

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	No. SA 008-2012
	:	
EARL KUNKEL, III,	:	
Defendant	:	
William E. McDonald, Esquire		Counsel for the Commonwealth
Joseph V. Sebelin, Jr., Esquire		Counsel for the Defendant

**MEMORANDUM OPINION**

Serfass, J. - August 30, 2012

Here before the Court is Defendant Earl Kunkel, III's (hereinafter "Defendant") Appeal of his conviction for one (1) count of Harassment (S) following a Summary Appeal Trial held on March 19, 2012. We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925 and recommend that our Order of March 19, 2012 be affirmed for the reasons set forth hereinafter.

**FACTUAL AND PROCEDURAL BACKGROUND**

On January 12, 2012, before Magisterial District Judge Joseph D. Homanko, Sr., Defendant was found guilty of one (1) count of Harassment - Course of Conduct with No Legitimate Purpose (S)<sup>1</sup> and sentenced to pay a fine of one hundred dollars (\$100.00). On February 8, 2012, Defendant filed a "Notice of Summary Appeal" with this Court. On March 19, 2012, a de novo

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<sup>1</sup> 18 Pa. C.S.A. § 2709(A) (3)

hearing was held before the undersigned on Defendant's summary appeal in accordance with Pennsylvania Rule of Criminal Procedure 462. At the conclusion of the hearing, Defendant was found guilty of one (1) count of Harassment (S), and sentenced to pay the costs of prosecution and a fine of one hundred dollars (\$100.00). A written order imposing sentence and containing the information required by Pennsylvania Rule of Criminal Procedure 462(g) was issued on March 19, 2012.

Defendant timely filed a Notice of Appeal to the Superior Court on April 16, 2012. On April 20, 2012, we entered an Order directing Defendant to file, within twenty-one (21) days of that Order's entry on the docket, a Concise Statement of the matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On or about May 11, 2012, prior to the expiry of the twenty-one (21) day period for timely filing, counsel for Defendant hand-delivered a copy of "Defendant/Appellant Earl Kunkel's 1925(b) Statement of Matters Complained on Appeal" to the Carbon County Clerk of Courts' office. Due to an administrative error, the Concise Statement was accepted and a time-stamped copy was returned to Defendant's counsel, but the Concise Statement was not docketed. Defendant did not serve this Court with a copy of that statement within the twenty-one (21) day period.

On May 18, 2012, more than twenty-one (21) days having elapsed since our Order of April 20, 2012 with no Concise Statement having been served upon this Court, our review of the docket indicated that no such statement had been filed and, as a result, we filed a Memorandum Opinion recommending that Defendant's appeal be quashed for failure to file a Concise Statement pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Defendant's counsel, upon receiving notice of the filing of our Memorandum Opinion, hand-delivered a time-stamped copy of his Concise Statement to this Court on May 18, 2012.

On May 31, 2012, Defendant filed a "Motion for Special Relief: Motion to Issue Opinion on Statement of Matters Complained," requesting that the Superior Court strike our Memorandum Opinion of May 18, 2012 and require this Court to issue an opinion addressing the matters complained of on appeal. On July 2, 2012, the Superior Court ordered this Court to direct Defendant to file and serve a statement in compliance with Pennsylvania Rule of Appellate Procedure 1925(b). The Superior Court further directed this Court to issue an opinion in compliance with Pennsylvania Rule of Appellate Procedure 1925(a) upon the filing and service of Defendant's concise statement. We issued an order on July 23, 2012 directing Defendant to file a concise statement in accordance with the Superior Court's order of July 2, 2012. Pursuant thereto, Defendant filed his

concise statement with the Clerk of Courts on August 2, 2012 and, on that same date, personally served the Court with a copy thereof.

## **DISCUSSION**

### **A. Issues on Appeal**

Defendant raises the following issues on appeal:

1. Whether the Court committed an error of law and/or abuse of discretion by finding the Defendant guilty of the summary offense of Harassment (18 Pa. C.S. 2709(a)(3));
2. Whether the Court committed an error of law and/or abuse of discretion by disregarding Defendant's constitutionally protected activity (i.e. political speech and/or First Amendment news gathering), the brief or de minimis duration of the alleged harassment of the officer, the fact that Defendant never argued with or spoke harshly to the officer(s), the fact that the Defendant's conduct did not create a public inconvenience or harm, the fact that the Defendant was only *filming* the officer(s), the fact that Defendant was on a public street in a lawful position, where the officer(s) placed no barriers or otherwise restricted pedestrian traffic, and the fact that Defendant's conduct did not constitute a course of conduct or repeated acts which served no legitimate purpose, and then ultimately finding the Defendant guilty of the summary offense of Harassment (18 Pa. C.S. 2709(a)(3));
3. Whether the Court committed an error of law and/or abuse of discretion by finding Defendant engaged in a course of conduct or repeatedly committed acts which served no legitimate purpose;
4. Whether the Court committed an error of law and/or abuse of discretion by finding Defendant guilty of the summary offense of Harassment where Defendant was engaged in a constitutionally protected activity (i.e. political speech and/or First Amendment news gathering);

