UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2443

September Term, 2013

WILLIAM SCOTT KERN

v.

STATE OF MARYLAND

Woodward,
Wright,
Berger,

JJ.

Opinion by Woodward, J.

Filed: July 11, 2016

On February 12, 2013, appellant, William Kern, a Baltimore City police officer, was conducting a training session for police cadets when he mistakenly drew his service weapon, instead of his training weapon, and shot one of the cadets. Appellant was charged with second degree assault and reckless endangerment. After a jury trial in the Circuit Court for Baltimore County, appellant was acquitted of the second degree assault charge but convicted of reckless endangerment. Appellant was sentenced to eighteen months of incarceration, with all but sixty days suspended, and two years' probation.

Appellant presents three questions on appeal, which we have condensed and rephrased as follows:[1]

1. Was there sufficient evidence to sustain appellant's conviction for reckless endangerment?

2. Did the trial court err or abuse its discretion by admitting testimony regarding the nature and extent of the victim's injuries?

[1] Appellant's questions, as set forth in his brief, are as follows:

1. Did the trial court err, as a matter of law, in failing to grant the Appellant's motion for judgment of acquittal when the evidence produced by the State was insufficient to support a conviction for Reckless Endangerment?

2. Did the trial court err, as a matter of law, in failing to grant the Appellant's motion for judgment of acquittal when the evidence produced was insufficient to show that the *actus reus* and *mens rea* of Reckless Endangerment existed concurrently?

3. Did the trial court err in allowing the state to produce evidence regarding the nature and extent of the injuries suffered by Cadet Gray when the prejudicial effect of such evidence outweighed any potential probative value?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

BACKGROUND

On October 15 through 17, 2013, appellant was tried in the circuit court on charges of reckless endangerment and second degree assault. At trial, the following facts were elicited.

On February 12, 2013, appellant, a nineteen-year veteran of the Baltimore City Police Department, and another officer, Officer Efren Edwards, led a training session for approximately nineteen police cadets. The training took place at the Rosewood Center, an abandoned psychiatric hospital in Owings Mill, Maryland, that was often used for law enforcement training purposes. The training was to take place in one of approximately ten buildings on the Rosewood campus. The only entrance to the building was a single door that locked from the outside. During the training session, this door was left propped open with a chair so that the officers and cadets would not be locked inside.

On the morning of the training, Officer Edwards arrived at the facility before 8:00 AM to do a "grounds search." Officer Edwards picked up the key for the building from the security officer, who was in a security booth on the grounds. Appellant also arrived, and Officer Edwards told appellant that he would search the building to ensure that it was empty and secure. Finding everything to be in order, Officer Edwards then unloaded his service weapon, put the weapon into a safety bag, and locked the bag in the trunk of his vehicle.

Officer Edwards did not check to see if appellant was armed. Officer Edwards testified that no live weapons were permitted within the training area because of the possibility of an accidental discharge.

Unbeknownst to Officer Edwards, during the training, appellant carried his live service weapon, a Glock .22. Appellant testified that he carried his service weapon during the training session because he "did not feel safe that it was a secured facility." Appellant also carried a Simunitions pistol in his pants pocket on the same side of his body as his holstered Glock. A Simunitions pistol is a device often used for training purposes because it is identical to a real service weapon in weight, size, and texture. A Simunitions pistol also expels a pellet that cannot cause substantial bodily harm.

During his testimony, appellant described a Simunitions device as follows:

> A [S]imunitions device is a handgun that looks very similar to the handgun that is utilized in our department. There are many [S]imunitions, different weapons for each department. There's, you know, you have Glock, you have Smith & Wesson, whichever department uses the [S]imunitions, they would use the one that closely resemble[s] the weapon that they use in service.

According to appellant, his service weapon and the Simunitions weapon are "almost exactly the same size, virtually the same weight. *The only difference is one has a blue handle and one has a black*." (Emphasis added).

Three officers testified that, during the morning training session, appellant accidentally drew his service weapon from the holster because of "muscle memory."

Appellant disputed this testimony and testified that he did not accidentally pull the wrong weapon, but rather drew his service weapon on purpose in order to demonstrate an answer to a question from a cadet.

During the afternoon session, the cadets were split into two groups. One group, led by appellant, was to practice "bunker training" downstairs in the gymnasium, while the other group was to practice "room clearing" with Officer Edwards upstairs. The cadets waiting their turn to participate in the exercises waited in a "safe area" outside the gymnasium. Separating the gymnasium from the safe area was a wooden door with a window. Appellant testified that the area outside the door created a situation known as a "fatal funnel," because it consisted of a doorway, hallway, stairway, and windows, and that cadets are taught to avoid fatal funnels, because they are often locations where police officers are killed.

