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APPROVAL OF THE APPELLATE DIVISION**

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1246-23**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GARY A. SMITH,

Defendant-Appellant.

Argued May 15, 2024 – Decided June 6, 2024

Before Judges Vernoia, Gummer, and Walcott-Henderson.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Union County, Indictment No. 23-05-0316.

Joseph M. Mazraani argued the cause for appellant (Mazraani & Liguori, LLP, attorneys; Joseph M. Mazraani, of counsel; Jeffrey S. Farmer, of counsel and on the brief).

Michele C. Buckley, Assistant Prosecutor, argued the cause for respondent (William A. Daniel, Union County Prosecutor, attorney; Michele C. Buckley, of counsel and on the brief).

Kevin Scott Finckenauer, Assistant Deputy Public Defender, argued the cause for amicus curiae New Jersey Office of the Public Defender (Jennifer Nicole Sellitti, Public Defender, attorney; Kevin Scott Finckenauer, of counsel and on brief).

Claude Caroline Heffron argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, PC, attorneys; Claude Caroline Heffron, on the brief).

PER CURIAM

By leave granted, defendant Gary A. Smith appeals from a sua sponte order entered by the court after the State and defendant had rested their cases during a hearing on defendant's motion to suppress two handguns seized from a rooftop during the search of an apartment into which defendant had fled while pursued by the police. The order permitted, but did not require, the State and defendant to submit evidence concerning the ownership and locations of the building or buildings in which the apartment is located and on which the rooftop is located. Having considered the arguments of the parties and amici curiae, the record, and the applicable legal principles, we affirm.

I.

In May 2023, a grand jury returned an indictment (No. 23-05-0315) charging defendant with two counts of: second-degree unlawful possession of

a weapon; second-degree possession of a weapon for an unlawful purpose, and fourth-degree unlawful possession of a large capacity magazine. The indictment also charged defendant with fourth-degree aggravated assault by pointing a firearm and fourth-degree possession of a prohibited weapon—a defaced firearm.¹

At defendant's arraignment on the charges, defense counsel advised the court he intended to file a motion to suppress evidence, and the court provided a schedule for the submission of the State's brief supporting the warrantless search that resulted in the recovery of the two handguns and defendant's opposition brief. See generally R. 3:5-7 (prescribing the procedure for filing

¹ We refer only to indictment No. 23-05-0315 because the court's December 13, 2023 order for which we granted defendant's motion for leave to appeal is docketed solely under that indictment number. We note a grand jury also returned another indictment, No. 23-05-0316, charging defendant under N.J.S.A. 2C:39-5(j) with two counts of first-degree unlawful possession of a weapon by a person having a prior conviction of a crime subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2. Those charges arose out of the same incident, and as a result of the same search and seizure of the handguns, as the charges in the first indictment (No. 23-05-0315). The transcript of the December 7, 2023 hearing that resulted in the issuance of the December 13, 2023 order that is challenged on appeal reflects that the court considered arguments concerning the suppression of evidence in the proceedings under both indictments. As such, and despite the fact that the court's December 13, 2023 order states it was issued under indictment No. 23-05-0315, our decision applies to the ongoing hearing on defendant's motion to suppress the evidence—two handguns—under both indictments.

motions to suppress evidence seized as the result of a warrantless search). The court scheduled a hearing on defendant's motion.

During the September 15, 2023 hearing, the State presented the testimony of Plainfield detectives James Addison and Marcello Lopez. They testified concerning the circumstances attendant to the search and seizure that yielded the two handguns defendant sought to suppress. The State also introduced into evidence a report, a video recording, and body-worn camera footage from the officers involved in defendant's arrest and the search that resulted in the seizure of the handguns.

The evidence presented during the hearing established that as Detective Addison watched a live feed from police surveillance cameras on a Plainfield street, he observed defendant brandish two handguns in a threatening way to the occupants of a parked vehicle.² When Detective Addison and other officers

² Our summary of the evidence does not constitute findings of fact that are binding on the trial court in its consideration of the suppression motion. The findings of fact pertinent to a disposition of defendant's motion shall be made by the trial court based on the evidence presented at the hearing and without regard to our general description of what occurred during the entry and search of the apartment. We have generally described some of the testimony presented at the suppression hearing solely for the purpose of providing context for our discussion of the proceedings on defendant's motion and the court's December 13, 2023 order permitting the presentation of additional evidence concerning the location of the rooftop that was searched and on which the handguns were found.

responded to the scene a few minutes later, defendant and another individual, Jaquan Terry, fled into a nearby building. Detective Addison and other officers pursued defendant and Terry into the building and up a single flight of stairs that led to the locked door of a two-bedroom apartment.

