Circuit Court for St. Mary's County
Case No.: 18-K-17-000184

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 10

September Term, 2018

REGINA MALVALEE CLAGGETT-BROWN

v.

STATE OF MARYLAND

Berger,
Leahy,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: August 16, 2019

*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.

Regina Malvalee Claggett-Brown, appellant herein, was convicted by a jury sitting in the Circuit Court for St. Mary's County of possession of heroin and, pertinent to the instant appeal, reckless endangerment in violation of Section 3-204(a)(1) of the Criminal Law Article, Maryland Code (2002, 2012 Repl. Vol.). The trial judge sentenced Claggett-Brown to five years' imprisonment for reckless endangerment, merging, for sentencing purposes, the possession charge. On appeal, Claggett-Brown presents the following question for our review:

> Was the evidence sufficient to convince any trier of fact that Appellant was guilty of reckless endangerment beyond a reasonable doubt?

For the reasons set forth below, we shall conclude that Claggett-Brown has not properly preserved the question for our review but were it to have been preserved we would find the evidence to be sufficient. Accordingly, we shall affirm the judgment of the Circuit Court.

FACTUAL BACKGROUND

At around 10:00 p.m. on October 7, 2016, Paul Baxter ("Baxter") left his home in Chesapeake Beach, Maryland to meet his longtime friend, Stephen Phillips ("Phillips"), at Phillips' place of employment in Chesapeake Beach. Upon leaving work, according to testimony adduced at trial, Phillips met Baxter in the parking lot and noticed that Baxter "was very – he was chatty, you know, he was very talkative." According to Phillips, it appeared that Baxter "might have been taking stuff before," alluding to drugs. Baxter then

drove the two to St. Mary's County where they had planned to meet Regina Malvalee Claggett-Brown ("Claggett-Brown") to purchase Xanax[1] and Percocet.[2]

Baxter and Phillips met Claggett-Brown at a mobile home park located in St. Mary's County, at around 12:45 a.m. According to Phillips' testimony, the two men purchased fifteen pills of Xanax from Claggett-Brown. Phillips swallowed some of the Xanax and handed one to Baxter, but Phillips could not recall at the time of trial whether Baxter actually took the pill. Baxter inquired whether Claggett-Brown had any Percocet available for sale, but she did not. Claggett-Brown informed them, though, that she could get "brown," referring to heroin.[3] Phillips testified that the two men agreed to the purchase,

[1] "Xanax," which is generally prescribed, is a medication "used to treat anxiety and panic disorders."
Xanax, *Drugs and Medication A-Z*, WEBMD, https://www.webmd.com/drugs/2/drug-9824/xanax-oral/details [*archived at* https://perma.cc/YF29-6YHF].

[2] "Percocet," which is generally prescribed, is a medication used to relieve "moderate severe pain" that "contains a[n] opioid (narcotic) pain reliever (oxycodone) and a non-opioid pain reliever (acetaminophen)." Percocet, *Drugs and Medication A-Z*, WEBMD, https://www.webmd.com/drugs/2/drug-7277/percocet-oral/details [*archived at* https://perma.cc/5XFL-DBQC].

The term, "opioid" is an umbrella term including all "medications used to treat pain such as morphine, codeine, methadone, oxycodone, hydrocodone, fentanyl, hydromorphone, and buprenorphine, as well as illegal drugs such as heroin and illicit potent opioids such as fentanyl analogs (e.g., carfentanil)." *Opioid Overdose Prevention Toolkit*, Substance Abuse & Mental Health Servs. Admin. 1 (June 2018), https://store.samhsa.gov/system/files/sma18-4742.pdf [*archived at* https://perma.cc/R3CZ-YZJZ].

[3] At trial, Stephen Phillips, who admitted having been addicted to pain killers following a workplace injury, stated that "I basically stuck with the, you know, Xanax and the Percocet, but if I couldn't find, you know, the Percocet – very rarely did I mess with the heroin." He also indicated that Paul Baxter had been addicted to pain killers and that the two would seek heroin in the alternative when they could not obtain prescription drugs.

explaining that "[Baxter] was under the weather a little bit because whatever – he was fine, just whatever would make him feel a bit better. . . . He was coming off I guess whatever he had in his system."

