

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CR-1190-2015
	:	
v.	:	
	:	
JAMES EDWARD NOTTINGHAM,	:	1925a
Defendant	:	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE

James Nottingham (Defendant) appeals from the Judgment of Sentence of July 11, 2017.

Background

Defendant was charged with Aggravated Assault¹, a felony of the first degree; Aggravated Assault², a felony of the second degree; Unlawful Restraint³, a felony of the second degree; Endangering the Welfare of Children⁴, a misdemeanor of the first degree; Terroristic Threats⁵, a misdemeanor of the first degree; Possessing Instruments of a Crime⁶, a misdemeanor of the first degree; Simple Assault⁷, a misdemeanor of the second degree; Recklessly Endangering Another Person⁸, a misdemeanor of the second degree; and Persons Not to Possess Firearms⁹; a felony of the second degree. The Persons Not to Possess charge was severed for trial and presided over by the Honorable Richard A. Gray on November 1, 2016. The jury

¹ 18 Pa.C.S. § 2702(a)(1).

² 18 Pa.C.S. § 2702(a)(4).

³ 18 Pa.C.S. § 2902(a)(1).

⁴ 18 Pa.C.S. § 4304(a)(1).

⁵ 18 Pa.C.S. § 2706(a).

⁶ 18 Pa.C.S. § 907(a).

⁷ 18 Pa.C.S. § 2701(a)(1).

⁸ 18 Pa.C.S. § 2705.

⁹ 18 Pa.C.S. § 6105(a)(1).

found the Defendant of the Persons Not to Possess charge and sentencing was deferred until January 4, 2017. Sentence of Judge Gray was for Defendant to serve a minimum of five (5) years to a maximum of ten (10) years in a State Correctional Institution.

On June 6, 2017, upon Motion of the Commonwealth, and with concurrence of the Defendant, both Aggravated Assault charges were nol prossed and the charge of Unlawful Restraint was reduced to a misdemeanor of the first degree.

A one day jury trial was held on June 26, 2017, and the jury returned a verdict of guilty on the remaining charges: (1) Unlawful Restraint; (2) Endangering the Welfare of a Child; (3) Terroristic Threats; (4) Possessing Instruments of a Crime; (5) Simple Assault; and (6) Recklessly Endangering Another Person. **Verdict Form**, 6/29/2017.

Defendant was sentenced by this Court on July 11, 2017, to an aggregate sentence of three (3) to six (6) years in a State Correctional Institution for the (1) Unlawful Restraint of Janet Smith, the (5) Simple Assault of T.M.¹⁰ and (6) Recklessly Endangering Janet Smith¹¹. **Sentence**, 7/11/2017. Additionally, Defendant was sentenced by this Court to nine (9) to eighteen (18) months on the remaining convictions of (2) Endangering the Welfare of Children, (3) Terroristic Threats, and (4) Possessing Instruments of a Crime. The sentences were ordered to run concurrent to one another and concurrent to the three to six year aggregate sentence. **Id.** at 14. Sentence of the Court was to run consecutive to any sentence Defendant may have received for the Persons Not to Possess conviction from Judge Gray. **Id.** at 13.

¹⁰ T.M. is the minor victim in this case.

¹¹ Janet Smith is the victim in this case.

Testimony

In the early morning hours of July 13, 2015, Pennsylvania State Police (PSP) were dispatched to a residence on Peavine Hollow Road in Hughesville, PA, in response to a screaming 911 call. **N.T.** 6/26/2016, at 81. All five people present at the residence at the time police responded to the call testified at trial regarding their recollection of that evening/early morning. The Commonwealth's witnesses were Janet Smith (Smith) **Id.** at 22; her daughter (S.S.) **Id.** at 40; Smith's two cousins, Brandon Renner (Renner) **Id.** at 57; and T.M. **Id.** at 47. The Defendant testified on his own behalf. **Id.** at 86.

Commonwealth's Testimony

Trooper Jason Michael Cooley (Cooley) testified on behalf of the Commonwealth. He testified that when meeting Defendant in his driveway, Defendant was clearly intoxicated. **Id.** at 77. He began his investigation regarding the damage to the white Mercury. He testified that Defendant began eating the broken auto glass. **Id.** at 78. Defendant tried to convince Cooley that the 911 call was related to an ongoing property dispute of which PSP was well aware, however, when Cooley walked into the home he found Smith, S.S., Renner, and T.M. inside and described them as "scared little puppies." **Id.** at 77. Another law enforcement officer came to the home and secured the area and Cooley took Defendant back to the police station for questioning. **Id.** at 79.

The 911 caller on the date in question was S.S., the daughter of Smith. Smith was the live-in girlfriend of Defendant at the Peavine Hollow residence. **Id.** at 22-23. S.S. called 911 at the direction of her mother because Defendant would not allow

Smith to leave his premises in his white Mercury vehicle. **Id.** at 25, 42. Defendant had blocked Smith from leaving his driveway by parking his truck behind her. **Id.** at 28, 41, 58.

Earlier in the day, Defendant had been working with Renner and T.M. clearing out a foreclosed home. **Id.** at 53, 87. After work, they proceeded to go the bar and drink for a one to two hours. T.M. remained in Defendant's truck outside the drinking establishment, as he is a minor. **Id.** at 48. Smith did come to the bar that evening but left around 10 pm and returned to Defendant's residence. **Id.** at 33, 62.

When Defendant came home from the bar, he had Renner and T.M. with him in his truck. **Id.** at 58. Smith was trying to leave Defendant's home with her daughter at that time but Defendant blocked her egress and threw a bottle at the back of the white Mercury she was driving. **Id.** at 28, 58-59.

T.M.¹² testified that Defendant stopped Smith from leaving. **Id.** at 48. Renner testified that Defendant said "Where are you going bitch in my car?" **Id.** at 58. Smith told her daughter to go in the house and call 911, and Smith followed shortly behind her as did Defendant and the other occupants of his vehicle. **Id.** at 59.

S.S.¹³ testified that she went to the upstairs bathroom to call 911 and that Defendant came into the bathroom and took the phone from her "after he busted the bathroom door open." **Id.** at 48. Smith, Renner and T.M. testified that Defendant picked up Smith and dropped her and that when she was cowering in the kitchen he threatened her life. He had loaded a rifle he obtained from a dresser drawer. **Id.** at 60.

¹² The cousin of Smith.

¹³ The daughter of Smith.

T.M. tried to protect Smith and Defendant picked T.M. up and threw him over his shoulders, **Id.** at 49, and struck his head. **Id.** at 50. T.M. testified that Smith was begging for her life and that his belief was that his cousin was about to die **Id.** at 51. Renner testified that Defendant told him and T.M. that he was not going to kill them

I'm trying to talk to him [Defendant], trying to talk to him, just not getting through. Stop. Points the gun at us and says I'm not gonna kill you, you guys have done nothing wrong to me and he puts his focus back on her [Smith].....

Id. at 60.

Smith, T.M., and Renner all testified that Defendant discharged his rifle outside the home and inside the home. **Id.** at 27, 50, 60. Trooper William Jones (Jones) from the Bureau of Forensic Services of PSP, testified to the location of discharged cartridges at the house which corroborated the testimony of the witnesses. **Id.** at 71-75.

Defendant's Testimony

In many respects, the testimony of Defendant was similar to that of the Commonwealth's witnesses. He testified that he had been cleaning a home on that date with Smith's cousins, they had gone drinking afterward and that he had an argument with Smith when they returned to the house. **Id.** at 88. He had different explanations for the bottle and the broken windshield. **Id.** at 94. He claimed that T.M. and Smith assaulted him. **Id.** at 98. He did admit that he called Smith a "bitch" after the alleged assault and then almost immediately saw law enforcement vehicle lights and went outside to meet the responding officers. **Id.** at 98. At trial, he denied having a gun during the incident. Defendant testified that it was Cooley who had injured him back at the police station and that was where all the "blood came from". **Id.** at 99, 101.

On rebuttal the Commonwealth presented/confronted Defendant with prior testimony that Defendant had given at both an earlier hearing and the testimony of a probation officer that had interviewed Defendant regarding the incident. **Id.** at 118-120. Defendant on these prior occasions admitted that he did have a gun. Also on rebuttal, the Commonwealth questioned Jones regarding the blood found at the crime scene. **Id.** at 109-112. The photographs showed suspected blood patterns on the license plate, the trunk lid, the door, the magazine of the firearm, the door handle of the residence, and a bag of undischarged rounds. **Id.**

Matters Complained of on Appeal

Did the Trial Court err by not honoring Defendant's request to either explicitly bar the use of blood evidence by the Commonwealth, or in the alternative to compel to have the blood tested, as the Defendant believes that the results will prove to be potentially exculpatory evidence?

Although this Court handled the trial, the Court relies upon the transcript of June 6, 2017. At that hearing on motions filed by Defendant, the Honorable Marc F. Lovecchio decided that 1) the Court did not have the power to order the test of the blood as Defendant requested and 2) even if it were within the power of the Court to order such testing, the results would not be relevant to the crimes charged as the Commonwealth was not using the evidence in its case in chief. Judge Lovecchio reserved his right to revisit his decision if trial testimony changed the determination that testing of the blood would be not be probative of any material element of the crimes charged. **Motion for Continuance**, 6/6/2017, at 6-7.

Defense Counsel did renew its request for the blood to be tested with this Court prior to the trial commencing. Defense Counsel argued that the testing of the

blood was essential to help prove the Defendant's defense. However, Defense Counsel did not present new evidence that would authorize this Court to modify the ruling of another Common Pleas Judge. **Jury Trial**, 6/26/2017, at 10. It is well settled that it is improper for a trial judge to overrule an interlocutory order by another judge of the same court in the same case as "there must be some degree of finality to determinations of all pre-trial applications so that judicial economy and efficiency can be maintained." Commonwealth v. Brown, 402 A.2d 1007, 1008 (Pa. 1979).

Any testimony about blood was presented by Defendant in his case. Defendant testified that it was Cooley who had injured him back at the police station and that was where all the "blood came from". **Id.** at 99, 101. Therefore, the Court granted the Commonwealth's request to question Jones regarding the blood found at the crime scene on rebuttal. **Id.** at 109-112. The crime scene photographs establish that blood was present at the crime scene prior to Defendant going to the police station visit. **Id.** The Defendant did not sustain his injuries at the police station as the photographs taken prior to the police station visit document undercutting Defendant's case. Defendant did not need testing of the blood or an order to exclude the evidence as the Commonwealth did not present it in its case in chief. The Court finds this issue has no merit.

Was the evidence presented by the Commonwealth sufficient to support the Jury's verdict of guilty on all counts, as the Commonwealth failed to prove the necessary elements for the charges of Unlawful Restraint, Endangering the Welfare of Children, Simple Assault, Harassment, Terroristic Threats, Recklessly Endangering Another Person, and Possessing Instruments of a Crime?

First, this Court notes that the Defendant is able to make a challenge to the sufficiency of the evidence on appeal. Pa.R.Crim.P. 606(A)(7).

In reviewing the sufficiency of the evidence, [the court] must determine whether the evidence admitted at trial, and all reasonable inferences drawn from that evidence, when viewed in the light most favorable to the Commonwealth as the verdict winner, was sufficient to enable the fact finder to conclude that the Commonwealth established all of the elements of the offense beyond a reasonable doubt. The Commonwealth may sustain its burden by means of wholly circumstantial evidence. Further, the trier of fact is free to believe all, part, or none of the evidence.

Commonwealth v. Woodward, 129 A.3d 480, 489-90 (Pa. 2015).

When reviewing the evidence as a whole in a light most favorable to the Commonwealth, the Court finds that the Commonwealth met its burden of proving Defendant's guilt such that a motion for judgment of acquittal would not have been granted had it been made. Commonwealth v. Feathers, 660 A.2d 90 (Pa. Super. 1995). The Court outlines below the evidence presented at trial and how it was sufficient to establish the elements of each crime charged.

A person commits a misdemeanor of the first degree if he knowingly restrains another unlawfully in circumstances exposing him to risk of serious bodily injury. 18 Pa.C.S. § 2902(a)(1) (Unlawful Restraint). Based on the testimony as outlined *supra*, there can be little doubt that the Commonwealth met its burden regarding unlawful restraint. Four individuals testified to Defendant not allowing Smith to leave the residence. The jury could have accepted the throwing of the bottle at the vehicle as

exposing Smith to serious bodily injury; however, it was without a doubt that the aiming of a rifle at Smith and discharging multiple cartridges was creating circumstances that risked her serious bodily injury.

A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support. 18 Pa.C.S. § 4304(a)(1) (Endangering Welfare of Children). The evidence established that two minors were present at 297 Peavine Hollow Road at the time of the incident, T.M. and S.S. The Commonwealth also established that the rifle was fired multiple times in the presence of these minors. Defendant had a duty to care, protect and support these minors as they were entrusted to his care, a duty which he violated when while becoming so intoxicated around them, he drove one of them home in his vehicle, and discharging a rifle repeatedly outside and inside his home in their presence.

A person is guilty of Simple Assault if he attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another. 18 Pa.C.S. § 270(a)(1) (Simple Assault). In this case, the Defendant was charged for T.M.'s injuries. The jury found the testimony of both T.M. and his cousin credible. The jury also saw photographs of T.M.'s injuries. Commonwealth's Exhibits 12A and 12B, **N.T.**, 6/26/2017, at 52. The photos showed red marks and bruising on T.M.'s hair line. **Id.** The testimony regarding the assault coupled with photographs documenting injuries sustained during the assault was sufficient to find the Defendant guilty of Simple Assault.

A person commits the crime of Harassment when, with intent to harass, annoy or alarm another, the person strikes, shoves, kicks or otherwise subjects the other person to physical contact, or attempts or threatens to do the same. 18 Pa.C.S. § 2709(a)(1) (Harassment). The Court found the injuries to T.M. and the Defendant's behavior of discharging a firearm to have established the elements of the charge of Harassment.

A person commits the crime of Terroristic Threats if the person communicates, either directly or indirectly, a threat to commit any crime of violence with intent to terrorize another. As used in this section, the term "communicates" means conveys in person or by written or electronic means, including telephone, electronic mail, Internet, facsimile, telex and similar transmissions. 18 Pa.C.S. § 2706 (Terroristic Threats). A person acts intentionally with respect to terroristic threats when it is his conscious object or purpose to terrorize. 18 Pa.C.S. § 302 (kinds of culpability defined).

There was direct evidence of Defendant's intent to terrorize. Smith testified that Defendant pointed a rifle at her and said, "Do you want die bitch?" **N.T.** 6/26/2017, at 27. Though Defendant reassured the male occupants of the home that he was not going to shoot them, the inference being that he was only interested in Smith, they were all terrorized as evidenced by Cooley testifying that when he came into the home the four were huddled together like scared puppies. **Id.** at 79. This was after Cooley had just witnessed Defendant eat shattered auto glass. **Id.** at 78.

A person commits the offense of Recklessly Endangering another Person if he recklessly engages in conduct, which places or may place another person in danger

of death or serious bodily injury. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. 18 Pa.C.S. §302 (kinds of culpability defined).

The discharge of the rifle so close to all of the occupants of the home that evening, but especially that of Smith, was sufficient to establish the crimes. Though Defendant did not kill Smith, his actions could have resulted in her death. Taking that risk by firing the rifle so many times and in such close proximity he was certainly taking an unjustifiable risk and behaving in a way that could be found to be a gross deviation from the standard of conduct that a reasonable person in his or her situation would have followed.

A person commits Possession of an Instrument of a Crime if he possesses a firearm or other weapon concealed upon his person with intent to employ it criminally. An instrument of a crime is anything used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have. A weapon is anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses, which it may have. The term includes a firearm, which is not loaded or lacks a clip or other component to render it immediately operable, and components, which can readily be assembled into a weapon. 18 Pa.C.S. § 907 (Possessing Instruments of Crime).

The testimony regarding the rifle at this trial as well as prior proceedings including an admission by Defendant established the criminal offense of Possessing Instruments of a Crime beyond a reasonable doubt.

As the Court finds no error with its ruling regarding the testing of blood and that the testimony overwhelmingly shows that Defendant committed the offenses for which the jury found him guilty, it respectfully requests that its Judgment of Sentence in the above captioned matter be affirmed.

By the Court,

Nancy L. Butts, President Judge

DATE: _____

cc: DA (MW)
PD (MW)
Gary Weber, Esq.