

Circuit Court for Montgomery County
Case No. C-15-CR-22-001259

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND

No. 1889

September Term, 2023

WESLEY JOSE NUNEZ

v.

STATE OF MARYLAND

Arthur,
Friedman,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 4, 2024

*This is a per curiam opinion. Consistent with Rule 1-104, the opinion is not precedent within the rule of stare decisis, nor may it be cited as persuasive authority.

Convicted by a jury in the Circuit Court for Montgomery County of robbery with a dangerous weapon, use of a firearm in the commission of a crime of violence, and conspiracy to commit those offenses, Wesley Jose Nunez, appellant, presents for our review a single issue: whether the evidence is insufficient to sustain the convictions. For the reasons that follow, we shall affirm the judgments of the circuit court.

At trial, the State called the victim,¹ who testified that on the afternoon of October 31, 2022, he was walking from the Forest Park Apartments to a bus stop when a minivan with three people inside “pulled up” and two men exited the minivan. Both men were African-American, appeared to be in their twenties, and were wearing ski masks. One of the men was holding a black pistol, and the other had a gun “tucked in his pants.” The man with the black pistol ordered the victim to surrender his phone and bag, and the other man “was . . . flinching with,” “touching,” and “showing” his gun “so [the victim] could see the butt of it.” The victim complied, and the men entered the minivan and departed. The victim subsequently told police that one of the assailants wore a gray sweatshirt.

The State also called Montgomery County Police Officer Charles Merriman, who testified that he went to the Forest Park Apartments in response to a “call for a robbery that just occurred.” Officer Merriman spoke with the victim, who stated that the vehicle involved was a “gold-ish colored minivan,” and that one of the assailants wore “a gray Nike tech sweatshirt hoodie.” The victim also stated that the assailants were African-American and male, that “the gentleman that had the gray Nike tech hoodie on had . . .

¹Because the victim, at the time of trial, was not yet eighteen years old, we shall refrain from identifying him by his name.

what he described as a black, Glock-type handgun,” and that “the second gentleman [had] the butt of [a] gun sticking out of his pocket or waistband area.” Officer Merriman subsequently broadcast the information over his radio.

The State also produced evidence that following Officer Merriman’s broadcast, police officers were dispatched to the White Oak Shopping Center, which is approximately three to four miles from the Forest Park Apartments. At the shopping center, Montgomery County Police Officer Andrew Kocur observed “a van that matched the description with a young black male wearing a gray sweater who was getting into the passenger seat.” When Officer Kocur “put [his] lights and sirens on,” the van “accelerated away” and “headed north on New Hampshire” Avenue. For approximately ten minutes and a distance of approximately seven miles, police pursued the van, which subsequently crashed into the back of a bus. Police subsequently removed from the van three men, one of whom was wearing a gray “Nike Tech” sweatshirt. Montgomery County Police Officer Ronald Felix-Fortuna testified that he assisted in removing one of the individuals from the van, and identified Mr. Nunez in court as that individual. Montgomery County Police Officer San Kang searched Mr. Nunez and discovered, inside his pants, a firearm with an olive green frame and extended magazine. Officer Kang identified Mr. Nunez in court as the person that the officer searched. A firefighter paramedic who had been called “to help remove passengers from [the] van” discovered, on the floor between the driver and front passenger’s seats, what appeared to be a black handgun.

After the van was towed to a police station, detectives searched the van and discovered, among other items, the victim’s phone and bag, a black ski mask, a “CO2

cartridge,” and “BB pellets.” Police identified the “black handgun” as a pellet, BB, or “CO2-type” gun resembling a Glock handgun. Mark Williford, a forensic firearms examiner for the Montgomery County Police Department’s Crime Laboratory, examined and test-fired the firearm discovered on Mr. Nunez’s person and determined it to be an operable 9mm Luger “Strike 80 C” firearm equipped with a “Glock 19 Gen 4 slide.”

Mr. Nunez first contends that the evidence is insufficient to sustain all of the convictions, because “he neither fit the description of the suspects nor was identified by [the victim] in court.” But, the State produced evidence that Mr. Nunez, who is African-American, was discovered in a van resembling the vehicle described by the victim as having been used by the assailants to depart the scene of the robbery, and containing clothing worn by the assailants and the victim’s property. Also, the victim stated that one of the assailants had a firearm “tucked in his pants,” and police later discovered a firearm inside Mr. Nunez’s pants. We conclude that this evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Mr. Nunez was one of the men who robbed the victim.

Mr. Nunez next contends that the evidence is insufficient to sustain the convictions for conspiracy, because “the State offered no evidence that [the] BB gun could qualify as a dangerous weapon.” The State counters that Mr. Nunez’s “argument is not preserved for appeal,” because in moving for judgment of acquittal, defense counsel “made no mention of the BB gun, did not question whether it was a dangerous weapon, [and did not] offer any other specific deficiencies in the evidence of conspiracy presented.” Alternatively, the State contends that “the State presented sufficient evidence to support [the] convictions.”

We agree with the State that Mr. Nunez’s contention is not preserved for our review. In making a motion for judgment of acquittal, a “defendant shall state with particularity all reasons why the motion should be granted,” Rule 4-324(a), and the Supreme Court of Maryland has stated that “[t]he issue of sufficiency of the evidence is not preserved when the defendant’s motion for judgment of acquittal is on a ground different than that set forth on appeal.” *Hobby v. State*, 436 Md. 526, 540 (2014) (internal citation and brackets omitted). Here, the grounds upon which Mr. Nunez moved for judgment of acquittal of the counts of conspiracy are different from that which he now sets forth on appeal, and hence, his contention is not preserved. Even if Mr. Nunez’s contention was preserved for our review, he would not prevail. The victim testified that when the assailant with the black pistol ordered the victim to surrender his phone and bag, the other assailant was “flinching with,” “touching,” and “showing” the butt of a gun that was later determined to be an operable firearm. This evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the assailants used a dangerous weapon.

Finally, Mr. Nunez contends that the evidence is insufficient to sustain the conviction for use of a firearm in the commission of a crime of violence, because “the evidence demonstrates only that Mr. Nunez possessed a firearm.” We disagree. The Supreme Court of Maryland has agreed with the Supreme Court of California that “[a]lthough the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means *or display* of a firearm in aiding the commission of [a] specified felon[y].” *Wynn v. State*, 313 Md. 533, 543 (1988) (quoting *People v. Chambers*,

498 P.2d 1024, 1027-28 (Cal. 1972)) (emphasis added). Here, the victim expressly testified that the assailant with the firearm “tucked in his pants” displayed the firearm to the victim as the other assailant demanded the victim’s property. Such conduct constitutes use of the firearm, and hence, the evidence is sufficient to sustain the convictions.

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