

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :
 : **CR-1226-2013**
 v. :
 :
 JERET SAMUEL HARVEY, : **CRIMINAL DIVISION**
 Defendant :

OPINION AND ORDER

On August 22, 2014, the Defendant filed a Post-Sentence Motion. The Court held a conference on the motion on September 8, 2014.

I. Background

The Defendant was charged with Theft by Unlawful Taking,¹ Receiving Stolen Property,² and Person not to Possess a Firearm.³ The Person not to Possess charge was severed for the purpose of trial. On February 24, 2014, a jury found the Defendant guilty of Theft by Unlawful Taking and Receiving Stolen Property. On June 9, 2014, a jury found the Defendant guilty of Person not to Possess a Firearm.

A. February 24, 2014 Trial

1. Derick Smith's Testimony

Derick Smith (Smith) testified to the following. On June 30, 2013, Smith was cleaning his living room when he heard the doorbell and knocking on the door. At the time, Smith was the only person in his residence. Smith did not answer the door, but he noticed the doorknob wiggle and the door begin to open. He pointed his revolver towards the door because he did not know who was entering the residence. As soon as Smith realized that the Defendant, his cousin,

¹ 18 Pa. C.S. § 3921(a).

² 18 Pa. C.S. § 3925(a).

³ 18 Pa. C.S. § 6105(a)(1).

was entering the residence, he lowered the revolver. Smith then put the revolver in the center compartment of his couch in his living room.

The Defendant and Smith sat on the couch in the living room. The Defendant asked to see Smith's revolver. Smith took the revolver out of the compartment, unloaded it, and handed it to the Defendant. The Defendant looked at the revolver and then gave it back to Smith, who reloaded the revolver and put it back in the compartment. Smith and the Defendant then talked.

After a while, Smith went to the kitchen to get a carpet cleaning machine. While in the kitchen, Smith could not see the Defendant and did not hear the sound of the couch compartment opening or closing. Smith returned to the living room about 45 seconds after leaving it. The Defendant was sitting in the same spot as when Smith left. The Defendant and Smith talked briefly. The Defendant then said that he was going to a specific gas station to buy cigarettes. The Defendant asked Smith if he wanted a pack, and Smith said no thank you. Smith thought the offer was unusual because the Defendant was not "the kind of person to buy someone something." The Defendant then said "that's what family is for" and left the residence. Thirty seconds after the Defendant left the residence, Smith ran to the couch compartment. He opened the compartment but did not see the revolver. Smith then ran towards the gas station to find the Defendant. He called 911 either right before he left the residence or as he was running to the gas station. Smith could not find the Defendant. When he got back to his residence, police were there.

A few days later, the Smith communicated with the Defendant via the website Facebook. Smith told the Defendant that if the Defendant returned the revolver, Smith would tell police that he found it in his residence. The Defendant "agreed to do that." The Defendant never contacted Smith with a specific date and time when he would return the revolver.

Later, Smith saw the Defendant on Third Avenue in Williamsport. Smith asked the Defendant about the revolver. The Defendant said the revolver was with a man who lived in an apartment off High Street in Williamsport. According to the Defendant, the apartment was numbered four. The Defendant said that two men lived in the apartment, and one of them used a wheelchair. The Defendant told Smith that he was just borrowing the revolver to do a job for Smith because Smith was in a financial bind. Smith assumed “doing a job” meant the Defendant was going to commit a robbery or a burglary. The Defendant got into a woman’s car, and Smith called 911. The woman began to drive, and Smith followed in his car. Smith gave the dispatcher the location of the woman’s car as he followed it. The car stopped near a Uni-mart in Williamsport. Police arrived in the area and arrested the Defendant. Since the Defendant’s arrest, Smith has not received a gun or money from the Defendant.

2. Officer Eric Derr’s Testimony

Officer Eric Derr (Derr) of the Williamsport Bureau of Police testified to the following. On June 30, 2013, at approximately 9:00 P.M., Derr was dispatched to Smith’s residence. Smith told Derr that the Defendant had taken Smith’s revolver. Derr did not find the Defendant on June 30, 2013.

On July 2, 2013, Derr arrested the Defendant. The Defendant did not have a gun when Derr arrested him. Derr did not find a gun near the location of the arrest. Smith told Derr that the Defendant told Smith the revolver was with a man who lived in an apartment numbered four and off High Street. Derr did not investigate whether the revolver was with such a man.

B. June 9, 2014 Trial

The Commonwealth and the Defense stipulated to the Defendant being unable to lawfully possess a firearm because of a prior offense. The substance of Smith's testimony during trial on June 9, 2014 was the same as his testimony on February 24, 2014 except for the following points. Smith did not know whether the revolver was loaded when he handed it to the Defendant. Smith did not know whether he or the Defendant put the revolver back in the couch compartment. The Defendant did not tell Smith where he was going to buy cigarettes; Smith assumed that the Defendant was going the gas station because it was nearby. Smith went to the gas station about five minutes after the Defendant left the residence. Somebody other than the Defendant may have told Smith that the man who lived in the apartment off High Street used a wheelchair.

Smith added the following information to his testimony of February 24, 2014. When the Defendant left the residence, Smith did not notice any bulges on the Defendant. The revolver could easily fit in a person's pocket. The revolver was five inches long and, at most, two inches wide.

C. Defendant's Motion

In his motion, the Defendant avers that the evidence in each trial was insufficient for the jury to find him guilty of Theft by Unlawful Taking, Receiving Stolen Property, and Person not to Possess a Firearm. Specifically, the Defendant argues that the evidence was insufficient for the jury to find that he took the revolver. Furthermore, the Defendant argues that even if the evidence was sufficient for the jury to find that he took the revolver, the evidence was insufficient for the jury to find that he took the revolver with intent to deprive Smith of it. The Defendant also argues that the evidence was insufficient for the jury to find that he received the

revolver. The Defendant argues that even if the evidence was sufficient for the jury to find that he received the revolver, the evidence was insufficient for the jury to find that the revolver was stolen property. Additionally, the Defendant argues that the evidence was insufficient for a jury to find that he possessed a firearm because the Commonwealth failed to produce evidence that he possessed, used, controlled, sold, or transferred a firearm.

The Defendant also avers that the guilty verdicts for Theft by Unlawful Taking, Receiving Stolen Property, and Person not to Possess were against the weight of the evidence. The Defendant argues that the verdicts were against the weight of the evidence for the same reasons that he argues the evidence was insufficient.

Finally, the Defendant avers that the sentence imposed was excessive. Specifically, he argues that his conformity to regulations while in prison negates the need for additional punishment and full incarceration.

II. Discussion

A. The Evidence was Sufficient for the Jury to Find Beyond a Reasonable Doubt that the Defendant Committed Theft by Unlawful Taking.

“When reviewing a sufficiency of the evidence claim, [the court] must review the evidence and all reasonable inferences in the light most favorable to the Commonwealth as the verdict winner, and . . . must determine if the evidence, thus viewed, is sufficient to enable the fact-finder to find every element of the offense beyond a reasonable doubt.” Commonwealth v. Goins, 867 A.2d 526, 527 (Pa. Super 2004).

“A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof.” 18 Pa. C.S. § 3921(a).

1. The Evidence was Sufficient for the Jury to Find Beyond a Reasonable Doubt that the Defendant Took the Revolver.

“[C]ircumstantial evidence, in itself, may be sufficient to establish the commission of a crime and the accused’s connection therewith.” Commonwealth v. Simpson, 260 A.2d 751, 754 (Pa. 1970). “It is solely the province of the trier of fact to pass upon the credibility of witnesses” Commonwealth v. Shaver, 460 A.2d 742, 745 (Pa. 1983).

Here, the circumstantial evidence was sufficient for the jury to find beyond a reasonable doubt that the Defendant took the revolver from the couch compartment. The following are the circumstances tending to show that the Defendant took the revolver. First, the Defendant asked to see the revolver. This shows that the Defendant had interest in the revolver. Second, the Defendant was in the living room when the revolver was put back in the compartment. This shows that the Defendant knew the location of the revolver. Third, Smith left the living room for 45 seconds. Therefore, the Defendant had the opportunity to take the revolver and conceal it. Fourth, the Defendant was the only person other than Smith in the residence. Smith testified that after the Defendant left the residence, the revolver was no longer in the compartment.

In addition to the circumstantial evidence, Smith testified that the Defendant agreed to return the revolver if Smith told police that he found the revolver in his residence. This is evidence that the Defendant took the revolver. Moreover, the Defendant told Smith that he was just borrowing the revolver. This is further evidence that the Defendant took the revolver. Finally, the Defendant told Smith that the revolver was with a man who lived in an apartment numbered four and off High Street. Regardless of whether the revolver was truly with such a man, the Defendant stating that he knew the location of the revolver is evidence that he took it.

The above evidence was sufficient for the jury to find beyond a reasonable doubt that Smith took the revolver.

2. The Evidence was Sufficient for the Jury to Find Beyond a Reasonable Doubt that the Defendant Took the Revolver with Intent to Permanently Deprive Smith of It.

In Pennsylvania's theft statute, deprive means "[t]o withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or to dispose of the property so as to make it unlikely that the owner will recover it." 18 Pa. C.S. § 3901. Theft by unlawful taking "[r]equire[s] the intent to deprive permanently." Commonwealth v. Young, 35 A.3d 54, 63 (Pa. Super. 2011).

The Defendant argues that his statement that he was going "to do a job" with the revolver shows that he did not intend to deprive Smith of the revolver. "[I]ntent may be established by circumstantial evidence since there is rarely any direct evidence of one's subjective state of mind." Commonwealth v. Utter, 421 A.2d 339, 341 (Pa. Super. 1980).

The following circumstances show that the Defendant intended to permanently deprive Smith of the revolver. First, the Defendant asked to see the revolver. This shows that the Defendant was interested in the revolver. Second, the Defendant asked Smith whether he wanted a pack of cigarettes. Smith testified that the offer struck him as unusual because the Defendant was not "the kind of person to buy someone something." When viewed in light most favorable to the Commonwealth, the offer to buy Smith something is evidence of the Defendant's guilty conscious. The jury could have reasonably inferred that because the Defendant felt guilty about depriving Smith of the revolver, he offered to buy Smith something. Third, when the Defendant talked about the revolver in a conversation on Facebook, he did not say that he was just

borrowing it. The Defendant had the opportunity to tell Smith on Facebook that he was just borrowing the revolver, but he did not say he was just borrowing it until his in-person conversation with Smith on July 2, 2013. Fourth, the Defendant did not establish a date and time to return the revolver even though he agreed to return it. Fifth, the Defendant never received money from the Defendant that would have been the result of the Defendant “doing a job.” The above circumstances provided the jury with sufficient evidence to find beyond a reasonable doubt that the Defendant took the revolver with intent to permanently deprive Smith of it.

B. The Evidence was Sufficient for the Jury to Find Beyond a Reasonable Doubt that the Defendant Committed the Offense of Receiving Stolen Property.

“The elements of receiving stolen property may be stated as: (1) intentionally acquiring possession, control or title, retaining, disposing, or lending on the security of movable property of another; (2) with knowledge or belief that it was probably stolen; and (3) intent to deprive permanently.” Young, 35 A.3d at 63.

1. The Evidence was Sufficient for the Jury to Find Beyond a Reasonable Doubt that the Defendant Retained or Disposed of the Revolver.

The Defendant agreed to return the gun if Smith told police that he found it in his residence. This is evidence that the Defendant retained the gun after taking it from the couch compartment. The Defendant told Smith that he was just borrowing the gun. This is further evidence that the Defendant retained the gun after taking it from the compartment. The Defendant told Smith that the gun was with a man who lived in an apartment off High Street. This is evidence that Smith disposed of the gun after taking it from the compartment. The Defendant never returned the revolver to Smith. This is evidence that the Defendant retained or

disposed of the revolver. The above evidence was sufficient for the jury to find that the Defendant retained or disposed of the revolver.

2. The Evidence was Sufficient for the Jury to Find Beyond a Reasonable Doubt that the Revolver was Stolen.

The evidence was sufficient for the jury to find that the revolver was stolen for the same reasons the evidence was sufficient for the jury to find that the Defendant took the revolver with intent to deprive Smith of it. The evidence showing that the Defendant intended to deprive Smith of the revolver was discussed above in Section II., A., 2.

C. The Evidence was Sufficient for the Jury to Find Beyond a Reasonable Doubt that the Defendant Possessed the Revolver.

The evidence was sufficient for the jury to find that the Defendant possessed the revolver for the same reasons the evidence was sufficient for the jury to find that the Defendant took the revolver from the center compartment. The reasons that the evidence was sufficient for the jury to find that the Defendant took the revolver were discussed in Section II., A., 1. While there is some inconsistency between Smith's testimony on February 24, 2014 and his testimony on June 9, 2014, the inconsistency does not reach the circumstances that show the Defendant took the revolver.

D. The Guilty Verdicts for Theft by Unlawful Taking, Receiving Stolen Property, and Person not to Possess a Firearm were not against the Weight of the Evidence.

As mentioned above, other than arguing that the evidence was insufficient, the Defendant does not state specifically how the verdicts were against the weight of the evidence. Since the Defendant's statement that he was going "to do a job" is the only specific piece of evidence that

the Defendant mentions in his motion, the Court will assume that the Defendant is arguing that this statement makes the verdicts contrary to the weight of the evidence.

“The law in this Commonwealth has long been that a new trial may be ordered ‘on the ground that the verdict is against the weight of the evidence, when the . . . verdict is so contrary to the evidence as to shock one’s sense of justice, and the award of a new trial is imperative so that right may be given another opportunity to prevail.’” Commonwealth v. Murray, 597 A.2d 111, 113 (Pa. Super. 1991). “The weight of the evidence is a matter exclusively for the finder of fact” Commonwealth v. Cox, 72 A.3d 719, 722 (Pa. Super. 2013).

The verdicts do not shock this Court’s sense of justice. Although the Defendant stated that he was just borrowing the revolver, there was evidence that the Defendant intended to permanently deprive Smith of the gun. The evidence showing that the Defendant intended to permanently deprive Smith of the revolver was discussed above in Section II., A., 2. The Defendant’s statement that he was just borrowing the revolver “to do a job” does not make the verdicts so contrary to the evidence as to shock this Court’s sense of justice.

E. The Sentence is not Excessive.

On August 14, 2014, the Court sentenced the Defendant. During the sentencing hearing, the Court found that the Receiving Stolen Property offense merged with the Theft by Unlawful Taking offense. On the Person not to Possess a Firearm offense, the Court sentenced the Defendant to incarceration for a minimum of 42 months and a maximum of 84 months. On the Theft by Unlawful Taking offense, the Court sentenced the Defendant to incarceration for a minimum of 18 months and a maximum 36 months to be followed by 24 months of probation. The sentence for the Theft by Unlawful Taking offense is consecutive to the sentence for the Person not to Possess a Firearm offense.

The Defendant had a prior record score of three. The offense gravity score for the Person not to Possess offense was ten because the revolver was loaded. 204 Pa. Code § 303.15. The offense gravity score for the Theft by Unlawful Taking offense was eight because the Defendant stole a firearm. 204 Pa. Code § 303.15. The sentencing guidelines gave a standard range of 42 – 54 months minimum confinement for the Person not to Possess offense and 18 – 24 months minimum confinement for the Theft offense. *See* 204 Pa. Code § 303.16(a). The Court’s sentence of 42 months minimum for the Person not to Possess is within the standard range. The Court’s sentence of 18 months minimum for the Theft offense is also within the standard range.

“In determining the sentence to be imposed the court shall . . . consider and select one or more of the following alternatives, and may impose them consecutively or concurrently: (1) An order of probation. . . . (3) Partial confinement. . . . (4) Total confinement. . . .” 42 Pa. C.S. § 9721(a). “The [Sentencing] Code makes clear that the . . . possible modes of punishment are alternatives, of which one or more could be selected.” Commonwealth v. Nickens, 393 A.2d 758, 759 (Pa. Super. 1978).

Theft of a Firearm is a felony of the second degree. 18 Pa. C.S. § 3903(a)(2). A felony of the second degree carries a maximum sentence of ten years. 18 Pa. C.S. § 1103. Here, the maximum sentence for the Theft offense was five years, which is less than the ten year statutory maximum.

When sentencing a defendant, “the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.” 42 Pa. C.S. § 9721(b). “At least two factors are crucial to such determination – the particular circumstances of the offense and the

character of the defendant.” Commonwealth v. Martin, 351 A.2d 650, 658 (Pa. 1976). A trial court must “state, on the record, the reasons for the sentence imposed.” Commonwealth v. Riggins, 377 A.2d 140, 149 (Pa. 1977).

Here, the Court considered the character of the Defendant. A pre-sentence report was provided to the Court. The Court extensively discussed the Defendant’s background, which included previous convictions of burglary and theft. N.T., August 14, 2014, p. 3-7. The Court also commended the Defendant for his success in the “Thinking for a Change” program. Id. at 17-18.

Additionally, the Court considered the circumstances of the offense. The Defendant denied taking the revolver. N.T., August 14, 2014, p. 5. The Court noted that the offense was similar to the offenses of which he had been convicted. Id. at 19. The Court also ordered restitution to Smith. Id. at 22. Because the Court considered the sentencing factors, it did not abuse its discretion, and the sentence is not excessive.

III. Conclusion

The evidence was sufficient for the jury to find beyond a reasonable doubt that the Defendant committed Theft by Unlawful Taking, Receiving Stolen Property, and Person not to Possess a Firearm. Furthermore, the verdicts were not against the weight of the evidence. Finally, the sentence imposed by the Court is not excessive.

ORDER

AND NOW, this _____ day of November, 2014, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Post-Sentence Motion is hereby DENIED. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), the Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of this Order; (b) the right to assistance of counsel in the preparation of the appeal; (c) if indigent, the right to appeal in forma pauperis and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and (d) the qualified right to bail under Pennsylvania Rule of Criminal Procedure 521(B).

By the Court,

Nancy L. Butts, President Judge