

Circuit Court for Baltimore City
Case No. 118102010

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3000

September Term, 2018

HERBERT MITCHELL

v.

STATE OF MARYLAND

Beachley,
Wells,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: November 26, 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.

Herbert Mitchell, appellant, was convicted by a jury in the Circuit Court for Baltimore City of attempted robbery with a dangerous weapon, use of a firearm in the commission of a crime of violence, and attempted theft. On appeal, Mr. Mitchell challenges the sufficiency of the evidence to support his conviction for use of a firearm in the commission of a crime of violence. We shall affirm.

“When reviewing the sufficiency of the evidence, we view the evidence and any reasonable inferences therefrom in the light most favorable to the State and determine whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Sewell v. State*, 239 Md. App. 571, 607 (2018) (citation omitted). “We do not reweigh the evidence but simply ask whether there was sufficient evidence – either direct or circumstantial – that could have possibly persuaded a rational jury to conclude that the defendant was guilty of the crime(s) charged.” *Id.* (emphasis omitted). “In doing so, [w]e defer to the fact finder’s opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]” *Id.* (citation and internal quotation marks omitted).

The State charged Mr. Mitchell with a violation of § 4-204 of the Criminal Law Article (Crim. Law), which provides that “[a] person may not use a firearm in the commission of a crime of violence . . . or any felony, whether the firearm is operable or inoperable at the time of the crime.” To convict Mr. Mitchell of that offense, the State was required to prove beyond a reasonable doubt that (1) a firearm was used by Mr. Mitchell, and (2) that Mr. Mitchell used a firearm in the commission of a felony or a crime of

violence. *Hallowell v. State*, 235 Md. App. 484, 507 (2018). A handgun is a “firearm” within the meaning of the statute. Crim. Law § 4-204(a)(2).

At trial, the victim testified, through an interpreter, that, on March 29, 2018, he was working as a cashier at a gas station. Someone knocked on the door of the secure cashier’s booth and he opened the door, thinking that it was one of his co-workers. When the victim opened the door, Mr. Mitchell was standing there. Mr. Mitchell pointed a black “handgun” at the victim and said, “give me all of your money.” The victim quickly closed the door to the booth so that Mr. Mitchell was not able to enter. Mr. Mitchell walked around the gas station for approximately 15 minutes, and then left. He was arrested later that day when he returned to the gas station and “tried to pump gas [in exchange for money] and beg money.” No handgun was recovered from Mr. Mitchell’s person during a search incident to the arrest.

The jury was shown video from the gas station’s surveillance system that depicts Mr. Mitchell approaching the door to the cashier’s booth while pulling the hood of his jacket tightly around his face and simultaneously looking around the gas station. He then reaches into the waistband of his pants and removes an object with his right hand. Mr. Mitchell knocks on the door and the door is then opened from inside, and immediately closed. Mr. Mitchell pushes against the door several times in an unsuccessful attempt to force the door open. He then walks away, while holding the object down and close to his right side, before putting it back into his waistband.

Mr. Mitchell testified in the defense portion of the case. He said that he had been homeless since 2016 because he was “badly on drugs” and was “stealing from home[,]” so

he “[took] to the streets until [he] got the right help that [he] needed[.]” He survived by eating out of garbage cans and “begging on the streets.” He denied that he robbed the gas station or that he had a gun, and said that the object he is seen holding in a still photograph that was taken from the surveillance video was an umbrella or a soda.

On appeal, Mr. Mitchell contends that the evidence was insufficient for the jury to find that the weapon used met the statutory definition of a firearm because (1) although the victim described the gun as a “handgun[.]” he “did not describe the gun with any further particularity”; (2) “the State elicited no information regarding [the victim’s] ability to distinguish an actual gun from a toy gun”; (3) it was “impossible” to tell from the surveillance video that was introduced into evidence what type of object Mr. Mitchell was holding; (4) Mr. Mitchell remained at the gas station instead of fleeing from the scene which was “inconsistent with the notion that the object he held was a qualifying firearm”; and (5) Mr. Mitchell testified that he was holding either a soda bottle or an umbrella, not a handgun. The State asserts that the victim’s testimony that Mr. Mitchell “pointed a black handgun at him while demanding money, coupled with [Mr.] Mitchell’s handling of the object as seen on the surveillance video,” was sufficient evidence to sustain the conviction. We agree with the State.

Eyewitness testimony that a handgun was used in the commission of a crime is sufficient for the finder of fact to conclude that a weapon was a handgun. *Brown v. State*, 182 Md. App. 138, 168 (2008) (citations omitted). *See also Couplin v. State*, 37 Md. App. 567, 576 (1977) (victim’s description of the weapon as “handgun” or “small pistol” was sufficient to withstand a motion for judgment of acquittal on a charge of use of a handgun

in the commission of a crime of violence) (*overruled in part on other grounds, State v. Ferrell*, 313 Md. 291 (1988)). Accordingly, the victim’s testimony that Mr. Mitchell had a “handgun,” without more, was sufficient for the jury to find that Mr. Mitchell used a “firearm” as that term is defined in the statute. The State was not required to prove that the handgun was real, and not a toy. *See Brown*, 182 Md. App. at 167 (“in the absence of contradictory evidence, the prosecution is not required to introduce specific evidence that the weapon was a firearm; was operable; or was not a toy.”) *See also Brooks v. State*, 314 Md. 585, 589 n.3 (1989) (if an instrument that is used in a crime “is described as a gun without further qualification, there is a permissible inference that it is a real and operable gun.”)

Although we conclude that the evidence was sufficient to sustain the conviction based solely on the victim’s testimony, we note that Mr. Mitchell’s contention that it was “impossible” to tell whether the object he was holding is a handgun is without merit. Rather, as the State notes, the surveillance video demonstrates that the object is shiny and is the size and shape of a handgun. Moreover, Mr. Mitchell’s handling of the object is consistent with the use of a handgun. He furtively pulled the object from his waistband as he approached the door to the cashier’s booth and then held it close and down by his side as he walked away, in an apparent attempt to conceal it from others in the area until he had the opportunity to covertly return it to his waistband. This was additional evidence from which the jury could conclude that Mr. Mitchell used a handgun in the commission of a crime. *See Correll v. State*, 215 Md. App. 483, 501 (2013) (“A weapon’s identity as a

handgun can be established by testimony or by inference, as opposed to tangible evidence in the form of the weapon.”) (citation and internal quotation marks omitted).

That Mr. Mitchell testified that the object he is seen holding in the surveillance video was not a handgun is irrelevant to our review of the sufficiency of the evidence. It is the role of the jury to resolve conflicts in the evidence and weigh the credibility of witnesses. *Correll*, 215 Md. App. at 502. “In doing so, the jury ‘can accept all, some, or none of the testimony of a particular witness.’” *Id.* (citation omitted).

Nor do we consider Mr. Mitchell’s contention that his actions following the attempted robbery were inconsistent with a finding that he used a handgun. Even if we were to agree with that contention, we do not consider evidence tending to support the defense theory of the case in evaluating whether evidence is legally sufficient to support a conviction, as exculpatory inferences are not part of the version of the evidence most favorable to the State. *Cerrato-Molina v. State*, 223 Md. App. 329, 351, *cert. denied*, 445 Md. 5 (2015). In sum, viewed in the light most favorable to the State, the evidence at trial, if believed, was sufficient to support a finding that Mr. Mitchell used a firearm in the commission of an attempted robbery.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**