Baxter then drove Phillips and Claggett-Brown to an apartment complex in Lexington Park, Maryland. Upon arrival, Baxter and Phillips provided sixty dollars each to Claggett-Brown. Claggett-Brown got out of the car, entered an apartment and returned approximately three to five minutes later, whereupon she handed a package of heroin to Phillips, who first "took a little bit of it" before handing it to Baxter. Phillips testified that Baxter "snorted some and he folded it back up and was giving it back to me and then he said that he didn't, he didn't think he got enough and he opened it back up and he snorted some more." Baxter then "folded it up, put it in a pill bottle and he told [Phillips] he couldn't see and asked if [Phillips] could drive." Phillips testified that Baxter then "got quiet." Phillips called to Claggett-Brown, who was standing outside the car talking on the phone and informed her that something was wrong. According to Phillips, Claggett-Brown "came up and she looked at [Baxter] and she ran inside and got a thing of ice and she started putting ice on him. And she, she kind of like looked at him and kind of smacked him a little bit and said that he's fine, he's fine."

Phillips then noticed that Baxter "was out, I mean, he moaned a little bit, but he was – he was incoherent, he wasn't there, like he was, he was going out." Phillips then traded seats with Baxter in the car, with Phillips sitting in the driver's seat. Phillips knew "there was something wrong" and decided to drive Baxter to the hospital. On the drive to Calvert Memorial Hospital, Phillips observed that Baxter "was moaning, he was moan – he was

mumbling a little bit and then he was, when we got on, we were on top of the bridge he started like gargling a little bit, then that, that was it." Phillips then observed no "signs of life" from Baxter.

Upon arriving to the hospital, Phillips informed medical personnel that Baxter had been nonresponsive. Baxter was declared dead shortly thereafter. Dr. Zabiullah Ali, a forensic pathologist with the Office of the Chief Medical Examiner, testified at trial that the "cause of death was a combination of oxycodone and heroin."

At trial, Phillips admitted that he had initially lied to the police about where he and Baxter had obtained the drugs, because he "didn't want to give up [Claggett-Brown]." He also acknowledged that he had been high on Xanax when first speaking with the police and had lied,

> [b]ecause I was scared, I, I didn't know if I did something – If I did something wrong, I, I, I was afraid. I didn't want anybody getting into trouble, I just, I freaked out and I was, I was so incoherent, you know, I mean I wasn't myself and I just, I lied.

About a week later, Phillips spoke with Officer Milton Pesante, a detective with the St. Mary's County Sheriff's Department, when he corrected his prior misstatements and showed Officer Pesante where he and Baxter had gotten the heroin, pointing out the exact apartment that Claggett-Brown entered, before returning to the vehicle with the heroin.

As part of the investigation surrounding Paul Baxter's death, Officer Pesante interviewed Claggett-Brown. When asked about "her association with Steve Phillips and what she would do in relation to him," Claggett-Brown responded: "Steve? Steve, no. I said Steve came down and met me. I won't sell Steve anything. I don't sell pills, but I

hooked him up with peoples that do. You understand, he called me and I – see, I'm like a middle person." Officer Pesante also asked Claggett-Brown "whether or not she realizes the lethality of heroin?" She responded: "That heroin kills people. . . . No, I don't deal with heroin at all. . . . I'm against it, it kills people." Claggett-Brown, during the course of the police interview, informed the officer that she did not sell any pills to Phillips or Baxter that evening, that she had seen the two men earlier in the day and that if Phillips had asked to buy drugs from her, at most, she provided him with the contact information of those from whom he could purchase drugs.

Officer Pesante then asked Claggett-Brown about who was driving the car, to which she responded, "I don't know what [Baxter] took and I told him, I said, you're not driving me anywhere" and that "at that time [Baxter] got out of the car and Steve drove." Officer Pesante testified that he questioned Claggett-Brown several times throughout the interview regarding heroin, to which she responded:

- "I ain't never dealt with heroin, never will";
- "Many people I've done seen drop dead from this stuff";
- "I'm against [heroin], it kills people";
- "I don't deal no heroin;"
- While in the hospital with pneumonia, Claggett-Brown observed "three kids c[o]me in there dead, that [overdosed]" on heroin; and
- "if you give drugs to a grown-ass man and he chooses to do them, that's on him."

Claggett-Brown initially was charged with possession of oxycodone, distribution of oxycodone, possession of heroin, distribution of heroin, reckless endangerment, involuntary manslaughter and second-degree murder. At trial, after the close of the State's case, counsel for Claggett-Brown made a motion for a judgment of acquittal on all charges. The State agreed to *nol pros* the possession and distribution of oxycodone charges. The trial judge denied the motion for judgment of acquittal as to the possession and distribution charges, concluding that such a determination was best left to the jury.

After the denial, counsel for Claggett-Brown announced that he would then "like to address the reckless – defenses of reckless endangerment and manslaughter and second degree murder." The trial judge then heard lengthy arguments on the second-degree murder charge and orally denied the motion to acquit as to that charge as well as the involuntary manslaughter charge, concluding that involuntary manslaughter is a lesser-included offense of second-degree murder. The trial judge, however, did not specifically rule on the charge of reckless endangerment, nor did defense counsel ever argue reasons why Claggett-Brown should be acquitted of the charge or request a ruling as to that charge. In denying the motion for judgment of acquittal on second-degree depraved heart murder, the judge, however, did discuss reckless endangerment:

> *Minor v. State* is a Maryland case, 326 Md. 436, 1991. And it had to do, as [defense counsel] points out, with reckless endangerment. The court ruled a Defendant need not intentionally cause a result or know that the conduct is – and I do find this applicable – substantially certain to cause a result.
>
> This is essentially the difference between reckless endangerment and depraved heart murder. That appears to say to me that it is the certainty or substantialness of the action.

> In other words, if you give a child a loaded gun and they are able to pull the trigger, the odds are very high that child is going to shoot something or shoot itself.
>
> It has been pointed out by [defense counsel] that people give drugs all the time, even assuming that his client gave drugs to the decedent; and that's up for the jury to decide. And most of the time it does not result in death. Nor homicide, not murder, not death.
>
> But in the totality of the circumstances, with the statement we have from the Defendant that she believes heroin kills people, then as to what her knowledge was, it was intense.
>
> She knows what dopesick is. She applies phrases to the consumption of heroin. [The State] said ten times; I would guess more than 15. She said, "I don't do it. It kills people." She gave specifics.
>
> She denied – "I don't deal heroin at all. I am against it. It kills people." And the phrase was "one hitter, quitter." And she was referring to dying, according to the witness.
>
> So seldom do you see a Defendant with so many statements that she believes heroin kills. She was as adamant that she was not engaging in the distribution of heroin as she was that the reason is it kills people.

The jury convicted Claggett-Brown of possession of heroin and reckless endangerment, acquitting her of second degree depraved heart murder, involuntary manslaughter and distribution of heroin. The trial judge, having merged both charges for sentencing purposes, sentenced Claggett-Brown to five years' imprisonment.

This timely appeal followed.

DISCUSSION

Claggett-Brown was convicted of violating Section 3-204(a)(1) of the Criminal Law Article, Maryland Code (2002, 2012 Repl. Vol.), which provides:

> (a) A person may not recklessly:
>
> > (1) engage in conduct that creates a substantial risk of death or serious physical injury to another;

Claggett-Brown argues that the evidence was insufficient to sustain her conviction for reckless endangerment. She contends that the distribution of heroin alone, without more, does not create a substantial risk of death or serious physical injury to another. She further posits that the statute surely cannot sweep within its scope all acts of distribution of heroin, including "run of the mill distribution." Claggett-Brown, finally, avers that her conviction for reckless endangerment cannot stand because she did not know of the heroin's potency or whether Baxter had ingested any other substances or was otherwise impaired at the time he used the heroin.

The State primarily contends that Claggett-Brown cannot raise her contention regarding reckless endangerment, because she failed to raise the argument at trial. The State argues that she essentially conceded the reckless endangerment charge in favor of focusing on the second-degree murder and manslaughter charges in her motion for judgment of acquittal. If preserved, however, the State avers that the evidence was sufficient to support Claggett-Brown's conviction for reckless endangerment, as the statements she made during her police interview indicate that she fully understood that selling heroin to Baxter could create a substantial risk of death or serious physical injury.

We agree with the State's primary contention that Claggett-Brown cannot now raise the insufficiency of evidence for her conviction of reckless endangerment because in her motion for judgment of acquittal she failed to particularize reasons why her motion should have been granted as to the reckless endangerment charge, in accordance with Maryland Rule 4-324(a), which provides:

> A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, 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. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.

Pursuant to Rule 4-324(a) and our jurisprudence, review on appeal of a sufficiency argument is available only when a defendant argues at trial "precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient." *Fraidin v. State*, 85 Md. App. 231, 244–45, *cert. denied*, 322 Md. 614 (1991); *see also Hobby v. State*, 436 Md. 526, 540 (2014). A motion for judgment of acquittal "which merely asserts that the evidence is insufficient to support a conviction, without specifying the deficiency, does not comply with the Rule and thus does not preserve the issue of sufficiency for appellate review." *Montgomery v. State*, 206 Md. App. 357, 385–86, *cert. denied*, 429 Md. 83 (2012) (quoting *Brooks v. State*, 68 Md. App. 604, 611 (1986), *cert. denied*, 308 Md. 382 (1987)); *see e.g.*, *Muir v. State*, 308 Md. 208, 218–19 (1986) (holding that sufficiency challenge of assault with intent to disable conviction was not preserved where, upon the conclusion of the State's case, "Muir moved for judgment of acquittal as to 'each and every count'" and the motion "was denied and renewed at the end of the entire case 'generally as to all counts' and specifically as to one count alleging burglary.").

In the instant matter, following the close of the State's case, counsel for Claggett-Brown moved for judgment of acquittal on all charges. Although the attorney for Claggett-

Brown mentioned all the crimes with which Claggett-Brown had been charged in the motion, his arguments focused solely on the possession, distribution, second-degree murder and manslaughter charges, which the trial judge emphasized in his ruling. Defense counsel never expressly argued the elements of reckless endangerment and the trial insufficiencies.[4]

Even if the argument were preserved, we determine that the evidence at trial was sufficient for a reasonable trier of fact to conclude, beyond a reasonable doubt, that Claggett-Brown committed the crime of reckless endangerment. In so concluding, we keep in mind that, when reviewing the sufficiency of the evidence, we must determine, after viewing the evidence in the light most favorable to the State, *Moulden v. State*, 212 Md. App. 331, 344 (2013), whether "*any* rational trier of fact could have found [the defendant] guilty of the crimes charged based upon the evidence presented at trial," *State v. Albrecht*, 336 Md. 475, 502 (1994). In weighing the sufficiency of the evidence, we recognize that the finder of fact is permitted to choose "'among differing inferences that might possibly be made from a factual situation,' . . . and we therefore 'defer to any possible reasonable inferences the [trier of fact] could have drawn from the admitted evidence[.]" *Titus v. State*, 423 Md. 548, 557–58 (2011) (quoting *Smith v. State*, 415 Md. 174, 183 (2010); *State*

[4] Claggett-Brown also argues, that because there is already a statute that makes it illegal to distribute heroin, Md. Code (2002, 2012 Repl. Vol.), § 5-602 of the Criminal Law Article, the General Assembly must have intended to remove the conduct prohibited by Section 5-602 from the ambit of the reckless endangerment statute. Although without merit, Claggett-Brown failed to proffer this argument below, and, as such, is precluded from raising it on appeal. *See Yates v. State*, 202 Md. App. 700, 724–26 (2011), *aff'd*, 429 Md. 112 (2012).

v. Mayers, 417 Md. 449, 466 (2010)). If the evidence "'either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt,' then we will affirm the conviction." *Bible v. State*, 411 Md. 138, 156 (2009) (quoting *State v. Stanley*, 351 Md. 733, 750 (1998)).

With these principles in mind, we look to the elements of reckless endangerment embodied in Section 3-204(a)(1) of the Criminal Law Article, Maryland Code (2002, 2012 Repl. Vol.) to determine whether the evidence in the instant case could have convinced any rational trier of fact of Claggett-Brown's guilt of that crime beyond a reasonable doubt. Those elements include:

- that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another;
- that a reasonable person would not have engaged in the conduct that created a substantial risk of death or serious physical injury to another; and
- that the defendant acted recklessly.

See Jones v. State, 357 Md. 408, 427 (2000) (citing *Albrecht*, 336 Md. at 501).

Section 3-204(a)(1) "is aimed at deterring the commission of potentially harmful conduct before an injury or death occurs." *Pagotto v. State*, 361 Md. 528, 549 (2000) (citing *Minor v. State*, 326 Md. 436, 442 (1992)). The statute's purpose is "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*, 326 Md. at 442. The focus,

therefore, is on the misconduct of the accused, *Pagotto*, 361 Md. at 549, which is evaluated pursuant to an objective standard:

> [G]uilt under the statute does not depend upon whether the accused intended that his reckless conduct create a substantial risk of death or serious injury to another. The test is whether the appellant's misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish.

Minor, 326 Md. at 443. A defendant's conduct is generally measured against the conduct of an ordinarily prudent individual similarly situated. *Albrecht*, 336 Md. at 501.

As to the first element, Claggett-Brown's act of providing heroin to Baxter, a controlled substance,[5] constitutes conduct that creates a substantial risk of death or serious physical injury to others. The Court of Appeals recently acknowledged that heroin is a noxious and toxic substance:

> It is undisputed that [the Respondent] was knowingly engaged in the unregulated selling of a CDS with no known medical benefit—an addictive and useless poison . . . .
>
> [D]ata collected by the State of Maryland's Department of Health and Mental Hygiene regarding fatal overdoses from heroin and other opioids [demonstrate that in] 2015, the year [the victim] died, there were 1,259 deaths from alcohol and drugs in Maryland—86% of these were opioid-related. *See Drug- and Alcohol-Related Intoxication Deaths in Maryland, 2015*, Md. Dep't of Health & Mental Hygiene 1, 5 (Sept. 2016), https://bha.health.maryland.gov/OVERDOSE_PREVENTION/Documents/2015%20Annual%20Report_revised.pdf [*archived at* https://perma.cc/48X6-DHKJ]. In this State, fatal overdoses from heroin rose dramatically between 2011 and 2015, from 247 to 748 overdoses, vastly exceeding the number of deaths caused by any other drug, including

[5] "Heroin is an opioid drug made from morphine, a natural substance taken from the seed pod of the various opium poppy plants[.]" *Heroin*, Nat. Inst. On Drug Abuse (June 2018), https://www.drugabuse.gov/publications/drugfacts/heroin [*archived at* https://perma.cc/L2AK-S7NT].

> fentanyl. *See id.* at fig. 6. In 2015, the rural counties of the Eastern Shore suffered 51 heroin-related deaths, including 11 deaths in Worcester County and 13 deaths in neighboring Wicomico. *See id.* at fig. 8.

State v. Thomas, No. 33, slip op. at *31–33, 2019 WL 2574642, at *15–16 (Md. June 24, 2019) (footnotes omitted).

In 2016, the year in which Baxter died, there were 2,089 deaths from alcohol and drugs in Maryland, 89% of them attributable to opioids. *See Drug- and Alcohol-Related Intoxication Deaths in Maryland, 2016*, Md. Dep't of Health & Mental Hygiene, 1, 5 (June 2017), https://bha.health.maryland.gov/OVERDOSE_PREVENTION/Documents/Maryland%202016%20Overdose%20Annual%20report.pdf [*archived at* https://perma.cc/V46M-ZTRJ]. In 2016, fatal overdoses from heroin resulted in 1,212 deaths. *Id.* at fig. 8. That same year, the counties of Southern Maryland suffered 48 heroin-related deaths, including 9 deaths in St. Mary's County, 17 in Calvert County and 22 in Charles County. *Id.* at fig. 9.

As to the second element, the distribution of heroin is conduct that a reasonable person would not engage in, considering the potential harm it may create for those involved. *See Albrecht*, 336 Md. at 500. Claggett-Brown in her interview repeatedly acknowledged that heroin "kills people" and as such she "never dealt" it and "never will." *See also Thomas*, slip op. at *32, 2019 WL 2574642, at *15 (agreeing with the statement "anyone in [Respondent's] situation would understand the dangers of heroin, and its propensity to harm physically, if not kill, individuals who are ingesting it.").

The evidence adduced at trial also supports the conclusion that Claggett-Brown acted recklessly in providing heroin to Baxter. Throughout her interview with the St.

Mary's County police, she repeatedly acknowledged the harmful, even fatal, effects of heroin. She also acknowledged the fact that she knew Phillips to be a habitual drug user and that Baxter appeared to be under the influence of some substance when she provided heroin to him. Despite expressing such strong disdain toward the drug and her observations about Phillips and Baxter, Claggett-Brown elected to play a pivotal role in providing them with heroin.

As a result, we conclude that any rational trier of fact could find that the State had proven the elements of reckless endangerment beyond a reasonable doubt.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.