SUPREME COURT OF NEW JERSEY
DOCKET NO. 089446
APP. DIV. DOCKET NO. A- 3502-21

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Petition for Certification from a Final Judgment of the Superior Court
v.	:	of New Jersey, Appellate Division.
JOHN T. BRAGG,	:	Sat Below:
Defendant-Petitioner.	:	Hon. Hany A. Mawla, J.A.D. Hon. Joseph L. Marczyk, J.A.D.
	:	Hon. Mark K. Chase, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-PETITIONER

JENNIFER N. SELLITTI
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
973-877-1200

STEFAN VAN JURA
Assistant Deputy Public Defender
Attorney ID: 039952004
Stefan.VanJura@opd.nj.gov

Of Counsel and
On the Brief
November 19, 2024

TABLE OF CONTENTS

PAGE NOS.

INDEX TO APPENDIX

PAGE NOS.

TABLE OF AUTHORITIES

PAGE NOS.

Cases

STATUTES

TABLE OF AUTHORITIES (Cont'd.)

PAGE NOS.

STATUTES (Cont'd.)

RULES

TABLE OF AUTHORITIES (Cont'd.)

PAGE NOS.

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

There was no question that the defendant and the drug-addicted alleged victims caused each other serious bodily injury. The sole contested issue at trial was whether defendant was fighting for his life, repelling the alleged victims' violent attempt to rob him of his drugs in his own home.

Well-established law on self-defense imposes a duty on a defendant to retreat, if he can do so safely, before resorting to deadly force. But, significantly, the exception to this general rule is that a defendant has no duty to retreat if he is in his own home. That is exactly the scenario here, where defendant fought with the alleged victims in his own apartment. Yet, the trial court failed to instruct the jury on that crucial principle, leaving the jury to believe that – for defendant to avail himself of self-defense – he must not have had the ability to flee the apartment safely. And, indeed, much of the State's cross-examination of defendant and summation focused on defendant's purported opportunities to flee the home during the fighting.

The Appellate Division excused this glaring instructional error by weighing the evidence. It pitted the State's "substantial objective evidence showing the apartment was not defendant's dwelling" against "only" defendant's "self-serving testimony," evidently finding that the former prevailed. This characterization of the evidence is simply wrong. But more to

the point, it is the very existence of this controversy that demands the instruction. It is only then that the *jury* can do the weighing.

Similarly, the Appellate Division found that the evidence "did not support a finding of self-defense, regardless of whether the apartment belonged to defendant" because the jury "was obviously convinced he was the aggressor." The court reasoned that, because defendant was convicted of kidnapping, the jury must have found defendant acted purposely to unlawfully confine the victims and to inflict bodily injury or to terrorize them. Therefore, defendant initiated the confrontation and could not invoke self-defense.

The first problem with this analysis is that it seeks to excuse a faulty instruction with reference to what the jury must have found as fact based on their verdict, which itself was reliant on that instruction. That is illogical. The second problem is that, even if the Appellate Division's extrapolation were the only possibility supported by consistent verdicts – which it is not – this Court does not require consistent verdicts. Under optimal circumstances, we can only guess what the jury was thinking; where a critical charge was omitted, it is a fool's errand.

Simply put, the Appellate Division's excusal of the trial court's error does not withstand scrutiny. Thus, because a botched jury charge lies at the very core of the trial, it was plain error, requiring reversal of the convictions.

PROCEDURAL HISTORY

Mercer County indictment number 18-12-0715 charged the defendant, John T. Bragg, 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] The following abbreviations will be used:
Da – appendix to this brief
1T – transcript of March 6, 2019
2T – transcript of March 7, 2019
3T – transcript of March 21, 2019
4T – transcript of April 4, 2019
5T – transcript of May 31, 2019

Trial began before the Honorable Peter E. Warshaw, Jr., J.S.C., and a jury on March 1, 2022. (11T) On March 23, 2022, the jury returned a verdict convicting 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 8-10 to 19-5; Da 20-42)

On June 28, 2022, defendant appeared before Judge Warshaw for sentencing. After granting the State's motion for a persistent offender discretionary extended-term sentence pursuant to N.J.S.A. 2C:44-3a, the court sentenced defendant to a term of life imprisonment on count three. Defendant was also sentenced to the following concurrent terms: counts one and two,

---

6T – transcript of November 18, 2019
7T – transcript of August 19, 2021
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 March 17, 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

twenty years with 85% parole ineligibility; and counts four and five, thirty years with 85% parole ineligibility.[2] The remaining counts were merged with the other convictions. (24T 38-1 to 57-11; Da 43-46)

A notice of appeal was filed on defendant's behalf on July 18, 2022. (Da 47-50) In an unpublished opinion decided on May 7, 2024, the Appellate Division affirmed defendant's convictions and sentence. (Da 51-74) In an order filed October 18, 2024, this Court granted defendant's petition for certification, "limited to the jury instruction issue regarding the duty to retreat." (Da 75-76)

[2] The periods of parole ineligibility were imposed pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2.

STATEMENT OF FACTS

Katisha Dillard, a resident of Kingsbury Towers apartment complex in Trenton, testified that on October 1, 2017, she heard "yelling, screaming and crying" emanating from an apartment down the hall. She testified that she heard the noises "for like a couple hours" before she decided to call the police, around 3:30 a.m. (11T 47-25 to 50-13)

Trenton Police Department Patrol Officer Frankie Guzman testified that he responded to apartment 9H. He and a fellow officer knocked on the door. (12T 6-24 to 13-2) A calm female voice asked, "who is it?" (12T 46-14 to 22) The police identified themselves, and the woman responded, "come in." However, the door was locked. Guzman believed he heard a "physical altercation" inside the apartment and a female voice "in distress." (12T 13-5 to 14-17) The officers twice attempted to kick the door in, but its sturdy metal frame resisted their efforts. On the third attempt, the door flew open and a skinny black male covered in blood – later identified as Daquan Anderson – was standing before them. (12T 14-23 to 16-19)

According to Guzman, Anderson appeared scared. He purportedly yelled, "help, help. He's killing her, he's stabbing her." They noted that Anderson was holding a piece of porcelain in his hand and had "some sort of shoelaces wrapped around both wrists and both his ankles." Contrary to their

order for him to exit the apartment, Anderson ran back into the darkness within. (12T 16-21 to 17-21; 34-9 to 14)

