SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2047-21T1
INDICTMENT NO. 19-06-1066-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior
v.	:	Court of New Jersey, Law Division, Middlesex County.
ANDREW J. HARRIOTT,	:	
Defendant-Appellant.	:	Sat Below:
	:	Hon. Benjamin S. Bucca Jr., J.S.C., and a Jury

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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June 19, 2023

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PRELIMINARY STATEMENT

Andrew Harriott was charged with murder and attempted murder arising out of a single episode. He maintained that he acted in self-defense and was convicted of passion/provocation manslaughter and attempted passion/ provocation manslaughter and related gun charges.

The jury could not properly evaluate Harriott's defense because the instructions on self-defense and on flight-as-consciousness-of-guilt were deficient and erroneous. The instructions on self-defense did not explain that it applied to passion/provocation manslaughter and attempted passion/ provocation manslaughter. Neither did it explain that, if the jury found, as Harriott testified with regard to the murder, that he fired a warning shot, he could be acquitted of the homicide. The instruction on flight as consciousness of guilt was prejudicially flawed as it charged only on the adverse inference the jury could draw from Harriott's flight and failed to include the defense explanation for the flight.

Harriott's convictions must be reversed because the critical instructional errors prevented the jury from considering his defense.

PROCEDURAL HISTORY

Middlesex County Indictment No. 19-06-1066-I, filed June 27, 2019, charged defendant Andrew J. Harriott, in four counts, with murder and attempted murder under N.J.S.A. 2C:11-3a and 2C:5-1 and gun possession under N.J.S.A. 2C:39-4a and 2C:39-5b. (Da 1-2)[1]

Following a 15-day trial before the Hon. Benjamin S. Bucca Jr., J.S.C., and a jury, in September and October 2021, Harriott was acquitted of murder and attempted murder and convicted of the lesser-included offenses of passion/provocation ("p/p") manslaughter and attempted passion/provocation manslaughter and the gun charges. (29T 6-21 to 10-4; Da 3-8) At sentencing, in February 2022, the court merged the gun charges with the manslaughter convictions and imposed maximum and consecutive terms on the manslaughter convictions amounting to an aggregate sentence of 20 years, 17 years without parole. (30T 59-22 to 62-23; Da 9-14)

The notice of appeal was filed on March 11, 2022. (Da 15-18)

[1] Da – appendix
PSR – Presentence Report

STATEMENT OF FACTS

The Akbar restaurant was host to two events on the night of March 22, 2019: the African-royalty-themed Royal Aries Ball (9T 111-3 to 10; 11T 14-21 to 15-12) and a gathering honoring Al-Tariq Brown on the one-year anniversary of his murder. (6T 164-22 to 165-14; 9T 111-10 to 13, 158-19 to 24)

Shane Fletcher, a party promoter known as "China Man," organized the Ball, which was scheduled to run from 9:00 p.m. to 2:00 a.m. He hired musical entertainment and security, arranged for the sale of food and drink, and publicized the Ball through advertising and social media. (9T 122-15 to 123-5; 11T 8-4 to 11, 9-13 to 25, 10-22 to 24, 15-20 to 25, 11-25 to 12-6; 13T 60-10 to 8; 23T 102-25 to 103-2) Fletcher hired Harriott, whom he knew under his stage name "Drew Cash," as one of the musical performers. (11T 19-23 to 20-24; 23T 102-25 to 103-2, 111-15 to 16)

A promoter Fletcher hired to aid in publicizing the Ball added the Al-Tariq Brown party to the evening. Fletcher had organized parties for the host of the Al-Tariq Brown event (11T 16-4 to 11), and was agreeable to including it with the Aries Ball saying, "Anything to bring in more people[.]" (11T 16-15 to 17-2) Like the other parties Fletcher had held at the Akbar, he expected the Ball to attract "hundreds of people[.]" (11T 12-16 to 13-5)

Fletcher retained Brett Carmen to provide security for the evening. (7T 77-22 to 25) Carmen and four of his staff searched everyone for weapons at the front door. (6T 144-4 to 15; 7T 82-8 to 10, 83-24 to 84-21, 172-17 to 174-15, 182-10 to 12; 13T 57-11 to 17) Partygoers then passed through a second door where they had to show a ticket or pay admission. (7T 85-23 to 86-9; 9T 123-20 to 125-1; 13T 35-7 to 10) Carmen estimated that there were about 350-400 people in attendance (7T114-25 to 115-2); he noted that everyone attending the Al-Tariq Brown party seemed to know each other (7T 89-24 to 90-2).

Sometime after 1:30 a.m., Carmen's staff notified him that there was a fight in the hall and that it might have started when people objected to one of the performers. (7T 123-23 to 124-8) In his statement to police, Carmen said that he also heard that "people were going after … [t]he person that sprayed a bottle." (7T 131-7 to 21) By the time Carmen made his way into the hall to see what was going on, the music had stopped and everyone was leaving. He turned the lights on to signal that the evening was over and returned to the front door to manage the crowd leaving the hall. (7T 90-21 to 93-10, 116-12 to 23) Shortly thereafter, one of Carmen's staff radioed him that shots had been

fired. (7T 94-19 to 23) Carmen went out to the parking lot where he learned that two people had been shot and he called the police. (7T 95-23 to 98-7)[2]

Shaquana Thomas testified that her family "paid for a section" of the hall for a party in honor of Al-Tariq Brown, publicized the event on Instagram, and also used a promoter. (6T 142-1 to 8, 142-24 to 143-2) Thomas did not know the people attending the Aries Ball. (6T 144-22 to 145-9)

A number of cars in Thomas's group arrived at the Akbar from Newark at about 1:00 a.m. (6T 143-9 to 22, 144-7 to 12) After spending some time on the dance floor, Thomas and a friend went to the restroom where they took pictures. Thomas testified that a couple of minutes after she returned to the floor, "they had cut the lights on, and [the] part[y] was, like, over" (6T 148-10 to 24) and everyone was leaving (6T 149-1 to 3).

As the crowd entered the parking lot, Thomas heard gunshots. She could not say how many shots,[3] but everyone started running. She saw Nahshon Brown,[4] who, she said, was known as "Naz" and "Nasty," hit his head against

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[2] Fletcher confirmed that, "late in the evening," there was a "disturbance on the dance floor" and the lights were turned up. (11T 22-23 to 23-14) Fletcher did not see the subsequent shooting in the restaurant parking lot. (11T 23-15 to 23)

[3] A member of the Al-Tariq party, Abree Williams, said she heard two shots in the parking lot. (13T 40-22 to 22)

[4] To avoid confusion, Al-Tariq Brown is referred to in the brief as "Al-Tariq" and Nahshon Brown as "Brown."

a pole and fall. (6T 141-16 to 25, 149-4 to 152-6) When Thomas reached Brown, she saw that he had been shot; she did not see who shot him. (6T 153-14 to 19, 167-25 to 168-2)

Raheem Bryant drove down from Newark with two friends to attend the party for his late cousin Al-Tariq. (13T 53-15 to 54-7, 56-2 to 6, 57-2 to 7) Bryant was also cousins with Nahshon Brown. (13T 58-25 to 59-4) Bryant could not recall that he had said in his statement to police that Brown paid the admission for 20 to 30 people (13T 177-11 to 14)[5] and denied that he had said Brown was buying drinks by the bottle for partygoers (13T 197-13 to 198-19). For his part, Bryant had only "[o]ne little shot" all night. (14T 203-14 to 204-12)

Bryant confirmed that he told the police that a fight broke out after, "I guess[,] the guys on the stage, I guess they throw enough champ ... you know, threw it to the crowd." (14T 202-9 to 203-13) And while Bryant maintained at trial that he had not seen any gang activity at the party (13T 138-4 to 11), in his statement to police, he assumed that the shooting was gang related (9T 154-6 to 18; 13T 76-2 to 77-20).

[5] According to Detective Michael Connelly's investigation, Brown appeared to "pay[] for everybody to get in[.]" (12T 83-10 to 84-8)

Bryant initially denied that he had any gang affiliation, but eventually admitted that both he and Brown had been in gangs "in the past" (13T 75-3 to 16) and acknowledged his own history of being "in the streets … [selling] drugs, shooting, all that" (13T 72-12 to 14).[6] When confronted with the assertion in his statement that Al-Tariq had also been in a gang, Bryant claimed he "never said none of that." (13T 195-17 to 196-6) At the same time, he admitted that he might have said in his statement that Brown was "in the Mob Piru gang," a Bloods set (9T 155-6 to 18; 13T 155-16 to 156-2, 158-18 to 20), and that Brown came to the party with numerous other gang members (9T 157-18 to 20). And further, that Brown had "a lot of authority," and, for that reason, possible rivals, including "Doc" and Black," both of whom were at the party, might covet "Brown's power" and want to "get him out of the way," and that the shooting might have been a "setup." (9T 157-7 to 17, 160-15 to 19; 13T 143-2 to 148-19, 179-25 to 180-7, 189-7 to 15, 192-18 to 19, 255-12 to 21; 14T 246-15 to 247-7; 15T 122-2 to 7, 156-7 to 159-20, 166-14 to 168-14, 180-15 to 183-14) At trial, Bryant claimed not to know anyone named Doc or Black. (14T 254-9; 15T 156-11, 159-20 to 160-2) He also acknowledged that naming names might lead to retaliation. (15T 173-8 to 175-21)

[6] Bryant had prior convictions for robbery and gun possession. (13T 52-15 to 53-11, 121-13 to 24; 15T 17-2 to 3, 33-15 to 35-20)

Although Bryant said he "wasn't really paying attention" to Harriott, he noted that he was wearing a blue and orange jacket. (13T 63-17 to 25) Bryant testified that, at some point after "the song went off," [Harriott] sped off" (13T 64-13 to 23) and Bryant "heard him say, 'I'm going to get my motherfucking gun." (13T 64-23 to 65-9) When confronted at trial with the fact that there is nothing in his statement about Harriott saying he was going to get a gun, Bryant said, "[Y]ou could read a person's mouth, body language, everything[.]" (15T 91-5 to 100-9, 16T 205-4 to 6) The prosecutor made it clear that Harriott never said "he was going to get his MF gun[.]" (27T 47-22 to 23)

At any rate, Bryant followed Harriott out of the hall where Bryant had a cigarette and then went back inside, told Brown he was going to leave, got his car, and pulled up in front of the restaurant. At trial, Bryant said that as he exited the car, he heard a gunshot seemingly pass his head and saw "the guy" in the blue-and-orange jacket running. Moments later, Bryant realized that he had been shot. (13T 67-8 to 69-6; 14T 215-2 to 11; 16T 232-16 to 23)

On the other hand, in his statement, Bryant said that he left his car near the front door and, as he proceeded, with Brown "right behind" him, toward a light pole in the middle of the parking lot, he heard gunfire. (15T 56-14 to 57-1, 85-14 to 86-20) Bryant said he turned and "saw the crowd by the front door.

That's when people started -- people start spiraling shots. Spiraling shots were going off by the front door." (14T 225-1 to 226-8) And while he maintained at trial that it was "impossible" that he had said that he heard four shots (14T 222-10 to 223-1), in his statement he described hearing four shots: "…I heard pop, then I heard pop, then I heard pop, and then I heard pop." (14T 215-15 to 216-1, 218-11 to 222-5, 223-5 to 13)

Harriott was 26 at the time of the offense and lived with his girlfriend and their young son at his parents' home in Franklin Township. (23T 98-23 to 99-5, 100-15 to 16) Harriott performed in several music genres, including reggae and hip-hop, and had appeared at the Akbar two or three times. (23T 103-7 to 9, 109-9 to 13; 24T 292-4 to 7) He was not given a fixed performance time for the Aries Ball and arrived at around 1:00 a.m. (23T 103-10 to 15; 24T 265-12 to 18) After he arrived, he learned that the Al-Tariq party had been added to the evening and that a number of people at the Al-Tariq party were members of the Bloods. (24T 237-19 to 21, 261-11 to 19, 265-4 to 7)

Harriott was wearing a black jacket with white stripes, a hat, and a white shirt. (23T 156-1 to 4, 178-17 to 179-9) He hung out with friends until about 1:30 when he handed the DJ a flash drive with his songs. (23T 108-4 to 12, 110-7 to 13, 116-21 to 23) To stir up excitement for his performance, as he

ascended the stage, he began a chant of "D's up," explaining that "D" referred to Drew Cash. (23T 111-15 to 112-4; 24T 268-14 to 16) Harriott testified that when his friends picked up the chant, some ten or 12 people on the dance floor "start[ed] throwing up gang signs" and pointing fingers as if shooting at the stage. (23T 111-18 to 23, 112-7 to 113-14, 114-25 to 115-2) He said that about 30 seconds into his "performance, those same people -- they just ran over to the table -- like bum-rushed the table that [he had been] at[.] … [And] a couple of the younger guys, they started grabbing bottles off the table." (23T 113-22 to 114-7, 115-2 to 4)[7]

Harriott heard that someone had sprayed champagne, but he was not sure what prompted the aggressive behavior. (23T 113-17 to 18, 114-16 to 115-8; 24T 271-14 to 272-17) He "told the DJ to stop the music to figure out what was going on" and stepped down off the stage. (23T 114-7 to 9, 115-14 to 15)

Like Harriott, his friend David Ninson came for the Aries Ball and learned after he arrived that there was also "another party going on" and that the people at the other party were from Newark. (22T 214-15 to 215-11) Ninson, who had prior convictions for burglary, gun and drug possession, and

[7] Detective Loren Long testified that he learned in his investigation that people on stage were heard to say, "G's up," which was understood to refer to the "Grape Street Crips" who are "arch rivals" of the Bloods. (9T 163-10 to 19, 164-20 to 165-8; 10T 206-17 to 207-16)

hindering (22T 221-15 to 224-6, 251-8 to 253-18, 258-17 to 260-18), testified that when Harriott started to perform, "a little commotion broke out. [Ninson] didn't understand what it was about" (22T 217-22 to 25), but the people from Newark were throwing up gang signs (22T 219-21 to 24).

When Harriott stepped off the stage, about a dozen people confronted him and his friends and threatened to "'smoke one of you crab-ass (N-words).'" (23T 116-5 to 13) Harriott explained that "crab is a term for a Crip" (23T 158-1 to 2), and testified that he was not a member of the Crips or any gang. (23T 158-6 to 9) He recalled: "[I]t got to the point where the DJ had to come -- and just split -- split them up from us…." (23T 116-13 to 17) And then "they stopped the party." (23T 116-20)

Harriott decided it was time to leave, and agreed to give his friend David Anderson and two women he knew from the neighborhood a lift. But Anderson was very concerned about the situation (23T 120-4 to 121-14, 140-24 to 141-16, 146-3 to 19), and told Harriott that before he left, he was going to talk to Nahshon Brown who Anderson knew "from doing time with him in jail." (23T 121-25 to 122-8, 126-21 to 127-2; 24T 221-19 to 223-10, 224-12 to 21) Harriott and Damien Sappleton, who had driven to the party together (23T 104-15 to 105-1), headed to Harriott's car in the restaurant parking lot

where they waited for Anderson and the two women. (7T129-11 to 20, 141-23 to 142-12, 143-14 to 144-4)

The parking lot was filling with people leaving the party, including, Harriott said, "Some of those same guys from inside [who] just kept continuing to send threats." (23T 147-8 to 11) Harriott and Sappleton, joined by Ninson, returned to the restaurant to look for Anderson and the two women, but did not see them. (23T 185-17 to 186-7, 193-4 to 6) En route, Harriott ran into his friend Zey who brought up the fact that a number of young rappers had been shot in recent years, and pressed Harriot to take his gun because "[n]obody want to see [him] die[.]" (23T 148-23 to 150-19) Harriott was initially reluctant to accept the gun, but ultimately put it in his jacket pocket, "just in case." (23T 149-14, 150-20 to 25, 151-5) He did not know whether the gun was loaded. (24T 210-25 to 211-5)

Harriott testified that while he and Sappleton waited near the restaurant entrance for Anderson and the young women, a group of men persisted with their threats: "And they kept saying it, like ya don't want no smoke." (23T 157-15 to 158-4) Harriott's suspicion that they had guns was confirmed when one of them "lifted his shirt and showed … a weapon." (23T 151-10 to 155-16) Harriott did not say "anything back" (23T 158-16 to 18), but he "put

his hand in [his] pocket" "to send a signal" that he also had a gun and "to back off" (23T 156-9 to 157-14, 167-22 to 168-15, 197-13 to 18).

Harriott was frightened and decided not to wait any longer for Anderson. As he and Ninson headed to Harriott's car, an acquaintance called Harriott over to tell him that he was worried about the situation. (23T 160-2 to 161-20, 194-1 to 195-8) At the same time, several people were approaching Harriott, threatening to "smoke him." The man who had lifted his shirt to flash his gun was now holding his hand in his sleeve. (23T 163-14 to 23, 167-12 to 16, 196-21 to 197-3) Harriott saw "no reason to have his hand in his sleeve" other than to hold a gun. (23T 165-19 to 24, 166-19 to 167-8) Harriott added that he was "not stupid," and suspected that a second man, who was "holding his hand down to his side," was also carrying a gun. (23T 171-15 to 21, 197-19 to 23)

In addition, two men were walking toward Harriott and Ninson from another direction. One of them, who Harriot subsequently learned was Raheem Bryant, had his hand in his pocket, which Harriott took to indicate that he had a gun. (23T 162-5 to 16, 165-10 to 17) Harriott subsequently learned that the man immediately behind Bryant was Nahshon Brown. (23T 165-6 to 9, 166-8 to 9) Harriott was close enough to hear Bryant tell Brown: "'I should cap this (N-word) right now.'" (23T 162-24 to 163-2, 164-10 to 25, 170-11 to 171-1, 196-9 to 19) Harriott understood "cap" to mean shoot or kill. (23T 165-1 to 3)

With Bryant and Brown coming from one direction and the group uttering threats coming from another, Harriott was being "ambushed from the back and front at the same time" and felt "trapped." (23T 169-12 to 170-4, 172-4 to 6, 198-23 to 199-12; 24T 203-7 to 8). He ran toward the restaurant where he knew there was a security crew; Bryant and Brown followed. (23T 198-2 to 13, 200-4 to 18) Before he made it to the restaurant door, Harriott heard a gunshot. He "fired once in the air, just to get them to back off," and then ran toward his car. (23T 173-2 to 175-2; 24T 203-8 to 10) As he ran, he heard two more shots; he heard four or five in total but did not see the shooter or shooters. (23T 175-2 to 7)

Ninson, who was running across the parking lot in front of Harriott, saw a "big guy" in a hat holding a gun coming at him. (22T 236-6 to 237-2, 241-17 to 23, 291-14 to 23) Ninson thought he was "about to die," and swung a bottle at the gunman. Ninson testified that the gunman tried to block the bottle with his left hand while holding the gun in his right hand. (22T 243-3 to 245-7, 246-11 to 13; 23T 175-11 to 18; 24T 203-16 to 20)[8]

After trying to fend off the gunman, Ninson ran toward the parking-lot exit. (22T 245-9 to 16, 246-25 to 247-2) But then he "saw someone else with a

[8] Ninson was initially charged with assault for swinging the bottle, but the charges were dropped. (10T 204-22 to 25; 12T 95-7 to 11)

gun"; he "screamed, 'Oh, shit, gun,'" and changed direction. (22T 247-11 to 25, 248-7 to 12, 285-22 to 286-3)[9] Ninson heard "at least four or five shots" while he was in the parking lot. (22T 246-4 to 8, 283-6 to 9)

After Harriott heard Ninson's shout-out about a gun, he saw Bryant "with a gun in his hand and he was lifting it." (23T 175-24 to 176-16, 177-16 to 17; 24T 204-25 to 205-1, 207-12 to 18, 279-20 to 21) Confident that "this guy was going to kill me," Harriott said he "just fired once to defend myself" (24T 203-8 to 10, 204-9 to 18, 217-20 to 22) and "kept running" until he got to his car.[10]

Brown incurred a single fatal gunshot wound to the chest. (7T 46-4 to 6, 67-5 to 12) Bryant was treated for a single gunshot wound to the face. (9T 38-

[9] Ninson explained that when the police questioned him a couple of days after the offense, he was not frank about the two men he saw with guns "[b]ecause … [he] found out where they was from, found out what they was into," and heard that "some guys from Newark … were driving around looking for [him], asking questions about [him]." (22T 286-24 to 281-1)

[10] Security cameras recorded activity at the entrance to the restaurant, but no video was offered from inside the banquet hall. Cameras were also stationed around the parking lot but they did not cover the entire lot and failed to capture, among other things, Harriott firing the warning shot. Ninson's encounter with the armed man and Harriott's encounter with Bryant were recorded and played by both parties. (6T 76-19 to 77-5; 9T 114-15 to 17, 132-4 to 133-12, 134-21 to 22, 175-18 to 200-8; 17T 46-25 to 74-2, 154-14 to 158-2; 23T 163-16 to 17, 168-3 to 6, 173-16 to 21, 188-10 to 192-22, 195-9 to 11, 196-13 to 198-22; 24T 203-4 to 12; Da 19)

25 to 39-2)[11] Only two spent casings were found at the scene.[12] According to the state's ballistics examiner, the recovered casings were fired from the same nine-mm. caliber gun. (11T 97-1 to 2, 98-16 to 17, 101-19 to 20, 121-14 to 17; 12T 48-12 to 15, 50-17 to 25, 71-15 to 17, 84-19 to 85-3) Without the gun, which was not found, all the examiner could say was that the bullet removed from Brown could have come from a nine-mm. gun. (12T 91-3 to 13, 96-12 to 97-20; 25T 61-22 to 62-5)[13]

A 911 operator testified that operators received multiple calls about the shooting, including information that there were two victims and "that there was possibly two shooters." (23T 29-7 to 9, 32-23 to 33-22, 60-19 to 23, 76-23 to 77-4) One caller described the shooter as a Black man in a white jacket (23T 27-1 to 28-2), while "dispatch relayed information that the shooting suspect was wearing a dark jacket with a[n] orange shirt." (23T 81-7 to 10, 83-

[11] Bryant's surgeon referred to one gunshot wound to the face and one to the back of the neck; the neck injury was an exit wound. (9T 44-12 to 20, 54-9 to 55-1; 12T 64-4 to 13; 16T 245-16 to 19)

[12] The examiner noted that automatic and semi-automatic guns eject a casing, a revolver does not. (12T 61-23 to 62-4, 63-8 to 24)

[13] Harriott testified that Anderson came to his home to collect the gun Zey had given him; he understood that Zey and Anderson shared its ownership. (24T 218-11 to 14, 227-5 to 8, 228-9 to 10, 233-7 to 16) Anderson died two months after the Aries Ball. (25T 61-22 to 25)

4 to 84-6) An officer at the scene also focused on a young man in a dark jacket and orange shirt who, as a passenger in a car, yelled at the driver to take off after the officer ordered him to stop. (6T 181-17 to 183-9)[14]

Harriott pointed out that he said "not one word to these guys the whole night" (23T 177-25 to 178-1) and that he did not resort to gunfire until after he heard gunshots and then only fired a warning shot in the air (23T 173-12 to 14, 174-6 to 7; 24T 203-8 to 10, 206-20 to 21). He fired a second shot at Bryant because he believed Bryant was about to shoot him. (23T 175-24 to 176-20)

Harriott testified that he did not shoot Brown (24T 203-14 to 21, 232-25 to 233-3) and was not aware that his second shot struck Bryant. (23T 176-23 to 177-2; 24T 205-7 to 16, 217-20, 289-1 to 4) When he learned that two people had been shot and the police were looking for him, he retained an attorney and turned himself in. (9T 148-16 to 18, 175-8 to 17; 24T 242-3 to 11)

[14] The officer pursued the car unsuccessfully in a high-speed chase for some two miles. (6T 184-19 to 22, 186-9 to 188-1)

LEGAL ARGUMENT

POINT I

THE JURY WAS NOT CHARGED THAT SELF-DEFENSE APPLIED TO THE LESSER-INCLUDED OFFENSES OF PASSION/ PROVOCATION MANSLAUGHTER AND ATTEMPTED PASSION/ PROVOCATION MANSLAUGHTER. (Not Raised Below)

Harriott was charged with murder and attempted murder. (Da 1) He admitted that he fired two shots but, in each instance, maintained that he acted in self-defense. (23T 173-2 to 175-2; 24T 203-8 to 10, 204-9 to 18, 217-20 to 22) Counsel told the jury: "This case is about self-defense. That's it." (25T 99-9) The jury, however, was not properly instructed on self-defense.

Before the court instructed on self-defense, it instructed on the charged offense of murder and the lesser-included offenses of aggravated manslaughter and reckless manslaughter (27T 151-11 to 164-15), followed by instructions on the charged offense of attempted murder and lesser-included assault offenses (27T 164-23 to 184-25). Thereafter, the court charged on self-defense. It began the self-defense charge by reminding the jury that murder and attempted murder were charged in Counts 1 and 2. (27T 185-2 to 5) And then it said: "As to these counts of the indictment and the less[e]r included charges, the defendant contends that if the State proves he used or threatened to use force

upon another person, that such force was justifiably used for self-protection or self-defense." (27T 185-6 to 10)

The instruction was correct – as far as it went. But, critically, it failed to explain that p/p manslaughter and attempted p/p manslaughter are lesser-included offenses of the offenses charged in Counts 1 and 2. See State v. Carrero, 229 N.J. 118, 128-29 (2017) ("'(a) homicide which would otherwise be murder ... [but] is committed in the heat of passion resulting from a reasonable provocation,' N.J.S.A. 2C:11–4(b)(2), is a well-established lesser-included offense of murder"). But the court didn't only fail to instruct that p/p manslaughter and attempted p/p manslaughter were lesser-included offenses. It never explicitly stated that self-defense applied to p/p manslaughter and attempted p/p manslaughter.

While the jury may have inferred from the instructions that aggravated manslaughter and reckless manslaughter were lesser-included offenses of murder and that assault was a lesser-included offense of attempted murder, the same cannot be said about the instructions on p/p manslaughter and attempted p/p manslaughter, which differed in several respects from the instructions on aggravated and reckless manslaughter and assault.

First, in contrast to the instructions on aggravated and reckless manslaughter and assault, the court expressly charged that p/p manslaughter was **an element of murder**, not a lesser-included offense:

> **The third element that the State must prove beyond a reasonable doubt to find defendant guilty of murder is that the defendant did not act in the heat of passion resulting from a reasonable provocation**. Passion or provocation manslaughter is a death caused purposely or knowingly that is committed in the heat of passion resulting from a reasonable provocation.

(27T 156-10 to 17) (emphasis added)

Second, consistent with the identification of p/p manslaughter as an element of murder, the jury was not charged that if it found Harriott not guilty of murder, it could then consider whether he was guilty of p/p manslaughter. Rather, the jury was charged that if it did not find Harriott guilty of murder **or** p/p manslaughter, it could then consider aggravated and reckless manslaughter:

> If … the State has failed to prove beyond a reasonable doubt that defendant purposely or knowingly caused death, you must find the defendant not guilty of murder and passion or provocation manslaughter and go on to consider whether defendant should be convicted of the crimes of aggravated or reckless manslaughter.

(27T 159-10 to 16)

Third, the jury was told that it could convict of murder **and** p/p manslaughter if it found that Harriott acted with purposeful intent. (27T 159-

10 to 16) In contrast, it was told that aggravated and simple manslaughter required only a reckless intent. (27T 159-17 to 20, 162-16 to 17)

Similarly, the court denominated attempted p/p manslaughter an element of attempted murder. (27T 168- 4 to 9) And, as with the murder charge, the court instructed that if the state failed to prove that Harriott committed attempted murder **or** attempted p/p manslaughter, only then would the jury "have to consider a less[e]r included charge of aggravated assault -- various aggravated assaults." (27T 170-24 to 171-4) Thus, with respect to attempted murder, the court explicitly identified assault, and only assault, as the lesser-included offense of the charged offense of attempted murder.

The defendant in State v. Supreme Life, 473 N.J. Super. 165 (App. Div. 2022), was charged with murder and claimed that he acted in self-defense and defense of others and was convicted of p/p manslaughter. The court reversed the conviction on plain error because the judge "explained self-defense and defense of another, but he never told the jury it also should consider those affirmative defenses if or when it considered the lesser-included charge of passion-provocation manslaughter." Id. at 177. See State v. Ciuffreda, 127 N.J. 73, 82 (1992) (noting that "self-defense applied as much to th[e] [p/p manslaughter] charge as it did to aggravated manslaughter and reckless manslaughter"); State v. Gentry, 439 N.J. Super. 57, 67 (App. Div. 2015)

("Where there is sufficient evidence to warrant a self-defense charge, failure to instruct the jury that self-defense is a complete justification for manslaughter offenses as well as for murder constitutes plain error."). Here, the court did not identify p/p manslaughter as a lesser-included offense of murder or charge that self-defense applied to p/p manslaughter.

"Self-defense exonerates a person who kills in the reasonable belief that such action was necessary to prevent his or her death or serious injury, even though this belief was later proven mistaken." State v. Kelly, 97 N.J. 178, 198 (1984). Harriott testified that he fired both shots in self-defense. (23T 173-2 to 175-2; 24T 203-8 to 10, 204-9 to 18, 217-20 to 22) He testified that the first time he drew the gun, he fired a warning shot up in the air because he heard gunfire and "was scared for my life." (23T 173-13 to 14, 174-6 to 175-2; 24T 203-9 to 10, 242-19) After he fired, he ran toward his car. (23T 174-6 to 19) He fired the second time because he encountered Bryant as he was heading to his car and believed Bryant was pointing a gun at him. (24T 203-8 to 10, 204-9 to 18, 217-20 to 22) Nahshon Brown was struck once and died. (7T 46-4 to 6, 67-5 to 12) Raheem Bryant was struck once and injured. (9T 38-25 to 39-2)

The failure to charge that self-defense applied to p/p manslaughter and attempted p/p manslaughter violated his constitutional right to due process and a fair trial and constitutes plain and reversible error. U.S. Const., amends. VI,

XIV; N.J. Const., art. I, ¶¶ 1, 9, 10; R. 2:10-2; see State v. Macon, 57 N.J. 325, 336 (1971) (plain error is reversible if "sufficient to raise reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached"); see also State v. Rodriguez, 195 N.J. 165, 175 (2008) (holding, where instruction failed to apply self-defense to all lesser-included offenses of murder, that "(e)rrors impacting directly upon … sensitive areas of a criminal trial are poor candidates for rehabilitation under the plain error theory").

POINT II

THE JURY WAS NOT CHARGED THAT IT COULD ACQUIT DEFENDANT OF BROWN'S HOMICIDE ON THE GROUND OF SELF-DEFENSE IF IT FOUND, AS DEFENDANT TESTIFIED, THAT HE FIRED A WARNING SHOT UP IN THE AIR. (Not Raised Below)

Harriott testified that he fired twice, both times in self-defense. (23T 173-12 to 14, 175-24 to 176-17) Harriott fired the first shot up in the air as a warning in response to the sounds of gunfire (23T 173-12 to 14, 174-6 to 7; 24T 203-8 to 10, 206-20 to 21); he fired the second shot because he believed Bryant was armed and "was going to kill [him]" (24T 203-8 to 10, 204-9 to 18, 217-20 to 22). There was evidence that others besides Harriott also fired guns (14T 215-15 to 216-1, 218-11 to 222-5, 223-5 to 13, 225-1 to 226-8; 22T 246-4 to 8, 283-6 to 9; 23T 175-2 to 5), but the police found only two shell casings

at the scene, and the ballistics examiner said they came from the same gun (11T 97-1 to 2, 98-16 to 17, 101-19 to 20, 121-14 to 17; 12T 48-12 to 15, 50-17 to 25, 71-15 to 17, 84-19 to 85-3).

Although Harriott testified that he fired up in the air and did not shoot Brown (24T 203-14 to 21, 232-25 to 233-3), the jury could have found, indeed, almost assuredly found, that the warning shot struck and killed Brown. On this record, the jury should have been instructed that firing a warning shot up in the air does not constitute deadly force, and that if it found that the warning shot struck Brown, it could acquit Harriott of Brown's homicide by reason of self-defense.

It is axiomatic that "[c]lear and correct jury charges are essential to a fair trial," State v. Robinson, 165 N.J. 32, 40 (2000), and "[e]rroneous instructions on matters or issues material to the jury's deliberations are presumed to be reversible error," State v. Jordan, 147 N.J. 409, 422 (1997). The failure to charge that firing a warning shot does not constitute deadly force was plain error as it "prejudicially affected the substantial rights of the defendant and [is] sufficiently grievous to justify notice by the reviewing court and convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Montalvo, 229 N.J. 300, 321 (2017) (internal quotation marks omitted). The error infringed Harriott's constitutional right to due process and

a fair trial and mandates reversal of his manslaughter conviction with respect to Nahshon Brown. U.S. Const., amends. VI, XIV; N.J. Const., art. I, ¶¶ 1, 9, 10; R. 2:10-2; Macon, 57 N.J. at 336 (plain error is reversible if "sufficient to raise reasonable doubt as to whether [it] led the jury to a result it otherwise might not have reached").

Harriott testified that people in the hall threatened to shoot him, that they followed him out to the parking and continued to threaten to shoot him, that he saw some of them with guns, and that he felt surrounded. When he heard gunfire, he "felt like my life was on the line." (23T 116-5 to 11, 163-14 to 168-1, 169-12 to 170-4, 172-4 to 6, 196-21 to 197-3, 198-23 to 199-12; 24T 203-7 to 8) He stated, no less than three times, that when he heard the gunfire, he "fired once up in the air just to get them to back off" and then he ran. (23T 173-13 to 14, 174-6 to 7; 24T 203-8 to 10) As he ran, he encountered Bryant who pointed a gun at him.

Harriott fully admitted that he fired at Bryant and wounded him. (24T 203-8 to 10, 204-9 to 18, 217-20 to 22) But he insisted that his first shot was fired up in the air and that he did not shoot Brown. (24T 203-14 to 21, 232-25 to 233-3).

The court instructed on the use of deadly and non-deadly force in self-defense. (27T 186-22 to 189-19) The instruction defined deadly force as "force

that the defendant uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm." (27T 187-9 to 12) And it explained that "purposely fir[ing] a firearm in the direction of another person … would be an example of deadly force." (27T 187-18 to 20) The instruction warned that "[o]ne cannot respond with deadly force to a threat of or even an actual minor attack" (27T 187-25 to 188-1), and that one could not "resort[] to deadly force [if he] knew that an opportunity to retreat with complete safety was available[.]" (27T 189-10 to 19)

Consistent with N.J.S.A. 2C:3-11b, the court also explained that "[a] mere threat with a firearm, however, intended only to make the victim of the threat believe that the defendant will use the firearm if necessary, is not an example of deadly force." (27T 187-20 to 24)[15] But, despite Harriott's testimony that his first shot was fired in response to sounds of gunfire and was fired up in the air and intended only as a warning shot, the court failed to instruct that a "threat with a firearm" could include firing a warning shot. Nor did the court charge that "**if defendant's initial use of the [gun] to fire [a] warning shot[] was perceived by defendant as reasonably necessary to**

[15] N.J.S.A. 2C:3-11b: "…A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force."

protect [himself], such conduct was privileged and could not result in criminal liability." State v. Bryant, 288 N.J. Super. 27, 38 (App. Div. 1996) (emphasis added).

The jury was told that Harriott fired a gun, twice, and that firing a gun in the direction of another constituted deadly force. Without an explicit instruction, the jurors would not have understood that firing a gun up in the air "intended only to make the victim of the threat believe that the defendant will use the firearm if necessary" was not deadly force, but only non-deadly force. The jury was not told that if Harriott reasonably believed that he needed to use such non-deadly force to defend against unlawful force, it could find that he acted in self-defense and acquit him of Brown's homicide.

"[T]he trial court's charge here was not molded in such a way as to properly explain the law to the jury in the context of the material facts of the case," State v. Concepcion, 111 N.J. 373, 379 (1988), and specifically, the material fact that if the jury found that Harriott "fired [a] warning shot[] in order to protect [himself], then his use of the weapon could not have been 'with the purpose of causing death or serious bodily harm[.]'" Bryant, 288 N.J. Super. at 38-39. A properly instructed jury could have found that Harriott did not use deadly force when he fired into the air and thus could have acquitted him of Brown's homicide. Because Harriott's jury was not properly instructed

on the use of non-deadly force, his conviction for the p/p manslaughter of Nahshon Brown must be reversed.

POINT III

THE INSTRUCTION ON FLIGHT AS CONSCIOUSNESS OF GUILT FAILED TO CHARGE, AS DEFENDANT TESTIFIED, THAT HE FLED BECAUSE HE WAS SCARED FOR HIS LIFE AND THAT HE LATER TURNED HIMSELF IN. (Not Raised Below)

The jury was instructed on flight as consciousness of guilt, and specifically, that if it found that Harriott fled "after the alleged commission of the crime" to avoid "accusation or arrest" on the instant charges, it could consider his flight "as an indication or proof of consciousness of guilt." (27T 198-23 to 200-5)

The prosecutor told the jury that the flight charge was "important," that if it found that Harriott fled "because he was worried about getting arrested or prosecuted for that offense, you can presume that he was guilty." (27T 122-23 to 123-1) For good measure, the prosecutor reminded the jury of the proverb, "Only the guilty flee when no one pursues,"[16] which, he explained, "understands the human condition. … If you didn't do anything wrong, you don't run away. But he ran away. We saw him sprint off." (27T 123-1 to 9)

[16] Proverbs 28:1 – "The wicked flee when no man pursueth[.]"

Harriott fully admitted that he fled the scene. But he testified that he fled because he thought he was about to get shot:

> I was scared and -- and after -- after -- after -- after the gunshot, I turned around, I fired once in the air. As I'm running I heard two more shots. So I'm just -- I'm trying to get … to my car."

(23T 174-25 to 175-10)

> I was scared. I'm like this guy is about to shoot me. … I seen him with a gun. … I just fired once and just kept running[.]

(23T 176-12 to 17)

> I was scared for my life. …I was scared because people were just trying to kill me.

(24T 215-24 to 216-1)

Harriott fled because he believed Bloods gang members were threatening to shoot him (24T 237-19 to 20, 265-4 to 7); because friends at the scene told him he was in danger (23T 140-24 to 141-16, 146-3 to 19, 148-23 to 150-19, 23T 160-19 to 161-20, 194-4 to 195-4); because he saw people, including Bryant, with guns (23T 151-10 to 155-16, 175-24 to 176-16); because he heard Ninson say he saw someone with a gun (22T 247-11 to 17); and because he heard gunfire (23T 173-4 to 7, 175-2 to 7). In short, Harriott fled because he was afraid that he would be shot if he remained at the scene. And he testified that he did not believe that he was out of danger even after he managed to get

to his car and drive away: "I was told these guys came in town looking to … kill me[.]"[17] (24T 240-1 to 4) Accordingly, Harriott said, he continued to be "scared for my life." (23T 173-13 to 14, 174-6 to 175-2; 24T 203-9 to 10, 242-19) The failure to include in the flight instruction any reference to Harriott's explanation for his departure was prejudicial error.

The New Jersey Supreme Court has long held that "[i]f a defendant offers an explanation for the departure, the trial court should instruct the jury that if it finds the defendant's explanation credible, it should not draw any inference of the defendant's consciousness of guilt from the defendant's departure." State v. Mann, 132 N.J. 410, 421 (1993). Accordingly, the Model Charge on Flight as Consciousness of Guilt (rev'd 5/10/10) directs that where, as here, "the defense has not denied that he/she departed the scene but has suggested an explanation," the court should charge that the defense has offered an explanation, and should "set forth [the] explanation" and should specifically instruct: "If you find the defendant's explanation credible, you should not draw any inference of the defendant's consciousness of guilt from the defendant's departure." https://www.njcourts.gov/sites/default/files/charges/non2c010.pdf

[17] Ninson also said that he heard that "some guys from Newark … were driving around looking for [him], asking questions about [him]." (22T 286-24 to 281-1)

The court made no mention of the fact that Harriott had offered an explanation for his flight, much less that the jury could find that his explanation negated the inference that his flight could serve as proof of consciousness of guilt. Neither did the court include in the instruction the fact that Harriott ultimately turned himself in. (9T 148-16 to 18, 175-8 to 17; 24T 242-3 to 11)[18]

Harriott admitted that he fired two shots but maintained that he committed no crime as he fired both shots in self-defense. The jury was told that if it found that he fled to avoid prosecution, it could consider his flight as proof that he knew he was guilty of the charged offenses. The failure to include in the flight charge Harriott's explanation that he fled because he was in fear for his life had the capacity to adversely affect the jury's consideration of his claim of self-defense. It was plain and reversible error for the court to omit from the instruction Harriott's explanation for his flight. The error infringed his constitutional right to due process and a fair trial and mandates reversal of his convictions. U.S. Const., amends. VI, XIV; N.J. Const., art. I,

[18] In contrast to the court's failure to incorporate Harriott's reasons for his flight in the flight charge, the court incorporated the witnesses' reasons for giving inconsistent statements in its charge on whether the jury should draw an adverse inference from their inconsistent statements. (27T 136-20 to 137-1: "Among the reasons given by Mr. Bryant to explain the inconsistencies were…."; 27T 17-2 to 8: "Among the reasons given by … Mr. Ninson to explain the inconsistencies … w[ere]….")

¶¶ 1, 9, 10; R. 2:10-2; State v. Cabbell, 207 N.J. 311, 338 (2011) (requiring reversal for constitutional error, even in absence of objection, if capable of producing unjust result).

POINT IV

THE MATTER MUST BE REMANDED FOR A NEW SENTENCING HEARING BECAUSE THE SENTENCING PROCEEDING WAS RIDDLED WITH ERROR, BOTH LEGAL AND FACTUAL, AND BECAUSE THE 20-YEAR TERM THE COURT IMPOSED, WHICH IS GREATER THAN THE SENTENCE THE STATE REQUESTED, IS EXCESSIVE. (30T 59-22 to 61-24; Da 9-14)

Harriott had just turned 26 at the time of the offense. He lived in his parents' home with his girlfriend and their young son. (23T 98-23 to 99-5; 30T 48-5 to 6; PSR 1) Harriott is a high-school graduate with two years of community college (PSR 13-14) and was employed as a truck helper while working to establish himself as a musical performer. (23T 103-7 to 9, 109-9 to 13; 24T 292-4 to 7; PSR 13) His only prior brush with the law consisted of a disorderly persons offense for possession of drug paraphernalia. N.J.S.A. 2C:36-2. (30T 48-1 to 4; PSR 6)

He was acquitted of the charged offenses of murder and attempted murder and convicted of the lesser offenses of p/p manslaughter and attempted p/p manslaughter. The state asked for an aggregate sentence of 18 years.

(30T 35-4 to 6) The court imposed 20 years. (30T 59-22 to 60-4, 61-15 to 24) The court arrived at its 20-year term by imposing maximum sentences on both convictions and running them consecutively, amounting to an aggregate parole disqualifier of 17 years. N.J.S.A. 2C:11-4c; 2C:43-6a(2); 2C:43-7.2.

The sentencing process was rife with error, from the court penalizing Harriott for failing to admit guilt or express remorse, to accusing him of perjury, to engaging in judicial fact finding with respect to the jury's p/p verdicts, to rejecting relevant mitigating factors, to breaching the Yarbough guidelines.[19] The violation of Harriott's constitutional protection against self-incrimination and right to trial by jury as well as the Code's fundamental sentencing principles resulted in unwarranted maximum and consecutive terms and is excessive. The sentence should be vacated and the matter remanded for a new sentencing hearing. See State v. Melvin, 248 N.J. 321, 341 (2021) (appellate deference to sentencing court "presupposes and depends upon the proper application of sentencing considerations); State v. Fuentes, 217 N.J. 57, 70 (2014) (violation of sentencing guidelines is ground for reversal).

The court found two aggravating factors, factor (3), the risk the defendant will commit another offense, and factor (9), the need for deterrence. N.J.S.A. 2C:44-1a(3), (9). (30T 54-20 to 25) It rejected two applicable

[19] State v. Yarbough, 100 N.J. 627 (1985).

mitigating factors proffered by the defense, factor (8), that "[t]he defendant's conduct was the result of circumstances unlikely to recur," and factor (9), that "[t]he character and attitude of the defendant indicate that the defendant is unlikely to commit another offense" N.J.S.A. 2C:44-1b(8), (9) (30T 57-21 to 58-2), and found only mitigating factor (7), that defendant had a good prior record, N.J.S.A. 2C:44-1b(7) (30T 56-16 to 19).[20]

Sentencing under the Criminal "Code focuses on the crime, not the criminal," Yarbough, 100 N.J. at 643; aggravating factors that pertain to the defendant carry less weight than those that pertain to the offense. See State v. Hodge, 95 N.J. 369, 375-77 (1984) (sentencing is "offense-oriented"). Both of the aggravating factors the court found pertain to the defendant; the court did not find any aggravating factors that pertain to the offense. See State v. Abdullah, 184 N.J. 497, 506 n.2 (2005) (noting that aggravating factors (3), (6), and (9) all relate to recidivism). And in arriving at aggravating factors (3) and (9) and rejecting mitigating factors (8) and (9), the court improperly placed substantial weight on Harriott's failure to incriminate himself at sentencing and on what, in the court's opinion, was his failure to express

[20] As Harriott turned 26 two weeks before the commission of the offense (30T 58-10 to 12), the court considered inapplicable mitigating factor (14), that "[t]he defendant was under 26 years of age at the time of the commission of the offense[.]" N.J.S.A. 2C:44-1b(14).

remorse, and on its improper parsing of the jury's verdict to Harriott's detriment.

A. The failure-to-confess and express-remorse errors

Generally, a court bases a finding of aggravating factor (3) on the fact that the defendant has prior convictions, which allows the court to infer that the prior punishments did not deter the defendant and thus to conclude that he is likely to continue committing crimes. See State v. Dalziel, 182 N.J. 494, 502 (2005) (finding "the extent of a defendant's prior record" in support of factor (3)); John M. Cannel, Criminal Code Annotated (Gann 2020 ed.), Comment N.J.S.A. 2C:44-1a(3), (6), and (9) ("To find these factors, which relate to the need to deter defendant from further offenses, courts are expected to make a qualitative assessment about the defendant in light of his criminal history."). In this case, however, where Harriott's entire prior record consisted of a single disorderly persons offense, so far from basing factor (3) on his prior record, the court found his record in mitigation, under factor (7). (30T 56-16 to 19) Unable to rely on Harriot's prior convictions, the court had to look further afield for support for factor (3).

Despite the fact that Harriott "apologize[d] for my actions on the night of March 23rd, 2019" (30T 12-12-13 to 14); said "[he] really wish[ed] [he] had never taken that gun"; twice said he was "sorry"; and asked for "forgiveness"

(30T 12-18 to 19), the court found factor (3) on the ground that he did not admit his responsibility or express remorse:

> [Harriott's] inability to admit the crimes he committed … and his overall lack of remorse demonstrate[] qualities that make him less amenable to rehabilitative and correctional programs designed to reduce the risk of reoffending, and thus make him more likely to reoffend. As a result, aggravating **factor (3) applies**, and in this court's opinion applies **with significant weight**.

(30T 54-15 to 22) (emphasis added)

Further, on the ground that the jury found p/p rather than self-defense, the court concluded that Harriott "lied on the witness stand." (30T 54-8 to 22) Combining its finding that Harriott did not confess his guilt at sentencing and its finding that he relied on what the court deemed the "false narrative" that he acted in self-defense, the court concluded, under aggravating **factor (9), that there was a "need for a strong sentence for deterrence**[.]" (30T 55-7 to 17) (emphasis added) The record does not support a finding of factor (3) or (9).

The United States and New Jersey Supreme Courts have forbidden courts from penalizing defendants for not confessing guilt or expressing contrition at sentencing. In Mitchell v. United States, 526 U.S. 314 (1999), the U.S. Supreme Court pointed out that the Fifth Amendment privilege against being "compelled in any criminal case to be a witness against [one]self" applies with equal force at sentencing. Accordingly, the Court held, a

defendant may not be "enlist[ed] ... as an instrument in his or her own condemnation," id. at 325, and a court may not draw [an] adverse inference" from the defendant's failure to confess guilt at sentencing, id. at 317. Similarly, the New Jersey Supreme Court has cautioned that "the sentencing judge should not himself seek to induce a defendant to confess," or "increase[] the sentence because [the defendant] defended against the charge and did not admit his guilt at sentencing." State v. Poteet, 61 N.J. 493, 497, 495 (1972); see State v. Jiminez, 266 N.J. Super. 560, 570 (App. Div. 1993) ("a sentencing judge may not enhance the penalty because [a defendant] contests his guilt"); see also State v. Marks, 201 N.J. Super. 514, 539- 40 (App. Div. 1985) ("a defendant's refusal to acknowledge guilt following a conviction is generally not a germane factor in the sentencing decision").

And while Harriott said he was sorry several different ways, neither the defendant's failure to express remorse nor his explicit rejection of remorse are aggravating factors under the Criminal Code. Further, contrary to the court's finding that Harriott's alleged lack of remorse adversely affected his amenability to rehabilitation, there is no legal consensus on whether a defendant who expresses remorse is less likely to reoffend. See Susan A. Bandes, Remorse and Criminal Justice, ("Remorse") Emotion Review, Vol. 8, 14-15 (October 23, 2015); State v. Case, 220 N.J. 49, 54 (2014) (sentence may

not be based on "unfounded assumptions"). Moreover, there is no legal consensus on the definition of remorse or on how to identify remorse.[21] "Conversely, there is evidence that ... evaluating remorse via demeanor is particularly problematic across racial and cultural divides and where the defendant is a juvenile, mentally ill, or taking psychotropic drugs." Bandes, Remorse, Vol. 8, at 15.

In addition to failing to take into account Harriott's apologies and otherwise misapplying factor (3), the court failed to reconcile its finding under aggravating factor (3), that Harriott was likely to reoffend, with its finding under mitigating factor (7), that, at age 26, he had a good prior record. See Case, 220 N.J. at 67 ("court [must] give a reasoned explanation for its conclusion that this first-time offender presented a risk to commit another offense").

The sentencing process was further tainted by the court's accusation that Harriott "lied on the stand." In the court's view, the jury's finding that Harriott acted "in the heat of passion resulting from a reasonable provocation," N.J.S.A. 2C:11-4b(2), rather than self-defense, as Harriott maintained, meant

[21] "[T]here is evidence that certain types of shame are tied to an increased likelihood of future criminal activity." Bandes, Remorse and Criminal Justice, Vol. 8, at 15 (italics in original). Thus if remorse is related to a decreased likelihood of criminal activity, it is essential to be able to distinguish it from shame. Id.

that he committed perjury. While Harriott contests the reductive conclusion that a jury's rejection of a witness's testimony means the witness lied, the fact that the court took pains to accuse Harriott of committing perjury raises the troubling inference that it sentenced him not only for the manslaughter offenses for which he was tried and convicted, but also for the crime of perjury, for which he was not charged.[22]

The matter must be remanded for a new sentencing hearing because the court improperly charged Harriott with perjury, improperly charged him with failing to acknowledge responsibility or express remorse despite the fact that he did both, and improperly treated his failure to incriminate himself at sentencing as reasons to increase his sentence.

B. The error in parsing the jury's passion/provocation verdicts

The Supreme Court holds that, to convict a defendant of p/p manslaughter, "[t]he first … requirement[] is that the provocation be adequate." State v. Mauricio, 117 N.J. 402, 412 (1990). Accordingly, the jury was instructed: "The first factor, there was adequate provocation." (27T 157-7 to 8, 168-14 to 15) The jury found adequate provocation with respect to Brown, and returned a conviction for p/p manslaughter. And the jury found

[22] The crime of perjury is set forth at N.J.S.A. 2C:28-1.

adequate provocation with respect to Bryant, and returned a conviction for attempted p/p manslaughter. (29T 8-15 to 9-3; Da 3, 5)

In State v. Melvin, the New Jersey Supreme Court ruled that, under the state-constitutional rights to trial by jury and fundamental fairness, the jury's "verdict is final and unassailable" and "the findings of juries cannot be nullified through lower-standard fact findings at sentencing." 248 N.J. at 349, 352. This Court construed the decision in Melvin in State v. Morente-Dubon, 474 N.J. Super. 197, 211 (App. Div. 2022). Like Harriott, the defendant in Morente-Dubon was charged with murder and convicted of p/p manslaughter. Because the sentencing court engaged in its own fact finding with respect to the jury's p/p verdict, this Court vacated the sentence and remanded the matter for a new sentencing hearing. Id. at 202.

The Morente-Dubon court noted that, prior to the Supreme Court decision in Melvin, the panel in State v. Teat, 233 N.J. Super. 368, 373 (App. Div. 1989), had allowed "a judge sentencing a defendant for p/p manslaughter [to] find as an aggravating factor … that the provocation to kill was slight or that reason had sufficient time to regain its sway before the defendant killed." The Morente-Dubon court concluded that "Melvin silently overruled Teat," 474 N.J. Super. at 212, and held that, once the jury returns a p/p verdict, a

sentencing court "**shall not consider the degree of provocation** or whether defendant had sufficient time to cool off." Id. at 213 (emphasis added).

Yet that is precisely what the sentencing court did here. Notwithstanding the fact that the jury found, with respect to both homicide charges, that the provocation was adequate, the court stated that, "in evaluating the appropriate sentence," it was its job to "evaluate ... the provocation." (30T 59-7 to 9) The court then determined that it "was on the lower end of passion/provocation" (30T 59-7 to 10) and, with that judicial fact finding, apparently applicable to both p/p convictions, it imposed the maximum ten-year term on both convictions. In imposing sentence in accordance with its own fact finding concerning the level of provocation, the court violated Harriott's rights to trial by jury and fundamental fairness.

C. The failure to find mitigating factors (8) and (9)

Harriott argued that mitigating factors (8) and (9), both of which address the likelihood the defendant will commit another offense, were applicable. The court said that it declined to find either factor "due to the defendant's lack of remorse and … his … revisionist history as to what transpired that evening. These qualities are obstacles toward rehabilitation and only … increase the risk of reoffending." (30T 57-22 to 58-2)

As discussed in Section A., above, the court's finding that Harriott did not express remorse is contrary to the record, not a statutory aggravating factor, and of questionable relevance to any aggravating factors; its finding that Harriott refrained from incriminating himself at sentencing violates his constitutional right against self-incrimination; and its finding that Harriott committed perjury is unwarranted. Harriott's good prior record, which the court found in mitigation (30T 56-16 to 19), supported both mitigating factor (8) and (9), and the court erred in rejecting both factors. See Dalziel, 182 N.J. at 505 (holding that where mitigating factors are "supported, they must be part of the deliberative process"). The failure to find relevant mitigating factors is ground for resentencing. Id. at 506 (remanding for resentencing "[b]ecause it is unclear … how this case would have turned out if the trial judge had applied the proper standards").

D. The misappplication of the Yarbough factors

The court misapplied the first Yarbough guideline as a result of which it abused its discretion in imposing consecutive terms on the manslaughter offenses.

The Yarbough Court identified six principles to guide courts in deciding whether to impose concurrent or consecutive sentences. The first principle states:

> [T]here can be no free crimes in a system for which the punishment shall fit the crime[.]

100 N.J. at 643. The sentencing court read this principle to hold that if it did not impose consecutive terms on the manslaughter and attempted manslaughter convictions, it "would be perceived as allowing" Harriott to commit a crime "without being punished." (30T 60-25 to 61-3) The court was mistaken.

The Yarbough axiom that there are "no-free crimes" "does not require the court automatically to impose consecutive sentences for multiple offenses." State v. Rogers, 124 N.J. 113, 121 (1991). The "no-free crimes" principle holds that a crime is not free where the punishment fits the crime. The Yarbough guidelines contemplate that a concurrent term may be the fitting punishment. Here, the facts and the Yarbough guidelines weighed in favor of concurrent terms for the p/p manslaughter and attempted p/p manslaughter convictions.

The guidelines favor consecutive terms where "the crimes and their objectives were predominantly independent of each other"; where "the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior"; and where "any of the crimes involved multiple victims[.]" 100 N.J. at 644. None of these factors apply here.

Harriott was charged with murder and attempted murder. The offenses occurred as part of a single, continuous episode. Each crime involved a single

victim and the court acknowledged that the evidence supported concurrent terms under the other two Yarbough factors stating: "[Both] shootings occurred within a short period of one another so as to constitute one criminal act … and were of similar objectives since the defendant testified that [in both instances,] he felt threatened[.]" (30T 61-4 to 9) See State v. Miller, 205 N.J. 109, 129 (2011) (Yarbough guidelines favor concurrent terms where crimes were not predominantly independent of each other and were committed at the same time and place); State v. Lester, 271 N.J. Super. 289, 293 (App. Div. 1994) ("Where separate crimes grow out of the same series of events or from the same factual nexus, consecutive sentences are not imposed."). Yet, despite the court's recognition that multiple guidelines supported concurrent terms, it imposed consecutive sentences. The inescapable conclusion is that its misunderstanding of the no-free crimes guideline was dispositive, and it imposed consecutive terms based on the mistaken belief that unless it imposed consecutive terms," Harriott would have committed a crime "without being punished." (30T 60-25 to 61-3)

E. The Torres error

Finally, in accordance with State v. Torres, 246 N.J. 246 (2021) , the matter must be remanded for a fairness analysis to review the imposition of consecutive and maximum terms that resulted in the aggregate sentence of

20 years, 17 ½ years without parole. Torres holds that where, as here, a court has imposed consecutive terms under the Yarbough guidelines, it must provide "[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding[.]" Id. at 268. The fairness evaluation is "the necessary second part to a Yarbough analysis[.]" Id. The trial court considered the aggravating and mitigating factors and the Yarbough factors and pronounced sentence. It did not engage in a fairness analysis.

F. The cumulative effect of the numerous sentencing errors warrants reversal and resentencing, which should be held before a different judge

Individually and cumulatively, the significant sentencing errors resulted in a factually and legally unsupported and excessive sentence and warrant a remand for a new sentencing hearing. And the rehearing should take place before a different judge.

At the sentencing hearing, Judge Bucca branded Harriott a liar; engaged in his own fact finding that devalued the jury's passion/provocation verdicts; and relied on his unwarranted refusal to acknowledge Harriott's expressions of remorse to find aggravating factors (3) and (9) and reject mitigating factors (8) and (9). All of these decisions raise troubling questions about Judge Bucca's impartiality. Caselaw, the Code of Judicial Conduct, and Court Rule all support resentencing by another judge. See DeNike v. Cupo, 196 N.J. 502, 514-15

(2008) (warning that "judges must avoid acting in a biased way or in a manner that may be *perceived* as partial" as "questions about the impartiality of the justice system … threaten[] the integrity of our judicial process") (italics in original; internal quotation marks omitted); Code of Judicial Conduct, Canon 3(C)(1) ("A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."); R. 1:12-1(g) (judges shall not sit on matters "when there is any ... reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so").

"[I]t is not necessary to prove actual prejudice on the part of the court to establish an appearance of impropriety"; recusal is required where "a reasonable, fully informed person" would "have doubts about the judge's impartiality." DeNike, 196 N.J. at 517 (internal quotation marks omitted). disqualification. Id. (internal citations omitted). Therefore, even where no actual bias exists, the court should be recused where it has "relied on inappropriate factors in reaching its determination." New Jersey Div. of Youth and Family Services v. A.W., 103 N.J. 591, 617 (1986). Further, where, as here, the trial court "has heard [the] evidence and may have a commitment to its findings," this Court has held that "it is best that the case be reconsidered by a new fact-finder." Id. See Melvin, 248 N.J. at 352–53 (ordering different

judge for resentencing noting that it would be difficult for defendant to understand how judge who made such rulings could arrive at a different determination on resentencing). The record establishes that the sentencing hearing was tainted and that Harriott is entitled to a new sentencing proceeding before a different judge.

CONCLUSION

As discussed in Point I, the passion/provocation manslaughter and attempted passion/provocation manslaughter convictions must be reversed because the jury was incorrectly instructed on self-defensee. As discussed in Point III, the passion/provocation manslaughter and attempted passion/provocation manslaughter convictions must be reversed because the jury was incorrectly instructed on flight as consciousness of guilt. As discussed in Point II, the passion/provocation manslaughter conviction must be reversed due to yet another error in the self-defense charge. If the Court does not reverse the convictions, it must order a remand for resentencing before a different judge because the sentencing hearing was riddled with error, including, among other errors, reliance on unsupported aggravating factors and failure to find applicable mitigating factors.

Respectfully submitted,

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Dated: June 19, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2047-21T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
	:	
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior Court of
v.	:	New Jersey, Middlesex County.
	:	
ANDREW J. HARRIOTT,	:	
	:	Sat Below: The Hon. Benjamin S. Bucca,
Defendant-Appellant.	:	Jr., J.S.C., and a jury.

BRIEF AND APPENDIX, SA1-22, ON BEHALF OF THE STATE OF NEW JERSEY

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OF COUNSEL AND ON THE BRIEF

OCTOBER 18, 2023

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"Db" defendant's brief;
"Sa" State's appendix;
"1T" Transcript dated February 3, 2020;
"2T" Transcript dated September 20, 2021;
"3T" Transcript dated September 21, 2021;
"4T" Transcript dated September 22, 2021;
"5T" Transcript dated September 23, 2021;
"6T" Transcript dated September 29, 2021;
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"10T" Transcript dated October 1, 2021 (vol. II);
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"29T" Transcript dated October 22, 2021;
"30T" Transcript dated January 4, 2022.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

On June 27, 2019, the grand jurors for Middlesex County returned Indictment Number 19-06-01066 charging defendant Andrew Harriott with the purposeful or knowing murder of N.B., contrary to N.J.S.A. 2C:11-3a (count one), with the attempted murder of R.B., contrary to N.J.S.A. 2C:5-1 and 2C:11-3a (count two), second degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5(b) (count three), and with second degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(a) (count four). (Da1-2).

The Honorable Benjamin S. Bucca, Jr., J.S.C., presided over the trial in this matter. (2T-30T). Jury selection began on September 20, 2021, and the jury returned its verdict on October 22, 2021. (2T; 29T). On count one, the jury found defendant guilty of passion/provocation manslaughter; on count two, the jury found defendant guilty of attempted passion/provocation manslaughter; on counts three and four, the jury found defendant guilty. (Da3-8; 29T8-15 to 29T9-23).

On January 4, 2022, Judge Bucca sentenced defendant to an aggregate sentence of twenty years in prison, subject to the parole bar under the No Early Release Act (NERA). (Da9). On count one, the judge imposed a sentence of ten years in prison, subject to NERA. (Da9; 30T59-22 to 30T60-4). On count two, the judge imposed a consecutive sentence of ten years in prison, subject to NERA. (Da9; Da12; 30T61-15 to 24). Counts three and four were merged with counts one and two. (Da9; Da12;

30T61-25 to 30T62-1). The applicable fines and penalties were also imposed. (Da10; Da13; 30T62-24 to 30T63-2).

Defendant thereafter filed a Notice of Appeal with this court. (Da15-19).

COUNTER-STATEMENT OF FACTS

The Akbar Restaurant, located in Edison Township off Route 1, is a venue hall for events. (6T101-24 to 6T102-10). It has a large parking lot, which is accessed by a gate. (6T102-14 to 19). The parking lot is attached to the parking lot of a Holiday Inn. (6T102-19 to 22). Shane Fletcher, who worked a full-time job, planned parties or events on the side. (11T7-17 to 18; 11t7-23 to 24; 11T8-2 to 15). The events he organized were for large functions. (11T9-10 to 12). He would book the venue site, organize the food and the entertainment. (11T9-13 to 25). He would also hire security. (11T10-22 to 24). He would advertise the events he planned on social media, printed flyers, by word of mouth or by using hired promoters. (11T11-25 to 11T12-3).

Fletcher was involved with promoting an event at the Akbar on Friday, March 22, 2019. (11T12-15 to 18). The event for that night was an annual event called the Aries Royal Ball, which celebrates African royalty and culture. (11T13-6 to 10; 11T14-21 to 25). Fletcher was expecting about 250 to 300 people to attend the event. (11T17-3 to 6). Attendees to the event would come dressed in African royalty attire. (11T14-21 to 15). For the entertainment, he booked disc jockeys called Drewski and Wala, a Caribbean DJ, and knew that defendant, who he knew as Drew Cash, was going to

entertain at the event. (11T19-8 to 11; 11T20-6 to 17; 11T20-23 to 24). DJ Drewski was a well-known radio entertainer and was expected to draw attendees to the Akbar. (6T162-9 to 12; 7T115-12 to 14). The flyer for the event advertised the time as between 9:00 p.m. to 2:00 a.m. (11T15-20 to 25).

In addition to the Aries Royal Ball, Fletcher allowed this event at the Akbar to be shared with another event involving another group of people who wanted to celebrate the birthday of Al-Tariq Brown, who had been killed in 2018. (6T141-5 to 11; 6T142-1 to 4; 6T164-24 to 6T165-3; 6T165-10 to 14; 11T16-4 to 18; 13T34-24 to 13T35-2; 13T53-23 to 13T54-7). The Brown family was a large one with most of them living in Newark. (13T34-20 to 23). The promoters of the party to celebrate Al-Tariq Brown's life posted the event on Instagram and social media. (6T142-5 to 7; 6T142-24 to 6T143-2). This event was not gang-related but was a family party. (13T74-9 to 13).

About two weeks before the events were to be held, Brett Carmen was hired to provide the security. (7T77-22 to 7T78-10; 7T78-12 to 17). Carmen was asked to search all attendees before entering the hall because no smoking products or weapons would be permitted inside. (7T82-11 to 19).

On the night of March 29, Raheem Bryant, who was a cousin of Al-Tariq Brown, went to the Akbar for the party. (13T54-23 to 25). Raheem drove to the Akbar in his car, a white Impala, and drove with two friends. (13T56-2 to 11; 13T57-2 to 5). He arrived at the event around 11:45 p.m. (13T56-21 to 25). When he got inside, he saw

his first cousin, Nashon Brown, whose nicknames were "Nasty" and "Naz." (6T141-19 to 25; 13T59-3 to 4; 13T59-12 to 14). By 2019, Nashon had turned his life around and was not in a gang. (13T75-15 to 21). Nashon was also related to Al-Tariq Brown. (6T165-15 to 17). Raheem spent about an hour at the event, and enjoyed himself, talking to his friends, eating, and dancing. (13T60-2 to 4; 13T60-15 to 16; 13T62-4 to 10). The crowd was mixed, given that there were two parties, but no one was bothered by it and the two groups were having a good time. (6T144-22 to 6T145-25).

Brett Carmen set up his security at the entrance to the Akbar with himself, two men and two women. (7T84-18 to 21). Everyone entering the Akbar was searched to ensure prohibited items, notably weapons, did not get inside. (7T172-15 to 24).

Raheem saw defendant at the event, but he did not know him. (13T63-1 to 5; 13T64-8 to 10). He saw that defendant was wearing a colorful jacket that had blue and orange in it. (13T63-14; 13T63-22 to 23). He also noticed a tattoo that defendant had on his neck. (13T64-1 to 7). At one point during the evening, Raheem noticed that the music stopped and then resumed after which he heard that "a situation" had gone on. (13T61-17 to 24). Brett Carmen was advised that there was a disturbance/fight going on inside but by the time he and one of his security aides got inside to investigate, the disturbance was over, and attendees were leaving. (7T90-19 to 24; 7T91-1 to 7). Carmen did not see anyone being sprayed at with champagne; nor did he see anyone getting pushed and shoved. (7T93-18 to 21).

Raheem got nervous after he heard defendant say, "I'm going to get my motherfucking gun." (13T64-23 to 13T65-9). Raheem followed defendant out of the Akbar because he wanted to see where defendant would go. (13T66-5 to 21). Raheem went back inside and told Nashon he was not sure defendant was serious, but he advised they should leave since the posted time for the party had expired. (13T67-7 to 18; 13T67-22 to 25).

Raheem then proceeded to leave. Nashon followed behind him, but Raheem did not know Nashon was behind him. (13T67-24 to 25). As Raheem walked out of the Akbar, he heard a "pow" sound. (13T68-1 to 6). He turned and did not realize he had been shot. (13T68-11 to 14). Before collapsing to the ground, Raheem saw defendant with the colored jacket running away. (13T68-14 to 17). Raheem was shot in the face. 13T74-1 to 4). Nashon also got shot.

Shaquana Thomas, who was a cousin of Al-Tariq Brown and who attended the party that night, had gone to the bathroom and when done saw that everyone was leaving the party, so she followed suit. (6T141-5 to 19; 6T143-6 to 11; 6T148-16 to 17; 6T148-19 to 24). As she walked out, she saw that Nashon was behind her. (6T149-1 to 8). She was walking in the parking lot when she heard shots. (6T149-10 to 13). Everyone started running and she fell to the pavement. (6T150-6 to 10). As she got up, she saw Nashon, who was now in front of her, fall to the ground. (6T150-11 to 21). As

he fell, he hit his head on a pole. (6T150-22 to 6T151-1). He did not move after falling. (6T152-6).

Shaquana ran over to him and screamed for him to get up. (6T152-10 to 16). Nashon did not respond. (6T152-19 to 21). She assumed that Nashon had lost consciousness from hitting his head, and when she moved his body to turn him around, she saw that he had a gunshot wound to his back. (6T152-22 to 6T153-2; 6T153-14 to 17). A person among the crowd that had gathered screamed for someone to get their car. (6T153-20 to 21). Shaquana ran to her car and drove it to where Nashon lay on the ground; her intent was to get him into her car so she could take him to the hospital. (6T154-3 to 4; 6T154-8 to 9). She was only able to get his body halfway into her car. (6T154-10 to 21). Shaquana did not see who shot Nashon. (6T167-25 to 6T168-2).

Abree Williams, also related to the Brown family and who came to the Akbar for the party to celebrate Al-Tariq Brown's birthday, was sitting in her vehicle in the parking lot when two shots rang out. (13T13T35-3 to 6; 13T35-19 to 25; 13T37-15 to 19; 13T40-20 to 22). She had gone to her car to let her feet rest. (13T37-15 to 19). After she heard the gunshots, she got out of her car and saw Raheem, who had been shot. (13T38-2 to 3; 13T38-11 to 14). Raheem was holding his bloody face. (13T39-5 to 9). Abree did not see who had shot him. (13T39-20 to 21).

When Raheem and Nashon got shot, Brett Carmen was inside the Akbar, so he did not hear gunshots, however, he became aware shots had been fired from his radio.

(7T94-17 to 25). When he got outside, he saw a large crowd by Nashon. (7T96-1 to 7). He then saw Raheem bleeding from his face. (7T96-14 to 17). Brett, when he saw Raheem's injury, called the police, and ran to his car to retrieve a shirt to help with the bleeding from Raheem's wound. (7T97-4 to 7; 7T97-15 to 16; 7T97-18 to 24; 7T179-19 to 21). He gave the shirt to one of his security aides, Nathaniel Green, who applied the shirt to Raheem's face. (7T97-25 to 7T98-5; 7T180-11 to 18).

An ambulance arrived at the scene and Raheem was rushed to the hospital. (7T98-8 to 10; 7T98-13 to 15). After Raheem was taken away, Brett Carmen walked over to where Nashon was lying on the ground and where people were standing and crying. (7T98-19 to 7T99-1). He could see that Nashon was dead, so he pulled his security team away. (7T99-2 to 5). He and his security team went back inside the Akbar to discuss the events of that night and to be available to speak with the police. (7T99-8 to 21).

One of the first officers to report to the Akbar was Edison Police Officer Scott Benedickson. (6T98-19 to 20; 6T101-20 to 23; 6T104-17 to 19). Officer Benedickson arrived around 2:00 a.m. on March 23. (6T101-20 to 23). When he arrived, he saw hundreds of people in the parking lot who were crying, screaming, and yelling. (6T104-20 to 25). It was "very chaotic." (6T104-23). He saw a crowd of people by a vehicle with a body laying half in car. (6T105-2 to 7; 6T105-23 to 6T106-3). They told him the man had been shot. (6T105-7 to 8). The officer checked for a pulse and could

not detect one. (6T106-14 to 16). The officer pulled Nashon's body out of the car and laid him flat on the ground. (6T107-3 to 7). The officer attempted CPR, but to no avail. (6T107-8 to 10; 6T107-22 to 23; 6T108-4 to 16; 6T108-23 to 25). Nashon would later be declared dead at the scene. (6T121-1 to 7).

Edison Police Officer Joseph DePasquale responded to the Akbar around 1:56 a.m. (6T172-16 to 19; 6T178-24 to 6T179-3). When Office DePasquale arrived at the scene, he saw vehicles leaving the premises at high rates of speed. (6T181-3 to 5). One vehicle, a silver-colored Chevy, was in the process of departing the scene and the officer was able to use his spotlight to illuminate the interior and saw the occupants inside who seemed to be nervous; when he told them not to leave, one of the occupants screamed to the driver to drive away. (6T181-17 to 6T182-7). The occupants looked to the officer to be around 25 to 30 years old; one of the back seat occupants was wearing a cap, an orange shirt, and a dark jacket. (6T182-19 to 21). All four occupants were African American men. (6T182-19 to 21).

After this car sped off, Officer DePasquale gave chase. (6T183-3 to 5). The officer heard on his radio that the suspect in the shootings was described as wearing a dark jacket and an orange shirt, which matched one of the men in the silver-colored vehicle. (6T183-5 to 9). The officer activated his overhead lights and pursued the vehicle. (6T183-22 to 25; 6T184-5 to 7). The vehicle ran a red light at a high rate of speed and almost hit another vehicle. (6T186-2 to 14). The officer's speed reached 85

miles per hour; the speed of the fleeing vehicle was about 95 to 100 miles per hour. (6T186-15 to 20). The officer tried to get a read on the license plate number but was not able to make it out because the driver of the fleeing vehicle turned off the headlights, which made it very difficult for the officer to see the license plate. (6T187-6 to 18). Because of the risks involved, the officer terminated the pursuit. (6T187-18 to 25; 6T188-5 to 7). When Officer DePasquale arrived back at the Akbar, there were still a lot of people in the parking lot. (6T189-13 to 22). He saw that CPR was being administered to Nashon. (6T189-22 to 23).

Edison Police Sergeant Loren Long also responded to the Akbar during the early morning hours on March 23. (9T100-19 to 22; 9T104-17 to 20). When Sergeant Long arrived at the scene, hundreds of people were still congregated in the parking lot. (9T106-4 to 6). The officers at the scene attempted to speak with those who were around, however, most of the persons approached did not want to talk to the police and exhibited some hostility to them. (9T106-24 to 9T107-5; 9T108-3 to 5). To make it more comfortable for people to talk, the police set up a room at the nearby hotel to conduct interviews. (9T109-18 to 25). Police were able to speak to two or three attendees and several relatives of the victims, but the police did not receive any information that morning on who shot the victims. (9T112-16 to 19).

The medical examiner performed the autopsy on Nashon Brown and recovered a bullet from his left chest. (7T33-15 to 19; 7T55-13 to 19). The bullet had damaged the

left ventricle of the heart. (7T63-3 to 9). The bullet had first hit the lungs, fractured some ribs and then hit the heart. (7T64-4 to 7; 7T65-2 to 6). The cause of death was listed as a gunshot wound to the chest with damage to the lungs and heart with massive blood loss. (7T67-8 to 12).

Raheem Bryant survived his gunshot wound. The gunshot wound to his face lacerated a blood vessel and required surgery. (9T36-13 to 16; 9T37-22; 9T72-14 to 18; 9T73-13 to 19). The gunshot wound caused him facial fractures and a broken jaw, as well. (17T64-17 to 20). Because it was difficult for Raheem to talk following his surgery, he did not give a statement to the police until May 2019. (17T64-4 to 10; 17T65-4 to 6).

Following the shootings, police retrieved surveillance video from cameras at the Akbar. (9T115-12 to 15). There were thirty surveillance cameras at the Akbar. (17T44-13 to 14). Sergeant Long reviewed the surveillance videos and saw a person of interest as the shooter as an African American male who was wearing a very distinctive jacket which had striped lines on it and who had a distinct tattoo on his neck. (9T115-16 to 9T116-9; 9T116-15 to 19; 9T116-22 to 25; 9T117-1 to 4; 9T134-12 to 17; 9T134-22 to 9T135-9; 9T135-18 to 9T136-2; 9T136-12 to 21; 9T138-2 to 12; 10T210-15 to 10T211-2). The surveillance video timed the shooting to be at 1:53 a.m. (17T102-15 to 18). Still photographs were made from the surveillance video which captured his person of interest entering the Akbar. (9T118-1 to 6; 9T118-19 to 22). Still

photographs from the video were made showing the tattoo on the neck. (9T119-19 to 24). Police also made from the video still photographs of another African American male with dreadlocks and a second African American male standing near to the man wearing the distinctive jacket. (9T120-4 to 16; 9T129-19 to 25; 9T133-12 to 9T134-3; 9T134-22 to 9T135-9; 9T134-22 to 9T135-9; 9T135-18 to 9T136-2; 9T137-2 to 12; 9T138-5 to 8; 10T211-12 to 22). From the surveillance videos, it appeared to police that these three men of interest arrived at the party at the same time. (9T138-9 to 12). The police created a TRAXS bulletin containing the still photographs to all police departments. (9T129-14 to 25). Police were able to learn the identities of the two men who were near to the man in the distinctive jacket: David Ninson and Damien Sappleton. (9T130-11 to 13; 9T130-18 to 20; 9T139-17 to 20; 17T25-6 to 11). Investigators spoke with Ninson, who was not truthful with them and refused to identify defendant even though police had images of Ninson in defendant's rap videos. (17T94-19 to 25; 22T267-25 to 22T268-21; 22T269-2 to 3). Sappleton declined to speak with the police. (17T95-16 to 19; 17T101-5).

Investigators also spoke with Shane Fletcher and learned the names of the people hired to provide the entertainment at the party, including "Drew Cash." (9T125-2 to 9). They searched social media sites to find "Drew Cash" and found such a name on Instagram. (9T125-11 to 14; 9T146-3 to 9; 9T146-21 to 9T147-6). The account advertised "Drew Cash" as a rapper who had a few thousand followers. (9T125-15 to

21). There were photographs of "Drew Cash" and one photograph on Instagram showed him wearing a jacket that looked like the jacket investigators saw in the Akbar surveillance videos. (9T125-22 to 9T126-11; 9T127-2 to 11; 9T147-7 to 10). Investigators also found videos of "Drew Cash" on YouTube and Facebook. (9T147-4 to 6). The build of the man in the social media photograph also fit the build and facial hair of the man in the surveillance video. (9T127-12 to 21; 9T147-17 to 22). Investigators learned that "Drew Cash" was Andrew Harriott. (9T128-2 to 3; 9T140-6 to 10). They learned that defendant's address was in Somerset. (9T140-11 to 13).

Investigators obtained a search warrant for defendant's address in Somerset and an arrest warrant for him. (9T140-14 to 16; 17T27-3 to 6; 17T27-10 to 14). Officers went to the address on March 27, 2019, and met with defendant's father, Basil Harriott; defendant was not at the house. (9T140-14 to 16; 9T142-6 to 10; 11T41-1 to 8; 11T141-16 to 19; 11T41-23 to 11T42-1; 17T29-12 to 20). Police executed the search warrant at the house, looking for the jacket or a gun, and did not find anything of evidential value. (9T140-23 to 25; 17T33-16 to 24). They showed defendant's father still photographs from a surveillance video, and he signed them, identifying defendant. (9T141-2 to 25; 17T30-24 to 17T31-15; 17T31-21 to 17T32-1). One of the still photographs was of the man of interest wearing the distinctive striped jacket. (9T145-7 to 15). The officers asked Mr. Harriott how they could contact defendant, and he

provided them with defendant's cell phone number. (9T142-11 to 16; 9T142-19 to 21; 17T32-24 to 17T33-2).

Investigators went to the home of defendant's sister to locate him, but defendant was not there. (9T143-3 to 6). They also spoke with defendant's girlfriend to locate him. (9T143-7 to 9; 17T34-18 to 23). They showed her a still photograph from the surveillance video, and she signed it, identifying defendant. (9T143-13 to 22; 17T35-4 to 10). She provided the same cell phone number for defendant. (9T143-23 to 9T144-4). The police asked defendant's girlfriend for her consent to search her vehicle, and she gave her consent. (9T144-5 to 10). Inside her vehicle, tucked underneath a seat, police seized a cell phone. (11T120-8 to 12; 17T35-20 to 23).

Following March 27, investigators continued to search for defendant, even enlisting the help of the United States Marshall Service. (9T148-8 to 10; 17T41-14 to 20). Their efforts were to no avail. (17T42-5 to 7). Finally, on April 4, 2019, investigators learned that defendant had turned himself in at the Middlesex County Sheriff's Office. (9T148-16 to 18; 9T149-12 to 16). Officers immediately took defendant into custody. (9T149-21 to 22).

The cell phone seized from the vehicle of defendant's girlfriend was subjected to a forensic examination. (13T9-24 to 13T10-3). After the shooting on the morning of March 23, there was no evidence a call to 9-1-1 was made from the phone. (17T102-11 to 22). The examination also revealed that the IMEI number for the seized cell phone

did not correspond to the IMEI number for cell phone calls found in T-Mobile records for defendant's cell number. (13T18-12 to 19). An IMEI number is a serial number assigned to a specific cell phone. (13T16-2 to 3). Each cell phone comes with a sim card, which can be removed and used in a different cell phone. (13T16-3 to 10). So, if a person takes the sim card from an Apple iPhone 11 and puts it into an Apple iPhone 13, the iPhone 13 would be using the same cell phone number. (13T16-4 to 10). So, the sim card can allow someone to transfer the use of a particular cell phone number to a different cell phone. (13T16-16 to 18).

Police never recovered the firearm used in the shootings. However, two spent casings recovered from the crime scene and the spent projectile recovered at the autopsy were submitted to a ballistics expert for review. (12T43-23 to 12T44-16; 12T48-12 to 15). The spent casings were 9 mm casings. (12T50-17 to 18; 12T50-23 to 25). Examination revealed that they had been fired from the same firearm. (12T84-19 to 12T85-3). The spent projectile recovered at the autopsy was a "38 class type," which meant it could have been fired from a .38, a .380 or a 9 mm handgun. (12T89-21 to 22; 12T90-19 to 20).

Defendant testified on his own behalf. He testified that he went to the Akbar on March 22, 2019, to perform there. (23T10225 to 23T103-4). He was asked to perform that night by Shane Fletcher, and defendant thought the party was an African-themed event. (23T103-1 to 4; 23T103-16 to 19). He claimed he drove his father's blue

Hyundai Sonata to the venue hall. (23T104-15 to 18). He came to the event with Damien Sappleton. (23T104-19 to 24). He claimed he arrived at the venue hall after midnight. (23T105-19 to 22). Once he was inside the hall, he saw attendees dressed in traditional African garments but also saw attendees dressed in civilian clothes. (23t106-13 to 17). He claimed to be confused since he thought the party was an African-themed event. (23T106-13 to 19). He estimated that there were over 300 people in attendance. (23T107-7 to 10). He saw about 100 people there for the African-themed event; the other group was much larger. (23T108-1 to 3). He claimed he had no weapon with him. (23T108-20 to 22).

Defendant claimed that he spent time at a table reserved for him before approaching the stage to perform. (23T108-8 to 11). He claimed that he gave the disc jockey a flash drive with his songs. (23T108-11 to 12; 23T108-23 to 25). Because his stage name was "Drew Cash," he would begin his act by saying, "Deez up." (23T111-15 to 20). When the crowd also started saying, "Deez up," defendant claimed he saw people throwing up gang signs. (23T112-5 to 10). He also saw people pointing up "gun fingers." (23T113-11 to 12). Defendant thought certain people in the audience were annoyed. (23T113-13 to 18).

Defendant claimed that thirty seconds into his performance, he saw about ten to fifteen people run over to his table and grab bottles from it. (23T113-22 to 25; 23T114-5 to 7; 23T115-16 to 18). Defendant told the disc jockey to stop playing the music.

(23T114-7 to 9). He then left the stage. (23T114-13 to 14). When he was off the stage, he claimed to hear people saying they would "smoke" him. (23T116-5 to 11). He estimated the time to be around 1:30 a.m. (23T116-21 to 23).

Defendant claimed that a friend of his named Anderson came up to him in a nervous and excited state. (23T120-4 to 11). They spoke after which defendant became scared. (23T121-8 to 14). Anderson asked defendant if he could give Anderson and two female friends a ride, and defendant said yes. (23T121-20 to 25). Defendant claimed that Anderson knew Nashon Brown and wanted to talk with Nashon before leaving the party. (23T121-25 to 23T122-6). Defendant claimed he left the hall while Anderson stayed behind inside to speak with Nashon Brown. (23T127-4 to 14).

Defendant claimed that when he left the Akbar, he did not see Anderson's female friends behind him. (23T127-22 to 23T128-1). He claimed that Sappleton was with him. (23T143-14 to 18). He denied going back to his vehicle to retrieve a gun. (23T129-24 to 25). He decided to walk back to the Akbar entrance to find the two female friends of Anderson, even though he claimed that as he was walking out, the same people who had been threatening him inside the hall were doing so as he was leaving. (23T130-1 to 2; 23T147-8 to 12; 23T148-7 to 15). He claimed that as he walked back, Sappleton was with him. (23T149-1 to 4).

Defendant claimed that as he was walking back to the Akbar entrance, a man he knew as "Zey" handed him a gun for protection. (23T149-9 to 14; 23T150-1 to 10;

23T151-1 to 3). Defendant placed the gun in his jacket pocket for protection. (23T151-6 to 9). He then waited outside for the two female companions of Anderson, but he did not see them or Anderson. (23T151-16 to 17; 23T151-23 to 25).

Defendant claimed that as he waited outside, a man pulled up his shirt and exposed a gun. (23T156-12 to 16). Defendant claimed he put his hand in his pocket to send a message to this man to back off. (23T156-13 to 18). Defendant claimed people in the crowd were still saying, "smoke you crab ass n-words." (23T158-1 to 3). Defendant claimed that "crab" was a term for the Crips street gang. (23T158-1 to 2). Defendant denied being a gang member, himself. (23T158-6 to 9).

Defendant claimed he had no issue with Rasheem Bryant or with Nashon Brown. (23T158-19 to 23). But he claimed he was told the two men were killers. (23T159-6 to 9). Defendant claimed that he started to walk back to his vehicle when someone called him back. (23T160-14 to 19; 23T161-2 to 7). He turned around and spoke with this person. (23T161-12 to 14). Then, defendant claimed he saw a person coming toward him with his hand in his pocket. (23T162-5 to 11). Defendant thought this person had a gun. (23T162-9 to 11). This person was Raheem Bryant. (23T162-12 to 14). Defendant claimed that Nashon Brown was behind Raheem Bryant. (23t165-4 to 9). Defendant claimed that he fired one shot into the air after he heard a gunshot. (23T173-4 to 14). He claimed he fired into the air to get the men who he claimed were chasing him. (23T173-15 to 18).

Defendant claimed that as he ran to his vehicle, David Ninson said, "gun." (23T175-11 to 14). Defendant claimed he saw Raheem Bryant with a gun in his hand, and he fired to protect himself. (23T175-23 to 23T176-9). Defendant claimed he thought Raheem was going to shoot him. (23T176-10 to 13). He then ran to his father's vehicle and drove home. (23T178-3 to 8; 23T178-11 to 12). He denied that he was in a silver-colored vehicle that morning. (23T178-13 to 16).

Defendant denied fleeing after the shootings. (24T242-1). He claimed that for the twelve days between the shootings and his arrest, he was avoiding being killed. (24T243-15 to 21). He claimed that when he left the Akbar, he was running to protect his life. (24T245-4 to 10). Defendant claimed that after the shootings, Anderson came to his home and took the gun defendant had used to shoot Raheem Bryant. (24T218-6 to 14). Defendant claimed that "Zey" told Anderson to get the gun. (24T227-5 to 8; 24T228-9 to 10).[1]

David Ninson testified for the defense. Ninson claimed that he and defendant were at the Akbar. (22T217-11 to 17). He saw defendant on the stage and was talking to a woman when a commotion broke out. (22T217-18 to 24). He claimed not to know what the commotion was about, but it looked to him as if the attendees from Newark were throwing up gang signs. (22T217-24 to 25; 22T219-21 to 24). Ninson claimed that shortly after the commotion, he exited the Akbar and snuck a bottle of alcohol from

[1] Defendant had no permit to purchase or carry a handgun. (12T135-2 to 10).

the party in his shirt. (22T220-8 to 9; 22T220-22 to 24; 22T221-1 to 4). He had no gun on him. (22T221-6 to 8). He claimed that when someone in the crowd came at him, he swung the bottle of alcohol at this person. (22T243-3 to 16). Ninson also claimed he saw a gun which was why he flung the bottle. (22T243-14 to 16). Ninson claimed to have heard four or five gunshots. (22T246-4 to 8).

The defense also produced a 9-1-1 dispatcher from March 23, 2019, to show that a caller described the shooter as a black male with a white jacket, (23T27-7 to 23T28-1), and that dispatchers knew there were possibly two shooters. (23T76-15 to 23T77-6).

The State produced rebuttal to show that Anderson was killed on May 18, 2019, (25T61-20 to 23), and that Nashon Brown had a conviction from 2012 for aggravated assault, which was admitted on the issue of propensity for violence. (25T62-19 to 22; 25T63-12 to 19).

Based upon the evidence outlined above, the jury convicted defendant of passion/provocation manslaughter, attempted passion/provocation manslaughter and the weapons-related offenses. This appeal follows.

LEGAL ARGUMENT

POINT I

DEFENDANT'S CLAIMS OF INSTRUCTIONAL ERROR DO NOT CONSTITUTE PLAIN ERROR. (NOT RAISED BELOW).[2]

Defendant, for the first time on appeal, raises three challenges to the trial court's jury charge. The State submits that defendant has not sustained his burden of showing that plain error occurred.

Plain error, in the context of a jury charge, is whether there is legal impropriety in the charge that prejudicially affected the substantive rights of the defendant sufficiently to justify notice by the court and to convince it that the error possessed a clear capacity to bring about an unjust result. State v. Torres, 183 N.J. 554, 564 (2005). See also R. 2:10-2. Defendant has the burden of demonstrating that plain error occurred, State v. Morton, 155 N.J. 383, 421 (1998), and he must show "clear" and "obvious" error which affected substantial rights. State v. Chew, 150 N.J. 30, 82 (1997).

The possibility of an unjust result must be sufficient to raise a reasonable doubt as to whether the error belatedly raised led the jury to a result it might not have reached. State v. Ross (II), 229 N.J. 389, 407 (2017). The plain error standard if a "high bar," aimed at promoting litigants to raise their objections at trial, so the trial court can timely

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[2] This Point responds to Points I, II and III in defendant's brief.

address them, as opposed to rewarding those who remain silent at trial to gain an advantage on appeal. State v. Santamaria, 236 N.J. 390, 409 (2019).

In evaluating a jury charge, the appellate court always reads the charge in its entirety, never in isolation. State v. Wilbely, 63 N.J. 420, 422 (1973). A jury charge that tracks the model jury charge is presumed to be proper because the process to adopt the model jury charges is 'comprehensive and thorough." State v. R.B., 183 N.J. 308, 325 (2005). When defendant lodges no objection to the jury charge at trial, there is a presumption that the charge was not erroneous and was unlikely to prejudice the defendant's case. State v. Singleton, 211 N.J. 157, 192 (2012).

In Point I of his brief, defendant contends that Judge Bucca erred by not instructing the jury that self-defense applied to passion/provocation manslaughter and to attempted passion/provocation manslaughter. He argues that the judge should have instructed the jury that passion/provocation manslaughter and attempted passion/provocation manslaughter were lesser included offenses of murder, count one, and attempted murder, count two. (Db19; Db22). Of note, defendant takes no issue with the trial court's jury instructions on the elements of murder and attempted murder when there is evidence of passion/provocation manslaughter but argues that the charge on the elements of the murder offenses were "correct-as far as it went." (Db19).

Defendant cites to State v. Supreme Life, 473 N.J. Super. 165 (App. Div. 2022) in arguing the judge's failure to instruct the jury that self-defense applied to

passion/provocation manslaughter as a lesser included offense on counts one and two was plain error. In Supreme Life, the defendant's convictions were reversed because of a "combination of errors" that had occurred at the trial, including the trial court's failure to instruct the jury that self-defense applied to all lesser included offenses, which included passion/provocation manslaughter. 473 N.J. Super. at 177. See also State v. Gentry, 439 N.J. Super. 57 (App. Div. 2015) (trial court's failure to instruct that self-defense applied to aggravated manslaughter and reckless manslaughter reversible error). Unlike Supreme Life, where the appellate court found cumulative error that had denied the defendant in that case a fair trial, there was no cumulative error in this case. See also Gentry, 439 N.J. Super. at 61-62 ("other serious trial errors, reviewed either separately or in combination with the charging error," required reversal). Judge Bucca's jury instructions, when viewed in their entirety, did not foreclose the jury from considering self-defense as it applied to passion/provocation manslaughter.

As noted above, count one of the indictment charged defendant with purposeful or knowing murder and count two charged him with attempted murder. Judge Bucca's jury charge on count one tracked the model jury charge for murder when passion/provocation manslaughter, aggravated manslaughter and reckless manslaughter charged as lesser included offenses. (Sa1-12; 27T151-21 to 27T164-15). Judge Bucca's jury charge on attempted murder tracked the model jury charge on attempted

murder when passion/provocation manslaughter is also charged. (Sa13-16; 27T164-23 to 27T169-25).

In accordance with the model jury charges on the substantive offenses, Judge Bucca did not refer to passion/provocation manslaughter as a "lesser included offense," but rather an element that the State had to disprove to convict defendant of purposeful or knowing murder and attempted murder. (Sa1; Sa4; Sa13; 27T151-24 to 27T152-5; 27T156-10 to 13; 27T165-15 to 17). Even when charging the jury on the offenses of aggravated manslaughter and reckless manslaughter with respect to count one, Judge Bucca followed the model jury charge and simply provided the instructions in sequence after he charged the jury on murder, which included the instructions on passion/provocation manslaughter. (Sa6; Sa9; 27T159-14 to 16; 27T162-13 to 15). They were not referred to as lesser included offenses.

The trial court's verdict sheet also conformed to what the model jury charges require. (Sa11; Sa16; Da3; Da5). Thus, count one on the verdict sheet was referred to as "murder/passion provocation" and passion/provocation manslaughter was provided as a possible verdict. (Da3). Count two was labeled "attempted murder" and attempted passion/provocation manslaughter was provided as a possible verdict. (Da5). When reviewing the verdict sheet with the jury at the end of the jury charge, Judge Bucca explained that there were three potential verdicts on counts one and two. (27T207-23 to 25; 27T208-11 to 16).

The structure of the model jury charge, and Judge Bucca's charge that comported with it, follows what the Supreme Court analyzed and held in State v. Coyle, 119 N.J. 194, 222-224 (1990), where the trial court in that case utilized a sequential instruction to charge the jury on murder, then aggravated manslaughter, then reckless manslaughter and then on passion/provocation manslaughter.[3] The Supreme Court held that normally sequential instructions are proper when charging greater and lesser included offenses, however, when there is evidence of passion/provocation, the court must be careful because the State is required to disprove it to convict the defendant of purposeful or knowing murder. In Coyle, the use of a sequential instruction, when the initial charge on murder did not clearly convey the State's burden to disprove passion/provocation manslaughter, was deemed to be error. Here, the trial court's instructions on murder, which tracked the model jury charges, followed this mandate by clearly instructing the jury on the State's burden to disprove passion/provocation manslaughter to convict defendant of purposeful or knowing murder. Passion/provocation manslaughter was an element that was part of the State's burden of proof.

Judge Bucca instructed the jury on several substantive offenses of aggravated assault with respect to count two of the indictment as lesser included offenses of

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[3] The model jury charge in use at the time provided for the use of sequential jury charges in this context. See State v. Cupe, 289 N.J. Super. 1, 7 (App. Div.) (holding in Coyle on misuse of sequential instructions involving passion/provocation manslaughter a new rule of law and not retroactive on collateral review), certif. denied, 144 N.J. 589 (1996).

attempted murder. (27T170-24 to 27T171-4). The judge referred to the charge of assault as a "lesser included charge." (27T171-3 to 5). The judge explained to the jury that the law requires the court to charge "lesser included offenses" even if they are not contained in the indictment. (27T171-6 to 8). The judge instructed the jury to consider these assault offenses along with those in the indictment. (27T171-13 to 14). The jury was then instructed on the elements of the different assault charges being submitted to it. (27T171-24 to 27T184-25).

Immediately after completing the charges on the various assault charges, Judge Bucca began his jury charge on self-defense, which tracked the model jury charge on self-defense when there is the use of deadly force. (Sa17-Sa19; 27T185-1 to 27T189-19). Judge Bucca reiterated that count one of the indictment charged defendant with the crime of murder and count two charged him with the crime of attempted murder. (27T185-2 to 5). The judge then stated "[a]s to these counts of the indictment and the lesser included charges," defendant contended that he had acted in self-defense. (27T185-6 to 10). Defendant argues that the trial court erred here by not explaining to the jury that passion/provocation manslaughter were lesser included offenses of murder and attempted murder and by stating that self-defense applied to them, as well. (Db19).

But defendant's belated challenge takes the structure and language of Judge Bucca's jury charge out of context. While passion/provocation manslaughter is referred to by the courts as a "lesser include offense," State v. Carrero, 229 N.J. 118, 229 (2017),

it is not referred to as such when charging the jury because it is part and parcel of the elements that the State must satisfy to convict of purposeful or knowing murder. It would have been out of context and somewhat confusing to explain passion/provocation manslaughter as a "lesser included offense" during the self-defense charge when the judge had just so carefully, and properly, instructed the jury on the interplay between murder and passion/provocation manslaughter during the substantive instruction on murder and attempted murder and had included passion/provocation as a possible verdict for both counts one and two. The fact that defense counsel raised no issue on this point shows that he did not read the court's charge as precluding the jury from considering self-defense as it applied to all offenses related to counts one and two.

As the record stands, the judge's instruction at the outset of the charge on self-defense expressly told the jury that the defense pertained to counts one and two, which the jury knew had included passion/provocation manslaughter. The judge also instructed that self-defense applied to the "lesser" included charges for count two, which the jury knew referred to the various assault charges. As noted above, jury charges are read in context and in their entirety. And plain error requires a clear and obvious error. There was no error on the facts in this case that was clearly capable of producing an unjust result. It is defendant's burden to establish plain error, and he has failed to do so.

The State also stresses that Judge Bucca discussed the court's jury charge with counsel before the charge was completely drafted. (16T281-7 to 16T288-22). There was a subsequent teleconference with counsel about the jury charge. (25T4-11 to 16). To the extent that self-protection was the gravamen of defendant's defense, the language now cited by the defendant as so important could have been requested. It was not requested because defense counsel saw no prejudice from the language used by the judge in the proposed charge. Defense counsel was satisfied with the judge's charge because it was in conformance with the model jury charges. The language and structure of the trial court's charge did not leave the jury with confusion on whether self-defense applied to all the offenses before it on counts one and two.

In Point II, defendant belatedly argues that Judge Bucca erred in the charge on self-defense by not instructing the jury that if it found defendant had fired a warning shot in the air, he had not used deadly force and thus if this bullet hit Nashon Brown, it had to acquit defendant of murder. The State submits that defendant has not demonstrated error, let alone plain, error with the trial court's instruction on self-defense.

Defendant is hard-pressed to argue error when he had every opportunity to ask Judge Bucca for the language he now cites. As noted earlier, the trial court discussed the jury charge with counsel. In any event, the prejudice argued by defendant is illusory.

Judge Bucca instructed the jury that deadly force is defined as force that defendant used with the purpose of causing or which he knew created a substantial risk of causing death or serious bodily harm. (27T187-9 to 12). The judge instructed the jury to find if defendant used deadly force. (27T188-6 to 7). The judge's charge, which tracked the language in the model jury charge, addressed defendant's argument that his firing of one shot in the air was for self-protection. The evidence showed that Nashon Brown was struck in the back. The firing of a gun up into the air is not firing it into someone's back. If firing into the air occurred, as defendant claimed, it was done not to hann anyone. Defendant denied shooting Nashon Brown and attempted to raise reasonable doubt during his defense that there was more than one shooter, a factual claim the jury rejected by convicting him on count one. There was no plain error with the trial court's instruction.

In Point III, defendant belatedly argues that Judge Bucca erred by not instructing the jury on his reasons for fleeing the crime scene. Again, it is defendant's burden to demonstrate plain error, meaning error that was clearly capable of producing an unjust result. Defendant has not sustained his burden.

Judge Bucca's instruction on flight took place at the end of the jury charge. (27T198-23 to 27T200-5). The jury was instructed that there was testimony in the case from which it might infer that defendant fled shortly after the alleged crime. (27T198-23 to 25). The judge instructed the jury that it was a question of fact for the jury to

decide. (27T199-1 to 3). The judge instructed that flight did not mean mere departure from a crime scene. (27T199-4 to 5). Flight meant that defendant, fearing that an accusation or arrest would be made against him, took refuge for the purpose of evading arrest on the charges. (27T199-6 to 10). If defendant took refuge for this purpose, the jury could consider it as consciousness of guilt. (27T199-10 to 12).

The judge further instructed the jury that it could consider flight as a consciousness of guilt if it found that defendant's purpose in leaving was to evade arrest or accusation for the offenses charged in the indictment. (27T199-13 to 17). The judge instructed the jury that if it found flight for the purpose of evading arrest or accusation, it could consider this evidence in connection with all the other evidence in the case as an indication of consciousness of guilt. (27T199-18 to 25). The judge ended the charge by instructing the jury that it was up to the jury as the judge of the facts to decide if there was evidence of flight as a consciousness of guilt and the weight to be given to the evidence. (27T200-1 to 5).

The trial court's instruction on flight did not include any language regarding defendant's explanation for his departure from the crime scene. The model jury charge provides that there should be language included to explain why defendant departed the scene if the defense has not denied leaving the scene but suggested a reason. (Sa21). See also State v. Mann, 132 N.J. 410 (1993). The trial court reviewed the jury charge with counsel before the end of all the evidence in the case and defense counsel lodged

no objection to the court's charge. To the extent an error was made, the State submits it did not rise to the level of plain error.

First, the jury heard extensive testimony from defendant when he took the stand and testified on his own behalf. (23T; 24T). Defendant testified to why he left the crime scene after shooting the gun in self-defense and to his continuing fear during the days that followed. The jury also heard the lengthy summation from defense counsel, (25T91-13 to 25T200-23; 26T201-1 to 26T214-13), which touched upon not only the issue of self-defense, but also defendant not realizing anyone was shot until days after the event, how people were out looking for him and how he eventually turned himself in to the police. (26T213-16 to 24).

Defendant's defense was justification or self-defense for the shooting. Thus, to the extent that the jury was not instructed that if it credited defendant's explanation for his flight it could not draw any inference of guilt from it, the omission was not clearly capable of producing an unjust result. The jury knew from defendant's testimony and the arguments of counsel that defendant's actions both during and after the crimes were spurred by his claim of fear. Secondly, the trial court's instruction made it clear that whether defendant fled as a consciousness of guilt was a question of fact for it to determine. The charge was neutral in that it did not outline the State's arguments in support of flight as a consciousness of guilt. The issue was left for the jury to decide. Defendant's claim of plain error should be rejected.

POINT II

DEFENDANT'S SENTENCE IS MANIFESTLY PROPER. (30T47-23 to 30T63-11).[4]

Defendant contends that the sentence imposed by Judge Bucca must be vacated because the judge engaged in impermissible fact-finding and improperly rejected certain mitigating factors urged by him. He also contends that the consecutive sentences were excessive because the shootings occurred close in time and the judge failed to state the overall fairness of consecutive sentencing, as State v. Torres, 246 N.J. 246 (2021) requires. The State concurs that a remand under Torres is warranted, however, defendant's remaining claims are without merit and do not warrant a remand for resentencing.

At sentencing, defense counsel argued in favor of concurrent sentences of five years in prison for counts one and two, arguing that while the jury found defendant unlawfully possessed the gun, it found he was not the first aggressor based upon the video evidence. (30T9-1 to 30T12-6). Defense counsel highlighted defendant's lack of a prior record and his ties to the community in arguing for the minimum sentence. (30T6-19 to 23; 30T7-12 to 13).

Defendant gave a statement in allocution. (30T12-13 to 21). He apologized for his actions on March 23, 2019. (30T12-13 to 14). He said he wished he had never

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[4] This Point responds to Point IV in defendant's brief.

taken possession of the gun. (30T12-14 to 15). He said he just wanted "to get back to raising [his] son" and said the night of the crime was a "tragic night." (30T12-19 to 21).

Before hearing from the State, Judge Bucca commented that everyone who stands before the court for sentencing has both good and bad qualities. (30T15-3 to 8). He explained that the court always did its very best to look "holistically" at the defendant being sentenced and to not fall prey to "cancel culture." (30T15-9 to 13).

During its argument in support of sentencing defendant to consecutive terms in prison of 9 years, (30T35-4 to 7), the State commented that the jury reached its verdict of passion/provocation manslaughter based upon its review and interpretation of the surveillance videos, not defendant's narration of it, because the jury found him guilty of shooting and killing Nashon Brown. (30T15-16 to 30T19-17). The State pointed out that defendant still did not take responsibility for killing Nashon Brown. (30T19-18 to 20). Defendant told the interviewer for the pre-sentence report that he did not shoot Nashon Brown, but the video shows him shooting Nashon Brown. (30T19-20 to 24). The jury determined that some scuffle outside the Akbar occurred that could not be explained; no one could explain the bottle being swung, and the jury returned its verdict on passion/provocation manslaughter on counts one and two. (30T20-2 to 7).

The State characterized defendant waiting outside of the Akbar entrance as "shooting fish in a barrel" because he knew the patrons coming outside from the party

did not have guns. (30T20-16 to 20). No audio was on the surveillance tapes, but defendant was the only person who had a gun. (30T20-21 to 23). Defendant not only shot Nashon Brown in the back, but he then shot Raheem Bryant in the face, and left both of them to suffer not caring whether he had harmed them or not. (30T21-2 to 10). The evidence showed no call for help came from defendant. (30T21-20 to 22).

The State argued that the judge should find as an aggravating factor the risk that defendant would commit another offense. (30T22-24 to 30T23-20). The State based its argument on the fact that defendant testified to a "series of lies" that the jury rejected. (30T23-1 to 13). Defendant took no responsibility for his actions, and he presented a risk of reoffending. (30T23-14 to 20). Defendant testified he shot one bullet into the air, but the video shows him running toward Nashon Brown and shooting him in the back. (30T24-16 to 21).

Judge Bucca made the following findings. The judge first noted that defendant had no prior criminal record. (30T48-1 to 4). Defendant, at the time of the crimes, had been 26 years old for several weeks. (30T48-5 to 6). The court then outlined the general facts of the case where there were two parties at the Akbar on the night in question which ended early due some altercation that took place between people friends of defendant and those who were friends of the Brown family. (30T48-24 to 30T49-15). The court, relying on the surveillance video evidence, commented that the patrons were leaving the Akbar peacefully and defendant was seen leaving the Akbar and

walking to a parked car after which he returned to the front entrance. (30T49-16 to 24). And it was beyond dispute that defendant was armed with the gun, which increased the risk of harm to himself and others. (30T49-22 to 30T50-3).

The judge outlined how defendant stayed at the entrance and the video evidence showed an initial interaction between him and Nashon Brown. (30T50-4 to 5; 30T50-8 to 9). Something was said but there was no audio to hear what was said. (30T50-9 to 13). The court commented that the video evidence showed Nashon Brown and defendant walking toward the Akbar and both walking in an aggressive manner. (30T50-15 to 17). The video was "clear" that defendant reached into his jacket pocket with his right hand exactly as he had described at trial where he had the gun. (30T50-18 to 21).

Judge Bucca then outlined how a different camera from inside the Akbar looking outside showed Nashon Brown starting to run away and defendant taking aggressive steps toward him and shooting him in the back. (30T50-22 to 30T51-7). After shooting Nashon Brown, defendant ran quickly through the parking lot with his friend Ninson behind him. (30T51-10 to 13). The judge commented that Ninson approached Raheem Bryant in the parking lot and switched his direction, however, defendant ran right toward Bryant and shot him in the face. (30T51-10 to 20). The judge found that if there was a fear of a gun, it was not reflected in how defendant ran toward Bryant. (30T51-21 to 24).

Judge Bucca found that the evidence showed that there was a verbal altercation, but little evidence of any physical altercation. (30T52-4 to 8). No one, other than the two victims, was harmed. (30T52-9 to 17). The jury rejected defendant's claim that he never shot Nashon Brown. (30T52-22 to 30T53-1). The jury also rejected defendant's claim that he had acted in self-defense. (30T53-2 to 3). The judge acknowledged that defendant apologized for his actions, but he still took no responsibility because he told the interviewer for the pre-sentence report he was attacked, and people wanted to kill him. (30T53-10 to 12).

Judge Bucca found as an aggravating factor that defendant was at risk of reoffending. (30T53-15 to 19). The court held that it could consider defendant's lack of remorse because it was relevant to whether defendant was amenable to rehabilitation. (30T53-20 to 30T54-4; 30T54-12 to 19). Defendant was found guilty but still denied his guilt. (30T54-5 to 7). The judge found that defendant lied on the stand when he said he had not shot Nashon Brown because the jury found him guilty on count one. (30T54-8 to 11).

Judge Bucca also found as an aggravating factor that there was a need to deter defendant and a general need for deterrence. (30T54-23 to 24). The need to deter defendant was manifest because the jury rejected his version of the facts, which the court characterized as a "false narrative." (30T55-7 to 17). There was a general need for deterrence to stop gun violence. (30T55-24 to 30T56-3).

Judge Bucca found as a mitigating factor that defendant had no prior record. (30T56-16 to 19). The judge rejected as mitigating factors that defendant did not cause or threaten serious harm or that he did not contemplate such harm because the jury found he had caused serious harm. (30T56-20 to 30T57-3). The judge rejected the defense argument that there was "strong provocation," N.J.S.A. 2C:44-1b(3), or "substantial grounds" tending to excuse his conduct, N.J.S.A. 2C:44-1b(4), because the jury had found him guilty of passion/provocation manslaughter and attempted passion/provocation manslaughter, so because the evidence at trial showed the evidence of provocation to be on the "lower end," there was no basis for the court at sentencing to give this point mitigating weight. (30T57-8 to 13; 30T57-11 to 16; 30T57-21 to 25; 30T58-13 to 30T59-6; 30T59-7 to 10). For the same reasons, the judge rejected defendant's argument that the victim induced or facilitated the crime, which would be a mitigating factor under N.J.S.A. 2C:44-1b(5).

Now, on appeal, defendant contends that Judge Bucca penalized him for not admitting his guilt, improperly accused him of committing perjury, engaged in improper judicial fact-finding that ignored the jury's verdict on counts one and two for passion/provocation manslaughter and improperly rejected the mitigating factors he urged the judge to consider. Defendant also argues that consecutive sentencing was unwarranted on the facts of this case. Defendant's claims should be rejected.

In reviewing a sentence on appeal, the appellate court is not to substitute its judgment for that of the sentencing court. State v. Case, 220 N.J. 49, 65 (2014). A sentence should be upheld unless the sentencing guidelines were violated, the findings on aggravating and mitigating factors were not based on competent and credible evidence in the record or the application of the guidelines to the facts shocks the judicial conscience. State v. Bolvito, 217 N.J. 221, 228 (2014). The appellate court reviews the propriety of the sentence under the abuse of discretion standard. State v. Trinidad, 241 N.J. 425, 453 (2020).

There are limitations on the trial court's fact-finding at sentencing. In State v. Melvin, 248 N.J. 321, 341 (2021), the Supreme Court held that the sentencing court had erred by making factual findings that contradicted those made by the jury in acquitting the defendant on certain counts. The Supreme Court noted that a jury's acquittal, even if erroneous, is entitled to "special weight." Id. at 342. The Supreme Court held that fundamental fairness prohibits the court from subjecting a defendant to sentencing for conduct the jury found the defendant not guilty. Id. at 326. Thus, in State v. Morente-Dubon, 474 N.J. Super. 197, 205, 211-212 (App. Div. 2022), the Appellate Division found error under Melvin when the sentencing court found the defendant had not been reasonably provoked and had had sufficient time to cool off before killing the victim, findings that directly contradicted the jury's verdict for passion/provocation manslaughter.

Similarly, although a defendant's refusal to admit guilt following conviction is not germane to sentencing, State v. Poteet, 61 N.J. 493 (1972); State v. Marks, 201 N.J. Super. 514, 539-540 (App. Div. 1985), the sentencing court may consider a lack of remorse as a basis for finding a risk of reoffending as an aggravating factor. State v. Carey, 168 N.J. 413, 426-427 (2001) (finding based on letter defendant wrote to the court); State v. O'Donnell, 117 N.J. 210, 217 (1989) (finding based on evidence adduced before court). A lack of remorse can also be relied upon in finding a need to deter. State v. Rivers, 252 N.J. Super. 142, 153-154 (App. Div. 1991) (finding based on defendant's statements about crime in presentence report and his denial of involvement at sentencing).

As outlined above, defendant was seeking the minimum sentence for a second-degree crime on counts one and two. He pressed for mitigating factors that compelled Judge Bucca to assess what happened in the case. There was video evidence admitted at the protracted trial that captured defendant shooting both victims, contrary to his testimony at trial he only shot Raheem Bryant. As the State argued, the jury interpreted the video evidence as fact finder to come to its verdicts of passion/provocation manslaughter and attempted passion/provocation manslaughter. But even after the jury rejected his claim of self-defense and of only shooting Raheem Bryant, defendant continued to maintain he acted to protect himself and failed to acknowledge his responsibility for killing Nashon Brown. Judge Bucca, who presided over the trial and

had seen the evidence, was in the position to assess the evidence in addressing what sentence to impose. He acknowledged the jury's verdict of passion/provocation manslaughter. The judge in this case did not make findings contrary to the jury's verdict acquitting defendant of purposeful or knowing murder.

The judge had to explain his reasons for rejecting the mitigating factors urged by defendant, which focused on the victims facilitating their demise and whether defendant had acted under "strong provocation" and whether he had "substantial grounds tending to excuse his conduct." N.J.S.A. 2C:44-1b(3), (4), (5). To this extent, the judge properly found that the jury had rejected as a lie defendant's trial testimony that he had not shot and killed Nashon Brown. The judge properly considered that the jury rejected defendant's claim he had acted in self-defense. This is not a case where the jury found that conduct did not occur. The jury found that defendant killed Nashon Brown and shot Raheem Bryant. The jury determined no justification or self-defense for his actions. The video evidence showed that defendant shot both victims. Unlike Melvin and Morente-Dubon, the trial court in this case did not rely upon an impermissible consideration or rely on conduct that the jury had found defendant not guilty.

Defendant's argument that Judge Bucca improperly relied upon his lack of remorse is also without merit. In arguing that a sentencing court may not rely upon a silence at sentencing, defendant cites to Mitchell v. United States, 526 U.S. 314 (1999), but his reliance on this case is misplaced. In Mitchell, the United States Supreme Court

held that a guilty plea does not constitute a waiver of the defendant's Fifth Amendment right to be free from self-incrimination; hence, the sentencing court erred in relying on the defendant's silence at the sentencing hearing to decide facts about the crime that bore upon the severity of the sentence. Id. at 326.

In Mitchell, the State presented evidence at sentencing on the quantity of drugs involved, and the defense presented no evidence of its own; the defendant asserted her Fifth Amendment right to remain silent. Id. at 319. The Supreme Court held that defendant could not be compelled to testify at her sentencing hearing. Id. at 326. Unlike the case in Mitchell, Judge Bucca did not compel testimony from defendant at his sentencing hearing.

On the contrary, defendant here freely elected to avail himself of his right of allocution. R. 3:21-4(b) states that sentencing shall not be imposed unless the defendant is addressed personally and asked if he or she desires to make a statement in his or her own behalf and to present any information in mitigation. This right of allocution derives from the common law and is considered fundamental such that if the court fails to afford defendant the right to make an allocution, the error requires a resentencing because the denial of this right is deemed to be structural error. State v. Jones, 232 N.J. 308, 319 (2018).

Here, defendant gave a statement in allocution. The trial court was entitled to assess the weight of what defendant said in allocution. The trial court was entitled to

assess its sincerity. Considering the evidence, which the trial court summarized based upon the surveillance videos, the court did not give credence to defendant's apology. The judge was not penalizing the defendant but was addressing the weight and sincerity of what was said to the court before sentencing. As noted earlier, a lack of remorse can be considered at sentencing.

Finally, as noted at the outset, defendant claims that he is entitled to a remand for resentencing under State v. Torres, 246 N.J. at 269, and the State concurs because Torres requires an explicit statement on the overall fairness of the sentence when consecutive sentencing is imposed.

However, because there were two victims in this case, one who died and the other who sustained serious bodily injury, the court's imposition of consecutive sentences in the first place was appropriate. Carey, 168 N.J. at 428. Defendant's claim to the contrary should be rejected.

CONCLUSION

For the following reasons, the State urges this court to uphold the convictions and to remand for a statement of reasons under State v. Torres, 246 N.J. 246 (2021).

Respectfully submitted,

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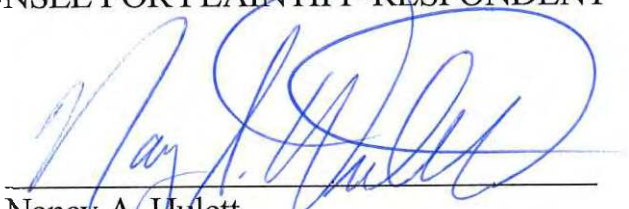
BY: 

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