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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0491-11T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL MAURO, JR., a/k/a MICHAEL S. MAURO, JR. and MICHAEL MAURO,

Defendant-Appellant.

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Submitted December 11, 2013 – Decided August 13, 2014

Before Judges Grall and Waugh.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 09-04-0609.

Joseph E. Krakora, Public Defender, attorney for appellant (Anderson D. Harkov, Designated Counsel, on the brief).

Andrew C. Carey, Acting Middlesex County Prosecutor, attorney for respondent (Brian D. Gillet, Special Deputy Attorney General/ Acting Assistant Prosecutor, of counsel and on the brief.

PER CURIAM

Defendant Michael Mauro, Jr. was arrested and charged with crimes he allegedly committed against officers of the Sayreville Police Department in a bar he owned and operated. A jury found

him guilty of two counts charging third-degree aggravated assault of Sergeant Lasko, N.J.S.A. 2C:12-1b(5)(a), and one count charging third-degree resisting arrest, N.J.S.A. 2C:29-2a(3). The jury, however, acquitted defendant of the remaining charges: attempting to disarm a law enforcement officer, N.J.S.A. 2C:12-11, aggravated assault against another officer, Patrolman Gaines, N.J.S.A. 2C:12-1b(5)(a) and terroristic threats, N.J.S.A. 2C:12-3a. The judge merged defendant's convictions and then imposed a four-year term of probation and the appropriate fines, penalties and assessments on one conviction for aggravated assault.

Defendant appeals and presents four claims related to his convictions:

> I. THE TRIAL COURT ERRED BY FAILING TO CHARGE THE JURY ON SELF DEFENSE WITH REGARD TO COUNT TWO, FOUR, AND FIVE.
> (NOT RAISED BELOW)
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> II. THE TRIAL COURT'S RESPONSE TO THE QUESTION ASKED BY THE JURY DURING ITS DELIBERATIONS ADDED LANGUAGE TO THE INDICTMENT THE STATE FAILED TO INCLUDE AND WAS SUCH A ONE SIDED RENDITION OF THE ALLEGED FACTS THAT IT STEERED THE JURY TO A GUILTY VERDICT, DEPRIVING DEFENDANT OF A FAIR TRIAL.
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> III. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT THE OPPORTUNITY TO INTRODUCE A HEARSAY STATEMENT MADE BY A POLICE OFFICER INDICATING DEFENDANT'S BAR WOULD BE "RAIDED" BY THE POLICE IN RETALIATION FOR AN INCIDENT THE NIGHT BEFORE DEFENDANT'S ARREST.

IV. THE FAILURE OF TRIAL COUNSEL TO REQUEST A JURY INSTRUCTION ON SELF DEFENSE, TO PREPARE HIMSELF TO MAKE A COHERENT ARGUMENT ON A KEY EVIDENTIARY ISSUE, AND TO ATTEMPT TO CONVINCE THE COURT TO PRESENT THE DEFENSE THEORY OF THE CASE WHEN IT RESPONDED TO A JURY QUESTION, DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The theory of the State's case was that defendant, who was intoxicated, resisted his arrest for obstructing administration of the law — a routine "bar check" conducted by police officers for violations of the conditions stated in the bar's license and other violations of the alcoholic beverage control (ABC) laws. The defense's theory was that Sergeant Lasko assaulted defendant and that the "bar check" was either contrived or retaliatory.

Although the witnesses for the State and the defense gave widely divergent accounts of what happened on the night of defendant's arrest, there was no dispute that the police had been summoned to the bar the night before because of a brawl in the bar's parking lot around closing time. Mr. Semenza, a witness for the defense who was the bar's bouncer, worked on the night of the brawl and also the night defendant was arrested.

Semenza gave the following account of the events on the night of the parking lot brawl. It involved a highly intoxicated patron who, according to Semenza, was an officer of

the Sayreville Police Department, Officer Cooks.[1] At about 1:30 a.m., the patron became "belligerent, condescending, disparaging" and "degrading" to others. Consequently, Semenza asked him to leave and escorted him outside for his "safety and the safety of everybody." Fifteen to twenty people followed and "all hell broke loose." "People were 'swinging, punching [and] kicking," and Semenza called 9-1-1. By the time police arrived Officer Cooks had gotten away, but Semenza intervened to help an officer who was on the ground being struck by someone on top of him.

Later, Semenza went with the police to identify persons apprehended for being involved in the brawl. When that was done, an officer took Semenza for a cup of coffee.

On the State's hearsay objection, the judge conducted a hearing outside the presence of the jury on the admissibility of Semenza's testimony about what the officer said to him. N.J.R.E. 104. The judge precluded Semenza from testifying that the officer told him he was doing Semenza a favor in return for

[1] In rebuttal, the State introduced evidence to show that there was no one named "Cooks" on Sayreville's police force. The State also produced evidence that an officer with a surname that could be mistaken for Cooks, "Kutz," was working the night of the brawl. On cross-examination, however, defense counsel elicited testimony from the same witness acknowledging that there is an officer named "Curtz," who was not working that night.

his help and warned him not to go to work the next day.

Semenza was, however, permitted to testify that he had a "gut feeling" and was expecting problems when he went to work the next night. He "knew the Sayreville police were going to be coming to the bar."

The State's witnesses gave this account of events at the bar on the night following the parking lot brawl. Because there were customers in the bar after the mandatory closing time on the night of the brawl and the police observed other violations of the ABC laws when they responded, the next night Patrolman Lestuck was assigned to watch activity at the bar from a nearby parking lot. Upon seeing multiple cars in the lot as closing time neared, Lestuck alerted his superior, Sergeant Lasko. Lasko, Lieutenant Fitzsimmons and Patrolman Connors joined Lestuck. Just after closing, Lasko and Lestuck went to the bar's front door and Fitzsimmons and Connors went to watch the back door.

Lasko gave this account. The bar's door was unlocked, and he entered alone, leaving Lestuck outside to guard the front exit. Upon entering at 2:01 a.m., Lasko saw twenty to thirty people inside. Some were cleaning and others were drinking at the bar or playing pool. Approaching those who did not appear to be working, Lasko asked for their driver's licenses.

According to Lasko, typically the person in charge when a bar check is done asks the officers why they are there and provides an employee list that bars are required to maintain, thereby allowing the officers to distinguish employees closing the bar and patrons who should be gone by closing. Defendant, who was sitting at the bar talking with others who had drinks, ran toward Lasko yelling. Standing about a foot away from Lasko, defendant told him to "get out of [his] bar," and asked "why [Lasko] was disrespecting [him] in front of his friends." His speech was slurred and his breath had the odor of alcohol.

Lasko testified that he just wanted to get the names of the people and go home. Accordingly, he told defendant that if he brought him the bar's license he would go away. Defendant returned to his seat, and Lasko announced that he was there to do "a bar check" and approached another group to collect driver's licenses.

Defendant, who was "quite agitated," ran back toward Lasko and directed him to leave. He got very close to Lasko and waived his hands in a threatening manner. Lasko advised defendant that he would arrest him for obstruction of the administration of law if he did not get out of his way and let him do what he had to do. Defendant, however, did not move.

By Lasko's account, he told defendant he was being arrested for obstructing and then took defendant's right wrist to place it on the bar and handcuff him. At that point, defendant "went absolutely berserk." He screamed, "I'm going to kill you," turned to face Lasko, put his foot against the bar and pushed off. Consequently, both men fell to the floor, and each of them struggled to get on top of the other. During the struggle, defendant got his arm around Lasko's neck and pulled it back, leaving "two big gouges." During the struggle, the toe of defendant's shoe also hammered Lasko's hand, leaving Lasko in pain and with a damaged tendon.

While defendant and Lasko struggled, Lasko radioed for more cars to be sent to the bar, and defendant continued to yell, punch and kick Lasko. Connors and Lestuck came to Lasko's assistance, but even with their help Lasko could not control defendant. When Patrolman D'Onofrio arrived in response to Lasko's call for additional officers, he saw the officers on the floor. After D'Onofrio arrived, defendant got his hand on and was yanking Lasko's holstered gun. People in the bar were yelling, urging defendant to stop.

Lasko yelled to warn the other officers in the bar that defendant had a hold of his gun. Connors and then D'Onofrio responded by using pepper spray on defendant, and after the

second spray the officers managed to cuff defendant and get him to his feet.

Lasko planned to get defendant outside and into a patrol car. Because defendant was spitting, Lasko, who was walking behind him, held two fingers on defendant's jaw and neck to keep him facing forward so he could not turn and spit on Lasko. Because there were too many people by the door, Lasko put defendant face-down on the floor again, got on his knees and straddled him to keep him down. While Lasko was on his knees and had defendant in that hold, defendant reached up and grabbed Lasko's testicles. Again, Lasko let the others know what was going on, and then hit defendant in the back of the head with his forearm, which caused defendant to release his grip. Lestuck and Fitzsimmons then took control of defendant, and Lasko followed them as they walked him outside.

Patrolman Gaines also assisted. Although he arrived at the bar earlier in response to Lasko's request for help, the door had been locked and D'Onofrio and Gaines could not get in until someone unlocked it. By that time, defendant was handcuffed. Other officers who responded to Lasko's call for assistance were in the same position and came in with Gaines.

Gaines helped escort defendant outside. As he and Fitzsimmons took defendant to the car, defendant spit in Gaines'

face. The spitting did not deter Gaines. As Gaines was standing behind defendant to put him in the car, defendant kicked back and struck Gaines in the knee. In response, an officer on the other side of the car used pepper spray again, and the officers got defendant in the car and took him to headquarters. Gaines' knee was treated, and he returned to work a week later.

Although defendant had no prior convictions, he elected to present his version of the events through witnesses who were in the bar on the night of his arrest.

Semenza testified as follows. Because he was expecting the police, he announced the "last call" earlier than usual and locked the doors so no other customers could enter. Later, when he opened the door so they could leave, "a stampede of police officers" – about six of them – came in. Sergeant Lasko came into the bar and cursed as he demanded the bar's paperwork. At that time, defendant was sitting at the bar and might have had a drink or two.

Semenza held defendant back and told him not to say anything because there were some kids outside who were drunk and under age. Ignoring him and mimicking Lasko's language, defendant asked Lasko what "f---ing paperwork" he wanted. In response, Lasko "charged [defendant] and grabbed him by the

throat." Coming "at a slow jog, [Lasko] grabbed him by the throat, bent him over the corner of the bar . . . and both [of them] fell to the floor." Semenza testified that defendant was not told that he was being arrested — "[t]hose words never came out."

Semenza explained that he did not help defendant because he was not stupid, but he watched. An officer kicked defendant in the face, and Semenza blocked a second kick the same officer aimed at defendant's face. After that, Officer Gaines lifted defendant's head and discharged mace in his eyes and mouth. When Lasko had defendant handcuffed and was sitting on his back, Lasko took defendant by his ears and smashed his face against the cement floor. According to Semenza, Lasko announced that defendant had hold of his testicles after he smashed defendant's face to the floor.

Semenza testified that the officers kept defendant in a chokehold as they walked him out of the bar — a hold so tight that defendant was turning blue. A bartender who testified for the State said the officers were dragging him out in handcuffs. For reasons unknown to Semenza, one of the officers slammed defendant back to the floor as they were taking him to the door. In any event, Semenza next saw defendant when he made bail and defendant's face was so "swollen, distorted, purple [and]

bruised" that Semenza would not have been able to recognize defendant if he did not know it was him.[2]

The prosecutor asked Semenza whether defendant was resisting the police. Semenza replied, "I believe [defendant] was more in fear for his life."

A patron, Mr. Buonacore, also testified for defendant. By his account, the officers came into the bar angry and when defendant asked Lasko what paperwork he wanted, Lasko "had him over the corner of his own bar," and then on the floor by himself and then with "four to five [other] cops beating him up." Using his cell phone, Buonacore started to record the events "to get evidence," but an officer took the phone from him, and when the officer returned it there was no video on it. Buonacore guessed "it didn't save." He admitted, however, that he did not report what he saw to any official.

I

With the foregoing factual background, we turn to consider defendant's claim that the evidence required the court to instruct the jury on self-defense. There is no question that defense counsel did not request an instruction on self-defense.

[2] In rebuttal, the State introduced evidence that defendant was accepted for admittance to a detention facility following his arrest, which would not have been done if defendant was bleeding or seriously injured.

In fact, the only jury instructions on substantive law counsel discussed with the judge concerned the submission of lesser-included and less serious related offenses. Moreover, prior to opening statements, defense counsel advised the court that defendant was not pursuing a claim of self-defense. The pre-trial colloquy touching on self-defense was brief and unambiguous:

> [PROSECUTOR]: Briefly, the — just want to put on the record some things that happened off the record on Friday so that we're all clear. The State represented the defense will not request any affirmative defense. So I would ask the term self-defense, defense of others, justification, intoxication, any of that would just be excluded. Because if the jury is not going to be instructed on it, then there's no reason for those terms to be thrown out.
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> THE COURT: They're not in the case, right?
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> [PROSECUTOR]: That's my point. I just wanted that clear in the order.
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> THE COURT: What's your position, [defense counsel]?
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> [DEFENSE COUNSEL]: My client — my client's not guilty. They assaulted him.
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> THE COURT: He's not saying he had to defense himself or anything?
>
> [DEFENSE COUNSEL]: No. They assaulted him.

Defense counsel's pre-trial position on self-defense and his failure to request an instruction on that defense or object to its omission has an impact on our review.

The first consideration is whether counsel's pre-trial colloquy with the court on self-defense bars defendant from raising this issue on appeal. See State v. A.R., 213 N.J. 542, 561 (2013). The invited error doctrine applies when a defendant "in some way has led the court into error." Id. at 561-62; accord N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342 (2010). Here, defense counsel simply stated his position. He did not urge or argue for the court to refrain from directing the jurors to consider self-defense. Accordingly, we conclude that the doctrine does not apply.

Although we may review the issue in the absence of invited error, defense counsel's failure to object to the omission of an instruction limits us to review for plain error – that is error clearly capable of producing an unjust result that warrants review in the interests of justice. R. 2:10-2.

> In respect of a late claim of error in a jury instruction, "plain error requires demonstration of 'legal 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.'" State v. Singleton, 211 N.J. 157,

> 182-83 (2012) (quoting State v. Chapland, 187 N.J. 275, 289 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970))).

Finally, because defense counsel did not request a charge on self-defense, the judge was not required to submit that defense to the jury unless it was "clearly indicate[d]" by the evidence. State v. Galicia, 210 N.J. 364, 390-91 (2012). "A trial judge must sua sponte charge self-defense in the absence of a request," if either the State's or defendant's evidence or a combination thereof provides a "rational basis" for and "clearly indicates" the defense. Id. at 390-91. That duty exists even if defendant has not made the claim, and it is error not to give an instruction on self-defense when that defense is clearly indicated. See Pressler & Verniero, Current N.J. Court Rules, comment 8.13 on R. 1:8-7, comment 1 on R. 3:12-1 (2014).

The question whether the defense was clearly indicated requires consideration of the elements of this affirmative defense, including its limitations. In part pertinent here, N.J.S.A. 2C:3-4 provides:

> a. Use of force justifiable for protection of the person. Subject to the provisions of this section and of section 2C:3-9 [(addressing the mistaken use of force)], the use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of

> protecting himself against the use of unlawful force by such other person on the present occasion.
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> b. Limitations on justifying necessity for use of force.
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> (1) The use of force is not justifiable under this section:
>
> (a) To resist an arrest which the actor knows is being made by a peace officer in the performance of his duties, although the arrest is unlawful, unless the peace officer employs unlawful force to effect such arrest; . . .
>
> . . . .

As interpreted by our courts, the statute permits

> [a] person [to] justifiably use force against another if he 'reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.' N.J.S.A. 2C:3—4(a). To avail himself of the justification of self-defense, the actor must have an "'actual, honest, reasonable belief'" in the necessity of using force. State v. Perry, 124 N.J. 128, 161 (1991) (quoting State v. Kelly, 97 N.J. 178, 198 (1984))[.]
>
> [Galicia, supra, 210 N.J. at 389.]

The statute's limitation on the use of force to resist arrest applies when the actor knows that an arrest "is being made by a peace officer in the performance of his duties." N.J.S.A. 2C:3-4b(1)(a) (set forth above). But the statute

includes an exception that permits a person to resist "unlawful force" used to effect an arrest. Ibid. Even prior to the adoption of N.J.S.A. 2C:3-4, the Supreme Court explained: "If, in effectuating the arrest or the temporary detention, the officer employs excessive and unnecessary force, the citizen may respond or counter with the use of reasonable force to protect himself, and if in so doing the officer is injured no criminal offense has been committed." State v. Mulvihill, 57 N.J. 151, 156 (1970). Since adoption of the statute, Judge Pressler has explained that "an officer effecting an arrest may use only such force as is reasonable under the circumstances." State v. Simms, 369 N.J. Super. 466, 472 (App. Div. 2004). However, "the citizen cannot use greater force in protecting himself from the officer's unlawful force than appears necessary under the circumstances, and he loses his privilege of self-defense if he knows that if he submits to the officer, the officer's excessive use of force will cease." Ibid.

The collective testimony given by Semenza and Buonacore, if believed, provided a rational basis for a claim of self-defense and the basis for that defense was clearly indicated. Lasko reacted without warning to defendant's flippant mimicking of Lasko's cursing demand for paperwork by grabbing defendant's neck and pushing him over on the corner of the bar. As

previously noted, Semenza testified that defendant was not told that he was being arrested. Moreover, by Semenza's account, as the struggle continued Lasko smashed defendant's face to the floor while straddling the handcuffed man and before Lasko announced that defendant had him by his testicles.

All of the foregoing clearly indicated that there were questions the jury should be directed to resolve about self-defense. In short, the facts pertinent to the following questions were in genuine dispute: whether defendant initially knew Lasko was arresting him; whether Lasko initially used excessive force; whether Lasko subsequently used more force than was reasonably necessary; and whether defendant reasonably believed that he could not have avoided further use of excessive force by submitting. This is not a case in which the evidence established that the defense is unavailable as a matter of law. Cf. Galicia, supra, 201 N.J. at 391 (rejecting a claim that the judge should have charged self-defense in the absence of a request where defendant used deadly force "at a time when defendant was in minimal—if any—danger . . . [and] had the option to drive away from the scene instead of aiming [his car] for the victim").

The remaining question is whether the omission of an instruction on self-defense amounts to plain error. In State

v. Simms this court found plain error where "[d]efendant testified that after he had submitted to the arrest, [the officer] had slammed his body into the wall and was trying to slam his head into the wall." 369 N.J. Super. at 473. On the facts in this case, the jury could have found that Lasko grabbed defendant by the neck and threw him over the bar without telling him he was under arrest and that defendant struggled with him to avoid additional use of excessive force. While the record by no means required the jurors to reach that conclusion, we have a reasonable doubt about whether the verdict would have been the same if the jurors had the opportunity to consider self-defense. Accordingly, we conclude that the error had the clear capacity to lead to an unjust result and that the interests of justice warrant notice of that error. R. 2:10-2.

Because the case must be retried, we briefly address defendant's objection to the trial court's exclusion of Semenza's testimony about an officer telling him not to go to the bar on the night the police went there to enforce the ABC laws. As previously noted, the court concluded that the evidence was inadmissible hearsay. But the content of the officer's implied warning was not hearsay, because it was not offered to prove that the truth of the matter asserted. N.J.R.E. 801(c). It was offered and had a tendency to support

defendant's claim that the police planned to go to the bar the following night and was admissible for that limited purpose.

Given our reversal of defendant's convictions, it is wholly unnecessary to consider the remaining issues. For the sake of completeness, we note that we have not considered defendant's claim of ineffective assistance of counsel because, to a large extent, it depends on matters outside the record. See State v. Preciose, 129 N.J. 451, 460-61 (1992). We have, however, considered the merits of defendant's objection to the judge's response to the jurors' question in light of the record and the arguments presented in the trial court and on this appeal. Based on that review, we are convinced that the arguments have insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2)

Defendant's convictions are reversed and the matter is remanded for further proceedings.