UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0416

September Term, 2015

WILLIE LEE GANEY, JR.

v.

STATE OF MARYLAND

Meredith,
Beachley,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 15, 2017

A jury in the Circuit Court for Harford County convicted appellant, Willie Lee Ganey, Jr., of robbery, robbery with a dangerous weapon, second-degree assault, and theft. The trial court merged the convictions for robbery, second-degree assault and theft into the conviction for robbery with a dangerous weapon, and sentenced appellant to 20 years' incarceration with all but 15 years suspended, followed by a period of five years' supervised probation. On appeal, appellant argues that the evidence is insufficient to support his conviction for robbery with a dangerous weapon where the weapon was a plastic air pistol, and alternatively, that he has been denied meaningful appellate review on this issue because the air pistol was destroyed following trial. Finding no error, we affirm.

FACTUAL BACKGROUND

On July 15, 2014, Zubair Ahmed ("Ahmed") was working the night shift at the 7-Eleven convenience store in Belcamp, Harford County. At approximately 2:40 a.m., a man wearing a bandana on his face entered the store with what appeared to be a gun, jumped over the counter, and instructed Ahmed to "open the register." The man struck Ahmed in the head three times with the gun, instructed Ahmed to remove money from two cash registers, and then took the money and fled the store.

At appellant's trial, Ahmed identified appellant as the man who robbed the store. Ahmed testified that appellant wore a bandana on his face that night, but that he recognized appellant by his eyes and voice because appellant had been coming into the store daily, sometimes twice per day, for almost two months prior to the robbery. On some of those

occasions, Ahmed gave appellant expired food, such as sandwiches and frozen items, free of charge.

The parties stipulated that when police searched appellant on July 15, 2014 at 6:00 a.m., he was in possession of the gun marked as State's Exhibit 2. Ahmed testified that the gun introduced as State's Exhibit 2 looked to be the same shape, size and color as the gun that appellant used in the robbery. Detective Aaron Huch of the Harford County Sheriff's Office testified that he investigated the robbery of the 7-Eleven in Belcamp in July of 2014. Detective Huch showed a photographic array to Ahmed, who selected appellant's photograph. Following his convictions, appellant timely appealed.

DISCUSSION

I. Preservation

As a threshold issue, we must determine whether appellant properly preserved his sufficiency argument for appeal. Maryland Rule 4-324(a) provides, in pertinent part that,

> A defendant may move for judgment of acquittal on one or more counts . . . at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted.

We have previously stated, "It is a well-established principle that our review of claims regarding the sufficiency of evidence is limited to the reasons which are stated with particularity in an appellant's motion for judgment of acquittal." *Claybourne v. State*, 209 Md. App. 706, 750 (2013) (citing *Taylor v. State*, 175 Md. App. 153, 159 (2007)). "The language of the rule is mandatory, and review of a claim of insufficiency is available only for the reasons given by [the defendant] in his motion for judgment of acquittal." *Peters v.*

State, 224 Md. App. 306, 353 (2015) (internal quotation marks omitted), (quoting *Whiting v. State*, 160 Md. App. 285, 308 (2004)), *cert. denied*, 445 Md. 127 (2015).

Appellant concedes that he did not specifically argue that the evidence was insufficient to convict him for robbery with a dangerous weapon in his motion for judgment of acquittal. Appellant contends, however, that he preserved his sufficiency argument because the issue was raised in and decided by the trial court pursuant to Maryland Rule 8-131(a).