The officers breached the door with a battering ram, entered the apartment, and searched for defendant and Terry. The officers found other adults and children in the apartment. The officers also found defendant and Terry in different rooms in the apartment and placed them under arrest and in handcuffs. The officers conducted what they later described as a protective sweep of the apartment for the handguns that had been seen in defendant's possession minutes earlier on the live feed from the surveillance cameras located on the street outside the building in which the apartment is located.

Following the officers' entry into the apartment, Detective Lopez climbed out of one of the apartment's bedroom windows onto to what he described as a "roof." Aided by a flashlight, he saw two handguns on the rooftop under one of the apartment's bedroom windows. He seized the handguns that defendant sought to suppress in his motion before the trial court.

Following the presentation of its witnesses, the State advised the court it had rested its case. Defense counsel informed the court defendant would not present any evidence.

The court requested that the parties submit post-hearing briefs addressing the issues arising under "the testimony that [had been] elicited" and explained it would provide the State with three weeks to file its post-hearing brief, and defendant three weeks to respond, because the court also required the parties address an additional issue the court had raised—whether the rooftop on which the handguns were found constitutes curtilage of the apartment under this court's then-recent decision in State v. Ingram, 474 N.J. Super. 522 (App. Div. 2023).³

The court provided counsel with a schedule for the submission of the briefs and scheduled a November 17, 2023 additional hearing on the suppression motion.⁴ The November 17, 2023 hearing did not proceed as scheduled. Instead,

³ In Ingram, this court addressed issues related to the legality of a search of the curtilage of a home, id. at 535-37, explaining in part that "when a government official steps onto curtilage of a home without permission, an implied license, or a warrant, the official has begun to conduct a search and the search will be lawful only if an exception to the warrant requirement applies," id. at 537.

⁴ At the conclusion of the September 15, 2023 hearing on defendant's suppression motion, the court also addressed and decided the State's request for a declaration of excludable time under N.J.S.A. 2A:162-22(b)(1)(c). We granted

the parties next appeared before the court on December 7, 2023, for the continuation of the hearing on defendant's motion.

At the hearing, defendant and the State offered their respective arguments concerning the validity of the entry and search of the apartment and rooftop. Pertinent here, during defense counsel's argument, the court asked if the officers, including Detective Lopez, had properly searched the rooftop. The court asked about Detective Lopez's discovery of the handguns, finding "the guns were on the roof of an adjacent building. The guns were not on the property of the apartment that [the officers] went into. They were on the roof of a building that had no connection other than being next door."

Defense counsel disputed the court's finding, stating, "[w]here's the evidence to that effect, Judge?" The court responded, "I watched the video." Defense counsel then asserted that the rooftop on which the guns were found is the rooftop of the building in which the apartment is located, and asked the court, "[w]here's the evidence that it's not?" The court responded, "I watched the

defendant's motion for leave to appeal from an April 25, 2024 order denying defendant's motion for reconsideration of the September 15, 2023 excludable-time order. We affirmed in part and reversed in part the April 25, 2024 order in a May 17, 2024 order entered in an appeal docketed as AM-000449-23. The trial court's disposition of the excludable-time issues raised in that matter is not an issue in this appeal.

video, sir. It's a different building." Defense counsel disagreed, stating "the guns were secreted right outside the window of the apartment." The court replied, "[o]utside the window on the roof of an adjacent building," and the court made the affirmative finding, "[i]t is not the same building, sir."

Defense counsel argued "there's no testimony to that [e]ffect," and the court reiterated, "[s]ir, I saw the video. I don't need testimony to that [e]ffect. I saw the video. The building is next door." Defense counsel asserted that the court incorrectly "assume[d]" the rooftop on which the handguns were found is on a different building than the building in which the apartment is located. Defense counsel also repeated his assertion there was no evidence the rooftop is on a separate building. The court rejected the claim, stating, "[y]ou keep on saying there's no evidence, but I saw the video," and "I have two eyes. I know what I saw, I saw the—it's an adjacent building. It's not the same building. It's the next[-]door building." When defense counsel again asserted the court had erroneously assumed the buildings are separate, the court responded, "[a]gain counsel, I have eyes. I saw the video."

