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A-2828-1072

 ORIGINAL

State of New Jersey,	:	Superior Court of New Jersey
	:	Appellate Division
Plaintiff/	:	Docket No.
Respondent,	:	
	:	Criminal Action
vs.	:	
	:	On Appeal From A Judgment
Steven Rashawn Wright,	:	of Conviction from the
	:	Superior Court of New
Defendant/	:	Jersey, Law Division,
Appellant.	:	Criminal Part, Hudson County
	:	
	:	Sat Below: The Hon.
	:	Joseph Isabella, JSC.,
	:	and a Jury

DEFENDANT/APPELLANT'S OPENING BRIEF

FILED
APPELLATE DIVISION

OCT 06 2011


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Defendant is Confined

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III. Preliminary Statement

This case involves an alleged burglary and aggravated sexual assault that occurred in Jersey City on or about November 19, 2006. The purported victim asserted that the defendant broke into her apartment and raped her. The defendant asserted that any encounter between them was purely consensual. The alleged victim and the defendant were the sole witnesses to any of the relevant events.

The parties were unable to resolve this matter by way of plea and the case proceeded to trial. The jury found defendant guilty of aggravated sexual assault and burglary, and the trial court sentenced defendant to a discretionary extended term of 25 years, consecutive to another sentence the defendant was already serving.

The trial was marred by a series of incidents that rendered it fundamentally unfair. First, the prosecutor made several remarks in his summation that fell far outside the bounds of proper closing arguments, thereby prejudicing the defendant. Further, the charge did not adequately instruct the jury on the applicable law. The cumulative effect of these errors prejudiced the defendant and deprived him of a fair trial.

For all of these reasons, and as discussed more thoroughly below, the defendant's convictions must be vacated, and this matter must be remanded to the trial court for further proceedings.

IV. Procedural History

In Indictment 1073-06-2008 (the "Indictment"), the Hudson County Grand Jury indicted Steven Wright, the defendant herein, ("Wright"), for: (a) Aggravated Sexual Assault in violation of N.J.S.A. 2C:14-2a(3) (Count One - first degree); and (b) Burglary, in violation of N.J.S.A. 2C:18-2 (Count Two - Second Degree). On or about June 30, 2008, Wright entered original pleas of "not guilty" as to these charges. Da1

The parties were unable to resolve this matter by way of plea and the case proceeded to trial. The trial commenced on or about March 17, 2010, and concluded on or about March 24, 2010. The jury found Wright guilty as to Count One. As to Count Two, the jury convicted Wright of a third-degree burglary. Da2

On or about August 26, 2010, the State moved for an order imposing a discretionary extended term at the time of sentencing (the "Extended Term Motion"). Da4

The trial court sentenced Wright on or about September 10, 2010. The trial court granted the Extended Term Motion. As to Count One, the trial court imposed a custodial term of 25 years, with an 85% parole disqualifier and five years of parole supervision pursuant to the State's No-Early-Release Act. The trial court merged Count Two with Count One. The trial court found further that Megan's Law applied to this case, and sentenced Wright to parole supervision for life. The trial court ordered further that the custodial term imposed in connection with the Indictment run consecutive to a 10-year custodial term imposed previously on Hudson County Indictment No. 924-07-06. Da15

Wright filed and served his Notice of Appeal and related papers, along with a Notice of Motion for an order allowing this appeal to be commenced out of time. Da18 On or about March 14, 2011, this Court entered an Order granting that Motion. This is Wright's opening Brief.

V. Statement of Facts¹

A. *Introduction*

The events giving rise to this case occurred on and around the evening of November 18, 2006, into the morning of November 19, 2006 (the "Incident Date") in Jersey City, New Jersey, in an apartment located at 235 Arlington Avenue. Liliana Santos ("Santos"), the purported victim, and Wright were the only witnesses to any of the relevant events.

B. *Santos*

Santos lived in an apartment at 235 Arlington Avenue in Jersey City on the Incident Date. The building is a brownstone building, and her unit was on the lowest level. The apartment had two front windows. Its main entrance was located under the stairs to another apartment on an upper floor. The main entrance of her apartment opened into the living room. A bathroom, kitchen and bedroom, all connected by a hallway, were located behind the living room. The bedroom was in the very back of the unit. Santos was the only tenant. 2T4-2T5.

¹ "1T" refers to the Transcript of Trial dated March 17, 2010.
"2T" refers to the Transcript of Trial dated March 18, 2010.
"3T" refers to the Transcript of Trial dated March 23, 2010.
"4T" refers to the Transcript of Trial dated March 24, 2010.
"5T" refers to the Transcript of Trial dated March 25, 2010.
"6T" refers to the Transcript of the sentencing hearing dated September 10, 2010.

One of the two front windows actually opened into a closet in the living room. The other window opened directly into the living room. The windows had screens. Santos testified that on the Incident Date, she locked the window that opened into the living room before she went to sleep, and that the other window remained locked at all times because it opened into a closet. The screens on the windows did not lock. 2T8-9 The few furnishings in the apartment included a television set located in the bedroom, near the bed. 2T9

Santos was asked at trial to describe her activities on the Incident Date, and began by saying that "[e]verything [was] a little blurry, but [she] remember[ed] some of what [she] did." 2T10 She attended a baby shower, went with friends to a local bar called the Latin Lounge, and then met some friends on Pine Street in Jersey City. 2T11-2T13 She called her boyfriend, Anthony Waring ("Waring") from Pine Street for a ride home. Waring was at another bar in the area. Waring met Santos, took her home, and accompanied her into the apartment. 2T14-15 They arrived there at about 1:30 to 2:00 am. 2T16 While there together, Santos and Waring had sex. Santos testified that Waring left at about 5:00 am. 2T17

Santos had difficulty remembering what happened at and after that point in the morning. She stated that she eventually woke up, locked the door behind Waring, closed and locked the window, smoked a cigarette and went back to sleep. 2T18

Santos began her description of the events that followed by stating that "[i]n between me laying down and going to sleep everything is like a blur. I don't really remember. It was so long ago." 2T20 Santos stated that the television was on when she went to sleep. 2T21

Santos woke up sometime later that morning. She testified that the television was off and somebody was choking her. 2T21 It was dark and she "could not see anything". In attempting to describe the relevant events in greater detail, Santos stated that she did not "remember everything exactly what happened because I tried so hard to block everything out. It happened so long ago." She stated that she struggled with her attacker, who then raped her. She stated specifically that until this point, she was not able to see her attacker. 2T22

As to the details of the sexual assault, Santos testified that her assailant put on a condom, inserted his penis inside of her, and began raping her. According to Santos, he apparently received a phone call while he was

assaulting her, which he answered. At this point, Santos was on her stomach, and her assailant was behind her. Santos stated that she was able to see his face in the light of the phone, and that she recognized him as Wright. Santos knew him - but only by his street name, which was "S.DOT". Aside from the light generated by the cell phone, the apartment was dark. 2T24-2T25 Santos also testified that she could not remember if her attacker received the phone called before or after he raped her. He then left through the front door. Santos then got up, went outside and saw someone running down the street. She then returned to the apartment, called 911, and took a shower. Upon returning to the apartment, Santos noticed that the window opening into the closet was broken. 2T26-2T27; 2T30

The 911 operator instructed Santos specifically to not take a shower, but she did so anyway. She said she did so because she was nervous, scared, and not thinking coherently. She could not remember if the police or ambulance arrived together or separately. 2T32

Santos testified that she left the clothes that she was wearing during the attack in her bathroom. There was blood on her shirt. Santos realized that the shirt had a bloodstain only when she was about to shower. Santos

testified that she was not bleeding at any point during the relevant time period. 2T37-2T38

Santos never identified her attacker as S.DOT to either the police officers or ambulance personnel who responded to her apartment. She was taken to Christ Hospital in Jersey City for examination and treatment. She could not remember if she told the nurse what had happened to her. She was also interviewed by Investigator Shanda Rosario of the Hudson County Prosecutor's Office ("Rosario"). 2T40-2T41 After the examination at the hospital, Santos went to give Rosario a Statement. During the Statement, Santos identified her assailant as S.DOT. 2T42-2T43 Santos had also called Waring prior to going to the detectives' office where she gave her Statement. Waring was waiting for her when she arrived at the detectives' office. She testified that she told Waring during this conversation that S.DOT had attacked her. 2T44

During her Statement, Santos testified that she could not provide Rosario with S.DOT's real name or address, but that she had seen him on the street on the Incident Date prior to the attack. 2T45-2T46 Santos did not hear from the Prosecutor's Office about the matter until approximately one year after the Incident Date. 2T48 She

then identified Wright as her attacker before the jury.

2T50

At some point, Santos testified that she had scratched her attacker across his face. On cross-examination, Santos could not recall the details of that portion of their encounter, including whether she had drawn blood. She also could not recall whether she had told anybody who had questioned her about the incident that she scratched her assailant, including the nurse who examined her at the hospital or Rosario. 2T65-2T66

Santos reiterated that her apartment was completely dark during the attack. 2T80 At the beginning of their encounter, Santos actually thought that her boyfriend, Waring, was her attacker. During the attack, she managed to feel her assailant's hair, which was similar in texture to Waring's. 2T73; 2T80; 2T82; 2T95 Regardless of her purported ability to identify Wright as her attacker at trial, she initially told Rosario that she could not identify anybody as the assailant. 2T81

On rebuttal, Santos testified that Wright's younger brother, Antwan Wright ("Antwan"), approached her on the street sometime after the alleged attack and, among other things, apologized for Wright's actions toward her, and asked her to not appear in Court to testify against Wright.

4T22 She also stated that the alleged attack quickly became a subject of discussion in the neighborhood. 4T23-4T24 Contrary to Wright's testimony discussed hereinbelow, She denied ever going to the apartment of Wright's mother. She also denied having a personal or romantic relationship with Wright on or around the Incident Date, or that she ever had consensual sex with him. 4T27

Waring also testified at trial. As noted above, Waring was Santos' boyfriend on and around the Incident Date. 2T103-2T104 Waring was at a local bar the night before the alleged assault. Sometime after leaving there, he met Santos and they both went to her apartment. 2T106-2T107 They stayed there for some time, had sex, and he left and went home. 2T110-2T112

According to Waring, Santos called him at approximately 8:00 am that morning from the detectives' office. She was upset and stated that she had been raped by S.DOT. 2T105-2T106; 2T114-2T116 Waring did not take Santos seriously at first. Prior to going to the detectives' office, he rode past her apartment "to see if she was serious. I thought she was kind of playing at first ..." He took her claim seriously only when he saw the crime scene around the apartment. 2T116 He then picked up Santos at the detectives' office and took her home. 2T118

C. *Wright*

Wright testified in his own behalf at trial. He stated that he and Santos had known each other since they were young. They attended the same grade school in Jersey City. Wright was older, but his younger brother was in Santos' grade. 3T101-3T102 As they grew up, they would see each other on the street and speak frequently. 3T104 Wright also knew both of Santos' brothers. 3T105

Wright and Santos developed a more serious relationship sometime prior to the Summer of 2006. 3T105 At this point, they spoke frequently on the phone. They became more intimate during that Summer and began a sexual relationship. 3T106-3T108 They continued having sex right up to the Incident Date. 3T108-3T110 Wright had another girlfriend during this period, and this apparently angered Santos. 3T111

At or about midnight on the Incident Date, Wright was with friends in the area around Marjae's bar in Jersey City. Wright saw Santos in the area, and called her on her cell phone later that night. 3T112 Santos, who was at home by this time, stated that she was relaxing. Wright asked if he could come over, Santos agreed, and Wright proceeded to her apartment. 3T113

Upon his arrival, Santos let Wright into the apartment. The couple ultimately went into the bedroom and had consensual sex on the bed. 3T116 Wright's girlfriend called him while he was there. His girlfriend was upset because Wright had not yet come home. At this point, Wright informed Santos that he had to leave. 3T117-3T118

Santos insisted that Wright remain with her in the apartment. She took his clothes and refused to return them. Wright, for his part, insisted that he had to leave. 3T118-3T119 Santos then threw his clothes into the closet in the living room that contained the window. 3T119 The two then argued over Santos' refusal to return his clothes, and her insistence that he remain in the apartment. Wright punched the window in the closet during this argument. The glass shattered, and he cut his hand. At this point in the exchange, Santos was holding his clothing. 3T120 Wright attempted to grab his clothing from her. He may have touched her with the hand that was cut by the window, but could not be sure. 3T122; 3T144 Wright left the apartment after he retrieved his clothes. 3T144

Wright was certain that Santos did not scratch him while they were having sex. 3T122 He also denied breaking the window and climbing into the apartment. 3T123

A few days after the Incident Date, Wright saw Santos on the street. She said hello and just kept walking. Wright also acknowledged that he uses the name "S.DOT", and stated that Santos would refer to him as such. 3T123; 3T132 He also saw her brothers on the street sometime after the Incident Date. They did not accuse him of anything, and acted as if nothing was wrong. 3T125

Wright's younger brother, Antwan ("Antwan"), also testified at trial, and verified much of Wright's testimony. 3T154 Antwan knew Santos because they had attended the same grade school in Jersey City, and were in the same class for at least some period of time. Growing up as teenagers, they saw each other frequently in various parts of town. 3T154-3T155 Thus, there could be no dispute that Antwan, like his older brother, knew Santos well.

In and around November, 2006, Antwan lived with his mother in her apartment. Wright would visit periodically, but stayed mainly with his girlfriend, Mia. 3T155 However, Antwan recalled that Wright and Santos started spending significant amounts of time together in and around the Summer of 2006. 3T156 Then, during this period, Wright and Santos arrived at the mother's apartment one morning at about 5:00 am. They both entered Wright's

mother's bedroom and apparently had sex. 3T157-3T158 This scene was repeated on several occasions. 3T159 Antwan would also see them together on the street, but did not notice any signs of tension between them. 3T159-3T160

Antwan discussed the incident with Santos at some point prior to the trial. He asked Santos why she had denied knowing Wright, and why she had accused him of rape. During this conversation, Santos never denied knowing Wright, and told Antwan that "[i]t don't matter what me and him did, he shouldn't a did that to me ... [l]ike it don't matter what happened in the past, he shouldn't a did that." 3T162-3T163

Finally, Davon Parson ("Parson"), a friend of Wright's, testified that he had known Wright, Santos, and both of Santos' brothers, since grade school. They all saw each other frequently in the same Jersey City neighborhood. 4T4-4T6 In or around May, 2006, Parson observed Wright and Santos hugging and flirting publicly on a regular basis. 4T8; 4T11. Thus, the couple did nothing to conceal the fact that their relationship had gone beyond that of friends, and that they were intimate.

D. The Investigation

As noted above, Rosario was the investigator assigned to this case. Santos first met with her at the hospital

where she was taken after the attack. They spoke about the incident, and Santos did not identify any particular individual as her attacker. 2T131-2T132

After the examination, Santos accompanied Rosario to the her office for a formal statement. 2T133 During the statement, Santos told Rosario that her attacker "looked like a guy she knew from the neighborhood by the name of S.DOT." She did not know this person's real name or address. 2T134

Rosario testified that she recovered the shirt Santos had worn during the incident while they were both at the hospital. Approximately one year later, Rosario learned that the blood on the shirt was Wright's. This apparently was the first time that Wright's name was connected in some way to the name S.DOT. 2T137-2T139

The trial court then informed the jury that the parties had stipulated that the blood on the shirt was Wright's. 2T138-2T139

Detective Matthew Stambuli, a detective with the Hudson County Prosecutor's Office ("Stambuli"), assisted in processing the crime scene. 3T6 Santos had already left for the hospital after Stambuli had arrived at her apartment. 3T7 During his investigation at the apartment, Stambuli discovered and photographed, among other things,

the broken window that led into the closet in the living room and Santos' white shirt which was stained with blood.²

3T10 Stambuli also discovered a used condom on the street near the apartment. 3T17 A DNA analysis performed on the condom produced inconclusive results. 3T20-3T21

Similarly, any fingerprints that Stambuli recovered from the apartment lacked sufficient detail to be useful. 3T22-3T23

The trial court then informed the jury that the parties had stipulated that the condom had been examined, and it was determined to be unsuitable for further testing. 3T28

On cross-examination, Stambuli testified that the broken window in front of the apartment, which was the only possible opening that the alleged assailant could have used to enter the apartment, was closed and locked when he arrived at the scene. 3T31-3T33 Stambuli admitted that this person could not have entered through the break in the window. 3T34 Thus, the assailant would have had to shatter the window, unlock and open it, climb through it into the apartment, and then close and lock what remained

² This directly contradicted Rosario's testimony concerning the fact that the shirt was recovered at the hospital.

of the broken window. 3T33-3T35 The police did not discover any blood on the window. 3T46

Stambuli stated further that the police discovered a condom wrapper in the bedroom. It was, however, impossible to determine the brand of the condom discovered on the sidewalk. Further, the wrapper did not have any fingerprints of evidentiary value. This, taken together with Stambuli's direct testimony, demonstrated that it was impossible to link the condom with anything that purportedly happened to Santos. 3T36-3T37

Finally, the crime scene team collected the sheets that were on the bed in Santos' apartment, but simply did not bother to have them checked for any DNA that could be used to identify Santos' assailant. 3T41

As noted above, Santos was transported to Christ Hospital in Jersey City after the incident, and was examined by Linda Richardson ("Richardson"), a sexual assault nurse examiner. 3T48-3T49; 3T52 As part of her examination, Richardson interviewed Santos in order to obtain information from her concerning the incident while it was still relatively fresh in her mind. 3T54-3T55 Richardson wrote down everything Santos told her as she said it. 3T58; 3T68 Had Santos identified her attacker by any kind of name, Richardson would have included it in her

report. However, Santos did not identify her attacker by any specific name. 3T69; 3T81-3T82; 3T86

Richardson noted further that Santos had showered after the incident, and therefore "pretty much wipe[d] away" any evidence that may have been on her person. Thus, the fact that Santos showered after the attack hampered Richardson's ability to collect evidence that could be used to identify the assailant. 3T70 Richardson's efforts at evidence collection were also limited by the fact that Santos' assailant used a condom during the attack. 3T73; 3T82

Additionally, Richardson stated that Santos never indicated that she had scratched her attacker. Had she done so, Richardson would have included this important fact in her report. 3T84 Finally, Santos told Richardson that she did not really see her attacker, except for the brief moment that his face was purportedly illuminated by the light of his cell phone. 3T86

E. The Prosecutor's Closing Statement

During his closing statement, the prosecutor discussed, among other things, his view of the assailant's reasoning in deciding to enter Santos' apartment through the window that opened into the closet. In doing so, the prosecutor stated "[a]nd let me just say this right now. I

cannot speak to what somebody like this or why someone like this would do this." Defense counsel objected to this extraneous and obviously improper remark, and the trial court overruled the objection. 4T58

Later in his summation, the prosecutor made the following highly prejudicial remarks:

"So, we saw obviously that the defense has put on a case. All right. Put on three witnesses. And Mr. Hirschorn rightly told you that there's no obligation to do that. But he did it, all right. **And as I said before, he tried to recreate this puzzle, okay. You're left with a picture of - of a bloody shirts, broken glass, sexual assault allegations, and you need to put together new puzzle pieces to fit together. And that's what he did.**

And I would submit to you, ladies and gentlemen, that he knew what that puzzle looked like. So he had to step back, all right. He had to start from there and reverse his way back. There had to be an explanation for each one of those things, all right.

And I would submit to you that you heard from witnesses. Now if you think about it, you heard the bare minimum." 4T67-4T68 (Emphasis supplied)

The following dialog then took place:

THE COURT: Come to sidebar a minute counsel, please.

THE COURT: You can't do that.

PROSECUTOR: Sure I can. They put it out there.

THE COURT: You can't say that (inaudible)

PROSECUTOR: (inaudible)

THE COURT: Be careful please. 4T68

Curiously, the stenographer was unable to hear and record the precise nature of the Court's objection and the prosecutor's response. However, the prosecutor's highly prejudicial remarks to the jury constituted nothing less than an unwarranted attack on defense counsel's integrity and credibility and accused him, in essence, of presenting a case before the jury that was little more than a completely contrived bill of goods.

F. The Jury Charge

Following summations, the trial court charged the jury. The charge consisted of the standard opening and closing instructions, as well as charges concerning the use and effect of prior convictions, charges on identification evidence, and substantive charges for aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second-degree burglary and third-degree burglary.

Even a cursory review of the charge in this case reveals that it consisted almost exclusively of a mere restatement of the model jury charges. Indeed, the only case-specific information that the trial court included in the charge were the names of the parties and some witnesses. See, e.g., 4T94-4T95; 4T98; 4T103; 4T110-4T113;

4T115; 4T118; 4T121. The charge did not include any other factual information that was elicited during the trial.

Additionally, the charge included the following instructions:

Defendant, as part of his general denial of guilt, contends the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that he is the person who committed the alleged offense.

The burden of proving the identity of the person who committed the crime is upon the State. For you to find the defendant guilty, the State must prove beyond a reasonable doubt that this defendant is the person who committed the crime.

The defendant has neither the burden nor the duty to show that the crime if committed was committed by someone else, or to prove the identity of that other person.

You must determine, therefore, not only whether the State has proven each and every element of the offenses charged beyond a reasonable doubt, but also whether the State has proven beyond a reasonable doubt that this person, this defendant, is the person who committed it. 4T97-4T98

As discussed elsewhere, Wright admitted to having sex with Santos in her apartment on the Incident Date. As to this fact, his identity was never at issue. Rather, the issue that the jury was required to consider was not Wright's identity, but whether his relationship with Santos was consensual. Thus, this portion of the charge effectively instructed the jury to simply ignore Wright's

sole defense and focus instead on his identity as a person who had sexual relations with Santos on the Incident Date, which was not a disputed fact.

Finally, after deliberations commenced, the jury asked for the definitions of, among other things, aggravated sexual assault and sexual assault. 5T3 After hearing from counsel, the trial court decided to recharge the jury on both offenses:

PROSECUTOR: No, I think how you should say this, maybe just read the sexual assault charge, and say that's sex assault. If you find there was a burglary on top of that sex assault, it makes it an aggravated sexual assault.

COURT: I can't do that. I'll read both and when I'm done I'm saying and the bottom line, ladies and gentlemen, the only difference between sexual assault and aggravated sexual assault is the aggravated sexual assault has a component of burglary.

PROSECUTOR: Okay.

COURT: Okay? That's probably a better way to do it. 5T6

The jury then entered the courtroom, and the trial court re-charged them on sexual assault and aggravated sexual assault. As to aggravated sexual charge, the trial court stated as follows:

Now, I'm going to give you the definition of aggravated sexual assault. And basically the only difference between these two definitions is with aggravated sexual assault the sexual penetration as referred to in sexual assault

occurred during the course of a burglary, okay. That's the only difference between the two. This has a burglary component, this does not.

But I'll repeat it.

Count one of the indictment charged the defendant with aggravated sexual assault. Our statute provides in pertinent part as follows. An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person during the commission of a burglary. 5T14

...

In order to convict the defendant of this charge, the State must prove the following elements beyond a reasonable doubt ... And three, the penetration occurred during the commission of a burglary.

...

Third element the State must prove beyond a reasonable doubt is that the penetration occurred during the commission of a burglary, all right.

...

So again, three elements for that one ... Three, the penetration occurred during the commission of a burglary.

So, between the two charges, the only difference is aggravated sexual assault has a burglary component. Without the burglary, if all other elements are met, then it's sexual assault. Okay? Understand? 5T14-5T16

Later, in dealing with another question from the jury,

the prosecutor commented as follows:

PROSECUTOR: Judge, I think that there is definitely a more important point here ... [T]hey need to be specifically instructed that the

burglary for aggravated sexual assault is only third degree burglary.

I-I'm forcing an issue here where they are saying we need to have third degree - second degree burglary, excuse me, in order to get the aggravated sexual assault. I didn't think that it was clear yesterday, I didn't think that it was clear today ...

In the verdict sheet itself it doesn't specify that you need only third degree burglary and I think that they should be informed about this in light of the questions that have been presented so far. 5T18-5T19

Defense counsel then objected to this request because it went beyond the scope of the jury's question. 5T19 The prosecutor then stated that he could not disagree with defense counsel's position, but still believe that the jury "should have been instructed specifically on this." The trial court then reminded the prosecutor that he had included that instruction in the original charge given the previous day. 5T20; 4T126-4T127³ The prosecutor responded as follows:

PROSECUTOR: But today when they had the question about the definition of aggravated sexual assault I specifically asked that the burglary that was sufficient - in essence, Judge, today when they were read they were left out an element of

³ As part of the original charge given the previous day, the trial court instructed the jury that "with respect to assault during the commission of a burglary, it doesn't matter whether it's a second or third degree burglary. But you must find a burglary occurred for commission - for the aggravated sexual - aggravated sexual - aggravated sexual assault to have occurred during the course of a burglary."

aggravated sexual assault. That wasn't read to them, and that's why I made the objection before. One of the elements of aggravated sexual assault is burglary, and when you instructed them again you didn't instruct them on what burglary is.

COURT: Oh, I didn't do it before when I should have done it you're saying.

PROSECUTOR: Yes.

[W]hen they ask for a definition, you're supposed to give them, they are supposed to get rather, the definition of all the elements, and I - I think you would admit, Judge, that you didn't define for them today what burglary -

COURT: I did not do it before. All right, I see your point.

5T20-5T21

After further colloquy, the trial court stated that it would re-charge the jury, as follows:

All right, so you want me to correct the previous - in other words, I can say this. Before when I gave you the definition of aggravated sexual assault and I told you the only difference between that and sexual assault was the burglary component, let me repeat the elements for you.

An actor is guilty of aggravated sexual assault if he commits sexual penetration with another person in the commission of a burglary.

It doesn't make a difference if it's a third degree burglary or a second degree burglary with respect to that count. 5T22

The jury then re-entered the courtroom and the trial court charged them, in relevant part, as follows:

Before I gave you the definitions of aggravated sexual assault and sexual assault, and I told you

the only difference was the burglary component in the aggravated, okay.

What I neglected or forgot to tell you was that it doesn't matter what level the burglary for aggravated sexual assault, it's any burglary for the aggravated sexual assault ... 5T23

The jury then convicted Wright of both counts in the Indictment. 5T5T24-5T25

As noted above, the prosecutor made several remarks during his closing statement that were clearly inappropriate and fell far outside the bounds of proper summation. The prosecutor essentially disparaged defense counsel by accusing him of fabricating his entire case. As to the defendant, the prosecutor's statement concerning his inability to explain "why someone like this" would engage in the conduct complained of could serve no purpose other than to stigmatize Wright before the jury almost immediately before the commencement of deliberations. The prosecutor's inflammatory remarks prejudiced Wright by depriving him of the right to have his case fairly and impartially considered by his jury in a detached and unemotional manner.

Further, the trial court's instructions to the jury in this case were materially defective. First, the charge consisted almost exclusively of "canned" statements from the model jury charges and, with the exception of the names

of the victim, the defendant, and certain witnesses, lacked any factual information elicited at trial. Additionally, the charge completely mischaracterized Wright's sole defense in this case. Finally, the charge on aggravated sexual assault was confusing, and therefore failed to properly instruct the jury on the elements of this offense. Taken as a whole, the charge was therefore inadequate since it failed to provide Wright's jury with the legal foundation it required to fairly and impartially consider the evidence in this case.

For all of these reasons, and as discussed more thoroughly below, Wright's convictions must be vacated, and this case must be remanded to the trial court for further proceedings.

IV. Legal Argument

Point A

Wright's Convictions Must Be Vacated Because Of The Prejudice Resulting From The Prosecutor's Inappropriate Remarks Made During His Closing Statement

As discussed above, the prosecutor made remarks during his summation that both disparaged defense counsel and stigmatized Wright. In addition to being inappropriate, these remarks clearly exceeded the bounds of what a prosecutor may include in a closing argument. Thus, these remarks prejudiced Wright before his jury by depriving him of a fair and impartial review of his case. Accordingly, Wright's convictions must be vacated.

Prosecutors are expected to make "vigorous and forceful closing argument[s] to the jury." State v. Rose, 112 N.J. 454, 518 (1988). However, "[t]his wide latitude is not unfettered [and] is bound by parameters established by decisional law and ethical considerations." State v. Whitaker, 402 N.J. Super. 495, 513 (App. Div. 2008). Our Supreme Court has held repeatedly that comments that denigrate defense counsel, or suggest that counsel has engaged in conduct intentionally designed to mislead the jury, exceed the bounds of permissible argument on summation. State v. Jenewicz, 193 N.J. 440, 471 (2008);

State v. Nelson, 173 N.J. 417, 461 (2002); State v. Smith, 167 N.J. 158, 177 (2001); Rose, 112 N.J. at 518-519. Against this backdrop, our courts "have 'not hesitated to reverse convictions where we have found that the prosecutor in his [or her] summation overstepped the bounds of propriety and created a real danger of prejudice to the accused.'" Nelson, 173 N.J. at 461 (citation omitted).

Further, comments by the prosecutor suggesting their inability to fathom why the defendant engaged in the conduct giving rise to the charges also has been held improper. State v. Roman, 382 N.J. Super. 44, 57-58 (App. Div. 2005).

In the matter at bar, the prosecutor's remarks clearly overstepped the bounds of propriety, and obviously prejudiced Wright. First, the prosecutor openly and unabashedly accused defense counsel of fabricating his entire case. He thereby publicly accused Wright's counsel of conduct that was both wrongful and unethical. By so disparaging Wright's counsel and damaging his credibility with the jury, the prosecutor cut off any chance that Wright may have had for a fair and impartial consideration of anything that counsel presented on his behalf during trial. See Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 2568-2569, 61 L.Ed.2d 197 (1979) ("[T]he lawyer is

the one person to whom society as a whole looks as the protector of the legal rights of [a criminal defendant] in his dealings with the police and courts.”)

Further, the prosecutor's inability to fathom "why someone like this" would engage in the conduct giving rise to the allegations underlying this case only served to further prejudice Wright by stigmatizing him to the jury. Such remarks obviously had no relationship to any evidence presented at trial, and clearly could not have supported any of the positions that the State or its witnesses articulated to the jury. The only possible purpose and effect of such remarks was to publicly disparage Wright before his jury, thereby depriving him of an unbiased consideration of the parties' trial proofs.

Criminal defendants are constitutionally entitled to a fair and impartial consideration of all of the evidence presented at trial. The prosecutor's comments to the jury effectively deprived Wright of this constitutional guarantee. Accordingly, his convictions must be vacated.

Point B

Wright's Convictions Must Be Vacated
Because The Instructions Given To The
Jury Hearing This Case Were Fatally Flawed

1. *The Jury Charge Consisted Almost Exclusively Of "Canned" Statements From The Model Charges, And Failed To Include Sufficient Factual Information Unique To This Case (Not Raised Below)*⁴

The jury charge in this case was almost completely void of any factual information elicited during trial. Thus, the jury was left with little more than a canned statement of law that was not placed sufficiently within the larger factual context of the case. Such a charge could not have provided the jury with the level of guidance necessary for a meaningful consideration of the evidence. Accordingly, Wright's trial was fundamentally unfair, and his convictions must be vacated.

Both the State and Federal Constitutions guarantee the right to a jury trial in criminal cases. See N.J. Const., Art. 1, Para. 9 ("The right to a trial by jury shall remain

⁴ It is anticipated that the State will argue that Points B1, B2 and B3 cannot survive review under the plain error standard of R. 2:10-2. As to reviewing the adequacy of jury instructions under this standard, our courts have held repeatedly that "[E]rrors impacting directly upon [such] sensitive areas of a criminal trial are poor candidates for rehabilitation' under the plain error theory." State v. Jordan, 147 N.J. 409, 422 (1997). (Citing State v. Simon, 79 N.J. 191, 206 (1979)). See also State v. Rodriguez, 195 N.J. 165, 175 (2008).

inviolable ..."); Art. 1, Para. 10 ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury ..."); U.S. Const., Art. III, Sec. 2, Para. 3 ("The Trial of all Crimes ... shall be by Jury ...") Amend. 6 ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."). This right is implemented, in part, by giving juries charges that are legally correct and factually balanced. Thus, our courts have held repeatedly that "[c]orrect charges are essential for a fair trial." State v. Martin, 119 N.J. 2, 15 (1990). See also State v. Collier, 90 N.J. 117, 122 (1982).

A jury "charge is a road map to guide the jury and without an appropriate charge a jury can take a wrong turn in its deliberations." Martin, supra. In order to be certain that a jury truly understands the charge, our Supreme Court has insisted regularly "that courts give content to the statutory language in their charges to juries." State v. Gartland, 149 N.J. 456, 475 (1997). "[A]n instruction solely in the terms of the language of the statute will not give sufficient guidance to the jury and engenders too great a risk that the jury's ultimate determination of guilt or innocence will be based on speculation, misunderstanding, or confusion." State v.

Olivio, 123 N.J. 550, 567-568 (1991). Thus, our Courts have recognized that although "[m]odel jury charges are often helpful to trial courts performing this important function ... the better practice is to mold the instruction in a manner that explains the law to the jury in the context of the material facts of the case." State v. Concepcion, 111 N.J. 373, 379 (1988)⁵. See also State v. Williams, 168 N.J. 323, 340 (2001); State v. Petties, 139 N.J. 310, 321 (1995).

In the matter at bar, the jury charge fell far short of this standard. Even a cursory review of the instructions reveals that it contains almost no factual information elicited during the trial. Indeed, it appears that the only factual information unique to the case that appears in the charge are the names of the alleged victim, the Defendant, and certain witnesses. Aside from this relatively meager information, the instructions are, as a whole, completely divorced from the facts elicited at

⁵ The Concepcion Court found support for its position on this issue in Schwarzer, Communicating with Juries: Problems and Remedies, 69 Cal. L. Rev. 731, 741 (1981), which "review[ed] studies evaluating the efficacy of jury charges and recommend[ed] 'against the use of abstract statements of legal principles and for the use of instructions phrased as concrete statements of the questions to be decided, incorporating the evidentiary context of persons, places, thing [sic] and events disclosed at trial.'"")

trial. For the reasons discussed above, such instructions simply do not provide juries with the level of guidance requisite to full, fair and impartial consideration of the evidence. Indeed, they effectively undercut a criminal defendant's most basic constitutional rights, including the right to a fair trial and fair consideration of the evidence by a jury. In this light, the trial court's instructions to the jury in this case were inadequate, and Wright's convictions must be vacated.

*2. The Charge Concerning
Aggravated Sexual Assault Was
Hopelessly Confusing
(Not Raised Below)*

As discussed above, the jury asked to be re-charged on the offenses of aggravated sexual assault and sexual assault. The re-charge, which addressed the primary offenses in this case, simply could not have provided the jury with adequate guidance concerning these offenses because it was so confusing. As a result of these material defects in the jury charge, Wright's convictions must be vacated.

As noted previously, the Supreme Court found in Martin, supra, that understandable charges are essential for a fair trial, and that we rely upon intelligible instructions to guide a jury's review of the proofs.

Significantly, these are not isolated holdings of a single court. Rather, they are fundamental underpinnings of any criminal jury trial that are emphasized repeatedly in decisions discussing the adequacy of jury instructions. See, e.g., Rodriguez, 195 N.J. at 175; State v. Savage, 172 N.J. 374, 387 (2002); Whitaker, 402 N.J. Super. at 513. Indeed, the need for clear and understandable charges on critical issues is so fundamental that misleading instructions are, under certain circumstances, presumed to be reversible error. Martin, 119 N.J. at 15. See also Jordan, 147 N.J. at 421-423; State v. Rolon, 400 N.J. Super. 608, 616 (App. Div. 2008) ("An essential ingredient of a fair trial is that a jury receive adequate and understandable instructions.") (Citing State v. Afanador, 151 N.J. 41, 54 (1997)); State v. Allen, 308 N.J. Super. 421, 431 (App. Div. 1998) ("Our courts have consistently 'placed an extraordinarily high value on the importance of appropriate and proper jury charges to the right to trial by jury.'") (Citing State v. Grunow, 102 N.J. 133, 148 (1986)).

Our Supreme Court has described the centrality of understandable jury instructions as follows:

"Appropriate and proper charges are essential for a fair trial. [citation] It is at this point in the trial before the jury retires to deliberate

and resolve the factual issues that the trial court should explain to the jury in an understandable fashion its function in relation to the legal issues involved ('court's instructions must ... correctly state the applicable law in understandable language'). [citation omitted] Entailed is 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. Most laypersons are uneducated in the law and do not understand lawyers' jargon or the nuances involved in many of the concepts with which they are called upon to deal in the jury room. [citation] A jury may not even have the luxury of the availability of a dictionary during its deliberations. [citation] Thus faithful performance of the court's duty of expounding the law for the jury's guidance and instruction requires a plain and clear exposition of the issues."

State v. Green, 86 N.J. 281, 287-288 (1981).

Further, in reviewing the adequacy of particular charges, our courts have held that "[t]he standard for assessing the soundness of a jury instruction is 'how and in what sense, under the evidence before them, and the circumstances of the trial, would ordinary ... jurors understand the instruction as a whole.'" Savage, 172 N.J. at 387 (Citation omitted). See also Allen, 308 N.J. Super. at 431.

After commencing deliberations, the jury in the matter at bar asked the trial court to, among other things, "define aggravated sexual assault and sexual assault." After hearing from counsel, the trial court decided to read

the model charges on each offense, and then add that the offense of aggravated sexual assault had a burglary component. The jury then re-entered the courtroom, and the trial court re-charged them on both offenses. As part of the re-charge, the trial court told the jury that the only difference between the two offenses was that aggravated sexual assault has a burglary component, and sexual assault does not. The prosecutor subsequently pointed out that the re-charge was materially defective because it failed to state that the offense of aggravated sexual assault could stem from either a second or third degree burglary. The prosecutor observed further that both the re-charge and the verdict sheet were silent on this issue. After hearing further from counsel, the trial court told the jury that "[i]t doesn't matter what level the burglary for aggravated sexual assault, its any burglary for the aggravated sexual assault."

The manner in which the trial court re-charged the jury on the elements of aggravated sexual assault and sexual assault was confusing, failed to provide the jury with the necessary level of guidance concerning the elements of these offenses, and therefore constitutes reversible error. First, the fact that the jury even asked for the definitions of these offenses after commencing

deliberations demonstrates plainly that the corresponding portions of the initial charge were inadequate. Thus, more carefully crafted instructions on these issues were required if the jury was to truly understand the substantive offenses charged in this case.

Further, and in a manner similar to the initial charge, the re-charge contained only the most minimal information concerning the facts of the case. Aside from mentioning occasionally the name of the alleged victim, the re-charge was divorced completely from any of the facts elicited at trial. Thus the re-charge consisted of little more than cold legal principles.

Additionally, aggravated sexual assault was the "top count" of the Indictment. The cases discussed herein make abundantly clear that our courts set high standards concerning the content and accuracy of jury charges. However, it is especially important that the jury understand the law as it pertains to the substantive offenses charged in the Indictment, and this is particularly true concerning the most serious offenses that carry the greatest sentencing exposure. Indeed, the instructions on the substantive offenses are the centerpiece of the charge, and it is impossible for a jury

to evaluate effectively a defendant's culpability absent a thorough understanding of the elements of each offense.

The re-charge fell far short of this mark. First, the trial court failed initially to instruct the jury that either a second or third degree burglary created a sufficient basis upon which to conclude that Wright was guilty of aggravated sexual assault. Then after interrupting deliberations and bringing the jury back into the courtroom for additional instructions, the trial court stated that "it doesn't matter what level the burglary for aggravated sexual assault, it's any burglary for the aggravated sexual assault." Such a statement may be clear to an attorney, but does little to instruct lay jurors concerning the relationship between aggravated sexual assault, burglary, and the facts of this case.

Against this backdrop, it is clear that this portion of the charge provided woefully inadequate guidance to the jury concerning the central issues in this case. This failure to provide the jury with intelligible instructions constitutes reversible error. Accordingly, Wright's convictions must be vacated.

*3. The Portion Of The Jury Charge
Concerning The Identity Of The
Assailant In This Case Misstated
And/Or Mischaracterized Wright's
Defense (Not Raised Below)*

As noted above, the trial court instructed the jury that Wright asserted that the State misidentified him as the person who committed the offense. As part of this instruction, the trial court stated, among other things, that the State has the burden of proving the identity of the person who committed the crime, and that the jury must find beyond a reasonable doubt that the State proved that Wright committed the crime.

The manner in which these instructions were given completely mischaracterized Wright's defense in this case. Wright did not assert directly that someone else sexually assaulted Santos, and he was misidentified as the person who purportedly raped her. He also never denied having sexual relations with Santos on the Incident Date. Indeed, Wright fully and freely admitted to having a sexual encounter with Santos on the Incident Date. The crucial difference between his position and that of the State was that this encounter was completely consensual. Thus, the issue of Wright's identity as someone who had sexual relations with Santos on the Incident Date was never at issue; rather, the issue that the jury was being asked to

consider was the nature and quality of that encounter. In this light, the trial court's instructions asked the jury to consider the wrong issue, thereby completely mischaracterizing Wright's sole defense.

As discussed above, jury instructions must provide accurate information concerning the relevant facts and the applicable law if they are to allow for a fair determination of the defendant's guilt or innocence. But charges must do more than this in order to guarantee a defendant's right to a fair trial. They also must accurately describe any defenses a criminal defendant may assert at trial. There can be no dispute that a defendant has a right to present defenses at trial as part of the larger case, and to have those defenses considered by the jury in a meaningful way. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (Collecting cases and noting that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967) (Recognizing the "right to present the defendant's version of the facts as well as the prosecutor's to the jury so it may decide where the truth lies. [] This right is a

fundamental element of due process of law.") See also In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948) (The failure to afford a criminal defendant "a reasonable opportunity to defend himself against [criminal charges is] a denial of due process of law.") It is equally beyond dispute that accurate and informative jury instructions concerning any defenses raised at trial are one of the primary means of implementing that right.

The manner in which the above-quoted portion of the jury charge mischaracterized Wright's defense compromised his right to a fair trial by failing to provide the jury with an accurate description of his position that fit within the larger context of the case. Because the Court's inaccurate description precluded meaningful jury consideration of Wright's defense, his convictions must be vacated.

Point C

Wright's Convictions Must Be Vacated Because Of The Cumulative Effect Of The Errors That Occurred During His Trial

As discussed above, the prosecutor made several remarks during his closing argument that were inappropriate and prejudiced Wright before the jury. Further, the trial court's charge to the jury consisted of a cold statement of

law that failed to provide the jury with meaningful guidance, was confusing in several material respects, and mischaracterized Wright's sole defense to the charges in this case. Because the cumulative effect of these errors deprived Wright of his constitutional right to a fair trial, his convictions must be vacated.

In State v. Orrechio, 16 N.J. 125, 129 (1971), our Supreme Court recognized that errors which, in and of themselves, may have little effect upon a trial can, in combination, deprive a defendant of his constitutional right to a fair trial:

"The accused, no matter how abhorrent the offense charged nor how seemingly evident the guilt, is entitled to a fair trial surrounded by the substantive and procedural safeguards which have stood for centuries as bulwarks of liberty ... Where ... the legal errors are of such magnitude as to prejudice the defendant's rights or, in their aggregate have rendered the trial unfair, our fundamental constitutional concepts dictate the granting of a new trial before an impartial jury."

The prejudicial nature of the prosecutor's remarks and the many flaws in the trial court's jury instructions have been outlined hereinabove. Significantly, these errors all occurred in succession immediately before the jury entered the jury room to commence deliberations. Thus, the final segment of the trial consisted of remarks from the prosecutor and instructions from the court that: (a)

disparaged Wright's defense counsel; (b) stigmatized Wright; (c) failed to clearly and intelligibly outline each of the elements of the primary offense(s) in the case; (d) mischaracterized Wright's sole defense to the charges; and (e) failed generally to provide adequate guidance for the manner in which the jury was to consider the evidence presented at trial. Because this series of errors obviously prejudiced Wright by distorting the jury's view of the case, his convictions must be vacated.

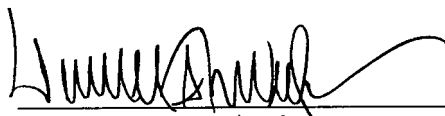
Conclusions

For all of the foregoing reasons, Wright's convictions must be vacated in their entirety.

Dated: October 5, 2011

Respectfully Submitted,

JAMES S. FRIEDMAN, LLC
Counsel to
Defendant/Appellant,
Steven Rashawn Wright

By: 
James S. Friedman

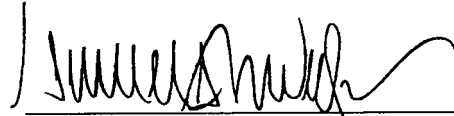
Certification of Service

1. The original and six copies of the prefixed brief, with the accompanying appendix, were filed with the Clerk of the Superior Court, Appellate Division, on or about October 5, 2011, via Priority Mail.

2. Two copies of the prefixed brief, with the accompanying appendix, were served upon DAG Teresa Blair on or about October 5, 2011, via Priority Mail.

All of the foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: October 5, 2011



James S. Friedman

State of New Jersey, :
 : Superior Court of New Jersey
 : Appellate Division
 Plaintiff/ :
 Respondent, : Docket No.
 :
 : Criminal Action
 vs. :
 : On Appeal From A Judgment
 Steven Rashawn Wright, :
 : of Conviction from the
 : Superior Court of New
 Defendant/ :
 Appellant. : Jersey, Law Division,
 : Criminal Part, Hudson County
 :
 : Sat Below: The Hon.
 : Joseph Isabella, JSC.,
 : and a Jury

**APPENDIX TO
DEFENDANT/APPELLANT'S OPENING BRIEF**

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Of Counsel and On The Brief

Defendant is Confined

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SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
LAW DIVISION-CRIMINAL BRANCH

A.D. 2008 TERM

3RD SESSION

2ND PANEL D

THE STATE OF NEW JERSEY

INDICTMENT NO. 1073 06 2008

vs.

CHARGE(S):

STEVEN WRIGHT

AGG SEX ASLT(NJS 2C:14-2a(3));
BURGLARY(NJS 2C:18-2)

DEFENDANT(S)

THE GRAND JURORS OF THE STATE OF NEW JERSEY FOR THE COUNTY OF HUDSON UPON THEIR OATHS, PRESENT THAT STEVEN WRIGHT ON OR ABOUT THE 19TH DAY OF NOVEMBER 2006, IN THE HUDSON OF JERSEY CITY IN THE COUNTY OF HUDSON AFORESAID AND WITHIN THE JURISDICTION OF THIS COURT, knowingly did commit an act of sexual penetration upon L.S., during the commission or attempted commission of a burglary, contrary to the provisions of N.J.S. 2C:14-2a(3), against the peace of this State, the Government and dignity of the same.

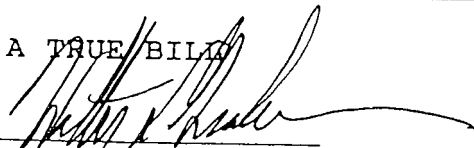
SECOND COUNT

And further PRESENT, That on the date, place and in the jurisdiction set forth in the FIRST Count herein, the said STEVEN WRIGHT knowingly did enter a structure of L.S. at 235 Arlington Avenue, Basement Apt, Jersey City, NJ, with the purpose to commit an offense therein, and in the course of committing the offense purposely, knowingly or recklessly inflicted bodily injury on L.S., contrary to the provisions of N.J.S. 2C:18-2, against the peace of this State, the Government and dignity of the same.

SM/mm


Edward J. De Fazio, PROSECUTOR

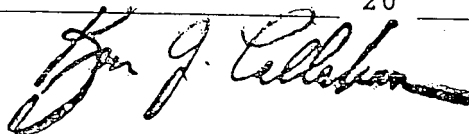
A TRUE BILL


FOREMAN

ASSIGNED TO THE SUPERIOR COURT

JUN 04 2008

20



PRESENTED:

MAY 21 2008

ASSIGNMENT JUDGE SUPERIOR COURT

STATE v. STEVEN WRIGHT
Indictment No. 1073-06-2008

COUNT ONE- SEXUAL ASSAULT DURING THE COMMISSION OF A BURGLARY

As to the First count, alleging that on November 19, 2006 that Steven Wright knowingly did commit an act of sexual penetration, upon L. Santos, during the commission of a burglary; How do you find the Defendant?

Not Guilty _____

Guilty _____

If Your verdict is guilty go directly on to Count Two; If your verdict is not guilty consider the following question:

On November 19, 2006, did Steven Wright commit an act of sexual penetration upon L. Santos, through the use of physical force or coercion; How do you find the Defendant?

Not Guilty _____

Guilty _____

If Your verdict is guilty go directly on to Count Two; If your verdict is not guilty consider the following question:

On November 19, 2006, did Steven Wright commit an act of Sexual Contact upon L. Santos, during the commission of a burglary; How do you find the Defendant?

Not Guilty _____

Guilty _____

If Your verdict is guilty go directly on to Count Two; If your verdict is not guilty consider the following question:

On November 19, 2006, did Steven Wright commit an act of sexual contact upon L. Santos, through the use of physical force or coercion; How do you find the Defendant?

Not Guilty _____

Guilty _____

COUNT TWO- BURGLARY

As to Second Count, alleging that on November 19, 2006, that Steven Wright knowingly did enter the apartment of L. Santos, at 235 Arlington Ave., Basement Apartment, Jersey City, New Jersey, with the purpose to commit an offense therein, and in the course of committing the offense, purposely or knowingly inflicted bodily injury on L.Santos; How do you find the Defendant,

Not Guilty _____

Guilty _____

If your verdict is not guilty consider the following question:

On November 19, 2006 did Steven Wright commit Burglary in the 3rd Degree by entering 235 Arlington Ave., Basement Apartment, Jersey City, New Jersey, without permission, with the purpose to commit an offense therein; How do you find the Defendant;

Not Guilty _____

Guilty _____

OFFICE OF THE HUDSON COUNTY PROSECUTOR

595 NEWARK AVENUE
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EDWARD J. DE FAZIO
PROSECUTOR

TELEPHONE: (201) 795-6400
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GAETANO T. GREGORY
FIRST ASSISTANT PROSECUTOR

The Honorable Joseph V. Isabella, J.S.C.
Hudson County Administration Building
595 Newark Avenue
Jersey City, NJ 07306


Re: State v. Steven Wright
Indictment No. 1073-06-2008
Prosecutor's File No. 08-823

March 30, 2010

Dear Judge Isabella:

Please allow this letter to serve as a motion by the State to seek an extended term of imprisonment on count 1 of the aforementioned indictment for the defendant pursuant to 2C:44-3a and Court Rule 3:21-4(e). The defendant was 22 years old at the time of the commission of the offense. He has been convicted of two crimes, Unlawful Possession of a Gun, and Armed Robbery on two separate occasions when he was at least 18 years of age. Both offenses occurred within 10 years of the date of the crime for which the defendant is being sentenced.

Respectfully submitted,



Gerard H. Breland for
Matthew Troiano

Cc: Keith Hirschorn
Steven Wright

EDWARD J. DE FAZIO
Prosecutor of Hudson County
Administration Building
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SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY - LAW DIVISION
(CRIMINAL)
INDICTMENT NO.: 1073-06-2008

STATE OF NEW JERSEY :
 :
 :
 Plaintiff, :
 :
 :
 -v- :
 :
 STEVEN WRIGHT, :
 :
 :
 Defendant. :
 :
 :

A F F I D A V I T

STATE OF NEW JERSEY)
 ss. :
 COUNTY OF HUDSON)

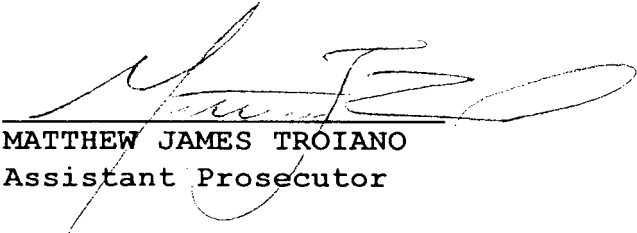
Matthew James Troiano, of full age, being duly sworn according to law, upon her oath, deposes and says:

1. I am an Assistant Prosecutor with the Hudson County Prosecutor's Office assigned to the above-captioned matter.
2. On March 25, 2010, the Defendant was found Guilty by Jury of Count One, Aggravated Sexual Assault, in violation of N.J.S.A. 2C:14-2(a)(3), and Count 2, the lesser included crime of Burglary in the Third Degree, in violation of N.J.S.A. 2C:18-2.

3. The Defendant has at least two (2) prior indictable convictions. They are as follows:
 - a) Indictment No. 914-06-04 (Hudson County, NJ). Unlawful Possession of a Weapon. Sentenced on June 19, 2005, to Three (3) years Probation.
 - b) Indictment No. 924-06-07 (Hudson County, NJ). Armed Robbery. Sentenced on February 9, 2009, to Ten (10) years in New Jersey State Prison, subject to the Parole Ineligibility requirements (85%) of the No Early Release Act.
4. The Defendant was born on February 14, 1984, and thus was over the age of twenty-one on or about November 19, 2006, the date of the criminal offenses for which he is being sentenced.
5. The Defendant has been previously convicted on at least two separate occasions of two crimes committed at different times when he was at least eighteen years of age and the Defendant's last conviction is within ten years of the date of the crimes for which he is being sentenced, or the date of the Defendant's last release from confinement is within 10 years of the date of the crime for which the Defendant is being sentenced.
6. Copies of the Defendant's Certified Judgments of Conviction are attached to this Affidavit.

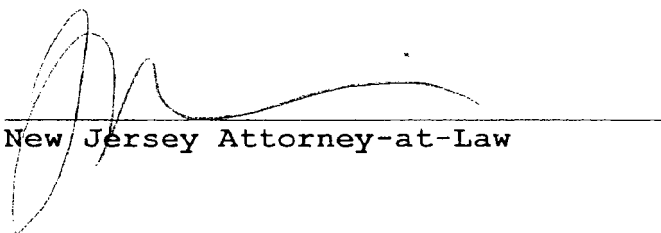
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7. The State moves for a Discretionary Extend Term of
Imprisonment pursuant to N.J.S.A. 2C:44-3(a); N.J.S.A. 43-
7(a)(3); and N.J.S.A. 2C:43-7(b).



MATTHEW JAMES TROIANO
Assistant Prosecutor

Sworn to and subscribed
before me this 26 day
of August, 2010



New Jersey Attorney-at-Law

D27

OFFICE OF THE HUDSON COUNTY PROSECUTOR

595 NEWARK AVENUE
JERSEY CITY, NEW JERSEY 07306

EDWARD J. DE FAZIO
PROSECUTOR

GAETANO T. GREGORY
FIRST ASSISTANT PROSECUTOR

TELEPHONE: (201) 795-6400
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August 26, 2010

Honorable Joseph Isabella, J.S.C.
Superior Court of New Jersey
Criminal Division
595 Newark Avenue, Room 802
Jersey City, N.J. 07306

Re: State v. Steven Wright
Superior Court of New Jersey
Law Division (Hudson County)
Indictment No. 1073-06-2008
Prosecutor File #08-823

Dear Judge Isabella:

Please accept this letter-brief in support of the State's Motion for the Imposition of an Extended Term of Imprisonment.

THE DEFENDANT SHOULD BE SENTENCED TO AN EXTENDED TERM OF IMPRISONMENT AS A PERSISTENT OFFENDER PURSUANT TO N.J.S.A. 2C:44-3A.

The New Jersey Supreme Court has provided instruction regarding the application of the "persistent offender" extended term statute. In State v. Dunbar, 108 N.J. 80 (1987), the Supreme Court required that a sentencing court first find that a Defendant qualifies as a persistent offender, a professional criminal or a hired criminal. Id. at 88-89. Then, the court must determine whether the imposition of an extended term is appropriate. Id. at 89. Finally, the court

DSB

must weigh the aggravating and mitigating factors first to determine the base top term and then again to determine whether to impose a period of parole ineligibility. Id.

A. Defendant's prior criminal history qualifies him for an extended term as a "persistent offender."

The Defendant is a "persistent offender" as demonstrated by his two (2) prior convictions. A "persistent offender" is one who:

[A]t the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in the time of these crimes or the date of the Defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the Defendant is being sentenced.

N.J.S.A. 2C:44-3(a). The Defendant was born on February 14, 1984, and thus was over the age of twenty-one on or about November 19, 2006, the date of the criminal offenses for which he is being sentenced. Also, the present offense for which the Defendant has been found guilty represents his third (3) indictable conviction.

The Defendant's previous criminal history includes a prior conviction for Unlawful Possession of a Weapon, a Handgun, in which he was sentenced on June 19, 2005. The Defendant was also convicted of Armed Robbery, in which he was sentenced on January 9, 2009. Said convictions were for crimes committed on different dates and within ten years of the date of the crimes for which the Defendant is presently being sentenced.

029

B. The aggravating factors clearly outweigh the mitigating factors in this case and therefore an extended term of imprisonment should be imposed.

After determining whether the imposition of an extended term is appropriate, this Court must weigh the aggravating and mitigating factors to determine the base top term and then again to determine whether to impose a period of parole ineligibility. Id. In this case, the aggravating factors clearly and substantially outweigh the mitigating factors and thus justify the imposition of an extend term of imprisonment.

It is the State's position that Aggravating Factor 1, the nature and circumstances of the offense, and the role of the actor therein, is applicable. 2C:44-1(a)(1). Here, the Defendant was found guilty of Aggravated Sexual Assault, for the sexual assault - the rape - of Lilliana Santos, during the commission of a Burglary. However, the facts testified to take this a step further. The testimony evidenced that the Defendant broke into the front window of the victim's apartment, crept through her darkened home and into her bedroom. Once inside Ms. Santos' bedroom, the Defendant began to choke the victim, threatening her to remain quiet. After Lilliana attempted to fight this Defendant off, he grabbed her, threw her on the bed and raped her. Before leaving, the Defendant threatened to kill the victim if she said anything.

The State submits that this Defendant took additional steps to carry out this rape and burglary, and for that reasons, the State asks this Court to find Aggravating Factor 1.

D2/0

According to Aggravating Factor 2, the gravity and seriousness of harm inflicted upon the victim should be analyzed. 2C:44-1 (a) (2). Lilliana's testimony revealed that as a result of this crime, she immediately moved out of her apartment, never to return. She went on to say that she left many of her belonging in this apartment in fear of going back. It was also evident from watching her testify that Lilliana experienced an extreme emotional and psychological trauma from this crime. During her testimony, her fragile emotional state was clearly visible. Her continuing fear of this Defendant and further victimization were obvious as well.

The State submits that the impact of this Defendant breaking into her home while she was alone and raping her has had and will likely continue to have a serious impact on her life. It is the State's position that the Defendant's actions and their affect on this victim should be considered as an appropriate factor.

Aggravating Factor 3, the risk that the Defendant will commit another offense, applies to this case. 2C:44-1 (a) (3). As previously stated, the Defendant now has three (3) indictable convictions. He is only twenty-six years old. The Defendant has been violating the law since 2002, at the age of eighteen, when he was found guilty in Municipal Court for Hindering, a violation of 2C:29-3. He has also been arrested a total of nine times, on a fairly consistent basis. Of most concern is the increased severity of these offenses as this Defendant has gotten older. According to his RAP sheet, which has been attached for your review, four of the last six arrests have

Dall

been for weapons-related crimes. As a result, the Defendant's criminal history has demonstrated that there is a great risk that he will commit another offense.

Similar to the arguments submitted *supra*, the State submits that Aggravating Factor 6, the extent of the Defendant's prior criminal record, applies as well. 2C:44-1(a)(6). However, the State concedes that this Defendant's entire record, including arrests, should not be considered with regard to this factor.

Lastly, Aggravating Factor 9, the need to deter this Defendant and others from violating the law. 2C:44-1(a)(9). Although rehabilitation is a factor in our judicial system, an equal if not greater goal is to deter criminals from committing more crimes. In this case, the prior sentences imposed have failed to deter this Defendant from violating the law. As such, there is a strong need to deter this Defendant in particular, as well as others, from violating the law.

Clearly, no mitigating factors apply to this case. See 2C:44-1(b). There are no grounds to justify or excuse the Defendant's conduct.

Both quantitatively and qualitatively, the aggravating factors clearly and substantially outweigh the non-existent mitigating factors. As such, the State asks this Court to impose a sentence within the extended term range.

In order to determine the appropriate sentence, this Court should look to 2C:43-7(a)(3), which states in pertinent part:

Dad

" . . . a person who has been convicted of a crime shall be sentenced, to an extended term of imprisonment, as follows . . . in the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 20 years and life imprisonment."

In this matter, the applicable crime is First Degree Aggravated Sexual Assault. 2C:14-2(a)(3). In light of the foregoing, the State requests that this Defendant be sentenced in the extended term within the applicable range. Specifically, the State requests a term of thirty-five (35) years in State Prison.

C. This Court should apply the provisions of N.J.S.A. 2C: 43-7.2 in conjunction with the Extended Term provisions of 2C:43-7.

Aggravating factors clearly outweigh the mitigating factors and would warrant the imposition of a period of parole ineligibility. However, such an analysis is not necessary in this matter. Here, the Defendant has been found guilty of First Degree Aggravated Sexual Assault, in violation of 2C:14-2(a)(3). As such, the sentencing provisions of the No Early Release Act apply and this Court should impose a minimum term of 85% of the sentence imposed. 2C:43-7.2(a). Furthermore, that sentence "shall be calculated based upon the sentence of incarceration *actually* imposed." 2C:43-7.2(b) (**emphasis added**). The State has asked this Court to impose a sentence of thirty-five years, eighty-five percent of which should be served without the possibility of parole.

