NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. EARL KUNKEL, III Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1144 EDA 2012

Appeal from the Judgment of Sentence of March 19, 2012
In the Court of Common Pleas of Carbon County
Criminal Division at No.: CP-13-SA-0000008-2012

BEFORE: OLSON, J., WECHT, J., and COLVILLE, J.*

MEMORANDUM BY WECHT, J.: **FILED AUGUST 27, 2013**

Earl Kunkel ("Appellant") appeals from the judgment of sentence entered following Appellant's *de novo* summary trial. We affirm.

On January 12, 2012, Appellant was convicted by a magisterial district justice of one count of summary harassment.[1] Appellant filed a timely summary appeal. On March 19, 2012, the court of common pleas conducted a *de novo* summary trial, which yielded the following facts, as summarized by the trial court:

> 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. As part

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* Retired Senior Judge assigned to the Superior Court.

[1] 18 Pa.C.S. § 2709(a)(3).

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. In the course of that vehicle search he was approached by an individual whom he identified as [Appellant], who appeared to be using a cell phone camera to videotape Detective Marzen. [Appellant's] brother, William Kunkel, testified that immediately prior to this encounter, he had informed [Appellant] that "there is cops at Willie's house and Lee is out there at his car."

Detective Marzen testified that he asked [Appellant] what he was doing and [Appellant] responded that the detective was breaking into a vehicle, and [Appellant] wanted to see the detective's search warrant. The detective replied that [Appellant], who was not the owner of the vehicle, was not entitled to the search warrant. Detective Marzen informed [Appellant] that he needed to back away from the detective as he performed the search. 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 [Appellant].

[Appellant] testified that his response was "[O]fficer, if you're doing your job, you have nothing to worry about." [Appellant'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. 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 [Appellant] 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.

The detective reiterated that [Appellant] 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. When [Appellant] remained recalcitrant to

> comply with that instruction, Detective Marzen radioed for assistance due to what he characterized as serious safety concerns.
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> Jim Thorpe Police Chief Joseph Schatz responded to Detective Marzen's radio call. When Chief Schatz arrived on the scene, he witnessed [Appellant] three to four feet from the subject vehicle accusing Detective Marzen of illegally entering the vehicle. [Appellant] informed Chief Schatz that Detective Marzen had entered the vehicle with the use of a crowbar, and that [Appellant] had every right to be in the place in which he had positioned himself "because it wasn't roped off." 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.

Trial Court Opinion ("T.C.O."), 8/30/2012, at 8-11 (citations to notes of testimony omitted).

Based upon these facts, Appellant again was convicted of summary harassment and ordered to pay a $100 fine. On April 16, 2012, Appellant filed a notice of appeal. In response, the trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Appellant timely delivered a copy of his concise statement to the Clerk of Courts of Carbon County. However, "due to an administrative error," the statement was time-stamped but not docketed. T.C.O. at 3. The trial court did not receive a copy of the statement. Consequently, on May 18, 2012, the trial court issued an opinion recommending that this Court quash Appellant's appeal due to the court's belief that Appellant had failed to file a concise statement. Upon receiving a copy of the opinion, defense

counsel promptly delivered a copy of the time-stamped concise statement to the trial court.

On May 31, 2012, defense counsel filed a motion with this Court requesting that we strike the trial court's opinion and order the trial court to issue a new opinion addressing the matters raised in the time-stamped concise statement. On July 2, 2012, we entered an order directing the trial court to order Appellant to file and properly serve upon the trial court a second concise statement. We further ordered the trial court to issue an opinion addressing the issues raised in the second concise statement. Both parties complied with our order.

Appellant's concise statement contained eleven assignments of error. After reviewing the statement, the trial court concluded that the issues raised by Appellant were not set forth with sufficient detail to enable the court to address the issues in any substantive way. T.C.O. at 7. Nonetheless, the court broke Appellant's issues into three primary categories: (1) sufficiency of the evidence; (2) weight of the evidence; and (3) credibility determinations. ***Id.*** Regarding the sufficiency claim, the trial court noted that Appellant failed to discuss the evidence presented at trial and how that evidence was insufficient to sustain his conviction. Despite finding the claim waived, the trial court provided a discussion of the evidence and determined that the Appellant's claim had no merit. ***Id.*** at 8-13. As to Appellant's weight claim, the trial court considered the evidence and concluded that the verdict did not shock the court's conscience. ***Id.*** at

14. Lastly, the trial court found Appellant's "credibility" claims to be challenges to the weight of the evidence. The court found these claims to be vague and undeveloped, and, therefore, waived. Appellant alleged that the trial court ignored inconsistencies in the Commonwealth's witnesses' testimony, but failed to point to any specific testimony that the court allegedly ignored or improperly credited. This failure, according to the trial court, required a finding of waiver. ***Id.*** at 15-16.

Appellant presents three questions for our consideration:

1. Whether [Appellant] has set forth a sufficiently specific 1925(b) statement?
2. Whether the trial court committed an abuse of discretion in its determination of the sufficiency of the evidence where Appellant was engaged in a constitutionally protected activity, Appellant's acts did not form the specific intent to harass, the Appellant's conduct did not form a course of conduct, where the Appellant had a legitimate purpose or alternatively where Appellant's acts were a de minimis violation?
3. Whether the trial court committed an abuse of discretion in its determination of the weight of the evidence and [credibility] of the witnesses?

Brief for Appellant at 6.

Appellant first contends that the trial court erred in finding that his Pa.R.A.P. 1925(b) concise statement was so vague that Appellant's issues were waived. Appellant maintains that the eleven issues set forth in his concise statement sufficiently identified the alleged errors, and the bases underlying those errors, to enable the court substantively to address Appellant's claims.

Appellant's concise statement contained the following eleven assertions:

1. This Honorable 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. This Honorable Court committed an error of law and/or abuse of discretion by disregarding the 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 the Defendant never argued with or spoke harshly to the officer(s), the fact that Defendant's conduct did not create a public inconvenience or harm, the fact that Defendant was only *filming* the officer(s), the fact that Defendant was on a public street in a lawful position, the fact that the officer(s) placed no barriers or otherwise restricted pedestrian traffic, and the fact that the 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. This Honorable Court committed an error of law and/or abuse of discretion by finding the Defendant engaged in a course of conduct or repeatedly committed acts which served no legitimate purpose.

4. This Honorable 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)) where Defendant was engaged in a constitutionally protected activity, i.e. political speech and/or First Amendment news gathering.

5. The decision of this Honorable Court was against the weight of the evidence.

6. The decision of this Honorable Court was against the weight of the evidence, where the 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 officers, 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. The decision of this Honorable Court was based upon insufficient evidence.

8. The decision of this Honorable Court was based upon insufficient evidence where the 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 officers, 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. The Honorable Court committed an error of law and/or abuse of discretion by finding the testimony of the Commonwealth's witnesses to be credible.

10. The Honorable Court committed an error of law and/or abuse of discretion by ignoring inconsistencies in the testimony of the Commonwealth's witnesses.

11. The Honorable Court committed an error of law and/or abuse of discretion by finding the testimony of the Defendant to not be credible.

Concise Statement, 5/11/2012, at 1-3 (emphasis in original).

As a general matter, issues not raised in a Rule 1925(b) statement will be deemed waived for appellate review. ***Commonwealth v. Castillo***, 888 A.2d 775, 780 (Pa. 2005) (quoting ***Commonwealth v. Lord***, 719 A.2d 306,

309 (Pa. 1998)). However, the mere inclusion of an issue in the statement, by itself, still may not be sufficient to overcome waiver. An appellant must state the assigned error with specificity in the concise statement in order for that issue to be addressed on appeal. ***Commonwealth v. Dowling***, 778 A.2d 683 (Pa. Super. 2001). In other words, the Rule 1925(b) statement must be "specific enough for the trial court to identify and address the issue [an appellant] wishe[s] to raise on appeal." ***Commonwealth v. Reeves***, 907 A.2d 1, 2 (Pa. Super. 2006). "[A] [c]oncise [s]tatement which is too vague to allow the [trial] court to identify the issues raised on appeal is the functional equivalent of no [c]oncise [s]tatement at all." ***Id.*** The court's review and legal analysis may be impaired fatally when the court has to guess at the issues raised. ***Id.*** Thus, if a concise statement is too vague, the court may find waiver. ***Id.***

Instantly, the trial court reviewed the above delineated assignments of error and concluded that Appellant's statements were "too unsubstantial" to permit the court to review them "intelligently." T.C.O. at 7. Consequently, the court deemed many of Appellant's issues to be waived, although the court ultimately discussed part of Appellant's sufficiency claim and Appellant's weight of the evidence claim. ***Id.*** We agree with the trial court that some of Appellant's issues are waived, but not all of them.

Appellant's statement of errors at time lacks clarity and specificity. Appellant merges various legal concepts in some of his claims, such as weight and sufficiency of the evidence, and fails to elaborate on others.

Nonetheless, despite the inartful drafting of the statement, a fair reading of the statement reveals that Appellant is asserting two main claims: (1) that the evidence was insufficient, and (2) that the verdict was against the weight of the evidence. Regarding his sufficiency claim, Appellant has clearly set forth the bases underlying his argument. Appellant maintains that the evidence was insufficient because the Commonwealth failed to prove: (1) that Appellant was not engaged in constitutionally protected activity; (2) that the alleged harassment of the officer created more than a *de minimis* harm; (3) that Appellant's behavior created a public inconvenience or harm; (4) that Appellant was not simply in a lawful place engaging in a lawful activity; and (5) that Appellant's course of conduct served no legitimate purpose. Concise Statement ¶8. Appellant clearly has set forth this claim with enough clarity to enable a trial court, and this Court, to comprehend and discuss meaningfully Appellant's sufficiency claim.

On the other hand, Appellant raised the exact same assertions as support for one of his weight claims. However, these bases pertain to the sufficiency of the Commonwealth's evidence, not the weight assigned to that evidence. Appellant's other challenges to the weight of the evidence lack sufficient specificity to enable a court meaningfully to address those claims. Appellant contends that the trial court abused its discretion by "finding the testimony of the Commonwealth's witnesses to be credible," by "ignoring inconsistencies in the testimony of the Commonwealth's witnesses," and by "finding the testimony of [Appellant] not to be credible." Concise Statement

¶¶9-11. Appellant fails to develop any of these averments. Appellant does not specify which witnesses the trial court should not have believed, which parts of their testimony were inconsistent, or which aspects of Appellant's testimony should have been believed over the testimony of the Commonwealth's witnesses. These boilerplate allegations are vague, and must be waived for appellate purposes. ***See Reeves***, *supra*.

We now turn to Appellant's sufficiency claim. "Our well-settled standard of review when evaluating a challenge to the sufficiency of the evidence mandates that we assess the evidence and all reasonable inferences drawn therefrom in the light most favorable to the verdict-winner." ***Commonwealth v. Whitacre***, 878 A.2d 96, 99 (Pa. Super. 2005). We must determine whether there is sufficient evidence to enable the fact-finder to have found every element of the crime beyond a reasonable doubt. ***Commonwealth v. Lambert***, 795 A.2d 1010, 1014-15 (Pa. Super. 2002) (internal citations and quotation marks omitted).

> In applying the above test, we may not weigh the evidence and substitute our judgment for that of 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.

Id.

Appellant was convicted of harassment, which requires proof that a person "with intent to harass, annoy or alarm another, . . . engages in a course of conduct or repeatedly commits acts which serve no legitimate purpose." 18 Pa.C.S. § 2709(a)(3). 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. § 2709(f).

The trial court, after reviewing the evidence as detailed above, set forth the following analysis:

> The evidence in this case supports a finding that [Appellant] 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, [Appellant] 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 [Appellant] 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 [Appellant] acted with the requisite intent.
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> Tellingly, when [Appellant] 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, [Appellant] reiterated his intent to remain in the place and challenged the notion that Detective

> Marzen had anything to worry about. Further, when the Chief of Police arrived on the scene he observed [Appellant] continuing to accuse the detective of breaking into the vehicle, and [Appellant] 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. § 2709(f).
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> Even by the most generous of interpretations, at the time the Chief of Police arrived, [Appellant] 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 [Appellant's] personal objection to the search. At no point during this period did [Appellant] have any legitimate purpose in interfering with what he had already been informed was a duly authorized police search. Even if [Appellant] 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.

T.C.O. at 11-13 (emphasis in original). Viewing the evidence in the light most favorable to the Commonwealth, as we must, we agree with the trial court that the evidence was sufficient to convict Appellant of harassment, and adopt the above analysis. However, we must also address briefly Appellant's arguments.

Appellant first contends that his actions were protected by the First Amendment to the United States Constitution. As Appellant points out, the scope of the harassment statute is tempered by its own proviso that "this section shall not apply . . . to any constitutionally protected activity." 18 Pa.C.S. § 2709(e). Appellant maintains that the mere video recording of a

police officer in a public location is a constitutionally protected activity, citing, *inter alia*, ***Agnew v. Dupler***, 717 A.2d 519 (Pa. 1998) (holding that video recording police officer in public does not violate the Wiretap Act), ***Commonwealth v. Henlen*** 564 A.2d 905 (Pa. 1989) (same), and ***Robinson v. Fetterman*** 378 F.Supp. 2d 534 (E.D.Pa. 2005) (holding that videotaping police officers is a protected First Amendment right), and cannot form the basis of a criminal conviction.

We need not offer any discussion on the viability or applicability of the cases cited by Appellant. Appellant's argument fails because it is premised upon the belief that the basis of his conviction was the video recording of Detective Marzen. To the contrary, the trial court analysis that we adopt herein demonstrates that the Commonwealth presented sufficient evidence to support Appellant's conviction without a single reference to the fact that Appellant was videotaping Detective Marzen. Thus, Appellant's argument necessarily fails.

Appellant next argues that ***Commonwealth v. Battaglia***, 725 A.2d 192 (Pa. Super. 1999), and ***Commonwealth v. Burton***, 445 A.2d 191 (Pa. Super. 1982), compel reversal of his conviction. However, a cursory inspection of these two cases reveals that they are inapposite.

