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Date: September 18, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1607-22T5

STATE OF NEW JERSEY,		CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior
v.	:	Court of New Jersey, Law
	:	Division, Middlesex County
ROBERT C. MCGRANAHAN,	:	Ind. No. 13-06-0874
	:	
Defendant-Appellant.	:	
	:	Sat Below:
	:	Hon. Andrea G. Carter, J.S.C.,
	:	and a jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY

The Middlesex County Grand Jury returned Indictment 13-06-0874 charging defendant Robert McGranahan with: purposeful or knowing murder, contrary to N.J.S.A. 2C:11-3a(1) or N.J.S.A. 2C:11-3a(2) (Count One); and third-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4d (Count Two). (Da 1)[1]

Defendant was acquitted of murder at his first trial in 2017, before the Honorable Dennis Nieves, J.S.C. and a jury, and convicted at that trial of both aggravated manslaughter and of Count Two, and sentenced to serve 25 years in prison, 85% without parole, for aggravated manslaughter with a concurrent term of four years on Count Two. (Da 2 to 4) But this Court reversed those convictions for instructional error in an opinion dated February 27, 2020. (Da 5 to 31) After retrial for aggravated manslaughter and for Count Two, in April and May 2022 before the Honorable Andrea G. Carter, J.S.C. and a jury, defendant was convicted of both of those charges. (Da 32 to 33)

On December 14, 2022, after various mergers, Judge Carter sentenced defendant to serve the same sentence that he received after the first trial -- a 25-year/85%-without-parole sentence for aggravated manslaughter, and a four-year concurrent sentence on Count Two. (Da 34 to 36) Defendant was also ordered

[1] Da – defendant's appendix to this brief
PSR – presentence report

to pay the usual fees and penalties. (Da 34 to 36)

On February 2, 2023, defendant filed his notice of appeal. (Da 37 to 40)

STATEMENT OF FACTS

Defendant was tried for murder, resulting in convictions for aggravated manslaughter and possession of a weapon for an unlawful purpose, for causing the death of Edward Demko. Then, defendant's convictions were reversed by this court (Da 5 to 31), after which he was tried again for those two offenses and convicted again. The defense at trial was self-defense, and, as discussed in detail in Point I, infra, the trial judge denied a defense request for the jury to be instructed on passion/provocation manslaughter. The State presented the following evidence at trial.

Sayreville Police Department communications operator Brian Tierney testified that at 2:37 a.m. on March 9, 2013, the 911 system received two calls from a landline on Giera Court – one call "abandoned" and one where the caller said only, "I just" -- and Tierney dispatched emergency vehicles to that address. (1T 78-13 to 82-7) Patrolman David Wilkins testified that he was dispatched to 29 Giera Court, part of a "townhouse complex," and that when he received no answer when he knocked on the "wide open" door, he went inside, announced his presence, and began to look around. (2T 20-14 to 19; 2T 27-27 to 25) There was a substantial amount of blood through much of the first two floors of the three-floor residence, which were in a state of disarray, and a TV was playing loudly. (2T 31-16 to 34-9; 2T 37-5 to 39-7; 2T 55-22 to 56-7) On the second floor, Wilkins found the body of Edward Demko, on the floor in a "hall area"

between the kitchen, living room, and dining room. (2T 45-22 to 46-3) Demko was holding a beeping phone in his right hand and a kitchen knife with an eight-inch blade in his left. (2T 47-16 to 19; 4T 63-15 to 18) Demko had no pulse and was not breathing. (2T 49-13 to 15) It did not look to Wilkins like the body had been moved, or that anyone had made an effort to clean up. (2T 61-11 to 16) Demko had blood on the bottom of his socks as if he had been walking around the residence during or after the struggle. (2T 56-14 to 23)

Dr. Andrew Falzon, the medical examiner, testified that Demko died from two stab wounds, one to the chest and one to the back. (4T 39-15 to 16) The wound to the chest was six inches deep and could have been an independent cause of death. (4T 49-14 to 16; 4T 45-21 to 23) The wound to the back was 2.75 inches deep, and also could have caused death by itself. (4T 51-10 to 52-5) The knife found in Demko's hand was capable of causing either of those wounds, Falzon testified. (4T 44-8 to 9; 4T 50-23 to 25) Falzon also described Demko as having 12 total incised "defensive wounds" on his hands. (4T 53-4 to 6; 4T 58-25 to 59-2) He agreed, however, that a person with defensive wounds could still have been the first aggressor in a confrontation. (4T 71-10 to 15) Falzon testified that Demko was 63 years old, 71" tall and weighed 185 pounds at the time of death, and Falzon agreed that Demko's heart disease would not have prevented him from grabbing or using a knife. (4T 61-7 to 8; 4T 78-20 to 24)

Lieutenant Ronald Nitto testified that at about 5 a.m. on March 9, 2013, defendant and his father, Richard McGranahan, walked into the Old Bridge Police Department. (1T 86-21 to 88-12) Defendant had blood on his face and elsewhere and, according to Nitto, he "looked extremely cold, and almost like he was in some sort of state of shock or something." (1T 88-17 to 20) Defendant "was eventually taken to the hospital," but first defendant told Nitto that he had "met a man online" and had gone to the man's house, where they had consensual sex. (1T 89-24 to 91-4) But then after they had drinks and watched a movie, the man wanted to have sex again, but defendant refused. (1T 91-4 to 7; 1T 106-13 to 112-16) Nitto claimed defendant told him that "they had some sort of fight or altercation after that" but Nitto alleged that defendant said nothing about getting attacked with a knife or stabbing anyone. (1T 91-7 to 17) Nitto claimed that he saw no injuries on defendant that would account for the amount of blood on him. (1T 95-5 to 11)

Nitto testified that it was "very cold" that night and that, while defendant wore a sweatshirt at the time he walked into the police station, defendant's father said that defendant had been shirtless outside in the cold and that the father had given him that sweatshirt to wear before they went to the police station. (1T 100-21 to 101-6) It did not look to Nitto like defendant had tried to clean up either himself or his clothing. (1T 100-3 to 20) Nitto claimed that at the hospital defendant told a nurse, "I had a knife. I think I might have stabbed him." (1T

99-1 to 4)

Detective James Napp testified that, at the hospital, defendant had a "large amount of blood covering his, you know, a good portion of his face, his hands, and his feet." (2T 103-15 to 16) Napp saw no injuries on defendant "that would equate to that amount of blood" (2T 107-17 to 22), but he admitted that defendant had incised wounds on his hands that could have come from a knife (i.e., defensive wounds) (2T 189-1 to 24), and that defendant also had "big scratches" on his back that looked "fresh." (2T 190-3 to 14) Yet, Napp admitted, no effort was made to test for DNA under Edward Demko's fingernails to see if it matched defendant. (2T 191-10 to 14) Napp also agreed that defendant appeared to cooperate in the police investigation, consenting to a search of his bedroom at his home and to photos at the hospital. (2T 182-17 to 183-15) Defense counsel, in cross-examination, also stressed the many bloodstains in many different places in Demko's apartment -- to demonstrate the extent of the struggle that went on -- and the fact that the police never swabbed many of them for DNA. (2T 187-14 to 188-13; 2T 191-17 to 194-19) Napp also admitted that none of the knives in the kitchen contained defendant's fingerprints. (2T 199-1 to 24)

Florian Almendares, a nurse at the hospital, testified that she spoke to defendant twice. The first time, he told her that "he was assaulted by his partner," but that no weapon was involved. (4T 11-7 to 16) The second time,

defendant said he was hit "with fists" (i.e., plural),[2] and that he then "struggled with" his partner, whereupon defendant realized that man had a knife. (4T 12-3 to 5) Defendant told Almendares that they then "struggled" further, and defendant "got hold of the knife" and "stabbed" the man. (4T 12-5 to 7) When defendant was brought to the hospital, Almendares agreed, his body temperature was "low," and he was "shivering." (4T 22-1 to 4)

Detective Rajesh Chopra testified that when he canvassed the neighborhood around Giera Court, he "did not find anything" evidential to the case. (2T 85-3 to 5) Allison Lane, a forensic scientist with the New Jersey State Police (NJSP), testified that rectal swabs taken from defendant were positive for sperm cells, but that no rectal swabs were taken from Edward Demko. (3T 18-8 to 9; 3T 27-16 to 24) Lane further testified that no knife was submitted for testing, and neither were swabs taken of defendant's belt buckle, nor from the linens from Demko's bedroom. (3T 24-24 to 26-22; 3T 28-22 to 29-4) Christopher Szymkowiak, another forensic scientist with the NJSP, testified that: DNA found on defendant's left hand is a mix of defendant's and Edward Demko's (3T 40-7 to 19); DNA from defendant's jeans is from Demko (3T 44-25 to 45-2); and DNA from defendant's rectal swab is Demko's. (3T 46-21 to 23) Szymkowiak testified further that another sample from the same jeans

[2] Almendares also said at another point that defendant said he was hit by "a fist." (4T 12-1 to 2)

allowed no conclusion as to Demko, but was positive for defendant as a contributor to a mixed DNA profile. (3T 46-21 to 23)

Three friends of defendant -- two ex-girlfriends and one male friend -- testified that defendant called and texted them in the early morning hours of March 9, 2013, begging for a ride. Shanna Bernhard claimed that defendant said he had been "stabbed," and she testified that he sounded "frantic," but that did not stop her from hanging up on him. (2T 67-18 to 68-6) Kaitlyn Sullivan testified that defendant told her he was "hurt" and needed a ride, but she told him she was in bed, asleep, and she did not help him. (2T 209-4 to 212-24) Timothy Hudson similarly refused to assist defendant, and claimed that defendant said he "had gotten attacked," was "shirtless," hiding under a tree, and "freezing" in the cold, and "may have stabbed somebody." (2T 219-16 to 220-11) Hudson also agreed that defendant told him he had "some type of sexual encounter" with the man who later attacked him, which embarrassed defendant, and that the attack came while they were watching the movie "Spartacus." (2T 222-15 to 22)

Joseph Demko, Edward Demko's brother (hereinafter "Joseph" to avoid confusion), testified that about 18 months prior to his brother's death, his brother's longtime male companion passed away. (3T 79-9 to 81-4) Edward Demko was depressed over his companion's death, Joseph testified. (3T 90-25 to 91-2) However, Joseph was unaware that his brother was engaging in online

dating and meeting men for "hookup" sex. (3T 85-11 to 87-6) Joseph testified further that Edward Demko "wasn't in the best of shape" from a car accident, and had some mobility issues, but he also agreed that, despite being blind in one eye, his brother regularly drove a car. (3T 82-13 to 83-22; 3T 89-11 to 13)

Dr. Kent Lerner, an orthopedic surgeon, testified that Edward Demko was in a motor-vehicle accident in 2012 that caused him to seek out Lerner for relief from pain in his neck and shoulder. (3T 106-17 to 107-15) Demko also had a coronary-artery bypass surgery in 1993 and an abdominal aortic aneurysm at some other unspecified time. (3T 108-6 to 9) Demko had no neurological issues but did have restriction in rotating his neck because of injury to his cervical spine. (3T 110-6 to 20) He was right-handed but had some impingement in his left shoulder as well. (3T 109-17 to 19; 3T 110-21 to 111-21) However, Lerner admitted that Demko could ride a bicycle, and would have been able to reach and grab a weapon with his right hand. (3T 117-19 to 118-15) He could also grab something with his left hand and hold onto it, according to Lerner. (3T 118-18 to 23)

The defense called a few witnesses, as follows. Eric Wagg, a forensic computer examiner for the State, testified that while he examined computers from both defendant and Demko, he found no evidence that defendant was planning to kill Demko and found no communication between the two. (4T 110-17 to 111-6) All he could tell was that the two men had both frequented a website

called Adam for Adam. (4T 111-1 to 3)

Lt. James Napp was called to again identify marks on defendant's back that were found at the hospital as "fresh" marks. (5T 6-11 to 7-15) Officer Gregory Goy testified that at the hospital defendant told him that he had been assaulted by his partner. (5T 48-14 to 16; 5T 49-11 to 15) Defendant at the time was "shirtless" and "cold," according to Goy, and "he was shaking and his teeth were chattering." (5T 48-21 to 49-10) Goy also agreed that he had been subpoenaed by the State to be a witness on the first day of trial, but then was never called -- the implication being that the prosecution liked Lt. Napp's version of defendant's statements at the hospital better than Goy's. (5T 57-13 to 15)

Finally, defendant's father, Richard McGranahan (hereinafter "Richard" to avoid confusion), testified that, after receiving a call from defendant's mother on March 9, 2013, he spoke to defendant on the phone and picked him up in a wooded area about ten minutes away. (5T 60-3 to 63-14) It was "about 28 degrees" and snowing at the time, Richard testified, and defendant emerged from the woods without a shirt on and "very sluggish" as if in shock. (5T 63-19 to 64-2) Defendant was "a little out of it," and had already told Richard that he had been assaulted. (5T 64-2 to 13) When Richard realized defendant had blood on him, he suggested that they go to the Old Bridge police station, which they did. (5T 64-23 to 65-12)

LEGAL ARGUMENT

POINT I

THE JUDGE COMMITTED REVERSIBLE ERROR WHEN SHE DENIED THE DEFENDANT'S REQUEST FOR A JURY INSTRUCTION ON THE LESSER-INCLUDED HOMICIDE OFFENSE OF PASSION/PROVOCATION MANSLAUGHTER. (RULING AT 5T 115-18 TO 118-24)

Because the evidence in the case -- when viewed in a light best for the defense -- clearly supported a claim of self-defense, N.J.S.A. 2C:3-4, because defendant claimed that Edward Demko attacked him with fists and a knife, the judge instructed the jury on self-defense as a means to an acquittal of any homicide charge. (6T 129-1 to 134-7) But, in direct conflict with a wealth of case law that makes it clear that passion/provocation manslaughter often presents a viable middle-ground lesser-included-offense option between a guilty verdict for a greater homicide offense and an acquittal on self-defense grounds, and must be charged -- if requested and if the evidence in the case presents a mere "rational basis" for a conviction of that lesser offense -- the judge refused a defense request to instruct the jury on the lesser-included offense of passion/provocation manslaughter. (5T 115-18 to 118-24) Because it was clearly error to deny such a request, defendant's conviction for aggravated manslaughter must be reversed and that count remanded for retrial. Defendant's

rights to due process and a fair trial under the Fourteenth Amendment and the corresponding provisions of the state constitution were violated by the refusal to instruct the jury on a rationally supported lesser-included homicide offense.

When a lesser-included offense is requested, as it was here, the standard of review regarding the denial of that request is a plenary consideration by the appellate court of whether "the evidence presents a rational basis on which the jury could acquit the defendant of the greater charge and convict the defendant of the lesser." State v. Brent, 137 N.J. 107, 117 (1994). When the request is made, "the trial court is obligated, in view of the defendant's interest, to examine the record thoroughly to determine if there is a rational basis in the evidence for finding that the defendant was not guilty of the higher offense charged but that the defendant was guilty of a lesser-included offense." State v. Sloane, 111 N.J. 293, 299 (1988). The "rational-basis test imposes a low threshold" for charging a lesser-included offense if the instruction is requested, State v. Crisantos, 102 N.J. 265, 278 (1986), and is met so long as "it would not be idle to have the jury decide whether the defendant had committed the lesser-included offense." State v. Mauricio, 117 N.J. 402, 417-18 (1990) (emphasis in original; internal quotation marks omitted). The question is merely whether the evidence "leave[s] room for dispute." Id. at 415. While "sheer speculation does not constitute a rational basis," Brent, 137 N.J. at 118, the judge's duty to "examine the record thoroughly" under Sloane and Crisantos must necessarily recognize the time-

honored maxim from State v. Ernst, 32 N.J. 567, 583 (1960), that the jury is free to believe some, all, or none of the evidence presented to it because the "rational basis" test looks to all the evidence in the case, and evidence supporting a finding of a rational basis can come from anywhere in the record. State v. Blanks, 313 N.J. Super. 55, 69-70 (App. Div. 1998) (a rational basis for giving a jury instruction can come from any evidence in the case, including entirely from the State's case). Moreover, the passion/provocation manslaughter instruction, if requested and supported by the evidence, must be given "regardless of whether the charge [of passion/provocation] is consistent with the defense." State v. Carrero, 229 N.J. 118, 121 (2017) (emphasis added), citing Brent, 137 N.J. at 118. In the Third Circuit, the failure to charge an appropriate lesser-included offense is a violation of the constitutional guarantee of due process. Vujosevic v. Rafferty, 844 F.2d 1023, 1027-1028 (3rd Cir. 1988).

Moreover, the "rational basis" standard for charging the lesser-included offense if it is requested by counsel, as it was here, is significantly lower than the standard if it is not requested. Carrero, 229 N.J. at 127-128; State v. Thomas, 187 N.J. 119, 132 (2006). In the absence of a request, the basis for charging the lesser must be "clearly indicated" from the record and the trial judge is not under the same duty "meticulously to sift" through the record to see if any aspect of the evidence supports the instruction. Id.; State v. Choice, 98 N.J. 295, 299 (1985). Indeed, if not requested, the need for the instruction must be "jumping

off the page" of the record for its absence to be reversible error. State v. Funderburg, 225 N.J. 66, 81-82 (2016), quoting State v. Denofa, 187 N.J. 24, 42 (2016); see also State v. Canfield, 252 N.J. 497, 501 (2023) (comparing and contrasting the two standards). Obviously, with the defense request for the instruction here, the plenary review of the judge's decision in this case must be under the mere "rational basis" standard of Brent, Carrero, and Sloane.

A passion/provocation manslaughter is a murder committed in the heat of passion in response to a provocation. N.J.S.A. 2C:11-4b(2). Passion/provocation manslaughter is a lesser-included offense of murder[3] and has four elements

[3] While aggravated manslaughter is not itself mitigated by passion/provocation, see State v. Grunow, 102 N.J. 133, 136-144 (1986); State v. Galicia, 210 N.J. 364, 380-383 (2012), the question of whether to instruct a jury on passion/provocation manslaughter at a retrial of a case that (1) began as a murder prosecution, (2) contained a passion/provocation instruction at the first trial, (3) resulted in an aggravated-manslaughter conviction at that first trial, but then (4) was reversed and remanded for retrial, is governed by Grunow -- which makes it clear that at the retrial on aggravated manslaughter, passion/provocation manslaughter should be instructed, if it is requested and supported by the evidence. 102 N.J. at 149. Here, defendant was originally indicted and tried for murder, as noted. He was convicted of aggravated manslaughter in a trial that contained instructional error that resulted in a reversal of that conviction and a remand for retrial. Plainly, Grunow requires that in such an instance passion/provocation manslaughter should still be instructed to the jury at the retrial for aggravated manslaughter. Id. Notably, here, when the judge raised the issue of whether Galicia or Grunow might somehow dictate that passion/provocation should not be instructed at the retrial, she did so believing that passion/provocation had not been instructed at the original murder trial (where she was not the judge). (5T 100-7 to 23) Almost immediately, both trial defense counsel and the prosecutor corrected the judge and informed her that

under Mauricio, 117 N.J. at 411: (1) reasonable, adequate provocation; (2) a lack of cooling-off time; (3) a defendant who, in fact, was provoked to kill; and (4) a defendant who, in fact, did not "cool off" before killing. The first two elements are objective and, if the lesser offense is requested and there is a rational basis for finding them in the evidence (or, if there is no request and the basis for finding them is clearly indicated from the evidence), the trial judge should instruct the jury on passion/provocation manslaughter, leaving the decision on the last two subjective elements "for the jury." State v. Robinson, 136 N.J. 476, 491 (1994), quoting Mauricio, supra, 117 N.J. at 413.

The Supreme Court has said that the right to have the jury consider a lesser-included offense is at "the very core of the guarantee of a fair trial," State v. Short, 131 N.J. 47, 52 (1993). In addition, the Court has recognized that a passion/provocation charge can be an appropriate complement to an instruction on self-defense. It has explained that where, as here, a jury rejects self-defense, it might well find that the decedent's conduct nevertheless constituted adequate provocation to satisfy the lesser passion/provocation-manslaughter offense. See State v. Bowens, 108 N.J. 622, 634, 641 (1987) (where jury finds "shooting to

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passion/provocation had been instructed at the first trial. (5T 101-6 to 12) The judge then immediately (and correctly) abandoned that line of reasoning/inquiry and moved on to the question of whether the evidence contained a rational basis for an instruction on passion/provocation manslaughter. As argued here in this point, she then resolved that latter question erroneously. (5T 115-18 to 118-24)

kill an unarmed attacker who has fallen to the ground" was not self-defense, it may find passion/provocation). Indeed, in Carrero, the Court upheld the reversal of a murder conviction for just that reason, in circumstances very close to the instant matter. In that case, the defense was self-defense, but the trial judge improperly refused a request to charge passion/provocation manslaughter, and the Court held that the jury could have returned a passion/provocation-manslaughter verdict under either of two theories: (1) that the decedent drew a gun, after which there was a tussle over the gun and the defendant shot the decedent, or (2) that there simply was "a physical struggle" between the two men and defendant over-responded to that struggle -- which itself constituted a "battery" -- and shot the decedent. 229 N.J. at 130-131.

The decision in Carrero follows a long line of precedent in that regard. In New Jersey, mutual combat or any "battery, except for a light blow, has traditionally been considered, almost as a matter of law, to be sufficiently provocative" to reduce murder to passion/provocation manslaughter. Mauricio, 117 N.J. at 414; see also Robinson, 136 N.J. at 492. Essentially any type of fighting situation, whether initially mutual or not, that is "started" by the eventual decedent, can result in a passion/provocation manslaughter rather than a murder, and, thus, the offense must be instructed to a jury where there is such evidence. Bowens, 108 N.J. at 641 (imperfect self-defense, or "over"-defending oneself, is not an independent or standalone defense, but it is a rational basis for

charging passion/provocation manslaughter); Blanks, 313 N.J. Super. at 72 (App. Div. 1998) (defendant who may have overreacted -- with a gun against an unarmed victim -- in self-defense to a punch warranted passion/provocation instruction); State v. Castagna, 376 N.J. Super. 323, 358-359 (App. Div.), certif. den. sub nom State v. Morales, 185 N.J. 36 (2005) (overreaction -- by dropping a heavy stone onto the head of the unarmed victim -- in defense of another who was merely punched warranted passion/provocation instruction). Robinson, 136 N.J. at 492 (defendant shot an unarmed person who punched him; attempted passion/provocation clearly indicated as a lesser offense); State v. Coyle, 119 N.J. 194, 224 (1990) (defendant pursued abusive husband of defendant's girlfriend down a street and repeatedly shot the unarmed husband to protect the girlfriend from him; passion/provocation manslaughter properly charged to the jury).

Here -- just like in Carrero -- if the jury rejected self-defense, the evidence provided a rational basis for giving the instruction on passion/provocation manslaughter as a lesser-included offense. The evidence -- from the State's case -- provided a rational basis for the jury to conclude any of the following: (1) after defendant and Demko had sex, they had drinks and watched a movie, and Demko wanted to have sex again, but defendant refused (1T 91-4 to 7; 1T 106-13 to 112-16); (2) Demko then "attacked" defendant "with fists" and the two men then "struggled," whereupon defendant realized that Demko was

brandishing a knife. (2T 219-16; 2T 222-20 to 22; 4T 12-3 to 5); (3) they then "struggled" further, and defendant "got hold of the knife" and "stabbed" Demko. (4T 12-5 to 7)

As in Carrero, there were two reasons -- independently or together -- to charge passion/provocation manslaughter. First, the evidence showed that the decedent drew a weapon. 229 N.J. at 130-131. Secondly, even if the jury believed that defendant grabbed the weapon from a counter, or elsewhere, rather than from Demko's hand, the second Carrero rationale would have nevertheless applied: that Demko committed a battery against defendant, to which defendant over-responded in self-defense and stabbed Demko. 229 N.J. at 130-131. As the Carrero Court noted, battery -- via a "physical struggle" as in Carrero, or via a punch or other infliction of injury, like in Robinson, 136 N.J. at 492; Blanks, 313 N.J. Super. at 72; Mauricio, 117 N.J. at 414; and Castagna, 376 N.J. Super. at 358-359 -- may constitute adequate provocation to allow the jury to reduce murder to passion/provocation manslaughter even when the defendant uses a deadly weapon and the decedent is unarmed. Carrero, 229 N.J. at 130-131.

As noted, while Blanks, Robinson, and Castagna all involved plain-error reversals for the failure to charge passion/provocation under the much tougher "clearly indicated" appellate standard of Funderburg and Canfield, the instant case, like Mauricio and Carrero, involves the mere "rational basis" test: does the evidence "leave room for dispute," in the words of Mauricio, 117 N.J. at 415,

for the jury on the issue of passion/provocation? Of course it does. The jury easily could have rejected self-defense, but had at least a reasonable doubt that the State nevertheless did not disprove passion/provocation. See State v. Grunow, 102 N.J. 133, 145 (1986) (assigning the burden of disproving passion/provocation to the State). There was ample evidence, from the State's case, that defendant was attacked by the decedent, whether the decedent was armed or not, and that the defendant immediately over-responded by arming himself and stabbing the decedent. Both of the objective prongs of the Mauricio test were met, and, thus, as in Carrero, the lesser-included-offense instruction on passion/provocation manslaughter should have been given, and the two subjective elements left for the jury to decide. 229 N.J. at 129, citing Mauricio, 117 N.J. at 413.

Notably, the judge, in denying the requested instruction, seems to have completely ignored both the minimal nature of the "rational basis" standard, as well as the fact that the burden of disproving passion/provocation is on the State. She questioned whether the evidence of Demko's attack on defendant only went to the issue of self-defense, rather than also passion/provocation (5T 92-23 to 24) -- a hard-to-understand interrogatory if one has even a basic familiarity with the main cases on passion/provocation, discussed in this point, that make clear that it is often the same exact evidence in a case that bears upon self-defense and passion/provocation. Moreover, when considering the "failure to cool off"

prong of the Mauricio test, the judge stated that she could not find any definitive evidence to influence the jury on the issue one way or the other (5T 118-18 to 20) -- a statement that ignores the fact that if the matter of "cooling off" is truly in doubt, it is the State, not the defendant that has failed in its burden of proof. See Grunow, 102 N.J. at 145. As in Carrero, there was plenty of evidence before the jury that could allow a juror to at least have a reasonable doubt about whether the State had disproved that defendant responded to a reasonable provocation (a physical attack and/or the brandishing of a weapon) with a near-immediate stabbing of the decedent. That is all that is required to charge passion/provocation manslaughter when requested. Defendant's aggravated-manslaughter conviction should be reversed and that count remanded for retrial.

POINT II

THE JURY INSTRUCTIONS AND VERDICT SHEET REPEATEDLY ERRONEOUSLY TOLD THE JURY TO CONVICT DEFENDANT OF HOMICIDE IF, AFTER CONSIDERATION OF ALL THE EVIDENCE IN THE CASE, THE JURY MERELY BELIEVED THAT ALL OF THE ORDINARY ELEMENTS OF THE HOMICIDE CRIMES WERE PROVEN BY THE STATE BEYOND A REASONABLE DOUBT -- A CLEAR ERROR IN A CASE WHERE SELF-DEFENSE IS AT ISSUE (NOT RAISED BELOW).

Because defendant alleged that he was defending himself against an attack by the eventual decedent, the defense in the case was self-defense (1T 36-10 to 17; 6T 53-2). Yet, even though the law is clear that, in a case where self-defense is the defense -- in addition to proving all the ordinary elements of the crime beyond a reasonable doubt -- the State must also disprove self-defense beyond a reasonable doubt in order to get a guilty verdict, State v. Kelly, 97 N.J. 178, 200 (1984); State v. Martinez, 229 N.J. Super. 593, 600 (App. Div. 1989), the jury instructions told the jurors repeatedly that they must return a guilty verdict if they found merely that the State proved the ordinary statutory elements of the homicide crimes beyond a reasonable doubt, with no mention of the role of self-defense. (6T 124-21 to 125-2; 6T 126-19 to 24; 6T 127-7 to 128-17) Then the verdict sheet did nothing to clear up that error, instructing the jury to return a guilty or not guilty verdict based solely on whether the State proved those

ordinary elements. (Da 32) Later explanations in the jury instruction of the doctrine of self-defense also did nothing to correct those prior errors; rather, they merely, on occasion, contradicted them, leaving the jury without a clear explanation of when it would be appropriate to convict defendant of a homicide offense. Defendant urges that this fundamental error on such a critical point of law was plain error, clearly capable of affecting the verdict, and that the error thereby deprived him of due process and a fair trial under the Fourteenth Amendment and under the corresponding provisions of the state constitution, requiring a reversal of his aggravated-manslaughter conviction and a remand for retrial.

The jury instructions on the substantive homicide crimes were remarkably consistent in telling the jurors that they must return a guilty verdict if merely the ordinary elements of the crime were proven by the State beyond a reasonable doubt. For instance, with regard to all of the crimes, the jurors were incorrectly told that the "specific criminal statute" that the defendant was charged with violating, "read together with the indictment identifies the elements which the State must prove beyond a reasonable doubt to establish the guilt of the defendant on each of the counts of the indictments" with no mention of the State's duty to also disprove self-defense before "guilt" is "established." (6T 123-25 to 124-4) (emphasis added). Similarly, again, with respect to all charged crimes, the jury was incorrectly told that the presumption of innocence

disappears merely if the State has proven those ordinary elements of the crimes, again with no reference to the State's duty to disprove self-defense as well. (6T 114-7 to 11) Then, specifically with regard to aggravated manslaughter, the jurors were told:

> In order for you to find the defendant guilty, the State is required to prove each of the following elements beyond a reasonable doubt: [listing just the three ordinary elements, i.e., causing death, recklessly, under circumstances manifesting extreme indifference to life]. (6T 124-21 to 125-2) (emphasis added)
>
> * * * *
>
> If after consideration of all of the evidence you are convinced beyond a reasonable doubt that the defendant recklessly caused Edward's -- Edward Demko's -- death under circumstances manifesting extreme indifference to human life, then your verdict must be guilty of aggravated manslaughter. (6T 126-19 to 24) (emphasis added)

The jury was then given similar instructions regarding the lesser-included offense of reckless manslaughter. (6T 127-7 to 128-17) Then the verdict sheet framed the Guilty/Not Guilty interrogatory this way, again emphasizing only the ordinary elements of the crime, just as the substantive instruction had:

> AGGRAVATED MANSLAUGHTER
>
> Count One of the Indictment charges that on or about March 9, 2013, in the Township of Sayreville, County of Middlesex, Defendant Robert McGranahan did recklessly cause the death of Edward Demko under circumstances manifesting extreme indifference to human life.
>
> Our verdict is:

NOT GUILTY _____ GUILTY _____

(Da 32)

Thus, the jury was told, over and over, to convict defendant of aggravated or reckless manslaughter if jurors merely found the ordinary elements of those homicide crimes, but obviously those instructions were dead wrong. They omitted the fact that the State also bore the burden of disproving self-defense. Kelly, 97 N.J. at 200. It is simply not true that the jury's "verdict must be guilty" if those ordinary elements are found beyond a reasonable doubt. Yet that is what jurors were told, a number of times.

The State is sure to note that, after being consistently told the incorrect law in that regard, the jurors were then instructed -- in complete contradiction to what they had been told all along thus far -- that "self-defense is a complete defense to aggravated manslaughter," that "it's [also] a complete defense to reckless manslaughter," and that the State bears the burden of disproving self-defense. (6T 129-1 to 6). Never, however, were they told how to reconcile those completely contradictory commands.

And therein lies the problem. The instruction on the whole is 100% contradictory. Did jurors vote to convict defendant because they found merely that the State had proven the ordinary elements of aggravated manslaughter? As noted, the instruction said numerous times that indeed they should; they "must" do so. Or, did jurors follow the later instruction on self-defense that sets forth

the State's obligations to disprove self-defense? The simple answer is that we have no idea which instructions they followed. All we can know is that they could not logically have followed both commands because those commands could not be more at odds.

It is a fundamental maxim of appellate law that contradictory jury instructions cannot withstand appellate scrutiny because it is impossible to know which instruction the jury followed. State v. Moore, 122 N.J. 420, 433 (1991); State v. Oglesby, 122 N.J. 522, 530 (1991); Francis v. Franklin, 471 U.S. 307, 323 n.8, 105 S.Ct. 1965, 1975 n.8 (1985). There is no more obvious application of that principle than here. These instructions were utterly contradictory: on one hand, the jury must convict if only the ordinary elements of aggravated manslaughter are proven; on the other, self-defense is a "complete" defense to aggravated manslaughter that the State must disprove. That latter instruction did not purport to "correct" the erroneous ones; rather it just contradicted them. Thus, in keeping with Moore, Oglesby, and Francis v. Franklin, reversal is required in such a situation when the error in question goes to such a fundamental matter. See also State v. McKinney, 223 N.J. 475, 495 (2015) ("An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions"; reversing convictions for plain errors in robbery instruction), quoting State v. Afanador, 151 N.J. 41, 54 (1997); State v. Concepcion, 111 N.J. 373, 379 (1988) (manslaughter conviction reversed when

explanation of "recklessness," which was pivotal in that case, did not explain completely); State v. Rhett, 127 N.J. 3, 5-7 (1992) (proper instructions are essential to a defendant's right to a fair trial and critical errors in jury instructions warrant reversal even when not objected to at trial); State v. Weeks, 107 N.J. 396, 410 (1987) ("[i]ncorrect instructions of law are poor candidates for rehabilitation under the harmless-error theory"). The instructions on what would need to be found in order to convict defendant of aggravated manslaughter failed to clearly and consistently convey the law to the jury, and, hence, with self-defense as the main defense in the case, that error plainly warrants a reversal of defendant's convictions and a remand for a retrial.

Indeed, the error here is a close "cousin" -- so to speak -- of the very same error that resulted in the reversal of defendant's convictions the first time. In that decision (Da 24 to 28), this Court reversed because the jury was not told that self-defense is a defense to manslaughter offenses. See State v. Gentry, 439 N.J. Super. 57, 67 (App. Div. 2015); State v. Supreme Life, 473 N.J. Super. 165, 177 (App. Div. 2022); and State v. Rodriguez, 195 N.J. 165, 169 (2008). Here, the jurors were not told that same fact either until they had been told over and over the exact opposite: that they must convict defendant of aggravated manslaughter as long as the State proved that defendant killed recklessly under circumstances manifesting extreme indifference to life. The later contradictory instruction, as noted, did not purport to correct all the prior errors. Rather it just

contradicted them. Which instruction did the jury follow, the right one or all the wrong ones? Oglesby and Moore tell this Court that there is no way to tell, and that reversal is mandated.

While there are obvious parallels, as noted, between New Jersey decisions on the topic, at least one out-of-state case is directly on point. In State v. Culkin, 35 P.2d 233, 245-246 (Haw. 2001), the Supreme Court of Hawaii found the very type of "must convict" command of the instant aggravated-manslaughter instruction to be reversible error in a manslaughter case. In Culkin, the Court reversed specifically because the instruction ordered the jury to return a conviction based on a finding of the other elements of the crime, but without necessarily finding, or deliberating upon, the absence of self-defense -- despite a separate, correct explanation of self-defense in the jury instruction in that case. That Court held: "Particularly problematic is the circuit court's instruction that 'if the prosecution [proves beyond a reasonable doubt that Culkin recklessly caused the death of Thomas], then you must return a verdict of guilty of manslaughter based upon reckless conduct'" when, in fact, the case involved a claim of self-defense that the State also had to negate in order to return a conviction. Id. at 245 (emphasis added, but brackets in original). The fact that self-defense was properly explained elsewhere in the instruction did not impress the Hawaii Supreme Court in Culkin because that fact at best rendered the overall instruction completely contradictory -- with the manslaughter instruction

demanding ("you must return a verdict of guilty") that the jury convict if it merely found a reckless killing (with no mention of the need for a finding of the absence of self-defense) whereas the separate self-defense instruction was itself internally correct.

In other words, Culkin is precisely on-point to the issue before this court. The jury in that case was erroneously told that it "must" return a verdict of guilty for manslaughter if it found the defendant recklessly caused death, i.e., the ordinary elements of manslaughter -- with the only mention of the role of self-defense contained in a separate instruction –- and the same thing happened here when the judge told the jury it "must" convict defendant of aggravated manslaughter if it found the ordinary elements of that crime, with the only mention of self-defense contained in separate instructions divorced from the aggravated-manslaughter instruction.

Culkin recognizes that, as argued here, "the jurors confronted seemingly contradictory instructions. On one hand, the instructions appear to require the jurors to find Culkin guilty of reckless manslaughter if he recklessly caused the death of Thomas. On the other hand, the [self-defense] instructions advise [elsewhere] that self-defense is a defense to 'any and all offenses' brought against Culkin.'" Id. at 245-246 (emphasis added). Culkin adopts the very same legal analysis urged by defendant here and reaches the conclusion that telling a jury that it "must" convict if the jury finds all the non-self-defense elements of

a crime is harmful error that is not "cured" by even a correct explanation of self-defense principles elsewhere in the instruction.

Whether following Culkin, or simply recognizing the fully and completely contradictory instructions that the jury was given here as erroneous under the Oglesby/Moore rationale, in either event, the correct result on appeal should be clear: the jury was given incorrect instructions that had the clear capacity to affect deliberations on the main issue in the case, and thus, under R. 2:10-2, that error is "plain" -- clearly capable of producing an unjust result -- and the defendant's aggravated-manslaughter conviction must be reversed and that count remanded for retrial.

POINT III

THE JUDGE FAILED IN HER ROLE AS "GATEKEEPER" OF THE TRIAL WHEN SHE CONDUCTED AN INSUFFICIENT VOIR DIRE OF THE JURY WHEN IT BECAME CLEAR THAT A STATE WITNESS, THE BROTHER OF THE DECEDENT, HAD SPOKEN TO SOME JURORS FOR FIVE MINUTES DURING A BREAK FROM COURT. (RULING AT 7T 47-6 TO 49-10)

On May 2, 2022, after jury deliberation had begun, a juror reported that Joseph Demko -- a State witness and the brother of the decedent -- had approached some jurors during a break from trial and had a conversation with them. Ultimately, after voir dire of the jury, defense counsel moved for a mistrial (7T 45-20 to 47-5), and the trial denied the motion, finding nothing untoward had occurred. (7T 47-6 to 49-10) Because, in fact, the decision on that motion was informed by jury voir dire that was insufficient to deal with the issue, the judge failed in her role as "gatekeeper" of the trial, and defendant's Sixth Amendment right to an impartial jury, his Fourteenth Amendment right to due process, and his corresponding state-constitutional rights were all violated. Consequently, defendant's convictions should be reversed, and the matter remanded for retrial.

The issue arose as follows. The judge went on the record at 9:50 a.m. that day to inform counsel that Juror Nine had reported that she and others had been approached by Joseph Demko while outside on a cigarette break on Thursday

April 28, and both counsel and the judge agreed that it was appropriate to voir dire that juror to see what had happened. (7T 3-1 to 5-17) Juror Nine described a "five or six minute[]" conversation that occurred when Joseph approached her and "two or three other jurors": "He was standing there. . . . We were talking about food. We were all kind of talking, just small conversations. So, I don't remember specifically what he was saying, but he was engaging in the conversation." (7T 7-1 to 5) Juror Nine recalled specifically talking about "Boba tea" and that Joseph "responded to one of the things we were saying about the tea." (7T 7-6 to 10) Only after the conversation ended did Juror Nine and others realize that they had just had a conversation with a witness in the case. (7T 6-2 to 20) Juror Nine said she could still be impartial. (7T 9-1 to 3)

The remaining jurors, including alternates,[4] were also subject to voir dire. Jurors Five and Thirteen told a similar story to Juror Nine's account, because they were involved in that same conversation, and both said they could remain impartial. (7T 11-16 to 14-5; 7T 15-25 to 17-16) The rest of the jurors, with one exception, claimed to know nothing about any conversation with a person outside the jury. (7T 21-21 to 39-15) But that exception was noteworthy.

Juror Sixteen, a deliberating juror, said that he did not have any interactions with anyone affiliated with the case and did not "witness" any such

[4] The alternates were Jurors One, Three, Four, and Eleven.

interactions of any such person with other jurors (7T 40-1 to 9) But then he dropped a bomb; when asked if he had "been within earshot of any discussions from your fellow jurors about any interactions with anyone affiliated with the case," Juror Sixteen said: "Just in deliberations." (7T 40-10 to 13) (emphasis added) And that is where the judge failed to do her job. Instead of asking Juror Sixteen what was said by others, the judge asked a follow-up question that she called "very specific," but which was actually insufficient: "Have you had interactions with your fellow jurors about any interactions they have had with witnesses outside of -- with -- witnesses connected to this case?" (7T 40-20 to 23) (emphasis added). Juror Sixteen replied, "No," and, after defense counsel moved for a mistrial -- noting that Joseph Demko had by that point sat through two trials and knew exactly what he was doing, trying "to warm up to them out there" -- the judge denied the motion, ruling that the conversation was "innocent" and would not impact the verdict. (7T 40-24; 7T 45-20 to 47-5; 7T 47-6 to 49-10)

Both the Sixth and Fourteenth Amendments, as well as the corresponding provisions of the state constitution, guarantee a defendant the right to an impartial jury. Those "provisions ensure that everyone charged with a crime has an absolute constitutional right to a fair trial in an atmosphere of judicial calm, before an impartial judge and an unprejudiced jury." State v. Tyler, 176 N.J. 171, 181 (2003) (internal quotations and citation omitted). A "trial is poisoned .

. . if the jurors deciding the case cannot review the evidence dispassionately, though the light of reason." State v. Fortin, 178 N.J. 540, 575 (2004). For these reasons, a "defendant's right to be tried before an impartial jury is one of the most basic guarantees of a fair trial." State v. Loftin, 191 N.J. 172, 187 (2007).

Because of the importance of this constitutional right, trial judges "in their gatekeeping role have a duty to 'take all appropriate measures to ensure the fair and proper administration of a criminal trial.'" Tyler, 176 N.J. at 181, quoting State v. Williams, 93 N.J. 39, 62 (1983). The "trial court's duty is to give life to that constitutional principle by impaneling a jury that 'is as nearly impartial as the lot of humanity will admit.'" Loftin, 191 N.J. at 187, quoting State v. Jackson, 43 N.J. 148, 157-58 (1964), cert. denied, 379 U.S. 982 (1965). This "high responsibility is placed on trial judges because the jury selection process is an integral part of the fair trial procedures to which every defendant charged with criminal wrongdoing is guaranteed by both the federal and state constitutions." Tyler, 176 N.J. at 181. The trial court thus "has an independent duty to act swiftly and decisively to overcome" potential juror bias. Williams, 93 N.J. at 62-63; see also State v. Morgan, 217 N.J. 1, 11 (2013).

When there is "the possibility of actual juror taint or exposure to extraneous influences (including jury misconduct and 'comments made to jurors by outside sources'), the judge must voir dire that juror and, in appropriate circumstances, the remaining jurors." State v. Bisaccia, 319 N.J. Super. 1, 13

(App. Div. 1999) (emphasis added), quoting State v. Scherzer, 301 N.J. Super. 363, 486-491 (App. Div.), certif. denied, 151 N.J. 466 (1997); see also State v. Bey, 112 N.J. 45, 89-90 (1988) That voir dire procedure is well-settled: "An appropriate voir dire of a juror" regarding possible juror misconduct "should inquire into the specific nature" of the matter. State v. R.D., 169 N.J. 551, 560 (2001) (emphasis added). "Depending on the juror's answers to searching questions by the court, the court must then determine whether it is necessary to voir dire individually other jurors to ensure the impartiality of the jury." Id. (emphasis added). Moreover, the court's "determination" of the proper course of action "should be explained on the record to facilitate review under the abuse of discretion standard." Id. at 560-561 (emphasis added).

Here, the judge did some of what the case law requires of her regarding jury voir dire when confronted with possible outside influence on the jury, but she abdicated her duty completely in one respect: when the voir dire of Juror Sixteen revealed that jurors were discussing the encounter with Joseph Demko in deliberations, the judge did not follow up with appropriate further voir dire to find out what they were discussing. Instead, she asked only what she called "a very specific" question to which Juror Sixteen provided a "very specific" answer that told the court very little. The judge asked not what the other jurors were saying in deliberation about the encounter with a person from the trial, but, rather, only whether Juror Sixteen had "interactions" with those other jurors

about that topic. (7T 40-19 to 23)

In other words, Juror Sixteen told the trial judge something important that the judge had not heard from any other juror: that some jurors "in deliberations" were discussing "interactions with" someone "affiliated with the case," but the judge's followup response was not to ask what was said by those other jurors, but rather only if Juror Sixteen had such "interactions" on that topic in deliberations. There was nothing close to meeting the Bey/R.D./Bisaccia standard of "specific" inquiry into the allegation by Juror Sixteen that in fact jurors were discussing the encounter with Joseph Demko during deliberations. Instead, all the judge asked was whether Juror Sixteen was part of those discussions.

Bisaccia makes it clear that when it appears that there is the "possibility" of impropriety, failing to address those allegations through an appropriately specific voir dire will necessarily be reversible error. 319 N.J. Super. at 11-15, citing Scherzer, 301 N.J. Super. at 486-491; see also State v. Weiler, 211 N.J. Super. 602 (App. Div.), certif. denied, 107 N.J. 37 (1986) (reversing for inadequate voir dire). Whenever such an issue might affect the verdict, it is the job of the court to make the necessary inquiries of that juror, and, if necessary, others. R.D., 169 N.J. at 558; State v. Wormley, 305 N.J. Super. 57, 70 (App. Div. 1997). Without such voir dire, the judge has abdicated her responsibility and the possibility of impropriety is thus presumed to be prejudicial, requiring

reversal. Tyler, 176 N.J. at 181-183 (reversing convictions for improperly allowing a tainted juror merely to hear the case with other jurors even though she did not ultimately deliberate on it; because her presence may have influenced other jurors, prejudice was presumed).

Here the trial judge failed badly in her role as "gatekeeper" of the impartiality of the jury and the fairness of the trial. Tyler, 176 N.J. at 181. The need for more voir dire of at least Juror Sixteen was clear under the Bisaccia/R.D. standard, and, depending on what that juror's answers would be to further questioning, it is likely that the matter could not be properly ruled upon at all until after the entire jury was subject to more specific voir dire regarding whether any jurors were discussing the encounter with Joseph Demko in deliberations, as alleged by Juror Sixteen. Yet the judge failed to properly inquire further when she learned, for the first time, from Juror Sixteen that jurors were discussing, during deliberations, an "interaction" with someone not "affiliated with the case." Instead, she asked a question only about whether Juror Sixteen was involved in those discussions, not about what the content of those discussions was. In other words, the judge denied the mistrial motion based on utterly incomplete information from an utterly incomplete voir dire -- an obvious abuse of discretion. The judge had information that a State witness's encounter with jurors was being discussed in jury deliberation and did nothing to explore that specific allegation. Consequently, defendant's rights to an impartial jury

and due process, as guaranteed to him by the state and federal constitutions, were violated. Thus, his convictions should be reversed, and the matter remanded for retrial.

POINT IV

THE SENTENCE IMPOSED IS MANIFESTLY EXCESSIVE, AND THE CONVICTIONS SHOULD HAVE MERGED. (RULING AT DA 34 TO 36; 10T 27-5 TO 39-25)

Judge Carter imposed a 25-year sentence, 85% without parole, on defendant for aggravated manslaughter, and imposed a separate concurrent four-year term for possession of a weapon for an unlawful purpose. (Da 34 to 36; 10T 27-5 to 39-25) In doing so, she made three significant errors: (1) failing to merge the weapons conviction into the conviction for aggravated manslaughter; (2) finding the nature and circumstances of the homicide to be an aggravating factor and to be worthy of "great" weight; and (3) finding defendant's prior record of two third-degree convictions to be worthy of "great" weight. The matter should be remanded to correct the merger and for resentencing to a lower term.

First of all, it could not be clearer that possession of a weapon for an unlawful purpose merges into the crime that is the unlawful purpose. State v. Diaz, 144 N.J. 628, 636-639 (1996). That merger should have been ordered.

Secondly, this aggravated manslaughter, while obviously a serious homicide, does not warrant a finding of the first aggravating factor: that the nature and circumstances of the offense were particularly "heinous, cruel, or depraved." N.J.S.A. 2C:44-1a(1). This was, unfortunately, a dispute between lovers that turned violent -- an altogether too-common occurrence, but not one

that involved a shocking number of wounds nor any other factor that would be atypical for a serious homicide. The judge called the killing "senseless," but that broad characterization hardly distinguishes it from other aggravated manslaughters. (10T 33-16 to 19) That factor should not have been considered, or, alternatively, even if technically "found" properly, it should not have been assigned "great weight," as the judge said she did here. (10T 33-11) Resentencing should be ordered so that factor does not play the role that it did in this sentencing.

Finally, defendant at the time of sentencing was 35 years old with two prior non-violent third-degree convictions. (PSR 8) While, obviously, that prior record is an aggravating factor to be considered against defendant, assigning it "great weight" in calculating the appropriate sentence was overkill. (10T 37-1 to 23) There is nothing in defendant's past record that warrants "great weight' in fashioning a sentence against him and a remand for resentencing should be ordered where that factor plays a more appropriate role in the sentencing decision.

CONCLUSION

For all of the reasons set forth in Points I through III, the defendant's convictions should be reversed and the matter remanded for retrial. Alternatively, for the reasons in Point IV, the convictions should be merged and the matter remanded for resentencing.

Respectfully submitted,

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Attorney for Defendant-Appellant

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Date: September 18, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1607-22T5

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Middlesex County.
v.	:	
ROBERT C. MCGRANAHAN,	:	Sat Below: The Hon. Andrea G. Carter, J.S.C., and a jury.
Defendant-Appellant.	:	

BRIEF AND APPENDIX, Sa1-13, ON BEHALF OF THE STATE OF NEW JERSEY

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FEBRUARY 12, 2024

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CITATIONS TO THE RECORD

"Da" defendant's appendix;
"Db" defendant's brief;
"Sa" State's appendix;
"1T" Transcript dated April 18, 2022;
"2T" Transcript dated April 19, 2022;
"3T" Transcript dated April 20, 2022;
"4T" Transcript dated April 26, 2022;
"5T" Transcript dated April 27, 2022;
"6T" Transcript dated April 28, 2022;
"7T" Transcript dated May 2, 2022;
"8T" Transcript dated May 3, 2022;
"9T" Transcript dated May 9, 2022;
"10T" Transcript dated December 14, 2022.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

The State concurs with the Statement of Procedural History in defendant's brief.

COUNTER-STATEMENT OF FACTS

On March 9, 2013, Brian Tierney was working as a communications operator for the Sayreville Police Department. (1T77-8 to 9; 1T78-8 to 10). At 2:37 that morning, he received a 9-1-1 call which was abandoned. (1T78-13 to 16). The call had come from a landline telephone, so Tierney saw the homeowner's name, address, and phone number. (1T79-1 to 6). The address on the call was Giera Court, located in the Parlin section of Sayreville. (1T79-7 to 8; 1T79-10 to 11). As Tierney attempted to dial the number from where the call originated, he received a second 9-1-1 call. (1T78-15 to 17). On this second call, Tierney asked what the emergency was; the person on the phone said, "I just. . ." (1T81-7 to 8). Tierney asked if the problem was trouble breathing. (1T81-9 to 10). There was no response. Tierney immediately dispatched an ambulance and the police to the address from where the call came, which was 29 Giera Court. (1T82-4 to 7; 1T82-12 to 15; 2T20-14 to 16). The address is in a large townhouse complex. (2T20-17 to 21).

Sayreville Police Officer David Wilkins was out on routine patrol the morning of March 9, 2013, when he was dispatched to 29 Giera Court. (2T17-

15 to 18; 2T20-4 to 9; 2T20-14 to 16). When the officer approached the home, he saw that the storm door to the unit was shut, but the main door was opened. (2T27-9 to 16). Officer Wilkins rang the doorbell but received no response, so he opened the storm door and announced his presence. (2T27-17 to 25). Still no response from anyone. (2T28-1 to 2). The officer then entered the residence. (2T28-8 to 10).

When he entered, he walked into a "mud room" where there was a set of stairs leading up to the living area of the townhouse. (2T28-17 to 2T29-3). The officer immediately saw evidence of blood on the wall of the staircase, which was a blood smear at the bottom of the railing. (2T30-20 to 21; 2T31-16 to 17). As he ascended the stairs, he noticed more blood marks on the wall. (2T31-16 to 20). He also heard sound from a television. (2T32-14 to 16).

When he reached the landing at the top of the stairs, he heard a telephone off its hook. (2T32-20 to 24). He also saw blood streaked on the carpet. (2T34-4 to 9). The officer saw the living room where there was a sofa that had heavy soiling of blood and slash marks in it. (2T37-17 to 25). There was a coffee table with two glasses on it and a beer can. (2T38-12 to 18).

When he approached the dining room and the kitchen area, he saw the body of the victim, 63-year-old Edward Demko, on the floor. (2T46-20 to 22; 4T61-3 to 5). Demko was dressed in a long-sleeved sweatshirt, jeans and

socks. (2T176-23 to 2T177-1). In the victim's left hand, the officer saw an 8-inch steak knife. (2T47-18 to 19). In the victim's right hand, the officer saw the telephone. (2T47-13 to 18). The officer checked for a pulse and did not hear one. (2T49-12 to 15).

While the police were responding to 29 Giera Court, defendant, who was 26 years old, was outside and not far away, wearing only pants and shoes. (5T63-18 to 23). His shirt and socks were at Edward Demko's home. (2T158-6 to 9; 2T160-14 to 22; 2T159-9 to 12). Defendant had gone to Demko's home the previous night to engage in consensual sex. (1T88-12 to 13; 1t90-19 to 23; 1T91-2 to 5).

At about 2:45 a.m., defendant reached out to a former girlfriend, Shanna Bernhard, who dated defendant from 2008 to 2011. (2T63-19 to 24; 2T64-5; 2T66-9 to 10). Even though she had broken off their relationship, defendant kept sending her "unwelcome" texts and calls. (2T65-1 to 8). She always told defendant to leave her alone and to stop contacting her. (2T65-14 to 16). On the morning of March 9, defendant first sent her a text. (2T66-1 to 6). Shanna was in Atlantic City with some friends and saw the text as she was returning to her room. (2T66-7 to 8; 2T66-11 to 13). Defendant's text to her was seeking her help. (2T67-1 to 3). She texted defendant and told him to leave her alone. (2T67-1 to 8). When defendant kept texting her and begging her to call him,

she relented and called him. (2T67-9 to 16; 2T73-13 to 22; 2T75-5 to 6). Defendant told Shanna that he had been stabbed and was hurt and needed help. (2T67-17 to 19; 2T75-4 to 8). He sounded frantic. (2T68-2 to 3). She told defendant to contact the police. (2T67-20 to 22).

Between 3:00 a.m. and 4:00 a.m., defendant started calling another former girlfriend, Kaitlyn Sullivan, who had dated defendant from 2012 to 2013. (2T204-16 to 21; 2T105-2 to 4). As of March 2013, Kaitlyn was living in East Brunswick. (2T205-9 to 10). Her phone started ringing that morning "off the hook." (2T208-4 to 6). She knew it was defendant calling her phone. (2T208-4 to 12). Defendant also sent her texts. (2T208-21 to 23). In the texts, defendant wrote that he had an emergency and he wanted Kaitlyn to come and pick him up. (2T209-9 to 10). He also texted her that he was hurt. (2T209-14). She texted defendant to tell him she was in bed asleep. (2T212-1 to 2). Kaitlyn never answered her phone. (2T209-4 to 5).

In addition to calling Shannon and Kaitlyn, defendant also reached out to his friend, Timothy Hudson, who was living in Levittown, Pennsylvania. (2T216-16 to 18; 2T217-6 to 14; 2T217-23 to 2T218-11; 2T219-2). Timothy spoke to defendant, who asked Timothy to pick him up in Sayreville. (2T218-22 to 24; 2T219-2). Defendant said he had been attacked as he was watching the movie "Spartacus" and was outside freezing with no shirt on as he hid

under a tree. (2T219-15 to 18; 2T220-9 to 10; 2T222-2 to 22). Defendant also said that he may have stabbed someone. (2T219-24 to 25). Defendant, who sounded frightened and scared, mentioned some sexual interaction with a man which made defendant embarrassed. (2T222-15 to 19). Timothy asked defendant what happened to his shirt; defendant said it was covered in blood. (2T220-10 to 11). Timothy's home was an hour away from Sayreville and he told defendant he would not come and get him. (2T219-3 to 5; 2T219-6 to 7).

Defendant's father was the one who came to pick up defendant that morning. (5T58-24 to 5T59-1; 5T61-3 to 9; 5T63-18 to 23). When defendant's father arrived, he saw defendant come out from among trees and saw that defendant had on no shirt and looked scared. (5T63-18 to 23). He saw blood on the side of defendant's head. (5T64-21 to 23). Defendant's father drove to the Old Bridge Police Department. (5T65-10 to 12).

When defendant and his father entered the Old Bridge Police Department headquarters on March 9 at 5:00 a.m., Old Bridge Sergeant Ronald Nitto was on duty. (1T84-15 to 19; 1T85-15 to 17; 1T85-24 to 25; 1T87-3 to 20; 1T88-1 to 2; 1T88-6 to 9). Defendant's father explained that he had picked up defendant in the vicinity of a townhome development off Ernston Road in Sayreville, which was close to the border with Old Bridge, and he feared defendant had hypothermia. (1T91-22 to 25; 1T92-8 to 10; 1T95-14 to

16). Defendant's father explained that defendant had not been wearing a shirt when he picked defendant up, so he gave defendant a sweatshirt to wear. (1T100-24 to 1T101-6). Sergeant Nitto saw that defendant had some blood on his face and looked to be extremely cold as if in shock. (Tt88-17 to 18; 1T88-18 to 20; 1T89-4 to 6; 1T90-1 to 4). The officer called for an ambulance. (1T95-21 to 23).

The officer also spoke with defendant, who said that he had met a man online, went to his home, had consensual sex with him after which they had some drinks and watched a movie. (1T88-12 to 13; 1T90-19 to 23; 1T91-2 to 5). Defendant also told the officer, as the officer characterized it, as "one of the two of them wanted to engage in more sex again" and "one of them didn't want to. And they had some sort of fight or altercation after that." (1T91-5 to 8; 1T94-22 to 1T95-1).[1] Sergeant Nitto did not observe any wound on defendant that would explain the blood he saw on him. (1T95-4 to 11).

When the ambulance arrived to take defendant to the hospital, Sergeant Nitto called the Sayreville Police Department. (1T94-16 to 20; 1T96-8 to 9; 1T96-15 to 19; 4T26-1 to 2; 4T26-7 to 13). The sergeant was informed that Sayreville was investigating a possible homicide at a townhome complex.

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[1] On cross-examination, the officer was shown the report he wrote that said defendant told him the other man wanted to have more sex and defendant refused. (1T112-4 to 16).

(1T96-19 to 21; 4T26-14 to 21). Sayreville asked the sergeant to send an officer to the hospital until one of its officers could be sent there. (1T96-21 to 25). An Old Bridge officer followed the ambulance to the hospital. (1T97-19 to 21).

Florian Almendares was a nurse working in the hospital's emergency room when defendant was brought there by the First Aid Squad. (4T4-5 to 6; 4T4-17 to 19; 4T5-4 to 5; 4T6-10 to 12). Almendares saw that defendant had dried blood on his pants and on his body. (4T6-19 to 23; 4T7-2 to 4). She asked defendant why he had been brought to the hospital; defendant answered that he had been assaulted by his partner. (4T11-7 to 11). She next asked if there was a weapon; defendant said no. (4T11-12 to 16; 4T17-12 to 13; 4t18-6; 4T18-9 to 10). They kept talking and defendant eventually said that a weapon had been involved. (4T11-17 to 24). Defendant said at first that he had been hit with a fist; he later said there had been an altercation with his partner chasing him and he saw a knife. (4T12-1 to 6).[2] Defendant claimed that they struggled, he got the knife and stabbed his partner. (4T12-5 to 7; 4T13-6 to 9).

[2] On direct, Almendares said defendant said he was hit with "a fist." (4T12-1 to 2). On cross-examination, defense counsel asked, "now, he told you he was hit with fists," to which she answered, "correct." (4T21-9 to 10).

Sergeant Nitto went to the hospital and heard the hospital staff talking with defendant. (1T97-25 to 1T98-2; 1T98-8 to 16). He heard the nurse ask defendant who had done him harm or if defendant's mate had harmed him. (1T99-1 to 2). The officer heard defendant answer that he had a knife and he thought he might have stabbed his partner. (1T99-3 to 4).

Middlesex County Prosecutor's Office Investigator James Napp also responded to the hospital. (2T92-4 to 12; 2T93-18 to 20; 2T105-13 to 20). When Investigator Napp arrived at the hospital, he saw that defendant had a large amount of blood on his face, hands, and feet. (2T103-13 to 16; 2T105-13 to 23). There was no dried blood on defendant's chest or his back area. (2T106-16 to 21). Investigator Napp also saw that defendant had a cut on his right, middle finger, and incision marks on the back of his hands. (2T105-17 to 24; 2T189-1 to 24). He also saw long scratches on defendant's back, which looked fresh to him. (2T190-3 to 8; 2T190-12 to 14). After defendant was cleaned, the investigator did not observe any additional injury to defendant that equated with the amount of blood he had seen on him. (2T107-13 to 16; 2T107-21 to 22). The investigator took photographs of defendant at the hospital. (2T104-10 to 16). The police gathered evidence from defendant at the hospital, including clothing and swabs. (2T163-15 to 25; 2T164-9 to 14; 2T164-19 to 25).

Investigator Napp processed the crime scene at 29 Giera Court. (2t94-3 to 5; 2T100-7 to 12; 2T11-20 to 22). The investigator found no signs of forced entry. (2T114-16 to 18). He observed a heavy concentration of blood on the dining room floor, at the top of the landing from the stairway from the mud room and in the living room area. (2T128-13 to 19). In the kitchen, the investigator saw blood near the sink. (2T118-21 to 22). He also saw a block of knives. (2T149-12 to 13). He saw no prints in the kitchen. (2T155-3 to 10).

In the living room, the sofa had a heavy concentration of blood and slash marks. (2T130-13 to 14; 2T132-7 to 9). An area rug was bunched up under a coffee table. (2T128-16 to 21). On top of the coffee table, the investigator saw a beer can and two glasses. (2T131-19 to 23). In the master bedroom, the investigator found a pair of socks. (2T158-6 to 9). He found a shirt hanging on the doorknob. (2T159-9 to 12).

The disarray in the home was a far cry from how Demko kept his home before his death. (3T85-5 to 10). As of March 2013, Demko had recently retired from his job at Sears and Roebuck. (3T78-21 to 22). Demko had lived at 29 Giera Court with his partner of almost thirty years. (3T79-13 to 16). His partner had passed away about 18 months before March 2013. (3T80-10 to 18). Demko was not in the best of physical health at the time of his death. He

had been injured in a motor vehicle accident and suffered from pain in his leg and was not able to raise his arms up all the way. (3T83-3 to 6). He also had a heart condition for which he had had bypass surgery. (3T84-2 to 5). Demko was also blind in one eye. (3T83-7 to 9).

The autopsy was performed on March 10, 2013. (2T171-4 to 11). The cause of death was listed as stab wounds to the chest and the back. (4T39-14 to 16). Testing showed no alcohol or drugs in the victim's blood. (4T60-22 to 24). It was clear that Demko had had heart surgery before his death: there was a scar on his chest, and he had had an artery bypass graft. (4T61-12 to 15).

There was one stab wound below the victim's left collar bone, which entered the body through the second rib and then penetrated the upper part of the left lung. (4T42-19 to 25; 4T46-23 to 24). The stab wound was six inches deep. (4T45-20 to 23). The penetration into the lung was an inch and a half. (4T45-24 to 4T46-9). The stab wound caused the lung to collapse and caused bleeding into the chest cavity. (4T49-14 to 16). The medical examiner looked at the knife recovered from the victim's hand and found that the dimensions of the knife were consistent with this stab wound. (4T43-4 to 8; 4T43-20 to 25; 4T44-5 to 7; 4T79-25 to 4T80-3). The trajectory of this wound was from front to back, from left to right and downwards. (4T67-10 to 12). If the victim and

the assailant were facing one another, the wound would be consistent with being struck by a right-handed person. (4T67-14 to 19). The medical examiner opined that this stab wound could have independently caused death. (4T69-12 to 14). The medical examiner found defects in Demko's sweatshirt to be consistent with the front and back stab wounds. (2T178-1 to 4; 4T52-15 to 23).

There was a second stab wound on the victim's back. (4T50-1 to 3). This stab wound was to the right of the midline, passing through muscles and into the right chest cavity and the right lung. (4T50-3 to 6). The wound was seven centimeters in depth or two and three-quarters of an inch. (4T50-7 to 9). The knife recovered at the crime scene in the victim's hand also was consistent with causing this stab wound. (4T50-20 to 22; 4T79-25 to 4T80-3). The medical examiner was not able to discern the sharp and blunt end of the direction of this stab wound. (4T68-1 to 8). The wound could have been inflicted while the victim and the assailant were face to face, however, it would have been hard to reach over and cause the wound. (4T68-9 to 13).

There was on the victim's shoulder a superficial, incised wound, which was caused by the cutting edge of a knife being dragged on the surface of the skin, creating a wound but not as deep as a stab wound. (4T44-21 to 25; 4T45-5 to 9; 4T45-1 to 4). There was another incised wound on the left forehead

and just above the left eyebrow. (4T59-8 to 11). The medical examiner found incised wounds on the face. (4T59-23 to 15). There was an abrasion on the nose and on the left shin, which were incurred at the time of the stabbings. (4T59-22 to 23; 4T63-3; 4T63-6 to 8).

There also were defensive wounds on the victim's left hand. (4T52-6 to 10; 4T53-2 to 6). It is normal for someone to fend off an attack to reach out, and in so doing, the edge of the knife rubs against the skin and causes an incised wound. (4T55-5 to 19). The medical examiner counted eight incised wounds on the victim's left hand. (4T56-12 to 16). On the victim's right hand, there was an incised wound on a fingertip. (4T57-24 to 4T58-3). There was another incised wound on the right palm. (4T58-7 to 9). Altogether, the medical examiner found four defensive wounds on the right hand. (4T58-15 to 17).

Forensic testing was conducted on evidence collected by the police. A swab taken from defendant's left hand revealed a mixture of DNA from defendant and Edward Demko. (3T40-3 to 9; 3T40-13 to 19). A swab taken from the passenger side of the vehicle owned by defendant's father revealed a mixture of DNA with the victim being the main contributor and defendant being the minor contributor. (2T105-21 to 2T166-1; 2T166-11 to 13; 3T42-18 to 21; 3T43-1 to 5). A cutting from defendant's jeans that tested positive for

the presumptive presence of blood showed a DNA sample from the victim. (2T163-15 to 22; 2T164-9 to 14; 3T17-3 to 10; 3T17-16; 3T19-19 to 15; 3T44-16 to 20; 3T44-24 to 3T45-2). A blood sample from the waist area of the jeans showed defendant to be the major contributor to the DNA mixture. (3T45-13 to 16). No conclusion could be drawn as to whether the victim was a contributor to the mixture. (3T45-19 to 25).

Anal swabs taken from defendant tested positive for the presence of sperm cells. (3T18-4 to 6; 3T18-10 to 11). Testing showed that the victim was the source of the DNA found in the sperm cell fraction. (3T46-20 to 23).

Defendant elected not to testify on his own behalf, however, the defense called several witnesses. (5T81-15 to 17). Eric Wagg, the chief forensic examiner at the New Jersey State Forensics Laboratory, testified that he was asked by the Middlesex County Prosecutor's Office to examine three computers that had been seized by police in the investigation: defendant's computer, which police had seized from defendant's bedroom in his home in Old Bridge, and two laptops belonging to the victim. (2T169-8 to 19; 2T170-15 to 20; 2T170-21 to 224T104-1 to 6; 4T106-13 to 16; 4T107-3 to 10). Wagg searched the computers using the word "stab" and "kill" and "murder" and could not find anything related to the crime. (4T108-22 to 4T109-6).

On cross-examination, Wagg acknowledged he had been looking for evidence to show defendant planned on killing the victim and found no such proof. (4T110-17 to 21). Wagg acknowledged that he found activity from both defendant and the victim on a website called, "Adam for Adam." (4T110-24 to 4T111-3). He found no communication between defendant and the victim, but he did not have their usernames. (4T111-4 to 16).

The defense recalled Investigator Napp, who identified photographs he took of defendant's left and right hand at the hospital, as well as a photograph he took of defendant's back. (5T6-11 to 15; 5T6-16 to 21; 5T6-22 to 5T7-2).

The defense called Old Bridge Police Officer Gregory Goy, who testified that when he arrived at the police station on March 9, 2013, at around 4:55 a.m., he spoke with defendant who said he had been assaulted. (5T9-12 to 17; 5T9-20 to 25; 5T10-3 to 6; 5T48-4 to 16). The officer was not provided with any details by defendant. (5T49-11 to 13). Sergeant Nitto was not present when defendant made this statement. (5T57-22 to 24). Officer Goy testified that defendant was not wearing a shirt and was shaking. (5T48-21 to 24; 5T49-9 to 10). The officer also testified that the State had issued him a subpoena to appear on April 18, 2022. (5T587-13 to 18).

Finally, the defense called defendant's father as a witness, who testified that it was 28 degrees outside when he saw defendant come out from some

trees and defendant had no shirt on and looked "scared as hell." (5T63-18 to 23). Defendant's father saw blood on the side of defendant's head. (5T64-21 to 23).

LEGAL ARGUMENT

POINT ONE

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST TO CHARGE THE JURY ON PASSION/PROVOCATION MANSLAUGHTER. (5T115-18 to 5T116-1; 5T116-7 to 13; 5T117-2 to 5; 5T118-9 to 24; 6T5-1 to 3; 6T5-17 to 21).

Defendant contends that the trial court erred by denying his request to charge the jury on passion/provocation manslaughter. Judge Carter considered the evidence produced at the trial and ruled that there was no rational basis for the charge. The judge's ruling should be upheld by this court.

N.J.S.A. 2C:1-8(e) requires that there be a "rational basis" in the record for the trial court to instruct the jury on a lesser-included offense. The rational basis test imposes a low threshold. State v. Carrero, 229 N.J. 118, 128 (2017). The trial court is obligated to examine the record "thoroughly" to determine if the rational basis test has been satisfied. State v. Crisantos, 102 N.J. 265, 278 (1986). The trial court reviews the evidence in the light most favorable to the defendant. Carrero, 229 N.J. at 128. Although the rational basis test sets a low threshold, a lesser-included offense should not be given when it would invite

the jury to engage in sheer speculation. State v. Josephs, 174 N.J. 44, 103-04 (2002); State v. Darrian, 255 N.J. Super. 435, 446 (App. Div.), certif. denied, 130 N.J. 13 (1992).

Here, the defense requested the court to charge passion/provocation manslaughter. It applies when a homicide, other than felony murder, which would otherwise be murder under N.J.S.A. 2C:11-3, other than felony murder, is "committed in the heat of passion resulting from a reasonable provocation." N.J.S.A. 2C:11-4(b)(2). The Legislature limited passion/provocation manslaughter to crimes that would otherwise constitute purposeful or knowing murder, as opposed to aggravated manslaughter and reckless manslaughter. State v. Galicia, 210 N.J. 364, 379 (2012).

There are four elements of passion/provocation manslaughter. State v. Canfield, 470 N.J. Super. 234, 275 (App. Div. 2022), aff'd as modified, 252 N.J. 497 (2023). First, there must be adequate provocation; second, the defendant must not have had time to "cool off" between the provocation and the killing; third, the defendant must have been impassioned by the provocation; and fourth, the defendant must not have cooled off before the killing. Ibid. The first two elements are objective, using a reasonable person perspective, and the last two elements are subjective. Ibid.

When a trial court is deciding whether to charge the jury on passion/provocation manslaughter, it must determine if there is sufficient evidence to meet the first two elements of the offense. Carrero, 229 N.J. at 129. The subjective elements of the offense "should usually be left to the jury to determine." State v. Mauricio, 117 N.J. 402, 413 (1990).

The Supreme Court has acknowledged that passion/provocation can arise in "an infinite number of factual settings." State v. Crisantos, 102 N.J. 265, 275 (1986). Thus, in determining whether to charge the jury on the offense, the trial court must look at "[t]he specific evidence" "carefully" "in the context of the entire record." Ibid. The amount of time between the provocation and the killing, and "the precise sequence of events," are "pivotal factors" in determining whether to charge the jury on passion/provocation manslaughter. Galicia, 210 N.J. at 380.

As to the first element of passion/provocation manslaughter, the provocation from an objective standpoint must be enough to arouse the passions of an ordinary person beyond his power of control. Darrian, 255 N.J. Super. at 447. The general rule is that words alone, no matter how offensive or insulting, do not constitute adequate provocation. Crisantos, 102 N.J. at 274.

Battery, except for a light blow, is sufficient provocation. Darrian, 255 N.J. Super. at 447. But while "mutual combat" can give rise to

passion/provocation, the contest must have been waged on equal terms with no unfair advantage taken of the deceased. Crisantos, 102 N.J. at 274-75. Thus, if the defendant used a deadly weapon against an unarmed victim, the offense is not manslaughter but murder. Ibid.

At defendant's first trial in 2016, the trial court instructed the jury on murder and passion/provocation manslaughter, as well as aggravated manslaughter and reckless manslaughter. (Da24; 5T101-10 to 12). The jury at the first trial was also charged on self-defense. (Da7). Evidence elicited at the first trial by the State included defendant's two statements to police on March 9, 2013, and on March 11, 2013, in which defendant provided a self-serving version of how he came to kill the victim. (Da9-23). Defendant also testified at the first trial. After considering all this evidence, the jury returned a verdict for aggravated manslaughter. (Da6).

The first jury's acquittal of murder did not preclude defendant from requesting passion/provocation manslaughter at the retrial. In State v. Grunow, 102 N.J. 133, 144-45 (1986), the trial court instructed the jury on passion/provocation manslaughter and the jury convicted the defendant of aggravated manslaughter, however, the Supreme Court reversed defendant's conviction because the trial court's jury instructions on passion/provocation manslaughter were impermissibly burden shifting. The Supreme Court

acknowledged that its remand for a new trial would present "practical problems" because Grunow could not be retried for purposeful or knowing murder. Id. at 149. Nonetheless, the Supreme Court ruled that if the evidence on the retrial warranted it, the trial court could submit passion/provocation manslaughter as an available verdict if the jury found from the evidence that the State had proven the elements of the offense beyond a reasonable doubt. Ibid.

This part of the Supreme Court's ruling in Grunow was relied upon by the Appellate Division in State v. Pridgen, 245 N.J. Super. 239, 250-51 (App. Div.), certif. denied, 126 N.J. 327 (1991), where the defendant, charged with purposeful or knowing murder and convicted of aggravated manslaughter, argued on appeal that the trial court erred in denying his request for a charge on passion/provocation manslaughter. The Appellate Division in Pridgen held that the trial court should have instructed the jury on passion/provocation manslaughter and thus reversed defendant's conviction. Ibid. The Appellate Division noted that defendant could not be retried for purposeful or knowing murder, however, Grunow permitted submission of passion/provocation

manslaughter in the context of a retrial if the evidence supported the charge, and the State proved the elements of it beyond a reasonable doubt. Id. at 251.[3]

Here, at defendant's retrial, the State presented much of the same evidence admitted at the first trial, but it did not present in its case-in-chief defendant's statement to police from March 9, 2013.[4] The State relied upon the testimony of several other witnesses to whom defendant had made admissions. This included defendant's ex-girlfriends, Shanna Bernhard and Kaitlyn Sullivan, his friend Timothy Hudson, Sergeant Nitto and the hospital nurse, Florian Almendares. Defendant chose not to take the stand at the retrial. (5T81-15 to 17).

It follows that defendant's request below for a jury charge on passion/provocation manslaughter, (5T84-19 to 22), was based on a different

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[3] Contrary to defendant's assertions, (Db19; Db20), if passion/provocation manslaughter is presented at a retrial where the first trial resulted in an acquittal for purposeful or knowing murder, the State's burden on the retrial is to prove the elements of passion/provocation manslaughter, not to disprove them.

5 Before the retrial commenced, the State moved under N.J.R.E. 104(c) to conduct a hearing on the admissibility of defendant's statements to police, a required hearing that was not conducted before the first trial. Judge Carter presided over the hearing, and the judge issued an opinion on March 10, 2022. (Sa1-13). The court found that defendant's statement from March 9, 2013, was admissible. (Sa5-10). The court ruled that defendant's statement from March 11, 2013, while constitutionally obtained by police, was subject to exclusion under N.J.R.E. 403. (Sa10).

evidentiary record from the one at the first trial. It was based on the various admissions defendant made to several witnesses who testified at the retrial, which lacked the detail that was before the first jury because of defendant's statements to police and his own testimony from the witness stand.

The jury below heard from Shanna Bernhard that defendant told her he had been stabbed, (2T67-17 to 19; 2T75-4 to 8); Kaitlyn Sullivan testified defendant texted her he was hurt, (2T209-14); Timothy Hudson testified that defendant said he was attacked as he was watching the movie, "Spartacus," (2T219-15 to 18; 2T220-9 to 10; 2T222-2 to 22), that he may have stabbed someone, (2T219-24 to 25), that there had been some sexual interaction with another man, (2T222-15 to 19); Sergeant Nitto outlined what defendant told him at the police station about how defendant went to a man's home, had consensual sex, watched a movie and a fight ensued when the other man wanted more sex, (1T88-12 to 13; 1T90-19 to 23; 1T91-2 to 5; 1T91-5 to 8; 1T94-22 to 1T95-1); Sergeant Nitto hearing defendant talking with the nurse, Florian Almendares, at the hospital and telling her he had a knife and might have stabbed his partner, (1T99-3 to 4); Florian Almendares testified that defendant told her he had been assaulted by his partner, (4T11-7 to 11), that there had been no weapon but that later defendant said there had been one, (4T11-12 to 16; 4T17-12 to 13; 4T18-6; 4T18-9 to 10; 4T11-17 to 24); that he

had been hit with a fist and then later said it was fists, (4T12-1 to 2; 4T21-9 to 10), that there was altercation with his partner chasing him and he saw a knife, (4T12-1 to 6), that they struggled and he got the knife and stabbed his partner, (4T12-5 to 7).

The jury also heard from Officer Goy during the defense case-in-chief that defendant told him at the police station that he had been assaulted. (5T48-4 to 16). There were photographs the defense admitted that were taken at the hospital of his hands and his back. (5T6-11 to 5T7-2).

After defense counsel requested a jury charge the jury on passion/provocation manslaughter, the court responded that it was having difficulty discerning the rational basis for the charge. (5T101-13 to 24). Defense counsel argued that a threat with a gun or a knife was sufficient to show adequate provocation. (5T102-15 to 23). Defense counsel also argued that the interaction between defendant and the victim involved sex, and the evidence showed that it was defendant who had refused the victim's advance for more sex. (5T103-11 to 21). Defense counsel replayed for the court the relevant testimony from Florian Almendares. (5T111-17 to 5T112-13). The court observed that not every case involving self-defense warranted passion/provocation manslaughter and that while the charge may have been

supported by the evidence at the first trial, it might not be supported by the evidence at the retrial. (5T107-24 to 5T108-6; 5T117-1 to 8).

The State argued that the elements of passion/provocation manslaughter were not supported by the evidence. (5T89-17 to 5T90-6). There was no evidence that the victim threatened defendant with a knife or that defendant refused to have more sex and said, "no, no, no." (5T114-16 to 20; 5T114-23 to 24). There was no evidence to show that the victim was mad. (5T114-25).

Judge Carter observed that the court had scoured the record, and it was not able to connect the dots based upon the evidence produced at the retrial. (5T115-18 to 5T116-1). The judge found that much "guessing [was] going on" about the circumstances surrounding the murder as it related to passion/provocation manslaughter. (5T116-7 to 13). The judge held that there was no evidence to show whether defendant had time to cool off. (5T118-9 to 24). The judge found that the jury would be left to speculate. (5T117-2 to 5). The judge held that it was not persuaded that a rational basis existed for the charge, but indicated the court would consider the issue overnight. (5T116-18 to 23).

The next day, Judge Carter addressed counsel and stated that the court had considered defendant's request to instruct the jury on passion/provocation manslaughter and had examined the record from the first trial to compare it to

the evidence produced at the retrial. (6T3-11 to14; 6T3-18 to 6T4-1). The judge noted that while the evidence produced at the first trial supported the requested charge, the evidence before the jury at the retrial did not provide a rational basis for the charge. (6T3-16 to 25; 6T4-2 to 6). Rather, the evidence before the jury provided only "snippets" of information, and defendant's reliance on the nurse's testimony only showed that he had been assaulted, a struggle ensued, and defendant was able to get the knife from the victim. (6T4-12 to 16; 6T4-24 to 25). The testimony from Officer Goy was similar in that defendant claimed he was assaulted. (6T4-22 to 24). The judge noted that the court had considered the evidence in its entirety and held the charge could not be submitted to the jury based upon "snippets." (6T5-1 to 3). On appeal, defendant claims that the trial court erred in denying his request to charge. For the following reasons, this court should uphold the trial court's ruling.

As outlined earlier, the issue of whether there was a rational basis for a passion/provocation manslaughter charge is a fact sensitive one where the "precise sequence of events" is critical. Galicia, 210 N.J. at 380. There had to be a rational basis of adequate provocation such that defendant's loss of self-control was a reasonable reaction, and that defendant did not have time to "cool off" between the provocation and the killing. In short, the issue was whether defendant was "not the master of his own understanding." State v.

Hollander, 207 N.J. Super. 453, 474-75 (App. Div.), certif. denied, 101 N.J. 335 (1985). The rational basis in the evidence was lacking.

Defendant's admissions produced below provided little to no context to support passion/provocation manslaughter. His text to Shanna Bernhard that he had been stabbed was not true, because the only injury to his hand was an incised wound to his right middle finger.[5] Only the victim suffered stab wounds. The victim was fully clothed when found by the police whereas defendant fled the scene partially dressed without a shirt and socks on. His admission to Sergeant Nitto that the victim demanded more sex is not supported by the evidence produced below. In any event, the law is clear that rejection of a sexual advance is not evidence of adequate provocation. State v. Jumpp, 262 N.J. Super. 514, 522-23 (App. Div.), certif. denied, 134 N.J. 474 (1993); State v. McClain, 248 N.J. Super. 409, 419 (App. Div.), certif. denied, 126 N.J. 341 (1991); Hollander, 207 N.J. Super. at 474-75.

In cases where a rational basis for passion/provocation manslaughter was found, there was critical proof from eyewitnesses and/or testimony from the charged defendants as to what happened. See Carrero, 229 N.J. at 122-125;

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[5] The medical examiner explained the difference between an incised wound and a stab wound, with the former being caused by the cutting edge of a knife being dragged on the surface of the skin, creating a wound but not a stab wound, which is a penetrating wound. (4T45-1 to 9).

Crisantos, 102 N.J. at 267-268; Pridgen, 245 N.J. Super. at 242-243. That detailed evidence was lacking here. The evidence at the retrial, as noted earlier, varied from the evidence produced at the first trial, where passion/provocation manslaughter was charged, because defendant's statements to police and his own testimony from the witness stand was not before the jury below.

As the Appellate Division summarized in its opinion ordering a new trial, (Da14-16), defendant's statement to police from March 9, 2013, included his claim of the victim trying to unbuckle his pants in the living room as he watched television, then defendant responding by grabbing the victim's wrist and pushing the victim away with the victim coming back at him and forcing defendant to grab the victim's wrist again, which led to defendant flailing his arms and the victim hitting him in the head several times and then defendant realizing the victim had something in his hands. (Da14-15). Defendant told police the victim came at him with a knife, and the two of them rolled on the floor, and defendant tried to get the victim off him and thought he stabbed the victim during the struggle. (Da15).

Defendant's testimony at the first trial mirrored the scenario he had painted in his statement to police: following the consensual sex, he and the victim went to the living room where the victim asked several times for more

sex and defendant said no; the victim came up to him and tried to unbuckle his pants; defendant responded by grabbing the victim's wrists to no avail; the victim hit him in the face twice; defendant saw a "shiny metallic object" in the victim's hand; defendant falling onto the couch, and struggling and then falling to the floor with defendant flailing his arms but not recalling taking the knife from the victim or stabbing him. (Da22). Defendant testified that the victim got the knife and attacked him. (Da23). He testified he did not act with the intent to murder the victim. (Da23).

In contrast to the evidence produced at defendant's first trial, the evidence presented at the retrial consisted of defendant's vague admissions about being assaulted and stabbing the victim. The trial court examined the trial record from the first trial and properly concluded that the admissions before the jury at the retrial were only "snippets" of the details admitted at the first trial and would leave the jury at the retrial to speculate on the issue of passion/provocation manslaughter.

To the extent defendant's admissions to Florian Almendares connoted some form of "mutual combat," it certainly did not implicate passion/provocation manslaughter because the combat was not on equal footing, as the law requires. Darrian, 255 N.J. Super. at 449. Edward Demko was 63 years old and not in the best of health. He had a history of heart

disease and underwent bypass surgery; he was blind in one eye and had suffered injuries in a car accident that left him with pain in his leg and an inability to lift his arms up all the way. In contrast, defendant was 26 years old with no physical infirmities.

While defendant had an incised wound on his right middle finger, some incision marks to the back of his hands and a scratch to his back, which was probably incurred when he ran out of the victim's house without a shirt and hid among trees as he tried to hitch a ride from those he contacted for this purpose, there were two deep stab wounds, one below the front collar bone and the second one to the back, of Edward Demko, which were in addition to the twelve defensive wounds on his hands. The blood witnesses saw on defendant's body at the police station and later at the hospital was not consistent with the minor incised injury on his finger. The evidence does not support the finding that the victim provoked defendant such that defendant was in a rage or the "heat of passion."

Passion/provocation requires a purposeful or knowing mental state, and defendant's admission to his friend in Pennsylvania was he may have stabbed someone. When he told the nurse that as he struggled with the victim, he was able to get the knife and stab the victim, there was no admission from defendant about a conscious objective to cause death or serious bodily injury,

which is required for a purposeful mental state. N.J.S.A. 2C:2-2b(1). Nor did it implicate a knowing mental state, meaning defendant was "practically certain" that his conduct would result in death or serious bodily injury. N.J.S.A. 2C:2-2b(2). In fact, Sergeant Nitto heard defendant tell the nurse he might have stabbed his partner, which is like what defendant said to his friend, Timothy Hudson. Rather, defendant's admissions on what he might have done implicated recklessness, a conscious disregard of a substantial and unjustifiable risk. N.J.S.A. 2C:2-2b(3). The State's evidence of defendant's admissions was sufficient to meet its constitutional burden to establish identity, however, it was insufficient to satisfy the rational basis test for submitting passion/provocation manslaughter to the jury as a possible verdict.

Defendant posits that the evidence produced below supported the jury finding that after defendant and the victim had consensual sex, they had drinks and watched a movie; that the victim wanted to have more sex but defendant refused; that the victim then attacked defendant with fists and the two men struggled whereupon defendant realized that the victim was brandishing a knife; they struggled some more and defendant got hold of the knife and stabbed the victim. (Db17-18). The nurse testified that defendant told her he was chased, and he saw a knife and there was a struggle where he got the knife away and stabbed the victim. (4T12-5 to 7). There was no admission from

defendant that the victim "brandished" a knife or that the fighting was the result of the victim attacking him first. In fact, initially, defendant denied to the nurse that there was a weapon. (4T11-12 to 16; 4T17-12 to 13). As the trial court noted, the scenario argued by defendant was filling in details that the jury at the retrial did not hear from the evidence. To the extent that defendant's admissions related that he and the victim struggled, the "mutual combat" was not on equal footing, as argued above.

The submission to the jury of self-defense does not mean there was a rational basis for passion/provocation manslaughter. Self-defense, an affirmative or justification defense, is analytically distinct from passion/provocation manslaughter. Canfield, 470 N.J. Super. at 258-59. There is no categorical rule which requires submission of passion/provocation manslaughter when self-defense is charged to the jury. Id. at 279. Defendant below argued self-defense, i.e., that his use of force against the victim was justified and thus lawful because the victim pulled out a knife and was the first aggressor. (See 1T53-17 to 18; 1T36-11; 1T74-4; 6T44-8 to 13; 6T53-2; 6T52-14 to 15; 6T53-12 to 13). Defendant told the nurse that as he was struggling with the victim, he saw a knife and was able to get it from the victim and then stabbed him, showing that defendant acted out of a need to protect himself. Because the evidence supported a claim that defendant

responded with force because he believed it was immediately necessary to protect himself against death or serious bodily harm, N.J.S.A. 2C:3-4(a), (b)(2), the trial court properly charged the jury with self-defense and the State's burden to disprove it. (6T129-1 to 6T134-7).

As the trial court ruled, a charge on passion/provocation manslaughter would improperly ask the jury to speculate. The State submits that the trial court complied with its obligation to carefully review the evidence in its entirety to determine whether a rational basis existed for passion/provocation manslaughter. In denying defendant's motion for a new trial, the trial court ruled that it had "fully considered" the requested charge and provided "specific reasons" for rejecting it. (10T12-22 to 10T13-2). The trial court's ruling was correct, and the State urges this court to uphold defendant's conviction for aggravated manslaughter and the weapons-related offense.

POINT II

THE TRIAL COURT'S INSTRUCTIONS ON THE STATE'S BURDEN OF PROOF WERE NOT CONFUSING OR CONTRADICTORY. (NOT RAISED BELOW).

Defendant, for the first time on appeal, contends that the trial court's jury instructions and verdict sheet were contradictory regarding the State's burden to prove the elements of aggravated manslaughter and reckless manslaughter beyond a reasonable doubt and its burden to disprove self-

defense. Defendant also lodges a belated attack on the form of the verdict sheet, which did not contain a question about self-defense. Defendant has not sustained his burden of establishing plain error with the trial court's instructions and the verdict sheet. Accordingly, this court should affirm defendant's convictions.

At the outset, the standard of review on appeal is plain error because defendant lodged no objection to the trial court's jury instructions or the verdict sheet. (6T149-22 to 6T150-1). Plain error is defined as error that had a clear capacity of producing an unjust result. R. 2:10-2. The plain error standard of review imposes a "high bar." State v. Alessi, 240 N.J. 501, 527 (2020) (quoting State v. Santamaria, 236 N.J. 390, 404 (2019)). The "high standard" serves as a "strong incentive" for counsel to pose timely objections so that any error can be cured by the trial court. Santamaria, 236 N.J. at 404. It also serves to dissuade silence at trial to gain a tactical advantage on appeal. State v. Ross (II), 229 N.J. 389, 407 (2017). Defendant has the burden of showing "clear" and "obvious" error that prejudiced his substantial rights. State v. Morton, 155 N.J. 383, 421 (1998); State v. Chew, 150 N.J. 30, 82 (1997). The issue is whether the belated claim of error led the jury to a result it might not otherwise have reached. State v. Docaj, 407 N.J. Super. 352, 362 (App. Div.), certif. denied, 200 N.J. 370 (2009).

It is well established that jury instructions are viewed in their entirety, never in isolation. State v. Wilbely, 63 N.J. 420, 422 (1973). The prejudicial effect from a claim of instructional error must be evaluated considering the totality of the circumstances, including not just all the instructions provided but also the arguments of counsel. State v. Adams, 194 N.J. 186, 207 (2008). Trial courts should follow the model jury charges because their adoption comes after a "comprehensive and thorough" review by "experienced jurists and lawyers." State v. R.B., 183 N.J. 308, 325 (2005). Although following the model jury charge is not dispositive, when the trial court follows it, "it is a persuasive argument in favor of the charge as delivered." State v. Angoy, 329 N.J. Super. 79, 84 (App. Div. 2000). Jurors are presumed to follow a trial court's instructions. E.g., State v. Vera-Larregui, 246 N.J. 94, 126 (2021).

R. 3:19-1(b) refers to the verdict sheet as recording the jury's verdict. As such, the verdict sheet does not supplement the trial court's instructions. State v. Gandhi, 201 N.J. 161, 196 (2010). The trial court's instructions serve as "the primary guide" as the jury considers the charges and the evidence. State v. Cuff, 239 N.J. 321, 341 (2019). If the jury understood the elements as instructed by the trial court, and was not misled by the verdict sheet, an error in the verdict sheet can be regarded as harmless. Ibid. Accord Gandhi, 201

N.J. at 196; State v. Reese, 267 N.J. Super. 278, 287 (App. Div.), certif. denied, 134 N.J. 563 (1993).

Here, defendant is hard pressed to argue plain error with his belated arguments finding fault with the trial court's instructions and the verdict sheet. The court and parties discussed the jury charge. (5T119-1 to 5T137-20; 6T5-22 to 6T6-8; 6T92-16 to 6T95-86T105-8 to 6T109-2). See also Point I, supra. Defendant had every opportunity to raise the issues he now raises on appeal but he did not. A failure to object shows that defense counsel had no issues with the charge or the verdict sheet. See State v. Singleton, 211 N.J. 157, 182 (2012) (if defendant does not object timely to the charge, there is a presumption the charge was correct and unlikely to prejudice defendant's case).

The purported belated error raised by defendant is that the trial court ended each substantive instruction on aggravated manslaughter and reckless manslaughter with the language in the model jury charge that instructs the jury that if, after considering all of the evidence, it was convinced beyond a reasonable doubt that defendant committed the crime at issue, its verdict for that offense must be guilty. (6T126-19 to 24; 6T128-14 to 17). Defendant claims that the jury was incorrectly charged because the elements outlined for each manslaughter offense did not include the State's burden to disprove self-

defense. (Db22). Defendant now claims that the judge's instructions on self-defense, which immediately followed the court's charge on the elements of aggravated manslaughter and reckless manslaughter, (6T129-1 to 6T134-7), were thus contradictory and confusing. He also belatedly claims error with the verdict sheet because it did not make any mention of self-defense. (Da32-33). Defendant has not sustained his burden under the plain error doctrine.

Self-defense under the Code is a justification defense and is treated as an affirmative defense. N.J.S.A. 2C:3-1(a); N.J.S.A. 2C:3-4; State v. Harmon, 104 N.J. 189, 206 (1986). Accordingly, the Code places upon the defendant the burden of coming forward initially with some evidence after which it becomes the State's burden to disprove the defense. N.J.S.A. 2C:1-13b(1). However, self-defense becomes relevant only when the essential elements of a crime have otherwise been established. Harmon, 104 N.J. at 207. See also State v. Delibero, 149 N.J. 90, 105 (1997) (jury had to consider whether defendant was guilty before considering whether he should be exculpated). The Code provides that use of force upon another is "justifiable" when the actor reasonably believes that the force was immediately necessary to protect himself from the use of unlawful force. N.J.S.A. 2C:3-4(a). If the State fails to disprove the defense, the defendant is acquitted, meaning the use of force

against the victim was justified and lawful. State v. Canfield, 470 N.J. Super. 234, 277 (App. Div. 2022), aff'd as modified, 252 N.J. 497 (2023).

Judge Carter's jury instructions, when viewed, as they must be, in their entirety, did not contain error or confuse the jury. The judge first instructed the jury on the elements of aggravated manslaughter and reckless manslaughter and gave the standard language from the model jury charge on convicting if the jury found the State had sustained its burden. (6T124-13 to 6T128-25). The court likewise instructed the jury that if the jury was not convinced that the State had sustained its burden of proving the elements of the offense, defendant was entitled to an acquittal. (6T126-24 to 6T127-6; 6T128-17 to 21). The language used by the trial court is from the model jury charges.

When the trial court then instructed on self-defense, the court began by instructing the jury that self-defense was a "complete defense" to aggravated manslaughter and reckless manslaughter. (6T129-1 to 4).[6] It was a "complete justification" to both manslaughter charges and to the weapons-related offense.

[6] The trial court instructed the jury that self-defense also applied to count two, possession of a weapon for an unlawful purpose, however, the court told the jury that the court's instructions on self-defense and the elements of that charge would come later in the charge. (6T129-6 to 9). The court's charge on the elements of the weapons-related offense and self-defense followed its instructions on self-defense as it applied to the manslaughter charges. (6T134-8 to 6T139-4). Defendant lodges no objection to the trial court's jury instructions on count two.

(6T129-4 to 10). Thus, the court instructed the jury that "if the State prove[d] [defendant] used, or threatened to use force upon Edward Demko," it was defendant's claim that the use of force was "justifiably used" for defendant's self-protection. (6T129-10 to 13). In short, he committed a crime, but it was justified.

After outlining the elements for the use of force or deadly force, the trial court instructed the jury that it was the State's burden to prove beyond a reasonable doubt that self-defense was untrue. (6T133-12 to 13). The court instructed the jury on the State's burden to disprove beyond a reasonable doubt that defendant knew he could have retreated with complete safety. (6T133-24 to 6T135-2). If the State did not carry its burden and the jury had reasonable doubt, the court instructed the jury that it was required to resolve the case in defendant's favor and allow the claim of self-defense and acquit him. (6T134-4 to 7).

The verdict sheet submitted to the jury contained possible verdicts of guilty or not guilty for aggravated manslaughter, reckless manslaughter, and possession of a weapon for an unlawful purpose. (Da32-33). There was no provision or question relating to self-defense.

Defendant's argument of plain error in the trial court's jury instructions is without merit. The claim of error being raised here, the failure to instruct

the jury on the State's burden to disprove self-defense when instructing on the elements of the substantive offense, was raised in State v. Bryant, 288 N.J. Super. 27 (App. Div.), certif. denied, 144 N.J. 589 (1996). In Bryant, the defendant argued that it was plain error not to refer to the justification defense of self-defense in the trial court's instructions on the elements of murder. 288 N.J. Super. at 40. The defendant in Bryant relied on State v. Coyle, 119 N.J. 194 (1990), where the Supreme Court held that a jury instruction foreclosed the jury from considering passion/provocation manslaughter in determining whether defendant was guilty of purposeful or knowing murder where the State's burden was to disprove passion/provocation manslaughter. Ibid.

The Appellate Division in Bryant held that defendant's reliance on Coyle was misplaced because the jury in Bryant was not instructed to disregard evidence of justification if it found the State had proven the statutory elements of murder but was expressly instructed that it was to acquit defendant if it harbored reasonable doubt that the killing was justified by self-defense. Ibid. The holding in Bryant defeats defendant's claim of plain error here.

Because self-defense is an affirmative defense under the Code, it is not an element of the charged offense but a defense that must be disproved if the jury finds that the crime was committed, and the issue becomes whether the use of force was justified. While the court's instructions on the elements of

aggravated manslaughter and reckless manslaughter contained the "must convict language," it was in addition to language that also told the jury to acquit if it found the State had not met its burden of proof on the elements of the offense. The "must convict" language must be seen in context with the instruction that immediately followed, which was the charge on self-defense and the State's burden to disprove it if it found that defendant used force against the victim. The trial court instructed the jury that its charge was to be seen in its entirety, (6T113-1 to 3), and the court reaffirmed this principle when it answered one of the jury's questions during deliberations. (7T56-25 to 7T57-4). The jury had a copy of the court's written instructions during its deliberations, as well. (6T149-10 to 11). If the jury was not convinced that the State had met its burden to disprove self-defense, the jury was instructed to acquit defendant. There was no error, let alone plain error with the trial court's instructions.

The trial court's instructions must be evaluated in the context of the trial and the jury knew from the evidence and the arguments of counsel that it would have to determine whether defendant acted in self-defense. (See 6T52-14 to 15; 6T53-2; 6T53-12 to 13; 6T60-6 to 7; 6T62-19 to 22; 6T62-23 to 6T63-11; 6T70-16 to 22; 6T75-14 to 6T77-11; 6T81-10 to 6T81-14; 6T85-10 to 16; 6T86-8 to 6T87-5; 6T91-11 to 18). The jury is presumed to have

followed the trial court's instructions, so there is no support for defendant's claim that the jury would have focused only on the "must convict" language and not consider self-defense. The trial court's instructions did not preclude the jury from considering self-defense in determining defendant's guilt.

Defendant's belated claim of error with the verdict sheet is unavailing. As noted earlier, R. 3:19-1(b) requires a verdict sheet to record the jury's verdict. It does not require the jury to record its findings on a defense. In State v. Branch, 301 N.J. Super. 307, 328 (App. Div. 1997), rev'd o.g., 155 N.J. 317 (1998), the Appellate Division held that the omission of self-defense from the verdict sheet was not plain error because "there is no verdict per se for self-defense." If the State here had not sustained its burden of disproving self-defense, the jury's verdict would have been not guilty, an option for which the verdict sheet provided on each substantive offense submitted to the jury. (Da32-33). There was no error with the verdict sheet as drafted by the court and submitted to the jury.

In any event, even if this court found that not placing self-defense on the verdict sheet was error, it was not plain error. The trial court's oral instructions conveyed the State's burden of proof on the elements of the offenses and on disproving self-defense, and the court provided the jury with its instructions for use during deliberations. (6T149-10 to 11). The jury thus

had not only the trial court's accurate instructions given verbally but in writing, as well. Cuff, 239 N.J. at 342. The trial court's instructions serve as the "primary guide" for the jury, not the verdict sheet. Id. at 341. In Cuff, the verdict sheet failed to include a possible verdict for a lesser included offense charged by the court, and the Supreme Court found no plain error. Id. at 342. Here, unlike in Cuff, the omission related to a defense, not a substantive crime, and there is no requirement that a verdict sheet contain a question pertaining to it. Branch, 301 N.J. Super. at 328. There was no error that was clearly capable of producing an unjust result.

Finally, defendant's reliance on State v. Culkin, 97 Hawai'i 206, 35 P.3d 233 (2001) is misplaced. In Culkin, the Supreme Court of Hawai'i found reversible error with the trial court's failure to instruct the jury on the State's burden to disprove self-defense when it outlined the elements for reckless manslaughter. 35 P.3d at 240-246. The trial court had instructed the jury for each offense, except reckless manslaughter, that the State bore the burden of proving that Culkin did not act in self-defense. Id. at 241. In Hawai'i, unlike New Jersey, self-defense by statute is not an affirmative defense and the burden is on the State to disprove it as an element of the charged offense. Id. at 242, 244. The court in Culkin held that the trial court's failure to charge the self-defense element for reckless manslaughter but so instructing for all other

substantive offenses was compounded by the jury's confusion when it asked the trial court during deliberations for clarification on whether self-defense applied to all offenses. Id. at 246.

The error in the Culkin case, which was the failure to charge under Hawai'i law an element of the offense, did not occur in this case. Self-defense is not an element of aggravated manslaughter or reckless manslaughter because it is an affirmative defense. The trial court instructed the jury on the elements of the manslaughter offenses and then instructed the jury to consider whether the force used upon the victim was justified as self-defense. If the State proved beyond a reasonable doubt that the defense was untrue, the jury had to reject the defense; if the jury had reasonable doubt, defendant was entitled to an acquittal. (6T133-12 to 6T134-7).

POINT III

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL. (7T47-6 to 7T49-10).

Defendant contends that the trial court abused its discretion when it denied his motion for a mistrial, which was prompted after it came to the court' s attention during deliberations that during a lunch break on the first day of deliberations, some of the jurors had a brief conversation with the victim's brother, Joseph Demko, who had testified at trial on behalf of the State. After

conducting individual questioning of the jurors, the trial court held that the conversation was "innocent" and there had been no extraneous information imparted to the jurors that had the capacity to prejudice the deliberations. The trial court's ruling is supported by the record and should be affirmed.

The decision to grant a defendant's motion for a mistrial rests within the sound discretion of the trial court. State v. Harvey, 151 N.J. 117, 205 (1997). The grant of a mistrial is an extraordinary remedy that should be granted sparingly. State v. Jenkins, 182 N.J. 112, 124 (2004). The appellate court should not disturb the denial of a mistrial "unless there [was] a clear showing of mistaken use of discretion by the trial court," Greenburg. v. Stanley, 30 N.J. 485, 503 (1959), or unless "manifest injustice would. . .result." State v. LaBrutto, 114 N.J. 187, 207 (1989). A mistrial should be granted only when necessary "to prevent an obvious failure of justice." Harvey, 151 N.J. at 205.

Defendant has a constitutional right to an impartial jury. State v. Williams, 113 N.J. 39, 61 (1983). The jury's verdict must be free from the taint of extraneous considerations and influences. State v. Scherzer, 301 N.J. Super. 363, 486 (App. Div.), certif. denied, 151 N.J. 466 (1997). The intrusion of irregular influences will warrant a new trial if the irregular matter could have the tendency to influence the jury in arriving at its verdict in a manner inconsistent with the proofs and the court's charge. Ibid. The issue is whether

the irregular matter had the capacity to influence the jury. State v. Grant, 254 N.J. Super. 571, 583 (App. Div. 1992). When there is any indication of exposure to extra-judicial information, the trial court should question the jurors individually to determine if they could fulfill their duty to judge the facts in an impartial and unbiased fashion. State v. Bey (I), 112 N.J. 45, 86-91 (1988).

Summations from counsel and Judge Carter's jury instructions took place on Thursday, April 28, 2022. (6T). Following summations, the jury was excused for its lunch break. (6T92-9 to 15). When the jury was back from lunch, the judge instructed the jury. (6T112-13 to 6T149-21). After commencing deliberations at 4:07 p.m., the jury requested the playback of testimony, which the court provided from 5:11 p.m. to 5:23 p.m. (6T155-8 to 6T156-21; 6T156-23 to 6T157-11; 6T157-18; 6T167-13). The jury deliberated until 5:35 p.m. without reaching a verdict. (6T167-16 to 21). The court instructed the jury that it was not to discuss the case with anyone. (6T168-18 to 21).

On the morning of Monday, May 2, 2022, the jury reported to court and resumed its deliberations. (7T). At 9:20 a.m., Judge Carter learned from a court officer that jurors number five and nine had approached her. (7T3-4 to 8). Juror number nine, while using the bathroom, told the officer that,

unbeknownst to her at the time, she had spoken to Joseph Demko during the lunch break outside the courthouse where there were benches. (7T3-9 to 16). The juror told the officer that it was "small talk." (7T3-17 to 18). The trial court ruled that probing questions needed to come from the court. (7T3-21 to 22). The trial court conducted an individual voir dire of the jurors, starting with juror number nine. (7T5-19 to 7T41-5).

Juror number nine told the court that on the prior Thursday, she and two other jurors were sitting on some benches outside the courthouse at the end of the lunch break. (7T6-2 to 5). She saw three other jurors approach them and they started talking; she saw a man with them that looked familiar to her, but she did not know who he was at the time. (7T6-2 to 13). He participated in the conversation, which was about food. (7T6-11 to 12). It was not until later when she and two other jurors were leaving the courthouse that she realized the man was one of the witnesses. (7T6-13 to 16). The juror characterized the conversation as "small conversation," and recalled some talk about "Boba tea." (7T7-1 to 7). The juror assured the judge that she could remain fair and impartial. (7T8-25 to 7T9-3). The court asked counsel if they had any further questions, and they said no. (7T9-4 to 7; 7T9-14 to 17).

The court next questioned juror number five. (7T10-24 to 7T11-1). The juror said she and juror number nine and one other juror, went at lunch to get

"Bobo" tea. (7T11-16 to 18). They sat down on benches outside the courthouse and other jurors approached after which they talked. (7T11-19 to 24; 7T11-25 to 7T12-1). A man approached and started talking, but it had nothing to do with the case. (7T12-4 to 5). She recalled she talked about the different flavors of "Bobo" tea and how she worked at a "Bobo" store, which prompted the man to comment that was why she knew so much about the drink. (7T12-11 to 12; 7T12-20 to 22). She just thought the man was a "random dude." (7T13-1 to 2). The juror recounted that one of the jurors who was present could not recall who the man was but asked her and juror number nine if they were sure once they realized the man was a witness; they said yes, and the juror said they should let the court know. (7T13-22 to 25). She assured the judge she could remain impartial. (7T14-2 to 4).

The court next questioned juror number thirteen. (7T15-16 to 19). The juror told the court she was with juror numbers five and nine during lunch the prior Thursday and other jurors came up to them and started talking. (7T15-25 to 7T16-14). A man she did not recognize walked up to them. (7T16-15 to 17). She recalled him talking about the weather. (7T16-17 to 18). It was not until that morning she learned who the man was. (7T16-16 to 17). The juror assured the judge she could remain impartial. (7T17-10 to 16).

The remaining jurors who were questioned all told the judge that they had not had any interactions with anyone affiliated with the case and had not been in the vicinity of any other juror interacting with anyone connected with the case. (7T21-21 to 24; 7T25-7 to 23; 7T26-10 to 7T27-5; 7T27-22 to 7T28-11; 7T29-3 to 16; 7T30-4 to 18; 7T31-6 to 23; 7T32-22 to 7T37-23; 7T34-19 to 7T35-9; 7T36-22 to 7T37-17; 7T38-7 to 7T39-7; 7T40-1 to 24).

Judge Carter denied defendant's motion for a mistrial. The judge ruled that the conversation with the jurors was about food and tea and was not a long conversation. (7T47-14 to 18; 7T48-14 to 25). The conversation was "innocent" and there was no evidence the conversation could influence the verdict. (7T49-2 to 5). The jurors had been forthright in alerting the court to the encounter, and all the jurors told the court they could be impartial. (7T47-24 to 7T48-6).

The trial court properly denied defendant's motion for a mistrial. The court followed what the law requires when it becomes known that irregular matter had come to the jury's attention and that is to question the jurors. The jurors who had participated in the conversation with Demko outlined a brief conversation at lunchtime that was idle chatter about food and "Boba" tea. There was no suggestion that Demko was trying to influence the jurors' decision on the case. They did not recognize him at the time of the

conversation. The issue was whether the conversation had the capacity to influence the verdict, and the innocuous nature of it had no such capacity. Cf. Grant, 254 N.J. Super. at 581 (juror talked with spouse, a corrections officer, about evidence); State v. Weiler, 211 N.J. Super. 602 (App. Div.) (court officer told juror defendant was guilty), certif. denied, 107 N.J. 37 (1986).

Defendant claims that Judge Carter failed to thoroughly question the last juror questioned, juror number sixteen, however, he is in a poor position to make this claim because when juror number sixteen was questioned, defense counsel did not argue the juror's responses showed there had been discussions about the lunchbreak conversation with Demko in deliberations. No one below construed the juror's answers in this manner.

The judge asked juror number sixteen if he had been within "earshot" of any discussions from the other jurors about any interactions with anyone affiliated with the case; the juror answered, "just in deliberations." (7T40-10 to 15). The judge told the juror the court did not want to learn the contents of the jury's deliberations, and said her question was very specific. (7T40-16 to 20). She asked the juror if he had interactions with any of his fellow jurors about interactions they had with witnesess "outside of—with—with witnesses connected to this case?" (7T40-20 to 23). The juror answered no. (7T40-16). The fact that neither party urged the court to ask further questions indicates

that the court's question and the juror's answer meant he had not spoken with any other juror about interactions they had with witnesses outside the deliberation room. In any event, the nature of the conversation that the few jurors had with Demko over the lunchbreak was innocuous and had nothing to do with the case. As such, it had no capacity to influence the jury. The trial court properly denied defendant's motion for a mistrial.[7]

POINT IV

DEFENDANT'S SENTENCE IS MANIFESTLY PROPER. (10T27-5 to 10T38-21).

The State concurs with defendant that count two merges with count one, however, it submits that the 25-year sentence for aggravated manslaughter should be affirmed.

The trial court's function at sentencing is to consider "a range of information unconstrained by evidential considerations," to conduct a "careful and deliberate analysis." State v. Fuentes, 217 N.J. 57, 71-72 (2014). Here, Judge Carter considered the submissions and exhibits from the parties, the pre-sentence report, submissions from defendant and everything she heard at the hearing. (10T27-5 to 18). The judge considered all the mitigating factors

[7] The trial court denied defendant's motion for a new trial on this ground. (10T4-18 to 10T5-16; 10T6-13 to 21; 10T8-18 to 25; 10T12-17 to 21; 10T13-6 to 16; 10T35-2 to 25).

urged by defendant, and she explained her reasons for rejecting them. (10T28-23 to 10T33-5). The court explained her reasons for finding as aggravating factors the nature and circumstances of the offense, the risk defendant would commit another offense, the nature and extent of his prior record, and the need for deterrence. (10T33-3 to 10T38-21). N.J.S.A. 2C:44-1a(1), (3), (6), (9). The court provided the requisite basis for its findings, and this court must not substitute its judgment for that of the court. E.g., State v. Lawless, 214 N.J. 594, 606 (2013).

Defendant improperly substitutes his judgment for that of the trial court by attacking the court's finding that the killing of Edward Demko was horrific and senseless. The victim suffered two deep stab wounds and clearly fought for his life. There was no support for the claim defendant was provoked. Defendant argues that his prior record was not serious, but Judge Carter gave weight to the nature of the prior convictions and the fact defendant was on probation when he killed Edward Demko. The judge's findings are supported in the record. The sentence should be affirmed.

CONCLUSION

The State asks that the court to uphold conviction and sentence.

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