

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0550

September Term, 2015

KEVIN RICHARDSON, JR.

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: June 3, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant Kevin Richardson, Jr., appeals from his convictions in the Circuit Court for Baltimore County of two counts of robbery with a dangerous weapon and two counts of robbery. He raises the following questions for our consideration:

“1. Did the trial court err by instructing the jury that a BB gun is a dangerous weapon?

2. Did the trial court err by allowing hearsay evidence of out-of-court statements in violation Mr. Richardson’s confrontation rights?”

We shall hold that the trial court erred in instructing the jury that a BB gun is a dangerous weapon, requiring reversal of the judgment of conviction. We do not reach the second question.

I.

Appellant was indicted by the Grand Jury for Baltimore County with two counts of robbery with a dangerous weapon, two counts of robbery, two counts of second-degree assault, and two counts of theft under \$1,000. The State *nol prossed* the two counts of second-degree assault and two counts of theft under \$1,000. A jury convicted appellant of two counts of robbery with a dangerous weapon and two counts of robbery. The court sentenced him to concurrent terms of incarceration of twenty years, all but ten suspended, on each of the two robbery with a dangerous weapon counts, and five years of probation.

The charges arose from an event which occurred on November 7, 2013. The following facts were adduced at trial. On November 7, 2013, Jonathan Jones and Deante

Anderson were walking to play basketball at the Boys and Girls Club on Fuji Road in Baltimore County. At about 3:00 p.m., as Mr. Jones and Mr. Anderson were in the middle of a narrow tunnel, two men entered the tunnel from the far side and blocked the path. One of the men produced a black long gun, which Mr. Jones suspected was not a real firearm. The man pulled out the gun, said “that’s dead,” or “shit is dead,” and pointed the gun at Mr. Jones and Mr. Anderson. The two men then made Mr. Jones and Mr. Anderson sit on the ground, and while the first man pointed the gun at them, the other one took Mr. Jones’s headphones, shoes, and \$20.00 cash that he was carrying. From Mr. Anderson the men took his shoes, headphones, a basketball bag, and a book bag. The men then ordered Mr. Jones and Mr. Anderson to walk out the end of the tunnel. Mr. Jones and Mr. Anderson walked to Mr. Anderson’s house where they called the police.

Mr. Anderson described the man with the gun as wearing gold “fronts” on his teeth, but that he had not seen the other man’s face. The police presented him with a photo array and he identified appellant as the man with the gun.

Detective Roberta Hanna of the Baltimore County Police Department investigated this incident and developed appellant as a suspect. Detective Hanna then obtained a search warrant for appellant’s home, where she found gold teeth “fronts” and a jar of BB pellets in appellant’s bedroom.

Appellant was tried in the Circuit Court for Baltimore County on November 19-20, 2014. At the close of all the evidence, the State requested that the court add the phrase,

“such as a BB gun,” to the end of the pattern instruction for robbery with a dangerous weapon, MPJI-Cr 4:28.1. The court agreed and instructed the jury as follows:

“The Defendant is also charged with the crime of robbery with a dangerous weapon. In order to convict the Defendant of robbery with a dangerous weapon, the State must prove all of the elements of robbery and must also prove that the Defendant committed the robbery by using a dangerous weapon. A dangerous weapon is an object that is capable of causing death or serious bodily injury, *such as a BB gun.*”

(Emphasis added). Appellant’s trial counsel objected immediately thereafter.

As noted above, the jury convicted appellant of two counts of robbery with a dangerous weapon and two counts of robbery. The court sentenced appellant to concurrent sentences of twenty years, all but ten suspended, on each of the robbery with a dangerous weapon counts, and five years of probation. This timely appeal followed.

II.

Before this Court, appellant argues that the trial court erred in instructing the jury that a BB gun is a dangerous weapon. At the State’s request, the court added the phrase, “such as a BB gun” to the end of the pattern instruction for robbery with a dangerous weapon, MPJI-Cr 4:28.1. Appellant argues that this additional language told the jury that a BB gun is a dangerous weapon as a matter of law, which was incorrect, and that whether an object such as a BB gun should be considered a dangerous weapon in this case is a question of fact that should have been determined by the jury.

