SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2336-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TROY L. BAILEY,

Defendant-Appellant.

Submitted March 8, 2021 – Decided May 18, 2022

Before Judges Rothstadt and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 19-04-0716.

Joseph E. Krakora, Public Defender, attorney for appellant (Zachary G. Markarian, Assistant Deputy Public Defender, of counsel and on the briefs).

Cary Shill, Acting Atlantic County Prosecutor, attorney for respondent (Mario C. Formica, Special Deputy Attorney General/Acting Deputy First Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his conditional guilty plea conviction for unlawful possession of a shotgun that was found under his mattress. The trial court denied defendant's motion to suppress the weapon, which was seized when police entered defendant's bedroom without a warrant when responding to a domestic violence incident. The police were invited into the bedroom and directed to the shotgun under the mattress by the domestic violence victim, who had a child in common with defendant but slept in a separate bedroom. The trial court found there was insufficient exigency to excuse the failure to obtain a warrant, but nonetheless concluded the entry into defendant's bedroom and ensuing seizure were authorized by the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. Although the officer testified he was aware the victim slept in a separate bedroom and believed that defendant had exclusive access to his bedroom, the trial court ruled the officer reasonably relied on the victim's apparent authority to consent to the police entry and ensuing search under defendant's mattress.[1]

[1] As we explain in section 2, infra, the officer presented seemingly inconsistent testimony at the suppression hearing concerning his belief as to who had access to defendant's bedroom. At the conclusion of his cross-examination by defense counsel, the officer acknowledged that he believed that only defendant had access to the room.

After carefully reviewing the record in light of the arguments of the parties and the governing principles of law, we are constrained to reverse the denial of defendant's suppression motion. The PDVA does not authorize a warrantless search of a residence for a weapon; rather, any such search must fall under a recognized exception to the warrant requirement, such as exigent circumstances or consent. In this instance, as the trial court correctly found, there was insufficient exigency to justify the warrantless search because defendant was detained by police in the apartment building lobby and thus could not access the weapon stored in his bedroom. Moreover, we conclude the State failed to prove by a preponderance of the evidence that police reasonably relied on the victim's apparent authority to consent to a search of defendant's bedroom. In these circumstances, police were obliged either to obtain consent from the only person authorized to consent to the search—defendant—or secure the bedroom and apply for a warrant.

I.

In April 2019, an Atlantic County grand jury returned an indictment charging defendant with: third-degree unlawful possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); third-degree threatening to commit a crime of

violence, N.J.S.A. 2C:12-13(a); third-degree unlawful possession of a shotgun, N.J.S.A. 2C:39-5(c)(1); second-degree child endangerment, N.J.S.A. 2C:24-4(a)(2); and second-degree certain persons not to possess weapons, N.J.S.A. 2C:39-7(b)(1).

Defendant moved to suppress the shotgun. In September 2019, the trial court convened an evidentiary hearing. On October 7, 2019, the trial court rendered a written opinion denying the motion to suppress.

Defendant thereafter negotiated a plea agreement with the prosecutor and on October 30, 2019, entered a guilty plea to third-degree unlawful possession of a shotgun, preserving the right to challenge the denial of his suppression motion. See R. 3:5-7(d). The State agreed to dismiss the remaining counts and also agreed to a Graves Act waiver pursuant N.J.S.A. 2C:43-6.2, reducing the mandatory minimum period of parole ineligibility from forty-two months to one year. In January 2020, defendant was sentenced in accordance with the plea agreement to a five-year prison term with a one-year period of parole ineligibility.

II.

The following facts were elicited at the suppression hearing. The State presented a single witness, Atlantic City Police Officer Eric Evans. The State

also introduced the roughly eight-minute electronic recording made by the officer's body worn camera. Officer Evans was dispatched to defendant's apartment to investigate a domestic violence incident reported by S.S., who lived in the apartment and has a five-year-old child in common with defendant.[2] S.S. also has a sixteen-year-old daughter who resided in the apartment, though unrelated to defendant.

S.S. called 9-1-1 to report that defendant had threatened her with a knife.[3] She provided a physical description of defendant and the clothing he was wearing. S.S. made a second 9-1-1 call informing the dispatcher she was especially concerned about a shotgun defendant kept in the apartment.

When officers arrived in the apartment building, they saw a man in the downstairs lobby who matched defendant's description. Defendant identified himself and admitted he had just left the apartment from which S.S. placed the 9-1-1 call. Defendant was detained in the lobby while Officer Evans went upstairs to meet with S.S.

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[2] We use initials to protect the identity of the domestic violence victim. R. 1:38-3(c)(12).

[3] The record before us provides very little information about the allegation of domestic violence and does not indicate whether a final restraining order (FRO) was issued.

S.S. confirmed that she lived in the apartment. She informed the officer she had recently moved from Philadelphia to co-parent the five-year-old child with defendant. She told Officer Evans that she and defendant slept in separate bedrooms. On cross-examination, defense counsel elicited the following information from Officer Evans:

> Defense counsel: Did anybody ask if she lived in that apartment?
>
> Officer Evans: If she lived in that apartment?
>
> Defense counsel: Yes.
>
> Officer Evans: She said it was her apartment.
>
> Defense counsel: She said it was her apartment?
>
> Office Evans: Yes.
>
> Defense counsel: But that wasn't her room, correct?
>
> Officer Evans: Correct.
>
> Defense counsel: She never said she stayed in that room?
>
> Officer Evans: Correct.
>
> Defense counsel: In fact, she said that only [defendant] stayed in that room?
>
> Officer Evans: Correct.

The door to defendant's bedroom was open. S.S. took Officer Evans inside defendant's room and "pointed out directly where the shotgun was" underneath

the mattress. S.S.'s sixteen-year-old daughter stated defendant kept the ammunition for the shotgun in his dresser drawer and she provided several shotgun shells to the officer.

Defendant was detained in the lobby throughout the course of Officer Evans' investigation in the apartment. Defendant was placed under arrest and removed from the apartment building after Officer Evans reported that a shotgun had been seized. Police never asked defendant to consent to the search of his bedroom.

Officer Evans gave seemingly inconsistent testimony regarding his belief that S.S. had access to defendant's bedroom. On direct examination by the assistant prosecutor, the officer testified as follows:

> Counsel: So what happened next?
>
> Officer Evans: She pointed out directly where the shotgun was along with the shotgun shells and it was true.
>
> Counsel: Now where was the – the shotgun located?
>
> Officer Evans: Underneath the mattress.
>
> Counsel: Of – And – Of – whose bedroom?
>
> Officer Evans: I – I believe Mr. Bailey's bedroom, but I believe they all had access to the bedroom.

On cross-examination by defense counsel, however, Officer Evans provided a different answer in response to counsel's direct question regarding who had access to defendant's bedroom. The officer testified as follows:

> Defense counsel: [S.S.] was not charged with possession of the shotgun, correct?
>
> Officer Evans: No, she was not.
>
> Defense counsel: And this is because the shotgun was found in Mr. Bailey's room?
>
> Officer Evans: Yes.
>
> Defense counsel: And it was a room that only he had access to?
>
> Officer Evans: I believe so.

Officer Evans' testimony ended on that note. The State conducted no re-direct examination to clarify who had access to defendant's bedroom. The trial court found that Officer Evans was a credible witness and that his testimony was corroborated by the body worn camera recording. The court's opinion does not, however, reconcile the apparent inconsistency in the officer's direct examination and cross-examination testimony with respect to whether S.S. or her sixteen-year-old daughter had access to defendant's bedroom.

Defendant raises the following contentions for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE GUN OFFICER EVANS SEIZED FROM [DEFENDANT'S] BEDROOM DURING A WARRANTLESS SEARCH. OFFICER EVANS KNEW [S.S.] LACKED AUTHORITY TO CONSENT TO A SEARCH OF [DEFENDANT'S] BEDROOM AND NO OTHER EXCEPTION TO THE WARRANT REQUIREMENT APPLIED
>
> > A. THE TRIAL COURT ERRED IN FINDING THAT OFFICER EVANS HAD A REASONABLE OBJECTIVE BELIEF THAT [S.S.] HAD APPARENT AUTHORITY TO CONSENT TO A SEARCH OF [DEFENDANT'S] BEDROOM
> >
> > B. THE TRIAL COURT ERRED IN HOLDING IN THE ALTERNATIVE THAT THE DOMESTIC VIOLENCE ACT PERMITTED THE STATE'S INTRODUCTION OF THE GUN AT TRIAL

III.

We begin our analysis by acknowledging general principles that govern this appeal. When reviewing the denial of a motion to suppress evidence, we "must uphold the factual findings underlying the trial court's decision, so long as those findings are 'supported by sufficient credible evidence in the record.'" State v. Evans, 235 N.J. 125, 133 (2018) (quoting State v. Elders, 192 N.J. 224,

243 (2007)). So too a trial judge's credibility determinations should be upheld if they are supported by sufficient, credible evidence. State v. S.S., 229 N.J. 360, 374 (2017). In contrast, an appellate court is not required to afford deference to a trial court's legal conclusions, which we review de novo. See State v. Bryant, 227 N.J. 60, 71–72 (2016); State v. Hathaway, 222 N.J. 453, 467 (2015).

As our Supreme Court recently emphasized, "[n]o principle is more firmly rooted in our Federal and State Constitutions than the right of the people to be free from unreasonable searches of their homes." State v. Hemenway, 239 N.J. 111, 116 (2019). "Although all warrantless searches are presumptively unreasonable, searches of the home are subject to even more careful scrutiny." Id. at 125–26 (citing State v. Edmonds, 211 N.J. 117, 129 (2012)). "That is so because '[t]he sanctity of one's home is among our most cherished rights,'" and because "'[t]he very core of the Fourth Amendment and Article 1, Paragraph 7 protects the right of the people to be safe within the walls of their homes, free from governmental intrusion.'" Id. at 126 (alterations in original) (quoting State v. Frankel, 179 N.J. 586, 611 (2004)); see also State v. Lamb, 218 N.J. 300, 314 (2014) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed") (quoting State v. Vargas, 213 N.J. 301

(2013)); State v. Evers, 175 N.J. 355, 384 (2003) (stating that privacy interest in a home is "entitled to the highest degree of respect and protection in the framework of our constitutional system"). We add that although the Fourth Amendment protects people, not places, Katz v. United States, 389 U.S. 347, 351 (1967), within the walls of the home, an adult's expectation of privacy is especially protected in his or her bedroom. This is particularly true when, as in this case, the person does not share the bedroom with a co-habitant.

As we have already noted, warrantless searches are presumptively unreasonable. Accordingly, the State bears the burden of proving the validity of a warrantless search. State v. Wright, 221 N.J. 456, 468 (2015). To be valid, a warrantless search must fit into a recognized exception to the warrant requirement. See State v. Watts, 223 N.J. 503, 513 (2015).

IV.

We first address whether the failure to obtain a warrant was justified by the exigency associated with the alleged domestic violence incident. We agree with the trial court that no exigency existed sufficient to justify the warrantless police entry of the bedroom to retrieve the weapon under the exigent circumstances exception, nor was the entry justified under "community caretaking." See State v. Bogan, 200 N.J. 61, 73–74 (2009). As our Supreme

Court stressed in State v. Vargas, "[w]e now hold, based on the United States Supreme Court's and this Court's jurisprudence, the community caretaking doctrine is not a justification for the warrantless entry and search of a home in the absence of some form of objectively reasonable emergency." 213 N.J. at 305. We presume this principle applies as well to the warrantless entry and search of a bedroom by an officer who is lawfully in the common area of an apartment. See also Caniglia v. Strom, 593 U.S. __ (2021) (declining to apply the community caretaking doctrine to authorize a warrantless search of a home, noting that "searches of vehicles and homes are constitutionally different").

In this instance, at the moment of the search for and seizure of the shotgun, defendant was detained in the downstairs lobby and thus had no access to the firearm upstairs. He was placed under arrest and was not permitted to return to the apartment. We do not doubt the hidden firearm posed a serious risk to S.S. and other residents of the apartment, including the five-year-old child. However, as Officer Evans candidly acknowledged in his testimony, there was no emergency at the moment the weapon was seized because defendant was detained in the downstairs lobby. Vargas, 213 N.J. at 305.

In these circumstances, nothing prevented the police from securing the bedroom and applying for a warrant based on the information S.S. provided.

Indeed, the PDVA explicitly empowers a judge to issue not only a temporary restraining order (TRO) to protect a victim of domestic violence, but also "to enter an order authorizing the police to search for and seize from the defendant's home, or any other place, weapons that may pose a threat to the victim." Hemenway, 239 N.J. at 116.

V.

We next address the trial court's ruling that the police entry into the bedroom and the ensuing search under the mattress were lawful because they were authorized by the PDVA. The PDVA authorizes law enforcement officers with probable cause to believe domestic violence has been committed to "upon observing or learning that a weapon is present on the premises, seize any weapon that the officer reasonable believes would expose the victim to a risk of serious bodily injury." N.J.S.A. 2C:25-21(d)(1)(b). This includes seizure of a weapon that poses a future harm or heightened risk of injury to the victim. See State v. Perkins, 358 N.J. Super. 151, 160 (App. Div. 2003) (citing State v. Johnson, 352 N.J. Super. 15, 20 (App. Div. 2002)).

We disagree with the trial court, however, that the PDVA authorized a warrantless search for the shotgun. As the Court in Hemenway made clear, the statutory framework for protecting domestic violence victims does not supplant

the need for police to comply with the Fourth Amendment and Article I, par. 7 of the New Jersey Constitution. 239 N.J. at 131–32. In Hemenway, the Court examined the validity of a warrant that had been issued under the PDVA based on the statutory standard of "reasonable cause" rather than the more stringent Fourth Amendment standard of "probable cause." The Court recognized "[t]hat constitutional commandment compels the police to secure a warrant based on probable cause before entering and searching a home, unless exigent circumstances justify suspending the warrant requirement. All statutes must conform to that fundamental constitutional principle." Id. at 116 (emphasis added). Although the Court was focused chiefly on the difference between "reasonable cause" and "probable cause," we read the highlighted portion of the Court's admonition to reaffirm that the warrant requirement—not just the probable cause standard of proof—applies to searches and seizures conducted by police in the course of domestic violence investigations. The constitutional commandment of the warrant requirement cannot be circumvented, in other words, simply because the object of the search is a firearm subject to seizure under the PDVA.

In State v. Younger, we addressed "the scope of the search that the law enforcement officer may undertake in order to find the weapon that the victim

of domestic violence reports to have been in the possession of the person committing the act." 305 N.J. Super. 250, 253 (App. Div. 1997). We recognized there are constitutional limitations on the authority of police to conduct a search for weapons as part of a domestic violence investigation. Consistent with the principle later confirmed in Hemenway, we held this authority "must be construed consistently with both the federal and the state Constitutions." Id. at 258.

As the Court in Hemenway stressed, "[c]ombatting domestic violence is an important societal and legislative goal." 239 N.J. at 117. However, "the beneficent goal of protecting domestic violence victims must be accomplished while abiding by well-established constitutional norms." Ibid. In this instance, police unquestionably had ample probable cause to believe that a firearm subject to seizure under the PDVA was concealed under defendant's mattress. This probable cause would certainly have supported a warrant application, but it is no substitute for a warrant issued by a neutral and detached judicial officer. Accordingly, the police entry into defendant's bedroom to look for and secure the weapon was lawful only if the State establishes by a preponderance of the evidence that an exception to the warrant requirement applies. We have already rejected the State's argument—as did the trial court—that the entry and search

of the bedroom was justified by exigent circumstances or under the community caretaking doctrine. We next address whether police acted lawfully under the consent doctrine and the so-called apparent authority doctrine.

VI.

Consent is a well-recognized exception to the warrant requirement. See State v. Domicz, 188 N.J. 285, 305 (2006) ("A search conducted pursuant to consent is a well-established exception to the constitutional requirement that police first secure a warrant based on probable cause before executing a search of a home."). It also is well-established that consent need not come from a defendant to be valid but may also come from a third party. State v. Lamb, 218 N.J. 300, 315–16 (2014). For example, "[a] co-habitant who possesses common authority over or has a sufficient relationship to the premises or effects sought to be inspected may voluntarily consent to a lawful search." Id. at 315 (citing United States v. Matlock, 415 U.S. 164, 171 (1974)).

In Matlock, the United States Supreme Court noted that common authority to consent to a police search

> rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-habitants has the right to permit the inspection in his own right and that the others have assumed the risk.

[Id. at 171 n.7.]

See also Fernandez v. California, 571 U.S. 292, 298–300 (2014); Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

There are, of course, limitations on the authority of a third party to grant consent. For example, "a third party's consent is invalid with respect to property within the exclusive use and control of another." State v. Suazo, 133 N.J. 315, 320 (1993) (citing United States v. Poole, 307 F. Supp. 1185, 1189 (E.D. La. 1969)).

In State v. Cushing, our Supreme Court addressed the validity of a third party's consent to search an adult household member's bedroom. 226 N.J. 187 (2016). Although the facts in Cushing are quite different from the facts in the case before us, the Court's opinion sets out the foundational principles that guide our analysis. The Court explained that "[t]hird parties derive authority from common and joint use of space. That requirement calls for careful scrutiny when applied to parties who are not the homeowners yet are purporting to authorize consent to search the bedroom of an adult in the home in which he [or she] resides." Id. at 202–03.

The Court emphasized that ultimately, the "[a]uthority to consent to search a particular area of a home turns on common usage[.]" Id. at 201 (emphasis

added). Accordingly, a third party who lives in an apartment does not necessarily have authority to consent to all locations within that apartment. As one well-respected commentator explains:

> Certainly the notion that persons sharing premises generally might nonetheless maintain certain mutually exclusive zones of privacy is a sound one, and is totally consistent with the underlying rationale of Matlock. Whether stated in terms of the right of each co-habitant to grant consent "in his [or her] own right" or of the risk assumed by each in this regard, it is necessary to consider the consenting party's authority over the particular area searched.
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> [4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 8.3(f) (6th ed. 2020).]

Furthermore, even if a third party does not have actual authority[4] to consent to search a particular area of a home, "an officer may, depending on the

[4] We note that in this case, the gravamen of the State's argument is that S.S. had apparent authority, not actual authority, to consent to a search of defendant's bedroom. Notably, the State did not call S.S. as a witness at the suppression hearing but instead relied on the testimony of Officer Evans. Nor does the record indicate that the State investigated further after the seizure to supplement the information concerning S.S.'s access to and common usage of defendant's bedroom. Rather, the State at the suppression hearing relied solely on the information that was known to Officer Evans at the time of the entry, search, and seizure. In view of the comparatively sparse record created at the suppression hearing, the State clearly did not prove that S.S. had actual authority to consent to the search. We therefore focus on whether Officer Evans reasonably believed S.S. had apparent authority to grant consent based on the information he learned prior to entering defendant's bedroom.

circumstances, rely on the apparent authority of a person consenting to a search." Cushing, 226 N.J. at 199. "Apparent authority arises when a third party (1) does not possess actual authority to consent but appears to have such authority and (2) the law enforcement officer reasonably relied, from an objective perspective, on that appearance of authority." Id. at 199–200 (citing Rodriguez, 497 U.S. at 185–89). "[E]vidence seized during such a search need not be suppressed . . . if the 'officer's belief that the third party had the authority to consent was objectively reasonable in view of the facts and circumstances known at the time of the search.'" Id. at 200 (quoting State v. Coles, 218 N.J. 322, 340 (2014)). Accordingly, "if a law-enforcement officer at the time of the search erroneously, but reasonably, believed that a third party possessed common authority over the property to be searched, a warrantless search based on that third party's consent is permissible under the Fourth Amendment." Suazo, 133 N.J. at 320 (citing Rodriguez, 497 U.S. at 186).

Importantly for purposes of this appeal, the Court in Cushing cautioned that in some circumstances, an officer may be alerted to the possibility that a defendant maintains exclusive control over the domain of his or her bedroom. 226 N.J. at 203. When that occurs, an officer is required to ascertain additional information before his or her reliance on a third party's consent will be deemed

to be objectively reasonable. Ibid. In Cushing, for example, the person who gave consent told the officer that she neither lived at the house nor owned it. Ibid. "At that point," the Court held, the officer "needed to establish a greater base of information than he did before following [the consenting third party] up the stairs and into defendant's bedroom." Ibid. In other words, the officer "was obliged to ascertain information about the use of, and access to, defendant's bedroom." Ibid. The Cushing Court further remarked that, "[t]he record ha[d] holes, which inure[d] to the detriment of the State, for it is the State that bears the burden of proving the objective reasonableness of this warrantless search." Id. at 204.

In Rodriguez, the United States Supreme Court emphasized that its acceptance of the so-called apparent authority doctrine

> does not suggest that law enforcement officers may always accept a person's invitation to enter premises. Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry.
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> [497 U.S. at 188.]

We now apply these general principles to the limited facts adduced by the State at the suppression hearing to determine whether it was objectively

reasonable for Officer Evans to believe that S.S. possessed common authority over defendant's bedroom and mattress and thus had apparent authority to consent to the entry and search. There is no doubt that the officer reasonably believed that S.S. resided in the apartment, having learned that she recently moved there from Philadelphia so that she could co-parent her five-year-old child with defendant. The trial judge determined in this regard that the officer "had no reason to question whether S.S. had a lawful right to be in the apartment." While that is unquestionably true, the more focused question we must address is whether S.S. had lawful access to and common authority over defendant's bedroom. As we have noted, our Supreme Court in Cushing did not assume that a co-habitant automatically has authority to consent to every nook and cranny of a home. Rather, the State must establish that the person giving consent had actual or at least apparent authority over the particular area of the home that was searched. 226 N.J. at 201. That authority "turns on common usage" of that particular area within the home. Ibid.

In this instance, Officer Evans knew that S.S. and defendant slept in separate bedrooms. The trial court determined that "[w]hile defendant may have been the only one who slept in the bedroom where the gun was located, the

bedroom door was not locked when the officers arrived, and there were no other restrictions to access the room."[5]

We agree that an open door is a relevant detail when inferring whether residents of the apartment could enter defendant's bedroom at will. However, an open door is not dispositive on the question of access to and common usage of defendant's bedroom. The record does not indicate whether defendant left the door open, or whether S.S. opened it in anticipation of inviting the police to take custody of the shotgun as per her request to the 9-1-1 dispatcher and to Officer Evans upon his arrival.[6] In the absence of clarifying facts, we are reluctant to hold that defendant either permitted or assumed the risk of unrestricted entry to his room simply because he failed to secure the room under lock and key.

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[5] We note that the record does not indicate whether there was a lock on the bedroom door. We gather from the transcript of the suppression hearing only that the door was already open when Officer Evans approached the room while he was accompanied by S.S. We presume the trial court's finding that "there were no other restrictions to access the room" refers only to physical barriers, since there was no testimony concerning whether defendant imposed and enforced a house rule restricting other residents from entering his bedroom without his permission.

[6] In Cushing, the officer "did not even know whether defendant's bedroom door was open or whether [the third-party consenter] opened it in order to enter it, either the first time or when he followed her in." 226 N.J. at 204.

The trial court also relied on the facts that S.S. knew that the shotgun was concealed under the mattress and that her daughter knew where inside the bedroom defendant stored shotgun shells. While these facts clearly demonstrate that S.S. and her daughter had been inside the room, it is unclear whether they were privileged to enter defendant's room when he was not present—much less whether they exercised any type of common usage or authority. Their familiarity with the location of the weapon and ammunition might as easily be explained by a prior surreptitious entry and private search. The State presented no evidence concerning the house rules, for lack of a better characterization, regarding access to and use of defendant's bedroom by other apartment residents. We are skeptical, moreover, that an adult male would allow an unrelated teenage girl unfettered access to his bedroom dresser drawers. We also are reluctant to hold that defendant assumed the risk of such intrusion by sharing an apartment with S.S. and her daughter.

Once he was informed that S.S. slept in her own bedroom and not in defendant's bedroom, Officer Evans "needed to establish a greater base of information" about S.S.'s access to and usage of defendant's bedroom before following her into that room. Cushing, 226 N.J. at 203. We believe the record in this case is most notable for what it does not include. No evidence was

presented concerning whether S.S. and defendant had resumed a romantic relationship.[7] The State thus presented no evidence that defendant and S.S. shared his bedroom and bed for sexual liaisons. There also is no evidence in the record concerning whether defendant typically kept his bedroom door open or closed. Nor is there any indication that S.S. kept personal belongings in the room or that she had any other reason to regularly enter or use defendant's bedroom. Rather, as we have noted, the inference drawn by the trial court that S.S. had access and common authority rests on the fact the door to the bedroom was open when Officer Evans arrived, and that S.S. and her daughter knew where the shotgun and ammunition were concealed.

We stress that Officer Evans never asked S.S. directly how S.S. knew of the shotgun under defendant's mattress, or whether defendant allowed her to enter the room, look under the mattress, and inspect the contents of his dresser drawers when he was not present. Nor did the State at the suppression hearing introduce evidence learned after the search that pertain to S.S.'s access to and common usage of the room. See supra note 4 (noting that the State did not establish that S.S. had actual authority to consent to a search of defendant's bedroom).

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[7] We note that defendant in his brief refers to S.S. as a "former girlfriend."

The point simply is that in this case, as in Cushing, there are "holes" in the record that, given the burden of proof, inure to the detriment of the State's apparent authority argument. See Cushing, 226 N.J. at 204. We also deem it significant that Officer Evans on cross-examination candidly acknowledged his belief that only defendant had access to his bedroom.[8]

We recognize the test of reasonableness that is used in applying the apparent authority doctrine is measured from an objective perspective, not a subjective one. Id. at 200. Even so, the State is hard-pressed to show that a reasonable officer would have believed that S.S. exercised common usage and authority over defendant's bedroom when the officer in this case believed that only defendant had access to it.

We emphasize that in reaching our conclusion, we do not question the officer's good faith when interacting with S.S. and acceding to her request to

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[8] The officer's answer must be viewed in the context of counsel's question relating to why S.S. was not charged with joint and constructive possession of the shotgun. Cf. State v. McCoy, 116 N.J. 293, 299 (1989) ("'[p]ossession signifies intentional control and dominion, the ability to affect physically and care for the item during a span of time.'") (alteration in original) (quoting State v. Brown, 80 N.J. 587, 597 (1979)). The fact that Officer Evans apparently believed that S.S. did not exercise control of the shotgun for criminal law purposes does not support—indeed, if anything, undermines—the State's argument that for Fourth Amendment purposes, she reasonably appeared to exercise common usage of and authority over the area where the weapon was concealed.

remove a deadly weapon from the apartment. See Cushing, 226 N.J. at 202 (noting there was no reason to question the officer's good faith when interacting with the consenting third party). Nor do we question S.S.'s efforts to protect herself and her children from the risk posed to them by the shotgun in view of the allegation of domestic violence involving a different weapon. We simply conclude that the State failed to present sufficient evidence at the suppression hearing to meet its burden to prove that the officer had an objectively reasonable belief that S.S. had the authority to consent to the entry and search. Accordingly, the trial court erred in denying defendant's motion to suppress.

We vacate defendant's conviction, reverse the denial of his suppression motion, and remand for trial.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.