

*Maguire*

STATE OF VERMONT  
FRANKLIN COUNTY, ss.

VERMONT DISTRICT COURT  
DOCKET No. 923-8-08 FrCr

**RECEIVED**

MAY 27 2009

FRANKLIN DISTRICT  
FAMILY COURT

STATE OF VERMONT

v.

WILLIAM WRIGHT

**DECISION AND ORDER**

Defendant William Wright was charged with five counts of reckless endangerment arising from his act of pointing an air rifle at five juveniles on August 6, 2008. At trial, a jury found Defendant guilty on all five counts. Defendant now files a Motion for Judgment of Acquittal under V.R.Cr.P. Rule 29(c) on the grounds that the State failed to produce evidence at trial demonstrating that the subject air rifle was loaded, and thus, the evidence was insufficient to sustain a conviction of reckless endangerment. For the reasons stated below, the Court *grants* Defendant's Motion.

A defendant is guilty of the crime of reckless endangerment when he or she "recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 13 V.S.A. § 1025. The reckless endangerment statute imposes a presumption of recklessness in cases where a "firearm" is used, regardless of whether the firearm is loaded or unloaded. *Id.* In this case, prior to trial, the Court determined that the air rifle used by Defendant was not a "firearm."<sup>1</sup> Thus, the statutory presumption of recklessness was not triggered, and the State had the burden of showing

<sup>1</sup> In another context, 13 V.S.A. § 4016(a)(3) defines "firearm" as "any weapon, whether loaded or unloaded, which will expel a projectile by the action of an explosive and includes any weapon commonly referred to as a pistol, revolver, rifle, gun, machine gun or shotgun." The Court has not seen any definition of "firearm" that includes an air rifle. The tortured construction of "firearm" by the Texas Appellate Court in *Boston v. State*, 1998 WL 19938, has not been adopted by any other court, nor should it be. In fact the Westlaw electronic publication notes that the opinion is "not designated for publication" and "unpublished opinions have no precedential value."

that Defendant's act of pointing an air rifle at his victims placed those victims "in danger of death or serious bodily injury." *Id.*

In *State v. McLaren*, 135 Vt. 291, 293 (1977), *superseded by statute as discussed in State v. Messier*, 2005 VT 98, ¶ 9; 178 Vt. 412, the Vermont Supreme Court held that, "the Legislature, when it enacted 13 V.S.A. § 1025, intended to proscribe conduct which would place the victim in *actual danger* of death or serious bodily injury, *not mere apparent danger.*" (Emphasis added.) Consequently, the Court determined that whether a firearm was unloaded or was otherwise inoperative was an "essential issue" for the jury to consider in determining whether a victim was placed in an "objective state of danger of death or serious bodily harm." *Id.* at 293-294; *see also State v. Emilo*, 146 Vt. 277, 278-279 (1985) (applying *McLaren* and finding no error in trial court decision that officer was placed in danger by being threatened with a loaded but uncocked revolver). As discussed above, subsequent amendment of the reckless endangerment statute explicitly eliminated the requirement that a firearm be loaded. *See Messier*, 2005 VT at ¶¶ 7-10. There has been no amendment, however, eliminating such requirement for a weapon other than a firearm, such as the air rifle used in this case. Therefore, the requirement of showing actual, and not mere apparent, danger still exists in cases where a weapon other than a firearm is used to place persons in danger of death or serious bodily injury.

At the trial, the State did not present any evidence demonstrating that the air rifle used by Defendant was loaded at the time Defendant pointed it at his victims. Rather, Deputy Miles testified that the air rifle was unloaded when he found it at Laura Ovitt's home on the evening of the incident, and Detective Glidden testified that the air rifle was unloaded when he received it to examine whether it was operative. Given that the only


relevant conduct in this case was Defendant's act of pointing the air rifle at his victims, in order to show that the victims were in actual danger of death or serious bodily injury, the State had the burden of demonstrating that the air rifle was loaded and operative when it was pointed at the victims. Although the State put forth evidence demonstrating that the air rifle was operative, it did not submit evidence demonstrating that it was loaded. Therefore, the State failed to meet its burden of showing that Defendant's victims were in any actual danger, and there was insufficient evidence to substantiate the jury's guilty verdict.

**ORDER**

For the above reasons, Defendant's Motion for Judgment of Acquittal is *granted*.

A judgment of not guilty is entered.

Dated at St. Albans, Vermont, this 27<sup>th</sup> day of May, 2009.

  
Michael S. Kupersmith  
District Judge