UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2132

September Term, 2015

IN RE: E. C.

Graeff,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: October 18, 2016

On September 11, 2015, a juvenile petition was filed in the Circuit Court for Prince George's County against E. C., who was born on May 8, 1998. The petition charged him, insofar as here pertinent, with first-degree assault, armed robbery, robbery, second-degree assault, reckless endangerment, conspiracy to commit armed robbery, conspiracy to commit robbery, and theft of property worth less than $1,000. After a merits hearing held on October 26, 2015, the circuit court found E. C. involved as to all of the abovementioned counts. On November 16, 2015, the circuit court ordered E. C. into a level B custodial commitment. In this timely appeal, E. C. raises three questions[1] that he phrases as follows:

> 1. Did the [c]ircuit [c]ourt err in finding sufficient evidence to sustain findings of involved as to the charges of reckless endangerment and first[-]degree assault?
>
> 2. Did the [c]ircuit [c]ourt err in admitting a prior consistent statement of a witness where the witness's credibility had not been attacked and the witness was no longer available to testify regarding the statement?
>
> 3. Did the [c]ircuit [c]ourt err in denying defense counsel the opportunity to cross-examine a witness on the issue of eyewitness credibility?

We shall answer the first question presented in the affirmative and reverse the court's finding of involved insofar as the charges of reckless endangerment and first-degree assault are concerned. As to questions 2 and 3, we find no reversible error and shall affirm the judgments as to all other counts.

[1] The order of the questions presented, as set forth in appellant's brief, has been altered.

I.
EVIDENCE INTRODUCED AT THE MERITS HEARING

At the merits hearing only two witnesses were called: Debra Parker and Detective Ricardo Jacob of the Prince George's County Police Department. Additionally, the State introduced into evidence a tape of the 911 call reporting the robbery of which E. C. was accused, and two videotapes showing the robbery and its immediate aftermath. The State also introduced several other exhibits, which will be discussed *infra*.

A. Testimony

On January 11, 2015, at approximately 9:30 p.m., Debra Parker drove her car to a gas station located in Prince George's County, Maryland. She got out of her car and stood in front of the cashier's window with a $20 bill in her hand, preparing to pay for gas. A boy, whom Ms. Parker later identified as appellant, approached her in the company of two other juveniles. Appellant grabbed her hand and said: "Miss, give me the money." He then showed her a black gun that he had in his right jacket pocket. Ms. Parker initially refused to give appellant her money, telling him that she was not going to give him her "last $20." After refusing to give up her money, appellant and Ms. Parker began to "tussle" over the money, with appellant trying to pull the $20 bill out of Ms. Parker's hand. Next, a bystander, who was getting gas, called out for Ms. Parker to "just give him the money." This advice caused Ms. Parker to let go of the $20 bill. She retained, however, a small piece of the corner of that bill that was ripped off. As soon as appellant got the bill from Ms. Parker, he ran away. The two young men that had accompanied appellant walked

away from the filling station. The man who had advised Ms. Parker to give up the money called 911 and Prince George's County Police officers arrived soon thereafter.

After Ms. Parker identified appellant in court as the person who had robbed her, she told the circuit court judge that appellant, at the time of the robbery, was wearing "a big old white, black and white sweat suit with Chinese letters on it. Big white Chinese letters." Also, Ms. Parker identified State's Exhibit 6 as the jacket, with Chinese letters on it, as the one that appellant was wearing at the time of the robbery. During Ms. Parker's testimony, the State introduced two surveillance videos obtained from the gas station at which the robbery occurred. Those videotapes were introduced into evidence as State's Exhibits 2 and 3. Ms. Parker confirmed that the videos accurately depicted what had happened during the robbery. Finally, Ms. Parker testified that after the robbery a Prince George's County police officer returned the $20 bill to her. That bill had a corner torn off and the piece of the bill that she had retained perfectly fit into that corner.

Ms. Parker identified State's Exhibit 4 (a BB pistol) as the weapon used in the robbery.

Detective Ricardo Jacob testified that on the night of January 11, 2015, he was directed to investigate the robbery of Ms. Parker. He arrived at the gas station within approximately three minutes after he received the call. Ms. Parker flagged him down and told him that someone had taken $20 from her. She gave Detective Jacob a description of the three persons she believed were involved in the robbery and told him the direction in which the robber and his two companions went. He then began taking a statement from Ms. Parker but before he finished writing up the statement, he received word that other

officers had stopped some individuals who fit Ms. Parker's description of the robber and his cohorts.

