

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP906-CR

Cir. Ct. No. 2007CF980

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GABIEL Y. BONILLA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. A jury found Gabiel Bonilla guilty of second-degree recklessly endangering safety and disorderly conduct, both while using a

dangerous weapon and as a habitual offender. On appeal, Bonilla challenges the sufficiency of the evidence supporting the reckless endangerment conviction.¹ Because the State presented evidence from which the jury could reasonably infer Bonilla's actions created an unreasonable and substantial risk of death or great bodily harm to another human being and Bonilla was aware of that risk, we affirm.

BACKGROUND

¶2 Bonilla's conviction arises from two incidents, both occurring in the early evening of May 10, 2007. Tim Dahlin testified he saw a maroon Crown Victoria car with "fancy" after-market rims "come screaming" into the parking lot of a hair salon in Green Bay. Dahlin was at a nearby traffic signal, and he entered the parking lot shortly after the maroon car, pulling into a parking spot next to it. Dahlin watched as a man, who he identified as Bonilla, went into the salon and came back out with a woman carrying a small child. Bonilla was "cursing profanities" at the woman and "hollering" at her to get in the car. Dahlin testified that Bonilla was "getting agitated" and reached under his car seat and "pulled out ... a small black pistol." Dahlin testified Bonilla "stuck his hand out the window and pull[ed] the trigger." The gun, which Bonilla had pointed up in the air, did not fire. Dahlin heard a "click" when Bonilla pulled the trigger. Dahlin testified Bonilla "was racking the action" and "pulled [the gun] back in the car and tr[ie]d to clear it. It was jammed or something, [it] had to be jammed or something the way he was trying to pull the action back." After the woman and child got into the car, Bonilla drove off and Dahlin went into the salon and called police.

¹ Bonilla does not challenge the disorderly conduct conviction.

¶3 About thirty minutes later, Bonilla drove at a high rate of speed down a nearby street where several children were playing. Several witnesses testified that the car swerved toward a group of children as it sped through the neighborhood. Thomas Meves, who lived on the street, yelled at the car to slow down. A short time later, the car returned, and Bonilla slowed the car as he neared Meves who was walking toward the car. More angry words were exchanged. Bonilla then pointed a silver pistol at Meves's head, and pulled the trigger. The gun did not fire. Meves was within ten feet of Bonilla when he pulled the trigger. Meves and several other witnesses testified that they heard a clicking noise when Bonilla pulled the trigger. Meves and Steve Oettinger, a friend who was standing behind Meves, both testified that the pistol misfired. Bonilla then left the scene but was apprehended shortly after the incident.

DISCUSSION

¶4 To convict Bonilla of second-degree recklessly endangering safety, the State had to prove that Bonilla endangered the safety of another human being by criminally reckless conduct. *See* WIS. STAT. §§ 941.30(2) and 939.24(1) (2009-10).² “‘Criminal recklessness’ means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.” WIS. STAT. § 939.24(1).

¶5 On appeal, Bonilla contends that there was insufficient evidence to prove that he acted in a criminally reckless fashion. Bonilla contends that the State did not establish that he created an unreasonable and substantial risk of death

² All references to the Wisconsin Statutes refer to the 2009-10 version unless otherwise noted.

or great bodily harm to Meves because the State “did not put forth any evidence to prove that the gun was loaded.” Bonilla reasons that proof that the gun was loaded was essential because an unloaded gun necessarily does not pose an unreasonable and substantial risk of death or great bodily harm. Bonilla asserts the gun “was either unloaded or broken [and] [e]ither way, [Bonilla] could not be aware that his conduct created a risk of death or great bodily harm.” We reject Bonilla’s argument.

¶6 We must uphold Bonilla’s conviction “unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If there is a possibility that the jury “could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt,” we must uphold the verdict. *Id.* at 507. “The test is not whether this court or any of the members thereof are convinced [of Bonilla’s guilt] beyond reasonable doubt, but whether this court can conclude the [jury] could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.” *Id.* at 503-04. “It is the function of the [jury], and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Id.* at 506.

¶7 We conclude there was evidence from which the jury could infer that the gun was loaded and that Bonilla was aware it was loaded.

¶8 Dahlin testified that, after the gun did not fire outside the hair salon, Bonilla “rack[ed] the action” and “tr[ie]d to clear it”—actions that would have

been meaningless if the gun were not loaded. As the State observes, Bonilla's action of pulling the trigger would have been pointless "unless the gun had a functional reality." Pointing a gun at another and pulling the trigger creates an unreasonable and substantial risk of death or great bodily harm. The jury could have inferred that the gun was loaded and that Bonilla knew that it was loaded. That the gun fortuitously misfired does not alter the criminally reckless nature of Bonilla's conduct. Therefore, we conclude that sufficient evidence supports the jury's verdict.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

