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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0305-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DOMINIQUE MITCHELL,

Defendant-Appellant.

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Submitted September 14, 2023 – Decided October 11, 2023

Before Judges Vernoia and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Indictment No. 18-02-0075.

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

Matthew J. Platkin, Attorney General, attorney for respondent (Amanda G. Schwartz, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Dominique Mitchell of second-degree aggravated assault by causing serious bodily injury to N.J.R. (Nina), fourth-degree criminal mischief, third-degree possession of a weapon—a knife—for an unlawful purpose, third-degree unlawful possession of the knife, and three counts of the petty disorderly persons offense of harassment.<sup>1</sup> Defendant argues the court erred by denying his motion to dismiss the second-degree aggravated assault charge following the close of the State's case and by failing to instruct the jury on self-defense as a complete defense to the aggravated assault charge.<sup>2</sup> We affirm.

## I.

The trial evidence established that on September 11, 2017, defendant resided with his then-girlfriend C.R. (Carol), her mother Nina, and Carol's sister

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<sup>1</sup> Following the return of the jury's verdict, the court found defendant guilty of the disorderly persons offense of simple assault. We use initials and pseudonyms to refer to the victims of the offenses charged in the indictment because the names of victims and alleged victims of domestic violence are excluded from public access under Rule 1:38-3(c)(12).

<sup>2</sup> Defendant does not challenge his convictions for criminal mischief, the possessory weapons offenses, the harassment offenses, or the simple assault. We therefore affirm those convictions. See Green Knight Cap., LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) (quoting Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 319 (App. Div. 2017)) (holding issues not briefed on appeal are deemed abandoned).

A.N-F (Ali) and her boyfriend J.M. (Jim). During the evening, Carol heard defendant in another room yelling and "cussing" at her son and spanking the child as defendant attempted to put him to sleep. Defendant became angry after Carol had told him she would put the child to sleep. Defendant entered the room where Carol laid on a bed, and defendant "tried grabbing" her "arm and pulled [her] hair." When defendant let go of Carol's arm, she took the child downstairs to Nina's bedroom.

Carol testified she had told Nina that she intended to call the police about defendant "putting his hands on [her] and [her] son," and Nina left the bedroom and told Carol's father, who was in the living room, about defendant's actions. According to Carol, her father said something to defendant, who responded by throwing "stuff" around the home.

Carol testified defendant attempted to push past Nina to enter the bedroom where Carol had remained, and Nina "gently" or "lightly" pushed defendant "back a couple steps" to prevent him from entering. According to Carol, defendant then punched Nina in the face and pushed her into a wood stove that stood near Nina's bedroom door.

Nina testified she had heard Carol and defendant yelling and arguing upstairs. Nina exited her bedroom and saw Carol coming down the stairs. Upset

and crying, Carol entered Nina's bedroom. Nina first spoke with Carol in the bedroom and then exited the room when she heard defendant coming down the stairs.

According to Nina, defendant attempted to enter her bedroom, but she "put [her] arm up for him not to" enter and that is when defendant punched her. Nina further testified she did not push defendant and "all [she] did was put [her] hand up because he wanted to go in [her] bedroom." She also testified Carol could not have seen her interaction with defendant outside the bedroom because the door was closed after she left the room.

Nina recalled defendant also had pushed her against the wall, put his hands on her throat, and "started choking" her. Ali came down the stairs and pulled defendant off Nina. According to Nina, defendant then began "hitting" Ali. In response, Nina "grabbed [defendant] from behind" to "pull him off" Ali. Defendant then "bashed [Nina's] head," and she "fell and hit the wood stove."

Nina testified that a few minutes later, she saw defendant on the steps holding a knife he kept in his room. Defendant and Jim argued, and Jim told defendant to "fight like a man and put the knife down." Defendant then threw the knife from his position on the steps, and the knife landed at Ali's feet.

Ali and Jim, who were asleep when the altercation began, testified defendant was "throwing punches" at Nina when she hit the wood stove. Ali explained she had tried to pull defendant off Nina to stop him from punching her, and defendant had responded by punching Ali instead. As Nina testified, it was after she had tried to pull defendant off Ali that he bashed her head and she fell onto the stove.

Jim testified he did not arrive downstairs until after Ali because he had to get dressed and put on his glasses. By the time Jim got downstairs, defendant had stopped punching Nina and Ali and was instead destroying items in the house. Defendant then attacked Nina a second time, and it was during this second attack he knocked her into the wood stove.

An ambulance took Nina to a local hospital, but she was then rushed to Cooper Hospital Trauma Center due to the extent of her injuries. She was treated by Dr. Ann Leilani Fahey, who specializes in plastic and reconstructive surgery. Dr. Fahey ordered a CAT scan of Nina's face and specifically, her facial bones, and determined Nina required surgery for a malar complex fracture on the left side of her face. According to Dr. Fahey, the malar complex fracture consisted of "fractures or breaks in multiple bones on the left side of [Nina's] face around her eye and her cheek."

Nina was released from the hospital but returned four days later for a two-and-one-half-hour surgery. During the procedure, Dr. Fahey exposed Nina's bones and "put little plates and screws across the fractures to realign them and keep them where they're supposed to be." Nina had four plates installed in her left cheek and titanium mesh near her eye. The surgery required three incisions, two outside her eye and one inside her mouth.

When asked at trial about the injuries she had sustained as a result of defendant's actions, Nina explained that one of the plates in her cheek "goes past her gum" and, as a result, she is "always in pain . . . because [she] can feel the plate." She testified she has worn dentures prior to the incident, but she could no longer wear the dentures—more than two years after the incident—because one of the plates installed during the surgery causes pain along her top gum line. Nina also testified she suffers from constant pain in her left eye following the incident and surgery.

Defendant moved for a judgment of acquittal on the second-degree assault charge following the close of the State's case. Defendant argued the State had failed to present sufficient evidence permitting a reasonable jury to convict him beyond a reasonable doubt of the offense because the State failed to establish defendant caused Nina serious bodily injury such that he could be convicted of

second-degree aggravated assault under N.J.S.A. 2C:12-1(b)(1) as charged in the indictment. The court denied the motion, finding that although the State had not presented evidence there was a substantial risk of death from Nina's injuries or she suffered any permanent disfigurement, the evidence, and the reasonable inferences from the evidence, established Nina could no longer wear her dentures as a result of her injuries. The court reasoned the evidence showed Nina had suffered a protracted impairment of the function of a bodily member or organ—her mouth—because it could be reasonably inferred her inability to use her dentures impaired her ability to use her mouth to eat.<sup>3</sup>

Defendant did not present any witnesses. As noted, the jury convicted defendant of second-degree aggravated assault of Nina, criminal mischief, three counts of petty disorderly persons offense harassment, and possessory weapons offenses. The court found defendant guilty of the simple assault of Carol.

The court imposed a five-year custodial term on the aggravated assault charge subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2, and lesser concurrent custodial terms on the remaining charges. This appeal followed.

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<sup>3</sup> The court also addressed defendant's claimed entitlement to a judgment of acquittal on other charges. We do not address defendant's other requests because he does not challenge the court's disposition of them on appeal.

Defendant presents the following arguments for our consideration:

POINT I

THE COURT ERRED BY NOT DISMISSING THE SECOND-DEGREE AGGRAVATED ASSAULT CHARGE, BECAUSE THE STATE OFFERED NO EVIDENCE THAT [DEFENDANT] CAUSED "SERIOUS" BODILY INJURY, WHICH REQUIRES PROOF OF "SUBSTANTIAL RISK OF DEATH," "SERIOUS, PERMANENT DISFIGUREMENT," OR "PROTRACTED LOSS OR IMPAIRMENT OF THE FUNCTION" OF THE BODY.

POINT II

THE COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE CODE'S JUSTIFICATION PRINCIPLES.

II.

Defendant first argues the court erred by denying his motion for acquittal on the second-degree aggravated assault charged at the close of the State's case. Defendant reprises the assertion he made before the trial court. He contends he was entitled to an acquittal on the second-degree assault charge because the State had failed to present evidence establishing an essential element of the crime—that defendant caused a serious bodily injury to Nina.

We conduct a de novo review of a court's denial of a motion for a judgment of acquittal at the close of the State's case pursuant to Rule 3:18-1. State v.



Josephs, 174 N.J. 44, 81 (2002). Under the Rule, a court shall enter a judgment of acquittal at the close of the State's case on the defendant's motion or its own initiative "if the evidence is insufficient to warrant a conviction." R. 3:18-1. In State v. Reyes, our Supreme Court established the following standard to determine if the State presented adequate evidence to survive a motion for acquittal under Rule 3:18-1:

whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt.

[50 N.J. 454, 459 (1967).]

In our review of an order denying a motion for a judgment of acquittal, "the relevant question is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Josephs, 174 N.J. at 81 (emphasis in original) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). We "must consider the State's proofs in light of the [Reyes] standard and . . . determine therefrom how the motion should have been decided." Ibid. (alteration in original).

