

Circuit Court for Somerset County

Case No. 19-K-16-010716

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 56

September Term, 2017

JAMAAL TAYLOR

v.

STATE OF MARYLAND

Friedman,
Beachley,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wilner, J.

Filed: January 11, 2018

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

Appellant was convicted by a jury in the Circuit Court for Somerset County of two counts of reckless endangerment, for which he was sentenced to two consecutive terms of five years imprisonment. He complains in this appeal that (1) the court erred in failing to suppress an out-of-court identification of him by one of the victims, Alexandra Smith, and (2) the evidence was legally insufficient to sustain his convictions. We find no merit in his complaints and therefore shall affirm the Circuit Court judgment.

The charges against appellant arose from an incident that occurred between 10:00 and 10:30 on the morning of May 13, 2016. Aaron Sterling rode his bicycle past appellant, whom he knew. Sterling said that he greeted appellant briefly, just saying “what’s up,” and, as he did, he saw “a flash of silver” and then heard shots,” so he “took off.” He said that appellant had a silver object in his hands. Sterling was not hurt.

Ms. Smith, a postal worker, was in the area at the time. She said she saw a white male, whom she identified from a photographic array as Sterling, talking to a black male, whom she identified, also from a photographic array, as appellant. She said she heard them yelling and then heard Sterling say “man, don’t do that, don’t do that” as he turned in her direction. She testified that Sterling rode his bicycle within six feet of her mail truck and about 12 feet from her and that appellant fired four shots at Sterling, although she did not see a gun. Upon hearing the shots, she dove into her mail truck. In a statement given to Salisbury Police Officer Fontaine, Ms. Smith said that the black male was holding a handgun and that she heard “pop, pop, pop and saw smoke coming from the gun.

Ms. Smith identified appellant from a photographic array prepared by Officer Fontaine. Looking at the array, which contained six photographs, she said, within four or five seconds, “that’s him.” She told the officer that she was about ten feet away from the white male and that appellant was about four feet away from the white male. No other evidence was recovered from the scene. Appellant produced an alibi defense. Two witnesses testified that appellant was at their home that entire day, from before daylight until the evening. The jury obviously did not believe them.

Appellant moved to suppress the identification evidence on the ground that it was unduly suggestive because appellant’s photograph had a “stark white background” and stood apart from the other five photographs. The trial court was not persuaded. The judge noted that when he looked at the photo array, “it never occurred to me to think that one of the pictures stood out from the others because of the white background” and that “the other five photos are strikingly similar.” He said that “[f]ive of the six are clearly of similar bone structure. They have similar skin color, similar facial hair and actually three of them have similar hairstyles.”

Taking into account the five considerations set forth in *Neil v. Biggers*, 409 U.S. 188 (1972)¹, the court noted that Ms. Alexander was “in broad daylight, early in the morning and has a chance you would think to view the Defendant pretty clearly,” that her attention “clearly had to be drawn to it by the shooting,” that the certainty of her

¹ Those considerations are (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the length of time between the crime and the confrontation.

identification was clear from the fact that it took her just seconds to select appellant's photograph, and that the time between the crime and the confrontation was almost "right away." Upon those findings, the court found that the photo array was not impermissibly suggestive and that there was no substantial likelihood of irreparable misidentification. We find no error in those determinations.

At the close of the State's case, appellant moved for judgment of acquittal on the charges of reckless endangerment on the sole ground that there was no evidence that he had a gun – no one saw a gun and no gun was ever recovered. That motion was denied, following which appellant called the two alibi witnesses to testify. At the close of all the evidence, appellant renewed his motion again solely on the ground that there was no evidence of the use of a gun. That motion also was denied.

In this appeal, appellant attempts to expand his argument, with respect to the charge involving Ms. Smith, by arguing that there was no evidence that she was within the "zone of danger." Apart from the fact that that argument was not made below and is therefore not preserved for appellate review, the evidence clearly sufficed to sustain the convictions. As we have observed, Mr. Sterling testified that he heard "shots" – "gunfire" – and that appellant had a silver object in his hands. Ms. Smith said that appellant fired four shots, which she also referred to as "gunshots." Although she said that she did not actually see a gun, she heard the "pop, pop, pop." This evidence sufficed to allow the jury to infer that the silver object in appellant's hand that produced noises that sounded like gunshots was, in fact, a gun. Shooting four bullets at someone in close range – 10 to 15 feet – constitutes reckless endangerment.

**JUDGMENT AFFIRMED; APPELLANT
TO PAY THE COSTS.**