

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-915

WILLIE CLYDE BRYANT JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Walton County.
Kelvin C. Wells, Judge.

August 17, 2020

ROWE, J.

Willie Clyde Bryant Jr. appeals his judgment and sentence for two counts of aggravated assault with a deadly weapon, two counts of possession of a controlled substance, and one count of resisting an officer without violence.* He asserts that he is entitled to reversal based on: 1) the trial court's denial of his motion for judgment of acquittal on the aggravated assault counts; 2) improper comments made by the prosecutor during closing arguments; and 3) the trial court's order denying his motion to

* Before trial, Bryant pleaded nolo contendere to the two possession counts.

correct sentencng errors. We affirm as to the first two issues, but we reverse as to the third.

Background

The charges against Bryant stemmed from a confrontation at Bryant's home among Bryant, Thomas Glass, and Jerry Tuggle. During his trial, Bryant, Glass, Tuggle, and the officers who responded to the incident testified.

Glass and Tuggle testified that they went to Bryant's house to collect money for a dog that Bryant bought from Tuggle. According to Tuggle, Bryant became irate and started arguing with them, eventually kicking the dog and telling Tuggle to take the dog back. So Tuggle took the dog and joined Glass at the home of their friends, who lived next door to Bryant. While they were outside talking, Glass saw Bryant walking around the side of his home and sticking a pistol in the front of his shorts. Tuggle stated that Bryant began waving the gun at them. Tuggle and Glass got into their truck to leave. As they were leaving, it looked to them like Bryant tried to pull the trigger of the gun, but it did not discharge. Concerned that their lives were being threatened, Tuggle and Glass drove off, and Glass called the police.

Sergeant Wayne Grandstaff and Deputy Damon Byrd testified that they responded to a call about a disturbance at Bryant's home. The caller reported that Bryant pointed a firearm at several people. When the officers arrived at Bryant's home, Bryant confronted and yelled at them, and he stepped in front of them. The officers eventually detained Bryant in the back of a patrol car because Bryant kept trying to reenter his home in defiance of the officers' orders to remain outside.

While Bryant was detained, Deputy Byrd obtained consent from Bryant's live-in girlfriend to search the home. Byrd searched the home and found a "chrome-plated pistol" matching the description of the gun reported by the caller. At first glance, the gun appeared to Deputy Byrd to be a Colt Python, .357 revolver. Sergeant Grandstaff also thought that the gun looked like a pistol. But the officers later learned it was a BB gun. Even so, Grandstaff testified that BB guns could still cause injuries. He had been shot

with a BB gun before and suffered an injury. He also used BB guns for hunting, killing animals, and target practice.

Bryant took the stand and denied pointing the BB gun at anyone. He claimed that Glass and Tuggle were lying. He admitted that he owned two BB guns and that he shot squirrels and rabbits with the guns. The defense rested and closing arguments began.

During closing arguments, the prosecutor stated that Bryant's BB gun could be used as a deadly weapon and was capable of causing great bodily harm. The prosecutor argued that a BB gun could injure a person's eye, referring to the admonition repeated to the protagonist in the classic film, *A Christmas Story*, namely that with a BB gun, "you'll shoot your eye out." The prosecutor argued:

I expect you will be instructed that a weapon is a deadly weapon if it is used or threatened to be used in a way likely to produce death or great bodily harm. I know we just left the Christmas season. There's a very popular movie that's called *The Christmas Story*. Ladies and gentlemen, the one big take away from the entire movie, everybody keeps telling the kid, you're going to shoot your eye out with it. Ladies and gentlemen, you see the weapon here. You actually heard from Mr. Bryant himself that he had used these BB guns to hunt and kill animals. You also heard from Deputy Grandstaff that it could be used to hunt animals and cause wounds there.

Ladies and gentlemen, it is very clear that the way he threatened and was pointing the gun at them, if that weapon were to have been discharged, that person would have been afraid of being struck in the eye and potentially being blinded by a BB gun. So you cannot say that a BB gun cannot produce great bodily harm. It can easily produce blindness or other injuries to a person if they are struck in the right area. Soft areas like eyes or other parts of the body could be severely injured by a BB gun. You can't say just because it's a BB gun, it can't cause anybody any serious bodily harm. From the testimony provided by Deputy Grandstaff and even the defendant himself these weapons are capable of producing great harm. There was

testimony about BB guns have been used to hunt animals and to kill the animals there.

The prosecutor repeated during rebuttal that a BB gun could injure a person's eye:

Speaking about whether a BB gun is a deadly weapon or not. Ladies and gentlemen, I believe it's clear. The testimony was that a BB gun is strong enough to kill a small animal. If it's strong enough to kill a small animal, it would be easy enough to put an eye out with.

....

What is the testimony again? The weapon was pointed at them. They could actually see the gun, see what it looked like; it was pointed in a direction that they were actually looking down the barrel of that BB gun. It was threatened at them. If it would have been discharged, it could have caused serious bodily injury.

The jury returned a verdict finding Bryant guilty. He was sentenced to five years on each count. This appeal follows.

Judgment of Acquittal

Bryant argues that the trial court reversibly erred when it denied his motion for judgment of acquittal. We review de novo the court's ruling on a motion for judgment of acquittal. *See Moran v. State*, 278 So. 3d 905, 908 (Fla. 1st DCA 2019). Judgment of acquittal is improper if the State presents competent, substantial evidence to establish every element of the crime. *Id.*

To prove that the BB gun was a deadly weapon, the State had to prove that the gun could be used "in a way likely to produce death or great bodily harm." *Winbush v. State*, 174 So. 3d 1088, 1089 (Fla. 1st DCA 2015). Whether a BB gun is likely to produce death or injury is a factual question for the jury to resolve. *See Bass v. State*, 232 So. 2d 25, 27 (Fla. 1st DCA 1970).

Bryant asserts that the State failed to prove by competent, substantial evidence that the BB gun was operational, that it was

loaded, or that Bryant threatened to use the gun in a way likely to produce death or great bodily harm. We disagree. Whether a BB gun is loaded or operational is not dispositive of whether it can be classified as a deadly weapon. *See id.*; *see also Santiago v. State*, 900 So. 2d 710, 712 (Fla. 3d DCA 2005) (“While there was no testimony that the BB gun used by the defendant to commit the burglary, herein, was loaded, the weapon itself was introduced and the jury had an opportunity to examine it to determine if it was capable of causing great bodily harm or serious injury. Moreover, there was no evidence introduced which established or even suggested that it was inoperable”). Here, the State presented competent, substantial evidence from which the jury could find that the BB gun could cause great bodily harm. Glass, Tuggle, and two police officers testified that Bryant had what looked like a pistol in his pocket, waved it around in front of several people, pointed it at Glass and Tuggle, and may have tried to fire the gun. Sergeant Grandstaff testified that he had been shot by a BB gun and that he used a BB gun to hunt and kill animals. Bryant testified that he killed squirrels and rabbits with a BB gun. Because there was competent, substantial evidence that the BB gun could be used in a manner that could cause death or great bodily harm, the trial court did not err in denying the motion for judgment of acquittal and submitting the issue to the jury.

Closing Arguments

Next, Bryant contends that the prosecutor made improper remarks during closing arguments, misstated the law and the facts, and commented on facts outside evidence. In particular, Bryant asserts that the prosecutor’s references to the film, *A Christmas Story*, to argue that a BB gun could “shoot your eye out” inserted facts not offered into evidence.

Because Bryant did not object at trial to the prosecutor’s closing arguments, we review this issue for fundamental error. *See Brooks v. State*, 762 So. 2d 879, 898–99 (Fla. 2000). A fundamental error is an error that reaches down into the validity of the trial itself such that a guilty verdict could not have been obtained without the assistance of the alleged error. *See Knight v. State*, 286 So. 3d 147, 151 (Fla. 2019) (reaffirming the test for fundamental error expressed in *Brown v. State*, 124 So. 2d 481 (Fla. 1960)).

In considering Bryant's argument on fundamental error, we note that counsel is permitted wide latitude in arguing to a jury. *See Thomas v. State*, 326 So. 2d 413, 415 (Fla. 1975). Still, counsel must remain within the limits of the record and confine closing arguments "to the facts and evidence presented to the jury and all logical deductions from the facts and evidence." *See Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1028 (Fla. 2000) (quoting *Knoizen v. Bruegger*, 713 So. 2d 1071, 1072 (Fla. 5th DCA 1998)).

Here, the State did not misstate the law or the evidence, or comment on matters outside the scope of evidence. Glass and Tuggle testified that Bryant pointed the BB gun at them. Bryant and Sergeant Grandstaff both testified that a BB gun can kill animals. And Grandstaff stated he had been shot with a BB gun. Given the evidence presented at trial, the jury could infer that a BB gun can cause great bodily harm, including an injury to a person's eye. Thus, the State's references to the admonition from *A Christmas Story* that a BB gun could "shoot your eye out" is a logical inference that the jury could draw from the evidence introduced at trial and did not amount to error, much less fundamental error.

Sentencing

Bryant next challenges the trial court's order denying his motion to correct sentencing error, raising three arguments. First, he argues that the court did not award the correct amount of credit for time served. The court announced during sentencing that Bryant would receive 36 days' time served on all counts. But in its written order, the trial court awarded credit only on count I.

Second, Bryant argues that the \$342.86 fine imposed by the trial court under section 775.083, Florida Statutes (2018), was improper because the court did not orally pronounce the fine at sentencing.

And third, he asserts that the trial court did not address its statutory authority for increasing the public defender charge under section 938.29, Florida Statutes (2018), beyond the \$100 requirement.

At the sentencing hearing, the court announced:

THE COURT: All right. At this time the Court is going to adjudicate him to be guilty. Sentence him to five years in the Department of Corrections on each third degree felony count for a total of four five year DOC sentences to run consecutive. On the misdemeanor I'll sentence him to time served. He will receive credit on all of those cases.

The 775 court costs, \$100 local government trust, \$100 cost of prosecution and \$300 PD fee will reduce to a judgment. The Court will order restitution and reserve for 60 days.

Despite its oral pronouncement, the trial court awarded Bryant credit for time served only on count I. The oral pronouncement of sentencing controls over the written sentence. *See Ashley v. State*, 850 So. 2d 1265, 1268 (Fla. 2003). And even though a defendant has no right to have jail credit for time served awarded on each sentence when consecutive sentences are imposed, the rescission of previously awarded jail credit constitutes an increased penalty and violates a defendant's rights under the Fifth Amendment of the United States Constitution. *See Cummings v. State*, 279 So. 3d 818, 820 (Fla. 1st DCA 2019). Thus, consistent with the court's oral pronouncement, and as the State properly concedes, the trial court should award Bryant credit for time served on each count.

As for the public defender fee imposed under section 938.29 and the statutory fine imposed under 775.083, a trial court must orally pronounce these discretionary items at sentencing because the defendant must be given notice and an opportunity to be heard. *See DeSalvo v. State*, 107 So. 3d 1185, 1186 n.2 (Fla. 1st DCA 2013) (observing that the trial court correctly found that the public defender fee imposed under section 938.29 could not be imposed because appellant was not given notice of his right to challenge the fee); *Lamoreaux v. State*, 88 So. 3d 379, 381 (Fla. 1st DCA 2012) (holding that the discretionary fine and statutory surcharge on the fine under section 775.083 must be orally pronounced at sentencing). Because the trial court did not orally pronounce the public defender fee or the statutory fine, we reverse the imposition of the fee and fine and remand for the entry of a corrected

judgment and sentence. On remand, the trial court may reimpose the fee and fine after providing notice to Bryant and following the proper procedure. *See Nix v. State*, 84 So. 3d 424, 426 (Fla. 1st DCA 2012).

AFFIRMED in part, REVERSED in part, and REMANDED.

LEWIS and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Andy Thomas, Public Defender, and Danielle Jorden, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and David Welch, Assistant Attorney General, Tallahassee, for Appellee.