5. Whether the Court's decision was against the weight of the evidence;
6. Whether the Court's decision was against the weight of the evidence where Defendant was engaged in a constitutionally protected activity (i.e. political speech and/or First Amendment news gathering), the duration of the alleged harassment of the officer was brief or de minimis, the Defendant never argued with or spoke harshly to the officer(s), the Defendant's conduct did not create a public inconvenience or harm, the Defendant was only *filming* the officer(s), the Defendant was on a public street in a lawful position, where the officer(s) placed no barriers or otherwise restricted pedestrian traffic, and the Defendant's conduct did not constitute a course of conduct or repeated acts which served no legitimate purpose;
7. Whether the Court's decision was based upon insufficient evidence;
8. Whether the Court's decision was based upon insufficient evidence where Defendant was engaged in a constitutionally protected activity (i.e. political speech and/or First Amendment news gathering), the duration of the alleged harassment of the officer was brief or de minimis, the Defendant never argued with or spoke harshly to the officer(s), the Defendant's conduct did not create a public inconvenience or harm, the Defendant was only filming the officer(s), the Defendant was on a public street in a lawful position, where the officer(s) placed no barriers or otherwise restricted pedestrian traffic, and the Defendant's conduct did not constitute a course of conduct or repeated acts which served no legitimate purpose;
9. Whether the Court committed an error of law and/or abuse of discretion by finding the testimony of the Commonwealth's witnesses to be credible;
10. Whether the Court committed an error of law and/or abuse of discretion by ignoring inconsistencies in the testimony of the Commonwealth's witnesses; and
11. Whether the Court committed an error of law and/or abuse of discretion by finding the testimony of the

Defendant to not be credible.

We address these claims of error in conformance with Pennsylvania Rule of Appellate Procedure 1925(a). We note, as a threshold matter, that "[a] Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." Commonwealth v. Dowling, 778 A.2d 683, 686 (Pa. Super. 2001). A claim that the evidence is insufficient or that a verdict is against the weight of the evidence, without specific allegations as to why this is the case, is too vague to preserve such a claim for review. Commonwealth v. Holmes, 461 A.2d 1268, 1270 (Pa. Super. 1983), Commonwealth v. Seibert, 799 A.2d 54 (Pa. Super. 2002).

Any issues not properly raised in Defendant's Concise Statement are deemed automatically waived. Commonwealth v. Lord, 719 A.2d 306, 309 (Pa. 1998); Commonwealth v. Butler, 812 A.2d 631, 633 (Pa. 2009). A bright-line rule requiring waiver of all issues not raised in a 1925(b) statement is "necessary to insure trial judges in each appealed case the opportunity to opine upon the issues which the appellant intends to raise, and thus provide appellate courts with records amenable to meaningful appellate review." Commonwealth v. Castillo, 888 A.2d 775, 779 (Pa. 2005).

We find that the majority of the issues Defendant raises in his Concise Statement are too insubstantial to allow this Court to address them intelligently, and we consider them waived accordingly. We will address, in turn, the three primary issues that we have identified as the essence of Defendant's appeal: whether Defendant's conviction was based on sufficient evidence, whether Defendant's conviction went against the weight of the evidence, and whether this Court's credibility determinations were in error.

### **1. Sufficiency of the Evidence**

As noted hereinabove, a defendant's unsupported claim that the evidence was insufficient to support a conviction is an inadequate formulation of an issue on appeal. Defendant has alleged that our decision was based on insufficient evidence without any accompanying discussion of the evidence presented, and for that reason we believe such allegation has been waived. Notwithstanding the issue of waiver, we find no merit in Defendant's claim of error.

Our inquiry here is "whether, viewing all the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient evidence to find every element of the crime beyond a reasonable doubt." Commonwealth v. Griscavage, 517 A.2d 1256, 1257 (Pa. 1986). Defendant was convicted of violating 18 Pa.

C.S.A. § 2709(A)(3), which provides, in pertinent part, as follows:

- (a) Offense defined.--A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person [...] (3) engages in a course of conduct or repeatedly commits acts which serve no legitimate purpose

A "course of conduct" is defined as "a pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct." 18 Pa. C.S.A. § 2709 (f). A single act is not sufficient to establish a course of conduct; instead, there must be multiple acts indicating a continuity of conduct. Commonwealth v. Battaglia, 725 A.2d 192, 194 (Pa. Super. 1999). The intent to commit harassment may be inferred from the totality of the circumstances. Commonwealth v. Beck, 441 A.2d 395, 398 (Pa. Super. 1982).

