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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3262-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES A. STUART,

Defendant-Appellant.

Submitted May 3, 2017 – Decided August 3, 2017

Before Judges Accurso, Manahan and Lisa.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 13-09-0949.

Joseph E. Krakora, Public Defender, attorney for appellant (Stefan Van Jura, Deputy Public Defender, of counsel and on the brief).

Sean F. Dalton, Gloucester County Prosecutor, attorney for respondent (Douglas B. Pagenkopf, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant James A. Stuart was charged in a four-count indictment with two counts of murder, one count of aggravated

manslaughter, and one count of possessing a firearm with the purpose of using it unlawfully against the person or property of another. These counts arose out of an incident in which there was only one victim, David Compton, who was killed by a single gunshot wound to his head. More specifically, the indictment charged: Count One, purposeful murder, N.J.S.A. 2C:11-3a(1); Count Two, knowing murder, N.J.S.A. 2C:11-3a(2); Count Three, aggravated manslaughter, N.J.S.A. 2C:11-4a; and Count Four, possession of a firearm with purpose to use it unlawfully against the person or property of another, N.J.S.A. 2C:39-4a. The jury acquitted defendant of Counts One and Four, and convicted him of Counts Two and Three. Accordingly, the jury found defendant guilty of both murder and aggravated manslaughter for this single homicidal act against a single victim. After merging Count Three with Count Two, the judge sentenced defendant to thirty years imprisonment with thirty years parole ineligibility, the minimum allowable sentence for murder. See N.J.S.A. 2C:11-3b(1).

Defendant raises the following points on appeal:

> POINT I
>
> DUE PROCESS REQUIRES THE KNOWING MURDER AND AGGRAVATED MANSLAUGHTER CONVICTIONS TO BE REVERSED. THERE WAS ONLY A SINGLE VICTIM, YET AN ERRONEOUS JURY INSTRUCTION PERMITTED THE JURY TO CONVICT ON BOTH OFFENSES. THE REQUISITE MENTAL STATES ARE IRRECONCILABLE AND THERE IS NO PRINCIPLED BASIS TO ELEVATE ONE

CONVICTION OVER THE OTHER. (Not Raised Below).

POINT II

THE TRIAL COURT ERRED IN ITS FAILURE TO CHARGE THE MISTAKE OF FACT DEFENSE. (Not Raised Below).

POINT III

THE TRIAL COURT ERRED IN ITS FAILURE TO CHARGE THE INTOXICATION DEFENSE. (Not Raised Below).

POINT IV

THE COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR A JUDGMENT OF ACQUITTAL OF THE MURDER CHARGES AND FOR A NEW TRIAL.

POINT V

THE AGGRAVATED MANSLAUGHTER CONVICTION SHOULD BE REVERSED BECAUSE THE STATE'S IMPROPER ARGUMENT ELEVATED DEFENDANT'S STANDARD OF CARE ABOVE THE OBJECTIVE REASONABLE PERSON STANDARD, WHICH, BY DEFNITION, ESTABLISHES THE FLOOR OF RECKLESS CONDUCT. (Not Raised Below).

POINT VI

THE CUMULATIVE EFFECT OF THE TRIAL ERRORS DENIED DEFENDANT HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL, AND WARRANTS REVERSAL. (Not Raised Below).

We agree with Points I and II. We conclude that the failure to charge the jury to consider the homicide counts sequentially and failure to charge the defense of mistake of fact constituted

plain error which was not harmless. Accordingly, we reverse and remand for a new trial as to Counts Two and Three.

I.

The homicide occurred on January 5, 2013. Defendant was a Deptford Township police officer at that time. Defendant and Compton were close personal friends, a friendship that dated back to their high school days about ten years earlier. The relevant factual circumstances can be divided, for purposes of analysis, into three parts: the events leading up to the time defendant and Compton were alone in defendant's house, which is where the homicidal act occurred; the activities and interactions of defendant and Compton during the hours they were alone in his house, including the shooting; and the events in the immediate aftermath of the shooting. All were relevant to the jury's assessment of defendant's guilt or innocence on the various charges presented to them.

The first set of events are not in dispute. Defendant worked a midnight shift, ending at about 6:30 a.m. on January 4, 2013. He went home and slept for a few hours, woke up and had lunch, and remained in his home, where he lived alone. By prior arrangement, defendant, Compton, and three other men, all of whom were friends of each other, planned to meet that night at a local bar. At about 9:00 p.m., Compton arrived at defendant's house. They

watched television together, and, at about 11:00 p.m., Compton drove himself and defendant to the bar. As planned, they met up there with their friends. The five friends remained at the bar until its 2:00 a.m. closing time. They enjoyed their evening, dancing with some women at the bar, conversing, and, of course, consuming some alcohol. Defendant contended that he drank about four beers during the four hours at the bar, and one shot of liquor.

At trial, defendant testified that he and Compton had no disagreements or disputes of any kind during their time together that evening, including at the bar. The other three men all testified to the same effect with respect to the bar. A surveillance video at the bar was played during trial, which further confirmed there were no disputes between any of the men, including between defendant and Compton.

When the bar closed, the other three men went to a nearby diner. Defendant and Compton went to defendant's house, where it was their intention to watch a movie, "Dredd," on Compton's computer through a website. En route from the bar to defendant's house, the two men stopped at a convenience store for food. Defendant again testified there was no dispute between the men at that time, and the surveillance video from the convenience store, played at trial, confirmed that fact.

The lead investigator in the case, Detective John Petroski of the Gloucester County Prosecutor's Office, confirmed in his trial testimony that the surveillance videos from the bar and the convenience store did not show any evidence of a conflict between defendant and Compton. Indeed, defendant, Compton, and several other friends were scheduled to take a cruise together the following week.

The next set of events pertain to the activities at defendant's house from the time they arrived there until the shooting that occurred shortly before 5:00 a.m. At trial, defendant gave a detailed account of his version of what transpired. Some of what he said was corroborated by physical evidence later found at the scene; some was not. Of course, the jury's assessment of defendant's credibility regarding these critical events was essential to their assessment of his culpability. It is not disputed that he fired the shot that killed Compton.

According to defendant, he and Compton had trouble getting the movie to play on defendant's television. They finally succeeded in making the necessary connection to defendant's computer and began to watch the movie at about 3:30 a.m. Defendant and Compton sat on opposite ends of the L-shaped couch, with defendant on the left side and Compton on the right. According

to defendant, during the entire time at his house, after returning from the bar, he consumed one or two beers and a large glass of scotch. He said Compton had one beer at his house.

Defendant carried his off-duty weapon, a Glock .27 handgun, in an ankle holster. He said that when he sat back to watch the movie and propped his leg up to relax, the ankle holster became uncomfortable and he removed it. The gun was loaded with a total of eleven rounds, nine in the magazine, one in the magazine extender, and one in the chamber. Defendant said he placed the holster containing the loaded gun beside himself on the couch.

According to defendant, Compton inquired about the gun. Apparently, Compton was unfamiliar with guns and had not had any personal experience with them. He wanted to know how the gun worked and wanted to handle it. Defendant said he took all of the steps required to render the gun safe. After removing it from the holster, he pointed it to the side, removed the magazine, racked the slide back to eject the round from the chamber, and visually and physically ensured there were no rounds in the gun. He then "dry fired" it a couple of times, pointing it to the side. The expelled round had fallen on the floor and defendant said he placed it in a standing up position on the end table next to him. He said he placed the magazine on the couch near where he was sitting. He then allowed Compton to handle the gun.

The movie they were watching was an action film with a lot of shooting in it. Compton was using the gun to pretend he was shooting the bad guys in the movie, by dry firing it at the television. At some point, Compton told defendant he was surprised at how hard it was to pull the trigger, something he did not expect. Defendant told him that of the three guns he had, the Glock .27 had a lighter trigger pull than the other two, an old revolver and his duty weapon, a Glock .22. Compton asked if he could see those two guns to compare trigger pulls. Defendant agreed.

He left Compton alone in the living room, leaving behind the ammunition as well as the gun that Compton was handling, and went upstairs to his bedroom to get the other two guns from the lockbox in which he kept them. He said he had no bullets for the revolver, and he had never had any, because he had bought that gun as a collector's item and never used it for actual firing. Defendant said that while still upstairs, he rendered the Glock .22 safe in the same manner as he had done previously with the Glock .27. He said he left the loaded magazine and the round that was ejected from the chamber in the lockbox. He then returned to the living room with both guns.

Defendant said that when he returned, the Glock .27 appeared to be in the same area where defendant had previously left it. He

allowed Compton to handle the other two guns and dry fire them. From time to time, defendant left the living room to use the bathroom or to get another drink, always leaving the live ammunition along with the three guns in the living room while Compton was there alone.

At some point during the movie, Compton asked defendant how to reload a gun. Defendant said he explained how it would be done but did not actually demonstrate it. Defendant drifted off to sleep. He is not sure how long he slept, but did not believe it was very long. He said he was awakened by a loud sequence in the movie, and when he woke up, Compton was laughing at him because he had fallen asleep.

Defendant said he reached for the Glock .27 at his side, observing that the magazine was still outside the weapon and in the same location where it had previously been on the couch. He was sitting about six feet from where Compton was sitting on the other end of the couch. He said he intended to dry fire at the "bad guys" in the movie, and as he began to pull the trigger, Compton said something that caused him to instinctively turn toward Compton. Defendant said as he did so, he was in the process of completing his trigger pull. He heard a loud boom and "didn't know what happened." He later surmised that as he was turning

toward Compton the direction of the gun also turned toward him and the shot struck Compton in the cheek.

Then, in the immediate aftermath of the shooting, these events occurred. Upon hearing the loud noise, defendant said he jumped out of his chair and banged into a nearby table causing his glass of scotch to break. He dropped the gun and tried to determine what happened. According to him, he was not aware at that time that he had fired the gun he was holding and did not know if somehow one of the other guns had gone off. His first thought was that if he had fired the gun he was holding "there's going to be a hole in my TV now if it was that gun." He looked to see if there was a spark or other damage to his television. He then realized that Compton should have been "freaking out" like he was, but he "didn't hear anything from [him]." Defendant then turned toward Compton and saw a small hole and blood coming from his cheek.

Defendant said he immediately attempted to provide first aid by placing his hand on Compton's cheek to stop the bleeding. He then ran into the kitchen and got some paper towels. On his way back to the living room, he grabbed his cell phone. He said while keeping one hand on Compton's cheek with the paper towels, and holding the phone with the other hand, he called a direct line to County Dispatch that was programmed into his phone.

Defendant said he chose to call that number rather than 911 because, in his estimation, it was the quickest way to get emergency assistance. He said he was aware that 911 calls are sometimes misdirected. Even more specifically, he said that his home is in Deptford Township, but has a Wenonah address, and is also very close to another neighboring community, Woodbury Heights.

The recording of the call was played twice for the jury, once during the State's case and once during defendant's. The recording revealed that defendant immediately identified himself as a police officer by badge number and that he requested an ambulance for a man who was shot. When asked what happened, defendant said: "we had a, a, a man, he was ah playing with a weapon, it was loaded and ah he, there was a shot fired." He said the man was shot in the cheek, and he said he was putting pressure on his cheek at that time. The dispatcher asked whether this was a family member, and defendant responded that it was "a friend."

Another dispatcher then got on the line and asked defendant how it happened, to which defendant replied: "Ah he was, he was playing with one of my weapons, I, I don't know how it happened, I don't know." This dispatcher then instructed defendant to go and get a clean towel and hold it with pressure on the wound. Defendant apparently went and got a towel and told the dispatcher

he had done so and was holding it on Compton's wound. The dispatcher then told defendant an ambulance was on its way. The call ended at that point.

The dispatcher then called Sergeant Edward Kiermeier of the Deptford Township Police Department to confirm that the call was not a prank. The first dispatcher, Patricia Warlow, "wanted to make sure that before [she] put it out over the radio that the guys weren't messing and saying, he said that his friend shot himself in the cheek." Kiermeier said he and other officers would immediately go to defendant's home and asked Warlow to hold off on broadcasting the call.

At trial, Warlow testified that she was unsure whether the caller was sincere because the tone of his voice was "too quiet and [a] whisper. There was no urgency in the call like I previously had with other gunshot calls." However, Warlow acknowledged that it is often difficult to hear clearly the voice coming in, and indicated this might have been the situation when defendant said he was putting pressure on Compton's cheek. She also acknowledged that the other dispatcher on the call, Elliott Davis, did not think it sounded like the caller was kidding. Indeed, in the recording of the call with Kiermeier, Davis said: "It doesn't sound like he's joking around at all." Davis did not testify at trial.

The recording of these calls confirmed that the movie was still playing and could be heard in the background. Defendant said that at one point during his conversation with the dispatchers, he put the phone on speaker to enable him to better tend to Compton.

Defendant further testified that, after the emergency call ended, he took it upon himself to do something other than continue tending to Compton while waiting for emergency personnel to arrive. He said he was aware from his police experience that emergency personnel would not enter a residence if it contained unsecured firearms. Instead, they would wait outside for police officers to arrive to clear the scene. For this reason, he said he felt there was not much he could do for Compton at that time, so he racked the slide back on the Glock .27, placed its magazine in the gun and ran to his bedroom with that gun in his bloody right hand and the other two guns in his clean left hand. His reason for placing the magazine in the Glock .27 was to make it easier to carry all three guns at once. He placed the Glock .27 on top of his bedroom dresser, and placed the Glock .22 and revolver in the lockbox, which he then closed. He said he wiped the blood from his hand on his jeans and then ran back downstairs to Compton. He said it appeared that Compton was choking on his own blood and he

began to reposition him on his side. At that time, the police arrived.

Kiermeier said he was notified at about 5:01 a.m. that County Dispatch had received a potential prank call and he personally went to the location. He arrived at defendant's home at 5:07 a.m. Two other officers arrived at the same time in separate vehicles. Defendant opened the door for Kiermeier, who saw Compton lying upright on the couch. He was unconscious and unresponsive, but was breathing and had a pulse. There was a cloth towel and paper towels beside him. Kiermeier asked defendant where the weapons were and what happened. Defendant replied that the weapons were in a safe upstairs.

On Kiermeier's instructions, one of the other officers removed defendant from the home and stayed with him in the backyard. Kiermeier said defendant appeared to be in a state of shock, looking like he was "in a complete daze." He said he "kept on asking [defendant], 'What happened? Did he shoot himself? Did you shoot him?'" Kiermeier continued that he believed defendant said "I don't know." On cross-examination, Kiermeier acknowledged that defendant had not simply stated that he had no idea what happened, but said "[h]is friend was shot by accident."

Paramedics arrived at 5:09 a.m. They removed Compton from the scene at 5:35 a.m. and transported him by ambulance to a hospital, where he died six days later from the gunshot wound.

There was considerable testimony from various witnesses regarding the conditions at defendant's house after the shooting. The living room was messy. Different witnesses described it differently. It was acknowledged that some of the mess may have occurred through the activities of the paramedics. Defendant testified that he is not a particularly good housekeeper. Kiermeier said it was "kind of messy," and looked to him like a "frat house." The significance of this testimony is that it could have supported an inference that defendant and Compton had engaged in a physical altercation of some sort.

Further, the prosecutor argued that some of defendant's testimony was incredible. For example, his decision to remove the guns from the living room not only was contrary to police training not to disturb the scene of a potential crime, but could not have really been accomplished in the manner defendant described. The guns in the lockbox, namely his duty weapon and the revolver, were in the same location as they would normally be. The Glock .22 was fully loaded, yet there was no blood in the closet, no blood on the safe, no blood on the duty weapon or its magazine, or on the

revolver. The prosecutor argued that this scenario defied credulity:

> Now remember: When he took it out of the safe, he says initially there was one in the chamber and the magazine was separate. So he ejected the live round and left it in the safe, the lock box. That's his testimony. He would have had to go back up, one-handed, with two guns in his hand, put the guns -- open the safe, or he said he left the safe open. Put the guns in. He would have -- to get the gun the way that it was found, he would have had to reload it, rack it, and drop the magazine out again to put one in the chamber. Because when we found that gun in the safe, there was one in the chamber. He did all that with one hand and never got any blood on anything?

This argument calls into question defendant's entire story about bringing the extra guns downstairs because Compton wanted to see them and compare the trigger pulls and about the dry firing at the bad guys in the movie, leading up to the live shot that killed Compton.

As to that shot, the prosecutor suggested it was unlikely that Compton would have attempted to load the gun on his own, and the defense suggestion that Compton did so while defendant had dozed off was also not believable. The prosecutor demonstrated to the jury the difficulty and noise that would be attendant to placing one round in the chamber of the Glock .27. She said:

> He would have had to put the magazine in. Rack the slide back, and then eject the magazine and put it down and put this in the

> exact same location where it was without the defendant waking up or knowing what he was doing.
>
> Now, he said that there was a movie playing in the background. And yes, you can hear it on parts of the dispatch tape. It's not very loud, though. So he didn't hear the slide being racked. He didn't hear the magazine clicking, nothing.
>
> And David would have had to, again, load it, rack it, drop the magazine out -- that would've kept one in the chamber, and then the magazine come out -- put it right back where it was.

The State also emphasized at trial, and continues to argue, that defendant's initial call to County Dispatch is significant in that he was concealing any level of culpability. He chose his words very carefully to make it sound as though the victim had accidentally shot himself. The State also points out that the evidence revealed a slightly downward trajectory to the bullet wound, which is inconsistent with defendant's testimony that he was sitting on the couch at the same level as Compton, when the shot was fired. This evidence could suggest that defendant was standing when he fired the shot.

Without dispute, defendant had been consuming alcohol in the hours prior to the shooting. A blood draw of defendant at 8:42 a.m., about four hours after the shooting, revealed a blood alcohol content of .144 percent. The State did not produce expert

testimony in an effort to extrapolate from this result what defendant's blood alcohol content would have been at the time of the shooting. Instead, the State simply pointed out that defendant's blood alcohol level was far above the .08 percent level at which driving a motor vehicle is prohibited.

Ballistics testimony established that the shot was fired from at least five and one-half feet away from Compton. This is consistent with defendant's testimony that he was sitting about six feet away from Compton when the shot was fired.

The Glock .27, covered in blood, was found on defendant's dresser in his upstairs bedroom. It contained a magazine loaded with nine bullets and none in the chamber. It was "locked to the rear." Because the Glock .27 could hold a total of eleven rounds, the other two had to be accounted for. One was accounted for by an empty shell casing found in the living room, and the other was a live round found on or near the table where defendant said he had placed it when he first rendered the gun safe. The evidence established that if the gun would have been fired with the magazine in it, another live round would have automatically been fed into the chamber. When the gun was recovered from defendant's dresser, there was not a bullet in the chamber. Thus, at least to some extent, these circumstances were consistent with defendant's version of the events.

Throughout his testimony, both on direct and cross-examination, defendant repeatedly insisted that he was 100% sure the Glock .27 was safe. He did not believe his friend would ever have attempted to load the gun after defendant had initially made it safe. However, in hindsight, he surmised that Compton must have loaded it while defendant was sleeping. This was his entire defense to any homicide charges, whether murder, aggravated manslaughter, or reckless manslaughter. Defendant steadfastly insisted that he would have never pulled the trigger of the Glock .27 if he had any reason to believe or suspect that it was loaded.

In her summation, the prosecutor made strong arguments as to how the evidence constituted proof of defendant's recklessness. She mentioned the murder charges only briefly and did not dwell upon how the evidence supported proof of either purposeful or knowing murder. She referred to the allowable permissive inference that a jury could draw from the use of a deadly weapon in killing another that it was the perpetrator's purpose to take the victim's life or cause serious bodily injury resulting in death. Indeed, the prosecutor concluded her summation by urging the jury "to please find him guilty of at least aggravated manslaughter."

When faced with motions for acquittal of murder, both at the end of the State's case and at the conclusion of all the evidence, the trial court noted that this was an extremely close case, closer

than any he had ever seen or heard of before. However, he concluded that there was sufficient evidence upon which a jury could reasonably convict defendant of murder, and he denied the motions.

II.

Defendant contends in Point I that his murder and aggravated manslaughter convictions are fatally irreconcilable and resulted from erroneous jury instructions on the homicide charges. More particularly, defendant argues that the trial court erred by permitting the jury to render verdicts on incompatible theories of culpability for commission of a homicide and that the jury did, in fact, find that defendant acted with two mutually exclusive states of mind in killing Compton. Defendant argues that, in the circumstances of this case, there is no sound basis to favor one conviction over the other and due process requires that both convictions be vacated.

At the charge conference, the court reviewed with counsel its proposed jury instructions. The charge instructed the jurors to render its verdict on Count One, purposeful murder. Then, whether guilty or not, the jury was instructed to render its verdict on Count Two, knowing murder. Then, again whether guilty or not, to render its verdict on Count Three, aggravated manslaughter. Finally, with respect to the homicide charges, the jurors would be instructed that if they found defendant guilty of aggravated

manslaughter, they should skip the next question, pertaining to reckless manslaughter, and go on to their consideration of Count Four. If, however, they found defendant not guilty of aggravated manslaughter, they would be instructed to consider and decide whether defendant should be found guilty or not guilty of the lesser-included offense of reckless manslaughter. The proposed jury verdict sheet was set up accordingly. Neither counsel objected to these provisions in the jury instructions or on the verdict sheet. The instructions were thus given, and, as we have stated, the jury found defendant not guilty of purposeful murder, but guilty of both knowing murder and reckless manslaughter.

Defendant now argues, for the first time on appeal, that these instructions were erroneous as they failed to direct the jury to render its verdict in sequence, first on the murder charges[1], to consider aggravated manslaughter only if defendant were found not guilty of murder, and likewise, to consider reckless manslaughter only if they found defendant not guilty of aggravated

[1] The prevailing practice is to combine knowing or purposeful murder in a single count of an indictment. After being instructed on both forms of murder, jurors are then further instructed that they do not have to agree unanimously as to which form of murder is present, as long as they all believe it was one form of murder or the other. Model Jury Charge (Criminal), "Murder and Aggravated/Reckless Manslaughter" (2011).

manslaughter. Defendant argues this is plain error which deprived him of a fair trial.

In Point II, defendant argues that the trial court also committed plain error in failing to charge the mistake of fact defense. At the charge conference, this potential instruction was never discussed. Defense counsel never requested it, and the court did not give it. Defendant's entire defense was predicated upon his unyielding assertion that he was certain, in his own mind, that the Glock .27 was unloaded, and that otherwise, he would not have been dry firing it at the television and would not have tragically pivoted towards Compton in response to Compton's voice. Defendant argues that "[r]eversal of the murder and aggravated manslaughter convictions should be ordered because this failure deprived defendant of a fair trial," citing U.S. Const. amends. V and XIV, and N.J. Const. art. I, ¶ 10.

Defendant asserts that either of these plain errors in the jury instructions constitute, individually, a basis for reversal. Obviously, defendant also argues that the cumulative effect of both errors adds greater weight to the need for reversal. We agree with defendant.

Jury instructions not objected to at trial are reviewed for plain error. State v. McKinney, 223 N.J. 475, 494 (2015). We will only reverse if that error was "clearly capable of producing

an unjust result." R. 2:10-2; State v. Adams, 194 N.J. 186, 207 (2008). Our Supreme Court has established that

> [i]n the context of jury instructions, plain error is "[l]egal 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."
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> [State v. Camacho, 218 N.J. 533, 554 (2014) (second alteration in original) (quoting State v. Adams, 194 N.J. 186, 207 (2008)).]

An unjust result arises when the error raises a reasonable doubt as to whether the jury was led to a result it might not otherwise have reached. State v. Taffaro, 195 N.J. 442, 454 (2008).

The court must not look at portions of the charge alleged to be erroneous in isolation; rather, "the charge should be examined as a whole to determine its overall effect," State v. Jordan, 147 N.J. 409, 422 (1997) (quoting State v. Wilbely, 63 N.J. 420, 422 (1973)), and "whether the challenged language was misleading or ambiguous," State v. Nelson, 173 N.J. 417, 447 (2002) (citing State v. Simon, 161 N.J. 416, 477 (1999)).

"An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions." State v. Afanador, 151 N.J. 41, 54 (1997). Jury instructions have been described as "a road map to guide the jury, and without an

appropriate charge a jury can take a wrong turn in its deliberations." State v. Martin, 119 N.J. 2, 15 (1990). The judge "should explain to the jury in an understandable fashion its function in relation to the legal issues involved." State v. Green, 86 N.J. 281, 287 (1981). The trial 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 trial 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 (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 Nelson, supra, 173 N.J. at 446). See also Jordan, supra, 147 N.J. at 422 (holding 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, supra, 151 N.J. at 54.

"This requirement of a charge on a fundamental matter is more critical in a criminal case when a person's liberty is at stake." Green, supra, 86 N.J. at 289. "The key to finding harmless error in such cases is the isolated nature of the transgression and the fact that a correct definition of the law on the same charge is found elsewhere in the court's instructions." State v. Sette, 259 N.J. Super. 156, 190-91 (App. Div.), certif. denied, 130 N.J. 597 (1992).

Because defendant was acquitted of purposeful murder, he cannot be retried for that offense under double jeopardy principles. We therefore limit our discussion to knowing murder. To prove a defendant guilty of knowing murder, the State must prove beyond a reasonable doubt that the defendant caused the victim's death or serious bodily injury that resulted in the victim's death, and did so knowingly. N.J.S.A. 2C:11-3a(2). "A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result." N.J.S.A. 2C:2-2b(2). Thus, the State was required to prove that defendant was aware that his conduct (pulling the trigger while the gun was pointed at Compton) would kill Compton or cause serious bodily injury resulting in death.

On the other hand, as relevant here, a defendant commits aggravated manslaughter if he "recklessly causes death under circumstances manifesting extreme indifference to human life." N.J.S.A. 2C:11-4a(1). "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." N.J.S.A. 2C:2-2b(3). Thus, for defendant to be convicted of aggravated manslaughter, the State was required to prove beyond a reasonable doubt that he acted recklessly, namely that he consciously disregarded a substantial and unjustifiable risk that his conduct would cause Compton's death or serious bodily injury resulting in death.

Thus, knowing murder requires not only awareness, but a practical certainty that defendant's conduct would cause death or serious bodily injury resulting in death, whereas manslaughter involves only a conscious disregard of a substantial and unjustifiable risk of death. State v. Breakiron, 108 N.J. 591, 605 (1987). See also State v. Wilder, 193 N.J. 398, 409 (quoting State v. Jenkins, 178 N.J. 347, 363 (2004)).

The model jury instruction on murder and manslaughter directs the jury to consider manslaughter only if it acquits of murder:

> If you determine that the State has proven beyond a reasonable doubt that the defendant purposely or knowingly caused death

> . . . , you must find the defendant guilty of murder.
>
> If, on the other hand, you determine that the State has not proven beyond a reasonable doubt that the defendant purposely or knowingly caused death or serious bodily injury resulting in death, then you must find him/her not guilty of murder (and go on to consider whether the defendant should be convicted of the crimes of aggravated or reckless manslaughter).
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> [Model Jury Charge (Criminal) "Murder And Aggravated/Reckless Manslaughter" (2011) (emphasis added).]

The State argues that because aggravated manslaughter is a lesser-included offense of murder only because "a lesser kind of culpability suffices to establish its commission," N.J.S.A. 2C:1-8d(3), it is not inconsistent for a defendant to be convicted of both offenses. This argument has facial appeal because imbedded within the definition of recklessness is a concept similar to "knowing" conduct, namely, conduct by which an actor "consciously" disregards a particular risk. However, this argument does not take into account the requirement that a lesser-included offense should not be submitted to a jury for consideration unless they have first unanimously found the defendant not guilty of the greater offense. State v. Zola, 112 N.J. 384, 405 (1988) cert. denied, 489 U.S. 1022, 109 S. Ct. 1146, 103 L. Ed. 2d 205 (1989). This accords with the principle that "a trial court has an

independent obligation to instruct on lesser-included charges when the facts adduced at trial clearly indicate that a jury could convict on the lesser while acquitting on the greater offense." Jenkins, supra, 178 N.J. at 361 (emphasis added). In State v. Ruiz, 399 N.J. Super. 86, 96 (App Div. 2008), we described the principle as follows:

> A lesser-included offense charge is warranted when (1) "the requested charge satisf[ies] the definition of an included offense set forth in N.J.S.A. 2C:1-8d, and (2) . . . there [is] a rational basis in the evidence to support a charge on that included offense." State v. Thomas, 187 N.J. 119, 131 (2006); see also N.J.S.A. 2C:1-8e (included offense should not be charged "unless there is a rational basis for a verdict convicting the defendant of the included offense"). "[A] rational basis in the evidence for a jury to acquit the defendant of the charged offense [is also necessary] before the court may instruct the jury on an uncharged offense." State v. Brent, 137 N.J. 107, 113-14 (1994).
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> [(emphasis and alterations in original).]

We further noted in Ruiz that there is "no meaningful difference between a crime charged in an indictment and an unindicted lesser-included offense based on the trial evidence." Id. at 99. Therefore, the fact that aggravated manslaughter was included in the indictment as a separate count does not distinguish it from the principles generally applicable to submitting lesser-

included offenses to a jury. One such principle is that the jury must first acquit of the greater offense.

This is what our Model Jury Charge prescribes, as well as the model verdict sheet. This practice channels the jury's attention to the distinction between the various homicide offenses that it may choose from, with a clear mandate that the jury may either find the defendant not guilty or choose one and only one of the homicide charges that is appropriate based on the evidence. And, because there is no meaningful distinction between an indicted lesser-included offense and one simply based on the evidence (as was, in this case, reckless manslaughter), the State is not deprived of having the jury consider all appropriate offenses. The State's charging discretion is not impaired.

It is clear to us that the guilty verdicts on murder and aggravated manslaughter were inconsistent. We are mindful of the Dunn/Powell[2] rule, which provides generally that inconsistent verdicts are permitted to stand "because it is beyond our power to prevent them." State v. Banko, 182 N.J. 44, 54 (2004). Such verdicts are permitted, even when the jury's action does not benefit the defendant, "so long as the evidence was sufficient to

[2] Dunn v. United States, 284 U.S. 390, 52 S. Ct. 189, 76 L. Ed. 356 (1932); United States v. Powell, 469 U.S. 57, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984).

establish guilt on the substantive offense beyond a reasonable doubt." Id. at 55 (quoting State v. Petties, 139 N.J. 310, 319 (1995)). "That said, the return of an 'inconsistent verdict' may not insulate a conviction from reversal based on other defects in the criminal proceeding." Ibid. In other words, the "Dunn/Powell rule does not sanitize other trial errors," State v. Grey, 147 N.J. 4, 17 (1996), such as "when an incomplete or misleading jury instruction causes an unfair trial." Banko, supra, 182 N.J. at 55.

The instruction here was misleading and led to an implausible result. A defendant cannot act simultaneously with distinctly different mental states. The jury should have been instructed to choose which, if any, of the mental states was proven beyond a reasonable doubt, and in a descending order of culpability to comply with the principle that a lesser-included offense will be considered only if the greater offense has first been unanimously found not to have been proven beyond a reasonable doubt. We conclude that the inconsistency is not "sanitized" and cannot be overlooked or adjusted by merger at sentencing, as was done here. On the contrary, we conclude that the misleading instruction caused an unfair trial.

We next consider the failure to instruct the jury regarding mistake of fact. This case cried out for such an instruction.

Indeed, in its appellate brief, the State begins its discussion on that point as follows: "The State recognizes the strength of the Defendant's argument with regard to a charge to a mistake of fact in the jury instructions." Then, after acknowledging that no such instruction was given, the State continues: "However, the jury was instructed they could consider Defendant's testimony in terms of credibility." The State continues to argue that the mistake of fact instruction was not necessary because the jurors were instructed to consider the evidence presented by the witnesses and their credibility, and because defendant did not raise an objection at trial.

We do not agree that the instructions as a whole were adequate to instruct the jurors on this critical point of law as it applied to the facts of this case. As to the absence of an objection, of course we are guided by the plain error standard. As with the error regarding the homicide charges, the error in failing to give a mistake of fact charge raises a reasonable doubt as to whether the jury was led to a result it might not otherwise have reached. Taffaro, supra, 195 N.J. at 454.

N.J.S.A. 2C:2-4a(1) provides that a mistake of fact "is a defense if the defendant reasonably arrived at the conclusion underlying the mistake and . . . [the mistake] negatives the culpable mental state required to establish the offense."

"[E]vidence of [a defendant's] mistaken belief relates to whether the State has failed to prove an essential element of the charged offense beyond a reasonable doubt." State v. Sexton, 160 N.J. 93, 106 (1999). "'No person may be convicted of an offense unless each element of such offense is proven beyond a reasonable doubt.' If the defendant's ignorance or mistake makes proof of a required culpability element impossible, the prosecution will necessarily fail in its proof of the offense." Sexton, supra, 160 N.J. at 100 (quoting Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L. Rev. 681, 726-27 (1983) (quoting Model Penal Code § 1.12(1) (Proposed Official Draft 1962)). In other words, mistake of fact is not a separate element but a "defense" against the mental state element, which, once raised, the State must overcome.[3] Id. at 106-07.

In Sexton, the jury found the defendant guilty of reckless manslaughter. 160 N.J. at 96. The Supreme Court held the trial court erred in not charging the jury with mistake of the fact, even if unreasonable, that Sexton thought the gun was unloaded

[3] Subsection (a) of the mistake of fact statute is "technically unnecessary" given the prosecution's obligation to prove each element of an offense beyond a reasonable doubt. See State v. Pena, 178 N.J. 297, 306 (2004) (citing Sexton, supra, 178 N.J. at 106).

when he shot his victim. Id. at 105-07. There, the victim gave Sexton a gun with the assurance it was not loaded. Id. at 95. Unbeknownst to either party, there was a bullet in the firing chamber which killed the victim when Sexton pulled the trigger. Ibid. A ballistics expert testified that a gun novice might have thought the gun was unloaded if the magazine was removed after one round was inserted in the chamber. Ibid. The Court suggested that, instead of charging mistake as a separate defense for a crime based on recklessness, the jury should be charged as to the elements of the offense and how the claimed mistake affects the culpability the State must prove. Id. at 106.

The Sexton Court suggested the following mistake of fact charge for reckless manslaughter:

> In this case, ladies and gentlemen of the jury, the defendant contends that he mistakenly believed that the gun was not loaded. If you find that the State has not proven beyond a reasonable doubt that the defendant was reckless in forming his belief that the gun was not loaded, defendant should be acquitted of the offense of manslaughter. On the other hand, if you find that the State has proven beyond a reasonable doubt that the defendant was reckless in forming the belief that the gun was not loaded, and consciously disregarded a substantial and unjustifiable risk that a killing would result from his conduct, then you should convict him of manslaughter.
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> [Ibid.]

After setting forth this suggested charge, the Court stated: "Undoubtedly, our Committee on Model Criminal Charges can improve the formulation." Ibid.

The formulation presently in effect for the mistake of fact charge, for a knowing or purposeful crime, approved in 2007, is as follows:

> If you find that the State has failed to prove beyond a reasonable doubt that defendant did not believe that (mistake of fact or law), then you must find him/her not guilty of (offense charged). However, if you find that the State has proven beyond a reasonable doubt that defendant did not believe (mistake of fact or law), and you find that the State has proven all of the elements of the offense beyond a reasonable doubt, then you must find him/her guilty of (offense charged).
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> [Model Jury Charge (Criminal) "Ignorance or Mistake" (2007).]

For a reckless crime, the model charge provides:

> If you find that the State has failed to prove beyond a reasonable doubt that defendant did not believe that (mistake of fact or law), or that he/she was reckless in forming that belief, as I have already defined that term for you, then you must find him/her not guilty of (offense charged). However, if you find that the State has proven beyond a reasonable doubt that defendant did not believe that (mistake of fact or law), or that he/she acted recklessly in forming that belief, and you find that the State has proven all of the elements of the offense beyond a reasonable doubt, then you must find defendant guilty of (offense charged).

[Ibid.]

Thus, to find defendant guilty of knowing murder, the State was obligated to prove beyond a reasonable doubt that defendant did not believe that the gun was unloaded. If the jury was convinced that the State carried its burden on this point, the jury would then go on to consider whether the State proved all elements of knowing murder beyond a reasonable doubt, in which case they must find defendant guilty of that charge.

To find defendant guilty of a reckless crime, including aggravated manslaughter, and, if the jury were to reach it, reckless manslaughter, the State was obligated to prove beyond a reasonable doubt either that defendant did not believe that the gun was unloaded or that he was reckless in forming that belief. If the jury was convinced that the State carried its burden on this point, the jury would then go on to determine whether the State proved all of the elements of the offense beyond a reasonable doubt, in which case it must find defendant guilty of that offense.

A review of the totality of the judge's charge convinces us that these important principles were not conveyed to the jury. In his summation, defense counsel touched upon the subject to some extent, arguing that defendant could not be guilty of knowing murder because he "believed in his mind that the gun wasn't loaded." With respect to aggravated manslaughter, defense counsel

argued that defendant could not be guilty because he "picked up the gun . . . to dry-fire it at the TV, . . . pulling back on the trigger" while turning toward Compton "and bang! The shot goes off." In her summation, the prosecutor did not broach the subject.

In our view, even though we are well aware that defendant's asserted mistake of fact was highlighted in the trial, particularly through defendant's testimony, defense counsel's limited reference to it in his summation was not sufficient to convey to the jury the significance of this point. Further, defense counsel's argument was posited in his capacity as an advocate for defendant. The judge correctly charged the jury that arguments of counsel are not evidence. In her summation the prosecutor did not acknowledge that she was required, in order to obtain a conviction, to prove beyond a reasonable doubt that defendant did not believe that the gun was unloaded (as to murder) or, as to manslaughter, that she was required to prove beyond a reasonable doubt that defendant did not believe the gun was unloaded, or if he did, he recklessly formed that belief. Even had the prosecutor conceded that point, the absence of a clear and unequivocal explanation by the court, in accordance with the model charge, might have still required reversal.

The plain error occasioned by these two shortcomings in the jury instructions cannot be viewed as an isolated transgression

that we can overlook because the correct principles of law were provided to the jury elsewhere in the court's instructions, or at least in the arguments of counsel. Thus, we cannot deem these errors harmless. A new trial is required on the remaining charges for which defendant was not acquitted.

III.

For the sake of completeness, we briefly address defendant's remaining arguments. In Point III, defendant argues that the court erred in failing to charge the jury with the voluntary intoxication defense. Voluntary intoxication can provide a defense to a charge of knowing and purposeful conduct if it is sufficient to cause a "prostration of faculties," meaning the intoxication must be of an "extremely high level" rendering the defendant incapable of forming an intent to commit the crime. State v. Cameron, 104 N.J. 42, 54 (1986); see also N.J.S.A. 2C:2-8a and b. A jury issue arises only if the evidence is such that a jury could conclude that defendant's faculties were so prostrated. State v. R.T., 205 N.J. 493, 508 (2011). If not, the charge is not warranted. Ibid.

If a defendant requests the charge, it will be given if there is a rational basis in the evidence for it. Id. at 509 (2011). If defense counsel does not request the instruction, the "clearly

indicated" standard applies, in which the need for the charge must "jump off" the page. Id. at 509-10.

In this case, defendant testified and gave an extremely detailed account, often minute by minute, of the events that transpired in his home when he was there alone with Compton after returning from the bar and leading up to the shooting. His detailed account included the shooting itself and his actions in the immediate aftermath of the shooting. In describing the events and the actions he took, he often gave detailed accounts of his thought processes in real time which induced him to act in that manner. Simply stated, it was not clearly indicated from this record that defendant met the prostration of faculties test. There was no error in failing to give this charge.

In Point IV, defendant argues that the court erred in denying his motions for acquittal at the end of the State's case and again at the conclusion of all evidence. We have described previously in this opinion some of the facts that weigh against reckless conduct and could have supported a jury finding of knowing conduct in defendant's shooting of Compton. Defendant's vague and misleading statements to the dispatcher when he called for assistance could be deemed indicative of denying any culpability. The fact that he called County Dispatch as a police officer, rather than the public 911 service, could be viewed as evidence that he

was hoping for preferential treatment. The downward projection of the wound could support a finding that he was standing, not sitting as he said he was, when he shot Compton. The jury could have rejected as incredible defendant's testimony that Compton asked him how to reload the gun, that he explained the process, and shortly thereafter fell asleep, during which time Compton must have reloaded the gun by placing one live round in the chamber, but without the magazine being left in the gun. Likewise, the jury could have rejected defendant's description of replacing his duty weapon and revolver in the lock box, having reloaded the duty weapon to its normal condition, but with a total absence of blood on the guns, the magazine, the lock box, or in the closet.

Overall, in assessing a trial court's ruling on a motion for judgment of acquittal, an appellate court reviews the decision de novo. State v. Williams, 218 N.J. 576, 593-94 (2014). In so doing, this court must determine "whether the evidence, viewed in its entirety, be it direct or circumstantial, and giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn," is sufficient to allow the jury to find guilt beyond a reasonable doubt. State v. Kluber, 130 N.J. Super. 336, 341 (App. Div.), certif. denied, 67 N.J. 72 (1975) (citing State v. Reyes, 50 N.J. 454, 458-59 (1967)); see also R. 3:18-1 (discussing a

motion for acquittal at the close of the State's case). If the State has failed to prove any one of the elements of the crime charged, the motion must be granted. Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 3:18-1 (2016). The "trial judge is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." Kubler, supra, 130 N.J. Super. at 342.

A trial court's ruling on a motion for a new trial "shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law." R. 2:10-1.[4] See also Dolson v. Anastasia, 55 N.J. 2, 7 (1969).

From our review of the record, we concur with the trial court's assessment that this was a very close case as between murder and aggravated or reckless manslaughter. However, it does not clearly appear to us that there was a miscarriage of justice

[4] Similarly, pursuant to Rule 3:20-1, the trial judge shall not set aside a jury verdict unless "it clearly and convincingly appears that there was a manifest denial of justice under the law." The "semantic" difference between "miscarriage of justice" and "manifest denial of justice under the law" is an "oversight and should not be construed as providing for a different standard in criminal cases at the trial level than that applicable to appellate review and to civil cases at the trial level." Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 3:20-1 (2016) (citing State v. Perez, 177 N.J. 540, 555 (2003); State v. Gaikwad, 349 N.J. Super. 62, 82 (App. Div. 2002)).

under the law. Defendant's argument on this point does not provide a basis for reversal.

In Point V, defendant argues, for the first time on appeal, that the aggravated manslaughter conviction should be reversed because the State improperly argued that defendant should be subject to an elevated standard of care by virtue of his police officer status. Through cross-examination, the prosecutor established that defendant received special training in the handling of firearms, firearms safety, the use of firearms, and the like. The prosecutor elicited that by defendant's version of the events, his conduct constituted violations of some departmental regulations pertaining to firearms. In her summation, the prosecutor recounted some of this testimony and argued that the jury should consider defendant's specialized firearms training in assessing whether he acted in a reckless manner.

The court instructed the jury on recklessness, including the provision that the risk disregarded by a defendant charged with reckless conduct must be a gross deviation from "the standard of conduct that a reasonable person would follow in the same situation." Defendant now argues that it was improper to suggest that a police officer, trained in firearm safety, should be held to a higher standard.

Defense counsel did not object to any of the questions posed in this regard, nor to the prosecutor's summation comments on this point. In light of the absence of timely objections, the court was not given the opportunity to rule on the objections, and, if deemed appropriate, to sustain them, give a limiting or curative instruction, or take other appropriate action.

In our view, the experience or lack of experience with firearms of an individual is relevant testimony in assessing whether that individual acted recklessly in the use of a firearm. On the whole, these questions and summation comments did not exceed permissible bounds and do not constitute plain error that would warrant reversal.

We do note that any suggestion by the prosecutor that defendant was guilty of violating department regulations and that he acted as though the departmental rules did not apply to him could be problematic. Such questions and comments should be carefully framed to avoid any suggestion to the jury that defendant should be convicted on his criminal charges for violating departmental rules and regulations. If requested, an appropriate limiting instruction should be considered. On the basis of this record, however, where there was no objection and no request for an instruction, we do not find a basis for reversal on this point.

We need not address, beyond what we have already stated, the argument in Point VI that the cumulative effect of the trial errors denied defendant his right to due process and a fair trial, thus warranting reversal.

For the reasons stated in Part II of this opinion, defendant's judgment of conviction is reversed, and the matter is remanded for a new trial on Counts Two (knowing murder) and Three (aggravated manslaughter).

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

CLERK OF THE APPELLATE DIVISION