

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-109

NOVEMBER TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 3, Lamoille Circuit
	}	
Eric Patch	}	DOCKET NO. 691-11-06 Lecr

Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a jury conviction of aggravated assault. On appeal, defendant argues that the trial court erred in denying his motions to dismiss and for acquittal because there was insufficient evidence to demonstrate that he acted recklessly. We affirm.

The facts are undisputed. On November 26, 2006, defendant was hunting for partridge by himself on his neighbor’s land. He thought he saw some movement in a tree and fired at it using a twelve-gauge shotgun. He could not see what he was shooting at. Defendant immediately heard a scream and saw another hunter fall out of the tree. Defendant went to assist the man. The victim, who was dressed in camouflage, had been bow hunting for deer from a tree stand on the property, owned by his in-laws. Defendant was charged with aggravated assault, 13 V.S.A. § 1024(a)(1), and trespass.

Prior to trial, defendant filed a motion to dismiss the charge of aggravated assault. Defendant argued that the State lacked sufficient evidence to support the charge. Under the statute, the State was required to prove that defendant caused “serious bodily injury to another . . . recklessly under circumstances manifesting extreme indifference to the value of human life.” *Id.* The State alleged that defendant acted recklessly, that is, in conscious disregard of “a substantial and unjustifiable risk.” *State v. LaClair*, 161 Vt. 585, 587 (1993). In his motion, defendant argued that the State lacked evidence to demonstrate that he was reckless because there was no indication that defendant knew the victim or any other person was in the tree at the time of the shooting and thus he could not have had a conscious understanding of the risk of shooting into the tree. The trial court denied defendant’s motion. The court explained that while defendant may not have intended to harm anyone, or known of the victim’s presence, his “entire course of conduct leading up to the moment when the trigger was pulled” could be considered by the jury and this conduct was sufficient for the jury to determine that defendant’s

conduct involved a gross deviation from the standard of conduct that a law-abiding person would have observed in the same situation.

At trial, defendant did not contest that he had shot the victim, nor did he contest that the victim had suffered serious bodily injury. Instead, he argued that he had reasonable grounds to believe that he had permission to hunt on his neighbor's property and did not act recklessly in shooting at the victim. At the close of the State's evidence, defendant moved for judgment of acquittal on the aggravated assault charge pursuant to V.R.Cr.P. 29(a), and the court denied the motion. The jury convicted defendant on both counts. Defendant now appeals the conviction for aggravated assault.

Defendant first argues that the State failed to prove and the jury could not find beyond a reasonable doubt that he acted with a conscious disregard of a substantial and unjustifiable risk. In reviewing the denial of a motion to dismiss, V.R.Cr.P. 12, and a motion for acquittal, V.R.Cr.P. 29, we apply the same standard of review, and "consider whether the evidence, taken in a light most favorable to the State and excluding modifying evidence, is sufficient to fairly and reasonably support a finding of guilt beyond a reasonable doubt." State v. Brooks, 163 Vt. 245, 254-55 (1995); see State v. Fanger, 164 Vt. 48, 51 (1995) (standard for motion to dismiss for lack of a prima facie case is the same as the standard for a motion for judgment of acquittal).

Essentially, defendant's argument is that the State had to prove that defendant was aware that the victim, or some other hunter, was in the area when he shot at the tree to demonstrate that defendant consciously disregarded a known risk. We disagree with defendant that the State had to prove he had actual knowledge of another person's presence in the area to demonstrate that defendant acted in conscious disregard of a substantial and unjustifiable risk. Reckless conduct occurs when the actor "consciously disregards a substantial and unjustifiable risk." Brooks, 163 Vt. at 251 (quotation omitted). We have explained that although the recklessness standard is more subjective than the one for negligence, it still requires "an objective view of the risk." Id. "The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Id. (quotation omitted). In this case, the State offered evidence to demonstrate that defendant had been hunting for many years, and as a licensed hunter had taken a hunter safety course, which explained the risks of shooting without identifying one's target. In addition, the State elicited testimony that defendant had hunted on his neighbor's property in the past and knew that there were tree stands in the area. Defendant argues that the State had to prove that defendant knew about the risk of harm to this particular victim, but the standard does not require such a showing. It was enough for the State to demonstrate that defendant knew that shooting at an unidentified target presented a risk of harm, especially in an area where there were tree stands and others might be present, and therefore deviated from the standard of conduct that a law-abiding person would observe.

Defendant also contends that the State did not offer sufficient evidence to demonstrate that his acts were a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Brooks, 163 Vt. at 251. Defendant argues that although the State presented evidence that failure to identify a target before shooting is a deviation from hunting standards, there was no evidence to support that it was a gross deviation. We are not

persuaded by this logic. Whether defendant's conduct rose to the level of a gross deviation from the standard of conduct a law-abiding person would observe in defendant's situation was a question of fact for the jury to determine.

Finally, defendant argues that there is no precedent for a conviction of aggravated assault under similar facts. Defendant attempts to distinguish other aggravated assault cases on the basis that in those cases the actor was aware of the victim's presence, whereas defendant did not know of the victim's presence. Again, the State is not required to prove that defendant had a disregard for the risk of harm to this victim in particular. The State must demonstrate evidence to show that defendant manifested an "extreme indifference to the value of human life." 13 V.S.A. § 1024(a)(1). Shooting indiscriminately at an unidentified target in an area where one knows there are tree stands is sufficient to fairly and reasonably support the charge of aggravated assault. Thus, the court did not err in denying defendant's motions to dismiss and for acquittal.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice