NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. ALFONS KEEFER Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 329 MDA 2013

Appeal from the Judgment of Sentence May 14, 2012
In the Court of Common Pleas of Northumberland County
Criminal Division at No(s): CP-49-CR-0001137-2010

BEFORE: DONOHUE, J., OTT, J., and PLATT, J.*

MEMORANDUM BY OTT, J.: **FILED MAY 05, 2014**

Alfons Keefer appeals from the judgment of sentence imposed on May 14, 2012, in the Court of Common Pleas of Northumberland County, followed by the denial of post-sentence motions on January 17, 2013. On February 13, 2012, a jury convicted Keefer of one count of theft by unlawful taking (movable property) and one count of obstructing administration of law or other law enforcement.[1] Keefer was sentenced to a term of four-and-one-half to 23 months of county imprisonment, followed by two years of consecutive probation. On appeal, he raises numerous evidentiary,

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. §§ 3921(a) and 5101, respectively.

constitutional, sufficiency, and sentencing arguments. Based upon the following, we affirm.

The trial court aptly set forth the facts as follows:

> The vehicle in question was a 2001 Ford F350 dual rear-wheel pickup truck owned by Joy Kulengusky that was valued originally in the $40,000.00 range. On February 4, 2008, Mrs. Kulengusky's husband, Scott Kulengusky, abandoned the truck after a City of Shamokin police officer attempted to execute a traffic stop.[1] Because the truck was blocking the flow of traffic, the police department contacted a towing business owned by [Keefer] and the truck was towed to [Keefer]'s business property.
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> [1] Mr. Kulengusky passed away prior to [Keefer]'s trial.
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> The next day or so the Kulenguskys tried to reach [Keefer] about the truck, and finally on February 7th [Keefer] returned their call to state that he was going away on vacation for a week. Meanwhile, the Kulenguskys never received a billing or information as to how to get some personal property out of the truck. Mr. Kulengusky told [Keefer] multiple times that he wanted to retrieve some personal property from the truck and "settle up" with [Keefer] in order to secure the return of the truck. The truck had been parked in by several other vehicles, which prevented the Kulenguskys from accessing it. At no time did [Keefer] provide the Kulenguskys with a bill for the towing and storage fees or otherwise inform them how they could retrieve their truck.
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> At the end of March 2008 the Kulenguskys noticed that the truck was no longer on [Keefer]'s business property. When the Kulenguskys asked where the truck was, [Keefer] told them "Ford Motor Company came and got the truck with all your belongings in it."
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> In reality, a representative of Ford Motor Credit spoke with [Keefer] concerning the truck and was informed that the towing and storage fees for the truck for three months were approximately $10,000.00. Because of a condition report previously performed on behalf of Ford Motor Credit, which indicated that the truck had some damage, Ford Motor Credit

> executed paperwork to release its lien on the truck and provided that paperwork to [Keefer].
>
> Then, in September 2008, one of Mr. Kulengusky's friends informed him that he saw the truck in [Keefer]'s garage, apparently having repairs made. This prompted the Kulenguskys to send [Keefer] a letter on September 21, 2008, by certified mail for the return of their belongings and truck. They received no response from [Keefer]. After receiving the letter, [Keefer] went into an expletive-filled rage on September 23, 2008, calling an individual that he was getting advice from on how to get a title from an "abandoned" vehicle and [telling] the individual that there was no way the Kulenguskys were getting their truck back. After receiving no response to their letter, the Kulenguskys eventually contacted the police. In addition, the police were told by Daniel Shingara that earlier in 2008, as an excavator digging out a garage for [Keefer] in an area where [Keefer] keeps towed vehicles, he saw the truck there with its distinctive dual wheels. Later, in the fall while hunting, he saw it at another property (the Cavanaugh property) under a tarp. [Keefer] had asked his friend, Shawn Cavanaugh, if he could store a vehicle at the Cavanaugh farm. [Keefer] placed the truck on the property and covered it with a tarp, leaving it there for several months. The police were given conflicting accounts by [Keefer], or on his behalf by his girlfriend, that Ford Motor Credit had repossessed it, that they had it but were getting title to it, and that they didn't know what happened to it or when it went missing. Following an investigation by the Shamokin City Police Department and the Pennsylvania State Police, charges were filed against [Keefer]. The present whereabouts of the truck are unknown.

Trial Court Opinion, 4/9/2013, at 2-3.

A two-day jury trial was held on February 10 and 13, 2012. As stated above, Keefer was found guilty of theft by unlawful taking and obstructing administration of law. On May 14, 2012, the trial court sentenced him to a term of four-and-one-half to 23 months of county imprisonment, to be followed by two years of probation. The court also ordered Keefer to pay

restitution to both Joy Kulengusky and Ford Motor Credit.[2] Keefer filed a post-trial motion on May 23, 2012, and requested a delay in disposition until a transcript could be prepared. He then obtained new counsel. An amended post-trial motion was filed on October 22, 2012, and a supplemental post-trial motion on November 19, 2012. By the time argument on the motions was scheduled, Keefer's post-sentence motions were denied by operation of law pursuant to Pa.R.Crim.P. 720(B)(3)(b). This appeal followed.[3]

Keefer now raises the following issues for our review:

1. Did the trial court commit reversible error when it over objection allowed into evidence the double hearsay statement of Joy Kulengusky and refused to strike the testimony and/or give a curative instruction?

2. Did the trial court commit reversible error by refusing to admit impeachment evidence in the form of photographs/video from Google Images?

3. Did the trial court commit reversible error by admitting into evidence a highly prejudicial wiretapped conversation between Tim Vincent and Alfons Keefer without first listening to it?

4. Did the trial court commit[] reversible error by denying defense counsel the opportunity to impeach Magisterial Judge John Gembic with a judicial conduct board letter tending to

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[2] Specifically, the court ordered Keefer to pay restitution in the amount of $2,100.00 to Joy Kulengusky and $32,500.00 to Ford Motor Credit.

[3] On February 19, 2013, the trial court ordered Keefer to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Keefer filed a concise statement on March 11, 2013. The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on April 9, 2013.

show that he was biased and giving untruthful testimony against Mr. Keefer?

5. Did the trial court's abdication of its role as an impartial evaluator of evidence deprive Mr. Keefer of his right to a fair trial in violation of the Fourteenth Amendment to the United States Constitution?

6. Did the trial court cause Mr. Keefer's right to a fair trial to be violated under the Fourteenth and Sixth Amendments of the United States Constitution by disallowing him to cross examine prosecution witnesses as to their bias?

7. Did the trial court commit reversible [error] in denying trial counsel's motion for acquittal on the theft by unlawful taking and obstructing the administration of law or law enforcement charges?

8. Did the trial court abuse its discretion in ordering the amount of restitution that it ordered paid?

Keefer's Brief at 4.

In Keefer's first argument, he claims the court erred in admitting a double hearsay statement by Kulengusky, in which she testified that her late husband told her that his unnamed friend saw their truck up on a lift in Keefer's garage and told the husband about its location. ***See*** Keefer's Brief at 17. He avers that the statement was offered for the truth of the matter asserted, which was the sole purpose of placing the truck in Keefer's possession and control, and no exception to the hearsay rule applied. ***Id.*** at 18. Moreover, Keefer contends the double-hearsay statement does not constitute harmless error because neither Kulengusky nor her late husband observed the truck on the lift. Lastly, he states that the probative value of the statement was outweighed by its prejudicial effect.

With respect to an admissibility of evidence claim, our standard of review is as follows:

> Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.
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> Judicial discretion requires action in conformity with law, upon facts and circumstances judicially before the court, after hearing and due consideration. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused.

Commonwealth v. Borovichka, 18 A.3d 1242, 1253 (Pa. Super. 2011) (citation omitted).

> Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement. As a general rule, hearsay is inadmissible, because such evidence lacks guarantees of trustworthiness fundamental to our system of jurisprudence. The rule against admitting hearsay evidence stems from its presumed unreliability, because the declarant cannot be challenged regarding the accuracy of the statement. However, certain exceptions "have been fashioned to accommodate certain classes of hearsay that are substantially more trustworthy than hearsay in general, and thus merit exception to the hearsay rule."

Commonwealth v. Kuder, 62 A.3d 1038, 1055 (Pa. Super. 2013) (citations omitted). Moreover, where proffered evidence in the form of an out-of-court statement contains another out-of-court declaration, both offered for the truth of the matters asserted, the proffered evidence is

considered "double hearsay." ***Commonwealth v. Yarris***, 731 A.2d 581, 592 (Pa. 1999). "In order for double hearsay to be admissible, the reliability and trustworthiness of each declarant must be independently established. This requirement is satisfied where each statement comes within an exception to the hearsay rule." ***Id.***

Kulengusky's direct examination testimony at issue is as follows:

> [Commonwealth]: Thank you, Your Honor. Miss Kulengusky, we were talking about what happened after you learned about Ford Motor Company repossessing your truck. What happened after that?
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> [Kulengusky]: We took it for granted that it was repossessed, so we just dealt with it and went on.
>
> [Commonwealth]: Did you, subsequent to that, learn that maybe Ford didn't repossess it?
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> [Kulengusky]: No, we thought they came and got it. We were -- you know, we didn't have any reason to think different.
>
> [Commonwealth]: Until when?
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> [Kulengusky]: Until – let's see. September, I think it was like the 21st, 22nd. I think it was the 21st. **One of Scott's friends, I don't know who it was, told him that they saw our truck in Mr. Keefer's garage up on the rack, or up in the air, and it was having work done on it.**
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> [Defense counsel]: Objection, Your Honor, hearsay. Move to strike the statement.
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> THE COURT: The objection was untimely.
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> [Defense counsel]: Thank you, Your Honor.
>
> [Commonwealth]: Would you tell us then, when you heard that, what did you do?

> [Kulengusky]: Well, he came home and told me. Okay. What we did is we wrote a letter to Mr. Keefer because we were kind of in shock, you know, like, all of a sudden you think it is probably -- I don't know was it six months or so. And then all of a sudden it is like, oh, my truck never went anywhere, that is really weird. So we wrote the letter to him stating that we heard that, you know, that you have the truck. It is in your garage, you're working on it. You know, we don't think this is fair. We want our truck back. We want our belongings, our truck. We said, please, you know, contact us. And we put the phone numbers in there. And we had the address on the letter. And that was the 1444 Pulaski in Coal Township. And we sent it certified letter. And it -- we got one of those little green slips back in the mail that he did receive it on -- I think it was September 23rd. And he signed it.
>
> [Commonwealth]: I'm going to show you Commonwealth's Exhibit Number 3. Do you recognize that?
>
> [Kulengusky]: Yes.
>
> [Commonwealth]: What is it?
>
> [Kulengusky]: That is the letter that we sent Mr. Keefer.

N.T., 2/10/2013 – 2/13/2013, at 58-59 (emphasis added).

The trial court found that this issue was waived on that basis that it was untimely. ***See*** Trial Court Opinion, 4/9/2013, at 7. Because our review rests solely upon a cold record, there is no indication that defense counsel did not make a timely objection. However, as the court explained:

> When reading a transcript of trial, it is impossible to ascertain how much time passed between questions, answers, and various other statements made on the record. This Court determined at trial that when the objection was made it was too late. [Keefer]'s present counsel was not there. In addition, after Kulengusky testified that she could not identify the friend who provided this information to her husband, she continued to provide testimony, uninterrupted by any objection.

Id. Therefore, we rely on the trial court's assessment of the timeliness of trial counsel's objection.

Moreover, even if counsel's objection was timely made, having reviewed the evidence presented, the trial court explained that it would have overruled any objections:

> In any event, a timely objection would still have been overruled as this testimony [was] admissible to explain why, after they believed the truck was repossessed, they again contacted [Keefer] for an explanation. Pa.R.E. 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted*." (emphasis added).[7] When viewed as a whole, it is clear that Kulengusky's testimony was not being offered to prove that [Keefer] actually had possession of the truck when Mr. Kulengusky received the information from his friend. Rather, the testimony was being offered to show the effect that it had on Mr. and Mrs. Kulengusky. After Mrs. Kulengusky's testimony concerning her husband's conversation with his friend, the Commonwealth's very next question was: "Would you tell us then, when you heard that, *what did you do*?" (Emphasis added). Mrs. Kulengusky responded: "Well, he came home and told me. Okay. What we did is we wrote a letter to Mr. Keefer …." Mr. Kulengusky's testimony cannot be considered hearsay when it was offered only to show what effect the conversation had on her and her husband (to write a letter of inquiry to [Keefer]) and not to prove that [Keefer] was in actual possession of the truck at that time.
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> [7] Subsequent to [Keefer]'s trial, Pa.R.E. 801(c) was amended and now defines hearsay as "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."

Id. at 8. Furthermore, as indicated by the trial court, after Kulengusky testified that she could not identify the friend who provided this information

to her late husband, she continued to provide testimony, uninterrupted by any objection, regarding the contents of a letter that she and her husband sent to Keefer on September 21, 2008 after receiving a tip on the whereabouts of their truck. N.T., 2/10/2013 – 2/13/2013, at 59. As Kulengusky summarized the letter, she indicated that she heard Keefer had the truck in his garage and that he was working on it. ***Id.*** This letter was admitted into evidence. ***See*** Commonwealth's Exhibit 3. This evidence is substantially similar to the testimony at issue and defense counsel did not oppose the admission of the letter. Therefore, any error regarding what the unidentified friend told Kuglensky's husband constituted, at most, harmless error,[4] and does not merit relief. ***See Commonwealth v. Housman***, 986 A.2d 822, 835 n.7 (Pa. 2009) (an improper evidentiary ruling is harmless if

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[4] We note the following:

> Where an [evidentiary] error is deemed to be harmless, a reversal is not warranted. Regarding the erroneous admission of evidence, harmless error exists where:
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> > (1) the error did not prejudice the defendant or the prejudice was *de minimis*; (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

(Footnote Continued Next Page)

the erroneously-admitted evidence was cumulative of substantially similar untainted evidence). Accordingly, Keefer's first claim fails.

In Keefer's second issue, he argues the trial court erred by refusing to review and admit impeachment evidence in the form of photographs/video from Google Street View Images. Keefer's Brief at 25. Specifically, Keefer wanted to use street view images of his property to contradict the testimony of one the Commonwealth witnesses, Daniel Shingara, who averred that he observed the truck on Keefer's property in October of 2008. ***Id.*** at 26. He asserts these images "would absolutely show the areas in which Mr. Keefer normally stored towed vehicles along the main road, and the Kulengusky[s'] truck was not there – period." ***Id.*** Lastly, Keefer contends there was a witness, Judy Smith, available to authenticate the photos and that this evidence was relevant, probative, and would not confuse the jury. ***Id.*** at 29.

By way of background, on the first day of trial, Shingara testified that he is a long-time friend of Keefer and was doing excavation work for Keefer on his property in early 2008. N.T., 2/10/2012-2/13/2012, at 154. In October of 2008, he noticed a silver Ford F350 pickup truck in a driveway

(Footnote Continued) ———————————

> ***Commonwealth v. Hutchinson***, 571 Pa. 45, 811 A.2d 556, 561 (Pa. 2002) (quoting ***Commonwealth v. Robinson***, 554 Pa. 293, 721 A.2d 344, 350 (Pa. 1999)).

Commonwealth v. Kuder, 62 A.3d 1038, 1053 (Pa. Super. 2013).

that went back behind the house and there were cars on either side of the truck. ***Id.*** at 157.[5] He stated that it had distinctive wheels and a California license plate. ***Id.*** at 154, 159. Shingara testified that he knew it was the Kulenguskys' truck based on damage to the tailgate. ***Id.*** at 155. No attempt was made to cross-examine Shingara using the Google Street View images at that time.[6]

On the second day of trial, Shingara was recalled as a witness. On direct, the Commonwealth asked Shingara two questions: (1) did the truck in Defense Exhibit Number 3 match the truck he saw at the Cavanaughs' property and (2) in 2007, did Keefer ask Shingara if he could store a vehicle on Shingara's property. ***Id.*** at 269-270. On cross, defense counsel asked, "Mr. Shingara, do you recall on Friday you testified that you saw the back end of the truck?" ***Id.*** at 270. Shingara testified that he saw the side and the back of the truck. Defense counsel then inquired, "All right. Mr.

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[5] Specifically, the Commonwealth asked him if the truck was on Keefer's main lot. ***Id.*** at 156. Shingara replied, "It was more by a house. There is a row of houses. And it was down from that a little bit is where we were digging. We were digging on the hill, so he could see down on it. And that is how I seen the truck." ***Id.*** at 157.

[6] Shingara testified that he subsequently saw the same truck behind his neighbor, Shawn Cavanaugh's garage with a blue tarp covering it while Shingara was hunting game. ***Id.*** at 157, 160. He stated he immediately recognized it as the missing Kulengusky truck. ***Id.*** at 158. Cavanaugh also testified at trial, averring that Keefer had asked Cavanaugh if he could store a vehicle at the Cavanaugh farm. ***Id.*** at 140. He stated Keefer placed the truck on the property and covered it with a tarp, leaving it there for several months. ***Id.*** at 142.

Shingara, when were you doing excavation work on Mr. Keefer's property?" ***Id.*** at 271. The Commonwealth objected, asserting that the question went beyond the scope of direct. During a sidebar, defense counsel then made the following request with respect Google Street View images:

> [Defense counsel]: Your Honor, Mr. Shingara already testified that the way he knows this truck, the one he saw on the lot, was that he recognized it prior on Mr. Keefer's lot. Rather than having more testimony on how he recognizes the truck, we can now present photographic evidence of Mr. Shingara's operation, putting when he did the excavation, his presence at it. And we can pan around and show that [the] truck was not on the lot at any given time that Mr. Shingara was doing his work. We can walk the jury through the street.
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> [The Commonwealth]: It is beyond the scope -- he could have done that when [Shingara] was called originally. I asked him two questions. Is this the truck you saw at the Cavanaugh[s']; and B, whether or not he stored a vehicle of Keefer's at his house.
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> THE COURT: The truck you asked about, was a different –
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> [The Commonwealth]: A different truck.
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> THE COURT: A totally different truck. There wasn't really any testimony about the truck in question, as I recall.
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> [The Commonwealth]: No.
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> THE COURT: I'll sustain the objection.

Id. at 271-272.

Subsequently, after the Commonwealth rested, and during another sidebar conference, defense made an additional request for admission of the Google Street View Images. The following exchange occurred:

> [Defense counsel]: Judge, if I may, there is one other issue that maybe we can get resolved ahead of time. And I just learned about this last night at about quarter to 7, otherwise we would have dealt with it before now. Apparently, as I believe I mentioned, Google Maps photographed this area with their street view, which allows us to actually see the area. And the interesting thing about when [Google's] car passed by is it happens to be when Danny Shingara is doing work on the property. So what we can do is walk Mr. Shingara through, have him identify that those are his vehicles, that was the project he was on. And we can also have Judy [Smith] do this as well because she is familiar with it. Have him walk us down the street and look at [Keefer]'s property. If he saw the vehicle, as he claims, he could tell us where it is.
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> [The Commonwealth]: The vehicle was towed by [Keefer] way out there behind his house. So, of course, we can't see it.
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> [Defense counsel]: That is where he said he saw it?
>
> [The Commonwealth]: Yes.
>
> [Defense counsel]: That is where [Shingara] said he saw it when he was working down here?
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> [The Commonwealth]: Correct. Because you notice there is no other vehicles on [Keefer]'s lot. He had them moved all the way up there.
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> THE COURT: The source of your evidence is Google?
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> [Defense counsel]: Google Maps.
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> THE COURT: We're not going to go there.

Id. at 294-295.

In its Rule 1925(a) opinion, the trial court set forth the following rationale for precluding the Google Street View Images:

> The request by [Keefer]'s counsel on the second day of trial to use Google Street View was certainly unexpected. The proffer made was to use the photos (which simulate a video)

from the Google website taken from the street upon which [Keefer]'s property fronted that was captured on a day during the period of time when a Commonwealth witness indicated that he saw the subject truck on the premises. The contention was that this was proper for impeachment purposes in that the website view does not show the truck.

[Keefer]'s counsel was properly not allowed to proceed as intended. . . . The Court's concern with the request was two-fold: (1) authentication as it was an unfamiliar technology and use of Google Street View was unknown to the undersigned (so surely there were jurors who would likewise have to be initiated to it for the first time), so who would be the proper person to set a foundation to understand what defense counsel wanted to show the witness; and (2) the probative value in contrast to prejudice to the Commonwealth of such evidence.

Perhaps certain websites present information that has been readily accepted and certain, for example, Google Maps, that authentication can be disposed with through judicial notice.[3] One can marvel at the technology that Google has invented and applied to create Google Street View, which launched officially in 2007 and was originally only available to show five cities (only New York and Miami on the east coast) (the cameras used back then were 5 megapixels, now they are 75 megapixels).[4] It must be kept in mind that the relevant imaging for the testimony of Shingara was early 2008. Google's Street View is just that – a view from the street. A car outfitted with sophisticated technology drives down a street, capturing photos and coordinating that imagery with the location's GPS coordinates and street address. Later an individual can use Google's Street View technology on Google's website by inputting a particular address and then viewing images as if they were standing on the street at that location, or even walking up and down the street.[5] So while there are images for the jury to see, just as with any photographic evidence, a proper foundation is still required under the Rules of Evidence for admissibility. Something more is required to establish a proper foundation than just showing the witness the website on an iPad with the request that the witness stroll down the replicated street on a virtual tour.

[3] "We take judicial notice of a Google map and satellite image as a 'source whose accuracy cannot reasonably be questioned,' at least for the purpose of determining the

general location of the [defendant's] home. Fed.R.Evid. 201(b)." *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012).

[4] http://techcrunch.com/2013/03/08/inside-google-street-view-from-larry-pages-car-to-the-depths-of-the-grand-canyon

[5] http://maps.google.com/help/maps/streetview/learn/cars-trikes-and-more.html

Aside from the foundation issues relating to authenticating the images, the evidence was inadmissible in any event due to the limited probative value here. Shingara testified that he saw the truck on [Keefer]'s property while he was performing excavation work there in early 2008. This was after [Keefer] told the owner of the truck that it was not in his possession, but it was taken by Ford Motor Credit. [Keefer] now argues that if he had been permitted to introduce evidence using Google Street View it would have shown that the truck was not on [Keefer]'s property at the time Shingara was performing the excavation work.

Here, no witness at this trial testified that the truck could be seen on [Keefer]'s property *from the street view*. There was no evidence that the truck was visible from the street when Shingara was doing his excavation work. Allowing the jury to view the Google Street View images for the street facing [Keefer]'s property is fraught with the limits of the technology, *i.e.*, it only captures where the cameras are pointing as they pass a certain location and it would allow the jury to make an impermissible conclusion that just because the truck was not visible on Google Street View, the truck was not on [Keefer]'s property. In light of the fact that there was no testimony that the truck was visible from the street, the limited probative value of the evidence would have been outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury.[6] *See* Pa.R.E. 403.

[6] At the time of [Keefer]'s trial, Pa.R.E. 403 stated: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Pa.R.E. 403 was subsequently amended and

> now states: "The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Trial Court Opinion, 4/9/2013, at 4-7.

Keeping our standard of review in mind, we agree with the trial court's preclusion of the Google Street View Images evidence based on the following:

First, at trial, the admission of the evidence became a question of timeliness for the court. ***See*** N.T., 2/10/2012-2/13/2012, at 271-272. When defense counsel first requested to introduce the evidence, it was on the second day of trial after the Commonwealth recalled Shingara as a witness to ask him two questions. Both of those questions were not related to Shingara's observation of the Kulengusky truck on Keefer's property. When defense counsel attempted to introduce the evidence again, Shingara had already been dismissed from the stand. ***Id.*** at 294-295. Therefore, the trial court was within its discretion to sustain the objection. ***See*** Pa.R.E. 611(b) ("Cross-examination of a witness … should be limited to the subject matter of the direct examination and matters affecting credibility").

Moreover, even if the evidence was timely introduced, as the court noted in its opinion, there were foundational issues related to authentication of the images and inadmissibility due to the limited probative value. ***See*** Trial Court Opinion, 4/9/2013, at 6.

> Before evidence may be admitted, it must be authenticated. Pennsylvania Rule of Evidence 901 governs the authentication of evidence. Rule 901 states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Pa.R.E. 901(a).

Commonwealth v. Smith, 47 A.3d 862, 865 (Pa. Super. 2012) (citation omitted), *appeal denied*, 60 A.3d 536 (Pa. 2012).

With respect to authentication, Keefer baldly argues there was a witness, Judy Smith, who was available at trial to authenticate the photos. Keefer's Brief at 26. However, he merely states that she was available and does not explain her familiarity or knowledge of Google or its Street View software.[7] As such, Keefer's argument does not demonstrate that Smith was a qualified witness to authenticate the images. ***See*** Pa.R.E. 901.

Furthermore, the evidence of the Google Street View Images lacked any probative value as it did not prove or disprove that the truck was on Keefer's lot. ***See*** Pa.R.E. 401; ***Commonwealth v. Serge***, 837 A.2d 1255, 1260-1261 (Pa. Super. 2003) ("Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or tends to support a reasonable inference or proposition regarding a material fact."), *aff'd*, 896 A.2d 1170 (Pa. 2006), *cert. denied*,

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[7] Moreover, it is unclear how Smith would have authenticated the Google images as she was the daughter of Keefer's girlfriend. N.T., 2/10/2012-2/13/2012, at 296. At trial, her testimony consisted of stating in April of 2008, she was at Keefer's garage when the Kulenguskys approached her and asked if they could retrieve the contents of the truck. ***Id.*** at 297-298.

549 U.S. 920 (2006). Shingara did not testify that he could see the truck from the street. Rather, he stated that he observed it behind a row of homes. N.T., 2/10/2012-2/13/2012, at 157. Therefore, the trial court properly concluded that the limited probative value of the evidence would have been outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury. ***See*** Pa.R.E. 403; ***Serge***, ***supra*** ("Relevant evidence may nevertheless be excluded 'if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'"). Accordingly, the court did not abuse its discretion in failing to admit the Google Street View Images, and Keefer's second argument fails.

In his third evidentiary issue, Keefer contends the court committed reversible error in admitting a wiretap conversation between himself and a Commonwealth witness, Timothy A. Vincent, "because it was wholly irrelevant to proving or disproving Mr. Keefer's guilt." Keefer's Brief at 30. Keefer claims the court never listened to the wiretap evidence and just accepted the Commonwealth's position that Keefer is suggesting Vincent lie on his behalf at trial was a "a jury question." ***Id.*** He states the taped conversation demonstrated that he never requested Vincent to lie at trial but rather, he and Vincent were talking about a truck, and not the stolen truck in question. ***Id.*** at 31. Moreover, he alleges Vincent never stated that he

saw the Kulengusky truck and that could not have readily identified it given that he saw the truck four to five years prior to the incident. Therefore, Keefer argues the evidence was not relevant and therefore, not admissible. Likewise, he states that admitting this evidence was not harmless error because "in this weak, circumstantial case with no overwhelming evidence of guilt, full of inadmissible hearsay, it allowed the Commonwealth to suggest that Mr. Keefer was someone of bad character, who would get someone to lie for him[.]" ***Id.*** at 32.

As background, Vincent is an inspection mechanic and was originally subpoenaed by the defense to testify. Over the July 4th, 2008, holiday weekend, he had observed a vehicle being removed from Keefer's impound lot, but it was a black truck and not a silver truck like the one at issue. N.T., 2/10/2012-2/13/2012, at 224-225. However, Vincent subsequently contacted the state police and agreed to cooperate with the Commonwealth in this case by consenting to having a phone conversation with Keefer recorded on February 8, 2012.

Prior to Vincent taking the stand, a sidebar conference was held where defense counsel objected to the recorded conversation between Keefer and Vincent, stating, "I'm not sure how it tends to prove or disprove that Mr. Keefer actually took the truck or used a document in some odd way which he is accused of doing." ***Id.*** at 207. The Commonwealth responded Vincent was "on the phone with Keefer regarding this case and the truck.… [Keefer]

is actually trying to suggest, and it is a jury question, that he should lie." ***Id.*** The court found the conversation could be introduced, stating, "That is going to be up for the jury to determine what significance they have with all that." ***Id.*** at 208.

Vincent then took the stand and testified that he agreed to work with the Commonwealth with respect to this case by allowing police to intercept his phone conversation with Keefer on February 8, 2012. ***Id.*** at 209. The recorded phone conversation was played for the jury to hear. ***Id.*** at 212-223. The relevant part is as follows:

> TIMOTHY VINCENT: All right. The other thing I want to go over is when I go to testify, I'm going to testify I seen a truck. The more I think about it, the more I remember it, you know, this is like four or five years ago now, but I think -- I'm pretty sure it was black with a gray tailgate. I'm not a hundred percent sure anymore. Hello.
>
> …
>
> ALFONS KEEFER: It was silver with a white tailgate is what it was.
>
> TIMOTHY VINCENT: I can't -- you know, like I said, it has been so long ago, I can't even remember anymore.
>
> ALFONS KEEFER: Yeah, it was a silver dually with a white tailgate. And actually the truck was a piece of shit. They had the God damn thing – the freaking taillights were taped in with scotch tape. Every freakin body panel on it was smashed. I mean, it was just a piece of shit truck.
>
> …
>
> TIMOTHY VINCENT: I remember – I think it was a black Ford dually. I think it might have been a Cab Plus. I'm pretty sure it

had an off-colored tailgate. Like a gray tailgate or something. That is what I think -- that is what I remember.

ALFONS KEEFER: Yeah. Well, this was one here had the grayish color, sliver. And it had a white tailgate on it is what it was.

…

TIMOTHY VINCENT: But, honestly, I can't remember a silver gray or whatever.

ALFONS KEEFER: Well, they're going to show you pictures of it over there, is what they're going to do. And they're going to say, [i]s this the truck. And, like I said, the one that they're whining about was that grayish color, silver fuckin dually.

TIMOTHY VINCENT: Okay. Because the one I'm thinking, if I'm remembering, the one I'm remembering is the black, like a black truck with an off-color tailgate.

…

ALFONS KEEFER: But like I said, the one that they're bitching about is this silver fuckin dually. And it had a white tailgate on it that was banged up. Because the whole fucking truck was banged up. It had bald tires on it. It was a real piece of shit.

TIMOTHY VINCENT: What I'm getting at is if I go in there and say, you know, and testify to the fact that I'm – in my mind, I think it was a black one, that is going to hurt you.

ALFONS KEEFER: Right. So, I don't know. But, you know, that is what it was. It was that fuckin gray, silver color one. And it had the white tailgate.

TIMOTHY VINCENT: Because what I am honestly remembering is the black truck with an odd tailgate. That is what I remember.

ALFONS KEEFER: I don't know.

…

TIMOTHY VINCENT: Okay. Because -- because honestly, you know if I go in there and testify to what I remember, and what I -- I'm hundred percent sure of what I saw --

ALFONS KEEFER: **Yeah, I mean as far as color wise, you don't really have to tell them the color wise, I don't think. It was a dually.**

TIMOTHY VINCENT: What I'm trying to get to you is that if I say it's black, you know, or dark blue or whatever --

ALFONS KEEFER: Yeah.

TIMOTHY VINCENT: But a different color tailgate, that's going to hurt you.

ALFONS KEEFER: Yeah. Well, I don't know.

TIMOTHY VINCENT: So I don't know -- that's where I'm at. I'm just trying to get to the point where --

ALFONS KEEFER: Yeah. Well, like I said, that truck disappeared. It was like the beginning of July in '08…. And it was right after I got the paperwork from Ford. And I went up to [Magistrate Judge] Gembic, because I asked my other lawyer, too, because they called him today and said to him about it. And so I called -- he said you gave him the truck. No, I didn't. What he told me was to go to Gembic and get a fuckin writ on it for a sheriff's sale. And I did that. And I told Gembic that we were going away. He knew that. And we come back and the fuckin truck was gone.

…

TIMOTHY VINCENT: I just don't want to get in a spot where if I go in and testify this truck is a different color --

ALFONS KEEFER: Yeah.

TIMOTHY VINCENT: -- than what they're saying it is, it's going to hurt you.

ALFONS KEEFER: Yeah. Well, they're going to show a picture of the truck. I can tell you that right now. They're going to say,

> well, is this the truck. Like I said, the pictures that they have of it is it's a dark grayish color, silver, with the fuckin white tailgate on it. That's the truck.
>
> TIMOTHY VINCENT: All right. Because I feel – or if you feel, it isn't going to hurt you, you know.
>
> ALFONS KEEFER: I don't know. You're going to have to talk to [my counsel] on that and see what he says.

Id. at 214-222 (emphasis added).

> This Court has long recognized that any attempt by a defendant to interfere with a witness's testimony is admissible to show a defendant's consciousness of guilt. ***See***, ***e.g.***, ***Commonwealth v. Johnson***, 542 Pa. 384, 398-99, 668 A.2d 97, 104 (1995) (concluding that a witness's testimony that a defendant offered him a bribe not to testify at trial was admissible to show the defendant's consciousness of guilt); ***Commonwealth v. Goldblum***, 498 Pa. 455, 472, 447 A.2d 234, 243 (1982) (citing cases for the proposition that the Commonwealth may demonstrate consciousness of guilt through attempts by a defendant to intimidate or influence a witness).

Commonwealth v. Johnson, 838 A.2d 663, 680 (Pa. 2003), *cert. denied*, 543 U.S. 1008 (2004).

Here, the trial court found the following:

> During the phone call, Vincent specifically discusses his recollection of observing a vehicle that he saw being removed from [Keefer]'s premises, a dual-wheel truck. He wanted [Keefer] to know he was unsure it was the subject vehicle due to the color. The audio tape revealed what may be construed as an attempt by [Keefer] to influence Vincent's testimony. When Vincent expressed concerns about testifying to what he truthfully remembered and the detrimental effect it might have on [Keefer]'s case, [Keefer] stated: "Yeah, I mean as far as color wise, you don't really have to tell them the color wise, I don't think. It was a dually." This was for the proper evaluation of the jury, whether [Keefer] attempted to influence the testimony of a witness is certainly relevant during that defendant's prosecution. Pa.R.E. 401.

Trial Court Opinion, 4/9/2013, at 9 (footnote omitted).

We agree with the trial court's rationale. Based on the testimony in *toto*, it is apparent that Keefer's statement to Vincent about the color of the truck was with respect to the truck at issue and was intended to influence Vincent's testimony at trial. Accordingly, the wiretap recording was relevant in demonstrating Keefer's consciousness of guilt. ***See Johnson***, ***supra***.[8] Therefore, the trial court did not err in admitting this evidence and Keefer's third argument fails.

Next, Keefer argues the trial court committed reversible error by denying counsel the opportunity to impeach Magisterial District Judge John Gembic with a judicial conduct board letter. Keefer's Brief at 33. Specifically, Keefer claims the letter showed that Magistrate Judge Gembic was biased and provided untruthful testimony against Keefer. He states there was no reason to exclude this impeachment evidence as it was a public record that directly contradicted Magistrate Judge Gembic's testimony.

By way of background, Magistrate Judge Gembic owns an auto dealership and is a licensed inspection mechanic. The Commonwealth offered him as an expert in buying and selling vehicles. N.T., 2/10/2012-

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[8] Moreover, we note that even if this wiretapped testimony was erroneously admitted, it was not prejudicial because when viewing the conversation as a whole, there was only one significant statement that could be interpreted as attempting to influence the witness.

2/13/2012, at 116. Magistrate Judge Gembic testified that he had a congenial relationship with Keefer. ***Id.*** at 112. He stated that between February and April of 2008, he saw the Kulengusky truck on Keefer's lot and valued it at $20,000.00. ***Id.*** at 113. Magistrate Judge Gembic testified that Keefer asked him how a person obtains title for an abandoned vehicle and he explained the procedure to Keefer. ***Id.*** at 117-120.[9]

Moreover, with respect to the issue at hand, Magistrate Judge Gembic stated that on August 29, 2009, Keefer filed a complaint with the Judicial Conduct Board, alleging that because the judge and Keefer were both involved in the towing business, there was a conflict of interest. ***Id.*** at 130. Magistrate Judge Gembic went before the board on September 22, 2010. He stated that some of the averments in Keefer's complaint were found to be inaccurate and therefore, he entered a settlement with the board, called a letter of counsel warning, to have it dismissed, and the case was closed. ***Id.*** On cross-examination, defense counsel attempted to introduce "**a letter to [Keefer] describing the discipline that was imposed**, describing the severity, and the nature of it" because he complained that Magistrate Judge Gembic was "mischaracterizing the actions of the Judicial Conduct Board." ***Id.*** at 133 (emphasis added). The Commonwealth objected and a sidebar

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[9] Furthermore, the judge stated that on September 23, 2008, he received a letter and an enraged phone message from Keefer concerning the truck and the Kulenguskys. ***Id.*** at 127-129.

conference was held. Because the author of the letter was not present for the Commonwealth to cross-examine, the trial court did not allow defense counsel to introduce the letter but did permit counsel to ask Magistrate Judge Gembic about his understanding of the events. ***Id.*** at 133-134. Defense counsel then cross-examined the judge about the letter. Magistrate Judge Gembic testified the board was not happy with the appearance of what was complained of and he voluntarily agreed to refrain from towing activity in the future. ***Id.*** at 135.

Generally, "[t]he credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these rules." Pa.R.E. 607(b). Nevertheless, the comment to Rule 607 notes that "there are limits on the admissibility of evidence relevant to the credibility of a witness imposed by these rules. For example, Pa.R.E. 403 excludes relevant evidence if its probative value is outweighed by danger of [confusing the issues.]" Pa.R.E. 607, Comment.

Here, the trial court found the following:

> The proceeding involving this board is confidential by law. In addition, the sanction the witness faced as a result of the complaint was a private one rather than public. [Keefer] was allowed to cross-examine the witness about the complaint and the disciplinary action taken against him, but to introduce the letter received by [Keefer] would only serve to confuse the jury, who as lay people would not be familiar with this process that was required to be confidential. [Keefer] achieved the showing of possible bias and motive of ill will that [the] witness could harbor against him by the allowable testimony presented at the trial. The letter itself deserved proper confidential consideration by this Court.

Trial Court Opinion, 4/9/2013, at 9-10.

We agree with the trial court's rationale. First, there was an issue with regard to proper authentication[10] where Keefer failed to present any evidence at trial, or in his argument on appeal, that the letter could be properly authenticated. Second, as the trial court noted, this was a confidential matter and because the letter was directed to Keefer, and not to Magistrate Judge Gembic, the admission of the letter would only serve to confuse the jury. Lastly, and most importantly, the trial court allowed Keefer to cross-examine Magistrate Judge Gembic about the complaint and the disciplinary action taken against him; thereby demonstrating any potential bias. Accordingly, we conclude the court did not abuse its

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[10] "Before evidence may be admitted, it must be authenticated." ***Smith***, ***supra***. Moreover,

> [a] document may be authenticated by direct proof, such as the testimony of a witness who saw the author sign the document, acknowledgment of execution by the signer, admission of authenticity by an adverse party, or proof that the document or its signature is in the purported author's handwriting. **See** *McCormick on Evidence*, §§ 219-221 (E. Cleary 2d Ed. 1972). A document also may be authenticated by circumstantial evidence, a practice which is "uniformly recognized as permissible." **Commonwealth v. Brooks**, 352 Pa. Super. 394, 508 A.2d 316 (Pa. Super. 1986)[.]

Commonwealth v. Koch, 39 A.3d 996, 1004 (Pa. Super. 2011). Here, for example, Keefer did not present the author of the letter to authenticate it.

discretion by refusing to admit the evidence of the judicial conduct board letter that was sent to Keefer.

In Keefer's fifth argument, he claims the trial court violated his right to a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution based on the following: (1) by not allowing him to cross-examine Magistrate Judge Gembic as to his potential bias *via* the judicial conduct board letter; and (2) by precluding the Google photographs and videos. We note that Keefer is essentially reiterating his second and fourth arguments, which were analyzed above. Because we concluded that the trial court did not err and/or abuse its discretion with respect to these issues, we need not address this claim further.

In Keefer's sixth argument, he argues the trial court abdicated its role as an impartial evaluator of the evidence by "utterly failing to look at or review the evidence" and by accepting "wholesale the Commonwealth's version of what the evidence showed without ever reviewing it." Keefer's Brief at 40-41. Specifically, he states the trial court improperly sustained two objections by the Commonwealth regarding the Google Street View Images evidence and permitted Vincent to testify over defense objection. ***Id.*** at 42. Moreover, he contends the trial court failed to address his motion to strike the double hearsay testimony of Joy Kulengusky. ***Id.*** at 43.

Generally,

> "[a] trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or

> whenever he believes his impartiality can be reasonably questioned." ***Commonwealth v. Goodman***, 454 Pa. 358, 311 A.2d 652, 654 (Pa. 1973). It is presumed that the judge has the ability to determine whether he will be able to rule impartially and without prejudice, and his assessment is personal, unreviewable, and final. ***Commonwealth v. Druce***, 577 Pa. 581, 848 A.2d 104, 108 (Pa. 2004). "Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overturned on appeal but for an abuse of discretion." ***Commonwealth v. Abu-Jamal***, 553 Pa. 485, 720 A.2d 79, 89 (Pa. 1998).

Commonwealth v. Blakeney, 946 A.2d 645, 662 (Pa. 2008), *cert. denied*, 555 U.S. 1177 (2009).

With respect to this claim, the trial court stated:

> [Keefer]'s allegation that the undersigned failed to act in a fair and impartial manner during his trial will not be dignified by any discussion herein other than to note that a complete review of the record confirms that any objections raised by defense counsel at trial were sustained whenever they were proper objections. Moreover, at the conclusion of the Commonwealth's case, the Court dismissed the charges against [Keefer] of Receiving Stolen Property and Tamper With/Fabricate Physical Evidence.

Trial Court Opinion, 4/9/2013, at 4 n.2.

We agree. None of the allegations raised by Keefer could lead a reasonable person to question the trial court's impartiality. As analyzed above, the court did not err or abuse its discretion with respect to those evidentiary determinations. Moreover, we note that Keefer does not argue or allege that any comments made by the trial court improperly persuaded the jury's findings. Accordingly, Keefer's sixth argument fails.

In Keefer's penultimate claim, he contends the trial court erred by failing to grant his motion for judgment of acquittal on the theft by unlawful taking and obstructing the administration of law or law enforcement charges because the evidence at trial was insufficient to prove the elements of the crimes beyond a reasonable doubt. Keefer's Brief at 45. Specifically, he asserts that there "was no[] credible, admissible evidence showing that Mr. Keefer ever unlawfully exercised control over the allegedly stolen Pick-up Truck. Likewise, there was no evidence Mr. Keefer intended to deprive the Kulenguskys of their truck." ***Id.*** He points to the following as unreliable evidence based on contradictions and bias: (1) the truck at issue was initially taken lawfully under the direction of the police to tow the vehicle; (2) Magistrate Judge Gembic's testimony that placed the truck in Keefer's possession was biased because Keefer filed a complaint against him with the judicial conduct board; and (3) Shingara's testimony that placed the truck in Keefer's possession, in which he stated that he saw a California license plate on the truck, was contradicted by Police Officer Raymond Siko's testimony that the officer removed a California license plate from the truck and the Ford appraiser, George McKinney's testimony that he did not remember seeing any license plate on the truck. Moreover, Keefer states that the truck went missing and was never found in his possession. ***Id.*** at 45-46.

Our standard of review regarding the denial of a motion for judgment of acquittal is as follows:

> A motion for judgment of acquittal challenges the sufficiency of the evidence to sustain a conviction on a particular charge, and is granted only in cases in which the Commonwealth has failed to carry its burden regarding that charge.
>
> 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 the above 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. Hutchinson, 947 A.2d 800, 805-806 (Pa. Super. 2008) (citation and emphasis omitted), appeal denied, 980 A.2d 606 (Pa. 2009).

The Crimes Code defines theft by unlawful taking as follows: "(a) **Movable property.**— A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof." 18 Pa.C.S. § 3921(a).

Obstructing administration of law is defined as follows:

> A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any

> other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

18 Pa.C.S. § 5101.

Here, the record reveals the following: City of Shamokin police officers contacted Keefer on February 4, 2008 to tow a disabled truck, with a California license plate, that belonged to the Kulenguskys. N.T., 2/10/2012-2/13/2012, at 34-35. After learning Keefer had towed the truck, the Kulenguskys repeatedly contacted Keefer to find out how they could retrieve the truck. ***Id.*** at 47. Keefer eventually called them and said that he was going to be going away on vacation, the truck was secure, and he would call them back when he returned. ***Id.*** at 51. Subsequently, the Kulenguskys went to Keefer's garage and Keefer told the husband that they owed money and "needed to talk with the credit company and try to make a deal with them, or try to sell the truck, and … get the money and pay it off." ***Id.*** at 53. Joy Kulengusky testified that at some point around the end of March, 2008, she and her husband discovered that the truck was no longer on Keefer's lot. As a result of this discovery, the Kulenguskys confronted Keefer and he "said that Ford Motor Company came and got the truck with all [their] belongings in it." ***Id.*** at 56.

Joy Kulengusky stated they "took it for granted that [the truck] was repossessed" and did nothing further. ***Id.*** at 58. However, in September of

2008, a friend of the husband's saw the truck in Keefer's garage and informed the Kulenguskys. ***Id.*** The Kulenguskys sent Keefer a letter asking about the truck but they never received a response from him. ***Id.*** at 60. They eventually reported the truck stolen to police in March of 2009. ***Id.*** at 61.

Ken Cade, a Ford Motor Credit employee, testified that around June of 2008, Keefer contacted him about the truck and the amount that he asked for in regards to the truck exceeded the value of the truck. ***Id.*** at 90. Cade stated that Ford Credit never repossessed the truck and sent Keefer an authorization to release the vehicle to him. ***Id.*** at 91. He also testified that the towing and storage fees, as indicated by Keefer on the assessment, were approximately $10,000.00. ***Id.*** at 95.

Magistrate Judge Gembic testified that he observed the truck several times on Keefer's lot between February and April of 2008. He stated that he asked Keefer if he could buy the truck and Keefer said that it was "his truck and he [was] keeping it." ***Id.*** at 113. The judge testified that several months later, he noticed the truck was gone from the lot. ***Id.*** at 117. Magistrate Judge Gembic also indicated that Keefer called him and asked how a person obtains title for vehicle that was abandoned on his property. ***Id.*** at 118. The judge explained the procedure around "20 times" to Keefer. ***Id.*** at 123. Magistrate Judge Gembic testified that on September 23, 2008,

he received a letter and a phone message from Keefer, which he summarized:

> The message was so crazy that it -- [Keefer] was just screaming, I just got this "MF-in" letter from this "A" hole Kulengusky. "F" them those "MFC-ers" "B" word. That is my "MF-in" truck. They are not getting it back. I got the "MF-in" title. They can kiss my "MF-in" ass. And before they get that truck back, I am going to cut that "MF-er" into little itty-bitty pieces and throw it in the garbage.

Id. at 127. Keefer called Magistrate Judge Gembic again that day, which the witness reiterated as follows:

> They're not getting that "F-in" truck. That's my truck. I'm keeping that truck. There is no way in the world they're getting it back. I'm going to cut that "F-in" thing up in a million pieces, they'll never get that thing back. And I stopped him at that point and I sad, [Keefer], is this the truck that you were asking me about an appraisal on. And he goes, Yeah, that's the one. And I said to him, Did you ever notify these people that you had their truck. And he told me that it did not matter, it is his truck and he is keeping it, and he has got the paperwork from Ford to say that it is his.

Id. at 128.

Shawn Cavanaugh, a friend of Keefer's, testified that in 2008, Keefer called him and asked if he could store a truck on Cavanaugh's property. ***Id.*** at 140-141. Cavanaugh agreed and stated that Keefer kept a truck under a tarp on his property for several months. ***Id.*** at 142. He also testified that Keefer removed the truck around Halloween of 2008. ***Id.*** at 145.

As noted above, Shingara testified that he saw the Kulengusky truck on Keefer's property in early 2008. ***Id.*** at 154. He stated that he saw the same truck on the Cavanaugh property in the fall of 2008 with the California

license plate. ***Id.*** at 158-159. He then contacted Officer William Miner and said that he thought he "found the truck that was missing from Keefer's." ***Id.*** at 159.

Officer Miner also testified that he investigated the complaint of the missing truck. In April of 2009, he spoke with Keefer's girlfriend, who was also an employee at the towing company, and she indicated that they still had the truck and Keefer was trying to get a mechanic's lien on it. ***Id.*** at 235. The officer also spoke with Keefer, who kept saying that he did not "know what happened to it." ***Id.*** at 236-237.

Here, the trial court opined the following with respect to the theft charge:

> In support of his argument, [Keefer] asserts that the testimony of the Commonwealth witness, which placed the truck in [Keefer]'s unlawful possession and control was biased due to the complaint filed by [Keefer] against him with the board referred to above. However, this testimony was not the only testimony and evidence presented but other witnesses placed the truck in [Keefer]'s unlawful possession and control.
>
> [Keefer] also argues that testimony offered by different Commonwealth witnesses was contradictory. The Commonwealth is not required to present a case free of any inconsistencies in its witnesses' testimony. It is only required to prove the elements of the crimes charged beyond a reasonable doubt, as it did here. In spite of [Keefer]'s argument to the contrary, the fact that the truck was never found does not mean that the Commonwealth failed to prove its case beyond a reasonable doubt. The Commonwealth may rely on circumstantial evidence to prove its case.

Trial Court Opinion, 4/9/2013, at 10-11. Moreover, with respect to the obstruction charge, the court stated: "[T]here was sufficient testimony that

the police were misled by [Keefer,] both by his statements to them and his conduct in hiding the vehicle from them." ***Id.*** at 10 n. 9.

We agree with the trial court's determination. We emphasize 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[.]" ***Hutchinson***, 947 A.2d at 806. The circumstantial evidence established that Keefer unlawfully took the truck and exercised an intent to deprive the owners where he informed the Kulenguskys that the truck had been repossessed by Ford Motor Credit when it had actually been in his possession the entire time. Moreover, the testimony from several witnesses established that Keefer continued to hide the truck by moving it from different properties. Further, Keefer misled the police with his statements regarding the whereabouts of the truck and again, his conduct in hiding the vehicle. As such, based on the totality of the evidence, the Commonwealth established that Keefer committed the crimes of theft by unlawful taking and obstructing administration of law. Therefore, the court did not err in denying his motion for judgment of acquittal. Accordingly, Keefer's seventh claim fails.

Lastly, Keefer argues the trial court abused its discretion with respect to the order of restitution because it was "inflated, unjustified and grossly excessive as to the actual value of the vehicle in question, a 2001 Ford F-350 du[a]l wheeled turbo diesel pick-up truck." Keefer's Brief at 47.

Specifically, he states the Commonwealth relied on the testimony of Magistrate Judge Gembic, who valued the vehicle at $32,500.00. Keefer states that this value contradicts the actual condition of the truck, which had "damaged, bald tires" and was valued "at far less than $5,000.00 [l]et alone $32,500.00." ***Id.*** at 47. Keefer states that contrary to the court's finding, he did nothing to prevent Ford Motor Credit from securing an interest in the truck and Ford Motor Credit employee, Cade, testified that the truck "'was not worth the towing bill,' which at the time was about $4,200.00." ***Id.*** at 49. He again alleges that Magistrate Judge Gembic was a direct competitor of Keefer and should not have been considered an unbiased witness in assessing the value of the truck. ***Id.*** Moreover, he states he "was unable to present an expert witness as to [the] value because the truck 'went missing' and was therefore unavailable for valuation." ***Id.*** at 48. Lastly, Keefer asserts that Cade was a more credible and objective witness than Magistrate Judge Gembic to assess the value of the truck. ***Id.*** at 49.

> In the context of criminal proceedings, an order of restitution is not simply an award of damages, but, rather, a sentence. An appeal from an order of restitution based upon a claim that a restitution order is unsupported by the record challenges the legality, rather than the discretionary aspects, of sentencing. [T]he determination as to whether the trial court imposed an illegal sentence is a question of law; our standard of review in cases dealing with questions of law is plenary.

Commonwealth v. Atanasio, 997 A.2d 1181, 1182-1183 (Pa. Super. 2010) (citations and quotation marks omitted). "It is the Commonwealth's burden of proving its entitlement to restitution." ***Id.*** at 1183. Moreover,

> [r]estitution for injuries to a person or property is authorized by statute "in addition to the punishment prescribed" for the crime at issue. ***See*** 18 Pa.C.S.A. § 1106(a). The amount of a restitution order is limited by the loss or damages sustained as a direct result of defendant's criminal conduct and by the amount supported by the record.

Commonwealth v. Wright, 722 A.2d 157, 160 (Pa. Super. 1998).

Here, the trial court found the following:

> [Keefer] argues that the Court erred in ordering restitution to be paid to Ford Motor Credit and in finding that the proper amount of restitution was $32,500.00. [Keefer] faults the Court for relying, in part, upon the testimony of the Commonwealth's witness as to the value of the truck, instead urging that the Court rely upon the testimony of the Ford Motor Credit employee. However, this employee had very little knowledge of the vehicle. In contrast, the Commonwealth's witness was an experienced car dealer, and even expressed an interest in buying the truck as an unusual, coveted model.
>
> The Crimes Code provides for a sentence of restitution in cases where property was unlawfully obtained. 18 Pa.C.S.A. § 1106. The Crime Victims Act, 18 P.S. § 11.103, defines a direct victim as "an individual against whom a crime has been committed or attempted and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings under this act." Ford Motor Credit was the direct victim of [Keefer]'s crimes here as Ford Motor Credit loaned the funds to Mrs. Kulengusky to allow her to acquire the truck. Ford Motor Credit has suffered the loss of its collateral, as it was manipulated by [Keefer] into surrendering its interest therein so he could obtain it for himself, free and clear. When Mrs. Kulengusky stopped making payments after [Keefer] towed her truck, [Keefer]'s actions directly prevented Ford Motor Credit from exercising its ability to recover its funds that paid for the

> allegedly missing vehicle, after being duped into losing its security, the vehicle itself. [Keefer] is responsible for restitution in the sums awarded to Kulengusky and Ford Motor Credit. The determination of the proper payee should not be a basis for reversal in favor of [Keefer], as no challenge thereto has been made by the Commonwealth.

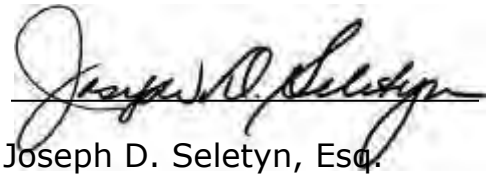
Trial Court Opinion, 4/9/2013, at 12 (footnote omitted).

At Keefer's May 14, 2012, sentencing proceeding, Magistrate Judge Gembic testified to his opinion regarding the value of the Kulengusky truck. N.T., 5/14/2012, at 7. As a car dealer, he stated that he was familiar with the truck. ***Id.*** at 8. He noted that at trial, he had testified that he saw the truck on Keefer's lot and offered $15,000.00 to buy it. ***Id.*** at 8-9. Moreover, he stated that he relied on several sources in determining the value of the truck, such as Manheim Auto Auction and Kelly Blue Book. ***Id.*** at 9. Magistrate Judge Gembic indicated that the value of the truck went up throughout the years as the truck was a rarity. ***Id.*** at 10. He testified that in 2008, the current retail price or fair market value of the truck would have been $32,500.00 based on the condition the truck, the research, and his own experience. ***Id.*** at 11, 14. Other than bias, which was addressed at trial and earlier in this appeal, Keefer did not challenge the testimony regarding the value of the truck at the time of sentencing. ***Id.*** at 15-17. The trial court found Magistrate Judge Gembic to be credible and accepted his testimony. We are bound by its credibility determination unless the record does not support it. ***See Commonwealth v. Helsel***, 53 A.3d 906, 918 (Pa. Super. 2012) ("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"), *appeal denied*, 62 A.3d 1244 (Pa. 2013). Here, the record supports the trial court's order for restitution and the amount ordered was not excessive. Accordingly, Keefer's legality of the sentence claim fails.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/5/2014