SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1987-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

CHRISTOPHER DIANTONIO,
DAEKWON SUMMERS,
JOSUE MONTALVO, and
DAVID I. FLANDERS,

Defendants-Respondents.

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Argued March 8, 2023 – Decided June 2, 2023

Before Judges Vernoia and Firko.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Cape May County, Indictment No. 21-08-0645.

Gretchen A. Pickering, Senior Assistant Prosecutor, argued the cause for appellant (Jeffrey H. Sutherland, Cape May County Prosecutor, attorney; Gretchen A. Pickering, of counsel and on the briefs).

Louis M. Barbone argued the cause for respondent Christopher Diantonio (Jacobs & Barbone, PA, attorneys; Louis M. Barbone, on the brief).

John V. Maher, Jr., attorney for respondent Daekwon Summers.[1]

PER CURIAM

By way of leave granted, the State appeals from the January 27, 2022 Law Division order granting defendants Christopher Diantonio's, Daekwon Summers's, David Flanders's, and Josue Montalvo's motion to dismiss second-degree conspiracy to commit aggravated assault, second-degree aggravated assault, and first-degree robbery charges—counts one, two, and four—in a five-count indictment. On appeal, the State claims there was prima facie evidence presented to the grand jury establishing each essential element of the dismissed charges warranting reversal. More specifically, the State's brief sets forth the following arguments:

POINT I

THE LAW DIVISION ERRONEOUSLY DISMISSED COUNTS ONE AND TWO OF THE INDICTMENT ON AN INCORRECT APPLICATION OF THE STANDARD OF REVIEW AND THE LAW REQUIRING PROOF BEYOND A REASONABLE

[1] Mr. Maher filed a brief on behalf of Daekwon Summers but did not participate in oral argument. Respondents David Flanders and Josue Montalvo did not file briefs.

DOUBT OF SERIOUS BODILY INJURY ON CHARGES OF SECOND-DEGREE ATTEMPTED AGGRAVATED ASSAULT.

A. STANDARD OF REVIEW.

B. IN FINDING THAT THE STATE DID NOT MAKE A PRIMA FACIE SHOWING OF SECOND-DEGREE ATTEMPT TO CAUSE SERIOUS BODILY INJURY, THE TRIAL COURT ABUSED ITS DISCRETION AND VIEWED THE EVIDENCE AND RATIONAL INFERENCES IN THE LIGHT MOST FAVORABLE TO DEFENDANTS NOT TO THE STATE.

C. THE LAW DIVISION ERRED IN REQUIRING THAT THE STATE PROVE SERIOUS BODILY INJURY BEYOND A REASONABLE DOUBT TO SUSTAIN A CHARGE OF AGGRAVATED ASSAULT UNDER N.J.S.A. 2C:12-1B(1).

POINT II

THE LAW DIVISION ABUSED ITS DISCRETION IN DISMISSING THE FIRST-DEGREE ROBBERY COUNT WHEN THE STATE PRESENTED PRIMA FACIE EVIDENCE OF EACH ELEMENT.

After careful consideration of the facts and applicable legal principles, we affirm the dismissal of the second-degree conspiracy to commit aggravated assault and second-degree aggravated assault charges (counts one and two) of the indictment. We agree with the motion judge's determination to dismiss the

first-degree robbery charges (count four) of the indictment. However, we remand to allow amendment of the indictment to change the first-degree robbery charge to the lesser-included offense of second-degree robbery based on the testimony presented to the grand jury.

I.

The record shows that on June 15, 2021, a Cape May County grand jury returned indictment number 21-06-0471 charging defendants with second-degree conspiracy to commit second-degree aggravated assault, N.J.S.A. 2C:5-2(a)(1) and 2C:12-1(b)(1); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); and third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2). Summers was also charged with third-degree hindering, N.J.S.A. 2C:29-3(b)(4). On June 27, 2021, a Cape May County grand jury returned a superseding indictment number 21-07-0574 charging defendants with the same counts set forth in indictment 21-06-0471, but adding first-degree robbery, N.J.S.A. 2C:15-1(a)(1) against all defendants.

On August 24, 2021, the State presented evidence for the third time to the grand jury. Patrolman Thomas Runyon of the Middle Township police department testified about the following events that occurred on April 22, 2021.

The victim, Z.P.,[2] called 9-1-1 and reported to the dispatcher that three men were following him in their car while he was walking near the intersection of Routes 149 and 9 in Cape May Court House in Middle Township. While on the phone with the 9-1-1 dispatcher, Z.P. reported that the three men began "chasing him" and that Z.P. started "running" from them. As he ran, Z.P. "dropped a portable speaker" he was carrying. Runyon testified the three men picked up the speaker, caught up to Z.P., and used the speaker to "hit" him. The three individuals got back into the car, which drove away.

Following a motor vehicle stop, Runyon confirmed Montalvo was identified by Z.P. as the driver of the vehicle and Diantonio, Flanders, and Summers were identified as the three passengers. Runyon explained that initially, Summers gave the officers the name "Laekwon Rice," but Runyon clarified this defendant's true name is Daekwon Summers. According to Runyon, Z.P. identified Diantonio, Flanders, and Summers as the men who assaulted him, and that the speaker was found in their car. Runyon further explained Z.P.'s injuries included "a bloody nose," "spitting up blood," and "arm pain where [Z.P.] could barely lift it." No other witnesses testified before the grand jury, and no documentary evidence was presented.

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[2] We use initials to protect the identity of the victim.

Following Runyon's testimony that day, the grand jury returned superseding indictment number 21-08-0645 charging all defendants with second-degree conspiracy to commit aggravated assault (count one); second-degree aggravated assault (count two); third-degree aggravated assault (count three); and first-degree robbery (count four). Summers was also charged with third-degree hindering (count five).

Defendants filed a motion to dismiss counts one, two, and four of indictment number 21-08-0645. Defendants challenged the insufficiency, inadequacy, and incompetency of the evidence supporting the charges in counts one, two, and four. The State opposed the motion contending the indictment was palpably sufficient, all essential elements of offense were established by the evidence, and the rational inferences drawn from that evidence were to be viewed in the light most favorable to the State. On January 19, 2022, the judge conducted oral argument on defendants' motion.

On January 27, 2022, the motion judge issued a memorandum of decision granting defendants' motion to dismiss counts one, two, and four of indictment number 21-08-0645. In considering counts one and two in tandem, the motion judge rejected the State's argument that the number of assailants, and their use of the speaker to "hit" Z.P., allowed the grand jury to make a reasonable

inference that serious bodily injury was inflicted on Z.P. The two counts respectively charged defendants with conspiracy to commit, and the commission of, aggravated assault in violation of N.J.S.A. 2C:12-1(b)(1).

The motion judge noted the injuries Z.P. sustained, which consisted of a bloody nose, left arm pain, and spitting up blood, do not constitute "serious" bodily injuries supporting a second-degree aggravated assault charge under N.J.S.A. 2C:12-1(b)(1), without further medical documented proof, which the State did not present to the grand jury. Given the "presentation and the paucity of evidence" as to Z.P.'s injuries, which did not suggest a substantial risk of death, serious permanent disfigurement, or protracted loss of the function of a body member or organ, the motion judge determined the conspiracy to commit second-degree aggravated assault and second-degree aggravated assault charges could not be sustained.

Further, the judge rejected the State's argument the "rational inference" to be drawn from the evidence was "that three men coordinated an attack against one" by using a "deadly weapon." Although defendants conceded that a "mini speaker" may have been used in the attack, the motion judge pointed out there was "no evidence . . . presented as to how this mini speaker was used or . . .

[that] it was used, in fact, as a 'deadly weapon.'" Consequently, the motion judge dismissed counts one and two of the indictment

The motion judge also found the evidence was "insufficient to show that defendants attempted to cause serious bodily injury using a deadly weapon. No serious bodily injury occurred, and no showing of an attempt to cause such injury was presented to the grand jury." Consequently, the motion judge dismissed counts one and two of the indictment.

The motion judge then addressed count four, the first-degree robbery charge. Citing State v. Lopez, 187 N.J. 91, 101 (2006), the judge emphasized our Supreme Court's admonition about the sequence of events when there is an assault and a robbery committed upon a victim: "the intention to steal must precede or be coterminous with the use of force." 187 N.J. at 101. The motion judge stated, "the intent to confront the victim is clear[,]" however, "the violence and the theft are unconnected[.]" Based on patrolman Runyon's testimony, the motion judge found that the grand jury "could not reasonably conclude that the intent or purpose behind [Z.P.] being followed, chased, and subsequently assaulted, was to commit the theft of the speaker."

Thus, the motion judge dismissed count four of the indictment, finding the evidence "clearly" showed the opportunity to steal the speaker arose after the

intent to assault Z.P. The court reasoned that the evidence "clearly suggests mere opportunity arose after the intent to assault the victim[,]" and thus count four of the indictment fails. A memorializing order was entered. The State moved for a stay pending appeal, which the motion court granted for a period of thirty days. We then granted the State's motion for leave to appeal.

II.

A "grand jury must be presented with sufficient evidence to justify the issuance of an indictment. The absence of any evidence to support the charges would render the indictment 'palpably defective' and subject to dismissal." State v. Morrison, 188 N.J. 2, 12 (2006) (citing State v. Hogan, 144 N.J. 216, 228-29 (1996)). However, "[a]t the grand jury stage, the State is not required to present enough evidence to sustain a conviction." State v. Feliciano, 224 N.J. 351, 380 (2016) (citing State v. N.J. Trade Waste Ass'n, 96 N.J. 8, 27 (1984)).

The prosecutor need only present "some evidence establishing each element of the crime to make out a prima facie case." Morrison, 188 N.J. at 12. "The quantum of this evidence . . . need not be great." State v. Schenkolewski, 301 N.J. Super. 115, 137 (App. Div. 1997) (citing State v. Bennett, 194 N.J. Super. 231, 234 (App. Div. 1984)). Our Supreme Court has explained, "[t]he grand jury 'is an accusative rather than an adjudicative body,' whose task is to

'assess whether there is an adequate basis for bringing a criminal charge.'" State v. Saavedra, 222 N.J. 39, 56 (2015) (quoting Hogan, 144 N.J. at 229-30).

"[I]n reviewing the grand jury record on a motion to dismiss an indictment, the trial court should use a standard similar to that applicable in a motion for a judgment of acquittal at trial" under Rule 3:18-1. Morrison, 188 N.J. at 13. "The court should evaluate whether, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it." Ibid. An indictment is presumed valid and should be disturbed only on the "clearest and plainest ground." State v. Perry, 124 N.J. 128, 168-69 (1991) (quoting N.J. Trade Waste Ass'n, 96 N.J. at 18-19).

Ultimately, the decision whether to dismiss an indictment lies within the discretion of the trial court, and that exercise of discretionary authority ordinarily will not be reversed on appeal unless it appears that the exercise of discretion was mistaken. State v. Bell, 241 N.J. 552, 561 (2020) (citations omitted). If the trial court's decision is based on a misconception of the law, however, we owe that decision no deference. State v. Lyons, 417 N.J. Super. 251, 258 (App. Div. 2010) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

A. Conspiracy to Commit Aggravated Assault (Count One) and Second-Degree Aggravated Assault (Count Two)

Count one of the indictment charged defendant and his co-defendants with "conspir[acy] with each other to commit the crime of aggravated assault, a crime in the second degree, in violation of N.J.S.A. 2C:12-1(b)(1); contrary to the provisions of N.J.S.A. 2C:5-2(a)(1)." Count two of the indictment charged that defendant and his co-defendants "attempt[ed] to cause serious bodily injury to [Z.P.] and/or did purposely or knowingly cause serious bodily injury to [Z.P.] and/or under circumstances manifesting extreme indifference to the value of human life, did recklessly cause serious bodily injury to [Z.P.], contrary to the provisions of N.J.S.A. 2C:12-1(b)(1)."

An agreement to commit a specific crime is at the heart of a conspiracy charge. State v. Samuels, 189 N.J. 236, 245 (2007). Under the New Jersey Code of Criminal Justice, "the major basis of conspiratorial liability [is] the unequivocal evidence of a firm purpose to commit a crime" provided by the agreement. State v. Roldan, 314 N.J. Super. 173, 181 (App. Div. 1998). A conspiracy may be proven by circumstantial evidence. Samuels, 189 N.J. at 246. An implicit or tacit agreement may be inferred from the circumstances. State v.

Kamienski, 254 N.J. Super. 75, 94 (App. Div. 1992). The essential elements of the conspiracy must be evaluated with reference to the underlying offense. Samuels, 189 N.J. at 246. A conspiracy to commit an aggravated assault requires only an agreement to commit the offense of aggravated assault and an overt act in furtherance of the agreement. See N.J.S.A. 2C:5-2(a)-(d)

A person is guilty of N.J.S.A. 2C:12-1(b)(1) second-degree aggravated assault, if they "[a]ttempt[] to cause serious bodily injury to another, or [cause] such injury purposely or knowingly or . . . recklessly." N.J.S.A. 2C:12-1(b)(1). Where a person causes serious bodily injury, they are guilty regardless of whether their mental state is purposeful, knowing or reckless. N.J.S.A. 2C:5-1(a); State v. Battle, 209 N.J. Super. 255, 258-59 (App. Div. 1986). However, where the person does not cause serious bodily injury but only attempts to do so, they are guilty only if the attempt to cause that result is purposeful. Ibid.

