NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
PERRY BENSON,	:	No. 842 MDA 2012
Appellant	:	

Appeal from the Sentencing, January 4, 2012,
in the Court of Common Pleas of Lycoming County
Criminal Division at No. CP-41-CR-0000622-2011

BEFORE: FORD ELLIOTT, P.J.E., PANELLA AND ALLEN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: January 31, 2013

Perry Benson appeals from the judgment of sentence of January 4, 2012, following his conviction of terroristic threats, simple assault and public drunkenness. We affirm.

The facts, as summarized by the trial court, are as follows:

> On April 23, 2011, William Dincher and Seth Allison were working as bartenders at the Shamrock Bar in Williamsport, Pennsylvania. Defendant was a patron in the bar. Defendant was getting loud and belligerent about his service at the bar. Defendant had a bulge in his waistband. He told Mr. Dincher and Mr. Allison, "Don't make me start popping off in here" and he reached toward his waistband. Dincher asked Defendant what he was reaching for. Defendant replied, "What do you think, a gun." Defendant then made threatening statements such as "I'll put a bullet in your f---ing head" and "I'll see you after you get off work" to the bartenders. They called 911. They then told Defendant that the police had been called and asked him to leave.

> Defendant went out the front door, but he came back into the bar through the adjoining sub shop and went into the bathroom of the bar with two other individuals. Just as the police arrived, Defendant exited through the back door. The police ordered Defendant to put up his hands and to get down on the ground. Defendant was not being entirely cooperative with the police efforts to handcuff him and take him into custody, but he was eventually arrested and taken to City Hall.

Trial court opinion, 5/1/12 at 1-2.

Appellant was charged with terroristic threats, simple assault by physical menace, resisting arrest, disorderly conduct along with the summary offenses of criminal mischief and public drunkenness. A jury trial took place on November 16, 2011. The jury found appellant guilty of terroristic threats and simple assault by physical menace, but acquitted him of resisting arrest and disorderly conduct. Consistent with the jury's verdict, the trial court found appellant guilty of public drunkenness and acquitted him of criminal mischief.

Appellant was sentenced on January 4, 2012 to incarceration in a state correctional facility for 18 to 36 months' for terroristic threats, and a concurrent term of 12 to 24 months' for simple assault by physical menace. Appellant filed a timely post-sentence motion alleging the guilty verdicts were against the weight of the evidence and the sentence imposed by the trial court was excessive. Following the denial of his post-sentence motion,

appellant filed a timely appeal in which he raises the following two issues for our review:[1]

> 1. WHETHER THE VERDICT ISSUED WAS AGAINST THE WEIGHT OF THE EVIDENCE SINCE THE CREDIBILITY OF THE LEAD WITNESSES W[AS] IN QUESTION?
>
> 2. WHETHER THE COURT ISSUED A SENTENCE THAT WAS MANIFESTLY EXCESSIVE AND CONTRARY TO THE FUNDAMENTAL NORMS UNDERLYING THE SENTENCING PROCESS?

Appellant's brief at 2.

Turning to appellant's weight claim, our standard of review is well-established:

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact ... thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice. Moreover, where[,as here,] the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence, ... rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Rice, 902 A.2d 542, 546 (Pa.Super. 2006) (citations and quotations omitted.)

Appellant notes that he did not have a gun nor was a gun found in the bar area. (Appellant's brief at 9.) He argues that the statements attributed

[1] We note that the Commonwealth has not filed a brief in this matter.

to him were inaccurate, and he never threatened the bartenders with any type of weapon. (***Id.***) Appellant points out after leaving the bar, he re-entered to use the restroom and then left without further incident. (***Id.***) He concludes that it is reasonable to infer that the altercation between him and the bartenders was nothing more than heated words exchanged during "spur-of-the-moment anger." (***Id.***)

The crime of terroristic threats is defined at 18 Pa.C.S.A. § 2706(a)(1), which provides: "A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to: commit any crime of violence with intent to terrorize another." In order to sustain a conviction under this section,

> [t]he Commonwealth must prove that 1) the defendant made a threat to commit a crime of violence, and 2) the threat was communicated with the intent to terrorize another or with reckless disregard for the risk of causing terror. Neither the ability to carry out the threat, nor a belief by the person threatened that the threat will be carried out, is an element of the offense. Rather, the harm sought to be prevented by the statute is the psychological distress that follows from an invasion of another's sense of personal security.

Commonwealth v. Reynolds, 835 A.2d 720, 730 (Pa.Super. 2003) (citations omitted.) Although "Section 2706 is not meant to penalize mere spur-of-the-moment threats which result from anger," "being angry does not render a person incapable of forming the intent to terrorize." ***Id.*** (quotation and citation omitted.)

Our review of the notes of testimony reveals that appellant denied making any threats to either Seth Allison or William Dincher, the bartenders. (Notes of testimony, 11/16/11 at 69.) Appellant denied telling either man that he had a gun. (***Id.***) Appellant denied threatening either man with a gun. (***Id.***) It was appellant's testimony that he had a disagreement with William Dincher because he believed Dincher used appellant's money to pay for other bar patrons' drinks. (***Id.*** at 68-69.) According to appellant, he and Dincher exchanged insults by calling each other names. (***Id.***)

Both bartenders testified that appellant stated, "Don't make me start popping off in here" and reached toward his waistband. (***Id.*** at 17, 23, 29.) When asked what he was reaching for, appellant replied, "What do you think, a gun." (***Id.*** at 18, 29.) Appellant made threatening statements such as "I'll put a bullet in your f---ing head." (***Id.*** at 29.) Both men testified they were afraid they were going to be shot. (***Id.*** at 18.) Dincher testified that he has been a bartender for 15 years and until this incident, he had never been so afraid of being shot. (***Id.*** at 28, 32.)

Pursuant to our standard of review, this court does not assess the reliability of witness testimony. This is the role of the fact-finder, and we cannot overturn the fact-finder's assessment as to the weight of the evidence unless there has been a palpable abuse of discretion by the trial court in its refusal to do so. ***Rice, supra***. Following our thorough review of the record, and particularly the evidence cited above, we are unable to

discern a palpable abuse of discretion by the trial court in determining that the verdict was not so contrary to the evidence as to shock one's sense of justice. Accordingly, appellant's first argument is without merit.[2]

Appellant's next issue concerns the discretionary aspects of his sentence. An appellant's right to challenge the discretionary aspects of his sentence is not absolute. ***Commonwealth v. Barzyk***, 692 A.2d 211, 216 (Pa.Super. 1997). Rather, a party who desires to raise such matters must petition this court for permission to appeal and demonstrate that there is a substantial question that the sentence is inappropriate. 42 Pa.C.S.A. § 9781(b); ***Commonwealth v. Tuladziecki***, 513 Pa. 508, 511, 522 A.2d 17, 18 (1987). To fulfill this requirement, the party seeking to appeal must include in his or her brief a concise statement of reasons relied upon in support of allowance of appeal. Pa.R.A.P., Rule 2119(f), 42 Pa.C.S.A., ***Commonwealth v. Saranchak***, 544 Pa. 158, 176, 675 A.2d 268, 277 (1996), ***cert. denied***, 519 U.S. 1061 (1997). By the terms of Rule 2119(f),

[2] We note that at the end of appellant's argument he adds a sentence regarding his conviction for simple assault. He states: "It was also an error to find [appellant] guilty of simple assault because he did not physically menace anyone and by his own testimony did not threaten anyone with a gun, which clearly did not exist anyway as no such weapon was found." (Appellant's brief at 10.) While appellant has failed to support this claim with any pertinent discussion and we could find waiver, ***see*** Pa.R.A.P. 2119(a), the same analysis used to discuss his conviction for terroristic threats applies here. The jury simply believed the bartenders and not appellant. The trial court did not abuse its discretion when it denied appellant's weight claim.

this statement should be placed immediately preceding the argument on the merits relating to the discretionary aspects of sentencing.

Appellant has included the requisite statement in his brief. Therein, he asserts that the trial court imposed a manifestly excessive sentence. In challenging the discretionary aspect of a sentence, a defendant must first demonstrate a substantial question exists to the appropriateness of the sentence before this court will consider whether the trial court abused its discretion. ***See Commonwealth v. Mouzon***, 571 Pa. 419, 425, 812 A.2d 617, 621 (2002). A substantial question does not exist unless there is a "colorable argument that the trial judge's actions were: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Commonwealth v. McKiel***, 629 A.2d 1012, 1013 (Pa.Super. 1993).

Here, appellant does not challenge a specific provision or the sentencing scheme nor cite any particular fundamental norm underlying the sentencing process that he believes was violated. Appellant simply asserts: "The lower court [] issued a manifestly excessive sentence to the appellant." (Appellant's brief at 7.) This amounts to a bald assertion. A bald claim that a sentence was excessive does not raise a substantial question. ***Commonwealth v. Fisher***, 47 A.3d 155, 159 (Pa.Super. 2012);

Commonwealth v. Titus, 816 A.2d 251, 255 (Pa.Super. 2003). Thus, we find appellant has not raised a substantial question for our review.[3]

Judgment of sentence affirmed.

[3] While a claim of a harsh or excessive sentence can, at times, raise a substantial question, that is not the case instantly. ***Commonwealth v. Kalichak***, 943 A.2d 285, 292 (Pa.Super. 2008). The trial court had the benefit of a pre-sentence report the court explained its reasons for the sentence, and sentenced appellant in the standard range. (Notes of testimony, sentencing, 1/4/12 at 3, 13-19); ***see Commonwealth v. Cruz-Centeno***, 668 A.2d 536, 545-546 (Pa.Super. 1995) (stating combination of PSI and standard range sentence, absent more, cannot be considered excessive or unreasonable), ***appeal denied***, 544 Pa. 653, 676 A.2d 1195 (1996).