In ***Battaglia***, the appellant, a landscaper, blew leaves from one lawn onto an abutting road. The police officer ordered the appellant to clean the leaves, which the appellant did. However, the appellant refused to comply when the officer instructed him to clean up leaves on a nearby lawn. The

appellant claimed that he was not responsible for those leaves. The appellant then stated that he was going to "fucking sue the police." The police officer then attempted to arrest the appellant. During the struggle, appellant reached out and snatched a pen from the officer's hand.

The appellant was convicted of, *inter alia*, harassment. On appeal, we reversed the conviction, finding that the appellant's statement was not made with the intent to harass. Moreover, we determined that the appellant's statements and actions, while ill-advised, did not constitute a course of conduct for harassment purposes. ***Id.*** at 194-95.

The facts of ***Battaglia*** do not resemble the facts of the instant case in any way. ***Battaglia*** involved an isolated emotional eruption, which amounted to nothing more than cussing at a police officer and snatching a pen. Instantly, as demonstrated above, Appellant engaged in a sustained course of conduct specifically designed to annoy Detective Marzen and interfere with the legitimate execution of a search warrant. These material distinctions not only reaffirm our conclusion that Appellant committed the crime of harassment, but also demonstrate that ***Battaglia*** has no bearing on this case.

The same can be said for ***Burton***. In that case, the appellant and a female friend were on a common porch of a boarding house where the friend lived. The landlord of the building came onto the porch and noticed the female crying. When the landlord inquired into her condition, the appellant instructed the landlord that the situation was none of his business. The

landlord asked the appellant to leave. In response, the appellant refused and an argument ensued. The argument culminated with the appellant shoving the landlord. ***Burton***, 445 A.2d at 192. Based upon these events, the appellant was arrested, and eventually convicted of harassment.

We reversed in a *per curiam* decision. We held that the evidence failed to demonstrate that Appellant possessed the intent to harass, annoy, or alarm the landlord. Appellant believed he had the right to be on the porch, and he was not presented with a valid reason to leave. Appellant argued with the landlord, but only briefly. We held that this did not amount to harassment. ***Id.*** at 193.

Burton does not resemble this case in any way. The appellant in ***Burton*** was not engaged in a sustained attempt to harass or annoy a police officer executing his duties on a public street. Moreover, the appellant in ***Burton*** responded to what he believed was an unwarranted request for him to leave. The response was brief, and was directly responsive to the request to leave. Here, the evidence supported the conclusion that Appellant voluntarily interjected himself into a situation involving a police detective who was searching for a gun, and that he did so for the purpose of annoying and harassing that detective. Appellant's intent and sustained effort distinguish this case from both ***Battaglia*** and ***Burton***.

Appellant next contends that the Commonwealth failed to prove: (1) that he possessed the specific intent to harass Detective Marzen; (2) that he engaged in a course of conduct for harassment purposes; and (3) that his

actions served no legitimate purpose. Brief for Appellant at 22-24. Because the trial court's general analysis of Appellant's sufficiency claim, which we adopted above, adequately addresses these concerns, we need not address them further. The evidence was sufficient to prove each of these elements of the crime.

Lastly, Appellant argues that his offense, if any, caused at most *de minimis* harm. Thus, Appellant maintains that his conviction should be dismissed pursuant to 18 Pa.C.S. § 312(a). Section 312(a), entitled "*De minimis* infractions," provides that a court shall dismiss any prosecution if the conduct of the defendant:

> 1. was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;
> 2. did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
> 3. presents such other extenuations that it cannot reasonably be regarded as envisaged by the General Assembly or other authority in forbidding the offense.

18 Pa.C.S. §§ 312(a)(1)-(3).

At trial, among other arguments, Appellant repeatedly emphasized that no harm befell the officers and that any delay caused by Appellant was momentary and insignificant. We disagree. Detective Marzen testified that he was searching for a firearm. Thus, the detective was concerned for his safety when Appellant approached and commenced his annoying behavior.

Detective Marzen repeatedly had to instruct Appellant to back away from him while he was executing the search warrant. Appellant not only ignored these instructions, but actually approached the detective. Appellant came so close that he was within reach of the detective's firearm. Detective Marzen's fears became so aroused by Appellant's behavior that he requested assistance to ensure his safety. Appellant's harassing behavior was not *de minimis*. To the contrary, Appellant placed a detective in fear for his safety while carrying out a lawful police activity. The Commonwealth submitted sufficient evidence to overcome Appellant's argument that the harm created by his actions was *de minimis*.

The evidence was sufficient to support Appellant's conviction. All other claims are waived. Judgment of sentence affirmed.

Judgment Entered.

Prothonotary

Date: 8/27/2013