NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. CASEY T. DRISCOLL Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 756 MDA 2012

Appeal from the Order Entered March 21, 2012
In the Court of Common Pleas of Lancaster County
Civil Division at No(s): CI-12-01969

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

MEMORANDUM BY OTT, J. Filed: February 19, 2013

Casey T. Driscoll appeals from the judgment of sentence entered against him following his conviction on ten counts of indirect criminal contempt. The charges arose from an incident in which Driscoll used a friend's cellphone to text his ex-girlfriend contrary to the dictates of a protection from abuse order. Driscoll received an aggregate sentence of three months' incarceration (immediately work release eligible) followed by 21 months of probation. Driscoll claims, (1) his sentence of partially consecutive sentences for ten counts of indirect criminal contempt violates the prohibition against double jeopardy, and (2) there was insufficient evidence to convict him of the tenth count. After a thorough review of the

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* Retired Senior Judge assigned to the Superior Court.

official record, submissions by the parties, and relevant law, we affirm on the basis of the comprehensive Pa.R.A.P. 1925(a) opinion authored by the Honorable Donald R. Totaro.

Briefly, the charges in this matter arose from an incident on February 26, 2012, in which Driscoll used the phone of his friend, Dan Barr, to send multiple text messages to his ex-girlfriend, Rebecca Parker, who had previously obtained a temporary protection from abuse order against Driscoll.[1] That order specifically forbade Driscoll from any contact with Parker, including written or telephonic communication. Barr was a mutual friend of Driscoll and Parker, and Parker would accept text messages from Barr's phone. Pretending to be Barr, Driscoll asked Parker to give him a second chance. Driscoll later admitted to Barr that he sent the text messages.

The trial court has comprehensively addressed the claims raised by Driscoll in the appeal in its June 12, 2012 Pa.R.A.P. 1925(a) opinon. Therefore, we rely upon the reasoning of that opinion in denying Driscoll relief. The parties are directed to attach a copy of the June 12, 2012 trial court opinion in the event of further proceedings.

Judgment of sentence affirmed.

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[1] Driscoll and Barr had been drinking and Barr became intoxicated. Driscoll used Barr's phone after Barr fell asleep.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION

COMMONWEALTH OF PENNSYLVANIA, o/b/o REBECCA F. PARKER : Docket No. CI-12-01969 (PFA)

VS. : Ref. No. 12-0037 (ICC)

CASEY T. DRISCOLL, Defendant : 756 MDA 2012

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PA R.A.P. 1925 OPINION

BY TOTARO, J.

Following a hearing held on March 7, 2012 and March 21, 2012, this court found Casey T. Driscoll [hereinafter "Defendant"] guilty on ten (10) counts of Indirect Criminal Contempt [hereinafter "ICC"], for sending ten separate text messages to Rebecca F. Parker [hereinafter "victim"] in violation of a Temporary Protection From Abuse [hereinafter "PFA"] Order issued against Defendant. (Notes of Testimony, 3/21/12 at 170) [hereinafter "N.T., 3/21/12"].

Defendant was subsequently sentenced on count one to ninety (90) days incarceration in Lancaster County Prison, followed by ninety (90) days probation. (N.T., 3/21/12 at 180-81). Defendant was further sentenced to six months concurrent probation on each of counts 2, 3 and 4, to run consecutive to the sentence imposed on count 1; six months concurrent probation on each of counts 5, 6 and 7, to run consecutive to the term of probation for counts 2, 3 and 4; and six months concurrent probation on each of counts 8, 9 and 10, to run consecutive to the term of probation for counts 5, 6 and 7. *Id.* The intent of this court was to create a net sentence of ninety (90) days imprisonment, followed by twenty-one (21) months of probation. *Id.* at 181. Defendant was also ordered to pay a fine of five hundred ($500) dollars and court costs. *Id.*

On March 29, 2012, Defendant filed multiple post-sentence motions, including a Motion to Set Bail Pending Appeal, a Motion in Arrest of Judgment and Motion for a New Trial, and a Post Sentence Motion to Modify Sentence.

On April 3, 2012, the trial court issued a twenty (20) day Rule Returnable upon the Commonwealth to show cause why Defendant was not entitled to the requested relief. The Commonwealth filed an Answer on April 4, 2012, opposing Defendant's Motion in Arrest of Judgment and for a New Trial. Thereafter, on April 4, 2012, the trial court entered an Order denying Defendant's Motion in Arrest of Judgment and Motion for a New Trial, as well as his Post Sentence Motion to Modify Sentence. However, the court did enter an Order permitting Defendant to resume his pre-sentence bail status of release on unsecured bail pending appeal.

On April 19, 2012, Defendant filed a Notice of Appeal from the judgment of sentence imposed on March 21, 2012, at which time Defendant was directed to file a Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b).

On May 10, 2012, Defendant timely filed a Statement of Errors Complained of on Appeal, asserting two (2) errors. *See* Statement of Errors Complained of on Appeal. First, Defendant asserts the following:

> the imposition, in part, of consecutive sentences for ten separate counts of Indirect Criminal Contempt arising from, at most, two violations of the PFA and two criminal episodes, was illegal, and a violation of [Defendant's] constitutional rights against double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution, and Article One, Section Ten of the Constitution of the Commonwealth of Pennsylvania.

Id.

In addition, Defendant asserts as the second error that the evidence presented as the basis for conviction on Count Ten (10) was insufficient to prove Defendant's guilt beyond a reasonable

doubt as to that count. *See* Statement of Errors Complained of on Appeal. This opinion is written pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

BACKGROUND

On February 15, 2012, the victim obtained a Temporary PFA Order against Defendant. *See* Temporary Protection From Abuse Order. Defendant was personally served with the Temporary PFA Order on February 16, 2012, by the Lancaster County Sheriff's Office. *See* Sheriff Service Process Receipt, and Affidavit of Return, dated February 16, 2012.

On February 28, 2012, a Police Criminal Complaint and Affidavit of Probable Cause were filed against Defendant, alleging Defendant violated the Temporary PFA Order by sending "multiple text messages to the victim using another person's cell phone." *See* Police Criminal Complaint, dated February 28, 2012.

On March 7, 2012, at the start of the ICC hearing, the Commonwealth moved to amend the Criminal Complaint from one (1) count of ICC to ten (10) counts of ICC, based upon the "number of text messages that are the basis of this allegation." (Notes of Testimony, 3/7/12 at 3) [hereinafter "N.T., 3/7/12"]. Defense counsel, while admitting the amendment did not affect his preparation for the hearing, objected by stating the amendment could have "more serious ramifications for my client." *Id.* at 3-4. The court overruled Defendant's objection and amended the complaint, noting the affidavit of probable cause made reference to multiple texts. *Id.* at 4.[1]

Testimony at the Hearing established that on Saturday, February 25, 2012, Defendant and Daniel Barr [hereinafter "Barr"] met at an establishment late in the evening and began consuming alcoholic beverages. (N.T., 3/7/12 at 51-52). It is the uncontested testimony that Barr drank to

[1] After the Commonwealth presented their testimony, the Court granted a defense continuance to allow defense counsel additional time to prepare his case. (N.T., 3/7/12 at 22, 87-88).

excess and became sick later that evening, while Defendant only consumed two alcoholic beverages. *Id.* at 52; (N.T., 3/21/12 at 155). After leaving the establishment, Defendant and Barr returned to Barr's residence. (N.T., 3/7/12 at 52). Upon their return, Defendant cared for Barr until Barr "passed out." (N.T., 3/7/12 at 53); (N.T., 3/21/12 at 156).

It is further undisputed that the ten text messages at issue in this case were sent to the victim from Barr's cell phone. (N.T., 3/21/12 at 96); (Plaintiff's Ex. 2). However, Barr denied sending to the victim any of the text messages constituting the ten ICC charges. (N.T., 3/7/12 at 57-58, 60-61, 68-74); (N.T. 3/21/12 at 138). Rather, Barr testified that when he passed out that evening, only Defendant was at his residence. (N.T., 3/7/12 at 52-54); (N.T., 3/21/12 at 121). Moreover, when Barr awoke on Sunday morning, Defendant was still there, "making sure [Barr] was okay." (N.T., 3/7/12 at 54). After he took a shower, Barr walked into his living room and witnessed Defendant holding Barr's cell phone. *Id.* at 54, 69-70. Moments later, Defendant left for work and handed Barr's cell phone back to Barr. *Id.* at 55, 74.

After taking his phone out of sleep mode, Barr immediately noticed text messages to the victim. (N.T., 3/7/12 at 55, 74). In fact, a text to the victim was open. *Id.* Upon reading the text messages constituting ten (10) counts of ICC, Barr believed the language used was similar to that which Defendant used when speaking in person regarding the victim. (N.T., 3/21/12 at 120-21). The following text messages constitute the basis for the ten (10) counts of ICC:

COUNT ONE: "Becca casey is going crazy he loves you that's all he keeps saying"[2]

COUNT TWO: "Yo girl I'm drunk right now and with him as you can tell he's being a baby and crying I guess he really loves you and hates himself for his anger"[3]

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[2] Sent February 26, 2012, at 03:19:20AM. *See* Plaintiff's Ex. 2; (N.T., 3/7/12 at 44).

[3] Sent February 26, 2012, at 03:39:24AM. *See* Plaintiff's Ex. 2; (N.T., 3/7/12 at 44).

COUNT THREE: "He said something about some meds hes taking now to help.him he always talks about you"[4]

COUNT FOUR: "Just give him one last chance I know he has changed just by.being around him its like he's not.the same person its really great"[5]

COUNT FIVE: "To see him want to"[6]

COUNT SIX: "I'm throwing up lol so.much he does love you girl I.never seen him.like this so.it has to be true"[7]

COUNT SEVEN: "Morning girl"[8]

COUNT EIGHT: "I'm still drunk ha just think about casey and not his anger and you two can fix this"[9]

COUNT NINE: "He really doesn't yes he lied a lot n has anger that he is fixing just remember the happy times you too had"[10]

COUNT TEN: "What u talking about hoe its me"[11]

Similarly, the victim did not believe, based upon her history of text communications with Barr, that the messages at issue here were being sent by Barr. (N.T., 3/7/12 at 8-10). To that same end, during the time period between the text messages from Barr's phone that constituted count nine (9) and count ten (10), the victim responded to Barr's phone by saying "Ok Dan doesn't text like this." *See* Plaintiff's Exhibit 2, text # 9136.

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[4] Sent February 26, 2012, at 03:40:24AM. *See* Plaintiff's Ex. 2; (N.T., 3/7/12 at 44).

[5] Sent February 26, 2012, at 03:41:49AM. *See* Plaintiff's Ex. 2; (N.T., 3/7/12 at 45-46).

[6] Sent February 26, 2012, at 03:42:40AM. *See* Plaintiff's Ex. 2; (N.T., 3/7/12 at 45-46).

[7] Sent February 26, 2012, at 03:44:16AM. *See* Plaintiff's Ex. 2; (N.T., 3/7/12 at 45-46).

[8] Sent February 26, 2012, at 08:36:34AM. *See* Plaintiff's Ex. 2; (N.T., 3/7/12 at 46).

[9] Sent February 26, 2012, at 08:37:59AM. *See* Plaintiff's Ex. 2; (N.T., 3/7/12 at 46).

[10] Sent February 26, 2012, at 08:42:36AM. *See* Plaintiff's Ex. 2; (N.T., 3/7/12 at 46).

[11] Sent February 26, 2012, at 08:45:28AM. *See* Plaintiff's Ex. 2; (N.T., 3/7/12 at 47).

At Defendant's request, the text history on Barr's phone involving Defendant and the victim were extracted and transcribed before the continued date of the ICC hearing. (N.T., 3/7/12 at 86); (N.T., 3/21/12 at 125-26). Upon continuation of the hearing, Barr testified to multiple text messages he received from Defendant prior to February 25, 2012. (N.T., 3/21/12 at 99-102). Those text messages sent by Defendant included the following:

> February 19, 2012 (08:40:04AM): "I Lost my best friend and the love of my life I only have you as a friend I have no one"[12]

> February 19, 2012 (08:43:45AM): "You and Becca were all I had in my life that ment anything to me the only people who I could trust and be happy with without thinking you two would care if I said something stupid I love you two so much I ruin everything u n her are my only true friends I had and the one person I love ever so much hates my guts n wants me dead"[13]

> February 19, 2012 (08:49:49AM): "[I don't care] if you show her this at all I did this I ruined my life n hers for what I've done and I'll I want to do is die cuz I can't deal with myself I no is wrong and I'll prob hits for saying that but it's how I feel there's no one in the world as smart, pretty, has a great personality, caring, care for the environment or have her eyes and smile she is the only one I ever can see myself . I ruined the best thing that happen to me I'm a straight up fuck up"[14]

In addition, Barr testified to a short text message exchange between he and the Defendant prior to February 25, 2012, as follows:

> MR. BARR: "She wants you to drop her stuff off at my house"
>
> DEFENDANT: "By law I can't I can go to jail"
>
> MR. BARR: "If u drop her shit off at my house?"
>
> DEFENDANT: "Yes it says it right in the pfa"[15]

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[12] *See* Plaintiff's Ex. 3, text # 7926; (N.T., 3/21/12 at 98).

[13] *See* Plaintiff's Ex. 3, text # 7927; (N.T., 3/21/12 at 99).

[14] *See* Plaintiff's Ex. 3, text # 7929; (N.T., 3/21/12 at 99).

[15] *See* Plaintiff's Ex. 3, text #s 8415, 8419, 8420, 8422; (N.T., 3/21/12 at 101).

Finally, Barr testified Defendant sent him a text message three days before the texts in question stating "Dan I can't go 2 years not tlking to bec or even seeing her fb" and "[s]he's the only one I picture myself with." *See* Plaintiff's Ex. 3, text #s 8790, 8791; (N.T., 3/21/12 at 102).

