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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-003502-21

CRIMINAL ACTION

STATE OF NEW JERSEY
PLAINTIFF-RESPONDENT

v.

JOHN T. BRAGG
DEFENDANT-APPELLANT

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY

SAT BELOW:
HON. PETER E. WARSHAW, P.J.CR.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On December 11, 2018, defendant John T. Bragg was charged in Mercer County Indictment Number 18-12-0715-I with two counts of attempted murder, contrary to N.J.S.A. 2C:11-3 and 2C:5-1 (counts one and two); three counts of first-degree kidnapping, contrary to N.J.S.A. 2C:13-1b(1) and (2) (count three, four, and five); two counts of second-degree aggravated assault, contrary to N.J.S.A. 2C:12-1b(1) (counts six and seven); three counts of third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3b (counts eight, nine, and twelve); three counts of third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3a (counts ten, eleven, and thirteen); two counts of third-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4d (counts fourteen and fifteen); fourth-degree unlawful possession of a weapon, contrary to N.J.S.A. 2C:39-5d (count sixteen); third-degree endangering the welfare of a child, contrary to N.J.S.A. 2C:24-4a(2) (count seventeen); and fourth-degree stalking, contrary to N.J.S.A. 2C:12-10b (counts eighteen and nineteen). Da 1-19.[1]

[1] This brief will use the following designations:
Db – Defendant's Appellate Division brief
Da – Appendix to defendant's Appellate Division brief
PSR – Presentence Report
1T – Transcript of March 6, 2019
2T – Transcript of March 7, 2019
3T – Transcript of March 21, 2019

On March 1, 2022, defendant's trial began before the Honorable Peter E. Warshaw, P.J.Cr., and a jury. (11T). The trial took place on various dates between March 1 and March 23 of 2022, on which date the jury returned a verdict convicting defendant of numerous counts in the indictment. Specifically, the jury convicted defendant on counts one through eight, ten, fourteen, fifteen, and seventeen, and on the lesser-included offenses of harassment on counts eleven and twelve. (23T; Da 20-42). On June 28, 2022, Judge Warshaw granted the State's motion for a persistent offender discretionary extended-term sentence, and sentenced defendant to a term of life imprisonment on count three.

4T – Transcript of April 4, 2019
5T – Transcript of May 31, 2019
6T – Transcript of November 18, 2019
7T – Transcript of August 19, 2019
8T – Transcript of September 28, 2021
9T – Transcript of February 22, 2022
10T – Transcript of February 23, 2022
11T – Transcript of March 1, 2022
12T – Transcript of March 3, 2022
13T – Transcript of March 4, 2022
14T – Transcript of March 8, 2022
15T – Transcript of March 9, 2022
16T – Transcript of March 10, 2022
17T – Transcript of March 11, 2022
18T – Transcript of March 15, 2022
19T – Transcript of March 16, 2022
20T – Transcript of March17, 2022
21T – Transcript of March 18, 2022
22T – Transcript of March 22, 2022
23T – Transcript of March 23, 2022
24T – Transcript of June 28, 2022

(24T; Da 43-46). The court also sentenced defendant to concurrent twenty-year terms with 85% parole ineligibility on counts one and two, and to concurrent thirty years terms with 85% parole ineligibility on counts four and five. Id. The remaining counts were merged with the other convictions. Id.

On July 18, 2022, defendant filed a notice of appeal with the Superior Court, Appellate Division. The State now submits this brief in opposition to defendant's appeal.

COUNTERSTATEMENT OF FACTS

On October 1, 2017, Trenton Police arrived at Apartment 9-H of the Kingsbury Apartments to respond to a call for service. (11T: 11-9 to 11-19). Upon arrival, officers were met by a male, later identified as Daquan Anderson, who was covered in blood and frantically begging for help before re-entering the apartment. (11T:12-13 to 13-2). Officers followed Anderson into apartment 9-H, and found blood on the door, the wall, and all over the apartment. (11T: 13-2 to 133). A female, later identified as Lorenza Fletcher, then ran towards the officers, naked and covered in blood. (11T:13-14 to 13-23). Next, police found Fletcher's three-year-old son L.I. standing in the doorway, with his clothes also covered in blood. (11T:13-23 to 14-4). Officers then entered the apartment and located defendant John Bragg. (11T:14-12 to 14-17). All three

adults – Fletcher, Anderson, and Bragg – suffered injuries which required medical treatment from hospital doctors. (12T: 144-3 to 144-23; 146-19 to 146-25). Fletcher had multiple stab wounds throughout her body and was bleeding profusely. (12T: 144-22 to 145-11). Anderson sustained lacerations to his arms and neck, with his condition described as critical. (13T: 44-11 to 51-6). Defendant was also in critical condition with injuries to his head. (18T: 7-25 to 8-10).

