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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIE WILEY, JR., Defendant and Appellant.	A129166 (San Mateo County Super. Ct. No. SC070316A)

I.

INTRODUCTION

A jury found appellant Willie Wiley, Jr. guilty of four felony offenses: (1) possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1))[1]; (2) possession of a controlled substance while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)); (3) possession of rock cocaine for sale (Health & Saf. Code, § 11351.5) with an arming allegation (Pen. Code, § 12022, subd. (c)); and (4) willful endangerment of a child (Pen. Code, § 273a, subd. (a).) Additionally, appellant was found to have one prior prison commitment within the meaning of Penal Code section 667.5, subdivision (b), and two prior strike convictions within the meaning

[1] Effective January 1, 2012, former section 12021, subdivision (a)(1), prohibiting possession of a firearm by a felon, was repealed and replaced without substantive change by Penal Code section 29800, subdivision (a)(1) (Stats. 2010, ch. 711, § 4 [repealed], Stats. 2010, ch. 711, § 6 [reenacted].

of Penal Code section 1170.12, subdivision (c)(1). Appellant was sentenced to a total term of 12 years in prison.

On appeal, appellant argues his due process rights under the Fourteenth Amendment to the United States Constitution were violated because there was insufficient evidence to support his convictions for felony child endangerment, possession of a firearm by a felon, and possession of a controlled substance while armed with a loaded firearm. Appellant also claims the jury was not properly instructed on the elements of felony child endangerment. We find these arguments to be without merit and affirm the judgment.

II.

FACTS AND PROCEDURAL HISTORY

On January 7, 2010, Parole Agent John Alvarez (Alvarez), accompanied by other agents, made an unannounced search at an apartment where appellant, who was on parole, resided. The apartment belonged to appellant's father and had several upstairs bedrooms. Appellant occasionally stayed at the apartment, which was occupied by his father, his sister, his cousin, and his uncle. Appellant usually slept downstairs.

Upon entering the house, Alvarez asked for appellant and was directed to the upstairs portion of the home. As Alvarez was on the stairway landing, he observed appellant exiting a rear bedroom holding a young child in his arms. Alvarez testified that he recognized the child, who was around two years old, as appellant's son. Alvarez had seen the child "running around" in the past. Alvarez smelled the aroma of marijuana as he stood in the hallway.

Alvarez then entered the bedroom which appellant had just exited. Alvarez observed a leather jacket on the bed, which Alvarez had seen appellant wear in the past. He also saw a marijuana cigarette lying on the dresser. The television was turned on with cartoons playing.

A search of the jacket revealed approximately 40 rocks of crack cocaine, individually wrapped, in the jacket's pocket. Each rock weighed approximately .2 grams and had a street value of $20, making the drugs' resale value around $1,000. The jacket

was lying on a bed. Wedged between the mattress and box spring was a loaded 45-caliber semi-automatic handgun that was cocked with the hammer pulled back and the safety off. Alvarez testified that all it would have taken to fire the gun was to pull the trigger. The gun was located approximately one to one and one-half feet from the upper left corner of the mattress, where it could be easily reached.

Alvarez also spoke with appellant's father, Willie Wiley, Sr., who arrived at the apartment during the parole search. At first, appellant's father claimed ownership of the firearm; but upon hearing that law enforcement would attempt to determine if the weapon was stolen, appellant's father recanted ownership and indicated, "Oh, no, it's on him."

III.

DISCUSSION

A. Evidence Supporting Conviction for Felony Child Endangerment

Appellant argues the evidence was insufficient to support his conviction for felony child endangerment under Penal Code section 273a, subdivision (a). That section provides in relevant part, "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, . . . having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, . . ." is guilty of felony child endangerment. Appellant claims there was insufficient evidence he willfully permitted his son to be endangered under circumstances likely to produce great bodily injury. Additionally, he claims the lack of sufficient evidence to support his conviction constitutes a denial of due process.

The due process clause of the Fourteenth Amendment of the United States Constitution protects a defendant in a criminal case against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (*In re Winship* (1970) 397 U.S. 358, 364.) In *Jackson v. Virginia* (1979) 443 U.S. 307 the United States Supreme Court held that the critical inquiry on review of the sufficiency of evidence to support a criminal conviction is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime proved beyond a reasonable doubt. (*Id*. at pp. 318-319.)

Applying these principles, the California Supreme Court in *People v. Johnson* (1980) 26 Cal.3d 557, set out the basic standard governing judicial review of a criminal conviction challenged as lacking evidentiary support. The *Johnson* court stated: "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id*. at p. 578.) The court also noted that it is not enough that there is "some" evidence supporting the finding; the evidence of each of the essential elements must be substantial. (*Id*. at p. 577.)

The purpose of Penal Code section 273a, subdivision (a), is to "protect a child from an abusive situation in which the probability of serious injury is great." (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835.) It proscribes both active and passive conduct, such as "child abuse by direct assault and child endangering by extreme neglect. [Citation.]" (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215-1216.) Where the defendant does not, himself, inflict injuries upon the child, a conviction under the statute requires that the defendant's conduct be "such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life." (*People v. Valdez* (2002) 27 Cal.4th 778, 791.) In *People v. Hansen* (1997) 59 Cal.App.4th 473, the court held that a violation of Penal Code section 273a, subdivision (a) can occur when the child is placed in a situation where the risk of great bodily injury or death was reasonably foreseeable such as where the caretaker stores a loaded gun in a home occupied by children without denying the children access to the weapon. (*Id.* at pp. 479-480.)

Similarly here, the jury could reasonably conclude appellant's conduct created a well-founded, foreseeable risk of great bodily harm to his child. During the parole search, the officer found a loaded, cocked, ready-to-be fired weapon under the mattress in the bedroom that had recently been occupied by appellant and his child. The gun was

approximately one foot from edge of the mattress where an inquisitive two-year-old child could have gotten it out and injured himself or others. A reasonable person with a proper regard for his child's safety would lock up such a dangerous or deadly weapon or at least place it out of the reach of a child whose curiosity and lack of life experience could lead the child to handle the gun with deadly consequences.

Also in the bedroom were 40 small wrapped packages of cocaine. A reasonable person would know that keeping such a large quantity of drugs within easy reach of a young, mobile and likely curious child is extremely dangerous. (See *People v. Perez* (2008) 164 Cal.App.4th 1462, 1473 ["leaving drugs and drug paraphernalia in plain view and/or within easy access of a four-year-old child placed that child at unreasonable risk of her personal safety"].)

In *People v. Odom* (1991) 226 Cal.App.3d 1028 (*Odom*), the court found that the record was "replete" with evidence showing there was a great probability that the defendant's children, who were ages seven and nine, would be seriously injured. (*Id.* at p. 1033.) There were 12 guns in the defendant's house, at least 3 of which were loaded, but no evidence that the children were prevented from accessing them. (*Ibid.*) There were chemicals and equipment throughout the house used in the manufacture of methamphetamine that "posed inherent dangers," and the chemicals were stored in a way that created a "disaster waiting to happen." (*Id.* at pp. 1033-1034.)

Like appellant in the instant case, the defendant in *Odom* claimed that because there was adult supervision, the children were not in danger. (*Odom*, *supra*, 226 Cal.App.3d at p. 1035.) However, the court noted that there was nothing showing that the children were restrained, and went on to say, "[i]t is more likely it would have been impossible to protect the children, ages nine and seven, from their own natural curiosity which could lead them to direct contact with the wires, guns, dogs and chemicals." (*Ibid.*)

While appellant argues, "as far as the evidence shows, [appellant] was protecting the child from all conceivable hazards," the jury was entitled to infer that the child was not always safely within appellant's arms, and that if appellant was truly concerned about

protecting his child, the drugs and the loaded gun would have been placed well out of the child's reach. Viewing the evidence in the light most favorable to the judgment, we conclude there is substantial evidence to support the jury's finding that appellant was guilty of felony child endangerment.

B. Instructional Error

Appellant contends that the instructions given the jury in connection with felony child endangerment were erroneous because they confused the distinction between felony child endangerment and misdemeanor child endangerment.

By its language, felony child endangerment as proscribed by Penal Code section 273a, subdivision (a) involves conduct by a person "under circumstances or conditions likely to produce great bodily harm or death." The lesser included offense of misdemeanor child endangerment, for which the jury in this case was also instructed, includes acts committed "under circumstances or conditions *other than those* likely to produce great bodily harm or death . . . ." (Pen. Code, § 273a, subd. (b), italics added.)

The reporter's transcript omits the reading of the jury instructions, but the record contains a clerk's transcript containing the typewritten instructions. The instructions with regard to felony child endangerment read as follows:

"The defendant is charged in Count 3 with child abuse likely to produce great bodily harm or death in violation of Penal Code section 273a[, subdivision] (a).

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant, while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child's person or health *might have been endangered*; [¶] AND

"2. The defendant caused or permitted the child to be endangered under circumstances or conditions likely to produce great bodily harm or death; [¶] AND

"3. The defendant was criminally negligent when he caused or permitted the child to be endangered." (Italics added.)

Appellant argues that instructing that a child "might have been endangered" as opposed to "was endangered" in the first numbered paragraph was in error and it may

have confused felony child endangerment with misdemeanor child endangerment, the lesser included offense. He claims that "[t]he instruction as given removes the requirement that the situation be such that the child's person or heath is *actually endangered*." (Italics added.) Consequently, because the jury was erroneously instructed on this "key element," he argues he was denied his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

Whether a jury has been correctly instructed depends upon the entire charge of the court (*People v. Rhodes* (1971) 21 Cal.App.3d 10, 20), and jurors are presumed to be intelligent persons capable of understanding and correlating jury instructions (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338).

Although the typewritten instruction inadvertently refers to "might have been endangered" rather than "was endangered," the court also properly instructed the jury in paragraph two of the instruction that in order to be found guilty of felony child endangerment, appellant must have actually "caused or permitted [his] child *to be endangered* under circumstances or conditions likely to produce great bodily harm or death." (Italics added.) This portion of the instruction made it abundantly clear that appellant's actions had to have posed a risk of great bodily harm or death to the child. Thus, there is no danger the jury was misled by the instructions and the jury could not possibly have concluded appellant was guilty of felony child endangerment without also finding that he actually endangered his child. Therefore, we find no prejudicial error.

C. Evidence Supporting Possession of a Firearm

In challenging his conviction for being a felon in possession of a firearm in violation of former Penal Code section 12021, subdivision (a)(1), appellant next contends there was insufficient evidence to support the jury's finding that he was in possession of a firearm. He claims there was "nothing in the record to indicate that the firearm under the mattress . . . was any more accessible" to appellant than it was to any of the other occupants of the house. Therefore, he insists that "non-exclusive accessibility is all the evidence there is to support" the conviction. Additionally, he claims the lack of sufficient evidence to support his conviction constitutes a denial of due process.

"The elements of the offense proscribed by [former Penal Code] section 12021 are conviction of a felony and ownership, possession, custody or control of a firearm. [Citations.]" (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) "Possession may be either actual or constructive as long as it is intentional. [Citation.]" (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 130.) As the court in *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, pointed out: "A violation of [former Penal Code] section 12021, subdivision (a) is a relatively simple crime to commit: an ex-felon who owns, possesses, or has custody or control of a firearm commits a felony. *Implicitly, the crime is committed the instant the felon in any way has a firearm within his control*." (*Id.* at p. 1410, fn. omitted.)

Based upon circumstantial evidence and the reasonable inferences drawn therefrom, the jury here could have concluded that appellant had possession of the loaded firearm found during the parole search. Appellant was seen coming out of a bedroom with his young son when he encountered his parole officer. Since cartoons were showing on the television in the bedroom, it was a fair inference to assume that appellant had recently taken the child into the bedroom to watch television. The parole officer detected the odor of marijuana. During the ensuing search, the officer discovered evidence of recent marijuana usage. The officer also found crack cocaine, individually packaged for sale, in a pocket of appellant's jacket. The jacket was placed on the top of the bed and the loaded gun was found under the bed's mattress.

In *People v. Bland* (1995) 10 Cal.4th 991 (*Bland*), our Supreme Court set forth the circumstances under which a defendant's possession of a firearm can be logically inferred. As the court pointed out, "Drug dealers are known to keep guns to protect not only themselves, but also their drugs and drug proceeds; ready access to a gun is often crucial to a drug dealer's commercial success. For this reason, a jury may properly infer that a firearm kept in close proximity to illegal drugs in a place frequented by the defendant during a possessory drug offense was available for the defendant's use in furtherance of the drug possession." (*Id.* at p. 1005.)

Consequently, the fact that the gun was found near a substantial amount of drugs packaged for sale supports the inference that appellant possessed the gun in case he encountered any problems in engaging in illegal drug transactions. Appellant's argument that any connection between the drugs and the loaded firearm in the bedroom was purely coincidental and that the gun actually belonged to appellant's father was fully presented to the jury and rejected.[2] Hence, when viewed in the light most favorable to the jury's verdict, the evidence supports the jury's conclusion that appellant was in possession of the firearm.

D. Evidence that Appellant was Armed with a Weapon

Pursuant to this court's order of December 21, 2011, appellant was granted leave to file a supplemental letter brief addressing whether the evidence supported the jury's verdict that he was in possession of a controlled substance while "armed" with a weapon in violation of Health and Safety Code section 11370.1, subdivision (a). That section provides that "every person who unlawfully possesses any amount of a substance containing cocaine . . . while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years." Health and Safety Code section 11370.1, subdivision (a), defines the term "armed with" as having a firearm "available for immediate offensive or defensive use."

Appellant defines the pivotal question as "whether or not a pistol lodged between the mattress and bedsprings is 'available for immediate use' within the meaning of Health and Safety Code section 11370.1." We believe resolution of this issue is controlled by our Supreme Court's decision in *Bland, supra,* 10 Cal.4th 991. In *Bland,* the Supreme Court interpreted the meaning of the phrase "armed with a firearm in the commission" of

[2] Willie Wiley, Sr., appellant's father, testified at trial that the gun belonged to him and that he placed it under the mattress for protection in case someone broke into his home.

a felony as used in Penal Code section 12022.[3] The defendant in *Bland* was not in his house when various firearms, including an assault weapon, was located under the bed in his bedroom. (*Bland*, *supra*, 10 Cal.4th at p. 995.) The defendant's bedroom closet contained 17.95 grams of rock cocaine. (*Ibid*.) Despite the fact that appellant did not have access to the firearms at the time of his arrest, the *Bland* court accepted the proposition that the defendant was armed with a firearm within the meaning of the statute. (*Id.* at p. 1006.)

The *Bland* court summarized its holding as follows: "[W]hen the prosecution has proved a charge of felony drug possession, and the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer (1) that the defendant knew of the firearm's presence, (2) that its presence together with the drugs was not accidental or coincidental, and (3) that, at some point during the period of illegal drug possession, the defendant was present with both the drugs and the firearm and thus that the firearm was available for the defendant to put to immediate use to aid in the drug possession. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was 'armed with a firearm in the commission' of a felony within the meaning of [Penal Code] section 12022." (*Bland*, *supra*, 10 Cal.4th at pp. 1002-1003, fn. omitted.)

The evidence in this case, viewed most favorably to the jury's verdict, shows that appellant was "armed" with a firearm. The weapon was placed underneath a mattress in a bedroom where drugs were kept by appellant. Although hidden, the fully loaded weapon was put in a place where appellant could quickly access it if he needed to. As

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[3] *Bland* involved the general enhancement under subdivision (a) of Penal Code section 12022, which applies when a defendant is armed with a firearm during the commission of a felony, whereas this case involves Health and Safety Code section 11370.1, subdivision (a), which applies when a defendant possesses illegal drugs while armed with a loaded, operable firearm. However, the language of Health and Safety Code section 11370.1, subdivision (a) ("while *armed with* a loaded, operable firearm"), is nearly identical to that of Penal Code section 12022, subdivision (c) ("personally *armed with* a firearm." (Italics added.) Therefore, we find *Bland*'s discussion of what constitutes being "armed" to be pertinent to our resolution of this issue.

stated in *Bland*, the possession of drugs constitutes a continuing offense, and if the prosecution shows that a firearm was found "in close proximity to the illegal drugs in a place frequented by the defendant," the jury may reasonably infer that the defendant had the firearm "available for the defendant to put to immediate use" at some point during the time he possessed the illegal drugs. (*Bland*, *supra*, 10 Cal.4th at pp. 1002-1003.)

Appellant contends that the evidence did not support the jury's verdict that he was "armed" with a weapon because a "[t]he time necessarily involved in lifting or reaching under the mattress and locating, then grabbing the gun prevents the weapon from being 'available for immediate use.' " However, this argument is unconvincing, as illustrated by *People v. Molina* (1994) 25 Cal.App.4th 1038 (*Molina*). In *Molina*, in searching a vehicle, the police found cocaine and methamphetamine. (*Id.* at p. 1042.) The police also found a loaded gun at the bottom of a zippered duffle bag stuffed with clothing. (*Id.* at pp. 1043-1044.) The *Molina* court rejected the defendant's argument that the firearm was not available "for immediate offensive or defensive use" because the duffle bag was behind the driver's car seat and the gun could not be easily accessed. (*Id.* at p. 1043.) The court held a violation of Health and Safety Code section 11370.1 could have occurred because there was evidence the defendant could reach into the bag while seated in the driver's seat. (*Molina*, at pp. 1043-1044.)

Similarly here, a person who has a loaded gun under a mattress would be able to get to the gun quickly to put it to immediate use. The evidence is sufficient to support appellant's conviction for Health and Safety Code section 11370.1, subdivision (a).

E. Evidence that the Gun was Operable

In order to convict appellant under Health and Safety Code, section 11370.1, subdivision (a), the prosecution had to show that appellant was "armed with a loaded, operable firearm." Appellant contends there was insufficient evidence the gun found under the mattress was operable. He points out that "[t]here is no evidence that the weapon was ever tested." Appellant further argues the evidence failed to establish the gun was operable because Parole Agent Alvarez "did not opine that the weapon was operable, only that it appeared operable."

In *People v. Smith* (1974) 38 Cal.App.3d 401 (*Smith*), the court specifically rejected the need for direct evidence of operability, concluding: "The circumstantial evidence that the weapon was operable was more than sufficient: Defendant was armed with a shotgun during the robbery. When he was arrested, a loaded shotgun and additional shotgun shells were found in the vehicle in which he was riding. A jury could easily infer that defendant would not have carried a loaded shotgun with additional shells, if the weapon were inoperable." (*Id*. at p. 410.)

As in *Smith, supra*, 38 Cal.App.3d 401, the jury in this case could easily draw the inference of operability. Here, Parole Agent Alvarez, a firearms instructor, found no visible signs of inoperability. His testimony was based on his close observations of the handgun and his extensive experience in law enforcement. The evidence also showed appellant had hidden the gun in close proximity to the bindles of crack cocaine that he possessed for purposes of sale. An inoperable weapon would be of little use in protecting appellant and/or his drugs. Furthermore, the fact that the gun was loaded and put into a position to be fired immediately is very strong evidence that it was operable.

This evidence of the gun's operability was " 'reasonable, credible, and of solid value.' " (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) It represented more than Agent Alvarez's mere speculation. Consequently, the jury could reasonably have inferred that the handgun was "operable" within the meaning of Health and Safety Code section 11370.1, subdivision (a).

IV.

DISPOSITION

The judgment is affirmed.

RUVOLO, P. J.

We concur:

RIVERA, J.

SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to Article VI, section 6 of the California Constitution.