

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3317-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OSVALDO RIVERA, JR.,

Defendant-Appellant.

Submitted September 20, 2017 – Decided September 29, 2017

Before Judges Fuentes and Koblitiz.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
13-09-2652.

Joseph E. Krakora, Public Defender, attorney
for appellant (Peter T. Blum, Assistant Deputy
Public Defender, of counsel and on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Sara M. Quigley,
Deputy Attorney General, of counsel and on the
brief).

PER CURIAM

A jury convicted defendant Osvaldo Rivera of eleven counts
including first-degree murder, N.J.S.A. 2C:11-3, and first-degree

attempted murder, N.J.S.A. 2C:11-3 and 2C:5-1(a), in the sexual assault and stabbing of defendant's neighbor, a twelve-year-old girl, and the stabbing death of her six-year-old brother, who tried to rescue his sister. Defendant raised the partial defense of intoxication. We affirm.

We need not recite the details of the vicious assaults, which occurred in the victims' home when defendant entered surreptitiously at night and assaulted the two children, cutting both of them in the neck and other places with a knife after sexually assaulting the girl numerous times. Multiple DNA samples linked defendant to the crimes. The victim who survived also recognized defendant and identified him in court at trial. The judge imposed sentences requiring an aggregate mandatory minimum term of eighty-two and one-half years.

Acknowledging the crimes were "horrific," defendant raises only the following issue on appeal:

POINT I: A NEW TRIAL SHOULD OCCUR BECAUSE THE COURT IMPROPERLY INVITED THE JURORS TO CONSIDER POTENTIAL PUNISHMENT BY INFORMING THEM OF THE DEGREES OF THE OFFENSES AND INFORMING THEM THAT THE [SIC] SOME CHARGES WERE "LESSER" OFFENSE. U.S. CONST. AMEND. XIV; N.J. CONST. ART. I, PARA. 1.

On the last occasion when counsel discussed the jury charge with the judge, defense counsel asked that the degrees of the crime be provided to the jury. The judge complied with the defense

request to include the degrees of the crimes although initially the State held a contrary view. Thus, any defense objection to the inclusion of degrees constitutes invited error. "A [party] cannot request the trial court to take a 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 which he urged, claiming it to be error and prejudicial." State v. Sykes, 93 N.J. Super. 90, 95 (App. Div. 1966). Like judicial estoppel, the doctrine of invited error "is designed to prevent [a party] from manipulating the system." State v. Jenkins, 178 N.J. 347, 359 (2004).

Defense counsel did request the trial judge to leave out the word "lesser" when explaining the possible charges to the jury. When denying the defense request, the judge noted that "lesser-included" is used in the model jury charges.

Defense counsel then argued to the jury in summation that defendant should be convicted of the charge of aggravated manslaughter rather than murder because, based on defendant's intoxication at the time of the crimes, he had not acted purposefully or knowingly. See State v. Cameron, 104 N.J. 42, 54-56 (1986) (holding that voluntary intoxication only operates as a defense to a purposeful or knowing offense where the intoxication is of such "an extremely high level" that it causes a "prostration

of faculties" making the requisite mental state for the offense "totally lacking") (internal citations omitted). She also argued that he should be convicted only of the crime of sexual assault rather than aggravated sexual assault based on the forensic evidence.

On appeal defendant argues that the jury should not be informed of which charges were more serious because the jury should not be involved in the penalty phase of the trial. See State v Short, 131 N.J. 47, 59-60 (stating that jurors should not be informed of potential sentences.) He argues that the jury might have been so inflamed by the nature of the criminal behavior that it neglected its duty to follow the instructions and chose to convict defendant of the more serious charges for that reason only. Defendant did not support his argument regarding the use of the word "lesser" in the jury charge with any case law directly on point from any jurisdiction. The wording is contained in the model jury charges. Model Jury Charge (Criminal), "Lesser[-] Included Offenses" (2002). The issue raised by defendant is without sufficient merit to require further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION