SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2466-13T3
A-4115-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HOPETON B. BROWN, JR. and
LAMAR A. JONES,

Defendants-Appellants.

Submitted October 11, 2016 – Decided August 1, 2017

Before Judges Ostrer, Leone and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 10-11-1702.

Joseph E. Krakora, Public Defender, attorney for appellant Hopeton B. Brown, Jr. (Stephen P. Hunter, Assistant Deputy Public Defender, of counsel and on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Lamar Jones (Frank J. Pugliese, Assistant Deputy Public Defender, of counsel and on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Susan L. Berkow, Special Assistant Prosecutor, of counsel and on the briefs).

Appellant Hopeton B. Brown, Jr. filed a pro se supplemental brief.

PER CURIAM

Defendants Hopeton B. Brown, Jr., and Lamar A. Jones were convicted of second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2, N.J.S.A. 2C:15-1(a), and fourth-degree criminal trespass, N.J.S.A. 2C:18-3, as a lesser-included offense of first-degree attempted armed robbery, N.J.S.A. 2C:5-1, N.J.S.A. 2C:15-1(a). Jones was also convicted of two firearms-related offenses: he unlawfully possessed a handgun, N.J.S.A. 2C:39-5(b), and he did so for an unlawful purpose, N.J.S.A. 2C:39-4(a), both second-degree offenses. Jones was acquitted of fourth-degree unlawful possession of hollow nose bullets. N.J.S.A. 2C:39-3(f). Brown was acquitted of all three firearms-related offenses. Both defendants were acquitted of criminal trespass by peering, another lesser-included offense of attempted armed robbery. The court sentenced Brown to an aggregate seven-year sentence, and Jones to an aggregate eight-year sentence, both subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

In brief, the prosecution arose out of an incident shortly before midnight on an August evening in North Brunswick. A concerned citizen reported to police that three men were acting suspiciously in front of a house on the block where he lived.

Police officers responded and stopped Jones, Brown and Keree Wade, who later testified against the other two. Upon investigation, police discovered that Jones and Wade possessed identical ski masks. The police found a third ski mask and a pistol discarded near the scene. DNA collected from the pistol's magazine matched a sample from Jones.

Wade's testimony at trial detailed the three men's intentions that night. He stated that they had planned to rob the home of a drug-dealer. After they arrived and Jones observed children in the proposed victim's home, they began to get cold feet. The three were in the midst of reconsidering their plan when police arrived. After being discovered, they fled the scene. Wade testified that he and Brown temporarily hid in the doorway of the residential building. The two were immediately separated from Jones.

Defendants challenge the court's denial of a suppression motion, evidentiary rulings, the sufficiency of the evidence, and the jury instructions.

I.

We first consider defendants' challenge to the court's denial of the motion to suppress Jones's ski mask. Jones argues:

> POINT I
>
> THE SKI MASK TAKEN FROM DEFENDANT SHOULD HAVE BEEN SUPPRESSED BECAUSE THERE WAS NO REASONABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY THE INVESTIGATORY STOP OR, IN THE ALTERNATIVE, TO SEIZE THE SKI MASK. U.S. Const. Amends IV, XIV; N.J. Const. Art. I, ¶¶ 1, 7.

Brown contends:

> POINT I
>
> THE SKI MASK TAKEN FROM CO-DEFENDANT JONES SHOULD HAVE BEEN SUPPRESSED BECAUSE THERE WAS NO REASONABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY THE INVESTIGATORY STOP OF JONES. ALTERNATIVELY, THE SEARCH AND SEIZURE OF THE SKI MASK EXCEEDED THE SCOPE OF AN INVESTIGATORY STOP. U.S. Const. Amends IV, XIV; N.J. Const. Art. I, ¶¶ 1, 7.

In sustaining the stop, and the search and seizure of the ski mask, the trial judge credited the sole witness at the suppression hearing, North Brunswick police officer Michael Sauvigne. He and other officers were dispatched to the scene based on the citizen's report of the three men acting suspiciously. When he arrived, he saw Jones sprinting down a sidewalk a couple blocks from where the citizen and two officers first saw the three men. Jones's two cohorts were being followed by two other officers on the opposite side of the street.

Jones then stopped and attempted to enter a parked car from the passenger-side door. Since there had been a rash of car

burglaries that summer, Sauvigne initially suspected that Jones might be breaking into the car. Sauvigne stopped his marked police vehicle in the middle of the street behind the car. Sauvigne got out and asked Jones, who was wearing a heavy hooded sweatshirt, to approach him. As Jones did, he had both hands in the hoodie's front pocket. After he removed his hands upon Sauvigne's command, a bulge remained.

Sauvigne then investigated the contents of Jones's front pocket, though the precise manner in which he did so is unclear. Sauvigne initially testified, "I ask him what the bulge is, and when I ask him about the bulge, he reaches in and says it's a hat, and pulls out a — a hat." Sauvigne said it was a ski hat with "eye holes cut out, and I believe either a mouth or a nose hole." Asked on cross-examination, "And you asked him to remove it?" Sauvigne responded, "I'm not sure if I asked him to remove it or if he said it's my hat and reached in. I believe he said it's my hat and he reached in and grabbed it out."

In his oral decision, the court presumed the officer asked Jones to remove the hat. After reviewing the events leading to the stop, the judge stated:

> The [c]ourt finds that the request of the officer[] to take out . . . whatever was in the gentleman's pocket is perfectly appropriate given the time of night, the -- the tenor of what's going around and the

> totality of circumstances, and the taking of that hat is perfectly appropriate given all of the information that was had by the officer at that time.[1]

However, in his written order filed the same day, the judge omitted the finding that Sauvigne asked Jones to remove the hat, stating: "Officer Sauvigne's inquiry as to what was in defendant Jones' pocket, after which defendant Jones pulled out a black ski mask, was lawful given all the information Officer Sauvigne had at that time . . . ."

Jones and Brown contend Sauvigne engaged in an investigatory stop without an articulable and reasonable suspicion of criminal activity. They further argue that even if he had grounds to stop Jones, the seizure of the hat exceeded the stop's legitimate scope. We disagree.

As our Supreme Court has recently emphasized, we apply a deferential standard of review to trial court fact findings on a motion to suppress evidence based on live testimony. State v. S.S., ___ N.J. ___ (2017) (slip op. at 16). We respect the trial court's opportunity to assess witnesses and have a "feel" of the

[1] In the course of oral argument, the judge suggested it did not matter whether the officer had asked Jones to remove the hat or he did so on his own. After reviewing the circumstances, the judge stated, "I would find and do find that even as an order, it was perfectly reasonable self protection where there's a bulge in somebody's pocket to make inquiry as to what it is and ask that it be seen."

case (indeed, we must defer even where the trial court evaluates video recorded evidence without live witnesses). Id. at 16, 25. We shall uphold findings "supported by sufficient credible evidence in the record," and shall not overturn a decision merely because we "would have reached a different conclusion." Id. at 16 (internal quotation marks and citation omitted). However, we owe no deference to trial courts' legal conclusions, "unless persuaded by their reasoning." Id. at 25 (internal quotation marks and citation omitted).

Applying this standard of review, we discern adequate support in the record for the conclusion that the officer, under the "totality of the circumstances," had not just a hunch, but a reasonable and articulable suspicion of criminal activity, to justify his investigatory stop of Jones. See, e.g., State v. Privott, 203 N.J. 16, 29-30 (2010); State v. Basil, 202 N.J. 570, 588-89 (2010); State v. Davis, 104 N.J. 490, 504-05 (1986).

Sauvigne responded to the report of suspicious activity from a concerned and identified neighbor, not an anonymous tipster. See State v. Stovall, 170 N.J. 346, 362 (2002) (stating that an ordinary citizen is assumed to have sufficient veracity and requiring no further showing of reliability). The observed men were reported lingering near a house around midnight. See State v. Gamble, 218 N.J. 412, 433 (2014) (location and hour of day

contribute to a reasonable and articulable suspicion). Sauvigne spotted Jones, who was wearing a heavy hoodie in August. See United States v. Maquire, 359 F.3d 71, 77 (1st Cir. 2004) (suspects wearing clothing "inappropriate for the weather" contributed to a reasonable and articulable suspicion). Sauvigne reasonably believed Jones was one of the three men reported by the neighbor, and he was sprinting down the street to avoid being caught. See State v. Piniero, 181 N.J. 13, 26 (2004) (stating that flight, "in combination with other circumstances . . . may support reasonable and articulable suspicion"). Mindful of a recent spate of car burglaries, he saw Jones attempt to enter a parked car from the passenger side. See State v. Citarella, 154 N.J. 272, 280 (1998) (considering "rash of burglaries in the area" as a factor in reasonably suspecting defendant of criminal activity); State v. Contreras, 326 N.J. Super. 528, 541 (App. Div. 1999) (stating that "recent nearby crimes" can be a factor in finding reasonable suspicion). Furthermore, Jones was far away from where he was originally spotted, providing additional cause to suspect he was attempting to enter a car not his own.

Sauvigne also had a reasonable articulable suspicion that Jones possessed a weapon, justifying his subsequent protective search. Added to the circumstances that justified the stop, Sauvigne observed a bulge in Jones's front pocket after he removed

his hands. The totality of those circumstances created an objectively reasonable fear that a weapon caused the bulge, posing a threat to Sauvigne's safety. "Indeed, a bulge alone has been held sufficient to validate a protective pat-down." State v. Smith, 134 N.J. 599, 621 (1994) (citing Pennsylvania v. Mimms, 434 U.S. 106, 111-12, 98 S. Ct. 330, 334, 54 L. Ed. 2d 331, 338 (1977)). Accordingly, the officer was "entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault him." Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889, 911 (1968).

Sauvigne's search was appropriately "confined in scope to an intrusion reasonably designed to discover weapons that might be used to assault the police officer." State v. Roach, 172 N.J. 19, 27 (2002) (quoting Terry, supra, 392 U.S. at 29, 88 S. Ct. at 1884, 20 L. Ed. 2d at 910) (internal quotation marks omitted). Not every Terry search is limited to a pat and frisk. "[C]ourts have upheld seizures of unidentifiable objects on a suspect's person where a lawful pat-down is either inconclusive or impossible." Id. at 28-29 (upholding search and seizure where officer reached into suspect's bulging pocket after inconclusive pat down). Nevertheless, the officer must resort to the "least intrusive maneuver to protect" his safety. Privott, supra, 203

N.J. at 31. In reviewing whether an officer has done so, "the facts surrounding the event are pivotal." Roach, supra, 172 N.J. at 29.

Officer Sauvigne asked Jones what was in his pocket. Jones answered it was a hat. Even assuming he did not remove it until Sauvigne's request, the officer's conduct met the fundamental test: it was "objectively reasonable under the totality of the circumstances." Ibid. (internal quotation marks and citation omitted).

Sauvigne's conduct would have been more intrusive had he not asked Jones what caused the bulge, but immediately commanded him to empty his pocket. Such an order would have invaded Jones's privacy interests over all its then-undisclosed contents. And once Sauvigne asked the question and received the answer that it was a harmless hat, it was reasonable for Sauvigne to confirm that fact. He could do so one of three ways: by patting and frisking Jones, which would have invaded Jones's bodily integrity; reaching into his pocket, which would have invaded his privacy interests over any other contents; or asked Jones to show him the hat. The course taken by Sauvigne was the least intrusive one.

Finally, Sauvigne had probable cause to retain the hat as evidence of suspected criminal activity. See Minnesota v. Dickerson, 508 U.S. 366, 379, 113 S. Ct. 2130, 2139, 124 L. Ed.

2d 334, 348 (1993) (holding that officer must have probable cause to believe object was related to crime in order to seize it permanently from the suspect); see also State v. Bruzzese, 94 N.J. 210, 236-38 (1983) (stating that, in order to seize property in plain view, there must be "probable cause to associate the property with criminal activity" (quoting Texas v. Brown, 460 U.S. 730, 741-42, 103 S. Ct. 1535, 1543, 75 L. Ed. 2d 502, 513 (1983))). Here, the "incriminating character of the object[,]" Dickerson, supra, 508 U.S. at 379, 113 S. Ct. at 2139, 124 L. Ed. 2d at 348, was obvious. Possession of a ski mask may well appear innocuous in January, but in August it was akin to possession of burglary tools or another instrument of criminal activity, particularly in light of the attendant circumstances. Cf. State v. Matthews, 799 N.W.2d 911 (Wisc. Ct. App.) (noting that even in cold weather, when defendant "may have worn the ski mask and hoodie to stay warm so that his choice of clothing was innocent," the police had a reasonable suspicion of criminal activity to further investigate), review denied, 806 N.W.2d 640 (2011).

Lastly, the fact that Sauvigne did not also arrest Jones is of no moment. "[P]robable cause to arrest and probable cause to search involve distinct and not necessarily identical inquiries." State v. Chippero, 201 N.J. 14, 31 (2009). The same distinction holds true for probable cause to seize.

In sum, we discern no error in the court's denial of the motion to suppress the ski mask.

II.

We turn next to claimed evidentiary errors at trial. Jones contends, as his Point II:

> THE COURT VIOLATED DEFENDANT'S RIGHTS TO CONFRONTATION, TO DUE PROCESS AND TO PRESENT A DEFENSE BY PRECLUDING HIM FROM PRESENTING EVIDENCE UNDERMINING THE CREDIBILITY OF CO-DEFENDANT WADE. U.S. CONST. AMENDS VI, XIV; N.J. CONST., ART. I, ¶¶ 1, 10.

Brown contends, as his Point III:

> THE PROSECUTOR'S QUESTIONING CONCERNING DEFENDANT'S SILENCE VIOLATED HIS RIGHT AGAINST SELF-INCRIMINATION AND THEREFORE AMOUNTED TO PROSECUTORIAL MISCONDUCT. U.S. Const. Amend. XIV, N.J. Const. Art. I, ¶ 1.

We consider these points in turn.

A.

The court denied the effort of Jones's counsel during Wade's cross-examination to elicit evidence that he was a member of a gang. Citing N.J.R.E. 608, the judge found that evidence of gang membership was not admissible to attack Wade's credibility. The judge also considered gang membership as evidence of a crime or other wrongful act under N.J.R.E. 404(b) as applied in State v. Cofield, 127 N.J. 328, 338 (1992). The judge noted that the evidence was not relevant to a material issue because the State

had not alleged, nor was there evidence that, "the alleged crime was instigated or part of any kind of gang activity . . . ." The court also concluded that evidence of gang activity was more prejudicial than probative under N.J.R.E. 403.

Jones argues that he was entitled "to impeach the credibility of the State's witness via his prior bad acts, i.e., his gang affiliation, and establish that through his gang activity he had ready access to firearms, including the one he attributed to defendant in this case." He argues the court's evidentiary ruling was erroneous and deprived him of his constitutional rights.

"A trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." State v. Nantambu, 221 N.J. 389, 402 (2015) (internal quotation marks and citation omitted). We apply de novo review on issues of law, ibid., or if the trial court applies the wrong legal standard, State v. Darby, 174 N.J. 509, 518 (2002).

Defendant proffered two purposes for eliciting Wade's gang affiliation: to undermine his credibility and to establish his ready access to firearms, including the one attributed to Jones. As to the first purpose, the court correctly barred testimony of Wade's gang affiliation because N.J.R.E. 405 and N.J.R.E. 608 preclude evidence of specific instances of conduct to challenge a

witness's credibility. State v. Scott, ___ N.J. ___, ___ (2017) (slip op. at 13). As the Court has recently described:

> N.J.R.E. 405 provides that "[s]pecific instances of conduct not the subject of a conviction of a crime shall be inadmissible," and N.J.R.E. 608 indicates that "a trait of character cannot be proved by specific instances of conduct" unless the prior act was a "false accusation against any person of a crime similar to the crime with which defendant is charged."
>
> [Ibid.]

