Circuit Court for Baltimore County
Case No. 03-K-14-005576

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2204

September Term, 2016

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EARL SYLVESTER COUSINS

v.

STATE OF MARYLAND

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Woodward, C.J.,
Meredith,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

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Opinion by Davis, J.

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Filed: October 23, 2017

Appellant, Earl Sylvester Cousins, was tried and convicted by a jury in the Circuit Court for Baltimore County (Cahill, J) of two counts of armed robbery, two counts of robbery, one count of theft over $10,000, one count of armed carjacking, one count of carjacking and one count of kidnapping. Appellant was sentenced to life in prison without the possibility of parole for armed robbery, ten years in prison for kidnapping and twenty years in prison for armed carjacking, the sentences to be served consecutive to one another and to another sentence he was already serving. The sentences on the remaining counts were made concurrent or merged. Appellant filed the instant appeal in which he posits the following questions for our review:

> 1. Based on statements Appellant made during trial and sentencing, did the trial court err by not conducting a competency hearing and/or ordering a competency evaluation?
>
> 2. Was the evidence sufficient to sustain Appellant's convictions for armed robbery and armed carjacking?
>
> 3. Was the evidence sufficient to sustain Appellant's conviction for kidnapping?

## FACTS AND LEGAL PROCEEDINGS

The genesis of the instant appeal is the proceedings before a jury in the Circuit Court for Baltimore County on September 14 and 15, 2016. The offenses for which appellant was tried and convicted emanate from the armed robbery of a branch of the M&T Bank on Loch Raven Boulevard on September 2, 2014 during which Appellant took over $20,000. One of the tellers identified Appellant as the robber and the State also introduced surveillance of the robber. In addition to the determination by a detective who reviewed the surveillance

tape that Appellant was the robber, Appellant's handprint was found on a chair in the lobby of the Bank. In addition, the name "Earl" appeared as an entry in a sign-in book from the bank. The robber had apparently signed the book. Moreover, an informant had called the police and told them that he had planned to participate in the robbery, but had "chickened out." The informant had also told the police that Appellant was the robber.

A dye pack hidden in the cash, maintained by the bank, exploded as Appellant fled from the bank. When Appellant was arrested, he was sitting near a truck in which a large amount of cash covered in dye was found inside the glove compartment. The driver told police that Appellant had put it there. Significantly, when Appellant was arrested, he confessed to robbing the bank and a recording of his confession was played for the jury.

After he committed the robbery, Appellant walked out of the bank, entered a taxi cab driven by Papa Mbaye and sat in the front passenger seat. Mbaye had been parked in front of the bank to drop off passengers. The passengers, Katarah Perry, her daughter and her mother-in-law, were still in the back seat of the cab when Appellant boarded. Appellant asked for a ride. Mbaye testified that Appellant never offered him money, but left cash on the console of the cab. Perry testified that Appellant offered Mbaye $200 and that, although Mbaye refused, Appellant left cash on the console. Appellant also offered money to Perry, who refused it.

Appellant told Mbaye, "You need to drive. I need a ride. You need to go." When Mbaye refused, Appellant pointed a gun at him and threatened him. Mbaye proceeded to drive, at which time, Perry's mother-in-law started to pray. Appellant "repeatedly said, you

know, I don't need to pray. You can stop praying. I'm not going to hurt you. I'm not going to shoot anybody. I just want a ride." He then made a comment "along the lines of I'm stealing a white man's money. I don't want to hurt anybody. I just want to get back at what's taken from me . . . ." Appellant ordered Mbaye to drive him to an intersection that was three or four miles away. The cab arrived at the intersection "after a few minutes." Appellant got out of the cab and walked away. Mbaye drove to a nearby location and called the police.

Although several witnesses testified that Appellant brandished a gun during commission of the robbery and carjacking, the gun was never recovered. Mbaye, who testified that he was not familiar with guns, described it as "small" and "black." Mbaye further described the weapon as a handgun and clarified that it did not look like a revolver. One of the bank employees also described the gun as not looking like a revolver. He described the weapon as a black "automatic" handgun that had a "clip that goes in the bottom of it." Although the employee could not visually verify that it was a real gun, he testified: "I really wasn't going to find out whether that gun was real or not . . . better to be safe than sorry." A bank teller testified that the gun "looked real," but also admitted that she didn't "know anything about guns." She could not recall specific details about the gun's appearance. Another teller, when asked whether the gun was real or fake, testified: "I wouldn't be positive on that. I'm not sure."

Appellant told detectives, who interviewed him, that it was a "fake gun" in "[a] little holster . . . with tape around it." He added that "that motherfucker didn't work. It ain't

shootin' no one [sic]." Appellant stated that it was "like a toy gun." When a detective asked if it was "a broken real gun," Appellant responded "[n]o, it was a toy gun . . . [i]t was like a toy gun." He finally added that "[i]t was basically like a blank gun, really . . . it wasn't shit. The holster made it look like a gun." One of the detectives speculated it was a real gun because, according to the Detective, when he interviews suspects, they sometimes lie about whether the gun they used in an offense was real or not. In cases where the gun is not recovered, the detective assumes that it was real.

On March 25, 2015, prior to the severance of Appellant's offenses for trial, the lower court ordered a competency evaluation upon the request of Appellant's trial counsel. The doctor who evaluated Appellant stated, in a prepared report, that Appellant was competent. At the time, Appellant's counsel and the State stipulated that he was competent to stand trial.

## DISCUSSION

### I.

Appellant contends that, because he made "bizarre statements" during his trial testimony and sentencing, "the trial court erred in failing to conduct a competency hearing and/or order a competency evaluation." Appellant requests that his convictions be reversed.

The State responds that the trial court properly exercised its discretion in declining to re-evaluate, *sua sponte*, Appellant's competency to stand trial. The State notes that Appellant had been previously evaluated and declared competent to stand trial, to which both the State and Appellant's trial counsel stipulated. Furthermore, the State asserts that,

after Appellant was found competent to stand trial, there is nothing in the record that would have triggered the court's legal duty to reassess his competency. The State maintains that Appellant "politely and cooperatively participated with his privately retained counsel during his second trial" and he demonstrated an understanding of his rights and the court proceedings. The State further notes that Appellant's privately retained counsel did not request a competency hearing. Regarding Appellant's assertions of his own "bizarre" behavior and "rambling" statements, the State argues that these instances fall short of triggering the court's obligation to order a re-evaluation of his competency to stand trial. The State maintains that Appellant's testimony, while untrue, does not constitute incompetence, but "rather a purposeful attempt to manipulate the facts in order to obtain a favorable verdict." The State also argues that the statements and behaviors at issue "are far less 'bizzarre' than those referenced in other cases," specifically, *Thanos v. State*, 330 Md. 77 (1993), *Gregg v. State*, 377 Md. 515 (2003) and *Peaks v. State*, 419 Md. 239 (2011). Accordingly, the State requests an affirmance of the lower court's decision.

"[C]ompetence to stand trial is the 'foundational right for the effective exercise of a defendant's other rights in a criminal trial.'" *Gregg*, 377 Md. at 526 (2003) (quoting *Medina v. California*, 505 U.S. 437, 457 (1992)). "The Fourteenth Amendment to our federal Constitution 'prohibits the criminal prosecution of a defendant who is not competent to stand trial,' and the Legislature has placed the duty to determine competence to stand trial on the trial court." *Id.* (quoting *Roberts v. State*, 361 Md. 346, 359, 363–67 (2000)).

Md. Code Ann., Crim. Proc. ("C.P.") § 3–104(a) provides, "If, before or during a trial, the defendant in a criminal case . . . appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial." This is to "ensure that the requirements of due process are satisfied." *Peaks*, 419 Md. at 251 (citing *Roberts*, 361 Md. at 363–64).

C.P. § 3–101(f) defines "[i]ncompetent to stand trial" to mean "not able: (1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." To be competent means having a "present ability to consult with [a] lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings[.]" *Thanos,* 330 Md. at 85 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

Competency to stand trial is presumed for a criminal defendant until an allegation to the contrary is made. *Gregg,* 377 Md. at 538. "Once an allegation of incompetence is made, however, the defendant's competence to stand trial then must be determined based on evidence meeting the beyond a reasonable doubt standard." *Id.*

In addition to an allegation of incompetence by the defendant or the prosecution, the duty of the trial court to determine a defendant's competence may also be triggered, "upon a *sua sponte* determination by the court that the defendant may not be competent to stand trial." *Thanos*, 330 Md. at 85. "Moreover, the determination is not one to be made lightly, but upon testimony and evidence on the record." *Treece v. State*, 313 Md. 665, 682

(1988) (citations omitted). "The observation of the defendant's behavior may also be considered 'evidence on the record' which might support a determination on the issue of competency." *Peaks*, 419 Md. at 256. Even after a defendant has been found competent, "a reconsideration may be made, within the court's discretion, at any time before final judgment." *Id.* at 259.

In *Thanos*, *supra,* the Court of Appeals held that, "the trial court did not have a *sua sponte* obligation to conduct a competency hearing." 330 Md. at 86. In support of its holding, the Court noted that the State had requested a competency evaluation of Thanos, but that Thanos opposed it, stating that neither he nor his counsel asserted incompetence and the trial court had not observed incompetence. *Id.* After receiving a death sentence, Thanos then "maintain[ed] that his bizarre behavior warranted a competency hearing." *Id.* The Court characterized this as seeking to "have it both ways."

The Court further noted that, after an independent review of the record, the evidence did not support the determination that the trial court erred in not ordering a competency hearing. "None of Thanos's four expert witnesses at the sentencing proceeding ever suggested that he was incompetent to stand trial." *Id.* Despite making "peculiar remarks to the trial judge, his words on the whole were very lucid." *Id.* "He appeared to grasp all of his rights as they arose throughout the proceedings." *Id.* "He explained very clearly why he preferred conditions in the Super Max facility in Baltimore to those of the St. Mary's County Detention Center." *Id.* "[H]e understood and insightfully articulated his tendency to become disruptive under stress, which reasonably justified his initial desire to absent

himself from the proceedings." *Id.*

In *Gregg, supra*, the Court also held that the lower court's *sua sponte* obligation to evaluate the accused's competency to stand trial had not been triggered, describing Gregg's behavior as "stubborn and argumentative, at most[.]" 377 Md. at 547. Specifically, the Court examined Gregg's argument with the trial judge regarding standing to address the court, *i.e.,* Gregg asserted that he had "orthopedic restrictions" on walking and that he had already done his "maximum [amount of] walking at three" in the morning. *Id.* at 529–30. Ultimately, the Court noted that, "[h]e responded appropriately to the judge's questions and his defense was in no way aberrant for a *pro se* defendant. *Id.* at 547. He demonstrated both a rational understanding of the proceedings in which he was involved and of the relevant facts." *Id.*

The Court also distinguished *Pate v. Robinson*, 383 U.S. 375 (1966), upon which Gregg relied. 377 Md. at 547. Unlike *Robinson*, there was no evidence of Gregg's history of "pronounced irrational behavior" *id,* and "[t]here [was] nothing in the record of the circuit court proceedings . . . indicating that Gregg lacked the 'sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding or factual understanding of the proceedings.'" *Id.* at 546 (quoting *Ware v. State*, 360 Md. 650, 706 (2000)).

In *Peaks*, *supra*, the Court held that there was insufficient evidence in the record to rebut Peaks' prior presumption of competence. 419 Md. at 261. Although Peaks "act[ed] out," "yell[ed] in court," "us[ed] profanities and indicat[ed] his belief that the system was

fixed against him[,]" even becoming "completely unruly" at one point, requiring removal from the court, *id.* at 249–50, there was evidence that he was also "lucid," "quite coherent," and "engaged in extensive discussions" with the judge. *Id.* at 206–61. Ultimately, the trial judge "determined that Peaks was only attempting to manipulate the court." *Id.* at 261.

In the instant case, Appellant draws our attention to the following examples, from his direct testimony, of his behavior that triggered the lower court's legal duty to re-evaluate *sua sponte* his competency to stand trial.

> • Appellant testified that his brother had an account at the M&T Bank and was "killed prior to what's going on with this stuff," *i.e.*, "given some bad drugs by a force due to what's going on right here, what I'm dealing with right here."
>
> • Appellant testified that his palm print may have been present at the bank because his mother had an account there.[1]
>
> • Appellant testified that his mother had been targeted by the FBI, stating that he "wouldn't ask her to testify." Appellant further explained:
>
> > My mother—I would never ask my mother to do nothing [sic] dishonest. I would never ask my mother to lie. My mother been [sic] through some stuff dealing with this same FBI agent and this case. My mother just loves my brother, lost my brother because of the stuff going on, and even though I'm a drug user and even though I have my shady dark side of life, I'm considerate when it comes to that lady.
> >
> > ***
> >
> > So you were on that tape, was that true or not? He says something about my mother was worried about me and knew I wanted to call on, and my mother never talked to them. You should go ask her. Let the jury decide. There she go [sic]. She's a jury witness. She's not going to lie for nobody [sic], you or nobody

[1] Appellant notes in his brief that, due to his mother's presence in court during other witnesses' testimony and a subsequent sequestration order, the defense could not call her to testify and corroborate his testimony that she had an account with the bank.

> else. I have no reason to lie to you. I'm a drug addict. I handle [sic] around my shady friends, you know. I'm scared to death of the police. I'm scare to death of you. I'm scared to death of this Court, you know, but I didn't rob that bank.

• Appellant testified that he was "kidnapped" by the police. When asked if the "FBI guy" he continued to reference was "Detective Morano,"[2] Appellant responded:

> FBI Agent Morano, the guy that sit here [sic] that can't be truthful, whatever you want to call him. He follow [sic] different police as they want. He a drug dealer. He's an FBI agent. He's a county police. He's a frank for an expert. He's a [sic] illusionary and he's all things in once. He's a video photographer. I don't know which [sic] his title. All I know [is] he had on [a] U.S. Marshal badge on [sic], and I knew I didn't want to bother him.

Appellant also characterizes his statements on cross-examination as "bizarre, rambling and unresponsive," and cites the following colloquy:

> Q. Anything happen on the trip? [when a police officer drove Appellant to the Baltimore County police station]
>
> A. Yes. He tried to talk to me about what we was going out there for and telling me my boy, Johnny Suggs, do I know him? He did this and he did that, [d]o I know him, Nelson Abertis? Man, you better come clean because they trying to pin some murders and some other stuff on you. You better do like they do, you know.
>
> Q. So you're saying it was that person that did that?
>
> A. He was telling me what I better do when I go see them two dudes with the suits on.
>
> Q. But you don't know who that person was?
>
> A. I don't know—I don't know his name. I know he was in that video, okay.
>
> Q. He was in the video?

[2] Detective Steven Morano of the Baltimore County Police Department was assigned to the Baltimore County Commercial Robbery Unit and the FBI task Force for bank robbery as of his trial testimony on September 15, 2016.

A. Yeah. He was in that video, and he was in that video when I was getting—when they took me down in the basement and he took my prints, and he couldn't get it right on the machine. He kept making me do it over and over again.

Q. Now we're going back to—who's that?

A. Morano, the FBI dude kept taking my prints. He couldn't get it right on the machine.

Q. What's that have to do with the other guy?

A. And the black guy was down there. He was just standing by. The white guy, he left and some black dudes from the city came. They—I guess they was [sic] city police or some friends of Johnny Suggs, you know.

Q. Okay. And what'd they have to do with this?

A. What'd they have to do with what?

Furthermore, Appellant cites his statements during allocution as "rais[ing] a *bona fide* doubt about his competence to proceed with sentencing." Appellant draws our attention to the following:

I'm not an animal. And if you locking Doug up for 23 years and he don't be, [sic] then Doug is legally insane or crazy. I never killed nobody, [sic] you know. I had bad, bad trials in this Court, and I'm so disgusted that you got [sic] all these state's attorneys. It became personal, you know.

It became personal and it's clear it's personal with him, you know. You give me 25 years no parole. Nobody [sic] identify me in court. You arrange for the sheriff to cause a mistrial so you can give me 25 no parole. I write, ask for drug treatment in there. It's all in the case file. I don't want to talk about that, but it's still no matter.

***

I'm 53 years old. You think sending me to jail for the rest of my life is going to change anything? It's not, you know. Do it [sic] make you feel what I feel when before you even came on the trial [sic] how the State's Attorney making mockery [sic], laughing like, you know, he could get in my face, you know?

> Sure, I'm a man and I'm going to say what I say, and I want you to understand I don't have nothing [sic] personal against you. I don't even have nothing [sic] personal against them because I understand them now. It took me a while to really, really understand them, right, but that's what happened.
>
> And it's a reason [sic] that he can't wear a black robe with all his friends that came along the last 20, 30 years out here can put robes on because they can judge and they can judge right [sic]. But can you hide behind a mask and do evil for evil? Don't nothing [sic] good from that.
>
> ***
>
> You're an assignment judge. You personally assigned yourself to this case after you gave me the 15 years. You said I was disrespectful in the courtroom, okay. If I file attorney grievance on my attorney and he can't represent me, I have mental problems. Why would you or anybody else would want me to represent myself in the courtroom?

Finally, before allocution, Appellant's trial attorney stated that "[h]is mother thinks that he suffered severe brain damage when he was in vitro because she was beaten by his father, but unfortunately there never was any medical examinations to support that."

In the instant appeal, the court found, and parties stipulated to the fact that Appellant was competent to stand trial before his offenses were severed for trial purposes. During the proceedings, there were no new assertions that Appellant was incompetent. Therefore, in order for there to have been a reason to re-evaluate Appellant's competency, the record would need to illustrate examples of behavior that would have triggered the court's legal duty, *sua sponte*, to reconsider Appellant's competency to stand trial. Although Appellant cites instances of "paranoid, rambling and unresponsive" comments, we are unpersuaded that these instances rise to the level that would trigger the court's legal duty to re-evaluate

his competency to stand trial.

Based on our review of the record, there is no indication that Appellant, at any time, lacked the requisite "sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding or factual understanding of the proceedings." *Gregg, supra.* For the majority of the proceedings, Appellant participated, without incident, and the instances cited do not undermine the presumption of Appellant's competency. Appellant's mistaken or feigned belief that his brother was killed because of his trial, that his mother was targeted by the FBI and that he was "kidnapped" by the police did not impair his ability to assist in his own defense, consult with his attorneys or to rationally and factually understand the proceedings.

Furthermore, Appellant's assertion that his trial attorney's statement about his mother's statement that Appellant may have brain damage from in-vitro abuse suffered by the mother at the hands of the father is a bald assertion without corroboration and, therefore, insufficient to support evidence of a history of mental health issues or brain damage that would have triggered a court to *sua sponte* re-evaluate Appellant's competency to stand trial.

Ultimately, Appellant was testifying from his actual or feigned perception about his version of events. Outlandish testimony alone does not equate to incompetence. However, it can, in conjunction with the evidence as a whole, trigger a court's legal duty to evaluate an accused's competence to stand trial when it illustrates that the accused lacked the "sufficient present ability to consult with his attorneys with a reasonable degree of rational

understanding or factual understanding of the proceedings." *Gregg, supra.* That was not the circumstance in the instant case. Accordingly, we hold that the trial court properly did not re-evaluate, *sua sponte*, Appellant's competency to stand trial.

**II.**

Appellant next contends that the evidence presented was insufficient to sustain his convictions for armed robbery and armed carjacking. Specifically, Appellant asserts that he moved for judgment of acquittal at the close of the State's case, arguing "that the evidence could not sustain convictions for armed robbery and armed carjacking because the State had failed to introduce sufficient evidence that the fake gun that Appellant brandished in the bank and in the taxi cab was a deadly or dangerous weapon." Appellant further asserts that he renewed his motion at the end of all of the evidence and that the trial court erred in denying it. Appellant argues that the gun was not recovered, the witnesses could not definitively discern the authenticity of the weapon and Appellant described the gun as "fake" and as a "toy" in his police statement. Accordingly, Appellant maintains that "the State failed in its burden to present sufficient evidence that the gun was a deadly or dangerous weapon" and requests that his armed robbery and armed carjacking convictions be vacated.

The State counters that "[t]here was ample evidence from which a reasonable juror could conclude that Cousins used a dangerous weapon" as the basis for his convictions for armed robbery and armed carjacking. The State maintains that a crucial factor in determining whether a weapon is a dangerous or deadly is not whether it is fake, but rather,

whether it is capable of inflicting serious bodily injury, *e.g.*, through bludgeoning. The State maintains that there was no evidence provided, including through Appellant's testimony, that would support the inference that the gun used was incapable of inflicting serious bodily harm. Accordingly, the State argues that the element of use of a dangerous weapon has been satisfied and Appellant's convictions must be upheld.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Carroll v. State*, 428 Md. 679, 688 (2012) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

When reviewing the sufficiency of the evidence to uphold a conviction, "[t]he test is whether, after viewing the evidence 'in the light most favorable to [the State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (second emphasis supplied); *accord Fuentes v. State*, 454 Md. 296, 164 A.3d 265, 272 (2017).

Md. Rule 4–324(a) provides, in 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." "Maryland law is clear that, on appeal, an appellant's sufficiency arguments are limited to the specific grounds stated in his motion for judgment at trial." *Reeves v. State*, 192 Md. App. 277, 306 (2010).

In the case *sub judice*, Appellant argued, on his motion for judgment of acquittal,

that the State failed to provide sufficient evidence that the "fake" gun was a dangerous or deadly weapon. Accordingly, Appellant's sufficiency argument is limited to that specific ground.

Md. Code Ann., Crim. Law ("C.L.") § 3–403(a)(1) prohibits an individual from committing or attempting to commit a robbery, pursuant to C.L. § 3–402, with a dangerous weapon.

C.L. § 3–401(e) defines "robbery" as retaining its "judicially determined meaning" with the following exceptions:

> (1) robbery includes obtaining the service of another by force or threat of force; and
>
> (2) robbery requires proof of intent to withhold property of another:
>
> (i) permanently;
>
> (ii) for a period that results in the appropriation of a part of the property's value;
>
> (iii) with the purpose to restore it only on payment of a reward or other compensation; or
>
> (iv) to dispose of the property or use or deal with the property in a manner that makes it unlikely that the owner will recover it.

C.L. § 3–405 prohibits the crime of "carjacking," which is defined in subpart (b)(1) as follows:

> An individual may not take unauthorized possession or control of a motor vehicle from another individual who actually possesses the motor vehicle, by force or violence, or by putting that individual in fear through intimidation or threat of force or violence.

Subpart (c)(1–2) provides for the crime of "armed carjacking," which occurs when

a person "employ[s] or display[s] a dangerous weapon during the commission of a carjacking."

In determining what constitutes a "dangerous weapon," the Court of Appeals has developed three objective tests, "only one of which need be satisfied, to determine that an object used during the commission of a robbery was a dangerous or deadly weapon[.]" *Handy v. State*, 357 Md. 685, 693 (2000).

> [T]he 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 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).

*Id.* (quoting *Brooks v. State*, 314 Md. 585, 600 (1989)).

In *Brooks*, *supra*, the Court held that the defendant's lightweight, plastic toy gun did not constitute a dangerous weapon. 314 Md. at 600. The Court noted that the toy gun did not "obviously" fall into the first category, *i.e.*, "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[.]'" *Id.* The Court also held that the toy gun was excluded from the third category because "[i]ts use was simply by way of displaying its butt to the victim while the weapon was in Brooks's trouser waistband[.]" *Id.* at 601.

Regarding the second category, the Court noted that, "[t]here [was] no evidence to suggest that it was of sufficient weight or heaviness to permit the conclusion" that the toy gun was immediately useable to inflict serious or deadly harm, *e.g.*, as a bludgeon. *Id.* at

600–01.

However, that is not to suggest that a toy or fake gun can never be considered a "dangerous weapon." Even when there is no evidence regarding the gun's weight, the Court has held that a toy or fake gun could be a dangerous weapon. In *Jackson v. State,* 231 Md. 591 (1963),[3] the Court held that a starter's pistol, incapable of firing anything other than blank cartridges, was a dangerous weapon because it could be used as a bludgeon. In *Hayes v. State,* 211 Md. 111 (1956),[4] the Court held that even an unloaded pistol could be a dangerous or deadly weapon as it could be quickly loaded or, again, used as a bludgeon.

Matters complicate, however, when a weapon has not been recovered. In these instances, this Court has held that circumstantial evidence may be used to uphold a conviction. In *Brown v. State,* 182 Md. App. 138, 166 (2008), we held that, "tangible evidence in the form of the weapon is not necessary to sustain a conviction; the weapon's identity as a handgun can be established by testimony or by inference." (Citations omitted). We further noted that, although "[c]ircumstantial evidence is as persuasive as direct evidence . . . [it] is only sufficient if the circumstances, taken together, do not require the trier of fact to resort to speculation or conjecture . . . ." *Id.* at 156–57 (citations omitted) (internal quotation marks omitted). The reasonable doubt standard must still be upheld and circumstantial evidence that "merely arouses suspicion or leaves room for conjecture is

[3] Declined to follow, on other grounds, by *Brooks v. State*, 314 Md. 585 (1989).

[4] Declined to follow, on other grounds, by *Brooks v. State*, 314 Md. 585 (1989).

obviously insufficient." *Id.* at 157 (citations omitted).

In the instant case, the weapon used, *i.e.*, a handgun, was unrecovered; however, there was sufficient circumstantial evidence, *via* witness testimony, to support Appellant's convictions for armed robbery and armed carjacking, specifically, the use of a "dangerous weapon" in the commission of the offenses. Although none of the witnesses could definitively testify that the gun was real, they testified that it appeared to be real. Furthermore, their descriptions included that it was a "small," "black," "automatic," "handgun," that did not look like a revolver and it had a "clip that [went] in the bottom of it." None of the witnesses, including Appellant, testified that the gun was either "lightweight," a color other than black or that it was made of "plastic." The appearance of the gun was real enough to coerce the witnesses to comply with Appellant's demands during the bank robbery.

Although Appellant testified that the gun was a "toy" and "fake," he also described the gun as a "blank gun." Appellant did not testify that the weapon was "lightweight," "plastic" or any other description that would question the weight of the gun or its adequacy in its use in inflicting serious bodily injury, *e.g.,* bludgeoning. Furthermore, as we stated, *supra*, the operability or ability to produce a projectile is not part of the calculus in determining whether a gun is a dangerous weapon. Even a starter's pistol, only capable of firing blank cartridges, can be considered a dangerous weapon because "pistols are frequently used as bludgeons in robberies." *Brooks*, 314 Md. 591–92 (citations omitted). *See also Jackson, supra.*

Therefore, for the foregoing reasons, we hold that the evidence was sufficient to support a finding, beyond a reasonable doubt, that Appellant used a dangerous weapon and, consequently, his convictions for armed robbery and armed carjacking are upheld.

**III.**

Appellant's final assignment of error is that the State failed to introduce sufficient evidence to sustain a conviction for kidnapping "because any asportation of the victim was merely incidental to the bank robbery[.]" The State responds that the robbery was completed and that the "taking and carrying away of Mbaye occurred after the bank robbery was over[.]"

C.L. § 3–502(a) provides that "[a] person may not, by force or fraud, carry or cause a person to be carried in or outside the State with the intent to have the person carried or concealed in or outside the State."

Maryland has adopted the view held by a majority of jurisdictions that a kidnapping must be a separate crime and not incidental to the commission of another felony.

> We aline ourselves with the majority approach that examines the circumstances of each case and determines from them whether the kidnapping—the intentional asportation—was merely incidental to the commission of another offense. We do not adopt, however, any specific formulation of standards for making that determination, but rather focus on those factors that seem to be central to most of the articulated guidelines, principally: How far, and where, was the victim taken? How long was the victim detained in relation to what was necessary to complete the crime? Was the movement either inherent as an element, or, as a practical matter, necessary to the commission, of the other crime? Did it have some independent purpose? Did the asportation subject the victim to any additional significant danger?

*State v. Stouffer*, 352 Md. 97, 113 (1998).

"Whether the confinement or movement of the victim is merely incidental to another crime depends, in nearly every case, on the circumstances[.]" *Id.* at 110.

In the instant case, Appellant argues that he was still escaping the bank robbery when the asportation of the victim, Mbaye, occurred. Appellant cites the fact that he entered the cab, which was parked outside of the bank building, "moments" after the robbery and he was still carrying the "proceeds" of the robbery. Appellant maintains that it was only after the victim refused his money that he demanded a ride at gunpoint. During the drive, Appellant "reassured" one of the other passengers that he was not going to hurt her and that he was not going to "shoot anybody." The cab was driven three to four miles away, *i.e.,* "a few minutes." Once the cab stopped and Appellant exited the vehicle, the victim was free to leave. Appellant also maintains that the gun used was fake and, therefore, could not have expose the victim to harm. Appellant notes that he "did not detain, move or harm the victim beyond what was necessary to escape the scene of the bank robbery" and that "any asportation" was "purely incidental to that offense[.]" Appellant requests that his conviction be vacated.

The State concurs with Appellant's application of the *Stouffer* analysis, but reaches a different result. According to the State, Appellant's forced movement of the victim was unrelated to the already completed bank robbery. The State maintains that the purpose for Mbaye's movement was to effect Appellant's escape, a separate motivation and not incidental to the bank robbery.

However, the State also argues that, "even if escaping the scene of the crime could

be considered a necessary part of the commission of the bank robbery, it was not necessary for Cousins to escape in the cab with its occupants still on board." The State notes that Appellant could have "fled on foot" or he could have ordered the occupants to vacate the cab and he could have fled with the vehicle on his own. The State argues that this fact "supports the reasonable inference that the asportation of Mbaye and his clients had an addition purpose, *i.e.*, to have possible hostages in the event that the police were to catch up with him during his escape." Finally, the State asserts that the movement under gunpoint of Mbaye and the occupants subjected them to additional danger beyond the scope of the bank robbery because none were present in the bank during the robbery. Accordingly, the State avers that the evidence was sufficient to support Appellant's kidnapping conviction.

Reviewing the *Stouffer* factors, we are persuaded that the asportation of Mbaye and the occupants of the cab was not incidental to the bank robbery and, therefore, the evidence is sufficient to uphold Appellant's kidnapping conviction.

Regarding "how far and to what location was the victim taken," the victims were transported three to four miles or several minutes away from the bank. Mbaye was ordered to drive to an intersection of Appellant's choosing, whereupon, Appellant vacated the vehicle.

As it pertains to the second factor, "how long was the victim detained in relation to what was necessary to complete the crime," the victims were detained after Appellant pointed a handgun at Mbaye, threatened him and ordered him to drive away from the bank, thereby moving the other occupants as well. The detention lasted until Appellant exited the

vehicle.

Regarding the third factor, "was the movement either inherent as an element, or, as a practical matter, necessary to the commission, of the other crime," the detention and movement of the victims was not an inherent element of bank robbery, nor was it necessary to effectuate the offense. Neither was the asportation of the victims practically necessary to escape the scene of the crime. There was no evidence presented that Appellant was unable to escape on foot, nor was there evidence presented that Appellant ordered the occupants to vacate the vehicle but that they refused. Appellant chose to keep the occupants in the cab and ordered Mbaye, at gunpoint, to drive away.

In analyzing the fourth factor, "did the movement have some independent purpose," the victims were moved not to further the bank robbery offense itself; the robbery had already been completed. The legal elements required to uphold Appellant's conviction occurred before he entered the cab. Appellant does not argue otherwise. Therefore, the "continuous offense" approach is inapplicable in the instant case. *See Ball v. State*, 347 Md. 156, 188–89 (1997) (holding that the continuous offense approach applied where the accused used force to prevent the interference with his possession of the stolen property, thereby elevating the offense to robbery). Looking at the elements of robbery, escape is not a requirement to uphold a conviction. *See, supra*, C.L. § 3–401(e).

Regarding the final and the fifth factor, "did the movement subject the victim to any significant additional danger," the victims were subjected to significant additional danger for a number of reasons. Appellant involved them, against their will, in a bank robbery

escape. This exposed the victims to a police chase, automobile accident and dangers from Appellant as well. Despite Appellant's reassurances that he was not going to hurt anyone and his assertions, on appeal, that the handgun was fake, the victims, who were innocently in a cab one moment and involved in a bank robbery escape under duress moments later, were subjected to significant additional danger.

Therefore, we hold that the evidence was sufficient to uphold Appellant's kidnapping conviction.

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