The police then entered the apartment, and moments later a naked woman, completely covered in blood, came to the entranceway. That woman was later identified as Lorenza Fletcher. (12T 19-11 to 21-1) Inside the apartment there was also a three-year-old boy named L.I., who was Fletcher's son. He was covered in blood but uninjured. The police directed Fletcher, Anderson, and L.I. to go into the hallway, which they did. (12T 21-2 to 24-10)

Guzman testified that, about a minute later, defendant emerged from the darkness of the apartment. Guzman observed that defendant had a bloody sweater covering a "a real big gash wound laceration to the left side of his head." He was ordered to the ground and handcuffed. (12T 25-16 to 26-9; 36-5 to 37-9) Defendant told the police, "They tried to rob me." (18T 272-7 to 22)

Paramedics arrived on the scene and began to administer medical treatment to Anderson, Fletcher, and defendant. Paramedic Scott Frank testified that he treated Anderson, who was bleeding from his arms and neck. (13T 46-19 to 51-6) Frank testified that Anderson had thin leather bindings, like boot laces, tied on his wrists. Because they constricted blood flow, Frank cut them off and handed them to a Trenton police officer. (13T 52-1 to 12; 56-10 to 57-23) The alleged bindings, however, were not preserved by law

enforcement and were not presented at trial. (12T 52-1 to 10) Another paramedic testified that he provided treatment to Fletcher for various stab wounds. He also inserted a syringe near her lung to relieve accumulating air pressure. (13T 70-18 to 77-16)

EMT Kevin Mohl testified that he treated defendant at the scene. Defendant was in critical condition with head injuries and a suspected chest injury. (18T 6-1 to 8-10) Mohl observed that defendant's injuries were so severe that he was unable to provide his own name. (18T 9-20 to 10-12) All four occupants of the apartment were brought to the hospital for evaluation and further treatment.

Emergency room trauma surgeon Dr. Dennis Quinlan treated defendant, Anderson, and Fletcher. Quinlan treated defendant for a concussion, and he closed wounds to defendant's head with staples and sutures. Defendant was in and out of consciousness, so multiple CT scans were performed on him. (13T 109-22 to 113-20; 142-25 to 145-17) Quinlan treated Anderson for multiple wounds to both upper extremities, and his right neck, right shoulder, and right hand. (13T 116-9 to 119-25) He also treated Fletcher for wounds to her face, scalp, chest, neck, hand, and both arms. In addition, Fletcher was treated with a chest tube for pneumothorax, which is a collection of air outside the lung that

causes the lung to collapse. She was also given a transfusion of one unit of blood. (13T 125-1 to 133-16)

Crime scene detective Luis Nazario testified that he responded to apartment 9H to process the scene. He noted that the apartment contained few belongings, that blood was spread throughout, and that there was a deflated air mattress in the bedroom. (13T 161-5 to 166-6) He did not find any weapons nor contraband, but neither did he look under the various piles of clothes strewn about, nor under the mattress. (13T 166-7 to 14; 230-9 to 23) In fact, Nazario did not touch anything except for taking swabs of suspected blood, which were never sent to the lab. (16T 212-25 to 213-15) Nazario noted that the toilet tank lid was broken into pieces, which were lying on the floor near the closet at the doorway to the apartment. (13T 173-4 to 23) He also documented a broken beer bottle and a woman's bra, soaked in blood, and a broken window in the bedroom. (13T 185-9 to 187-16)

Nazario testified that he later responded to the hospital to collect defendant's bloody clothing. Inside defendant's pants pockets Nazario found, among other things, $280 in cash, pepper spray, and a Samsung cell phone with a cracked screen. (13T 193-21 to 197-17)

At trial, the State presented the testimony of both Anderson and Fletcher, who testified that defendant was the aggressor. To the contrary, as discussed below, defendant testified that he was defending himself from them.

Anderson testified that he is a cousin of Fletcher, that they grew up together, and that they would often spend time together. (14T 6-12 to 7-4) Anderson met defendant through Fletcher, who was in an intimate relationship with defendant. According to Anderson, defendant regularly provided Fletcher with drugs or money in exchange for sex. Defendant would "pop up" unannounced, looking for Fletcher, or he would contact Anderson, seeking his help to find her. In exchange, defendant would give Anderson "powder," meaning cocaine. (14T 17-5 to 20-18)

Anderson testified that on September 30, 2017, he went to a wedding reception with Fletcher and her son, L.I. (14T 8-3 to 10-3) At night, after the reception, Anderson's mother dropped them off at a friend's house in West Trenton. After less than an hour, they arranged to be picked up there in defendant's car. (14T 10-17 to 13-15) Fletcher and Anderson had planned to get drugs from defendant and get high. (14T 125-21 to 126-3) Anderson explained that Fletcher had left L.I.'s baby bottle at the reception, so she asked defendant to drive her to a 7-Eleven and then a QuickChek to get a "sippy cup" for L.I. Neither store carried sippy cups. Defendant drove them to his

apartment at the Kingsbury Towers in Trenton and said he would find L.I. a cup or a bottle. (14T 20-19 to 24-6)

The four of them took the elevator to the ninth floor, where defendant unlocked the door to apartment 9H. L.I. was asleep in Fletcher's arms. She put him down on an inflatable mattress in the bedroom. (14T 24-18 to 28-3; 29-22 to 30-1) According to Anderson, while L.I. slept, Anderson and Fletcher began using Percocet, cocaine, rum, and beer, all of which had been provided by defendant. (14T 28-19 to 29-4) While Fletcher and Anderson continued ingesting substances, defendant left the apartment to get a sippy cup for L.I. When he returned, he gave Fletcher a cup that appeared to have been used by another child. This upset Fletcher, who began to pack up her belongings to leave the apartment. (14T 30-17 to 32-4)

According to Anderson, defendant asked Anderson if he thought defendant was stupid. Anderson said that he was "dumb" for bringing back a second-hand cup for L.I. This allegedly enraged defendant. He punched Anderson in the face and the two men began fighting. (14T 32-13 to 24) Anderson testified that defendant produced a knife and stabbed Anderson's right hand twice. (14T 33-17 to 25) When Anderson tried to call 911, defendant took his cell phone away and broke it. (14T 93-20 to 23) Defendant purportedly said that Fletcher was going to die today, and that if Anderson

wanted to be spared, he would have to be tied up. Anderson submitted to defendant, who used shoelaces from Fletcher's and Anderson's shoes to tie his hands and feet. Defendant ordered him to get into the bathtub. (14T 34-8 to 35-3)

Defendant purportedly told Fletcher that she was "going to give [him] some for the last time." Evidently interpreting this to be a demand for sex, Fletcher took her clothes off. (14T 35-7 to 35-13) The bathroom door was closed, so Anderson did not know what else transpired between defendant and Fletcher. (14T 72-8 to 21) In any event, Anderson testified that he used a broken piece of glass that he found in the medicine cabinet to cut off his bindings. Anderson then took the tank lid off the toilet tank and waited for defendant to open the bathroom door. When he did, Anderson bashed him over the head with it, causing it to shatter. Defendant staggered but did not fall down. (14T 34-16 to 36-7; 101-16 to 23) The fighting continued. Defendant allegedly told Anderson that now he was going to die, too, and he cut him on his neck with the knife. Fletcher was punching defendant from behind while Anderson got a pot (or pan) from the kitchen and struck defendant with it. (14T 36-9 to 37-6) Although L.I. was not hurt, Anderson observed that he was in close proximity to the fighting. (14T 52-1 to 14)

Anderson further testified that they heard a knock at the door. Fletcher tried to run to the door to answer it, but defendant grabbed her, pulled her to the ground, and began stabbing her. (14T 50-11 to 18) According to Anderson, that was when Fletcher sustained most of her injuries. (14T 112-113-1 to 16) Anderson testified that he was getting weak and was afraid he was dying. Yet, he managed to slip past the fray and open the door for the police. (14T 113-8 to 10)

Fletcher testified similarly to Anderson.[3] Fletcher, who was 29 years old in 2017, acknowledged that she had a severe drug addiction. She began abusing Percocet, cocaine, and alcohol on a daily basis when she was about 25 years old. She routinely had sex with men in exchange for drugs, and she was essentially homeless, living place to place. (14T 152-8 to 156-25) Fletcher explained that she gave birth to her son, L.I., in 2014, but due to her addiction, her mother took custody of the child. L.I. was generally not permitted to spend the night with her, but she regularly visited with him. (14T 155-16 to 158-8)

With respect to her relationship with defendant, Fletcher testified that she met him on the street one day. She found him to be "nice and sweet," and they exchanged phone numbers. (14T 158-10 to 161-11) Coincidently,

[3] As discussed below, it was the defense's theory that Fletcher and Anderson conspired to rob defendant, and then conspired to tell a similar tale to avoid legal liability. (11T 19-22 to 20-19)

defendant was friends with her great uncle, Mike, who had a "clubhouse" or "party house" on Wayne Avenue in Trenton. That night, Fletcher and defendant met up there. He gave her cocaine and Percocet, and a small amount of money, and she returned to his house to have sex with him. (14T 160-20 to 167-12) Fletcher explained that that was the genesis of their relationship and usual practice: defendant would give her money, cocaine, and Percocet; she would provide sex. They began seeing each other every day. She described him as a "gentleman" initially, but he later revealed a jealous side. (14T 175-19 to 177-21)

Fletcher alleged that defendant would hit or push her when he got jealous, that he had threatened to kill her, and that he had choked her on two prior occasions. However, they would soon make up and continue seeing each other again. (14T 182-20 to 190-18)[4] Fletcher testified that during that time period she would regularly hang out with her cousin, Anderson, and they would use drugs together. Defendant would also allegedly give drugs to

[4] Fletcher and her grandmother also testified about two times when defendant had followed her to her grandmother's home in Ewing Township. The police were called but no charges were filed against defendant. (14T 192-22 to 195-6) In addition, the State elicited extensive testimony about text messages recovered from defendant's Samsung phone which demonstrated a contentious relationship between defendant and Fletcher. (16T 4-17 to 147-17)

Anderson in exchange for Anderson telling him where he could find the transient Fletcher. (14T 179-9 to 180-15)

Turning specifically to the day of the incident, Fletcher testified that on September 30, 2017, she went with Anderson and L.I. to her mother's wedding, followed by a reception. They stayed at the reception until about 11:00 p.m., and then got a ride to a friend's house in West Trenton. (14T 196-19 to 204-16) There, Fletcher called defendant, asking him to pick up her and Anderson because they wanted to get cocaine and Percocet from defendant. She also wanted defendant to help her get a baby bottle[5] for L.I. because she had left his at the reception. (14T 206-17 to 207-17) When defendant arrived at the friend's house, Fletcher, Anderson, and L.I. got into his car. Defendant drove to two convenience stores, but neither had a baby bottle. (14T 208-5 to 23)

According to Fletcher, defendant then said that he wanted to make a stop at Kingsbury Towers to get drugs. (14T 208-23 to 211-25) At about 12:30 a.m., they went inside with him, up the elevator to his apartment. In the apartment, defendant gave Fletcher and Anderson cocaine and Percocet, which they ingested. (14T 212-1 to 217-10) Fletcher testified that while she was getting

[5] The terms "baby bottle" and "sippy cup" were apparently used interchangeably by the witnesses.

high, L.I. woke up. Fletcher told defendant that she needed a bottle for him, so defendant left the apartment and returned with a sippy cup. Fletcher told defendant that she would not give that cup to L.I. because it did not have the soft nipple that he prefers. Fletcher began to pack up her belongings and called for a cab. (14T 217-12 to 219-18)

Fletcher testified that defendant got mad and said, "you all not going nowhere." All of a sudden, according to Fletcher, defendant punched Anderson in the face and then pulled out a pocketknife. (14T 221-1 to 223-20) Fletcher testified that she tried to grab defendant's arm, but defendant started stabbing her and Anderson. Defendant purportedly told Fletcher that it was her "killing day." He first cut her on her thumb, then her arm as the fight moved throughout the small apartment. (14T 224-7 to 229-7)

Fletcher managed to kick out the window in the bedroom and yelled for help. Defendant then forced Fletcher and Anderson into the bathroom. (14T 230-14 to 231-9) Defendant accused Fletcher of "playing with his feelings," and threatened to kill them and leave L.I. with the security guard downstairs. (14T 232-4 to 233-20) Defendant allegedly told Fletcher that "he was going to fuck [her] for the last time." She took off her clothing. Defendant allegedly tied up Anderson with shoelaces in the bathtub, and asked Fletcher how she wanted to die: with the knife or by strangulation. (14T 235-2 to 239-25)

Fletcher sat on the living room floor and talked to defendant, after which he put her back in the bathroom with Anderson. (14T 235-3 to 241-5)

According to Fletcher, during the ongoing confrontation, Anderson hit defendant over the head with the toilet tank lid. This enraged defendant further. (14T 243-8 to 246-19) And when the police arrived at the apartment door, defendant increased the ferocity of his attack on Fletcher, stabbing her multiple times. It stopped only when Anderson opened the door and allowed the police inside the apartment. Fletcher believed she was cut a total of 27 times all over her body. (14T 246-20 to 252-22)

In sharp contrast with the narratives of Anderson and Fletcher, defendant testified that he was the victim of an attempted robbery and that the injuries caused to Anderson and Fletcher were caused as he fought for his own life.

Defendant testified that in 2017 he was living with his niece and was in the process of moving into his new apartment at Kingsbury Towers, which he sublet from a customer of his fledgling auto sales business. (18T 56-7 to 57-5; 201-1 to 202-22; 87-6 to 88-5) Like Fletcher, he described how the couple met on the street and quickly developed a romantic relationship. (18T 58-5 to 59-12) Defendant readily acknowledged that he would provide Fletcher with Percocet and cocaine, but his motives were more benign than portrayed by Fletcher. He explained that he had tried to wean her off drugs with little

success, so the next best thing was to provide her with the drugs for which she would otherwise prostitute herself. This allowed her to see her son more. (18T 61-15 to 63-4; 134-7 to 135-13)

Defendant testified that he would routinely do fatherly things with L.I., whom he described as his "buddy," and he tried to keep Fletcher from getting high around him. (18T 63-5 to 23; 151-23 to 152-7) He would provide Fletcher with cell phones to maintain contact with her because she typically bounced from place to place. (18T 64-1 to 65-4)

According to defendant, a few days before Fletcher's mother's wedding Fletcher was upset with him because she thought that defendant was seeing another woman. (18T 82-1 to 17) Nonetheless, they agreed that defendant would pick her up at a friend's house after the reception. (18T 83-8 to 84-3) After picking up Fletcher, Anderson, and L.I. in West Trenton, he drove them to convenience stores looking for a replacement sippy cup for L.I. They were unsuccessful. (18T 84-24 to 86-3) Defendant then brought the three to his apartment – 9H of Kingsbury Towers – which he opened with the key provided to him by the sublessor. (18T 86-6 to 88-25)

As soon as they entered the apartment, Fletcher and Anderson asked defendant for Percocet and cocaine, which he provided and which they

promptly snorted.[6] (18T 89-1 to 92-19) L.I. was asleep on the air mattress in the bedroom, yet Fletcher insisted that defendant procure a sippy cup for him. Defendant explained that he did not want Fletcher to leave the apartment, so he agreed to go out and get one. (18T 93-15 to 94-5)

He went to a neighborhood store but could not find one. While deciding where to go next, he received a phone call from Fletcher inquiring where he was, which he thought was odd. (18T 94-12 to 95-14) Suspecting that Fletcher and Anderson were trying to gauge how long he would be gone – and knowing that his drug stash was in the apartment with two drug addicts – defendant told her he would look for a sippy cup at Walmart, located several miles out of town. (18T 95-17 to 96-11; 207-7 to 211-6) Instead, he returned to the apartment, and when he entered, he saw that his apartment was in disarray and Fletcher was holding his purple Crown Royal bag containing his supply of drugs. Fletcher was surprised; she said that she thought he was going to Walmart. (18T 96-17 to 99-12) The next thing defendant knew, he was struck in the head by Anderson with the toilet tank lid, causing it to shatter, and causing blood to gush from his head. (18T 99-13 to 100-14) Thus, defendant testified that he was attacked first.

[6] Defendant did not use drugs himself. He acknowledged that he sold them for a profit. (18T 128-23 to 129-1)

Defendant testified that Anderson then picked up a piece of the broken lid and tried to hit him with it. Defendant explained that he would have sprayed Anderson with his mace, but the tight pockets of his skinny jeans prevented quick access. Instead, defendant grabbed a small pocketknife he had clipped to his waist and "stabbed at him." (18T 100-14 to 25; 228-16 to 229-4) While defendant tried to repel Anderson's attack, Fletcher "grabbed at" him and tried to stab him with a broken piece of the tank lid. Defendant swung the knife at Fletcher to try to ward her off. They began grappling throughout the apartment. (18T 102-1 to 103-15) However, Fletcher stopped fighting when L.I. awoke, although Anderson continued to attack defendant. (18T 103-16 to 104-2)

Defendant testified that Fletcher apparently sought to diffuse the situation. She offered to tie up Anderson so that the fighting would stop. However, that was only a ruse. She tied up Anderson loosely, which allowed Anderson to escape and continue attacking defendant when defendant had let his guard down. (18T 104-3 to 106-23) Both Fletcher and Anderson resumed hitting defendant, using pans from the kitchen. (18T 106-23 to 107-1) Fletcher was also biting him. Defendant explained that he was fighting for his life, swinging the knife at them until he fell to the bathroom floor, exhausted and going in and out of consciousness. Anderson took the knife from defendant and

gave it to Fletcher, who slashed defendant with it. Defendant was able to get the knife back and again stabbed Fletcher with it. Defendant testified that before Anderson and Fletcher were able to kill him, the police arrived at the apartment and the fighting stopped. (18T 107-6 to 111-18; 286-3 to 286-24)

At the conclusion of his direct examination, defendant reiterated that he had never threatened Anderson nor tied him up; it was Fletcher who put the shoelaces on Anderson. (18T 112-15 to 113-1) Indeed, at one point during the confrontation, when defendant began to lose consciousness, Anderson and Fletcher attempted to tie defendant up. (18T 109-11 to 13; 256-13 to 257-1) Yet, when the police arrived on the scene, they neglected to collect or document those ligatures. (18T 116-25 to 117-25)

Defendant also expressly denied threatening Fletcher on that night – nor at any time in the past[7] – and he never told her to take off her clothes or suggest that he was going to have sex with her one last time before killing her. Defendant explained that Fletcher took her clothes off of her own accord, evidently trying to entice defendant as part of a ruse to gain the upper hand in the conflict. (18T 113-11 to 114-12; 281-23 to 282-12) He expressly denied

[7] Defendant denied ever hitting or choking Fletcher. He claimed that they did not have a violent or abusive relationship although they would periodically argue, and on one occasion he grabbed her face and squeezed her cheeks when her friend stole drugs from him. (18T 156-21 to 160-9)

having any intention to kill Anderson or Fletcher. He did not have any "hardship towards" Fletcher and, in fact, was quite fond of her. (18T 114-13 to 115-2) And to the extent that defendant repeatedly tried to find or contact Fletcher, he explained that it was because he was trying to dissuade her from prostituting herself, not to harass or annoy her. (18T 115-15 to 116-5)

Defendant reiterated that he was only trying to survive the situation. They hit him first, attacked and tried to rob him. He sustained head injuries and stab wounds to his face and neck. (18T 274-14 to 18) He feared he was going to die and he used the force he believed was necessary to protect himself from them. (18T 120-8 to 121-2)

On cross-examination the State repeatedly challenged defendant's claimed inability to flee the apartment, particularly when defendant had possession of the knife and Fletcher was tying up Anderson. (18T 249-5 to 256-12) Similarly, in summation, the State repeatedly highlighted defendant's ability to "get out of the apartment," either during the 1 ½ hour fight, while Fletcher was tying up Anderson, or when he had possession of the knife. (19T 140-1 to 12; 142-8 to 10) Thus, the entire case turned on the believability of defendant's claim of self-defense, which was called into question by the suggestion that defendant could have safely retreated from the apartment.

LEGAL ARGUMENT

POINT I

DEFENDANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY A FAULTY SELF-DEFENSE JURY CHARGE THAT FAILED TO CORRECTLY INSTRUCT THE JURY THAT DEFENDANT HAD NO DUTY TO RETREAT IN HIS OWN HOME. U.S. Const. amend. XIV; N.J. Const. art. 1, pars. 1, 9, and 10. (Not Raised Below)

Contrary to well-established law, the trial court instructed the jury that defendant had a duty to retreat in his own home, and that if he could do so safely, he could not avail himself of the defense of self-defense. Because there was evidence from which the jury might well have found that defendant could have safely retreated, there is an intolerable risk that defendant was unfairly deprived of his defense. A significant error in an instruction of this magnitude is "clearly capable of producing an unjust result." R. 2:10-2. The convictions must be reversed.

Time and again, reviewing courts have emphasized that clear and correct jury instructions are essential to a defendant's right to a fair trial. State v. Rodriguez, 195 N.J. 165, 175 (2008). See State v. Afanador, 151 N.J. 41, 54 (1997) ("An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions.") (citing State v. Martin, 119 N.J. 2, 15 (1990)); State v. Green, 86 N.J. 281, 287 (1981) ("Appropriate and proper jury

instructions are essential to a fair trial.") (citing Gabriel v. Auf Der Heide-Aragona, Inc., 14 N.J. Super. 558, 563-64 (App. Div. 1951)). Jury instructions have been described as "a road map to guide the jury[;] without an appropriate charge, a jury can take a wrong turn in its deliberations." Martin, 119 N.J. at 15.

The judge "should explain to the jury in an understandable fashion its function in relation to the legal issues involved." Green, 86 N.J. at 287 (citing Jurman v. Samuel Braen, Inc., 47 N.J. 586, 591-92 (1966)). The judge must deliver "a comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Id. at 287-88. The judge must "instruct the jury as to the fundamental principles of law which control the case [including] the definition of the crime, the commission of which is basic to the prosecution against the defendant." Id. at 288 (quoting State v. Butler, 27 N.J. 560, 595-96 (1958)).

"Because proper jury instructions are essential to a fair trial, 'erroneous instructions on material points are presumed to' possess the capacity to unfairly prejudice the defendant." State v. Bunch, 180 N.J. 534, 541-42 (2004) (quoting State v. Nelson, 173 N.J. 417, 446 (2002)); see also State v. Jordan, 147 N.J. 409, 422 (1997) (finding that some jury instructions are "so crucial to the jury's deliberations on the guilt of a criminal defendant that errors in those

instructions are presumed to be reversible"). Therefore, "[e]rroneous instructions are poor candidates for rehabilitation as harmless, and are ordinarily presumed to be reversible error." Afanador, 151 N.J. at 54 (citing State v. Brown, 138 N.J. 481, 522 (1994)).

Turning specifically to self-defense, it has been recognized that if there is a rational basis for it in the record, self-defense must be charged. See State v. Kelly, 97 N.J. 178, 200 (1984) (noting that "if any evidence raising the issue of self-defense is adduced, either in the State's or the defendant's case, then the jury must be instructed" on that defense); see also State v. Galloway, 133 N.J. 631, 648 (1993) (suggesting that when deciding whether defendant is entitled to a specific defense, evidence must be "viewed in the light most favorable to the defendant").

Prior to 1999, the self-defense statute provided in relevant part:

> The actor is not obliged to retreat from [the] dwelling, unless [the actor] was the initial aggressor or is assailed in [the actor's own] dwelling by another person whose dwelling the actor knows it to be ....

State v. Gartland, 149 N.J. 456, 467 (1997) (quoting N.J.S.A. 2C:3-4b(2) (b) (i)). In 1999, the Legislature amended N.J.S.A. 2C:3-4b(2) (b) (i), which now provides, "The actor is not obliged to retreat from his dwelling, unless he was the initial aggressor ...." See Cannel, New Jersey Criminal Code Annotated, comment on N.J.S.A. 2C:3-4 (2019) (The Legislature amended "the statute to

remove the exception requiring retreat from a cohabitant assailant."). As a result of the amendment, "the duty to retreat by a person attacked in the person's home [was] eliminated in all cases except if the person instigated the altercation." Assembly Judiciary Committee, Statement to S. 271 (November 16, 1998).

"The home is accorded special treatment within the justification of self-defense." State v. Montalvo, 229 N.J. 300, 319 (2020). If the alleged assault occurred outside the defendant's dwelling, the jury must also find that the defendant was unable to retreat with complete safety. N.J.S.A. 2C:3-4(b)(2)(b); Rodriguez, 195 N.J. at 175; Gartland, 149 N.J. at 467. Conversely, if the alleged assault occurred in the defendant's dwelling, the duty to retreat does not exist, so long as the defendant did not provoke the attacker. Montalvo, 229 N.J. at 320.

The problem here is that the trial court did not follow the guidance in footnote 4 to the model charge, which provides:

> 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. N.J.S.A. 2C:3-4b(2) (b) (i).

Model Jury Charge (Criminal), "Justification - Self Defense In Self Protection" (rev'd 6/13/11).

Here, the entire case obviously turned on the viability of self-defense, so the judge issued an instruction to the jury, largely tracking the model charge. (20T 35-10 to 40-23) However, within the self-defense charge, the jury was instructed on the duty to retreat:

> If you find that the defendant knew that he could avoid the necessity of using deadly force by retreating, provided that the defendant knew he could do so with complete safety and that such an opportunity was available, then the defense of self-defense is not available to him.
>
> In your inquiry as to whether a defendant who resorted to deadly force knew that an opportunity to retreat with complete safety was available, the total circumstances, including the attendant excitement accompanying the situation, must be considered.
>
> * * *
>
> The burden of proof is upon the State to prove beyond a reasonable doubt that the defendant knew he could have retreated with complete safety. If the State carries its burden, then you must disallow the defense of self-defense.

(20T 38-22 to 40-19) This was a significant error.

It is undeniable that defendant lived in apartment 9H of Kingsbury Towers. True, defendant did not have a formal lease, and he was in the process of moving the rest of his belongings from his niece's house to the apartment. (18T 198-14 to 23) But the law does not impose legal formality or luxurious living conditions to be a dwelling. Defendant testified that he traded a used

vehicle for six months' rent. (18T 87-20 to 88-5) He had been staying at the apartment for a "few weeks" before the incident. (18T 198-6 to 14) He had an electronic fob to enter the building, and the key to the apartment door, which he obtained from the sublessor. (18T 88-6 to 19) He had a bed, cookware, a TV, and personal belongings in the apartment. And he told Anderson and Fletcher that it was his apartment. It matters little that Anderson saw the sublessor's mail in the apartment (Da 57), or that defendant used the sign-in sheet when entering. (15T 200-4 to 10) That is to be expected if you have an informal sublease; a swap of a used car for six months' rent.

The law on self-defense does not provide lesser rights to poor people, depending on how nice or stable their homes are. N.J.S.A. 2C:3-11c defines dwelling as "the actor's home or place of lodging," and the facts of this case so clearly met that definition that the trial court was obligated to charge the non-duty to retreat, no matter what position counsel took. Thus, the exception to the duty to retreat obviously applies, and a correct self-defense charge must include this exception.

Moreover, the failure to charge this exception to the general rule was particularly harmful in this case. As noted above, a significant portion of the State's cross-examination of defendant focused on his purported ability to escape the apartment:

Q: So she put the string around his wrists; is that correct?
A: Yes, ma'am. Yes. I can tell you that.
Q: And she put the string around his feet, right?
A: Right.
Q: And he was sitting down --
A: The tying it, I can't tell you she tied it, but -- because it --
Q: Well, either you know or you don't.
A: Because within one second he busted me in the head again, so she couldn't have.
Q: Where were you when she was tying him up?
A: Right there. Right there. Ma'am, I was busted in the head. I was bleeding out of my fucking head. I was --
Q: You still had the knife in your hand, right?
A: What does that have to do with me bleeding out the head? I was -- I was confused.
Q: Did you have the knife in your hand?
A: Huh? Huh?
Q: Did you have the knife in your hand?
A: Yes, ma'am. Yes. Yes.
Q: You didn't run out of the apartment, right?
A: How? How? The dude is right there in front of me blocking off the bedroom.
Q: But he's being tied up.
A: Listen to this, ma'am. He's blocking off the -- do you understand the story or are you not listening to me?

* * *

Q: I want you to answer my specific question. Okay?
A: Okay. I'm going to ask you a simple question.
Q: When she's tying Daquan up, according to what you were saying --
A: Okay. Okay.
Q: -- where are you?

* * *

A: I'm on the side -- I'm on the side of the bed. I'm on the -- right here. The bed is right here. She's right here. First he's here. When she calls him, we start fighting a little more. Then I'm right here.
Q: Mr. Bragg, where --
A: All right. Well, I'm telling you right now, I'm right here on the side of the bed towards the -- towards the -- the window is right

here. I'm right here. So you're standing there watching her tie him up?
A: No. I'm on the side right there. She's -- yes, but they're -- she comes -- like he's like blocking off the room. He -- she comes right there. I'm on the side right there. And she was like --
Q: So her attention is on him, she's tying him up, right? That's what you testified to.
A: She was putting -- apparently she didn't tie him up, because he just came right after me. So she's putting the stuff on -- she's putting the stuff on. I see them through my eyes, ma'am. I see it.
Q: But you didn't run out of the apartment when you saw that.
A: I was -- they were -- that's your trick. I was on the side. He had the room blocked off. Aren't you understanding me? Do you-all understand what I'm
trying to say?
Q: You had a knife in your hands.
A I know, but --
Q: And she was tying him up.
A: -- but he had the thing in his hand. What are you talking about?
Q: But she was tying him up, and you had a knife in your hand. Did you run out of the apartment --
A: How? They got me blocked off.
Q: Did you run out or not?
A: How? They got me blocked off.
Q: Did you run out?
A: Ma'am, I wouldn't care if the judge say anything on that.
Q: Yes or no?
A: I'm not going to answer something that don't make sense. How? They had me blocked off, ma'am.
Q: Answer the question posed.
A: They got me blocked off. How -- listen to this, ma'am. I was fighting for my life. I'm on the side. He's trying to hit me.
Q: Mr. Bragg. Mr. Bragg.
A: Yes.
Q: Please answer the question asked. Did you leave the apartment while she was --
A: How? How?
Q: -- tying him up?
A: They got me blocked off.
Q: Yes or no?

A: I would be a fool to answer something like that. They got me blocked off. I can't go nowhere. I can't go nowhere.
THE COURT: So the answer is no.
THE DEFENDANT: He had the thing --
THE COURT: You couldn't leave the apartment.
THE DEFENDANT: -- in his hands. Huh?
THE COURT: The answer is no. You didn't leave the apartment.
BY MS. SPARKMAN:
A: What are you saying?
Q: I asked you, did you leave the apartment when she was tying Daquan up?
A: I --
Q: The answer is no, right?
A: Listen, no, it's not a yes or no question. That's not a yes or no question. That --
Q: You were standing in the apartment --
A: I couldn't, because he had me blocked off. Okay. There your question. I couldn't, because he had me blocked off.
Q: But you had the knife in your hand.
A: But he -- no. He had the toilet lid in his hand.
THE COURT: All right. All right. We've covered this.
THE DEFENDANT: He had the toilet lid in his hand. What are you talking about?
BY MS. SPARKMAN:
Q: So you didn't leave the apartment?
A: He had me blocked off, ma'am. What are you talking about? He had me blocked off. I never had an opportunity -- listen to me, ma'am. If I could have got away from them, I would have left. I'm bleeding.
Q: Okay. Then you said --
A: They had me blocked off the whole time, ma'am.
Q: They had you blocked off?
A: Yes. I was on the side. He –

(18T 249-6 to 256-12) (emphasis added).

Similarly, defendant's alleged ability to flee the apartment was a prominent theme in the State's summation:

> This is a person who claims that for an hour and 45 minutes, an hour and a half, he was fighting for his life, that he couldn't get out of the apartment, he was being attacked by Lorenza and Daquan and he did what he had to do.
>
> How is that possible? What was he doing when Lorenza was tying up Daquan, and why would she do that? Did that make sense? Think about it. So you're going to disable the one person who is helping you attack the defendant? You're going to make his odds better? It doesn't make any sense. And if it doesn't make any sense, probably because it didn't happen.

(19T 140-1 to 12)

> The defendant was the one with the weapon most of the time. Again, why would he have not just run out of the apartment?

(19T 142-8 to 10) (emphasis added).

Thus, defendant was overwhelmingly prejudiced by the jury charge as delivered. The jury was informed that self-defense did not apply if defendant could have fled his home safely, yet the law imposes no such duty. The State's summation – and a significant portion of its proofs – focused heavily on defendant's purported opportunity to leave the home during the confrontation, and specifically while Fletcher was tying up Anderson and defendant possessed the knife. This was undeniably a powerful factual argument that fit perfectly with the erroneous charge. Thus, there is a very real possibility that

the jury found self-defense to be inapplicable because of a duty to retreat from the dwelling – a duty defendant did not have under the law.

Our courts have not hesitated to reverse convictions where there were errors in the self-defense charge. See State v. Martinez, 229 N.J. Super. 593, 604 (App. Div. 1989) (reversal required where "the trial court may have led the jury to believe that defendant had a duty to retreat"). See also Rodriguez, 195 N.J. 165 (reversal required where jury not informed that self-defense applied to reckless manslaughter as well as murder); State v. O'Neil, 219 N.J. 598, 601 (2014) (same); State v. O'Carroll, 385 N.J. Super. 211, 237 (App. Div.), certif. denied, 188 N.J. 489 (2006) (reversal ordered where there was a rational basis for self-defense charge, which was not given, even where defense counsel "offered the view that the evidence was not legally sufficient" for the charge).

To constitute plain error, "not every possibility of an unjust result will suffice." Ibid. "[T]he possibility must be 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" Ibid. (quoting State v. Macon, 57 N.J. 325, 336 (1971)). Such is the case here, where the entire controversy depended on whether or not self-defense justified defendant's conduct, and where a faulty jury instruction unfairly swept that defense out from under him. The convictions must be reversed.

POINT II

THE APPELLATE DIVISION'S REASONS FOR DENYING RELIEF DO NOT WITHSTAND SCRUTINY.

The Appellate Division's entire legal analysis is contained in a single paragraph and is comprised of two arguments. (Da 69-70) The first is that there was more (or better) evidence supporting the claim that apartment 9H was not defendant's dwelling than evidence supporting that it was. The second is that the guilty verdicts on kidnapping and endangering the welfare of a child demonstrate that the jury believed defendant was the initial aggressor, so he could not otherwise avail himself of the defense of self-defense. Both arguments should be rejected.

A. The Decision to Charge the Jury on a Defense Depends on Whether There Is Factual Support for That Defense, not a Weighing of the Competing Claims.

The law is well-established that the decision to charge the jury on a defense is dependent upon whether the defense is supported by evidence in the record, independent of other evidence the jury might credit in rejecting the defense. This Court has recognized that "if any evidence raising the issue of self-defense is adduced, either in the State's or the defendant's case, then the jury must be instructed." Kelly, 97 N.J. at 200. "As long as a self-defense

charge is requested and supported by some evidence in the record, it must be given." Rodriguez, 195 N.J. at 174. Indeed, "[a] trial judge must sua sponte charge self-defense [even] in the absence of a request… 'if there exists evidence in either the State's or the defendant's case sufficient to provide a 'rational basis' for its applicability.'" State v. Galicia, 210 N.J. 364, 390 (2012) (quoting O'Carroll, 385 N.J. Super. at 236) (quotation and emphasis omitted). Consistently missing from this line of cases is any concern about the nature or worth of contrary evidence.

Yet, here, the Appellate Division began its dismissal of the instructional error by noting:

> Applying these principles, we discern no plain error that led to an unjust result. The State presented substantial objective evidence showing the apartment was not defendant's dwelling. Defendant presented only his self-serving testimony.

(Da 69-70) The opinion does not further explain the significance of the contrasting narratives, but it seems to suggest that the failure to charge is excusable (at least partially) because more or better evidence supported the claim that apartment 9H was not defendant's dwelling.

Factually, it is untrue that only self-serving testimony showed the apartment to be defendant's dwelling. Defendant brought Fletcher and Anderson to the apartment, possessed an electronic fob for the main entrance,

and opened the apartment door with a key. Inside was defendant's drug stash. Also inside were a bed, cookware, a TV, and his clothing. It was a humble accommodation, to be sure. But this was evidence separate from defendant's "self-serving testimony" that apartment 9H was his dwelling.

Moreover, this parsing of the evidence misses the point: the source or credibility of the evidence is irrelevant. If any evidence to support self-defense is in the record, then a full and proper self-defense charge must be issued, which, in this case, must include the caveat that defendant does not have a duty to retreat from his own home before resorting to deadly force.[8] That was not done here.

B. The Failure to Issue a Full and Proper Self-Defense Charge Cannot Be Excused by Reference to The Guilty Verdicts.

The Appellate Division found that the "evidence simply did not support a finding of self-defense, regardless of whether the apartment belonged to defendant" because the jury "was obviously convinced he was the aggressor." (Da 70) This finding was flawed because it was premised on conjecture about

[8] Unlike in Gartland, 149 N.J. at 476-77, and State v. Concepcion, 111 N.J. 373, 379 (1988), where convictions were reversed because the jury instructions were inadequately factually tailored to the case, the problem here is the omission of necessary statutory language, presenting a much clearer claim of error.

what the jury must have found as fact based on their verdict. It should be rejected.

After suggesting that the non-duty to retreat instruction did not need to be given because there was evidence on both sides of the debate, the Appellate Division found that self-defense did not apply for another reason:

> Moreover, given the guilty verdict returned on fourteen of the nineteen counts, it is clear the jury did not believe defendant's testimony and was obviously convinced he was the aggressor. Indeed, the jury found defendant guilty of kidnapping Fletcher, Anderson, and L.I. This required them to find he purposely acted to unlawfully confine his victims for a substantial period with the purpose to inflict bodily injury or to terrorize them. N.J.S.A. 2C:13-1(b)(2). The jury further found defendant abused or neglected L.I. and purposely harassed Fletcher. The evidence simply did not support a finding of self-defense, regardless of whether the apartment belonged to defendant.
>
> [(Da 70)]

The fundamental problem with this rationale is that it puts the proverbial cart before the horse. The court reasoned that defendant was not entitled to the self-defense instruction because he was convicted of most of the charged offenses. But the jury might have rejected self-defense because the charge was faulty, not because the jury was "obviously convinced [defendant] was the aggressor." Likely, they found that defendant could have safely fled the home, which he had no duty to do.

Furthermore, this Court has consistently held that we cannot meaningfully cobble together a version of the facts the jury must have found based on apparently inconsistent verdicts, or for any other reason. See State v. Banko, 182 N.J. 44, 53-56 (2004) (detailing reasons for permitting inconsistent verdicts); State v. Grunow, 102 N.J. 133, 148 (1986) (citing "tradition of the common law" that "does not permit us to speculate upon the foundations of a jury verdict"). That is because "an individualized assessment of the reason for [a jury verdict] would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." Ibid. (quoting United States v. Powell, 469 U.S. 57, 66 (1984)).

Despite this admonition, the Appellate Division engage in precisely this type of speculation. Thus, both of the Appellate Division's reasons for denying relief are based on a misapplication of governing caselaw and should be rejected.

POINT III

THE FAILURE TO CORRECTLY INSTRUCT THE JURY THAT DEFENDANT HAD NO DUTY TO RETREAT IN HIS OWN DWELLING WAS NOT "INVITED ERROR."

Although its ultimate conclusion was wrong, the Appellate Division correctly determined that the instructional error should be examined for plain error; namely, whether it was "clearly capable of producing an unjust result." R. 2:10-2. (Da 67; 69) Nonetheless, because the State asserted before the Appellate Division that the error was "invited" by defense counsel – and because defendant expects the State will reprise that argument before this Court – defendant will briefly address why it is not invited error.

"Mistakes at trial are subject to the invited-error doctrine." State v. A.R., 213 N.J. 542, 561 (2013). "Under that settled principle of law, trial errors that "'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal....'"" Ibid. (quoting State v. Corsaro, 107 N.J. 339, 345 (1987) (alteration in original) (quoting State v. Harper, 128 N.J. Super. 270, 277 (App. Div. 1974))). "The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." Brett v. Great

Am. Recreation, Inc., 144 N.J. 479, 503 (1996). "The defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought and urged, claiming it to be error and prejudicial." State v. Pontery, 19 N.J. 457, 471 (1955). Even if a party has "invited" an error, however, courts will not bar defendants from raising an issue on appeal if "the particular error ... cut mortally into the substantive rights of the defendant...." Corsaro, 107 N.J. at 345 (internal quotation marks and citation omitted).

Here, defense counsel did not urge a particular course of action; at most, she agreed with the court's inclination. The matter was first discussed at the preliminary charge conference where defense counsel appeared to agree with the court that the non-duty to retreat from a dwelling language was not needed. (17T 102-4 to 103-24) Critically, however, the court and defense counsel acknowledged that this preliminary conference was occurring before either party had rested, and they agreed that the question would have to be revisited at the close of the evidence:

> Court: Alright. So, we'll just have to wait and see how things unfold on that.
>
> Defense counsel: Right.

> Court: Because we can't go any further now and I appreciate the hypothetical nature of some of this.

(17T 103-25 to 104-5) The State then presented one additional witness in its case-in-chief, the defense presented three witnesses, including defendant himself, and the State called a witness in rebuttal. (18T 4-19 to 322-8; 19T 64-25 to 86-17)

A final charge conference was later held after the close of the evidence. (19T) However, at that conference, there was not a meeting of the minds because defense counsel was looking at an earlier draft of the charge:

> Court: I think that the otherwise the language regarding deadly force, non-deadly force retreat, I think it's all appropriate in its general sense.
>
> Defense counsel: Yep, I agree.
>
> Court: And the, I think that what we circulated took out the dwelling [and] the porch language.
>
> Defense counsel: Okay, I just might be looking at an older –
>
> Court: Yeah, you might be working off the older one, I know that. Prosecutor, any concerns regarding the adequacy of the self-defense charge?
>
> Prosecutor: No, Judge.
>
> Court: All right, so we can basically say that Parts 1 and 2 are good. Let's go on to Part 3 which I would like to address in order of the charges themselves.

(19T 26-22 to 27-14) The conference then moved onto other topics.

To be clear, defense counsel should have expressly requested the omitted language. But what occurred here was not invited error. At most, this was a bumbling acquiescence, not an active petitioning of the court for a particular course of action. See O'Carroll, 385 N.J. Super. at 237 ("There is no question of invited error on this issue; defense counsel did not ask the judge to omit the justification charge as an element the State must disprove, but merely offered the view that the evidence was not legally sufficient."). The reasoning behind the invited error doctrine is to avoid gamesmanship. And there is certainly no gamesmanship here, especially in light of the trial court's independent duty to deliver a full and correct self-defense instruction where there is a "clearly indicated" "rational basis" for the charge. See Galicia, 210 N.J. at 390-91 ("The evidence must 'clearly indicate' such a defense to call for such an instruction in the absence of a request to charge.") (quoting State v. Perry, 124 N.J. 128, 161 (1991)).

The entire case turned on self-defense. And, given the tenor of the vigorous cross-examination of defendant and the State's summation, the viability of self-defense depended heavily on whether defendant could safely flee from his home. The error therefore "cut mortally into the substantive rights of the defendant...." Corsaro, 107 N.J. at 345. Reversal of the convictions is required whether the error is plain error or invited error.

CONCLUSION

The convictions must be reversed because defendant was denied due process and a fair trial by a faulty self-defense jury charge that failed to correctly instruct the jury that defendant had no duty to retreat in his own dwelling. The Appellate Division's reasons for denying relief should be rejected, and defense counsel did not "invite" the instructional error.

Respectfully submitted,

JENNIFER N. SELLITTI
Public Defender
Attorney for Defendant-Appellant

BY: /s/ Stefan Van Jura
STEFAN VAN JURA
Assistant Deputy Public Defender
Attorney ID: 039952004

Dated: November 19, 2024