Jones's second purpose in introducing evidence of gang affiliation implicates both N.J.R.E. 404(b) and N.J.R.E. 403. As to the former rule, we recognize that when a defendant seeks to use evidence of another's crime or wrong defensively, the more stringent test in Cofield does not apply because "an accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made." State v. Weaver, 219 N.J. 131, 150 (2014) (internal quotation marks and citation omitted). When a defendant offers N.J.R.E. 404(b) evidence "exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the admissibility standard." Ibid. (internal quotation marks and citation omitted). It is thus unclear whether N.J.R.E. 404(b) should preclude the admission of Wade's gang membership.

Regardless, "trial courts must still determine that the probative value of [other wrongs] evidence is not substantially outweighed by any of the [N.J.R.E.] 403 factors . . . ." Id. at 151. Application of those factors justified exclusion of evidence of Wade's gang membership as it would have resulted in undue prejudice, confused the issues and misled the jury. In particular, had evidence been elicited that Wade was a gang member, it would have opened the door to evidence that Brown and Jones were members as well. Wade so alleged in his statement to police.

Even assuming gang membership may serve as circumstantial evidence of exposure to guns generally, it is less probative of possession of a gun on a particular occasion. Moreover, a jury could misuse evidence of gang membership to conclude Wade was unworthy of belief, or "a bad person in general," Cofield, supra, 127 N.J. at 336 (internal quotation marks and citation omitted), uses barred by N.J.R.E. 608 and 404(b). In any event, counsel elicited on cross-examination that Wade had seen guns regularly on the streets.

Finally, we discern no merit to defendant's argument that the court's evidentiary ruling denied him his constitutional rights of confrontation and due process. The right to cross-examine witnesses is "among the minimum essentials of a fair trial . . . ." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045,

35 L. Ed. 2d 297, 308 (1973). Yet, "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Id. at 295, 93 S. Ct. at 1046, 35 L. Ed. 2d at 309. While "denial or significant diminution" of a defendant's rights requires close scrutiny of those competing interests, ibid., a court may place "reasonable limits on . . . cross-examination" to guard against "prejudice, confusion of the issues . . . or interrogation that is . . . only marginally relevant." State v. Budis, 125 N.J. 519, 532 (1991) (internal quotation marks and citation omitted). As there was no "denial or significant diminution" of defendant's rights, we discern no constitutional violation.

B.

Brown contends he was denied a fair trial because the prosecutor improperly elicited Brown's silence in response to police questioning. Brown points to a question to a different witness, Wade. Wade testified that when the officers first stopped him and Brown, they asked Wade about Jones. Wade testified that he denied knowing Jones. The prosecutor then asked, "And did Hopeton [Brown] answer that question as well?" Over an objection of Brown's counsel, Wade confirmed that the question was also asked of Brown and that he did not respond.

The State may use a defendant's silence to impeach credibility, when the silence does not occur "at or near" the time of arrest, and "there is no government compulsion and the objective circumstances demonstrate that a reasonable person in defendant's position would have acted differently . . . ." State v. Stas, 212 N.J. 37, 58 (2012) (citation omitted). Yet, the silence "cannot . . . be used as substantive evidence of a defendant's guilt." Ibid. Here, although Brown's alleged silence did not occur at or near the time of arrest, it apparently served as substantive evidence. Although Brown did not deny knowing Jones, according to Wade, he also declined to admit knowing him — perhaps demonstrating a consciousness of guilt.

However, we view the admission of evidence of Brown's silence to be harmless. First, Sauvigne contradicted Wade's account of Brown's silence, and testified that he believed both men "said the same thing" in denying they knew or were with Jones that evening. Second, the substantive weight of Brown's silence, even if the jury credited Wade over Sauvigne, was negligible. Brown was among the three men spotted by the neighbor. He was in the company of Wade, who admitted his involvement in the scheme, and attributed the initial idea to Brown. Sauvigne testified he saw all three men leave the scene together, and they later arrived together at the police station to retrieve certain items that had been seized.

Thus, Brown's silence added little to the evidence of Brown's involvement and his guilt. Its admission did not deny defendant a fair trial.

III.

Both defendants contend the court erred in its jury instruction. Jones also raises points regarding the State's summation, and the sufficiency of the evidence as to the trespass and weapons offenses. Jones contends:

> POINT III
>
> FOURTH-DEGREE CRIMINAL TRESPASS SHOULD NOT HAVE BEEN SUBMITTED FOR THE JURY'S CONSIDERATION BECAUSE THE STATE'S EVIDENCE FAILED TO ESTABLISH A PRIMA FACIE CASE OF CRIMINAL TRESPASS BY UNLAWFUL ENTRY OF A DWELLING. THEREFORE, THE TRESPASS CONVICTION MUST BE VACATED AND THE CHARGE DISMISSED. ALTERNATIVELY, THE COURT SHOULD FIND THE INSTRUCTION ON THE CHARGE OF CRIMINAL TRESPASS ERRONEOUS, AS IT CONFLATED THE FOURTH-DEGREE OFFENSE WITH THE PETTY DISORDERLY PERSONS OFFENSE. CONSEQUENTLY, THE TRESPASS CONVICTION MUST BE VACATED AND A NEW TRIAL ON THAT OFFENSE ORDERED.
>
> POINT IV
>
> DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE WEAPONS OFFENSES SHOULD HAVE BEEN GRANTED.
>
> POINT V
>
> IN THREE SHORT INFLAMMATORY SENTENCES DELIVERED IN SUMMATION THE PROSECUTOR ALSO BOLSTERED ITS OWN WITNESS AND DENIGRATED THE DEFENDANTS. THIS INSTANCE OF MISCONDCUT

NECESSITATES REVERSAL OF DEFENDANT'S CONVICTIONS AND A NEW TRIAL (Not Raised Below).

Brown contends, in his Point II:

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY FAILING TO CHARGE LESSER-INCLUDED OFFENSES TO CONSPIRACY. U.S. Const. Amend. XIV; N.J. Const. Art. I, ¶ 1.

He also contends in a pro se supplemental brief:

POINT 1

THE COURT ERRED IN CHARGING THE JURY WITH ARMED ROBBERY; [THE] ERRONEOUS JURY CHARGE DEPRIVED DEFENDANT OF A FAIR TRIAL.

POINT 2

CONVICTION FOR 2ND DEGREE CONSPIRACY TO COMMIT ROBBERY LACKED LEGAL MERIT, AND THE COURT ERRED IN NOT GRANTING A POST-VERDICT MOTION FOR A NEW TRIAL.

A.

We find merit only in Jones's contention that the evidence did not support his conviction of criminal trespass of a dwelling.[2] We begin with the elements of the offense. A person commits a fourth-degree offense if, "knowing that he is not licensed or

[2] Jones filed a post-trial motion for a judgment of acquittal or, alternatively, a new trial, which the court denied. He did not specifically raise, and consequently the court did not specifically address, the adequacy of the evidence in support of the fourth-degree trespass conviction. Nonetheless, we conclude Jones preserved his ability to raise the issue whether the jury verdict was against the weight of the evidence. See R. 2:10-1. The State does not disagree.

privileged to do so, he enters or surreptitiously remains in any . . . structure" and the "offense . . . is committed in a dwelling." N.J.S.A. 2C:18-3(a). If the offense is not committed in a dwelling (or other structures or facilities specifically identified), then the offense is a disorderly persons offense. Alternatively, a person commits the petty disorderly persons offense of defiant trespass if:

> knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:
>
> (1) Actual communication to the actor; or
>
> (2) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
>
> (3) Fencing or other enclosure manifestly designed to exclude intruders.
>
> [N.J.S.A. 2C:18-3(b).]

Thus, subsection (a) covers entry into a house — a "structure" and a "dwelling"; and subsection (b) covers entry into a house's backyard — "any place." See State v. Braxton, 330 N.J. Super. 561, 566-67 (App. Div. 2000) (noting that the latter is not a lesser-included offense of the former).

There was no evidence that Jones entered the dwelling of the proposed robbery victim or any other dwelling or structure. Wade

testified that he, Brown and Jones waited outside the target's residence. After spotting the target, they eventually left the vehicle and assembled by the side of the house. Then Jones left the two and walked to the front of the house to see who was inside. Jones returned to tell Wade and Brown that he had seen children. Police then arrived. Wade testified he and Brown "went into the next house; it was open . . . so we sat in the hallway. Lamar [Jones], I don't know where he was at; he was on the side of the house." Two officers followed Wade and Brown. Sauvigne ultimately caught up with Jones.

Although we must give the State the benefit of all favorable testimony and all favorable inferences that one could reasonably draw, see, e.g., State v. Rodriguez, 141 N.J. Super. 7, 11-12 (App. Div. 1976), it would be pure speculation to conclude that Jones entered the dwelling or any other structure. Wade did not see him do so, and it is unreasonable to infer he did based on the surrounding circumstances. Indeed, the State's theory was that Jones separated himself from Wade and Brown in order to dispose of the weapon.

We note that there was also an insufficient basis to convict Jones of either disorderly persons or petty disorderly persons trespass. The lack of proof that Jones entered the dwelling or any other structure compels an acquittal of disorderly persons

trespass under subsection (a). Furthermore, the jury instructions were inadequate to convict defendant of petty disorderly persons trespass. The verdict sheet asked the jury to determine whether Jones, "knowing that he was not licensed or privileged to do so," either (1) "was in any place" or (2) "enter[ed] the premises" at the specified address.[3] Although being "in any place" without authority is an element of a petty disorderly persons offense under subsection (b), the jury was never instructed as to the "notice against trespass" element of the petty disorderly persons offense.

Therefore, a judgment of acquittal shall be entered as to trespass. Any further comment on Jones's contentions regarding the jury instruction on criminal trespass is unnecessary.

B.

Having searched the record, we are unconvinced that Brown requested an instruction on the lesser-included offense of conspiracy to commit theft. Thus, we review his argument under a plain error standard, which requires a showing of error "clearly capable of producing an unjust result." State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 2:10-2). The court is required to give an unrequested instruction sua sponte "when there is obvious

[3] Notably, as the question was posed in the disjunctive, it is unclear whether the jury even found entry at all.

record support for such a charge"; in other words, "[o]nly if the record clearly indicates a lesser-included charge — that is, if the evidence is jumping off the page . . . ." Id. at 81 (internal quotation marks and citations omitted).

Brown contends that the evidence that he knew Jones possessed a gun was equivocal. Wade testified that when they arrived at the target's house, Jones retrieved the gun from the trunk. Wade further stated that Brown was standing at the side of the car and could not see precisely what Jones was getting. But, particularly in light of the other evidence in support of the crime as charged, uncertainty regarding whether Brown saw the gun falls short of "obvious record support" for charging the lesser-included offense that Brown conspired with the others only to commit a theft.

Wade testified that Brown was the one who proposed to "rob" the victim, and Brown was the one who disclosed the target possessed over $100,000. All three conspirators waited for the target to be in his home, and they all had ski masks — both facts suggesting they intended to confront their victim. It is also implausible to believe that their intended target would part with over $100,000 unless "threaten[ed] . . . or purposely put[] . . . in fear of immediate bodily injury . . . ." N.J.S.A. 2C:15-1(a).

Although this review of the record demonstrates that Brown has failed to meet his burden, there is even less factual basis

for the lesser-included offense when one considers the evidence surrounding Wade's and Jones's intent. After all, Wade testified that Jones possessed the gun; Wade saw that he did; Jones's DNA was on the gun; and the gun was found near the spot where Jones was arrested. There can be no doubt that Jones and Wade planned to commit a robbery that night.

