Circuit Court for Wicomico County
Case No.: C-22-CR-17-000862

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2866

September Term, 2018

TROY JALEN HOLMES

v.

STATE OF MARYLAND

Friedman,
Gould,
Battaglia, Lynne, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: March 4, 2020

*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, Troy Jalen Holmes, was convicted by a jury in the Circuit Court for Wicomico County of first-degree assault, second-degree assault, reckless endangerment, the use of a firearm in the commission of a felony or a crime of violence, possession of a regulated firearm after being convicted of a disqualifying crime and wearing, carrying or transporting a handgun. Judge Kathleen Beckstead of the Circuit Court for Wicomico County, thereafter, sentenced Holmes to 15 years' imprisonment for the first-degree assault conviction, 5 years' imprisonment for the second-degree assault conviction, 15 years' imprisonment for the use of a firearm in the commission of a felony or a crime of violence conviction and 5 years' imprisonment for the possession of a regulated firearm conviction, all to run concurrently, for a total of 15 years. The convictions with respect to reckless endangerment and wearing, carrying or transporting a regulated firearm were merged into the first-degree assault count for sentencing purposes.

Holmes presents the following questions for our review, which we have renumbered:

> 1. Did the trial court err in admitting inculpatory statements made by Mr. Holmes at the Talbot County Detention Center, where Mr. Holmes was sleep deprived and under the influence of both alcohol and a hospital-administered opioid, and where Mr. Holmes's interrogator conceded that Mr. Holmes was "not in [his] total right mind"?
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> 2. [D]id Mr. Holmes's conviction for first-degree assault, second-degree assault, and reckless endangerment amount to an improper variance, where the indictment specifically charged Mr. Holmes with assaulting and endangering Mr. Velez, and where the State failed to prove that Mr. Velez was, in fact, present at the scene of the alleged crimes?
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> 3. Was there sufficient evidence that Mr. Holmes intended to assault or endanger Mr. Velez—the crime specifically charged by the State—where Mr. Velez denied ever being at the scene of the crime, and the State's only

> evidence was blurry surveillance footage that the trial judge initially discredited as not "sufficient identification . . . to allow a jury to decide for themselves that this is Joshua Velez"?

For the reasons set forth below, we shall answer Holmes' questions in the negative and shall affirm the judgments of the Circuit Court.

In the wee hours of October 22, 2017, an argument broke out at a Royal Farms in Salisbury, Maryland between Holmes and another man, whom the State posited was Josh Velez. Based upon video footage at the Royal Farms, Mr. Velez entered the store shortly before Holmes, who then appeared to chase Mr. Velez around the store. Within seconds, Mr. Velez left the store followed by Holmes, who removed an item from his waistband, which the State contended at trial was a handgun. Immediately thereafter, a round of gun shots was fired, some of which entered the store, one of which struck a customer. Holmes proceeded to flee the store in a car, at which time an unidentified individual shot at the car and hit Holmes in the back.

Holmes then went to Peninsula Regional Medical Center ("Hospital") where he was treated for a "gun shot wound in his right flank region," a "fracture of the 11th rib" and a laceration on his hand. While at the Hospital, Holmes was prescribed and took Tramadol.[1]

Early that same morning, Detective Jennifer Hall of the Wicomico County Sheriff's Office arrived at the Hospital, as a result of reports of gunshot victims and briefly spoke

[1] Tramadol, a medication which is "similar to opioid (narcotic) analgesics," helps "relieve moderate to moderately severe pain"; it "works in the brain to change how your body feels and responds to pain." Tramadol HCL, *Drugs and Medication A-Z*, WEBMD, https://www.webmd.com/drugs/2/drug-4398-5239/tramadol-oral/tramadol-oral/details [*archived at* https://perma.cc/96PV-SC6V].

with Holmes. According to the Detective's testimony at the suppression hearing, when she entered the room where Holmes had been under observation, she noted that he appeared to be "lucid. Responsive to me. And was able to have a conversation with me." Detective Hall's interview with Holmes lasted approximately fifteen minutes. Although she had confronted him about a handgun that had been found in his vehicle, after she had been informed of its existence shortly after asking him about the Royal Farms shooting, she ended the interview because she did not want to continue to question him while he was under medical care.[2] Later that morning, as adduced by the evidence, a Hospital groundskeeper discovered a loaded black .9 millimeter Beretta wrapped inside of a "black looking jacket" under a tree near the Hospital's emergency room entrance.

Later that day, Holmes was discharged from the Hospital and taken into police custody, based upon an outstanding warrant for him in Talbot County. At around 5:30 p.m. that evening, approximately fifteen hours after the events at the Royal Farms had transpired, three officers questioned Holmes regarding the shooting. According to testimony adduced at the suppression hearing, before questioning Holmes, officers notified him of his *Miranda* rights,[3] which he waived orally and in writing.

Although Holmes initially stated that he had not been at the Royal Farms at the time of the shooting, by the interview's end, he stated that he had been there and that he had fired a handgun in self-defense.

[2] Neither the recovery of the handgun from the car or the handgun found in the car itself were in issue at trial and are not before us.

[3] *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

VOLUNTARINESS OF STATEMENTS

Prior to trial, counsel for Holmes moved to suppress the statements Holmes made during the interview at the Hospital as well as during his interview at the Talbot County Detention Center, contending that they were made involuntarily, because Holmes had been deprived of sleep and under the influence of alcohol and medically prescribed pain medication.

After a hearing on the matter, in which recordings of both interviews had been submitted, Judge S. James Sarbanes sitting in the Circuit Court for Wicomico County, by written Opinion and Order, denied the motion. Judge Sarbanes opined that the statements made by Holmes at the Hospital had been voluntary because he was not in custody nor impaired at the time, explaining:

> While Defendant had to remain at the hospital because he was subject of ongoing medical care, he could have terminated the interview at any time. He never requested to do so. Defendant was not restrained and was initially interviewed as a witness. The interview lasted ten to fifteen minutes and was conducted as Defendant was lying in a hospital bed with a gunshot wound, for which he was being treated by medical staff. The interrogation was conducted by one officer with a recording device which was shown to the Defendant. After conducting the initial interview, Detective Hall learned that a handgun was located in Defendant's vehicle and she returned to question Defendant. Detective Hall confronted Defendant about the handgun but he was still not in custody. The interview was terminated very shortly thereafter.
>
> Detective Hall testified that she did not perform any field sobriety tests on Defendant. However, she stated that Defendant was lucid and responsive to her questions. She stated that there was no odor of alcohol from his breath or person, and his eyes were not bloodshot or glassy. Defendant stated that he felt fine and that he wanted to be released from the hospital. Further, Defendant's blood alcohol content was relatively low at .0791 and he tested negative for any controlled dangerous substances.

Accordingly, Judge Sarbanes concluded that, "[b]ased upon the totality of the circumstances and all relevant factors, Defendant's statements to Detective Hall at [the Hospital] were voluntary as he was not in custody and was not impaired at the time of the interview."

Judge Sarbanes also denied Holmes' motion to suppress the statements he made during his interview at the Talbot County Detention Center, explaining:

> Defendant was administered and waived his *Miranda* rights, which indicates the statements thereafter are voluntary. . . . Thus, the determination of whether his Mirandized statements were voluntary may be made in assessing the totality of the circumstances, including factors such as the length of the interrogation and the manner in which the interrogation [] was conducted. . . . Based upon the evidence presented at the motions hearing, Defendant was in police custody upon being discharged from PRMC until his interrogation at the TCDC at 5:46 p.m. There is no evidence that he did not sleep while in transit to and while incarcerated at the TCDC prior to the interrogation. The only evidence that he was tired was that he mentioned he was tired at the end of his interrogation. The evidence presented by law enforcement was that his speech was normal, his responses were coherent and clear, his demeanor was normal, and he was able to understand and sign his *Miranda* waiver.
>
> Based upon the totality of the circumstances and all relevant factors, the Defendant's statements to detectives at the TCDC were voluntary because he was properly given his *Miranda* rights and there is no evidence to indicate that he was sleep deprived or even that he did not have the opportunity to sleep prior to the interrogation to the point that his statements were involuntary.

Holmes contends that, based upon the totality of the circumstances, his *Miranda* waiver and the inculpatory statements given at the Detention Center that followed were involuntary and, thus, inadmissible. Holmes bases this contention on the fact that, during his interview at the Detention Center, the officers "repeatedly noted that he was clearly under the influence of *both* alcohol and Tramadol." He avers that the hearing judge erred in not considering the impact of these substances on his ability to provide a voluntary

waiver. He argues further that his inability to provide voluntary statements had also been inhibited by his lack of sleep at the time of the interview.

