

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
MATTHEW P. GLASS,	:	
	:	
Appellant	:	No. 808 MDA 2013

Appeal from the Judgment of Sentence Entered April 8, 2013,
In the Court of Common Pleas of Adams County,
Criminal Division, at No. CP-01-CR-0000046-2013.

BEFORE: DONOHUE, SHOGAN and MUSMANNO, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED JANUARY 30, 2014

Appellant, Matthew P. Glass, appeals from the judgment of sentence imposed following his conviction at a bench trial of harassment under 18 Pa.C.S.A. § 2709(a)(4). We affirm.

The trial court summarized the evidence in the light most favorable to the Commonwealth as follows:

[The victim] is a former paramour of the Appellant and the mother of his child. Appellant, at the time of the incident, was housed in Huntingdon State Prison. The relationship between Appellant and [the victim] was strained at best and involved contentious child support litigation. Subsequent to a recent child support conference at which Appellant appeared by telephone, [the victim] received correspondence from Appellant on November 7, 2012. The correspondence was postmarked November 5, 2012 with a return address to Appellant containing his inmate number and the SCI-Huntingdon postal address. Upon opening the correspondence, [the victim] discovered a note in the Appellant's handwriting accompanied by toilet tissue

smeared with fecal matter.² At trial, Appellant admitted writing the correspondence[;] however [he] denied placing the used tissue in the same.

² The text of the note read: "Here you go! Just thought I'd return the favor! I hope you burn in hell you lying fucking deceitful two-faced ungrateful bitch!!"

Trial Court Opinion, 6/26/13, at 1. Following the conviction, the trial court sentenced Appellant to incarceration for a term of ninety days to one year.¹

This appeal followed, in which Appellant presents one question for review:

1. Was a finding of guilt under the Pennsylvania harassment statute, 18 Pa.C.S. § 2709, unconstitutional "as applied" to [Appellant], where [Appellant's] speech did not, and was not likely to, arouse sexual desires in the sole receiver of the speech?

Appellant's Brief at 4.

Appellant "maintains that the evidence was not sufficient to find guilt beyond a reasonable doubt that the speech in question was a 'communication' defined as non-'legitimate' speech . . . under the statute so as to avoid constitutional protections." Appellant's Brief at 7. In reviewing a sufficiency challenge, "we must determine whether the evidence admitted at trial, as well as all reasonable inferences drawn therefrom, when viewed in the light most favorable to the verdict winner, are sufficient to support all elements of the offense." **Commonwealth v. Cox**, 72 A.3d 719, 721 (Pa.

¹ The sentence placed Appellant in a state facility "as it aggregates with a state parole revocation which [Appellant] [was] currently serving." Order of Court, 4/9/13.

Super. 2013) (quoting **Commonwealth v. Koch**, 39 A.3d 996, 1001 (Pa. Super. 2011)). When performing this review, “we may not reweigh the evidence or substitute our own judgment for that of the fact finder.” **Id.** (quoting **Koch**, 39 A.3d at 1001).

Appellant was charged with harassment, which is codified at 18 Pa.C.S.A. § 2709(a)(4), as follows:

(a) Offense defined.--A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person:

* * *

(4) communicates to or about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures[.]

See Commonwealth v. Hartzell, 988 A.2d 141 (Pa. Super. 2009) (applying 18 Pa.C.S.A. § 2709(a)(4)).

“An intent to harass may be inferred from the totality of the circumstances.” **Cox**, 72 A.3d at 721 (quoting **Commonwealth v. Lutes**, 793 A.2d 949, 961 (Pa. Super. 2002)). The harassment statute defines “communicates” as follows:

“Communicates.” Conveys a message without intent of legitimate communication or address by oral, nonverbal, written or electronic means, including telephone, electronic mail, Internet, facsimile, telex, wireless communication or similar transmission.

18 Pa.C.S.A. § 2709(f).

Here, the trial court observed, “Appellant does not challenge [its] factual conclusion that the evidence supports, beyond a reasonable doubt, a finding that he placed the used tissue in the correspondence.” Trial Court Opinion, 6/26/13, at 1. We discern support in the record for the trial court’s factual finding that Appellant placed the note and soiled tissue in an envelope and sent them to the victim. N.T., 4/8/13, at 3–10 and Commonwealth Exhibits 1–3. Furthermore, by his own admission, “Appellant does not contend that the letter and tissue were not communications for purposes of the statute.” Appellant’s Brief at 12. Indeed, as opined by the trial court and discussed below, “[e]vidence of a communication instantly can be found in both the nonverbal and written text of the items forwarded and addressed to [the victim].” Trial Court Opinion, 4/8/13, at 4. Thus, for purposes of our review, the only statutory elements of harassment at issue are whether Appellant acted “with intent to harass, annoy or alarm” and whether Appellant’s communications were “lewd, lascivious, threatening or obscene.” 18 Pa.C.S.A. § 2709(a)(4).

Regarding the intent element, Appellant implicitly denies an intent to harass, annoy, or alarm the Victim by describing “the language of the letter [as] . . . often used by both parties in the relationship, and . . . therefore not shocking to either party.” Appellant’s Brief at 12. He claims the note and tissue “are legitimate (i.e. constitutionally-protected) communications.” ***Id.***

(citing **Commonwealth v. Duncan**, 363 A.2d 803, 807 (Pa. Super. 1976)). According to Appellant, “the speech at issue was entitled to full constitutional protection because it served a legitimate purpose,” and it did not fall within one of the “well-defined and narrowly limited classes of speech that have been enumerated by the Supreme Court,” which are “fighting words, incitement, obscenity, defamation, commercial speech, etc.” **Id.** at 7, 10. Specifically, Appellant claims the note served a legitimate purpose as a response “to ongoing disputes regarding child custody matters,” and the soiled tissue “became expressive speech and subject to First Amendment protections” by being referred to in the note. **Id.** at 7–8.

The trial court rejected Appellant’s lack-of-intent argument:

In establishing the element of intent to harass, the Commonwealth may properly rely upon inferences derived from the totality of the circumstances. **Commonwealth v. Lutes**, 793 A.2d 949, 961 (Pa. Super. 2002). Instantly, it defies reason to suggest that the inclusion of tissue paper smeared with human feces in a correspondence is not meant to annoy or alarm the recipient. Appellant in this case, by the inclusion of the used tissue paper, is not expressing social or political beliefs or ideas or engaging in any legitimate conduct. Rather, in communicating with [the Victim] by mailing a note accompanied by excrement, Appellant was going beyond legitimate communication to annoy [the Victim] in a manner intolerable by a civilized society. Indeed, the purpose of the communication is self-evident by the language of the note.

Trial Court Opinion, 6/26/13, at 2.

Upon review, we agree with the trial court’s analysis. Appellant offers — and the record reveals — no legitimate purpose for the written (note) and

non-verbal (soiled tissue) communications he sent to the Victim. Appellant and the Victim had a contentious relationship. Appellant sent the note and the soiled tissue to the Victim after a child support conference “which apparently had not favored Appellant.” Appellant’s Brief at 5. The sarcasm in Appellant’s words, “Here you go!” and “return the favor,” and the repulsiveness of used toilet tissue, suggest he was angry about the Victim’s role in the conference. The totality of these circumstances supports a reasonable inference that Appellant sent the note and the soiled tissue out of anger, intending to annoy the Victim or alarm her that he was retaliating. Based on the foregoing, we discern no error in the trial court’s legal conclusion that Appellant acted with the intent to harass, annoy, or alarm.

Next, we address the “lewd, lascivious, threatening or obscene” element of section 2709(a)(4). Appellant contends that the harassment statute is unconstitutional as applied to him because his speech “did not, and was not likely to, arouse sexual desires in the sole receiver of the speech.” Appellant’s Brief at 4. We disagree with Appellant’s interpretation of the statute and conclude that he is not entitled to relief.

Appellant specifically argues that the Commonwealth failed to prove that the challenged communication was obscene and, therefore, not within the area of constitutionally protected speech under the three-prong test announced in **Miller v. California**, 413 U.S. 15, 24 (1973). Appellant’s

Brief at 13, 16. In **Miller**, the United States Supreme Court set forth guidelines for determining what constitutes “obscenity,” as follows:

(a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24.

The Pennsylvania Legislature has codified the **Miller** test in the Pennsylvania Crimes Code, “dutifully follow[ing] the language suggested by the United States Supreme Court in defining the permissible scope of regulation of works which depict or describe sexual conduct.”

Commonwealth v. Bond, 504 A.2d 869, 875 (Pa. Super. 1986).

“Obscene.” Any material or performance, if:

- (1) the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest;
- (2) the subject matter depicts or describes in a patently offensive way, sexual conduct of a type described in this section; and
- (3) the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.

* * *

“Sexual conduct.” Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, anal or oral sodomy and sexual bestiality; and patently offensive representations or

descriptions of masturbation, **excretory functions**, sadomasochistic abuse and lewd exhibition of the genitals.

18 Pa.C.S.A. § 5903(b) (emphasis supplied). “An accepted definition of prurient is ‘having lascivious thoughts or desires: Lewd.’” **Bond**, 504 A.2d at 875 (citing Websters New Collegiate Dictionary).

Relying on Pennsylvania’s definition of the term “obscene,” the trial court rejected Appellant’s argument:

Similarly, that the communication was lewd, lascivious, and obscene is beyond reproach. Although section 2709 does not specifically define “obscene,” other statutes on the same or similar subject define the word. See 1 Pa. C.S.A. § 1921 (intention of the general assembly may be ascertained by considering other statutes upon the same or similar subject). Pennsylvania law related to obscene materials, 18 Pa. C.S.A. § 5903, defines “obscene” as any material or performance which depicts in a patently offensive way sexual conduct which an average person applying contemporary community standards would find, taken as a whole, appeals to prurient interest. 18 Pa. C.S.A. § 5903(b). That same statute includes in the definition of “sexual conduct” patently offensive representations or descriptions of excretory functions. . . . It cannot be seriously argued that the average person applying contemporary community standards would not find Appellant’s communication repulsive.

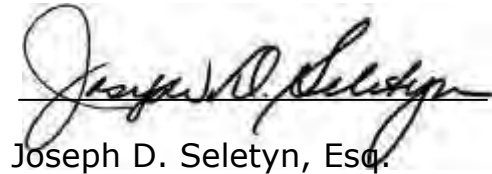
Trial Court Opinion, 4/8/13, at 2–3.

Upon review of Pennsylvania’s statutory definition of “obscene,” we agree with the trial court that the communications at issue were obscene and, therefore, not legitimate. The note and the soiled tissue are a patently offensive representation of an excretory function and clearly meet the statutory definition. 18 Pa.C.S.A. § 5309(b). Given their content, the note

and the soiled tissue are an affront to contemporary community standards. Taken as a whole, the note and the soiled tissue lack serious literary, artistic, political, educational, or scientific value. Thus, contrary to Appellant's assertion, his communications to the Victim do not fall within the area of constitutionally protected speech under the First Amendment. We conclude, therefore, the trial court did not err in determining that the evidence was sufficient to support Appellant's harassment conviction.

Judgment of sentence affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/30/2014