

State of New Hampshire
Supreme Court

NO. 2023-0030

2023 TERM
JULY SESSION

State of New Hampshire

v.

Derrick T. Moyer

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLANT, DERRICK MOYER

July 12, 2023

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QUESTIONS PRESENTED

- I. Was the evidence sufficient to establish that the defendant acted recklessly?
Preserved: MOTION FOR DIRECTED VERDICT, Day_2 at 266-70; CLOSING ARGUMENT, Day_2 at 266-70; *Transcript, passim*.

- II. Was the evidence sufficient to establish that the defendant was the individual who shot the bullet on the date and time alleged?
Preserved: MOTION FOR DIRECTED VERDICT, Day_2 at 266-70; CLOSING ARGUMENT, Day_2 at 266-70; *Transcript, passim*.

STATEMENT OF FACTS

I. **Derrick Moyer Shoots Safely**

Derrick Moyer lives on 33 acres in Hampstead, New Hampshire. *Day 1* at 66, 97; *Day 2* at 208, 230. He owns several guns, and fires them frequently, sometimes with his teenage son. *Day 2* at 197. He has a shooting range comprised of a 40-foot berm, or hill of earth, which absorbs the shots, on which there is a barrel full of logs, which avoids ricochet. *Day 1* at 71-72, 76-77; *Day 2* at 200-01, 262; PHOTO FROM CHICKEN COOP TOWARD BERM, Exh. 24 (May 27, 2020), *Appx.* at 15. He fires toward the northeast from a spot near the chicken coop behind his home. *Day 1* at 71-72, 77, 138-39; *Day 2* at 262.

The distance from Moyer's shooting spot to the Gabriel Court neighborhood in that direction is 2,000 to 3,000 feet. ARREST WARRANT AFFIDAVIT (June 17, 2020), *Appx.* at 3. The police characterized the area between them as "dense forest ... heavily treed, shrubs, undergrowth," *Day 1* at 59-60, 63, which obscures any view to the other, *Day 1* at 13, 47, 59, which would be difficult to traverse, *Day 1* at 47, and through which a bullet could not pass. *Day 1* at 60. Viewed from Moyer's home, the police observed that the terrain goes down, and then rises back up to Gabriel Court. *Day 1* at 77-78.

In addition to the berm, the barrel, and the expanse, Moyer takes other precautions when he shoots. He uses his guns' safety mechanisms, accounts for the fact that semi-automatic weapons may tend to rise as a shooter works through a magazine, and does not fire into the sky. *Day 1* at 74-76, 83, 146-47; *Day 2* at 202, 208. Beyond noise, he has not before been accused of causing harm, nor been warned of creating danger. *Day 1* at 20, 24, 97, 146-47.

Moyer tends to shoot in the mornings and evenings, *Day 2* at 234, engendering years of complaints from neighbors. *Day 1* at 19, 38-39, 48, 125, 129-30; *Day 2* at 214, 223-27, 230-32, 238-39, 243-48, 251, 260-61. The police routinely log them, *Day 1* at 135, 137; *Day 2* at 229, 232, 239-40, 244-46, 250-

51, 262-63, but because Moyer is in conformity with the law and Hampstead's noise ordinance, the police inform citizens it is an annoyance about which little can be done. *Day 1* at 64-65; *Day 2* at 239-40, 243-45, 250, 261-62; *see* HAMPSTEAD NOISE ORDINANCE (Mar. 14, 2000), *Appx.* at 31, <<https://www.hampsteadnh.us/ordinances/files/noise>>. The police have nonetheless approached Moyer in the past, *Day 1* at 43, 112; *Day 2* at 233, 262, but he declined to admit them to his property. *Day 1* at 43, 69, 153-54; *Day 2* at 262.

II. Bullet Resting Between Panes of Living Room Window

During Memorial Day weekend in 2020, SU and KZ, who were then 12 years old, were having a sleep-over on the patio of one of the homes on Gabriel Court. *Day 1* at 11-12, 34-36; PHOTOS OF PATIO, Exhs. 9, 10, 15 (May 24, 2020), *Appx.* at 19, 20, 26. At around 8:45 Sunday morning, May 24, 2020, they were alarmed by a bullet going over their heads and hearing a window break. *Day 1* at 11-20, 118. They summoned adults and called the police, who shortly arrived. *Day 1* at 15, 18-19, 27-28, 56-57, 94-99, 116; *Day 2* at 213.