Later during the arguments, defense counsel claimed the rooftop Detective Lopez had searched is curtilage of the apartment. Without citing to any evidence, defense counsel asserted the handguns were found on the "roof of the

place"—the apartment—the police were searching and, for that reason, and based on the other circumstances extant at the time, Detective Lopez had unlawfully searched the rooftop because the officers had not obtained a warrant. Defense counsel further claimed the handguns had been "secreted right under the windowsill of that same apartment."

Defense counsel also repeated the claim the State "didn't offer evidence" establishing the roof is part of the building that houses the apartment and argued Detective Lopez had stepped out of the window of the apartment onto the roof of the building that houses the apartment. In response, the court said, "[n]o, no, no, no. He didn't. That's not true."

The court also reiterated it had "observed the video" from the body-worn camera recordings and relied on that evidence as the basis for its repeatedly-stated finding that the rooftop on which the handguns were found is on a building separate from the one in which the apartment is located. The court noted that defendant had argued the State did not present any evidence establishing the rooftop is on a building separate from the apartment's building and stated, "then maybe I should reopen the hearing for the purpose of determining whether or not that is right or wrong for your client's benefit."

Defense counsel replied, "[a]bsolutely not," claiming that reopening the hearing would provide the State with "an opportunity to fix [its] case" after the State already had an opportunity to "put [its] case on."⁵ Defense counsel also argued it was the State's burden to present the evidence establishing the validity of the search, it had failed to do so, and therefore the court could not properly reopen the hearing.

The State argued that recordings from the officers' body-worn cameras showed that the roof Detective Lopez searched is on a building separate from the one housing the apartment. The State asserted that the rooftop of the separate building is not curtilage of the apartment. The State also argued that the totality of all the circumstances supported the warrantless search of the apartment and rooftop. Apparently confident the evidence that had been presented at the hearing had established the rooftop is not part of the building in which the apartment is located, and therefore does not constitute curtilage of the

⁵ Defense counsel also argued that during an off-the-record in-chambers conference with the court and counsel prior to the September 15, 2023 evidentiary hearing, the court had raised the issue concerning whether the roof constitutes curtilage of the apartment and, despite that conversation, the State had failed to present any evidence addressing the issue during the presentation of its case.

apartment, the State did not request that the court reopen the suppression hearing as the court had suggested it might do on its own.

The court reserved decision on the motion. The following day, December 8, 2023, a member of the court's staff sent an email to counsel advising the court "had decided that additional testimony will be necessary to render" its decision. The court directed that the parties "submit evidence for the court's consideration regarding the ownership of the property"—the building in which the apartment is located—"where defendant was arrested and the adjacent property."

The email further stated "[e]ach party is welcome to offer evidence regarding the roof in question" and that a hearing would be held on January 5, 2024, "at which time testimony will be taken regarding this issue." Defendant's counsel responded, requesting that the court "provide an order that the testimonial hearing" on the suppression motion "is being reopened, sua sponte."

On December 13, 2023, the court issued an order stating "[e]ach party is free to submit evidence and offer testimony solely regarding the ownership of certain property"—the building in which the apartment is located—"the metes and bounds of same, and its physical characteristics specifically as it relates to the roof of the subject premises and property adjacent thereto." The order

further stated, "[a] hearing will be conducted on January 5, 2024, . . . regarding only this issue."

Defendant moved for leave to appeal from the December 13, 2023 order. On December 22, 2023, the motion court issued an amplification of its December 7, 2023 bench opinion supporting its December 13, 2023 order. The court explained that defense counsel had not accepted the court's conclusion that the handguns "were located on the roof of an adjacent property, not the property where defendant [had been] detained." The court further noted that defense counsel had "repeatedly stated that there was no evidence submitted regarding the ownership of the roof."

