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19-P-112 Appeals Court

COMMONWEALTH vs. RODNEY COOPER.

No. 19-P-112.

Suffolk. December 11, 2019. - June 30, 2020.

Present: Rubin, Lemire, & Hand, JJ.

Firearms. Evidence, Inference, Firearm. Practice, Criminal, Required finding.

Complaint received and sworn to in the Dorchester Division of the Boston Municipal Court Department on August 17, 2016.

After transfer to the Central Division of the Boston Municipal Court Department, the case was heard by Debra Shopteese, J.

Thomas J. Combs for the defendant.
Stephanie Ainbinder, Assistant District Attorney, for the Commonwealth.

RUBIN, J. The defendant was convicted after a bench trial of, among other charges, carrying a loaded firearm without a license, G. L. c. 269, § 10 (n). The defendant argues that the evidence presented by the Commonwealth was insufficient as a matter of law to prove beyond a reasonable doubt that the

defendant knew that the firearm he possessed was loaded. We affirm.

Viewing the evidence in the light most favorable to the Commonwealth, as we must on this claim of insufficiency of the evidence to support the finding, see Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), the finder of fact, here the judge sitting without a jury, could have found the following.

On August 17, 2016, shortly before 6 A.M., Boston police received a 911 call reporting that an individual was unconscious and in possession of a firearm in the playground of the Oliver Wendell Holmes School. Officers responded to that location and observed the defendant, who appeared to be sleeping on a platform on the playground structure. A responding officer could see the back area and handle of a gun protruding from where it was tucked into the defendant's armpit area. The defendant's other arm was across his body, but not gripping the gun. The magazine was fully inserted into the gun seized by the police such that one could not know simply from observing it whether it was loaded. In fact, it was. There were four bullets in the magazine.

The defendant was transported to a police station where he was permitted to make a telephone call in the presence of a police officer. In that call, the defendant used the word "Mom" numerous times, leading the officer to conclude that the

defendant was talking to his mother. The officer heard the defendant mention a "small pistol" as the reason for his arrest, and heard him repeatedly refer to a "recent homicide," and then say, "I don't want to be the next one." In an interview with police, the lawfulness of which is not contested by the defendant, a detective asked the defendant, "Why are you carrying what you were carrying?" The defendant responded, "Yeah. . . . I live around a lot of violence. Someone was killed right around the corner for no reason."

Discussion. The defendant argues that this case is controlled by Commonwealth v. Brown, 479 Mass. 600, 608-609 (2018), in which the Supreme Judicial Court held that there was insufficient evidence of the defendant's knowledge that the gun, the possession of which formed the basis for his conviction, was loaded. In that case, the defendant was arrested for driving without a valid license and ultimately an inventory search was conducted of his vehicle. Id. at 602. A gun was found in the rear console of the vehicle. Id. Although the court recognized that "[k]nowledge can be inferred from circumstantial evidence," see id. at 608, quoting Staples v. United States, 511 U.S. 600, 615 n.11 (1994), it concluded that "the Commonwealth did not present any evidence from which an inference could be drawn that the defendant was aware that the firearm was loaded." Brown, supra.

In Commonwealth v. Galarza, 93 Mass. App. Ct. 740, 748 (2018), which the defendant also contends is analogous to this case, we held that the Commonwealth presented insufficient evidence to prove beyond a reasonable doubt that the defendant, who was found driving a third-party's truck that held a loaded handgun in its center console, knew that this firearm was loaded. The defendant's nervousness when speaking to police and his attempts to block officers' access to the center console were sufficient to prove that the defendant knowingly possessed the firearm, but this behavior alone did not prove that he knew of the one round of ammunition in the chamber and seven rounds of ammunition in the magazine. Id. at 742, 747-748. As in Brown, there was no evidence, beyond the actual ammunition itself, that the defendant knew that the gun was loaded. Id. at 748.

In this case, as in Commonwealth v. Resende, 94 Mass. App. Ct. 194, 200-201 (2018), there is circumstantial evidence that distinguishes what happened here from what happened in Brown and Galarza, and from which reasonable inferences can be drawn sufficient to support a finding beyond a reasonable doubt that the defendant knew the gun was loaded.

To begin with, the defendant was out of doors, and the gun was neither holstered, nor concealed, but was drawn. As we recently said in Commonwealth v. Mitchell, "[i]t is reasonable

to infer that one that brings a gun to a location knows whether or not it is loaded . . . ." 95 Mass. App. Ct. 406, 419 (2019). Further, the judge could have found that the gun was tucked into the defendant's armpit area. In Resende, the defendant was found with the firearm in his waistband. We said there that "[a] commonsense inference from that fact alone is that a person would check to see if the firearm was loaded before putting it in his waistband." Resende, 94 Mass. App. Ct. at 200. The same is true of tucking a gun under one's arm in the armpit area. Finally, the defendant's statements indicating that he had obtained the gun following a recent homicide for self-protective purposes -- a purpose for which many people obtain a firearm -- supports an inference that this was a gun that the defendant had deliberately obtained, not merely one he had, for example, found or taken from someone. This reduces the likelihood that the defendant would be unaware of whether the gun was loaded because he had no substantial connection to it, and thus strengthens the inference that he would have known whether or not it was loaded. On all the facts and circumstances here, then, although the inference of knowledge is not inescapable, it is a reasonable one, Commonwealth v. Powell, 459 Mass. 572, 579, cert. denied, 565 U.S. 1262 (2011), and the evidence is sufficient to support

the judge's finding beyond a reasonable doubt that the defendant knew the gun was loaded.[1] The judgments are affirmed.

So ordered.

[1] We recently held that evidence that a defendant was carrying a firearm in his waistband, standing alone, was insufficient to prove his knowledge that the firearm was loaded. See Commonwealth v. Grayson, 96 Mass. App. Ct. 748, 753 (2019). Here, however, as described in the text, there is more than just the fact that the gun was tucked in the defendant's armpit.