	Case		8 18 A.2d

Citing References (62)

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by NEGATIVE	 1. State v. Lisa  919 A.2d 145, 154+ , N.J.Super.A.D. CRIMINAL JUSTICE - Indictment and Information. Dismissal was warranted for indictment for reckless manslaughter based on failure to call emergency services for companion.	Apr. 04, 2007	Case		8 18 A.2d
Cited by	 2. State v. Long  801 A.2d 221, 234 , N.J. CRIMINAL JUSTICE - Evidence. Victim's statements to her mother that defendant's mother had fallen and died were part of the res gestae.	July 15, 2002	Case		6 8 A.2d
Cited by	 3. State v. Covell  725 A.2d 675, 683+ , N.J. CRIMINAL JUSTICE - Child Luring. Statement about prior alleged act of lewdness was admissible as other conduct evidence.	Mar. 24, 1999	Case		9 A.2d
Cited by	 4. State v. Galloway 628 A.2d 735, 750+ , N.J. Diminished Capacity. Term "mental disease or defect" in diminished capacity statute does not preclude evidence of mental condition consisting of borderline personality disorder.	Aug. 02, 1993	Case		18 A.2d
Cited by	5. State v. Matulewicz 557 A.2d 1001, 1004 , N.J. Defendant appealed from an order of the Superior Court allowing the State to prosecute him for capital murder for the death of his four-month-old daughter. The Supreme Court...	May 11, 1989	Case		18 A.2d
Cited by	6. State v. Singletary  2017 WL 510534, *4 , N.J.Super.A.D. Defendant Bobby Singletary, previously employed as a corrections officer at the Adult Diagnostic Treatment Center (Center), appeals from his convictions and sentence for official...	Feb. 08, 2017	Case		1 A.2d
Cited by	7. State v. Jeter  2014 WL 563681, *2 , N.J.Super.A.D. Defendant appeals from his convictions for third-degree possession of phencyclidine (PCP), N.J.S.A. 2C:35-10(a)(1), (count one); second-degree possession with intent to distribute...	Feb. 14, 2014	Case		1 A.2d
Cited by	8. State v. Ragland 2013 WL 5942238, *7 , N.J.Super.A.D. Tried by a jury, defendant Dyshon Ragland was convicted of first-degree armed robbery, N.J.S.A. 2C:15-1; first-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and 2C:11-3;...	Nov. 07, 2013	Case		5 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	9. <u>State v. Sapienza</u> 2009 WL 62992, *3 , N.J.Super.A.D. Defendant Michael Sapienza appeals from his conviction for second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a), and third-degree unlawful possession...	Jan. 13, 2009	Case		6 8 A.2d
Cited by	10. <u>Yansomah v. Glita</u> 2008 WL 1744493, *2+ , N.J.Super.A.D. Plaintiff filed a complaint that alleged she fell and suffered injuries in a building owned by defendant due to a faulty metal nosing on a stair. Defendant successfully moved for...	Apr. 17, 2008	Case		6 8 A.2d
Cited by	11. <u>State v. Thompson</u> 2007 WL 1556606, *5 , N.J.Super.A.D. Defendant John E. Thompson appeals from his conviction, in abstentia, after a jury trial for third-degree possession of a controlled dangerous substance (CDS), cocaine, N.J.S.A....	May 31, 2007	Case		6 8 A.2d
Cited by	12. <u>State v. T.C.</u> 2006 WL 1911009, *4 , N.J.Super.A.D. Tried to a jury, defendant, T.C., was acquitted of second-degree reckless manslaughter, N.J.S.A. 2C:11-4b(1) (count one), and convicted of second-degree endangering the welfare of...	July 13, 2006	Case		20 A.2d
Cited by	13. <u>State v. Donato</u> 2006 WL 1633666, *28 , N.J.Super.A.D. After a lengthy jury trial on an indictment charging him with the murder of his wife, defendant John Donato was convicted of aggravated manslaughter and sentenced to seventeen and...	June 14, 2006	Case		6 8 A.2d