Brown does not consider the latter evidence in his brief because he contends he could conspire to commit a theft even if Jones and Wade conspired with him to commit a robbery. His argument relies on our Court's adoption of the "unilateral" approach to conspiracy. We are unpersuaded by his application of this doctrine.

An essential element of a conspiracy is the agreement with another to commit a specific crime:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
>
> [N.J.S.A. 2C:5-2(a).]

As noted in State v. Del Fino, 100 N.J. 154, 160 (1985), which Brown cites, this definition focuses a trier of fact on the individual conspirator's culpability, rather than the culpability of the conspiracy as a whole.

But the drafters' "unilateral" approach only meant that there need not be at least two guilty conspirators in order for a conspiracy to exist. Ibid. For example, a conspiracy can exist where the defendant's only co-conspirator faked his agreement. See State v. Conway, 193 N.J. Super. 133, 159-60 (App. Div.) ("[U]ndercover agents can be conspirators for the purpose of proving that a conspiracy existed."), certif. denied, 97 N.J. 650 (1984); State v. La Forge, 183 N.J. Super. 118, 119-21 (Law Div. 1981); see also Paul H. Robinson & Jane A. Grall, Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond, 35 Stan. L. Rev. 681, 752-53 (1983) (noting that a "unilateral concept of agreement" only requires "that the defendant believe that he has entered into an agreement with the co-conspirator" and that the nonliability of a co-conspirator is not a defense under this theory).

Indeed, the drafters of this provision distinguished its definition from others that required "at least two guilty conspirators" in order for there to be a conspiracy at all. II New Jersey Criminal Law Revision Commission: Commentary p. 131

(1971) (internal quotation marks and citation omitted). Quoting the Tentative Draft of the Model Penal Code, the Criminal Law Revision Commission noted three contexts in which the unilateral approach would yield a different result from a bilateral approach: "[w]here the person with whom the defendant conspired" (1) "is irresponsible or has immunity"; (2) "secretly intended not to go through with the plan"; and (3) "has not been apprehended or tried, or his case has been disposed of in a manner that would raise questions of consistency about a conviction of the defendant." Ibid.

Brown suggests a different understanding of "unilateral" conspiracy. It does not involve a conspiracy with an irresponsible actor or an undercover officer who "agrees" to engage in criminal conduct but does not intend to follow through; nor does it involve a conspiracy with another person who has been or is later acquitted. Brown contends a conspiracy could exist without a meeting of the minds at all: he could think he was agreeing with his cohorts to commit a theft, while his cohorts believed he was agreeing to commit a different crime. Brown has provided no precedent for that precise proposition, nor have we found any. In any event, the trial court was not required, sua sponte, to fashion an instruction based on such a novel theory.

C.

The remaining issues presented by Jones and by Brown in his supplemental pro se brief lack sufficient merit to warrant extended discussion. R. 2:11-3(e)(2). The following brief comments with respect to Jones's points will suffice.

The court did not err in denying Jones's motion for a judgment of acquittal on the weapons offenses as there was ample evidence from which a jury could reasonably convict. Although Jones raised questions about the chain of custody of the firearm and other aspects of the DNA testing, Sauvigne testified that he appropriately handled the firearm and secured it. An expert testified that Jones's DNA was found on the magazine. Furthermore, Wade testified that Jones possessed the firearm; Jones fled separately from Brown and Wade when police arrived; and the firearm was found near the spot where Jones was stopped.

Jones's claim of prosecutorial misconduct pertains to remarks in the prosecutor's closing statement. To persuade the jury that the State's agreement with such an unlikable character as Wade was unavoidable, the prosecutor compared the State's agreement with one federal prosecutors were famously constrained to make with the noted organized crime figure, John Gotti. As defense counsel did not object, we presume the comments were not prejudicial. State v. Frost, 158 N.J. 76, 83 (1999). We are unconvinced there was

error, let alone plain error, warranting a new trial. The prosecutor's remarks were neither inflammatory, nor were they likely to be understood to liken defendants to "mob members." If anything, they defamed the State's own witness.

Affirmed as to Brown; affirmed in part and reversed in part as to Jones.