Upon observing several cadets through the window in the door, appellant saw an opportunity to remind the trainees to avoid fatal funnels. Appellant drew what he believed to be his Simunitions weapon and fired at the door. Appellant testified that he believed that there was no risk at firing the Simunitions weapon at the door because its pellet would not have been able to penetrate a wooden door. Upon hearing a gun discharge, appellant realized he had mistakenly drawn his service weapon. A live round stuck Cadet Raymond Gray, causing nearly fatal injuries.

Before trial, appellant filed five motions in limine, including a motion to suppress evidence regarding the nature and extent of Cadet Gray's injuries. The trial court ruled that

the information regarding the injuries was relevant, and that its probative value was not substantially outweighed by the risk of unfair prejudice. The court, however, agreed to limit the State's evidence regarding the injuries by excluding evidence that "may inflame the passions of the jury more than what they need to know." The State proffered that it would not introduce photographic evidence of Gray's injuries.

As stated above, appellant was convicted of reckless endangerment and sentenced to eighteen months' incarceration, with all but sixty days suspended, and two years of supervised probation. This timely appeal followed.

Additional facts shall be set forth as necessary to resolve the issues raised on appeal.

DISCUSSION

I. *Sufficiency of the Evidence*

> "[W]hen an appellate court "is called upon to determine whether sufficient evidence exists to sustain a criminal conviction, it is not the function or duty of the appellate court to undertake a review of the record that would amount to, in essence, a retrial of the case. Rather, we review the evidence in the light most favorable to the State. . . ."

State v. Albrecht, 336 Md. 475, 478 (1994) (citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). We are not concerned with whether the jury's verdict

> is in accord with what appears to us to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence–that is, evidence that 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.

Albrecht, 336 Md. at 478 (citations and internal quotations marks omitted). "[W]e must view the evidence in the light most favorable to the prosecution, and the judgment can be reversed only if we find that no rational trier of fact could have found the essential elements of the crime." *State v. Pagotto*, 361 Md. 528, 533-34 (2000) (citing *Jackson*, 443 U.S. at 319). The test "is not whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Fraidin v. State*, 85 Md. App. 231, 241 (emphasis in original), *cert. denied*, 322 Md. 614 (1991).

Section 3-204 of the Criminal Law Article ("CL"), the reckless endangerment statute, provides, in relevant part:

> (a) **A person may not recklessly**:
>
> (1) **engage in conduct that creates a substantial risk of death or serious physical injury to another**; or
>
> (2) discharge a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another.
>
> (b) A person who violates this section is guilty of the misdemeanor of reckless endangerment and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $5,000 or both.

The Maryland Criminal Pattern Jury Instruction for reckless endangerment provides:

> The defendant is charged with the crime of reckless endangerment. In order to convict the defendant of reckless endangerment, the State must prove:

> (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.
>
> The defendant acted recklessly if [he] [she] was aware that [his] [her] conduct created a risk of death or serious physical injury to another and then [he] [she] consciously disregarded that risk.

Maryland Criminal Pattern Jury Instructions 4:26A (2d ed. 2012) ("MPJI-CR") (brackets in original).

A. Conduct that Created a Substantial Risk of Death or Serious Physical Injury

Appellant argues that "the events leading up to and including the accidental discharge on February 12, 2013, do not demonstrate a gross and wanton departure from the standard of conduct expected of a similarly situated police officer." The State responds that appellant's argument as to whether his conduct created a substantial risk of death or serious physical injury to another is not preserved, because it was not raised in his oral motion for judgment of acquittal or in his brief in support of his renewed motion for judgment of acquittal. We agree and shall explain.

At the close of the State's case-in-chief, appellant moved for judgment of acquittal on the reckless endangerment charge, and the parties argued at length. Appellant did not contend that the State failed to prove that his conduct created a substantial risk of death or

serious physical injury. At the conclusion of all the evidence, the following conversation took place:

THE COURT:	All right. That's the conclusion of the evidence. Motions?
[DEFENSE COUNSEL]:	Renew my Motion for Judgment of Acquittal, Your Honor. **I'll submit on the brief that's been filed.**
THE COURT:	Okay. All right. I'm going to deny your Motion. I think these are all issues to be resolved by the jury and we'll let the jury resolve them.

(Emphasis added).

In the brief referred to above by defense counsel,[2] appellant noted that, as to the first element of reckless endangerment, a jury must consider whether "the risk created by the defendant's conduct [was] substantial[.] This first area of inquiry calls for an objective assessment." Appellant's brief, in discussing this issue, went on to state, "[a]ssuming, *arguendo*, that the State has elicited evidence identifying [appellant] as the individual who shot Cadet Gray, the defense concedes that a substantial risk of harm was objectively created by [appellant]'s conduct." Appellant testified at trial that he was the individual who shot Cadet Gray.

[2] Although the record reflects that appellant's brief was provided to the trial judge, who considered it in denying the motion, the brief was never filed with the court. The brief was therefore not originally included in the record submitted on appeal. The State has filed a motion to supplement the record with the brief, which is unopposed by appellant. That motion will be granted.

An appellant's sufficiency arguments are limited to those stated in his motion for judgment of acquittal at trial. Md. Rule 4-324(a); *Reeves v. State*, 192 Md. App. 277, 306 (2010). Maryland Rule 4-324(a) states that 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.

Because appellant did not challenge the sufficiency of the evidence on the first element of the crime of reckless endangerment in his oral motion, and because he explicitly conceded it in his brief to the trial court, we conclude that appellant has waived appellate review of the first element. Even if preserved, however, we believe that the State produced sufficient evidence at trial for a rational factfinder to conclude that appellant's conduct objectively created a substantial risk of death or serious physical harm to another.

According to the Court of Appeals, the test is "whether [ ] 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." *Pagotto*, 361 Md. at 549 (citation and internal quotation marks omitted). This is an objective test. *Williams v. State*, 100 Md. App. 468, 503 (1994) ("It is in measuring the substantiality of the risk that an objective test is involved.").

Appellant argues that carrying a service weapon and a Simunitions weapon at the same time during a training exercise is not sufficient evidence to prove this element.

Appellant's articulation of his conduct, however, is not complete. The conduct that appellant engaged in included the entirety of his actions: he was simultaneously carrying a live weapon and a Simunitions weapon; the weapons were on the same side of his body; the weapons were nearly identical in weight and appearance; and he drew one of the weapons, pointed it at a human being, and, without first looking at the weapon to assure that it was not the live one, pulled the trigger. The question posed by the first element is whether appellant's conduct, "considering all of the factors of the case, was such that it amounted to 'wanton or reckless disregard for human life.'" *Pagotto*, 361 Md. at 538 (quoting *Duren v. State*, 203 Md. 584, 589 (1954)). Taken as a whole, when viewed objectively and in the light most favorable to the State, appellant's conduct created a substantial risk of death or serious physical injury to another.

B. A Reasonable Person

The second element of reckless endangerment requires the State to prove that a reasonable person would not have engaged in the conduct at issue. MPJI-CR 4:26A. This test is also objective. *Williams*, 100 Md. App. at 504 (explaining that "to qualify a defendant as 'reckless,' it is necessary that the risk that is consciously disregarded be, objectively measured, not only quantitatively substantial but also qualitatively unjustified"). A police officer accused of reckless endangerment "must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated." *Pagotto*, 361 Md. at 549.

> [A] violation of police guidelines *may* be the basis for a criminal prosecution, which may, in turn, result in a criminal conviction. Thus, to be sure, while a violation of police guidelines is not negligence *per se*, it is a factor to be considered in determining the reasonableness of police conduct.

Id. at 557 (emphasis in original) (citations omitted).

Appellant contends that the evidence was insufficient on the second element, because the State did not introduce any evidence "that bound [ ] [a]ppellant or any other trainer to the rules and regulations found in the 'Simunitions Manual,'" nor any other evidence demonstrating what standard operating procedures were in place on February 12, 2013, nor proof that any alleged violation was significant or reckless. Moreover, appellant argues that his conduct was justified, because the Rosewood facility was unsecured, there was only one security guard on the entire campus, and the door to the building remained open throughout the day.

The State responds that appellant's actions were not justified, because his "security concerns did not justify his extraordinarily risky conduct." The State argues that the building was secure, and that any possible risk from a vagrant or drug addict would not require the immediate availability of a firearm.

Appellant's expert witness, John Farnam, testified at trial as an expert in law enforcement training. Farnam stated that the Glock .22 and the T-17 Simunitions gun are identical in their dimensions and very similar in weight. Farnam also testified that, from his own experience when armed with both a live weapon and a Simunitions device, he has

reached for the wrong weapon. Farnam stated that he would never carry a live firearm while actively participating in a Simunitions training where a weapon is being fired at another person. Farnam agreed that carrying a live firearm while actively participating in Simunitions training exercises created a substantial risk of death or serious physical injury.

According to Farnam, usually in a Simunitions training situation, one person would remain armed and "maintain a referee status." This person would not participate in the training scenarios, because that "would carry with it more risk than I'm willing to expose myself to and expose my students to." Appellant never acted as a "referee" on the day in question.

Officer Edwards testified that live weapons were not permitted within the Simunitions training area, "because of the possibility of an accidental discharge." Officer Edwards said:

> One of the rules are [sic] that there is always a safety officer present. If that person is conducting himself as the safety officer, he is not to participate in any way with the [S]imunitions training. He is to stand outside of the perimeter where the [S]imunitions training is being conducted. If he chooses to participate in the [S]imunition training, then he is not allowed to have his weapon on him, his service weapon or any type of actual firearm on him. Then there is the [S]imunitions portion of the, the, making sure that everyone else who is involved, per se, the trainees or the sworn officers, are also checked to make sure that there are no live weapons utilized or are being a part of the training.[3]

[3] It is undisputed that there was no safety officer present at the training on February 12, 2013.

Thus there was sufficient evidence for a reasonable trier of fact to determine that appellant's conduct was in violation of department guidelines or practices.

Moreover, there was sufficient evidence that a reasonable juror could find that appellant's conduct was not justified, because the likelihood of an intruder was remote. Officer Edwards testified that he searched the building upon arriving to determine that it was empty and secure. Officer Edwards stated that "I did a recon of the building, all three floors, and, and, [sic] and assured that there was no one inside. There's only one way in or one way out so I couldn't have missed anyone in there." Although the single outside door remained propped open during the training, appellant was accompanied by nineteen cadets, who were more than likely capable of dealing with any additional person wandering in. Other officers also testified that they did not feel it was necessary to bring a live weapon to the training. Finally, there was a security guard on the property, which was otherwise filled with buildings that were "vacant, empty and secured."

Appellant relies heavily on *Pagotto*, a case in which a police officer was convicted of involuntary manslaughter and reckless endangerment after he fatally shot the driver of a vehicle while conducting a traffic stop. 361 Md. at 532, 536-37. In that case, Pagotto approached the car, believing the driver had a weapon. *Id.* at 536. As the car began drifting forward, an officer ordered the driver to stop the car, and Pagotto approached the driver's side door with his weapon drawn. *Id.* When Pagotto tried to remove the driver from the car, a struggle ensued, and the gun discharged, killing the driver. *Id.* at 537. The State alleged

that Pagotto violated police procedures, and that those violations constituted gross negligence. Specifically, Pagotto (1) closed in on the driver with his gun drawn, (2) attempted a vehicle extraction with one arm while his gun was in the other hand, and (3) had his finger on the slide of the gun instead of below the trigger guard. *Id.* at 539, 541, 545. The Court of Appeals affirmed this Court's opinion reversing the conviction, holding that evidence that Pagotto violated police procedures was not sufficient to show that his conduct was grossly negligent or reckless. *Id.* at 547. The Court held that Pagotto's actions did not, under the circumstances, "manifest such a gross departure from what would be the conduct of an ordinary and prudent person so as to amount to a disregard of the consequences." *Id.* at 548.

In the instant case, however, appellant's own expert testified that appellant's conduct created a substantial risk of death or serious physical injury, and that he would not carry a live weapon and a Simunitions weapon at the same time that he was actively participating in a Simunitions training exercise. Furthermore, in *Pagotto*, the officer was attempting to defend and protect himself, not, as in the instant case, trying to take advantage of a teaching moment.

C. Acting Recklessly

The third element of reckless endangerment requires the State to prove that the defendant acted recklessly. This is a subjective test in which the jury must consider (1)

whether appellant knew of some risk, and (2) whether appellant consciously disregarded that risk. *See Williams*, 100 Md. App. at 509.

The evidence in the instant case clearly supported appellant's awareness that, by carrying his service weapon on the same side as the Simunitions weapon, there was risk that he would accidentally draw the wrong weapon, because that is exactly what happened earlier that day during the training exercise. Given appellant's awareness of the risk of drawing the wrong weapon, a jury could rationally infer that, if appellant did not check which weapon he drew before pointing the weapon at a person and pulling the trigger, there was a substantial risk of death or serious physical injury from the shooting of a live weapon. Appellant could have easily verified that he had the Simunitions weapon rather than his service weapon in his hand by simply looking at the weapon for the telltale blue marking of the Simunitions gun. Finally, it is undisputed that appellant did not check which weapon that he had drawn before pointing it at a cadet and pulling the trigger. Thus the jury could conclude that appellant consciously disregarded the substantial risk of death or serious physical injury created by his conduct.

The State cites to *Duckworth v. State*, 323 Md. 532 (1991), which we view as instructive. In that case, a jury convicted the defendant of child abuse and battery after he shot a child when his gun allegedly discharged accidentally. *Id.* at 534-35. The Court of Appeals held that the evidence presented at trial that the defendant was directly pointing a

gun at the child, whether or not he believed it was unloaded, was sufficient to support the recklessness element of battery. *Id.* at 540. The Court explained:

> [T]he act of pointing a firearm at a nearby human being, without being certain that the weapon will not discharge, generally is sufficiently reckless to support a conviction for voluntary manslaughter where the unintended discharge of the weapon results in death. Similarly, here, where the discharge of the weapon resulted in a wounding short of death, the same degree of recklessness supports the battery conviction.

Id. at 542.

Appellant, like the defendant in *Duckworth*, pointed a weapon directly at another person, and without verifying that the weapon would not discharge a live round, pulled the trigger. Moreover, all appellant had to do was look at the weapon before pulling the trigger, rather than physically inspecting the weapon to ensure that it was not loaded. In sum, the evidence amply supported a finding by the jury that appellant was aware of the substantial risk of death or serious physical injury caused by his conduct and that appellant consciously disregarded that risk. Accordingly, we conclude that there was sufficient evidence to support appellant's conviction for reckless endangerment.

II. ***Evidence on Nature and Extent of Injuries***

Appellant contends that all evidence regarding the nature and extent of Cadet Gray's injuries is irrelevant, because reckless endangerment does not require proof of injury or harm. According to appellant, because the statute punishes the conduct of the accused and not the

outcome, the nature and extent of injuries caused by appellant's conduct serve only to "inflame the passions of the jury."

The State responds that appellant did not preserve this issue for appellate review, because he did not object to much of the testimony at trial regarding Cadet Gray's injuries. The State also argues that, if preserved, the evidence of Cadet Gray's injuries served as proof of how dangerous appellant's behavior was, and that the evidence presented at trial was not graphic or gruesome.

We agree that appellant's issue is not preserved for our review. As stated above, before trial, appellant filed a motion in limine to exclude the extent of harm caused to Cadet Gray, the degree of injuries, and the effect of the injuries on Cadet Gray's life. In his motion, appellant argued that, for the State to prove reckless endangerment, it needed to show only that there was some harm caused by appellant's conduct, but that any additional details would unfairly prejudice the jury. The trial court determined that the information was relevant, and that the probative value outweighed the danger of unfair prejudice. The court, however, limited the State's evidence to "the fact that he was injured, . . . that he doesn't have a memory of this and that he, he is receiving rehabilitation." The court prohibited the State from presenting evidence regarding "his day to day activities, which may inflame the passions of the jury more than what they need to know as to why he's not here to testify and why he does not have a recollection. There's various other reasons why, I, I think that it is

probative, but that would be speculative of me." The parties also agreed that no photographic evidence of the injuries would be presented at trial.

At trial, Officer Edwards testified that "there was one trainee who was standing there who had glass exploded in his face, that was the first person I saw. I then recognized that we had a trainee laying on the floor and I, I, I noticed that he had a bullet wound in his forehead." Carolyn Gray, Cadet Gray's mother, testified briefly regarding her son's current state. Ms. Gray testified only that Cadet Gray was currently in a rehabilitation facility out of state and that he has no recollection of the events of February 12, 2013. Officer Eva Tonin testified that she "heard screaming behind the door and saying he got shot in the head." Officer Kevin Wojciechowski testified that he saw Cadet Gray fall to the ground and that he saw blood on another officer. Appellant did not object to any of the aforementioned testimony.

Officer Russell Tourangeau testified that Cadet Gray was "unconscious, still breathing, bleeding quite a bit." Appellant objected, and the court overruled his objection. The witness continued, "Bleeding quite a bit. At that point, I just wanted to make sure 911 was called." The State asked, "what, if any, injuries did you observe on Trainee Gray?" Appellant objected, and the court again overruled the objection. The witness answered, "there was a gunshot wound through his forehead."