At trial, both Fletcher and Anderson testified that defendant was the aggressor and initiated the altercation. Specifically, Fletcher testified that she had been in a relationship with defendant, in which she would routinely provide him sex in exchange for money, Percocet, and cocaine. (14T: 176-1 to 177-6). Fletcher testified that on the date of the incident, she, along with her cousin Daquan Anderson, and her son L.I., met with defendant, who said that he wanted to make a stop at Kingsbury to get drugs. (14T: 210-6 to 211-25). Fletcher testified that while at Kingsbury, she told defendant she needed a bottle for L.I., so defendant left her, Anderson, and L.I. in the apartment while he left to get a bottle. (14T: 217-13 to 217-23). Defendant then returned fifteen minutes later with a cup for L.I. which appeared to be used, leading to an argument between Fletcher and defendant. (14T: 218-2 to 221-8). Fletcher stated that during this argument, defendant started "swinging on" Anderson and began swinging his

arms left and right while holding a knife. (14T: 222-3 to 224-19). This sparked the altercation inside the apartment, during which Fletcher stated that defendant "went crazy" and started stabbing her and Anderson, and threatened to kill her by telling her it was "her killing day". (14T: 222-7 to 232-7). During this attack, Fletcher and Anderson attempted to defend themselves by fighting back physically, including Anderson striking defendant in the head with the lid to the toilet tank. (14T: 232-10 to 244-21). The fight continued until police entered the apartment, at which point defendant jumped on Fletcher and started stabbing her repeatedly, a total of twenty-seven times. (14T: 246-2 to 252-24).

Anderson testified very similarly to Fletcher. Specifically, Anderson stated that they went with defendant to Kingbury to get drugs from defendant. (14T: 24-7 to 28-23). Like Fletcher, Anderson also testified that defendant left to get a bottle for L.I., which resulted in an argument with Fletcher upon his return. (14T:30-17 to 32-11). During the argument, Anderson testified that defendant jumped up and punched him, which sparked the physical altercation. (14T:32-12 to 32-24). Anderson gave consistent testimony regarding the defendant stabbing him with a knife, threatening and stabbing Fletcher, and about striking defendant with the toilet tank lid in an attempt to fight back. (14T: 33-16 to 55-11).

Conversely, defendant testified that it was Anderson and Fletcher who initiated the attack, and that he was acting in self-defense. Defendant stated he returned to the apartment after getting the bottle for L.I. and found Anderson and Fletcher in the process of trying to steal his drugs, with the apartment in disarray. (18T: 94-23 to 99-12). Defendant claimed that as soon as he entered, Anderson struck him in the head with the lid to the toilet tank. (18T: 99-18 to 100-12). Defendant stated that he initially tried to defend himself with pepper spray, but he was unable to remove it from his pocket, so resorted to grabbing a pocketknife and stabbing Anderson. (18T: 100-16 to 101-25). Defendant stated numerous times that he was "fighting for [his] life" and that his actions in the apartment were merely to defend himself against the ongoing attack from Anderson and Fletcher. (18T: 102-1 to 108-9; 227-21 to 229-4; 279-7 to 279-16).