At the close of the State's case, appellant moved for judgment of acquittal on the basis that the evidence was insufficient to identify him as the robber. The court denied appellant's motion and the defense rested. Appellant subsequently renewed his motion for judgment of acquittal at the close of all the evidence, and the court ruled as follows:

> THE COURT: Okay. [Defense counsel], do you wish to renew your motion?
>
> [DEFENSE COUNSEL]: Yes, Your Honor. And I would renew motion for judgment of acquittal on all counts. I will ask you to simply incorporate the argument that I made at the end of State's case . . . .
>
> THE COURT: All right. In my reading last night to make decisions about the instructions, as I stated, I did read the *Handy* case *Handy v. State*, at 357 Md. 685 (2000), and that is a case which made it clear that the Court must make an independent finding as a matter of law with regard to the character of the implement or instrument used as a dangerous or deadly weapon. The procedure which was described in the *[H]andy* case was that it is for the Court to determine initially as a matter of law whether an object can be considered a deadly or dangerous weapon under any of the *Brooks* categories.
>
> If the trial court is satisfied than [sic] an object can fit into any of the *Brooks* tests, then the trier of fact is left to determine whether the criminal use of a deadly or dangerous weapon actually occurred. And in this case, and in other discussion, *it was clear that the motion for judgment was the appropriate time for the Court to do that review as a matter of law* . . . .

> Let me finish. The first thing I have to do is analyze the object itself. The second is whether or not the allegations of the State actually constitute the commission of a robbery with a dangerous or deadly weapon. And the Court does feel as a matter of law under the facts which have been presented by the State even viewing them in the light most favorable to the defendant at this juncture of the trial that the elements of robbery with a dangerous or deadly weapon have been met in this case.
>
> And as the other charges are lesser included offenses, the Court finds that there is sufficient evidence to take this matter to the jury with regard to those as well.
>
> As I previously stated in quoting from the *Handy* case, obviously it is for the trier of fact to determine whether the crime – excuse me, whether the criminal use of a deadly or dangerous weapon actually occurred in this case. All right, [defense counsel], certainly I'll be happy to hear from you.
>
> [DEFENSE COUNSEL]: . . . I just, for the record, would object to the Court's finding as a matter of law regarding this particular exhibit. I believe it's Exhibit No. 2. I've had a chance to examine it as well. . . . But aside from that, it to me appears to be a toy plastic device. It's light weight. Has no visible magazine in it, although the Court did indicate that it appeared that there was an area where a magazine would fit.
>
> There's been no testimony at all offered by the State to determine what it actually is. So it's mere speculation by the Court as to what that device is. And more important, it also was not evaluated to see if it was functional, which again, under the theory of bludgeon, I assume would not work. However, I will point out that we have proof that it is not an effective bludgeon. In fact, the one, the video and the testimony from the State's witness Mr. Ahmed indicates that he was, in fact, hit with a gun. And there was no evidence of injury testified to nor alleged. So for those reasons, I would object to the Court's ruling on that issue.

(Emphasis added). The trial court then heard argument from the State.

> [PROSECUTOR]: Just briefly, Your Honor . . . . Just because Mr. Ganey was unsuccessful in inflicting injury upon Mr. Ahmed doesn't mean it wasn't possible or was, in fact, unlikely. . . The question is not whether the item did cause injury but whether the item was used in a way that is likely to cause serious injury. And I think hitting somebody in the head with any hard plastic object whether it be light weight or heavy, you hit somebody in the

> head with a hard plastic object such as this weapon, you are likely to cause serious injury even if you fail.

The court stated that it was "not going to make any change to its finding in this case."

Although appellant did not properly preserve the dangerous or deadly weapon argument, we note that both parties argued the issue before the trial court. We have previously reviewed sufficiency of evidence arguments despite them not being properly preserved, noting that "the purpose of the Rule's particularization requirement, is to enable the trial judge to be aware of the precise basis for the defendant's belief that the evidence is insufficient." *Steward v. State*, 218 Md. App. 550, 558 (2014) (quotation marks omitted) (citing *Warfield v. State*, 315 Md. 474, 487 (1989)). *See also Bacon v. State*, 82 Md. App. 737, 740-41 (1990) (concluding that a sufficiency challenge was raised and decided below where, although the specific argument as to insufficiency was not raised by defense counsel, it was "clearly contemplated" by the court), *rev'd on other grounds*, 322 Md. 140 (1991). We shall therefore address appellant's sufficiency argument.

