NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. PAUL D. KOCUR Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1099 WDA 2013

Appeal from the Judgment of Sentence May 13, 2013
In the Court of Common Pleas of Warren County
Criminal Division at No(s): CP-62-MD-0000053-2013

BEFORE: BOWES, J., ALLEN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J. **FILED DECEMBER 17, 2013**

Paul Kocur appeals from the judgment of sentence imposed by the Court of Common Pleas of Warren County following his conviction for indirect criminal contempt[1] for violating an order entered pursuant to the Protection from Abuse Act.[2] After careful review, we affirm based on the opinion of the Honorable Maureen A. Skerda.

The trial court ably summarized the facts and procedural posture of this matter as follows:

> On November 7, 2012, [Kocur]'s mother, Mary A. Kocur, filed a Petition for Protection from Abuse, based on, among other things, [Kocur]'s past threats to shoot [Mary] and [Kocur]'s destruction of [his mother]'s bathroom door. That same day,

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[1] 23 Pa.C.S.A. § 6114.

[2] 23 Pa.C.S. §§ 6101 – 6117.

November 7, 2012, a Temporary Protection From Abuse Order (the "PFA") was issued, prohibiting contact between [Mary] and [Kocur], as well as several other protected parties, including [Mary]'s daughter, Connie Onoratti, who also happens to be [Kocur]'s sister. Although not at issue here, two weeks later, on November 21, 2012, following an agreement without a hearing on the instant matter, the Court entered a Final Protection From Abuse Order.

The Temporary PFA (as well as the Final PFA, not at issue here) included language forbidding [Kocur] from "contact[ing] [Mary], or any other person protected under this order, by telephone or by any other means, including through third persons." PFA, p. 1. The PFA provided "[Kocur] shall not abuse, stalk, harass, threaten, or attempt to use physical force that would reasonably be expected to cause bodily injury to [his mother] or any other protected person in any place where they might be found." PFA, p. 2, ¶ 1. The PFA also prohibited [Kocur] "from having ANY CONTACT with [Mary], either directly or indirectly, or any other person protected under this order, at any location..." PFA, p. 2, I 3 (emphasis in original). [Kocur] was also specifically prohibited from contacting [Mary], or any other person protected under this Order, by telephone or by any other means, including through third persons. PFA, p. 2, ¶ 4. In addition to Connie Onoratti, [Mary]'s daughter ([Kocur]'s sister), the PFA protected Angela and Tiffany Onoratti, [Mary]'s granddaughters ([Kocur]'s nieces).

On November 11, 2012, Trooper Anthony R. Kestle of the Pennsylvania State Police spoke with Connie Onoratti, sister of [Kocur] and a protected party under the November 7, 2012, Temporary PFA, and received information that [Kocur] was in violation of the PFA Court Order. Over six months later, on May 1, 2013, an arrest warrant was issued for [Kocur] for Contempt for Violation of the November 7, 2012, PFA Order. After a continuance at the request of [Kocur], the hearing on the PFA violation was held May 13, 2013.

At the hearing, the following facts were adduced. [Kocur] and his mother (Plaintiff in the PFA action) lived together on Lanning Hill Road, Sugar Grove, Pennsylvania. On November 7, 2012, the Warren County Sheriff served [Kocur] with notice of the PFA action, including a Temporary Protection from Abuse Order, proscribing conduct as outlined above. The Temporary PFA Order was time stamped at 4:12 p.m. November 7, 2012. At

> 8:00 p.m., that same evening, the PFA was served upon [Kocur] at his place of residence on Lanning Hill Road. However, [Mary] was not then present with [Kocur] in the Lanning Hill Road residence. Sometime after service of the PFA, while [Kocur] was gathering his things to depart from the Lanning Hill Road residence, although testimony was not clear exactly what time, [Kocur] was a party to a telephone call made by Josh Haney, a friend of [Kocur]'s. However, before answering the telephone call from Haney, the answering machine at the Lanning Hill Road residence picked up the call and began recording the conversation. [Kocur] subsequently told Haney that he was going to "get [his sister, Connie Onoratti]" and "sue her ass." [Kocur] also mentioned the PFA and the pending legal proceedings against him. Connie Onoratti, the sole witness for the Commonwealth in this proceeding, testified that she recognized [Kocur]'s voice on the recording as belonging to [Kocur], her brother. (However, the answering machine recording itself was not brought to court or admitted into evidence.) It was this answering machine message containing threats against Connie Onoratti that formed the violation of the PFA Order.

Trial Court Opinion, 7/12/13, at 2-3.

Following the hearing, the trial court found Kocur guilty of indirect criminal contempt for violation of a PFA. The court sentenced Kocur to ten days' to six months' imprisonment and costs and fines in the amount of $783.50. On June 6, 2013, Kocur, through his counsel, filed a timely notice of appeal. In response to an order from the trial court, Kocur filed a concise statement of errors complained of on appeal on June 24, 2013. ***See*** Pa.R.A.P. 1925(b).

On appeal, Kocur asks this Court to review whether the evidence was sufficient to sustain a conviction for indirect criminal contempt. Brief of Appellant, at 4. Kocur contends that the message he left on his mother's

answering machine was not an intentional or knowing act and that he did not act with wrongful intent.

"When reviewing a contempt conviction . . . we are confined to a determination of whether the facts support the trial court decision. We will reverse a trial court's determination only when there has been a plain abuse of discretion." ***Commonwealth v. Brumbaugh***, 932 A.2d 108, 111 (Pa. Super. 2007).

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [this] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.
>
> A charge of indirect criminal contempt consists of a claim that a violation of an Order or Decree of court occurred outside the presence of the court. Where a PFA order is involved, an indirect criminal contempt charge is designed to seek punishment for violation of the protective order. As with those accused of any crime, one charged with indirect criminal contempt is to be provided the safeguards which statute and criminal procedures afford. To establish indirect criminal contempt, the Commonwealth must prove: 1) the Order was sufficiently

> definite, clear, and specific to the contemnor as to leave no doubt of the conduct prohibited; 2) the contemnor had notice of the Order; 3) the act constituting the violation must have been volitional; and 4) the contemnor must have acted with wrongful intent.

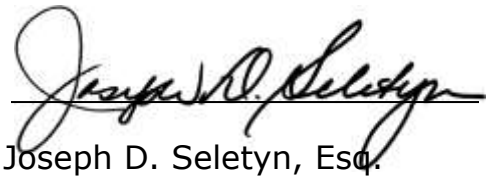
Id. at 109-10 (citations omitted).

The trial court properly concluded that the testimony and evidence presented was sufficient to sustain a conviction for indirect criminal contempt. Trial Court Opinion, 6/12/13, at 3-5. The Commonwealth's evidence established that: (1) the order was sufficiently definite, clear, and specific to Kocur as to leave no doubt of the conduct prohibited; (2) Kocur had notice of the order because he referenced it during the recording; (3) Kocur acted volitionally because he spoke with the intent to communicate ideas of his own free will while he was on his mother's phone in his mother's house; and (4) that Kocur acted with wrongful intent because he discussed conduct that he intended to carry out against a protected party despite knowing he was being recorded. ***Id***. at 110. Furthermore, the trial court noted in its opinion that it had the opportunity to observe Kocur and found his testimony to be wholly incredible. Trial Court Opinion, 6/12/13, at 5.

After reviewing the parties' briefs, the record, and the relevant case law, we conclude that Judge Skerda's well-reasoned opinion thoroughly and properly disposes of the question of sufficiency of the evidence. Accordingly, we affirm on the basis of the trial court's opinion, which counsel should attach in the event of further proceedings.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/17/2013

Appendix B

IN THE COURT OF COMMON PLEAS
OF THE 37th JUDICIAL DISTRICT OF PENNSYLVANIA
WARREN COUNTY BRANCH
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA

vs.

MD 53 of 2013
AD 598 of 2012

PAUL DAVID KOCUR

MEMORANDUM OPINION PURSUANT TO Pa.R.A.P. 1925(a)

Before the Court is the appeal of Paul David Kocur, hereinafter "Defendant." Following a hearing on May 13, 2013, Defendant was found guilty of Indirect Criminal Contempt for violation of a Protection From Abuse Order "PFA," issued November 7, 2012, pursuant to the Protection From Abuse Act, 23 Pa.C.S.A. § 6101 *et seq.* The Sentence Order was filed May 14, 2013, and sentenced Defendant to ten (10) days to six months in the Warren County Jail, with credit for time served, a fine of five-hundred dollars ($500.00) and the costs of prosecution. Defendant's total costs and fines amounted to seven-hundred eighty-three dollars and fifty cents ($783.50).

On June 12, 2013, Defendant, represented by Alan M. Conn, Assistant Public Defender of Warren County, filed a Motion to Proceed In Forma Pauperis. Said Motion was granted the same day. Also on June 12, 2013, Defendant appealed the Sentence Order of May 13, 2013, filed May 14, 2013. Defendant was ordered to serve a Concise Statement of Errors Complained of on Appeal pursuant to Pa.R.A.P. 1925(b), on June 17, 2013. Defendant filed his Concise Statement of Matters Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b) on June 24, 2013.

Defendant essentially complains of five (5) matters in his Statement of Matters Complained of on Appeal. First, Defendant notes that there is no indication that the answering machine message at issue threatened violence or any illegal act towards any protected party. Second, Defendant notes that there is no indication of the time that the message was left on the answering machine. Third, Defendant notes that the phone message was not directed toward a protected party. Fourth, Defendant notes that there is no evidence the message was intentionally left on the answering machine or that there was any intentional conduct by Defendant toward his

mother or sister. Fifth, Defendant notes that the recording was not saved or introduced into evidence, and thus appears to be invoking the Best Evidence Rule.

On November 7, 2012, the Defendant's mother, Mary A. Kocur, Plaintiff, filed a Petition for Protection from Abuse, based on, among other things, Defendant's past threats to shoot Plaintiff and Defendant's destruction of Plaintiff's bathroom door. That same day, November 7, 2012, a Temporary Protection From Abuse Order (the "PFA") was issued, prohibiting contact between Plaintiff and Defendant, as well as several other protected parties, including Plaintiff's daughter, Connie Onoratti, who also happens to be Defendant's sister. Although not at issue here, two weeks later, on November 21, 2012, following an agreement without a hearing on the instant matter, the Court entered a Final Protection From Abuse Order.

The Temporary PFA (as well as the Final PFA, not at issue here) included language forbidding Defendant from "contact[ing] Plaintiff, or any other person protected under this order, by telephone or by any other means, including through third persons." PFA, p. 1. The PFA provided "Defendant shall not abuse, stalk, harass, threaten, or attempt to use physical force that would reasonably be expected to cause bodily injury to Plaintiff or any other protected person in any place where they might be found." PFA, p. 2, ¶ 1. The PFA also prohibited Defendant "from having **ANY CONTACT** with Plaintiff, either directly or indirectly, or any other person protected under this order, at any location..." PFA, p. 2, ¶ 3 (emphasis in original). Defendant was also specifically prohibited from contacting Plaintiff, or any other person protected under this Order, by telephone or by any other means, including through third persons. PFA, p. 2, ¶ 4. In addition to Connie Onoratti, Plaintiff's daughter (Defendant's sister), the PFA protected Angela and Tiffany Onoratti, Plaintiff's granddaughters (Defendant's nieces).

On November 11, 2012, Trooper Anthony R. Kestle of the Pennsylvania State Police spoke with Connie Onoratti, sister of Defendant and a protected party under the November 7, 2012, Temporary PFA, and received information that Defendant was in violation of the PFA Court Order. Over six months later, on May 1, 2013, an arrest warrant was issued for Defendant for Contempt for Violation of the November 7, 2012, PFA Order. After a continuance at the request of Defendant, the hearing on the PFA violation was held May 13, 2013.

At the hearing, the following facts were adduced. Defendant and his mother (Plaintiff in the PFA action) lived together on Lanning Hill Road, Sugar Grove, Pennsylvania. On November 7, 2012, the Warren County Sheriff served Defendant with notice of the PFA action, including a

Temporary Protection From Abuse Order, proscribing conduct as outlined above. The Temporary PFA Order was time stamped at 4:12 p.m. November 7, 2012. At 8:00 p.m., that same evening, the PFA was served upon Defendant at his place of residence on Lanning Hill Road. However, Plaintiff was not then present with Defendant in the Lanning Hill Road residence. Sometime after service of the PFA, while Defendant was gathering his things to depart from the Lanning Hill Road residence, although testimony was not clear exactly what time, Defendant was a party to a telephone call made by Josh Haney, a friend of Defendant. However, before answering the telephone call from Haney, the answering machine at the Lanning Hill Road residence picked up the call and began recording the conversation. Defendant subsequently told Haney that he was going to "get [his sister, Connie Onoratti]" and "sue her ass." Defendant also mentioned the PFA and the pending legal proceedings against him. Connie Onoratti, the sole witness for the Commonwealth in this proceeding, testified that she recognized Defendant's voice on the recording as belonging to Defendant, her brother. (However, the answering machine recording itself was not brought to court or admitted into evidence.) It was this answering machine message containing threats against Connie Onoratti that formed the violation of the PFA Order.

As with any other criminal proceeding, Defendant may only be found guilty of the offense charged if the Commonwealth proves every element of the crime charged against him beyond a reasonable doubt. *Comm. v. Nelson*, 690 A.2d 728, 732 (Pa. Super. 1997). It is through this lens that the Court examines Defendant's allegations of error. To establish indirect criminal contempt, the Commonwealth must prove: 1) the order was sufficiently definite, clear, and specific to the contemnor as to leave no doubt of the conduct prohibited; 2) the contemnor had notice of the order; 3) the act constituting the violation must have been volitional; and 4) the contemnor must have acted with wrongful intent. *Comm. v. Walsh*, 36 A.3d 613, 619 (Pa. Super. 2012) (internal citations omitted).

Defendant's first item complained of on appeal is that there is no indication that the answering machine message at issue threatened violence or any illegal act towards any protected party. As outlined above, the PFA forbids *any contact* with a protected party, whether direct or indirect. Thus, it is not necessary to find a threat of violence or illegal act directed toward a protected party to find a violation of the PFA. A mere *contact* with a protected party is sufficient for a finding of a violation. The Court finds that contact occurred. The contact could reasonably

be adduced because Plaintiff, Defendant's mother, and Defendant resided together. Plaintiff was aware that Defendant had been served with the PFA and was free to return home when she listened to the answering machine message in which Defendant discussed his desire "to get" a protected party. Thus, Defendant contacted a protected party. Thus, the Court finds no grounds for relief in Defendant's first statement of error.

Defendant's second item complained of on appeal is there is no indication of the time the message at issue was left on the answering machine. However, based on both the testimony of Connie Onoratti, a protected party under the November 7, 2012, PFA and of Defendant, the conversation recorded on the answering machine contained reference to the fact that Defendant was being evicted from the Lanning Hill Road residence and then needed a ride away from the residence. Defendant acknowledged his eviction was as a result of the PFA Order. Thus, the PFA Order must have been served at some point *before* Defendant participated in his phone call discussing his need for a ride, which phone call also contained the elements of a violation of the PFA. Thus, because the timeline indicates Defendant made the threats at issue *after* he was served with the Temporary PFA, the Court finds no grounds for relief in Defendant's second statement of error.

Third, Defendant notes that the phone message was not directed toward a protected party. Just as direct communication of the threat between the defendant and the victim is not a required element of the crime of terroristic threats, *Comm. v. Kelley*, 664 A.2d 123 (Pa. Super. 1995), so too is direct communication not necessary for a violation of a PFA. *PFA of November 7, 2012; see also, Comm. v. Baker*, 766 A.2d 328, 330 (Pa. 2001). All that is necessary to constitute a violation of the PFA is that the threat somehow makes its way to the victim. Here, the threat was left on a protected party's answering machine, and referenced "get[ting]" another protected party. Although the answering machine was at a house that had heretofore been a shared residence of Defendant and his mother, Plaintiff, Defendant knew or should have known that the Plaintiff would listen to the messages on the answering machine. Therefore, the message was directed and communicated toward a protected party in the sense that it was left somewhere that a protected party would inevitably receive the message. Thus, the Court finds no grounds for relief in Defendant's third statement of error.

Fourth, Defendant notes that there is no evidence the message was intentionally left on the answering machine or that there was any intentional conduct by Defendant toward his mother

or sister. At the time of the hearing, the Court had the benefit of observing Defendant's demeanor in Court. Listening to Defendant's testimony, the Court found the testimony of Defendant at this hearing was wholly incredible. In *Walsh*, the Defendant there told a third party to tell a protected party that [the protected party] would be harmed if Defendant saw [the protected party.] *Walsh*, 36 A.3d at 619. The relaying of the threat through a third party was sufficient for a finding of contempt. The key in *Walsh* was Defendant knowingly and willfully made threatening or harassing statements to a third party to be relayed to [the victim] despite the terms of the PFA order; *and* that Defendant made those statements with wrongful intent. *Id.*

Here, Defendant acted volitionally in his communication with the third party, Josh Haney. Defendant spoke with the intent to communicate ideas of his own free will. Thus, Defendant acted volitionally. Undoubtedly, Defendant intended to speak and intended to communicate the words that formed the basis of the threat. Defendant shared a house with his mother, the protected party, and knew or should have known that he was being recorded on the answering machine. All parties involved acknowledged Defendant's voice was the voice on the answering machine message at issue. Therefore, identification is not at issue. Defendant knew his mother and sister were then living together and had recently obtained a PFA against him. Defendant knew he was in his mother's house. Defendant knew he was on his mother's telephone. Defendant must have known his message on the answering machine would be communicated to his sister, a protected party under the Temporary PFA with which he had just been served. Thus, Defendant intended a communication. Furthermore, Defendant discussed conduct which he intended to carry out against protected parties, i.e., an intention "to get" or "to sue" his mother and/or sister, protected parties. Thus, because the Court found Defendant was aware that he was being recorded, (Notes of Testimony, "N.T.," at page 17), the Court finds Defendant intended that his message reach the protected party, Connie Onoratti, based on the circumstances that existed at the house at the time Defendant was served with the PFA paperwork. The District Attorney elicited additional testimony from Ms. Onoratti that confirmed the existence of an ongoing acrimonious relationship between the siblings. The evidence indicated to the Court that the Defendant had made prior phone calls to his sister before November 7, 2012, and that this particular phone call was purposefully conducted.

Fifth, Defendant notes that the "recording was not saved or introduced into evidence," and thus appears to be invoking the Best Evidence Rule. However, Defendant does not

explicitly cite the Best Evidence Rule as grounds for an appeal in his Statement of Errors nor did he object to testimony about the answering machine recording at trial. Any issue not properly included in the Statement is deemed waived. Pa.R.A.P. 1925(b)(3)(iv); Court Order of June 17, 2013; *Comm. v. Lord*, 719 A.2d 306 (Pa. 1998). Any failure to object to allegedly improper testimony at a proceeding constitutes waiver. *Comm. v. Redel*, 484 A.2d 171, 175 (Pa. Super. 1984) (internal citations omitted). Thus, this Court does not address Defendant's fifth claim of error as the error was not preserved for appeal by timely objection at the hearing.

Thus, for the reasons stated above and on the record at the time of hearing, the Court finds no grounds for relief in Defendant's claims. No further opinion shall issue.

BY THE COURT:

MAUREEN A. SKERDA, P.J.
Date: July 12, 2013