The court stated it "was faced with a conundrum." More particularly, the court explained its ruling on the suppression motion "could be based on" the evidence "on the roof issue" that had been presented during the September 15, 2023 evidentiary hearing, but the court noted that the matter "would undoubtedly be brought up on appeal" based on the arguments defendant had made on the issue. The court then explained that, "[i]n the alternative, additional testimony could be taken regarding the issue, and [defendant's] concerns could be addressed."

The court further posited that if additional testimony was elicited, "it may be concluded that where the guns were found is part of the land where defendant was arrested." The court explained that it sought to "ensure . . . defendant receives every consideration and opportunity to present his defense." The court further found authority for its determination the parties should be permitted to present evidence concerning ownership of the roof under N.J.R.E. 611 and N.J.R.E. 102.

We granted defendant's motion for leave to appeal from the December 13, 2023 order. We also granted the motions of the New Jersey Office of the Public Defender and the Association of Criminal Defense Lawyers of New Jersey to appear as *amicus curiae*.

Defendant offers the following arguments in support of his challenge to the court's December 13, 2023 order:

POINT I

THE COURT'S DECISION SUA SPONTE TO REOPEN THE SUPPRESSION HEARING IS A VIOLATION OF DUE PROCESS AND RAISES SERIOUS QUESTIONS CONCERNING THE IMPARTIALITY OF THE TRIAL JUDGE.

POINT II

THERE IS NO SOUND BASIS UPON WHICH TO
REOPEN THE HEARING EVEN IF THE MOTION
WERE MADE BY THE STATE.

II.

Prior to addressing defendant's arguments, we summarize the legal principles that guide our analysis. "'The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution, in almost identical language, protect against unreasonable searches and seizures.'" State v. Smart, 253 N.J. 156, 164 (2023) (quoting State v. Nyema, 249 N.J. 509, 527 (2022)). "[S]earches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid." Id. at 165 (quoting State v. Goldsmith, 251 N.J. 384, 398 (2022)). To overcome the presumption, the State has the burden of "show[ing] by a preponderance of evidence that the search falls within one of the well-recognized exceptions to the warrant requirement." Ibid. Following the filing of defendant's suppression motion, the State sought to satisfy that burden at the September 15, 2023, evidentiary hearing.

In a criminal proceeding, "[t]he roles of the judge, prosecutor and defense attorney are distinct. The attorneys are advocates for the respective sides, while

the judge is to be the neutral adjudicator." State v. Swint, 328 N.J. Super. 236, 260 (App. Div. 2000). A court should not act in a manner that supports a perception by the parties that the court is an advocate for a party. Id. at 259. A judge "is not an adversarial party to" a criminal proceeding, and "[t]he function of trial judges is to remain impartial and detached, not to 'take sides.'" State v. Santiago, 267 N.J. Super. 432, 437 (Law Div. 1993) (quoting U.S. v. Five Pers., 472 F. Supp. 64, 68 (D.N.J. 1979)); see generally Frugis v. Bracigliano, 351 N.J. Super. 328, 351 (App. Div. 2002) (explaining "[a] judge must remain impartial, detached, and should neither take sides nor appear to take sides in the dispute"). The impartiality of a trial judge must be maintained at all times; a judge has no authority to prosecute a criminal case on behalf of the State. State v. Avena, 281 N.J. Super. 327, 336 (App. Div. 1995).

Defendant argues the court erred by sua sponte reopening the suppression hearing by allowing the submission of additional evidence concerning ownership of the building on which the rooftop is located. Defendant claims the court's order deprived him of his due process right to an impartial tribunal at his suppression hearing. See id. at 336-37 (explaining a criminal defendant is denied "due process" when a trial court acts "in a prosecutorial role"). He further claims the court was not impartial because it had reopened the hearing to

"achieve a particular result" favoring and supporting the State's claim the rooftop does not constitute curtilage of the apartment because it is on a building separate from the one in which the apartment is located.

We reject defendant's argument, and the similar arguments offered by amici, because they are founded on the inaccurate premise that the court reopened the hearing and provided the State with the proverbial second bite at the apple because the State had failed to present evidence establishing the rooftop's location in the first instance. Defendant argues that because the State had failed to present evidence the rooftop is on a building separate from the building in which the apartment is located, the State had also failed to establish the rooftop is not curtilage of the apartment.

