

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
(SAMANTHA M. FOOTE)	:	
	:	
v.	:	No. 12-21,353
	:	
MARC BRUSCOE,	:	PROTECTION FROM ABUSE
Defendant	:	APPEAL

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE

On September 17, 2012, Samantha Foote (Foote) requested a Temporary Protection From Abuse (PFA) Order against Marc Bruscoe (Defendant), the father of her child. On the same day, the Honorable Dudley N. Anderson granted the temporary PFA Order. On October 1, 2012 a Final Protection From Abuse Order was granted by Judge Anderson. Specifically, the Order stated that Defendant is prohibited from having **ANY CONTACT** with Plaintiff either directly or indirectly . . . including but not limited to any contact at Plaintiff’s . . . business, or place of employment. In addition, the Order stated that “Father may have written contact (letter, email, text) with Mother for purposes of exercising partial custody or with respect to any issue related to the welfare of the child.”

On October 11, 2012, Foote called the police regarding text messages sent to her by the Defendant. Police went to the Defendant’s residence but no action or charges were made against the Defendant. On October 12, 2012, Foote was leaving her place of employment with a co-worker at 333 Market Street, Williamsport, PA 17701. N.T., October 22, 2012, p.5. Foote walked down the left side of the street and eventually crossed the road to drop off a UPS package, separating herself from the co-worker. Foote believed she may have seen the Defendant’s vehicle in the James V. Brown Library’s parking lot but was unsure. Foote re-

crossed the street and accessed her car in the Door Parking Lot. While leaving the parking lot, Foote stopped her vehicle at a stop sign to take a right onto Market Street and saw the Defendant's vehicle leaving the James V. Brown parking lot. Foote waited at the stop sign for a few seconds to see if the Defendant would turn in front of her, but he did not. Foote made the turn and went to the left most lane, where she passed the Defendant and made eye contact with him. The Defendant pulled his vehicle out and followed Foote for two blocks and at the second stop sign swerved around Foote's vehicle, beeped his horn numerous times, and drove off at a high rate of speed. Foote called police and shortly afterwards the Defendant text messaged her asking how their son was doing. Foote stated at the hearing that the Defendant had not text her in months asking about their son and that based on the time of the text he would have known she had not yet picked him up from day care.

The Defendant also testified at the hearing and stated that he did not see Foote at all on October 12, 2012. The Defendant stated that he was at the James V. Brown Library, which is near Foote's place of employment, and that he left the library between 4:40 PM and 4:45 PM. N.T., October 22, 2012, p.27. The Defendant testified that he knew where Foote worked and that she left work between 4:45 PM and 5:00 PM. He also stated that he was at home all day and waited until that time to go to the library.

This Court found that the Defendant was not in contempt of his PFA Order for the text messages as there was a provision in the Final PFA Order that allowed text messages to be exchanged between the parties for any issues related to the child. The Court, however, found the Defendant in contempt for intentionally being near the Foote's place of employment at a time where it was likely that he would see her. The Defendant was charged \$300 for his indirect criminal contempt. On November 20, 2012, the Defendant filed a Notice of Appeal to the

Superior Court of Pennsylvania. Included with the Notice of Appeal was a concise statement of matters complained of on appeal: 1) the Court erred in concluding that the Commonwealth had met its burden of proof that the Defendant committed a violation of indirect criminal contempt; 2) the Commonwealth's only witness, Samantha M. Foote, testified falsely and inconsistently on several occasions; 3) the Court erred in allowing Foote to testify to hearsay concerning what her attorney told her; 4) the Court erred in reversing the burden of proof; the Defendant should not have to prove that he acted reasonably under the circumstances.

Whether the Court erred in concluding that the Commonwealth had met its burden of proof that the Defendant committed a violation of indirect criminal contempt

The Defendant contends that the Commonwealth did not meet its burden to find an indirect criminal contempt. “The PFA Act operates to protect victims of domestic violence and permit the courts to respond quickly and flexibly to both early signs and subsequent acts of abuse with the issuance of protection orders.” Commonwealth v. Walsh, 36 A.3d 613, 618 (Pa. Super 2012). Once a PFA order is granted a defendant may be found in indirect criminal contempt if he does not comply with its terms.¹ “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.” Id. Every element may be proven through circumstantial evidence. On appeal, the standard of review for sufficiency of evidence is whether viewing all of the evidence in the light most favorable to the verdict winner there is sufficient evidence to find every element of the crime beyond a reasonable doubt. Id. (citing Commonwealth v. Brumbaugh, 932 A.2d 108, 109-10 (Pa. Super. 2007)).

¹ The Defendant's Final PFA Order states that indirect criminal contempt may result for a violation of the Order.

The Defendant did not state exactly how the Commonwealth failed to meet its burden of proof and thus this Court will address all the elements. First, the Court must determine whether the Final PFA Order was sufficiently clear to leave no doubt of the conduct that was prohibited to the Defendant. The Order stated:

Except as provided in Paragraph 5 of this order, Defendant is prohibited from having **ANY CONTACT** with Plaintiff either directly or indirectly, or any other person protected under this order, at any location, including but not limited to any contact at Plaintiff's or other protected party's school, business, or place of employment.

Not only does the Order clearly state that the Defendant is prohibited from making any contact with Foote, it specifically states no contact at her "place of employment." Second, the Commonwealth was to prove that the Defendant had notice of the Order. On October 1, 2012, the Defendant appeared personally with his attorney for the entry of Final PFA Order. In addition, Foote contacted police about a potential violation of the PFA the day earlier and the Defendant argued that it was not a violation according to specific terms of his Order. The record is clear that the Commonwealth proved that the Defendant was given notice of the Final PFA Order.

The third element is that the Commonwealth must prove that the violation committed by the Defendant was volitional. The Defendant waited till the late afternoon to go the library, knew that the library was located in close proximity to Foote's place of employment, and left the library exactly when he knew Foote would be leaving to pick up their child. The Defendant did not pull out of the library's parking lot until Foote passed him and then swerved around her while honking. The record shows that the Defendant was acting in a volitional manner when he made contact with Foote.²

² As stated above, circumstantial evidence is permitted to make a finding on an indirect criminal contempt.

Finally, the Commonwealth had to prove that the Defendant acted with wrongful intent. As stated above, the Defendant was aware of the PFA Order and placed himself in a position where he would make contact with Foote. Further, the Defendant followed Foote's vehicle for two blocks, swerved his car around Foote's, and honked his horn. Apart from contact between the parties regarding their son, no contact is permitted. The Court had sufficient evidence to find that the Defendant had wrongful intent. After a review of the record the Court finds that the Defendant's issue lacks merit.

Whether the Commonwealth's only witness, Samantha M. Foote, testified falsely and inconsistently on several occasions

The Defendant argues that the Commonwealth witness, Foote, was not credible. During a PFA Contempt hearing, "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.; Leonard v. Smith, 684 A.2d 622, 627 (Pa. Super. 1996) (determining not to disturb a trial court's credibility determinations for a PFA Contempt proceeding); Commonwealth v. Hall, 554 A.2d 919 (Pa. Super 1989) (finding that credibility of a witness is the sole province of the fact-finder and will not be reversed on appeal). Therefore, the Court finds that the issue of the credibility of Foote is within the discretion of the Court. In addition, Foote's testimony was more credible based on the location and time that the Defendant was near Foote's place of employment and the time that Foote called police.

Whether the Court erred in allowing Foote to testify to hearsay concerning what her attorney told her

The Defendant contends that the Court erred in allowing hearsay testimony. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing,

offered in evidence to prove the truth of the matter asserted.” Pa.R.E. 801(c). “When an extrajudicial statement is offered for a purpose apart from proving the truth its contents, it is not hearsay and is not excluded under the hearsay rule.” Commonwealth v. Darden, 457 A.2d 549, 551 (Pa. Super. 1983). At the hearing, the following dialogue is in question by the Defendant:

FOOTE: Well, the reason I had called the day before was because he had threatened to take my son when it was my vacation with him, so I was – I was sitting on my porch, me and my parents all looking around like is he going to come take him. So yes, I called the police because I’m sick of being scared all the time. I’m sick of being scared. And when it’s my vacation week with him, I don’t want to be threatened that he’s going to take him, and it was my vacation week with him. So, yes, that’s why I called the police, because I was not – I was not – I was scared that he was going to come try to take Logan.

CALLAHAN: Do you have a court order about that vacation week?

FOOTE: Actually he – from what Kyle said you and him both discussed it.

CALLAHAN: I object, Your Honor.

COURT: She’s responding to your question, overruled. You asked her a question, so she’s answering your question.

CALLAHAN: Okay.

FOOTE: And Kyle told me if you have a problem, if you don’t remember it to call him and he will reiterate. And I actually have a text message right in my folder that says I gave him actually two months’ notice that I was taking a vacation week.

N.T., October 22, 2012, p.17-18. Not only did the defense attorney elicit the hearsay, but he was aware of the answer and knew it would contain hearsay as he was the one that negotiated an agreement for the vacation week with Foote’s attorney. In addition, the hearsay is completely irrelevant to the facts that resulted in the PFA Contempt proceeding. The issue of the vacation was apparently the reason for Foote calling the police the night before, which resulted in no action and was not at issue in the proceeding. The Defendant was found in contempt of the PFA Order based on his actions on October 12, 2012 and not October 11, 2012.

The Court erred in reversing the burden of proof; the Defendant should not have to prove that he acted reasonably under the circumstances

As stated above, the Commonwealth properly proved all the elements of the indirect criminal contempt. After a review of the record, there is no indication that the Court reversed the burden of proof or required the Defendant to prove he acted reasonably under the circumstances. As such, the Court finds that this issue is without merit.

Conclusion

As none of the Defendant's contentions appear to have merit, it is respectfully suggested that the Defendant's sentence be affirmed.

DATE: _____

By the Court,

Nancy L. Butts, President Judge

xc: DA
Richard J. Callahan, Esq.