Barr also testified to text messages between he and the Defendant that were sent after the ten text messages in question were sent. (N.T., 3/21/12 at 103-105). Those messages, beginning at 8:44:34 a.m. on Sunday, February 26, 2012, contained the following exchange:

DEFENDANT: Remember to sell me to Becca please Dan[16]

DEFENDANT: Please Dan[17]

MR. BARR: What![18]

DEFENDANT: Tlk to Becca for me and sell me to her[19]

MR. BARR: Ok well she knows that was you texting her on my phone Wich you can get in big trouble[20]

DEFENDANT: Just tlk to her please Dan I'm going crazy[21]

DEFENDANT: Dan the first time I've been happy in 2 week was when I texted her[22]

DEFENDANT: Dan I'm sry ever since this happen I've been true to you and Becca n you are my only friends[23]

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[16] Sent 2/26/12 at 08:44:34AM. *See* Plaintiff's Ex. 3, text # 9135; (N.T., 3/21/12 at 102-03).

[17] Sent 2/26/12 at 08:48:19AM. *See* Plaintiff's Ex. 3, text # 9140; (N.T., 3/21/12 at 103).

[18] Sent 2/26/12 at 08:56:28AM. *See* Plaintiff's Ex. 3, text # 9160; (N.T., 3/21/12 at 103).

[19] Sent 2/26/12 at 09:02:24AM. *See* Plaintiff's Ex. 3, text # 9172; (N.T., 3/21/12 at 103).

[20] Sent 2/26/12 at 09:04:04AM. *See* Plaintiff's Ex. 3, text # 9177; (N.T., 3/21/12 at 103).

[21] Sent 2/26/12 at 09:15:24AM. *See* Plaintiff's Ex. 3, text # 9193; (N.T., 3/21/12 at 103).

[22] Sent 2/26/12 at 09:17:51AM. *See* Plaintiff's Ex. 3, text # 9199; (N.T., 3/21/12 at 103).

[23] Sent 2/26/12 at 09:30:09AM. *See* Plaintiff's Ex. 3, text # 9211.

DEFENDANT: I really hope this meds work for me[24]

MR. BARR: Yea[25]

DEFENDANT: Just please tlk to her[26]

DEFENDANT: Do u think I've changed alil bit[27]

DEFENDANT: Dan please I've never been this in love[28]

MR. BARR: Casey stop I'm no getting inbetween you two I told you that. I'm not some messanger[29]

DEFENDANT: So then I'll Just go to jail I can't do this not tlking to her she's the one thing that would make me happy[30]

Defendant denied sending text messages from Barr's cell phone to the victim. (N.T., 3/21/12 at 157). Defendant stated it was "impossible" to send those text messages "[b]ecause I wasn't at the residence of Dan Barr at that time. I was home sleeping." *Id.* Defendant maintained that after Barr passed out, Defendant left and arrived back at his own home at 1:30 a.m., a residence which he shares with his mother and father.[31] *Id.* at 156-57.

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[24] Sent 2/26/12 at 09:30:39AM. *See* Plaintiff's Ex. 3, text # 9212.

[25] Sent 2/26/12 at 09:31:36AM. *See* Plaintiff's Ex. 3, text # 9214.

[26] Sent 2/26/12 at 09:32:21AM. *See* Plaintiff's Ex. 3, text # 9216; (N.T., 3/21/12 at 104).

[27] Sent 2/26/12 at 09:32:24AM. *See* Plaintiff's Ex. 3, text # 9217; (N.T., 3/21/12 at 104).

[28] Sent 2/26/12 at 09:40:07AM. *See* Plaintiff's Ex. 3, text # 9225; (N.T., 3/21/12 at 104).

[29] Sent 2/26/12 at 09:41:55AM. *See* Plaintiff's Ex. 3, text # 9227; (N.T., 3/21/12 at 104).

[30] Sent 2/26/12 at 09:55:09AM. *See* Plaintiff's Ex. 3, text # 9232; (N.T., 3/21/12 at 103-04).

[31] While Defendant claimed he returned home at 1:30 a.m., Defendant's father testified he heard Defendant arrive home between 12:30 a.m. and 12:45 a.m. (N.T., 3/21/12 at 143-44). The Court did not find Defendant's testimony or that of his father to be credible. *Id.* at 170.

DISCUSSION

I. Whether the trial court erred by imposing, in part, consecutive sentences for ten separate counts of ICC, thus violating Defendant's constitutional rights against double jeopardy?[32]

In his Statement of Errors Complained of on Appeal, Defendant first asserts the trial court erred by imposing, in part, consecutive sentences for ten (10) separate counts of ICC when Defendant's conduct constituted, at most, two (2) violations of the protective order, thereby violating Defendant's constitutional rights against double jeopardy. *See* Statement of Errors Complained of on Appeal.

At the onset, an appeal based in double jeopardy raises a question of constitutional law; as such, the Superior Court's "scope of review in making a determination on a question of law is, as always, plenary." *Hill v. Randolph*, 24 A.3d 866, 871 (Pa. Super. 2011) (citing *Commonwealth v. Mattis*, 686 A.2d 408, 410 (Pa. Super. 1996)).

The double jeopardy clause found in the Fifth Amendment of the United States Constitution, applicable to states through the Fourteenth Amendment, provides that no person shall "be subject for the same offense twice put in jeopardy of life or limb." *Commonwealth v. Decker*, 664 A.2d 1028, 1029 (Pa. Super. 1995) (citing U.S. CONST. amend. V). Likewise, the Constitution of the Commonwealth of Pennsylvania states that "[n]o person shall for the same offense, be twice put in jeopardy of life and limb." PA. CONST. art. I, § 10. These provisions provide protection "against multiple punishments for the same offense." *Commonwealth v. Jackson*, 10 A.3d 341, 345 (Pa. Super. 2010) (quoting *Decker*, 664 A.2d at 1029). As such, the Pennsylvania Supreme Court has acknowledged that consecutive sentences for a single offense

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[32] The Trial Court imposed concurrent sentences of probation on six of the ten counts for which Defendant was found guilty. (N.T., 3/21/12 at 180-81).

constitute impermissible multiple punishment under the double jeopardy clause. *Commonwealth v. Houtz*, 437 A.2d 385, 386 (Pa. 1981).

Typically, to determine whether an individual's protection from multiple punishments for the same offense has been violated, Pennsylvania courts apply the test set forth by the United States Supreme Court in *Blockberger v. U.S.*, 284 U.S. 299 (1932). *See Hill*, 24 A.3d at 871-72. Under *Blockberger*, the Court applies a 'same-elements' test; where double jeopardy applies when the elements of one offense are the same as, or included within, the elements of the other offense. *See Hill*, 24 A.3d at 871-72 (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)).

In a recent decision, the Superior Court of Pennsylvania stated "a PFA contemnor charged with multiple counts of ICC may very well have committed multiple criminal acts in the course of violating a PFA order." *Hill*, 24 A.3d at 873. According to the Superior Court, when such a situation arises, the resulting merger of charges following a *Blockberger* analysis is "inappropriate ... given the multiple crimes committed." *Id.* In *Hill*, where the trial court found appellant violated a final PFA order in two distinct ways, by first entering the residence of the victim and then physically attacking the victim, the Superior Court rejected appellant's double jeopardy argument. *Id.* The Superior Court in *Hill* agreed with the trial court's "estimation that these two distinct acts were not simply two types of the same abuse but were, instead, two separate instances of abuse each deserving of its own charge and sentence." *Id.* [33]

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[33] *Commonwealth v. Williams*, 753 A.2d 856 (Pa. Super. 2000), provides a comparison on the appropriateness of multiple sentences. In *Williams*, where appellant expressed his displeasure with the trial court by raising his middle finger and stating "F-k You" to the judge, the trial court found appellant in contempt for both the hand gesture and the verbal utterance. *Id.* at 859. Unlike *Hill*, the Superior Court in *Williams* agreed with appellant's double jeopardy challenge, finding the verbal utterance and hand gesture were "contemporaneously executed" and had the same meaning. *Id.* Moreover, the Superior Court stated "the statement and simultaneous gesture were so inextricably intertwined that they must be considered to have been one unified act of contemptuous misconduct." *Id.* at 864-65.

Additionally, in *Commonwealth v. Adams*, 442 A.2d 277 (Pa. Super. 1982), appellant alleged he was twice put in jeopardy after receiving separate consecutive sentences for two counts of involuntary deviate sexual intercourse and one count of rape. *Id.* at 279. The Superior Court held "where the defendant's actions constitute separate injuries to the 'peace and dignity of the Commonwealth,' then each separate act may be punished separately." *Id.* The Court found the verdicts were based on two separate acts, and thus, "[t]he sentences on these bills are, hence, also based on two separate acts and are, therefore, not violative of double jeopardy." *Id.* at 280.

In *Commonwealth v. Wienckowski*, 537 A.2d 866 (Pa. Super. 1988), the Superior Court held that "[o]nce a defendant commits a crime, he will not be permitted to escape liability for additional crimes under the guise that they were committed in the same criminal transaction." *Id.* at 871. Where each act is a separate injury, a defendant who commits several discreet criminal acts may be punished individually for them despite "their close relationship in a single criminal episode." *Id.*

When sentencing for multiple offenses, 42 Pa.C.S.A. §9721 affords the sentencing court discretion to impose a sentence concurrently or consecutively to other sentences being imposed, upon consideration of individual circumstances concerning the defendant and the many crimes he committed. *See Commonwealth v. Diaz*, 867 A.2d 1285, 1288 (Pa. Super. 2005); *Commonwealth v. Boyer*, 856 A.2d 149, 154 (Pa. Super. 2004), *aff'd*, 891 A.2d 1265 (Pa. 2006).

Based on the particular facts of the present case, when analyzed under applicable law as set forth above, the imposition, in part, of consecutive sentences for ten separate counts of indirect criminal contempt was not a violation of Defendant's constitutional rights against double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution, nor

under Article One, Section Ten of the Constitution of the Commonwealth of Pennsylvania. Simply put, Defendant in the instant case did not commit a single offense. Rather, Defendant completed ten separate acts by sending ten separate and distinct text messages to the victim.

As demonstrated by Plaintiff's Exhibit 2, each individual text message was sent at a different moment in time, requiring Defendant to engage in a new, separate act of typing a new text message and pressing the 'send' button on the cell phone to send a prohibited communication. (N.T., 3/7/12 at 80). Furthermore, each text constituted a separate violation of the Temporary PFA Order. As such, *Hill, supra*, represents the applicable controlling authority when it states that "a PFA contemnor charged with multiple counts of ICC may very well have committed multiple criminal acts in the course of violating a PFA order." *Hill*, 24 A.3d at 873.

Defendant asserts, both at trial and in the Statement of Errors Complained of on Appeal, that his conduct constituted a "conversation" with the victim that represented, at most, two counts of ICC. *See* Statement of Errors Complained of on Appeal; (N.T., 3/7/12 at 82-84). However, although these acts happened in close proximity to one another, that does not preclude the filing of separate counts or the imposition of separate sentences. *See Commonwealth v. Mayo*, 417 A.2d 701, 702 (Pa. Super. 1980) (separate assaults occurring in close proximity to one another did not preclude consecutive sentences).

Moreover, where a PFA defendant makes impermissible contact through means other than by modern technology, such as sending multiple letters through the mail or making multiple appearances at a victim's residence, each contact constitutes a separate offense. To allow a different outcome simply based upon the communication medium chosen by a PFA defendant would undercut the Superior Court's position in *Hill* regarding multiple criminal acts committed

in the course of violating a PFA Order, and would allow for PFA victims to potentially suffer repeated acts of abuse without proper recourse. Such a result would be contrary to the legislative intent of the Protection From Abuse Act.[34] Such an outcome would also create judicial precedence lacking consideration of the ever increasing use of electronic communication within our society. As such, Defendant's 'conversation' argument is without merit and the imposition, in part, of consecutive sentences for ten separate counts of indirect criminal contempt was not a violation of Defendant's constitutional rights against double jeopardy.[35]

II. Whether the evidence was sufficient to prove beyond a reasonable doubt that Defendant was guilty of the tenth charge of Indirect Criminal Contempt?

In his Statement of Errors Complained of on Appeal, Defendant next asserts the "evidence presented by the Commonwealth was insufficient to prove beyond a reasonable doubt that [Defendant] was guilty of the tenth charge of indirect criminal contempt."[36] *See* Statement of Errors Complained of on Appeal.

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[34] The Purpose of the PFA Act is "to protect the victims of domestic violence from the perpetrators of such abuse." *Fonner v. Fonner*, 731 A.2d 160, 161 (Pa. Super. 1999).

[35] Defendant's conduct is distinguishable from *Williams*, 753 A.2d at 856. In *Williams*, appellant's act of raising his middle finger to the trial judge and expressing profane language meaning the same was "contemporaneously executed" and was "so inextricably intertwined that they must be considered to have been one unified act of contemptuous" conduct. *Id.* at 864-65. In the present case, Defendant sent ten separate text messages to the victim over an extended period of time.

[36] The following elements must be met to satisfy a claim of indirect criminal contempt:

> [w]here a PFA order is involved, an indirect criminal contempt charge is designed to seek punishment for violation of the protective order.... To establish indirect criminal contempt, the Commonwealth must prove: 1) the Order was sufficiently definite, clear, and specific to the contemnor as to leave no doubt of the conduct prohibited; 2) the contemnor had notice of the Order; 3) the act constituting the violation must have been volitional; and 4) the contemnor must have acted with wrongful intent.

Commonwealth v. Jackson, 10 A.3d 341, 346 (Pa. Super. 2010) (quoting *Commonwealth v. Brumbaugh*, 932 A.2d 108, 110 (Pa. Super. 2007)).

