IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	**CR-244-2015**
v.	:	
	:	
DERRICK WAYNE MOYER,	:	**CRIMINAL DIVISION**
Defendant	:	

OPINION AND ORDER

On October 2, 2015, the Defendant filed a timely post-sentence motion. On November 10, 2015, the Court held a conference to hear argument on the motion.

I. Background

On September 15, 2015, a jury found the Defendant guilty of Intimidation of Witnesses or Victims (Intimidation),[1] Criminal Use of a Communication Facility,[2] and Possessing an Instrument of Crime.[3] For Intimidation, the Defendant received an aggravated range sentence of 60 months to 120 months of incarceration. For Criminal Use of a Communication Facility, the Defendant received an aggravated range sentence of one year to two years of incarceration consecutive to the incarceration for Intimidation. For Possessing an Instrument of Crime, the Court made a finding of guilt without further penalty.

A. Gage Wood's Testimony

In 2008, Gage Wood (Wood) was adjudicated delinquent for theft by unlawful taking. In 2010, Wood was adjudicated delinquent for criminal trespass. In 2012, Wood pled guilty to conspiracy to commit burglary.

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[1] 18 Pa.C.S. § 4952(a)(1).
[2] 18 Pa.C.S. § 7512.
[3] 18 Pa.C.S. § 907(a).

Prior to the Defendant's offenses, Wood was housed with the Defendant in Lycoming County Prison, but Wood did not have a relationship with the Defendant. When the Defendant's offenses occurred, Wood had already testified at the preliminary hearing for a murder case, and he was intending to testify at the trial about "incriminating evidence of what [the defendant in the murder case] told [Wood] at the prison regarding the murder case." N.T., 9/15/15, at 12. The Defendant was a friend of the defendant in the murder case.

On January 18, 2015, the Defendant "put a post on [Wood's] Facebook wall calling [Wood] a rat or something to that extent." Id. at 13. The posting was on "the public part of Facebook where everybody can see." Id. Wood deleted the posting.

After the Defendant's posting, Wood sent a private message to the Defendant via Facebook. The message said, "[Y]ou can be next." Id. at 15. Wood was "referencing that [he will] report [the Defendant] for harassing and intimidating [him]." Id. The Defendant responded with a message that said, "I will get you f'd up." Id. at 16. Wood responded, "[Y]eah, we will see. You got me f'd up apparently." Id. The Defendant responded, "N word you're a B word." Id. at 17. Wood responded, "[Y]ou can enjoy witness intimidation and tampering charges." Id. Wood then sent another message that said, "[Y]ou can slide through though." Id. Wood testified that the messages meant that the Defendant "can do what he wants, but there is consequences." Id. The Defendant responded, "B I'm on house arrest, but where you stay at." Id. The Defendant then sent another message that said, "Aye yo B where you live?" Id. at 18. Wood responded that he lives in Williamsport. The Defendant then sent a message that said, "You rat. What street rat." Id. Wood responded, "[N]ice, I'll let Harry know how you are." Id. at 19. Wood testified that he knew "Harry" was the intensive supervised bail officer and knew the Defendant was "on intensive supervised bail." Id. The Defendant responded, "Shut up B." Id.

Wood then sent a message that said, "Sixth Ave." The Defendant responded, "[A]ddress." Id. Wood responded by providing a random address and then sent another message that said, "WYA." Id. at 20. Wood testified that "WYA" meant "Where you at?" Id. The Defendant responded, "Grier N word." Id. Wood responded, "Perfect slide I'm white though." Id. Wood testified that he meant the Defendant "can come if he wants." Id. The Defendant responded, "I'm going to leave you alone before you hop on my case you f'ing rat. You told my man, but slide through Grier whenever." Id. The Defendant then sent a message that said, "[Y]eah, N word just let me know when you gonna slide." Id. at 21. Wood responded, "[t]hat sucks it wasn't my man's that's all that matters to me. Don't worry I won't hop on your case you just caught a new case dumb ass and . . . they're on their way second or third house." Id. Wood testified that he meant that he did not know anything about the Defendant's case, but the Defendant "just got new charges for harassing and intimidating." Id.

Wood did not tell law enforcement about the Defendant's messages until around January 23, 2015 because initially he "wasn't really feeling intimidated." Id. at 22. He did not tell law enforcement until "after [he] processed the severity of what could happen." Id.

B. Agent Stephen Sorage's Testimony

Stephen Sorage (Agent Sorage) has been a member of law enforcement for 34 years. Since January of 2013, Agent Sorage has been a detective with the Lycoming County District Attorney's Office. Before working in the District Attorney's Office, Agent Sorage was a detective with the Williamsport Bureau of Police.

Agent Sorage began investigating the Defendant in January of 2015. He spoke to the Defendant, who indicated that he knew Wood had provided statements in the murder case. The Defendant also indicated that he did not know if Wood "was still telling." N.T., 9/15/15, at 34.

Agent Sorage asked the Defendant "if you knew that [Wood] was telling, but didn't know that [Wood] was still telling, why would you post what you posted . . . if it wasn't to keep [Wood] from telling?" Id. After the Defendant did not answer, Agent Sorage asked, "[A]m I right or wrong?" Id. The Defendant said, "[R]ight." Id.

C. Agent Trent Peacock's Testimony

Agent Trent Peacock (Agent Peacock) is a detective in the Williamsport Bureau of Police; he has worked for the Williamsport police for 27 years. Agent Peacock was the lead investigator on the murder case, which had a preliminary hearing in 2014. He knew that the Defendant was a friend of the defendant in the murder case. Agent Peacock interviewed the Defendant and asked him about the messages he sent to Wood. The Defendant said he initiated the conversation with Wood by calling Wood a rat. The Defendant also said he used his cell phone to send the messages.

D. Commonwealth's Exhibits 1, 3, 4, 5, and 6.

The following is the content of Commonwealth's Exhibit 1, 3, 4, 5, and 6, which are the messages exchanged between Wood and the Defendant:

Wood: You can be next

Defendant: What I will get Yuh fucked up

Wood: Ya we will ser

Wood: See

Wood: You got me Fucked up apparently

Defendant: Nigga yu a bitch cuz

Wood: But since You insist, y'all both can enjoy the witness intimidation and tampering charges.

Wood: I'm saying you can slide through

Defendant: Bitch I'm on house arrest but where u stay at

Defendant: Aye yo bitch where you live

Wood: Port

Defendant: Yu rat

Defendant: What street rat

Wood: Nice I'll let Harry know how you are

Defendant: Shut up bitch

Wood: Sixth

Wood: Ave

Defendant: Address

Wood: 911 sixth

Wood: Corner of park

Wood: Wya

Defendant: Grier nigga

Wood: Perfect slide, I'm white though

Defendant: IMA leave yu alone before Yuh hop on my case yu fukcin rat yu told on my man but slide thru Grier whenever

Defendant: Yeah nigga just let me kno when yu gonna slide

Wood: That sucks, wasn't my man's that's all that matters to me

Wood: don't worry I won't hop on your case, you just caught a new case dumbass

Wood: They on the way. Second or third house?

E. Post-Sentence Motion Arguments

The Defendant argues that the evidence was insufficient for a jury to find him guilty of Intimidation, Criminal Use of a Communication Facility, and Possessing an Instrument of Crime. He contends the evidence was insufficient because "[t]he only evidence that the Commonwealth introduced with respect to [the murder] case was that [the Defendant] called Mr. Woods [*sic*] a 'rat' on Facebook," and "calling Mr. Woods [*sic*] a name is not in and of itself sufficient to establish the crime of Intimidation of a Witness." In addition, the Defendant argues that the verdict is against the weight of the evidence because "[t]he only evidence presented with respect to Intimidation of a Witness was testimony by Gage Woods [*sic*] that [the Defendant] called him a rat on Facebook with respect to [the murder] case," and "[t]he threat by [the Defendant] that occurred after the post was in response to Mr. Woods [*sic*] messaging [the Defendant] about 'hopping' on [the Defendant's] case, not [the murder] case." The Defendant also argues that the aggravated range sentences for Intimidation and Criminal Use of a Communication Facility were "unwarranted and excessive given the facts and circumstances of the case, as well as the lack of a prior criminal record." The Commonwealth stated that it was relying on the transcripts from the trial and the sentencing hearing.