Cited by	 14. <u>State ex rel. J.A.</u> 897 A.2d 1119, 1125 , N.J.Super.A.D. FAMILY LAW - Juvenile Justice. Eyewitness' statements to police came within either present sense impression or excited utterance exception to hearsay rule.	May 23, 2006	Case		8 A.2d
Cited by	15. <u>State v. Messino</u> 876 A.2d 818, 834 , N.J.Super.A.D. CRIMINAL JUSTICE - Counsel. Defendant's asking officer whether officer thought that defendant needed lawyer was not request for attorney.	June 30, 2005	Case		20 A.2d
Cited by	 16. <u>State v. Conigliaro</u> 811 A.2d 491, 496 , N.J.Super.A.D. CRIMINAL JUSTICE - Evidence. Sexual assault victim's written statement was not excited utterance.	Dec. 17, 2002	Case		6 8 A.2d
Cited by	 17. <u>State v. Clark</u> 790 A.2d 945, 951 , N.J.Super.A.D. CRIMINAL JUSTICE - Discovery. Prosecutor's failure to disclose eyewitness deprived assault defendant of fair trial.	Feb. 07, 2002	Case		8 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	 18. <u>Yueh v. Yueh</u> 748 A.2d 150, 158 , N.J.Super.A.D. FAMILY LAW - Attorney Fees. Evidence did not support finding, for award of fees, that former wife did not act in good faith.	Apr. 04, 2000	Case		11 A.2d
Cited by	 19. <u>Truchan v. Sayreville Bar and Restaurant, Inc.</u> 731 A.2d 1218, 1223 , N.J.Super.A.D. TORTS - Dram Shop. Statements by eyewitnesses to collision were admissible as excited utterances in dram shop action.	July 09, 1999	Case		8 A.2d
Cited by	 20. <u>State v. Lazarchick</u> 715 A.2d 365, 376 , N.J.Super.A.D. LABOR AND EMPLOYMENT - Public Employment. Forfeiture of police officer's employment was mandatory after he had been convicted of disorderly persons offenses arising from assault on...	Sep. 03, 1998	Case		6 8 A.2d
Cited by	21. <u>Palmisano v. Pear</u> 703 A.2d 966, 970 , N.J.Super.A.D. HEALTH - Evidence. Patient's statement to breast specialist that gynecologist "felt" lump during prior examination was not admissible in medical malpractice action under medical...	Dec. 19, 1997	Case		13 A.2d
Cited by	 22. <u>State v. Nutter</u> 609 A.2d 65, 74 , N.J.Super.A.D. Defendant was convicted in the Superior Court, Essex County of murder, unlawful possession of a knife, and possession of a knife for an unlawful purpose and he appealed. The...	July 02, 1992	Case		—
Cited by	 23. <u>State v. M.L.</u> 600 A.2d 1211, 1220 , N.J.Super.A.D. Defendant was convicted before the Superior Court, Law Division, Mercer County, of endangering the welfare of a child, and she appealed. The Superior Court, Appellate Division,...	Oct. 16, 1991	Case		20 A.2d
Cited by	 24. <u>State v. Johnson</u> 563 A.2d 851, 856 , N.J.Super.A.D. Defendant was convicted of murder in the second degree in the Superior Court, Law Division, Camden County, and defendant appealed. The Superior Court, Michels, P.J.A.D., held...	Aug. 16, 1989	Case		—
Cited by	 25. <u>State v. Rivera</u> 556 A.2d 1227, 1233 , N.J.Super.A.D. Defendant was convicted by jury in the Superior Court, Law Division, Essex County, of knowing or purposeful murder by his own conduct, robbery, aggravated sexual assault, and...	Mar. 23, 1989	Case		11 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	 26. State v. Crandall 555 A.2d 35, 39+ , N.J.Super.A.D. Defendant was convicted in the Superior Court, Law Division, Burlington County, of first-degree aggravated assault, second-degree sexual assault, and endangering welfare of child. ...	Mar. 09, 1989	Case		3 A.2d
Cited by	27. State v. Davis 550 A.2d 1241, 1245+ , N.J.Super.A.D. Defendant was convicted in the Superior Court, Law Division, Salem County, of two counts of sexual assault and two counts of endangering welfare of a child, and he appealed. The...	Nov. 28, 1988	Case		3 A.2d
Cited by	28. State v. McCutcheon 560 A.2d 1303, 1305+ , N.J.Super.L. In defendant's prosecution for first-degree aggravated sexual assault of his stepdaughter, State moved to permit stepdaughter to testify via closed circuit television in...	Oct. 12, 1988	Case		—
Cited by	29. Carson v. Sullivan 2007 WL 2446479, *9 , D.N.J. This matter is before the Court on Petitioner Todd Carson's petition for habeas corpus relief under 28 U.S.C. § 2254. For the reasons discussed below, the petition for habeas...	Aug. 23, 2007	Case		—
Mentioned by	30. New Jersey Div. of Youth and Family Services v. D.D. 2009 WL 1506886, *7 , N.J.Super.A.D. This matter returns for review following our remand. Defendant D .D. appeals from a Family Part order entered on April 17, 2008, entered after a fact-finding hearing. The trial...	June 01, 2009	Case		—
Mentioned by	 31. State v. Buda 912 A.2d 735, 740 , N.J.Super.A.D. CRIMINAL JUSTICE - Confrontation. Statements of non-testifying child to DYFS worker were "testimonial," such that their admission violated Confrontation Clause.	Dec. 20, 2006	Case		8 A.2d
Mentioned by	 32. State v. Rivera 797 A.2d 175, 181 , N.J.Super.A.D. CRIMINAL JUSTICE - Confrontation. Admission of co-defendant's hearsay statement implicating defendant violated the Confrontation Clause.	May 16, 2002	Case		6 8 A.2d
Mentioned by	 33. State v. Dishon 687 A.2d 1074, 1091 , N.J.Super.A.D. CRIMINAL JUSTICE - Jury. It was error to conduct voir dire about homosexuality, a central theme of the prosecution's case, outside of defendant's presence and after defendant had...	Feb. 06, 1997	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Mentioned by	34. <u>State v. Kamienski</u> 603 A.2d 78, 88+ , N.J.Super.A.D. Defendants were convicted in the Superior Court, Law Division, Ocean County, of conspiracy to possess cocaine with intent to distribute, and one defendant was convicted of murder....	Feb. 19, 1992	Case		14 A.2d
—	35. <u>PRESENTING AND CHALLENGING WITNESSES UNDER NEW JERSEY RULES OF EVIDENCE 607, 611(C), AND 803(A)(1): SHOULD WE VOUCH FOR THE CREDIBILITY OF THESE RULES?</u> 27 Seton Hall L. Rev. 399 , 489 I. Introduction. 400 II. The Common-Law Model for Presenting Witness Testimony. 406 A. The Voucher Rule. 406 B. The Prohibition of Leading Questions on Direct Examination. 411 ...	1997	Law Review	—	—
—	36. <u>Declarant's age as affecting admissibility as res gestae</u> 83 A.L.R.2d 1368 This annotation covers cases in which declarations or oral statements were admitted, or held inadmissible, under the res gestae exception to the hearsay evidence rule, where the...	1962	ALR	—	—
—	37. <u>Guralnick's New Jersey Family Law Annotated H CH 18 I, I Closed Circuit Testimony by Minor</u>	2017	Other Secondary Source	—	3 15 A.2d
—	38. <u>Jones on Evidence--Civil and Criminal s 28:15, Young children as declarants</u> Courts are particularly lenient with the time factor when the declarant is a young child and the event was particularly traumatic. This permissiveness takes several forms. First,...	2017	Other Secondary Source	—	6 A.2d
—	39. <u>Jones on Evidence--Civil and Criminal s 28:17, Statement "relating to" the event; secondary or subsequent event</u> To qualify as an excited utterance, the statement must "relate to" the event or condition that prompted it. Unless the statement is a complete nonsequitur, this rarely poses a...	2017	Other Secondary Source	—	6 A.2d
—	40. <u>1A N.J. Prac. Series R 2:10-2, 2:10-2. Notice of Trial Errors</u> N.J. Prac. Series 1. This is a single rule applying to both criminal and civil and to judicial and administrative appeals, and replacing the more particularized provisions of the source rules with...	2017	Other Secondary Source	—	4 6 7 A.2d
—	41. <u>1A N.J. Prac. Series R 3:15-2, 3:15-2. Relief from Prejudicial Joinder</u> N.J. Prac. Series 1. As the greatest potential for prejudice in a joint trial lies in the confession of one defendant implicating a co-defendant, paragraph (a) of the rule provides a specific...	2017	Other Secondary Source	—	1 2 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	<u>42. 2B N.J. Prac. Series N.J.R.E. 403, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time</u> N.J. Prac. Series Rule 403 contains the principles established by both N.J.Evid.R. 4 and Fed.R.Evid. 403. Although the formulation is closer to the federal rule than the 1967 New Jersey rule, the...	2017	Other Secondary Source	—	2 12 A.2d
—	<u>43. 2C N.J. Prac. Series N.J.R.E. 607, Credibility and Neutralization</u> N.J. Prac. Series The proposed rule appearing on page 469 of the Main Volume is the New Jersey Evidence Committee's proposed Rule 607 not the federal rule. It was inadvertently placed on page 469....	2017	Other Secondary Source	—	13 A.2d
—	<u>44. 2D N.J. Prac. Series N.J.R.E. 801, Definition</u> N.J. Prac. Series The definitions of statement, declarant, and hearsay contained in Rule 801(a), (b), and (c), respectively, are identical to those of Fed.R.Evid. 801(a), (b), and (c), respectively....	2017	Other Secondary Source	—	3 A.2d
—	<u>45. 2D N.J. Prac. Series N.J.R.E. 803(c)(1), Present Sense Impression</u> N.J. Prac. Series As stated above, Rule 803(c), following the federal format and the enumeration of Fed.R.Evid. 803, collects other hearsay exceptions which are not dependent upon the unavailability...	2017	Other Secondary Source	—	8 9 A.2d
—	<u>46. 2D N.J. Prac. Series N.J.R.E. 803(c)(2), Excited Utterance</u> N.J. Prac. Series Excited utterance. Rule 803(c)(2) is identical to Fed.R.Evid. 803(2) except that it adds the phrase "without opportunity to deliberate or fabricate," taken from N.J.Evid.R....	2017	Other Secondary Source	—	4 6 8 A.2d
—	<u>47. 32 N.J. Prac. Series s 20:19, Closed circuit television testimony of child witness</u> N.J. Prac. Series N.J.S.A. 2A:84A-32.4 allows the testimony of a witness 16 years of age or younger to be presented to the jury by means of one-way closed circuit television in lieu of live...	2016	Other Secondary Source	—	3 A.2d
—	<u>48. 32 N.J. Prac. Series s 21:22, Hearsay-Homicide case-Threats made by defendant to victim</u> N.J. Prac. Series Prosecutors want to introduce evidence that the homicide victim (declarant) had told someone (witness) that the accused had threatened the victim's life. Such testimony by the...	2016	Other Secondary Source	—	6 8 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	49. 32 N.J. Prac. Series s 21:57, The prosecutor should, if possible, save evidence of "other bad acts" committed by the defendant for rebuttal N.J. Prac. Series Except when a defendant raises the defense of entrapment, evidence that the defendant committed "other bad acts" (i.e. crimes, wrongs or other acts other than those at issue...	2016	Other Secondary Source	—	5 A.2d
—	50. 33 N.J. Prac. Series s 1:7, Method of prosecution when conduct constitutes more than one offense-Merger N.J. Prac. Series The Code of Criminal Justice seeks to define the prosecution's right to charge and convict for more than one offense as well as to formulate limitations upon the unfair...	2017	Other Secondary Source	—	—