The Code defines "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." N.J.S.A. 2C:11-1(b); State v. Alexander, 233 N.J. 132, 147 (2018). "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, [they] . . .

purposely engage[] in conduct which would constitute the crime." N.J.S.A. 2C: 5-1(a)(1). An individual "acts purposely with respect to the nature of [their] conduct or as a result thereof if it is [their] conscious object to engage in conduct of that nature or to cause such a result." N.J.S.A. 2C:2-2(b)(1).

Also, an attempt is purposeful not only because it is so defined by statute, but because one cannot logically attempt to cause a particular result unless causing that result is one's "conscious object," the distinguishing feature of a purposeful mental state. N.J.S.A. 2C:2-2(b)(1); State v. McAllister, 211 N.J. Super. 355, 362 (App. Div. 1986). For attempted aggravated assault, the defendant must be shown to have "purposely" attempted to cause serious bodily injury. N.J.S.A. 2C:5-1(a)(1). Where a subsection of the Code defines an offense as an attempt to cause and also as causing serious bodily injury or bodily injury, the attempt is a separate offense. McAllister, 211 N.J. Super. at 365.

The State argues the second-degree conspiracy to commit aggravated assault (count one) and second-degree aggravated assault (count two) charges are supported by the evidence presented to the grand jury. In support of this argument, the State asserts proof of injury is not required to convict an individual of second-degree attempt to cause serious bodily injury. The State claims the rational inference to be drawn from the grand jury testimony is that

defendants attempted to cause serious bodily injury by perpetrating "a targeted and coordinated violent attack" on "a single defenseless person." In the State's view, those facts establish defendants purposely intended to cause serious bodily injury under N.J.S.A. 2C:12-1(b)(1). We are unpersuaded.

Although the indictment charged defendants with causing serious bodily injury as well as attempt to cause serious bodily injury, the State concedes the evidence presented to the grand jury does not establish defendants caused serious bodily injury. Therefore, we consider only whether the evidence is sufficient to establish the existence of a conspiracy to commit an aggravated assault under count one and an attempt to cause serious bodily injury under count two. A conspiracy to commit an aggravated assault does not require proof of injury or even an attempt to cause serious bodily injury. It requires only an agreement to commit the offense of aggravated assault and an overt act in furtherance of the agreement. See N.J.S.A. 2C:5-2(a)-(d).

Here, the grand jury heard testimony that Z.P. called 9-1-1 to report that individuals were following him in their car while he was walking. While still on the phone with dispatch, Z.P. reported that three of the men got out of the car and began chasing him. Z.P. dropped a portable speaker he was carrying, and the three men picked up the speaker. They then used the speaker to hit Z.P.

before getting back in their car and they drove away with the speaker. Z.P.'s injuries included a bloody nose, left arm pain, and he was spitting up blood. Later, when the police stopped the car that defendants were driving after the incident, the speaker was found in the car. Nevertheless, with respect to the second-degree conspiracy to commit aggravated assault charge, the grand jury was not presented with any detail concerning the actions by the three defendants involved that supports a reasonable inference the defendants reached an implicit or tacit agreement to commit a second-degree aggravated assault—with the accompanying purpose to cause serious bodily injury. In our view, the scant and vague testimony presented to the grand jury simply does not present sufficient facts and circumstances on which such an inference could be reasonably made. Indeed, the testimony presented to the grand jury establishes only that defendants "hit" the victim. See Kamienski, 254 N.J. Super. at 94.

In the same vein, the evidence presented to the grand jury lacked information as to the actual assault or the characteristics of the speaker, which is interchangeably referred to as a "portable," or "mini" speaker and "portable radio." No information was provided about the speaker's manufacturer, weight, or dimensions, and there were no photographs of the speaker. Saliently, Z.P. refused medical treatment offered by the police, and the record is devoid of any

medical records pertaining to the incident or photographs depicting Z.P.'s injuries. No medical bills were presented either in connection with Z.P.'s injuries, and there was no evidence he sustained physical or psychological consequences from the assault. Thus, similar to the aforementioned insufficiency of the evidence supporting the conspiracy charge, the evidence presented to the grand jury lacked sufficient evidence establishing defendants attempted to cause serious bodily injury to Z.P.

