

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2776

September Term, 2015

DAWAN HAWKINS

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: April 4, 2017

*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.

Dawan Hawkins, appellant, was convicted by a jury in the Circuit Court for Baltimore City of reckless endangerment. The court sentenced Hawkins to three years' incarceration, with credit for time served. Hawkins now asks us to consider whether the evidence was sufficient to sustain his conviction.

BACKGROUND

On April 18, 2015, Hawkins suffered five gunshot wounds from Officer David Bodine in an incident arising from the evasion of a traffic stop. As a result of the incident, Hawkins was charged with: first and second-degree assault; illegal possession of a firearm; wearing, carrying, and transporting a handgun; and reckless endangerment.

At trial, Bodine testified to the following:

Hawkins was a passenger in a car that was pulled over for a traffic stop by Officer Daniel Belen. Bodine, in a separate patrol car, noticed that the driver of the car had not put it in park as Belen approached the car on foot. The car evaded Belen and drove away, and Officer Bodine followed in his patrol car, notifying dispatch of the evasion. The car continued down a road that ended in the parking lot of an elementary school. Bodine notified dispatch that he suspected the people in the car would bail out at the school.

The car stopped in the school's parking lot, and Hawkins exited from the passenger door. Bodine remained in his patrol car to monitor the movements of the driver of the car, but saw Hawkins replace a handgun, which had fallen out, back into the waistband at the front of his pants. Hawkins began to run away across the school grounds, and Bodine began to chase him on foot. There was a large drainage pipe, approximately two-and-a-half or three feet in diameter, lying at a right angle close to the perimeter of the field next

to the school. Hawkins jumped over the pipe, but stumbled forward when he landed, catching himself with his hands on a nearby wall. Bodine saw Hawkins reach into his waistband with his right hand and turn to his left toward Bodine, revealing the handgun. Bodine instructed him to, “Drop the gun. Get on the ground. Drop the gun;” instead, Hawkins dove to the ground behind the right-angle corner of the large pipe, pointing the handgun toward Bodine. Bodine then crossed over the pipe approximately 25 feet from where Hawkins had taken cover and, seeing the handgun pointed toward him, discharged his weapon six times toward Hawkins, hitting him five times. Bodine instructed Hawkins again to drop the gun and move away from it, which he did. At this point, other officers responded to the scene, handcuffed Hawkins, and recovered the handgun, which had five live rounds in it.

The officer assigned to the internal affairs investigation of Bodine’s shooting of Hawkins, Detective Alexis Emanuelli, also testified for the State. She testified that the two guns involved in the incident, Bodine’s and Hawkins’s, were test-fired in the firearms division and determined to be operable, prior to being tested for DNA and fingerprints. Because the guns were both cleaned prior to the firearms testing, there was no opportunity to test them for DNA and fingerprints.

Hawkins’s counsel highlighted this failure to link Hawkins to the gun by fingerprint or DNA evidence, along with Bodine’s failure to report to dispatch that Hawkins had a gun while he was running, in order to argue to the jury that Hawkins did not have a gun during Officer Bodine’s pursuit of him.

As we have explained, the jury found Hawkins guilty of reckless endangerment, and acquitted him of the other charges. The court sentenced Hawkins to three years' incarceration, with credit for time served. Hawkins thereafter filed a timely notice of appeal.

DISCUSSION

Hawkins argues that there was insufficient evidence for a rational trier of fact to find that he acted recklessly in pointing the handgun at Bodine. Hawkins continues to maintain that he did not possess a gun that evening, but argues in the alternative that the evidence was insufficient to show that there was a live round in the chamber. He asserts that, lacking evidence of a live round in the chamber, the case is analogous to those where the defendant pointed an unloaded gun at someone. Hawkins supports his arguments by noting that the jury acquitted him of the firearm charges indicating, in his view, that the jury did not believe that he possessed a handgun or firearm.

The State counters that the evidence was sufficient, regardless of inconsistencies, to submit the charge of reckless endangerment to the jury.