The police found a bullet resting between the double panes of the living room window. The window is constructed such that there are three layers between outside and inside: outermost is the bug screen, then an outer pane of glass, and a second innermost pane of glass. Sandwiched between the panes is a decorative metal muntin, creating the appearance of small individual windows. The bullet damaged the screen and broke the outer pane of glass. It came to rest against the muntin, between the panes. It did not break the innermost glass nor enter the living room. *Day 1* at 25, 28, 31-37, 58; PHOTO OF WINDOW & SCREEN FROM OUTSIDE, Exh. 5 (May 24, 2020), *Appx.* at 16; PHOTO OF BULLET ON MUNTIN BETWEEN PANES FROM INSIDE, Exh. 6 (May 24, 2020), *Appx.* at 17; CLOSEUP PHOTO OF BULLET ON MUNTIN BETWEEN PANES FROM INSIDE, Exh. 7 (May 24, 2020), *Appx.* at 18; PHOTO OF BULLET ON MUNTIN BETWEEN PANES FROM OUTSIDE, Exh. 11 (May 24, 2020), *Appx.* at 22; PHOTO OF BULLET ON MUNTIN BETWEEN PANES FROM OUTSIDE, Exh. 12 (May 24, 2020), *Appx.* at 23; PHOTO OF BULLET ON MUNTIN BETWEEN PANES FROM INSIDE, Exh. 20 (May 24, 2020), *Appx.* at 30.

SU's mother, who SU believed was on the sofa in the living room, was unaware, and initially thought SU's and KZ's exclamations were in jest. *Day 1* at 12, 15, 20, 37; PHOTO OF COUCH IN LIVING ROOM INSIDE OF WINDOW, Exh. 18 (May 24, 2020), *Appx.* at 28; PHOTO OF PATIO FROM LIVING ROOM WITH BULLET ON MUNTIN, Exh. 19 (May 24, 2020), *Appx.* at 29.

III. Random Stray Bullet Caused No Harm

The two officers who responded to the scene talked to SU, KZ, and the adults, took photos, and seized the bullet. *Day 1* at 20, 118-19. They borrowed a ladder from the homeowner, and using an orange driveway marker 4 or 5 feet long, *Day 1* at 60, inserted the rod into where the screen was broken and where the bullet had impacted the pane of glass, in order to determine the bullet's trajectory. *Day 1* at 20, 23, 29-30, 33-36, 46-47, 60-62; PHOTO OF LADDER NEAR WINDOW, Exh. 8 (May 24, 2020), *Appx.* at 19; PHOTO OF OFFICER ON LADDER WITH ORANGE ROD ESTIMATING TRAJECTORY, Exh. 13 (May 24, 2020), *Appx.* at 24; PHOTO OF OFFICER ON LADDER WITH ROD ESTIMATING TRAJECTORY, Exh. 14 (May 24, 2020), *Appx.* at 25; PHOTO OF OFFICER ON WITH ROD ESTIMATING TRAJECTORY, Exh. 16 (May 24, 2020), *Appx.* at 27.

In this manner, the police estimated the bullet had probably:

been fired up over the trees and ... landed coming down at a downward angle, struck the windscreen at a higher angle, and then it struck the window.

Day 1 at 58.

Then, using an online map, *Day 1* at 59 (officer describing ONLINE MAP, Exh. 4 (May 24, 2020) (exhibit not moved into evidence)), the police surmised that the bullet had probably been fired from the direction of Moyer's property. *Day 1* at 38, 63, 121.

The police found no other bullets. *Day 1* at 49. The Gabriel Court homeowners had no previous connection with Moyer, *Day 1* at 13, 25, and there was no evidence the shot was intentional or that the Gabriel Court home was targeted. *Day 1* at 50, 150.

The police thus determined that it was a "stray bullet," *Day 1* at 50, and that probably:

[S]omeone had been firing from a distance away and that the round went up in the air and came down randomly and hit that window.

Day 1 at 150. The police thus concluded “there was no immediate danger around the house requiring to secure the house and secure the people inside,” *Day 1* at 118, and accordingly did not hunt for a shooter lurking in the woods. *Day-1* at 23, 48-49, 118, 120, 150.

IV. Who Shot the Gun?

After the long weekend, an officer went to Moyer's home. The officer informed Moyer of the bullet found in the window of the house on Gabriel Court, and showed him pictures. *Day 1* at 71. Moyer admitted he had been shooting over the weekend and asserted his right to do that, with which the officer agreed. *Day 1* at 64, 74. The officer reported that:

He apologized several times. Said he would pay for the damage. He was very ... sorry for what had happened and wanted to rel[a]y that to the homeowner.

Day 1 at 79. Moyer showed the officer his shooting range, and was generally cooperative. *Day 1* at 64, 79, 138. The officer attempted to look for "brass" casings or spent cartridges, but the grass was tall and none were found. *Day 1* at 138. Moyer volunteered to the police both the rifle he had been shooting and an empty box of ammunition. *Day 1* at 78-80. The police interviewed someone in the neighborhood who said she had heard 10 rapid-fire shots from Moyer's property on Sunday morning. *Day 1* at 122, 128.

In June, after the Hampstead police secured an arrest warrant, they phoned Moyer, who presented himself at the police station and surrendered several more firearms. *Day 1* at 78-85. The State laboratory later established that the bullet at Gabriel Court matched one of Moyer's guns. *Day 1* at 163-179.

At first, Moyer told the police he had been shooting alone, *Day 1* at 69, but later admitted his minor son had been with him that weekend, *Day 2* at 191-94, and that they had been shooting together. *Day 1* at 142-44. The son

testified¹; he corroborated that he and Moyer had been shooting together during the weekend, *Day 2* at 197, but said neither of them had been using the matching firearm on Sunday morning. *Day 2* at 199, 208.

¹Moyer's son testified in the presence of his counsel, after receiving immunity pursuant to *State v. Richards*, 129 N.H. 669 (1987). ORDER (Oct. 29, 2021), *Appx.* at 10 ("Counsel for the witness with the purported Richards issue confirmed that her client would have a 5th Amendment privilege if called to the stand at trial by the defendant. The State conceded it would have to provide a letter of immunity."); *Day 2* at 196 (*Richards* counsel announcing presence), 198 (confirming immunity letter in exchange for testimony). The State gave the son immunity before his testimony. ALAN MOYER IMMUNITY LETTER (Aug. 3, 2022), *Appx.* at 13.

STATEMENT OF THE CASE

The State charged Moyer with Reckless Conduct, a Class B Felony when it involves a firearm. INDICTMENT (Sept. 18, 2020), *Addendum* at [31](#); RSA 631:3, I (“A person is guilty of reckless conduct if he recklessly engages in conduct which places or may place another in danger of serious bodily injury.”); RSA 631:3, II (“Reckless conduct is a class B felony if the person uses a deadly weapon”); RSA 626:2, II(c) (definition of reckless conduct).

The matter was tried over two days in August 2002 to a judge, ORDER ON JURY TRIAL WAIVER (July 27, 2022), *Appx.* at 12, who took a view. FINAL PRETRIAL CONFERENCE ORDER (July 21, 2022), *Appx.* at 11; *see Day 1* at 183. SU testified about the bullet landing in the window over her head. The police chief and several officers described the record of citizen noise complaints, their investigation of the incident, and arrest procedures. The State criminologist matched the bullet to the gun. The minor son and his mother testified that he was at Moyer’s house during Memorial Day weekend, and that he was shooting with his father.

The court (*Daniel I. St.Hilaire, J.*) described the bullet landing at Gabriel Court and the police investigation that followed. It recited the statutory elements of Reckless Conduct, and found Moyer guilty. ORDER AFTER CRIMINAL BENCH TRIAL (Aug. 31, 2022), *Addendum* at [21](#). The court sentenced him to 12 months committed to the house of corrections, with all but 30 days suspended for five years upon condition of good behavior and no use of “firearms, fireworks, explosives, toy/fake guns, or any other devices that simulate the sound of a firearm or explosive.”² HOUSE OF CORRECTIONS SENTENCE (Nov. 8, 2022), *Addendum* at [28](#); MITTIMUS (Jan. 5, 2023), *Addendum* at [27](#). This appeal followed.

