SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001690-22T2
IND. NO. 20-02-00199-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Bergen County.
KWAKU DUA,	:	
		Sat Below:
Defendant-Appellant.	:	
		Hon. Carol Novey Catuogno, J.S.C.,
	:	and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: January 31, 2024

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PRELIMINARY STATEMENT

On November 1, 2019, Mr. Kwaku Agyemang Dua[1] called the police to help him resolve a dispute at a restaurant where he was eating with his family. Two police officers, Hwang and Enriquez, responded to the restaurant, and a physical altercation occurred between Mr. Dua and the officers. Mr. Dua's wife, Mrs. Sara Dua,[2] testified that Hwang approached Mr. Dua from behind and grabbed his arm as Mr. Dua was talking to Enriquez. Sara Dua testified that while the two officers pushed Mr. Dua out the front door of the restaurant, Mr. Dua put his arms up in a self-defensive motion. Outside the restaurant, the two officers immediately attempted to take Mr. Dua down, and Sara Dua testified that she watched Mr. Dua attempt to defend himself. It was undisputed that during the struggle, Hwang punched Mr. Dua in the eye, fracturing his orbital bone. The incident resulted in Enriquez suffering a minor fracture in his wrist, and Hwang experiencing some unexplained neck pain, as well as injuring his finger as a result of punching Mr. Dua.

The jury convicted Mr. Dua of aggravated assault on a law enforcement officer (Enriquez) and of attempted aggravated assault on a law enforcement officer (Hwang). The jury acquitted Mr. Dua of resisting arrest. Given the

[1] Hereinafter referred to as Mr. Dua
[2] Hereinafter referred to as Sara Dua.

unclear nature of the video footage shown at trial, practically the entire case turned on the jury's assessment of the testimony of Sara Dua and the two officers. Against this backdrop, the trial court committed several errors that undermined the jury's ability to fairly evaluate the evidence. First, the court erroneously permitted both officers to testify that they had arrested Mr. Dua for aggravated assault on a police officer. Moreover, the court failed to instruct the jury on self-defense, as well as on causation, where the evidence presented at trial clearly required the jury to be instructed on both. Because these errors, individually and cumulatively, could have impacted the jury's verdict, Mr. Dua was denied a fair trial and his convictions must be reversed.

PROCEDURAL HISTORY

Bergen Ind. No. 20-02-00199-I charged Kwaku Dua with two counts of third-degree aggravated assault on a police officer, contrary to N.J.S.A. 2C:12-1b(5)(a) (Counts 1 and 3); and one count of third-degree resisting arrest, contrary to N.J.S.A. 2C:29-2(a) (Count 2). (Da 1-2)[3]

Dua was tried in October 2022, before the Hon. Judge Carol Novey Catuogno, J.S.C., and a jury. On October 19, the court denied Mr. Dua's motion for a judgment of acquittal. (7T:238-15 to 242-8) On October 25, 2022, the jury acquitted Mr. Dua of resisting arrest, and convicted him of one count of aggravated assault on a police officer, as well as of fourth-degree attempted aggravated assault on a police officer. (9T:131-3 to 133-11) (Da 3-4) On December 16, 2022, the court sentenced Mr. Dua to an aggregate sentence of three years of probation. (10T:36-20 to 37-18; Da 5-7) A notice of appeal was filed on February 10, 2023. (Da 8-11)

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[3] Da: Defendant's appendix

1T: Transcript of 9/22/2022 (Hearing)
2T: Transcript of 10/11/2022 (Pretrial)
3T: Transcript of 10/12/2022 (Trial)
4T: Transcript of 10/13/2022 (Trial)
5T: Transcript of 10/14/2022 (Trial)
6T: Transcript of 10/18/2022 (Trial) (Separated into Vol. I (pages 1-200) and Vol. II (pages 201-269))
7T: Transcript of 10/19/2022 (Trial)
8T: Transcript of 10/21/2022 (Trial)
9T: Transcript of 10/25/2022 (Trial)
10T: Transcript of 12/16/2022 (Sentence)

STATEMENT OF FACTS

On November 21, 2019, Mr. Dua was having lunch with his family at a buffet restaurant. Seated around the table with him were his mother, his wife, his ex-partner, and eight of their children. (8T:22-9 to 23) After having a dispute with restaurant employees regarding the service, Mr. Dua called 911 in an effort to resolve the issue. (8T:31-10 to 32-5)

Two police officers, Officer John Hwang and Officer Andres Enriquez, responded to the restaurant, and an altercation between the officers and Mr. Dua took place. Video footage from a surveillance camera inside the restaurant capturing the altercation between Mr. Dua, Hwang, and Enriquez was played several times for the jury. (6T:147-9 to 148-1, 149-10 to 150-16; 8T:35-7 to 36-2, 40-8 to 41-25, 171-15 to 175-19; Da 12)[4]

Defense counsel played the surveillance footage for defense witness Sara Dua. (8T:41-1 to 25; Da 12) She recalled that the police arrived in several minutes and that she observed Mr. Dua speaking with Enriquez inside the restaurant.[5] (8T:32-15 to 17, 33-23 to 35-1) Sara Dua testified that Mr. Dua was visibly upset, but that he was neither aggressive nor disrespectful towards the

[4] Video exhibit D-14 is the same video as S-3-3, and D-14A appears to refer to one portion of the same video played by defense counsel. (8T:40-19 to 41-7)
[5] Sara Dua could not recall Ofc. Enriquez's name, and described him as the "white or Hispanic officer." (8T:34-23 to 35-5, 46-16 to 21, 52-22 to 53-2)

officer. (8T:54-19 to 55-17) She testified that when Hwang[6] first entered the restaurant, he came over to where she was standing to intervene in a dispute between her and another customer "who was yelling very unpleasant things" at her and her family. (8T:44-9 to 14, 45-4 to 47-7, 51-23 to 52-13) Sara Dua testified that Hwang left the restaurant, and that upon re-entering, he grabbed Mr. Dua's arm or wrist, Mr. Dua pulled away, and the officers began pushing him towards the front door "forcefully." (8T:55-19 to 22, 57-2 to 9, 58-18 to 21, 60-17 to 61-15) Mrs. Dua testified that "in defense," Mr. Dua "put his hands up – in a kind, of, like, a self-defense motion." (8T:59-4 to 11)

Hwang and Enriquez, the two police officers who responded to Mr. Dua's 911 call, both testified for the State. Enriquez recalled that when he arrived at the restaurant around 2:00 pm, he could hear yelling from outside. (6T:136-10 to 22) Hwang testified that he arrived at the restaurant at the same time as Enriquez. Hwang and Enriquez described the situation inside the restaurant similarly. Hwang called it chaotic, stating that "everyone was very loud and aggressive" and that "employees are screaming, other people … everyone's just yelling at each other" and that he "had absolutely no idea who was involved, what was going on." (7T:73-19 to 74-25; 76-5 to 9) Enriquez testified that he encountered a "large crowd of people" inside and that "everybody was involved,

[6] Likewise, Sara Dua refers to Hwang as the "Asian officer." (8T:46-16 to 21)

everybody was yelling." (6T:136-24 to 137-24) Enriquez testified that he was standing near the counter, trying to talk to Mr. Dua, but that it was difficult to communicate properly because of how many people were around them – including Mr. Dua's family and restaurant employees. (6T:141-11 to 24) Enriquez testified that Mr. Dua was upset, agitated, and loud, and that Mr. Dua told him that he had been disrespected by one of the restaurant employees and was standing up for his family. (6T:138-22 to 139-2, 20 to 25, 200-11 to 24)

Enriquez testified that Hwang approached Mr. Dua from behind and "attempted to get Mr. Dua's attention to escort him outside" by putting his hand out. (6T:142-22 to 143-2, 144-7 to 21) Hwang claimed that he walked toward Mr. Dua and Enriquez because he wanted to "de-escalate the situation," and that Mr. Dua immediately punched him in the chest before he said anything. (7T:78-23 to 80-3) Hwang stated that he and Enriquez tried to grab Mr. Dua, but that Mr. Dua walked backwards out the first set of doors in the vestibule and then pushed Hwang, causing Hwang to hit the door behind him. (7T:81-10 to 82-3) Enriquez testified that Mr. Dua pushed Hwang into the vestibule wall. (6T:145-18 to 146-21) Both officers testified that they followed Mr. Dua as he backed away through the second set of doors and onto the street. (6T:150-18 to 23; 7T:81-19 to 82-3)

Two videos of the altercation outside the restaurant between the police officers and Mr. Dua were played for the jury – one from Enriquez's mobile video recorder (MVR), which included the audio recording from his body-worn microphone, and one taken by Mr. Guang Li, the restaurant manager, on his cellphone. (6T:158-25 to 163-17; 8T:80-19 to 81-21, 189-23 to 24; Da 13-14) Hwang's MVR recording was also played for the jury, but because the camera was facing the inside of Hwang's police car, it did not capture any video footage of the incident. It did however include audio captured by Hwang's body-worn microphone from both inside and outside the restaurant. (7T:91-19 to 95-20; 8T:83-9 to 17, 175-20 to 176-21; Da 15) Neither Hwang nor Enriquez wore body cameras. (1T:202-17 to 18; 2T:153-4 to 6)

The police officers and Sara Dua gave conflicting testimony regarding what occurred outside the restaurant. Enriquez testified that after exiting the restaurant, he and Hwang attempted to grab Mr. Dua's arms on the sidewalk outside of the restaurant. (6T:152-4 to 153-3) According to Enriquez, they grabbed at Mr. Dua, attempting to take him down, until Mr. Dua and the officers ended up on the ground (6T:153-4 to 20) According to Hwang, upon exiting the restaurant, Mr. Dua "landed on the hood" of a police car that was partially on the curb, both officers landed on top of him, and all of them "fell off the curb and rolled onto the parking lot." (7T:81-24 to 82-4 to 7)

Hwang and Enriquez testified that Mr. Dua tried to swing at Hwang and grab his leg, and that Hwang punched Mr. Dua in the face. (7T:84-18 to 85-11) Enriquez testified that he pushed Sara Dua "because she was involved, either to calm [Mr. Dua] down or to stop us from – she claimed, hurting him," and that he "had to push her off to separate her to stop her from getting involved." (6T:156-13 to 18) The officers proceeded to handcuff and arrest Mr. Dua, whose left eye was visibly semi-shut and swollen from Hwang's punch. (6T:158-17 to 24; 7T:97-22 to 98-5, 172-13 to 25; Da 16-17) The entire incident from the officer's arrival on the scene until Mr. Dua's arrest took a total of approximately eight minutes. (7T:190-4 to 21)

Sara Dua gave a different account of the struggle between Mr. Dua and the police officers outside the restaurant. After running outside with the children, she saw one of the officers with his hand around Mr. Dua's neck and the other officer with his hand in Mr. Dua's face. (8T:61-2 to 20) She testified that she saw Hwang point his gun at Mr. Dua while his partner tried to take Mr. Dua to the ground. She saw Hwang reholster his gun and attempt to take him down as well. (8T:61-20 to 63-10, 89-14 to 21) Sara Dua recalled that she was very close to the struggle, trying to calm Mr. Dua down, and that the officers "weren't too happy about that." (8T:63-13 to 22) She testified that "she physically watched [Mr. Dua] defend himself," but that she did not see him trying to hit an officer.

(8T:93-4 to 17) Sara Dua testified that while the officers were taking Mr. Dua to the ground, one of them had his knee in Mr. Dua's rib, one of them hit him with his nightstick twice, and one of them punched him in the eye twice. (8T:65-2 to 6, 66-19 to 67-5) Sara Dua testified that her husband suffered an orbital fracture as a result of being punched by one of the officers, and that he was taken to the hospital "several hours after it happened." (8T:67-14 to 21, 70-7 to 17) Defense counsel showed Sara Dua several photographs of Mr. Dua's face taken after the incident, and she confirmed that she had taken them. (8T:70-18 to 73-2; Da 16-18)

Enriquez testified that he did not know that Mr. Dua was the individual who had originally called 911 and did not know his name until after the arrest. (7T:47-4 to 8) Hwang testified that he never asked who the 911 caller was after arriving on the scene. (7T:149-25 to 151-1) Following the arrest, Hwang interviewed everyone who said they were involved in the incident – including three or four workers and the restaurant manager – but did not interview anyone from Mr. Dua's family or group. (7T:96-20 to 97-3) Hwang stated that he wrote the incident report when he returned to work – about eight weeks after the incident – from a combination of his recollection and the evidence provided to him. (7T:99-19 to 100-12, 104-1 to 6)

Hwang testified that he injured his middle finger, and that his injury was the result of punching Mr. Dua. (7T:98-6 to 16; 156-18 to 157-10) He stated that he had some neck pain after the arrest, without specifying the cause. (7T:98-16 to 18) Enriquez testified that he sustained "a small fracture" in his right wrist when he fell on the ground in the parking lot, while "rolling around with Mr. Dua." (6T:163-19 to 164-5)

LEGAL ARGUMENT

POINT I

BOTH POLICE OFFICERS TESTIFIED THAT MR. DUA COMMITTED THE CHARGED CRIME OF AGGRAVATED ASSAULT ON A POLICE OFFICER, DENYING MR. DUA A FAIR TRIAL AND REQUIRING REVERSAL. (NOT RAISED BELOW)

Witness testimony squarely addressing the ultimate issue of a defendant's guilt infringes upon the jury's role and is unquestionably inadmissible under our well-established case law. See State v. Simms, 224 N.J. 393, 407 (2016) (citing State v. Reeds, 197 N.J. 280, 293 (2009)). Here, Enriquez and Hwang both answered the ultimate question at issue in the trial by testifying that Mr. Dua committed aggravated assault on a police officer. This was plain error, denying Mr. Dua his right to a fair trial and requiring reversal of his convictions.

While a police officer witness may offer fact testimony, opinion testimony on an ultimate issue – such as the defendant's guilt – is impermissible. See State v. Trinidad, 241 N.J. 425, 446-447 (2020) (holding admission of police officer's testimony that defendant's actions "appear to have been criminal" was error); see also State v. McLean, 205 N.J. 438, 461 (2011) (reversing defendant's convictions for C.D.S possession with intent to distribute where police officer gave inadmissible opinion testimony that he had observed drug transaction); Simms, 224 N.J. at 404 (holding admission of police officer's statements to effect that C.D.S. transaction

had occurred was error). The risk that the jury will accept the improper ultimate issue testimony is even greater when the witness is a law enforcement officer. See State v. Hawk, 327 N.J. Super. 276, 285 (App. Div. 2000) (noting that ordinary citizens are more likely to believe testifying police officers than defendants because "police occupy a position of authority in our communities").

Testimony on the ultimate issue of the defendant's guilt usurps the jury's role as the exclusive finder of fact, is clearly capable of producing an unjust result, and requires reversal. Simms, 224 N.J. at 406-07 (citing Reeds, 197 N.J. at 296-97, 300-01). In both Simms and Reeds, our Supreme Court held that the admission of a detective's expert testimony pronouncing the defendant guilty of the charged offenses requires reversal. Ibid. The Court noted that, in both cases, the detectives mimicked the statutory language of the charged offenses in their testimony – thereby rendering "an ultimate-issue opinion expressing a belief in the guilt of the defendants." Ibid.

Here, both Hwang and Enriquez opined on Mr. Dua's guilt and testified to the ultimate issue numerous times throughout the trial. Enriquez testified to the ultimate issue – that Dua committed an aggravated assault on Hwang – three times during direct examination. He first stated that he saw Hwang "grab [Dua] to arrest him for agg. assault on a police officer" inside of the restaurant, and repeated this, stating, "at that point he was going to be placed under arrest for disorderly conduct and agg.

assault on a police officer." (6T:143-8 to 13; 145-12 to 17) Regarding the altercation outside the restaurant, Enriquez testified that they ultimately arrested Mr. Dua "for disorderly conduct, agg. assault, and resisting arrest." (6T:158-20 to 24) Similarly, Hwang testified that he wanted to arrest Mr. Dua after Mr. Dua allegedly punched him because "it's aggravated assault on a police officer." (7T:80-6 to 15, 81-7 to 8) As in Simms and Reeds, the officers' statements were "tantamount to a legal conclusion" and openly pronounced Mr. Dua guilty of the offenses that he was charged with. See 224 N.J. at 407 (quoting Reeds, 197 N.J. at 297). Furthermore, the officers' testimony tracked the statutory language of the charged offenses, invading the province of the jury. Ibid. While the officers could testify to what they saw – for instance, that they saw Mr. Dua hit Hwang – they could not testify that Mr. Dua committed the charged crime.

The two officers' four total statements that Mr. Dua had committed aggravated assault on a police officer were clearly capable of producing an unjust result. Therefore, the admission of these statements constituted plain error. R. 2:10-2. The surveillance footage capturing the altercation inside the restaurant was ambiguous, as evidenced both by the footage itself and the jury's questions during deliberations. (See 9T:15-2 to 17-9, 21-17 to 22-20, 54-19 to 56-7; Da 12) (Jury question asking to see video again multiple times, and follow-up requests for screen to be brought closer to jury box, to be able to shift in the jury box to see better, and

to change playback speed). Enriquez testified that the hotly disputed altercation constituted "aggravated assault on a police officer" immediately before the ambiguous video was played for the jury – depriving the jury of their right to determine what the video portrayed for themselves. (6T:147-9 to 148-1, 149-10 to 150-16; Da 12) Given the ambiguous nature of the video, Hwang's subsequent testimony that he wanted to arrest Mr. Dua for aggravated assault inside the restaurant deepened the harm from Enriquez's previous impermissible testimony. Likewise, Enriquez's subsequent testimony that Mr. Dua was ultimately arrested for "agg. assault" outside the restaurant made it more likely that the jury would convict Mr. Dua of committing aggravated assault against both officers. (6T:158-20 to 24)

The harm from the officers' ultimate issue testimony was exacerbated by the prosecutor's improper opening statement. In opening, the prosecutor told the jury that they would hear Hwang testify that he arrested Mr. Dua "because he just assaulted a police officer." (6T:58-14 to 16); See State v. Walden, 370 N.J. Super. 549, 558 (App. Div. 2004) (jurors give a prosecutor's comments in opening and closing statements great weight because prosecutors are representatives of the State). The officers' improper ultimate issue testimony, coupled with the prosecutor's inappropriate opening remark highlighting the testimony and lending it the State's imprimatur, had the clear capacity to deny Mr. Dua his fundamental right to have a jury fairly evaluate the merits of his defense. See Simms, 224 N.J. at 405-06

(reversing defendant's convictions where detective's ultimate-issue expert testimony was clearly capable of producing unjust result, and harm was exacerbated by prosecutor's improper hypothetical question); R. 2:10-2; U.S. Const., amends. VI, XIV; N.J. Const., art. I, ¶¶ 1, 10. Consequently, Mr. Dua's convictions must be reversed.

POINT II

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON SELF-DEFENSE DEPRIVED MR. DUA OF A FAIR TRIAL. (NOT RAISED BELOW)

The trial court's failure to instruct the jury on self-defense violated Mr. Dua's right to a fair trial because had the jury been instructed on self-defense, it could have found it to be a complete justification to all the charges against Mr. Dua. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10. If any evidence raising the issue of self-defense is presented at trial, "whether in the State's case or in the defendant's case, then the jury must be instructed that the State is required to prove beyond a reasonable doubt that the self-defense [justification] claim does not accord with the facts." State v. Kelly, 97 N.J. 178, 200 (1984); State v. Galicia, 210 N.J. 364, 390 (2012) ("A trial judge must sua sponte charge self-defense in the absence of a request … if there exists evidence in either the State's or the defendant's case sufficient to provide a rational basis for its applicability.") (internal quotations omitted). Where the evidence viewed in the light most favorable to the defendant is

sufficient to support a claim of self-defense, a court's failure to instruct the jury that self-defense is a complete justification for the crime charged has the clear capacity to produce an unjust result. See State v. Gentry, 439 N.J. Super. 57, 62-63 (App. Div. 2015). Accordingly, the court's failure to instruct the jury on self-defense requires the reversal of Mr. Dua's convictions.

There are two different sets of self-defense model jury instructions that apply to civilian-police altercations, both of which are based on the self-defense statute, N.J.S.A. 2C:3-4 ("Use of force in self-protection"). The self-defense statute was amended to its present form in direct response to our Supreme Court's decisions in State v. Mulvihill, 57 N.J. 151 (1970) and in State v. Montague, 55 N.J. 387 (1970). These cases, discussed in detail below, require the jury to be instructed on self-defense where there is evidence that the defendant used force in self-defense during an altercation with a police officer. The "Justification – Self-Defense" model jury instruction (hereinafter, "general self-defense model charge") applies where there is evidence that the altercation between the defendant and the police officer took on the essential character of an altercation between private individuals. See Model Jury Charges (Criminal), "Justification – Self Defense" (rev. June 13, 2011); Mulvihill, 57 N.J. at 158-59; Montague, 55 N.J. at 404-06. The "Justification – Self Defense Resisting Arrest" model jury instruction (hereinafter, "resisting arrest self-defense model charge") applies where there is evidence that a police officer used excessive

force in conducting an arrest, and the defendant resisted in self-defense. See Model Jury Charges (Criminal), "Justification – Self Defense Resisting Arrest" (approved Oct. 17, 1988); Mulvihill, 57 N.J. at 156-57. Both charges should have been given here.

In Mulvihill, our Supreme Court held that the trial court erroneously failed to instruct the jury on self-defense where the defendant got into a physical altercation with a uniformed police officer. 57 N.J. at 157-59. The defendant and the police officer gave conflicting accounts of the events that transpired after the officer stopped the defendant for a suspected ordinance violation. Recounting the facts in the light most favorable to the defendant, the Court noted that the defendant testified that the officer grabbed him and told him that he "should" arrest him, and a struggle ensued when he tried to free himself. After the officer struck the defendant on the head with his gun and pointed it at him, the defendant grabbed the officer's hand to point the gun away from himself, a shot went off harmlessly, and the defendant punched the officer, before being arrested and charged with assault and battery on a police officer. Id. at 154-155.

The Supreme Court identified two separate bases for its conclusion that the trial court erred in failing to instruct the jury on self-defense. First, the Court held that there was a factual dispute for the jury to resolve regarding whether the defendant was arrested prior to punching the officer. Had the jury found that the

officer's assertion that he "should" arrest the defendant did not constitute an arrest, "the fracas between the two men [would take] on the character of a combat between two private individuals," and the defendant would be entitled to have the jury determine whether he hit the police officer in self-defense. Id. at 158-59. The Court found that this was the "more crucial basis for accepting self-defense as a legitimate contention in this case," although it was not raised before the trial court. Id. at 157.

Second, the Court held that the trial court should have instructed the jury on self-defense even if the jury had found that the police officer "informed [defendant] expressly, or by his course of conduct that he was under arrest." Id. at 158. If the defendant was under arrest when he hit the officer, the question before the jury would then be whether the officer employed excessive force in attempting to overcome the defendant's resistance, and whether the defendant reasonably acted in self-defense to repel the excessive force "in light of all the circumstances apparent to him at the moment." Id. at 157. The Court held that the law of this state permits "reasonable resistance" to an officer's use of excessive force. Ibid.

Therefore, the Court held that on retrial, the jury must be instructed to "consider the matter of self-defense" in accordance with the appropriate theory based on its factual determination regarding when the arrest occurred. Id. at 159. Were the jury to find that the defendant was not under arrest at the time of the altercation, it should apply the same self-defense principles to the altercation

between the defendant and the officer as ordinarily apply to combat between private individuals. Were the jury to find that the altercation took place after the defendant was arrested, it should determine whether the officer employed excessive force, and whether the defendant reasonably acted in self-defense to repel the excessive force. See ibid.

Similarly, in State v. Montague, our Supreme Court reversed the defendant's conviction for assault on a police officer due to the trial court's failure to properly instruct the jury on the defendant's right to intervene in defense of his niece where there was sufficient evidence that the defendant reasonably believed that the officer was beating his niece in response to her verbal taunts. 55 N.J. at 390-93, 404-06. The Court further held that the trial judge erroneously instructed the jury that the defendant "could not prevail on his asserted defense that he had reasonably intervened to protect his niece if, regardless of the appearances and his beliefs," the officer had in fact arrested his niece and she actually resisted arrest. Id. at 403-404. The Court explained that the fact that the officer was in uniform did not in itself "obviate the possibility that the officer was using excessive and unnecessary force or that he was engaged in a private altercation rather than in the bona fide performance of his police duties." Id. at 405-06.

In response to Mulvihill and Montague, the legislature amended subsection b(1)(a) of the self-defense statute, N.J.S.A 2C:3-4, by adding the following underlined text:

> b. Limitations on justifying necessity for use of force.
>
> (1) The use of force is not justifiable under this section:
>
> (a) To resist an arrest which the actor knows is being made by a peace officer in the performance of his duties, although the arrest is unlawful, unless the peace officer employs unlawful force to effect such arrest; …
>
> N.J.S.A. 2C:3-4b(1)(a); see also N.J. CRIMINAL LAW REVISION COMMISSION, I FINAL REPORT: SECTION 2C:3-4, at 26-27 (1971).

The 1971 New Jersey Criminal Law Revision Commission Commentary (hereafter 1971 Commentary), explicitly states that a police officer does not act "in the performance of his duties" within the meaning of Mulvihill and Montague when he engages in the equivalent of a private altercation or uses excessive force, and that a defendant's resistance in this situation may constitute self-defense. The 1971 Commentary notes:

> "The Montague case holds that resistance is proper if the defendant reasonably believes the officer not to be acting in good faith in the performance of his duties, but instead to be using excessive force or engaged in a private altercation … By adding the words "in the performance of his duties," we have incorporated this holding into the Code."
>
> N.J. CRIMINAL LAW REVISION COMMISSION, II FINAL REPORT: COMMENTARY 3-4, at 104 (1971) (citing Montague, 55 N.J. at 405; State v. Mulvihill, 105 N.J. Super. 458 (App. Div. 1969) certif. granted, 54 N.J. 560 (1969)).

Both the general self-defense model charge and the resisting arrest self-defense model charge reproduce the language of the amended self-defense statute. See N.J.S.A. 2C:3-4b(1)(a); Model Jury Charges (Criminal), "Justification – Self Defense" (rev. June 13, 2011); Model Jury Charges (Criminal), "Justification – Self Defense Resisting Arrest" (approved Oct. 17, 1988). The self-defense statute and the holdings of Mulvihill and Montague stand for the proposition that when sufficient evidence of self-defense is adduced at trial to require a self-defense jury charge, and there is a factual dispute as to whether the defendant was under arrest when he had a physical altercation with a police officer, the court needs to give the jury both the general self-defense charge and the resisting arrest self-defense charge, as well as instructions on when and how to apply each charge.

Here, sufficient evidence that Mr. Dua acted in self-defense was adduced at trial, requiring the trial court to instruct the jury on self-defense. Furthermore, there was a factual dispute as to whether Mr. Dua was under arrest or knew that he was being arrested at the time of his physical altercations with the police officers, both inside and outside of the restaurant. Therefore, the trial court was required to instruct the jury on self-defense by giving both the general self-defense charge and the resisting arrest self-defense charge. The court should have tailored the instructions to the specific facts of the case, explaining which

self-defense charge the jury should consider based on its factual determinations regarding whether Mr. Dua was under arrest at the time of the altercation in question. See Gentry, 439 N.J. Super. at 72 (reversing defendant's conviction and reminding remand court of importance of "molding jury instructions so that the jury clearly understands how the evidence in this particular case relates to the legal concepts addressed in the charge"). Had the jury been instructed on self-defense, it could have found that Mr. Dua acted in self-defense both inside and outside of the restaurant. Therefore, Mr. Dua's convictions must be reversed.

Beginning with the altercation inside the restaurant, the court was required to instruct the jury on self-defense because there was sufficient evidence adduced at trial that Mr. Dua acted in self-defense. Sara Dua testified that Mr. Dua never hit Hwang, but that Hwang grabbed Mr. Dua's arm and began "forcefully pushing him" towards the door, in response to which Mr. Dua put his hands up "in a kind of … self-defensive motion." (8T:59-4 to 11) The officers, on the other hand, testified that Dua hit Hwang unprompted. (7T:81-1 to 20) Considering the State and the defense case together, the jury could have concluded that Hwang grabbed Mr. Dua and both officers forcefully pushed him out of the restaurant, at which point Mr. Dua responded by attempting to hit Hwang in self-defense. Thus, a self-defense instruction was warranted. See Mulvihill, 57 N.J. at 154-55 (finding trial court was required to instruct jury on self-defense where defendant's testimony

recounting his struggle with police officer raised issue of self-defense); State v. Blanks, 313 N.J. Super. 55, 69-70 (App. Div. 1998) (holding defendant entitled to self-defense charge where jury could have reasonably concluded that he acted in self-defense based on combination of evidence from State's case and defendant's case).

Furthermore, as in Mulvihill, there was a clear factual dispute for the jury to resolve as to whether Mr. Dua was under arrest at the time of the altercation. Both police officers testified that they neither arrested nor intended to arrest Mr. Dua inside the restaurant, prior to him allegedly hitting Hwang. Enriquez testified that the officers never told Mr. Dua that he was under arrest, but only that he would be arrested if he kept yelling. (6T:203-25 to 204-3; 7T:63-10 to 19) Hwang specifically testified that he was not attempting to arrest Mr. Dua when he reached towards him, and had no intention of arresting him at that point. (7T:80-13 to 15; 81-7 to 8) However, Sara Dua testified that the officers told Mr. Dua that he was under arrest after grabbing him and while pushing him out of the restaurant. (8T:55-18 to 23, 57-5 to 10) Thus, the jury could have found either that Mr. Dua was under arrest or that he was not under arrest inside the restaurant, and the jury should have received both self-defense charges.

Reversal is required because had the jury been properly instructed on self-defense, they could have acquitted Mr. Dua of aggravated assault on Ofc. Hwang

entirely.[7] See Blanks, 313 N.J. Super. at 64 ("With respect to jury charges, [e]rroneous instructions on matters or issues that are material to the jury's deliberation are presumed to be reversible error in criminal prosecutions) (internal quotations omitted). If the jury found that Mr. Dua was not under arrest at the time of this altercation, they could have acquitted him based on finding that the altercation was the equivalent of a scuffle between private individuals and that Mr. Dua acted in regular self-defense. If the jury found that Mr. Dua was under arrest at the time of the altercation, they could have acquitted him on the basis that he acted in self-defense in response to the officers' unlawful use of force. The court's failure to properly instruct the jury on self-defense deprived Mr. Dua of a fair trial, requiring reversal.

Turning to the events that occurred outside the restaurant, the police officers and Sara Dua gave conflicting testimony regarding what happened, and Sara Dua's testimony clearly raised the issue of self-defense. Sara Dua testified that she saw "one officer with his arm around [her] husband's neck and the other officer with his hand in his face" by the side of the police car, before the officers and Mr. Dua ended up in the street. (8T:61-2 to 20) Then, she saw Hwang step back, pull a gun from his holster, and point it at Mr. Dua before re-holstering it. (8T:61-16 to 63-4) Sara

[7] The jury convicted Mr. Dua of the lesser offense of attempted aggravated assault on Ofc. Hwang. (Da 3, 5)

Dua recalled her mother in-law asking the officer if he was going to shoot. (8T:61-20 to 22) She testified that the officers were being "very aggressive" in taking Mr. Dua down to the ground, that one of them had his knee in Mr. Dua's rib, one of them punched Mr. Dua twice in the eye, and one of them hit him twice with a nightstick. (8T:64-23 to 65-6, 67-1 to 5)

Sara Dua did not see Mr. Dua "throw a punch at the officers." (8T:93-4 to 10) She testified that she watched her husband "defend himself" and told him to "stop struggling," not because he was resisting, but because she was afraid of what the police would do. (8T:93-4 to 17, 95-1 to 11) She testified that after the arrest, Mr. Dua was taken to the hospital for treatment of his injuries, and established that the photographs the defense attorney showed her accurately reflected what Mr. Dua's eye looked like after the arrest. (8T:67-14 to 21, 70-7 to 73-2; Da 16-18) Sara Dua's testimony plainly warranted a self-defense instruction.

As with the altercation inside the restaurant, the evidence presented a factual dispute as to whether Mr. Dua was under arrest or knew that he was being arrested outside the restaurant. The jury could have found either that Mr. Dua did not know that he was being arrested and thought he was being merely beaten, or that he knew that he was being arrested. Thus, the jury should have received both the general self-defense charge and the resisting arrest self-defense charge. Notably, the fact that the jury ultimately acquitted Mr. Dua of resisting arrest suggests that they

believed that Mr. Dua did not know that he was being arrested outside of the restaurant. In the second part of jury question C-7, the jury asked "Does an officer need to verbalize the intent to arrest?" (9T:95-14 to 17) In response, the court read the resisting arrest charge to the jury again – including the instruction that to find Mr. Dua guilty of resisting arrest, the jury must find that the State proved beyond a reasonable doubt that "Hwang was effecting an arrest," as well as "acting under color of his official authority," and that he "announce[d] his intention to arrest prior to the resistance." (9T:95-18 to 98-15) The jury's ultimate acquittal of Mr. Dua on the resisting arrest charge, together with the jury's question (C-7), implies that they were unconvinced that Mr. Dua knew that he was being arrested outside of the restaurant.

Had the jury been properly instructed on self-defense, there is a real possibility that they would have acquitted Mr. Dua of the aggravated assault charges outside the restaurant as well. Viewing the evidence in the light most favorable to Mr. Dua, the jury could have concluded that Mr. Dua did not know he was under arrest, thought he was being beaten by police for his conduct inside the restaurant, and was responding in self-defense. Alternatively, the jury could have found that Mr. Dua knew he was being arrested and acted in self-defense in response to the officers' use of excessive force. Therefore, had the jury been properly instructed, it could have acquitted him of all charges. The absence of self-defense jury instructions denied Mr. Dua a fair trial. Reversal of his convictions is thus required.

POINT III

THE TRIAL COURT'S FAILURE TO ADEQUATELY INSTRUCT THE JURY ON CAUSATION WAS PLAIN ERROR WHERE THERE WAS A FACTUAL DISPUTE OVER WHETHER MR. DUA ACTUALLY CAUSED OFC. ENRIQUEZ'S WRIST FRACTURE. (NOT RAISED BELOW)

The State's theory underlying Count 3 of the indictment (aggravated assault on Enriquez) was that Mr. Dua recklessly caused Enriquez's wrist fracture during the altercation between the two police officers and Mr. Dua outside of the restaurant. (8T:192-8 to 193-6) However, this was a disputed issue based on the trial evidence, and defense counsel asserted that Enriquez likely hurt his own wrist by landing on it while taking Mr. Dua down. (7T:235-11 to 20) Because there was a clear factual dispute regarding the actual cause of Enriquez's injury, the jury should have been instructed on causation. Had the jury been properly instructed on causation, there is a real possibility it would have acquitted Mr. Dua of aggravated assault on Enriquez. Thus, the trial court's failure to instruct the jury on causation denied Mr. Dua his right to have a jury fairly evaluate the merits of his defense.

While the "full" causation charge is not required in all cases, it must be given when causation is contested at trial. State v. Canfield, 470 N.J. Super. 234, 315-16, 319 (App. Div. 2022), aff'd as modified, 252 N.J. 497 (2023) (finding causation is "genuinely at issue" where there is a dispute as to whether "the actual result of a

defendant's conduct is fortuitous"). The model jury instruction for aggravated assault on a police officer includes an instruction on but-for causation, explaining that for the jury to find that the defendant caused bodily injury to the victim, "the State must prove beyond a reasonable doubt that (he/she) would not have been injured but for the defendant's conduct." Model Jury Charges (Criminal), "Aggravated Assault – Upon Law Enforcement Officer (N.J.S.A. 2C:12-1b(5))" (rev. Dec. 3, 2001). Footnote 9 adds that "If causation is contested, a fuller explanation of causation may be needed," as per the Causation statute, N.J.S.A. 2C:2-3. Id. at 3 n.9.

The causation model jury charge instructs jurors to undertake a two-step analysis. Model Jury Charges (Criminal), "Causation (N.J.S.A. 2C:2-3)" (approved Jun. 10, 2013). First, the jury must determine whether the State has proved "but-for" causation beyond a reasonable doubt, or in other words, that "without defendant's actions, the result would not have occurred." Ibid. Second, depending on whether the mens rea of the offense charged is purposeful/knowing conduct, or reckless conduct, the jury must respectively determine either that the actual result of the defendant's conduct was within his design or contemplation, or that the defendant was aware of the risk that the actual result would occur. If the jury determines that the defendant neither contemplated the actual result, nor was aware of the risk that it would occur, then it must determine either that the actual result "involve[s] the

same kind of injury or harm as that designed or contemplated" (where the mens rea of the offense charged is purposeful/knowing conduct), or that it involves "the same kind of injury or harm as the probable result" (where the mens rea of the offense charged is recklessness), and that the actual result is not "too remote, too accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the defendant's liability or on the gravity of his/her offense." Ibid.

Where the relationship between the defendant's conduct and the resultant harm is "genuinely at issue based on the trial evidence," the trial court's failure to give "full" jury instructions on causation constitutes plain error. See Canfield, 470 N.J. Super. at 316-320 (citing State v. Green, 318 N.J. Super. 361 (App. Div. 1999); State v. Parkhill, 461 N.J. Super. 494, (App. Div. 2019); State v. Martin, 119 N.J. 2, 15 (1990)). In State v. Green, the defendant was charged with several counts of aggravated assault on a police officer. After the officer approached the defendant to speak with him, the defendant fled in his car, hitting the officer in the leg. 318 N.J. Super. at 367-68. The officer then chased after the defendant's car on foot and injured his hand by punching through the driver's side window in an attempt to shut off the ignition. Id. at 368. At trial, the State asserted that the defendant caused the injuries to the officer's hands, but the evidence suggested that the injuries were at least partly caused by the officer's own volitional act of punching through the car window. Id. at 373-4.

This Court held that the factual dispute regarding the cause of the officer's injuries was for the jury to resolve, and that the trial judge's failure to give a fact-specific causation charge was plain error. Id. at 374-75. The Court reasoned that had the jury been properly instructed on causation, it may have had reasonable doubt regarding whether the injuries sustained by the officer after punching through the defendant's window "involved the same kind of injury or harm as that designed or contemplated by defendant, or whether those injuries were too remote, accidental in their occurrence, or dependent on the [volitional] act of [the officer] to have a just bearing on defendant's liability or on the gravity of his offense." Ibid. (citing N.J.S.A. 2C:2–3(b) and (c)); see also State v. Parkhill, 461 N.J. Super. 494, 497 (App. Div. 2019) (holding absence of full causation charge was plain error because evidence raised issue as to "remoteness, fortuity, or another's volitional act" where defendant charged with reckless vehicular homicide argued victim caused accident by crossing busy road against light and outside cross-walk); State v. Martin, 119 N.J. 2, 9-10, 13-17 (1990) (holding court's failure to give full causation charge was plain error where defendant argued that supervening events broke chain of causation between his act of setting fire in building and victim's death).

In the instant case, there was a clear factual dispute regarding the actual cause of Enriquez's wrist injury, as well as regarding whether remoteness, fortuity, or

Enriquez's own volitional act interrupted the chain of causation between Mr. Dua's actions and Enriquez's wrist injury. Enriquez testified that he sustained "a small fracture" in his right wrist when he "fell rolling around with Dua trying to gain control of his right arm." (6T:163-19 to 164-5) In his motion for acquittal, defense counsel argued that Enriquez likely hurt his wrist by falling on it himself while taking Mr. Dua down, and that therefore, the State could not demonstrate that Mr. Dua had caused his wrist injury. (7T:235-11 to 20) The State responded that to meet its burden of substantiating the charge of aggravated assault on Enriquez, it needed only to present evidence that Enriquez had hurt his wrist "when he was taking the defendant to the ground," and that Mr. Dua acted "either purposely, knowingly, or even recklessly." (7T:238-2 to 13) During the State's summation, the State argued that Mr. Dua "caused bodily injury to Officer Enriquez" by either recklessly, or purposely or knowingly resisting arrest. (8T:192-8 to 193-6)

The trial court erred by failing to instruct the jury on causation where the cause of Enriquez's wrist injury was disputed and genuinely at issue based on the trial evidence. Had the jury had been adequately instructed on causation, it could easily have found that Enriquez's wrist fracture was neither within the risk of which Mr. Dua was aware, nor within his design or contemplation, and that the injury was too remote, accidental in its occurrence, or dependent on Enriquez's own volitional acts to have a just bearing on Dua's liability. This is particularly true where the jury

ultimately acquitted Dua of resisting arrest, and the State's theory underlying the charge of aggravated assault on Enriquez was predicated on Mr. Dua's alleged recklessness in the course of *resisting arrest*. The trial court's failure to properly instruct the jury on causation was clearly capable of producing an unjust result where there was a real possibility that the jury would have acquitted Mr. Dua not just of resisting arrest, but also of aggravated assault on Enriquez, had they been properly instructed. Therefore, Mr. Dua's convictions must be reversed.

POINT IV

THE CUMULATIVE IMPACT OF THE ERRORS DENIED MR. DUA A FAIR TRIAL (NOT RAISED BELOW)

"Even if an individual error does not require reversal, the cumulative effect of a series of errors can cast doubt on a verdict and call for a new trial." State v. Sanchez-Medina, 231 N.J. 452, 469 (2018) (citing State v. Jenewicz, 193 N.J. 440, 473 (2008). Each of the errors in Points I through III is sufficient to require reversal. If, however, this Court disagrees, defendant submits that the cumulative effect of these errors requires reversal. Id. During the trial, Sara Dua testified that Mr. Dua repeatedly attempted to defend himself over the course of the police encounter. Had the jury found that Mr. Dua acted in self-defense, it would have constituted a complete defense to the charges against him. The court's failure to instruct the jury on self-defense was extremely harmful, particularly

taken together with its erroneous admission of both Hwang's and Enriquez's testimony that Mr. Dua was guilty of aggravated assault on a police officer, and its failure to instruct the jury on causation where there was a clear factual dispute as to whether Mr. Dua actually caused Enriquez's injuries. The cumulative impact of these errors deprived Mr. Dua of due process and a fair trial. Accordingly, Mr. Dua's convictions should be reversed and the matter remanded for a new trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10.

CONCLUSION

For the reasons set forth herein, Mr. Dua's convictions must be reversed.

Respectfully submitted,

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Dated: January 31, 2024

Superior Court of New Jersey

Appellate Division

DOCKET NO. A-1690-22

CRIMINAL ACTION

	:	On Appeal from a Judgment of Conviction Entered in the
STATE OF NEW JERSEY	:	Superior Court of New Jersey, Law Division, Bergen County.
v.	:	
KWAKU DUA.	:	
	:	Sat Below:
		Hon. Carol V. Novey Catuogno, J.S.C., and a jury

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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DEFENDANT IS NOT CONFINED

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PROCEDURAL HISTORY

On February 14, 2020, Indictment No. 20-02-00199-I charged defendant Kwaku Dua a/k/a Kwaku Agyemang-Dua with third-degree aggravated assault on police officer John Hwang, N.J.S.A. 2C:12-1(b)(5)(A) (count one); third-degree resisting arrest, N.J.S.A. 2C:29-2(a) (count two); and third-degree aggravated assault on police officer Andres Enriquez, N.J.S.A. 2C:12-1(b)(5)(A) (count three). (Da1-2).[1]

Defendant's trial was held before the Honorable Carol V. Novey Catuogno, J.S.C.,[2] and a jury on October 18, 19, 21, and 25, 2022. (6T; 7T; 8T; 9T). The State presented the testimony of Guang Li to authenticate video surveillance footage and cell phone footage that Li filmed, (6T78-9 to 110-17);

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[1] Citations to the record are as follows:

"Db" – defendant's brief
"Da" – defendant's appendix
"Pa" – State's appendix
"1T" – transcript dated 9/22/2022
"2T" – transcript dated 10/11/2022
"3T" – transcript dated 10/12/2022
"4T" – transcript dated 10/13/2022
"5T" – transcript dated 10/14/2022
"6T" – transcript dated 10/18/2022 (Separated into Vol. I (pages 1-200) and Vol. II (pages 201-269))
"7T" – transcript dated 10/19/2022
"8T" – transcript dated 10/21/2022
"9T" – transcript dated 10/25/2022
"10T" – transcript dated 12/16/2022

[2] Judge Catuogno is now the Assignment Judge for Bergen County.

Bergenfield Police Officer Andres Enriquez, (6T116-8 to 253-24, 7T20-20 to 65-23); and Bergenfield Police Officer John Hwang, (7T69-20 to 229-8). Defendant presented the testimony of his wife, Sarah Agyemang-Dua. (8T20-25 to 97-10).

On October 25, 2022, the jury returned its verdict, finding defendant: guilty of the lesser included offense of fourth-degree aggravated assault (of Officer Hwang) under count one; not guilty of third-degree resisting arrest under count two; and guilty of third-degree aggravated assault (of Officer Enriquez) under count three. (9T131-19 to 133-11).

On December 16, 2022, the trial judge sentenced defendant to three years of probation on count one and three years of probation on count three, which ran concurrent with count one. (Da5; 10T36-20 to 37-13).

STATEMENT OF FACTS

A. Between Bouts of Hurling Abuse at Restaurant Staff, Defendant Calls 911 Over a Cup Lid and Straw.

This case is about defendant's unwillingness to control his anger.

On November 21, 2019, defendant was dining with his family, including wife Sarah Dua, at International Buffet, a Chinese restaurant in Bergenfield. Defendant asked staff at International Buffet to give him a new cup lid and straw, because one of his children dropped their lid on the floor. (8T21-18 to 26-18). When staff provided defendant with a new lid and straw and placed

them on a part of the table that defendant perceived to be dirty, defendant became enraged. (6T132-9 to -13). Video surveillance footage shows that defendant threw the new lid and straw at staff, and then continued berating staff even as they offered him yet another lid and straw. (Pa2 at 13:55:45 to 13:56:23). Defendant then picked up and threw the lid and straw at staff a second time. (Pa2 at 13:56:07 to 13:57:08). Defendant screamed at them to the point that other patrons intervened, but defendant responded aggressively and refused to calm down. (Pa2 at 13:58:08 to 13:58:33).

At approximately 2:00 p.m., defendant called 911. (6T132-9 to -13). Surveillance video shows that defendant called 911 just two minutes after he threw the lid and straw at restaurant staff for the second time. (Pa1 at 13:58:41). The State played the recording of the 911 call at defendant's trial. (6T133-11 to -13; Pa1). When the 911 dispatcher asked defendant what his "emergency" was, defendant responded that he was being "disrespected" by restaurant staff and explained that a waitress placed a lid and straw directly on his table. (Pa1 at 0:00:55 to 0:01:24; 8T31-22 to -24). When the dispatcher advised defendant to cease speaking with staff and to wait outside the restaurant for police to arrive, defendant began speaking over the dispatcher, saying he wanted police to watch a video recording of how the waitress placed

the lid and straw on his table. (Pa1 at 0:01:49 to 0:02:04). Before hanging up, defendant agreed to step outside. (Pa1 at 0:02:05 to 0:02:15).

At the conclusion of the 911 call, defendant remained in the restaurant and continued berating staff over the lid and straw. Defendant picked up and threw the lid and straw at staff yet again even as his family members approached him and tried to calm him down. (Pa2 at 13:58:56 to 14:03:22).

B. Defendant Assaults Two Uniformed Police Officers and Resists Arrest.

Bergenfield Police dispatched Officers Andres Enriquez and John Hwang. (6T133-18 to 135-9). Officer Enriquez, who was uniformed and arrived in a marked patrol car, was the first to arrive, and as he approached the restaurant, he heard defendant "yelling" loudly from the inside. (6T135-20 to 136-9). Officer Enriquez recognized defendant's voice, which Officer Enriquez had heard on the 911 call. (6T131-22 to -25). A large crowd of people had gathered near the vestibule of the restaurant, and it was initially difficult for Officer Enriquez to determine what was going on. (6T137-10 to -24).

Defendant approached Officer Enriquez. Defendant was "very angry," "agitated," and explained that "was disrespected" by the restaurant. (6T137-25 to 138-25; Da15 at 0:03:59 to 0:04:00). To deescalate the situation, Officer Enriquez calmly asked defendant to "lower his voice" and "relax" but

defendant continued yelling about the service at the restaurant despite Officer Enriquez's repeated pleas. (6T138-25 to 139-25, 140-3 to -21; Da15 at 0:04:01 to 0:04:23). Defendant added that he was "willing to fight for his family." (6T139-25 to 140-1; Da15 at 0:04:34 to 0:04:37).[3]

Defendant continued escalating the situation, and Officer Enriquez warned defendant that he would be placed under arrest for disorderly conduct if he did not calm down. (6T141-4 to -8; S-4 at 0:04:35 to 0:04:38). Meanwhile, Sarah Dua was also pleading with defendant for him to calm down. (6T142-12 to -19).

Officer Hwang, who was uniformed, also arrived on scene in a marked patrol car. Entering the restaurant, Officer Hwang heard defendant screaming obscenities at the restaurant staff. (7T62-15 to -23). He and Officer Enriquez wanted to escort defendant outside in order to limit the disturbance to customers. (6T142-22 to 143-2). Officer Hwang attempted "to guide [defendant] outside of the restaurant where" they could have a calm discussion and stepped toward defendant. In response, defendant punched Officer Hwang in the chest. (7T80-16 to 81-19).

[3] Defendant and Officer Enriquez's words are difficult to discern from the video marked as S-4, which includes an audio recording of the initial stage of their encounter.

Officer Hwang and Officer Enriquez then attempted to grab defendant and arrest him as defendant made his way out of the restaurant. (7T81-19 to -24). Defendant then struck Officer Hwang in the chest again, this time with two open palms, which pushed the officer against one of the doors of the restaurant. (7T81-24 to 82-1). This is consistent with a surveillance video in evidence, which shows defendant aggressively moving his arms and body at one of the uniformed officers while they are in the entryway of the restaurant. (Da12 at 14:06:41 to 14:06:43).

The three ended up outside of the restaurant, with defendant being pushed onto the hood of one of the patrol cars before landing on the ground between two marked patrol cars in a busy parking lot of a shopping complex. (7T82-3 to -25). Defendant's family, which included his wife, ex-partner, mother, and four young children, followed them outside. (7T82-25 to 83-7).

The officers were on top of defendant and attempting to get him under control. (7T89-5 to -7). To resist the officers' arrest, defendant tightened his body and flailed his arms. He then tried to punch Officer Hwang in the face. (7T84-9 to -20). During the struggle, defendant kept asking, "What did I do?" He also insisted that he did nothing wrong. (Da14 at 0:00:00 to 0:01:18). Officers repeatedly told defendant to "stop resisting" and to get on his stomach. (Da14 at 0:00:14 to 0:00:36). Defendant proceeded to wrap his arm

around Officer Hwang's thigh and reached toward Officer Hwang's firearm. (7T84-18 to -24). To subdue defendant, Officer Hwang punched defendant in the face with a closed fist. (7T85-4 to -11; Da14 at 0:00:29 to 00:00:31).

Finally, Officer Hwang was able to turn defendant onto his stomach and handcuffed him. (7T85-12 to -16, 87-4 to -13; Da14 at 0:00:44 to 0:02:41).

C. Sarah Dua's Statements at Trial.

In her testimony at trial, Sarah Dua told a different version of events, some of which was blatantly false.

Sarah Dua testified that while they were outside the restaurant, she saw "the Asian officer" pull a gun and point it at defendant. (8T61-18 to -25). Sarah Dua added that the officer, when asked by defendant's mother if he was going to shoot defendant, said, "Yes, I'm going to kill him – I'm going to shoot him." Sarah Dua claimed that the officer then looked around and put the gun back in his holster. (8T63-5 to -9). None of this is portrayed on any of the videos in evidence.

Sarah Dua denied that defendant threw any punches at the officer, (8T64-6 to -8), but a video of the struggle shows that defendant threw a hand at Officer Hwang, (Da14 at 0:00:25 to 0:00:27).

Additionally, Sarah Dua initially testified that one of the officers had "his arm around [defendant]'s neck," (8T61-6 to -19), but on cross-

examination admitted that this was untrue, (8T89-2 to -15). She also testified that Officer Hwang struck defendant twice with a "nightstick," (8T65-5 to -6), something that the videos in evidence do not depict.

LEGAL ARGUMENT

POINT I

THE OFFICERS' TESTIMONY THAT THEY WERE ARRESTING DEFENDANT FOR AGGRAVATED ASSAULT WAS NOT CLEARLY CAPABLE OF PRODUCING AN UNJUST RESULT.

Defendant submits that in testifying, Officer Enriquez and Officer Hwang both answered the ultimate question at trial by testifying that they intended to arrest defendant for aggravated assault. (Db11-15). The State submits that (1) the officers did not testify to the ultimate issue, and (2) any error in admitting this testimony was not clearly capable of producing an unjust result because the State presented admissible testimony and evidence which permitted the jury to draw its own conclusions about defendant's guilt.

A. The Officers Did Not Testify to the Ultimate Issue.

For the first time on appeal, defendant takes issue with four brief portions of the officers' testimony:

- Officer Enriquez's testimony that "after the recoil, after [Officer Hwang] had to step back, he attempted to, you know, grab [defendant] to arrest him for agg. assault on a police officer." (6T143-8 to -13).

- Officer Enriquez's testimony that, "At that point, [defendant] was going to be placed under arrest for disorderly conduct and agg. assault on a police officer." (6T145-15 to -17).

- Officer Enriquez's testimony that defendant was placed under arrest for "disorderly conduct, agg. assault, and resisting arrest." (6T158-2 to -24).

- Officer Hwang's testimony that after defendant shoved him he "wanted to arrest him at that point because . . . it's aggravated assault on a law enforcement officer." (7T80-11 to -12).

A police officer may testify to facts, that is, "what the officer did and saw." State v. McLean, 205 N.J. 438, 460 (2011). To that end, N.J.R.E. 701 provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue.

Fact testimony "includes no opinion, lay or expert, and does not convey information about what the officer 'believed,' 'thought' or 'suspected,' but instead is an ordinary fact-based recitation by a witness with first-hand knowledge." McLean, 205 N.J. at 460.

Conversely, the State cannot present testimony which opines on a defendant's guilt, State v. Trinidad, 241 N.J. 425, 445-46 (2020), or a core issue in the case where doing so is tantamount to declaring a defendant guilty, State v. Frisby, 174 N.J. 583, 587-89 (2002) (the credibility of defendant's

alibi). Such testimony is problematic, because courts should "avoid inadvertently encouraging a jury prematurely to think of a defendant as guilty . . . ." State v. Hightower, 120 N.J. 378, 427 (1990) (Handler, J. concurring).

Here, the officers did not opine that defendant was guilty of aggravated assault. Instead, they testified that they were arresting defendant for aggravated assault. This testimony was factual and relevant to the case against defendant, because defendant was charged with resisting arrest and one of the elements of resisting arrest is that a law enforcement officer was "effecting an arrest." Model Jury Charges (Criminal), "Resisting Arrest - Flight Not Alleged (N.J.S.A. 2C:29-2a)" at 1 (May 7, 2007). Certainly, the testimony "assist[ed]" the jury "in determining a fact in issue," N.J.R.E. 701 – namely the "effecting an arrest" element of resisting arrest.

B. Assuming Arguendo That the Testimony Should Not Have Been Admitted, This was Not Plain Error.

Assuming arguendo that it was an error to permit the officers to testify that they were arresting defendant for aggravated assault, this error was not reversible because the jury was well-equipped to reach its own conclusion on defendant's guilt on the aggravated assault counts.

Defendant did not raise this issue below, so this Court reviews for plain error. "When a defendant does not object to an alleged error at trial, such error is reviewed under the plain error standard." State v. Singh, 245 N.J. 1, 13

(2021); see also R. 2:10-2. An unchallenged error must be "clearly capable of producing an unjust result," R. 2:10-2, and "will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached," State v. R.K., 220 N.J. 444, 456 (2015). "Plain error is a high bar and constitutes error not properly preserved for appeal but of a magnitude dictating appellate consideration." State v. Santamaria, 236 N.J. 390, 404 (2019) (internal quotation marks omitted). "[T]o rerun a trial when the error could easily have been cured on request would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal." Ibid. (quoting State v. Ross, 229 N.J. 389, 407 (2017)) (internal quotation marks omitted).

Where testimony is admitted in error or without a necessary curative jury instruction, the testimony is only plain error where it "le[a]ds the jury to a result it would not have otherwise reached." Trinidad, 241 N.J. at 447 (quoting State v. Macon, 57 N.J. 325, 336 (1971). To that end, when a police officer testifies, the officer cannot opine that the defendant is guilty. Trinidad, 241 N.J. at 445-46. However, so long as the testimony does not sit at the heart of the State's case, such an error does not amount to plain error warranting reversal if the State presents admissible testimony and evidence which permit the jury to draw its own conclusions about the defendant's guilt. Id. at 446-47.

For example, in Trinidad, the defendant was a former police officer being tried for misconduct and other offenses "following an automobile stop gone awry." Id. at 433. An internal affairs investigator testified at trial that based on the dashboard camera footage, the defendant's actions "appeared to have been criminal." Id. at 441-42. Applying plain error review, the Supreme Court held that while the trial judge should have instructed the jury to disregard the internal affairs investigator's statement that the defendant's actions "appeared to have been criminal," "[t]hose five words were not the sole basis of his testimony . . . ." Id. at 446. In fact, dashboard camera footage depicted the defendant arriving at the scene, crashing his car into the stopped driver's car, and later slamming the stopped driver onto the hood of the driver's car. Id. at 436-37. This demonstrated that the defendant had falsified his police report, thereby committing official misconduct and several other charged offenses. Id. at 446-47.

Here, Officer Enriquez and Officer Hwang testified to facts which permitted the jury to draw its own conclusion as to whether defendant committed the offense of aggravated assault, describing, for example, how defendant threw punches. Likewise, the State presented several video exhibits depicting defendant's assault on the officers. Similar to whether the defendant in Trinidad committed official misconduct by falsifying his report, whether or

not defendant committed aggravated assault on the officers in this case was "demonstrabl[e]," id. at 447, based on the video evidence. In turn, the jury was well-equipped to reach its own conclusions about whether defendant was guilty of aggravated assault. Further, the fact that the jury acquitted defendant of the third-degree aggravated assault of Officer Hwang and instead convicted him of the lesser-included offense of fourth-degree aggravated assault under count one, suggests that the jury was not swayed by the officers' testimony about why they were arresting defendant. As such, defendant did not suffer any prejudice.

In support of his contention that the officers improperly testified about why they were arresting him, defendant primarily relies on State v. Simms, 224 N.J. 393 (2016), State v. McLean, 205 N.J. 438 (2011), and State v. Reeds, 197 N.J. 280 (2009), distinguishable cases outlining the limits on the ability of police experts in the area of narcotics transactions to testify that a defendant's observed behavior was indicative of a narcotics transaction. (Db11-13).

In Simms, police observed the defendant hand an unidentified object to a suspected narcotics customer. What the defendant was holding was critical to the State's case because police found narcotics in the suspected customer's possession. So, if the unknown object handed by the defendant to the suspected customer was narcotics, the defendant distributed narcotics and was

guilty of a crime. 224 N.J. at 397-98. The State asked a detective, who was testifying as an expert in narcotics distribution, whether, assuming the unidentified object was narcotics, the defendant conspired to commit narcotics distribution with a co-defendant. Id. at 396. The Supreme Court determined that the testimony in question was sufficiently prejudicial to warrant reversal on plain error review, because the expert testified to the defendant's state of mind, which the jury should have been permitted to infer from the facts. Id. at 409.

McLean involved an officer testifying that he believed that he observed a narcotics transaction take place based upon a hand-to-hand exchange of an unknown object that he observed. 205 N.J. at 444-46. Not only did the officer opine on the defendant's guilt, but unlike Simms, the officer was not qualified as an expert in narcotics transactions. Id. at 460-63.

In Reeds, a detective testifying as an expert in narcotics distribution testified to the ultimate issue based on facts which were presented as "hypothetical" but in actuality described the entirety of the defendant's encounter with police. 197 N.J. at 284-87. Further, when asked if it were even "possible" for the drugs to be possessed without intent to distribute, the detective reiterated his opinion that the narcotics were possessed with intent to distribute. Id. at 287. And the officer additionally opined that the defendant

was in "constructive possession." Ibid. The Supreme Court held that the detective's use of legalistic language – i.e. "constructive possession" – amounted to reversible error because it amounted to "a veritable pronouncement of guilt on the two possession crimes for which defendant was charged." Id. at 297. Here, the officers did not testify to any legal conclusion that the jury would have to make. Rather, they merely stated they were arresting the defendant, which was an element of the resisting arrest charge.

In sum, defendant's jury had a plethora of qualified evidence from which they could conclude that defendant was guilty of aggravated assault. Defendant's reliance on narcotics transaction expert cases is inapt because the expert testimony unnecessarily prejudiced the defense in those cases.

POINT II

THE COURT WAS UNDER NO OBLIGATION TO SUA SPONTE INSTRUCT THE JURY ON SELF-DEFENSE FOR THE RESISTING ARREST CHARGE.

Defendant submits that the trial judge erred by not sua sponte instructing the jury on self-defense, which would have served as a "complete justification to all the charges against" him. (Db15). The State counters that defendant cannot assert a self-defense claim in the context of an arrest by police officers where he was the initial aggressor and where he knew that submitting to their arrest would terminate their use of force.

In a criminal trial, "correct jury charges are especially critical in guiding deliberations in criminal matters, [and] improper instructions on material issues are presumed to constitute reversible error." State v. Jenkins, 178 N.J. 347, 361 (2004). "Where there is sufficient evidence to warrant a self-defense charge, failure to instruct the jury . . . constitutes plain error." State v. Gentry, 439 N.J. Super. 57, 67 (App. Div. 2015). "However," where a defendant has failed to request a jury instruction or otherwise object below, "[t]he mere possibility of an unjust result is not enough." State v. Sanders, 467 N.J. Super. 325, 333 (App. Div. 2021) (quoting State v. Funderburg, 225 N.J. 66, 79 (2016)). "Rather, '[t]he possibility must be real, one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Alexander, 233 N.J. 132, 142 (2018) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

A defense "counsel's failure to specifically request a" self-defense "instruction suggests he perceived the defense was not supported by the evidence at trial." Cf. State v. Doss, 310 N.J. Super. 450, 460 (App. Div. 1998) (defense of others instruction). With any affirmative defense, the burden of proof is on the defendant. See id. at 460.

Generally, self-defense is not a defense to resisting arrest or aggravated assault on a police officer. New Jersey law makes clear that "force may not be

used to resist even an unlawful arrest, and it use will support a conviction for assault on an officer." John M. Cannel, N.J. Criminal Code Annotated, cmt. 10 on N.J.S.A. 2C:12-1 (2023 ed.); see also State v. Casimono, 250 N.J. Super. 173, 182-85 (App. Div. 1991). "Strong policy reasons" necessitate the rule that misconduct or unlawful actions by police related to a defendant's crime do not constitute affirmative defenses:

> A contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct. . . . [This would] give[] a defendant an intolerable carte blanche to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. This result is too far reaching and too high a price for society to pay in order to deter police misconduct.
>
> [Casimono, 250 N.J. Super. at 184 (quoting United States v. Bailey, 691 F.2d 1009, 1012-19 (11th Cir.1982)).]

While most case law on this subject pertains to resisting arrest cases, the same reasoning applies to aggravated assault on a police officer. Cannel, N.J. Criminal Code Annotated, cmt 10 on N.J.S.A. 2C:12-1.

Self-defense is only a defense to resisting arrest or aggravated assault on a police officer where an officer "uses excessive or unnecessary force." Simms, 369 N.J. Super. at 472; N.J.S.A. 2C:3-4(b)(1)(a). Where an officer uses excessive or unnecessary force, "the citizen may respond or counter with

the use of reasonable force to protect himself . . . ." Ibid. (quoting State v. Mulvihill, 57 N.J. 151, 156 (1970)). However,

> the citizen cannot use greater force in protecting himself from the officer's unlawful force than appears necessary under the circumstances, and he loses his privilege of self-defense if he knows that if he submits to the officer, the officer's excessive use of force will cease. And, of course, the citizen must reasonably believe that the use of force is necessary to protect himself from the officer's excessive use of force.
>
> [Ibid. (emphasis added).]

Further, "the initial force of the arresting officer" is "immaterial." State v. Villanueva, 373 N.J. Super. 588, 599 (App. Div. 2004). Critically, a defendant cannot claim self-defense where he is the initial aggressor. State v. Moore, 158 N.J. 292, 311-12 (1999) overruled on other grounds by State v. Rodriguez, 195 N.J. 165, 173-74 (2008); Villanueva, 373 N.J. Super. at 600.

Here, defendant was the initial aggressor, punching Officer Hwang in the chest and pushing him, so defendant cannot raise self-defense. Moreover, a reasonable person in defendant's position would have understood that if he ceased resisting, the officers' use of force would cease. The videos in evidence depict how the officers constantly instructed defendant to get on his stomach and "stop resisting," yet defendant continued to stiffen his body and flail his arms. At one point, defendant tried to strike Officer Hwang in the face and reached for a firearm. Because defendant should have understood that if he

ceased resisting the officers' use of force would terminate, defendant lost any privilege of self-defense. Mulvihill, 57 N.J. at 156. At all times, the officers' use of force remained measured and well within expected bounds.

The facts and procedural history of this case bear similarity to those of State v. Doss, where this Court held that a trial judge was under no obligation to sua sponte instruct the jury on self-defense. 310 N.J. Super. at 458-60. The defendant in Doss both failed to request a self-defense instruction and "during his summation [the] defendant's counsel never specifically argued that [the] defendant's conduct was justified as a proper means of lawful force" to defend his co-defendant. Id. at 459. On appeal, the defendant, a jail inmate, argued that he should have received a sua sponte defense of others instruction at trial, because he testified that a corrections officer was attacking a fellow inmate. Id. at 458-59. This Court held there was no evidence produced at trial to support the defendant's contention that the correctional officers' use of force was excessive, so there was no rational basis to charge self-defense. Id. at 459.

Like Doss, defendant failed to raise the issue of self-defense below, so it can be assumed that his attorney did not believe the evidence in the record supported such an instruction. Id. at 460. Regardless, defendant presented no competent evidence that the officers' use of force against him was excessive.

Although defendant presented the testimony of his wife, Sarah Dua, her testimony was self-contradictory and was directly contradicted by the video exhibits presented by the State at trial.

Defendant's reliance on Mulvihill, 57 N.J. 151, and State v. Montague, 55 N.J. 387 (1970), (Db16-23), is misplaced. In Mulvihill, the Supreme Court determined that a jury could conclude that the defendant, who claimed self-defense, was not being arrested given his testimony about his encounter with a police officer. 55 N.J. at 158-60.

Defendant suggests that the jury's judgment of acquittal on the resisting arrest charges demonstrates that it was unclear if he was being arrested. (Db25-26). A more straightforward explanation is that the trial judge mistakenly instructed the jury that in order to find defendant guilty of resisting arrest, the officers had to announce explicitly to defendant they were arresting defendant.[4] (8T224-8 to -16). Because the officers did not announce their

[4] Perhaps confusingly, the Model Jury Instruction provides, "It is not a defense to a prosecution under this subsection that the law enforcement officer was acting unlawfully in making the arrest, provided (he/she) was acting under color of (his/her) official authority and provided the law enforcement officer announces (his/her) intention to arrest prior to the resistance." Model Jury Charges (Criminal), "Resisting Arrest - Flight Not Alleged (N.J.S.A. 2C:29-2a)" at 2. This imposes no general requirement on officers to announce their intention to arrest and instead provides an avenue to conviction if the arrest is unlawful. That is, if the arrest is unlawful, a defendant can still be guilty of resisting arrest only if the officer announces his intention to effect an arrest.

intention to arrest defendant, the jury was left no choice but to acquit defendant of resisting arrest in light of the trial judge's instruction. Certainly, however, the jury was not instructed that no arrest took place.[5]

And while defendant asserts that there was a factual dispute given Sarah Dua's testimony, (Db23), she contradicted herself on the stand and the videos demonstrated that her account of the encounter was false. A defendant is not entitled to a self-defense instruction simply because a defense witness lies or severely misremembers facts before a jury. As the Mulvihill Court noted in the context of a "defense of another" instruction, "[t]he intervenor's mere naked assertion of such appearance and belief [in excessive force], without more, could not as a matter of sound policy be deemed sufficient to take the defense to the jury." 55 N.J. at 405.

Likewise, defendant's reliance on Montague is inapt, because in the analogous context of a request for a "defense of another" charge, the defendant presented competent evidence of excessive force. Ibid. ("[H]ere there was something more"). In Montague, the defendant testified that

> he saw his niece leave the car and heard her tell Nance that he was "a [racial slur] cop in uniform"; Lilliteen and the other occupants of the car, as well as Officer Nance, were Negroes. The defendant's testimony continued as follows: "That is all I could hear but he

[5] Additionally, the State notes that this Court accepts inconsistent jury verdicts. E.g., State v. Petties, 139 N.J. 310, 319 (1995).

> said don't call me no [racial slur] cop or I'll smack you. My niece said I'll smack you back."
>
> [Id. at 392.]

In sum, four other witnesses corroborated the defendant's account that (1) the officer's arrest of the defendant's niece was unlawful, and (2) the defendant was acting in defense of another. Furthermore, there was no video evidence disproving the defendant's testimony. Id. at 392-93. That is unlike here, where defendant only presented one witness whose testimony was internally contradictory and which video evidence externally contradicted.

In sum, the record did not support a sua sponte self-defense charge, because defendant did not present any competent evidence demonstrating that the officers' use of force was excessive; because defendant was the initial aggressor; and because defendant should have known that had he ceased resisting, the officers' use of force would have terminated given their repeated commands for defendant to stop resisting and to get on his stomach.

POINT III

BECAUSE DEFENDANT DID NOT CONTEST CAUSATION OF ALL INJURY AND BECAUSE CAUSATION OF SEVERE BODILY INJURY IS NOT AN ELEMENT OF THIRD-DEGREE AGGRAVATED ASSAULT ON A POLICE OFFICER, THE TRIAL JUDGE WAS NOT REQUIRED TO SUA SPONTE INSTRUCT THE JURY ON CAUSATION.

In Point III of his brief, defendant submits that it was plain error for the trial judge to not sua sponte instruct the jury on the causation of Officer Enriquez's injuries. (Db27-32). The State submits that defendant's argument lacks merit.

To convict a defendant of third-degree aggravated assault on a police officer, N.J.S.A. 2C:12-1(b)(5)(a), the State must prove the defendant:

> 1. that the defendant purposely attempted to cause or purposely, knowingly or recklessly caused bodily injury . . .;
>
> 2. that [the victim] was a law-enforcement officer;
>
> 3[]. that the defendant knew that [the victim] was a law enforcement officer acting in the performance of (his/her) duties or while in uniform or exhibiting evidence of (his/her) authority[.]
>
> [Model Jury Charges (Criminal), "Aggravated Assault – Upon Law Enforcement Officer (Attempting to Cause or Purposely, Knowing or Recklessly Causing Bodily Injury) (N.J.S.A. 2C:12-1b(5)(a), (b), (c), (d), (e), (f), (g)" at 1 (rev. Dec. 3, 2001).]

Because third-degree aggravated assault is established by what would otherwise be simple assault except committed against victim who was a police officer, the State is not required to prove severe bodily injury. Rather, the State only needs to prove "physical pain, illness or any impairment of physical condition." Id. at 2.

For simple assault, "[n]ot much is required to show bodily injury. For example, the stinging sensation caused by a slap is adequate to support an assault." State v. Stull, 403 N.J. Super. 501, 505 (App. Div. 2008) (quoting N.B. v. T.B., 297 N.J. Super. 35, 43 (App.Div.1997)). To prove that defendant purposely or knowingly caused bodily injury, the State must show that the defendant intended through his conduct to cause physical pain, illness, or any impairment of a physical condition. State ex rel. S.B., 333 N.J. Super. 236, 242 (App. Div. 2000). Physical pain may be proven by relying "largely on inferences available on the proofs of the nature of the contact in the past." Ibid.

Causation is an issue for the jury to decide. State v. Buckley, 216 N.J. 249, 263 (2013). New Jersey courts distinguish a "full" causation jury instruction, Model Jury Charges (Criminal), "Causation (N.J.S.A. 2C:2-3)" (rev. Jun. 10, 2013), from a more basic instruction defining "causation" as a "but for" cause. The "full" causation charge provides that the State must prove

two elements for causation: first, that the defendant's conduct was the "but for" cause of a result; and second, that the defendant had the requisite mens rea to be held criminally responsible for that result. Model Jury Charges (Criminal), "Causation (N.J.S.A. 2C:2-3),"

This Court recently acknowledged that "the 'full' causation jury instruction is not required in all cases." State v. Canfield, 470 N.J. Super. 234, 312 (App. Div. 2022). Only where causation of injury is contested is the "full" causation instruction required for third-degree aggravated assault. Model Jury Charges (Criminal), "Aggravated Assault – Upon Law Enforcement Officer (Attempting to Cause or Purposely, Knowing or Recklessly Causing Bodily Injury) (N.J.S.A. 2C:12-1b(5)(a), (b), (c), (d), (e), (f), (g)" at 3 n.9.

