

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN THE INTEREST OF:	:	IN THE SUPERIOR COURT OF
E.P.L., A MINOR	:	PENNSYLVANIA
	:	
	:	
APPEAL OF:	:	
E.P.L., A MINOR	:	No. 2207 EDA 2012

Appeal from the Dispositional Order Entered July 23, 2012,
In the Court of Common Pleas of Philadelphia County,
Family Court Division, Juvenile Branch, at CP-51-JV-0002182-2012.

BEFORE: SHOGAN, WECHT and COLVILLE*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED DECEMBER 17, 2013**

Appellant, E.P.L., a minor, appeals from the dispositional order entered after he was adjudicated delinquent on charges of sale or transfer of firearms and possession of firearms by a minor. We affirm.

The juvenile court summarized the facts of this case as follows:

On December 26, 2011, Philadelphia Police Officer Matthew Lally went to the home of Mr. [K.M.] located [on] West Allegheny Avenue. (Notes of Testimony, July 2, 2012, p. 3) Mr. [K.M.] called the police after receiving a firearm from his juvenile son, [J.M.]. (N.O.T., p. 3) The officer was met by a concerned Mr. [K.M.], who gave the officer the operable Smith and Wesson 9 millimeter firearm that he had obtained from his son, [J.M.]. (N.O.T., pp. 3, 4, 7 & 8) The juvenile, [J.M.], was placed under arrest and taken to Northwest Detective Division. (N.O.T., p. 5) [J.M.] told the officer that because he owed money to drug dealers, [Appellant] handed him a firearm for protection. (N.O.T., pp. 6 & 13)

[J.M.] testified that [Appellant] and he were in the drug trade and sold marijuana and cocaine together. (Notes of Testimony, July 2, 2012, pp. 9 & 10) There came a time when [J.M.] was "short" approximately \$100 that he owed to other drug dealers. (N.O.T., p. 13) [Appellant] told [J.M.] that these

*Retired Senior Judge assigned to the Superior Court.

drug dealers wanted to hurt [J.M.] for being short on the money. (N.O.T., pp. 14) As a result of these threats [J.M.] obtained the firearm from [Appellant], in the cover of dark, near the campus of Saint Joseph's University. (N.O.T., pp. 11 through 14) [Appellant] pulled the firearm from under his shirt and then taught [J.M.] how to load it. (N.O.T., pp. 12 & 13) [Appellant] warned [J.M.] to tell no one. (N.O.T., p. 13)

[J.M.] testified he feared for his family's safety and ran away on December 22, and did not return until December 26. (N.O.T., pp. 25 & 26) [J.M.] was on the streets but briefly stayed at his grandmother's house. (N.O.T., p. 27) When [J.M.] returned home he confessed to his father his drug selling and firearm possession. (N.O.T., pp. 9 & 11) [J.M.] confessed because he "didn't want to be in the drug game anymore." (N.O.T., p. 9) In addition to the admissions to his father and Officer Lally, [J.M.] gave two signed statements detailing how he received the firearm from [Appellant], one given to Detective Shelly Perks on December 26, 2011 and the second given to Agent Reinhold on February 14, 2012. (N.O.T., pp. 17 & 22) [Appellant] later confronted [J.M.] for cooperating with law enforcement. (N.O.T., p. 24)

On cross-examination [J.M.] testified that he believed he might receive probation for cooperating. (N.O.T., p. 32) [J.M.] also believed that if he did not cooperate he might get placed by a judge. (N.O.T., p. 32) However, no threats or promises were made to [J.M.] prior to making all statements to police, nor were any threats or promises made to [J.M.] for testifying at trial. (N.O.T., p. 22)

Detective Shelly Perks testified that she took [J.M.'s] statement on the evening of December 26, 2011, and that in her estimation, [J.M.] was very truthful and cooperative. (N.O.T., pp. 36 & 37) In this statement [J.M.] stated that [Appellant] transferred [to] him the firearm. (N.O.T., p. 38)

[Appellant] provided character witnesses. (N.O.T., pp. 43 through 51) One of the character witnesses, [L.C.], was a classmate of [Appellant's] and [J.M.'s]. (N.O.T., p. 51) She testified that she previously shared an English class with [J.M.] and [Appellant]. (N.O.T., p. 51) According to [L.C.], [Appellant] and [J.M.] were not friends and that no one "hangs with" [J.M.]

and that he is not trustworthy. (Notes of Testimony, July 2, 2012, pp. 52 & 53) [L.C.] spends a lot of time with [Appellant], playing basketball or other games, and they have many mutual friends. (N.O.T., pp. 53 through 56)

[Appellant's] mother, . . . , testified as both an alibi and character witness. (N.O.T., p. 56) Essentially, she testified that on December 23, 2011, from approximately 1 p.m. to a little before 10 p.m., [Appellant] was with her and the family, shopping in the Springfield and Bala Cynwyd areas. (N.O.T., pp. 56 through 69) Shortly before 10 p.m., the family ate at a Five Guys restaurant. (N.O.T., p. 69) [Appellant's] mother identified a bank statement with numerous transactions and produced a date and time-stamped (8:26 p.m.) receipt from the Marshall's department store in Springfield, Pennsylvania. (N.O.T., pp. 59 & 60) [Appellant's] mother identified photographs of the family in front of a Christmas tree at home, which she testified were taken the night of December 23, 2011 and the following morning. (N.O.T., pp. 62 & 63) None of the photographs had date and time on them. (N.O.T., p. 65) [Appellant's] mother did not want her [] son in any trouble. (N.O.T., p. 65)

[Appellant] elected to testify and in sum stated that he did not transfer a firearm to [J.M.] nor has he ever sold drugs. (N.O.T., p. 73) [Appellant] described his relationship with [J.M.] as contentious because they often argued in class, and that they were not friends. (N.O.T., p. 71) [Appellant] further claimed that their relationship was so contentious that the Vice Principal spoke with [Appellant] about [J.M.], shortly before December 23, 2011. (N.O.T., p. 72)

[Appellant] also testified that on December 23, 2011, he drove his mother, step-father and brother around to various stores in the Springfield and Bala Cynwyd areas. (N.O.T., p. 72) According to [Appellant], he shopped all day with his family. (N.O.T., pp. 72 & 73)

On cross examination [Appellant] claimed that [J.M.'s] testimony was a lie. (N.O.T., pp. 73 & 74) [Appellant] further stated that [J.M.] possibly lied out of fear or out of jealousy of [Appellant]. (N.O.T., p. 74) According to [Appellant], he has a lot of friends and always dresses nicely, while [J.M.] does not

dress nicely and gets teased. (N.O.T., p. 74) In sum, [Appellant] believed [J.M.] had a motive to implicate him because of jealousy and out of self-interest in his own case. (N.O.T., pp. 73 & 74)

Juvenile Court Opinion, 12/7/12, at 2-4 (footnote omitted).

Appellant was arrested and charged with firearms offenses. On July 2, 2012, Appellant was adjudicated delinquent. On July 23, 2012, Appellant was committed to a juvenile placement facility. This timely appeal followed.

Appellant presents the following issue for our review:

Was not the evidence insufficient to find appellant guilty of the charged offense of 18 Pa.C.S.A. §6111(a)(1), which governs the delivery of firearms by a seller, as appellant was not proven to be a seller of firearms, and is not the trial court's contention, first asserted in her Rule 1925 opinion months after trial, that she found appellant guilty of §6111(g)(2) — a different, uncharged offense — a violation of appellant's state and federal due process rights and the Rules of Juvenile Court Procedure?

Appellant's Brief at 3.

Appellant argues that the Commonwealth's delinquency petition specifically charged him with 18 Pa.C.S.A. § 6111(a)(1), which governs the delivery of firearms by "sellers." Appellant claims there was insufficient evidence that Appellant sold a firearm, yet the court found Appellant delinquent of § 6111. Appellant notes that the juvenile court did not specify the subsection at the time of the verdict and it was not until the juvenile court judge filed her opinion, in response to Appellant's claim of insufficient evidence to prove his guilt of § 6111(a)(1), that she found Appellant delinquent under § 6111(g)(2). Appellant claims that the due process

clauses of the Pennsylvania and U.S. Constitutions forbid convicting a defendant of a crime that is different than the one with which he was charged, and once the Commonwealth produced a charging document specifying charges, it was limited to proceeding on those charges. Thus, Appellant contends that the juvenile court erred both in denying a motion for judgment of acquittal and in adjudicating him delinquent, because the evidence showed the event at issue did not conform to the event presented in the juvenile delinquency petition.

We begin our review with the following standard in mind:

In evaluating a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt. In making this determination, we must evaluate the entire trial record and consider all the evidence actually received. It is within the province of the fact finder to determine the weight to be accorded each witness's testimony and to believe all, part, or none of the evidence introduced at trial.

In the Interest of J.C., 751 A.2d 1178, 1180 (Pa. Super. 2000). Moreover, the Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by wholly circumstantial evidence. ***In the Interest of J.D.***, 798 A.2d 210, 212 (Pa. Super. 2002).

In addition we are mindful that, "indictments must be read in a common sense manner and are not to be construed in an overly technical

sense.” ***Commonwealth v. Einhorn***, 911 A.2d 960, 978 (Pa. Super. 2006) (quoting ***Commonwealth v. Ohle***, 470 A.2d 61 (Pa. 1983)). The purpose of the indictment is to provide the accused with sufficient notice to prepare a defense. ***Id.*** A variance is not fatal unless it could mislead the defendant at trial, impairs a substantial right or involves an element of surprise that would prejudice the defendant’s efforts to prepare his defense. ***Id.*** Our Supreme Court has long explained that a variance is considered a significant obstacle to a defense only if it:

mislead[s] the defendant at trial, involves an element of surprise prejudicial to the defendant’s efforts to prepare his defense, precludes the defendant from anticipating the prosecution’s proof, or impairs a substantial right.

Commonwealth v. Pope, 317 A.2d 887, 890 (Pa. 1974).

We further observe that the Pennsylvania Rules of Juvenile Court Procedure govern the filing of a petition of delinquency. Specifically, Rule 330 governs the delinquency petition, its filing, contents and function. Pursuant to Rule 330, the Commonwealth must submit, among other things, the following in the delinquency petition:

Rule 330. Petition: Filing, Contents, Function

C. Petition contents. Every petition shall set forth plainly:

(6) (a) (i) **a summary of the facts sufficient to advise the juvenile of the nature of the offense alleged**; and

(ii) the official or customary citation of the statute and section, or other provision of law which the juvenile is alleged to have violated, but **an error in such citation shall not affect the validity or sufficiency of the written allegation;**

Pa.R.J.C.P. 330(C)(6)(a) (emphasis added).

The sale, possession, transfer, and registration of firearms are governed by the Uniform Firearms Act (“UFA”), the purpose of which is to “prohibit certain persons from possessing a firearm within this Commonwealth.” ***Commonwealth v. Baxter***, 956 A.2d 465, 471 (Pa. Super. 2008). The UFA addresses sale and transfers of firearms, in relevant part, as follows:

§ 6111. Sale or transfer of firearms.

(a) Time and manner of delivery.

(1) Except as provided in paragraph (2), no seller shall deliver a firearm to the purchaser or transferee thereof until 48 hours shall have elapsed from the time of the application for the purchase thereof, and, when delivered, the firearm shall be securely wrapped and shall be unloaded.

18 Pa.C.S.A. § 6111(a)(1). The penalties for violations of section 6111 are set forth under subsection (g) and provide, in relevant part, as follows:

(g) Penalties.—

* * *

(2) **Any person**, licensed dealer, licensed manufacturer or licensed importer **who knowingly or intentionally** sells, delivers or **transfers a firearm under circumstances intended to provide a firearm to any person**, purchaser or transferee **who is unqualified or ineligible to control,**

possess or use a firearm under this chapter commits a felony of the third degree and shall in addition be subject to revocation of the license to sell firearms for a period of three years.

18 Pa.C.S.A. § 6111(g)(2) (emphasis added).

Here, our review of the certified record reflects that the delinquency petition filed in this case contained the following summary of facts:

4) The delinquent acts committed by the accused were:

ON OR ABOUT 12/23/2011 AT OR AROUND
54TH STREET AND CITY LINE AVENUE IN
PHILADELPHIA, [APPELLANT] POSSESSED A
CONCEALED FIREARM AND TRANSFERRED ANOTHER
FIREARM TO [J.M.], A JUVENILE.

Delinquency Petition, 5/18/12, at 1. We conclude that the above summary was sufficient to advise Appellant of the nature of the offenses alleged, those being that Appellant possessed a concealed firearm, and that Appellant transferred another firearm to a specific minor.

In addition, the delinquency petition then provided the following:

5) The above acts were against the peace and dignity of the Commonwealth and were in violation of the Pennsylvania Penal Laws, Sections(s) [sic] and Title(s):

<u>Statute</u>	<u>Grade</u>	<u>Offense</u>
18§6111§§A1	F3	Deliver Firearm After 48 Hours Elapsed

Delinquency Petition, 5/18/12, at 1.

Thus, even assuming that the portion of the delinquency petition setting forth the "official or customary citation of the statute and section, or

other provision of law” which Appellant is alleged to have violated is erroneous because it lists subsection (a)(1) instead of subsection (g)(2), we are constrained to conclude that such error to the citation did not affect the validity or sufficiency of the written allegation. Indeed, such errors to delinquency petitions have been contemplated by Rule 330(C)(6)(a)(ii), and do not affect the validity of the written allegation in the delinquency petition.

Our further review of the record reflects that, at the delinquency hearing, Appellant moved for a judgment of acquittal on the “6111” charge. Specifically, counsel for Appellant stated:

I would argue that in order for it to be a felony of the Third Degree, the Commonwealth must prove that the person that transferred the gun knew that the transferee was not licensed.

N.T., 7/2/12, at 40. Hence, it is evident from the certified record that any error to the listing of the subsection of the statute in the delinquency petition did not hamper the defense presented by Appellant at the time of the delinquency hearing. Accordingly, we discern no error on the part of the juvenile court and conclude that Appellant’s claim lacks merit.

Moreover, in addressing this issue the juvenile court presented the following thorough discussion, which we set forth as our own:

**PURPORTED VARIANCE WAS NOT FATAL BECAUSE THE
DEFENDANT WAS CLEARLY ON NOTICE OF THE CHARGES
AND WAS NOT SURPRISED NOR PREJUDICED**

[Appellant] was actually found guilty of § 6111(g)(2), which is the illegal transfer of a firearm to an ineligible person. Therefore, [Appellant’s] true claim is that there was a fatal

variance between the charges and what he was actually found guilty of. Because [Appellant] was clearly put on notice of the allegations, this variance was not fatal.

A purported variance between the indictment and the offense proved will not be fatal to the Commonwealth's case unless it could mislead the defendant at trial, involves an element of surprise prejudicial to the defendant's efforts to prepare his defense, precludes the defendant from anticipating the prosecution's proof, or otherwise impairs a substantial right of the defendant.

Commonwealth vs. Fulton, 318 Pa. Super. 470, 476; 465 A.2d 650, 653 (1983) (citing *Commonwealth vs. Pope*, 455 Pa. 384, 317 A.2d 887 (1974)). "Generally stated, the requirement is that a defendant be given clear notice of the charges against him so that he can properly prepare a defense." *Commonwealth vs. Fulton*, 318 Pa. Super. 470, 476; 465 A.2d 650, 653 (citing *Commonwealth vs. Wolfe*, 220 Pa. Superior Ct. 415, 289 A.2d 153 (1972)). In addition, the Superior Court has found non-fatal variances where the offense proved was not a lesser included offense of the charge in the indictment, or as in this case, the petition. *Commonwealth vs. Fulton*, 318 Pa. Super. 470 at 477; 465 A.2d 650, 653 (1983). The relevant portions of § 6111 of the Crimes Code state:

(a) Time and manner of delivery.

(1) Except as provided in paragraph (2), no seller shall deliver a firearm to the purchaser or transferee thereof until 48 hours shall have elapsed from the time of the application for the purchase thereof, and, when delivered, the firearm shall be securely wrapped and shall be unloaded.

. . . .

(g) Penalties.

. . . .

(2) Any person ... who knowingly or intentionally ... delivers or transfers a firearm under circumstances

intended to provide a firearm to any person ... who is unqualified or ineligible to control, possess or use a firearm under this chapter commits a felony of the third degree....

The evidence clearly supported the guilty verdict under the applicable 6111(g)(2) because [Appellant] transferred a firearm to another juvenile, [J.M.]. Because [J.M.] is a juvenile he is statutorily ineligible to receive a firearm.

It belies reality that the Commonwealth would allege the juvenile defendant was in the business of selling firearms as defined in subsection (a)(1). In the delinquent petition the Commonwealth made no allegation that [Appellant] was a "seller" in the business of selling firearms, but rather that "... [Appellant] possessed a ... firearm and transferred a firearm to [J.M.], a juvenile." Also, both the Commonwealth's and [Appellant's] evidence centered on whether [Appellant] transferred a firearm to an ineligible person. In fact, during [Appellant's] motion for judgment of acquittal, [Appellant] argued the Commonwealth failed to prove his knowledge that [J.M.] was an ineligible recipient, not that the Commonwealth failed to prove that [Appellant] was a firearms dealer, or "seller." Defense counsel's argument, in pertinent part, stated:

I would argue that in order for it to be a Felony of the Third Degree, the Commonwealth must prove that the person that transferred the gun knew that the transferee was not licensed.

The difference between subsections (g)(1) and (g)(2) is that the latter requires that the recipient be ineligible to possess a firearm.

In closing argument [Appellant's] claims centered on [J.M.'s] credibility, not whether the Commonwealth failed to prove that [Appellant] was a "seller." (N.O.T., pp. 75 through 82) In sum, [Appellant] prepared to contest charges under the applicable subsection of § 6111(g)(2), not (a)(1) which deals with "sellers" or firearms dealers. As evidenced throughout the entire record, [Appellant] was clearly on notice of the charges specified in the petition. Had [Appellant] truly believed he was charged under subsection (a)(1), he would have made that

argument at trial and would have certainly asked questions pertaining to that.

For the foregoing reasons, the variance was not fatal because [Appellant] was clearly on notice of the charges, anticipated the prosecution's proof, and was not prejudiced.

Juvenile Court Opinion, 12/7/12, at 5-7.

In addition, to the extent that Appellant presents a challenge to the sufficiency of the evidence to support the adjudication, we set forth the following discussion as to this issue by the juvenile court and adopt it as our own:

**EVIDENCE WAS SUFFICIENT TO SUSTAIN GUILTY
VERDICTS FOR § 6111(G)(2)-TRANSFER OF A FIREARM
TO AN INELIGIBLE PERSON AND § 6110.1-POSSESSION
OF A FIREARM BY A MINOR**

[Appellant] next claims that the evidence was insufficient to support the guilty verdicts. This claim fails. As cited above, the relevant portion of § 6111(g)(2) of the Crimes Code states:

Any person ... who knowingly or intentionally ... delivers or transfers a firearm under circumstances intended to provide a firearm to any person ... who is unqualified or ineligible to control, possess or use a firearm under this chapter commits a felony of the third degree

Furthermore, the relevant portions of § 6110.1 (Possession of a Firearm by a Minor) of the Crimes Code states:

(a) Firearm. -- . . . a person under 18 years of age shall not possess or transport a firearm anywhere in this Commonwealth.

Viewing the evidence in the light most favorable to the Commonwealth as verdict winner, the evidence was compelling in supporting the guilty verdicts. *Commonwealth v. Rife*, 454 Pa. 506, 509, 312 A.2d 406 (1973). In addition, "[t]he test of

sufficiency of the evidence is whether accepting as true all the evidence, together with all reasonable inferences therefrom upon which the fact finder could properly have based its verdict, such evidence and inferences are sufficient in law to prove guilt beyond a reasonable doubt." *Commonwealth v. Green*, 464 Pa. 557, 347 A.2d 682 (1975). Finally, where there is a sufficiency of the evidence claim, "the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part, or none of the evidence." *Commonwealth v. McClendon*, 874 A.2d 1223, 1228-1229 (Pa. Super. 2005); *see also In re RN., JR.*, 951 A.2d 363, 369 (Pa. Super. 2008).

Here, [J.M.'s] testimony was very credible despite [Appellant's] belief that it was self-serving and possibly motivated by "jealousy" toward [Appellant]. This Court gave great weight to [J.M.'s] testimony. Compellingly, [J.M.] confessed his participation in drug dealing and firearm possession. [J.M.] could easily have discarded the firearm instead of availing himself to the juvenile delinquent system. Instead, in response to perceived dangers from other drug dealers and concern for his own family, [J.M.] decided to get out of the "drug game." Moreover, [J.M.'s] version of events never changed and was truthfully consistent.

On December 26, 2011, [J.M.] told his father and Officer Lally that [Appellant] gave him the firearm. That very night [J.M.] also confessed to Detective Perks that [Appellant] gave him the firearm. Moreover, Detective Perks testified that [J.M.'s] demeanor was truthful and cooperative without any indication of deception. On February 14, 2012, [J.M.] gave yet another statement to Agent Reinhold, stating for a third time that [Appellant] gave him the firearm. This Court imagines no perceived benefit to [J.M.] for initially implicating [Appellant]. In fact, implicating [Appellant] did not have the effect of exculpating [J.M.] with his father, Officer Lally, or with Detective Perks. [J.M.'s] confessions did not lessen his culpability because he essentially admitted to conspiracy, in addition to possessing the firearm and selling drugs. Only the February statement could have possibly provided an opportunity to embellish or lie out of self-interest. Instead, even this last statement was consistent with all previous statements. Lastly, at the time [J.M.] gave each statement, no threats or promises were made

to [J.M.] for confessing his involvement or for implicating [Appellant].

In contrast, [Appellant's] testimony was completely self-serving and incredible. This Court completely discounted [Appellant's] fictitious version of events and was equally unimpressed with his character witnesses. Moreover, [Appellant's] mother's testimony was largely incredible. This Court does, however, take note that she was candid when admitting she wanted no trouble for her [] son. This Court believed her testimony to be biased and overwhelmed by her desire to keep her guilty son out of trouble. Even defense witness [L.C.] added little to [Appellant's] cause. She claimed that [J.M.] was unpopular while [Appellant] was popular. She testified [to] being very good friends with [Appellant] and spending a lot of time with him and sharing many mutual friends. She also stated that [Appellant] and [J.M.] were unfriendly and that she did not view [J.M.] as trustworthy, despite failing to articulate meaningful reasons for that assessment. In short, this Court largely discounted [L.C.'s] testimony because her testimony was overwhelmingly biased and incredible, as well.

In conclusion, the evidence proved that on December 23, 2011, [Appellant] possessed a firearm and transferred it to another juvenile at a previously agreed upon location near Saint Joseph's University. For the foregoing reasons, the evidence was sufficient to support the guilty verdicts.

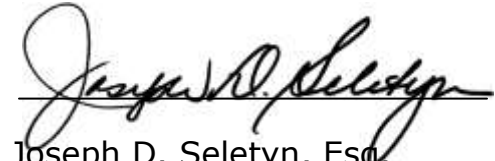
Juvenile Court Opinion, 12/7/12, at 7-9.

Order affirmed.

WECHT, J., files a Dissenting Memorandum.

J-A21009-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/17/2013