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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1141-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WAYNE M. HALL, a/k/a
CHRISTIAN J. CREWS,

Defendant-Appellant.

Submitted June 7, 2023 – Decided June 15, 2023

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Indictment No. 19-04-0458.

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

Mark Musella, Bergen County Prosecutor, attorney for
respondent (K. Charles Deutsch, Assistant Prosecutor,
of counsel and on the brief).

PER CURIAM

Defendant Wayne M. Hall, a/k/a Christian J. Crews, appeals from the entry of a March 30, 2020 judgment of conviction ("JOC"), which sentenced him to three years' imprisonment with a one-year period of parole ineligibility, following a jury trial in which defendant was convicted of third-degree resisting arrest by use or threat of physical force or violence, contrary to N.J.S.A. 2C:29-2a(3)(a). We reverse and remand for a new trial.

We discern the following facts from the record. On February 7, 2019, Englewood police officers Sean O'Hara, Jason Mejia, and Michael McCue were all working security detail in the courtroom of the Englewood Municipal Court.¹ The officers were uniformed and wearing standard police utility belts.

Near the end of the court's session that day, the municipal judge sentenced defendant to ten days in Bergen County Jail for a motor vehicle offense. After the municipal judge imposed his sentence, defendant "continued to plead his case to the judge," who ignored him and turned away. At that point, the judge told the officers to place defendant under arrest.

¹ Only officers O'Hara and Mejia testified in this matter; the facts as established within are largely derived from their testimony.

Following the judge's orders, officers Mejia and McCue approached defendant from behind and explained that he was being placed under arrest.² However, defendant "again continue[d] to try to speak to the judge" in an attempt to "plead his case." Officer Mejia advised defendant to cooperate and asked him to place "both his hands behind the small of his back," but defendant continued to refuse. Rather than put his hands behind his back, defendant "became very stiff and . . . placed both of his arms [tight] in front of himself, grabbing his wrists" with his hands clenched.

Once again, officer Mejia pleaded with defendant to cooperate, but defendant refused and continued to ignore the officer's commands. Defendant spoke over Mejia, in an attempt to communicate with the municipal judge, with his voice growing louder.

At that point, it became "clearly evident" to the officers that defendant "wasn't going to obey." Officers Mejia and McCue then approached defendant from both sides and "placed their hands on his arms in an attempt to move his hands from the front of his body to the back of his body, so [that defendant] could be handcuffed." However, defendant began to "flail[] his arms" and upper

² Officer O'Hara testified that he saw officers Mejia and McCue approach defendant and that officer Mejia was "very professional and very straightforward with his instructions."

torso away from the officers and "shoulder[ed] his weight" against them, preventing the officers from "get[ting] a very good, solid grasp of him." Defendant "sw[ung] his arms in a very violent fashion," "freed both of his hands from the officers," and moved backward in the courtroom away from the judge, placing himself between the courtroom's benches.

After defendant freed both of his arms, Mejia and McCue tried to bring him to the ground by "grabbing his legs." At that point, Officer O'Hara—who had been standing between defendant and the judge—intervened. O'Hara grabbed defendant's left arm to "gain control of it and place it behind [defendant's] back." Defendant then "pulled his arm towards him[self], which brought [O'Hara] off-balance [and caused him to] lean forward, at which time [defendant] turned around to face [O'Hara]." Then, defendant's "left arm came across [O'Hara's] head, pinning [O'Hara's] head . . . between [defendant's] body and . . . arm." Officer Mejia continued to try to grab defendant's leg but was unsuccessful.

While holding on to O'Hara, defendant allegedly reached for the butt end of O'Hara's gun and began to pull on it, causing the firearm to move.³ Officer

³ O'Hara testified that he felt "a very distinct firm pull on [his] firearm."

O'Hara placed his hand on his holster to keep the firearm holstered and away from defendant.

O'Hara then grabbed defendant's hands and lifted him up, causing the two to hit the floor and court benches; the two men separated, and O'Hara was able to get back on his feet "a distance away from" defendant. When defendant got up from the floor, Mejia and McCue again approached defendant and grabbed both of his arms, advising defendant to "stop resisting arrest."

Meanwhile, O'Hara drew his Taser and warned defendant that he was going to use it to control him. However, defendant continued to struggle, using the courtroom benches "as leverage" while Mejia and McCue attempted to restrain him. Due to "the violent manner in which [defendant] was acting" and the inability of the several officers to otherwise control him, O'Hara discharged his Taser at defendant once Mejia and McCue moved out of the line of fire.⁴

According to the officers, the Taser "was only slightly effective." "[T]he Taser deploys two probes that are connected by wires back to the initial device[:]

⁴ When a Taser is deployed, a camera turns on to record; the State played the video from the Taser at trial, which recorded the officers' continued commands to defendant to stop resisting. The video does not show defendant's fall and ultimate arrest. Due to its poor quality, the video is largely unhelpful in assessing the series of events which occurred in the courtroom on the date of the incident.

one probe struck [defendant] in the upper thigh area, the other one went into his sweatshirt but did not make contact with his body, . . . limiting the amount of current that [was] sent through." Thus, the Taser did not "paralyze [defendant] for about five seconds," as it was supposed to. The only noticeable effect on defendant "was a quick stiffness in his leg." Thus, defendant "was still able to move his upper body freely and continued to do so in terms of swinging his upper torso and arms."

After the Taser's five-second cycle, officers Mejia and McCue continued to try and subdue defendant. At that time, a fourth officer—Officer Calderin—arrived in the courtroom from the vestibule and began to clear benches out of the way. Only then was O'Hara able to trip defendant, causing him to fall to the ground, at which point the officers were finally able to control both of defendant's arms and handcuff him. O'Hara and Calderin then lifted defendant to his feet, searched him for weapons, and moved him to the arrest processing room. From start to finish, the entire incident lasted between three to four minutes.

As a result of this incident, on April 3, 2019, a Bergen County grand jury returned Indictment No. 19-04-00458-1, charging defendant with second-degree disarming a law enforcement officer, contrary to N.J.S.A. 2C:12-11 (count one);

third-degree aggravated assault of a law enforcement officer, contrary to N.J.S.A. 2C:12-1(b)(5)(A) (count two); and third-degree resisting arrest by use or threat of physical force or violence, contrary to N.J.S.A. 2C:29-2a(3)(a) (count three).

Defendant's jury trial lasted six non-consecutive days, from February 20, 2020 to February 28, 2020. The State presented its case in one day, only calling officers O'Hara and Mejia to testify. The defense rested its case without presenting any witnesses.

Before submitting the case to the jury, the judge provided the following instructions as to count three:

Count III of the indictment charges defendant with committing the crime of resisting arrest by using or threatening to use force or physical violence against P.O.s O'Hara, and/or Mejia, and/or McCue, and/or using any other means to create a substantial risk of causing physical injury to P.O.s O'Hara, and/or Mejia, and/or McCue.

. . . .

In order to convict defendant of this charge, . . . the State first must prove beyond a reasonable doubt that defendant committed the basic offense of resisting arrest. The four elements of that offense are: 1) that P.O.s O'Hara, and/or Mejia, and/or McCue were law enforcement officers; 2) that P.O.s O'Hara, and/or Mejia, and/or McCue were effecting an arrest; 3) that defendant knew or had reason to know

that P.O.s [] O'Hara, and/or [] Mejia, and/or [] McCue were law enforcement officers effecting an arrest; and 4) that . . . defendant purposely prevent or attempted to prevent P.O.s [] O'Hara, and/or [] Mejia, and/or [] McCue from effecting the arrest.⁵

. . . .

. . . If you find that the State has proven the basic offense of resisting arrest beyond a reasonable doubt, you must continue your deliberations to consider the offense charged in the indictment, which is the most serious form of the crime of resisting arrest: namely, whether the State has proven beyond a reasonable doubt that, in resisting arrest, [] defendant used or threatened to use physical force or violence against a law enforcement officer or another. . . . Physical force means the exercise of strength or power against the victim. That force need not entail pain or bodily harm and need not leave any mark. Physical . . . violence means dynamic power showing great strength, power, intensity, fury, and destructiveness.

If you find that the State has proven beyond a reasonable doubt all five elements of the offense, then you must find defendant guilty of resisting arrest by using or threatening to use physical force or violence against a law enforcement officer or another, the offense charged in the indictment, . . . the most serious form of the crime of resisting arrest. If the State failed to prove the fifth element beyond a reasonable doubt,

⁵ Before finalizing these instructions and submitting them to the jury, the judge and counsel for both sides discussed their substance. There, the judge specifically asked defense counsel if he objected to the inclusion of the "and/or" language suggested by the State, to which defense counsel replied: "No objection. That's fine." No further discussion of that discrete issue was had.

you must find the defendant guilty of the basic offense of resisting arrest.

[(emphasis added).]

The judge further provided a general instruction on the requirement of unanimity, stating that "[t]he verdict must represent the considered judgment of each juror and must be unanimous as to each charge. This means all of you must agree if [] defendant is guilty or not guilty on each charge." "You may return on each crime charged a verdict of either not guilty or guilty. Your verdict, whatever it may be as to each crime charged, must be unanimous. Each of the [twelve] members of the deliberating jury must agree as to the verdict."

On February 28, 2020, the jury acquitted defendant of counts one and two,⁶ but found defendant guilty of count three. This appeal followed.

On appeal, defendant raises the following arguments for our consideration:

POINT I

THE FAILURE TO INSTRUCT THE JURY THAT THEY HAD TO UNANIMOUSLY AGREE TO THE IDENTITY OF THE VICTIM REQUIRES REVERSAL OF DEFENDANT'S CONVICTION. (Not Raised Below).

⁶ The jury also acquitted defendant of the lesser-included offense of simple assault against O'Hara.

POINT II

THE REPEATED TESTIMONY FROM BOTH POLICE WITNESSES THAT DEFENDANT HAD RESISTED ARREST WAS INADMISSIBLE AND HIGHLY UNFAIRLY PREJUDICIAL LAY OPINION TESTIMONY, AND ITS ADMISSION REQUIRES REVERSAL OF DEFENDANT'S CONVICTION. (Not Raised Below).

Because defendant did not object or otherwise raise before the trial court the legal issues he now raises on appeal, we review his arguments under the plain error standard of Rule 2:10-2. See State v. Singh, 245 N.J. 1, 13 (2021) ("When a defendant does not object to an alleged error at trial, such error is reviewed under the plain error standard"). Under this standard, "[t]he mere possibility of an unjust result is not enough." State v. Funderburg, 225 N.J. 66, 79 (2016).

"In the context of a jury trial, the 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.'" State v. G.E.P., 243 N.J. 362, 389-90 (2020) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)). Thus, the plain error standard requires a determination of: "(1) whether there was error; and (2) whether that error was 'clearly capable of producing an unjust result,' R. 2:10-2; that is, whether there is 'a reasonable doubt . . . as to whether the error led the jury to a result it

otherwise might not have reached." State v. Dunbrack, 245 N.J. 531, 544 (2021) (quoting Funderburg, 225 N.J. at 79). "To determine whether an alleged error rises to the level of plain error, it 'must be evaluated in light of the overall strength of the State's case.'" State v. Clark, 251 N.J. 266, 287 (2022) (quoting State v. Sanchez-Medina, 231 N.J. 452, 468 (2018)).

Even in criminal cases, our Supreme Court has noted that plain error review "is a 'high bar,' requiring reversal only where the possibility of an injustice is 'real' and 'sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Alessi, 240 N.J. 501, 527 (2020) (first quoting State v. Santamaria, 236 N.J. 390, 404 (2019); and then quoting State v. Macon, 57 N.J. 325, 336 (1971)). "The 'high standard' used in [our] plain error analysis 'provides a strong incentive for counsel to interpose a timely objection, enabling the trial court to forestall or correct a potential error.'" Santamaria, 236 N.J. at 404 (quoting State v. Bueso, 225 N.J. 193, 203 (2016)). "A defendant who does not raise an issue before a trial court bears the burden of establishing . . . plain error because 'to rerun a trial when the error could easily have been cured on request[] would reward the litigant who suffers an error for tactical advantage.'" Id. at 404-05 (quoting State v. Ross, 229 N.J. 389, 407 (2017)).

Here, defendant was convicted pursuant to N.J.S.A. 2C:29-2a(3)(a), which provides that a person is guilty of third-degree resisting arrest if "he purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest" and "[u]ses or threatens to use physical force or violence against the law enforcement officer or another[.]"

First, to support a conviction for the basic offense of resisting arrest, which is a disorderly persons offense, our courts have held that the State must prove four elements beyond a reasonable doubt: (1) the person making the arrest was a law enforcement officer; (2) that person was effecting an arrest; (3) the defendant knew or had reason to know that a law enforcement officer was effecting an arrest; and (4) the defendant purposely prevented or attempted to prevent the officer from effectuating the arrest. State v. Simms, 369 N.J. Super. 466, 470-71 (App. Div. 2004); see Model Jury Charge (Criminal), "Resisting Arrest – Flight Not Alleged" (2007). This offense is then elevated to a third-degree crime, "which is the most serious form of . . . resisting arrest," if the State proves a "fifth element" beyond a reasonable doubt: "that, in resisting arrest, the defendant used or threatened to use physical force or violence against a law enforcement officer or another." Model Jury Charge (Criminal), "Resisting Arrest – Flight Not Alleged" (2007) (quoting N.J.S.A. 2C:29-2a(3)(a)).

On appeal, defendant's first argument revolves around the so-called unanimity requirement, which mandates that "'jurors [must] be in substantial agreement as to just what a defendant did' before determining his or her guilt or innocence." State v. Frisby, 174 N.J. 583, 596 (2002) (quoting United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977)); State v. Parker, 124 N.J. 628, 633 (1991) ("[T]he unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" (quoting Gipson, 533 F.2d at 457)); see Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (recognizing that "a [criminal] defendant enjoys a 'constitutional right to demand that his liberty not be taken from him except by . . . the unanimous verdict of a jury of twelve persons.'" (quoting Thompson v. Utah, 170 U.S. 343, 351 (1898)). While Article I, Paragraph 9 of the New Jersey Constitution and Rule 1:8-9 require a unanimous verdict in criminal cases, Parker, 124 N.J. at 633, "exactly how [the unanimity requirement] plays out in individual cases is more complicated." Frisby, 174 N.J. at 596. For instance, unanimity is not required where "a statute embodies a single offense that may be committed in a number of cognate ways." Id. at 597.

Defendant asserts that the specific identity of the victim(s) is an "essential element" of third-degree resisting arrest by use or threatened use of force or

violence, N.J.S.A. 2C:29-2a(3)(a), of which he was convicted. In so doing, defendant argues that his conviction should be reversed due to the court's failure to specifically instruct the jury that they must unanimously agree on the identity of "the victim" of the third-degree crime, which allegedly amounted to plain error warranting reversal of his conviction.

Specifically, defendant points to the fact that the instructions for the elements of the basic offense included "and/or" when listing the three officers, which established three "possible victims" for the resisting arrest charge. This matter was compounded by the language used when describing the fifth element of the third-degree crime—i.e., the use or threatened use of force element. In that regard, defendant relies on the fact that the jury was instructed to consider whether "defendant used or threatened to use physical force or violence against a law enforcement officer or another," and that "[p]hysical force means the exercise of strength or power against the victim," (emphasis added), which defendant contends "in no way" resolved the issue that there were three potential victims.

Under these circumstances, defendant asserts that the jury was required to unanimously agree on the identity of the victim(s) before it could convict defendant of third-degree resisting arrest. Here, because there were three law

enforcement officers against whom defendant was alleged to have used or threatened use of physical force or violence, defendant asserts that the jury could have found that all three officers, or any combination thereof, were the victim(s) of his allegedly unlawful conduct. Thus, without including a specific unanimity requirement, defendant contends that the instructions created a "clear risk" that not all jurors would agree on the identity of the victim of the third-degree crime, leading to a non-unanimous verdict.

In support of his position, defendant cites to State v. Gentry, 183 N.J. 30 (2005), wherein the Court applied the principle of unanimity to reverse a conviction for second-degree robbery where there was an indication that the jury was not in unanimous agreement as to which of the two potential victims had been subject to the defendant's alleged unlawful force during the theft. Id. at 31-33. There, the defendant was indicted on one count of second-degree robbery, pursuant to N.J.S.A. 2C:15-1, of a store manager "and/or" an employee. Id. at 31. It was alleged that, during the theft, defendant "charged" an employee, knocking her backwards, and punched, kicked, and dragged the store manager as the manager attempted to prevent the defendant from exiting the store. Ibid. Thus, it was the State's theory that the defendant had shoplifted and used force against the employee, the manager, or both, while he fled. Ibid.

However, the defendant contended that he only "brushed" past the employee in running away, and accidentally kicked the manager, who had grabbed onto the defendant's pants in an attempt to thwart his escape. Ibid. Therefore, the defendant's central argument was that he never intended to use force against or threaten either of the alleged victims. Ibid.

During deliberations, the jury sent a note to the trial judge explaining that, while all jurors were in agreement that "defendant knowingly used force against" either the manager or the employee, they could not agree as to whether the employee or the manager had been the victim of the unlawful force. Id. at 31-32. One group of jurors believed that the unlawful force had been applied only against the manager, while another group believed that the opposite was true. Ibid. The trial court ultimately concluded that such an outcome represented a unanimous jury finding of guilt and so instructed the jury. Id. at 32.

On appeal, a majority of an Appellate Division panel upheld the trial court's ruling; however, Judge Coburn dissented on the ground that the jurors had not unanimously agreed as to which acts were committed against which victims. State v. Gentry, 370 N.J. Super. 413, 426-27 (App. Div. 2004) (Coburn, J., dissenting). In Judge Coburn's view, the jury's note to the trial judge clearly

demonstrated the requisite dangers of a fragmented verdict and jury confusion regarding unanimity. Ibid.

Ultimately, the Supreme Court reversed the decision of the Appellate Division and remanded for a new trial, substantially for the reasons expressed in Judge Coburn's dissent. Gentry, 183 N.J. at 33. Thus, the Court concluded that an unanimity instruction was necessary in the matter to counteract the confusion caused by the fact that there was more than one potential victim to the robbery. See id. at 31-33.

Here, because defendant was charged and convicted in a single indictment of resisting arrest by use or threatened use of physical force or violence against three victims, the pertinent question is whether the facts are sufficiently similar to those in Gentry or whether they present a great enough "danger of a fragmented verdict" to have warranted a specific unanimity instruction. See Parker, 124 N.J. at 641.

"Ordinarily, a general instruction on the requirement of unanimity suffices to instruct the jury that it must be unanimous on whatever specifications it finds to be the predicate of a guilty verdict." Ibid. Our Supreme Court has held, however, that a specific unanimity requirement is necessary "'in cases where there is a danger of a fragmented verdict'" and, in such cases, "'the trial court

must[,] upon request[,] offer a specific unanimity instruction." Id. at 637 (quoting United States v. North, 910 F.2d 843, 875 (D.C. Cir. 1990)). This circumstance can arise where the facts are "'exceptionally complex'" or "'where there is a variance between the indictment and the trial proofs.'" Id. at 636 (quoting United States v. Ryan, 828 F.2d 1010, 1020 (3d. Cir. 1987)). Moreover, "[a]lthough such a charge should be granted on request, in the absence of a specific request, the failure so to charge does not necessarily constitute reversible error." Id. at 637. The "core question" in such cases is "whether the instructions 'as a whole posed a genuine risk that the jury would be confused.'" Id. at 638 (quoting United States v. North, 920 F.2d 940, 951 (D.C. Cir. 1990)). In so doing, the court must focus on whether the charges "formed a core of conceptually-similar acts," and whether there was "any tangible indication of jury confusion." Id. at 639.

Guided by these legal principles, we are constrained to reverse defendant's conviction. While recognizing that the risk of jury confusion is not as apparent as that in Gentry, we find that the same underlying concerns of a fragmented verdict are present here.

Although "a jury charge is presumed to be proper when it tracks the model jury charge," State v. Cotto, 471 N.J. Super. 489, 543 (App. Div. 2022), the

instructions at issue in the instant matter were not sufficiently molded to the material facts of this case. See *ibid.* ("[A]n instruction that is appropriate in one case may not be sufficient for another case. Ordinarily, the better practice is to mold the instruction in a manner that explains the law to the jury in the context of the material facts of the case." (quoting *State v. Concepcion*, 111 N.J. 373, 379 (1988)). Here, the use of "and/or" in describing the elements of the basic offense—which constituted a significant departure from the model jury charge—coupled with the absence of a specific unanimity instruction on the fifth element of the elevated third-degree crime, created a substantial risk of a non-unanimous verdict on the identity of "the victim" of defendant's alleged use of physical force. Specifically, some jurors may have found that defendant used force against Officer Mejia to prevent him from effecting an arrest, others may have found that defendant used force against Officer O'Hara to prevent him from effecting an arrest, and still others may have found that defendant used force against Officer McCue to prevent him from effecting an arrest. Therefore, because "[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 because we discern "no tactical advantage" in defendant's

failure to object at trial, see Santamaria, 236 N.J. at 404, we agree with defendant and find plain error warranting reversal.

Finally, the error in this matter cannot be said to be harmless in light of the State's evidence of defendant's guilt. See State v. J.L.G., 234 N.J. 265, 306 (2018) ("An error is harmless unless, in light of the record as a whole, there is a 'possibility that it led to an unjust verdict' – that is, a possibility 'sufficient to raise a reasonable doubt' that 'the error led the jury to a result it otherwise might not have reached.'" (quoting State v. Macon, 57 N.J. 325, 335-36 (1971))). At the outset, we recognize that incorrect jury instructions "are poor candidates for rehabilitation under a harmless-error analysis," State v. Rhett, 127 N.J. 3, 7 (1992), and are "excusable only if they are harmless beyond a reasonable doubt," State v. Vick, 117 N.J. 288, 292 (1989) (quoting State v. Crisantos, 102 N.J. 265, 273 (1986)).

Here, the jury acquitted defendant of count two, which charged him with aggravated assault of an officer and the lesser-included charge of simple assault. Both of these charges related to defendant's conduct as it pertained to Officer O'Hara, whose testimony regarding defendant's alleged use of physical force against him was the most compelling. Thus, had the jury been properly instructed that they were required to unanimously agree on the identity of "the

victim," there is—at least—a meaningful and reasonable chance that "the error led the jury to a result it otherwise might not have reached." G.E.P., 243 N.J. at 389-90 (quoting Jordan, 147 N.J. at 422).

In light of our decision to reverse defendant's conviction and remand pursuant to defendant's first argument, we discern no need to address the remaining issues.

Reversed and remanded for a new trial in accordance with this opinion.

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



CLERK OF THE APPELLATE DIVISION