NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. MATTHEW PATRICK GLASS Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1201 MDA 2012

Appeal from the Judgment of Sentence May 30, 2012
In the Court of Common Pleas of Adams County
Criminal Division at No(s): CP-01-MD-0000997-2012

BEFORE: MUNDY, J., OLSON, J., and STRASSBURGER, J.*

MEMORANDUM BY MUNDY, J.: Filed: February 8, 2013

Appellant, Matthew Patrick Glass, appeals from the May 30, 2012 judgment of sentence of six months' probation, entered following his conviction of indirect criminal contempt pursuant to the Protection from Abuse Act (PFA).[1] After careful review, we affirm.

The trial court has summarized the factual and procedural history of this case as follows.

> The [trial c]ourt entered a [PFA] Order on June 17, 2009, on behalf of the victim, Melissa Feezer. The PFA Order was entered by agreement and docketed at 09-S-878. Paragraph 2 of the PFA Order evicted and excluded Appellant from the residence located at

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* Retired Senior Judge assigned to the Superior Court.

[1] 23 Pa.C.S.A. §§ 6101-6117

136 Roberta Jean Avenue, Littlestown, Pennsylvania, 17340. Paragraph 3 of the PFA Order provided:

> Except as provided in Paragraph 5 of this order, Defendant is prohibited from having ANY CONTACT with Plaintiff either directly or indirectly, or any other person protected under this order, at any location, including but not limited to any contact at Plaintiff's or other protected party's school, business, or place of employment.

Finally, Paragraph 5 of the PFA provided for custody of J.G., Appellant and Ms. Feezer's son, and provided that:

> Primary physical custody of the minor child/ren is awarded to Plaintiff. Defendant shall have the following partial physical custody/visitation rights: Defendant shall have partial physical custody as the parties may from time to time agree. Contact with regard to Defendant's partial physical custody shall not be considered a violation of this Order.

The PFA Order expired on June 17, 2012.

On April 5, 2012, Officer James Spielman of the Littlestown Borough Police was on duty, in full uniform and in a marked patrol vehicle when he received a dispatch to 136 Roberta Jean Avenue. The dispatch indicated that there was a subject attempting to break into the residence, and there was yelling and screaming. When Officer Spielman arrived on scene, he exited his patrol vehicle and approached the residence. Officer Spielman observed Appellant exit the front of the residence located at 136 Roberta Jean Avenue, and Appellant ran to the rear of the building. Upon making contact with Appellant on the rear patio, Appellant did not say anything to Officer Spielman. Officer Spielman then made contact with Ms. Feezer and observed that the door frame of the residence at 136 Roberta Jean Avenue was broken out, with some screws

> laying on the floor and the door jam [sic] newly broken. …
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> On April 6, 2012, Appellant was charged with indirect criminal contempt under 23 Pa. C.S.A. § 6114(a), as a misdemeanor of the third degree. On May 30, 2012, a hearing occurred, at which in addition to Officer Spielman, Ms. Feezer testified. Ms. Feezer testified that earlier in the day on April 5, 2012, she cleaned out her closets and found some of Appellant's belongings. Ms. Feezer put Appellant's belongings on the patio of her residence and told Appellant he could come pick up his belongings. Ms. Feezer also told Appellant that if he arrived early, he could also see their son. However, Appellant arrived at the residence late, after Ms. Feezer had already put their son to bed. Appellant began banging on the door, and Ms. Feezer yelled at Appellant that his belongings were on the porch. Appellant continued to bang on the door, and Ms. Feezer continued to scream that his belongings were on the patio. During the course of this interaction, Appellant broke the door frame to the entrance of Ms. Feezer's residence.
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> Following the contempt hearing on May 30, 2012, Appellant was found in contempt of the June 17, 2009 PFA Order and was sentenced to six months['] probation. On June 5, 2012, Appellant filed his Motion for Reconsideration, and by Order dated June 20, 2012, Appellant's Motion for Reconsideration was denied. The instant appeal followed.

Trial Court Opinion, 8/2/12, at 1-3.

On appeal, Appellant raises the following issues for our review.[2]

> 1. Did the [trial] court [commit] an error of law when it applied a preponderance of the evidence

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[2] Appellant and the trial court have complied with Pa.R.A.P. 1925.

> standard rather than a proof beyond a reasonable doubt standard in a criminal contempt matter?
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> 2. Did the [trial] court abuse its discretion in determining that the Commonwealth had proven beyond a reasonable doubt that the [PFA] Order against Appellant was sufficiently definite, clear, and specific, where the Order contains contradictory paragraphs regarding his visitation and property rights?
>
> 3. Did the [trial] court abuse its discretion in determining that the Commonwealth had proven beyond a reasonable doubt that the PFA Order acted with wrongful intent where uncontradicted testimony from the victim indicated that Appellant was present on the property pursuant to an exception in the PFA Order granting Appellant rights to communicate with victim about, and to visit with, their minor child?

Appellant's Brief at 4.

Appellant asserts in his first issue that the trial court erred when, at the conclusion of the indirect criminal contempt hearing, it stated that based on the evidence presented it "finds by preponderance of the evidence that [Appellant] is in contempt of the Order." Appellant's Brief at 10, *citing* N.T., 5/30/12, at 15. We must first determine if this issue has been properly preserved.

"[W]here a trial court directs a defendant to file a concise statement of matters complained of on appeal, any issues not raised in that statement shall be waived." ***Commonwealth v. Bullock***, 948 A.2d 818, 823 (Pa. Super. 2008), *appeal denied*, 968 A.2d 1280 (Pa. 2009); ***see also*** Pa.R.A.P.

302(a) (providing "[i]ssues not raised in the [trial] court are waived and cannot be raised for the first time on appeal").

> It is well established that trial judges must be given an opportunity to correct errors at the time they are made. [A] party may not remain silent and afterwards complain of matters which, if erroneous, the court would have corrected.

Commonwealth v. Strunk, 953 A.2d 577, 579-580 (Pa. Super. 2008) (citations and internal quotation marks omitted). Instantly, this issue was not included in Appellant's Rule 1925(b) statement or raised before the trial court by contemporaneous objection or post-sentence motion. Consequently Appellant's issue is waived. Even if not waived, the trial court, in its Rule 1925(a) opinion has made clear that, notwithstanding its erroneous comment relative to the Commonwealth's burden of proof, it nevertheless applied a beyond a reasonable doubt standard in assessing the evidence presented at the May 20, 2012 hearing. Trial Court Opinion, 8/2/12, at 3.

Appellant's next two issues raise challenges to the sufficiency of the Commonwealth's evidence to prove the charge of indirect criminal contempt beyond a reasonable doubt. Appellant's Brief at 4. "A claim challenging the sufficiency of the evidence is a question of law." ***Commonwealth v. Widmer***, 744 A.2d 745, 751 (Pa. 2000).

> 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.

Commonwealth v. Walsh, 36 A.3d 613, 618-619 (Pa. Super. 2012), *quoting* ***Commonwealth v. Brumbaugh****,* 932 A.2d 108, 109–110 (Pa. Super. 2007) (citations omitted).

> 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. ***Commonwealth v. Padilla****,* 885 A.2d 994 (Pa. Super. 2005). "Where a PFA order is involved, an indirect criminal contempt charge is designed to seek punishment for violation of the protective order." ***Id.*** at 996. 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." ***Id.*** at 996–97 (citation omitted). 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. ***Commonwealth v. Ashton***, 824 A.2d 1198, 1202 (Pa. Super. 2003).

Brumbaugh, ***supra*** at 110.

Appellant challenges the Commonwealth's proof of only the first and fourth elements of proof for indirect criminal contempt. He first contends the PFA order was not "sufficiently clear and specific" of the conduct meant to be prohibited. Appellant's Brief at 7. He argues that the paragraph five exception to the no contact and exclusive possession provisions of the order "indicates that Appellant was given express permission to contact Ms. Feezer … as long as it was for the purpose of visitation with their minor son." ***Id.*** at 12. Appellant contends "[i]t would not make sense to grant Defendant an exception for 'partial physical/visitation rights' if Appellant is not allowed on the property at any time, even by agreement, to visit with or pick up his son." ***Id.*** at 15. "It is not reasonable for Appellant … to believe that [the grant of exclusive possession of the property to Ms. Feezer] would ban him from the property under every circumstance, even if he were acting within the Paragraph 5 exception regarding his minor son." ***Id.*** We disagree with Appellant's conclusions.

Appellant's argument mischaracterizes the trial court's conclusions and selectively cites from the evidence presented by the Commonwealth. Although couched in terms of whether the prohibitions in the order were clear, Appellant's argument is actually that the trial court should accept his assertion that his actions fell within the paragraph five exception. In so

doing, Appellant minimizes those actions. As cited in the history above, paragraph five of the PFA order allowed, as an exception to the clear no-contact and exclusive-possession provisions, for "partial physical custody [of the parties' minor child] as the parties may from time to time agree," and noted that "[c]ontact with regard to [Appellant's] partial physical custody shall not be considered a violation of this Order." PFA Order, 6/17/09, at 2, ¶5.

The trial court found that Ms. Feezer did agree Appellant could come to the residence to see his son that evening. However, Appellant did not come in the time period agreed upon and refused to leave with his belongings when requested. The trial court further found that Appellant's behavior of yelling and pounding on the door, breaking the doorjamb, while refusing to leave, in no way pertained to Appellant's partial physical custody. Trial Court Opinion, 8/2/12, at 5-6. It was that activity, and not his mere presence to see his son, that served as a basis for the finding of indirect criminal contempt.[3] Appellant ignores these findings and assumes his conviction was based on his mere presence at the residence to visit his child. Appellant's Brief at 13.

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[3] The trial court also found that Appellant's primary purpose in being at Ms. Feezer's residence was to pick up his belongings she had collected and invited him to retrieve. Trial Court Opinion, 8/2/12, at 5.

We conclude the trial court committed no error of law in determining that the June 17, 2009 PFA order was clear and unambiguous in prohibiting Appellant's presence at Ms. Feezer's residence at a time not agreed upon by her, in remaining on the premises despite her demands that he leave, and in proceeding to yell and pound on the door with sufficient force to break the front doorjamb. The exception to the no contact and exclusive possession provision contained in paragraph five of the PFA order was clear in its scope to times agreed upon by the parties and for the purpose of partial custody. We conclude the provision did not create an ambiguity that Appellant's behavior in this case was in any way encompassed by that exception.

Appellant next argues that the Commonwealth did not show that he acted with requisite wrongful intent. Appellant's Brief at 16. "It is imperative that trial judges use common sense and consider the context and surrounding factors in making their determinations of whether a violation of a court order is truly *intentional* before imposing sanctions of criminal contempt." ***Commonwealth v. Haigh***, 874 A.2d 1174, 1177-1178 (Pa. Super. 2005) (emphasis original), *appeal denied*, 887 A.2d 1240 (Pa. 2005). Additionally, "wrongful intent can be imputed by virtue of the substantial certainty that [one's actions will be] in violation of the PFA Order." ***Brumbaugh***, ***supra*** at 111.

Appellant contends, as in his previous issue, that Ms. Feezer testified she gave "Appellant explicit permission to come to her residence so that

they may discuss, and so that he could see, his minor child." Appellant's Brief at 16. He further contends his arrival to see his child "comports with the exception contained within Paragraph 5 … of the Order." ***Id.*** As discussed above, however, it is Appellant's arrival at a time **not** agreed to by Ms. Feezer, his remaining on the premises when asked to leave, and his ensuing harassing behavior that exceeded the scope of the paragraph five exception. Appellant's pretextual reliance on a purported intent to merely visit his child as invited to do by Ms. Feezer, does not negate his further intent regarding his subsequent actions.

We conclude the evidence supports the trial court's conclusion that Appellant possessed wrongful intent in violating the PFA order. Based on all the foregoing reasons, we affirm Appellant's May 30, 2012 judgment of sentence.

Judgment of sentence affirmed.