

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH :
 :
 vs. : No. CR-953-2015
 :
 CODY ASHER, :
 Defendant :
 OPINION AND ORDER

Defendant is charged by criminal complaint filed on April 7, 2015 with numerous assault and related charges arising out of Defendant's allegedly leaving on a floor in the residence a loaded and cocked handgun that was accessible to a two-year old, who then accessed the handgun and accidentally shot himself causing serious bodily injury.

The Information was filed on June 26, 2015. Defendant is charged as follows: Count 1, aggravated assault (recklessly causing bodily injury to another under circumstances manifesting extreme indifference to the value of human life); Count 2, aggravated assault (recklessly causing bodily injury to a child less than six years of age by a person of 18 years of age or older)¹; Count 3, endangering the welfare of children; Count 4, simple assault (recklessly causing bodily injury to another); Count 5, simple assault (negligently causing bodily injury with a deadly weapon); and Count 6, recklessly endangering another person.

A hearing was originally scheduled for September 23, 2015. At that hearing, the Commonwealth admitted without objection, Exhibit 1, which is a transcript of the preliminary hearing before Magisterial District Judge (MDJ) Gary Whiteman on June 1,

¹ The criminal information originally charged Defendant with a violation of 18 Pa. C.S.A. § 2702 (6) attempting by physical menace to put an enumerated person in fear of imminent serious bodily injury. Upon motion of the Commonwealth, without objection of the Defendant, this charge was amended to 18 Pa. C.S.A. § 2702 (8), recklessly causing bodily injury to a child less than 6 years of age by a person 18 years of age or older.

2015. Unfortunately, the hearing could not be concluded because a material witness was subpoenaed by the Commonwealth but did not appear. As a result, the hearing was continued to October 5, 2015.

The parties stipulated that the court could consider the facts as set forth in the preliminary hearing transcript.

On March 26, 2015, Officer Bill Hagemeyer of the Montoursville Police Department was dispatched to 219 Broad Street in Montoursville for a gunshot involving a two-year old child. The child, who had an obvious wound to his leg, was being held in the arms of his mother, Amanda Fry, while she was sitting on the sofa in the living room on the first floor of the residence. Defendant was “visibly shaken, upset, crying, screaming.” (Transcript, p. 14).

Defendant led Officer Hagemeyer to the upstairs bedroom where the handgun which caused the injury to the child was lying on the bed. The gun had recently been fired. An empty casing was still stuck in the gun.

Upon questioning, Defendant indicated that the child was left downstairs alone for about 15 minutes while he was upstairs in the shower with the mother. According to conversations Officer Hagemeyer had with the child’s mother, she and Defendant were showering and the child was left unattended approximately five minutes.

With respect to the gun, Defendant told Officer Hagemeyer that it was lying on the floor beside the bed. The bed had no frame. It was “a mattress on the floor.” (Transcript, p. 5). Defendant indicated that when the gun was left next to the bed, it was fully

loaded with the hammer cocked. Defendant claimed, however, that “the slide-lock safety was left on.” (Transcript, p. 6).

Officer Hagemeyer tested the gun. He confirmed that it had a safety-lock mechanism on the slide. He also indicated that the lock “sits up,” which keeps the slide from functioning. (Transcript, p. 6). The slide-safety mechanism was “pretty stiff.” (Transcript, p. 7). With the safety off, however, the gun was very sensitive and went off “real easy.” (Transcript, p. 7). According to Officer Hagemeyer, there are actually two safeties on the handgun. There is “a slide-lock” and “a safety on the back-strap.” (Transcript, p. 16).

Defendant indicated to Officer Hagemeyer that he had previously left the gun lying there by his bed on the floor and that “on several occasions” the child “had seen him do it” and the child saw Defendant pick up the gun from that spot and place it on his hip.

According to Officer Hagemeyer, the place where Defendant claimed he kept the handgun was on the bedroom floor next to the bed, which would also be “right up against the doorframe pretty much.” (Transcript, p. 10). It was “a matter of inches from the door...as you walked into the bedroom just to your right as you passed the doorframe on the floor is where it would have been left.” (Transcript, p. 10).

Defendant also conceded that prior to the incident he had arguments with the child’s mother “about how he had kept and stored his handguns about the house.” (Transcript, p. 8).

Subsequently, law enforcement conducted a search of the living room area. Lying on top of the gun safe there was a box of ammunition which was the same type that

was found in the handgun, .45 caliber. Lying on the left side of the television stand, which “sat pretty low” was “a magazine ... of that handgun which was fully loaded as well.” (Transcript, p. 10). Officer Hagemeyer also indicated that there was an “in-line muzzle loader lying” on an adjacent sofa, as well as a gun safe in the living room. (Transcript, pp. 3, 4, 14, 15).

Amanda Fry, the child’s mother (hereinafter “Mom”) testified at the October 5, 2015 hearing.

On the date of the incident, the child was 2 ½ years old. He had been walking since he was 14 months old. Defendant had been living with the child and her since the child was 8 months old.

The child was able to climb the stairs “by himself” prior to the date of the incident. Both she and Defendant “have seen [the child] go up the stairs.”

On the date of the incident, Defendant and child were downstairs in the living room. Mom went upstairs to take a shower. Defendant came upstairs to shower with Mom. They heard a gunshot downstairs. Defendant ran down to the dining room, while Mom ran to the living room and located the child.

Defendant had always taken his gun with him “everywhere.” When Defendant showered he “usually” kept the gun in the “pedestal sink.” Mom and Defendant had an “ongoing argument” about the gun. Defendant refused to keep the gun locked in a safe; instead he agreed to have the gun “without a bullet chambered.” In order to chamber a bullet the slide had to be moved which apparently satisfied mom because even she “couldn’t do it.”

An audio/video tape of an interview with Defendant on 3-27-15 was introduced as Commonwealth's Exhibit 2. The Court viewed this tape.

Defendant admitted that the child was left downstairs in the living room while he showered with Mom. When he went upstairs to shower, he left the gun lying on the floor "in plain view" just inside the bedroom door. The gun was loaded with the hammer cocked. Defendant claimed the slide and grip safeties were both on.

Defendant further admitted that the child previously watched Defendant pick up the gun and put it on Defendant's hip. He also conceded that the child knew that Defendant sometimes kept the gun on the bedroom floor. He acknowledge as well that Mom "was not too excited about the gun lying around."

During the September 23, 2015 hearing, the Court confirmed with defense counsel, his specific arguments relating to the petition for habeas corpus. Defense counsel admitted that the argument on all of the charges was the same; that is, the Commonwealth could not prove the required mens rea for prima facie purposes with respect to any of the charges.

The argument with respect to both aggravated assault charges, the first simple assault charge and the recklessly endangering another person charge, is that the Commonwealth cannot prove for prima facie purposes the mens rea element of recklessness. With respect to the endangering welfare of children charge, Defendant asserts that the Commonwealth cannot prove the mens rea of knowingly. With respect to the second simple assault charge, bodily injury with a deadly weapon, Defendant claims that the

Commonwealth cannot prove for prima facie purposes the required mens rea of negligence.

A petition for writ of habeas corpus is the proper means for testing a pre-trial finding that the Commonwealth has sufficient evidence to establish a prima facie case.

Commonwealth v. Black, 103 A.3d 70, 77 (Pa. Super. 2015)(quoting *Commonwealth v. Fountain*, 811 A.2d 24, 25 (Pa. Super. 2002)).

“A prima facie case consists of evidence, read in the light most favorable to the Commonwealth, that sufficiently establishes both the commission of the crime and that the accused is probably the perpetrator of that crime. The Commonwealth need not prove the defendant’s guilt beyond a reasonable doubt. Rather, the Commonwealth must show sufficient probable cause that the defendant committed the offense, and the evidence should be such that if presented at trial, and as accepted as true, the judge would be warranted in allowing the case to go to jury. *Black*, supra (quoting *Fountain*, 811 A.2d at 25-26).

Contrary to what Defendant has argued, “[i]n determining the presence or absence of a prima facie case, inferences reasonably drawn from the evidence of record that would support a verdict of guilty are to be given effect....” *Commonwealth v. Hendricks*, 927 A.2d 289, 291 (Pa. Super. 2007)(quoting *Commonwealth v. Packard*, 767 A.2d 1068, 1071 (Pa. Super. 2001)(citation omitted)).

A prima facie case merely requires evidence of each element of the offense charged; not evidence beyond a reasonable doubt. *Commonwealth v. Patrick*, 933 A.2d 1043, 1047 (Pa. Super. 2007) (en banc).

Section 302(b)(3) of the Crimes Code defines reckless conduct as

follows:

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. CONSOL. STAT. ANN. §302(b)(3).

For the offenses in this case which require a mens rea of recklessness, the Commonwealth must prove a conscious disregard of a known risk of death or serious bodily injury. *Commonwealth v. Martuscelli*, 54 A.3d 940, 949 (Pa. Super. 2012). Serious bodily injury is bodily injury which creates a substantial risk of death or which causes, a permanent disfigurement, or protracted loss of impairment of the function of any bodily member or organ. 18 PA. CONSOL. STAT. ANN. § 2301; *Martuscelli*, supra.

The Court finds that the evidence is sufficient to prove for prima facie purposes the mens rea requirement of recklessness. Accepting Defendant's version as true, he and his girlfriend left a two-year old child without any supervision for 15 minutes. While he and his girlfriend were showering, the unattended child had complete access to a loaded and cocked firearm. The loaded firearm was immediately accessible to the child upon entering the bedroom. The child had the ability to walk up the stairs. The child was aware of the gun, was aware where it was sometimes located and had previously witnessed the Defendant pick it up and place it at his side.

The more plausible scenario, which involves reading the facts in the light

most favorable to the Commonwealth, is that the child was left downstairs in the presence of the loaded and cocked firearm with the safety mechanisms not activated.

It is important to note that the factfinder does not need to accept all of the testimony of a witness. The factfinder is free to believe all, part or none of the testimony. *Commonwealth v. Arrington*, 86 A.3d 831, 840 (Pa. 2014).

The circumstantial evidence along with the direct evidence proves the following for prima facie purposes: A two-year old child was left unattended for 15 minutes while the only two supervising adults were upstairs showering together. The child gained access to a loaded handgun that was cocked and could easily be fired. The handgun was most likely in the living room area near where the child was located. The handgun was obviously fired and injured the child while the child was playing with it in the living room. Evidence of ammunition, a magazine and at least one other weapon in the living room circumstantially suggest that the handgun was present in the living room and perhaps even close to the television that the victim was watching. The fact that it would have been extremely difficult for even an adult to release the safeties circumstantially proves that the safeties were not activated at the time the gun was being played with by the child. Defendant was aware of the dangerous manner that he stored his guns because he and the child's mother argued about it. Finally, the Defendant's demeanor may suggest to a jury consciousness of guilt. He was visibly shaken, upset, crying and screaming. Moreover, Defendant's consciousness of guilt may be inferred by the jury from the fact that Defendant actually moved the weapon to the upstairs bedroom after the incident and may have lied with respect to where it was located

and whether the safeties were activated.

Because the Court concludes that the mens rea of recklessness has been established for prima facie purposes, the Court will deny Defendant's petition for habeas corpus with respect to Count 1 (aggravated assault), Count 2 (aggravated assault), Count 4 (simple assault) and Count 6 (recklessly endangering another person).

The Court will next address Defendant's argument with respect to Count 3, endangering the welfare of children.

Section 4304 of the Crimes Code defines the crime of endangering the welfare of children as follows:

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. CONSOL. STAT. ANN. § 4304 (a) (1).

The term "knowingly" is defined in § 302 (b) (2) which states:

A person acts knowingly with respect to a material element of an offense when: (i) the element involves the nature of his conduct or the attended circumstances if the element involves the nature of his conduct or the attended circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct he is aware that it is practically certain that his conduct will cause such a result.

18 PA. CONSOL. STAT. ANN. § 302 (b) (2).

Based on these facts and circumstances as set forth above, a jury could reasonably conclude that Defendant knowingly endangered the welfare of the child. He knew

the gun was loaded and cocked. He knew that the gun was accessible to the child. He intentionally placed it either on the floor in his bedroom or in the living room. He intentionally left the child unattended for 15 minutes. He knew that the child was only 2 years old and had an interest in the weapon. The practically certain outcome of this combination of facts is exactly what occurred -- the child picked up the gun, played with it and accidentally shot himself.

Because the Court finds that the Commonwealth has proved for prima facie purposes the mens rea element of knowingly, the Court will deny Defendant's petition for habeas corpus with respect to Count 3, endangering the welfare of children.

Finally, with respect to Count 5, simple assault by negligently causing bodily injury with a deadly weapon, Defendant argues that his conduct for prima facie purposes was not negligent. Defendant argues that there is no evidence that he engaged in conduct that was a gross deviation from the standard of conduct that a reasonable person would observe in this situation. Defendant also argues that he took a number of steps that limited the actual danger, "not created the actual danger." (Petition for Habeas Corpus, Paragraph 83).

Based upon the Court's analysis as set forth above, the Court obviously disagrees.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and justifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

18 PA. CONSOL. STAT. ANN. § 302 (b)(4).

Leaving a two year old child unattended for 15 minutes with access to a loaded and cocked firearm is clearly grossly negligent. It is akin to playing Russian roulette. The child was aware of where Defendant kept the handgun, which was an area that the child could readily access. Moreover, Defendant argued with the child's mother about the manner in which he stored his firearms. A reasonable person would never leave a handgun lying around loaded and cocked, regardless of whether the safety mechanisms were activated or not, and certainly not in areas where a small child could access it. The fact that there was a gun safe in which the handgun could have been properly secured in the residence only makes Defendant's conduct more egregious.

Because the Court is satisfied that the Commonwealth has proven for prima facie purposes the required mens rea of negligence, the Court will deny Defendant's petition for habeas corpus with respect to Count 5.

In a final note, defense counsel made such a fervent argument in support of his position that he, in essence, contended that the court would be unable to find a case in another jurisdiction where similar charges were held for court under similar circumstances. The court found a case that it views as similar where the evidence was sufficient for proof beyond a reasonable doubt, a higher standard than prima facie. The court would refer defense counsel to *State of Tennessee v. Tracy Goodwin*, 143 S.W.3d 771 (Tenn. 2004), in which the Tennessee Supreme Court found the evidence was sufficient to sustain a defendant's convictions for felony reckless endangerment and criminally negligent homicide.

The facts of the case were as follows: The defendant got into an argument with a woman, Ms. Jackson, over ownership of a dog. The defendant claimed the dog belonged to his son and Ms. Jackson claimed the dog belonged to her nephew. Ms. Jackson's brother, Mr. Jones, told the defendant to bring back ownership papers and, if the dog really belonged to the defendant, Mr. Jones would give the dog to him. Instead of returning with ownership papers, the defendant returned with a loaded shotgun and threatened Ms. Jackson with it. The police were called and the defendant ran away into the nearby woods.

About two weeks later, a nine year old girl who lived in the neighborhood and her ten year old cousin went into the woods. They found the shotgun that was later identified as belonging to the defendant. The shotgun was loaded and the hammer was already pulled back. The girls believed the gun was a water gun. The brother of one of the girls attempted to take the gun from them. As the girls argued with him over the gun, he fell onto the ground. When the gun hit the ground, it fired, killing one of the girls and seriously injuring the other.

The girls were the victims of the criminally negligent homicide and reckless endangerment charges.²

In upholding these convictions, the Court stated:

It is a matter of common sense that guns, particularly loaded and cocked guns,

² Defendant was also charged with aggravated assault related to the incident with Ms. Jackson and Mr. Jones. The defendant received a new trial on those charges.

ought to be kept safely out of the reach of young children. In this case, the defendant exercised extremely poor judgment in his handling of an inherently dangerous weapon. The defendant chose to leave his shotgun in the woods that were a mere fifty feet behind a house in a crowded neighborhood. While there were not children in the woods at the time, the defendant had seen many children playing in Ms. Jackson's yard. And not only did he leave his loaded gun where it would be easily accessible to children, but he also left the weapon cocked. Sergeant Moody testified that to fire the shotgun, the hammer had to be pulled back and then the trigger pulled; he also testified that it took more force to pull back the hammer than it would to pull the trigger.

On these facts, a rational jury could have found that the defendant's actions constituted a 'gross deviation from the standard of care that an ordinary person would exercise' and that he knew or should have known that his conduct or the result of that conduct would imperil the life [of] another.

143 S.W.3d at 779.

ORDER

AND NOW, this ___ day of October 2015 following a hearing and argument, Defendant's Omnibus Pretrial Motion in the nature of a Petition for Writ of Habeas Corpus with respect to Counts 1 through 6 of the Information is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Martin Wade, Esquire (ADA)
Robert Cronin, Esquire
Gary Weber, Lycoming Reporter
Work file