The State concedes that the trial court erred in instructing the jury that a BB gun is a dangerous weapon. The State asserts that in the context of the evidence and arguments presented to the jury at trial, the error was harmless.

III.

The principal question in this case is whether the court, by instructing the jury that a BB gun is a dangerous weapon, unconstitutionally relieved the State of its burden to prove all of the elements of the crime of robbery with a dangerous weapon. Concerning error, the State offers only a bald assertion with no support or further argument that the error was harmless. We hold that the error was not harmless, and shall reverse.

It is fundamental that the Fourteenth Amendment to the United States Constitution and the Maryland Constitution require the State to prove each element of a charged offense beyond a reasonable doubt. *See Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (“The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder ‘beyond a reasonable doubt’ of the facts necessary to establish each of those elements.”); *Savoy v. State*, 420 Md. 232, 246 (2011). This requirement is also guaranteed by the Maryland Declaration of Rights. *State v. Greco*, 199 Md. App. 646, 667-68 (2011) *aff’d*, 427 Md. 477 (2012). In a jury trial, the jury is the exclusive judge of the facts in a case. *Gore v. State*, 309 Md. 203, 210 (1987) (citing Md. Dec. of Rts. Art. 23).

The purpose of jury instructions “is to aid the jury in clearly understanding the case, to provide guidance for the jury’s deliberations, and to help the jury arrive at a correct verdict. Jury instructions direct the jury’s attention to the legal principles that apply to the facts of the case.” *General v. State*, 367 Md. 475, 485 (2002). In order to aid the jury in its deliberations, a trial judge will instruct the jury as to the relevant law in the case. *Atkins v. State*, 421 Md. 434, 443 (2011). An instruction that serves to relieve the state of its burden to prove a defendant’s guilt beyond a reasonable doubt is constitutionally objectionable and grounds for reversal. *Stabb v. State*, 423 Md. 454, 464 (2011).

The parties agree, as do we, that the trial court erred in instructing the jury on robbery with a dangerous weapon by adding the phrase “such as a BB gun.” The question of whether a BB gun, or any other instrument, is a dangerous weapon is not determined as a matter of law, but is determined based on an objective test:

“[F]or an instrument to qualify as a dangerous or deadly weapon under [former Article 27] § 488, the instrument must be (1) designed as ‘anything used or designed to be used in destroying, defeating, or injuring an enemy, or as an instrument of offensive or defensive combat,’ *Bennett v. State*, 237 Md. 212, 214-15, 205 A.2d 393, 394 (1964); (2) under the circumstances of the case, immediately useable to inflict serious or deadly harm (*e.g.*, unloaded gun or starter’s pistol useable as a bludgeon); or (3) actually used in a way likely to inflict that sort of harm (*e.g.*, microphone cord used as a garrote).”

Brooks v. State, 314 Md. 585, 600 (1989). A BB gun may be a dangerous weapon under the *Brooks* test, but is not *per se* a dangerous weapon as a matter of law.

Although the record before us does not include a transcript of the proceedings, we assume that the court delivered MPJI-Cr 2:00, Binding Nature of Instructions,¹ as the State’s written request for that instruction is included in the record. Even if the court did not give MPJI-Cr 2:00, the jury was bound by the court’s instructions. By giving the altered MPJI-Cr. 4:28.1 instruction, the court essentially mandated the jury to find an element of robbery with a dangerous weapon without considering whether the BB gun in fact constituted a dangerous weapon. This error deprived appellant of a fair trial as the State was unconstitutionally relieved of proving an element of the crime alleged.

**JUDGMENTS OF THE CIRCUIT
COURT FOR BALTIMORE COUNTY
REVERSED. CASE REMANDED TO
THAT COURT FOR A NEW TRIAL.
COSTS TO BE PAID BY
BALTIMORE COUNTY.**

¹ MPJI-Cr 2:00, Binding Nature of Instructions, reads as follows:

“Members of the jury, the time has come to explain the law that applies to this case. The instructions that I give about the law are binding upon you. In other words, you must apply the law as I explain it in arriving at your verdict. On the other hand, any comments that I may have made or may make about the facts are not binding upon you and are advisory only. You are the ones to decide the facts and apply the law to those facts.”