SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4080-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID P. GIORDANO,

Defendant-Appellant.

Argued January 23, 2018 – Decided March 8, 2018

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Indictment No. 13-03-0819.

Joshua D. Sanders, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Joshua D. Sanders, on the brief).

Nancy P. Scharff, Assistant Prosecutor, argued the cause for respondent (Mary Eva Colalillo, Camden County Prosecutor, attorney; Nancy P. Scharff, of counsel and on the brief).

PER CURIAM

Defendant David P. Giordano was tried before a jury, which found him guilty of aggravated manslaughter and possession of a weapon for an unlawful purpose. Defendant appeals from the judgment of conviction dated March 30, 2016. We affirm.

I.

A Camden County grand jury charged defendant with two offenses arising from the death of Michael Taylor: first-degree murder, contrary to N.J.S.A. 2C:11-3(a)(1) and (2) (count one), and third-degree possession of a weapon for an unlawful purpose, contrary to N.J.S.A. 2C:39-4(d) (count two). Defendant later was tried before a jury.

At the trial, the State presented evidence, which established that on June 5, 2012, defendant was residing in a multiple dwelling in Voorhees that included four condominiums, two on the first floor and two on the second floor. Defendant and B.K. were living in condominiums on the second floor.[1] Taylor was living in the condominium directly beneath defendant's condominium.

The stairway from the first to the second floor extends outward from the center of the front of the building. There is an open, roofed landing at the top of the stairs, which extends from

[1] We use initials to identify some of the individuals involved in this matter to protect their privacy.

the entry doors to the two condominiums, across the front of the building.

L.M. testified that at around 1:00 p.m., she was visiting B.K. in his condominium, when she heard banging outside and people "yelling back and forth." She opened the door to see what was happening and observed defendant on top of Taylor on the porch "straight across" from B.K.'s condominium, "up against the balcony." According to L.M., defendant was "straddled over" Taylor. Taylor was laying on his back, but using both hands to get defendant off him.

L.M. testified that defendant had a black-handled butcher knife in his right hand. She did not see him stab Taylor, but she saw blood on the floor on the landing in front of B.K.'s condominium and on Taylor, who appeared to be injured. L.M. did not think that Taylor was armed with any weapon. L.M. slammed the door and screamed that they had to call 9-1-1.

L.M. made the call and as she was doing so, opened the door. She observed Taylor laying on his stomach in front of the door to B.K.'s condominium. Taylor was trying to bang on the door with his hand. On the recording of the 9-1-1 call, B.K. is heard stating that Taylor was "dying outside of my door." B.K. shut the door and told L.M. to stay inside, but she went outside and saw that Taylor was bleeding badly. She applied pressure to his wounds, following

directions relayed to her by the person who answered the 9-1-1 call.

S.S. was also in B.K.'s condominium when the stabbing occurred. He testified that he also heard a "big bang" outside the door to the condominium and then saw defendant stab Taylor. He said Taylor was on his back and defendant was on top of and crouched over him. According to S.S., Taylor did not have a weapon, and he was in a defensive position, trying to ward off the attack. S.S. stated that at that time, the two men were directly in front of the door to B.K.'s condominium.

S.S. testified that he saw defendant stab Taylor two times in his abdomen using a knife, which he described as "fairly large." He said the knife was about six to seven inches long. He commented that Taylor's arm was "really cut bad" and he was bleeding profusely.

S.S. acknowledged that in his initial statement to the police, he indicated that he did not really see anyone when he opened the door, but he said he thought the police were asking him about the second time he opened the door. He also admitted that his second statement, which he provided to the police in February 2015, was the first time he said defendant had been the aggressor. He testified that he did not tell the officers he had seen defendant stab Taylor because he feared for his life and did not want to get

involved. Later, after Taylor died, S.S. decided he had to tell the truth about what he saw.

B.K. testified that on June 5, 2012, he was in his condominium with L.M. and S.S. watching television, listening to music, and drinking beer. Around 1:00 p.m., B.K. heard a loud "thump" outside the door. He opened the door and saw defendant stab Taylor. Taylor was on his backside, with his back against the front railing on the landing, and defendant was "hunched over" him.

According to B.K., defendant had a knife and it did not appear that Taylor had a weapon. Taylor was defending himself, using both arms to try to push defendant off. B.K. described the knife as a kind of kitchen knife with "the biggest butcher blade." He said he saw defendant stab Taylor in the chest area. As this was happening, B.K. slammed the door shut but he looked out the side window and he could see blood gushing from Taylor's arm.

Taylor knocked on the door and asked for help, stating that he was hurt and bleeding. B.K. would not let Taylor in because he was afraid defendant still had the knife. He waited until the police arrived, which was less than five minutes later. At this point, Taylor had collapsed. He was laying on his back on the stairs. B.K. passed towels and cloths to L.M., who was outside attempting to aid Taylor. B.K. did not give a statement to the

police until after he received a subpoena. He said he did not want to get involved.

One of the Voorhees police officers testified that Taylor was conscious when he responded to the scene. Taylor told the officer defendant had stabbed him before he kicked in the door to defendant's condominium. Taylor said he chased defendant after defendant stabbed him. Taylor also pointed to defendant's condominium and said "Dave stabbed me."

The trauma surgeon who treated Taylor testified that Taylor was "awake and alert" but "very agitated." Taylor seemed to be answering questions although he was "a little bit confused." The doctor testified about what Taylor said to him. Taylor told the doctor he lived on the bottom floor of the building and his upstairs neighbor had a balcony.

Taylor said he had a birdcage and his upstairs neighbor had been throwing water down onto the birds in the cage. This upset Taylor and he yelled at the neighbor several times. At some point, Taylor told the neighbor "he was coming." According to the doctor, Taylor stated that

> [h]e left his apartment, ran up the stairs where he said he was met at the door by his upstairs neighbor who came out with a pair of knives in his hands. . . . He told me that when he got to the landing, the neighbor came to the doorway with the knives. His quote to me was that "He said if you want to fight,

> we're going to fight." And that's all he really said. At that point, he stopped speaking . . . .

The doctor testified that Taylor died on June 24, 2012, noting that he had been "incredibly ill" while in the hospital.

The Medical Examiner for Camden, Gloucester, and Salem Counties performed Taylor's autopsy. The doctor stated that Taylor had two stab wounds in the chest and one in his left arm above the elbow. One of the stab wounds struck the heart and lung. The stab wound in the arm was deep and could have caused moderate to excessive blood loss. The doctor opined to a reasonable degree of medical certainty that the cause of Taylor's death was multiple stab wounds, and the manner of death was a homicide.

Defendant's videotaped statement was played for the jury during the testimony of the detective from the Camden County Prosecutor's Office, who interviewed defendant on the day of the stabbing. Defendant said he came out of his condominium with a knife and did so "before the fight started." He stated that he confronted Taylor before he got to the door. The detective asked if the incident started inside the condominium, and defendant replied, "[n]o, we were outside, we weren't inside, we were outside."

Defendant claimed that Taylor punched and kicked him, but admitted that he first stabbed Taylor with the knife. He had been

aiming for Taylor's hand. He also admitted that Taylor had his arms up when he swung at him. The detective asked why defendant had not called the police instead of grabbing the knife and going outside, and defendant replied that he did so thinking that Taylor "would go away." Defendant said he returned to his condominium after he stabbed Taylor and Taylor tried to follow him. Defendant shut the door, but Taylor "kicked the door in."

Defendant stated that at this point, the incident ended. He did not go outside again, but went to the kitchen sink, washed the knife and tried to clean up the blood. He denied that he saw Taylor laying on the ground, or people trying to help him. A DNA test indicated that Taylor was the source of a major DNA profile on the blade of the butcher knife recovered from defendant's kitchen drawer.

Defendant presented testimony from R.R., L.M.'s father, who resides with L.M. in the condominium complex. He provided an account that differed in part from the accounts of the other witnesses. He stated that he heard hollering and cursing, and saw Taylor following defendant up the stairs. According to R.R., Taylor lunged at defendant when he reached the landing. However, R.R. later said defendant was already at the top of the stairs when Taylor threw him down. He stated that defendant suddenly got up and ran away, and Taylor ran after him, pounding on his door.

Defendant testified he had been confused when the detectives questioned him after the incident. He stated that he told the detectives the door had been kicked down, and then he and Taylor had the confrontation, but "it was really we had the confrontation and then the door was kicked down." Defendant acknowledged he stabbed Taylor. He did not know whether he used the butcher knife. Defendant admitted he could have locked his door when he heard Taylor coming up the stairs, but he "never thought about" doing that. He claimed he was upset and nervous and wanted to "calm the situation down" so he "went and got the knife and went outside."

After observing a portion of his videotaped statement, defendant testified he and Taylor wound up in front of B.K.'s condominium because he grabbed Taylor's foot when Taylor allegedly tried to kick him. He stated that after the stabbing, he returned to his condominium. He acknowledged he confronted Taylor before Taylor got to defendant's door, and when he saw Taylor coming up the stairs, he went outside to confront him.

The jury found defendant not guilty of murder, but guilty of the lesser-included offense of aggravated manslaughter. N.J.S.A. 2C:11-4(a). The jury also found defendant guilty of possession of a weapon for an unlawful purpose. The judge granted defendant's motion to sentence him as a second-degree offender, and imposed an eight-year prison term, with an eighty-five percent period of

parole ineligibility, pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. The judge also imposed a concurrent three-year term for the weapons offense. In addition, the judge imposed appropriate penalties and assessments. This appeal followed.

II.

On appeal, defendant raises a single issue, which he did not raise in the trial court:

> THE JURY INSTRUCTIONS IMPROPERLY OMITTED AN ENTIRE RELEVANT SUBSECTION OF THE APPLICABLE STATUTE ON SELF-DEFENSE, TO WIT, THE USE OF DEADLY FORCE AGAINST AN INTRUDER, WHICH WAS CLEARLY INDICATED BY THE RECORD, IN A CASE WHERE THE DEFENSE WAS SELF-DEFENSE.

We note that when, as here, a defendant does not request a jury instruction or object to its omission from the charge, we review the judgment for plain error. State v. Funderburg, 225 N.J. 66, 79 (2016). Thus, we will disregard the error "unless it is of such a nature as to have been clearly capable of producing an unjust result." Ibid. (citing R. 2:10-2; State v. Robinson, 165 N.J. 32, 47 (2000)). "The mere possibility of an unjust result is not enough." Ibid. (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). To warrant reversal of a conviction, the error "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. (alteration in original) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

Here, the trial judge instructed the jury on self-defense by providing the jury with the model jury instruction. See Model Jury Charge (Criminal), "Justification — Self Defense (N.J.S.A. 2C:3-4)" (rev. June 13, 2011). Among other things, the judge instructed the jury that, "[w]hen a person is in imminent danger of bodily harm, the person has a right to use force, or even deadly force, when that force is necessary to pre[v]ent the use against him of the unlawful force." The judge stated, "[t]he force used by the defendant must not be significantly greater than and must be proportionate to the unlawful force threatened or used against the defendant."

The judge stated that there are "different levels of force that a person may use in his own defense to prevent unlawful harm." The judge said "[t]he defendant can only use that amount of force . . . that he reasonably believes is necessary to protect himself against harm." The judge said, "[i]f the defendant is attempting to protect himself against exposure to death or substantial danger of serious bodily harm, he may resort to the use of deadly force. Otherwise, he may only resort to non-deadly force."

The judge explained the concepts of unlawful force, deadly force, and serious bodily harm. The judge told the jury that it

had to determine whether defendant used deadly force and if so, whether defendant reasonably believed he had to use such force "to defend against the unlawful conduct of another." The judge then said that self-defense "exonerates a person who uses force in the reasonable belief that such action was necessary to prevent his or her death or serious injury even though his belief was later proven mistaken." The judge noted that "the law only requires a reasonable, not necessarily a correct[,] judgment."

The judge also explained that there are limitations on the use of deadly force, and that the defense of self-defense was not available to defendant if he knew he could "avoid the necessity of using deadly force by retreating, provided the defendant knew he could do so with complete safety." The judge added, however, that there is an exception to the rule of retreat and a person need not retreat from his own dwelling, including a porch, unless he was the initial aggressor. The judge stated that "[a] dwelling includ[es] the porch or other similar structure."

The judge further explained that the State had the burden of proving beyond a reasonable doubt that the defense of self-defense is "untrue." The judge noted that this defense "only applies if all conditions or elements previously described exist." The defense must be rejected "if the State disproves any of the

conditions beyond a reasonable doubt." The same applies to the issue of retreat.

The judge commented, "[t]he 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 to you, you must disallow the defense." The judge further explained that if the State does not meet this burden and the jury has a reasonable doubt, "then it must be resolved in favor of the defendant and you must allow the claim of self-defense and acquit the defendant."

III.

On appeal, defendant argues that the judge should have instructed the jury sua sponte on self-defense involving use of force upon an intruder, pursuant to N.J.S.A. 2C:3-4(c)(1), which states:

> notwithstanding the provisions of N.J.S.[A.] 2C:3-5, N.J.S.[A.] 2C:3-9, or this section, the use of force or deadly force upon or toward an intruder who is unlawfully in a dwelling is justifiable when the actor reasonably believes that the force is immediately necessary for the purpose of protecting himself or other persons in the dwelling against the use of unlawful force by the intruder on the present occasion.

Defendant argues that the jury clearly had a basis to find that he was confronted by an intruder, who was about to do him

harm. He contends that he armed himself in self-defense from the "approaching, menacing" Taylor. He contends the jury could have determined that he was lawfully in his dwelling and reasonably believed he was threatened by the "attacking" Taylor. He argues that the jury was wrongly left to consider only the standard version of self-defense.

We are not persuaded by these contentions. As defendant recognizes, the trial judge is only required to instruct a jury sua sponte on a defense "when the evidence clearly indicates the appropriateness of such a charge." State v. Walker, 203 N.J. 73, 87 (2010). See also State v. Denofa, 187 N.J. 24, 42 (2006) (requiring sua sponte instruction on lesser-included offense when evidence "clearly indicates" the instruction is required). Here, the evidence did not "clearly indicate" that when defendant used deadly force, Taylor was an "intruder" unlawfully in defendant's "dwelling."

As we have explained, the testimony at trial indicated that defendant stabbed Taylor on the second-floor landing of the building, outside of B.K.'s condominium. At that point in time, Taylor could not be considered an intruder unlawfully within defendant's "dwelling." As the judge explained, a dwelling includes a porch or similar structure. Even if we consider the landing a "porch," the evidence did not "clearly indicate" that

the part of the landing in front of the door to B.K.'s condominium was a part of defendant's "dwelling." Moreover, the evidence did not "clearly indicate" that the jury could find that when defendant used deadly force, it was "immediately necessary for the purpose of protecting himself or other persons in the dwelling against the use of unlawful force by" Taylor. N.J.S.A. 2C:3-4(c).

We note that in instructing the jury on self-defense, the judge stated that defendant did not have a duty to retreat "from his own dwelling, including the porch, unless he . . . was the initial aggressor." The judge explained that "[a] dwelling includ[es] the porch or other similar structure." The judge apparently thought that the jury should determine whether all or part of the second-floor landing was defendant's "dwelling."

We need not decide whether the judge erred by including this instruction in the charge. We hold only that the judge's failure to charge the defense under N.J.S.A. 2C:3-4(c) was not plain error. As we have explained, the evidence did not "clearly indicate" that such a charge was required and its omission was not "clearly capable of producing an unjust result." R. 2:10-2.

Our decision in State v. Bilek, 308 N.J. Super. 1 (App. Div. 1998), does not support defendant's argument. In that case, the defendant was found guilty of fourth-degree aggravated assault, contrary to N.J.S.A. 2C:12-1(b)(4). Id. at 3. The defendant was

the part-time superintendent of an eighteen-unit apartment complex, and he lived in one of the apartments on the third floor. Id. at 5-6. There was one entrance into the apartment, which went from the common hallway into the kitchen. Id. at 6. A neighbor was told that defendant used profane language toward his sister and he went to defendant's apartment. Ibid.

The defendant refused to answer the door, and the neighbor returned to his apartment. Ibid. He told his father, who became angry and went with his son to the defendant's apartment. Ibid. When the defendant opened his door, the neighbors confronted him. Ibid. Apparently, the dispute "became quite heated." Ibid. The parties disagreed as to whether the neighbors were in the defendant's kitchen at the time; however, it was "clear that they were, at the least, in the doorway to the apartment." Ibid. Defendant claimed he was terrified. Ibid. He went to his bedroom, returned with a gun, "racked it," and pointed it at the neighbors. Ibid.

We held that the judge erred by giving the jury the general self-defense instruction and the charge for defense of one's home against intruders, noting that only the latter charge was required. Id. at 11-12. We observed that the concept of a "dwelling" should have been "expressly defined to include the apartment's entranceway." Id. at 12. We noted that "the trial judge referred

to a porch as being part of a dwelling" but that would not necessarily "be understood to include the doorway into a common hallway in an apartment setting." Ibid.

Bilek thus provides no support for the conclusion that the landing on the second floor of defendant's building where defendant stabbed Taylor was part of his "dwelling." As we have explained, Bilek dealt with an incident that occurred either within or in the entranceway to the defendant's apartment.

The decision in State v. Bonano, 59 N.J. 515 (1971), also does not support defendant's argument. There, the Court considered the doctrine of retreat and expressly limited it to cases "where the defendant is actually in his dwelling house." Id. at 520. In Bonano, the defendant apparently struck his wife because she left the house without his permission. Id. at 517.

The defendant's step-daughter informed defendant's brother-in-law about what had happened. Ibid. The brother-in-law armed himself with a knife and set out for his sister's home. Ibid. The defendant was standing in the doorway of his house as his brother-in-law began to mount the steps of the house. Ibid. The defendant fired a revolver and shot his brother-in-law, who died shortly thereafter. Ibid. The Supreme Court held that a person need not retreat when attacked in his own dwelling house, and a dwelling

includes "[a] porch or other similar physical appurtenance." Id. at 519-20.

However, the facts of this case are significantly different from those in Bonano, where the defendant was standing in the doorway to his home. The duty to retreat did not apply because the defendant was within his "dwelling home," which included his porch.

In this case, the evidence presented at trial did not "clearly indicate" that the area of the second-floor landing outside of B.K.'s condominium, where defendant used deadly force, was part of defendant's "dwelling home." Thus, the judge had no obligation to sua sponte charge the defense under N.J.S.A. 2C:3-4(c).

Affirmed.