D. This Court should impose consecutive sentences as to this Defendant.

D213

It is the State's position that consecutive sentences are also appropriate in this matter. As this Court is aware, the Defendant is currently serving a sentence of ten (10) years with 85% in State Prison on his 2009 conviction for First Degree Armed Robbery. Although the underlying crime occurred after the commission of the present crime, it is clear that the cases involved different crimes, different acts of violence, and different victims. State v. Yarbough, 100 N.J. 627, 630 (1985).

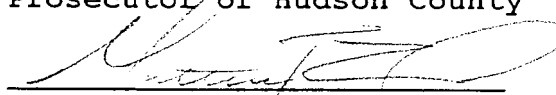
CONCLUSION

For the aforementioned reasons, the State respectfully requests that the State's Motion for an Extended Term be **GRANTED**.

Respectfully submitted,

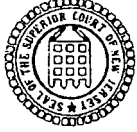
EDWARD J. DE FAZIO
Prosecutor of Hudson County

By:


MATTHEW JAMES TROIANO
Assistant Prosecutor

cc: Keith Hirschorn, Esq.

D214



Judgment of Conviction

Superior Court of New Jersey, HUDSON County

State of New Jersey

v.

Last Name
WRIGHT

First Name
STEVEN

Middle Name

Also Known As

Date of Birth
02/14/1984

SBI Number
771235C

Date(s) of Offense
11/19/2006

Date of Arrest
02/29/2008

PROMIS Number
08 000823-001

Date Ind / Acc / Complt Filed
06/04/2008

Original Plea
 Not Guilty Guilty

Date of Original Plea
06/30/2008

Adjudication By Guilty Plea Jury Trial Verdict Non-Jury Trial Verdict Dismissed / Acquitted Date: 03/25/2010

Original Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
08-06-01073-I	1	AGG SEX ASSLT-CRIM	2C:14-2A(3)	1
08-06-01073-I	2	BURGLARY	2C:18-2	2

Final Charges

Ind / Acc / Complt	Count	Description	Statute	Degree
08-06-01073-I	1	AGG SEX ASSLT-CRIM	2C:14-2A(3)	1
08-06-01073-I	2	BURGLARY	2C:18-2	3

Sentencing Statement

It is, therefore, on 09/10/2010 **ORDERED** and **ADJUDGED** that the defendant is sentenced as follows:
COUNT 1 COMMITTED TO THE CUSTODY OF THE DEPT. OF CORRECTIONS FOR A PERIOD OF 25 YEARS, MUST SERVE 85% OF MAXIMUM TERM. FIVE YEARS PAROLE SUPERVISION UPON RELEASE.

COUNT 2 MERGE WITH COUNT 1

TO RUN CONSECUTIVE TO SENTENCE NOW SERVING ON 07-06-924

PAROLE SUPERVISION FOR LIFE
MEGAN'S LAW APPLIES

It is further **ORDERED** that the sheriff deliver the defendant to the appropriate correctional authority.

Total Custodial Term
25 Years 00 Months 000 Days

Institution Name
CARE COMMISS/CORR

Total Probation Term
00 Years 00 Months

Do 15

DEDR (N.J.S.A. 2C:35-15 and 2C:35-5.11)

A mandatory Drug Enforcement and Demand Reduction (DEDR) penalty is imposed for each count. (Write in number of counts for each degree.)

DEDR penalty reduction granted (N.J.S.A. 2C:35-15a(2))

	Standard	Doubled
1st Degree	@ \$	@ \$
2nd Degree	@ \$	@ \$
3rd Degree	@ \$	@ \$
4th Degree	@ \$	@ \$
DP or Petty DP	@ \$	@ \$

Total DEDR Penalty \$

The court further ORDERS that collection of the DEDR penalty be suspended upon defendant's entry into a residential drug program for the term of the program. (N.J.S.A. 2C:35-15e)

Additional Conditions

The defendant is hereby ordered to provide a DNA sample and ordered to pay the costs for testing of the sample provided (N.J.S.A. 53:1-20.20).

The defendant is hereby sentenced to community supervision for life. (If offense occurred before 1/14/04) (N.J.S.A. 2C:43-6.4)

The defendant is hereby sentenced to parole supervision for life. (If offense occurred on or after 1/14/04) (N.J.S.A. 2C:43-6.4).

The defendant is hereby ordered to serve a 5 year term of parole supervision, which term shall begin as soon as defendant completes the sentence of incarceration. (N.J.S.A. 2C:43-7.2).

The court imposes a restraining order pursuant to DORA. (N.J.S.A. 2C:35-5.7(h)). Restraining Order expires

Forensic Laboratory Fee (N.J.S.A. 2C:35-20) Total Lab Fee

Offenses @ \$ \$

Findings Per N.J.S.A. 2C:47-3

The court finds that the defendant's conduct was characterized by a pattern of repetitive and compulsive behavior.

The court finds that the defendant is amenable to sex offender treatment.

The court finds that the defendant is willing to participate in sex offender treatment.

VCCA Assessment (N.J.S.A. 2C:43-3.1)

Counts	Number	Amount
1	1 @	\$ 100.00
	@	\$
	@	\$
	@	\$

Total VCCA Assessment \$ 100.00

License Suspension

CDS / Paraphernalia (N.J.S.A. 2C:35-16) Waived

Auto-Theft / Unlawful Taking (N.J.S.A. 2C:20-2.1)

Ejecting (N.J.S.A. 2C:29-2)

Other

Vehicle Theft / Unlawful Taking Penalty (N.J.S.A. 2C:20-2.1)

Offense Mandatory Penalty

\$ \$

Other Fees and Penalties

Law Enforcement Officers Training and Equipment Fund Penalty (N.J.S.A. 2C:43-3.3) <input checked="" type="checkbox"/> \$ 30.00	Safe Neighborhood Services Fund Assessment (N.J.S.A. 2C:43-3.2) <input checked="" type="checkbox"/> 1 Offenses @ \$ 75.00 Total: \$ 75.00
Probation Supervision Fee (N.J.S.A. 2C:45-1d) <input type="checkbox"/> \$	Statewide Sexual Assault Nurse Examiner Program Penalty (N.J.S.A. 2C:43-3.6) <input checked="" type="checkbox"/> 1 Offenses @ \$ 800.00 Total \$ 800.00
Transaction Fee (N.J.S.A. 2C:46-1.1) <input type="checkbox"/> \$	Certain Sexual Offenders Surcharge (N.J.S.A. 2C:43-3.7) <input type="checkbox"/> \$
Domestic Violence Offender Surcharge (N.J.S.A. 2C:25-29.4) <input type="checkbox"/> \$	Sex Crime Victim Treatment Fund Penalty (N.J.S.A. 2C:14-10) <input checked="" type="checkbox"/> \$ 1,000.00
Fine \$	Restitution \$
Total Financial Obligation \$ 2,005.00	

Details

Number of Months Non-resident driving privileges revoked

Start Date End Date

Details

Driver's License Number Jurisdiction

If the court is unable to collect the license, complete the following:
Defendant's Address

City State Zip

Date of Birth Sex Eye Color

M F

Time Credits		
Time Spent in Custody R. 3:21-8 Date: From - To Total Number of Days _____	Gap Time Spent in Custody N.J.S.A. 2C:44-5b(2) Date: From - To 01/09/2009 - 09/10/2010 Total Number of Days <u>610</u>	Prior Service Credit Date: From - To Total Number of Days _____
	Rosado Time Date: From - To Total Number of Days _____	

Statement of Reasons - Include all applicable aggravating and mitigating factors

AGGRAVATING FACTORS

2. The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable or exercising normal physical or mental power of resistance.

3. The risk that the defendant will commit another offense.

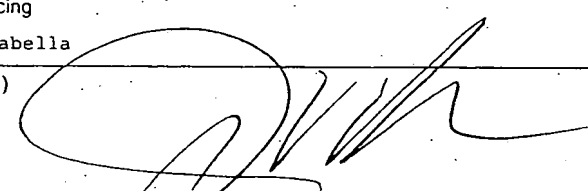
6. The extent of the defendant's prior criminal record and the seriousness of the offenses of which he/she has been convicted.

9. The need for deterring the defendant and others from violating the law.

MITIGATING FACTORS
None

Since I find no mitigating factors, I am clearly convinced that the aggravating factors substantially predominate.

The provisions of N.J.S.A. 2C:44-3A are applicable.

Form Prepared By MARYANN CASSIE	Preparer Telephone Number (201) 795-6662
Attorney for Defendant at Sentencing KEITH HIRSCHORN	Public Defender <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Prosecutor at Sentencing MATTHEW TROIANO	Deputy Attorney General <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Judge at Sentencing Joseph V. Isabella	
Judge (Signature) 	Date 9/16/10



**New Jersey Judiciary
Superior Court - Appellate Division
NOTICE OF APPEAL**

Type or clearly print all information. Attach additional sheets if necessary.		ATTORNEY / LAW FIRM / PRO SE LITIGANT			
TITLE IN FULL (AS CAPTIONED BELOW): State of New Jersey, Plaintiff/Respondent, vs. Steven Rashawn Wright, Defendant/Appellant.		NAME James S. Friedman LLC/James S. Friedman			
		STREET ADDRESS PO Box 32009			
		CITY Newark	STATE NJ	ZIP 07102	PHONE NUMBER 973-353-9500
		EMAIL ADDRESS jfriedlaw@optonline.net			

ON APPEAL FROM		
TRIAL COURT JUDGE The Hon. Joseph Isabella, JSC	TRIAL COURT OR STATE AGENCY Superior Court, Hudson County	TRIAL COURT OR AGENCY NUMBER 08-06-01073-I

Notice is hereby given that Steven Rashawn Wright appeals to the Appellate Division from a Judgment or Order entered on September 10, 2010 in the Civil Criminal or Family Part of the Superior Court or from a State Agency decision entered on _____.

If not appealing the entire judgment, order or agency decision, specify what parts or paragraphs are being appealed.

Have all issues, as to all parties in this action, before the trial court or agency been disposed of? (In consolidated actions, all issues as to all parties in all actions must have been disposed of.) Yes No

If not, has the order been properly certified as final pursuant to R. 4:42-2? Yes No

For criminal, quasi-criminal and juvenile actions only:

Give a concise statement of the offense and the judgment including date entered and any sentence or disposition imposed: Defendant convicted of one count of Aggravated Sexual Assault, 1st degree. Sentence wd to custodial term of 25 years.

This appeal is from a conviction post judgment motion post-conviction relief.

If post-conviction relief, is it the 1st 2nd other _____
specify

Is defendant incarcerated? Yes No

Was bail granted or the sentence or disposition stayed? Yes No

If in custody, name the place of confinement:
NJDOC

Defendant was represented below by:
 Public Defender self private counsel _____
specify

0218

Notice of appeal and attached case information statement have been served where applicable on the following:

	Name	Date of Service
Trial Court Judge	The Hon. Joseph Isabella, JSC	2/15/11
Trial Court Division Manager	Mr. Dennis Murphy	2/15/11
Tax Court Administrator		
State Agency		
Attorney General or Attorney for other Governmental body pursuant to R. 2:5-1(a), (e) or (h)		
Other parties in this action:		

Name and Designation	Attorney Name, Address and Telephone No.	Date of Service
DAG Teresa Blair	Div. of Criminal Appeals, Hughes Justice Complex, 25 Market Street, PO Box 086, Trenton, NJ 08625-0086	2/15/11
Edward J. Defazio, Esq.	Hudson County Prosecutor's Office, 595 Newark Avenue, Jersey City, New Jersey 07306	2/15/11
Edward J. Defazio, Esq.		

Attached transcript request form has been served where applicable on the following:

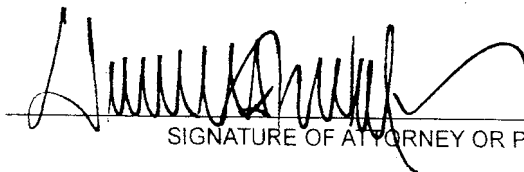
	Name	Date of Service	Amount of Deposit
Trial Court Transcript Office	Hudson County Court Reporters' Office	2/15/11	
Court Reporter (if applicable)			
Supervisor of Court Reporters			
Clerk of the Tax Court			
State Agency			

Exempt from submitting the transcript request form due to the following:

- No verbatim record.
- Transcript in possession of attorney or pro se litigant (four copies of the transcript must be submitted along with an electronic copy):
List the date(s) of the trial or hearing:
- Motion for abbreviation of transcript filed with the court or agency below. Attach copy.
- Motion for free transcript filed with the court below. Attach copy.

I certify that the foregoing statements are true to the best of my knowledge, information and belief. I also certify that, unless exempt, the filing fee required by N.J.S.A. 22A:2 has been paid.

2/15/11
DATE


SIGNATURE OF ATTORNEY OR PRO SE LITIGANT

0219

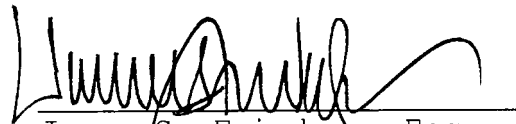
Certification of Service

1. The original and five copies of the prefixed Brief and Appendix were filed with the Appellate Division Clerk's Office on or about October 5, 2011, via Priority Mail.

2. Two copies of the prefixed Brief and Appendix were served upon DAG Teresa Blair of the Division of Criminal Justice, Appeals Bureau, on or about October 5, 2011, via priority mail.

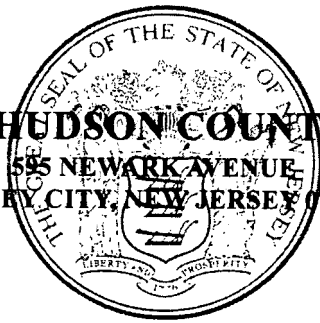
All of the foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: October 5, 2011


James S. Friedman, Esq.

OFFICE OF THE HUDSON COUNTY PROSECUTOR

595 NEWARK AVENUE
JERSEY CITY, NEW JERSEY 07306



A - 2828-10T2

EDWARD J. DE FAZIO
PROSECUTOR

TELEPHONE: (201) 795-6400
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GAETANO T. GREGORY
FIRST ASSISTANT PROSECUTOR

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2828-10T2

STATE OF NEW JERSEY,	:	Criminal Action
Plaintiff-Respondent,	:	On Appeal from Final Judgment of Conviction
-v-	:	
STEVEN WRIGHT,	:	Superior Court of New Jersey Hudson County - Law Division
Defendant-Appellant.	:	Sat Below: Hon. Joseph Isabella, J.S.C.,

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

FILED
APPELLATE DIVISION

DEC 12 2011

[Signature]
CLERK

DEC 12 2011

EDWARD J. DE FAZIO
Prosecutor of Hudson County
Administration Building
595 Newark Avenue
Jersey City, New Jersey 07306
(201) 795-6400

LINDA CLAUDE-OBEN
Legal Assistant
On the Brief

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PROCEDURAL HISTORY

The State adopts the Procedural History as stated in the brief submitted on behalf of Steven Rashawn Wright (hereinafter "Appellant"), as if set forth at length herein. The State, however, reserves the right to supplement the Procedural History in the Legal Argument, infra.

COUNTER-STATEMENT OF FACTS

In the early morning of November 19, 2006, Liliana Santos (hereinafter the "victim"), was sexually assaulted while sleeping in the bedroom of her basement apartment on 235 Arlington Avenue, in Jersey City. [2T20 to 22]. The victim testified that on the evening of November 18, 2006, she attended a baby shower at approximately 8:00 p.m. on Erie Street in Downtown Jersey City. [2T10]. Before the baby shower, the victim testified that she saw "S. Dot", Appellant, on Communipaw Avenue in Jersey City, while visiting her friends and family. The victim's mother lived on Vanhorne Street and Bramhall Avenue. [2T46-10 to 46-12], The victim said "what's up" to Appellant, but did not stop to talk to him. [2T45-17 to 46-13]. Between midnight and 12:30 a.m., the victim testified that she left the baby shower with friends and was driven to Latin Lounge, off of Mammoth Avenue in Downtown Jersey City, by June, her friend's uncle. [2T11 to 12]. The victim testified that she then left Latin Lounge and June drove her to Pine Street, in the area of Coumunipaw. The victim used June's phone to call her boyfriend, Anthony Waring. [2T13-11 to 13-22]. Mr. Waring told the victim that he was at Bar Marjae's on Hallady Street and Communipaw, in the same

neighborhood as where the victim had placed the phone call. **[2T13-11 to 14-16]**.

The victim met Mr. Waring in front of Bar Marjae's, where they both got into his car and drove to the victim's house. **[2T15-1 to 15-10; 2T106-22 to 107-13]**. Neither the victim nor Mr. Waring noticed anything out of the ordinary when outside or inside the apartment when they arrived between 1:30 a.m. and 2:00 a.m. **[2T17-12 to 17-18; 2T111-11 to 111-13]**. Mr. Waring testified that he did not notice a broken window in the apartment while he was in the apartment. **[2T111-18 to 111-23]**. The victim and Mr. Waring testified that the victim took a shower, smoked a cigarette by a window, then had sex with Mr. Waring. **[2T16-23 to 17-3]**. Later on that morning between 5 a.m. and 6 a.m., the victim took a shower, walked her boyfriend to the door, and locked the door to the basement apartment. **[2T17-19 to 17-23; 2T112-13 to 113-18]**. Mr. Waring testified that when he left the victim's apartment he did not notice anything suspicious. **[2T113-19 to 113-21]**. After the victim locked the door, she smoked a cigarette by an open window in the living room, then closed and locked that window and went back to bed. **[2T18-3 to 18-6]**. The victim testified that the only light in the apartment left on was the bathroom light, and that she left the television on. **[2T21-6 to 21-**

13]. The victim slept in a light blue checker board pajamas and a white spaghetti strap camisole. [2T21-14 to 21-18].

The victim testified that as she slept on the air mattress in her bedroom, she woke up to a dark room with the television off with someone choking her. [2T21-22 to 21-24]. The victim testified that while Appellant choked her, he yelled at her to "Shut the F up". [2T22-12 to 22-13]. The victim tried to fight Appellant off and they rolled off the air mattress, the victim reached up and turned on the television, but Appellant squished her face against the floor, turned off the television and threw the victim back on the mattress. [2T22-13 to 22-18]. The victim testified that Appellant smelled of alcohol, "like he had been drinking a lot." [2T23-4 to 23-6]. She also testified that in an effort to fight off Appellant, she scratched his face and tried to kick him but he was too tall and strong for her to fight him back. [2T23]. While the victim was fighting the Appellant off her, he choked her then pull off her shirt and all of her clothes. [2T23-18 to 23-23].

The victim testified that after the Appellant turned off the television, he threw her back on the

mattress face down; Appellant was on his knees, holding the victim down. [2T24-3 to 24-8]. The victim heard a condom wrapper unwrapping, then felt Appellant penetrate her vaginally with his penis. [2T24-10 to 24-12]. Appellant received a phone call and answered the phone; the victim testified that she turned her head and could see his face illuminated by the light on the cell phone. [2T24-12 to 25-9]. The victim testified that she recognized the assailant to be S. Dot, Appellant. [2T25-10 to 25-24]. After receiving the phone call, Appellant got up and left. [2T26]. The victim testified that once Appellant left and she heard the front door close, she ran to the door, looked out the window, saw the gate open, ran out the door and saw someone to her left running down the street. [2T26-19 to 27-2]. The victim then ran back into her apartment, called 911 to report that someone had broken into her apartment and raped her, and took a shower. [2T27-1 to 27-11; 2T29-6 to 29-12]. When the victim ran back into her apartment she noticed that the window in the closet was broken. [2T30].

The victim testified that she took a shower after she called 911 even though the dispatcher told her not to because she felt disgusting. **[2T32-3 to 32-16]**. Prior to getting in the shower, the victim noticed blood on her shirt that was not there prior to her sexual assault. **[2T37]**.

The ambulance and Jersey City Police arrived after the victim got out of the shower. **[2T32-17 to 32-24]**. The ambulance took the victim to Christ Hospital in Jersey City where she was examined. **[2T40; 2T129-20 to 130-4]**. Sexual Assault Nurse, Linda Richardson, did a sexual assault evidence collection kit on the victim. While at the hospital, the victim called her boyfriend, Mr. Waring, to tell him that "S. Dot" broke into her house and raped her. **[2T43-24 to 44-10; 2T105-14 to 106-3]**. After her examination, the victim testified that Hudson County Prosecutor's Office Detective Shonda Rosario (for the Special Victims Unit), met with her and took her to Duncan Avenue in Jersey City to get a statement. **[2T41 to 42]**. Detective Rosario corroborated the victim's testimony and testified at trial that she spoke with the victim informally after the physical examination then transported the victim to Special Victim's Unit office. **[2T131 to 133]**. The victim was too scared to tell the Detective who the

Appellant was, but Mr. Waring told her to tell Detective Rosario and she gave a statement telling the detective that the assailant was S. Dot and that she didn't know his real name. **[2T43]**. The victim testified that at the time of the sexual assault she did not know Appellant's real name, last name, or his address. **[2T45-10 to 45-16]**. Detective Rosario testified that the victim could give a physical description of Appellant, but did not know his full name, address; the victim told Detective that she knew S. Dot from the neighborhood. **[2T134-8 to 134-18]**. After the sexual assault, the victim continued to contact Detective Rosario to tell her when she saw Appellant so he could be arrested. **[2T47 to 48]**.

During the trial Appellant testified and offered his version of events. Appellant testified that he knew the victim because she was the same age as his younger brother Antoine. **[3T101]**. In addition, Appellant testified that he knew that from the time she was a child, the victim lived at Vanhorne and Bramhall. **[3T102-16 to 101-20]**. Appellant saw her again in 2006 because the victim was "down the block from where [he] be at." **[3T103-4 to 103-13]**. Appellant testified that he would be on Communipaw and Vanhorne and that he would see the victim walk to the store. **[3T103-15 to 103-17]**. Appellant testified that he

hung out with the victim a couple times on the block in 2006. **[3T104]**. He further testified that before the summer of 2006, he and the victim would "hook up to go chill with each other or hang out. **[3T105]**. Appellant's brother, Antoine Wright testified that he witnessed the victim and Appellant "chilling" and hanging out. **[3T160]**. Appellant's friend, Davon Parsons, testified that he witnessed the victim and Appellant hugging and flirting in 2006. **[4T7-17 to 17-22; 4T8-21]**.

Appellant testified that he had sex with the victim for the first time in the summer of 2006 at his mother's house. **[3T106-10 to 106-24]**. Appellant and his brother Antoine testified that Appellant had sex in Appellant's mother's bedroom while their mother was out; Appellant's brother, Antoine was in the apartment when Appellant allegedly had sex with the victim. **[3T106-15 to 108; 3T157 to 157]**. It is further alleged that the victim and Appellant had sex approximately five times; three times at his mother's home, once at his friend "Buddha's" house, and at the victim's apartment the night of the sexual assault. **[3T111-11 to 111-22]**. Antoine Wright testified that the victim has sex with Appellant more than once at his mother's apartment. **[3T159]**.

Appellant testified that he saw the victim in the early morning of November 19, 2006 in front of Marjae's. **[3T112]**. He testified that he called her cell phone and she told him that he could come over to her house. **[3T113]**. Appellant also testified that he did not drink anything at all that night. **[3T114-1 to 114-4]**. He then testified that his friend Steve dropped him off at the victim's house, where she opened the front door and let him in. **[3T114]**. Appellant testified that he had consensual sex with the victim and afterwards his girlfriend, Mia called him. **[3T116-16 to 117-11]**. Appellant stated that the victim was upset that he had to leave, argued with him, grabbed his hoody, phone and hat and threw them inside the closet. **[3T118-5 to 119-14]**. Appellant then testified that he got angry and punched the closet window with his right hand. **[3T120]**. At some point after Appellant allegedly punched the window, the victim was holding the Appellant's stuff while Appellant's friend Steve was blowing his car horn outside the apartment. **[3T120 to 121]**. Appellant testified that he pulled his hoody out of the victim's hand and made contact with the victim's shirt. **[3T121-12 to 122-4]**. Appellant testified that he had consensual sex with the victim, that she never told him to stop or said "you're

raping me", and that he did not break the closet window from the outside. **[3T126]**.

LEGAL ARGUMENT

POINT I¹

THE PROSECUTOR'S CLOSING REMARKS WERE PERMISSIBLE AND DID NOT VIOLATE APPELLANT'S RIGHT TO A FAIR TRIAL.

Appellant argues that the Prosecutor's remarks during summation disparaged his trial counsel and stigmatized him, resulting in a denial of his right to a fair trial. [Db32]. It is argued that these remarks amounted to prosecutorial misconduct and as a result Appellant's convictions should be reversed. Even a cursory review of the Prosecutor's closing statement reveals conduct which is wholly permissible and which at no point threatened Appellant's right to a fair trial.

Appellant makes two arguments in support of his claim that prosecutorial misconduct in the summation warrants reversal: (1) the prosecutor "accused [trial counsel] of fabricating his entire case"; and (2) the prosecutor made a remark which stigmatized Appellant to the jury. [Db33]. It is unclear whether there was an objection to the first issue, as it was the trial court that asked for a side bar to discuss the State's remarks. Accordingly, the plain error standard applies. The second issue was raised below

¹ Point I address Point A of Appellant's brief.

therefore the "egregious" standard applies. State v. Frost, 158 N.J. 76, 83 (1999).

The standard for reversal based on prosecutorial misconduct is well settled. It requires an evaluation of the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial. State v. Timmendequas, 161 N.J. 515, 587 (1999), certif. denied, 534 U.S. 858 (2001). Prosecutorial misconduct constitutes reversible error when it is "so egregious as to work a deprivation of defendant's right to a fair trial." State v. Feaster, 156 N.J. 1, 59 (1998). The alleged misconduct "must be considered in the context of the trial as a whole." State v. Morton, 155 N.J. 383, 416 (1998). "To justify reversal, the prosecutor's conduct must be clearly and unmistakably improper and must have substantially prejudiced a defendant's fundamental right to have a jury fairly evaluate the merits of his defense." State v. Timmendequas, supra, 161 N.J. at 575 (citing State v. Roach, 146 N.J. 208, 219, certif. denied, 519 U.S. 1021 (1996)).

In determining whether the prosecutor's comments were sufficiently egregious to deny defendant a fair trial, we consider the tenor of the trial and the responsiveness of counsel and the court to the improprieties when they

occurred. Id. In evaluating a prosecutor's conduct, an appellate court must decide 1) whether defense counsel made timely and proper objections to the improper remarks, 2) whether the remarks were withdrawn promptly, and 3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. Id. at 576.

Generally, if no objection was made to the allegedly improper remarks, the remarks will not be deemed prejudicial. State v. Ramseur, 106 N.J. 123, 323 (1987). Failure to make a timely objection indicates that defense counsel did not believe the remarks were prejudicial at the time they were made. State v. Bauman, 298 N.J. Super. 176, 207 (App. Div.), certif. denied, 150 N.J. 25 (1997). Failure to object also deprives the court of an opportunity to take curative action. Id. In Bauman, the court noted, "Silence on the part of counsel and a subsequent motion for a new trial cannot be condoned." Id.

When no objection is made during trial to the prosecutor's remarks, those remarks are reviewable only under the standard of the plain error rule, articulated in R. 2:10-2. This rule provides in relevant part:

Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been **clearly capable of producing an unjust result.** (emphasis added).

No undue prejudice arose from the very minor portions of the summation at issue here. When properly considering the summation as a whole, no prosecutorial misconduct can be discerned. **See State v. Ingram, 196 N.J. 23, 43 (2008)** (evaluating the propriety of a prosecutor's summation when [t]aken as a whole).

First, Appellant's argument that the State accused Appellant's trial counsel of "fabricating his entire case" is without merit. [Db33]. The State is permitted to respond to arguments and issues raised by defense counsel. **State v. Morais, 359 N.J. Super. 123, 131 (App. Div.), certif. denied, sub nom. State v. Pantoja, 169 N.J. 610 (2001); State v. Johnson, 287 N.J. Super. 247, 266 (1996).**

Here, the credibility of the victim was genuinely disputed, making the Prosecutor's comments necessary. The victim and Appellant had two very different versions of what transpired during the sexual assault and the about the presence of the evidence (bloody shirt, broken glass and the sexual assault allegations). Appellant's trial counsel argued in his summation:

Now the first witness that you all heard from was Liliana Santos. Liliana Santos got on the stand and told you a story. She told you what she believed happened back in November of 2006 with many tears, with some emotion. And if it happened that way, ladies and gentlemen, I submit to you that you should have been emotional as

well. If it happened that way, ladies and gentlemen, I submit to you that you should have been emotional as well. If it happened that way, if that happened, then this is a sad situation and you should find Mr. Wright guilty.

But ladies and gentlemen, it didn't happen like Liliana Santos said. Liliana Santos got on the stand and testified about that night, about before that night, about after that night.

[4T40-16 to 41-3].

Appellant's trial counsel continued and stated:

The two people most intimately involved in this case, the man facing the jail sentence and the alleged victim of this crime had the most reason to fabricate. And I submit to you that Liliana Santos told quite a story.

[4T41-21 to 41-25].

Appellant produced two witnesses at trial who testified that the victim had a prior sexual relationship with Appellant. Further, Appellant testified during trial and offered an explanation as to why his blood was on the victim's shirt, what happened to the condom he used during the sexual assault, and how and why he broke the closet window.

The Prosecutor stated in summation:

"And lawyers sometimes use this analogy of a puzzle, all right, that you need to put the pieces of the puzzle together to get the picture. I would submit that I've just given you the picture. All right. And the testimony and the evidence and the exhibits were all those pieces that went together to form this picture. I would submit to you that once you have that picture, the defense is left with a situation where they need to change those pieces, all right. They need to come up with their own pieces that fit together to get the end result, all right. The end result being

here a bloody shirt, the end result being a broken window, the end result being a sexual assault."
[4T63-7 to 63-20].

The Prosecutor's comments were wholly proper as they did not stray from the evidence, but were merely responsive to Appellant's alternative version of events. Appellant attacked the victim's credibility and presented his version of the facts, along with witnesses who supported his take on the evidence. The State's argument and puzzle analogy can be reasonably characterized as a response to Appellant's arguments in summation. Appellant's trial counsel told the jury "I don't know why Liliana Santos lied to you." **[4T49-19 to 49-20].** The Prosecutor provided the jury with the analogy not to disparage trial counsel, but to offer the jury an explanation as to why there were two different versions of the sexual assault.

STATE: And as I said before, he tried to recreate this puzzle, okay. You're left with a picture of - of a bloody shirt (sic), broken glass, sexual assault allegations, and you need to put together new puzzle pieces to fit together. And that's what he did. And I would submit to you, ladies and gentlemen, that he knew what that puzzle looked like. So he had to step back, all right. He had to start from there and reverse his way back. There had to be an explanation for each one of those things, all right. And I would submit to you that you heard from witnesses. Now if you think about it, you heard the bare minimum.

COURT: Come to sidebar a minute counsel, please.

(On the record discussion at sidebar)

COURT: You can't say that (inaudible)

PROSECUTOR: (inaudible)

COURT: Be careful please.

[4T67-19 to 68-17].

The Prosecutor's puzzle analogy can hardly be characterized as disparaging to Appellant's trial counsel. As mentioned above, the Prosecutor was simply responding to Appellant's presentation of the facts. Appellant's trial counsel stated in his summation that the victim lied on the stand. **[4T49-19 to 49-20]**. He argued in summation that the victim lied about knowing the two defense witnesses, having a previous sexual relationship with Appellant, and the sexual assault. The Prosecutor's remarks were a direct response to Appellant's assertions that his two witnesses not only knew the victim, but saw her flirting and hugging Appellant. **[3T50 to 52]**. The Prosecutor's argument that the jury heard the "bare minimum" was based on the evidence. Neither witness could specify when they saw the victim "flirting" with Appellant, nor could they provide details or corroborating evidence of Appellant's alleged relationship with the victim.

Further, Appellant failed to object to these remarks during the trial. Appellant's failure to object to the remarks indicate that he did not find them to be

prejudicial. The Prosecutor's remarks were in response to trial counsel's summation and do not amount to prosecutorial misconduct. Accordingly, the trial court properly allowed the remarks to be made without an instruction to the jury. As such, Appellant's convictions should be upheld.

Appellant also argues that the Prosecutor's comment that "I cannot speak to what somebody like this or why someone like this would do this," during summation stigmatized him to the jury. **[4T58-10 to 58-12]; [Db34]**. Appellant objected to this statement and the trial court overruled the objection. **[4T58]**. The Prosecutor's comment did not ask the jury to draw conclusions about Appellant's character or propensity to commit the charged crimes, but instead it pointed out to the jury the State's inability to provide Appellant's motive for committing the crime. The trial court properly overruled Appellant's objection to the comment as it was in direct response to Appellant's assertion that the sexual assault was consensual based on a prior sexual relationship with the victim. Appellant's argument that the sex was consensual indicates that he had no motive to commit the charge crime. The Prosecutor's comment was merely a counter-argument to Appellant's defense strategy regarding his motive to commit the crime.

This was readily apparent as the trial court failed to sustain Appellant's objection. Accordingly, the Prosecutor's comment was not egregious and did not deprive Appellant of his right to a fair trial.

When the closing argument is read as a whole, it is clear the prosecutor's comments did not substantially prejudice Appellant's right to a fair trial. It is readily apparent that the Prosecutor's remarks were a counter to Appellant's defense strategy which called into question Appellant's motive and the credibility of the victim. When taken in context, the Prosecutor's comments were clearly not disparaging to trial counsel or stigmatizing to Appellant. Given the overwhelming evidence of Appellant's guilt, such fleeting comments did not effect the jury verdict. Appellant would have been found guilty even if those comments had not been made.

For the foregoing reasons, the State submits that Appellant's contentions are without merit. When taken in the context of the trial as a whole, the comments did not rise to the level of reversible error. The prosecutor's comments did not have the capacity to "substantially prejudice the defendant's fundamental right to have the jury thoroughly evaluate the merits of his defense." **State v. Frost, supra, 158 N.J. at 83.** The verdict this jury

rendered cannot be said to have been fueled by emotion rather than a dispassionate analysis of the evidence. **See State v. Black**, 380 **N.J. Super.** 581, 594-95 (App.Div. 2005), **certif. denied**, 186 **N.J.** 243 (2006).

It is important to remember that the State has great leeway in its closing. For the reasons set forth above, the State submits that Appellant's contentions are without merit. Appellant has failed to show how the comments of the trial prosecutor violated his constitutional right to a fair trial.

POINT II²

THE TRIAL COURT CORRECTLY CHARGED THE JURY AND APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE PROTECTED.

Appellant alleges that the trial court failed to include relevant factual information into the model jury instructions, resulting in a denial of Appellant's right to a fair trial. Appellant also argues that the trial court's instruction on Aggravated Sexual Assault was confusing and that the portion of the jury charge relating to the identity of the assailant mischaracterized Appellant's defense. For that reason, Appellant argues these alleged errors denied Appellant his right to a fair trial and his convictions should be vacated. [Db35].

However, because Appellant did not object to the charge as given, the right to challenge the instructions on appeal has been waived. See R. 1:7-2. When a defendant fails to raise an objection to jury instructions at trial, he waives the right to object on appeal and the Appellate Court "may infer that the instructions were adequate in the context of [the] trial." R. 1:7-2; State v. Brown, 325 N.J. Super. 447, 452 (App. Div. 1999), certif. denied, 163 N.J. 76 (2000). On appellate review, exceptions are made for jury instructions issued in error. R. 1:7-2. Since no

² Point II address Point B of Appellant's brief.

objection was made to the court's jury instruction at trial, the appropriate standard of review is plain error. R. 2:10-2; State v. Green, 86 N.J. 281, 288-89 (1981); State v. Bogus, 223 N.J. Super. 409, 419, certif. denied, 111 N.J. 567 (1988). The Supreme Court has set forth the standard for determining whether an instructional error constitutes plain error:

In considering whether an error in the charge in a criminal case amounts to plain error, our Supreme Court has defined plain error as legal impropriety in the charge, prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court [which convinces] the court that of itself [,] the error possessed a clear capacity to bring about an unjust result.

[State v. Hock, 54 N.J. 526, 538 (1969), certif. denied, 399 U.S. 930 (1970). State v. Viera, 346 N.J. Super. 198, 210 (App. Div. 2001), certif. denied, 174 N.J. 38 (2002).]

The State acknowledges that, "[a]ppropriate and proper jury charges are essential for a fair trial." State v. Jordan, 147 N.J. 409, 421 (1997); State v. Green, supra, 86 N.J. at 287. "Erroneous instructions on matters or issues that are material to the jury's deliberations are presumed to be reversible error in criminal prosecutions." State v. Jordan, supra, 147 N.J. at 422; State v. Warren, 104 N.J. 571, 579 (1986). However, the charge must be read as a

whole to determine whether it was erroneous. State v. Jordan, supra, 147 at 422; State v. Wilbely, 63 N.J. 420, 422 (1973). "Portions of a charge alleged to be erroneous cannot be dealt with in isolation but the charge should be examined as a whole to determine its overall effect." Ibid. The claim of a harmful error will be determined by review of the entire charge and the context of the error. State v. R.B., 183 N.J. 308, 324-25 (2005). A charge as a whole may be deemed appropriate even if not perfectly clear. State v. Harris, 141 N.J. 525 (1995); State v. Concepcion, 111 N.J. 373, 379 (1988).

It is also important to note that "Appellant's failure to 'interpose a timely objection constitutes strong evidence that the error belatedly raised here was actually of no moment.'" State v. Tierney, 356 N.J. Super. 468, 481 (App. Div.), certif. denied, 176 N.J. 72 (2003), quoting, State v. White, 326 N.J. Super. 304, 315 (App. Div. 1999), certif. denied, 163 N.J. 397 (2000). In the instant case the trial attorney made no objections to the jury charge. Further, it is clear that the jury charge, when read as a whole, was not erroneous.

A. The Trial Court Properly Instructed the Jury on the Charges.³

Appellant argues that the trial court failed to place the jury instructions within the proper factual context of the case. [Db35]. This argument is without merit. If a reviewing court finds that the model jury instruction adequately explained the law, the trial court's failure to relate its explanation of the applicable law to the specific facts of the case does not constitute reversible error. State v. Walker, 322 N.J. Super. 535, 548 (App. Div.), certif. denied, 162 N.J. 487 (1999).

Here, the trial court instructed the jury using the model jury charges. If the facts of the case are complex and confusing, the trial court has the discretion to provide the jury with an intricate discussion of the facts. State v. Morton, supra, 155 N.J. at 422; State v. Biegenwald, 106 N.J. 13, 44-45 (1987). A trial court's failure to relate its explanation of the law to the specific facts is not reversible error if the model jury instruction adequately explained the law, particularly in the absence of objections. State v. Morton, supra, 155 N.J. at 421-22; State v. Walker, supra, 322 N.J. Super. at 548. Jury charges should be molded when "legal concepts which a

³ Point II(A) addresses Point B(1.) of Appellant's brief.

jury is required to apply are more complicated conceptually than evaluation of witness credibility." State v. Walker, supra, 322 N.J. Super. at 548.

In the case at bar, the trial court properly recited the law as set forth in the model jury charges. There is no indication that the trial court was required to recite the law in the factual context of the case. The legal concepts which the jury was required to apply to the facts of this case, were neither complicated nor confusing. Therefore the trial court did not err in reciting the model jury charges. Further, the key facts were straight forward: the victim was sexually assaulted in her bedroom, the window in her closet was broken, and Appellant's blood was found on the victim's shirt. Although based on the evidence there are different versions of the story, the underlying facts are not in dispute. In fact, Appellant conceded that he had had sex with the victim, that he broke the window in the closet and that his blood was on her shirt.

The facts in this case were not complex or confusing. Accordingly, the trial court's recitation of the model jury charges does not constitute plain error. As such, Appellant's convictions should be upheld.

B. The Jury Instruction Relating to Aggravated Sexual Assault was Wholly Proper.

Appellant argues that the trial court's charge on Aggravated Sexual Assault and Sexual Assault during jury deliberations was confusing. Based on this alleged "material defect[s]" in the jury charge, Appellant argues his convictions must be vacated. [Db38].

The trial court is "obligated to clear the confusion" when a jury seeks clarification of a jury charge. State v. Conway, 193 N.J. Super. 133, 157 (App. Div.), certif. denied, 97 N.J. 650 (1984). The jury charge as a whole was clear and consistent with the controlling law. Appellant contends that the mere fact that the jury asked for the definitions of aggravated sexual assault and sexual assault indicates the jury charges were unclear. This argument is without merit. The jury sent out a question asking for the definitions of Aggravated Sexual Assault and Sexual Assault. [5T3-2 to 3-4]. Here, the trial court properly clarified this unambiguous request by re-charging the jury, providing the distinction between the two offenses and pointing out that aggravated sexual assault has a burglary component. [5T16-11 to 16-14]. After making the distinction clear, the trial court asked the jurors, "Okay?"

Understand?" and the record does not reflect any further confusion by the jurors. **[5T16-14]**.

Appellant further argues that the trial court's second recitation of the Aggravated Sexual Assault and Sexual Assault charges constitutes reversible error based on the instruction regarding the burglary element of the Aggravated Sexual Assault charge. The Prosecutor pointed out to the trial court that during the re-charge, the court failed to inform the jury that the burglary element of the Aggravated Sexual Assault charge would be satisfied with either third degree burglary or second degree burglary. **[5T18-24 to 19-17]**. When taken as a whole, the jury charge on Aggravated Sexual Assault and Sexual Assault was proper. The trial court in its re-charge, correctly recited the model jury charges. In addition, the jury did not ask for further clarification.

Appellant argues that the trial court's statement that "it doesn't matter what level the burglary for aggravated sexual assault, it's any burglary for the aggravated sexual assault," was unclear to the jury. The jury was only given two levels of burglary in its initial charge, second and third degree burglary. The trial court's initial charge was proper.

COURT: The last charge in the indictment is burglary. The pertinent part of our statute on which the indictment is based reads as follows. A person is guilty of burglary in the third degree if with the prupose to commit an offense therein, the person enters a structure knowing that he is not licensed or privileged to do so, with the intent to commit a crime once he's inside.

A person is guilty of burglary in the second degree if in the course of committing the offense I just described to you, that person purposely or knowingly inflicts or threatens to inflict bodily injury on anyone.

[4T119-5 to 119-17].

COURT: Two things. The first count, aggravated sexual assault during the commission of a burglary has - the sexual penetration must have occurred without consent of the victim. And also in order to convict of aggravated sexual assault during the commission of a burglary, you have to find, you must find either a second or third degree burglary occurred.

[4T127-8 to 127-14].

The trial court did not err in its initial charge of Count One, Aggravated Sexual Assault. Moreover, the trial court's re-charge of Count One was also proper. The trial court's instruction was clear and the language used was plain and simple. Further, the jury was properly and adequately charged initially; during deliberations the jury did not question the burglary element of the charges making it clear that the initial charge was understood. It is readily apparent that the jury understood that the trial court's comment regarding the "level of burglary"

referenced either second or third degree. For that reason, Appellant's argument is without merit and his convictions should be upheld.

C. The Trial Court's Jury Charge on Identity Did Not Constitute Plain Error.

When taken as a whole, the jury charge was proper and the trial court's remarks concerning Appellant's denial of guilt did not constitute plain error. Appellant argues that his right to a fair trial was violated by the trial court's "mischaracterization" of his defense. [Db46]. Appellant's argument is without merit.

As mentioned above, jury charges must be read as a whole to determine whether it was erroneous. State v. Jordan, supra, 147 N.J. at 422; State v. Wilbely, supra, 63 N.J. at 422. Appellant's failure to timely object "constitutes strong evidence that the error belatedly raised here was actually of no moment." State v. Tierney, supra, 356 N.J. Super. 468 at 481. In the case at bar, Appellant failed to object while the trial court charged the jury. Appellant's defense centered on whether or not sex with the victim was consensual. [Db44]. The identity of the assailant was conceded by Appellant. He acknowledged on the witness stand that he had sex with the

victim on the night in question in her apartment. **[3T116-16 to 116-23]**.

The trial court's remark that Appellant's denial of guilt includes the argument that the State had failed to prove beyond a reasonable doubt that Appellant committed the charged crimes, is in fact correct as Appellant contends that he did not sexually assault the victim. Moreover, Appellant argued in summation that the victim could not identify her assailant. **[4T45-3 to 45-9]**.

TRIAL COUNSEL: Do I know why she came in here and made up this story? I have absolutely no idea. Was she disturbed that Mr. Wright didn't want to be with her or that he no longer wished to have any kind of a relationship with her other than of a sexual nature? I don't know. As a matter of fact, I would submit that none of us know. But that's not really for our consideration here. Liliana Santos got up on this stand and pinned herself in to the story of she didn't know S. DOT or Stephen Wright before that day, never spoke to him other than to say what's up. So, this isn't a situation where you, ladies and gentlemen, should go back there and consider did she let Stephen Wright in and then say no at some point or did he continue after she said no. This isn't that situation. Liliana Santos didn't say that. *She said Stephen Wright broke into her apartment and raped her. But she couldn't identify him.*

[4T44-15 to 45-9]. (emphasis added)

TRIAL COUNSEL: Again, Liliana Santos got on the stand and claimed to you ladies and gentlemen that she didn't know Stephen Wright. She knew him as S. DOT. That goes back again to how she found out his real name.

[4T52-3 to 52-6].

The trial court accurately characterized Appellant's defense. Appellant cannot rescind the arguments he raised in his summation to suit his direct appeal claims. Throughout the trial Appellant argued that the victim knew him and had a consensual sexual relationship with him. The victim opposed this characterization of her interaction with Appellant and denied having any type of previous relationship with him. [4T27 to 28-1]. Appellant put his identity in issue by arguing that the victim's assertion that she did not know him personally was false and by questioning the fact that she could only identify him as "S. Dot" to law enforcement.

When taken as a whole, the jury charge on identification was proper. Appellant raised the issue of identification during the trial and in his summation. Accordingly, the trial court properly characterized Appellant's defense. Appellant's argument is without merit and his convictions should be upheld.

This decision should not be disturbed. It is clear, from the entirely consistent verdict, that the trial court properly charged the jury with the Count One and Two of the indictment. The State submits that the evidence in this case was overwhelming, the trial court's jury charge was wholly proper and did not create the possibility of an

unjust result. Moreover, Appellant has not met his burden. Appellant failed to establish that the trial court's jury charge amounted to reversible error. Thus, Appellant's convictions should be upheld.

