Circuit Court for Prince George's County
Case No.: CT150832X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3180

September Term, 2018

JARVIS LEE JOHNSON

v.

STATE OF MARYLAND

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

JJ.

Opinion by Friedman, J.

Filed: February 12, 2020

A jury sitting in the Circuit Court for Prince George's County found appellant, Jarvis Johnson, guilty of (1) first-degree assault, (2) two counts of reckless endangerment, (3) use of a firearm in a crime of violence, (4) wearing, carrying, or transporting a handgun on his person, and (5) wearing, carrying, or transporting a handgun in a vehicle. The circuit court sentenced Johnson to an aggregate term of imprisonment of twenty-four years, with all but twenty years suspended in favor of five years' probation.

Johnson did not thereafter note a timely appeal of his convictions to this Court. Nevertheless, he was awarded post-conviction relief in the form of the right to note a belated appeal, which he did. On appeal, he contends *first*, that the evidence was not legally sufficient, and *second*, that the sentence for one count of reckless endangerment should have merged into his sentence for first-degree assault. We disagree with his first contention but agree with the second. We, therefore, remand the case to the circuit court for re-sentencing consistent with this opinion, and otherwise affirm.

BACKGROUND

On April 15, 2015, at around 9:00 p.m., Calvin Lomax, a private security guard, was on duty at the Carriage Hill apartment complex when he received a call from the front gate dispatcher reporting that a silver Kia operated by a woman had entered the apartment complex's gate behind another vehicle without stopping at the gatehouse as required. The security guards followed the Kia until it stopped. At that point, another pair of security officers joined them.

After Lomax began to speak to the woman, Johnson approached and interrupted them to explain that the woman was his wife. Lomax told Johnson to wait, at which point

Johnson became aggressive and began to curse loudly. Lomax then told Johnson and the woman, neither of whom lived at the apartment complex, to leave the property. As the couple drove away Johnson screamed out of the window, according to Lomax, "something like 'I guess you don't know who I am … I'll be back … I'll shut this motherfucker down.'" When the Kia was about a quarter of a mile away, driving towards the exit of the apartment complex, Johnson began firing a pistol from the passenger side of the vehicle. Lomax took cover next to a parked car.

The security guards blocked off the area where the shots were fired from and the police later recovered seven .40 caliber shell casings. Lomax and another security officer later identified Johnson, in a double-blind photographic array,[1] as the person they saw shooting out of the silver Kia. Lomax also identified Johnson from a photograph taken by a security camera mounted on the security booth at the gate to the apartment complex.

DISCUSSION

I.

Johnson contends that the evidence was legally insufficient to support his convictions and that, therefore, the circuit court erred in denying his motion for judgment of acquittal.

[1] It was explained at trial that a double-blind photographic array is so named because the person presenting the array is unaware of the suspect's identity, and therefore cannot influence the witness's selection. In addition, the arrays shown to Lomax and the other security guard were presented by two different police officers who otherwise had no involvement in the investigation.

In considering a challenge to the sufficiency of the evidence, we ask "'whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (2016) (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)). Moreover, "[w]e do not re-weigh the evidence, but 'we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *State v. Smith*, 374 Md. 527, 534 (2003) (quoting *White v. State*, 363 Md. 150, 162 (2001)). This Court will not reverse a conviction on the evidence "'unless clearly erroneous.'" *Id.* at 535 (quoting *State v. Raines*, 326 Md. 582, 590 (1992)).

For the reasons that follow, we hold that the evidence was legally sufficient to support each of Johnson's convictions.

A.

Among the crimes Johnson was charged with and convicted of is the first-degree assault of Lomax in violation of section 3-202 of the Criminal Law Article of the Maryland Code. MD. CODE, CRIMINAL LAW ("CR") § 3-202.

"To convict [a defendant] of first-degree assault, the State must prove all the elements of assault in the second-degree, and, to elevate the offense to first-degree, at least one of the statutory aggravating factors." *Snyder v. State*, 210 Md. App. 370, 379 (2013).

Second-degree assault can be carried out in three distinct ways: (1) by intentionally frightening the victim; (2) by battering the victim; or (3) by attempting to batter the victim. *Jones v. State*, 440 Md. 450, 455 (2014). Second-degree assault elevates to first-degree assault when a person "intentionally cause[s] or attempt[s] to cause serious physical injury to another," or when a person "commit[s] an assault with a firearm."[2] CR § 3-202.

The "intent-to-frighten" type of assault "requires that the defendant commit an act with the intent to place another in fear of immediate physical harm, and the defendant had the apparent ability, at that time, to bring about the physical harm." *Snyder*, 210 Md. App. at 382. In *Lamb v. State*, this Court made clear that, under the "intent-to-frighten" form of assault, "it is not necessary that the victim be actually frightened or placed in fear of an imminent battery[.]" 93 Md. App. 422, 437 (1992). Additionally, it "is of no consequence" that, from the assailant's perspective, there is no "apparent present ability" to threaten the victim. *Id*. at 443. Rather, the relevant inquiry is whether, from the victim's perspective, "the victim is … placed in reasonable *apprehension* of an impending battery." *Id*. at 437–38 (emphasis added).

Johnson claims that the evidence was legally insufficient to support his conviction for first-degree assault because the obstructed quarter-mile distance between Johnson and Lomax when the shots were fired was too great to support the inferences that Johnson intended to place Lomax in fear of an imminent battery, and that Lomax reasonably feared

[2] In Johnson's case, the jury was instructed on the "intent-to-frighten" theory of second-degree assault and on both theories of aggravation to first degree assault.

immediate harm. As a result, Johnson further argues that because first-degree assault was the only underlying crime of violence of which he was convicted, the evidence was insufficient to support his conviction for unlawful use of a firearm in a crime of violence.

We believe that the evidence was more than sufficient for the jury to conclude that, when Johnson fired his weapon multiple times from the window of a moving vehicle after becoming enraged and shouting profanities at the security guards, he "committed an act with the intent to place [Lomax] … in fear of immediate physical harm." *See Snyder*, 210 Md. App. at 382. Moreover, given that the weapon was actually fired, and there was no evidence establishing that a bullet fired from a firearm could not cover the distance between Johnson and Lomax, the jury could have inferred that Johnson had "the apparent ability, at the time, to bring about physical harm." *Id*. Lastly, the jury could have found that because Lomax took cover next to a parked car, he "reasonably feared immediate physical harm." *Id*. Thus, we hold that the evidence was sufficient for the jury to conclude that Johnson committed first-degree assault of the intent-to-frighten variety on Lomax. We also hold that the evidence was sufficient to support the conviction for use of a firearm in the commission of a crime of violence.

B.

Johnson also contends that the evidence was legally insufficient to support his convictions for recklessly endangering Lomax and the other security officers. Johnson claims (similarly to his argument regarding the sufficiency of the evidence for the first-degree assault conviction) that given the obstructed quarter-mile distance between Johnson

and the security guards, and the fact that the shots were fired in an unknown direction, no reasonable person could have felt endangered by the shooting.

Under CR § 3-204, "[a] person may not recklessly … engage in conduct that creates a substantial risk of death or serious physical injury to another." Accordingly, to prove reckless endangerment, the State must show: "(1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; (2) that a reasonable person would not have engaged in that conduct; and (3) that the defendant acted recklessly." *Jones v. State*, 357 Md. 408, 427 (2000). Moreover, "to evaluate whether the behavior is reckless," a defendant's conduct is examined "from the standpoint of an ordinary, law-abiding citizen under similar circumstances." *Id*. at 428.

Johnson relies, in part, on *Albrecht v. State* for the proposition that the security officers were not in the "arc of danger" of Johnson's shooting spree. 105 Md. App. 45 (1995). Johnson's reliance on *Albrecht* is misplaced. In *Perry v. State*, we explained:

> In the context of the *Albrecht* case—the genesis of the "arc of danger" expression—the appellant was a police officer who was trained to carry and discharge a gun, and the exact line of fire was known and established. This Court was able to conduct a heightened and nuanced review of who at the scene was actually placed in substantial risk of death or serious bodily harm based on the arc of danger created by the officer's line of fire. When Officer Albrecht, a trained officer authorized to carry and use a weapon, purposefully aimed it at one precise target in broad daylight, the arc of danger was very narrow.

229 Md. App. 687, 705 (2016) (citation omitted).

This Court further pointed out that, in Perry's case, "the reckless behavior that created the substantial risk was not that of a police officer, trained to discharge a weapon

leveled at a specific target, [rather,] Perry was a civilian who was not authorized to carry or discharge a weapon." *Id*. at 706. Largely because of that distinction, the Court in *Perry* went on to find that "the highly nuanced 'arc of danger' analysis that was applied in *Albrecht* [was] inapplicable to the facts presented in [that] case." *Id*. Similarly, in Johnson's case, we too find the "arc of danger" analysis inapplicable. In fact, we believe that Johnson's conduct is exactly the sort of behavior that the General Assembly sought to deter in enacting section CR § 3-204. The goal of the statute is to prevent "the commission of potentially harmful conduct before an injury or death occurs." *State v. Albrecht*, 336 Md. 475, 500-501 (1994). Moments after becoming angry at the security officers for being asked to comply with the rules of the apartment complex, Johnson repeatedly and wildly fired a pistol from a moving vehicle. Under those circumstances, the jury could have reasonably found that Johnson's conduct put the security officers in substantial risk of death or serious physical injury sufficient to find reckless endangerment.

C.

Johnson challenges the sufficiency of the evidence supporting his two convictions for wearing, carrying, or transporting a handgun because, according to him, there was no evidence from which a rational juror could find that a handgun, and not some other sort of firearm, was what he fired from the window of the silver Kia. We disagree.

Section 4-203(a) of the Criminal Law Article prohibits a person from wearing, carrying, or transporting a handgun on their person or in a vehicle. CR § 4-203(a). "'Handgun' means a pistol, revolver, or other firearm capable of being concealed on the

person," including "a short-barreled shotgun and a short-barreled rifle[,]" but not including "a shotgun, rifle, or antique firearm." CR §4-201(c).

At trial, Lomax testified that Johnson had used a handgun during the shooting. The following exchange occurred on re-direct examination:[3]

> THE STATE: And the statement that you actually ended up writing, I think you were trying to clarify [your written statement] regarding the question you were asked about the handgun. Isn't it true the question was, what type of gun was used. Isn't it true that was the question asked of you?
>
> CALVIN LOMAX: Yes.
>
> THE STATE: Do you recall what you answered?
>
> CALVIN LOMAX: According to the statement, it sounded like a gun.
>
> THE STATE: A handgun?
>
> CALVIN LOMAX: A handgun, yes.
>
> THE STATE: So it's not that you were saying, that defense counsel was saying that it sounded like a gun. You were actually asked if you knew what type of gun was used?
>
> CALVIN LOMAX: Correct.
>
> THE STATE: And you said a handgun, correct?
>
> CALVIN LOMAX: Correct.

[3] We note that Johnson had first impeached Lomax's credibility on cross examination with the fact that the report he wrote about this incident stated that he only heard the gunshots and did not see the muzzle flash as he testified to on direct examination.

"[I]t is well established in Maryland that the testimony of even a single eyewitness, if believed, is sufficient evidence to support a conviction." *Marlin v. State*, 192 Md. App. 134, 153 (2010). We, therefore, hold that there was legally sufficient evidence from which a rational jury could have reasonably concluded that Johnson fired a handgun and not a shotgun, rifle, or antique firearm.

II.

Johnson, relying on our holding in *Marlin v. State*, contends that his five-year consecutive sentence for recklessly endangering Lomax should merge, under the rule of lenity, with his sentence for first-degree assault on Lomax. 192 Md. App. 134 (2010). The State agrees, and, given that *Marlin* stands directly for the proposition that when the same conduct forms the basis of both a reckless endangerment conviction and a first-degree assault conviction, the sentence for reckless endangerment merges into the sentence for first-degree assault, so do we.

That is, however, where the agreement of the parties ends. Johnson argues that we should vacate the five-year sentence for reckless endangerment, thereby reducing his aggregate sentence to twenty-four years, with all but fifteen years suspended in favor of five years' probation. The State asserts that, pursuant to the Court of Appeals' holding in *Twigg v. State*, we should vacate all of Johnson's sentences and remand the case to the circuit court for re-sentencing on all counts, at which Johnson could not receive a greater aggregate sentence than he already received, *i.e*. twenty-four years, with all but twenty years suspended in favor of five years' probation. 447 Md. 1 (2016). We agree with the State.

Section 12-702(b) of the Courts and Judicial Proceedings Article provides that:

> (b) If an appellate court remands a criminal case to a lower court in order that the lower court may pronounce the proper … sentence … the lower court may impose any sentence authorized by law to be imposed as punishment for the *offense*. However, it may not impose a sentence more severe than the sentence previously imposed for the offense unless:
>
> (1) The reasons for the increased sentence affirmatively appear;
>
> (2) The reasons are based upon additional objective information concerning identifiable conduct on the part of the defendant; and
>
> (3) The factual data upon which the increased sentence is based appears as part of the record.

MD. CODE, COURTS AND JUDICIAL PROCEEDINGS ("CJ") § 12-702(b) (emphasis added).

According to the Court of Appeals' analysis of CJ § 12-702(b) in *Twigg*, "offense means not simply one count in a multi-count charging document, but rather the entirety of the sentencing package that takes into account each of the individual crimes of which the defendant was found guilty." *Twigg*, 447 Md. at 26-27. *Twigg* further explained that:

> the original sentencing court is viewed as having imposed individual sentences merely as component parts or building blocks of a larger total punishment for the aggregate convictions, and, thus, to invalidate any part of that package without allowing the court thereafter to review and revise the remaining valid convictions would frustrate the court's sentencing intent.

Id. at 28.

Having determined that Johnson's sentence for recklessly endangering Lomax should have merged with his sentence for first-degree assault, we agree with the State that,

in light of *Twigg*, the appropriate remedy is to vacate all of Johnson's sentences and remand for re-sentencing.[4] We, therefore, vacate Johnson's sentences and remand the case to the circuit court for re-sentencing consistent with this opinion.

APPELLANT'S SENTENCES VACATED. JUDGMENTS OTHERWISE AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR RESENTENCING. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE–HALF BY PRINCE GEORGE'S COUNTY.

[4] The parties are in agreement that Johnson's individual sentence for first-degree assault may not be increased upon re-sentencing because it is a crime of violence and any increase in that sentence would have the impact of delaying his parole eligibility date. According to *State v. Thomas*, a resentencing that results in a later parole eligibility date is more severe than an original sentence, and is therefore prohibited. 465 Md. 288, 310 (2019). We, therefore, agree with the parties that *Thomas* prohibits the imposition of a greater sentence for first-degree assault upon remand.