Defendant contends the court could not properly reopen the hearing to allow the State to present evidence concerning the curtilage issue where the State had failed to present such evidence prior to resting its case. Defendant claims the court's order therefore projects an impermissible appearance of partiality and impropriety in favor of the State that violates his due process rights.

Defendant's claims, and the arguments supporting them presented by amici, are undermined by the record. Following the presentation of the evidence

at the suppression hearing, the court explained that based on its review of the body-worn camera recordings, it had concluded the rooftop is on a building different from, but adjacent to, the one housing the apartment. See generally State v. S.S., 229 N.J. 360, 377-81 (2017) (explaining reviewing courts shall generally defer to a trial court's findings of fact based on its review of video or documentary evidence).

When defense counsel disagreed, the court explained it had relied on competent evidence—the body-worn camera recordings—in reaching its determination the rooftop is not attached to or part of the building in which the apartment is located. Indeed, when defense counsel argued the State had not presented any evidence establishing the roof is on a separate building, the court repeatedly stated that competent evidence—the recordings—established to the court's satisfaction that the rooftop is on a building separate from the building in which the apartment is located. The court repeatedly explained that it found the rooftop is on a separate building based on its observation of the recordings with its "own eyes."

Thus, based on the court's factual findings, the State did not require an opportunity to present additional evidence of the roof's location. And, with good reason, the State neither required nor requested an opportunity to present

additional evidence concerning ownership of the buildings because the court had already determined the buildings are separate based on the evidence the State had presented.

The court therefore did not, as defendant contends, permit the presentation of additional evidence to allow the State to establish facts—the location of the rooftop—because the State had failed to carry that burden before it rested its case. Defendant's contention is founded on the false premise the State had not presented such evidence and had not carried its burden in the first instance. But, as we have explained, the argument ignores that the court had already made its finding concerning the rooftop's location based on competent evidence and what the court plainly explained it had observed on the recordings.

As a result, the premise on which defendant's arguments on appeal rests—that the court's order improperly reopened the evidentiary record to provide the State with a chance to prove the rooftop's location—is belied by the record. Contrary to defendant's conclusory assertions, the State had already presented evidence that the court determined established the rooftop's location is on a building different than the one that houses the apartment.

Therefore, there was no need for the court to provide the State an opportunity to offer additional evidence concerning the location of the rooftop.

And that is not what the court did. As explained by the court, it reopened the hearing to allow the parties to introduce additional evidence pertinent to whether the court's finding of fact about the rooftop's location was "right or wrong for [defendant's] benefit." In its amplification, the court explained it had permitted the presentation of additional evidence because it might lead to a conclusion favorable to defendant—a finding "that where the guns were found is part of the land where defendant was arrested." The court further explained that it issued the order to "ensure . . . defendant receives every consideration and opportunity to present his defense."

Stated differently, the court's reopening of the hearing was for the purpose of allowing defendant an opportunity to establish the court's finding, that the rooftop and apartment were on and in separate buildings, is incorrect.⁶ The State did not need or require an opportunity because the court had already found as

⁶ We observe the court's December 13, 2023 order did not require the presentation of any additional evidence by either party. The court merely permitted the presentation of additional evidence. The court's order therefore did not compel defendant to present evidence in a matter in which defendant has no burden of proof. Rather, the order presented defendant with only an opportunity to present evidence addressing the court's finding of fact—that the recordings show two separate buildings—and his counsel's assertion the buildings are not separate.

fact that the rooftop is on a building different than the one in which the apartment is located.

For those reasons, we reject defendant's claim, which is joined by amici, that the court's order allowing the presentation of additional evidence concerning ownership of the building in which the apartment is located and the location of the rooftop constituted an improper effort to allow the State a second chance to present evidence about the rooftop's location it had failed to properly present during the evidentiary hearing. Rather than favor the State, the court's order allows defendant an opportunity to present evidence supporting his counsel's otherwise conclusory assertion—made in response to the court's finding about the rooftop's location—that the rooftop is located on the same building that houses the apartment.

We find no evidence or appearance of partiality or impropriety in the court's order. It did not favor either party. The court did not pick sides or act as an advocate. Cf. State v. Taffaro, 195 N.J. 442, 453 (2008) (finding the judge's questioning of a criminal defendant during trial crossed the line separating permissible judicial intervention and improper advocacy, because the questions had the effect of undermining the defendant's credibility and influencing the jury's verdict). The order was the product of the court's impartial

and detached attempt to afford defendant—who faces very serious charges and whose counsel had asserted, without any citation to evidence, that the rooftop is located on the building that houses the apartment—an opportunity to present evidence to counter the court's factual finding. As the court explained, the order was intended to afford defendant the opportunity to demonstrate whether the court's finding was right or wrong. We discern no error in that.

We find inapplicable the cases cited by defendant and amici that stand for the proposition that a court may not sua sponte reopen a case to permit the State a second opportunity to present evidence essential to its proofs that the State had failed to present in the first instance. Defendant relies on J.F. v. State, where the court determined the trial judge erred by sua sponte reopening the State's case to allow the completion of a fingerprint analysis and later admission of fingerprint evidence supporting the State's proofs.⁷ 718 So. 2d 251, 252 (Fla. Dist. Ct. App. 1998).

⁷ It is unnecessary to address each of the cases cited by defendant and amici because they are inapposite for the same reasons we reject defendant's reliance on J.F., 718 So. 2d at 251. In short, in the other cases relied upon by defendant and amici, the trial courts erred by sua sponte ordering the presentation of additional evidence essential to the State's proofs that the State had failed to present prior to resting its case. For the reasons we have explained, and will explain, that is not the case here. See, e.g., State v. Payton, 195 A.3d 1249, 1266

The court reasoned that the trial judge's actions could "easily be seen as giving the state an unrequested second chance to proof its case." Ibid. The court further noted the trial judge had "suggested that he was not convinced beyond a reasonable doubt regarding defendant's guilt until the fingerprint results," which had been obtained pursuant to the judge's sua sponte order for a fingerprint analysis, "were admitted in evidence." Ibid. In other words, the court determined the trial judge's reopening of the State's case was improper because the trial judge had otherwise determined the State had failed to sustain its burden of proof and then sua sponte reopened the State's case to allow the State to fill the gaps in its proofs.

There are no similar circumstances here. The motion court did not order the production of evidence essential to the State's proofs that was otherwise lacking in the State's proofs at the evidentiary hearing. As the record shows and we have explained, the motion court repeatedly advised defendant it had determined the buildings are separate based on its review of evidence—the

(Md. 2018) (deeming it improper for the trial court to sua sponte reopen the State's case to cure the State's insufficient evidence after the defendant moved for judgment of acquittal); State v. Brock, 940 S.W.2d 577, 581 (Tenn. Crim. App. 1996) (finding the judge's decision to sua sponte reopen the State's proof at trial an abuse of discretion because the judge only sought to remedy the State's evidentiary shortcomings).

recordings—the State had presented as part of its proofs at the hearing. Unlike in J.F., the State had not failed to present proofs essential to establishing the buildings are separate and, as such, the court's order permitting the submission of additional evidence is wholly dissimilar to the trial judge's sua sponte decision in J.F. directing and allowing the State to develop essential evidence otherwise missing from the State's proofs. Ibid.

Moreover, prior to issuing its order, the motion court had not found the State had failed to present evidence establishing the buildings are separate. Again, the court informed defendant the State had already presented evidence—the recordings—establishing the rooftop is on a separate building, and the court had found as fact the buildings are separate based on that evidence before issuing its order allowing the submission of additional evidence. Thus, unlike in J.F., there is no basis to conclude the trial court had decided the State's proofs were inadequate and then sua sponte permitted the presentation of additional evidence to breathe life into the State's fatally-flawed proofs. Rather, as it explained, the motion court allowed the presentation of the additional evidence for defendant's "benefit" to address the court's factual finding the buildings are separate.

We are unpersuaded the court lacked the authority to manage the presentation of the proofs at the suppression hearing such that it could not

properly permit the parties to supplement the evidence. The court did not order the parties to develop or present any evidence. The court's order merely provided an opportunity for the parties to do so.

We also cannot ignore the circumstances leading to the court's issuance of the order. See State v. Medina, 349 N.J. Super. 108, 132 (App. Div. 2002) (finding charges of judicial impropriety "must be viewed within the context of the entire" proceeding). Following the presentation of the evidence at the hearing, the court directed the filing of post-hearing briefs and noted it required the parties to address an additional and new legal issue—whether the rooftop constitutes curtilage of the apartment under our decision in Ingram, 474 N.J. Super. at 535-37. In fact, the court explained it granted the parties each an additional week to submit their post-hearing briefs to address that additional issue.

Following the submission of the parties' briefs and its review of the State's evidence—including the recordings—the court advised the parties it had determined as a matter of fact that the rooftop where the guns were found is on a building separate from the one in which the apartment is located. And, as we have detailed, it was in response to defendant's challenge to the finding that the

court issued its order allowing the submission of additional evidence concerning the location of the rooftop for defendant's "benefit."

Properly viewed in that context, the court's order permitted the parties an opportunity to present evidence on an issue—whether the rooftop constitutes curtilage of the apartment—the court had identified was an additional issue following the presentation of evidence and about which the court had made a factual determination based on evidence presented. Indeed, as this court has explained, a trial court may not "expand a case before [it] by adding new issues which come to mind . . . without giving the parties a full and fair opportunity to meet those issues." Bands Refuse Removal, Inc. v. Fair Lawn, 62 N.J. Super. 522, 553 (App. Div. 1960). Here, when defendant disputed the court's finding of fact and argued affirmatively the rooftop is on a building separate from the one that houses the apartment, the court merely offered the parties a full and fair opportunity to present evidence concerning the legal issue that was addressed after the evidentiary record had otherwise closed.

Defendant and amici argue the court lacked the authority to reopen the suppression hearing and otherwise abused its discretion by doing so. The court's order arose from the court's determination following the evidentiary hearing that the parties should address the curtilage issue in their post-hearing briefs based

on our then-recent decision in Ingram, 474 N.J. Super. at 535-37, and defense counsel's later response to the court's findings of fact that the rooftop is on a building separate from the building that houses the apartment. Based on the confluence of those circumstances, the court correctly employed its authority under N.J.R.E. 611(a)(1) to exercise reasonable control over the mode of presenting evidence by simply affording, for defendant's benefit, the parties an opportunity to present additional evidence in response to the court's factual finding concerning the rooftop's location. The court's order did little more than provide a procedure—the presentation of additional evidence—such that the truth of defendant's claim the rooftop is not on a separate building could be determined. See N.J.R.E. 611(a)(1).

A court has discretion to grant a party's motion to reopen their case to present omitted evidence. Carbajal v. Patel, 468 N.J. Super. 139, 159 (App. Div. 2021). And, we agree a court should not do so sua sponte for the purpose of saving the State from its failure to present evidence essential to its proofs in a criminal matter. See, e.g., People v. Kuntz, 607 N.E.2d 313, 316-17 (Ill. App. Ct. 1993) (finding the trial court abused its discretion by sua sponte granting a continuance for the State to present more evidence, because "but for the court's

intervention, the State would have failed to rebut the defendant's prima facie case").

For the reasons noted, however, that is not what happened here. The court possessed the discretion to reopen the hearing and allow both parties to submit additional evidence for the purpose of affording defendant the opportunity to address the court's factual finding that the rooftop is on a building different from the one that houses the apartment. See, e.g., Commonwealth v. Safka, 141 A.3d 1239, 1250 (Pa. 2016) (explaining a trial court has discretion to sua sponte reopen the record to allow additional testimony to avoid a miscarriage of justice). Defendant makes no showing the court abused that discretion here.

In affirming the court's order, we do not determine whether the court's conclusion the recordings proved the rooftop is on a building different than the one that houses the apartment is supported by substantial evidence. That is not an issue before us. Nor do we offer an opinion as to whether the manner in which, if at all, the court's finding about the rooftop's location should factor into the court's determination of defendant's suppression motion.

We conclude only that the court did not abuse its discretion or otherwise err in its December 13, 2023 order by affording the parties an opportunity to present evidence concerning the locations of the rooftop and apartment. To the

extent any such competent evidence shall be presented by the parties pursuant to the court's order, it shall be considered by the court with all the other evidence.

The trial court shall make its findings of fact based on all the evidence presented, consider the parties' arguments, and decide the suppression motion based on the applicable principles of law. We offer no opinion on the merits of the suppression motion, and nothing in this opinion shall be construed as constituting binding findings of fact or conclusions of law as to the merits of the motion.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION