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25-P-933

Appeals Court

COMMONWEALTH vs. ORETTE NICHOLAS JACKSON.

No. 25-P-933.

Hampden. July 13, 2026. - October 16, 2026.

Present: Ditkoff, Hand, & Grant, JJ.

Firearms. Motor Vehicle, Firearms, Operating under the influence. Intoxication. Statute, Construction.

Complaint received and sworn to in the Springfield Division of the District Court Department on March 15, 2021.

The case was tried before Robert S. Murphy, Jr., J.

Charles P. McGinty for the defendant.

Travis H. Lynch, Assistant District Attorney (Hilary A. Sullivan, Assistant District Attorney, also present) for the Commonwealth.

HAND, J. This case presents the question whether G. L. c. 269, § 10H (§ 10H) -- which criminalizes conduct including, as pertinent here, the carrying of a loaded firearm while the

person is under the influence of liquor¹ -- requires that the Commonwealth prove as an essential element that the defendant knew that the firearm was loaded. We conclude that it does. Because the evidence at trial was insufficient to prove the defendant's knowledge beyond a reasonable doubt, we reverse the defendant's conviction under § 10H. We affirm the defendant's conviction of operating a motor vehicle while under the influence of intoxicating liquor (OUI), G. L. c. 90, § 24 (1) (a) (1), as amended through St. 2018, c. 69, §§ 32-33.

1. Facts. At approximately 4 A.M. on a March morning in 2021, a State police trooper saw a white minivan traveling ahead of him on Interstate 291 in the city of Springfield; the minivan's taillights were not illuminated. As the trooper watched, the minivan drifted back and forth across the right lane, crossing repeatedly into the left lane and the breakdown lane. The trooper stopped the minivan and spoke to the defendant, who was the driver. The trooper could smell a strong odor of alcohol coming from the defendant's breath; he noted that the defendant's speech was slurred; and he saw that the defendant's eyes were glazed over, glassy, and bloodshot. When

¹ Section 10H was amended in 2024 to additionally criminalize carrying a loaded firearm "while with a percentage, by weight, of alcohol in the[] blood of eight one-hundredths or greater." St. 2024, c. 135, § 133. As we note infra, that amendment does not affect our analysis.

the trooper asked the defendant for his driver's license and registration, the defendant fumbled through the glove box, dropping items on his lap and on the floor. He eventually provided his license and the minivan's registration to the trooper.² Although the defendant initially denied having had anything to drink, he later told the trooper that he had consumed two beers while visiting a friend in Springfield.

The trooper looked up the defendant's information in a database available in his cruiser, through which he could "run licenses and registration." In doing so, the trooper learned that the defendant had a valid Massachusetts license to carry firearms. The trooper asked the defendant if he was carrying a firearm. The defendant answered that he had a firearm in a holster on his hip and allowed the trooper to take it. The firearm had a full magazine inserted into its "mag well." The trooper collected a second magazine from the minivan's glove box.³

² There was no evidence at trial identifying the owner of the minivan.

³ The firearm, magazines, and ammunition were admitted in evidence. The parties stipulated that the weapon was a .45 caliber Smith and Wesson semiautomatic pistol of a certain make and serial number; that it was a "firearm" as defined in G. L. c. 140, § 121, as amended through St. 2018, c. 123, §§ 1-7; and that the cartridges recovered met the statutory definition of ammunition, see id. It would not have been possible by simple visual inspection of the exterior of the firearm to determine whether the firearm was loaded.

The trooper directed the defendant to walk to the front of the minivan. The defendant seemed "off balance" when he walked and had to raise his arms for balance. He was unsuccessful in completing the field sobriety tests the trooper administered because he could not remember or follow the trooper's instructions and because he could not maintain his balance. The trooper formed the opinion that the defendant was intoxicated and arrested him for a violation of § 10H and for OUI.⁴ At times during the booking process, the defendant appeared to be asleep.