II. Discussion

A. The Evidence was Sufficient for a Jury to Find Every Element of Intimidation Beyond a Reasonable Doubt.

The following is the standard courts apply when reviewing challenges to the sufficiency of the evidence:

> The standard [courts] apply when 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, [courts] may not weigh the evidence and substitute [their] judgment for the fact-finder. In addition . . . 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. Furthermore, when reviewing a sufficiency claim, [the court] is required to give the prosecution the benefit of all reasonable inferences to be drawn from the evidence.
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> However, the inferences must flow from facts and circumstances proven in the record, and must be of such volume and quality as to overcome the presumption of innocence and satisfy the jury of an accused's guilt beyond a reasonable doubt. The trier of fact cannot base a conviction on conjecture and speculation and a verdict which is premised on suspicion will fail . . . .

Commonwealth v. Bostick, 958 A.2d 543, 560 (Pa. Super. 2008).

A person commits Intimidation "if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to . . . [r]efrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime." 18 Pa.C.S. § 4952(a)(1).

The Commonwealth must prove intimidation. Commonwealth v. Doughty, 2015 Pa. LEXIS 2669, 15-16 (Pa. 2015). "Section 4952 requires proof that the defendant intended to intimidate the [witness]. That is, the proof must show that the defendant acted or engaged in conduct: (1) with the 'conscious object to engage in conduct of that nature or to cause such a result,' . . . or (2) with the awareness 'that it is practically certain that the conduct will cause such a result . . . .' The focus of the inquiry is upon the conduct and statements of the defendant; most often, it is only through the defendant's acts and statements and the reasonable inferences

therefrom, that guilt may be confirmed." Commonwealth v. Brachbill, 527 A.2d 113, 117-18 (Pa. Super. 1987). "The Commonwealth is not required to prove mens rea by direct evidence. Frequently such evidence is not available. In such cases, the Commonwealth may rely on circumstantial evidence." Commonwealth v. Collington, 615 A.2d 769, 770 (Pa. Super. 1992).

Here, the Defendant called Wood a "rat" twice and asked Wood where he lived. The Defendant was a friend of the defendant in the murder case as evidenced by the Defendant referring to the murder case defendant as "my man." The Defendant knew Wood had provided statements relevant to the murder case. Because there was evidence that Defendant was a friend of the defendant in the murder case, a jury could infer that the Defendant knew that the murder case was ongoing. Viewing the evidence in the light most favorable to the Commonwealth and given the Defendant's friendship with the defendant in the murder case, a jury could find beyond a reasonable doubt that the Defendant sent the messages with the intent to obstruct, impede, impair, prevent, or interfere with the administration of criminal justice in the murder case.

The Defendant calling Wood a "rat" and asking Wood where he lived is sufficient evidence for the jury to find beyond a reasonable doubt that the Defendant attempted to intimidate Wood. Because the Defendant knew that Wood had information relevant to the murder case but did not know whether Wood "was still telling," a jury could infer that the Defendant was attempting to intimidate Wood to refrain from informing or reporting to law enforcement or the prosecutor information concerning the murder case. Thus, the Commonwealth presented sufficient evidence to enable the jury to find every element of Intimidation beyond a reasonable doubt.

B. The Evidence was Sufficient for a Jury to Find Every Element of Criminal Use of a Communication Facility Beyond a Reasonable Doubt.

To establish evidence sufficient to convict a person of Criminal Use of a Communication Facility, "the Commonwealth must prove beyond a reasonable doubt that: (1) [the person] knowingly and intentionally used a communication facility; (2) [the person] knowingly, intentionally or recklessly facilitated an underlying felony; and (3) the underlying felony occurred." Commonwealth v. Moss, 852 A.2d 374, 382 (Pa. Super. 2004). Here, Agent Peacock testified that the Defendant said he used his cell phone to send the messages to Wood. As discussed above, the evidence was sufficient for a jury to find beyond a reasonable doubt that, by sending the messages, the Defendant committed the felony of intimidation of a witness in a murder case. Therefore, the Commonwealth presented sufficient evidence to enable the jury to find beyond a reasonable doubt every element of Criminal Use of a Communication Facility.

C. The Evidence was Sufficient for a Jury Find Every Element of Possession of a Criminal Instrument Beyond a Reasonable Doubt.

"To prove [Possession of a Criminal Instrument], the Commonwealth must demonstrate that the defendant 'possesses any instrument of crime with intent to employ it criminally.' An instrument of crime is defined as '[a]nything specially made or specially adapted for criminal use' or '[a]nything used for criminal purposes and possessed by the actor under circumstances not manifestly appropriate for lawful uses it may have.'" Commonwealth v. Stokes, 38 A.3d 846, 854 (Pa. Super. 2011) (quoting 18 Pa.C.S. § 907). Here, the Defendant said that he used his cell phone to send the messages to Wood. As discussed above, the evidence was sufficient for a jury to find that the Defendant committed Intimidation when he sent the messages. Therefore, the Commonwealth presented sufficient evidence for a jury to find beyond a reasonable doubt that the Defendant had the intent to use the phone criminally, used the phone criminally, and

possessed the phone under circumstances not manifestly appropriate for the lawful uses that it has.

D. The Verdict is not Against the Weight of the Evidence.

The following is the standard courts apply when reviewing weight of the evidence claims:

> The finder of fact is the exclusive judge of the weight of the evidence as the fact finder is free to believe all, part, or none of the evidence presented and determines the credibility of the witnesses.
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> [A] new trial [should be granted] only where the verdict is so contrary to the evidence as to shock one's sense of justice. A verdict is said to be contrary to the evidence such that it shocks one's sense of justice when 'the figure of Justice totters on her pedestal,' or when 'the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience.'

Commonwealth v. Boyd, 73 A.3d 1269, 1275-76 (Pa. Super. 2013).

Here, the Defendant asserts that "[t]he only evidence presented with respect to Intimidation of a Witness was testimony by Gage Woods [*sic*] that [the Defendant] called him a rat on Facebook with respect to [the murder] case." The Court disagrees with the Defendant's assertion. In addition to calling Wood a "rat," the Defendant said that Wood told on "[his] man," and the Defendant asked Wood where he lived. Given this evidence, the verdict does not shock this Court's conscious.

E. The Sentence is Neither Unwarranted nor Excessive.

In June 2015, the Defendant was sentenced in another Lycoming County case, so the Court had "paperwork on [the Defendant] from that sentencing." N.T., 9/15/15, at 81-82. For each offense in this case, the Court stated the standard range of the sentencing guideline. N.T., 9/24/15, at 3. The Court considered the Defendant's age and knows that the Defendant is "going

to miss a whole chunk of time." Id. at 11. However, the circumstances of the offenses and the character of the Defendant led the Court to impose aggravated range sentences. The Defendant had a prior record score of zero, but when he committed the offenses, he was in the "unique situation" of being "out on nominal bail for an attempted murder charge." Id. at 10, 11. At the time of sentencing, the Defendant was already serving an eight to 25 year sentence for an aggravated assault conviction. Id. at 3, 6. The Defendant planned the offenses, and "there was more involved than just a random act of impulse." Id. at 12. In addition, the Court was aware of that the victim wanted a maximum sentence, so that witnesses would have a "sense of protection" and "public/others are not discouraged from cooperating with police." Id. at 4. The Court believes that a lesser sentence "will diminish the seriousness of this intimidation." Id. at 10.

III. Conclusion

The evidence was sufficient for a jury to find every element of the offenses beyond a reasonable doubt. The verdict is not against the weight of the evidence. The sentence is not excessive as the Court considered the circumstances of the offenses and the character of the Defendant.

ORDER

AND NOW, this _____ day of January, 2016, based upon the foregoing Opinion, it is ORDERED and DIRECTED that the Defendant's Post-Sentence Motion is hereby DENIED. Pursuant to Pennsylvania Rule of Criminal Procedure 720(B)(4), the Defendant is hereby notified of the following: (a) the right to appeal this Order within thirty (30) days of the date of entry of this Order; (b) the right to assistance of counsel in the preparation of the appeal; (c) if indigent, the right to appeal in forma pauperis and to proceed with assigned counsel as provided in Pennsylvania Rule of Criminal Procedure 122; and (d) the qualified right to bail under Pennsylvania Rule of Criminal Procedure 521(B).

By the Court,

Nancy L. Butts, President Judge