At the preliminary charging conference, the trial court discussed with counsel whether or not the jury needed to be instructed regarding the exception[2] to the duty to retreat rule when a defendant is in his or her own dwelling. (17T: 100-25 to 104-19). The trial court asked the State and defense counsel whether

[2] Footnote 4 to the Model Jury Charge on Self-Defense reads: "[a]n exception to the rule of retreat, however, is that a person need not retreat from his or her own dwelling, including the porch, unless he or she was the initial aggressor." Model Jury Charge (Criminal), "Justification – Self-Defense In Self Protection" (rev'd 6/13/11).

or not an instruction on the exception was necessary in this case. (17T: 100-25 to 101-5). Defense counsel responded that this instruction was not necessary because the incident did not occur within the defendant's dwelling, and thus was not applicable:

> THE COURT: … I'm going to need some guidance from you folks on the applicability of dwellings and things like that ….
>
> MS. LYONS: You mean, just the one, the -- a dwelling --
>
> THE COURT: Where it says, "charge where applicable," yes.
>
> MS. LYONS: Yeah.
>
> THE COURT: I mean, you know, I don't know.
>
> MS. LYONS: I can't imagine that that needs to –
>
> (Attorney discussion)
>
> THE COURT: And right now the evidence before the Court, it appears is that it's not his dwelling.
>
> …
>
> THE COURT: -- the fact that the structure that they were in would constitute a dwelling of somebody's is -- I don't think that's the issue, whether it's his dwelling, ability -- obligation to retreat in his own dwelling as opposed to somebody else's dwelling.
>
> MS. MOORHEAD: I think the charge is clear that –

> MS. LYONS: Yeah, but I think the charge as it reads is fine the way it is.
>
> THE COURT: Without the charge with applicable stuff?
>
> MS. LYONS: Right, yes.
>
> THE COURT: Yes, okay. All right.
>
> (17T: 102-6 to 103-22).

Ultimately, the court instructed the jury on self-defense, including the duty to retreat, but did not read the exception to the duty to retreat rule for when an offense occurs withing the defendant's dwelling. (20T: 35-10 to 40-23).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE DEFENDANT'S DUTY TO RETREAT IN THE SELF-DEFENSE JURY CHARGE

Defendant contends that the trial court erred in failing to instruct the jury on the exception to the duty to retreat rule. Defendant argues that Apartment 9-H of the Kingsbury Towers constituted his dwelling, and thus the instruction should have been read. As the record clearly reflects, consistent with defense counsel's representations to the court below, defendant's crimes did not take

place within defendant's dwelling. As defendant has failed to establish otherwise, the trial court's jury instruction was proper, and defendant's conviction should be affirmed.

After providing counsel with the proposed jury charges, the trial court held both a preliminary charge conference and a charge conference on the record in order to memorialize what the parties and the court had previously discussed regarding the jury charges. (17T:89-14 to 153-24; 19T: 25-12 to 61-12). During this time, the trial court reviewed with counsel the exact language that was going to be read to the jury and gave counsel the opportunity to raise any possible issues. At no point during the charge conference did either defense counsel object to the proposed charging language concerning the self-defense jury instruction. Further, no objections were made when the trial court read the language to the jury. (20T: 35-10 to 40-23).

A. Defendant has not established plain error in the trial court's instructions to the jury because this offense did not occur within defendant's dwelling.

Proper jury charges are essential for a fair trial. State v. Green, 86 N.J. 281, 287 (1981). Jurors must receive accurate instructions on the law as it pertains to the facts and issues of each case. State v. Thompson, 59 N.J. 396, 411 (1971). Where a defendant did not object to the jury charges, and thus deprived the court of an opportunity to remedy the omitted [portion of the]

instruction before the case went to the jury, "it may be presumed that the instructions were adequate," and that defendant thought so at the time of trial. State v. Belliard, 415 N.J. Super. 51, 66 (App. Div. 2010); State v. Sharpless, 314 N.J. Super. 440, 456-57 (App. Div. 1998). Thus, on review, "[a] claim of deficiency in a jury charge to which no objection is interposed will not be considered unless it qualifies as plain error, that is, legal impropriety in the charge affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that, of itself, the error possessed a clear capacity to bring about an unjust result." State v. Walker, 203 N.J. 73, 89-90 (2010); State v. Burns, 192 N.J. 312, 341 (2007); R. 2:10-2.