—	51. 33 N.J. Prac. Series s 2:6, Liability for conduct of another-Complicity N.J. Prac. Series Under certain circumstances a person will be held accountable in a criminal prosecution for the acts of another person. An indictment need not expressly allege a violation of...	2017	Other Secondary Source	—	14 A.2d
—	52. 33 N.J. Prac. Series s 8:8, Manslaughter N.J. Prac. Series The second degree crime of manslaughter is divided into two categories. The first type of manslaughter is a criminal homicide which is committed recklessly. The second is a...	2017	Other Secondary Source	—	18 20 A.2d
—	53. 33 N.J. Prac. Series s 19:2, Endangering welfare of children N.J. Prac. Series The various offenses of endangering the welfare of children which are set forth in the Code of Criminal Justice have a number of pre-Code statutes as their source. The problems...	2017	Other Secondary Source	—	20 A.2d
—	54. 33 N.J. Prac. Series s 19:8, Cruelty and neglect of children N.J. Prac. Series The crime of cruelty and neglect of children is not part of the Code of Criminal Justice It is a fourth degree crime for any parent, guardian or person having the care custody or...	2017	Other Secondary Source	—	20 A.2d
—	55. 47 N.J. Prac. Series s 31:7, Spontaneous and contemporaneous statements: N.J.R.E. 803(c)(1) and (2) N.J. Prac. Series The N.J.R.E. 803 series of exceptions to the hearsay rule do not depend on the declarant's availability. N.J.R.E. 803(c)(1), "Present sense impression" provides that a statement...	2017	Other Secondary Source	—	6 8 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	56. 47 N.J. Prac. Series s 39:4, Rehabilitating the witness N.J. Prac. Series N.J.R.E. 607, which replaced former Rule 20, states: Except as otherwise provided by N.J.R.E. 405 and 608, for the purpose of impairing or supporting the credibility of a witness,...	2017	Other Secondary Source	—	13 A.2d
—	57. Substantive Criminal Law s 6.2, Omission to act For criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty. As we have seen, some criminal...	2017	Other Secondary Source	—	—
—	58. CJS Homicide s 37, Omission or neglect to perform legal duty resulting in death CJS Homicide The omission or neglect to perform a legal duty resulting in death may constitute murder where the omission was willful, and there was deliberate intent to cause death. In a murder...	2017	Other Secondary Source	—	16 A.2d
—	59. CJS Homicide s 137, Generally CJS Homicide A charge of manslaughter may be predicated on a failure to act as well as on an act, that is to say, a failure to perform a legal duty may form a basis for involuntary...	2017	Other Secondary Source	—	16 A.2d
—	60. CJS Homicide s 138, Neglect of children or other helpless and dependent persons CJS Homicide The rule that it may be manslaughter to omit to perform a legal duty has frequently been applied in cases of failure on the part of parents or others charged with the custody and...	2017	Other Secondary Source	—	—
—	61. THE REIGN OF THE QUEEN OF HEARTS: THE DECLINING SIGNIFICANCE OF THE PRESUMPTION OF INNOCENCE - A BRIEF COMMENTARY 37 Clev. St. L. Rev. 393 , 415 I. THE DEVELOPMENT OF THE PRESUMPTION OF INNOCENCE. 395 II. LOSS OF LIBERTY/ LOSS OF INNOCENCE. 399 III. LOSS OF INNOCENCE/LOSS OF PROPERTY. 404 IV. THE PRESUMPTION OF INNOCENCE AND...	1989	Law Review	—	18 A.2d
—	62. VIDEOTAPED WILLS: AN EVIDENTIARY TOOL OR A WRITTEN WILL SUBSTITUTE? 77 Iowa L. Rev. 1187 , 1216 The law, founded on stare decisis and cloaked in customs, changes slowly. New ideas and techniques are often viewed with skepticism and doubt. Older attorneys often shy away from...	1992	Law Review	—	8 A.2d