2. Procedural background. At the beginning of the defendant's jury trial in the District Court, the judge instructed the jury that under § 10H, the elements of carrying a loaded firearm while intoxicated were "first, that the defendant carried a weapon on his person . . . that met the legal definition of a firearm; second, that the firearm was loaded with ammunition; and third, that the defendant was under the influence of intoxicating liquor."⁵ At the close of the Commonwealth's case, however, the judge sua sponte raised the question whether § 10H also required the Commonwealth to prove

⁴ The trooper also cited the defendant for two civil motor vehicle violations.

⁵ These instructions are consistent with Instruction 7.670 of the Criminal Model Jury Instructions for Use in the District Court (2021).

that the defendant knew that the firearm was loaded. After hearing argument from the prosecutor and defense counsel, the judge ruled that the Commonwealth was required to prove, as an element of § 10H, that the defendant knew that the firearm was loaded. In doing so, the judge cited to our decision in Commonwealth v. Grayson, 96 Mass. App. Ct. 748 (2019), and noted the similarities between the language of the statute at issue in that case (G. L. c. 269, § 10 [n]) and that of § 10H.⁶ The Commonwealth objected to the instruction on the knowledge element.

The judge instructed the jury that they were required to reach verdicts on "two charges"; that "[e]ach charge . . . is an accusation of a different crime, although they have overlapping elements"; and that they "must consider each charge separately and return a separate verdict . . . for each charge." The judge first instructed the jury on the elements of OUI, tracking the language of the model jury instructions, including a detailed explanation of what it means to be "under the influence of alcohol" for the purposes of that charge. See Instruction 5.310

⁶ The judge initially expressed concern about the lack of evidence of the defendant's knowledge. The defendant did not move for a required finding of not guilty but did argue that the evidence of knowledge was insufficient. Ultimately, the judge concluded that a required finding of not guilty on the charge under § 10H was not warranted.

of the Criminal Model Jury Instructions for Use in the District Court (2019). Immediately afterward, the judge instructed the jury on the elements of § 10H that he had outlined at the beginning of the trial, plus the requirement that the defendant knew that the firearm he was carrying was loaded. The judge also reinstructed the jury on the meaning of the phrase, "under the influence of alcohol," consistent with the model instruction for § 10H. See Instruction 7.670 of the Criminal Model Jury Instructions for Use in the District Court (2021).⁷ The jury convicted the defendant of both charges, and this appeal followed.

3. Discussion. a. Elements of § 10H include the defendant's knowledge that the firearm was loaded. As relevant here, § 10H provides that

"[w]hoever, having in effect a license to carry firearms . . . , carries on his person, or has under his control in a vehicle, a loaded firearm, . . . while under the influence of intoxicating liquor . . . shall be punished by a fine of not more than \$5,000 or by imprisonment in the house of correction for not more than two and one-half years, or by both such fine and imprisonment."

⁷ Consistent with the model instruction, the trial judge did not instruct that the defendant's licensure was an element of the crime. See G. L. c. 269, § 10H (applies to person "having in effect a license to carry firearms issued under [G. L. c. 140, § 131 or 131F]"). As the question has not been briefed before us, we do not reach the issue whether licensure is an affirmative element or this statutory language merely expresses the Legislature's intent to prevent a defendant from being convicted of violating both G. L. c. 269, § 10 (n), and G. L. c. 269, § 10H, for the same act.

Section 10H does not explicitly require that the licensee know that the firearm was loaded, and whether that section includes an implied requirement to that effect appears to be a question of first impression. We approach the question mindful that "[o]ur primary duty in interpreting a statute is 'to effectuate the intent of the Legislature in enacting it.'" Commonwealth v. Brown, 479 Mass. 600, 606 (2018), quoting Sheehan v. Weaver, 467 Mass. 734, 737 (2014). Our review is de novo. See Commonwealth v. James, 493 Mass. 828, 834 (2024).

"Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent." Brown, 479 Mass. at 606, quoting Thurdin v. SEI Boston, LLC, 452 Mass. 436, 444 (2008). Nonetheless, "[w]e generally presume that criminal liability will not be imposed without some level of mens rea." Commonwealth v. Kelly, 484 Mass. 53, 58 (2020). "Given this, the absence of explicit language involving mens rea in a statute is not dispositive of a legislative intent to create a strict liability offense." Id. Rather, "we 'must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense.'" Id. at 57, quoting Commonwealth v. Morgan, 476 Mass. 768, 777 (2017).

In reaching our decision, we are guided by the Supreme Judicial Court's opinion in Commonwealth v. Jackson, 369 Mass.

904 (1976). In that case, the defendant was convicted of carrying a pistol without a license in violation of G. L. c. 269, § 10 (a) (§ 10 [a]), which at the time did not explicitly require proof of the defendant's knowledge that the defendant was carrying a firearm.⁸ See Jackson, supra at 905 & n.1. The defendant argued that § 10 (a) was a strict liability statute that "constitut[ed] a violation of the due process clause of the Fourteenth Amendment [to the United States Constitution] and parallel provisions of our State Constitution, arts. 1, 10 and 12 of the [Massachusetts] Declaration of Rights," for reasons including the harshness of the penalties the statute imposed. Jackson, supra at 916. The Supreme Judicial Court cautioned that "a strict liability offense does not necessarily constitute a denial of due process" but -- "mindful of . . . the need to avoid possible constitutional

⁸ At that time, § 10 (a), as amended through St. 1975, c. 113, § 2, provided in relevant part as follows:

"(a) Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, a firearm, loaded or unloaded, . . . without [being licensed to carry firearms] . . . shall be punished by imprisonment in the state prison for not less than two and one-half nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. The sentence imposed upon such person shall not be reduced to less than one year"

See Jackson, 369 Mass. at 905 & n.1.

doubts" -- went on to "interpret § 10 (a) as requiring, as a necessary element of the offense, proof that the accused knew that he was carrying a firearm." Jackson, supra. In the court's words, "We would not feel justified in ruling that knowledge is not necessary where the penalty is so severe." Id., quoting Commonwealth v. Boone, 356 Mass. 85, 87 (1969).

The Legislature subsequently amended § 10 (a) to include an explicit requirement that violators "knowingly" possess a firearm. St. 1990, c. 511, § 2. See G. L. c. 269, § 10 (a) ("Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded . . . shall be punished . . . "). Since then, the Supreme Judicial Court has ruled that another provision of G. L. c. 269, § 10, implicitly requires knowledge of possession, despite the absence of an explicit mens rea requirement. See Commonwealth v. O'Connell, 432 Mass. 657, 663 (2000) (inferring G. L. c. 269, § 10 [c], contains requirement that defendant knowingly possess weapon, but noting that Commonwealth was not required to prove defendant's knowledge that "physical characteristics of the firearm he possessed" met statutory definition of prohibited "sawed-off shotgun"). These decisions are consistent with other rulings similarly inferring knowledge requirements. See, e.g., Boone, 356 Mass. at 87 (reading knowledge requirement into precursor to

G. L. c. 269, § 10 [a], based on severity of potential punishment); Commonwealth v. Buckley, 354 Mass. 508, 512 (1968) (reading knowledge requirement into statute criminalizing being present where narcotic drug was illegally kept because "any other interpretation would raise serious constitutional doubts" in light of statute's severe penalty of up to five years in prison). Cf. Brown, 479 Mass. at 606-608 (reading knowledge requirement into G. L. c. 269, § 10 [n], which criminalizes unlawful possession of loaded firearm, whereas G. L. c. 269, § 10 [h], unlawful possession of ammunition, is lesser included offense of § 10 [n]).

The Commonwealth argues that it was not required to prove that the defendant knew the firearm in his possession was loaded because § 10H's enactment reflects the Legislature's intention to create a "strict liability, public welfare offense." Kelly, 484 Mass. at 58. See id., quoting Staples v. United States, 511 U.S. 600, 607 (1994) (defining public welfare statutes as laws that "criminalize conduct that has not necessarily caused harm but is 'potentially harmful or injurious'"; collecting cases). Public welfare statutes are exceptions to the "general[] presum[ption] that criminal liability will not be imposed without some level of mens rea." Kelly, supra. Considering factors including the nature of the conduct targeted by § 10H, see Kelly, supra at 58-59, "the ability of a defendant to take

actions to avoid violating the statute," id. at 60, and the severity of the potential punishments, see id. at 59-60, we are not persuaded that the Legislature intended § 10H to be a public welfare statute.

We acknowledge that some of the factors set forth in Kelly, 484 Mass. at 58-61,⁹ could here suggest a legislative intent consistent with the creation of a public welfare statute. It is true that § 10H prohibits conduct that creates a risk of harm but is not necessarily harmful. See Kelly, supra at 59 (statute prohibiting discharge of firearm within 500 feet of dwelling "is consistent with a public welfare offense because it punishes risky behavior, not behavior that necessarily has caused a harm"). It is also true that, generally, a firearms licensee could avoid violating § 10H by simply opting not to carry any firearm when the licensee is, or might become, intoxicated by alcohol. See Kelly, supra at 61 (risk of discharging firearm within 500 feet of dwelling is easily avoided by owner's deciding not to discharge weapon, and accidental discharge is easily prevented by use of mechanical locks or other safety devices).

⁹ In Kelly, 484 Mass. at 62, the Supreme Judicial Court held that a statute prohibiting discharge of a firearm within 500 feet of a dwelling was a public welfare offense.

Our consideration of the penalty imposed for a violation of § 10H, however, leads us to a conclusion different than that in Kelly. The maximum potential penalties for violating § 10H are imprisonment for a term of two and one-half years and a fine of \$5,000. G. L. c. 269, § 10H. The severity of these sanctions distinguishes them from "the category of 'fines or short jail sentences' that are characteristic of public welfare offenses." Kelly, 484 Mass. at 60, quoting Staples, 511 U.S. at 616. Although a severe sanction is "not dispositive" of legislative intent, Massachusetts courts have consistently "interpreted statutes that contain no specific mens rea requirement, but that provide a harsh penalty, to contain an implicit requirement of a particular mens rea." Kelly, supra at 59. See id., and cases cited. See also Commonwealth v. Collier, 427 Mass. 385, 388 (1998) (reading mens rea requirement into statute criminalizing violation of protective order, based in part on "severe penalty . . . of up to two and one-half years of imprisonment"); Jackson, 369 Mass. at 907, 916 (similar, five-year maximum sentence and one-year mandatory minimum for carrying firearm without license); Boone, 356 Mass. at 87 (same); Buckley, 354 Mass. at 511-512 (similar, five-year maximum sentence for being present where narcotic drug was held). Contrast Kelly, supra at 60 (maximum penalties of three months' incarceration and fine of one hundred dollars were "squarely within" range indicative of

intent to create public welfare statute); Commonwealth v. Tart, 408 Mass. 249, 265 (1990) (maximum penalties of thirty days' imprisonment and fine of fifty dollars were "relatively small" and did not justify inference of mens rea requirement for regulatory violation). We are not persuaded that the Legislature intended to impose a two and one-half year term of incarceration, plus a substantial fine, without requiring proof of the defendant's knowledge that he was committing the act proscribed by the statute.

The Commonwealth claims that some importation of mens rea -- that the intoxication must be voluntary -- assuages "due process-based concerns about imposing strict liability." This is not the case, as illustrated by the following hypothetical. Imagine that a licensee goes out to dinner with a friend who, unbeknownst to the licensee, is carrying a loaded firearm in her bag. By the conclusion of the meal, the licensee has consumed enough alcohol to be under the influence within the meaning of the statute. As the licensee and the friend prepare to leave, the friend asks the licensee to take her bag while the friend goes to the restroom. If the licensee takes possession of the bag containing the firearm, the licensee would be subject to prosecution under the Commonwealth's theory of § 10H, despite being unaware of the loaded firearm in the bag. The fact that the licensee is voluntarily intoxicated does not, in this

instance, bear on her knowledge that she is carrying the firearm or that the firearm is loaded. To that extent, § 10H, as the Commonwealth envisions it, would impose strict liability for possession of a loaded firearm, even if the statute provides for some "mens rea" as to the element of the defendant's intoxication.

Moreover, the Commonwealth can provide no reason for inferring the requirement of voluntary intoxication but not knowledge that the firearm is loaded. Nothing in the statutory language explicitly requires that the intoxication be voluntary. See G. L. c. 265, § 10H. We have stated that, "where proof of intoxication is an express element of any offense charged, the Commonwealth bears the burden of proving that the defendant's intoxication was voluntary." Commonwealth v. Darch, 54 Mass. App. Ct. 713, 716 (2002). We did this, however, as a matter of inferring legislative intent, concluding that the Legislature did not intend to make "it a crime . . . to drive after having unknowingly been slipped a[n intoxicating] drug." Id., quoting Commonwealth v. Wallace, 14 Mass. App. Ct. 358, 360 (1982). Similar inferences drive our conclusion here. See Jackson, 369 Mass. at 916.

We do not share the Commonwealth's concern that our interpretation necessarily leads to the absurd result that a defendant licensee charged with carrying a loaded firearm while

under the influence could defend against that charge by arguing that the defendant was too intoxicated to have knowingly committed the crime. This is because the Commonwealth may prove a violation of § 10H at any time that a licensee is both knowingly carrying a loaded weapon and "under the influence" to any degree. In the absence of evidence that the defendant became instantaneously intoxicated to the point of legal incapacity -- a scenario we think unlikely -- the Commonwealth may rely on circumstantial evidence to prove that the defendant carried the loaded firearm at a point when the defendant was "under the influence" but not yet incapacitated. Cf. Commonwealth v. Sama, 411 Mass. 293, 298 (1991) (in prosecution for murder under theory of third prong malice, jury must consider "the nature and extent of the defendant's knowledge of the circumstances at the time he [or she] acted"). And, as we have discussed, we do not think the Legislature intended to punish one who has unknowingly come to possess a loaded firearm after becoming intoxicated.

Because the conduct at issue in this case was the defendant's carrying a loaded firearm while under the influence of intoxicating liquor, we explain our decision using those terms. We think the reasoning and our holding equally applicable to cases involving allegations that the defendant violated § 10H by any of the other ways set forth in that

section, including by carrying a loaded firearm or having it "under [one's] control in a vehicle . . . while with a percentage, by weight, of alcohol in the[] blood of eight one-hundredths or greater, or while under the influence of . . . marijuana, narcotic drugs, depressants or stimulant substances" as defined in G. L. c. 94C, § 1, "or from smelling or inhaling the fumes of any substance having the property of releasing toxic vapors as defined in [G. L. c. 270, § 18]." G. L. c. 269, § 10H.

b. Sufficiency of the evidence of the defendant's knowledge that the firearm was loaded.¹⁰ Considering the evidence under the familiar Latimore standard, we agree with the defendant that it was insufficient to prove that he knew that the firearm he carried was loaded. See Commonwealth v. Latimore, 378 Mass. 671, 677 (1979) (appellate court conducting sufficiency review asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

¹⁰ Because "findings based on legally insufficient evidence are inherently serious enough to create a substantial risk of a miscarriage of justice," Commonwealth v. Qasim Q., 491 Mass. 650, 659 n.14 (2023), quoting Commonwealth v. Grandison, 433 Mass. 135, 140 n.8 (2001), we consider the sufficiency question despite the absence of a formal motion for a required finding of not guilty. The question whether there was sufficient evidence that the defendant knew the firearm was loaded was discussed prior to the case being submitted to the jury.

beyond a reasonable doubt" [citation omitted]). The Commonwealth need not introduce direct evidence of knowledge because "[p]roof of the essential elements of the crime may be based on reasonable inferences drawn from the evidence," provided the inferences are "reasonable and possible." Commonwealth v. Wurtzberger, 496 Mass. 203, 205 (2025), quoting Commonwealth v. Kapaia, 490 Mass. 787, 791 (2022). The Commonwealth's evidence may not, however, be so limited that it can prove the defendant's guilt only by "piling inference upon inference." Commonwealth v. Ferguson, 384 Mass. 13, 18 (1981). In the same vein, a reviewing court cannot affirm a conviction based on its determination "that there was some record evidence, however slight, to support each essential element of the offense." Commonwealth v. Smith, 496 Mass. 304, 316 (2025), quoting Commonwealth v. Gonzalez, 475 Mass. 396, 407 (2016).

We compare the Commonwealth's showing in this case to the evidence presented in Commonwealth v. Resende, 94 Mass. App. Ct. 194 (2018), a case cited by both parties. In Resende, as in this case, there was no direct evidence that the defendant knew that the firearm he was carrying in his waistband was loaded. See id. at 200. However, significant features differ: there, the defendant, Erickson Resende, admitted to "some familiarity with firearms," id. at 201; immediately before being found with the firearm, Resende had been threatening someone, including

mentioning a gun, see id. at 196, 201; and a police officer had to forcibly disarm Resende, see id. at 196. Although we characterized the question as "close," we concluded that this evidence was sufficient to prove Resende's knowledge that the firearm he carried was loaded. Id. at 200.

The evidence in this case was less substantial than that in Resende. Although the jury could have drawn some inference of knowledge from (1) the defendant's carrying the firearm on his hip, see Grayson, 96 Mass. App. Ct. at 755 ("To be sure, common sense dictates that a person check whether a firearm is loaded before further handling or carrying it . . . in a holster . . ."),¹¹ and (2) the presence of an additional loaded magazine in the minivan's glove box, cf. Commonwealth v. Paul, 96 Mass. App. Ct. 263, 266-267 (2019) (evidence of knowledge that firearm was loaded was sufficient where, among other things, defendant was carrying firearm in backpack on his person and kept fully

¹¹ Where the Commonwealth did not introduce evidence about any gun safety training or about the requirements for obtaining a license to carry firearms, we are not persuaded that the evidence that the defendant was licensed could reasonably have bolstered these inferences about the defendant's knowledge. Cf. Grayson, 96 Mass. App. Ct. at 755 ("persons who possess firearms without a license cannot be presumed with any high degree of confidence to follow common sense in the area of firearm safety"); Resende, 94 Mass. App. Ct. at 200-201 (defendant's admission to "some familiarity with firearms" "strengthened" inference of knowledge drawn from evidence that defendant carried loaded firearm in his waistband).

loaded magazine in same section of backpack), there was no evidence comparable to the threats or admitted familiarity with firearms as in Resende to suggest that the defendant actually did have that knowledge. We held in Grayson, 96 Mass. App. Ct. at 753-754, that the mere fact that a firearm was carried in a waistband was insufficient to prove a defendant's knowledge that a firearm was loaded. In this case, there is little reason to think that the presence of ammunition in the closed glove box provided the defendant with knowledge that the firearm in the holster on his hip was loaded. We think the evidence in this case too thin to prove knowledge beyond a reasonable doubt, see Commonwealth v. Silva, 482 Mass. 275, 289 (2019) ("any inference constituting an element of an offense must be established beyond a reasonable doubt"), and as a result, we conclude that the defendant's conviction under § 10H must be reversed and that judgment must enter in his favor as to that charge.¹²

¹² Given our conclusion, we need not and do not reach the defendant's facial challenge to the constitutionality of § 10H in light of the United States Supreme Court's decision in New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). During the pendency of this appeal, the Supreme Court decided United States v. Hemani, 608 U.S. 772, 794-795 (2026), finding unconstitutional a statute that prohibited a habitual marijuana user from possessing a firearm. The Supreme Court noted that it did "not address efforts to ban . . . those presently intoxicated . . . from possessing a firearm," id. at 794; the parties here provided supplemental briefing on that case.

c. Validity of the OUI conviction. We are not persuaded by the defendant's argument that reversing his conviction under § 10H requires us also to vacate his OUI conviction. The evidence supporting the OUI conviction was more than sufficient -- a point the defendant does not contest -- and the argument in his brief that the jury might have viewed him with a jaundiced eye based on evidence that he was carrying a loaded firearm is entirely speculative and beside the point. The defendant provides no reason why the full circumstances of the stop would not have been admissible in any event. We discern no reason to disturb the jury's guilty verdict on the OUI charge.

4. Conclusion. On count 4 of the complaint charging carrying a loaded firearm while intoxicated, in violation of G. L. c. 269, § 10H, the judgment is reversed, the verdict is set aside, and judgment shall enter for the defendant. On count 3 of the complaint charging operating under the influence of liquor, in violation of G. L. c. 90, § 24 (1) (a) (1), the judgment is affirmed.

So ordered.