POINT III⁴

**DEFENDANT RECEIVED A FAIR TRIAL WITHOUT
CUMULATIVE ERRORS.**

Appellant complains of so-called "cumulative errors" throughout the trial which caused Appellant's right to a fair trial to be violated. For the reasons set forth in Point I and Point II of the State's brief, none of the issues raised by Appellant amount to error; therefore, their cumulative affect need not be considered by this Court.

While it is true that cumulative errors may, in the aggregate, be sufficient grounds for reversal while the singular errors alone would not be, none of the occurrences complained of by Appellant were in fact errors. As addressed in great detail in Point I, supra, the Prosecutor's comments were wholly permissible in that they were in direct response to Appellant's arguments and did not have the capacity to deny Appellant's right to a fair trial. As in Point II, supra, the trial court did not err in any of its instructions to the jury. There was no accumulation of errors which deprived Appellant of his right to a fair trial, and so Appellant's claim should be denied.

⁴Point III addresses Point C of Appellant's brief.

CONCLUSION

For all the foregoing reasons the State respectfully submits that the Appellant's conviction and sentence be **AFFIRMED.**

Respectfully submitted,

**EDWARD J. DE FAZIO
Prosecutor of Hudson County**

BY:

(cc for)
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2828-10T3

2

STATE OF NEW JERSEY, :

Plaintiff-Respondent, :

-v- :

CERTIFICATION

STEVEN WRIGHT, :

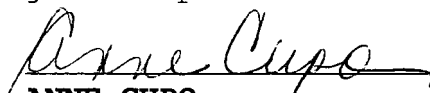
Defendant-Appellant. :

ANNE CUPO, of full age, hereby certifies that:

I am a Legal Secretary in the Office of the Hudson County
Prosecutor, Administration Building, 595 Newark Avenue, Jersey
City, New Jersey 07306.

On the 8th day of December 2011, at the direction of
STEPHANIE DAVIS-ELSON, Assistant Prosecutor, I served two (2)
copies of the State's Brief **via REGULAR U.S. MAIL** upon James S.
Friedman, Esq., 17 Academy Street, Suite 100, P.O. box 32009,
Newark, New Jersey 07102.

I certify that the foregoing statements made by me are
true. I am aware that if any of the foregoing statements made
by me are willfully false, I am subject to punishment.


ANNE CUPO

Dated: December 8, 2011

DLK

A - 2828-10T2

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PLEASE REPLY TO NEWARK

January 4, 2012

FILED
APPELLATE DIVISION

JAN 05 2012

The Honorable Judges of the
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
25 West Market Street
Post Office Box 006
Trenton, New Jersey 08625-0006

RECEIVED
APPELLATE DIVISION

JAN 05 2012 K

SUPERIOR COURT
OF NEW JERSEY

Re: State vs. Steven Rashawn Wright
Docket No. A-2828-10T2

On Appeal From A Judgment Of The Superior
Court Of New Jersey, Law Division, Criminal Part
Hudson County

Sat Below: The Hon. Joseph Isabella, JSC,
And a Jury

**REPLY BRIEF OF DEFENDANT/APPELLANT,
STEVEN RASHAWN WRIGHT
ORAL ARGUMENT REQUESTED**

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Dear Honorable Judges:

Introduction

This firm represents Steven Rashawn Wright, the Defendant/Appellant in this matter ("Wright")¹. Please accept this letter brief in reply to the responding brief of Plaintiff/Respondent, State of New Jersey.

For the reasons discussed below, as well as those set forth previously in Wright's opening brief, it is respectfully submitted that the State's arguments must be rejected in their entirety, and that Wright's convictions must be reversed.

Procedural History

The procedural history underlying this appeal is more thoroughly set forth in Wright's opening brief, and is incorporated herein by reference as if set forth at length.

Statement of Facts

The facts underlying this appeal are more thoroughly set forth in Wright's opening brief, and are incorporated herein by reference as if set forth at length.

¹ Any defined terms used herein have the meaning ascribed to them in Wright's opening brief.

Legal Argument

Point A

The State's Argument That The Assistant Prosecutor's Remarks Were Permissible And Did Not Deprive Wright Of A Fair Trial Must Be Rejected

In its brief, the State attempts repeatedly to characterize the Assistant Prosecutor's completely impermissible remarks as perfectly appropriate and/or completely harmless in light of the facts and circumstances of this case. In this regard, the State's brief is studded with statements such as "[t]he State is permitted to respond to arguments and issues raised by defense counsel" (Pb14); "[t]he Prosecutor's comments were wholly proper [and] merely responsive to [Wright's] alternative version of events ... The State's argument ... can be reasonably characterized as a response to [Wright's] argument in summation" (Pb16); and "[t]he prosecutor was simply responding to [Wright's] presentation of the facts" (Pb17). The State suggests further that even if the Assistant Prosecutor's remarks strayed beyond the bounds of propriety (which they did), it did not matter because the evidence at trial demonstrated that Wright was obviously guilty. These transparent attempts to sanitize the Assistant Prosecutor's remarks cannot mask their highly prejudicial nature, or the

detrimental effect they had on Wright's trial. Accordingly, and as discussed more thoroughly below, Wright's convictions must be reversed.

As our Supreme Court observed in State v. Frost, 158 N.J. 76 (1999), what prosecutors can - and cannot - say to juries has been the subject of considerable litigation ("instances of prosecutorial excesses ... seem to come to [our appellate courts] with numbing frequency.") Id. at 88 (Citation omitted). To address this problem, Frost set clear boundaries within which prosecutors must remain when addressing a jury. Although prosecutors are entitled to considerable leeway in closing arguments, their statements must be reasonably related to the scope of the evidence presented at trial. 158 N.J. at 82. In commenting upon the evidence, they may not "stray[] beyond the acceptable limits of advocacy [but] are duty-bound to confine [themselves] to facts revealed during the trial and reasonable inferences to be drawn from that evidence ... [Improper comments by the prosecutor are problematic] because they divert the juror's attention from the facts of the case before them ... [It follows that] '[a] prosecutor is [never] permitted to cast unjustified aspersions' on defense counsel or the defense." 158 N.J. at 84-85 (Citations omitted).

To further highlight the severity of this issue, Frost recalled that

[t]his Court has repeatedly expressed concern for prosecutorial propriety. **We have said time and again that 'because the prosecutor represents the government and the people of the State, it is reasonable to say that jurors have confidence that he will fairly fulfill his duty to see that justice is done whether by conviction of the guilty or acquittal of the innocent.'** His comments ... carry the full authority of the State. Hence, we cannot sit idly by and condone prosecutorial excesses ... **Prosecutors should confine their summations to a review of, and an argument on, the evidence, and not indulge in improper expressions of personal or official opinion as to the guilt of the defendant, or [otherwise engage] in collateral improprieties of any type ...**" 158 N.J. at 87-88 (Citations omitted; Emphasis supplied).

Further, in Frost, the jury's determination of guilt or innocence rested entirely upon whether it believed the testimony of the officers or the defendant. In commenting upon this, our Supreme Court noted that "[c]redibility was the critical issue in the case ... The State's entire case rested on the testimony of the officers. **When a jury must choose which of two opposing versions to credit, it simply cannot be said that the evidence is overwhelming.**" 158 N.J. at 87 (Emphasis supplied).

Against this backdrop, the Frost Court found that appellate courts examining these issues must determine whether the prosecutor's remarks were sufficiently

egregious to deprive the defendant of a fair trial. This determination must be made in light of the tenor of the entire trial. Specifically, the appellate court must consider: (A) whether defense counsel objected to the comments; (B) whether the remarks were withdrawn; and (C) whether the Court ordered the remarks stricken and instructed the jury to disregard them. 158 N.J. at 83.

Given the foregoing standard, it is clear that the Assistant Prosecutor's remarks in the matter at bar were sufficiently egregious to deprive the defendant of a fair trial, and therefore constitute grounds for reversal. As to the first remark discussed in Wright's opening brief, defense counsel timely objected, and the objection was overruled. Thus, the remark was not withdrawn, and the Court did not strike it or give the jury an appropriate instruction. However, informing the jury that the Assistant Prosecutor "cannot speak to what somebody like this or why someone like this would do this" (Db23) clearly did nothing to enhance the jury's understanding of the evidence. Rather, this was nothing more than an incendiary statement that served no purpose other than to inflame a jury that had just listened to emotionally charged testimony in a highly sensitive matter, thereby prejudicing their view of Wright. Defense counsel's objection to this

egregious remark should have been sustained, the remark should have been stricken, and the jury should have received an appropriate instruction directing it to disregard the statement. The trial court's failure to take these steps constitutes reversible error.

The second set of remarks complained of in Wright's opening brief also had no proper purpose, but was just as egregious.² First, the State now argues that this portion of Wright's argument must be reviewed under a "plain error" standard. However, after the Assistant Prosecutor made this remark, the trial judge called counsel to sidebar and specifically told the Assistant Prosecutor "[Y]ou can't do that." It was entirely possible that defense counsel was going to lodge a timely objection, but could not do so only because of the trial judge's prompt response to this obviously inappropriate remark. Further, it goes without citation to authority that a trial court has an ongoing responsibility to police its proceedings and the attorneys appearing before it. In this light, the trial judge's response to the Assistant Prosecutor's highly prejudicial remarks may be appropriately viewed as the functional equivalent of a timely objection. Nevertheless, the record

² As described more thoroughly in Wright's opening brief, this was the portion of closing arguments during which the Assistant Prosecutor accused defense counsel of fabricating his entire case. See Db23-24.

indicates that the remark was not withdrawn, and the jury did not receive any instruction to disregard these obviously pointless and inappropriate statements, which clearly did not qualify as fair comment on the evidence presented at trial, and could serve no purpose other than to suggest strongly to the jury that defense counsel was a liar. Thus, the trial court's failure to strike these remarks or give an appropriate instruction also constitutes reversible error.

Finally, it bears noting that a finding of guilt or innocence in this case depended almost exclusively upon whether the jury believed Santos or Wright. They were the only two individuals present when the events at issue occurred, and they are the only ones who knew whether their encounter was consensual. Accordingly, and given the Frost Court's observations discussed above, the State's evidence of Wright's guilt is far from overwhelming, and a fair evaluation of the credibility of both the defendant and his attorney take center stage in the jury's consideration of the facts. Because the Assistant Prosecutor's egregious remarks damaged that credibility beyond repair and the trial court failed to respond appropriately, Wright's convictions must be reversed.

Point B

The Jury Instructions In This Case Were
Wholly Inadequate, Notwithstanding The
State's Arguments To The Contrary

The State argues that the jury instructions in this case consisted of clear and correct statements of law that properly characterized Wright's position in this case. As discussed below and in Wright's opening brief, even a cursory review of the record demonstrates plainly that this is not true.

As the State acknowledges in its responding brief, "[a]ppropriate and proper jury charges are essential for a fair trial", and "[e]rroneous instructions on matters or issues that are material to the jury's deliberations are presumed to be reversible error in criminal prosecutions." State v. Jordan, 147 N.J. 409, 421-422 (1997); State v. Vick, 117 N.J. 288, 289 (1989); State v. Warren, 104 N.J. 571, 579 (1986); State v. Green, 86 N.J. 281, 287 (1981). Thus, our Courts have recognized continually the central role that jury instructions occupy in any criminal trial, and are reluctant to view problems relating to jury instructions as harmless or inconsequential. Rather, such errors must be viewed differently, since they relate so strongly to the role of the jury and the fundamental fairness of the proceedings.

At least one commentator has observed that:

"[L]awyers devote tremendous energy to refining arcane statements of the law that mean little to the jury. Justice Frankfurter noted that all too often instructions to juries are 'abracadabra' ... Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language - that, indeed, for all the jury's understanding of them, they are spoken in a foreign language. Yet, every day, cases which have taken weeks to try are reversed by upper courts because a phrase or a sentence, meaningless to the jury, has been included in or omitted from the judge's charge ... **[T]he assumption that juries adequately understand their instructions is simply no longer tenable. Once it is established that jurors do not fully understand instructions, the related assumption that jurors faithfully follow them also becomes subject to grave doubt. Even with the best of intentions, people cannot follow instructions that they do not comprehend ... Much research by linguists, psychologists and other has confirmed that jurors tend to have great difficulty understanding the instructions that are supposed to guide their decisionmaking."**

Reforming the Language of Jury Instructions, 22 Hofstra Law. Rev. 37, 41-42 (1993) (Citations omitted; Emphasis supplied). Nevertheless, and regardless of the difficulties associated with this task, the trial court has an absolute duty to present the jury with clear and intelligible instructions that will serve as a basis for a

fair, balanced and meaningful review of the evidence. Green, 86 N.J. at 288.

In the matter at bar, the jury instructions fell far short of this standard. First, the State asserts that there was no need to mold the instructions with facts elicited at trial because the case was uncomplicated and straight-forward. If this were true, however, it is respectfully submitted that Wright's jury would have proceeded through its deliberations without any questions. However, the record demonstrates plainly that they required repeated explanations of the applicable law. Placing the cold legal statements that they were given within the larger factual context of the case would undoubtedly have made the instructions more intelligible.

The record also evidences that the aggravated assault charge was far too confusing to provide lay jurors with the level of guidance required for intelligent deliberations. Indeed, even the Assistant Prosecutor complained to the trial court about the confusing nature of this portion of the charge. In light of his concerns, coupled with the disjointed manner in which the aggravated assault charge was delivered, it is simply impossible to conclude that the jury understood the elements of this offense. Further, these errors were particularly egregious given the central

role the aggravated assault charge played in the larger case.

Finally, as to Wright's remaining argument concerning defects in the charge, the State essentially ignores the fact that the manner in which the trial court charged the jury on identification undercut Wright's ability to defend himself at trial by mischaracterizing his sole defense. Intelligible charges that addressed any purported identification issue(s) without doing violence to Wright's sole defense could have been fashioned in light of the facts and circumstances of this case, but were not. As a result of this omission, Wright was deprived of the right to have his defense evaluated by his jury in a fair and balanced manner.

Against this backdrop, it is obvious that the defects in the charge prejudicially affected Wright's substantial rights, and possessed a clear capacity to produce an unjust result. State v. Hock, 54 N.J. 526, 538 (1969), Cert. Den., 399 U.S. 930, 90 S.Ct 2254, 26 L.Ed.2d 797 (1970); State v. Viera, 346 N.J. Super. 198 (App. Div. 2001), Certif. Den., 174 N.J. 38 (2002). Accordingly, Wright's convictions must be reversed.

Conclusion

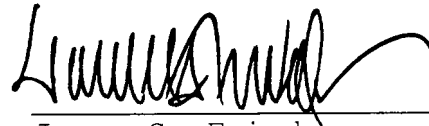
For all of the foregoing reasons, as well as those set forth in Wright's opening brief, Wright's convictions must be reversed.

Respectfully Submitted,

JAMES S. FRIEDMAN, LLC

Counsel to
Defendant/Appellant,
Steven Wright

By:



James S. Friedman

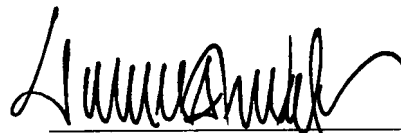
Certification of Service

The original and four copies of the prefixed letter brief were filed with the Appellate Division Clerk's Office on January 4, 2012, via Priority Mail.

Two copies of the prefixed letter brief were served on AP Stephanie Davis-Elson of the Hudson County Prosecutor's Office on January 4, 2012, via regular mail.

All of the foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 4, 2011



James S. Friedman