Plain error is error that "is clearly capable of producing an unjust result." State v. Weston, 222 N.J. 277, 294 (2015); State v. Singleton, 211 N.J. 157, 182-83 (2012); State v. Reeds, 197 N.J. 280, 298 (2009); R. 2:10-2. To establish plain error, the defendant must prove that the trial court's error was "clear and obvious and that it affected his substantial rights." State v. Morton, 155 N.J. 383, 421 (1998). Not every possibility of an unjust result will suffice. State v. Jordan, 147 N.J. 409, 422 (1997). The error claimed must be "so egregious that it raises a reasonable doubt as to whether the error led the jury to a result it

otherwise might not have reached." State v. Tierney, 356 N.J. Super. 468, 477 (App. Div. 2003) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

An alleged error in the jury charge must be viewed in the totality of the entire charge, not in isolation. State v. Nero, 195 N.J. 397, 407 (2008) (quoting State v. Chapland, 187 N.J. 275, 289 (2006)); State v. Jordan, 147 N.J. 409, 422 (1997); State v. Clausell, 121 N.J. 298, 330 (1990). While jury charges that provide incorrect instructions of law are poor candidates for rehabilitation under the harmless error theory, "courts are generally reluctant to reverse on the grounds of plain error when no objection to a charge has been made." State v. Marrero, 148 N.J. 469, 496 (1997). This is especially so where an instruction was not so much incorrect as capable of being improved, as reversal is warranted only if the entire instruction is misleading or prejudicially ambiguous, not simply if it could have been better. State v. Delibero, 149 N.J. 90, 106 (1997); Marrero, 148 N.J. at 496; State v. LaFrance, 117 N.J. 583, 594 (1990); State v. Crumb, 307 N.J. Super. 204, 238-39 (App. Div. 1997); see State v. G.V., 162 N.J. 252, 260 (2000). In addition, any finding of plain error depends on an evaluation of the overall strength of the State's case. Belliard, 415 N.J. Super. at 66; Nero, 195 N.J. at 407. If, on examining the charge and the case as a whole, prejudicial error does not appear, the verdict must stand. State v. Council, 49 N.J. 341, 342 (1967).

Defendant's argument is predicated on his belief that Kingsbury Apartment 9-H constituted his "dwelling" for the purpose of this exception. Generally, a defendant may not resort to deadly force in self-defense if "the defendant knew he/she could [retreat] with complete safety." Model Jury Charge (Criminal), "Justification – Self-Defense In Self Protection" (rev'd 6/13/11). An exception to this rule is that one "need not retreat from his or her own dwelling, including the porch, unless he or she was the initial aggressor." Id.; State v. Bonano, 59 N.J. 515 (1971) (limiting the applicability of this rule to "those cases where the defendant is actually in his dwelling house."); State v. Martinez, 229 N.J. Super. 593, 604 (App. Div. 1989). For the purposes of self-defense, "dwelling" is defined as "any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging…." N.J.S.A. 2C:3-11c. While there is little doubt that an apartment qualifies as a dwelling, the plain language of the Model Jury Instruction makes it clear that defendant would only be entitled to this exception if Kingsbury Towers Apartment 9-H was *his own* dwelling.

Here, there was voluminous testimony regarding Kingsbury Towers Apartment 9-H. Defendant testified that in 2017, he was "in the process of moving into Kingsbury" and that he was "in transit." (18T: 56-19 to 57-5). Defendant stated that he had previously lived in Georgia and still had a Georgia

driver's license and car registration. (18T: 57-2 to 57-16). Defendant testified that he had been staying at the apartment for "a few weeks" at the time of the incident and that many of his belongings were at his niece's house where he had previously been staying. (18T: 198-6 to 198-23). Defendant explained that he came to stay at the apartment as a result of a transaction in which he gave a vehicle to the renter of the apartment in exchange for him being permitted to stay there for four to six months. (18T: 87-6 to 88-10). Defendant was given a key for the apartment and key fob to enter the building by the tenant, although he admitted that his name was not on the lease and that he was not making any rent payments. (18T: 201-1 to 201-24).[3]

Despite Fletcher having an ongoing relationship with defendant in which they would see each other quite frequently[4], neither she nor Anderson were aware that defendant had any connection to Kingsbury. During her testimony, Fletcher was asked whether she knew defendant was at Kingsbury and was going to get drugs from there, to which she replied "I didn't know he was at Kingsbury. He still was at his cousin house. I never went to Kingsbury until the day he

[3] When asked about the rent payments for the apartment, defendant stated "Yeah, I ain't have nothing to do with that. I don't know nothing about those details right there." (18T: 201-23 to 201-24).

[4] Defendant testified that he would see Fletcher "every day" during the beginning of their relationship, and that he would see her "a couple times per week" by the end. (18T: 197-10 to 197-19).

stabbed me. He said something about Kingsbury." (15T: 45-10 to 45-23). Fletcher stated multiple times in her testimony that she had never been to Kingsbury before and that she was unaware that the plan was to go to that apartment. (Id.; 14T: 211-5 to 211-18; 15T: 45-24 to 47-2). Fletcher also gave a statement to Detective Gonzalez in the course of his investigation of this incident, which Detective Gonzalez testified about during the trial. During Detective Gonzalez' testimony, he stated that Fletcher advised him that she had been told by defendant that "he had to make a stop *at a friend's house* at Kingsbury," which is how they ended up in the apartment that night. (18T: 30-11 to 30-22) (emphasis added).

Anderson likewise testified that he had never been to Kingsbury to see the defendant prior to the incident. (14T: 24-7 to 24-17). Anderson was asked what his understanding of who lived at the apartment and gave the following response:

> Q What was your understanding of who lived at the apartment?
>
> A Well, John told us that it was his apartment but I don't believe so because I went inside and I kind of, like, snooped around a little bit and I found mail, like, from – it was, like, a lady's name and address and the place looked vacant to me.
>
> Q Why did it look vacant?

> A ‘Cause it just, like, the set-up. It was like it was, like, empty. There really wasn’t nothing in there, like an air mattress, like a tv. It just didn’t look like it was operable.
>
> (14T: 27-9 to 27-20).

Defendant also acknowledged that neither Fletcher nor Anderson had ever been to Kingsbury with him prior to the day of the incident. (18T:196-17 to 198-5).

Even further evidence that Kingsbury was not defendant’s dwelling exists when looking at the testimony presented regarding the security procedures for the apartment building. Dominick Camillo, the former director of security at Kingbury Corporation Apartments, offered testimony at trial regarding the procedures for entering the building. Camillo testified that when visitors entered the building, they would need to sign in with the security guard to be allowed into the building. (15T: 187-19 to 189-15). The sign-in sheet would detail what apartment the guest was going to, the name of the guest and the tenant’s name, along with the time they arrived and departed. (15T:189-4 to 189-12). Camillo testified that on the day of the incident, he remembered that someone with the last name of Bragg had signed in as a visitor. (15T: 200-4 to 200-10). Additionally, Detective Michael Paglione testified that he had received the sign-in sheet from Camillo during his investigation. (16T: 172-22 to 176-25). Detective Paglione stated that the name John Bragg appeared on the sheet where

the visitor's name was listed, and that there was another name listed in the spot for the tenant's name. (16T: 173-18 to 173-23; 175-16 to 176-4).

Based on the testimony provided, there was ample evidence that defendant did not reside at Kingsbury Apartment 9-H, and thus it could not be considered his dwelling for the purposes of the duty to retreat exception. Defense counsel conceded such during the charge conference. Defendant's connections to the apartment were tenuous, as he himself made no contributions to the rent payments nor signed any leasing paperwork with the apartment company and followed the procedures of a visitor when entering the premises on the night of the crime. As defendant has not shown that the instruction provided any incorrect statements of law or any error "so egregious that it raises a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached," Tierney, 356 N.J. Super. at 477, defendant's conviction should be affirmed.

Alternatively, any potential error in the jury instruction was harmless error, as the jury did not accept the defendant's testimony as credible. During the trial, there was voluminous testimony given by numerous witnesses. The only evidence that defendant acted in self-defense came from his own testimony in which he asserted that Fletcher and Anderson initiated the attack. (See 18T). However, if the jury believed Fletcher and Anderson's testimony that defendant

was the aggressor, the exception to the duty to retreat rule would not apply. Model Jury Charge (Criminal), "Justification – Self-Defense In Self Protection" (rev'd 6/13/11) ("An exception to the rule of retreat, however, is that a person need not retreat from his or her own dwelling, including the porch, *unless he or she was the initial aggressor.*") (emphasis added).

The jury, having heard an abundance of evidence over the course of a trial spanning over three weeks, not only convicted defendant of several charges for which he invoked a self-defense justification, but also convicted him of several charges for which self-defense did not apply.[5] (Da20-42) (convicting defendant of kidnapping, terroristic threats, stalking, endangering, and criminal restraint, none of which self-defense was applicable to). Notably, for the charges of kidnapping in violation of N.J.S.A. 2C:13-1b(2), the verdict sheet demonstrates that the jury found defendant guilty of unlawfully confining both Fletcher and Anderson "for a substantial period with the purpose to inflict bodily injury on or to terrorize" them. (Da23, Da25). This makes it clear that the jury believed that defendant was the aggressor and acted with the purpose of inflicting bodily injury on the victims. Thus, even if the jury had been instructed

[5] During the jury instruction, the court specified that self-defense was applicable for the charges of attempted murder, aggravated assault, unlawful possession of a weapon, and possession of a weapon for an unlawful purpose. (20T: 35-10 to 35-22).

regarding the exception to the duty to retreat rule, they would have found that it did not apply as defendant was the aggressor. Any finding otherwise would be inconsistent with their guilty verdict on the charges for which self-defense does not apply.

Additionally, the trial judge expanded upon the jury's findings during sentencing, noting the following:

> Mr. Bragg maintains his innocence and I begin my evaluation here by noting that he maintains his innocence. The version which he proffered in his limited cooperation with the pre-sentence report was that he had been robbed. That is consistent with the trial testimony, which he offered. It is consistent with his theory of the case, and it is consistent with what he has been saying all along. The jury rejected this, and they appeared to have rejected it emphatically, and having sat through the trial, my personal observation is that the testimony, which Mr. Bragg offered was self-serving, and not credible, and very simply not true.
>
> (24T: 28-17 to 39-4.)

This colloquy by the court makes it clear that the jury did not accept defendant's version of the events. Absent the defendant's own testimony, the jury is left to believe the facts as represented by Anderson and Fletcher, who were the only other witnesses to what occurred within the apartment. Their testimonies show that defendant was the aggressor during this incident, and therefore is not subject to the exception to the rule of retreat when in one's dwelling. Thus, even if the

court did err in its jury instruction, this error was harmless and would have had no bearing on the jury's decision.

B. Any error in the jury instruction was invited error and should not be reversed.

Alternatively, it should be noted that because defense counsel participated in the charge conference and did not object to the proposed charge at the end of the conference, the invited error doctrine applies and, therefore, reversal is unwarranted.

Under the invited error doctrine, "trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal.'" State v. A.R., 213 N.J. 542, 561 (2013); State v. Corsaro, 107 N.J. 339, 345 (1987). In other words, if a party has "invited" the error, he is barred from raising an objection for the first time on appeal. See N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342 (2010). This principle of law gives voice to "the common-sense notion that a 'disappointed litigant' cannot argue on appeal that a prior ruling was erroneous 'when that party urged the lower court to adopt the proposition now alleged to be error.'" A.R., 213 N.J. at 542.

The invited error doctrine is grounded in "considerations of fairness[,]" and is meant to "prevent defendants from manipulating the system." Id.; State

v. Jenkins, 178 N.J. 347, 359 (2004). While courts will not bar defendants from raising an issue on appeal pursuant to this doctrine if "the particular error ... cut mortally into the substantive rights of the defendant ..." Corsaro, 107 N.J. at 345, the doctrine will be automatically applied unless its application would "cause a fundamental miscarriage of justice." M.C. III, 201 N.J. at 342.

The facts of this case fall squarely within the invited-error doctrine. It is clear from the record that during the preliminary charging conference the trial court specifically inquired of defense counsel whether the dwelling exception duty to retreat rule was applicable. (17T: 102-4 to 104-2). Defense counsel agreed with the trial court's assessment that the instruction was not applicable and state on the record that "the charge as it reads is fine the way it is." (17T:103-9 to 103-18). This issue was brought up once more during the final charging conference, in which defense counsel once again expressed their satisfaction with the self-defense jury instruction. (19T:26-4 to 27-10). Defense counsel never objected to this language or requested that this language be altered or changed in any way. As defense counsel actively participated in the charge conference and "acquiesced in or consented to" the final jury charge, any purported error therein cannot now be a basis to overturn the conviction. See A.R., 213 N.J. at 561; Corsaro, 107 N.J. at 345. As such, defendant's conviction should be affirmed.

POINT II

THE COURT PROPERLY SENTENCED DEFENDANT BASED ON EVALUATION OF THE AGGRAVATING AND MITIGATING FACTORS AND PRESENTENCE REPORT

Defendant claims that the court erred in imposing an extended-term sentence of life in prison because defendant raised a bona fide claim of self-defense. Db33. Specifically, defendant argues that the court erred in failing to find mitigating factors three, N.J.S.A. 2C:44-lb(3) ("[t]he defendant acted under a strong provocation"); four, N.J.S.A. 2C:44-lb(4) ("[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense"); and five, N.J.S.A. 2C:44-lb(5) ("[t]he victim of the defendant's conduct induced or facilitated its commission"). Db33.

An appellate court's review of a sentencing court's imposition of sentence is guided by an abuse of discretion standard. State v. Jones, 232 N.J. 308, 318 (2018). An appellate court reviews a sentence "in accordance with a deferential standard." State v. Trinidad, 241 N.J. 425, 453 (2020) (quoting State v. Fuentes, 217 N.J. 57, 70 (2014)). The appellate court should defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014). Appellate review is limited only to whether there is a "clear showing of abuse of discretion." State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Whitaker, 79 N.J. 503, 512 (1979)).

If the sentencing court "follow[ed] the Code and the basic precepts that channel sentencing discretion," the reviewing court should affirm the sentence, so long as the sentence does not "shock the judicial conscience." Trinidad, 241 N.J. at 453; Case, 220 N.J. at 65. Thus, appellate courts must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" Bolvito, 217 N.J. at 228 (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

The test is not whether the reviewing court would have reached a different conclusion as to a proper sentence; it is "whether, on the basis of the evidence, no reasonable sentencing court could have imposed the sentence under review." State v. Tango, 287 N.J. Super. 416, 422 (App. Div. 1996); (quoting State v. Ghertler, 114 N.J. 383, 388 (1989)). Rather, it is "bound to affirm a sentence, even if it would have arrived at a different result," so long as the sentencing court properly identifies aggravating and mitigating factors that are supported by competent, credible evidence. See Case, 220 N.J. at 64 (noting that a qualitative assessment of relevant aggravating and mitigating factor must be conducted by the sentencing court rather than a quantitative approach); see also State v. O'Donnell, 117 N.J. 210, 215 (1989); see also State v. Jabbour, 118 N.J.

1, 5 (1990) (emphasizing that a reviewing court should not "second-guess a sentencing court's decision").

Here, defendant's rationale for why the court should have found mitigating factors three, four, and five and are predicated on the belief that he was acting in self-defense. The court acknowledged these claims during sentencing, but ultimately found that defendant was not credible and that these arguments were inconsistent with the court's observations of the testimony. (24T: 38-17 to 39-4). Further, the court addressed the defendant's arguments in favor of finding mitigating factors three and four on the record. In rejecting mitigating factor three, the court found that "the defendant was not in any way provoked." (24T: 47-16 to 48-8). In rejecting mitigating factor four, the court held that there was no basis to justify the defendant's conduct, and that his claims of self-defense were "simply not so" and were "contrary to all of the evidence" presented. (24T: 489 to 48-24). Thus, it is clear from the record that the trial court properly considered and evaluated defendant's arguments in its finding that no mitigating factors applied. See Case, 220 N.J. at 64.

Since the trial court correctly applied the appropriate aggravating factors, considered and considered the appropriate mitigating factors, and properly applied the sentencing guidelines set forth in the Code of Criminal Justice to impose a sentence that was not "so clearly wide of the mark as to shock the

court's conscience," see Bolvito, 217 N.J. at 228; Roth, 95 N.J. at 364–66, defendant's sentence, should, therefore, be affirmed.

CONCLUSION

For all the above-stated reasons, the State respectfully requests that this Court affirm defendant's conviction and sentence.

Respectfully submitted,

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Mercer County Prosecutor

BY: Colin J. Rizzo
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