“The applicable standard is whether after viewing the evidence in the light most favorable to the prosecution *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Bloodsworth v. State*, 307 Md. 164, 167 (1986) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). In our review, it is not for us to weigh the evidence or determine the credibility of a witness. *Jones v. State*, 343 Md. 448, 465 (1996). Our evaluation is not “whether the evidence *should have or probably would have* persuaded the majority of fact finders” but rather whether it “*possibly could*

have persuaded *any* rational fact finder.” *Fraidin v. State*, 85 Md. App. 231, 241 (1991). “[T]he concern is only with whether the State has met its burden of production and not with whether it has met any burden of persuasion.” *Id.* Even where there is a substantial discrepancy between testimony or other pieces of evidence, such discrepancies “[g]o[] to the weight and not to the sufficiency of the evidence.” *Branch v. State*, 305 Md. 177, 184 (1986). Finally, “[w]e may only sustain the jury’s findings ‘if the circumstances, taken together, do not require the trier of facts to resort to speculation or conjecture.’” *Moulden v. State*, 212 Md. App. 331, 354 (2013) (quoting *Brown v. State*, 182 Md. App. 138, 157 (2008)).

Hawkins was convicted of reckless endangerment. The statute provides:

A person may not recklessly:

(1) engage in conduct that creates a substantial risk of death or serious physical injury to another; or

(2) discharge a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another.

Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article (“C.L.”), § 3-204(a). “[I]t is clear from our case law that the legislature enacted [this statute] to deter or inhibit behavior.” *Jones v. State*, 357 Md. 408, 428 (2000). *See also Minor v. State*, 326 Md. 436, 442 (1992) (“It is the reckless conduct and not the harm caused by the conduct, if any, which the statute was intended to criminalize.”).

Further, to determine whether such behavior is reckless under the statute, “the trier of fact must evaluate the defendant’s conduct from the standpoint of an ordinary, law-abiding citizen under similar circumstances.” *Jones*, 357 Md. at 428. In other words, “[t]he

test is whether the appellant’s misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish.” *Minor*, 326 Md. at 443.

“The elements of a *prima facie* case of reckless endangerment are: 1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly.” *Jones*, 357 Md. at 427 (citing *State v. Albrecht*, 336 Md. 475, 501 (1994)). These elements were not found to be proven in *Moulden* where the defendant used a fake gun when he assaulted the victim. 212 Md. App. at 350. In that case, the record did not support a finding that the defendant’s conduct created a substantial risk of death or serious physical injury to the victim because there was no evidence that the fake gun was “operable as a firearm or substantial enough to use as a bludgeoning instrument.” *Id.* at 358. As we recently stated in *Perry v. State*, 229 Md. App. 687, 698 (2016), “it is not a requirement that the individual have intended to cause the result. Rather, the applicable *mens rea*, derived from the statute’s employment of the term ‘reckless,’ is the ‘conscious disregard of a substantial risk’ of harm.” (quoting *Williams v. State*, 100 Md. App. 468, 503 (1994)).

In *Moulden*, we contrasted the assault by showing a fake gun with earlier cases, noting, “[t]hese cases hold that the risk of death or injury created in recklessly handling a loaded, operable firearm is that the weapon may discharge.” 212 Md. App. at 358.

In *Albrecht, supra*, a police officer was aiming a shotgun, loaded and racked, at a suspect when the shotgun discharged and struck her in the chest. 336 Md. at 481-82. The Court of Appeals determined that the evidence was sufficient to support a finding that the police officer acted recklessly, given the testimony that he had customized the shotgun in a potentially dangerous manner, that he loaded it and pointed it at a suspect holding only a bag of Fritos, that he placed his finger on the trigger while deciding whether the suspect was a threat, and that he did so in the presence of bystanders. *Id.* at 505.

In *Wieland v. State*, 101 Md. App. 1 (1994), the elements of reckless endangerment were also proven. Billy Wieland, intoxicated, was awakened by his brother Bryan Wieland knocking and kicking at his front door. *Id.* at 6. Startled, Billy loaded his handgun and went to the door. *Id.* at 6-7. As the door swung open, Billy tripped and fell, and the handgun discharged, hitting Bryan. *Id.* at 7. “[E]ven brandishing a loaded and cocked weapon in the direction of another person, particularly when in shaky control of one’s motor skills, could also be deemed conduct that creates a substantial risk of death or serious physical injury to another person.” *Id.* at 28 (internal quotation marks omitted).