²After this appeal was taken, Moyer filed a motion for bail pending appeal. The court vacated the sentence, ordered bail pending appeal, and indicated that if the conviction is upheld, it would later conduct a re-sentencing. *Bail Hearing Transcript* (Feb. 3, 2023) at 6.

SUMMARY OF ARGUMENT

Derrick Moyer took comprehensive precautions to avoid risks from his recreational shooting. By regarding the risks and doing what a law-abiding person would do, he acted lawfully, and not recklessly. Moreover, others had access to his guns and firing range, and there is no proof that Moyer fired the gun launching the bullet that landed on Gabriel Court. Accordingly, this court should reverse.

ARGUMENT

I. Moyer Acted Reasonably, Taking Precautions to Avoid Risk of Harm

Conduct is criminally reckless when a person “recklessly engages in conduct which places or may place another in danger of serious bodily injury.”

RSA 631:3. “Recklessly” is defined by statute:

A person acts recklessly ... when he is aware of and *consciously disregards* a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard constitutes a *gross deviation* from the conduct that a law-abiding person would observe in the situation.

RSA 626:2, II(c) (emphasis added).

Assessment of criminal recklessness ... is whether a defendant was aware of the risk of serious bodily injury resulting from his actions, consciously disregarded the risk, and had knowledge of circumstances that made disregarding the risk a gross deviation from law-abiding conduct.

State v. Belleville, 166 N.H. 58, 62 (2014) (quotation omitted).

Recklessness “is a subjective inquiry. It does not depend upon the actual harm resulting from the defendant’s conduct. Nor does it depend upon whether the defendant anticipated the precise risk or injury that resulted.” *State v. Hull*, 149 N.H. 706, 713 (2003). Knowledge of obvious risks is presumed. *State v. Evans*, 134 N.H. 378, 386 (1991).

This court has held that conduct that consciously disregards substantial risks, and is therefore criminally reckless, includes excessive violence during physical fights, *State v. Locke*, 144 N.H. 348 (1999); *State v. Bennett*, 144 N.H. 13 (1999); *State v. Benson*, 124 N.H. 767 (1984), and shaking babies. *State v. Wilmot*, 163 N.H. 148 (2012); *State v. Evans*, 134 N.H. 378 (1991). Conscious disregard with vehicles includes aggressive tailgating causing a much smaller car to crash,

State v. Carnevale, 172 N.H. 700 (2019), being prolongedly distracted by texting, *State v. Belleville*, 166 N.H. 58 (2014), injuring pedestrians by driving on a sidewalk, *State v. Euliano*, 161 N.H. 601 (2011), striking a police officer stopped on the side of the road, *Hull*, 149 N.H. at 706, and doing “swervies” with children in the bed of a pickup truck. *State v. Lamprey*, 149 N.H. 364 (2003). A brief crossover into the oncoming lane, however, where there was no evidence of speeding, alcohol, or drugs, is not criminally reckless. *State v. Shepard*, 158 N.H. 743 (2009).

In cases where guns were involved, recklessness was affirmed when the defendants’ use of the firearm was senseless and without precaution for safety. In *State v. McCabe*, 145 N.H. 686 (2001), the defendant fired a handgun in an occupied apartment with people sleeping within 20 feet. In *In re Farrell*, 142 N.H. 424 (1997), while in a bedroom, a juvenile defendant fatally fired a loaded gun into his friend’s face. In *State v. Haines*, 142 N.H. 692 (1998), the defendant was brandishing a loaded rifle in the middle of town. In *State v. Wilson*, 52 P.3d 545 (Wash. App. 2002), the defendant fired a gun into a crowded house party.

Regarding the gross deviation prong, “[a]ssessment of criminal recklessness ... involves comparing the defendant’s conduct with that of a law-abiding person.” *Belleville*, 166 N.H. at 62. If there are meaningful additional precautions that a law-abiding person would have taken, the conduct is a gross deviation, and therefore criminally reckless. *Lamprey*, 149 N.H. at 365 (“no child seats or safety belts were in place in the truck bed”); *Hull*, 149 N.H. at 714 (“a law-abiding citizen would have waited for traffic to pass to avoid driving too close to a police officer engaged in a traffic stop”); *Belleville*, 166 N.H. at 64 (“a law-abiding citizen would not have voluntarily remained inattentive for such an appreciable length of time over such a distance”).