The State, as an initial matter, contends that the statements Holmes made to Detective Hill at the Hospital are not at issue as the State never offered them at trial. The State further posits that Holmes cannot complain about the hearing judge's decision to deny his motion to suppress the statements he made to officers at the Detention Center because he waived the alleged claim of error by agreeing to allow a portion of the interrogation's recording to be played at trial.[4] In the alternative, if preserved, the State argues that the statements Holmes made to the officers were, nonetheless, voluntary and, thus, admissible.

[4] When the State moved to enter into evidence portions of the recorded interview at the Detention Center, the following discussion ensued at the bench:

> [DEFENSE COUNSEL]: For the record because we have agreed to only play a portion of that, I have no objection to it coming into evidence for purposes of that portion being played but I didn't want it to be confusing to what they have access to.
>
> THE COURT: The entire DVD is being offered for identification only, you're going to play portions of it for the jury, is that right?
>
> [THE STATE]: Correct.
>
> THE COURT: Very good. So it will be received with that understanding.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.
>
> (Whereupon, counsel and the Defendant returned to the trial tables . . .)
>
> ***
>
> [THE STATE]: Your Honor, for the record we played from 28:12 to 30:05
>
> (continued . . .)

In reviewing the denial of a motion to suppress evidence, we ordinarily consider only the information contained in the record of the suppression hearing, and not the trial record. *Williamson v. State*, 398 Md. 489, 500 (2007) (citations omitted). Where, as here, the motion is denied, we review the evidence and all reasonable inferences drawn therefrom in the light most favorable to the prevailing party on the motion, the State. *Id.* (citations omitted). "Although we extend great deference to the hearing judge's findings of fact, we review independently the application of the law to those facts to determine if the evidence at issue was obtained in violation of law and, accordingly, should be suppressed." *Id.* (quoting *Whiting v. State*, 389 Md. 334, 345 (2005)).

Holmes' Statements at the Hospital

With respect to Holmes' statements made to Detective Hill at the Hospital, where "evidence that is the subject of the suppression hearing is never offered at trial, the trial judge's ruling on the motion is not preserved for appellate review." *Jackson v. State*, 52 Md. App. 327, 332 (citing *Linkey v. State*, 46 Md. App. 312, (1980)), *cert. denied*, 294 Md. 652 (1982). Accordingly, because the State did not proffer Holmes' statements from the Hospital at trial, we have no occasion to review the propriety of Judge Sarbanes' decision on this point.

(continued . . .)

> on the first clip of the disc that's marked as State's Exhibit No. 24. And then on the same track we played from 31:01 to 33:45.
>
> THE COURT: Thank you. And that's all that's being offered into evidence pursuant to stipulation and the Court's ruling.

Holmes' Statements at Talbot County Detention Center

With respect to the statements Holmes made at the Detention Center, we look to Rule 4-252(h)(2)(c), which provides:

> If the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, on the motion of a defendant and in the exercise of its discretion, grants a supplemental hearing or a hearing de novo and rules otherwise. A pretrial ruling denying the motion to suppress is reviewable on a motion for a new trial or on appeal of a conviction.

Based upon our interpretation of the Rule, where a circuit court denies a defendant's motion to suppress evidence, the defendant need not object to the evidence at trial to preserve the issue of its admission for appellate review. *Jackson v. State*, 52 Md. App. 327, 331 (1982). However, where a pretrial motion to suppress is denied and at trial the accused affirmatively states that he or she "has no objection to the admission of the contested evidence, his statement effects a waiver[.]" *Id.* at 332 (citing *Erman v. State*, 49 Md. App. 605, 630 (1981), *cert. denied*, 292 Md. 13 (1981)). Accordingly, because counsel for Holmes stated that she had "no objection to [the recording] coming into evidence," we conclude that Holmes has not properly preserved the issue for our review.

Were we to consider Holmes' argument on the merits, we, nonetheless, would conclude that Judge Sarbanes properly concluded that any statements Holmes made at the Detention Center were done so voluntarily.

"Only voluntary confessions are admissible as evidence under Maryland law." *Knight v. State*, 381 Md. 517, 531 (2004) (footnote omitted). Inculpatory statements are voluntary if they are "freely and voluntarily made" and the defendant making them "knew and understood what he [or she] was saying" at the time he or she said it. *Id.* at 531–32

(quoting *Hoey v. State*, 311 Md. 473, 480–81 (1988)). "In order to be deemed voluntary, a confession must satisfy the mandates of the U.S. Constitution, the Maryland Constitution and Declaration of Rights, the United States Supreme Court's decision in *Miranda*, and Maryland non-constitutional law." *Id.*

Generally, absent circumstances to the contrary, "an express written or oral statement of waiver of the right to remain silent . . . is usually strong proof of the validity of that waiver[.]" *Warren v. State*, 205 Md. App. 93, 117, (2012) (citation omitted). Furthermore, "[w]hen the issue is voluntariness, rather than *Miranda* compliance . . . the failure of a defendant to testify almost forecloses any chance of prevailing. . . . Only the defendant can truly tell us what was going on in the defendant's mind. Without such testimony, there is usually no direct evidence of involuntariness." *Id.* (quoting *Ashford v. State*, 147 Md. App. 1, 55–56, *cert. denied*, 372 Md. 430 (2002)).

In evaluating the validity of a waiver, a reviewing court must consider the particular facts and circumstances surrounding an interrogation, including the conduct of the accused as well as the accused's "age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Gonzalez v. State*, 429 Md. 632, 652 (2012) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560 (1979)); *see also McIntyre v. State*, 309 Md. 607, 615–16 (1987). A reviewing court should also consider "the length of the interrogation, the manner in which it was conducted [and] the number of police officers present throughout the interrogation[.]" *Winder v. State*, 362 Md. 275, 307 (2001).

Mental impairment from drugs or alcohol does not per se render a statement involuntary and a court may admit that statement if it "concludes that it was freely and voluntarily made despite the evidence of mental impairment." *McCray v. State*, 122 Md. App. 598, 615–16 (1998) (quoting *Dempsey*, 277 Md. at 151). "It is only when defendants are so mentally impaired that they do not know or understand what they are saying that statements become involuntary." *Id.* at 616 (citing *Hoey*, 311 Md. at 481).

In the instant matter, we conclude that Judge Sarbanes did not err in denying Holmes' motion to suppress statements he made to officers at the Detention Center, as the findings that his oral and written *Miranda* waiver, and statements made thereafter, had been given voluntarily are supported by the record which included testimony from two of the three questioning officers and a review of the interrogation's recording.

Holmes, however, also contends that the factual circumstances in *United States v. Taylor*, 745 F.3d 15 (2d Cir. 2014) support the conclusion that his statements were involuntary and, thus, inadmissible. The *Taylor* court, in holding that the defendant's statements had been involuntary, noted that Taylor had ingested a large quantity of Xanax immediately preceding his arrest and interrogation and that he was "in and out of consciousness while giving his statement, and in a trance or a stupor most of the time when not actually asleep." *Id.* at 25. Accordingly, the court concluded that the "officers' persistent questioning took advantage of Taylor's diminished mental state, and ultimately overbore his will." *Id.* *Taylor* is factually inapposite from the present manner. Here, nothing in the record supports the notion that Holmes ingested any substance which altered his mental state immediately prior to his interrogation at the Detention Center. In fact, the

record indicates that Holmes' blood-alcohol content was .0791 over twelve hours earlier and that he had been in custody ever since his release from the Hospital. Testimony adduced at the suppression hearing, in addition to the admitted recordings, also indicated that Holmes answered questions coherently, unlike Taylor.

VARIANCE

At trial, the State called the alleged victim, Josh Velez, as a witness. On direct examination, the State played for him video footage from the shooting which took place at Royal Farms and asked if anyone looked familiar to him; Mr. Velez repeatedly stated that he did not recognize anyone in the video. Mr. Velez also testified that he had had never been to Salisbury before the trial, had never before been to Wicomico County, had never been to a Royal Farms and that he had never "been fired at by gunfire." He essentially denied having had been assaulted by Holmes on October 22, 2017.

Based upon Mr. Velez's testimony, Holmes, before us, contends that his convictions should be reversed because he was charged with crimes specific to Mr. Velez and that the State's failure to prove that Mr. Velez had in fact been fired upon by Holmes meant there was a material variance between the "*allegata* and *probata*."[5]

The State initially posits that the alleged variance is not properly before us because Holmes failed to raise the issue at trial. Even if properly preserved, the State argues that Holmes fails to identify any specific variance and that his complaint with respect to the

[5] The term *allegata* is the plural form of *allegatum*, which means "[a] fact alleged in a pleading." Black's Law Dictionary (11th ed. 2019). *Probata* is the plural form of *probatum*, which means "[s]omething conclusively established or proved; proof." *Id.*

identity of the victim goes to the weight of the evidence rather than a material variance. The State further contends that, because Holmes does not allege that he was misled by the charging document or otherwise inhibited from mounting a defense, he is not entitled to the relief sought.

A "variance has been defined as 'a difference between the allegations in a charging instrument and the proof actually introduced at trial.'" *Crispino v. State*, 417 Md. 31, 51 (2010) (quoting Black's Law Dictionary 1692 (9th ed. 2009)). "When there is a material variance between the *allegata* and the *probata*, the judgment must be reversed." *Green v. State*, 23 Md. App. 680, 685 (1974) (citation omitted). A variance is material where it is "likely to mislead the defendant in preparing his defense." *Jackson v. State*, 10 Md. App. 337, 349 (1970). In order to raise the objection that a variance between the allegations in a charging document and the evidence produced at trial prejudiced a defendant, "it is essential that the question be seasonably raised during the trial." *Id.* (citations omitted). In *Jackson*, we held that, where the appellant failed to argue that he "had been misled in preparing his defense" based upon the alleged variance at trial, he was precluded from raising the issue on appeal. *Id.*

Holmes failed to raise the variance issue at trial, but essentially it is a nonissue because the jury did not believe Mr. Velez's testimony and convicted Holmes of first-degree assault, second-degree assault and reckless endangerment of Mr. Velez. The State proved at trial that Mr. Velez was at the store, proof, which, as we shall see, was sufficient to convict Holmes. There simply was no variance.

SUFFICIENCY OF THE EVIDENCE

At the close of the State's case, counsel for Holmes made a motion for acquittal as to all charges. After hearing arguments, Judge Beckstead granted the motion as to attempted first-degree murder (Count 5) and the lesser-included offense of attempted second-degree murder but denied it as to the remaining charges. The jury convicted Holmes of first-degree assault (Count 6), second-degree assault (Count 7) and reckless endangerment (Count 8), all of which related to Josh Velez, and acquitted him of the nine other counts of reckless endangerment related to other individuals inside of the Royal Farms at the time of the shooting. The jury also convicted Holmes of the use of a firearm in the commission of a felony or crime of violence (Count 9), the wearing, carrying and transporting of a handgun (Count 10) and the illegal possession of a regulated firearm (Count 11).

Before us, Holmes primarily takes issue with Judge Beckstead's ruling on sufficiency as it relates to first-degree assault, second-degree assault and reckless endangerment based upon the argument that the State failed to prove that Mr. Velez had in fact been the victim of the crimes as alleged. Holmes also asserts that the elements of these crimes were not proven. He further contends that, based upon the insufficient evidence used to support an assault of Mr. Velez, the use of a firearm in the commission of a felony or crime of violence conviction must also fall.

The State disagrees and posits that, "[f]rom the surveillance footage, a reasonable juror could conclude that the person depicted in those images was Velez." The State also avers that the jury was entitled to disbelieve Mr. Velez's testimony to the contrary. Thus,

the State contends, sufficient evidence existed to support the charges for which Holmes was convicted, as all of the other elements of the complained of convictions were proven beyond a reasonable doubt.

Upon hearing arguments with respect to the sufficiency of the evidence as it related to the question of the victim's identity, Judge Beckstead disagreed with the argument that the charges could not stand, based upon Mr. Velez's testimony, explaining:

> But I will say that based upon the video footage, I think there is sufficient similarities and in having seen Josh Velez in court, it's good enough that a person could reasonably conclude beyond a reasonable doubt that that was Josh Velez.
>
> I say that because he is – we saw him in court, and nobody asked how tall or what his weight was, not that he necessarily would have said anything accurately given his demeanor, but he is – you can tell that he is a young male, a black male. He's got similar features, facial hair, mustache and beard at the time.
>
> Now, all of those things are subject to change, you know, so we didn't elicit from him what he looked like on the day in question because, of course, he wasn't there according to him on the date in question.
>
> But I believe that if you just look at his body build and things of that nature, that a juror could, a reasonable juror could look at the video and conclude that that's the same person. It's close. I will give you that. It's very close.

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) and *State v. Mayers*, 417 Md. 449, 466 (2010)). We give "due regard to the [fact finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *State v. Suddith*, 379 Md. 425, 430 (2004) (quoting *Moye v. State*, 369 Md. 2, 12 (2002)). 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)).

Judge Beckstead concluded that a reasonable juror could have determined that Mr. Velez was the victim of the above-mentioned crimes, despite his assertions to the contrary, because "[t]he trier of fact is entitled to accept or reject all, part, or none of the testimony of a witness." *Johnson v. State*, 156 Md. App. 694, 714 (2004); *see also State v. Greene*, 240 Md. App. 119 (2019). Our primary function, "in respect to evidentiary inferences is to determine whether the trial court made reasonable, *i.e.*, rational, inferences from extant facts." *State v. Smith*, 374 Md. 527, 547 (2003). Based upon our review of the Royal Farms video footage, we agree with Judge Beckstead that a reasonable juror could identify the victim in the video if presented with that individual in person. *See Williams v. State*, 445 Md. 452 (2015).

We now address the sufficiency of the evidence with respect to the other elements of the crimes about which Holmes complains.

First- and Second-Degree Assault

In Maryland, first- and second-degree assault are statutory crimes. *See* Maryland Code (2002, 2012 Repl. Vol.), Sections 3-202, 3-203 of the Criminal Law Article.[6] To convict an individual of first-degree assault, the State must prove all the elements of assault in the second-degree and at least one of the statutory aggravating factors contained in Section 3-202(a) of the Criminal Law Article. Statutory second-degree assault "encompasses three types of common law assault and battery": the "intent to frighten" assault, attempted battery and battery. *Snyder v. State*, 210 Md. App. 370, 380 (2013).

To prove the "intent to frighten variety" of second-degree assault, the State must prove "that the defendant committed an act with the intent to place [another] in fear of immediate" offensive physical contact or physical harm, "that the defendant had the apparent ability, at that time, to bring about" the offensive physical contact or physical harm; "that [the other] reasonably feared immediate" offensive physical contact or physical

[6] Section 3-202(a) of the Criminal Law Article, Maryland Code (2002, 2012 Repl. Vol.), the provision which delineates conduct constituting first-degree assault, provides:

> (1) A person may not intentionally cause or attempt to cause serious physical injury to another.
> (2) A person may not commit an assault with a firearm, including:
> (i) a handgun, antique firearm, rifle, shotgun, short-barreled shotgun, or short-barreled rifle, as those terms are defined in § 4-201 of this article;
> (ii) an assault pistol, as defined in § 4-301 of this article;
> (iii) a machine gun as defined in § 4-4-1 of this article; and
> (iv) a regulated firearm, as defined in § 5-101 of the Public Safety Article.

Section 3-203(a) of the Criminal Law Article, Maryland Code (2002, 2012 Repl. Vol.), the provision which delineates conduct constituting second-degree assault, provides that "[a] person may not commit an assault."

harm; and "that the defendant's actions were not legally justified." Maryland Criminal Pattern Jury Instructions (MPJI-Cr.) 4:01A. To prove the attempted battery variety of second-degree assault, the State must prove that the defendant actually tried to cause harm to another, that the defendant intended to bring about the physical harm to another and that the defendant's actions were not consented to by the other individual. MPJI-Cr. 4:01B. To prove the battery variety of second-degree assault, the State must prove that the defendant caused offensive physical contact with or physical harm to another, that the contact was the result of an intentional or reckless act of the defendant that was not accidental and that the contact was not consented to nor legally justified. MPJI-Cr. 4:01C.

In the present matter, the video footage from the Royal Farms, which had been played at trial, and which we have reviewed, shows Holmes punching Mr. Velez in the face constituting a second-degree assault of the battery variety. Furthermore, Mr. Velez can be seen in the video running from Holmes in the store and holding his hands up before exiting the Royal Farms, at which time, Holmes stated during his interrogation at the Detention Center, he pulled out a handgun and fired it in order to get away from Mr. Velez. A reasonable juror could have viewed this evidence and concluded that Holmes' conduct was intended to, and did, place Mr. Velez in fear of physical contact or physical harm, without justification, thus, constituting second-degree assault of the intent-to-frighten variety.

With respect to the first-degree assault conviction, the evidence adduced at trial, reflected Holmes' admission regarding his use of a handgun outside of the Royal Farms, a shell casing of which matched the gun recovered at the Hospital entrance. As such, a

reasonable juror could have inferred that Holmes had used the handgun to effectuate a more aggravated assault on Mr. Velez.

Accordingly, we conclude that any rational trier of fact could find that the State had proven the elements of first- and second-degree assault beyond a reasonable doubt.

Reckless Endangerment

Holmes also contends that his conviction for reckless endangerment as it related to Mr. Velez cannot stand because, in addition to the "inadequate identification of Mr. Velez," the trial court explicitly found that the bullet that allegedly endangered Mr. Velez "would not have put [him] in immediate jeopardy or harm."[7]

We look to Section 3-204(a)(1) of the Criminal Law Article, Maryland Code (2002, 2012 Repl. Vol.), the statutory provision which embodies the elements of reckless endangerment to determine whether any rational trier of fact could have found Holmes guilty beyond a reasonable doubt, the elements of which 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 *State v. Albrecht*, 336 Md. 475, 501 (1994)).

[7] The statement made by Judge Beckstead, however, was made in relation to the attempted first-degree murder charge, a charge of which Holmes was acquitted by Judge Beckstead and requires proof of a specific intent to kill the victim. *See State v. Selby*, 319 Md. 174, 178 (1990).

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. Reckless endangerment is a general intent crime. *See Holbrook v. State*, 364 Md. 354, 371 (2001); *Williams v. State*, 100 Md. App. 468, 490 (1994).

Eleven shell casings were found at the Royal Farms store, only one of which corresponded to the Berretta that Holmes dumped near the Hospital entrance. That shell casing was found near the bottom of a window frame, close to the ground and, as Holmes avers, not near to where Mr. Velez was standing. Accordingly, Holmes posits that Mr. Velez was not put in immediate jeopardy or harm as he was not in the arc of danger.

The Court of Appeals and we have repeatedly held that the act of brandishing a loaded and cocked weapon at someone can be conduct that creates a substantial risk of death or serious physical injury to another person. *See Albrecht*, *supra*, 336 Md. 475; *Minor v. State*, 326 Md. 436 (1992); *Perry v. State*, 229 Md. App. 687 (2016) (affirming reckless endangerment conviction where defendant, in fleeing from police officers on foot in the middle of the night with a loaded gun which accidentally fired, thus prompting officer to return fire, created a substantial risk of death or serious physical injury); *Albrecht v. State*, 105 Md. App. 45, 58 (1995).

In the present case, Holmes' statement made during his interrogation established the fact that he had fired his handgun at Mr. Velez. The argument that the bullet missed Mr. Velez and landed near his feet does not obviate that Holmes had placed Mr. Velez at risk of serious bodily injury by shooting his gun. *See Albrecht v. State*, 105 Md. App. 45 (1995) (affirming conviction for reckless endangerment of passerby for negligent discharge of shotgun because the passerby was within the arc of danger, being within 10 degrees to right of central axis of line of fire and was no more than 75 feet from the defendant).

Use of a Firearm in the Commission of a Felony

Holmes' final contention is that, because the State failed to provide sufficient evidence to support the assault and reckless endangerment charges, his conviction for the use of a firearm in the commission of a felony or crime of violence must also fail.[8] We

[8] Section 4-204(b) of the Criminal Law Article, Maryland Code (2002, 2012 Repl. Vol.), prohibits a person from using "a firearm in the commission of a crime of violence, as defined by § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime."

have determined that sufficient evidence existed to support the assault and reckless endangerment charges; we also determine that there was sufficient evidence that Holmes used a firearm in the commission of the assault and reckless endangerment acts, both of which are felonies upon conviction.

As a result, we affirm Holmes' convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.