In *Minor, supra*, the defendant has been drinking and taking cocaine and heroin with his brother when they began talking about playing Russian Roulette. 326 Md. at 438. Minor handed his brother a loaded shotgun with the safety off and dared him to pull the trigger, after telling him that Russian Roulette cannot be played with a shotgun since it lacks a barrel. *Id.* His brother pulled the trigger and shot himself fatally. *Id.* Viewing these facts in the light most favorable to the prosecution, the Court of Appeals determined that a rational trier of fact could have found that the defendant behaved recklessly. *Id.* at

443-44. Indeed, the weapon need not have been fired in order to find reckless endangerment. *Boyer v. State*, 107 Md. App. 32, 41-42 (1995). “The proper inquiry is into whether the gun was handled in a manner that created a substantial risk sufficient to find reckless endangerment.” *Perry*, 229 Md. App. at 700.

Hawkins presents essentially two arguments: (1) that the evidence was insufficient to show that he was in possession of a gun; and (2) that if he possessed a gun, there was insufficient evidence to show that he behaved reckless when he pointed it at Bodine.

Bodine testified that he saw Hawkins carrying a handgun in his waistband, and later pulling the gun out of the waistband and pointing it at him. The State also entered a handgun and five live rounds into evidence, which Bodine testified matched the one he saw in Hawkins hand. Although Hawkins attempted to raise doubts that he was carrying the gun, based on the lack of DNA evidence and some inconsistencies in Bodine’s testimony, such discrepancies go the weight of the evidence. We are satisfied that the State met its burden by introducing evidence that Hawkins was in possession of a gun that evening.

Alternatively, Hawkins argues that his behavior in carrying and pointing the gun at Bodine did not rise to the level of recklessness by comparing his behavior to that in the cases discussed, *supra*. With reference to the Model Penal Code, Hawkins argues in his brief that, since he did not fire the handgun, he could not be found to have acted recklessly. His argument fails when considering *Minor*, where the defendant did not fire the fatal shot, but merely handed his brother the loaded shotgun and dared him to use it. 326 Md. at 438.

Although it was the brother who pulled the trigger, the evidence was sufficient to support a finding of *Minor*’s recklessness for having provided the weapon. *Id.* at 443-44.

We find nothing in *Minor*, or the other cases to which we have referred, to support the proposition that firing the weapon, or causing the weapon to be fired is the baseline behavior for a finding of recklessness. Further, there was testimony that Hawkins pointed the gun at Bodine. Although he did not fire the gun, brandishing it in the circumstances could be deemed to be handling it recklessly, because he was physically asserting himself.

Hawkins also argues that his behavior did not rise to the level of recklessness because there was no evidence that any of the five live rounds recovered from the gun were in the gun's chamber. With a capacity for nine rounds, Hawkins argues, the State's failure to show that a live round was in the chamber was the equivalent to pointing an unloaded gun. Unlike *Moulden's* fake gun, which the State failed to counter with evidence that it was capable of firing a bullet or being used as a bludgeon, a juror could infer that, with five live rounds, Hawkins's gun was capable of firing, even if he needed to ready the gun first by moving a live round into the chamber. The fact finder cannot "resort to speculation or conjecture," but is permitted to draw inferences in considering the evidence. *Moulden*, 212 Md. App. at 354.

Even absent direct evidence that Hawkins had his finger on the trigger, as in *Albrecht*, or that the gun was "loaded and cocked" and Hawkins was in "shaky control of [his] motor skills," as in *Wieland*, the State offered sufficient evidence for the jury to consider whether Hawkins's conduct was reckless. Bodine testified as to Hawkins failure to obey repeated commands to stop running and to drop the gun, and to Hawkins pointing the gun at him after taking cover behind the pipe. The State presented testimony and results of a firearms test showing that the handgun recovered from Hawkins was operable. The

jury was not required to speculate whether the gun was loaded or operable, or whether Hawkins was pointing it at Bodine, because the evidence on those points was sufficient. From the standpoint of “an ordinary, law-abiding citizen under similar circumstances,” the State’s evidence was sufficient for the jury to find that Hawkins engaged in reckless conduct. *Jones*, 357 Md. at 428.

**JUDGMENTS OF THE CIRCUIT
COURT FOR BALTIMORE CITY
AFFIRMED.
COSTS TO BE PAID BY
APPELLANT.**