Here, although defendant disputed causing Officer Enriquez's bone fracture, he did not dispute his offensive touching of Officer Enriquez during the struggle outside of the restaurant while he was resisting arrest. To wit, the State did not need to prove that Officer Enriquez suffered a severe bodily injury, such as a bone fracture, at the hands of defendant to convict defendant of third-degree aggravated assault. It was enough for the jury to infer the physical pain or discomfort that Officer Enriquez felt during the struggle with defendant. As such, the jury did not need a full causation instruction and could

infer physical injury from the fact that defendant engaged in a melee with Office Enriquez.

Indeed, the trial judge's instructions to the jury for count three, the third-degree aggravated assault of Officer Enriquez, were correct and adequate. In instructing the jury on count three, the judge stated: "For you to find that the defendant caused bodily injury to Andres Enriquez, the State must prove beyond a reasonable doubt that he would not have been injured but for defendant's conduct." (8T231-1 to -4). The judge defined "injury" for third-degree aggravated assault on a police officer as "physical pain, illness, or any impairment of physical condition." (8T229-4 to -5). Plainly, this correctly guided the jury and instructed them to convict defendant if they found that he committed simple assault against a police officer.

Defendant's reliance on State v. Green, 318 N.J. Super. 361 (App. Div. 1999), (Db29-30), is inapt. There, a defendant was charged not only with third-degree aggravated assault of a police office, N.J.S.A. 2C:12-1(b)(5)(a), but also second-degree aggravated assault causing severe bodily injury, N.J.S.A. 2C:12-1(b)(1). This Court held that the trial judge erred by not instructing the jury on causation of injury on the second-degree aggravated assault count, not that the jury required a causation instruction on the third-degree aggravated assault count. This Court noted that the causation of the

victim officer's severe bodily injury for the purposes of the second-degree aggravated assault count was at issue, even though defendant's causation of minor injuries to the officer were not in dispute. Id. at 373-75. As such, Green implicitly supports the State's position that a full causation instruction was unnecessary for the third-degree aggravated assault charge.

POINT IV

BECAUSE DEFENDANT DOES NOT IDENTIFY ANY ERRORS AT TRIAL, HE CANNOT CLAIM CUMULATIVE ERROR.

Lastly, defendant argues that the cumulative impact of errors at his trial deprived him of a fair one, even if each error individually does not merit reversal. (Db32-33). The State counters that because defendant does not complain of any actual errors at his trial, he cannot claim cumulative errors deprived him of a fair trial.

"When legal errors cumulatively render a trial unfair, the Constitution requires a new trial." State v. Weaver, 219 N.J. 131, 155 (2014). Importantly, however, "[i]f a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair." Ibid. Here, the State submits that defendant has failed to identify any actual error at trial. And even if defendant has identified an error, the error was not sufficiently prejudicial.

CONCLUSION

For the foregoing reasons, the State respectfully submits that this Court should affirm the verdict below.

Respectfully submitted,

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001690-22T2
INDICTMENT NO. 20-02-00199-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Bergen County.
KWAKU DUA,	:	
		Sat Below:
Defendant-Appellant.	:	Hon. Carol Novey Catuogno, J.S.C., and a Jury.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS NOT CONFINED

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Kwaku Dua relies on the Procedural History and Statement of Facts set forth in his opening brief (Db 3-10)[1]

LEGAL ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT TRIAL REQUIRED THE TRIAL COURT TO INSTRUCT THE JURY ON SELF-DEFENSE.

Mr. Dua relies on Point II of his opening brief, adding that the State's brief misapprehends the relevant law. The State fundamentally misunderstands the framework for charging self-defense in the context of civilian-police altercations. As a result, it does not engage with the key argument raised in Mr. Dua's brief: that the jury should have been instructed on two different applicable theories of self-defense based on the evidence presented at trial. Contrary to the State's assertion that "self-defense is only a defense to resisting arrest or aggravated assault on a police officer where an officer 'uses excessive or unnecessary force'" (Sb 17), our state's jurisprudence recognizes that the jury

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[1] Da: Defendant's appendix
Db: Defendant's opening brief
Sa: State's appendix
Sb: State's brief
8T: Transcript of 10/21/2022 (Trial)
9T: Transcript of 10/25/2022 (Trial)

must be charged on self-defense in the context of civilian-police altercations in two different scenarios.

In the first scenario, where evidence is presented at trial indicating that the defendant was not under arrest or did not know that he was being arrested when he used force, the jury must be instructed that the same self-defense principles apply to the altercation between the defendant and the police officer as ordinarily apply to combat between private individuals. (Db 16-21) (citing State v. Mulvihill, 57 N.J. 151, 159-59 (1970); State v. Montague, 55 N.J. 387, 403-06 (1970)). These principles are set forth in the general model jury charge on self-defense. (Db 16) (citing Model Jury Charges (Criminal), "Justification – Self Defense" (rev. June 13, 2011)). In the second scenario, evidence is presented at trial indicating that the defendant was under arrest or knew that he was being arrested, but that he used force in self-protection in response to the police officer's use of excessive force. In this scenario, the jury should be instructed in accordance with the principles set forth in the model jury charge on self-defense in the context of resisting arrest. (See Db 16-19); (citing Model Jury Charges (Criminal), "Justification – Self Defense Resisting Arrest" (approved Oct. 17, 1988)).

When there is a factual dispute as to whether the defendant was under arrest when he had a physical altercation with a police officer, the court needs

to give the jury both the general self-defense charge and the resisting arrest self-defense charge, as well as instructions on when and how to apply each. (Db 21) Here, there were factual disputes at trial regarding whether Mr. Dua was under arrest or knew that he was under arrest at various points during his altercations with the police officers. Based on these factual disputes, the jury should have received both sets of self-defense jury instructions. However, the State's brief fails to engage with a key argument raised by Mr. Dua – that the trial court was required to instruct the jury in accordance with the general self-defense charge as well as the resisting arrest self-defense charge. The jury should have been instructed that if they found that Mr. Dua was either not under arrest or did not know that he was being arrested when he used force, they should apply the same self-defense principles to his altercation with the police officers that would ordinarily apply to altercations between private individuals. (Db 21-25)

Furthermore, the State's claim that the jury acquitted Mr. Dua of resisting arrest because "the trial judge mistakenly instructed the jury" – and not because the jury found that the State failed to prove that Mr. Dua knew that he was being arrested beyond a reasonable doubt – is meritless. (Sb 20-21) The trial judge gave the jury the model charge on resisting arrest and tailored it to the facts of the case. See State v. Cotto, 471 N.J. Super. 489, 543 (App. Div. 2022) ("[A] jury charge is presumed to be proper when it tracks the model jury charge.") The

charge given to the jury included the instruction that the State must prove beyond a reasonable doubt that Mr. Dua "knew or had reason to know that John [H][w]ang was a law enforcement officer *effecting an arrest.*" (8T:224-17 to 20) (emphasis own). The judge subsequently responded to the jury's question about whether an officer needs to verbally express his intent to arrest the defendant by rereading the model charge. (Db 25-26) (9T:95-14 to 98-15) We presume that the jury understood and followed the court's instructions, and that it acquitted Mr. Dua of resisting arrest because the State did not prove the elements of the offense beyond a reasonable doubt. See State v. A.L.A., 251 N.J. 580, 598 (2022) (noting that the presumption that the jury follows the trial court's instructions is one of the foundations of our jury system.) (citing State v. Burns, 192 N.J. 312, 335 (2007)).

Furthermore, the State asserts that Mr. Dua could not "claim self-defense" for two reasons: because he was the initial aggressor and because "a reasonable person in [his] position would have understood" that if he submitted to the officers, their use of force would cease. (Sb 18) However, the State's arguments rely entirely on the State supplying its own answers to the key factual disputes at trial – which were for the jury alone to decide – and its misapprehension of the relevant law. See Mulvihill, 57 N.J. at 278-89 (holding that "for the purpose of determining whether the legal issue of self-defense is available for jury

consideration, it is necessary to consider the facts in the light most favorable to the defendant.")

First, the State argues that Mr. Dua "cannot raise self-defense" because he "was the initial aggressor," claiming that Mr. Dua punched and pushed Hwang inside the restaurant. (Sb 18) However, the State's claim is based entirely on Hwang's testimony – which was hotly disputed at trial. (See Db 22); (See 8T:59-4 to 11) (Sara Dua's testimony that Mr. Dua never pushed or punched Hwang, but that Hwang grabbed Mr. Dua's arm and began "forcefully pushing him" towards the door, and Mr. Dua put his hands up "in a kind of … self-defensive motion" in response.) Viewing the evidence in the light most favorable to Mr. Dua, the court was clearly required to instruct the jury on self-defense. See State v. Villanueva, 373 N.J. Super. 588, 600-01 (App. Div. 2004) (finding that principle that individual who provokes assault cannot claim self-defense does not apply where "defendant contends that he was not the aggressor.") Furthermore, it is worth noting that the jury did not fully accept Hwang's account of events – they acquitted Mr. Dua of aggravated assault on Hwang, instead finding him guilty of the lesser offense of attempted aggravated assault. (Db 3); (Da 3, 5) This highlights the harm of the trial court's failure to instruct the jury on self-defense.

Second, while the State acknowledges that an individual may use force to protect himself in response to a police officer's use of excessive force, it contends that Mr. Dua "lost any privilege of self-defense" because he "should have understood that if he ceased resisting, the officers' use of force would terminate." (Sb 18-19) (citing Mulvihill, 57 N.J. at 157). However, Mulvihill does not support the State's position. In Mulvihill, our Supreme Court explains that "a civilian being subjected to excessive force or attack and defending against it" is not required "to make a split second determination, amounting to a gamble, as to whether if he terminates his defensive measures, he will suffer further beyond arrest." Id. at 157-58; see id. at 154-55, 158 (holding trial court's failure to instruct jury on self-defense was reversible error where jury could have found officer used excessive force in attempting to arrest defendant by hitting him with gun and that defendant punched officer in self-protection).

Mulvihill makes it clear that Mr. Dua was not required to make a "split second determination" about whether the officers' use of force would cease if he submitted prior to acting in self-defense outside the restaurant. As detailed in Mr. Dua's initial brief, the jury plainly could have found that the officers used excessive force and that Mr. Dua responded by using force in self-protection. (Db 24-26). Therefore, it is clear from the evidence presented at trial that the court was required to instruct the jury on self-defense. See State v. Washington,

57 N.J. 160, 163 (1970) (holding testimony that officers used "excessive force in effectuating arrests and that defendants' counter-physical measures were protective … was sufficient to require submission of the issue of self-defense to the jury" where parties presented sharply conflicting versions of incident.) Accordingly, Mr. Dua's convictions must be reversed.

CONCLUSION

For the reasons set forth herein and in Mr. Dua's opening brief, his convictions must be reversed.

Respectfully Submitted,

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