

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

VICTOR KELLY,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3431 EDA 2012

Appeal from the Judgment of Sentence entered November 9, 2012,
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No(s): CP-51-CR-0010062-2011

BEFORE: ALLEN, OTT and COLVILLE*, JJ.

MEMORANDUM BY ALLEN, J.:

FILED SEPTEMBER 20, 2013

Victor Kelly ("Appellant") appeals from the judgment of sentence imposed after the trial court convicted him of firearms not to be carried without a license, carrying firearms in public in Philadelphia, possession of an instrument of crime, and recklessly endangering another person.¹ We affirm.

The facts of record are as follows. Ms. Markisha Claks testified that on July 14, 2011, she was cleaning the front of her house when Appellant left a "big bicycle" on the sidewalk in front of her house. N.T., 7/20/12, at 7-8, 15. When Ms. Claks asked Appellant to remove the bike, Appellant said "fuck you." *Id.* at 8. Ms. Claks then moved the bike, and Appellant told her

¹ 18 Pa.C.S.A. §§ 6106, 6108, 907 and 2507.

she was “a dumb bitch.” *Id.* at 9. Ms. Claks and Appellant proceeded to argue, and Appellant “poked” Ms. Claks in the forehead and chased her up the street. *Id.* at 9-10. Ms. Claks ran into her house and shut the door. *Id.* at 10. When Ms. Claks came back outside, Appellant was still there. *Id.* Ms. Claks said she was going to call her cousin. *Id.* Appellant responded that if Ms. Claks called her cousin, Appellant would “kill [Ms. Claks] and [her] kids.” *Id.* Ms. Claks went to get her cousin. *Id.* When she returned to her house, Appellant was standing across the street, approximately 20-25 feet away, and Ms. Claks could see he had a gun, with the black handle of the gun visible in Appellant’s waist. *Id.* at 11-13, 21-22.

Philadelphia Police Officer Paul Groves testified to receiving a radio call on July 14, 2011, and reporting to Bennington Street, where Ms. Claks’ house is located. *Id.* at 29. Officer Groves observed Appellant standing on the corner in front of a silver minivan “by the passenger side tire.” *Id.* at 29. Officer Groves indicated to Appellant “to come here” and Appellant “started walking away.” *Id.* As Officer Groves began to walk toward Appellant, Appellant “walked faster” in the other direction. *Id.* at 29-30. Officer Groves stopped at the minivan, where there “was a gun sitting right on the tire of the minivan.” *Id.* at 30. Officer Groves testified that Appellant had been “standing directly in front of the tire.” *Id.* The gun was recovered and determined to have been loaded and operable. *Id.* at 31, 38. Appellant did not have a valid license to carry a gun. *Id.* at 38.

Appellant testified to getting into an argument with Ms. Claks, but denied that he threatened to kill her and her children. N.T., 9/5/12, at 8, 16-17. Appellant did not recall a silver minivan, and denied having a gun. *Id.* at 17. Appellant's father, Victor Kelly, Sr., testified to Appellant's reputation for being peaceful. *Id.* at 36-42.

After hearing the above evidence, the trial court found Appellant guilty of firearms not to be carried without a license, carrying firearms in public in Philadelphia, possession of an instrument of crime, and recklessly endangering another person. The trial court imposed an aggregate sentence of 15 to 30 months imprisonment, with a concurrent 5 years of reporting probation. Appellant filed this timely appeal,² in which he presents the following three sufficiency issues for our review:

1. Was not the evidence insufficient to support appellant's conviction under Section 6106 of the Uniform Firearms Act, insofar as the Commonwealth failed to prove that appellant carried a firearm either in a vehicle or concealed about his person?
2. Was not the evidence insufficient to support appellant's conviction for possession of an instrument of crime, insofar as the Commonwealth failed to prove that appellant possessed an instrument of crime or that he did so with the specific intent to employ it criminally?
3. Was not the evidence insufficient to support appellant's conviction for recklessly endangering another person, insofar as the Commonwealth failed to prove that appellant

² Appellant and the trial court have complied with Pa.R.A.P. 1925.

engaged in conduct which placed or might have placed another person in danger of death or serious bodily injury, or that he acted recklessly in doing so?

Appellant's Brief at 3.

When examining a challenge to the sufficiency of the evidence, our standard of review is as follows:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [finder] 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. Jones, 874 A.2d 108, 120 (Pa. Super. 2005).

In conjunction with the foregoing standard of review, we have reviewed the certified record, particularly the transcript from the non-jury trial, and found no merit to Appellant's sufficiency claims. The Honorable

Sean F. Kennedy, sitting as the trial court judge, has filed a comprehensive opinion, which we adopt and incorporate as our own.³ Judge Kennedy has analyzed Appellant's sufficiency arguments, citing prevailing statutory and case law, such that further commentary by this Court would be redundant.

Given that the trial court analysis is supported by the record, we adopt the trial court's February 25, 2013 opinion in its entirety, and affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambetti", is written over a horizontal line.

Prothonotary

Date: 9/20/2013

³ Judge Kennedy notes that in his Pa.R.A.P. 1925(b) statement, Appellant claimed that the trial court "in pre-trial rulings by the Honorable Linda Carpenter erred in denying the appellant's motion in limine to preclude the introduction of 911 calls." Trial Court Opinion, 2/25/13, at 4. Judge Kennedy therefore requests that we affirm Appellant's judgment of sentence pending the Opinion of Judge Linda Carpenter. *Id.* at 9. Since Appellant has only presented this Court with three sufficiency issues, the pre-trial rulings and Judge Carpenter's opinion are moot.

FILED

FEB 25 2013

Appeals Unit
District of PA

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : CP-51-CR-0010062-2011
:
vs. :
:
VICTOR KELLY : SUPERIOR COURT
: NO. 3431 EDA 2012

OPINION

KENNEDY, SEAN F., J.

FEBRUARY 21, 2013

FINDINGS OF FACT

On July 14, 2011 at around 4:00 p.m., Markisha Claks was cleaning the front of her house on the 3900 block of Bennington Street which is located in Philadelphia, Pennsylvania. N.T. 7/20/2012 at 7-8. As Ms. Claks was cleaning her front, the Defendant, Victor Kelly, came up with street with a bicycles and left it on the side of Ms. Claks' sidewalk. N.T. 7/20/2012 at 8. Ms. Claks asked the Defendant to take the bike with him and the Defendant responded by saying, "Fuck you." *Id.*

The Defendant then began to walk down the street and Ms. Claks proceeded to move the bicycle onto the sidewalk to which the Defendant responded, "You're a dumb bitch." N.T. 7/20/2012 at 9. At this time, the Defendant and Ms. Claks began to argue back and forth and the Defendant eventually left. *Id.* Since she believed that the Defendant had left the block, Ms. Claks walked to the corner store. *Id.* As she returned from the store, the Defendant was once again on the block. *Id.* Ms. Claks and the Defendant began to argue again and the Defendant

Exhibit "B"

poked Ms. Claks in the forehead several times. *Id.* Ms. Claks then stated that she was going to get her cousin and as she walked away the Defendant chased her into her house. N.T. 7/20/2012 at 10. Ms. Claks later came outside and the Defendant once again chased Ms. Claks into her house after she told the Defendant again that she was going to get her cousin. *Id.* After Ms. Claks shut the door, the Defendant proceeded to punch Ms. Claks' door and stated, "If you call him around here, I'm going to kill you and your kids." *Id.*

Ms. Claks came outside a few minutes later to get in her neighbor's car and go around the corner to her cousin's house. *Id.* As Ms. Claks was in the car her neighbor told her to call the cops because he had just lost a cousin. *Id.* As Ms. Claks and her neighbor returned to 3900 Bennington Street, Ms. Claks attempted to flag down a police vehicle, however, her neighbors were all out and had already reported the incident to the police. *Id.*

At this time, Ms. Claks observed the Defendant in front of the medical center on the corner of Bennington and Luzerne. N.T. 7/20/2012 at 29. Ms. Claks was about 20-25 feet away from the Defendant, but she noticed a gun in his waist because she could see the black handle sticking out of his waist band. N.T. 7/20/2012 at 12. At this time, Officer Groves came on the scene and observed the Defendant standing in front of a silver mini van by the passenger side tire on the corner of Bennington and Luzerne. N.T. 7/20/2012 at 29. Officer Groves indicated to the Defendant to "come here", however, the Defendant began to walk away to a driveway between K Street and Bennington Street. N.T. 7/20/2012 at 30. Officer Groves did not follow the Defendant because after the Defendant walked away he observed a gun sitting right on the tire of the mini van. N.T. 7/20/2012 at 30. Officer Groves testified that the Defendant was the only person near the van and that only two other people were close and they were still about ten feet

away. N.T. 7/20/2012 at 32. The Defendant was later stopped in the driveway between K and Bennington Streets by Officer Martin. *Id.*

The loaded gun was placed on a property receipt and the ballistic report indicated that the gun was a 22 caliber automatic handgun with the capacity of ten in the magazine and one in the chamber. N.T. 7/20/2012 at 38. There was also gunshot residue in the barrel and the gun was found to be operable. *Id.* Also, the Pennsylvania State Police confirmed that the Defendant did not have a valid license to carry under Section 6109 of the Crimes Code. *Id.*

PROCEDURAL HISTORY

On July 20, 2012, the Defendant requested and was granted a waiver of a jury trial, which occurred before the Honorable Sean F. Kennedy after the Defendant's Motion in Limine was denied by the Honorable Linda Carpenter on June 15, 2012. The trial was bi-furcated and completed on September 5, 2012. Based on the evidence, the Defendant was found guilty of Firearms Not to Be Carried Without a License (18§6106§§A1), Carrying Firearms in Public in Philadelphia (18§6108), Possession of an Instrument of Crime (18§907§§A), and Recklessly Endangering Another Person (35§2705), and Not Guilty of Terroristic Threats With Intent to Terrorize Another (18§2706§§A1), Simple Assault (18§2701§§A), and Criminal Mischief – Tamper with Property (18§3304§§A2). On November 9, 2012, the Defendant was sentenced to fifteen to thirty months incarceration for the Firearms Not to Be Carried Without a License violation, and five years of reporting probation for the Carrying Firearms in Public in Philadelphia violation to run consecutive to one another. The Defendant received no further penalty on the Possession of an Instrument of Crime Violation and the Recklessly Endangering

Another Person Violation. Under these circumstances, the Defendant filed a timely Notice of Appeal with the Superior Court of Pennsylvania.

STANDARDS OF REVIEW

I. Sufficiency of the Evidence

When evaluating a sufficiency claim, our standard is whether, viewing all the evidence and reasonable inferences in the light most favorable to the Commonwealth, the fact finder reasonably could have determined each element of the crime was established beyond a reasonable doubt. *Commonwealth v. Kane*, 10 A.3d 327, 332 (Pa. Super. 2010). The Superior Court considers all the evidence admitted, without regard to any claim that some of the evidence was wrongly allowed. *Id.* The Superior Court will not weigh the evidence or make credibility determinations. *Id.* Moreover, any doubts concerning a defendant's guilt were to be resolved by the fact finder, unless the evidence was so weak and inconclusive that no probability of fact could be drawn from that evidence. *Id.*

DISCUSSION

In his 1925(b) Statement of Matters Complained of on Appeal, the Defendant asserts the following arguments for appeal: (1) The court in pre-trial rulings by the Honorable Linda Carpenter erred in denying the appellant's motion in limine to preclude the introduction of 911 calls, (2) The evidence was insufficient as a matter of law to find appellant guilty of firearms not to be carried without a license, (3) The evidence was insufficient as a matter of law to find appellant guilty of possession of an instrument of crime, and (4) The evidence was insufficient as a matter of law to find appellant guilty of recklessly endangering another person.

I. The Appellant's motion in limine to preclude the introduction of 911 calls was decided by the Honorable Linda Carpenter.

Pursuant to Pa. R.A.P. 1925(a)(1), an opinion on this alleged error is to be provided by the Honorable Linda Carpenter.

II. There was sufficient evidence, as a matter of law, to convict the Defendant of Firearms Not to be Carried without a License.

The Commonwealth may sustain its burden by proving the crime's elements with evidence which is entirely circumstantial and the trier of fact, who determines credibility of witnesses and the weight to give the evidence produced, is free to believe all, part, or none of the evidence. *Commonwealth v. Riley*, 811 A.2d 610, 614 (Pa. Super. 2002), quoting *Commonwealth v. Brown*, 701 A.2d 252, 254 (Pa. Super. 1997). 18 Pa.C.S.A. § 6106(a)(1) states: "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, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree." 18 Pa.C.S.A. § 6106(a)(1).

The facts of this case are uncontroverted. Ms. Claks credibly testified that she was involved in an argument with the Defendant in which Ms. Claks was poked in the forehead and chased into her home by the Defendant several times. After Ms. Claks told the Defendant that she was going to call her cousin the Defendant stated, "If you call him around here, I'm going to kill you and your kids." Ms. Claks also testified that both she and the Defendant left the area for a few minutes. When Ms. Claks returned, the Defendant was also back in the area. At this time, Ms. Claks saw a gun in the defendant's waist band, seeing the black handle of same sticking out

of his waist band. Officer Groves also credibly testified that as he came on the scene and told the Defendant to "come here," the Defendant walked away. At this time, Officer Groves observed a gun sitting on the right tire of the minivan. Officer Groves testified that the Defendant was the only person near the van and that two other people were approximately ten feet away.

The loaded gun was placed on a property receipt and the ballistic report indicated that the gun was a 22 caliber automatic handgun with the capacity of ten in the magazine and one in the chamber. There was also gunshot residue in the barrel and the gun was found to be operable. Also, the Pennsylvania State Police confirmed that the Defendant did not have a valid license to carry under Section 6109 of the Crimes Code.

This testimony and observations of the Defendant's actions by both an eye witness and Office Groves provide clear and convincing evidence that the Defendant carried a firearm on his person without a valid and lawfully issued license. Therefore, the evidence was sufficient to convict the Defendant of Firearms Not to be Carried without a License.

III. There was sufficient evidence, as a matter of law, to convict the Defendant of Possession of an Instrument of Crime.

The Commonwealth may sustain its burden by proving the crime's elements with evidence which is entirely circumstantial and the trier of fact, who determines credibility of witnesses and the weight to give the evidence produced, is free to believe all, part, or none of the evidence. *Commonwealth v. Riley*, 811 A.2d 610, 614 (Pa. Super. 2002), quoting *Commonwealth v. Brown*, 701 A.2d 252, 254 (Pa. Super. 1997). To sustain a conviction for Possessing an Instrument of a Crime, the Commonwealth must prove that Appellant possessed a handgun, pistol, or other firearm; that this item was an instrument of a crime; and that Appellant .

possessed this item with the intent to attempt to commit or commit a crime. 18 Pa. C.S.A. § 907(b) cited by *Pennsylvania v. Baucage*, 4 Pa. D. & C.5th 138, 146-147 (2008).

The facts of this case are uncontroverted. Ms. Claks credibly testified that she was involved in an argument with the Defendant in which Ms. Claks was poked in the forehead and chased into her home by the Defendant several times. After Ms. Claks told the Defendant that she was going to call her cousin the Defendant stated, "If you call him around here, I'm going to kill you and your kids." Ms. Claks also testified that both she and the Defendant left the area for a few minutes. When Ms. Claks returned, the Defendant was also back in the area. At this time, Ms. Claks saw a gun in the defendant's waist band, seeing the black handle of same sticking out of his waist band. Officer Groves also credibly testified that as he came on the scene and told the Defendant to "come here," the Defendant walked away. At this time, Officer Groves observed a gun sitting on the right tire of the minivan. Officer Groves testified that the Defendant was the only person near the van and that two other people were approximately ten feet away.

This testimony and observations of the Defendant's actions by both an eye witness and Office Groves provide clear and convincing evidence that the Defendant carried a firearm with the intent to commit a crime as the Defendant argued with Ms. Claks, threatened to kill her and her children, left the area and subsequently came back to the area with a firearm. Therefore, the evidence was sufficient to convict the Defendant of Possession of an Instrument of Crime.

IV. There was sufficient evidence, as a matter of law, to convict the Defendant of Recklessly Endangering another Person.

The Commonwealth may sustain its burden by proving the crime's elements with evidence which is entirely circumstantial and the trier of fact, who determines credibility of

witnesses and the weight to give the evidence produced, is free to believe all, part, or none of the evidence. *Commonwealth v. Riley*, 811 A.2d 610, 614 (Pa. Super. 2002), quoting *Commonwealth v. Brown*, 701 A.2d 252, 254 (Pa. Super. 1997). To sustain a conviction for recklessly endangering another person the Commonwealth must prove that the Appellant recklessly engaged in conduct that placed the victims in danger of death or serious bodily injury. 18 Pa. C.S.A. § 2705. A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that serious bodily injury will result from his conduct. Pa. C.S.A. § 302(b)(3). The risk must be of such nature and degree that, considering the nature and intent of the Individual's conduct, and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct a reasonable person would have observed in the individual's situation. *Pennsylvania v. Baucage*, 4 Pa. D. & C.5th 138, 146 (2008).

The facts of this case are uncontroverted. Ms. Claks credibly testified that she was involved in an argument with the Defendant in which Ms. Claks was poked in the forehead and chased into her home by the Defendant several times. After Ms. Claks told the Defendant that she was going to call her cousin the Defendant stated, "If you call him around here, I'm going to kill you and your kids." Ms. Claks also testified that both she and the Defendant left the area for a few minutes. When Ms. Claks returned the Defendant, was also back in the area. At this time, Ms. Claks saw a gun in the defendant's waist band, seeing the black handle of same sticking out of his waist band. Officer Groves also credibly testified that as he came on the scene and told the Defendant to "come here," the Defendant walked away. At this time, Officer Groves observed a gun sitting on the right tire of the minivan. Officer Groves testified that the Defendant was the only person near the van and that two other people were approximately ten feet away.

Both carrying a concealed weapon and leaving a loaded gun unattended on a tire of car could be considered a conscious disregard of a substantial and unjustifiable risk that substantial injury could occur. This along with the fact that the Defendant argued with Ms. Claks, threatened to kill her and her children, left the area and subsequently came back to the area with a firearm provide clear and convincing evidence that the Defendant acted recklessly to the point that the Defendant put Ms. Claks and others in danger of death or serious bodily injury. Therefore, the evidence was sufficient to convict the Defendant of Recklessly Endangering Another Person.

CONCLUSION

There was sufficient evidence, as a matter of law, to convict the Defendant of the Firearms Not to be Carried without a License, Possession of an Instrument of Crime, and Recklessly Endangering Another Person violations. As a result, the Trial Court respectfully requests that the determination of guilt and sentence be affirmed on appeal pending the Opinion from the Honorable Linda Carpenter.

BY THE COURT:

SEAN F. KENNEDY, J.