Officer Jonathan Molina testified that he "saw when Gray got hit on, on [sic] the head and when he got hit, he fell backwards facing away from me and I saw a squirt of blood as

he was falling down." Appellant objected and was overruled. Officer Molina also testified that he screamed, "Gray got shot in the head." Appellant did not object to this testimony.

Appellant did not make a motion in limine to exclude the testimony of Dr. David Vitburg, a critical care physician who responded to the Rosewood facility on February 12, 2013. Dr. Vitburg testified regarding Cadet Gray's level of consciousness, and that

> [h]e couldn't do basic things like keep the, his tongue off the back of his throat, he couldn't move air effectively in and out of his lungs. He had kind of blood over his face that could have been obstructing his airway and, you know, for many reasons, he could not effectively move oxygen or carbon dioxide into and out of his lungs, and it was imperative to secure his airway before moving him.

This statement elicited no objection from appellant. The State then asked Dr. Vitburg, "Was there any difficulty, in this particular circumstances [sic], with intubating him?" Appellant objected, and the court overruled the objection. Dr. Vitburg continued to describe Cadet Gray's status. Appellant did not object to Dr. Vitburg's testimony again and asked no questions on cross-examination.

We conclude that appellant did not preserve this issue for our review. "This Court has long approved the proposition that we will not find reversible error on appeal when objectionable testimony is admitted if the essential contents of that objectionable testimony have already been established and presented to the jury *without objection* through the prior testimony of other witnesses." *Yates v. State*, 429 Md. 112, 120 (2012) (emphasis in original) (citations and internal quotation marks omitted). Here, appellant objected to only

some of the testimony regarding Cadet Gray's condition and the extent of his injuries. We therefore cannot conclude that it was error or abuse of discretion to allow the remaining testimony, which was essentially identical to that which appellant objected.

Even if preserved, however, we do not believe that the trial court erred or abused its discretion by admitting the testimony regarding Cadet Gray's injuries. The Court of Appeals has held that "the issue of whether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court, and that the abuse of discretion standard is applicable to the trial court's determination of relevancy." *State v. Simms*, 420 Md. 705, 724 (2011) (citations and internal quotation marks omitted). While trial judges do not have the discretion to admit irrelevant evidence, they are "vested with discretion in weighing relevancy in light of unfairness or efficiency considerations." *Id.* If the evidence is relevant, we then turn to whether the probative value of the evidence is outweighed by the danger of unfair prejudice. *Id.* at 725; Md. Rule 5-403.

We agree with the trial court that the testimony regarding Cadet Gray's injuries was relevant to whether appellant's conduct caused a substantial risk of death or serious physical injury. Maryland Rule 5-401 defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In the instant case, the evidence that Cadet Gray suffered serious injuries is relevant to show that appellant's

conduct created a substantial risk of death or serious physical injury, because his conduct did in fact cause serious physical injury.

Appellant is correct that the reckless endangerment statute "is aimed at deterring the commission of potentially harmful conduct before an injury or death occurs. As a consequence, a defendant may be guilty of reckless endangerment even where he has caused no injury." *Albrecht*, 336 Md. at 500. Nevertheless, proof of an injury is not irrelevant to whether certain conduct constitutes reckless endangerment. Here, appellant pulled the trigger of what he believed to be a weapon that would cause no harm and instead caused serious physical injury. The resulting injury is relevant to show the substantial nature of the risk associated with appellant's behavior. Moreover, the injuries were relevant to the second degree assault charge.[4]

[4] The Maryland Criminal Pattern Jury Instruction for the battery version of second degree assault provides that:

> Assault is causing offensive physical contact to another person. In order to convict the defendant of assault, the State must prove:
>
> (1) that the defendant caused [offensive physical contact with] [physical harm to] (name);
>
> (2) that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and
>
> (3) that the contact was [not consented to by (name)] [not legally justified].

MPJI-CR 4:01C (brackets and parentheses in original).

Furthermore, the trial court limited the evidence that the State could admit regarding the nature and extent of the injuries. The State did not seek to admit any photographs or particularly gruesome descriptions of the injuries, nor was there detailed evidence regarding Cadet Gray's current status or future prognosis. By sanitizing the evidence that was admitted, the court prevented any unfair prejudice that the injuries could have otherwise had on the jury.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; APPELLANT TO PAY COSTS.