In pertinent part, N.J.S.A. 2C:12-1(b)(1) provides that a person is guilty of second-degree aggravated assault if the person "[a]ttempts to cause serious bodily injury to another . . . or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury." Serious bodily injury is defined as "bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." N.J.S.A. 2C:11-1(b). "'Serious bodily injury' is to be distinguished from 'significant bodily injury,' which is defined by N.J.S.A. 2C:11-1(d) as 'bodily injury which creates a temporary loss of the function of any bodily member or organ or temporary loss of any one of the five senses.'" State v. Kane, 335 N.J. Super. 391, 397-98 (App. Div. 2000).

To establish defendant's guilt of aggravated assault under N.J.S.A. 2C:12-1(b)(1) based on reckless conduct as alleged in the indictment, the State was required to prove beyond a reasonable doubt that defendant had caused serious bodily injury to Nina and had acted recklessly under circumstances manifesting extreme indifference to the value of human life. Model Jury Charges (Criminal), "Aggravated Assault – Serious Bodily Injury (N.J.S.A. 2C:12-1(b)(1))," (rev. Jan. 9, 2012). Defendant claims he was entitled to a judgment of acquittal

because the State failed to prove he caused serious bodily injury to Nina.<sup>4</sup> He does not argue the evidence was insufficient to establish he recklessly caused Nina injury.

The State does not contend the evidence established defendant had recklessly caused bodily injury which either created a substantial risk of death or resulted in a serious permanent disfigurement under N.J.S.A. 2C:11-1(b). The State argues it satisfied its burden of proving defendant had caused a serious bodily injury because the evidence showed Nina suffered a protracted loss or impairment of the function of a bodily member or organ—her mouth. We therefore determine only whether the State's evidence, when viewed in the light most favorable to the prosecution, allowed a rational trier of fact to conclude beyond a reasonable doubt that Nina had suffered from a protracted loss or impairment of her mouth such that she suffered a serious bodily injury under N.J.S.A. 2C:11-1(b). Josephs, 174 N.J. at 81.

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<sup>4</sup> The indictment charged defendant with "recklessly caus[ing] serious bodily injury to" Nina, and the court instructed the jury as to the elements of that offense under N.J.S.A. 2C:12-1(b)(1). The indictment did not charge defendant with attempting to cause serious bodily injury to Nina under N.J.S.A. 2C:12-1(b)(1), which provides, in part, a person is guilty of second-degree aggravated assault by "[a]ttempt[ing] to cause serious bodily injury to another."

In State v. Norman, we held evidence showing the victim of an alleged assault had suffered from a "small right subdural hematoma," which caused headaches that largely subsided within two weeks and which the defendant's doctor expected to "resolve spontaneously" did not constitute serious bodily injury under N.J.S.A. 2C:11-1(b). 405 N.J. Super. 149, 160 (App. Div. 2009).

In Kane, we determined a broken nose did not qualify as a serious bodily injury under N.J.S.A. 2C:11-1(b) because there was no "evidence indicating that 'the victim's condition was protracted, prolonged or extended in time.'" 335 N.J. Super. at 399. We explained that to establish serious bodily injury, the State should present evidence "concerning how the injury affected the victim's daily life and normal activities," id. at 398, and that evidence as to the "nature and extent" of the injury "may determine whether" the injury resulted in a protracted loss or impairment of the function of a bodily member or organ under N.J.S.A. 2C:11-1(b). Id. at 398-99. We concluded that evidence showing the victim suffered only a broken nose, without more, did not establish a serious bodily injury. Id. at 399.

Here, the evidence presented by the State established Nina had suffered injuries beyond simply the broken bones that were repaired during the lengthy surgery that followed defendant's assault. As she explained during her

September 2019 trial testimony, Nina had worn dentures prior to the assault in August 2017, but due to the injuries recklessly inflicted by defendant and the resultant surgery, she had been unable to wear her dentures and continued to suffer from pain in her gums over the two years following the incident.

As the trial court correctly determined, Nina's testimony permitted a reasonable inference that she had suffered, and would continue to suffer, a protracted impairment of the use of her mouth such that the State sustained its burden of presenting evidence upon which a jury could, and did, find beyond a reasonable doubt that defendant had recklessly caused Nina serious bodily injury under N.J.S.A. 2C:12-1(b)(1) and N.J.S.A. 2C:11-1(b). See, e.g., State v. Villar, 150 N.J. 503, 507, 518 (1997) (finding evidence the defendant struck the victim in the mouth, splitting her lip, breaking a tooth, and requiring stitches, and the victim "still had throbbing in her gums" two years later established the victim suffered a "serious bodily injury" supporting a second-degree aggravated assault conviction under N.J.S.A. 2C:12-1(b)(1)). We therefore affirm the court's denial of defendant's motion for judgment of acquittal on the second-degree aggravated assault charge following the close of the State's case.

### III.

Defendant also argues the court erred by failing to sua sponte instruct the jury on the affirmative defense of self-defense. Defendant contends the court was obligated to instruct the jury on self-defense because Carol's testimony Nina gently or lightly pushed defendant back a few steps as he attempted to enter Nina's bedroom provided a reasonable factual basis supporting the instruction.

Where, as here, a defendant does not object to a jury charge, we review the court's alleged failure to provide a correct charge for plain error. State v. Funderburg, 225 N.J. 66, 79 (2016); R. 2:10-2. "[P]lain error requires demonstration of 'legal impropriety in the charge prejudicially 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. Chapland, 187 N.J. 275, 289 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969)). When a defendant does not object to the charge, "there is presumption that the charge was not error and was unlikely to prejudice . . . defendant's case.'" State v. Montalvo, 229 N.J. 300, 320 (2017) (quoting State v. Singleton, 211 N.J. 157, 182 (2012)).

In determining whether a failure to provide an instruction to a jury constitutes plain error, we must consider that "[a]ppropriate and proper charges

to a jury are essential for a fair trial," State v. Carrero, 229 N.J. 118, 127 (2017) (quoting State v. Daniels, 224 N.J. 168, 180 (2016)), and "crucial to the jury's deliberations on the guilt of a criminal defendant," State v. Jordan, 147 N.J. 409, 422 (1997). However, for an error in a charge to require reversal, it must be "sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict that it otherwise might not have reached." State v. Galicia, 210 N.J. 364, 388 (2012) (alteration in original) (quoting State v. Lazo, 209 N.J. 9, 26 (2012)).

"A trial judge must sua sponte charge self-defense . . . 'if there exists evidence in either the State's or the defendant's case sufficient to provide a "rational basis" for its applicability.'" Id. at 390 (quoting State v. O'Carroll, 385 N.J. Super. 211, 236 (App. Div. 2006)). In the absence of a request for a self-defense instruction, the "'evidence must "clearly indicate[]" such a defense' to warrant a self-defense instruction." State v. Fowler, 239 N.J. 171, 185 (2019) (alteration in original) (quoting Galicia, 210 N.J. at 390-91).

N.J.S.A. 2C:3-4(a) provides that "the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." "To avail himself of the justification of self-defense, the actor must have an "actual, honest,

reasonable belief" in the necessity of using force." Galicia, 210 N.J. at 389 (quoting State v. Perry, 124 N.J. 128, 161 (1991)). "The reasonableness of the defendant's belief is to be determined by . . . an objective standard of what a reasonable person would have done in defendant's position in light of the circumstances known to defendant at the time force was used." State v. Sanders, 467 N.J. Super. 325, 334 (App. Div. 2021) (quoting State v. Bryant, 288 N.J. Super. 27, 34 (App. Div. 1996)).

Measured against these principles, we find no plain error in the lack of a sua sponte self-defense instruction. "In considering whether to charge the jury on self-defense, a court should consider the circumstances that might give rise to that defense, including the defendant's and alleged aggressor's conduct." State v. Rodriguez, 195 N.J. 165, 174 (2008). Here, defendant's argument is founded on Carol's testimony she saw Nina lightly or gently push defendant back a few steps as he sought to enter Nina's bedroom. The argument ignores that Carol also testified that once defendant was pushed back a few steps, defendant punched Nina in the face. Thus, accepting Carol's testimony as accurate, after being forced backward by Nina's gentle push, defendant became the aggressor by punching Nina in the face as she did nothing more than stand outside her bedroom. Moreover, Carol did not see anything further because she was "hiding



with [her] son" in the bedroom, and although Nina denied pushing defendant, she testified that as defendant approached her bedroom, he had pushed her against the wall and began choking her.

In our view, that evidence does not "clearly indicate[] a defense to warrant a self-defense instruction" such that the court was obligated to sua sponte provide a self-defense charge to the jury. Fowler, 239 N.J. at 185 (alteration in original). Based on any objective standard, the evidence does not support a finding that a reasonable person would have believed defendant's actions and use of force—punching Nina in the face and choking her—were warranted in light of the circumstances presented after defendant stepped backward a few steps in response to Nina's light or gentle push. Sanders, 467 N.J. Super. at 334. The court therefore did not err by not including in its jury charge an instruction on self-defense.

To the extent we have not expressly addressed any arguments made on defendant's behalf, we find they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION