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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0583-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EMMANUEL C. DIKE,

Defendant-Appellant.

Submitted October 24, 2022 – Decided November 28, 2022

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 17-04-0244.

Joseph E. Krakora, Public Defender, attorney for appellant (Simon Wiener, Assistant Deputy Public Defender, of counsel and on the briefs).

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

PER CURIAM

Defendant appeals from a February 12, 2020 judgment of conviction for first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2), focusing his argument on the denial of a right to a fair trial because the judge failed to sua sponte issue a passion/provocation manslaughter charge to the jury. We affirm the conviction but remand to the sentencing court to enter an amended judgment of conviction reflecting the sentence as placed on the record during the sentencing hearing.

The following facts were adduced at trial. Defendant did not testify but his recorded statements to the police were read to the jury.

According to defendant, on October 19, 2016, his former girlfriend, Christa Capers, met him at his parent's house to discuss their recent break-up. Defendant asked if Capers would be willing to "give [him] one more shot." Capers declined to resume a relationship with defendant.

Defendant then confessed to Capers that he had been involved with another woman during the break in their relationship. Capers allegedly began hitting defendant "real hard." Defendant described Capers as "tall for a female" and thought she "should be a boxer."

Defendant told the police he was uncertain whether he initially put his hands on Capers' neck or just pinned Capers to the bed by her wrists. Defendant

stated that he "laid on her" with his full body weight while Capers was on the bed. Defendant claimed Capers "pushed [him] off" and resumed hitting him.

At that point, defendant explained he put his hands around Capers' neck. According to defendant, after a minute, Capers "passed out" and began "gurgling." Defendant kept "calling her and calling her." Eventually he laid down next to Capers and fell asleep. Defendant left the house around six o'clock the next morning.

Defendant's mother returned home from working the evening shift and found Capers cold and motionless in defendant's bedroom. Defendant's mother called 9-1-1 and investigators from the Union County Sheriff's Department were sent to the home. A detective working with the homicide task force at the Union County Prosecutor's Office asked defendant's parents to telephone their son but defendant did not answer the phone. Eight days later, the police discovered defendant at a hotel.

After the police located defendant, he willingly accompanied the officers to the Union County Prosecutor's Office. Defendant gave a statement after reviewing and signing a Miranda¹ waiver form. During the interview, defendant told the police his version of the events after Capers arrived at his house. The

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

police subsequently arrested defendant and charged him with Capers' murder. On April 5, 2017, a Union County grand jury indicted defendant on a charge of first-degree murder.

Defendant's trial began on December 10, 2019 and concluded on December 12, 2019. Before closing arguments, the trial judge conducted a charge conference. After the judge revised the proposed jury charges as requested by both counsel, defense counsel stated, "the charge is appropriate and acceptable to the defense." The judge instructed the jury on murder, aggravated manslaughter, and reckless manslaughter. The judge did not include any instruction on self-defense because defendant never asserted that defense.

The jury found defendant guilty of first-degree murder. On February 7, 2020, the judge sentenced defendant to a thirty-year term of imprisonment with thirty years of parole ineligibility. However, the February 11, 2020 judgment of conviction mistakenly indicated defendant's guilt was the product of negotiations between the State and defense counsel and imposed a thirty year period of parole "eligibility."

On appeal, defendant argues the following:

POINT I

THE TRIAL COURT PLAINLY ERRED BY NOT
GIVING A PASSION/PROVOCATION-

MANSLAUGHTER JURY CHARGE DESPITE IT BEING CLEARLY INDICATED IN THE RECORD, DENYING [DEFENDANT] A FAIR TRIAL AND REQUIRING REVERSAL AND REMAND. N.J. CONST. ART. 1, ¶ 10; U.S. CONST. AMEND. XIV. (NOT RAISED BELOW).

A. The Trial Court Was Required to Instruct the Jury [A]bout Any Lesser Offense Clearly Indicated by the Evidence as Viewed in the Light Most Favorable to [Defendant].

B. The Trial Evidence Clearly Indicated the Possibility of Adequate Provocation and Lack of Time to Cool Off, the Two Key Elements of Passion/Provocation Manslaughter.

1. Uncontroverted Evidence Revealed Battery, Which Clearly Indicates the Possibility of Adequate Provocation Almost as a Matter of Law.

2. The Trial Evidence Clearly Indicated the Possibility of Insufficient Time to Cool Off.

Our standard of review of jury charges is well settled. When a defendant alleges error in the jury charge, the charge must be reviewed as a whole. State v. Loftin, 146 N.J. 295, 379 (1996). We acknowledge that "[a]ppropriate and proper charges to a jury are essential for a fair trial." State v. Jordan, 147 N.J. 409, 421 (1997) (quoting State v. Green, 86 N.J. 281, 287 (1981)). Because an individual's liberty is at stake, "[e]rroneous instructions on matters or issues that are material to the jury's deliberation are presumed to be reversible error in

criminal prosecutions." Id. at 422 (citing State v. Warren, 104 N.J. 571, 579 (1986)). A "court has an 'independent duty . . . to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case, irrespective of the particular language suggested by either party.'" State v. Baum, 224 N.J. 147, 159 (2016) (alteration in original) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)).

However, "[w]ithout an objection at the time a jury instruction is given, 'there is a presumption that the charge was not error and was unlikely to prejudice the defendant's case.'" State v. Montalvo, 229 N.J. 300, 320 (2017) (emphasis added) (quoting State v. Singleton, 211 N.J. 157, 182 (2012)); see also State v. Funderburg, 225 N.J. 66, 79 (2016) (explaining that the time to object to a jury instruction is before the jury deliberates). When a defendant fails to object to an error regarding jury charges, we review for plain error. State v. Singh, 245 N.J. 1, 13 (2021); R. 2:10-2. "Under that standard, we disregard any alleged error 'unless it is of such a nature as to have been clearly capable of producing an unjust result.'" Funderburg, 225 N.J. at 79 (quoting R. 1:7-2). "The mere possibility of an unjust result is not enough. To warrant reversal . . . , an error at trial must be sufficient to raise 'a reasonable doubt . . . as to whether

the error led the jury to a result it otherwise might not have reached.'" Ibid. (alteration in original) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

Here, defendant claims the trial judge erred in failing to give a passion/provocation manslaughter charge warranting a new trial. However, defense counsel never requested this charge during the trial. Thus, we review for plain error. Having reviewed the record, we discern no plain error in the judge's exclusion of the passion/provocation manslaughter charge under the circumstances presented in this case.

Passion/provocation manslaughter, as a lesser-included offense to murder, is applicable "when a homicide which would otherwise be murder under [N.J.S.A.] 2C:11-3 . . . is 'committed in the heat of passion resulting from a reasonable provocation.'" State v. Galicia, 210 N.J. 364, 378-79 (2012) (quoting N.J.S.A. 2C:11-4(b)(2)). Thus, "murder can be downgraded to voluntary manslaughter by virtue of a finding of passion/provocation." Id. at 380.

"[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, 178 N.J. at 361. However, when a charge is not requested, "the charge should be delivered to the jury only when there is 'obvious record support for such [a]

charge" Funderburg, 225 N.J. at 81 (quoting State v. Powell, 84 N.J. 305, 319 (1980)). "Only if the record clearly indicates a lesser-included charge - that is, if the evidence is jumping off the page - must the court give the required instruction." State v. Denofa, 187 N.J. 24, 42 (2006).

There are four elements to passion/provocation manslaughter: "the provocation must be adequate; the defendant must not have had time to cool off between the provocation and the slaying; the provocation must have actually impassioned the defendant; and the defendant must not have actually cooled off before the slaying." State v. Mauricio, 117 N.J. 402, 411 (1990). While the first two elements are objective, the last two elements are subjective and the "subjective elements 'should usually be left to the jury to determine.'" State v. Carrero, 229 N.J. 118, 129 (2017) (quoting Mauricio, 117 N.J. at 413).

In determining if there is adequate provocation, the court must decide whether a reasonable person would have been provoked "sufficiently to 'arouse the passions of an ordinary man [or woman] beyond the power of his [or her] control.'" State v. Canfield, 470 N.J. Super. 234, 275 (App. Div.), certif. granted, 251 N.J. 38 (2022)² (quoting State v. King, 37 N.J. 285, 301-02 (1962)).

² The petition for certification granted in Canfield is "limited to defendant's argument that the trial court should have sua sponte instructed the jury on

The adequacy of the provocation depends on the proportionality of the response. State v. Darrian, 255 N.J. Super. 435, 449 (App. Div. 1992). Generally, "battery, except for a light blow, has traditionally been considered, almost as matter of law, to be sufficiently provocative." State v. Robinson, 136 N.J. 476, 492 (1994) (quoting Mauricio, 117 N.J. at 414).

However, where there is evidence of only a slight provocation, a disproportionate response will preclude a finding that the provocation was adequate. Darrian, 255 N.J. Super. at 449. Additionally, altercations where there is a significant disparity in the parties' size, strength, or control generally fail to constitute adequate provocation. Id. at 451 (holding strangulation by a taller and stronger individual would be out of proportion to punches inflicted by a shorter and weaker person); State v. Oglesby, 122 N.J. 522, 536 (1991) (holding that a "single blow by an unarmed woman could [not] have aroused the passions of an ordinary man beyond the power of his control").

Here, defendant told the police that Capers hit him "real hard." In response, defendant subdued and strangled Capers. Even if Capers hit defendant

passion/provocation manslaughter . . . in a murder trial in which the trial court determines to instruct the jury on self-defense" 251 N.J. at 38. Here, defendant never argued self-defense. Therefore, the Court's decision in Canfield, scheduled for oral argument on November 7, 2022, is unlikely to offer guidance relevant to the facts in this case.

repeatedly and forcefully as he claimed, the alleged provocation was outweighed by the severity of defendant's response, strangling Capers until she was dead.

Defendant's reaction in this case differs from the cases supporting adequate provocation for a passion/provocation manslaughter charge. In cases where we upheld the passion/provocation manslaughter charge, the physical altercation was waged on equal terms with serious threats of bodily harm. Even assuming all of the facts in defendant's statement to the police were true, including that Capers was taller and stronger than the average female, defendant's disproportionate reaction of rendering Capers unable to breathe precluded issuance of the passion/provocation manslaughter charge.

After Capers struck defendant, he subdued Capers by pinning her to the bed and laying on top of her. When Capers pushed defendant off, he claimed that she resumed hitting him. Instead of grabbing her wrists or pinning her to the bed as he did before, defendant strangled Capers until she stopped breathing.³ Despite Capers' alleged strength, defendant had sufficient control to restrain Capers by laying his body weight on top of her to thwart her punches. Under the circumstances, there was no parity of strength or control in the fight

³ According to the State's medical expert, it takes between three and four minutes to strangle a person to death.

between defendant and Capers, and defendant's reaction was disproportionate to any provocation. See State v. Viera, 346 N.J. Super. 198, 212 (App. Div. 2001) ("[T]he judge must determine whether a reasonable fact-finder could conclude that the loss of self-control was a reasonable reaction").

We are satisfied that nothing in this record "jumps off the page" to warrant the issuance of a sua sponte jury instruction on passion/provocation manslaughter. Because there were no facts suggesting defendant's satisfaction of the two objective elements for a passion/provocation manslaughter charge, the judge did not err, let alone commit plain error, by failing to sua sponte charge the jury in that regard.

While we affirm defendant's conviction, we remand for the sentencing judge to amend the judgment of conviction to reflect the judge's statements during the sentencing hearing. At the February 7, 2020 hearing, the judge sentenced defendant to a term of thirty years and stated defendant "must serve [thirty] years before [he was] eligible for parole." However, the February 11, 2020 judgment of conviction sentenced defendant to a prison term of thirty years, "with [thirty] years of parole eligibility" rather than "parole ineligibility." Additionally, the judgment of conviction incorrectly stated the sentence imposed was the result of negotiations between defendant and the State. It is

clear from the record that there was no negotiated plea in this case, and the judge sentenced defendant after the jury found him guilty of first-degree murder. Based on the differences between the judge's statements on the record during the sentencing hearing and the written judgment of conviction, we remand to the sentencing court to amend the judgment of conviction to be consistent with the statements placed on the record on February 7, 2020.

Affirmed as to the conviction but remanded to amend the judgment of conviction consistent with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION