NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DARNELL NEWSOME, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 60 EDA 2012

Appeal from the Judgment of Sentence Entered October 6, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0407901-2006

BEFORE: BENDER, J., BOWES, J., and LAZARUS, J.

MEMORANDUM BY BENDER, J. **FILED MAY 16, 2013**

Darnell Newsome (Appellant) appeals from the judgment of sentence of an aggregate term of 7 to 14 years' incarceration following a bench trial at which Appellant was found guilty of persons not to possess, use, manufacture, control, sell or transfer firearms, 18 Pa.C.S. § 6105; firearms not to be carried without a license, 18 Pa.C.S. § 6106; possessing instruments of crime, 18 Pa.C.S. § 6108; simple assault, 18 Pa.C.S. § 2701; recklessly endangering another person, 18 Pa.C.S. § 2705; and endangering welfare of children, 18 Pa.C.S. § 4304. Appellant challenges the sufficiency of the evidence concerning the firearms convictions and the crime of endangering the welfare of children. After careful review, we affirm.[1]

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[1] The Commonwealth has not filed a brief in this matter.

The trial court set forth the factual overview of this matter as follows:

> On March 2, 2006, [Q.N.], then age ten, lived with his mother, Mia Newsom, and his brother [N.N.], age 5, and sister [S.N.], age 4, at 3573 Emerald Street, Philadelphia PA. The children's father, Appellant, came to visit, ostensibly to help [N.N.] with his schoolwork, and upon his arrival, Appellant began yelling about [Q.N.'s] television which was then in the living room and not in [Q.N.'s] bedroom. [Q.N.] testified that when his mother attempted to go upstairs to get her pocketbook Appellant dragged her by [her] foot back down the stairs and began hitting her in her face and about her body. Appellant then retrieved a black handgun from his hip and put it to her head whereupon five-year old [N.N.] jumped in front of him. Appellant then left the house.
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> Later that evening, Philadelphia Police Detective Paul Alminde interviewed Mia Newsome and she stated that she did not want her son involved in the court process. Detective Alminde testified that at the time of her initial report to police, Newsome told police officers that Appellant pulled out a black handgun and pointed it at her face. She also told police that the incident was witnessed by her son [Q.N.].
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> A stipulation was entered that at the time of the incident, Appellant ha[d] a prior conviction which precluded him from carrying a firearm under Section 6105 and that he did not have a license to possess or carry a handgun.
>
> Carl Bragdon testified for the defense that he is Mia Newsome's cousin and that on the day of the incident he spoke with Mia, who called him at approximately 2-2:30 PM, and that she told him that she and her husband were fighting. Bragdon stated that Mia did not say anything about Appellant having a handgun during their telephone conversation.

Trial Court Opinion (T.C.O.), 7/20/12, at 2-3 (unnumbered) (citations to the record omitted).

After the bench trial, Appellant was found guilty and sentenced as stated above. He filed post-sentence motions that the trial court denied. He

then filed the instant appeal and a timely concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant now raises the following two issues for our review:

> A. Did the lower court err when it found that there was sufficient evidence to prove beyond a reasonable doubt, the criminal offenses of persons not to possess, use[,] manufacture, control, sell or transfer firearms; firearms not to be carried without a license and carrying firearms on public streets or public property in Philadelphia, as there was no evidence adduced at trial that the alleged firearm was operable?
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> B. Did the lower court err when it found that there was sufficient evidence to prove, beyond a reasonable doubt, the criminal offense of endangering welfare of children, as there was no evidence adduced at trial that Appellant Darnell Newsome knowingly endangered the welfare of N.N. by violating a duty of care, protection and support?

Appellant's brief at 2.

Both of Appellant's claims raise sufficiency of the evidence arguments. The first claim concerns the absence of evidence proving that the firearm involved in the incident was operable as that fact relates to the three firearms offenses. The second claim relates to the child endangerment offense, in which Appellant asserts that he did not "knowingly endanger[] the welfare of N.N. by violating a duty of care, protection or support." Appellant's brief at 6.

> In reviewing a sufficiency of the evidence claim, we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense. ***Commonwealth v. Moreno***, 14 A.3d 133 (Pa. Super. 2011). Additionally, we may not reweigh the evidence or substitute our own judgment for that of the fact

> finder. ***Commonwealth v. Hartzell,*** 988 A.2d 141 (Pa. Super. 2009). The evidence may be entirely circumstantial as long as it links the accused to the crime beyond a reasonable doubt. ***Moreno, supra*** at 136.

Commonwealth v. Koch, 39 A.3d 996, 1001 (Pa. Super. 2011).

Appellant's first sufficiency argument relates to the firearms violations set forth at 18 Pa.C.S. § 6105(a)(1), § 6106(a)(1) and § 6108. These statutes provide:

> **§ 6105. Persons not to possess, use manufacture, control, sell or transfer firearms**
>
> **(a) Offense defined.**—
>
> (1) A person who has been convicted of an offense enumerated in subsection (b), within or without this Commonwealth, regardless of the length of sentence or whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture or obtain a license to possess, use, control, sell, transfer or manufacture a firearm in this Commonwealth.

18 Pa.C.S. § 6105(a)(1).

> **§ 6106. Firearms not to be carried without a license**
>
> **(a) Offense defined.—**
>
> (1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, … without a valid and lawfully issued license under this chapter commits a felony of the third degree.

18 Pa.C.S. § 6106(a)(1).

> **§ 6108. Carrying firearms on public streets or public property in Philadelphia**
>
> No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless:

> (1) such person is licensed to carry a firearm; or
> (2) such person is exempt from licensing under section 6106 of this title (relating to firearms not to be carried without a license).

18 Pa.C.S. § 6108(1) and (2).

To support his sufficiency argument that the Commonwealth had to prove that the firearm Appellant was carrying was operable, he relies on ***Commonwealth v. Stevenson***, 894 A.2d 759 (Pa. Super. 2006), and quotes this Court's statement that "[i]n order to sustain convictions under these sections [6105(a)(1) and 6106(a)(1)], the firearm in question must have been operable or capable of being converted into an object that could fire a shot. ***Id.*** at 775 (citing ***Commonwealth v. Layton***, 307 A.2d 843, 844 (Pa. 1973)). Consequently, Appellant argues that because no such evidence was presented his convictions for the firearms offenses cannot be sustained.

This Court in ***Commonwealth v. Thomas***, 988 A.2d 669 (Pa. Super. 2009), *appeal denied*, 4 A.3d 1054 (Pa. 2010), clarified the definition of firearm as follows:

> In order to obtain a conviction under 18 Pa.C.S. § 6105, the Commonwealth must prove beyond a reasonable doubt that the defendant possessed a firearm and that he was convicted of an enumerated offense that prohibits him from possessing, using, controlling, or transferring a firearm. The term "firearm" is defined in that section as any weapon that is "designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of any such weapon." 18 Pa.C.S. § 6105(i).

Id. at 671-72.

As for the crime of carrying a firearm without a license under 18 Pa.C.S. § 6106(a), "the Commonwealth must prove: '(a) that the weapon was a firearm, (b) that the firearm was unlicensed, and (c) that where the firearm was concealed on or about the person, it was outside his home or place of business.'" ***Commonwealth v. Parker***, 847 A.2d 745, 750 (Pa. Super. 2004) (quoting ***Commonwealth v. Bavusa***, 750 A.2d 855, 857 (Pa. Super. 2000)). Similar to the definition of "firearm" in section 6105, "firearm" is defined in section 6106(e) as "any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive or the frame or receiver of the weapon." 18 Pa.C.S. § 6106(e)(1).

Additionally, under 18 Pa.C.S. § 6108, unless an individual is licensed or exempt, "a crime is committed by carrying a weapon on a public street." ***Commonwealth v. Woods***, 710 A.2d 626, 631 (Pa. Super. 1998). Since section 6108 does not provide a separate definition of "firearm," we rely on the general definition as found in section 6102 of the Pennsylvania Uniform Firearms Act of 1995, which provides:

> **"Firearm."** --Any pistol or revolver with a barrel length less than 15 inches, any shotgun with a barrel length less than 18 inches or any rifle with a barrel length less than 16 inches, or any pistol, revolver, rifle or shotgun with an overall length of less than 26 inches. The barrel length of a firearm shall be determined by measuring from the muzzle of the barrel to the face of the closed action, bolt or cylinder, whichever is applicable.

18 Pa.C.S. § 6102.

After perusing the statutory language supplied above, we do not discern any language tending to require proof of operability. Thus, we disagree with Appellant that proof of operability is required here. Moreover, as in ***Thomas***, we conclude that Appellant's reliance on ***Stevenson*** is misplaced. Specifically, the ***Thomas*** court stated:

> In [***Stevenson***], the defendant was convicted of persons not to possess firearms after police officers recovered a Beretta handgun from his person during an investigatory detention. The defendant challenged his conviction on the basis that the gun was inoperable, citing evidence that the firing pin fell out while the weapon was being test-fired. This Court upheld the defendant's conviction under ***Layton***, reasoning that the Beretta was "clearly operable" for purposes of section 6105 because it functioned normally during the initial test-firing session and continued to function after the firing pin was reinserted.
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> [The appellant in ***Thomas***] argues that ***Stevenson*** is significant because it "interpreted the current version of the Uniform Firearms Act, and [the ***Stevenson*** Court] clearly reasoned that operability remains an element for the offense at issue [in this case]." [Thomas's] brief at 9. While we agree that ***Stevenson*** was decided after the current version of the Act became effective, we are not persuaded that operability is an essential element of section 6105 based upon that case. ***Layton*** and the other firearm possession cases cited in ***Stevenson*** were published several years before the legislature materially altered the definition of a firearm for purposes of section 6105 and certain enumerated subsections of section 6106. Under the revised definition, an individual is subject to criminal prosecution if he unlawfully possesses: (1) any weapon that is specifically designed to or may readily be converted to expel a projectile by means of an explosive; or (2) the frame or receiver of such a weapon. ***See*** 18 Pa.C.S. § 6105(i); ***see also*** 18 Pa.C.S. § 6106(e). The statutory language is clear, and it does not require proof that the weapon was capable of expelling a projectile when it was seized; on the contrary, the fact that a person can be prosecuted simply for possessing a semiautomatic pistol frame

> refutes this notion because the frame requires additional parts, *e.g.*, a slide and barrel, in order to fire a bullet. Thus, the use of the terms "frame" and "receiver" in section 6105(i) demonstrates that the legislature sought to eliminate the operability requirement articulated in ***Layton*** for purposes of this section.
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> The ***Stevenson*** Court did not review the pertinent statutory language and proceeded to analyze the defendant's claims in accordance with ***Layton***, which was no longer applicable to a conviction under this section. Nevertheless, it correctly denied relief on the basis that the defendant possessed a handgun that was specifically designed to shoot bullets. Accordingly, that decision does not preclude us from reviewing Appellant's argument under the appropriate standard.

Thomas, 988 A.2d at 671-72 (footnotes omitted).

Thus, we conclude that it was unnecessary for the Commonwealth to submit evidence that the gun Appellant carried and displayed during the incident was operable. Especially, since no gun was recovered in the present incident, it would be impossible to determine operability and at the same time would diminish trial testimony that Appellant did in fact possess and brandish a gun to threaten the victims. Appellant's first issue is without merit.

Next, with regard to Appellant's second issue, he argues that no evidence was presented at trial proving that he "knowingly endangered the welfare of N.N. by violating a duty of care, protection or support." Appellant's brief at 9. Citing ***Commonwealth v. Cardwell***, 515 A.2d 311, 313 (Pa. Super. 1986), Appellant asserts that the crime of endangering the welfare of a child is a specific intent offense and without evidence showing

that Appellant acted "knowingly," he should not have been found guilty of the offense. We disagree.

This Court in ***Commonwealth v. Retkofsky***, 860 A.2d 1098 (Pa. Super. 2004), a case involving the sufficiency of the evidence to convict for endangering the welfare of a child, provides the following:

> An individual is guilty of endangering the welfare of a child if he or she, as a parent, guardian, or other person supervising the child's welfare, "knowingly endangers the welfare of the child by violating a duty of care, protection, or support." 18 Pa.C.S.A. § 4304. Our Supreme Court has stated that statutes pertaining to juveniles such as this one are "basically protective in nature" and thus are necessarily drawn "to cover a broad range of conduct in order to safeguard the welfare and security of our children." ***Commonwealth v. Mack***, 467 Pa. 613, 617, 359 A.2d 770, 772 (1976) (quoting ***Commonwealth v. Marlin***, 452 Pa. 380, 386, 305 A.2d 14, 18 (1973)). Whether particular conduct falls within the purview of the statute is to be determined within the context of the "common sense of the community." ***Id.*** at 618, 359 A.2d at 772.
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> The accused must act "knowingly" to be convicted of endangering the welfare of a child. 18 Pa.C.S.A. § 4304. We have employed a three-prong standard to determine whether the Commonwealth's evidence is sufficient to prove this intent element: 1) the accused must be aware of his or her duty to protect the child; 2) the accused must be "aware that the child is in circumstances that could threaten the child's physical or psychological welfare;" and 3) the accused either must have failed to act or must have taken "action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare." ***Commonwealth v. Wallace***, 817 A.2d 485, 490-91 (Pa. Super. 2002) (citing ***Commonwealth v. Cardwell***, 357 Pa. Super. 38, 515 A.2d 311, 315 (Pa. Super. 1986)).

Id. at 1099-1100.

Appellant does not address the three-pronged test set forth above. Rather, he simply relates his actions with regard to Mia Newsome, claiming that the incident only lasted about five minutes. Then, Appellant states that "[i]t was not until N.N. jumped in front of him when he pulled out a black handgun and put it to Mia Newsome's head [that] anyone other than Mr. Newsome and Mia Newsome became involved." Appellant's brief at 10. Thus, Appellant asserts that no testimony demonstrated that he knew he was endangering his son. This argument is specious at best. In effect, Appellant appears to be blaming the five-year-old child for stepping between Appellant and Mia Newsome. Appellant was surely aware of the danger in which he placed the child under the circumstances. It is unreasonable to think that Appellant would be unaware of the risk in which he placed his son and the serious consequences his actions might have caused. The court as "fact-finder could reasonably find that the 'common sense of the community,' ***Mack*** at 618, 359 A.2d 772, put [A]ppellant's action within the purview of the statute." ***Retkofsky***, 860 A.2d at 1101. Therefore, we conclude that Appellant's second issue affords him no relief.

Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 5/16/2013