II. Sufficiency of the Evidence

Appellant contends that there was insufficient evidence to convict him under Md. Code (2002, 2012 Repl. Vol.,) § 3-403(a)(1) of the Criminal Law Article ("CL"). That section provides:

> (a) Prohibited – A person may not commit or attempt to commit robbery under § 3-402 of this subtitle:
>
> (1) with a dangerous weapon[.]

Appellant argues that he could not have committed robbery with a dangerous weapon because the air pistol is not a "dangerous weapon." The Court of Appeals has explained the two-step procedural analysis applicable here.

> It is for the trial court to determine initially, as a matter of law, whether an object can be considered a deadly or dangerous weapon under any of the *Brooks* categories. If the trial court is satisfied that an object can fit into any of the *Brooks* tests, then the trier of fact is left to determine whether the criminal use of a deadly or dangerous weapon, actually occurred.

Handy v. State, 357 Md. 685, 694 (2000).

A. Dangerousness as a Matter of Law

We must first consider, as a matter of law, whether the air pistol here could be considered a deadly or dangerous weapon. "When the trial judge's ruling involves a legal question . . . we review the trial court's ruling *de novo*." *Parker v. State*, 408 Md. 428, 437 (2009) (citation omitted).

In *Brooks v. State*, 314 Md. 585 (1989) the Court of Appeals announced the following objective test to determine whether an item constitutes a dangerous weapon in the context of an armed robbery:

> [F]or an instrument to qualify as a dangerous or deadly weapon under [the armed robbery statute], 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; (2) under the circumstances of the case, immediately usable 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, 314 Md. at 600 (internal citations and quotation marks omitted).

In *Brooks*, the defendant robbed a Fotomat store by pulling up his shirt to reveal "a gun" tucked into his pants. *Id*. at 586. The store clerk testified that she believed Brooks would have shot her had she not given him money from the cash register. *Id*. The "gun" was actually a "lightweight plastic toy pistol." *Id*. The Court in *Brooks* then applied its new objective test to determine whether the plastic toy pistol qualified as a dangerous or deadly weapon. It concluded that the toy pistol did not qualify as a dangerous weapon because: (1) it was not an instrument designed or used to destroy, defeat, or injure an enemy in combat; (2) there was no evidence to suggest that the toy pistol's weight or heaviness permitted it to potentially inflict serious or deadly harm; and (3) that Brooks only used the toy pistol in a threatening manner rather than in a way that could inflict serious or deadly harm. *Id*. at 600-601.[1]

In *Handy v. State*, 357 Md. 685 (2000), the Court of Appeals applied the *Brooks* test to determine whether pepper spray was a dangerous or deadly weapon within the meaning of the predecessor of CL § 3-403(a)(1). In *Handy*, the defendant sprayed a mailman's eyes with pepper spray, and then stole the mailman's mail bag. *Id*. at 689. After the jury

[1] The defendant in *Brooks* was convicted under Md. Code (1957, 1996 Repl. Vol.), Art. 27, §488, the predecessor statute to CL § 3-403, which provided for enhanced penalties for robberies committed "with a dangerous or deadly weapon." In 2002, the legislature recodified the statute as CL § 3-403 and deleted the word "deadly." 2002 Md. Laws, ch. 26. According to the Revisor's Note to CL § 3-403, "any weapon that is inherently deadly is also inherently dangerous," thus, the removal of "deadly" from the statute was not a substantive change. The legislature amended CL § 3-403 again in 2005, adding (a)(2), which provides that a person may also commit robbery with a dangerous weapon "by displaying a written instrument claiming that the person has possession of a dangerous weapon." The legislature has not amended CL § 3-403 since 2005.

convicted *Handy* of armed robbery, he appealed, arguing that pepper spray was not a dangerous or deadly weapon pursuant to the armed robbery statute. *Id*. at 690.

The Court of Appeals applied the three objective tests from *Brooks* to the use of pepper spray. To determine whether pepper spray fit into the first category in *Brooks*—an instrument used or designed to destroy, defeat, or injure an enemy—the Court looked at how other jurisdictions addressed the use of pepper spray in an armed robbery. *Id.* at 696-699. Noting that pepper spray could cause pain and impairment to a victim when correctly utilized, the Court held that "pepper spray, mace, and tear gas canisters generally are designed in such a way that they may fit within the first category of *Brooks*." *Id*. at 699. The Court then considered whether the use of pepper spray also qualified as a dangerous weapon pursuant to the second and third categories in *Brooks*, i.e., "whether under the circumstances of the case, the weapon was immediately useable to inflict serious . . . harm, or whether it was actually used in a way likely to inflict that sort of harm." *Id*. at 699 (internal quotation marks omitted) (quoting *Brooks*, 314 Md. at 600). The Court of Appeals considered the mailman's testimony that the pepper spray caused him pain and temporarily impaired his vision, and concluded that that testimony produced legally sufficient evidence that the pepper spray allegedly used was a dangerous weapon pursuant to the second and third categories in *Brooks*. *Id*. at 700-01.

Here, the trial court examined the air pistol in order to determine whether it qualified as a dangerous weapon pursuant to the three-part test articulated in *Brooks*:

> I did take the opportunity in the presence of counsel yesterday to examine the item referred to as a gun. *I did find it to be what appears to the Court at least to be an air pistol. It appears to be made of plastic, but it is*

not a flimsy plastic item such as would be used to reproduce something which is actually a toy. It is substantial. It is something that does not simply crumple on contact. It is not extremely heavy, but it does have some heft to it, although, it is not something I would describe as a heavy item.

The Court did note when I reviewed it that it does apparently have a hollow part of the handle which appears to be something where a magazine could have been put in. At the time the Court examined it, at the time it was offered into evidence, and presumably the time it was seized from the defendant within several hours of this offense, it did not have a[] magazine in it. But from its construction, the way the trigger works, the way the hammer works, the way it all seems to be designed, it appears to be an air pistol. It also appears to be an air pistol because it does have the characteristic orange markings around the opening at the end of the muzzle, which are typically put there to alert anyone looking at that item that it is an air pistol and not an automatic handgun. *Because it does mimic the shape and size and color otherwise of an automatic handgun.*

In this case, however, the orange markings on the item had been blackened to look like the black muzzle and handle. In one area black duck [sic] tape was used. In another area what appeared to be ink was used. And there was a third substance [that] was used as well. The Court is unclear what that was, although, it's flaking off onto the Court's hand. So clearly this item has been altered to appear to be a handgun.

The Court does not look at the alterations of the item in the making [of] the assessment as to whether or not the item fits into one of the three definitions. The Court looks to the fact that it does appear to the Court at least to be an item which was designed to expel projectile, probably a plastic one, but any type of expelling of any type of projectile at close range the Court views as something that could do significant damage, particularly when pointed at someone's face, particularly had it been loaded and had it been discharged in the area of someone's eye.

So I think that this item certainly had that potential. However, *what the Court looks to in making the finding today is how the item was actually used. It was not theoretically a bludgeon. It was actually used, according to the video, which is in evidence, as a bludgeon, and according to Mr. Ahmed not once, not twice, but three times.*

And the Court having examined the item itself, *I do find when used in such a way to strike someone in the head repeated times that this is an item which could inflict serious harm. And so based on that, the Court does find*

> *as a matter of law that whether or not this item is something that was something that fit into the Brooks categories one or two, although I think there is an argument it definitely fit into two, it certainly fit into three because it was actually used in a way that was likely to inflict that sort of harm, three blows to the head. And the item itself in the Court's view is substantial enough to inflict serious harm.*

(Emphasis added.) The trial court concluded that, as a matter of law, the air pistol qualified as a dangerous weapon pursuant to the third category of *Brooks*.

Applying the *Brooks* test to this case, we agree with appellant that the air pistol is not designed to destroy, defeat, or injure an enemy or for combat, and therefore does not qualify as a dangerous weapon pursuant to the first category in *Brooks*.

Moving to the second *Brooks* category, the instrument must, under the circumstances, be immediately useable to inflict serious or deadly harm. *Brooks*, 314 Md. 600. Here, the State produced no evidence to explain what types of projectiles the air pistol could fire, whether it was loaded with ammunition on the night of the robbery, what kind of harm the projectiles would cause if fired, and whether this particular air pistol was capable of firing on the night of the robbery. In short, the State introduced no evidence at trial pertaining to the functionality of the air pistol. There was insufficient evidence, then, to classify this air pistol as a dangerous weapon pursuant to the second category in *Brooks*.

To qualify as a dangerous weapon pursuant to the third *Brooks* category, the instrument must be "actually used in a way likely to inflict that sort of harm [serious or deadly]." *Id.* Here, Ahmed testified that appellant struck him in the head with the air pistol three times.

Appellant argues that the air pistol could not be used in a way likely to inflict serious or deadly harm because Ahmed sustained no serious injuries. Whether appellant successfully inflicted harm on Ahmed does not negate the fact that appellant actually used the air pistol in such a manner. As the Court of Appeals explained in *Handy*, merely the potential for harm, rather than actual harm, determines whether an object is a dangerous weapon as a matter of law:

> We, however, believe that when, as a matter of law, an object or substance can be used as a deadly or dangerous weapon, the potential for bodily harm suffices, regardless of the extent of resulting harm in an actual case. For example, if a person threatens to use pepper spray or attempts to use pepper spray but misses the victim's respiratory system or eyes, striking him on the shoulder or chest, but nonetheless successfully completes the robbery, or attempts to complete it, he or she has committed robbery with a deadly or dangerous weapon, just as if the offender had committed a robbery by simply displaying a handgun, or by simply discharging a handgun, but missing the victim.

357 Md. at 699.

Here, the trial court examined the air pistol thoroughly and described its weight, noting that it was "substantial," and "something that does not simply crumple on contact," and though "not extremely heavy," it "does have some heft to it."

Based on the trial court's observations of the gun and the evidence indicating its use as a bludgeon, we hold that there was sufficient evidence from which the trial court could find that this air pistol, when used as a bludgeon, qualified as a dangerous weapon under the third category of the *Brooks* analysis.

B. Sufficiency of Evidence

Because the trial court correctly determined as a matter of law that the air pistol here qualifies as a dangerous weapon, the jury was permitted to determine whether appellant actually committed the robbery with a dangerous weapon. *Handy*, 357 Md. at 694. The standard of review for the sufficiency of the evidence 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.'" *Hobby v. State,* 436 Md. 526, 538 (2014) (citations omitted) (quoting *Derr v. State,* 434 Md. 88, 129 (2013)) (emphasis in original). "The test is not whether the evidence *should have or probably would have* persuaded the majority of the fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Painter v. State*, 157 Md. App. 1, 11 (2004) (internal citations and quotations omitted). In applying this test, "[w]e defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence." *Neal v. State*, 191 Md. App. 297, 314 (2010) (internal citations and quotations omitted).

Given that the jury had the opportunity to view the surveillance video of the robbery, assess Ahmed's credibility, handle the air pistol during deliberations, and consider the stipulation of the parties that police found the air pistol on appellant's person in the hours following the robbery, a rational trier of fact could have found the essential elements of armed robbery beyond a reasonable doubt.

III. The Effect of the Missing Air Pistol on Appellate Review

Due to circumstances beyond appellant's control, the air pistol admitted as State's Exhibit 2 was destroyed and therefore not transmitted with the record on appeal. Appellant contends that he has been denied meaningful appellate review because it is impossible for this Court to determine whether the air pistol was a dangerous weapon "without being able to touch and see it or without specific enough descriptions to envision it."

In support of his contention, appellant relies on *Wilson v. State,* 334 Md. 469 (1994). In *Wilson*, due to a tape recording error, the defendant's cross and redirect examinations were not recorded. *Id*. at 472. Only in preparation for his appeal did the defendant learn of this recording error. *Id*. at 473. In determining whether to grant Wilson a new trial, the Court of Appeals stated, "It is only when it is impossible adequately to substitute for the record . . . that the appellate court need consider a defendant's claim of deprivation of meaningful appellate review. *Id*. at 476 (citing *Smith v. State*, 291 Md. 125, 137 (1981)). The Court stated:

> If the omission is not completely supplied, to be entitled to a new trial, the petitioner must establish that *the missing material rendered his appeal meaningless*, *i.e.,* that he was deprived of meaningful appellate review. To accomplish this, he has to show that the omission is not inconsequential, but is 'in some manner' relevant to the appeal. We hold that the petitioner met this burden in this case. Indeed, consistent with the parties' agreement, the portion of the transcript which *could not be reproduced* involved an issue that went to the very heart of the appeal, *i.e*., whether the petitioner was improperly cross-examined . . . .

Id. at 477 (emphasis added). Because the parties could not reproduce the relevant portion of the record, the Court of Appeals granted Wilson a new trial. *Id*. at 479.

Here, there is no need to substitute for the missing air pistol—the record provides a more than adequate description. In its ruling as a matter of law that the air pistol constituted a dangerous weapon pursuant to *Brooks*, the trial court thoroughly described the air pistol in detail, stating,

> I did take the opportunity in the presence of counsel yesterday to examine the item referred to as a gun. I did find it to be what appears to the Court at least to be an air pistol. It appears to be made of plastic, but it is not a flimsy plastic item such as would be used to reproduce something which is actually a toy. It is substantial. It is something that does not simply crumple on contact. It is not extremely heavy, but it does have some heft to it, although, it is not something I would describe as a heavy item.
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> The Court did note when I reviewed it that it does apparently have a hollow part of the handle which appears to be something where a magazine could have been put in. At the time the Court examined it, at the time it was offered into evidence, and presumably the time it was seized from defendant within several hours of this offense, it did not have a[] magazine in it. But from its construction, the way the trigger works, the way the hammer works, the way it all seems to be designed, it appears to be an air pistol. It also appears to be an air pistol because it does have the characteristic orange markings around the opening at the end of the muzzle, which are typically put there to alert anyone looking at that item that it is an air pistol and not an automatic handgun. Because it does mimic the shape and size and color otherwise of an automatic handgun.

In lodging an objection to the trial court's ruling, appellant's trial counsel argued that the air pistol is "light weight" but did not challenge the court's description of the air pistol in any significant way. Nor does appellant, on appeal, contend that the court's description was inaccurate. Based on the trial court's descriptions, we are able to determine whether, as a matter of law, the air pistol constitutes a dangerous weapon pursuant to *Brooks*.

In addition to the trial court's description, appellant supplemented the record on appeal to include affidavits and letters from trial counsel and the trial judge. Consistent

with the court's description, appellant's trial counsel described the air pistol in an affidavit as follows:

> It was constructed of plastic and was black in color. The very tip of the barrel had a red plastic ring which appeared to have black markings which are not factory produced. The style of the gun was an automatic. Its size was about that of a full size automatic handgun. There was no clip or magazine with the gun that I can recall and in fact I do not believe that the gun was designed to have a magazine. The gun was lightweight and I would estimate its weight as approximately one to two pounds. I would describe the gun as a toy gun.

The prosecutor also supplemented the record and provided a photograph of State's Exhibit 2, in which the air pistol was positioned above a ruler for scale, indicating that the air pistol was approximately eight inches in length. Finally, the trial judge also provided a letter to supplement the record in which she explained that, "[b]ecause it was clear that the nature of the object used would be an issue on appeal if the trial should result in a conviction, [the court] took great care to put the whole of [its] observations and analysis on the record."

The record sufficiently describes the air pistol in question such that it does not require any substitution. Therefore, appellant has not been deprived of meaningful appellate review.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.