Therefore, the record before the grand jury was insufficient to support the charges in counts one—second-degree conspiracy to commit aggravated assault—and two—second-degree aggravated assault. The grand jurors had no evidence upon which to conclude that the manner in which Z.P. was "hit" support the conspiracy and assault charges as second-degree offenses. As noted, the sparse grand jury testimony did not include any description of the manner in which the victim was "hit," where the victim was "hit," or how many times the victim was "hit." The State did not present sufficient evidence establishing the essential elements of the aforementioned offenses charged. We conclude the motion judge properly dismissed counts one and two of the indictment.

B. First-Degree Robbery and Accomplice Liability (Count Four)

Count four of the indictment charged defendant and his co-defendants with first-degree robbery:

> [I]n the course of committing a theft, did inflict bodily injury or uses force upon another, or threatens another with or purposely puts him in fear of immediate bodily injury or commits or threatens immediately to commit any crime of the first or second degree and did purposely inflict or attempt to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon, contrary to provisions of N.J.S.A. 2C:15-1(a)(1) and/or N.J.S.A. 2C:15-1(a)(2) and or 2C:15-1(a)(3).

The robbery statute reads:

> a. Robbery defined. A person is guilty of robbery if, in the course of committing a theft, [they]:
>
> > (1) Inflict bodily injury or uses force upon another; or
> >
> > (2) Threaten another with or purposely puts [them] in fear of immediate bodily injury; or
> >
> > (3) Commits or threatens immediately to commit any crime of the first or second degree.
>
> An act shall be deemed to be included in the phrase "in the course of committing a theft" if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.
>
> b. Grading. Robbery is a crime of the second degree, except that it is a crime of the first degree if in the

> course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.
>
> [N.J.S.A. 2C:15-1.]

A prosecutor seeking an indictment must show at least some evidence of each element of a crime. Hogan, 144 N.J. at 236. In State v. Nero, the Supreme Court concluded that, "because [t]heft is a specific intent crime [and i]t follows that robbery, as an aggravated form of theft, is a specific intent crime as well[,]" State v. Lopez, 187 N.J. 91, 98 (2006) (citations omitted), and "based on the language of the statute itself, a 'purposeful' state of mind is required for first-degree robbery by use of a . . . weapon." 195 N.J. 397, 401 (2008). "Committing or attempting to commit a theft is a necessary element of the crime of robbery." State v. Whitaker, 200 N.J. 444, 460 (2009). A person is guilty of theft if "he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." N.J.S.A. 2C:20-3.

"Robbery is a crime of . . . the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon." N.J.S.A. 2C:15-1(b). "[A]ssaultive or intimidating conduct necessary to elevate theft to robbery somehow must be related to the

theft itself. If such assaultive or intimidating conduct occurs 'in immediate flight after the attempt or commission' of the theft, then what was a theft becomes a robbery." Whitaker, 200 N.J. at 460 (quoting N.J.S.A. 2C:15-1).

A person can be liable for "an offense if it is committed 'by the conduct of another person for which he is legally accountable.'" State v. Hill, 199 N.J. 545, 567 (2009) (quoting State v. White, 98 N.J. 122, 129 (1984)); N.J.S.A. 2C:2-6(a). A defendant can be "legally accountable for another when that person acts as an accomplice." Ibid.; N.J.S.A. 2C:2-6(b)(3). A person is an accomplice of another when:

> [w]ith the purpose of promoting or facilitating the commission of the offense; he
>
> (a) Solicits such other person to commit it;
>
> (b) Aids or agrees or attempts to aid such other person in planning or committing it; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make proper effort so to do.
>
> [N.J.S.A. 2C:2-6(c)(1).]

"To be an accomplice, a person must act with 'the purpose of promoting or facilitating the commission of the substantive offense for which he is charged.'" Hill, 199 N.J. at 567 (quoting White, 98 N.J. at 129). To be guilty of a crime in the same degree, an accomplice must be shown to have the same

mens rea as the principal. Id. at 567-68. "[E]ach defendant may 'be guilty of a higher or lower degree of crime than the other, [and] the degree of guilt [will] depend[] entirely upon [their] own actions, intent and state of mind.'" Id. at 568 (alteration in original) (quoting State v. Fair, 45 N.J. 77, 95 (1965)). "[A]ccomplice liability need not be alleged in an indictment." State v. Hakim, 205 N.J. Super. 385, 388 (App. Div. 1985). The grand jury need only determine there is probable cause defendant aided in the theft. Hill, 199 N.J. at 567; N.J.S.A. 2C:2-6(c)(1).

