NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. BRIAN J. BURKETT, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 445 EDA 2012

Appeal from the Judgment of Sentence October 12, 2011
In the Court of Common Pleas of Bucks County
Criminal Division at No.: CP-09-CR-0006335-2010

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

MEMORANDUM BY PLATT, J. Filed: February 11, 2013

Appellant, Brian J. Burkett, appeals from the judgment of sentence imposed following his conviction of aggravated assault, simple assault, resisting arrest, disorderly conduct, and harassment. We affirm.

The trial court summarized the factual history of this matter:

> The evidence presented at trial established that on May 5, 2010, Bristol Township police were dispatched to a residence in Croydon, located in Bristol Township, Bucks County, for a report of a neighbor dispute. The dispute occurred between [Appellant] and his neighbors, Mr. and Mrs. Donahue. Mrs. Donahue testified that she was in her backyard assembling a swimming pool during a birthday party for her son. She testified that [Appellant], who lives directly behind her house, approached their shared fence and began screaming at her. Mrs. Donahue testified that [Appellant] lost his temper when a piece of wooden latticework that had been leaning against her shed fell and hit the fence dividing the two properties. According to Mrs.

* Retired Senior Judge assigned to the Superior Court.

Donahue, [Appellant] grabbed the lattice from her side of the fence and start[ed] hitting her shed with it. During this time, she alleged [Appellant] called her "ugly" names and was using profanity. In response, Mrs. Donahue swung an aluminum pole at [Appellant], hitting his arm.

During this altercation, Mrs. Donahue's husband, Brian Donahue, entered the backyard and confronted [Appellant]. Mr. Donahue testified that when he approached [Appellant], [Appellant] struck him with the wooden latticework, causing a cut on his hand. Mr. Donahue testified that [Appellant], who appeared to be "out of his mind," then picked up an aluminum ladder from the Donahue[s'] yard and "rammed" the ladder against the Donahue[s'] shed located next to the fence. Mr. Donahue testified that [Appellant] hit him with a small spade shovel. In response, Mr. Donahue punched [Appellant]. Mr. Donahue thereafter called 911 and went to the front of his residence to wait for the police.

Bristol Township Officers Jason Reilly and Jason Mancuso were dispatched to the Donahue residence in response to the 911 call. While in route to that location, the officers were advised by police dispatch that a heated argument had escalated into a physical confrontation and that one of the subjects involved was threatening to retrieve a gun. The officers, in full uniform, arrived on scene in marked patrol vehicles with lights and sirens activated.

The officers were met by Brian Donahue in front of his residence. Officer Reilly observed that Mr. Donahue had blood on his face, a cut on his chest, a bleeding shoulder and a ripped shirt. The officers determined that Mr. Donahue did not have any weapons on him and proceeded to the backyard to speak to the other party involved in the physical confrontation. Upon entering the Donahue[s'] backyard area, the officers observed [Appellant] and two other individuals in [Appellant's] backyard. [Appellant] was cursing and pacing and had blood on his face. He was openly hostile, angry and agitated. Officer Reilly asked [Appellant] if they could speak with him. [Appellant's] first response was a blank stare. He was told to calm down and was again asked to come over and speak to the officers. This time [Appellant] stated, "F--- that. I'm not coming over there." When asked to talk to the police a third time, [Appellant] said,

"F--- that. If you want to talk to me, you're going to have to come into my yard. I'm not coming near that fence."

In order to enter [Appellant's] yard and keep [Appellant] in sight, the officers had to climb over the chain link fence that divided the properties. As Officer Mancuso was climbing over the fence, [Appellant] came over to Officer Mancuso and pushed his food. Officer Reilly ordered [Appellant] to back away from the fence. [Appellant] initially did as directed. However, when Officer Mancuso reached the top of the fence, both officers observed [Appellant] suddenly approach the fence and grab both of Officer Mancuso's legs, pulling the officer to the ground. Officer Mancuso landed on his right side. His elbow was the first part of his body to make impact.

While Officer Mancuso was on the ground, [Appellant] stood over him, assuming an aggressive posture. Fearing that [Appellant] was going to strike or get on top of Officer Mancuso, Officer Reilly grabbed [Appellant] and put him into a headlock. Officer Mancuso attempted to effectuate an arrest but was prevented from doing so as [Appellant] struggled with Officer Reilly. [Appellant] was told that he was under arrest and was advised to stop resisting. [Appellant] continued to resist. He began flailing his arms and legs, kicking Officer Mancuso in the shins. [Appellant] broke free from Officer Reilly's grip and approached Officer Mancuso with closed fists, swinging both arms. Officer Mancuso hit [Appellant] in the face. Officer Mancuso continued to give [Appellant] verbal commands to comply with the officers' orders to get on the ground and stop resisting arrest. [Appellant] did not comply. Ultimately, Officer Reilly was able to force [Appellant] to the ground. He instructed [Appellant] to show his hands and put them behind his back. [Appellant] again did not comply with the officer's instructions. After a period of time, the officers were able to free [Appellant's] hands from under his body and handcuff him. The police continued to restrain [Appellant] on the ground until backup officers arrived.

Officer Mancuso and fellow Bristol Township Police Officer Ken Margerum arrested [Appellant] at his residence. During the arrest, [Appellant] began yelling and screaming. Once he was taken into custody, [Appellant] stated, "on a good day," he would have taken "both cops."

> As a result from being pulled from the fence, Officer Mancuso suffered a torn glenoid labrum tendon. Dr. Mark Lazarus, Officer Mancuso's treating physician, testified at trial and described the extreme pain caused by such an injury and the extensive physical therapy required to treat it. Dr. Lazarus testified that labrum tears never heal and that patients can always get a recurrence of pain.
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> As a result of the injury Officer Mancuso suffered at the hands of [Appellant], Officer Mancuso underwent four weeks of physical therapy and was out of work for nine to ten weeks. He will have to continue doing physical therapy at home three days a week for an indefinite period of time. As of the time of trial, the officer testified that he still had not regained full strength in his shoulder and that he continues to experience pain and a restricted range of motion.

(Trial Court Opinion, 3/30/12, at 2-5 (footnote and record citations omitted)).

On May 13, 2011, a jury convicted Appellant of aggravated assault—serious bodily injury to a police officer, Officer Mancuso; simple assault—bodily injury to Officer Mancuso; resisting arrest, and disorderly conduct. The trial court found Appellant guilty of harassment as related to Brian Donahue.[1] On October 12, 2011, the court sentenced Appellant to not less than four nor more than ten years' imprisonment, to be followed by thirty-nine months' probation. The trial court denied Appellant's post-sentence motion on January 31, 2012. This appeal followed.[2]

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[1] Appellant was acquitted of aggravated assault—bodily injury to a police officer, Officer Mancuso; simple assault—bodily injury as related to Brian Donahue; and terroristic threats as related to Brian Donahue.

[2] Appellant filed his statement of errors complained of on appeal on March 5, 2012. The trial court filed its opinion on March 30, 2012. ***See*** Pa.R.A.P. 1925.

Appellant raises seven issues on appeal:

> 1. Whether the trial court erred in failing to grant a mistrial arising from the Commonwealth's failure to produce discovery relevant to the cross-examination of witnesses, Brian Donahue and Jennifer Donahue?
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> 2. Whether the cumulative effect of errors relating to evidentiary issues by the trial court require [Appellant] to be granted a new trial?
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> 3. Whether the trial court erred in its response to jury question two such that [Appellant] should be granted a new trial?
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> 4. Whether the evidence, even when construed in a light most favorable to the Commonwealth, is insufficient to demonstrate that [Appellant] acted with criminal intent in this matter such that [Appellant] should be acquitted of the charges in this matter relating to Officer Mancuso[?]
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> 5. Whether the trial court erred in finding [Appellant] guilty of summary harassment relating to Brian Donahue where the jury acquitted [Appellant] of all charges relating [to] Donahue?
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> 6. Whether the trial court should have recused itself in the sentencing phase of the proceeding?
>
> 7. Whether the trial court's sentence was harsh given the recommendation of the Pre-sentence investigator and the jury's finding of recklessness involved in the incident rather then [sic] a deliberate, overt, and intentional act on the part of [Appellant] to injure an officer?

(Appellant's Brief, at 5-6).

Appellant's first issue on appeal is that the trial court erred in failing to grant a mistrial as a result of the Commonwealth's discovery violation. (***See id.*** at 29). Appellant argues that he was prejudiced and deprived of a fair

trial because the Commonwealth failed to turn over all of the police reports arising out of the incident during discovery. (***See id.*** at 29-34).[3]

When a discovery violation occurs, the trial court has broad discretion in ordering an appropriate remedy, including granting a continuance or excluding the evidence. ***See*** Pa.R.Crim.P. 573(E); ***Commonwealth v. Causey***, 833 A.2d 165, 171 (Pa. Super. 2003), *appeal denied*, 848 A.2d 927 (Pa. 2004).

> Our [standard] of review is whether the court abused its discretion in not excluding evidence pursuant to Rule 573(E). A defendant seeking relief from a discovery violation must demonstrate prejudice. A violation of discovery does not automatically entitle appellant to a new trial. Rather, an appellant must demonstrate how a more timely disclosure would have affected his trial strategy or how he was otherwise prejudiced by the alleged late disclosure.

Causey, ***supra***, at 171 (citations and quotation marks omitted).

Pennsylvania Rule of Criminal Procedure 573 lists categories of mandatory and discretionary discovery materials. ***See*** Pa.R.Crim.P. 573(B). It permits disclosure, in the discretion of the trial court, of, *inter alia*, "the names and addresses of eyewitnesses" and "all written or recorded statements, and substantial verbatim oral statements, of eyewitnesses the Commonwealth intends to call at trial[.]" Pa.R.Crim.P. 573(B)(2)(a)(i), (ii).

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[3] The Commonwealth admits that several paragraphs from the police reports were not included in the discovery material. (***See*** Commonwealth's Brief, at 14). Appellant concedes that the non-disclosure was not intentional. (***See*** Appellant's Brief, at 30 n.1).

In the instant matter, prior to trial, Appellant requested police records related to the incident at issue. During the course of discovery, the district attorney reached out to Appellant's counsel and assured him that all police reports had been produced. However, at trial, Appellant discovered that portions of police reports, which contained statements made by Donahue and his wife, had not been turned over. (***See*** Trial Ct. Op., 3/30/12, at 9-10).

On May 11, 2011, during trial, Appellant moved for a mistrial upon discovery of the missing statements. (N.T., 5/11/11, at 372). He argued that he was prejudiced by the Commonwealth's failure to disclose the statements because Donahue and his wife had already testified at trial by the time the missing statements were discovered and their trial testimony was inconsistent with some of the information in the statements that they gave to the police. (***Id.*** at 374-77). Appellant also claimed he was prejudiced because the late discovery of the statements affected his planned cross-examination. (***Id.*** at 378). The trial court ruled that any possible prejudice could be cured by recalling Donahue and his wife for further cross-examination, with an explanation to the jury that the statements had just been turned over to defense counsel, and did so. (***Id.*** 385-88).

We agree with the trial court that recalling the witnesses cured any possible prejudice to Appellant caused by the non-disclosure of the statements during the discovery process. (***See*** Trial Ct. Op., 3/30/12, at

11). The trial court specifically instructed the jury that defense counsel was not provided with the statements prior to the testimony of Donahue and his wife and that the trial court was recalling the witnesses because the defense was entitled to question them on the content of the statements. (***See*** N.T., 5/12/11, at 554). Defense counsel then engaged in additional cross-examination of the witnesses and inquired as to the discrepancies between their testimony and the statements contained in the police report. (***See id.***, at 556-67). We find no abuse of discretion in the trial court's remedy. ***See Causey***, ***supra*** at 171. Appellant's first issue is without merit.

Next, Appellant claims that three errors relating to evidentiary rulings during trial require granting him a new trial. (***See*** Appellant's Brief, at 34-40). When reviewing a claim concerning the admission of evidence, the applicable standard was set forth in ***Commonwealth v. Reid***, 811 A.2d 530 (Pa. 2002), *cert. denied*, 540 U.S. 850 (2003), as follows: "The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion." ***Reid***, ***supra*** at 550 (citation omitted). Further, "[t]he scope and manner of cross-examination are within the sound discretion of the trial court and will not be overturned unless the court has abused that discretion." ***Commonwealth v. Nunn***, 947 A.2d 756, 761 (Pa. Super. 2008), *appeal denied*, 960 A.2d 838 (Pa. 2008) (citation omitted).

Appellant first argues that the trial court erred in allowing the admission of testimony during his wife's cross-examination relating to the damages requested in a pending civil suit by Appellant and his wife against the police officers involved in the incident. (***See*** Appellant's Brief, at 34). Appellant claims this was prejudicial because "the jury [was] provided with a specific amount as 'the value claimed' when the value is clearly a jurisdictional estimate." (***Id.*** at 36).

As the trial court noted, this testimony was proper because it related to Appellant's wife's credibility and possible bias. (***See*** Trial Ct. Op., 3/30/12, at 13). This Court has explained that "[c]ross-examination may be employed to test a witness' story, to impeach credibility, and to establish the witness' motive for testifying. It is well-established that a witness may be cross-examined as to any matter tending to show the interest or bias of that witness." ***Commonwealth v. Buksa***, 655 A.2d 576, 579 (Pa. Super. 1995), *appeal denied*, 664 A.2d 972 (Pa. 1995) (citations and quotation marks omitted); ***see Commonwealth v. Rouse***, 782 A.2d 1041, 1045 (Pa. Super. 2001) ("Pennsylvania courts have consistently recognized that evidence of bias is relevant to impeach the credibility of a witness."); ***see also*** Pa.R.E. 607(b) ("The credibility of a witness may be impeached by any evidence relevant to that issue . . .").

In the instant matter, the assistant district attorney questioned Appellant's wife about the amount of damages requested in the civil lawsuit

filed by Appellant and his wife against Officers Mancuso and Reilly and the police department. (***See*** N.T., 5/12/11, at 784). We find no abuse of discretion in the trial court's decision to permit this line of questioning, as it went to the credibility and possible bias of Appellant's wife. ***See Rouse***, ***supra*** at 1044 (allowing testimony concerning related civil litigation as evidence of possible bias). There is no merit to Appellant's claim.

Appellant's next claim of trial court error is that the trial court should have permitted cross-examination of Officer Mancuso relating to his interest in a possible civil action against Appellant. (***See*** Appellant's Brief, at 36). Appellant wished to enter into evidence a letter that he and his wife received from an attorney, requesting that Appellant have his insurance company immediately contact the attorney in relation to injuries suffered by Officer Mancuso. (***See id***. at 37).

We find no abuse of discretion in the trial court's decision to exclude the letter. ***See Reid***, ***supra***, at 550. As the trial court explained, at the time of trial, Officer Mancuso had not filed any type of civil lawsuit against Appellant. (Trial Ct. Op., 3/30/12, at 14). Further, Officer Mancuso specifically testified that he did not authorize the filing of a lawsuit and had no intention to do so. (***See*** N.T., 5/11/11, at 479). In fact, the only mention in the letter of a lawsuit was where counsel urged Appellant "to take care of the matter immediately . . . to avoid possible loss of insurance

coverage and legal proceedings." (N.T., Exhibit 3). Appellant's claim is without merit.[4]

Appellant's final allegation of evidentiary error is that the trial court should have permitted defense counsel to question Officer Mancuso about his experience with diabetic individuals. (Appellant's Brief, at 39). Appellant contends that this line of questioning was relevant because his behavior at the time of the incident, including yelling, sweating, and acting erratically, could be explained by his diabetic condition. (***See id.*** at 39-40). Appellant argues that this line of questioning was not intended as a defense to his actions, but rather to show that his did not have a guilty state of mind. (***Id.*** at 40).

The issue of Appellant's diabetes arose during a pre-trial hearing, at which time, defense counsel stated that he did not think it would be relevant and he did not object to evidence related to the condition being excluded. (***See*** N.T., 5/09/11, at 32-33). The trial court and the parties agreed that if the issue were to become relevant, they would re-visit the issue of admissibility. (***See id.***). The diabetes issue did not arise again until Officer Mancuso was on the stand, undergoing cross-examination, and defense

[4] The cases that Appellant cites in support of his claim are distinguishable. In ***Rouse***, the appellant argued that testimony should have been admitted about a civil action that had already been instituted. ***See Rouse***, ***supra***, at 1044. ***Commonwealth v. Bridges***, 757 A.2d 859, 874-75 (Pa. 2000), *cert. denied*, 535 U.S. 1102 (2002) and ***Commonwealth v. Nolen***, 634 A.2d 192, 195 (Pa. 1993), both deal with possible bias related to an alleged promise of leniency on pending criminal charges in exchange for a witness's testimony.

counsel asked him if he had ever dealt with anybody suffering from diabetes in his experience as a police officer. (N.T., 5/11/11, at 522). The Commonwealth objected to this question, and, following a sidebar discussion, the trial court sustained the objection and struck the question. (***Id.*** at 523-25).

This Court has explained that

> [a] lay witness may testify as to certain matters, involving health, the apparent physical condition of a person, and as to obvious symptoms, but his testimony must be confined to facts within his knowledge, and may not be extended to matters involving the existence or non-existence of a disease, which is only discoverable through the training and experience of a medical expert. Thus, a layperson may not testify to the presence of an underlying disease[.]

Cominsky v. Donovan, 846 A.2d 1256, 1259 (Pa. Super. 2004) (citations and internal quotation marks omitted).

Appellant argues that the reason he asked Officer Mancuso whether he had experience with diabetic individuals was to ascertain whether he had training or experience beyond that of a layperson. (***See*** Appellant's Brief, at 39-40). However, Appellant does not argue that, even with some training, Officer Mancuso would be considered a "medical expert," qualified to diagnose the presence of a disease such as diabetes. ***Cominsky***, ***supra*** at 1259; (***see also*** Appellant's Brief, at 39-40). Because Officer Mancuso was not a medical expert and Appellant had no other medical expert prepared to testify as to Appellant's condition, his claim fails. (***See*** N.T., 5/11/11, at

523-25). Appellant's second question on appeal, related to alleged evidentiary errors by the trial court, is without merit.

Appellant's next question on appeal is whether the trial court erred in its response to a question submitted by the jury. (***See*** Appellant's Brief, at 40-43). "When a jury submits a question to the court indicating a need to have a matter clarified, the court may properly respond thereto." ***Commonwealth v. Leonberger***, 932 A.2d 218, 225 (Pa. Super. 2007) (citation omitted).

> The scope of supplemental instructions given in response to a jury's request rests within the sound discretion of the trial judge. There may be situations in which a trial judge may decline to answer questions put by the jury, but where a jury returns on its own motion indicating confusion, the court has the duty to give such additional instructions on the law as the court may think necessary to clarify the jury's doubt or confusion.

Commonwealth v. Davalos, 779 A.2d 1190, 1195 (Pa. Super. 2001), *appeal denied*, 790 A.2d 1013 (Pa. 2001) (citations omitted).

During deliberations, the jury asked the following question: "If the Defendant took an action towards the police officer, and the police officer fell, but there was no physical conduct -- contact, can you still consider it an assault?" (N.T., 5/13/11, at 866). The trial court first reviewed the crimes Appellant was charged with and the various types of mental states required. (***Id.*** at 872-73).[5] It then continued:

[5] The trial court indicated that it had discussed the response with counsel, and gave the attorney for each party a chance to explain on the record what other instructions they had wanted to be included in the response. (***See***

> The question, as I interpret it, is whether – is whether or not physical contact is necessary in order to prove the causation element, that the Defendant's conduct caused the injury. And I will instruct you as follows.
>
> The Defendant's conduct must be antecedent, meaning that but for the Defendant's conduct, the result in question would not have occurred. The victim's injury cannot be entirely attributable to other factors. There must be a causal connection between the Defendant's conduct and the result of the Defendant's conduct. And that causal relationship requires more than mere coincidence as to time and place, meaning being there.
>
> Let me repeat that. The Defendant's conduct must be antecedent, meaning but for the Defendant's conduct, the result in question would not have occurred.
>
> The second requirement is that the result of the Defendant's actions cannot be so extraordinarily remote or attenuated that it would be unfair to hold the Defendant responsible. This second requirement is met when the victim's injury is the natural or foreseeable consequence of the Defendant's action.
>
> Let me repeat that. There's really a two-step analysis in terms of causation. Did the conduct cause the fall? And that's what I believe you were asking me. And you were wanting to know whether it had to be physical conduct.
>
> I am not going to answer that literally. That's for you to decide. What I will tell you is you have to look at the conduct and make the following determinations: Was the Defendant's conduct antecedent, meaning but for the Defendant's conduct, the fall would never have occurred?
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> The victim – the victim's injury cannot entirely be attributable to other factors. There must be a causal connection between the conduct of the Defendant and the result of that

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N.T., 5/13/11, at 866-70). At that time, defense counsel stated his belief that the jury should be instructed on the divergence rule, and the trial court denied the request, stating that it believed the question to be related to causation, not intent. (***See id.*** 868-70).

> conduct, meaning the – whatever the Defendant did or you find the Defendant to have done, and the result of that conduct, the fall, you must find that the fall is a result of that. Specifically, you must find that the Defendant's conduct – that the victim's fall was the natural or foreseeable consequence of the Defendant's actions.

(***Id.***, at 874-75). The trial court also informed the jury that if the response did not answer the question the jury was asking, it may submit another question. (***Id.*** at 875).

Appellant argues that while the trial court's response covered the general rule of causal relationship between conduct and result, ***see*** 18 Pa.C.S.A. § 303(a), it should have also instructed the jury on the divergence rule, ***see*** 18 Pa.C.S.A. § 303(b)-(c).[6] (***See*** Appellant's Brief, at 41).

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[6] Section 303, "Causal relationship between conduct and result," provides, in relevant part:

> **(a) General rule.**—Conduct is the cause of a result when:
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> (1) it is an antecedent but for which the result in question would not have occurred; and
>
> (2) the relationship between the conduct and result satisfies any additional causal requirements imposed by this title or by the law defining the offense.
>
> **(b) Divergence between result designed or contemplated and actual result.**—When intentionally or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the intent or the contemplation of the actor unless:
>
> (1) the actual result differs from that designed or contemplated as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have

Appellant contends that the jury's question went to intent, not causation, thus requiring the additional instructions. (***See id.***).

Subsection (a) of Section 303 deals with causation. ***See*** 18 Pa.C.S.A. § 303(a). Subsections (b) and (c) deal with intent. ***See id.*** at § 303(b)-(c). Because the trial court found the jury's question to be "a very literal question regarding causation," it did not include instructions related to subsections (b) and (c). (Trial Ct. Op., 3/30/12, at 18). The trial court "did not find it appropriate to answer the question with [Subsections (b) and (c)] language, as it would be non-responsive to the literal question posed by the jury and would tend to confuse the jury." (***Id.*** at 20).

> been more serious or more extensive than that caused; or
>
> (2) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a bearing on the actor's liability or on the gravity of his offense.
>
> **(c) Divergence between probable and actual result.**—When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:
>
> (1) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
>
> (2) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a bearing on the liability of the actor or on the gravity of his offense.

18 Pa.C.S.A. § 303(a)-(c).

We agree with the trial court that the jury's question dealt with causation and not intent, and we find no abuse of discretion in the response given. The trial court properly instructed the jury as to the elements of causation, and, while Appellant argues that additional language should have been included, he does not contend that the trial court's causation instruction was inaccurate and unclear. ***See Commonwealth v. Chambers***, 685 A.2d 96, 102 (Pa. 1996), *cert. denied*, 522 U.S. 827 (1997) ("The trial court has broad discretion in phrasing jury instructions, and may choose its own wording as long as the law is clearly, adequately, and accurately present to the jury for its consideration.") (citations omitted).

Further, the trial court specifically told the jury that they could ask another question if his response did not address their question. (***See*** N.T., 5/13/11, at 875). The jury did not do so, indicating that the trial court's answer accurately responded to the question it was posing. ***See Davalos***, ***supra***, at 1195 ("After re-charging the jury, the trial court asked whether any juror wanted him to redefine criminal conspiracy again and none did. Furthermore, the jury did not return with any further questions before rendering its verdict. This reflects that the trial court judge, using his discretion, provided additional instructions on the law that clarified the jury's initial doubt or confusion."). Appellant's claim that the trial court abused its discretion in answering the jury's question is without merit.

Appellant's next question on appeal is whether the evidence was sufficient to support his convictions. (***See*** Appellant's Brief, at 43-45). Specifically, Appellant claims there was insufficient evidence of his intent. (***See id.*** at 43). When reviewing a claim challenging the sufficiency of the evidence, we apply the following standard:

> [W]hether 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. Bullick, 830 A.2d 998, 1000 (Pa. Super. 2003) (quoting ***Commonwealth v. Gooding***, 818 A.2d 546, 549 (Pa. Super. 2003), *appeal denied*, 835 A.2d 709 (Pa. 2003)).

Appellant never specifies which particular convictions he is challenging. (***See*** Appellant's Brief, at 43-45). Appellant has also failed to provide any relevant legal or record citations that support his argument aside from three citations explaining the general standard of review. (***See id.***). He has also failed to explain properly and develop his argument related to the sufficiency

of the evidence. Appellant's claim is waived. ***See*** Pa.R.A.P. 2101, 2119(a)-(c).

Moreover, Appellant's claim is without merit. In Appellant's 1925(b) statement of errors, he challenges the sufficiency of the evidence "of the charges in this matter relating to Officer Mancuso." (Concise Statement of Matters Complained of on Appeal, 3/05/12, at 2). Thus, we presume he is challenging his aggravated assault—serious bodily injury to a protected class and simple assault—bodily injury convictions.[7] The other two counts, resisting arrest and disorderly conduct,[8] do not relate directly to Officer Mancuso.[9] ***See*** Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement . . . are waived.").

Appellant contends that because "[t]he jury found [Appellant] guilty of the crimes identified on the verdict sheet that contained a 'reckless' state

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[7] 18 Pa.C.S.A. §§ 2702(a)(2) and 2701(a)(1), respectively.

[8] ***Id.*** at §§ 5104 and 5503(a)(1), respectively.

[9] The resisting arrest count is not exclusive to Officer Mancuso. Even if it were, we would find sufficient evidence to uphold Appellant's conviction. Resisting arrest occurs where a person "with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty . . . creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the arrest." 18 Pa.C.S.A. § 5104. In the instant matter, while Officers Mancuso and Reilly were attempting to arrest him, Appellant refused to obey police orders, flailed his arms and legs, kicked Officer Mancuso in the shins, and swung his fists at Officer Mancuso. The officers had to force Appellant to the ground, free his hands from under his body, and restrain Appellant until backup arrived. (***See*** Trial Ct. Op., 3/30/12, at 4). Thus, there was sufficient evidence presented at trial for the jury to find Appellant guilty of resisting arrest.

of mind as an element of the crime," but acquitted him of the crime related to Officer Mancuso requiring an intentional state of mind, "the verdict of guilty beyond a reasonable doubt cannot survive" because the divergence rule applies.[10] (Appellant's Brief, at 44). The divergence rule states that "[w]hen recklessly . . . causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware[.]" 18 Pa.C.S.A. § 303(c).

"A person is guilty of aggravated assault if he . . . attempts to cause or intentionally, knowingly, or recklessly causes serious bodily injury to any of the officers, agents, employees or other persons enumerated in subsection (c) . . . while in the performance of duty[.]" 18 Pa.C.S.A. § 2702(a)(2). Subsection (c) includes police officers. ***Id.*** at § 2702(c)(1). "Serious bodily injury" is defined as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." ***Id.*** at § 2301. Simple assault is defined as an "attempt[] to cause or intentionally, knowingly or recklessly cause[] bodily injury to another."

[10] We note that the statutory definitions of aggravated assault and simple assault both list three possible states of mind for conviction: intentional, knowing, or reckless. ***See*** 18 Pa.C.S.A. §§ 2702(a)(2), 2701(a)(1). The jury is not required to state under which state of mind it found Appellant to be acting. Thus, Appellant's assertion that he was acquitted of all the crimes relating to Officer Mancuso that required an intentional state of mind is not correct. (***See*** Appellant's Brief, at 44).

Id. at § 2701(a)(1). "Bodily injury" is defined as "[i]mpairment of physical condition or substantial pain." ***Id.*** at § 2301.

> "A person acts intentionally with respect to a material aspect of an offense when . . . it is his conscious object to engage in conduct of that nature or to cause such a result[.]" 18 Pa.C.S.A. § 302(b)(1)(i). As intent is a subjective frame of mind, it is of necessity difficult of direct proof. The intent to cause serious bodily injury may be proven by direct or circumstantial evidence.

Commonwealth v. Jackson, 955 A.2d 441, 446 (Pa. Super. 2008), *appeal denied*, 967 A.2d 958 (Pa. 2009) (case citations and some quotation marks omitted).

After reviewing the evidence, we find sufficient evidence to support Appellant's convictions. The Commonwealth presented evidence that, after Appellant and a neighbor got into a fight, police were called to the scene. When one police officer tried to go over a fence dividing the properties of Appellant and his neighbor, Appellant approached the officer and made a grabbing action towards his leg, despite being told to stay back, after which the officer fell to the ground.[11] Following this, Appellant continued to fight with both officers. This is sufficient evidence for the jury to find that Appellant was guilty of aggravated and simple assault. (***See*** Trial Ct. Op., 3/30/12, at 7-8).[12] Appellant's issue lacks merit.

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[11] The officer experienced a sharp pain in his shoulder and suffered a tear of his glenoid labrum, causing him to miss over two months of work.

[12] We also note that Appellant's contention that the jury must have found he had a reckless state of mind at the time of the crimes is nothing more than an assumption. (***See*** Appellant's Brief, at 44). The jury was not required to

Appellant's next claim is that he should not have been found guilty of summary harassment. (Appellant's Brief, at 45). Appellant argues that "the jury rejected entirely the notion that [Appellant] engaged Donahue in any physical contact" and Donahue caused his own injuries when he reached over the fence and punched Appellant. (***Id.***). We note that aside from the statutory provision for summary harassment, Appellant has failed to cite any relevant legal authority in support of his claim. Thus, his claim is waived. ***See*** Pa.R.A.P. 2101, 2119(a)-(c).

Moreover, his claim is without merit. We adopt the reasoning of the trial court, which explained as follows:

> The trial judge, not the jury, sits as the finder of fact in summary cases. Inconsistent verdicts are permissible in Pennsylvania. ***Commonwealth v. Yachymiak***, 505 A.2d 1024, 1027 (Pa. Super. 1986). The reasoning underlying the ruling in ***Yachymiak*** was recently reiterated in ***Commonwealth v. Barger***, 956 A.2d 458, 460-461 (Pa. Super. 2008), wherein the [C]ourt stated,
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> > In ***Commonwealth v. Wharton***, 594 A.2d 696, 699 (1991), and ***Yachymiak***, ***supra***, we held that inconsistent verdicts are permissible in Pennsylvania. We reasoned that: An acquittal cannot be interpreted as a specific finding in relation to some of the evidence presented; an acquittal may represent the jury's exercise of its historic power of lenity; and a contrary rule would abrogate the criminal procedural rules that empower a judge to determine all questions of law and fact as to summary offenses. ***Wharton***, ***supra*** at 698-99; ***Yachymiak***, ***supra*** at 1026-1027.

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indicate with which state of mind it believed Appellant acted and any attempt to determine this would be mere conjecture.

> Moreover, the jury's verdict as to Simple Assault would not, in any case, compel the same result as to the Harassment charge. Harassment is not a lesser included offense of Simple Assault. Each offense requires proof of an element the other does not. As the court explained in ***Commonwealth v. Townley***, 722 A.2d 1098, 1099 (Pa. Super. 1998),
>
> > To establish harassment, there must be proof the accused acted with an intent to harass, annoy, or alarm another person. This unique element of intent is not required for simple assault. To prove simple assault, an intentional or reckless effort to cause bodily injury must be shown. Bodily injury is not a part of harassment. These crimes have distinct mental elements, and distinct types of harm are addressed.

(Trial Ct. Op., 3/30/12, at 17-18 (citation formatting provided)). Therefore, even were Appellant's claim not waived, we would find it to be without merit.

Appellant's next question on appeal is whether the trial court should have recused itself from the sentencing phase of this matter because

> [a]t the time of sentencing, unknown to the defense at that time, a private citizen had filed a complaint against the trial judge arising from her ruling in a custody action . . . . The [j]udge did not disclose this fact to either party at the time of sentencing. As the sentencing hearing developed, it became clear that the focus of the trial court related to the civil action [Appellant] had filed against multiple parties.

(Appellant's Brief, at 46 (record citation omitted)). Appellant claims that, as a result of the civil suit filed against the trial court judge, she improperly called witnesses to testify and questioned Appellant in a way that indicated bias. (***See id.*** at 47-48).[13] We disagree.

[13] The Commonwealth argues that Appellant's recusal claim is waived because he failed to filed a motion prior to or make a timely objection at sentencing. (***See*** Commonwealth's Brief, at 41). Because Appellant was unaware of the pending civil suit against the trial court judge at the time of

> It is the burden of the party requesting recusal to produce evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially. As a general rule, a motion for recusal is initially directed to and decided by the jurist whose impartiality is being challenged. In considering a recusal request, the jurist must first make a conscientious determination of his or her ability to assess the case in an impartial manner, free of personal bias or interest in the outcome. The jurist must then consider whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. This is a person and unreviewable decision that only the jurist can make. Where a jurist rules that he or she can hear and dispose of a case fairly and without prejudice, that decision will not be overruled on appeal but for an abuse of discretion. In reviewing a denial of a disqualification motion, we recognize that our judges are honorable, fair and competent.

Commonwealth v. Flor, 998 A.2d 606, 641-42 (Pa. 2010), *cert. denied*, 131 S.Ct. 2102 (2011) (citation omitted).

Appellant has not explained, and we do not see, how a lawsuit filed as the result of a ruling in a "completely unrelated" case affected the trial court's ability to preside over Appellant's sentencing hearing. (Trial Ct. Op., 3/31/12, at 25). Nor, after review of the record, do we find any evidence of bias or partiality by the sentencing court. We find no abuse of discretion in the trial court's denial of Appellant's request for disqualification. This issue is without merit.

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sentencing, he filed a post-trial motion for relief, in which he argued, *inter alia*, that the trial court should have recused itself from sentencing. (***See*** Supplemental Motion for Post Sentence Relief, 11/30/11, at 1). The trial court denied Appellant's supplemental motion on January 30, 2012. (***See*** Trial Court Order, 1/30/12).

Appellant's final claim on appeal is that the trial court erred in sentencing Appellant where it "disregard[ed] the recommendations of the pre-sentence investigator and overlook[ed] that the jury rejected that [Appellant] acted intentionally[.]" (Appellant's Brief, at 48). Appellant contends that the trial court also "ignored and/or overlooked the mitigating factors" and imposed an "overly harsh" sentence. (***Id.*** at 49).

This Court set forth the standard for reviewing a claim challenging a discretionary aspect of sentencing in ***Commonwealth v. Shugars***, 895 A.2d 1270 (Pa. Super. 2006), as follows:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Shugars, ***supra*** at 1275 (citation omitted).

There is no absolute right to an appeal challenging discretionary aspects of sentencing. ***Commonwealth v. Hornaman***, 920 A.2d 1282, 1284 (Pa. Super. 2007). To preserve properly the discretionary aspects of sentencing for appellate review: (1) the issue must be raised during sentencing or in a timely post-sentence motion; (2) appellant's brief must contain a concise statement of reasons relied upon pursuant to Pa.R.A.P. 2119(f); and (3) appellant must demonstrate that there is a substantial question his sentence is inappropriate under the Sentencing Code or it is

contrary to the fundamental norms that underlie the sentencing process. ***Id.***; ***see also Commonwealth v. Fiascki***, 886 A.2d 261, 263 (Pa. Super. 2005), *appeal denied*, 897 A.2d 451 (Pa. 2006).

Here, Appellant has failed to include the requisite Rule 2119(f) statement. "A failure to include the Rule 2119(f) statement does not automatically waive an appellant's argument; however, we are precluded from reaching the merits of the claim when the Commonwealth lodges an objection to the omission of the statement." ***Commonwealth v. Bruce***, 916 A.2d 657, 666 (Pa. Super. 2007), *appeal denied*, 932 A.2d 74 (Pa. 2007) (citation omitted). Because the Commonwealth has objected to Appellant's failure to include a Rule 2119(f) statement in his brief, (***see*** Commonwealth's Brief, at 46), we find Appellant's discretionary aspects of sentencing challenge waived.

Judgment of sentence affirmed.