Detective Jacob drove Ms. Parker to two different locations where suspects were stopped. At the first stop, Ms. Parker identified appellant as the individual who had taken her money.

In her trial testimony, Ms. Parker identified a picture of appellant, which was entered into evidence as State's Exhibit 5. The picture was taken after the police removed appellant's jacket (State's Exhibit 6). According to Ms. Parker, the picture accurately showed how appellant was dressed (from the waist down) at the time of the robbery. After identifying appellant at the "show-up," Detective Jacobs took Ms. Parker to a second location where she identified two other suspects.

B. Stipulations

The parties stipulated that "Officer Stevenson[2] . . . would testify that the ripped $20 bill (that was subsequently given back to Ms. Parker) was recovered off of . . . William Thomas," who was one of the individuals that was involved in the "show-up" that Detective Jacob conducted.

The parties also stipulated that a Prince George's County Police officer would have testified that the unloaded BB gun, introduced into evidence as State's Exhibit 4, was recovered from another individual whose last name was Pierce. Mr. Pierce was also stopped by police shortly after the incident. The parties agreed that the unloaded BB pistol

[2] Officer Stevenson's first name is not provided in the record.

that was introduced, was in the same or substantially the same condition as when it was recovered from Pierce.

II.
TRIAL JUDGE'S DECISION

The judge said that he "didn't know whether he had ever seen a clearer video" of a crime than those introduced by the State. The judge stressed that a jacket worn by the robber, identical to the one introduced into evidence, was shown in one of the videos. He noted that the jacket had the same type of writing on the front of it as described by Ms. Parker, whom he found to be an extremely credible witness. The court concluded that appellant was the criminal agent who committed the robbery of Ms. Parker and related crimes.

III.
A. First Issue Presented

Appellant contends that the evidence was insufficient to prove him guilty of reckless endangerment. The elements 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.'" *Holbrook v. State*, 364 Md. 354, 366-67 (2001) (quoting *Jones v. State*, 357 Md. 408, 427 (2000)). Reckless endangerment "'is intended to deal with the situation in which a victim is put at substantial risk of death or serious bodily harm but may, through a stroke of good fortune, be spared the consummated harm itself.'" *Moulden v. State*, 212 Md. App. 331, 355 (2013) (quoting *Albrecht v. State*, 105 Md. App. 45, 58 (1995)).

In enacting the reckless endangerment statute, it was the legislature's intent "to punish, as criminal, *reckless conduct* which created a substantial risk of death or serious physical injury to another person. *It is the reckless conduct and not the harm caused by the conduct, if any,* which the statute was intended to criminalize." *Minor v. State*, 326 Md. 436, 442 (1992) (emphasis added). "'Serious physical injury' means physical injury that: (1) creates a substantial risk of death; or (2) causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ." Md. Code Ann. (2012 Repl. Vol.) Criminal Law Article ("Crim. Law") § 3-201(d).

The act of pointing a fake or inoperable firearm at another does not create the risk necessary to support a conviction for reckless endangerment, absent proof that the gun could be used as a bludgeoning instrument. *Moulden*, 212 Md. App. at 358.

The State argues:

> Based on [E.] C.'s actions in pressing the gun against the victim during the robbery and pointing it in her direction as he fled, the juvenile court could reasonably infer that the gun was loaded. Even if not loaded, however, because of the close proximity of [E.] C. and the victim during the robbery, the gun certainly was usable as a bludgeon. Under either circumstance, [E.] C.'s conduct created a substantial risk of serious physical to the victim. Accordingly, the evidence was sufficient to sustain the juvenile court's finding of involved as to reckless endangerment.

At trial, there was no direct evidence that the BB gun was loaded at the time of the robbery. The only evidence introduced concerning whether the gun was loaded was the stipulation that when the BB gun was recovered, about ten minutes after the robbery, it was unloaded. The State argues that the trial judge could have inferred, legitimately, that

because the gun was used in a robbery, it must have been loaded at the time of the robbery. In our view, this is not a legitimate inference. As we said, in *Coates v. State*, 90 Md. App. 105, 117 (1992):

> When analyzing the legal sufficiency of circumstantial evidence rather than direct evidence, we are measuring the adequacy of predicate facts, assuming them to be true, to give rise to inferred facts. The rule is that the inferred fact must follow more likely than not from the predicate fact for the [trier of fact] even to be permitted the option of inferring.

One cannot legitimately conclude from the predicate fact (that a BB gun was used in a robbery and that same gun was found unloaded ten minutes after the robbery), that it is more likely than not that the BB gun was loaded when the robbery was committed. Rather than a legitimate inference, such a conclusion could only be based on naked speculation.

Although the videotapes showed that, during the robbery, appellant at one point, pointed the BB gun at Ms. Parker, that evidence, unaccompanied by evidence showing that the BB gun was loaded, was insufficient to show that this act put the victim at a substantial risk of suffering death or serious bodily harm.

We also reject the State's alternative argument that the judge could have convicted appellant under the theory that the BB gun could have been used as a bludgeon. The argument overlooks the fact that the petition filed against appellant alleged in the reckless endangerment count, the following:

> On or about January 11, 2015, in Prince George's County, Maryland, did recklessly engage in conduct, to wit: pointing a BB gun at Debra Parker that created a substantial risk of death or serious physical injury to Debra Parker, in violation of CR-03-204(a)(1) of the

> criminal law against the government and dignity of the state. (Reckless Endangerment).

Given the allegation in the petition, the State was barred from convicting appellant of reckless endangerment under the alternate theory, i.e., that the BB gun could have been used as a bludgeon.[3]

[3] Aside from the pleading issue, there is another problem with the finding of involvement in the crime of reckless endangerment. The State must prove that the gun was "handled in a manner that created a substantial risk" of death or bodily harm. *See Perry v. State*, ___ Md. App. ____, ____ (No. 2489, September Term, 2014), s*lip op*. at 10 (filed September 28, 2016). Here, there was no evidence showing that the gun was handled in a way that showed it was likely to be used as a bludgeon. The video showed that appellant simply pointed the gun at Ms. Parker as he ran away and earlier had pressed the gun against her torso. Appellant never gave any indication that he intended to hit Ms. Parker with the gun. In *Perry* we said:

> It is well established in Maryland that "'the *actus reus* of creating a substantial risk is to be measured objectively, not subjectively . . . on the basis of the physical evidence in the case'" *Hall v. State*, 448 Md. 318, 330 (2016) (quoting *Williams*, 100 Md. App. [468] at 495 [(1994)]). Objectively, we need not pause to inquire whether a loaded gun is the kind of instrument that can create a substantial risk of death or serious physical injury. The proper inquiry is into whether the gun was handled in a manner that created a substantial risk sufficient to find reckless endangerment. Our survey of Maryland appellate opinions reveals that the reckless endangerment statute is most frequently applied in situations involving firearms. . . . Indeed, we observed in *Moulden v. State*, 212 Md. App. 331, 356 (2013) that documents in the legislative history file of the reckless endangerment statute express a particular concern for the reckless discharge of firearms. 212 Md. App. at 356 (citing Senate Judicial Proceedings Committee Floor Report on H.B. 1448 (1989) ("This bill prohibits conduct which, while not criminal under current law, creates a substantial risk that a criminal act will result. According to testimony, individuals who recklessly shoot firearms without criminal intent near roads or buildings cannot be prosecuted under current law.")) (other citations omitted).

(continued . . .)

We turn next to the first-degree assault charge. First-degree assault requires that a person intentionally cause, or attempt to cause, serious physical injury to another, Crim. Law § 3-202(a)(1), or that a person commit an assault with a firearm. A BB gun is not a "firearm" as defined by the statute. *See* Crim. Law § 3-202(a)(2).

In order to obtain a conviction under § 3-202(a)(1), as the State did here, the State "must prove that an individual had a specific intent to cause a serious physical injury[.]" *Chilcoat v. State*, 155 Md. App. 394, 403 (2004) (citing *Dixon v. State*, 364 Md. 209, 239 (2001)). For purposes of showing that someone had the specific intent to cause serious physical injury, it may be inferred that one intends the natural and probable consequences of his or her actions. *Id*.

Appellant argues:

> Here, where nobody was injured and none of [E.]'s actions had the natural and probable consequence of causing serious physical harm, there is no basis for the judge's conclusion that [E.] acted with the specific intent to cause Ms. Parker serious physical injury. . . . [A]ll the State showed was that [E.] grabbed and squeezed one of Ms. Parker's hands, showed her an unloaded BB gun before placing the toy [sic] gun behind his back, pulled on the $20 bill that she held until

(. . . continued)

> It is axiomatic that the use of a gun does not always create a substantial risk sufficient to find reckless endangerment. *See Williams*, 100 Md. App. 497-99 (citing *People v. Davis*, 526 N.E.2d 20 (N.Y. 1988)). In *Williams*, this Court examined the *Davis* decision because it "elaborated on the necessity that a risk actually be created," *id*. at 498, noting in that case "the *actus reus* of risk creation had not occurred, notwithstanding the defendant's aiming and attempting to fire a gun, because the gun was inoperable." *Id.* at 497.

Slip op. at 10-11 (some citations omitted) (emphasis added).

> she let go, and then ran away. This is not the behavior of one who is attempting to inflict serious bodily harm. *Cf. Ford v. State*, 330 Md. 682 (1993) (evidence supported finding of specific intent to disable drivers and passengers of vehicles where landscaping rocks were thrown at moving vehicles on the highway). To the contrary, this is a straightforward example of second[-]degree assault, in that there was both an obvious intent to frighten Ms. Parker and unlawful contact with her hand.

The State takes a contrary view, but the reasoning supporting that view is weak. It argues:

> [E.] C.'s actions in pressing the gun against the victim as they struggled for the $20 bill, and pointing the gun at the victim as he fled with the money allowed the court to infer that [E.] C. possessed the specific intent to cause a serious physical injury to the victim, regardless of whether the victim was injured. His finding of involved as to first[-]degree assault should be affirmed.

As already mentioned, a videotape shows that at one point appellant pressed the BB gun against Ms. Parker's torso. The video also shows that appellant pointed the BB gun at Ms. Parker as he fled. But one certainly could not infer from those facts that appellant intended to cause Ms. Parker serious injury – or for that matter, injury of any sort. We shall therefore reverse the trial court's finding of involvement as to Count I that charged first-degree assault.

B. Second Issue Presented

During direct-examination of Detective Jacob, he was asked about what happened before the first "show-up" where appellant was identified by Ms. Parker as the person who stole $20 from her. The following exchange occurred:

> [PROSECUTOR]: At the first stop did you have - - what happened at the first stop?

> [WITNESS]: At the first stop, on the way - - well, [the victim] was very vivid with [sic] description. She said one of the suspects had black and white - -
>
> [DEFENSE COUNSEL]: Objection.
>
> [COURT]: Basis?
>
> [DEFENSE COUNSEL]: Hearsay.
>
> [COURT]: Overruled. She was aiding in his investigation. Overruled.
>
> [WITNESS]: She gave a description of - - she was very vivid as far as like black sweat pants, with white decorations on it. That's how she called it. And also a matching jacket.
>
> [PROSECUTOR]: All right.
>
> [WITNESS]: So – and as we're driving down, she's giving me the description again. As we pulled up to the stop, I remember seeing the same exact description that she's giving me. So once the patrol officers stood him up and brought him in front of the car, she immediately said, yes, that's the person that took her money.

(Emphasis added.)

Appellant argues, and we will assume, *arguendo*, that appellant is legally correct in his argument that the portion of Detective Jacob's answer that we have emphasized was hearsay and that no exception to the hearsay rule was applicable. Even with that assumption, we hold that the alleged error was harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976). We say this because at trial it was undisputed that the robbery was accurately shown by the videotapes. Those tapes clearly showed the jacket the robber was wearing and how the robber was otherwise dressed. As the judge found, the videos corroborated Ms. Parker's trial testimony in this regard. How the

appellant was dressed when he was captured was also shown by a photo (Exhibit 5) that was introduced into evidence without objection, and by Exhibit 6 – the jacket with distinctive lettering that was taken from appellant when he was arrested. The State gained nothing, and appellant lost nothing, by allowing Detective Jacob to give the answers at issue.

C. Third Issue Presented

Appellant argues that the hearing judge abused his discretion by arbitrarily limiting cross-examination of Detective Jacob concerning the issue of Ms. Parker's reliability. The contention is made because, during the exchange set forth below, the trial judge sustained a single objection during defense counsel's cross-examination of Detective Jacob. That questioning concerned the first show-up. The exchange was as follows:

> [DEFENSE COUNSEL:] Now, you said – you testified that [the victim] did identify the [Respondent] in one of the show-ups, correct?
>
> [WITNESS]: Yes.
>
> [DEFENSE COUNSEL]: Okay. You weren't sure how many people were present at that time though?
>
> [WITNESS]: I can't remember exactly how many, no.
>
> [DEFENSE COUNSEL]: But he'd been arrested at that point, correct?
>
> [WITNESS]: No.
>
> [DEFENSE COUNSEL]: He hadn't been arrested? He was not in cuffs?
>
> [WITNESS]: When we pulled up, he was not in cuffs yet.
>
> [DEFENSE COUNSEL]: Was he sitting on the curb?

[WITNESS]: He was.

[DEFENSE COUNSEL]: Were there officers around him?

[WITNESS]: Yes, sir.

[DEFENSE COUNSEL]: How many, do you think?

[WITNESS]: I can't recall exactly how many officers.

[DEFENSE COUNSEL]: Was it more than one?

[WITNESS]: It was more than one.

[DEFENSE COUNSEL]: More than two?

[WITNESS]: I can't recall.

[DEFENSE COUNSEL]: You can't recall? More than one though. Was there a cruiser nearby where he was sitting on the curb?

[PROSECUTOR]: I'm going to object to this line of questioning. My basis for the objection is that it's a motion. I think it should have been addressed at pretrial, not during the merits of the trial. I think I see where he's going, but - -

[DEFENSE COUNSEL]: Still goes to her accuracy or credibility in identifying him.

[COURT]: If that's what it goes to, overruled. I mean, I'm sorry, sustain the objection, if that's what it goes to credibility. Sustained.

[DEFENSE COUNSEL]: Well, by credibility I just mean whether she was biased when she was making the identification.

[COURT]: Sustained.

According to appellant, by sustaining the objection, the trial judge was cutting off a line of questioning designed to challenge the "reliability of Ms. Parker's identification." Our review of the record does not support appellant's contention that the judge prevented

defense counsel from pursuing any line of questioning, especially one directed at undermining the reliability of the victim's identification. For starters, defense counsel never said he wanted to test the reliability of Ms. Parker's identification. And, the fact that a line of questioning about Ms. Parker's reliability was not cut off is shown by the questions that were allowed after the objection was sustained, *viz*.:

> [DEFENSE COUNSEL]: So, [the victim], she was in the car with you when she did that identification?
>
> [WITNESS]: Yes, sir. She was in my passenger seat.
>
> [DEFENSE COUNSEL]: Were there any other officers in the car with you?
>
> [PROSECUTOR]: Objection. It's the same – he's just coming at it in another way. It's the same line of questioning.
>
> [COURT]: Overruled. Anyone else in the car with you, or just the two of you?
>
> [WITNESS]: No sir, just me and [the victim].
>
> [COURT]: Okay.
>
> [DEFENSE COUNSEL]: You would have told her that she was going to see – try to identify the suspects in the robbery, correct?
>
> [WITNESS]: I can't remember exactly what I told her, but I did tell her we were going to -- I was going to show her two stops. I can't remember my exact words, as far as instruction-wise.

For the reasons set forth above, we hold that the trial judge did not commit reversible error by sustaining the objection at issue.[4]

JUDGMENTS FINDING APELLANT INVOLVED IN THE CRIMES OF RECKLESS ENDANGERMENT AND FIRST-DEGREE ASSAULT REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR NEW DEPOSITION HEARING; ALL OTHER JUDGMENTS AFFIRMED; COSTS TO BE PAID 50% BY PRINCE GEORGE'S COUNTY AND 50% BY APPELLANT.

[4] As mentioned earlier, the question to which appellant's counsel objected was whether there was a police cruiser parked near appellant when the first show-up occurred. It is difficult to see how the answer to that question would have had any impact on the reliability, *vel non*, of Ms. Parker's identification in light of the fact that Detective Jacob had already admitted that when appellant was identified, he was sitting on a curb in the company of at least two police officers. Detective Jacob's testimony showed that the show-up in question, like almost all show-ups, was suggestive. The question for the trial judge was whether the identification was nevertheless reliable. Based on the video, the court found it was.