The Court's consideration of Defendant's sufficiency argument is governed by the following principles:

> 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, [the Superior Court] 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 finder 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. Estepp, 17 A.3d 939, 943-44 (Pa. Super. 2011) (quoting *Commonwealth v. Brooks*, 7 A.3d 852, 856-57 (Pa. Super. 2010)).

To preserve a claim that the evidence was insufficient, the 1925(b) statement needs to specify the element or elements upon which the evidence was insufficient, so the appellate court may analyze that element on appeal. *Commonwealth v. Manley,* 985 A.2d 256, 262 (Pa. Super. 2009). Defendant bases his claim on two particular facts: first, that Defendant sent a text from his own cell phone to Barr's phone between the time of the text messages constituting Count Nine and Count Ten; and second, that Barr admitted he "might" have sent the tenth text himself. *See* Statement of Errors Complained of on Appeal.

The following chart illustrates the sequence of events as presented through testimony and exhibits:

COUNT TEN TIME FRAME ANALYSIS	
Communication Between Mr. Barr's Cell Phone and Defendant's Cell Phone[37]	**Communication Between the Victim's Cell Phone and Mr. Barr's Cell Phone**[38]
	08:42:36AM Text from Barr's phone to the victim's phone. This text constitutes Count 9. "He really doesn't yes he lied a lot n has anger that he is fixing just remember the happy times you too had."
08:44:34AM Text from Defendant's phone to Barr's Phone. "Remember to sell me to Becca please Dan"	
	08:44:44AM Text from the victim's phone to Barr's phone. "Ok Dan doesn't text like this."
	08:45:28AM Text from Barr's phone to the victim's phone. This text constitutes Count 10. "What u talking about hoe its me"
	08:47:21AM Text from the victim's phone to Barr's phone. [omitted]
	08:47:54AM Text from Barr's phone to the victim's phone. "Jk that was all casey!!! I got soooo fucked up last night. I am still feeling like I wanna throw up. Im pretty sure he went threw all of our text"
08:48:19AM Text from Defendant's phone to Barr's Phone. "Please Dan"	

[37] *See* Plaintiff's Ex. 3, text #s 9135, 9140.

[38] *See* Plaintiff's Ex. 2, text #s 9134, 9136, 9137, 9138, 9139.

When viewing all evidence in a light most favorable to the verdict winner, sufficient evidence was presented for the court to find every element of Count Ten beyond a reasonable doubt. Barr denied sending the text messages which comprise the ten counts in question. (N.T., 3/7/12 at 57-58, 60-61, 68-74). Barr testified language used in the text messages was similar to what Defendant would use when speaking in person regarding the victim. (N.T., 3/21/12 at 120-21). Barr testified Defendant was at his residence when the text messages were sent. (N.T., 3/7/12 at 52-54). Barr testified he witnessed Defendant holding his (Barr's) cell phone. *Id.* at 54, 69-70. Finally, Barr testified that immediately after Defendant handed Barr his cell phone and left the residence, Barr found an open text message communication window to the victim. *Id.* at 55, 74. This Court found Barr's testimony to be credible. (N.T., 3/21/12 at 170).

Additionally, text messages sent by Defendant to Barr before and after the ten text messages in question provide circumstantial evidence showing Defendant sent all ten text messages. Prior text messages show Defendant was distraught at his relationship with the victim, Defendant understood the consequences of violating the PFA Order, and Defendant thought he might violate the PFA Order.[39] (N.T., 3/21/12 at 97-102). Subsequent text messages show Defendant attempting to engage Barr in prohibited third party communication with the victim, admitting to sending text messages in violation of the Temporary PFA Order,[40] and choosing to disregard the known consequences of violating the PFA Order.[41] *Id.* at 102-04.

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[39] Defendant sent a text message to Barr reading: "I can't go 2 years no tlking to bec or even seeing her fb". *See* Plaintiff's Exhibit 3; (N.T., 3/21/12 at 98-102).

[40] Defendant sent a text message to Barr reading: "the first time I've been happy in 2 week was when I texted her." *See* Plaintiff's Exhibit 3; (N.T., 3/21/12 at 102-04).

[41] Defendant sent a text message to Barr reading: "then I'll Just go to jail I can't do this not tlking to her." *See* Plaintiff's Exhibit 3; (N.T., 3/21/12 at 102-04).

In contrast to the testimony of Barr, this court found Defendant elusive, evasive and not at all credible when questioned about text messages he sent to Barr before and after the text messages constituting the ten counts of ICC.[42] (N.T., 3/21/12 at 158-161). Moreover, this court found Defendant's conduct and presentation of testimony disturbing. *Id.* at 180. Furthermore, Defendant's testimony was inconsistent with that of his father regarding the time at which Defendant allegedly arrived home. *Id.* at 143, 149. "While passing upon the credibility of witnesses and the weight of the evidence produced," the fact-finder "is free to believe all, part or none of the evidence." *Estepp*, 17 A.3d at 944. Here, this court did not find Defendant to be credible. (N.T., 3/31/12 at 170, 180).

Nonetheless, as noted by Defendant, Barr did acknowledge on cross-examination he may have sent the text message constituting Count Ten. (N.T., 3/21/12 at 117, 123). However, in reviewing claims for sufficiency of the evidence, "the entire record must be evaluated and all evidence actually received must be considered." *Estepp*, 17 A.3d at 944. Furthermore, the facts and circumstances established by the Commonwealth "need not preclude every possibility of innocence," and "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." *Id.* at 943. In the instant case, Barr initially provided testimony denying he sent the tenth text message. (N.T., 3/7/12 at 71-74). Barr's later

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[42] Defendant admitted to sending text messages back and forth with Barr immediately following the text message constituting count ten. (N.T., 3/21/12 at 166-67); *See* Plaintiff's Ex. 3. During those text messages, Barr confronted Defendant by saying "well she knows that was you texting her on my phone Wich you can get in big trouble." (N.T., 3/21/12 at 103); Plaintiff's Ex. 3, text # 9177. Despite Defendant's awareness of the Temporary PFA Order and knowledge of the consequences for violating such an order, Defendant did not deny Barr's assertion, but rather responded by writing "[j]ust talk to her please Dan I'm going crazy." Plaintiff's Ex. 3, text # 9193.

testimony, where he conceded he may have sent the text, was tentative at best.[43] In evaluating Barr's demeanor at the time he admitted to possibly sending the tenth text message, this Court observed a witness who appeared confused with the questions of Defendant's counsel and frustrated by the repetitiveness of those same questions. (N.T., 3/21/12 at 106-24).

After reviewing the entire record, including the totality of Barr's testimony, the victim's testimony which indicated the texts did not sound like Barr, and all circumstantial evidence, this court as fact-finder accepted as credible Barr's earlier testimony that he did not send the text message constituting Count Ten.[44] *Estepp*, 17 A.3d at 943-44. As such, the evidence presented by the Commonwealth was sufficient to prove beyond a reasonable doubt the guilt of Defendant.

Assuming, *arguendo*, the evidence is not sufficient to find Defendant guilty on Count Ten, a reversal and new trial are not required, given the fact that the sentence imposed was concurrent to other counts for which Defendant was properly found guilty. *Commonwealth v. Carr*, 10 A.2d 133, 138 (Pa. Super. 1939). Where it is clear that a concurrent sentence does not affect the length of the other sentences imposed upon an appellant, it is not necessary to remand, but rather Judgment of sentence for counts one through nine should be affirmed, while the sentence imposed upon Count Ten would be vacated. *See Commonwealth v. Gordon*, 477 A.2d 1342 (1984); *Commonwealth v. Ruffin*, 463 A.2d 1117 (1983).

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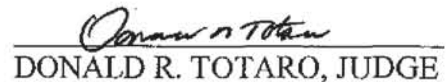
[43] Barr testified as follows: "That one I'm questionable. I may have sent that; I may not have sent that." (N.T., 3/21/12 at 123).

[44] Defendant bases his claim in part on the fact that Defendant sent a text message from his own cell phone to Barr's phone between the time of the text messages constituting Count Nine and Count Ten, implying Defendant would not have done so unless Bar was in possession of his own phone. However, a clear inference can be drawn from the testimony that Defendant was in possession of both his cell phone and Barr's cell phone during the entire period of time in which all ten text messages were sent to the victim. In fact, as noted by Defendant's counsel during the ICC hearing, "it seems like the two phones are in the same guy's hand." (N.T., 3/21/12 at 123-24).

CONCLUSION

Based on the above analysis, this court did not violate Defendant's constitutional rights against double jeopardy by the imposition, in part, of consecutive sentences for ten separate counts of Indirect Criminal Contempt. Additionally, the evidence presented by the Commonwealth was sufficient to prove beyond a reasonable doubt Defendant was guilty of the tenth count of Indirect Criminal Contempt. Therefore, Defendant's sentence should be Affirmed.

BY THE COURT:



DONALD R. TOTARO, JUDGE

DATE: June 12, 2012

ATTEST: ____________

Copies: Craig W. Stedman, Esquire, District Attorney
MaryJean Glick, Esquire, Senior Assistant Public Defender

NOTICE OF ENTRY OF ORDER OR DECREE
PURSUANT TO PA. R.C.P. NO: 236
NOTIFICATION - THE ATTACHED DOCUMENT
HAS BEEN FILED IN THIS CASE
PROTHONOTARY OF LANCASTER CO., PA
DATE: 6-13-12