COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1084

COMMONWEALTH

vs.

ROBERT A. MASON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Robert A. Mason, was convicted of improperly storing a firearm in a place where a minor "may have access without committing an unforeseeable trespass." G. L. c. 140, § 131L (a), (c).[1] On appeal, the defendant maintains that (1) there was insufficient evidence to prove beyond a reasonable doubt that the defendant knowingly had possession of an improperly stored firearm on or about the date specified in the indictment; (2) the jury were improperly instructed; and (3) the prosecutor misstated the evidence in closing argument. We affirm.

[1] The defendant was charged with numerous other firearms-related offenses which were dismissed. He was additionally acquitted of violation of an abuse prevention order, possession of ammunition without a firearms identification (FID) card, and five counts of possession of a firearm without an FID card.

1. Background. We summarize the facts as the jury may have found them, viewed for sufficiency purposes in the light most favorable to the Commonwealth. See Coggins v. Commonwealth, 483 Mass. 1001, 1001 (2019).

On May 6, 2015, an abuse prevention order issued pursuant to G. L. c. 209A, § 3B, ordering the defendant, a gun collector, to "immediately surrender to the Milton Police Department or to the police officer serving this order all guns, ammunition, gun licenses and FID cards."[2] The order did not require the defendant to stay away from the family home where his estranged wife, adult child, adult grandchild, and six month old grandchild lived, and where his older grandchildren visited. He continued to visit following the issuance of the order.

That day, Milton police officers went to the defendant's house to take possession of his firearms. The defendant's family gave officers the key to a large safe in the basement where they understood firearms were stored. Officers removed sixteen rifles, two pellet guns, and one handgun from the safe. When the defendant was served with the abuse prevention order later that day, the officer told him that the police had taken his firearms.

[2] The order, initially due to expire the following day, was extended for a year, after a hearing at which the defendant did not appear.

On the night of May 26, 2015, the defendant's adult son found twenty-eight rifles underneath a pile of blankets in the defendant's attic, where the family stored winter clothing, holiday decorations, and household items. The attic was near the bedroom where the defendant's two visiting grandchildren frequently stayed. The attic could be accessed by pulling a low rope from the ceiling of the upstairs hallway to unfold stairs up to the attic.[3] A desk and chair were nearby.

The defendant's son reported the twenty-eight firearms to the Milton police the following day. An officer met with the defendant and asked him if there were any additional firearms in the house, clarifying that the police only seized the sixteen rifles, two pellet guns, and one handgun from the basement safe. The defendant told the officer that there were no additional firearms in the house. He declined the officer's request to walk through the house to confirm that there were no additional firearms, but later left a note for his son, directing his son to surrender on his behalf any additional firearms of his that might remain in the house. The police executed a search warrant and seized twenty-one handguns from a locked box in the basement, and twenty-eight rifles unsecured on the attic floor,

[3] The defendant's wife, who was approximately five feet, five inches tall, testified that she could reach the rope to the attic door unaided.

only one of which had a trigger lock. They seized ammunition from both the attic and basement.

2. Sufficiency of the evidence. The defendant asserts error in the denial of his motion for a required finding. He claims that there was insufficient evidence to establish that he was the person who improperly stored firearms in the attic, that he knew about the improperly stored firearms, that minors were present who might access the firearms, and that the defendant knew of the minors' presence.

"We review the denial of a motion for a required finding of not guilty by asking whether any rational fact finder, when viewing the evidence in the light most favorable to the Commonwealth, could find all material elements of the offense beyond a reasonable doubt." Commonwealth v. Lovering, 89 Mass. App. Ct. 76, 77 (2016). "If, from the evidence, conflicting inferences are possible, it is for the jury to determine where the truth lies, for the weight and credibility of the evidence is wholly within their province." Commonwealth v. Kelly, 470 Mass. 682, 693 (2015), quoting Commonwealth v. Lao, 443 Mass. 770, 779 (2005). See Commonwealth v. Ragland, 72 Mass. App. Ct. 815, 832 (2008) ("The task of assessing the cogency of evidence and resolving conflicting testimony . . . is the exclusive province of the jury"). Viewing the evidence under the standard

set out in Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), the evidence was sufficient to sustain a conviction.

General Laws c. 140, § 131L (a), proscribes, in relevant part, keeping or storing "any firearm, rifle or shotgun . . . in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user." Subsection (c) provides an additional penalty when a violation of subsection (a) occurs "in a place where a person younger than 18 years of age . . . may have access without committing an unforeseeable trespass." The law "applies only where the gun owner chooses not to carry a firearm or keep it under his immediate control." Commonwealth v. McGowan, 464 Mass. 232, 243 (2013).

The unsecured firearms were recovered from the attic of the defendant's family's home. Although he did not reside there, the defendant continued to visit and store belongings in the home, including his firearms. He kept a notebook itemizing some items in his collection of firearms. The defendant testified at trial that he had moved firearms from the basement to the attic several years earlier. While he claimed that the firearms had trigger locks on them when he stored them in the attic, and that

his son had removed them, it was for the jury to decide whether to credit this testimony. See Coggins, 483 Mass. at 1004.

The defendant's argument that his son became the "storer" once the defendant left the home and the son reported the guns is equally unavailing. The defendant was the owner of the guns, and as the owner he was responsible for storing them in compliance with the law. See Lovering, 89 Mass. App. Ct. at 78-79.[4]

The defendant also contends that the evidence was insufficient that he improperly stored the firearms "on or about May 27, 2015," as alleged in the indictment. He claims he was misled by the police into believing that all the guns were seized on May 6, 2015. However, there was evidence from which a jury could find that the police officers told the defendant what had been seized on May 6, 2015, and that he denied the existence of any other guns. While this evidence was disputed by the defendant, it was for the jury to resolve questions of credibility. Coggins, 483 Mass. at 1004. Furthermore, time is not an element of the offense, and the jury would have been

[4] The defendant's son was, at that time, a Milton police officer. The defendant claims that the son's discovery of the guns in the attic means that the Milton police seized them and stored them in the attic. The defendant offers no factual or legal support for his claim that the son was acting on behalf of the Milton police with respect to the discovery of the guns, or the decision to leave them there until the morning.

permitted to infer that the guns were improperly stored on May 6, or even May 5, 2015. See Commonwealth v. Day, 387 Mass. 915, 921-922 (1983); Commonwealth v. Manooshian, 326 Mass. 514, 516 (1950).

The evidence was also sufficient regarding the access of children under the age of eighteen to the firearms. The defendant's two minor grandchildren, aged eight and four, regularly visited and spent the night in an upstairs bedroom near the attic's entry. The defendant testified that they were at the house nearly every weekend. There was ample evidence to permit a jury to find that the defendant was aware of their presence and their ability to get into the attic.

While the defendant asserts that the children were not seen in and could not access the attic on May 27, 2015, the statute is a public safety statute, preventative in nature. It does not require that the children actually access the guns, or have access to them on a particular day. General Laws c. 140, § 131L, "requires guns to be maintained in locked containers in a way that will deter all but the most persistent from gaining access." Commonwealth v. Parzick, 64 Mass. App. Ct. 846, 850 (2005). A jury could have permissibly concluded that the firearms in the attic belonged to the defendant, that they were unsecured, and that eight and four year old children could have

gotten into the attic "without committing unforeseeable trespass." G. L. c. 140, § 131L (c).

3. Jury instruction. The defendant acknowledges that the judge instructed the jury as requested by the defendant, in language tracking the Model Jury Instructions for Use in the District Court. On appeal, he asserts that the model instruction unconstitutionally omits an element of the crime of improper gun storage, namely knowledge that the guns were improperly stored. We review for a substantial risk of a miscarriage of justice.

The defendant maintains that the failure to instruct the jury on knowledge as an element of the offense constituted a deprivation of due process.[5] We need not decide whether, in some circumstance, knowledge would constitute an element of the offense. As drafted, the statute requires that the owner of the gun secure it in a particular manner. See Lovering, 89 Mass. App. Ct. at 78-79. The defendant testified that he did just that. Had the jury believed his version of events, i.e., that his son removed the locks in order to curry favor with the police, the jury would have been obligated to acquit. The

[5] The Commonwealth need not prove specific knowledge of the law. "When statutes impose punishment out of considerations of public policy, lack of knowledge of the law or of the fact that the law has been violated does not exonerate the person who may have unwittingly violated the statute." Commonwealth v. Belanger, 30 Mass. App. Ct. 31, 33 (1991).

defendant offered a complete defense -- that he intentionally secured the guns in the manner prescribed by statute. The jury's verdict reflects their rejection of that version of events, that is, the jury "necessarily found" knowledge. Commonwealth v. McCray, 93 Mass. App. Ct. 835, 847 (2018).[6]

4. Closing argument. The defendant asserts that the prosecutor misstated the evidence during closing argument when he asserted, "You have an eight year old and a four year old, and you have 25 rifles or shotguns up in the attic without trigger locks. They are improperly stored." The defendant acknowledges that there were twenty-eight firearms in the attic, of which twenty-five had no trigger lock. He contends, however, that only two firearms were test-fired by police, and the evidence adduced at trial suggested that only an additional eleven firearms were operational, not the twenty-eight suggested by the prosecutor.

The absence of an objection by the defendant assigns error in a closing argument to review for a substantial risk of a miscarriage of justice. Commonwealth v. Shruhan, 89 Mass. App. Ct. 320, 326 (2016). We consider the significance of the

[6] The defendant also contends that the statute imposed a requirement that the defendant have "knowledge" that the children may have access to the attic. This argument is based on the same misconstruction of the statute addressed supra, and is rejected.

omission of an objection; the effect of the judge's instructions; the importance of the challenged remark (its relation to a central issue or a collateral matter of the case); and the capacity of the statement at issue to cause a different verdict. Commonwealth v. Kozec, 399 Mass. 514, 518 (1987).

Here, the omission of a prompt objection indicates that the comment lacked the prejudicial impact attributed to it on appeal. See Commonwealth v. Lugo, 89 Mass. App. Ct. 229, 237 (2016). The trial judge's instructions on the presumption of innocence, the allocation and burden of proof, and role of jurors as finders of fact safeguarded against prejudice. Although the comment was not collateral to the five indictments charging the defendant with possession of a firearm without an FID card, the jury found him not guilty of these charges. The record therefore suggests that the jury understood their role as the sole finders of fact, who are "presumed to follow the instructions given by the judge." Shruhan, 89 Mass. App. Ct. at 325. The prosecutor's misstatement had little or no probable

effect upon the verdict.

Judgment affirmed.

By the Court (Vuono, Meade & Sullivan, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: November 27, 2019.

[7] The panelists are listed in order of seniority.