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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1331-22**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CALVIN L. CLARK, a/k/a
CALVIN L. CLARK, SR.,

Defendant-Appellant.

Argued April 30, 2024 – Decided May 30, 2024

Before Judges Rose and Torregrossa-O'Connor.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 21-12-0925.

Alison Gifford, Assistant Deputy Public Defender, argued the cause for appellant (Jennifer Nicole Sellitti, Public Defender, attorney; Alison Gifford, of counsel and on the brief).

Jeffrey Nicholas Krachun, Assistant Prosecutor, argued the cause for respondent (Jennifer Webb-McRae, Cumberland County Prosecutor, attorney; Jeffrey Nicholas Krachun, of counsel and on the brief).

PER CURIAM

On October 8, 2021, police responded to the scene of a reported assault and found the victim, Christopher Smith, lying outside on the ground, bleeding and unresponsive, with extensive injuries to his head and face. Defendant, Calvin L. Clark, admitted he beat Smith, but claimed he acted in self-defense. Subsequently, a grand jury charged defendant with second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d). A jury thereafter found defendant guilty of only the lesser-included offense of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7), and defendant was sentenced to five years' imprisonment.

Defendant appeals, arguing:

POINT I

DEFENDANT WAS DENIED A FAIR TRIAL WHEN, AFTER THE JURY REPORTED THAT IT WAS DEADLOCKED, THE JUDGE GAVE A SUPPLEMENTAL INSTRUCTION TELLING THE JURORS THEY COULD REACH A COMPROMISE VERDICT.

POINT II

DEFENDANT WAS DENIED A FAIR TRIAL BY IMPROPER OFFICER TESTIMONY THAT VIOLATED DEFENDANT'S CONFRONTATION

RIGHTS AND EXPRESSED THE OFFICERS' PERSONAL OPINION ABOUT DEFENDANT'S GUILT.

A. Reversal Is Required Because Inappropriate Hearsay Testimony Created The Inescapable Inference That The Police Possessed Extra-Record Evidence of Defendant's Guilt.

B. Reversal Is Required Because The Officers' Testimony Inappropriately Communicated To The Jury That They Believed The Defendant Committed The Crime For Which He Was On Trial.

POINT III

DEFENDANT WAS PREJUDICED BY THE TRIAL COURT'S FAILURE TO CHARGE THE JURY REGARDING THE PROPER ASSESSMENT OF STATEMENTS ALLEGEDLY MADE BY HIM. (Not Raised Below).

POINT IV

REVERSAL IS REQUIRED BECAUSE THE COURT IMPROPERLY INSTRUCTED THE JURY ON THE DUTY TO RETREAT. (Not Raised Below).

POINT V

THE CUMULATIVE IMPACT OF THE ERRORS DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL. (Not Raised Below).

POINT VI

THE JUDGE ERRED IN IMPOSING \$2,460 RESTITUTION WITHOUT FIRST HAVING A HEARING ON DEFENDANT'S ABILITY TO PAY.

Persuaded by the contentions raised in Point I, we reverse defendant's conviction and remand for a new trial, concluding the court improperly advised the jury to consider reaching a "compromise" verdict. In view of our disposition, we need not address the arguments raised in Points II to IV; we do so only for completeness to provide guidance should there be a new trial. However, we decline to address defendant's restitution argument raised in Point VI, as the State acknowledges defendant was entitled to an ability-to-pay hearing.

I.

A. The Offense

At trial, the State presented testimony from the victim, an alleged eyewitness, the victim's trauma surgeon, the victim's wife, and four investigating police officers. Defendant called one witness and testified on his own behalf. Although the circumstances of the actual offense were contested, certain facts were undisputed. Specifically, in the early morning hours of October 8, 2021, after a physical confrontation involving defendant and the victim, Bridgeton City police responded to a report of an assault outside a second-story apartment

on North Pearl Street (the apartment). When officers arrived, Smith lay prone in the street outside the apartment building with visible wounds to his head, his face so swollen he could not speak, and a bicycle on the ground beside him. Emergency medical responders were already treating Smith's respiratory distress and suspected brain injury before transporting him to the hospital.

Following a trail of blood up the steps leading to the second-floor apartment, police found only its resident, Albert Blazie, inside. Officers encountered "people exiting the apartment" who indicated "they didn't know what happened." Blazie gave police his account of what occurred, describing an earlier incident in the apartment between Smith and defendant leading to defendant's assaulting Smith.

Officers outside soon encountered defendant, who returned to the scene. Police body worn cameras captured defendant's statements including his claim that Smith had stolen defendant's bicycle, and defendant "beat his ass" and "would do it again." Defendant was placed under arrest and transported to Bridgeton Police Department where he gave police a formal statement of his version of events.

Accounts of defendant's encounter with Smith diverged. Blazie testified defendant once resided in the apartment but had moved out prior to the night of

the incident. Blazie described sitting on the floor "getting high" with Smith when defendant entered and "told [Smith] to get out of [the] chair." Blazie recalled defendant and Smith having a "verbal confrontation," during which Smith stood up before defendant hit Smith in the jaw. Smith fell to the floor and, according to Blazie, defendant continued to hit Smith "on the side of the face . . . [m]ore than five" times. Defendant then "grabbed [a] stick" which was near the door and "hit [Smith] over the back a few times with that." Blazie testified defendant then "got [Smith] by his feet, dragged him through the hallway, in through the kitchen, . . . and threw him down the steps" of the two-story building. He testified defendant grabbed Smith's bicycle, threw it onto the street, and then threw it on top of Smith.

The police witnesses testified, over defendant's objection, that their investigation left them with the same understanding of what occurred. Officer Kayla Morales explained:

Through my investigation, I learned that . . . Smith was sitting in a chair in the apartment and [defendant] didn't want him to sit there, so he told him to get out of the chair and they engaged in a fight, a physical fight. [Defendant] struck the victim several times until he couldn't get up anymore.

. . . .

Initially, he struck [Smith] with his fist and then a wooden post.

Other officers similarly summarized what they learned through the police investigation.

Officer Darren Bosco testified, "[s]o, there was an argument inside the residence over a chair. [Defendant], was arguing with Christopher Smith about sitting in Albert Blazie's chair. He asked him to get up, and when [Smith] refused to get out of the chair, [defendant] began to assault him." The prosecutor then asked, "how did he assault him?" to which Bosco answered:

It . . . started out [defendant] punching [Smith]. He punched him in his face numerous times and then he began to drag him into the hallway. There's a small hallway that leads towards the kitchen. He drags him through there and, once he's in the hallway, he begins to hit him with a—like, a wooden baluster for a . . . for a railing. He hits him with that and then he continues to drag him outside towards the steps, where he pushes him down the steps.

Officer Jahaira Roman also described the investigation:

[PROSECUTOR] From your investigation, what did you learn had happened in the apartment?

[ROMAN] I learned that the victim, Christopher Smith, had been inside the apartment, was apparently sitting in a chair that belonged to . . . Blazie. The accused at that time became upset that the victim was sitting in the chair, so he began to assault him by

punching him in the face and then proceeded to strike him in the back with a stick.

[PROSECUTOR] Okay. Who did you learn was the accused that night?

[ROMAN] Calvin Clark.

Smith could not recall the assault but testified that on the day of the incident he travelled to the apartment on his bicycle to visit Blazie. Smith remembered only that a "gentleman had appeared . . . speaking about a chair" and then waking up in a hospital with a feeding tube in his mouth "because [he] had been . . . unconscious so many days."

Following the incident, life was "very difficult" for Smith because he "had to relearn everything again," lost the vision in his left eye, and could no longer work. Smith remained on medication and continued speech and physical therapy. Smith's wife corroborated his change in daily activities, testifying that she had to redirect conversations with him, help him get dressed in the morning, and assist in administering medicine.

Smith's trauma surgeon, qualified as an expert, testified extensively about Smith's injuries, which initially presented as a potentially "life-threatening brain injury due to severe facial trauma and swelling." According to the doctor, Smith suffered lacerations, swelling, and bruising of the face and head, broken teeth,

"respiratory distress" caused by "swelling about the airway," and permanent loss of vision in one eye. Smith's initial tests were positive for benzodiazepine, cocaine, tetrahydrocannabinol, and alcohol.

The State introduced into evidence defendant's Mirandized¹ statement to police, explaining that Smith stole his bicycle, "changed it around," and brought it into the apartment that day. Defendant stated he went into the apartment, saw Smith in [Blazie]'s chair, and told Smith to "get out of his chair . . . let him up." Defendant claimed Smith then "grabbed [him] by [his] neck" and "choked" him. Defendant admitted Smith "didn't get" him, but because Smith "messed up," "that's when [he] lifted [Smith]." Defendant stated Smith was "dazed" and tried to get up, but he "hit him again until he stopped . . . trying." Defendant admitted he "smacked [Smith] on the back . . . on his behind" with a "board." Defendant then threw Smith down the stairs, "drug [sic] him out and put him out," and threw the bicycle outside. Defendant claimed Smith had the choice to "[g]et out [of] the chair or start fighting." When asked when he planned to stop hitting Smith, defendant replied "when he didn't get up no more." When asked if defendant intended to kill Smith, defendant answered, "[i]f that's what it took to keep him from killing me, yes."

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

Although defendant and Blazie initially rented the apartment together, defendant had entered a rehabilitation center prior to the incident and intended to move in with his sister upon completing treatment. Defendant's landlord testified that he believed defendant had moved out prior to October 8, and defendant claimed he returned to the apartment to collect his belongings.

Defendant testified that he knew Smith made prior threats against him and throughout the altercation, he felt threatened and believed Smith was going to harm him. Contrary to his earlier statement, defendant indicated he arrived first, and Smith came in later yelling about the bicycle. Defendant claimed he did not want to fight the bigger and younger Smith, but felt "trapped," recounting that Smith initiated the fight when Blazie was not in the room, blocked the door, and attempted to grab defendant's throat. Defendant punched Smith who "rush[ed defendant] back" causing the two to fall. Defendant claimed Smith continued to attempt to fight back, even after defendant hit him with the stick, until defendant pushed him down the steps. Defendant testified that "all this . . . commotion [was] about a bicycle," which is why he then threw the bicycle "over the rail." Defendant left the apartment and tripped over the bike, so he "got mad and picked the bike up and . . . threw the bike towards [Smith]." Defendant told the jury he was intoxicated during the altercation, and hungry and sleep-deprived

when he gave his statement to police.

B. The Jury Instructions

During several pretrial conferences, the court addressed and finalized jury instructions, with no mention by the court or the parties of potential lesser-included offenses; and none were issued to the jury. Accordingly, the court instructed the jury concerning the three offenses charged in the indictment.

After instructing the jury regarding the law of second-degree aggravated assault, the court presented, in large part, the model jury charge on self-defense. But on the issue of defendant's duty to retreat, the court stated only:

The same theory applies to the issue of retreat. Remember that the obligation of the defendant to retreat only arises if you find the defendant resorts to the use of deadly force. If the defendant does not resort to the use of deadly force, one who is unlawfully attacked may hold his position and not retreat whether the attack upon him is by deadly force or lesser force.

The court did not instruct the jury that if it determined defendant attempted to use deadly force, was in his own home, and was not the initial aggressor, he had no duty to retreat. See Model Jury Charges (Criminal), "Justification—Self Defense: In Self Protection (N.J.S.A. 2C:3-4)" at 3 (rev. Nov. 13, 2023).

As to credibility of witnesses, the court gave the entire model instruction. See Model Jury Charges (Criminal), "Parts 1 & 2 (General Information to

Credibility of Witnesses)" at 5-6 (rev. Sept. 1, 2022). However, the court did not issue any instruction regarding the jury's consideration of defendant's statements. See Model Jury Charge (Criminal), "Statements of Defendant," (rev. June 14, 2010); see also Model Jury Charge (Criminal), "Statement By Defendant (Where Admissible For Credibility Purposes Only)" (approved Apr. 13, 1992); Model Jury Charges (Criminal), "Credibility—Defendant's Statements at or Near Time of Arrest (To Be Used Only When Defendant Testifies)" (approved June 21, 2020).

C. The Deliberations

Before the first day's deliberations ended, the jury asked two separate questions. The jury first inquired: "Can the aggravated assault charge [be] lessened?" Before the court responded, the jury sent a second message requesting to review defendant's "confession at the police department." The court informed counsel it discerned "no lesser included offense" and thought it should "answer . . . in the negative" regarding lesser offenses.

Thereafter, without objection, the court told the jury there were "no lesser offenses as defendant was charged with second-degree aggravated assault on the basis that there were serious bodily injuries." The court advised the jury that the recorded confession would be replayed when it returned for the next day of

deliberations.

Two days later, before deliberations resumed, defendant requested that the court instruct the jury on simple assault, a disorderly persons offense, and mutual fighting, a petty disorderly persons offense, N.J.S.A. 2C:12-1(a). The State asked the court also to instruct the jury on third-degree aggravated assault, significant bodily injury, N.J.S.A. 2C:12-1(b)(7), and allow counsel another opportunity to address the jury regarding these lesser-included charges. The defense responded, opposing addition of the third-degree aggravated assault charge, arguing the State presented evidence that the injuries were potentially fatal and could have caused death, and "by adding the third-degree aggravated assault charge, we're potentially just leading the jury to a . . . compromised verdict, as opposed to . . . their true feelings on the case."

Defense counsel also objected to supplemental summations, arguing, "I don't think there's any mechanism under the law that allows us for a second closing argument in this case. It's another bite at the apple." The court disagreed and granted the State's requests, indicating that the lesser-included offenses benefitted the defense, and it was "fair" to add both offenses and give counsel "an opportunity to address the jury briefly."

Over the objection of the defense, the court first replayed defendant's

recorded statement for the jury before addressing the addition of lesser-included offenses. Supplemental summations were then made to the jury before the court issued the lesser-included offense instruction followed by the substantive jury charges for third-degree aggravated assault simple assault, and mutual fighting. The jury received a revised verdict sheet, but the court did not advise the jury about the applicability of self-defense to those lesser-included offenses or that simple assault should be considered only if the jury found defendant not guilty of third-degree aggravated assault. The verdict sheet did not reference the lesser-included petty disorderly persons offense of simple assault by mutual fighting.

Deliberations continued until the jury asked whether defendant's intoxication had "any bearing on his culpability in our discussions." Without objection from counsel, the court responded that "[v]oluntary intoxication is not a defense to criminal offenses."

Later that afternoon, the jury sent a note to the court stating, "[w]e have been unable to reach agreement on two issues. It does not appear that we can reach an agreement." In response, the court provided the following standard instruction orally and in writing, agreed upon by the parties:

It is your duty, as jurors, to consult with one another and to deliberate with a view towards 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 for the mere purpose of returning a verdict.

....

You have indicated that your deliberations have reached an impasse. Do you feel further deliberations will be beneficial or do you feel that you have reached a point at which further deliberations would be futile? Please return to the jury room to confer and advise me of your decision in another note.

See Model Jury Charges (Criminal), "Judge's Instructions on Further Jury Deliberations" (approved Jan. 14, 2013); see also State v. Czachor, 82 N.J. 392 (1980).

The court then sua sponte added the following additional instruction without prior notice to counsel:

I'm going to ask that you go back and deliberate. And if you are unable to reach a verdict today, to let me know that in a note. But I have to send you back and ask you to try to continue your deliberations with an eye towards rendering a decision even if it's a compromise decision. (emphasis added).

Both parties immediately addressed the court at sidebar before the jury

left the courtroom agreeing the court should correct the erroneous instruction to consider compromising. Defense counsel argued juries must never compromise in reaching a verdict and the court's erroneous use of the word "[c]ompromise indicates you give a little, and I'll give a little, and we'll land somewhere in the middle." The court responded that it "gave the appropriate instruction . . . [and] they need to continue to deliberate."

Approximately one hour later, the jury informed the court "[t]here [wa]s a failure to agree." The court denied defendant's ensuing request for a mistrial, reasoning the jury should at a minimum deliberate until the end of the day. Before the court could respond to the reported deadlock, the jury advised it reached a verdict, finding defendant guilty of the lesser-included offense of third-degree "aggravated assault with significant bodily injury."

II.

A.

In his first point, defendant urges that the trial court impermissibly instructed the already divided jury to continue deliberations "with an eye toward rendering a decision even if it's a compromise." Defendant contends the court's superfluous and incorrect additional direction mandates reversal of his conviction. Well-settled principles govern our review of the sufficiency of the

court's instructions.

"Appropriate and proper jury instructions are essential to a fair trial." State v. McKinney, 223 N.J. 475, 495 (2015) (quoting State v. Green, 86 N.J. 281, 287 (1981)). The instructions act as "'a road map to guide the jury' [and a] 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.'" Ibid. (citations omitted) (first quoting State v. Martin, 119 N.J. 2, 15 (1990); and then quoting Green, 86 N.J. at 287-88). Indeed, "[e]rroneous jury instructions on matters material to a jury's deliberations are ordinarily presumed to be reversible error." State v. Jackmon, 305 N.J. Super. 274, 277-78 (App. Div. 1997). A jury charge "inadequate to guide the jury in the course its deliberation should take" mandates reversal of the resulting conviction. Id. at 290 (quoting State v. Cook, 300 N.J. Super. 476, 489 (App. Div. 1996)).

When a defendant objects to a jury instruction at the time of its delivery, as in this case, we review the instruction for harmless error. See Willner v. Vertical Realty, Inc., 235 N.J. 65, 80 (2018). Conversely, when a defendant claims a trial court's jury instruction was in error, but the defendant failed to "object[] at the time [the] jury instruction [was] given, 'there is a presumption

that the charge was not error and was unlikely to prejudice the defendant's case." Id. at 79 (quoting State v. Montalvo, 229 N.J. 300, 320 (2017)). "Therefore, 'the failure to object to a jury instruction requires review under the plain error standard.'" Ibid. (quoting State v. Wakefield, 190 N.J. 397, 473 (2007)).

Critically, "a jury verdict must not be the product of coercion" State v. Ross, 218 N.J. 130, 144 (2014). In Czachor, our Supreme Court held that when juries express an impasse, "a charge containing coercive features should not be given to a jury in the trial of criminal case." 82 N.J. at 402, 404-06 (recognizing that "errors which impact substantially and directly on fundamental procedural safeguards, and particularly upon the sensitive process of jury deliberations, are not amenable to harmless error rehabilitation"). The model charge addressing jury deadlock addresses Czachor's concerns. See Model Jury Charges (Criminal), "Judge's Instructions on Further Jury Deliberations" (approved Jan. 14, 2013).

"When a jury communicates a deadlock, trial courts 'should be guided in the exercise of sound discretion by such factors as the length and complexity of trial and the quality and duration of the jury's deliberations.'" Ross, 218 N.J. at 144 (quoting Czachor, 82 N.J. at 407). Assuredly, "[t]he 'independent judgment' that is critical is the judgment of twelve deliberating jurors each free from

external pressure to conform his or her judgment with that of his peers to reach a verdict." State v. Adim, 410 N.J. Super. 410, 423 (App. Div. 2009) (citing Czachor, 82 N.J. at 409).

Those deficiencies and infirmities include: the potential for interference with the deliberative process through introduction of extraneous considerations, Czachor, 82 N.J. at 398-405; see Figueroa, 190 N.J. 219, 236 (2007); inaccurate descriptions of a juror's duty, id. at 398-99; see Figueroa, 190 N.J. at 232; subtly coercive suggestions such as those inherent in negative implications about the capacity and impartiality of jurors who are unable to reach agreement and the prospect of prolonged and compelled deliberations, id. at 400; see Figueroa, 190 N.J. at 231-32; and juror vulnerability "to judicial suasion to compose differences," id. at 399; see Figueroa, 190 N.J. at 238.

[Adim, 410 N.J. Super. at 425 (citations reformatted).]

Trial judges must be vigilant in providing pressure-free instructions to ensure that their encouragement does not improperly influence jurors to abandon their viewpoints. The Supreme Court has recognized that

[c]onsistent with the principle that a jury verdict must not be the product of coercion, appellate review of a trial court's supplemental instruction is "guided by a concern for the weighty role that the judge plays in the dynamics of the courtroom." Figueroa, 190 N.J. at 238 (citing State v. Tyler, 176 N.J. 171, 181 (2003)). The trial judge's discretion must be exercised in a manner that ensures "'a jury verdict free from untoward interference from any source, including the court.'" State v. Shomo, 129 N.J. 248, 257 (1992) (quoting State

v. Collier, 90 N.J. 117, 122 (1982)); see also State v. Corsaro, 107 N.J. 339, 346 (1987) (cautioning that "the deliberative process . . . must be insulated from influences that could warp or undermine the jury's deliberations and its ultimate determination").

[Ross, 218 N.J. at 144-45 (citations reformatted).]

Further, while reviewing courts must ordinarily "expect and rely on 'the ability of jurors to faithfully follow a trial judge's instructions in deliberating on a defendant's guilt,'" that presumes the jury instructions are not incomplete, incorrect, or misleading. State v. Wilder, 193 N.J. 398, 415-16 (2008) (quoting State v. Muhammad, 145 N.J. 23, 52 (1996)) (noting that "absent an incomplete or misleading jury instruction, there is to be no speculation on the reasons for a jury's verdict"). To assess the impact of a faulty instruction, "[t]he charge must be read as a whole in determining whether there was any error." State v. Torres, 183 N.J. 554, 564 (2005) (citing State v. Jordan, 147 N.J. 409, 422 (1997)) (noting when the instruction is "crucial to the jury's" determination of guilt, "it is a poor candidate for rehabilitation").

B.

Here, in the context of the jury instructions in their entirety and this jury's deliberations as a whole, we conclude the trial court's additional direction that it "ha[d] to send [the jurors] back and ask [them] to continue [their] deliberations

with an eye towards rendering a decision even if it's a compromise" was error "clearly capable of producing an unjust result." R. 2:10-2. We recognize reversing a conviction due to an error or omission requires "some degree of possibility that [the error] led to an unjust result. The possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict that it otherwise might not have reached." State v. Galicia, 210 N.J. 364, 388 (2012) (alterations in original) (quoting State v. Lazo, 209 N.J. 9, 26 (2012)). Placing the trial court's comments regarding compromise in the timeline of deliberations, the possibility of an unjust result was real.

We view the incorrect instruction in context, including the genesis of the lesser-included offense option. Significantly, it was not the court or the parties that sought to provide a lesser-included alternative to the jury. Instead, it was the jury—after deliberations commenced—that inquired: "Can the aggravated assault charge [be] lessened?" It was only then, after first advising the jury that no lesser-included offenses existed for second-degree aggravated assault, that the court instructed the jury on the lesser-included offenses of third-degree aggravated assault, disorderly persons simple assault, and petty disorderly persons mutual fighting. These instructions came after the playback of

defendant's confession and second summations by counsel.² The court gave the model instruction on lesser-included charges and then provided the law pertaining to each offense. The court did not re-instruct the jury on self-defense or discuss its applicability to these lesser offenses. The court did not instruct the jury to consider simple assault only if it first found the defendant not guilty of third-degree aggravated assault. It was against this backdrop, that the jury proceeded with its deliberations.

Approximately one hour after the new instructions regarding those lesser-included offenses, the jury inquired whether it could consider defendant's intoxication in assessing his culpability. The court told the jury that "voluntary intoxication was not a defense." Shortly thereafter, the jury indicated it was "unable to reach agreement." We recognize the court then provided the model charge on continued deliberations, which included the important Czachor instructions designed to prevent compromise. We appreciate that the court also inquired whether the jurors felt "further deliberations [would] be beneficial . . .

² Because defendant does not challenge that order of events or the late consideration of the lesser-included offenses and presentation of supplemental closing arguments to an already-deliberating jury that had previously signaled the possibility it had moved beyond the actual charges to seek a lesser offense, the propriety of that procedure is not before us. We note its irregularity only to provide further context for reviewing the impact of what we view to be the judge's improper compromise instruction.

or . . . futile," and told them to confer and send a note advising of their answer. If the court had stopped there, so too would our consideration of the issue.

Unfortunately, the court's next instruction immediately contradicted and undermined the Czachor charge. The court directed the jury: "I'm going to ask that you go back and deliberate. And if you are unable to reach a verdict today, to let me know that in a note." The court then told the jury, "[b]ut I have to send you back and ask you to try" to render a decision, "even if it's a compromise." In our view, the capacity of those comments to confuse the jury is readily apparent. To give the court's instruction its plain meaning is to understand its ability to induce an impermissible compromise by an already struggling jury.

This was a jury that had on its own initiative already requested alternatives to the charges under consideration, inquired about the applicability of an intoxication defense, and even with the belated addition of alternative lesser charges, indicated it could not agree on a verdict. The court's instruction that the jury continue to deliberate with an eye toward compromise had the capacity to suggest that was the desired result. Both counsel urged the court to correct its misstatement. Yet the court refused, stating the charge was appropriate and that the jury "need[ed] to continue to deliberate."

