

2013 PA Super 218

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CALVIN BARTHOLOMUE LYNCH,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 761 MDA 2011

Appeal from the Judgment Nunc Pro Tunc March 24, 2011
In the Court of Common Pleas of Lancaster County
Criminal Division at No(s): CP-36-CR-0005345-2009
CP-36-CR-0005350-2009

BEFORE: STEVENS, P.J., BENDER, J., BOWES, J., GANTMAN, J.,
DONOHUE, J., ALLEN, J., OLSON, J., OTT, J., and WECHT, J.

OPINION BY STEVENS, P.J.

FILED JULY 29, 2013

Calvin Lynch, Appellant, files this appeal from the judgment of sentence of six to twelve years' incarceration for intimidation of a witness or victim, 18 Pa.C.S. § 4952. Appellant contends that the evidence was either insufficient to prove intimidation as contemplated by the statute or, if deemed so sufficient, unsupportive of a felony grading of the offense. On a record showing Appellant offered to his assault victim benefits designed to compel her absence from his criminal trial, we hold that Appellant committed an act the legislature explicitly sought to proscribe through its enactment of Section 4952. We affirm.

The trial court provides an apt recitation of relevant and undisputed facts, as follows:

On October 10, 2009, the victim in this case was brutally beaten with a baseball bat by [Appellant] who was her boyfriend and the father of her children. After hitting his victim with the bat, [Appellant] choked her until she lost consciousness. As a result of this assault the victim sustained a large gash to her head requiring six or seven stitches, a fractured elbow requiring surgery, bruises to her neck and arm and cuts on her legs and one of her knees. Just days later, [Appellant] made two collect calls to the victim from prison asking her to drop the charges and not to show up in court to testify. On October 17, 2009, the victim received the handwritten letter from [Appellant] asking her to drop the charges or not show up to testify.

Trial Court Opinion ("TCO"), 6/8/11, at 1-2.

The crux of Appellant's sufficiency challenge states that:

[t]he evidence was insufficient to prove the offense of intimidation of witnesses at 18 Pa.C.S. § 4952—or at least a felony version of that offense—where the content of the communications was not intimidating and where [Appellant] did not offer the complainant a pecuniary or other benefit.

Brief for Appellant at 13.

As a general matter, our standard of review of sufficiency claims requires that we evaluate the record "in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence." **Commonwealth v. Widmer**, 560 Pa. 308, 744 A.2d 745, 751 (Pa.2000). "Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." **Commonwealth v. Brewer**, 876 A.2d 1029, 1032 (Pa. Super. 2005). Nevertheless, "the Commonwealth need not establish guilt to a mathematical certainty." **Id.**; **see also Commonwealth v. Aguado**, 760 A.2d 1181, 1185 (Pa. Super. 2000) ("[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant's innocence."). Any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances. **See**

Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001).

The Commonwealth may sustain its burden by means of wholly circumstantial evidence. ***See Brewer***, 876 A.2d at 1032. Accordingly, “[t]he fact that the evidence establishing a defendant's participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence.” ***Id.*** (quoting ***Commonwealth v. Murphy***, 795 A.2d 1025, 1038–39 (Pa. Super. 2002)). Significantly, we may not substitute our judgment for that of the fact finder; thus, so long as the evidence adduced, accepted in the light most favorable to the Commonwealth, demonstrates the respective elements of a defendant's crimes beyond a reasonable doubt, the appellant's convictions will be upheld. ***See Brewer***, 876 A.2d at 1032.

Commonwealth v. Stays, ---A.3d---, 2013 WL 3378980, at *7 - 8 (Pa. Super. filed July 8, 2013).

The witness intimidation statute reads, in its entirety, as follows:

(a) Offense defined.--A person commits an offense 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:

(1) Refrain 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.

(2) Give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge.

(3) Withhold any testimony, information, document or thing relating to the commission of a crime from any law enforcement officer, prosecuting official or judge.

(4) Give any false or misleading information or testimony or refrain from giving any testimony, information,

document or thing, relating to the commission of a crime, to an attorney representing a criminal defendant.

(5) Elude, evade or ignore any request to appear or legal process summoning him to appear to testify or supply evidence.

(6) Absent himself from any proceeding or investigation to which he has been legally summoned.

(b) Grading.—

- (1) The offense is a felony of the degree indicated in paragraphs (2) through (4) if:
 - (i) The actor employs force, violence or deception, or threatens to employ force or violence, upon the witness or victim or, with the requisite intent or knowledge upon any other person.
 - (ii) The actor offers any pecuniary or other benefit to the witness or victim or, with the requisite intent or knowledge, to any other person.
 - (iii) The actor's conduct is in furtherance of a conspiracy to intimidate a witness or victim.
 - (iv) The actor accepts, agrees or solicits another to accept any pecuniary or other benefit to intimidate a witness or victim.
 - (v) The actor has suffered any prior conviction for any violation of this section or any predecessor law hereto, or has been convicted, under any Federal statute or statute of any other state, of an act which would be a violation of this section if committed in this State.

- (2) The offense is a felony of the first degree if a felony of the first degree or murder in the first or second degree was charged in the case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.
- (3) The offense is a felony of the second degree if a felony of the second degree is the most serious offense charged in the case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.
- (4) The offense is a felony of the third degree in any other case in which the actor sought to influence or intimidate a witness or victim as specified in this subsection.
- (5) Otherwise the offense is a misdemeanor of the second degree.

18 Pa.C.S. § 4952.

The trial court concluded that the evidence sufficiently demonstrated Appellant's intent to intimidate his girlfriend so that she would not testify against him. The mere act of repeatedly asking a closely-related assault victim, likely still vulnerable in the wake of the brutal beating he administered to her just days earlier, to refrain from testifying against him manifested an intent to intimidate for purposes of Section 4952(a)(1), the court reasoned. Specifically, it found that:

The record in this case clearly demonstrates that there was sufficient evidence to support the guilty verdict for [18 Pa.C.S. § 4952]. In this case, [Appellant] made two phone calls to his victim just days after beating her with a baseball bat and choking her. In those phone calls from prison [Appellant] specifically asked his victim to drop the charges and not testify against him in court. Additionally, [Appellant] sent a letter to his

victim again pressing her not to testify against him. Through this letter, [Appellant] made it clear to his victim that she was the key to him being released from prison. After listening to the evidence presented by the Commonwealth regarding the brutal beating of the victim by [Appellant] and the phone calls and letter from prison, the Court inferred from the surrounding circumstances that [Appellant] intended to intimidate his victim so she would not testify against him.

TCO, at 2 – 3.

Appellant counters that neither an intent nor an attempt to intimidate may be inferred from communications showing only that he prostrated himself in asking and even begging his girlfriend not to testify. Our review of the phone call transcripts entered into the record indeed reveals that Appellant's girlfriend consistently assumed a dominant position in the conversation and adamantly rejected his pleas. Nevertheless, the statute proscribes an attempt to intimidate a witness into withholding evidence, without reference to whether the attempt actually succeeds. As such, there may be instances where a plea for compassion and forgiveness by a physically abusive companion, partner, or other relation may appear pitiful and even prove unsuccessful in the end, but was, given the dynamics of the relationship at hand, reasonably calculated by the actor to deliver the kind of veiled threat that has bent the witness to his will in the past. In this regard, the facts of each case and the history between the actor and the witness will determine whether such communications, without more, qualify as "intimidation."

Here, however, we need not make such a determination, as the record includes additional instances in which Appellant communicates a clear offer of pecuniary and other benefits as prohibited by the witness intimidation statute. As noted *supra*, a person commits the proscribed offense if, with the intent to interfere with the administration of justice, he attempts to intimidate any witness or victim into withholding testimony from law enforcement, a prosecutor, or a judge. 18 Pa.C.S. § 4952(a)(3). Under Section 4952(b)(1)(ii), a felony version of the offense occurs where “the actor offers any pecuniary or other benefit to the witness or victim or, with the requisite intent or knowledge, to any other person.”

In ***Commonwealth v. Brachbill***, 520 Pa. 533, 555 A.2d 82 (1989), the Pennsylvania Supreme Court clarified that any offer of benefit with such intent violates the statute even if unaccompanied by threats or overt intimidation:

The offense as defined in paragraph (a) is expressly deemed [] a felony [] under (b) if: “[(1)(ii)] The actor offers any pecuniary or other benefit to the witness or victim....” Thus, although section 4952(a) uses the word “intimidates” and not the former broader term “induce,” it is nevertheless clear that the legislature intended to proscribe, under the provisions of this section, any offers of benefit with the intent to “obstruct, impede, impair, prevent or interfere with the administration of criminal justice, ...,” and that such conduct would constitute a felony of the third degree.

Id. at 540, 555 A.2d at 85. Turning to the facts before it, the ***Brachbill*** Court discerned a violation from evidence that two prison guards attempted to thwart an official investigation into their alleged abuse of a former inmate

by giving him \$7.00 and offering to buy him pants and dinner for his family in exchange for his silence. ***Id.***

Similarly, Appellant offered pecuniary and other benefits in an attempt to frustrate the prosecution of aggravated assault charges levied against him. In both phone calls and letters in which he persistently asked and even begged his girlfriend not to show at trial, Appellant offered a more stable and rewarding family life for her and their children in exchange for her refusal to testify:

I know deep down inside you still love me & all's you want is the CC you fell in love with to be there for you & the kids & love you back the way you love me.... So I'm beggin you, Lynda, don't send me away just yet.... Jail ain't the answer for me.... So please Lynda don't show up to court please..... And you already know that you don't have to, they try to scare you but you know all that already.

I propose that when I do get out (if you don't come to court) I could stay at my mom's and still help with the kids; do whatever I gotta do and then maybe we can move with the income tax money & start fresh....

So, it's a win-win situation for you & me & our kids.... On the other hand, you send me back to jail to rot & wallow in my own shit.

And I swear whatever you want me to do, whatever you tell me to do, I will do, no questions asked. That's my commitment to you.... So my life is your will...so please don't throw me away in this system.... So please Lynda don't let this system swallow me up away from you & specially my kids. If not for me, please do it for them. They need me out there & I need to be there for them.

Appellant's letter, authored 10/17/09, at 2,3,5, and 6.

Brachbill instructs that a violation of the witness intimidation statute is made upon "any offers of benefit with the intent to 'obstruct, impede, impair, prevent or interfere with the administration of criminal justice....'" **Id.** at 540, 555 A.2d at 86. Clearly revealed from the excerpt above is that Appellant offered benefits to the prospective chief witness against him with the intent to compel her absence from his trial. Made explicit in the letter is that all benefits are conditional on her complete disengagement from his prosecution. His criminal intent to frustrate the administration of justice, moreover, is not simply inferable from the offer itself, it is plainly disclosed where he repeatedly indicates that with his girlfriend's compliance, the prosecution against him would founder and charges would be dropped.

As made, Appellant's offer was neither too speculative nor vague to come within the ambit of Section 4952. Indeed, an offer of benefits may be so vague, incredible, or frivolous on its face that it necessarily fails to constitute the criminal act proscribed by the statute, but such is not the case here. Appellant and his girlfriend had a family, and his offer of providing improved household stability and financial support for her and their children in the event she withdrew from his case specifically targeted a parent's basic drive to meet core childcare needs. Though it ultimately rang hollow with his exasperated girlfriend, his proposal was not, under the circumstances, so preposterous that it failed to constitute a valid offer.

Furthermore, there can be no reasonable question upon reading the excerpt above that Appellant's promise of a tax return was both wholly dependent upon the girlfriend's inaction—"if you don't come to court"—and an offering of funds not belonging to the girlfriend. Appellant's plea may not have been persuasive, but it was not so illogical, either, that he attempted to entice his girlfriend with her own money. Instead, it represented a way by which he attempted to buttress his offer of stability and support with a specific example of how it could all work. As such, this portion of the offer represented a legitimate offer of pecuniary benefits as contemplated by the statute.

We conclude, therefore, that the legislature intended Section 4952 to address the very conduct here at issue. Appellant sought to frustrate the administration of justice by offering to give the Commonwealth's chief witness pecuniary and other benefits if she agreed to refrain from testifying against him. Accordingly, on a record of a serious offer of benefits made with the intent to derail a prosecution, we find a violation of Section 4952 and affirm judgment of sentence.

Judgment of sentence is affirmed.

BENDER, J. FILES A DISSENTING OPINION, WHICH JUDGE DONOHUE AND JUDGE WECHT JOIN.

Judgment Entered.


Deputy Prothonotary

Date: 7/29/2013