

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

IN THE INTEREST OF: S.H, A MINOR : IN THE SUPERIOR COURT OF  
: PENNSYLVANIA  
APPEAL OF: S.H., :  
: Appellant : No. 923 EDA 2011

Appeal from the Dispositional Order, March 10, 2011,  
in the Court of Common Pleas of Philadelphia County  
Juvenile Division at No. CP-51-JV-0000257-2011

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS AND MUSMANNO, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: March 11, 2013

S.H., a juvenile, appeals from the order of disposition<sup>1</sup> of March 10, 2011, following his adjudication of delinquency for possession of a firearm by a minor and possession of marijuana. After careful review, we affirm.

The facts of this matter, as recounted by the trial court, are as follows:

On January 18, 2011 at approximately 4 p.m., Philadelphia Police Officer Andre Daniels was sitting in his patrol car at a gas station on the 1400 block of Lehigh Avenue. Officer Daniels described seeing the defendant and another male engaged in "like a struggle." The other male was directly behind the defendant and holding the defendant's arms. The officer observed the defendant firmly possessing a firearm with both of his hands. Only the defendant was holding the firearm as he was holding the firearm at his waist level.

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<sup>1</sup> We note that S.H. purports to appeal from the adjudication of delinquency; however, "In juvenile proceedings, the final Order from which a direct appeal may be taken is the Order of Disposition, entered after the juvenile is adjudicated delinquent." *Commonwealth v. S.F.*, 912 A.2d 887, 888-889 (Pa.Super. 2006). We have amended the caption accordingly.

The officer approached and the other male put his hands up and blurted that the defendant "pulled the gun out on me." The officer ordered the defendant to drop the automatic firearm but the defendant did not. At this point, the officer was approximately fifteen feet away from the defendant. For a second time, the officer ordered the defendant to drop the firearm and the defendant eventually complied.

As the officer approached, the defendant walked eastbound on Lehigh Avenue, away from the officer. The officer pursued the defendant a short distance. The defendant was detained and recovered from the ground near the defendant was a 45 caliber automatic firearm, where the defendant dropped it. Also recovered from the defendant were nineteen vials of marijuana. At this point, the other male was no longer at the scene. The defendant had minor bleeding from his mouth area, which the officer initially did not even notice. Once in custody, the defendant became cooperative. A ballistics report was moved into evidence, establishing that the 45 caliber firearm was an automatic weapon that was fully operable. It was also stipulated by and between counsel that if the defendant's mother testified, she would state that her son had a good reputation and that she had spoken with people in the community about her son's good reputation. The defendant elected to testify at trial.

The defendant testified that on January 18, 2011, he was in a fight with this other male, whose name he did not know. Defendant claimed he previously fought said male after a disagreement on the basketball court during a pick-up game. This initial encounter took place several months prior during the summertime. Defendant testified he won this fight and that he bruised this other male's face and ego.

The defendant claimed he saw this male on the 54 S.E.P.T.A bus at Broad Street and Lehigh Avenue, on the day he was arrested. As the defendant boarded the bus he noticed this male sitting in the

back of the occupied bus. According to the defendant, there were many people on the bus. The defendant and this other male stared at each other. According to the defendant, said male stood and approached the defendant. In response, the defendant stood and then the male punched the defendant on the head. The defendant claimed he hit this male back "like five to six times." Both began "grabbing each other" and trying to "slam each other" onboard the crowded bus. Finally, they pushed off each other. At this point, the defendant claimed said male pulled a firearm from his hip area. This male swung the gun at the defendant, hitting him on the lip with the barrel of the firearm. Defendant testified that while this male was swinging the firearm the defendant was grabbing the firearm. According to the defendant, this entire titanic ordeal took place on a heavily occupied bus. Finally after much "tussling...on the bus," both the defendant and the said male inexplicably tussled themselves off the bus.

Defendant stated he "was in shock" and "thought [he] was about to die." Defendant also claimed to have never seen a gun before, except in the movies. Despite suffering this public transportation nightmare, defendant claimed having the wherewithal to heroically tussle with and then detain the other male because "[he] wasn't going to let him go until [he] seen a cop." According to the defendant, he then did "seen a cop coming" and the defendant and said male dropped the firearm. The defendant picked up the firearm then threw it down again.

On cross-examination, the defendant testified that no one from the bus called police, but that people screamed once the other male pulled out the firearm. It was a double-length bus with doors in the middle and in the front. Defendant testified that he was not certain how he "tussled" off the bus but that he was certain he "tussled" out through the back-door. Once off the bus, the defendant and the other male were on Broad Street where they

struggled for another two to three minutes. Defendant admitted being in exclusive possession of the 45 caliber firearm when the officer arrived.

Supplemental trial court opinion, 5/10/12 at 2-4 (internal citations to the notes of testimony omitted.)

On February 16, 2011, appellant was adjudicated delinquent of possession of a firearm by a minor and possession of a small amount of marijuana. On March 10, 2011, the trial court entered a dispositional order and appellant was committed to the Summit Academy Gun Prevention Program. Appellant filed a timely notice of appeal; however, the trial court found waiver when it did not receive a timely statement of errors complained of on appeal. By order dated March 14, 2012, this court remanded the matter and ordered that the disposition hearing notes of testimony be included in the certified record and copies provided to appellant. Appellant was then ordered to file his statement of errors complained of on appeal within 21 days of his receipt of the notes of testimony. Appellant complied and filed his statement of errors; the trial court filed a supplemental opinion.

Appellant presents the following issue for our review:

Did not the trial court err in convicting appellant of possession of a firearm by a minor, where another individual pulled a firearm on appellant and the appellant, acting in self-defense and out of legal necessity, struggled and disarmed the man, obtaining possession of the firearm for only a couple seconds before the police arrived, and where such momentary and transitory possession met neither the statutory definition of possession nor negated the affirmative defense of legal necessity?

Appellant's brief at 3.

Regarding his conviction for possession of a firearm, appellant contends his momentary and transitory possession of the gun did not meet the statutory definition of "possession." (Appellant's brief at 8.) Appellant is challenging the sufficiency of the evidence to support the trial court's adjudication.

The Superior Court will not disturb the lower court's disposition absent a manifest abuse of discretion. *In the Interest of J.D.*, 798 A.2d 210, 213 (Pa.Super.2002). When a juvenile is charged with an act that would constitute a crime if committed by an adult, the Commonwealth must establish the elements of the crime by proof "beyond a reasonable doubt." *In the Interest of A.D.*, 771 A.2d 45, 48 (Pa.Super.2001) (*en banc*). When considering a challenge to the sufficiency of the evidence following an adjudication of delinquency, we must review the entire record and view the evidence in the light most favorable to the Commonwealth. *Id.*

In determining whether the Commonwealth presented sufficient evidence to meet its burden of proof, the test to be applied is whether, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences therefrom, there is sufficient evidence to find every element of the crime charged. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by wholly circumstantial evidence.

*In re J.D.*, 798 A.2d at 212 (citations omitted). The facts and circumstances established by the Commonwealth need not be absolutely incompatible with a defendant's innocence. *Id.* at 212–13.

Questions of doubt are for the hearing judge, unless the evidence is so weak that, as a matter of law, no probability of fact can be drawn from the combined circumstances established by the Commonwealth. *Id.* at 213.

*In re R.N.*, 951 A.2d 363, 366-367 (Pa.Super. 2008).

In determining the sufficiency of the evidence, we do not review a diminished record. The law is clear "that in determining the sufficiency of the evidence to support the verdict, we are required to consider all evidence actually received, whether the trial court's rulings on evidence were correct or incorrect." *Commonwealth v. Pankraz*, 382 Pa.Super. 116, 119-120, 554 A.2d 974, 976 (1989). *See also: Commonwealth v. Smith*, 523 Pa. 577, 582, 568 A.2d 600, 602-603 (1989); *Commonwealth v. DiSabatino*, 399 Pa.Super. 1, 4, 581 A.2d 645, 646 (1990). "Where improperly admitted evidence has been allowed to be considered by the jury, its subsequent deletion does not justify a finding of insufficient evidence. The remedy in such a case is the grant of a new trial." *Commonwealth v. Smith, supra*, 523 Pa. at 582, 568 A.2d at 603.

*Commonwealth v. Parker*, 644 A.2d 1245, 1247 (Pa.Super. 1994), *appeal denied*, 540 Pa. 630, 658 A.2d 793 (1995).

The Crimes Code defines possession of a firearm by a minor as follows:

**§ 6110.1. Possession of firearm by minor**

(a) **Firearm.**--Except as provided in subsection (b), a person under 18 years of age shall not possess or transport a firearm anywhere in this Commonwealth.

18 Pa.C.S.A. § 6110.1.

"Possession" is defined as:

- (c) **Possession as an act.**-Possession is an act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

18 Pa.C.S.A. § 301(c).

According to appellant, his uncontroverted testimony established that he only possessed the handgun for a couple of seconds before the officer arrived, and he was still engaged in a struggle with the man who attacked him. Thus, appellant contends his possession was transitory and there was no time for him to consciously decide to continue possession, as opposed to move to safety and abandon the firearm in an appropriate manner. (Appellant's brief at 8-9.)

"To prove possession of a firearm, the Commonwealth must establish that an individual either had actual physical possession of the weapon or had the power of control over the weapon with the intention to exercise that control. Possession may be proven by circumstantial evidence." *In the Interest of R.N.*, 951 A.2d at 369-370. In finding that the evidence supported the charge of possession of a firearm, the trial court relied on the police officer's testimony. The officer testified that appellant solely possessed the firearm. According to the officer, when he first saw appellant he noticed appellant "holding a handgun and the other gentleman was around [appellant] holding his arms." (Notes of testimony, 2/16/11 at 3-4.) The officer stated, "Drop the handgun." (*Id.* at 4.) The other male involved

in the struggle with appellant put his hands up and said, “[appellant] pulled a gun on me.” (*Id.*) The officer ordered appellant to drop the gun a second time and he did. (*Id.* at 5.) Despite appellant’s self-serving claims to the contrary, the evidence indicated it took two commands from the police officer before appellant finally dropped the firearm.

The trial court determined appellant’s version of the events lacked credibility. The court explained:

It is difficult for this Court to believe there was any struggle on a city bus. It belies reality to accept that such an enormous struggle occurred on a crowded bus in the middle of a major city, and that no one called the police, nor even tried to intervene out of their own self-preservation. Further the record is replete[sic] of any bus surveillance tape or any eyewitness account from even a bus driver. Had such a battle occurred, this would have been introduced by the defendant at trial to corroborate his testimony. Moreover, it is likely that an incident-report would have been documented by S.E.P.T.A., especially if passengers had fought onboard a bus and then fallen off the back. At the very least such documentation would have been created for liability reasons. None was introduced because it did not happen.

Supplemental trial court opinion, 5/10/12 at 6.

As this court stated in *In re T.G.*, 836 A.2d 1003, 1005 (Pa.Super. 2003), “[W]e must defer to the credibility determinations of the trial court, as these are within the sole province of the finder of fact. The trier of fact, while passing upon the credibility of witnesses, is free to believe all, part, or none of the evidence.” Based on the credibility determinations made by the



trial and viewing the evidence in the light most favorable to the Commonwealth, the evidence was sufficient to support the trial court's adjudication of delinquency for possession of a firearm.

Next, appellant argues that even if we agree with the trial court that he did "possess" the firearm, he did so out of legal necessity to protect himself from harm. (Appellant's brief at 8.) Because justification is an affirmative defense, the defendant has the burden of proof. ***Commonwealth v. Manera***, 827 A.2d 482 (Pa.Super. 2003). In ***Manera***, this court summarized principles of justification:

"Justification" is defined in 18 Pa.C.S.A. § 503 as follows:

Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if:

1. the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;
2. neither this title nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and,
3. a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

18 Pa.C.S.A. § 503(a). [Footnote: The Official Comment to this section states that § 503 is not limited to situations where the harm or evil to be avoided is death or bodily injury.]

In *Commonwealth v. Capitolo*, 508 Pa. 372, 498 A.2d 806 (1985), our Supreme Court restated the elements of a successful justification defense as follows:

1. that the actor was faced with a clear and imminent harm, not one which is debatable or speculative;
2. that the actor could reasonably expect that the actor's actions would be effective in avoiding this greater harm,
3. that there is no legal alternative which will be effective in abating the harm; and,
4. that the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.

*Id.* at 809.

*Manera*, 827 A.2d at 484.

In the instant case, appellant argues he possessed the weapon to save himself from imminent personal injury. (Appellant's brief at 10.) The trial court, however, found that appellant was the aggressor and sole possessor of a deadly weapon, whereas the unarmed male was in distress as he struggled to keep appellant at bay. (Supplemental trial court opinion, 5/10/12 at 8.) The trial court placed great weight on the fact that appellant had to be ordered twice to drop the gun before he did so. Appellant's argument that he believed he was in imminent danger or that it was necessary to further possess the handgun, appears incredible especially

since the officer appellant claimed to be waiting for was actually there.<sup>2</sup> Thus, the record reflects that appellant failed to carry his burden of proof on the first prong of the *Capitolo* test for justification: namely, that he was “faced with a clear and imminent harm, not one which is debatable or speculative.” *Manera*. Accordingly, this claim fails.

Viewing the evidence in the light most favorable to the Commonwealth, we conclude the Commonwealth presented sufficient evidence to adjudicate appellant delinquent of possession of a firearm.<sup>3</sup>

Order affirmed.

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<sup>2</sup> Appellant specifically testified: “We was tussling a lot on the bus. So I wasn’t going to let him go until I seen a cop.” (Notes of testimony, 2/16/11 at 16.)

<sup>3</sup> We note appellant did not challenge his adjudication of delinquency for possession of marijuana.