Thus, for Defendant to have been properly convicted of a violation under this section, viewing all evidence in the light most favorable to the Commonwealth and drawing therefrom all reasonable inferences favorable to the Commonwealth, the evidence must demonstrate that Defendant had intent to harass, annoy or alarm another, and that he engaged in a course of conduct or committed repeated acts serving no legitimate purpose.

Detective Lee Marzen of the Jim Thorpe Police Department testified that on October 25, 2011, he was executing a search



warrant on Center Avenue in the Borough of Jim Thorpe. (N.T., 3/19/2012, p. 4). As part of the execution of this search warrant, after obtaining the consent and the keys of the occupant of the residence being searched, Detective Marzen was conducting a search of the occupant's automobile, which was parked across the street from the residence. (N.T., 3/19/2012, p. 5). In the course of that vehicle search he was approached by an individual whom he identified as Defendant, Earl Kunkel, III, who appeared to be using a cell phone camera to videotape Detective Marzen. (N.T., 3/19/2012, p. 6). Defendant's brother, William Kunkel, testified that immediately prior to this encounter, he had informed Defendant that "there is cops at Willie's house and Lee is out there at his car." (N.T., 3/19/2012, p. 56).

Detective Marzen testified that he asked Defendant what he was doing and Defendant responded that the detective was breaking into a vehicle, and Defendant wanted to see the detective's search warrant. The detective replied that Defendant, who was not the owner of the vehicle, was not entitled to the search warrant. (N.T., 3/19/2012, p. 7). Detective Marzen informed Defendant that he needed to back away from the detective as he performed the search. Id. The detective testified that he gave that instruction as a safety precaution, because he was searching the vehicle for a firearm

which was reportedly in the glove compartment, and he did not wish to disclose that information to Defendant. (N.T., 3/19/2012, p. 8).

Defendant testified that his response was "[O]fficer, if you're doing your job, you have nothing to worry about." (N.T., 3/19/2012, p. 44). Defendant's testimony was that he simply remained in the same position after receiving that instruction, and that, in fact, he eventually moved closer to the car. Id.

Detective Marzen testified as follows:

A short time later when I was bent down on the passenger's side of the vehicle with the car door open [...] at one point when I was down on the ground on my knee -- bending down rather, I turned to my back, approximately three feet from behind me Mr. Kunkel was standing directly behind me which alarmed me because my gun is exposed to that side and I took it as an immediate threat that I'm looking for a gun and my gun is exposed and I don't know what he's doing other than videotaping me at this point. (N.T. 3/19/2012, p. 8).

The detective reiterated that Defendant needed to back away as the detective was executing a search pursuant to the consent of the owner of the vehicle, and that the detective was concerned for his own safety. (N.T., 3/19/2012, p. 9). When Defendant remained recalcitrant to comply with that instruction, Detective Marzen radioed for assistance due to what he characterized as serious safety concerns. (N.T., 3/19/2012, p. 9).

Jim Thorpe Police Chief Joseph Schatz responded to Detective Marzen's radio call. (N.T., 3/19/2012, p. 29). When Chief Schatz arrived on the scene, he witnessed Defendant three to four feet from the subject vehicle accusing Detective Marzen of illegally entering the vehicle. (N.T., 3/19/2012, p. 29). Defendant informed Chief Schatz that Detective Marzen had entered the vehicle with the use of a crowbar, and that Defendant had every right to be in the place in which he had positioned himself "because it wasn't roped off." (N.T., 3/19/2012, p. 30). Chief Schatz then asked Detective Marzen if he did in fact have a crowbar, and Detective Marzen indicated that he did not, and demonstrated that he was using the owner's car keys to gain access to the vehicle. (N.T., 3/19/2012, p. 19).

The evidence in this case supports a finding that Defendant both acted with the intent to harass, annoy or alarm Detective Marzen **and** engaged in a course of conduct which served no legitimate purpose. Specifically, Defendant was informed that a police officer was searching an automobile on the street and approached Detective Marzen, unreasonably demanding to see the detective's search warrant. Concerned for his safety, Detective Marzen then instructed Defendant multiple times to back away from the immediate area so that the detective could conduct the vehicle search pursuant to the aforesaid warrant. Based upon

his own testimony and his failure to adhere to clearly articulated repeated instructions from Detective Marzen, we can reasonably infer that Defendant acted with the requisite intent.

Tellingly, when Defendant was informed that he was interfering with the execution of the search warrant and that because he was not the owner of the vehicle he had no right to see the search warrant, he moved closer to the vehicle, positioning himself directly behind the detective. Upon being directed again to move away from the vehicle because he was presenting a safety concern to the detective, Defendant reiterated his intent to remain in place and challenged the notion that Detective Marzen had anything to worry about. Further, when the Chief of Police arrived at the scene he observed Defendant continuing to accuse the detective of breaking into the vehicle, and Defendant made a specious accusation that a crowbar had been employed in the process of accessing said vehicle. Clearly, this series of actions constituted a course of conduct as defined by 18 Pa. C.S.A. § 2709(f).

Even by the most generous of interpretations, at the time the Chief of Police arrived, Defendant could not have reasonably doubted that the detective was acting in an official capacity in executing a legitimate search. His intent in persisting to make demands and accusations could only have been to harass the

detective in the course of his official duties, based on Defendant's personal objection to the search. At no point during this period did Defendant have any legitimate purpose in interfering with what he had already been informed was a duly authorized police search. Even if Defendant unreasonably failed to recognize the inherent risk he created by approaching a uniformed police officer in a confrontational manner, if his intent was not to harass, annoy or alarm Detective Marzen he surely would have desisted after the first or second time that he was informed of the detective's concerns. Because he continued with this course of conduct, based upon the totality of the circumstances, the evidence supports a conviction for Harassment.<sup>2</sup>

## **2. The Weight of the Evidence**

A trial court's decision regarding the weight of the evidence will not be reversed absent an abuse of discretion. Commonwealth v. Fox, 422 619 A.2d 327 (Pa. Super. 1993). An appellate review does not include a reweighing of the evidence or a substitution of the appellate court's judgment for the

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<sup>2</sup> We note that Defendant's arguments with respect to "constitutionally protected activity" are unpersuasive and without merit. Indeed, Defendant's attempt to cast his actions as "political speech and/or First Amendment news gathering" is a red herring. Defendant's self-described efforts to record or "gather news" regarding the execution of a search warrant were not the basis for his conviction before this Court. Rather, Defendant's actions in repeatedly confronting, challenging and interfering with a police officer in the lawful execution of his duties, as well as the safety hazard which Defendant created thereby, clearly served no legitimate purpose and formed the basis of Defendant's conviction for Harassment.

trial court's; instead, the limited question on review is whether "a verdict of guilt is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture." Commonwealth v. Hamilton, 546 A.2d 90, 96 (Pa. Super. 1988) (quoting Commonwealth v. Farquharson, 354 A.2d 545, 550 (Pa. 1976)). A finding of guilt that is against the weight of the evidence is so contrary to the evidence as to "shock one's sense of justice." Commonwealth v. Rogers, 615 A.2d 55, 64 (Pa. Super. 1992).

Defendant's conviction was not against the weight of the evidence. As discussed hereinabove, it is uncontested that Defendant approached Detective Marzen and made multiple statements and inquiries about the detective's search of a vehicle not owned by Defendant. Multiple witnesses testified that Defendant was approximately three to four feet away from the detective. Defendant admits that he was informed of the detective's safety concerns and that he did not comply with the detective's request to back away from the area. A conviction resting upon this factual basis is not an abuse of discretion, nor is it contradictory, based on conjecture, or shocking to the conscience. Accordingly, we submit that the weight of the evidence supported Defendant's conviction.

### 3. Credibility

Defendant's ninth (9<sup>th</sup>), tenth (10<sup>th</sup>) and eleventh (11<sup>th</sup>) "Matters Complained On Appeal" allege that this Court committed errors of law or abuses of discretion by finding the Commonwealth's witnesses credible, by ignoring inconsistencies in Commonwealth witnesses' testimony, and by finding the Defendant not credible, respectively. Here, as above, we note that Defendant's mere claims that the Court erred are insufficiently specific to effectively raise these issues on appeal. Defendant makes no reference to any particular factors or statements present in the testimony of Defendant or the Commonwealth's witnesses that bear on the credibility of either, or that would elucidate any alleged inconsistencies. As a result, we believe that a waiver has occurred; as above, however, we address the issue notwithstanding that belief.

Arguments regarding witness credibility and inconsistent testimony challenge the weight rather than the sufficiency of the evidence. Commonwealth v. DeJesus, 860 A.2d 102, 107 (Pa. 2004). An appellate court's function is not "to pass on the credibility of witnesses or to act as the trier of fact," and "an appellate court will not substitute its judgment for that of the fact-finder." Commonwealth v. Lutes, 793 A.2d 949, 960 (Pa. Super. 2002) (citing Ludmer v. Nernberg, 640 A.2d 939, 944 (Pa. 1994)).

In the absence of an explicit allegation as to where in the record the testimony that was allegedly ignored or improperly credited may be found, we are unable to specifically address Defendant's assignment of error. This Court found that the weight of the evidence, including the testimony of several witnesses, supported a conviction for Harassment. In so finding, the Court appropriately relied upon its own estimation of the credibility of each witness.

#### **CONCLUSION**

Based upon the foregoing, we respectfully recommend that Defendant's conviction on the charge of Harassment (S) be upheld.

**BY THE COURT:**

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**Steven R. Serfass, J.**