UNPUBLISHED

COURT OF APPEALS OF VIRGINIA

Present: Judges Petty, Chafin and Senior Judge Annunziata
Argued at Alexandria, Virginia

MICHAEL DONNELL GREEN

v. Record No. 1888-11-4

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY
JUDGE ROSEMARIE ANNUNZIATA
JANUARY 8, 2013

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
Craig D. Johnston, Judge

Christopher D. Feldmann (Irving & Irving, P.C., on brief), for appellant.

Katherine Quinlan Adelfio, Assistant Attorney General (Kenneth T. Cuccinelli, II, Attorney General, on brief), for appellee.

Michael Donnell Green, appellant, was convicted for the use of a firearm in the commission of a felony. On appeal, he contends the trial court erred by finding sufficient evidence was presented to convict him of the use or display of a firearm in a threatening manner during the commission of a robbery.[1] Finding the trial court did not rule on this specific argument, we affirm appellant's conviction.

Code § 18.2-53.1 states in pertinent part: "It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit . . . robbery . . . ."

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

[1] Appellant was also convicted of three counts of robbery. However, this appeal involves only the conviction for use of a firearm in the commission of a felony in violation of Code § 18.2-53.1, Circuit Court No. CR10000481-00.

In his opening brief, appellant argues he never threatened the victim in any way and none of his actions in the course of the robbery indicated a "threatening manner." He also asserts that "[w]hile fear was clearly induced in the mind of the victim by the presence of a gun in this case, [appellant] clearly did not threaten the victim or display his firearm in a threatening manner to induce that fear." Appellant contends the evidence was insufficient to prove he violated Code § 18.2-53.1 because no evidence showed he either used the firearm or displayed it in a threatening manner.

At the trial, appellant argued the evidence failed to prove he possessed a gun during the incident, there was "[n]o threat or force [or] violence," there was no proof he had a "working gun," and there was "no use of a firearm" in the robbery.

The trial court, when announcing its decision concerning the firearm charge, stated that it reviewed this Court's *en banc* opinion in Startin v. Commonwealth, 56 Va. App. 26, 690 S.E.2d 310 (2010) (*en banc*).[2] The trial court asked the prosecutor and appellant's counsel to review the Startin opinion, and the trial court heard further arguments on the use of a firearm charge. Appellant's counsel limited his argument to whether the item appellant possessed during the robbery looked like "an actual firearm" and whether the victim believed it was a firearm.

The trial court found appellant guilty of robbery, stating:

> I find that there was a weapon or what appeared to be a weapon to [the victim], and that [the victim] was put in fear as a result of that. In fear of serious bodily harm as a result of that.
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> From [the victim's] own testimony he thought he might get shot and that's reasonable concern under the circumstances. And that was what caused him to give over the money.

[2] Appellant's trial took place on January 3, 2011. On March 4, 2011, the Supreme Court of Virginia affirmed this Court's *en banc* decision in Startin v. Commonwealth, 281 Va. 374, 706 S.E.2d 873 (2011).

The trial court then addressed its ruling related to the firearm charge and stated:

> I find that . . . you pulled from your pocket something that looked . . . to the victim like a firearm, and that under the case law, he's not required to be an expert and find out whether it's a toy or not a toy. It had the appearance of being a firearm. He was reasonably in fear of being shot if he tried to grab it and failed to do it.
>
> I think that demonstrates, that while he wasn't enough of an expert to be sure, in fact, it appeared to be a firearm to [the victim] and was used in a manner that was intended to make him believe it was a firearm, and that he was not required to test it by grabbing it or failing to give money and see whether he actually got shot or not.
>
> [T]his was within precisely what the statute was intended to preclude or forbid. Which is when someone won't give you what they've asked for without a weapon being displayed one gets out and put on the counter. That's exactly what the legislature intended it forbid when they said that one may not use or display a firearm in the commission of a felony.
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> The proof that it was actually a working firearm I don't think was necessary under the circumstances.

Thus, the trial court's rulings focused on whether the item appeared to be a firearm, whether the victim believed it was a firearm, and whether the victim was put in fear. However, on appeal, appellant argues the evidence was insufficient because "[w]hile fear was clearly induced in the mind of the victim by the presence of a gun . . . [appellant] clearly did not threaten the victim or display his firearm in a threatening manner to induce that fear." The trial court did not rule on the argument that the evidence failed to show appellant threatened the victim or displayed the firearm in a threatening manner during the incident.[3] "Because the record does not show that the trial court ruled on appellant's argument, there is no ruling of the trial court for this

[3] We note that this Court's *en banc* opinion in Startin specifically states it does not address the argument raised by appellant in the instant case--whether the evidence was sufficient to prove he used or attempted to use a firearm in a threatening manner. Startin, 56 Va. App. at 30 n.1, 690 S.E.2d at 312 n.1.

Court to review on appeal." Duva v. Duva, 55 Va. App. 286, 299, 685 S.E.2d 842, 849 (2009) (citing Fisher v. Commonwealth, 16 Va. App. 447, 454, 431 S.E.2d 886, 890 (1993)).

Accordingly, we affirm the judgment of the trial court.

Affirmed.