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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4364-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KHIRY J. WALKER,

Defendant-Appellant.

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Argued April 26, 2023 – Decided May 3, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 12-12-1117.

Austin J. Howard, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Austin J. Howard, of counsel and on the briefs.)

Stephen C. Sayer, Assistant Prosecutor, argued the cause for respondent (Jennifer Webb-McRae, Cumberland County Prosecutor, attorney; Andre R. Araujo, Assistant Prosecutor, of counsel and on the brief).

## PER CURIAM

Defendant Khiry J. Walker appeals from his conviction for fourth-degree criminal trespass, N.J.S.A. 2C:18-3(a), following a jury trial. Among other things, defendant contends that his conviction should be reversed because the trial judge failed to properly instruct the jurors on how they should conduct their deliberations. Indeed, the judge omitted this portion of the final jury instruction in its entirety. Because this clear error was not harmless under the circumstances of this case, we reverse defendant's conviction and remand for further proceedings.

The background of this case is set forth in our opinion on defendant's earlier appeal from the denial of the petition for post-conviction relief (PCR) defendant filed after his conviction. See State v. Walker, Docket No. A-3675-18 (App. Div. June 22, 2020). In that opinion, we summarized the pertinent procedural history and facts as follows:

Defendant and his co-defendant, Ryan A. Askins, were jointly charged with a July 2012 armed home invasion in a ten-count indictment. Defendant was charged with the following eight counts: attempted second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a) and N.J.S.A. 2C:15-1(a)(1); first-degree robbery, N.J.S.A. 2C:15-1(a)(1); second-degree burglary, N.J.S.A. 2C:18-2(a)(1); third-degree terroristic threats, N.J.S.A. 2C:12-3(b); fourth-degree

aggravated assault, N.J.S.A. 2C:12-1(b)(4); third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)1; third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2); and second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a).

. . . .

The State presented the following evidence at the 2014 trial. In July 2012, defendant's aunt, P.B., who was eight months pregnant, had a birthday party at her home. The party was attended by multiple family members, including defendant and her other nephew, Askins. Guests began to leave between 8:30 p.m. and 9:00 p.m., at which time P.B. also left to drive a guest home. Upon returning ten to fifteen minutes later, she saw defendant and Askins still sitting outside. She told them she was going to bed and asked them to leave. Defendant and Askins remained sitting for two minutes before leaving.

At about 1:00 a.m., P.B. was awakened by a knock on her front door. She looked through her window to see who was knocking but saw no one. She returned to bed, but not "even a minute" later, she heard knocking again, this time from her back door. The speaker at the door identified himself as her "Uncle Rock." P.B. testified that although she was not expecting her uncle, he occasionally "check[ed] up on" her "at about that time." P.B. opened the door and discovered two men dressed in black. The men were wearing face masks with hoodies tightly tied around their faces to conceal their identities.

The men entered P.B.'s house, pointing guns at her and demanding money. P.B. recognized the men's voices as defendant and Askins. They all moved into P.B.'s bedroom, where her young grandson was

sleeping. Afraid for her grandson, P.B. began "struggling" and "fighting" with the men.

As P.B. "was punching" the men, they fought back and "hit[] [her] in [her] stomach." She pulled off their masks and confirmed the assailants were defendant and Askins. She testified that upon seeing their faces, she said aloud, "Oh, really, Ryan and Khiry." P.B. fell to the ground, as did her grandson who fell off the bed. Defendant and Askins asked P.B.'s grandson "where the money at" and as he was on the floor, defendant hit the child on his leg with a gun.

P.B. called for her son, who was sleeping in the living room. Askins hit P.B.'s son on the head with his gun, causing him to bleed and resulting in what P.B. described as "a small hole on the . . . top of his head, right in the center." Without taking any property, defendant and Askins ran away.

Despite the injuries sustained by her son, and having been hit in her stomach while pregnant, P.B. did not call the police immediately after the incident. P.B. testified that she "was too upset and scared" to do so. She contacted the police the following day.

During the joint jury trial, neither defendant nor Askins testified. P.B., and two police officers testified on behalf of the State. P.B.'s grandson was also scheduled to testify, but he "shut down" prior to his testimony and refused to enter the courtroom.

[Id. at 1-4.]

The jury found defendant and Askins "guilty only of criminal trespass as a lesser-included offense of burglary." Id. at 2. Because defendant had already

been "incarcerated beyond the maximum eighteen-month sentence for a fourth-degree crime," the trial court sentenced defendant on the day of his conviction to a time-served sentence. Id. at 4-5.

Although defendant asserted that he asked his trial attorney to file a direct appeal on his behalf, no appeal was filed. Id. at 2. Defendant thereafter filed a timely petition for PCR and argued that his attorney was ineffective for failing to file the requested appeal. Ibid. The trial court denied the petition. Ibid. Defendant appealed that determination. Id. at 1. For the reasons set forth in our opinion in Walker, we reversed the trial court's order denying defendant's petition and granted defendant the opportunity to file a direct appeal from his conviction for fourth-degree criminal trespass. Id. at 9-12.

On his direct appeal, defendant now raises the following contentions:

POINT I

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT ITS VERDICT MUST REPRESENT THE HONEST, INDIVIDUAL JUDGMENT OF EACH JUROR DENIED DEFENDANT A FAIR TRIAL. (Not Raised Below).

POINT II

ALTHOUGH THERE WAS NO CHARGE OF RECENT FABRICATION OR IMPROPER INFLUENCE, THE TRIAL COURT PERMITTED TWO POLICE OFFICERS TO TESTIFY ABOUT THE

ALLEGED VICTIM'S PRIOR CONSISTENT STATEMENTS, WHICH IMPROPERLY BOLSTERED HER SHAKY CREDIBILITY AND DENIED DEFENDANT A FAIR TRIAL. (Partially Raised Below).

### POINT III

MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT DENIED DEFENDANT A FAIR TRIAL: THE TRIAL PROSECUTOR FALSELY ASSERTED THAT THE ALLEGED VICTIM'S MOTIVE TO LIE DID NOT EXIST, PROVOKED JURORS' EMOTIONS BY ASKING THEM TO PUT THEMSELVES IN THE VICTIM'S SHOES, AND DISPARAGED DEFENSE COUNSEL'S CROSS-EXAMINATION OF THE VICTIM. (Not Raised Below).

### POINT IV

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S REQUEST FOR AN ADVERSE-INFERENCE JURY CHARGE UNDER STATE V. CLAWANS<sup>[1]</sup> BASED ON THE STATE'S UNEXPLAINED FAILURE TO CALL AS A WITNESS THE ONLY OTHER NON-CHILD ALLEGED VICTIM. (Raised Below).

### POINT V

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE TO CRIMINAL TRESPASS -- THAT DEFENDANT HAD IMPLIED PERMISSION TO ENTER -- WHICH WAS CLEARLY INDICATED

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<sup>1</sup> State v. Clawans, 38 N.J. 162 (1962).

HERE WHERE DEFENDANT WAS THE ALLEGED VICTIM'S NEPHEW AND THE VICTIM INVITED HIM IN HOURS BEFORE THE UNLAWFUL ENTRY. (Not Raised Below).

POINT VI

THE CUMULATIVE EFFECT OF THE TRIAL COURT'S AND THE PROSECUTOR'S NUMEROUS ERRORS DENIED DEFENDANT A FAIR TRIAL BECAUSE THEY IMPROPERLY BOLSTERED THE STATE'S CASE AND HINDERED THE DEFENSE IN A TRIAL THAT HINGED SOLELY ON THE SHAKY CREDIBILITY OF A SINGLE WITNESS. (Not Raised Below).

POINT VII

ALTERNATIVELY, DEFENDANT'S CONVICTION FOR FOURTH-DEGREE CRIMINAL TRESPASS MUST BE AMENDED TO A DISORDERLY-PERSONS OFFENSE BECAUSE THE JURY DID NOT FIND AN ESSENTIAL ELEMENT OF FOURTH-DEGREE CRIMINAL TRESPASS. (Not Raised Below).

We address only defendant's first claim of error, as this decision makes the others moot. In Point I of his brief, defendant asserts that the trial judge omitted a critical portion of the "Criminal Final Charge" set forth in the Model Jury Charges (Criminal).<sup>2</sup> In State v. Czachor, our Supreme Court directed trial

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<sup>2</sup> The most current Criminal Final Charge was last revised on September 1, 2022. However, the portion of the Final Charge that was in effect at the time of

courts to include this instruction "in the initial general charge to the jury" at the conclusion of a trial, and to repeat this instruction in the event the jury reports it is unable to reach a verdict. State v. Czachor, 82 N.J. 392, 405-07 (1980). In pertinent part, this portion of the Final Charge states:

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or the mere purpose of returning a verdict. You are not partisans. You are judges -- judges of the facts.

[Model Jury Charges (Criminal), "Criminal Final Charge" (rev. Sept. 1, 2022).]

In his final charge to the jury in this case, the trial judge failed to provide the jurors with this instruction as required by Czachor. Defendant did not object to this omission at the conclusion of the judge's instructions, but now asserts that the judge's error constitutes reversible error.

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defendant's trial on March 5 and 6, 2014 was identical to the current Model Charge.



In its responsive brief, "[t]he State concedes that the jury instructions were not standard, and that the central issue in this case was the credibility of the victim." However, the State asserts that because defendant was acquitted of all of the charges except criminal trespass, the judge's error was harmless. We disagree with the State's contention and conclude that the omission of this critical instruction requires reversal.

It is well settled that "[a]ppropriate and proper charges are essential for a fair trial." State v. Baum, 224 N.J. 147, 158-59 (2016) (alteration in original) (quoting State v. Reddish, 181 N.J. 553, 613 (2004)). Jury instructions must give "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 159 (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). "[I]n reviewing any claim of error relating to a jury charge, the 'charge must be read as a whole in determining whether there was any error . . .'" State v. Gonzalez, 444 N.J. Super. 62, 70-71 (App. Div. 2016) (quoting State v. Torres, 183 N.J. 554, 564 (2005)).

If, like here, defense counsel did not object to the jury charge at trial, the plain error standard applies. State v. Singleton, 211 N.J. 157, 182-83 (2012). Plain error is error that is "clearly capable of producing an unjust result." Id. at

182; See also R. 2:10-2. In terms of its effect in a jury trial, the error must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971).

However, certain jury instructions are so crucial to a jury's deliberations on the guilt of a criminal defendant that errors in those instructions "impacting directly upon these sensitive areas of a criminal trial are poor candidates for rehabilitation" under the plain error theory. State v. Simon, 79 N.J. 191, 206 (1979). That is the case here.

Our decision over twenty-five years ago in State v. Allen is dispositive of the issue presented in this matter. State v. Allen, 308 N.J. Super. 421 (App. Div. 1998). In Allen, as here, the trial "judge failed to include any comment regarding consultation and deliberation with other jurors or the obligation of the juror to decide the case for himself or herself and that the vote should represent the individual view of each juror as to insure a just and proper result." Id. at 429-30 (citing Czachor, 82 N.J. at 405 n.4).

In concluding that this omission required the reversal of the defendant's conviction and a new trial, we observed that "[o]ur courts have consistently 'placed an extraordinarily high value on the importance of appropriate and

proper jury charges to the right to trial by jury. Erroneous instructions on matters material to the juror's deliberations are presumed to be reversible error.'" Id. at 431 (quoting State v. Grunow, 102 N.J. 133, 148 (1986)); See also State v. Figueroa, 190 N.J. 219, 237 (2007) (where the Supreme Court cited Allen with approval and stated that "[t]he Appellate Division, following our directives in Czachor, has reversed guilty verdicts reached by juries that, among other things, were never given the general admonitions of the standard final charge.").

As we held in Allen, "[t]he charge to the jury is the road map for the jury to follow in its quest for the truth. There is little room for shortcuts or abbreviated charges which may preclude the jury from finding its way." Id. at 431-32. Unfortunately in this case, the trial judge failed to provide the jurors with the important instructions they needed to navigate their deliberations. The missing instructions were clearly a required "part of the 'standard' charge and absent a substantial basis should have been charged." Id. at 432. As in Allen, we conclude that the judge's failure to provide the deliberation charges was plain error. R. 2:10-2.

Therefore, we reverse defendant's conviction for criminal trespass and vacate the sentence.<sup>3</sup> We remand for re-trial on this charge, should the State choose to re-try defendant. Should the State choose not to re-try defendant, the judgment of conviction must be corrected.

Reversed and remanded. 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

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<sup>3</sup> As noted above, defendant has already served the maximum sentence for this fourth-degree offense.