Significantly, the jury never informed the court whether further deliberations would be helpful as the model charge directed. If, as the State suggests, earlier proper instructions cured any error, the jury could have followed those directions and sent a note immediately informing if continued deliberations would be productive. Instead, tellingly, an hour later, the jury sent a message indicating a "failure to agree." After denying defendant's mistrial request reasoning that the jury should at least deliberate until the end of the day, but before the court could address the jury's note, the jury sent a note that it had reached a verdict.

We are not satisfied that the court's erroneous compromise instruction was harmless. Even the verdict sheet, indicating that the jury found defendant guilty of third-degree aggravated assault and conversely found the defendant not guilty of its lesser-included offense of simple assault further casts doubt on the integrity of the verdict.³ See State v. Frisby, 174 N.J. 583, 600 (2002) (recognizing "if a jury affirmatively evidences 'confusion' by its questions or its answers on a jury verdict form, that would be an important factor in determining whether the absence of a specific unanimity charge caused defendant to be

³ We note also the mistaken omission from the verdict sheet of petty disorderly persons mutual fighting.

prejudiced"). The jury's consideration of simple assault after already finding defendant guilty of aggravated assault signals confusion compounding our real concern that the incomplete and incorrect charges led at least some of the jurors to bend their wills to reach a verdict. As such, we must vacate the verdict that cannot stand on the weak foundation of possible improper compromise.

III.

As to defendant's challenge to the officers' testimony raised in Point II, we recognize the constitutional right to confrontation is "an essential attribute of the right to a fair trial" State v. Branch, 182 N.J. 338, 348 (2005). As such, an officer acting as a lay witness may not "interpret[] facts for the jury bearing directly on [a] defendant's guilt." State v. Smith, 436 N.J. Super. 556, 574-75 (App. Div. 2014). Additionally, "both the Confrontation Clause and the hearsay rule are violated when, at trial, a police officer conveys, directly or by inference, information from a non-testifying declarant to incriminate the defendant in the crime charged." Branch, 182 N.J. at 350 (citing State v. Bankston, 63 N.J. 263, 268-69 (1973)). The officers' testimony included impermissible interpretations of hearsay statements from testifying and non-testifying witnesses and improper police opinions as to defendant's guilt. On retrial, eliciting such testimony should be avoided.

IV.

Turning to the contentions raised in Point III, we note the importance of properly instructing a jury regarding its specific consideration of statements allegedly made by defendants. The omitted jury instructions would have advised the jury its "function [is] to determine whether or not [any written or oral] statement was actually made by the defendant, and, if made, whether the statement or any portion of it is credible" and provided particularized guidance on reviewing such evidence with appropriate "caution." Model Jury Charges (Criminal), "Statements of Defendant" (rev. June 14, 2010). "[W]henver a defendant's oral or written statements . . . are introduced," trial courts are mandated to give the relevant instructions whether requested by defendant or not. Jordan, 147 N.J. at 425.

Here, two of the jury's questions seeking replay of the police interrogation and clarification of the impact of defendant's intoxication amplify the import of defendant's statement in this case. Accordingly, general witness credibility instructions would rarely suffice in place of the carefully tailored charges advising the jury of the manner in which it is to consider defendant's statements with caution.

V.

We note also that self-defense instructions, challenged in defendant's Point IV, should cover all possible alternative scenarios supported by the record. Whether defendant used or attempted deadly force or regular force was for the jury to decide, as was the question of defendant's domicile at the time, which was directly tied to his duty to retreat or lack thereof.⁴ An adequate jury instruction on self-defense must contain a complete charge on the duty to retreat.

We add that the self-defense charge should be provided after each lesser-included offense lest the jury incorrectly believe the defense has no application. See State v. Supreme Life, 473 N.J. Super. 165, 176 (App. Div. 2022) (holding it "was plain error for the judge to omit specific instructions advising the jury that it should consider the affirmative defenses as to all the lesser-included offenses").

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

⁴ Deadly force is not justifiable when an actor can "avoid the necessity of using such force with complete safety by retreating . . ." N.J.S.A. 2C:3-4(b)(2)(b). However, "[t]he actor is not obliged to retreat from his dwelling, unless he was the initial aggressor." N.J.S.A. 2C:3-4(b)(2)(b)(i).