

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

BRIAN CLOPP,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 305 EDA 2012

Appeal from the Judgment of Sentence October 12, 2010  
In the Court of Common Pleas of Philadelphia County  
Criminal Division at No(s): MC-51-CR-0034883-2010

BEFORE: BOWES, MUNDY, and FITZGERALD,\* JJ.

MEMORANDUM BY BOWES, J.:

**FILED NOVEMBER 25, 2013**

Brian Clopp appeals from the judgment of sentence of six months probation imposed by the trial court after it found him guilty of indirect criminal contempt. We reverse.

The record reveals the following. On July 18, 2010, Appellant drove by his wife and children while they were walking a block from their home. At the time, Appellant's wife had a Protection From Abuse Order ("PFA") against Appellant. Appellant did not speak with or communicate with his wife. Appellant's wife called police, and he was arrested and charged with harassment and indirect criminal contempt. Following a hearing, the court dismissed the harassment charge and found Appellant guilty of indirect

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\* Former Justice specially assigned to the Superior Court.

criminal contempt. The court imposed a sentence of six months probation on October 12, 2010.

Appellant incorrectly filed a *pro se* notice of appeal for a trial *de novo* with the Philadelphia Court of Common Pleas on that same date. Upon learning of Appellant's desire to appeal, counsel filed a timely notice of appeal on November 2, 2010. That notice of appeal was stamped as "received accepted for review only" by the clerk of quarter sessions on November 2, 2010, and again was time stamped as filed on November 10, 2010.

On or about April 13, 2011, the trial court quashed Appellant's *pro se* notice of appeal. Somewhat inexplicably, the trial court did not enter an order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal until July 10, 2012, over one and one-half years after it sentenced Appellant. Appellant complied on July 24, 2012, but the trial court did not file its Pa.R.A.P. 1925(a) decision until January 18, 2013. The matter is now ready for this Court's review. Appellant's sole issue on appeal is, "Was not the evidence insufficient to convict appellant of indirect criminal contempt?" Appellant's brief at 3.

In analyzing a sufficiency challenge, "we must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt."

**Commonwealth v. Brown**, 52 A.3d 320, 323 (Pa.Super. 2012). Critically important, we must draw all reasonable inferences from the evidence in favor of the Commonwealth as the verdict-winner. **Commonwealth v. Hopkins**, 67 A.3d 817, 820 (Pa.Super. 2013). “Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.” **Brown, supra** at 323. Of course, “the evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented.” **Id.**

The Commonwealth can meet its burden “by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.” **Id.** It is improper for this Court “to re-weigh the evidence and substitute our judgment for that of the fact-finder.” **Id.** Additionally, “the entire record must be evaluated and all evidence actually received must be considered.” **Id.**

Appellant argues that evidence that he drove by his wife and her children while they were walking a block away from their home is insufficient to prove he was in violation of the PFA order. He notes that his wife did not testify that he communicated with her or the children or made eye contact.

According to Appellant, the trial court expanded the scope of the PFA order by finding that he was ordered to stay away from “the area near [wife’s] residence on the 2600 block of Ash Street in the City and County of Philadelphia.” Appellant’s brief at 12 (quoting Trial Court Opinion, 1/18/13). Appellant sets forth that the PFA order did not exclude him from driving in the neighborhood and there was no evidence that he contacted his wife or in any manner violated the terms of the PFA order.

The Commonwealth relies entirely on the trial court opinion. Therein, the court concluded that Appellant admitted to violating “the letter and spirit of the PFA numerous times.” Trial Court Opinion, 1/18/13, at 2. In this regard, the court supported its decision by noting that Appellant admitted to driving through the neighborhood to attempt to regain a job at a pizza shop, to banking in the area, and acknowledged that his church as well as family and friends lived in the neighborhood. These facts, however, do not establish that Appellant violated the PFA order. Indeed, the trial court’s findings that Appellant violated the PFA order are wholly unsupported by the evidence.

The PFA order, which the Commonwealth introduced into evidence, provides in relevant part:

1. DEFENDANT SHALL NOT ABUSE, STALK, HARASS, THREATEN OR ATTEMPT TO USE PHYSICAL FORCE THAT WOULD REASONABLY BE EXPECTED TO CAUSE BODILY INJURY TO THE PLAINTIFF OR ANY OTHER PROTECTED PERSON IN ANY PLACE WHERE THEY MIGHT BE FOUND.

2. DEFENDANT IS COMPLETELY EVICTED AND EXCLUDED FROM THE RESIDENCE AT:

**\*\*CONFIDENTIAL\*\***

OR ANY OTHER RESIDENCE WHERE PLAINTIFF OR ANY OTHER PERSON PROTECTED UNDER THIS ORDER MAY LIVE. EXCLUSIVE POSSESSION OF THE RESIDENCE IS GRANTED TO PLAINTIFF. DEFENDANT SHALL HAVE NO RIGHT OR PRIVILEGE TO ENTER OR BE PRESENT ON THE PREMISES OF PLAINTIFF OR ANY OTHER PERSON PROTECTED UNDER THIS ORDER.

3. 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 SCHOOL, BUSINESS, OR PLACE OF EMPLOYMENT.

4. DEFENDANT SHALL NOT CONTACT THE PLAINTIFF, OR ANY OTHER PERSON PROTECTED UNDER THIS ORDER, BY TELEPHONE OR BY ANY OTHER MEANS, INCLUDING THROUGH THIRD PERSONS.

PFA Order, No 0805V7090.<sup>1</sup>

We recite portions of the testimony at the PFA hearing to illustrate the absence of evidence that Appellant violated the terms outlined in the PFA order.

Prosecutor: Ma'am, I want to take you back to July 18 of 2010, approximately 7:00 in the evening. On that date and time were you on the 2700 block of Ash Street?

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<sup>1</sup> The exhibit introduced into evidence was not provided with the certified record; however, it is a matter of public record in the Philadelphia Court of Common Pleas. Appellant attached a copy of the order as an exhibit and the Commonwealth has not disputed any aspect of the order.

Wife: Yes.

Prosecutor: Ma'am, where do you live or where did you live on that day?

Wife: 2608 Ash Street.

Court: Ash?

Prosecutor: A-S-H.

Court: Thank you.

Prosecutor: What part of the city is that in?

Wife: Bridesburg in Philadelphia.

Prosecutor: Ma'am, did you see anyone on that day that you see in the courtroom today?

Wife: Yes.

Prosecutor: Could you tell us who that was please?

Wife: Brian Clopp.

Prosecutor: And where do you see him in the courtroom?

Wife: He's sitting right there in the red shirt.

Prosecutor: Your Honor, for the record, the witness identified the defendant. Ma'am, on that day do you know where Brian Clopp lived?

Wife: Not that I know of.

Prosecutor: Ma'am, could you tell his Honor what, if anything, you saw the defendant do on that day?

Wife: He was driving down Ash Street while I was walking down Ash Street.

Prosecutor: And where did you see him?

Wife: He was in his car. I was walking. He was driving.

Prosecutor: Where?

Wife: 2700 block Ash Street.

Prosecutor: Brief indulgence, your Honor. I don't think I have any more questions.

Court: You don't have any more questions other than he was driving in the location?

Prosecutor: I don't think so except maybe one follow up.

Court: You may proceed.

Prosecutor: When the defendant drove past you how close was he to you?

Wife: I was on the pavement with my children, and he was in the car. So I'm not exactly sure the distance he was in the street, I was on the pavement.

Prosecutor: So, maybe one normal car from you?

Wife: I'm guessing, however the width of the pavement is.

N.T., 10/12/10, at 3-5.

Appellant explained that he was driving to a local pizzeria where he had worked for over seven years to try and get his job back. The pizzeria was two blocks from his Wife's residence. The trial court seized on the following testimony to support its contempt finding.

Okay, I was told to stay away from 2600 block of Ash Street by a judge. I've done that for two and a half years, that's what I was told. 2600 Ash Street. And I never broke it yet—but 2700, my bank is right there, I used to own properties there, the recreation is there. My parish is there. Renzi Pizza is there. The post-office is there. And friends in my neighborhood are there, friends, families.

N.T., 10/12/10, at 14.

“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. Moody***, 46 A.3d 765, 772 (Pa.Super. 2012). Even viewed in a light most favorable to the Commonwealth, the testimony introduced at the hearing does not establish that Appellant violated the plain terms of the PFA order; rather, the evidence shows only that Appellant drove by his wife one time while she was walking a block away from her home. There was no evidence that Appellant’s wife and their children walked down that block at the same time on a regular basis.

The order in question does not prohibit Appellant from driving in the area where his wife resided, unless his driving amounted to stalking, harassing, or threatening his wife. Appellant did not contact, stalk, abuse, harass, threaten either directly or indirectly his wife. Indeed, the trial court dismissed the harassment charge based on insufficient evidence and the evidence of Appellant’s actions does not establish *prima facie* evidence of stalking. **See** 18 Pa.C.S. § 2709.1.<sup>2</sup> Similarly, the evidence introduced does

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<sup>2</sup> 18 Pa.C.S. § 2709.1 reads in relevant part:

**(a) Offense defined.**--A person commits the crime of stalking when the person either:

(1) engages in a course of conduct or repeatedly commits acts toward another person, including following the person without

(Footnote Continued Next Page)

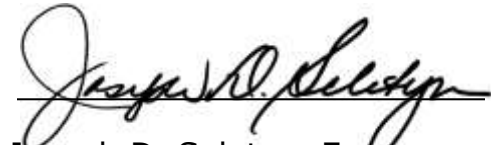


not constitute "abuse" under the PFA statute. **See** 23 Pa.C.S.A. § 6102 (defining abuse in pertinent part as "Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury."). Therefore, we reverse.

Judgment of sentence reversed.

Judge Mundy files a Dissenting Statement.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 11/25/2013

*(Footnote Continued)* \_\_\_\_\_

proper authority, under circumstances which demonstrate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress to such other person; or

(2) engages in a course of conduct or repeatedly communicates to another person under circumstances which demonstrate or communicate either an intent to place such other person in reasonable fear of bodily injury or to cause substantial emotional distress to such other person.