In Moyer’s case, he took deliberate and significant precautions to avoid

injury to the public from his firearms practice. He constructed a shooting range on a large plot, with 2,000 to 3,000 feet of thick vegetation between it and the nearest neighborhood. His range consisted of a 40-foot tall berm, featuring an anti-ricochet device, which he has consistently used without incident. Moyer observed standard safety procedures, was aware of his gun's tendency to raise, and did not fire randomly in the air. *See State v. Fox*, 947 S.W.2d 865, 865 (Tenn. Crim. App. 1996) (not reckless to "discharg[e] a pistol into the air or up into a tree"). Given that the Gabriel Court neighborhood is not at any significantly lower elevation than Moyer's range, it is not reasonable to anticipate that a bullet would travel an unusually long distance.

That SU and KZ were alarmed at Gabriel Court is not evidence that Moyer acted recklessly. Moyer took reasonable precautions, short of refraining from shooting – which is his right. He thus did not "consciously disregard" the risk of public injury; rather, he consciously regarded it. Because he took the reasonable precautions that a law-abiding person would, in order to continue shooting on his property, his conduct did not deviate from the statutory standard.

This court should therefore reverse Moyer's conviction.

II. No Proof Beyond a Reasonable Doubt That Moyer Was the Shooter

The State did not prove beyond a reasonable doubt that Moyer shot the bullet that landed at Gabriel Court.

While a neighbor may have heard shots Sunday morning, Moyer's son testified that he routinely used Moyer's guns, but that neither he nor Moyer had shot the matching gun on the morning the bullet arrived at Gabriel Court. It is apparent the son had some criminal liability in the matter, as the court found that the son's *Richards* attorney "confirmed that her client [had] a 5th Amendment privilege" in testifying for the defendant. ORDER (Oct. 29, 2021), *Appx.* at 10; ALAN MOYER IMMUNITY LETTER (Aug. 3, 2022), *Appx.* at 13; DEFENDANT'S MOTION FOR RICHARDS HEARING (Sept. 3, 2021), *Appx.* at 9.

No other witness testified as to who might have shot the gun.

Despite Moyer offering contrition and reparation to the homeowner upon learning of the bullet in the window, it is unproven that he was the shooter, and this court should thus reverse.

CONCLUSION

“When evaluating the sufficiency of the evidence, [this court] consider[s] whether a rational trier of fact could have found guilt beyond a reasonable doubt, viewing all of the evidence and all reasonable inferences drawn therefrom, in the light most favorable to the State.” *State v. Gunnip*, 174 N.H. 778, 780 (2022). “A challenge to the sufficiency of the evidence raises a question of law, which [this court] review[s] *de novo*.” *State v. Seibel*, 174 N.H. 440, 445 (2021).

Shooting into backyard berms is common in rural New Hampshire. Upholding the conviction here could severely limit that tradition. One unfortunate shot, in the context of comprehensive precautions, is neither disregard for risk nor deviation from law-abiding conduct. This court should thus reverse.

Moreover, given the uncertainty regarding whether Moyer, his son, or someone else was responsible for the shot, the State did not prove Moyer guilty beyond a reasonable doubt, and this court should reverse.

Respectfully submitted,

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Dated: July 12, 2023

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CERTIFICATIONS & REQUEST FOR ORAL ARGUMENT

A full oral argument is requested.

I hereby certify that the decision being appealed is addended to this brief or is contained in a separate appendix. I further certify that this brief contains no more than 9,500 words, exclusive of those portions which are exempted.

I further certify that on July 12, 2023, copies of the foregoing will be forwarded to Sam M. Gonyea, Assistant Attorney General, via this court’s e-filing system.

Dated: July 12, 2023



Joshua L. Gordon, Esq.

ADDENDUM

1. ORDER AFTER CRIMINAL BENCH TRIAL (Aug. 31, 2022). [21](#)
2. MITTIMUS (Nov. 8, 2022) [27](#)
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