

SUPREME COURT OF THE STATE OF DELAWARE

Grayson v. State

Grayson v. State · No. No. 470, 2017 · Decided May 10, 2019

SUMMARY

The Delaware Supreme Court reversed Mark Grayson's convictions for first-degree reckless endangering, possession of a firearm during the commission of a felony, resisting arrest, and possession of a firearm by a person prohibited. The Court held that the Superior Court committed reversible error by refusing to instruct the jury on the lesser-included offense of second-degree reckless endangering. The Court also rejected Grayson's challenge to the sufficiency of the evidence and remanded for the convictions to be vacated, bail to be reinstated, and a new trial to be scheduled.

CASE DETAILS

COURT	Supreme Court of the State of Delaware
WRITING FOR THE COURT	Collins J. Seitz, Jr.; Vaughn, Justice; Seitz, Justice; Traynor, Justice
JURISDICTION	Delaware
DECIDED	May 10, 2019
DOCKET	No. 470, 2017
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Direct appeal from convictions and sentencing in the Delaware Superior Court.
STANDARD OF REVIEW	The court reviewed the denial of the motion for judgment of acquittal under whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements beyond a reasonable doubt, and reviewed the evidence de novo. The jury-instruction issue was reviewed for reversible error.
PRECEDENTIAL VALUE	published
PARTIES	Mark Grayson v. State of Delaware

TOPICS

- lesser included offense instructions
- jury instructions
- criminal procedure
- appellate procedure
- burden of proof

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

QUESTIONS PRESENTED

1. Whether the Superior Court reversibly erred by refusing to instruct the jury on the lesser-included offense of second degree reckless endangering because the alleged use of a firearm was considered necessarily capable of causing death.
2. Whether the evidence was insufficient to support Grayson's conviction for first degree reckless endangering.

HOLDINGS

1. The Superior Court reversibly erred by refusing to give the requested instruction on second degree reckless endangering. The circumstances permitted a reasonable jury to find that Grayson created a substantial risk of physical injury without necessarily creating a substantial risk of death.
2. The evidence was sufficient for a rational juror to find beyond a reasonable doubt that Grayson recklessly created a substantial and unjustifiable risk that a shot could kill someone.

KEY QUOTATIONS

“Under the circumstances, a rational juror could conclude Grayson was aware he was shooting in a way that created a substantial and unjustifiable risk that one of the shots could kill someone.” (at 6)

“This matter is REMANDED to the Superior Court to vacate Grayson’s convictions, to reinstate bail, and to set a new trial date.” (at 7)

FACTUAL BACKGROUND

Officer Jesse Russell heard gunshots while patrolling a shopping-center parking lot and observed Grayson handling what appeared to be a firearm, with smoke emanating from it as Grayson continued shooting. Grayson fled when ordered to stop and was apprehended after a short chase. Although no firearm was recovered, police found six spent shell casings where Russell had observed Grayson operating the apparent firearm, and Grayson's hands tested positive for gunshot residue.

PROCEDURAL HISTORY

A Superior Court grand jury indicted Grayson on first degree reckless endangering, possession of a firearm during the commission of a felony, resisting arrest, possession of a firearm by a person prohibited, and possession of firearm ammunition by a person prohibited. The charges were severed into two jury trials, resulting in convictions for first degree reckless endangering, PFDCE, resisting arrest, and PFBPP. The Superior Court declared Grayson a habitual offender and sentenced him to an aggregate forty-six years of incarceration, suspended after forty-five years for one year of probation. On direct appeal, the Delaware Supreme Court reversed and remanded because the trial court failed to give a requested lesser-included-offense instruction and rejected Grayson's sufficiency challenge.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The Superior Court was directed to vacate Grayson's convictions, reinstate bail, and set a new trial date. Jurisdiction was not retained.

CASES CITED

- White v. State, 173 A.3d 78, 80 (Del. 2017)
- Weddington v. State, 545 A.2d 607, 612, 616 (Del. 1988)
- Monroe v. State, 652 A.2d 560, 567-68 (Del. 1995)
- Rose v. State, 51 A.3d 479, 482 (Del. 2012)
- Robertson v. State, 596 A.2d 1345, 1355 (Del. 1991)
- Shipley v. State, 570 A.2d 1159, 1170 (Del. 1990)

OPINION

PER CURIAM.

IN THE SUPREME COURT OF THE STATE OF DELAWARE MARK GRAYSON, § § No. 470, 2017 Defendant Below, § Appellant, § Court Below—Superior Court § of the State of Delaware v. § § Cr. ID Nos. 1509003378A (N) STATE OF DELAWARE, § 1509003378B § Plaintiff Below, § Appellee. § Submitted: March 15, 2019 Decided: May 10, 2019 Before VAUGHN, SEITZ, and TRAYNOR, Justices. ORDER Upon careful consideration of the parties' briefs and the record below, it appears to the Court that: (1) On October 26, 2015, a Superior Court grand jury indicted the appellant, Mark Grayson, for first degree reckless endangering, possession of a firearm during the commission of a felony ("PFDCF"), resisting arrest, possession of a firearm by a person prohibited ("PFBPP"), and possession of firearm ammunition by a person prohibited ("PFABPP").

At Grayson's request, the Superior Court severed the PFBPP and PFABPP charges from the remaining counts. Following two separate jury trials—the first on the first degree reckless endangering, resisting arrest, and PFDCF charges and the second on the person prohibited charges—Grayson was found guilty of first degree reckless endangering, PFDCF, resisting arrest, and PFBPP.

On October 27, 2017, the Superior Court granted the State's motion to declare Grayson a habitual offender and sentenced Grayson to an aggregate 46 years of incarceration, suspended after 45 years for one year of probation. This is Grayson's direct appeal.

(2) The trial transcript reflects that, on September 4, 2015, Wilmington Police Officer Jesse Russell was working a security detail, patrolling the parking lot of the Adams Four Shopping

Center, when he heard gunshots. Officer Russell observed Grayson handling what appeared to him — based on the way Grayson held and manipulated it—to be a firearm. Officer Russell witnessed plumes of smoke emanating from the presumed firearm as Grayson continued to shoot in the area of the shopping center.

Officer Russell approached Grayson, made eye contact with him, and ordered him to stop. Grayson fled, but Officer Russell apprehended Grayson after chasing him for roughly a block's distance. When Grayson was taken into custody, he did not have a weapon on him.

However, six spent shell casings were located in the area where Officer Russell observed Grayson seemingly operating a firearm. In addition, Grayson's hands tested positive for the presence of gunshot residue. 2 (3) Grayson raises several issues on appeal.

We need address only two of them. First, Grayson argues the Superior Court erred when it declined Grayson's request for a jury instruction on the lesser included offense of second degree reckless endangering. A conviction for first degree reckless endangering requires that the jury find the defendant's actions created a "substantial risk of death to another person"¹ whereas a conviction for second degree reckless endangering requires only that the jury find the defendant's actions created a "substantial risk of physical injury to another person."² The record reflects the Superior Court denied Grayson's request for a jury instruction on the lesser included offense of second degree reckless endangering because it determined the alleged use of a firearm precluded the instruction.

That is, the Superior Court accepted the State's position that the firing of a gun is always capable of causing death. However, after the conclusion of Grayson's trials, this Court considered a similar factual scenario in *White v. State*.³ In *White*, we reversed the defendant's conviction because the Superior Court failed to instruct the jury on second degree reckless endangering.

In so doing, we concluded it was possible for a reasonable jury to have found the defendant guilty of second degree reckless endangering 1 11 Del. C. § 604. 2 11 Del. C. § 603(a). 3 173 A.3d 78 (Del. 2017). 3 because there was evidence that the defendant "was not pointing his gun at anyone in particular and was instead aiming blindly behind himself."⁴ With commendable candor, the State agrees the facts here support Grayson's argument that the jury should have been instructed on the lesser included offense of second degree reckless endangering.

The State suggests the Court remand this case to the Superior Court with directions that Grayson's conviction in both cases be vacated and that the matter be scheduled for a new trial.⁵ (4) The Court acknowledges that the State's confession of error "is in accordance with the highest traditions of the Delaware Bar and the prosecutor's unique role and duty to seek justice within an adversary system."⁶ Notwithstanding this confession of error, we must make an independent

determination that the Superior Court committed a reversible error in denying Grayson's request for a jury instruction on second degree reckless endangering.⁷ 4 Id. at 80.

5 Here, because the first jury found Grayson guilty of the PFDCF charge, the Superior Court instructed the second jury that, as a matter of fact, Grayson possessed a firearm on September 4, 2015. If, on retrial, Grayson is found not guilty of first degree reckless endangering, the jury would not reach the PFDCF charge and the State would be required to prove each element of the PFBPP charge beyond a reasonable doubt.

Thus, both convictions must be vacated to correct the error. 6 *Weddington v. State*, 545 A.2d 607, 616 (Del. 1988). 7 Id. at 612 ("A confession of error does not require the reversal of the judgment of conviction in the trial court."). 4 (5) After careful consideration, we agree that the Superior Court's failure to instruct the jury on second degree reckless endangering constitutes reversible error.

In reaching this conclusion, we note that although Officer Russell testified that there were people in and around the shopping center, he did not say that Grayson fired his weapon in the direction of anyone. We concur that the State's requested relief is appropriate under the circumstances.

(6) Although remand is appropriate and analysis of Grayson's other arguments is premature, we will consider Grayson's contention that the Superior Court erred in denying his motion for judgment of acquittal based on sufficiency of the evidence.

We do so in the interest of justice because, as Grayson correctly notes, if we find the evidence insufficient to uphold his conviction for first degree reckless endangering, the State cannot retry him for the underlying conduct under the Double Jeopardy Clause of the United States Constitution and we would remand the case for an entry of judgment of acquittal.⁸ (7) "A person is guilty of reckless endangering in the first degree when the person recklessly engages in conduct which creates a substantial risk of death to another person."⁹ "A person acts recklessly... when the person 8 *Monroe v. State*, 652 A.2d 560, 567-68 (Del.

1995). 9 11 Del. C. § 604. 5 is aware of and consciously disregards a substantial and justifiable risk that [death]... will result from the conduct."¹⁰ The risk must be great enough that disregarding it "constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."¹¹ (8) We review claims of insufficient evidence to determine whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.¹² We review the evidence in the record de novo.¹³ "The fact that most of the State's evidence [is] circumstantial is irrelevant; 'the Court does not distinguish between direct and circumstantial evidence.'"¹⁴ Here, the record reflects that Officer Russell heard gunshots, saw plumes of smoke

emanating from Grayson's hands, made eye contact with Grayson, and chased and apprehended Grayson.

Although no weapon was recovered, the police located spent shell casings at the scene and recovered gunshot residue from Grayson's hands. Under the circumstances, a rational juror could conclude Grayson was aware he was shooting in a way that created a substantial and unjustifiable risk that one of the shots could kill 10 11 Del. C. § 231(e). 11 Id. 12 Rose v. State, 51 A.3d 479, 482 (Del.

2012). 13 Id. 14 Robertson v. State, 596 A.2d 1345, 1355 (Del. 1991) (citing Shipley v. State, 570 A.2d 1159, 1170 (Del. 1990)). 6 someone. We find no merit to Grayson's argument that the Superior Court erred in denying his motion of judgment of acquittal based on the sufficiency of the evidence. NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED.

This matter is REMANDED to the Superior Court to vacate Grayson's convictions, to reinstate bail, and to set a new trial date. Jurisdiction is not retained. BY THE COURT: /s/ Collins J. Seitz, Jr. Justice 7