The State argues the motion judge abused her discretion in dismissing count four of the indictment, which charged all defendants with first-degree robbery under the theory of accomplice liability. The State challenges dismissal of count four, arguing defendants—all four of them—used the speaker to hit Z.P. during the attack. The State argues robbery is essentially a theft accompanied by an assault, citing State v. Battle, 209 N.J. Super. 255, 260 (App. Div. 1986).

According to the State, by retrieving the speaker and taking it back to the car Montalvo was driving, the State presented prima facie evidence that a theft occurred because defendants "exercised unlawful control over movable property with purpose to deprive him thereof[,]" in violation of N.J.S.A. 2C:20-3(a). The

State also contends evidence of the attempt to cause serious bodily injury upon Z.P. during the theft satisfies the element of force for the robbery charge, and that the grand jury heard evidence that the speaker was used in such a way as to make a rational inference that it was a deadly weapon as defined in N.J.S.A. 2C:11-1(c).

Here, the State presented sufficient evidence supporting a robbery charge. The evidence showed defendants committed a theft, as they took Z.P.'s portable speaker, inflicted "bodily injury[,]" and "used force" during said theft. See N.J.S.A. 2C:15-1. Notwithstanding, there is no evidence of the amount of force used beyond the testimony stating the victim was hit. As such, the evidence does not establish the amount of force required for a first-degree robbery charge under N.J.S.A. 2C:15-1(b).

Nevertheless, given that the State receives the benefit of the reasonable inference, we conclude the evidence presented to the grand jury supports a reasonable inference defendants intended to deprive Z.P. of the portable speaker prior to the assault. Lopez, 187 N.J. at 97. The evidence shows Z.P. was holding the speaker when defendants exited the car and chased him and, when he dropped the speaker, it was immediately retrieved by defendants. Those facts support the reasonable inference defendants exited the car and chased Z.P. to

obtain the speaker he held, and thus defendants had the intent to commit a theft before assaulting Z.P.

The record offers no evidence of any other motive for defendants to exit the vehicle and pursue Z.P., and their immediate retrieval of the speaker and continued possession before and after the assault that supports the robbery charge. The timeline supports a reasonable inference defendants intended to steal the speaker when they exited the vehicle. Thus, we are satisfied the State presented at least some evidence defendants intended to commit a theft prior to the assault that followed the theft. Ibid. The speaker was not left with Z.P. or on the street. Rather, the speaker was found inside the vehicle defendants were in when the police stopped their vehicle.

We reject the State's argument that because Z.P. was hit with the portable speaker, this fact establishes defendants used a "deadly weapon" during the "robbery." In pertinent part, our code defines a "deadly weapon" as an

> instrument . . . which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury or which in the matter it is fashioned would lead the victim reasonably to believe it to be capable of producing death or serious bodily injury[.]
>
> [N.J.S.A. 2C:11-1(c).]

We agree with the motion judge the State did not present sufficient evidence the portable speaker constituted a "deadly weapon" as defined by N.J.S.A. 2C:11-1(c). The State did not present any evidence establishing either the manner in which the speaker was used or intended to be used, that it was capable of producing death or serious bodily injury or that the manner in which it was used would lead Z.P. to reasonably believe it to be capable of causing death or serious bodily injury.

Although the State argues the reasonable inferences to which it is entitled based on the evidence establish the speaker was a dangerous weapon under N.J.S.A. 2C:11-1(c), absent any evidence as to the characteristics of the portable speaker, such as its dimensions, weight, shape, or the materials of which it was made, or the manner in which it was actually used, the record is devoid of any foundation upon which it could be reasonably inferred that the speaker was capable of causing death or serious bodily injury.

Because a rational inference exists that defendants intended to steal the speaker prior to the assault, when viewed in a light most favorable to the State, a reversal and remand as to the robbery charge is warranted. The very limited information presented to the grand jury does not support a finding of first-degree robbery but supports a finding of second-degree robbery. Therefore, we remand

the matter to the motion judge to modify her order and allow the State to prosecute defendants for the lesser included offense of second-degree robbery. N.J.S.A. 2C:15-1; State v. Farrad, 164 N.J. 247, 266 (2000).

To the extent we have not considered any other arguments raised by the State, we conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed in part, reversed, and remanded in part for proceedings consistent with our opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION