APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

SUPERIOR COURT OF PENNSYLVANIA

No. 1394 MDA 2022

COMMONWEALTH OF PENNSYLVANIA

v.

KATHRYN DANA PAPP,

Appellant

Submitted April 17, 2023

Filed October 20, 2023

OPINION

OPINION BY McCAFFERY, J.:

Kathryn Dana Papp (Appellant) appeals from the judgment of sentence of a $100 fine imposed in the Dauphin County Court of Common Pleas following her jury conviction of one count of harassment – communicates repeatedly.[1] On appeal, she argues: (1) the harassment statute is violative of the free speech protections in both the United States and Pennsylvania Constitutions on its face and as-applied; (2) the trial court erred in failing to instruct the jury regarding constitutionally protected activity under both the United States and Pennsylvania Constitutions;

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[1] 18 Pa.C.S. § 2709(a)(7).

and (3) the evidence was insufficient to support her conviction. For the reasons below, we affirm.

I. FACTS & PROCEDURAL HISTORY

The facts underlying Appellant's conviction, as developed during the jury trial, are as follows:

On August 4, 2020, Mark Hoover (hereinafter "Victim") and his wife took their 4-year-old dog, Flash, to Noah's Ark Veterinary Center ("Noah's Ark") for an annual check-up and vaccinations. Appellant was the veterinarian on duty that day at Noah's Ark. When Victim and his wife went to pick up Flash from Noah's Ark, Appellant stated that she believed Flash suffered from diabetes insipidus, and she recommended a medication called Desmopressin. Heeding Appellant's recommendation, Victim gave Flash a dose of the medication that had been prescribed. By the next evening, Flash had suffered two seizures, which prompted Victim to take Flash to an emergency veterinarian center called Shores. After the visit to Shores, Victim stopped administering the Desmopressin to Flash, and according to Victim, Flash had no subsequent seizures. Despite Victim's requests, however, the veterinarian at Shores did not provide an opinion on whether Appellant had erred by prescribing the Desmopressin.

On the afternoon of August 5, 2020, the same day that Flash suffered his two seizures, Victim took his other dog, 13-year-old Nick, to Noah's Ark for a check-up and vaccinations as he had done with Flash the previous day. Per COVID protocol that was in effect at the time, when Victim went to pick up Nick, Victim remained in his vehicle and called into the office to tell the staff that he was there to pick up Nick. When Victim called in, an administrative assistant answered

the phone and quoted him the cost for the visit. When Victim questioned the cost, the assistant explained that various services had been performed on Nick, including x-rays and bloodwork. Victim began to dispute the charges for these services, explaining that he had only authorized vaccinations and an annual check-up. At that point, the assistant transferred the call to Appellant, who was again the veterinarian on duty.

According to Victim, when he questioned Appellant about the charges, Appellant began "berating" Victim, cursing at him, and accusing him of being abusive to his animals. Wanting to end the phone conversation, Victim told Appellant to just bring Nick out to his vehicle. When Victim got out of his vehicle to retrieve Nick, Appellant continued to yell at him, accusing him of being an abusive pet owner and proclaiming that she was going to report Victim for animal abuse. Eventually, Victim placed Nick in his SUV, Appellant threw some papers into the back of Victim's vehicle, and Appellant backed away from Victim's vehicle as Victim was closing the tailgate. Victim asked Appellant to send him a bill for the charges that he had approved, and he left Noah's Ark. Victim recalled that Appellant seemed upset and made a comment about how she would "have to eat the bill."

Later [during] the evening of August 5, 2020, after the argument between Appellant and Victim at Noah's Ark, Victim received a text message from Appellant which contained a video of his dog Flash. The video focused on Flash's eyes, as his vision had been adversely affected by his diabetes insipidus condition. Accompanying the video was a one-word message which read: "Abuse."

Later the same evening, Victim received a friend request from Appellant on Facebook. Victim did not accept Appellant's friend request, but throughout the course of the evening, from approximately 5:30 p.m. to 11:41 p.m., Appellant sent Victim a multitude of messages via Facebook Messenger.

The first Facebook message, sent by Appellant at 5:33 p.m., stated: "*You have only ever brought Nick to Noah's Vet Center two times ever and declined all diagnostics and only wanted vaccines. I will be reporting you for mistreatment of your pets*." Victim responded to the Appellant's message as follows: "*At this point you should end all contact with me other than for payment for wellness visit and shots we approved*."

Despite Victim's request that Appellant end all contact, Appellant continued to send Victim various Facebook messages throughout the evening. Appellant's second message, which was sent about an hour after the first, read: "*Actually you can block me anytime you like, but I sent him my email. We are reporting you and you can contact my attorney*." [Victim testified that he is not tech savvy and would have required his son's assistance to block Appellant on Facebook.]

A third Facebook message from Appellant stated: "*Too bad your pet wasn't well enough to receive the shots you approved.*" Appellant's fourth Facebook message, which was lengthier, read as follows:

> *Talk about unethical. I have never met two people who care less for the wellbeing of their pets.*
>
> *Pretty fucked up that your four-year-old dog walked around blind for four years with his pupils completely dilated like some crack addict and you guys happen to not notice or care*[.]

That you declined every single year testing for heartworm and the three tick diseases[.]

That you were trying to give a vaccine which affects the immune system to a dog with an ALP[2] *over 2000 and possibly kill him.*

And don't worry about putting me up on Facebook because I'm already gonna put you all there complete with all the information [seeing as you] didn't pay for it and I get to own it[.[3]]

After Appellant's fourth Facebook message, which was sent at approximately 7:00 p.m., [Victim] sent a response at 7:45, in which he said: "*As stated before, please stop contacting me.*" Appellant replied by stating: "*It is a free world. You can block people easily on Facebook. Ouch, this must hurt.*" Appellant then sent Victim various pictures of Victim's financial information that Appellant had retrieved on the internet. Moreover, Appellant sent Victim a screenshot of information she had retrieved regarding Victim's wife, including her name and date of birth as well as information about a traffic violation that Victim's wife incurred in 2013.

At about 9:54 p.m., Appellant messaged Victim on Facebook again, this time giving Victim the name of Appellant's lawyer and telling Victim to contact the lawyer if he had any issues. Shortly thereafter, Appellant sent another brief Facebook message,

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[2] "ALP" is not explained or defined in the briefs or the record.

[3] We have corrected the trial court's recitation of the messages to reflect the structure of the message as set forth in the exhibit presented at trial. *See* N.T. Jury Trial, 5/2-3/2022, at 38-40; Commonwealth's Exhibit 3.

> stating: "*I do not have time for low lifes with broke moral compasses.*"
>
> Somewhere around that time, Victim contacted the Lower Paxton Township Police Department. Victim spoke with Officer Derek Day and conveyed that he believed he was being harassed by Appellant. After speaking with Victim, Officer Day contacted Appellant and left a message that he wished to speak with her. Appellant returned the call and spoke with Officer Day. According to the Officer, Appellant stated that she should have stopped communicating with Victim after he requested she stop, and she admitted that her "mouth can get her in trouble sometimes." Appellant also indicated to the Officer that she wanted to report Victim to the Humane Society for abuse, and the Officer informed her that she could report Victim to the police if she wanted to. There was no evidence presented, however, to indicate that Appellant reported Victim to either the Humane Society or the police.
>
> Shortly before midnight, after Victim and Appellant had both spoken with Officer Day, Victim responded to Appellant's most recent Facebook message, telling Appellant: "*I have contacted the police. You are harassing me. Please stop.*" Shortly thereafter, at around 11:41 p.m., Appellant replied by stating: "*We've chatted. I told them everything.*" That message was the last message exchanged between Appellant and Victim.

Trial Ct. Op., 11/30/22, at 2-6 (record citations omitted & some paragraph breaks added).

However, there were two other communications introduced and discussed at trial – a post on Appellant's

personal Facebook page, and an email sent from Appellant to Victim and his wife. Victim testified that after receiving the message from Appellant stating she was "going to put [him] up on Facebook[,]" he looked at her personal profile and saw a post dated the day before, August 4th. *See* N.T., Jury Trial, at 53-54, 68. The post included pictures of various animals, including the video of Flash that Appellant had texted to Victim, with a caption that read: "Yet another crazy one. So grateful for wonderful pet owners" with a heart emoji. *See id.* at 53; Defendant's Exhibit 1. Although this was posted before his interaction with Appellant, Victim interpreted this as a negative comment about him. *See* N.T., Jury Trial, at 54.

Moreover, while Appellant was sending Victim a barrage of messages on Facebook on August 5th, she also sent him and his wife the following email at 6:20 p.m.:

> Subject: Re: Flash differentials
>
> You both are being reported for lack of proper veterinary care for your pets. We have seen Nick only 2 times EVER and you declined ALL diagnostics and requested ONLY vaccines. He is close to 14 [years old] and that is 2 total visits. You are inhumane. You have a BLIND 4 [year old] dog you couldn[']t even realize was blind nor treat!! I have the rads, bloodwork, pictures, videos and more to support this. If you would like to sue, for absolutely anything at all, please contact my father and personal attorney, Allen N[.] Papp, directly at his law firm – Adams, Cassese & Papp.
>
> Best regards to both of you uncaring assholes,
>
> Kathryn Papp, DVM

N.T., Jury Trial, at 44-45; Commonwealth's Exhibit 8.

Appellant was subsequently charged with one count of harassment – communicates repeatedly, a misdemeanor of the third degree. On September 23, 2021, she filed an omnibus pretrial motion seeking dismissal of the charge on two bases: (1) the facts were insufficient to sustain a conviction of harassment; and (2) the charge violated both the First Amendment of the United States Constitution[4] and Article 1, Section 7 of the Pennsylvania Constitution.[5] *See* Appellant's Omnibus Pre-trial Motion, 9/23/21, at 4-6. The Commonwealth filed a response, and the trial court subsequently denied the motion.[6]

The case proceeded to a two-day jury trial conducted on May 2 and 3, 2022. Victim and Officer Day testified on behalf of the Commonwealth. Appellant testified in her own defense.

> [She] claimed that she had sent all the messages because she believed the dogs had serious medical

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[4] *See* U.S. Const. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press").

[5] *See* Pa. Const. art. 1, § 7 ("The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.")

[6] No order denying Appellant's pretrial motion appears in the certified record or on trial court docket. However, following the Commonwealth's case-in-chief at trial, Appellant moved for a judgment of acquittal based on the same arguments she made in her pretrial motion, and, in particular, the fact that she was being prosecuted only for her speech, not for her conduct. *See* N.T., Jury Trial, at 85-86. At that time, the trial court stated that the pretrial motion had been denied by another judge. *See id.* at 86. Appellant agreed, noting that the pretrial judge "said it would be more appropriate" to address after the Commonwealth presented its case. *Id.* Thereafter, the trial court denied the motion for judgment of acquittal. *See id.* at 87.

> conditions, and she was frustrated that Victim and his wife would not listen to her and had accused her of being a bad veterinarian. She testified that she was "so worked up that [she] used improper language", that she was "haughty" and "overreacted", and she conceded that she "should have taken a step back and more calmly explained why [Victim and his wife] should have been more concerned."

Trial Ct. Op. at 6 (record citations omitted). At the conclusion of trial, the jury found Appellant guilty of harassment – communicates repeatedly. Appellant agreed to proceed immediately to sentencing, at which time the trial court imposed a $100 fine.

Appellant filed a timely post-sentence motion. First, she asserted that her conviction violated the First Amendment of the United States Constitution as-applied to the facts and circumstances of her case.[7] *See* Appellant's Post-Sentence Motion and Memorandum of Law, 5/13/22, at 2-4. She argued: (1) she was "convicted solely on the contents of her speech, not by virtue of any physical conduct[;]" and (2) restrictions on free speech are subject to strict scrutiny and have been upheld only when the victim is unable to avoid the speech, so that it becomes an "abusive trespass on one's privacy." *Id.* (citations omitted). Appellant insisted that the evidence proved Victim could have avoided the messages by blocking her on Facebook. *Id.* at 3. Second, in a related claim, she asserted that the jury should have been instructed to consider the following: (1) that the harassment statute does not apply to

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[7] Notably, Appellant's argument focused only on a violation of the United States Constitution, and not the Pennsylvania Constitution.

constitutionally protected activity, and a person may not be convicted for speech that is simply offensive or disagreeable; and (2) whether Victim had the "reasonable ability" to avoid the communication. *Id.* at 6.

The trial court denied Appellant's post-sentence motion on September 6, 2022. This timely appeal follows.[8]

II. ISSUES ON APPEAL

Appellant presents the following claims for our review:

> I. Did the [trial court] err by denying [Appellant's] Post-Sentence Motion for judgment of acquittal, or vacatur of judgment of sentence, as violating the First Amendment of the U.S. Constitution on its face or as applied to the facts and circumstances of the case?
>
> II. Did the [trial court] err by denying [Appellant's] Post-Sentence Motion for a new trial due to refusal to instruct the jury on constitutionally protected activity under the First Amendment of the U.S. Constitution and under Article I, Section 7 of the Pennsylvania Constitution?
>
> III. Is [the] evidence insufficient as a matter of law for [Appellant's] conviction for harassment under 18 Pa.C.S. § 2709(a)(7)?

Appellant's Brief at 2-3.

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[8] On October 17, 2022, Appellant complied with the court's order to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal. The court then filed a responsive opinion on November 30th.

III. CONSTITUTIONALITY OF SECTION 2709(a)(7)

In her first issue, Appellant insists that Subsection (a)(7) of the harassment statute violates both the First Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution on its face and as-applied to the facts of her case. *See* 18 Pa.C.S. § 2709(a)(7).

A challenge to the constitutionality of a criminal statute presents us with "a pure question of law for which our standard of review is *de novo*, and our scope of review is plenary." *Commonwealth v. Collins*, 286 A.3d 767, 775 (Pa. Super. 2022). Our review is guided by the following:

> [A] statute is presumed to be constitutional and will only be invalidated as unconstitutional if it clearly, palpably, and plainly violates constitutional rights.
>
> [A] defendant may contest the constitutionality of a statute on its face or as-applied. A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case. An as-applied attack, in contrast, does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right. A criminal defendant may seek to vacate his conviction by demonstrating a law's facial or as-applied unconstitutionality.

Commonwealth v. Bradley, 232 A.3d 747, 756-57 (Pa. Super. 2020) (citation omitted & paragraph break added). "If there is any doubt that a challenger has failed to [demonstrate the] high burden [of establishing the unconstitutionality of a statute], then

that doubt must be resolved in favor of finding the statute constitutional." *Collins*, 286 A.3d at 785 (citation omitted).

Here, Appellant challenges the constitutionality of subsection (a)(7) of the harassment statute, which provides, in pertinent part:

> (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;
>
> (5) communicates repeatedly in an anonymous manner;
>
> (6) communicates repeatedly at extremely inconvenient hours; or
>
> (7) communicates repeatedly in a manner other than specified in paragraphs (4), (5) and (6).
>
> * * *
>
> (f) Definitions.–As used in this section, the following words and phrases shall have the meanings given to them in this subsection:
>
> "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. § 2709(a)(4)-(7), (f) (emphases added). Therefore, a person may be convicted of harassment

under subsection (a)(7) if, with the intent to harass, annoy or alarm another person, she communicates a message repeatedly without the intent of a legitimate communication. *See* 18 Pa.C.S. § 2709(a)(7), (f).

(a) State Constitutional Challenge

As noted *supra*, Appellant challenges the constitutionality of Section 2709(a)(7) under both the United States and Pennsylvania Constitutions. *See* Appellant's Brief at 18-19. We conclude, however, that Appellant has waived her claim under Article I, Section 7 of the Pennsylvania Constitution because she did not sufficiently articulate a separate state constitution claim before the trial court. As we have repeatedly recognized:

> The Pennsylvania Rules of Appellate Procedure specify that issues that are not first raised in the trial court are waived on appeal. *See* Pa.R.A.P. 302(a). Even issues of constitutional dimension cannot be raised for the first time on appeal.

Commonwealth v. Strunk, 953 A.2d 577, 579 (Pa. Super. 2008) (some citations omitted).

Appellant's only reference to the "broader" free speech protections under Article I, § 7 of the Pennsylvania Constitution in the trial court was in the following three paragraphs in her omnibus pretrial motion:

> 15. Article I, Section 7 of the Pennsylvania Constitution's Provisions are broader, and they predate those in the First Amendment of the United States Constitution by roughly 13 years.
>
> 16. Article I draws clear lines around which speech may be civilly actionable while keeping the government out of criminalizing speech, whether written or spoken.

* * *

> 18. Article I, Section 7 comes down to the citizens of Pennsylvania from the principles laid out in William Penn's Frame of Government in 1682, and its protections provide a complete and total privilege against prosecution for the writing of political dissidents and other unpopular statements published in the press.

Appellant's Omnibus Pre-trial Motion at 5. Appellant did not provide any argument or case law asserting a state constitutional claim in her brief filed in support of that motion, nor did she present any such claim in her post-sentence motion. See Appellant's Brief in Support of Omnibus Pre-Trial Motion, 9/23/21, at 2-7 (unpaginated); Appellant's Post-Sentence Motion and Memorandum of Law at 2-4 (asserting her conviction "violates the First Amendment of the U.S. Constitution as-applied to the facts and circumstances") (some capitalization omitted & emphasis added).

More importantly, Appellant did not identify an Article I, Section 7 challenge in her court-ordered Rule 1925(b) statement. Rather, she argued only that the court erred in denying her post-sentence motion when her conviction was "violative of the First Amendment of the U.S. Constitution on its face or as applied to the facts and circumstances of the case." Appellant's Statement of Errors Complained of on Appeal, 10/17/22, at 1 (emphasis added). Consequently, the trial court did not address a distinct state constitutional challenge to the harassment statute in its opinion. Thus, we conclude Appellant has waived her separate challenge to the harassment statute based on the "broader" protections under Article I, Section 7 of the Pennsylvania

Constitution.[9] *See Commonwealth v. Armolt*, —— Pa. –––, 294 A.3d 364, 379 (2023) (holding defendant waived constitutional *ex post* facto claim by failing to include it in Rule 1925(b) statement).

Accordingly, we turn our focus to Appellant's multi-faceted argument that Section 2709(a)(7) violates her First Amendment right of free speech both on its face and as-applied to the facts of her case.

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[9] Were we to find the issue was preserved in the trial court, we would, nevertheless, conclude Appellant failed to present a cognizable state constitutional claim in her brief on appeal. In *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991), the Pennsylvania Supreme Court set forth four factors a litigant should analyze when asserting an independent claim under the Pennsylvania Constitution, including: (1) the text of the provision; (2) the "history of the provision, including Pennsylvania case-law;" (3) related cases from other states; and (4) relevant policy considerations. *Id.* at 895. Although the Supreme Court subsequently explained that a litigant is not required to address all four factors in order to preserve a claim, she must "specifically implicate the Pennsylvania constitution in the claim raised, cite cases in support of the claim, and relate the cases to the claim." *Commonwealth v. Crouse*, 729 A.2d 588, 594 (Pa. Super. 1999), *citing Commonwealth v. White*, 543 Pa. 45, 669 A.2d 896, 899 (1995).

Here, Appellant clearly implicated the protections of Article I, Section 7 in her argument. However, other than emphasizing that our state Constitution provides "broader" protection than our federal Constitution, Appellant fails to relate how this broader protection supports her claim. *See* Appellant's Brief at 19, 22, 25, 29, 33, 35, 37, 47, 50. Indeed, her consistent argument throughout the brief is that because Section 2709(a)(7) infringes upon the free speech protections under the First Amendment, it also violates the "broader protections" under the Pennsylvania Constitution. *See id.* at 29, 35, 37, 47, 50. For this reason, too, we would conclude Appellant's state constitutional claim is waived.

(b) Facial Constitutional Challenge

Appellant first argues Section 2709(a)(7) is facially overbroad and unconstitutional. *See* Appellant's Brief at 19. She maintains that her appeal presents a case of first impression, since the Pennsylvania Supreme Court has not reviewed the constitutionality of Subsection (a)(7). Appellant's Brief at 20. Although she recognizes that the Supreme Court rejected a facial constitutional challenge to a prior version of the harassment statute in *Commonwealth v. Hendrickson*, 555 Pa. 277, 724 A.2d 315 (1999), Appellant insists *Hendrickson* is not controlling here. She points out that Subsection (a)(7) was not included in the statute the *Hendrickson* Court reviewed, and the Court relied on "constitutional predicates that are no longer good law[.]" *See id.* at 21-23. She maintains that the United States Supreme Court has clarified that "inherently expressive" conduct is protected by the First Amendment, and the element "communicates repeatedly" in the current statute "includes inherently expressive conduct." *Id.* at 23-24, *citing Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006).

Relying upon a decision of the Third Circuit Court of Appeals, Appellant argues that "[t]o fall outside the protection of the First Amendment, harassing speech must be (1) subjectively viewed as such by the victim and (2) 'objectively severe or pervasive enough that a reasonable person would agree that is it harassment' under the totality of the circumstances." Appellant's Brief at 24, *citing Saxe v. State College Area School Dist.*, 240 F.3d 200, 205 (3rd Cir. 2001). However, she cautions that when speech or expressive conduct is protected under the First Amendment, "the subjective intent of the speaker is irrelevant." Appellant's Brief

at 26 (citation & internal quotation marks omitted). Appellant maintains that because our culture has lost "the ability to handle provocative criticism[,]" "[h]arassment is now equated with merely hearing offensive speech[,]" and "persons are becoming convicted of harassment based on the content, or viewpoint, of the communication, because it is used to infer intent[.]" *Id.* at 27-28. She asserts, however, that both the content of the communication and intent of the speaker are protected by the First Amendment. *Id.* at 28.

Appellant also insists that we must review the constitutionality of Section 2709(a)(7) pursuant to the strict scrutiny standard because the statute relies on the content of speech to determine harassment. *See* Appellant's Brief at 29-30. She contends that the statute fails strict scrutiny for several reasons: (1) it does not delineate how many times a person must communicate to constitute "too many times[;]" (2) "[t]o 'communicate repeatedly' includes conduct that is 'inherently expressive[;]'" (3) Subsection (a)(7) does not even require a victim, that is, a communication to another person; and (4) Subsection (a)(7) does not require the Commonwealth to prove the communication lacked a "legitimate purpose." *See id.* at 30, 32, 34 (citations & emphasis omitted).

Appellant recognizes that "First Amendment jurisprudence leaves one other avenue [for otherwise protected speech] to survive strict scrutiny" – that is, "when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." Appellant's Brief at 34-35 (emphasis omitted), *citing Erznoznik v. Jacksonville*, 422 U.S. 205, 209, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). Because Section 2709(a)(7) does not require the Commonwealth to demonstrate

that the victim/listener is unable to avoid exposure to the offensive speech, Appellant insists the statute is facially overbroad and violates her First Amendment rights.

We begin our analysis with the Supreme Court's decision in *Hendrickson*. In that case, the defendant repeatedly and anonymously faxed documents containing "racial and ethnic statements and derogatory comments about the medical and legal professions" to "about forty people at their offices." *Hendrickson*, 724 A.2d at 316. In all, the individuals received "about 400 faxes." *Id.* "The recipients testified that the faxes disrupted their offices and invoked emotions of anger and fear." *Id.* at 317. The defendant was subsequently arrested and charged with "multiple counts of harassment by communication or address under 18 Pa.C.S. § 5504(a)(1) and (a)(2)[.]"[10] *Id.* Following his conviction, the defendant filed a direct appeal asserting Section 5504 was "unconstitutionally overbroad and vague in violation of the United States" Constitution.[11] *Id.*

Former Section 5504 provided as follows:

> (a) Offense defined. — A person commits a misdemeanor of the third degree if, with intent to harass another, he:
>
> (1) makes a telephone call without intent of legitimate communication or addresses to or

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[10] Section 5504 was repealed effective February of 2003, and is now encompassed in the harassment (18 Pa.C.S. § 2709(a)(4)-(7)) and stalking (18 Pa.C.S. § 2709.1) statutes. *See Commonwealth v. Collins*, 286 A.3d 767, 776 (Pa. Super. 2022).

[11] As Appellant points out, the defendant also challenged the statute under the Pennsylvania Constitution, but the Court determined that claim was waived. *See Hendrickson*, 724 A.2d at 317 n.1.

> about such other person any lewd, lascivious or indecent words or language or anonymously telephones another person repeatedly; or
>
> (2) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language.

Hendrickson, 724 A.2d at 317, *citing* 18 Pa.C.S. § 5504(a)(1)-(2).

In reviewing the constitutionality of the statute, the Supreme Court observed that "[a] statute is overbroad if by its reach it punishes a substantial amount of constitutionally-protected conduct." *Hendrickson*, 724 A.2d at 317-18 (citations omitted). The Court explained, however, that "[t]he function of overbreadth adjudication ... attenuates as the prohibited behavior moves from pure speech towards conduct, where the conduct falls within the scope of otherwise valid criminal laws that reflect legitimate state interests." *Id.* at 318 (citations omitted).

Upon review of Section 5504, the Supreme Court concluded the statute was not unconstitutionally overbroad:

> [T]he plain language of Section 5504 seeks to regulate *conduct* intended to harass another. The government has a legitimate interest in preventing the harassment of individuals. *The statute is not directed at the content of speech and is unrelated to the suppression of free expression*. Rather, the statute focuses on the *manner and means of communication* and proscribes communications made with an intent to harass. By requiring an intent to harass, the statute does not punish constitutionally-protected conduct and ... is not facially overbroad in relation to its legiti-

mate purpose. *Hendrickson*, 724 A.2d at 318 (emphases added).[12]

As stated *supra*, Appellant first insists that we are not bound by the decision in *Hendrickson* because Subsection (a)(7) was not included in the prior statute. *See* Appellant's Brief at 21-22. Upon our review, however, we conclude that the decision in *Hendrickson* is controlling.

Although Subsection (a)(7) was not specifically included in the former statute, Section 5504 proscribed the same conduct. Section 5504 provided that a person was guilty of harassment by communication if, "with the *intent to harass* another" she, *inter alia*, "[made] a telephone call *without intent of legitimate communication*[;] or [made] *repeated communications* anonymously or at extremely inconvenient hours or in offensively course language." *See* 18 Pa.C.S. § 5504(a)(1)-(2) (emphases added) (repealed). Similarly, Section 2709(a)(7) provides that a person is guilty of harassment "when, with the intent to harass, annoy or alarm another, the person ... *communicates repeatedly* in a manner other than specified in paragraphs (4), (5), and (6)[,]" which proscribe, respectively, lewd or obscene words or drawings, anonymous communications, and communications at "extremely inconvenient hours[.]" *See* 18 Pa.C.S. § 2709(a)(4)-(7). Moreover, Section 2709(f) defines "[c]ommunicates" as "[c]onvey[ing] a message

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[12] Although Appellant does not raise a vagueness challenge on appeal, we note that the *Hendrickson* Court also determined the statute was not unconstitutionally vague. *See Hendrickson*, 724 A.2d at 319 (holding language of statute, read in context, was sufficiently specific for defendant to understand what was prohibited, and jury's determination that he acted with specific intent undercuts any argument that he did not understand the crime).

without intent of legitimate communication ...." 18 Pa.C.S. § 2709(f) (emphasis added). Therefore, Section 2709(a)(7), like former Section 5504, criminalizes the act of repeatedly communicating a message, without any legitimate intent, for the intended purpose of harassing, alarming or annoying another person. Accordingly, we conclude, as did the *Hendrickson* Court, that the statute is not unconstitutionally overbroad because it "seeks to regulate *conduct*" and "is not directed at the content of speech [or] the suppression of free expression." *Hendrickson*, 724 A.2d at 318 (emphasis added). Rather, like former Section 5504, Section 2709(a)(7) "is directed at the harassing nature of the communications, which the legislature has a legitimate interest in proscribing." *Id.*

Appellant also contends that *Hendrickson* is not controlling because it "rested on constitutional predicates that are no longer good law based on subsequent precedents by the U.S. Supreme Court and the U.S. Court of Appeals for the Third Circuit." Appellant's Brief at 23. Again, we disagree.[13]

Appellant asserts that more recent federal law regarding "inherently expressive conduct" somehow undermines the decision in *Hendrickson*, and that there is no "categorical harassment exception to the First Amendment's free speech clause." *See* Appellant's Brief at 23-24, *citing Rumsfeld*, 547 U.S. at 66, 126

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[13] To the extent Appellant argues that *Hendrickson* should be overruled, we remind her that "[i]t is a fundamental precept of our judicial system that a lower tribunal may not disregard the standards articulated by a higher court." *Commonwealth v. Randolph*, 553 Pa. 224, 718 A.2d 1242, 1245 (1998). *See also Commonwealth v. Edrington*, 317 Pa.Super. 545, 464 A.2d 456, 460 n.3 (1983) ("[T]he Superior Court cannot overrule Supreme Court decisions.").

S.Ct. 1297; *Saxe*, 240 F.3d at 205. Our review of *Hendrickson*, however, does not reveal any conflict. As noted *supra*, the *Hendrickson* Court relied upon the fact that Section 5504 regulated the "harassing nature of the communications" not the messages conveyed. *See Hendrickson*, 724 A.2d at 318. Thus, whether focusing on expressive speech or expressive conduct, Section 2709(a)(7) prohibits the repeated communication of a message, which has no legitimate intent, with the specific purpose of harassing, annoying or alarming another person. *See Rumsfeld*, 547 U.S. at 65-67, 126 S.Ct. 1297 (act which denied federal funding to colleges that prohibited or prevented military from recruiting on campus as a result of colleges' disagreement with government's policy on homosexuals in military did not violate right to free speech; "[t]he expressive component of [the] school's actions is not created by the conduct itself but by the speech that accompanies it").

Moreover, Appellant's reliance on *Saxe* is misplaced. She cites the following test to determine whether harassing speech falls outside the protection of the First Amendment: the "harassing speech must be (1) subjectively viewed as such by the victim and (2) 'objectively severe or pervasive enough that a reasonable person would agree that it is harassment' under the totality of the circumstances." Appellant's Brief at 24, *citing Saxe*, 240 F.3d at 205 (citation omitted). However, Appellant fails to describe the context in which the Third Circuit applied this test, which, we conclude, is critical.

In *Saxe*, the Third Circuit Court of Appeals considered whether a school district's anti-harassment policy was unconstitutionally overbroad. The policy proscribed, *inter alia*, "unwelcome verbal, written or physical conduct directed at the particular charac-

teristic[s]" of another with "the purpose or effect of substantially interfering with the student's education performance or creating" a hostile environment. *See Saxe*, 240 F.3d at 202-03. The *Saxe* Court cited the above test when discussing the concept of "'hostile environment' harassment." *See id.* at 205. Indeed, the quote relied upon by Appellant specifically states that the test is relevant to determine if conduct constitutes harassment under "*a 'hostile environment' theory*[.]" *Id.* (emphasis added).[14] Moreover, in a footnote, the Third Circuit acknowledged that "Pennsylvania's criminal harassment statute" – Section 2709 – "covers a *much narrower range* of conduct than [was] implicated by the" school policy at issue. *Id.* at 204 n.4 (emphasis added). Thus, we conclude the test in *Saxe* is not relevant in the present case. Accordingly, we have neither the authority nor the inclination to overrule *Hendrickson*. *See Randolph*, 718 A.2d at 1245.

Because we conclude the Supreme Court's decision in *Hendrickson* is dispositive of Appellant's facial challenge to Section 2709(c), we need not engage in a prolonged discussion of the remaining arguments in Appellant's first issue. With regard to her call for "strict scrutiny" review,[15] we note:

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[14] Appellant fails to acknowledge the *Saxe* Court did *not* create the two-part test – rather, it quoted the United States Supreme Court's decision in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). *Harris*, in turn, was not a First Amendment case; rather the *Harris* Court considered the "definition of a discriminatorily 'abusive work environment' (also known as a 'hostile work environment') under Title VII of the Civil Rights Act of 1964[.]" *Id.* at 18-19, 114 S.Ct. 367. Thus, it is inapplicable here.

[15] *See* Appellant's Brief at 29-30.

> *[C]ontent-based restrictions* on speech are presumptively unconstitutional and are subject to the strict scrutiny standard, which requires the government to prove that the restrictions are narrowly tailored to serve a compelling state interest. *Government regulation of speech is content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed*.

S.B. v. S.S., 664 Pa. 1, 243 A.3d 90, 104-05 (2020) (citation & quotation marks omitted; emphases added). Here, Section 2709 does not seek to regulate an individual's speech based on "the topic discussed or the idea or message expressed[;]" rather, it regulates the manner in which a communication is delivered. *See id.*; *Hendrickson*, 724 A.2d at 318 (holding harassment statute "is not directed at the content of speech" but "focuses on the manner and means of communication and proscribes communications made with an intent to harass"). Accordingly, strict scrutiny is not required.

Further, relying upon *Erznoznik*, Appellant also contends that Section 2709(a)(7) is facially unconstitutional because it does not require the Commonwealth to prove the victim/listener was unable to avoid exposure to the offensive speech. *See* Appellant's Brief at 34-35. Again, however, Appellant relies on decisions which are factually dissimilar. The *Erznoznik* Court considered the "facial validity of a [city] ordinance that prohibit[ed] showing films containing nudity by a drive-in movie theater when its screen [was] visible from a public street or place." *Erznoznik*, 422 U.S. at 206, 95 S.Ct. 2268. Because the ordinance, on its face, "discriminate[d] among movies solely on the basis of content[,]" the Supreme Court applied strict scrutiny. *See id.* at 209, 211, 95 S.Ct. 2268. The Court observed that "selective

restrictions [on speech] have been upheld only when the speaker intrudes on the privacy of the home, ... or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Id.* at 209, 95 S.Ct. 2268 (citations & footnote omitted). As discussed above, the statute at issue in the present case is not subject to strict scrutiny because it does not seek to restrict the *content* of speech. Thus, Appellant's facial challenge to Subsection 2709(a)(7) fails.

(c) As-Applied Constitutional Challenge

Appellant also presents an as-applied challenge to the constitutionality of the Section 2709(a)(7). She argues that application of the statute under the facts and circumstances of her case violates her First Amendment rights. Appellant's Brief at 37. First, Appellant states that "strict scrutiny must be applied" because her prosecution was "not content-neutral[;]" the contents of her communications were admitted at trial and shown to the jury. *See id.* at 38. She points out that the Commonwealth argued to the jury that the "*messages* were outlandish as a professional veterinarian." *Id.* (emphasis added & record citation omitted). Thus, Appellant suggests the jury was required to consider the "content" of the speech.

Further, Appellant categorizes the private messages as simply her attempt to "communicat[e] a particularized viewpoint to" Victim on a matter of public concern, namely animal abuse and neglect. *Id.* at 39-40. She maintains that the First Amendment protects speech regardless of whether others disapprove "of the ideas expressed[,]" and extends its protection to the use of profanity. *Id.* at 40-41.

With regard to the particular facts of her case, Appellant emphasizes that "the speech in question

was a single episode that occurred within one day – August 5, 2020." Appellant's Brief at 42. Moreover, due to Facebook's limit regarding the number of sentences in a message, she insists that "her numerous [p]rivate [m]essages are, in reality, a single communication, made contemporaneously." *Id.* Appellant asserts the Commonwealth did not prove that her communications were "objectively severe or pervasive enough that a reasonable person would agree that it is harassment" in order to pass the *Saxe* test. *See Saxe*, 240 F.3d at 205; Appellant's Brief at 42-43.

Moreover, Appellant argues that "[t]o survive constitutional strict scrutiny as applied ... the Commonwealth had to prove [Victim] was a captive audience" as set forth in *Erznoznik*. *See* Appellant's Brief at 43-44. She claims that, here, Victim could have avoided the harassment by simply blocking Appellant's private messages – an action he chose not to take. *See id.* at 46. Appellant insists Victim "chose to be harassed." *Id.* at 48 (emphasis omitted).

We begin by reiterating that we are not required to review the harassment statute under strict scrutiny. As explained *supra*, strict scrutiny applies to content-based restrictions on speech – that is when the law "applies to a particular speech because of the topic discussed or the idea or message expressed." *S.B.*, 243 A.3d at 104-05 (citation omitted). Subsection 2709(a)(7) does not regulate speech based on the message expressed, but rather "focuses on the manner and means of communication and proscribes communications made with an intent to harass." *Hendrickson*, 724 A.2d at 318.

Appellant contends, however, that her prosecution was "content-based" because the Commonwealth relied on the content of her communications to argue

that her messages were "outlandish" and, in fact, displayed her messages to the jury. *See* Appellant's Brief at 38. She insists: "In order to be content-neutral, basically, the contents of the defendant's communications cannot be admitted into the record or shown to the jury." *Id.* Appellant cites no authority supporting this broad claim, and our research has uncovered none.

In *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), the United States Supreme Court considered the constitutionality of a statute that prohibited a person from "speech-related conduct within 100 feet of the entrance to any health care facility." *Id.* at 707, 120 S.Ct. 2480. The statute prohibited a person from knowingly approaching within eight feet of another, for the purpose of passing a leaflet, displaying a sign, or counseling. *Id.* In concluding the statute was content-neutral, the Supreme Court observed:

> It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.

Hill, 530 U.S. at 721, 120 S.Ct. 2480.

Similarly, here, the content of Appellant's messages was relevant for two purposes: (1) to determine if the messages were intended as legitimate communications; and (2) to determine if Appellant's intent was to

harass, alarm, or annoy Victim. The statute itself, however, is content-neutral. Appellant was not guilty of harassment simply because Victim disapproved of her messages or did not agree with her allegations of abuse. She was convicted because the jury found she repeatedly sent messages to Victim, for which she had no legitimate purpose, and did so with the intent to harass him.

Appellant's as-applied constitutional challenge under *Erznoznik* fails for the same reason as her facial challenge – the statute is not subject to strict scrutiny. We also note that *Erznoznik* considered an ordinance which purported to protect the privacy interests of the *public* at large. The Court opined:

> The ... ordinance discriminates among movies solely on the basis of content. Its effect is to deter drive-in theaters from showing movies containing any nudity, however innocent or even educational. This discrimination cannot be justified as a means of preventing significant intrusions on privacy. *The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes*. In short, the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.' Thus, we conclude that the limited privacy interest of persons on the public streets cannot justify this censorship of otherwise protected speech on the basis of its content.

Erznoznik, 422 U.S. at 211-12, 95 S.Ct. 2268 (citations & footnote omitted). Conversely, the harassment statute, as-applied to Appellant, does not seek to protect the privacy of the public at large. Rather, it seeks to prevent repeated communications of a non-

legitimate nature, made with the specific intent to harass a specific listener. Accordingly, *Erznoznik* is inapplicable.

Lastly, with regard to Appellant's assertion that her communications were not "pervasive enough that a reasonable person would agree that it is harassment[,]" we emphasize that she continues to rely upon a standard set forth in *Saxe*, a decision that applies to hostile environment harassment, and is not applicable here. *See* Appellant's Brief at 43. Accordingly, we conclude Subsection 2709(a)(7) satisfies First Amendment protections both facially and as-applied.

IV. JURY INSTRUCTIONS

Next, Appellant argues the trial court erred in denying her post-sentence motion for a new trial because the court refused to instruct the jury "on the protections under the First Amendment of the U.S. Constitution." Appellant's Brief at 51. Specifically, she contends the court should have instructed the jury that, in order to convict Appellant, it was required to determine whether the speech was "objectively severe or pervasive enough that a reasonable person would agree that it is harassment[,]" and whether Victim was a captive audience, such that it was "impractical for [him] to avoid exposure to the offensive speech." *See id.* at 55 (citation omitted).

Our review of a challenge to the court's jury instructions is well-settled:

> [W]e review the charge as a whole to determine if it is fair and complete. The trial court commits an abuse of discretion only when there is an inaccurate statement of the law. A charge is considered adequate unless the jury was palpably misled by

> what the trial judge said or there is an omission which is tantamount to fundamental error.

Commonwealth v. Lake, 281 A.3d 341, 347 (Pa. Super. 2022) (citation & quotation marks omitted), *appeal denied*, 291 A.3d 333 (Pa. 2023).

First, we observe that Appellant does not specify where in the record she requested the two charges she sets forth in her brief. *See* Appellant's Brief at 55. Although she cites to page 58 in the Reproduced Record, that page corresponds to her post-sentence motion, and not to any proposed jury instructions supplied to the trial court.

Second, as we discussed *supra*, neither the "objectively severe or pervasive enough" test set out in *Saxe*, nor the captive audience requirement pronounced in *Erznoznik*, are applicable under the facts presented here. Thus, there would have been no basis for the trial court to instruct the jury on those concepts.

Third, we note:

> "A general exception to the charge to the jury will not preserve an issue for appeal. Specific exception shall be taken to the language or omission complained of." Pa.R.A.P. 302(b). Additionally, this Court has held that, in the criminal trial context, the mere submission and subsequent denial of proposed points for charge that are inconsistent with or omitted from the instructions actually given will not suffice to preserve an issue, absent a specific objection or exception to the charge or the trial court's ruling respecting the points.

Commonwealth v. Sanchez, 623 Pa. 253, 82 A.3d 943, 978 (2013) (some citations omitted). Here, as we discuss *infra*, Appellant's only on-the-record objection

to the trial court's charge was that the court did not instruct the jury that her First Amendment right to free speech trumped any statute to the contrary. Consequently, she did not preserve an objection based on the specific instructions she now requests in her brief.

Fourth, we conclude the trial court's instruction was clear and appropriate. With regard to the criminal charge of harassment, the court instructed the jury as follows:

> [Appellant] has been charged with harassment. To find [Appellant] guilty of this offense you must find that each of the following elements has been proved beyond a reasonable doubt.
>
> First, that [Appellant] communicated repeatedly with [Victim]. Now, what do we mean by communicate? To communicate means to convey a message or address and individual by oral, nonverbal, written or electronic means, such as telephone, electronic mail, internet ... all forms of electronic communication, without intent of a legitimate communication.
>
> And the second element is that [Appellant] did so with the intent to harass, annoy or alarm [Victim]. A person acts intentionally when it is his or her conscious object or purpose to bring about such a result.
>
> So ladies and gentlemen, you have to determine whether the crime of harassment has been committed. Yes, there is free speech and we all know that and recognize that, but this law basically says, for communication, at what point does it become criminal.

N.T. at 154-55.

After the instructions were provided, Appellant's counsel asked for a sidebar, where the following discussion ensued:

> [Appellant's counsel]: I know we were talking off the record earlier. So the only other thing that I would ask to be charged on is that the *First Amendment is superior and it overrules any statute to the contrary and that if they find that the speech is protected by the First Amendment, that they cannot convict on the basis of the content of that speech*. I would ask for any instruction to that effect.
>
> [Commonwealth's counsel]: I thoroughly object to that. That is not something that we're here for today. We are here for the charge of harassment.
>
> [Appellant's counsel]: Your Honor, I repeat, again, the – Article 6 of the Constitution said –
>
> [Commonwealth's counsel]: You had adequate time to send proposed instructions to [the trial court].
>
> THE COURT: I think both of you have sort of outlined that. I think it's over to the jury. I like to think I made it clear in my instructions that there is a right of free speech, but it would point to draw the line. I think it's clear so I'm not gonna confuse the issue.
>
> You have an exception. You made your objection timely. You're protected on the record. So just leave it at that. Thank you.

N.T. at 155-56 (emphasis added).

We detect no error or abuse of discretion on the part of the trial court. The court's instruction focused the jury on Appellant's actions and intent – not the content

of her speech. The court acknowledged that citizens have the right to free speech, but at some point the method or manner of communication can become criminal. Accordingly, Appellant's jury charge challenge fails.

V. SUFFICIENCY OF THE EVIDENCE

In her final claim, Appellant argues the evidence was insufficient to support her Section 2709(a)(7) conviction. Our review of a sufficiency claim is well-settled:

> A challenge to the sufficiency of the evidence presents a question of law and is subject to plenary review under a *de novo* standard. When reviewing the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, viewed in the light most favorable to the Commonwealth, were sufficient to prove every element of the offense beyond a reasonable doubt. [T]he facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

Commonwealth v. Collins, 286 A.3d at 773-74 (citations & quotation marks omitted). Moreover, "we may not reweigh the evidence or substitute our own judgment for that of the fact finder." *Commonwealth v. Cox*, 72 A.3d 719, 721 (Pa. Super. 2013) (citations & quotation marks omitted).

As noted above, in order to convict Appellant of harassment under Subsection 2709(a)(7), the Commonwealth was required to prove that she communicated a message repeatedly, without the intent of a legiti-

mate communication, and with the specific intent to harass, annoy or alarm Victim. *See* 18 Pa.C.S. § 2709(a)(7), (f).

Appellant first insists that she engaged in "constitutionally protected activity" pursuant to Section 2709(e), and therefore her intent to harass Victim is irrelevant. *See* Appellant's Brief at 55-56. She also maintains the record "does not support a reasonable inference of [her] intent to alarm [Victim] based on an e-mail and Facebook private messages within a single day." Appellant's Brief at 56. Appellant emphasizes that there was no physical contact between the two, nor threats of physical harm – "[a]t best, [Victim] subjectively felt threatened by the content of her speech that she was going to have his dogs taken away[.]" *Id.* at 57. Moreover, she contends that she did not act without a legitimate purpose, and, in fact, encouraged Victim to contact *her* attorney. *Id.* at 56.

The trial court concluded the evidence was sufficient to support the verdict based on the following:

> Appellant sent no fewer than ten messages to Victim though a variety of mediums, including text messaging, Facebook messaging, and email. These message were sent despite multiple pleas by Victim that Appellant cease communicating with him. And although Appellant claims that she sent some of the messages out of concern for Victim's dogs, most of the messages consisted of disrespectful, vulgar, or otherwise unprofessional language, and some of the messages contained very personal information about ... Victim and his wife that had absolutely nothing to do with pets or veterinary care whatsoever. This includes the Facebook messages in which Appellant provided screenshots of Victim's financial information and

> information regarding traffic violations previously committed by Victim's wife. Appellant herself even conceded that she was "so worked up that [she] used improper language", and that she was "haughty" and "overreacted" and that she "should have taken a step back and more calmly explained why [Victim and his wife] should have been more concerned.["] Based on all of this evidence, any reasonable juror could easily find that these messages were not sent with a constructive purpose in mind and they were sent for no other purpose than to harass, annoy, or alarm Victim and/or his wife. Therefore, there was ample evidence to support the jury's finding that Appellant had harassed Victim[.]

Trial Ct. Op. at 7-8.

Upon our review, we agree the evidence was sufficient to support the verdict. As discussed *supra*, Appellant was not convicted for engaging in constitutionally protected activity. She was convicted based on her conduct, not the content of her speech.

Moreover, while Appellant attempts to downplay the *repeated* nature of her communications – emphasizing she merely sent one email and several private Facebook messages all within a single day – we conclude the evidence supports the jury's verdict. After their argument in the parking lot, at 5:24 p.m., Appellant sent Victim an unsolicited *text* accusing him of animal abuse. *See* N.T. at 34; Commonwealth's Exhibit 9. About 10 minutes later, she sent Victim a private *Facebook message* informing him she would be reporting him for the alleged mistreatment of his dogs. *See* N.T. at 37; Commonwealth's Exhibit 2. At that point, Victim *explicitly* requested that Appellant end all contact with him. *Id.* Around the same time, Victim received a

Facebook friend request from Appellant, which he did not accept. *See* N.T. at 36-37.

At approximately 6:20 p.m., Appellant sent Victim an *email* in which she, again, accused Victim and his wife of abusing their dogs, describing them as "inhumane" and "uncaring assholes," and providing the name of her attorney (her father) in case they wanted to sue her. N.T. at 44-45; Commonwealth's Exhibit 8. Despite Victim's earlier explicit plea to stop all contact, at approximately 7:07 p.m., Appellant sent Victim eight successive Facebook messages accusing Victim and his wife of neglecting their dogs, and informing Victim he could block her and contact her attorney.[16] *See* N.T. at 38-39; Commonwealth's Exhibits 2-4. At 7:45 p.m., Victim, again, explicitly requested Appellant to "please stop contacting" him. N.T. at 40; Commonwealth's Exhibit 4.

Rather than cease all communication, Appellant responded that it was "a free world" and Victim could "block" her on Facebook; she also stated "Ouch, this must hurt." N.T. at 40. Appellant then sent Victim pictures of his financial information and his wife's traffic violation – information that had nothing to do with her alleged concern for the safety of Victim's dogs. *See id.* at 40-41; Commonwealth's Exhibits 5, 6. After receiving no response from Victim, Appellant sent another series of messages at 9:54 p.m. which included the names of her lawyers and the comment, "I do not have time for low lifes with broke moral compasses." *See* N.T. at 42; Commonwealth's Exhibit 7. Victim

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[16] Appellant claims these messages were, in actuality, one message sent in "blocks of four or five sentences[.]" N.T. at 116. Regardless, Appellant still continued to send messages to Victim with no purpose other than to harass or annoy him.

responded by informing Appellant he had contacted the police, and again asked her, for the third time, to "stop." *Id.* Two hours later, at 11:41 p.m., Appellant responded: "We've chatted. I told them everything." N.T. at 42-43; Commonwealth's Exhibit 7.

Although the communications occurred over one evening, Appellant contacted Victim by three different means – text, email and Facebook message – and sent numerous messages *after* Victim twice requested that she stop contacting him. Furthermore, the jury acted within its discretion when it rejected Appellant's claim that she sent the messages for a legitimate purpose, *i.e.*, to alert Victim of her intention to report him for animal neglect. Without any response from Victim, Appellant denigrated him and his wife by quickly resorting to name-calling and sending pictures of unrelated personal information. While this information was public, the jury could reasonably conclude that Appellant's intention had nothing to do with her concern for Victim's pets. Moreover, her repeated messaging of Victim – which regressed into matters irrelevant to the care of his pets – despite his pleas to stop, supports the jury's determination that Appellant acted with the specific intent to harass, annoy or alarm Victim. Accordingly, Appellant's final claim fails.

VI. CONCLUSION

Therefore, we conclude that Section 2709(a)(7) does not violate Appellant's First Amendment right to free speech either facially or as-applied. We also reject Appellant's challenges to the trial court's jury instructions and the sufficiency of the evidence supporting her convictions. Consequently, we affirm the judgment of sentence.

Judgment of sentence affirmed.

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 611 MAL 2023

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

KATHRYN DANA PAPP,

Petitioner

Petition for Allowance of Appeal from the
Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 2nd day of April, 2024, the Petition for Allowance of Appeal is DENIED.

Justice McCaffery did not participate in the consideration or decision of this matter.

A True Copy Elizabeth E. Zisk
As Of 04/02/2024
Attest: /s/ Elizabeth E. Zisk
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX C

47 U.S.C. § 223(a)(1)(C), Communications Decency Act ("Whoever—in interstate or foreign communications—makes a telephone call or utilizes telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to abuse, threaten, or harass ….")

APPENDIX D

Ala. Code § 13A-11-8(b) ("[a] person commits the crime of harassing communications if, with intent to harass or alarm another person, he or she")

Alaska Stat. § 11.61.120 ("[a] person commits the crime of harassment in the second degree if, with intent to harass or annoy another person, that person")

Ariz. Rev. Stat. § 13-2916 ("[i]t is unlawful for a person to knowingly terrify, intimidate, threaten or harass a specific person or persons by doing any of the following")

Ark. Code Ann. § 5-41-108 ("A person commits the offense of unlawful computerized communications if, with the purpose to frighten, intimidate, threaten, abuse, or harass another person, the person sends a message ….")

Ark. Code Ann. § 5-71-209(b)(1) ("[a] person commits the offense of harassing communications if: With the purpose to harass, annoy, or alarm another person, the person")

Cal. Penal Code § 653m(b) ("Every person who, with intent to annoy or harass, makes repeated telephone calls or makes repeated contact by means of an electronic communication device, or makes any combination of calls or contact, to another person is … guilty of a misdemeanor ....")

Colo. Rev. Stat. § 18-9-111(1) ("[a] person commits harassment if, with intent to harass, annoy, or alarm another person, he or she")

Conn. Gen. Stat. § 53a-183 ("[a] person is guilty of harassment in the second degree when with intent to harass, terrorize or alarm another person")

Del. Code Ann. tit. 11, § 1311 ("[a] person is guilty of harassment when, with intent to harass, annoy or alarm another person")

D.C. Code § 22-3133(a) ("[i]t is unlawful for a person to purposefully engage in a course of conduct directed at a specific individual: With the intent to cause that individual to")

Fla. Stat. § 365.16 ("Whoever: Makes a telephone call … solely to harass any person at the called number, is guilty of a misdemeanor ….")

Ga. Code Ann. § 16-11-39.1 ("A person commits the offense of harassing communications if such person: Contacts another … for the purpose of harassing, molesting, threatening, or intimidating ….")

Haw. Rev. Stat. § 711-1106 ("[a] person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person")

Idaho Code § 18-6710 ("Any person who, with intent to annoy, terrify, threaten, intimidate, harass, or offend, contacts another ….")

720 Ill. Comp. Stat. 5/26.5-2 ("A person commits harassment by telephone when he or she uses telephone communication for any of the following purposes: … Making a telephone call … with intent to abuse, threaten or harass ….")

Ind. Code § 35-45-2-2 ("A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication: … uses a computer network … or other form of electronic communication to: communicate with a person ….")

Iowa Code § 708.7(1.b) ("A person commits harassment when the person, purposefully and without legitimate purpose, has personal contact with another person,

with the intent to threaten, intimidate, or alarm that other person.")

Kan. Stat. Ann. § 21-6206 ("Harassment by telecommunication device is the use of: A telecommunications device to … make or transmit any comment, request, suggestion, proposal, image or text with intent to abuse, threaten or harass ….")

Ky. Rev. Stat. Ann. § 525.080 ("[a] person is guilty of harassing communications when, with intent to intimidate, harass, annoy, or alarm another person, he or she")

La. Stat. Ann. § 14:40.3 ("Cyberstalking is action of any person to accomplish any of the following: … electronically communicate to another repeatedly … for the purpose of threatening, terrifying, or harassing any person.")

La. Stat. Ann. § 14:285 ("No person shall … send repeated text messages or other messages using any telecommunications device … in a manner reasonably expected to abuse, torment, harass, embarrass, or offend another ….")

Me. Stat. tit. 17-A, § 506-A ("A person is guilty of harassment if, without reasonable cause: The person engages in any course of conduct with the intent to harass, torment or threaten another person ….")

Md. Code Ann. Crim. Law § 3-804 ("A person may not use telephone facilities or equipment to make: … repeated calls with the intent to annoy, abuse, torment, harass, or embarrass another ….")

Mass. Gen. Laws ch. 269, § 14A ("Whoever … contacts another person by electronic communication … repeatedly, for the sole purpose of harassing, annoying or molesting the person … shall be punished ….")

Mich. Comp. Laws § 750.411s ("A person shall not post a message through the use of any medium of communication, including the internet … if … [p]osting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.")

Mich. Comp. Laws § 750.540e ("A person who maliciously uses any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quiet of another person by doing any of the following is guilty of a misdemeanor ….")

Minn. Stat. § 609.749 ("[a] person who commits any of the acts listed in paragraph (c) is guilty of a gross misdemeanor if the person, with the intent to kill, injure, harass, or intimidate another person")

Miss. Code Ann. § 97-45-15 ("It is unlawful for a person to … electronically communicate to another repeatedly … for the purpose of threatening, terrifying or harassing any person.")

Mo. Rev. Stat. § 565.090 ("A person commits the offense of harassment in the first degree if he or she, without good cause, engages in any act with the purpose to cause emotional distress to another person, and such act does cause such person to suffer emotional distress.")

Mont. Code Ann. § 45-8-213 ("[A] person commits the offense of violating privacy in communications if the person knowingly or purposely: with the purpose to terrify, intimidate, threaten, harass, or injure, communicates with a person by electronic communication and threatens to inflict injury or physical harm to the person or property of the person or makes repeated use

of obscene, lewd, or profane language or repeated lewd or lascivious suggestions ….")

Neb. Rev. Stat. § 28-1310 ("A person commits the offense of intimidation by telephone call or electronic communication if, with intent to intimidate, threaten, or harass an individual, the person ….")

Nev. Rev. Stat. § 200.571(b) ("A person is guilty of harassment if: … the person knowingly … places the person receiving the threat in reasonable fear that the threat will be carried out.")

Nev. Rev. Stat. § 200.575(1) ("A person who, without lawful authority, willfully or maliciously engages in a course of conduct directed towards a victim that would cause a reasonable person under similar circumstances to feel terrorized, frightened, intimidated, harassed … commits the crime of stalking ….")

N.H. Rev. Stat. Ann. § 644:4 ("A person is guilty of a misdemeanor … if such person: Makes a telephone call, whether or not a conversation ensues, with no legitimate communicative purpose ….")

N.J. Stat. Ann. § 2C:33-4.1 ("[a] person commits the crime of cyber-harassment if, while making … communications in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person")

N.M. Stat. Ann. § 30-20-12 ("It shall be unlawful for any person, with intent to terrify, intimidate, threaten, harass, annoy or offend, to telephone another and use any obscene, lewd or profane language or suggest any lewd, criminal or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person.")

N.Y. Penal Law § 240.30 ("A person is guilty of aggravated harassment in the second degree when: … [w]ith intent to harass or threaten another person, he or she makes a telephone call … with no purpose of legitimate communication.")

N.C. Gen. Stat. § 14-196 ("It shall be unlawful for any person: … [t]o telephone another repeatedly … for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person ….")

N.C. Gen. Stat. § 14-196.3 ("It is unlawful for a person to: … electronically communicate to another repeatedly … for the purpose of abusing, annoying, threatening, terrifying, harassing, or embarrassing any person.")

N.D. Cent. Code 12.1-17-07 ("[a] person is guilty of an offense if, with intent to frighten or harass another, the person")

Ohio Rev. Code Ann. § 2917.21 ("No person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person.")

Okla. Stat. tit. 21 § 1172 ("It shall be unlawful for a person who, by means of a telecommunication or other electronic communication device, willfully … Makes a telecommunication or other electronic communication including text, sound or images with intent to terrify, intimidate or harass ….")

Or. Rev. Stat. § 166.090 ("A telephone caller commits the crime of telephonic harassment if the caller intentionally harasses or annoys another person ….")

18 Pa. Cons. Stat. § 2709(a) ("A person commits the crime of harassment when, with intent to harass,

annoy or alarm another, the person … communicates repeatedly in a manner other than specified ….")

11 R.I. Gen. Laws § 11-52-4.2 ("Whoever transmits any communication by computer or other electronic device to any person or causes any person to be contacted for the sole purpose of harassing that person or his or her family is guilty of a misdemeanor ….")

S.C. Code Ann. § 16-17-430 ("It is unlawful for a person to: … telephone or electronically contact another repeatedly … for the purpose of annoying or harassing ….")

S.D. Codified Laws § 22-19A-1 ("No person may: … [w]illfully, maliciously, and repeatedly harass another person by means of any verbal, electronic, digital media, mechanical, telegraphic, or written communication.")

S.D. Codified Laws § 49-31-31 ("It is a Class 1 misdemeanor for a person to use a telephone or other electronic communication … [t]o contact another person with intent to terrorize, intimidate, threaten, harass, or annoy such person by using obscene or lewd language or by suggesting a lewd or lascivious act ....")

Tenn. Code. Ann. § 39-17-308 ("A person commits an offense who intentionally: … Communicates with another person without lawful purpose, anonymously or otherwise, with the intent that the frequency or means of the communication annoys, offends, alarms, or frightens the recipient ….")

Tex. Penal Code Ann. § 42.07 ("A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person … sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another ….")

Utah Code Ann. 1953 § 76-9-201 ("[a] person is guilty of electronic communication harassment … if with intent to intimidate, abuse, threaten, harass, frighten, or disrupt the electronic communications of another, the person")

Vt. Stat. Ann. tit. 13, § 1027 ("A person who, with intent to terrify, intimidate, threaten, harass, or annoy, makes contact by means of a telephonic or other electronic communication with another and … attempts to disturb, by repeated telephone calls or other electronic communications … the peace, quiet, or right of privacy of any person at the place where the communication or communications are received shall be fined … or be imprisoned ….")

Va. Code Ann. § 18.2-427 ("Any person who uses obscene, vulgar, profane, lewd, lascivious, or indecent language, or makes any suggestion or proposal of an obscene nature, or threatens any illegal or immoral act with the intent to coerce, intimidate, or harass any person, over any telephone or citizens band radio, in this Commonwealth, is guilty of a Class 1 misdemeanor.")

Wash. Rev. Code § 9.61.230 ("Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person … is guilty of a class C felony ….")

Wash. Rev. Code § 9A.90.120 ("A person is guilty of cyber harassment if the person, with intent to harass or intimidate any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to that person or a third party and the communication ….")

W. Va. Code § 61-3C-14a ("It is unlawful for any person, with the intent to harass or abuse another person, to

use a computer, mobile phone, personal digital assistant or other electronic communication device to ….")

Wis. Stat. § 947.0125 ("Whoever does any of the following is subject to a Class B forfeiture: … (c) With intent solely to harass another person, sends repeated messages to the person on an electronic mail or other computerized communication system. (d) With intent solely to harass another person, sends repeated messages on an electronic mail or other computerized communication system with the reasonable expectation that the person will receive the messages.")

Wyo. Stat. Ann. § 6-2-506 ("Unless otherwise provided by law, a person commits the crime of stalking if, with intent to harass another person, the person engages in a course of conduct reasonably likely to harass that person, including but not limited to any combination of the following: (i) Communicating … with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses ….")

APPENDIX E

[1] IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

No. CP-22-CR-0004780-2020

COMMONWEALTH OF PENNSYLVANIA

vs.

KATHRYN DANA PAPP

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

[Pages 1-176]

BEFORE: HONORABLE RICHARD A. LEWIS, SENIOR JUDGE

DATE: MAY 2 & 3, 2022

PLACE: COURTROOM NO. 6 and 3
DAUPHIN COUNTY COURTHOUSE
HARRISBURG, PENNSYLVANIA

APPEARANCES:

PAIGE PERRUCCI, ESQUIRE
Office of the District Attorney

For - Commonwealth

JOEL A. READY, ESQUIRE

For - Defendant

[2] INDEX TO WITNESSES

COMMONWEALTH	DIRECT	CROSS	REDIRECT	RECROSS
Mark Hoover				
Atty. Perrucci	22		65	
Atty. Ready		52		67
Derek Day				
Atty. Perrucci	69		–	
Atty. Ready		77		–

DEFENDANT	DIRECT	CROSS	REDIRECT	RECROSS
Kathryn D. Papp				
Atty. Ready	88		115	
Atty. Perrucci		106		116

[3] INDEX TO EXHIBITS

COMMONWEALTH'S	IDENTIFIED	ADMITTED
1 Facebook Request	35	36
2 Facebook Message	37	38
3 Facebook Message	38	38
4 Facebook Message	40	38
5 Facebook Message	41	38
6 Facebook Message	41	38
7 Facebook Message	41	38
8 Email	43	43
9 Text Message	72	81
10 Facebook Post	73	81
11 Professional Conduct; racing publication, Paulick report	111	–

DEFENDANT'S	IDENTIFIED	ADMITTED
1 Facebook Post	52	53
2 Text Message	100	100

[4] PROCEEDINGS
Monday, May 2, 2022
10:48 a.m.

THE COURT: Any preliminary matters that we need to discuss before bringing the jury up?

ATTORNEY PERRUCCI: We need to discuss the motion in limine. Judge Evans didn't make a decision on that. I think he left it to you.

THE COURT: I looked at it. What's your position on it, Mr. Ready?

ATTORNEY READY: I think it's relevant, I think it's appropriate and, obviously – let me see how the case develops – I do intend to call the witness by Zoom and authenticate the records and the fact that that was to happen immediately. During or after the time frame in which this happened I think is relevant. I think it actually happened before the Facebook messages went out.

THE COURT: And what is it that you would hope to introduce?

ATTORNEY READY: The records showing the statements that were made. Your Honor, I apologize, is it okay if – we have the witness at issue in the courtroom. I think it would be appropriate for us to discuss that without the witnesses present.

THE COURT: All right. Yeah, why don't you come on up.

* * *

[16] case, the jury must determine the credibility of each and every witness who testifies.

What is credibility? Well, there's a nice instruction at the end of the case that I'll give you, but for now the one-word definition, credibility means believability, believability, okay, who do you believe, who do you believe, but we'll talk about that more at the end of the case.

However, ladies and gentlemen, the one thing that I will stress to you, the one thing that I think it's a pretty educated guess on my part that each attorney will argue to you at the appropriate time is for you to use your common sense and your life's experience. They are the tools that our court system urges jurors to use in every case. Don't leave it at home, bring it along with you, common sense, life experience. It's invaluable, so don't be afraid to use it.

At the very end of – once both closing arguments have concluded, then I instruct you on the law. That part of the case is known as the charge. I'll give you the formal definitions of a charge and talk about your duties as jurors.

You are the judge of the facts. You are the judges of the credibility of the witnesses. I cannot tell you what to believe or what not to believe. It's not my job [17] and I will not step on your turf. That's your job.

However, when I give you the instructions at the end of the case, when I explain the law to you, not that it's in any way complicated in this case, but when I explain that to you you have to follow the law as I give it to you. So you're the judge of the facts, I'm the judge of the law.

So we'll get started and we're gonna go till right around noon and we'll stop, give you a lunch break and

then we'll come back this afternoon and pick up where we leave off at the noon hour.

All right, Ms. Perrucci.

ATTORNEY PERRUCCI: May it please the Court, defense, ladies and gentlemen of the jury. There was a saying my mother always told me, if you don't have anything nice to say, don't say it at all.

On August 5th of 2020 Mark Hoover took his 13-year-old dog to Noah's Ark Veterinarian Center. It was during the midst of COVID. The protocol was that he had to drop his dog off and come pick the dog back up.

When he was called by the vet tech to tell him to come pick up the dog and they told him what treatment was prescribed, he did not authorize or give consent to some of that treatment. So he disputed it.

Well, the defendant got on the phone and began to argue with him, but it doesn't end there. When he came to [18] pick up his dog she drags his dog outside, starts yelling in his face about the treatments and then throws the papers into his van where he then asks her to please leave, but she's not done making her point.

You will hear through testimony today that the defendant sent Mr. Hoover nonstop text messages, Facebook messages and a Facebook post and an e-mail. They were not just your typical concerned messages. She called Mr. Hoover and his wife uncaring assholes and she went so far as to send them screenshots of their mortgage and criminal history. She was asked on several occasions to stop all contact and she refused.

The defendant is charged with harassment by repeated communications and an individual commits

this crime when she intends to harass, annoy or alarm another person by repeated communication.

I ask you, ladies and gentlemen of the jury, to listen to the testimony of each witness, read and carefully observe the evidence presented and find the defendant guilty of harassment. Thank you.

THE COURT: Thank you, Ms. Perrucci. Mr. Ready.

ATTORNEY READY: Thank you, Your Honor. May it please the Court, ladies and gentlemen. Good morning.

I know that before you left the house this [19] morning probably the first thing you said was I really hope they don't pick me. So if you're here, I apologize and I know this is not what any of you wanted to do with a Monday, but now that you're here I'm gonna ask for your time and attention because you are in what might seem at first glance to be a simple, minor case, but in reality has serious consequences for our society.

My friend on the other side, Ms. Perrucci, who represents the government said in her opening my mother always told me that you shouldn't say – if you don't have anything nice to say, don't say it at all. And I think that's a good moral statement, but I'm gonna argue throughout the course of this trial that it's not a legal one.

You have a right in this country to say whatever you want, no matter how mean, no matter how nasty, and that comes with all sorts of positive and negative things for our society.

It means that the Supreme Court of the United States has told us that you can wear a cuss word on your shirt into a courthouse. The Supreme Court has told us you can even do things – hold up signs at

funerals that say God loves dead soldiers, but the Commonwealth is gonna try to argue to you that the one thing you can't do is tell somebody your failure to get your dog care is animal abuse.

There are two things basically that you're

* * *

[26] that point on that – at that appointment?

A. She said that she believed he had diabetes insipidus.

Q. Okay. And were there any treatments that were done in regards to the diabetes?

A. She recommended a medication which –

THE COURT: I'm sorry, who is she?

THE WITNESS: Dr. Papp.

THE COURT: Okay. Go ahead.

THE WITNESS: She recommended a medication. This is why I'm not a pharmacist. It's desmopressin, something to that effect.

BY ATTORNEY PERRUCCI:

Q. Okay. And did you dispute that? Did you decide that that was something that you wanted to do for your dog?

A. We went with the doctor's recommendation.

Q. Okay. And do you remember around what the total cost was for Flash's appointment?

A. 4 or $500.

Q. Okay. And did you have any disputes about that price?

A. No, when we picked him up for the day they had a procedure in place due to COVID that we would pay

by credit card. They came out, got my card, paid the bill and we went on our way.

[27] Q. And did you begin administering the medication that was given by the defendant for Flash?

A. Yes.

Q. And did you trust the defendant's judgment?

A. Yes.

Q. So I'm going to direct your attention now to August 5th of 2020.

Do you recall taking Nick to Noah's Ark that day?

A. Yes.

Q. And just so the jury is aware, is Nick your senior dog?

A. Nick is my senior dog. He was 13 at the time.

Q. And what was the appointment for?

A. The same notification card from the veterinary office, due for a yearly checkup, vaccines.

Q. Okay. And around what time did you drop him off that day?

A. That was before noon.

Q. Okay. And during that time when you dropped him off to when he was seen he was boarded at – was he boarded at Noah's Ark?

A. Yes.

Q. Okay. How was Flash doing at that time?

A. Flash ended up having a seizure.

Q. And has he ever had any seizures before?

[28] A. He's never had a seizure.

Q. Okay. And did you call Noah's Ark?

A. We contacted the vet's office. They recommended that we cut the dosage of the medicine back. Excuse me. They said to skip a dose and then to cut back the amount of the dosage.

Q. Okay. And did Flash have anymore [sic] seizures that day after reducing the medication?

A. Flash had an additional seizure later in the evening.

Q. And did you decide to call Noah's Ark again?

A. The last seizure that he had was after we had picked Nick up and at that point in time our business relationship was over. So we did not.

Q. Okay.

A. We took Flash to an emergency veterinary service.

Q. Okay. So what time was Nick's appointment finished that day?

A. We picked Nick up approximately 5 p.m.

Q. Okay. And when you went to pick Nick up you can't walk inside, correct?

A. Correct, we had to wait in our vehicle for – to make payment and then our pet was delivered to us in the parking lot.

Q. Okay. So let's walk through this. Do they call [29] you?

A. When you arrive we called into them, said we're here to pick up Nick.

Q. And when you made that phone call did you speak to the defendant?

A. At first we spoke to the administrative assistant or the tech that answered the phone and then they quoted a price and I questioned the price of the bill. It seemed high and she explained procedures that were done, such as x-rays, blood work.

Q. Did you authorize any of those?

A. I did not authorize any of those. I questioned why we would be charged for that because I only authorized his vaccinations and his yearly checkup.

Q. And was there any mention of that when you had called about Flash earlier in regards to his seizure, that they were gonna conduct those treatments?

A. There was good communication with Flash the day earlier, that, you know, the doctor had noticed a couple things and wanted to explore that and we authorized those charges.

Q. Okay. So at that point did the defendant ever speak with you on the phone?

A. The first person I spoke to, she said that, you know, that's the bill and was trying to explain it and I [30] disputed the charge and she said you would have to speak with the veterinarian. A short time later Dr. Papp took the phone.

Q. Okay. And what did she say to you or how did the conversation go?

A. I questioned the dollar amount and said I didn't authorize the procedures to be done on him. I was questioning why we weren't notified in advance and she just immediately just started berating me on the phone, accusing me of being abusive to my animals, swearing at me, using profanity and I just wanted to end that conversation and I just said bring my pet out.

Q. Would you say she was handling the matter professionally?

A. Completely unprofessionally.

Q. Okay. I'd like to direct your attention to when you picked up the dogs then.

So when you were waiting for Nick to come out what happened?

A. I was sitting in my vehicle. The doctor brought my dog out on a leash. He has a bad kneecap, as I had stated before. He kind of limps a little bit. She was dragging him in tow, a little concerning.

So I got out of my vehicle to go take the leash from Dr. Papp. The berating continued. She said that she [31] was gonna report us for being abusive pet owners. She said that my dog has only ever been to a vet twice and I disputed that because I have taken my pet yearly to veterinary care, both of my dogs.

Her temper and her demeanor were very elevated, screaming. I got to the point where I was very upset, wanted to, you know, share my thoughts with the business owner, tried to pull my phone out to record the video.

Unfortunately, I was so upset that I – I'm potentially technologically not so savvy that I couldn't get the video to record, because I think it would speak volumes to the lack of professionalism that she demonstrated in the parking lot that day.

Q. And was anyone else around at that time when she was talking to you?

A. My wife was in the vehicle. There was also I believe what was another customer there to pick up a

pet kind of a couple parking spaces away from me. He was waiting in his vehicle.

Q. Did she say anything to you when you were trying to record her acting that way?

A. Oh, yes. She kind of smugly commented to me, go ahead and videotape me, I've been on HBO, I'm on camera all the time, and it just seemed to not faze her.

Q. And how did that argument end?

[32] A. That argument ended with me – I opened the tailgate of my SUV to put my dog in the back. She threw papers into the SUV from blood work, treatment, those types of papers into the back of the vehicle.

I asked her to back up so that – excuse me, I picked Nick up, put him into the back of the vehicle. I asked her to back up so that the tailgate would not strike her on the way down. She backed up, I closed the tailgate, I asked her to send me a bill for charges that I approved and I left for the day.

Q. Okay. And did you read the paperwork that she had thrown into your vehicle?

A. Not until I got home.

Q. Okay. And what was in the paperwork or what did she hand you, what information did she hand you?

A. There was a stack of information. One of the things was about how people should not use retractable leashes. There was information in there about blood work. I believe that there was information in there about x-rays.

Q. Okay. When you left did anyone from Noah's Ark try to contact you after that point?

A. The clerk called our phone, asked me why we didn't pay and we asked them to mail us a bill because I didn't want to go back to the property after the incident.

Q. Okay. And you said that Nick is an older dog and [33] he has bad knees, correct?

A. Nick's 13. He was observed with a knee condition.

Q. Okay. Has the defendant ever prior to this ever said that you've abused your dogs before?

A. No.

Q. Okay. And do you believe she became angry after you refused to pay?

A. She was completely triggered over the fact that we –

ATTORNEY READY: Objection. This calls for speculation.

THE COURT: All right, sustained. You can rephrase your question.

THE WITNESS: Her outburst –

THE COURT: Just a second, sir, hold on. Rephrase your question.

BY ATTORNEY PERRUCCI:

Q. Did you feel as though she was upset about you not paying for the treatment that she had done to Nick?

A. Yes, she had commented that she would have to eat the bill.

Q. Okay. Now, did you have any concern after you left that the defendant would try to contact you?

A. I didn't anticipate her contacting me.

Q. Okay. And did you receive a text message that [34] night from a random number?

A. I did.

Q. What did it say?

A. It was a video of my younger dog, Flash, that was showing his eyes, which is a condition of the diabetes insipidus. It was a video of that with the word abuse.

Q. Did you have any clue who it came from?

A. At the time I did not.

Q. Okay. Did you ever personally give the defendant your phone number?

A. I did not.

Q. Do you have a Facebook page?

A. I do.

Q. Would you say that you're a tech-savvy person?

A. I'm gonna say moderately not.

Q. Okay. Do you have any other forms of social media?

A. I have a Facebook account and that's pretty much it.

Q. Okay. And out of a 1 to 10, to give the jury a familiarity with how tech savvy you are, how familiar are you with Facebook's features, 1 out of 10 would you rate yourself?

ATTORNEY READY: I'm gonna object on the basis of relevance.

[35] THE COURT: Overruled.

THE WITNESS: Probably a 4.

BY ATTORNEY PERRUCCI:

Q. Okay. Did you receive a Facebook friend request that day?

A. I did.

Q. Okay. And who was it from?

A. It was from Dr. Papp.

Q. I'm going to direct your attention to Commonwealth's Exhibit 1.

Court's indulgence. May I approach the witness?

THE COURT: Please, yes.

BY ATTORNEY PERRUCCI:

Q. Around what time did the defendant friend request you on Facebook do you think?

A. I'm gonna say approximately 6:30 p.m.

Q. And do you recognize Commonwealth's Exhibit 1?

A. I do.

Q. How are you able to identify this?

A. I did that screenshot on my phone.

Q. Okay. And is that from your Facebook account?

A. Yes.

Q. Okay. And is that your notification page?

A. Yes.

Q. And does this fairly and accurately depict your [36] Facebook account and notification page?

A. Yes.

ATTORNEY PERRUCCI: Judge, I ask that Commonwealth Exhibit 1 be made part of the record.

ATTORNEY READY: No objection.

THE COURT: Very well, it's admitted. You may publish.

ATTORNEY PERRUCCI: Thank you.

BY ATTORNEY PERRUCCI:

Q. Did you accept her friend request?

A. No.

Q. What happened after she had Facebook friend requested you?

A. I started receiving messages from her and an e-mail from her.

Q. Around what time would you say that you had received Facebook messages from her?

A. It was right about the same time frame.

Q. I'm gonna show you Commonwealth's Exhibit 2 through 7.

ATTORNEY PERRUCCI: May I approach, Judge?

THE COURT: Please. You don't have to ask, just come on up.

ATTORNEY PERRUCCI: Defense is stipulating to the authenticity of these exhibits.

[37] ATTORNEY READY: That's correct.

THE COURT: All right, very well.

BY ATTORNEY PERRUCCI:

Q. I would like to draw your attention to Exhibit 2 and you will have that – a personal file of that.

Was this the first message that she had sent you?

A. Yes.

Q. And around what time would you say that that was?

A. It's timestamped 5:33 p.m.

Q. And what does she say in this text message?

A. She says: You have only ever brought Nick to Noah's Vet Center two times ever and declined all diagnostics and only wanted vaccines. I will be reporting you for mistreatment of your pets.

Q. And at that point what did you reply?

A. My response to her was: At this point you should end all contact with me other than for payment for wellness visit and shots we approved.

Q. So you asked her to stop contacting you, correct?

A. Absolutely.

THE COURT: Ladies and gentlemen, you're probably having some difficulty reading from that distance and we are totally out of our opera glasses.

ATTORNEY PERRUCCI: Sorry, everyone. This isn't our typical courtroom.

[38] THE COURT: But I did want to let you know that at the end of the case when you go out to deliberate you will have hard copies of all of the exhibits.

ATTORNEY PERRUCCI: Judge, I didn't mention this earlier, but I do ask that Commonwealth's Exhibit 2 through 7 be made part of the record.

ATTORNEY READY: No objection.

THE COURT: Very well, they're admitted. You may publish.

BY ATTORNEY PERRUCCI:

Q. Now, did she message you again at any point?

A. About an hour later.

Q. Okay. And can you read for the jury what she had messaged you then at that point?

A. Her next message was: Actually you can block me at anytime you like, but I sent him my e-mail. We are reporting you and you can contact my attorney.

Q. Do you know how to block an individual?

A. I would probably refer that to my son to help me with that. He's a little more tech savvy than I am.

Q. Okay. I'm going to show you Commonwealth's next exhibit.

Was this a continuation from what she had just said to you at that point?

A. Yes.

[39] Q. And can you please read what this exhibit says and what she had messaged you?

A. Her next message was: Too bad your pet wasn't well enough to receive the shots you approved. Should I continue?

Q. You can read all the way through, yep.

A. Her next message was: Talk about unethical. I have never met two people who care less for the well-being of their pets.

Am I allowed to use the exact language that she did?

THE COURT: Please. We're all adults here.

THE WITNESS: It gets a little graphic.

The next one is: Pretty fucked up that your four-year-old dog walked around blind for four years with his pupils completely dilated like some crack addict and you guys happen to not notice or care; that you declined every single year testing for heartworm and the three tick diseases; that you were trying to give a vaccine which affects the immune system to a dog with an ALP over 2000 and possibly kill him.

Don't worry about putting me up on Facebook because I'm already gonna put you up – excuse me, put you all there complete with all the information singers he didn't pay for it and I get to own it. And then the next message, she corrected herself, seeing as u.

* * *

[41] Q. And what did she send you at that point?

A. The next three were – I guess she was running somewhere on the internet background information on my wife and she provided screenshots from her phone of my wife's name, date of birth and a traffic violation that my wife had back in 2013 I believe it was.

Q. And just on your, you know, personal knowledge, how do you think that she had your wife's information?

ATTORNEY READY: Objection, just based on speculation.

THE COURT: Well, unfortunately, I have to sustain that unless you could rephrase it in some manner. You can't have him guessing.

ATTORNEY PERRUCCI: Sure.

BY ATTORNEY PERRUCCI:

Q. Do you believe that the information came from your client information from Noah's Ark?

A. Absolutely.

ATTORNEY READY: I'm gonna object again, Your Honor. It's based on speculation.

THE COURT: Well, no, overrule at that point. Go ahead, continue.

BY ATTORNEY PERRUCCI:

Q. You can answer that question.

A. My wife's name and information was on file with [42] the veterinarian's office.

Q. Did she attempt to contact you by any other form other than what we've already saw, the text message and Facebook message?

A. There was an e-mail.

Q. Okay. And around what time would you say that that was?

A. That was earlier in the evening, approximately 6 p.m.

Q. Okay. So that was in between these messages?

A. At some point in time.

Q. Okay. Does she message you again?

A. On Facebook, yes.

Q. And at what time was that?

A. This one would have been 9:54 p.m.

Q. And can you read for the jury what she messaged you?

A. This time she stated that I could contact her lawyer with my issues. She listed Adams, Cassese and Papp, Attorneys At Law in Woodbridge, New Jersey. And then she followed that up with a comment: I do not have time for low lifes with broke moral compasses.

Q. And did you respond to that message?

A. To that one I responded: I have contacted the police. You are harassing me. Please stop.

[43] Q. And did she respond to that message?

A. 11:41 p.m. she responded: We've chatted. I told them everything.

Q. So it's safe to say that she was contacting you from around 5:30-ish p.m. to about 11:41 p.m., correct?

A. Yes.

Q. Did you respond to anymore [sic] messages?

A. No.

Q. Now, you mentioned that she messaged you – or she e-mailed you?

A. Yes.

Q. Okay. What time did you say that that was around again?

A. It was approximately 6 p.m.

Q. Okay.

A. Maybe 6:30.

Q. Okay. I'm going to show you Commonwealth's Exhibit 8.

ATTORNEY PERRUCCI: Your Honor, defense stipulates to the authenticity of this e-mail.

THE COURT: All right. Thank you.

ATTORNEY PERRUCCI: I'd ask for Commonwealth's Exhibit 8 to be made part of the record.

ATTORNEY READY: No objection.

THE COURT: Very well. It's admitted and can [44] be published.

BY ATTORNEY PERRUCCI:

Q. Can you tell me what that is?

A. This was an e-mail that was sent to my family's e-mail account.

Q. Okay. And it is redacted. So the jury doesn't have any personal information.

Your e-mail account is connected to only you or is there other people in your family?

A. My wife uses it as well.

Q. Okay. Is that the e-mail that's on file at Noah's Ark?

A. Yes.

Q. Can you please read to the jury what the defendant e-mailed you?

A. Subject line is Flash differentials. You are both being reported for lack of proper veterinarian care for your pets. We have seen Nick only two times EVER, in capital letters, and you declined ALL, in capital letters, diagnostics and requested ONLY, capitalized, vaccines. He is close to 14 years old and that is two total visits. You are inhumane. You have a BLIND, in capitals, four-year-old dog you couldn't even realize was blind nor treat. I have the rads, blood work, pictures, videos and more to support this. If you would like to sue for absolutely anything at all,

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[47] no news report is here, so there's nothing in the news media, that's not a factor, but nothing on social media or anything along that particular line. That's throughout the course of this trial.

Once you announce a verdict, then you're free to discuss the case as much as you wish, that's your business after that, but until then I ask that you not discuss it, get no other information.

Have a nice lunch. We'll see you back here at 1:30.

(The jury exited the courtroom at 11:56 a.m.)

ATTORNEY READY: I would just ask that the witness be given an instruction just regarding being on a break under oath because I know it's confusing if you're not used to the courtroom procedure.

THE COURT: Mr. Hoover, during the recess you are not to discuss your testimony with anyone, not even with the district attorney or the police officer.

All right, see you at 1:30. Thanks.

THE COURTROOM CLERK: Court is in recess till 1:30.

(A recess was taken from 11:58 a.m. to 1:32 p.m.)

[48] THE COURT: Good afternoon, everyone.

Anything for the record before we bring the jury up?

ATTORNEY PERRUCCI: No, Your Honor.

THE COURT: Well, let's bring them up. Mr. Hoover, you can come back up on the stand.

THE COURTROOM CLERK: Please rise for the jury.

(The jury entered the courtroom at 1:34 p.m.)

THE COURT: Please have a seat, everyone.

Ladies and gentlemen, good afternoon. Hope you had a nice lunch. We're now back in session, ready to resume where we left off. Mr. Hoover is on the stand.

Mr. Hoover, of course, obviously, sir, you're still under oath.

Ms. Perrucci, where you left off.

DIRECT EXAMINATION, CONTINUED

BY ATTORNEY PERRUCCI:

Q. Mr. Hoover, so we went through that she had messaged you on Facebook and friend requested you. There was a text message and also an e-mail.

Was there any other thing that she posted or messaged you in regards to your animals?

A. She posted something on Facebook.

Q. Okay. And when did you see that?

[49] A. That would have been the evening of August 5.

Q. Okay. So the same day that she was messaging you on Facebook?

A. Yes.

Q. And is her Facebook public then? That means if you looked her up on Facebook could you see what she posts?

A. At that time it was. I don't know her status now.

Q. Okay. I'd like to redirect your attention to later that day.

While she was messaging you what was the status of your dog Flash?

A. He was in the emergency room at Shores emergency veterinary center.

Q. And was that for the seizures?

A. Yes.

Q. And who else was with you at Shores?

A. My wife and my daughter.

Q. And what was Flash's diagnosis at Shores?

A. He had a low sodium level. We had asked about the medication and the seizures. They determined it would be best to keep him overnight. We agreed with that. They did some IVs.

Q. Were you originally hesitant to leave him overnight at Shores?

A. At first, yes.

[50] Q. Okay. But then you did agree to let him stay there?

A. We agreed based on her recommendation.

Q. Okay. And what – did you pick Flash up the next day then?

A. The next morning we did.

Q. And how was Flash the next day?

A. Back to his normal self.

Q. And did you stop giving him that medication, the medication that was prescribed from Noah's Ark?

A. Yes.

Q. Okay. And did Shores have you do a follow-up with a veterinarian after that for like a checkup or anything?

A. They had me follow up with a vet. Our business relationship with Noah's Place at that point wasn't an opportunity, so we went back to our previous vet, Dr. Guise.

Q. And where is he located at?

A. He's located on Lockwillow Avenue.

Q. Okay. And what was the diagnosis of Flash at Lockwillow? Was he okay at that point?

A. He was fine at that point. We were instructed to monitor his water intake.

ATTORNEY READY: I'm gonna object, Your Honor. It's hearsay on the status of the dog and also on relevance.

THE COURT: Overruled. You're allowed. Go [51] ahead, you may continue.

THE WITNESS: We monitored his water intake and if there were additional concerns we were to reach back out to the vet.

BY ATTORNEY PERRUCCI:

Q. I'm going to direct your attention to when the defendant was claiming that you abused your dog.

Were you ever contacted by the Humane Society about neglect of your animals?

A. No.

Q. Did anyone ever come to your house and investigate you or your wife in regards to your animal ownership?

A. No.

Q. Did anyone from the Department of Agriculture come to your house for a report of dog abuse?

A. No.

Q. Did Officer Day ever further investigate or inquire of animal abuse as a police officer from Lower Paxton in regards to your animals?

A. No.

ATTORNEY PERRUCCI: Nothing further, Your Honor.

THE COURT: All right. Thank you. Cross, please.

[52] CROSS EXAMINATION

BY ATTORNEY READY:

Q. Mr. Hoover, good afternoon. Ms. Papp never physically assaulted you, did she?

A. There was no physical contact.

Q. She didn't ever stalk you, walk around after you in a public place, anything like that, correct?

A. Not that I witnessed.

Q. I mean, you're not aware at any point in which she was following you around anywhere or showing up where you were in public, anything like that, correct?

A. Not that I'm aware of.

Q. You mentioned there was a Facebook post. I wanna turn your attention back to that.

You said there was a Facebook post about this incident. Is that correct?

A. There was a Facebook post which was the same video that I received through a text message and the caption was crazy pet owners or something to that effect.

Q. I'm gonna approach for just a moment. Is this the post you're referring to?

A. Yes.

ATTORNEY READY: And, Your Honor, I'm gonna move the admission of Defendant's 1.

THE COURT: All right. Any objection?

[53] ATTORNEY PERRUCCI: No, Your Honor.

THE COURT: All right. It's admitted. You may publish.

BY ATTORNEY READY:

Q. I'm gonna read this. It says: Yet another crazy one. So grateful for wonderful pet owners, heart.

Is that a correct reading of what you saw in that post?

A. That's accurate.

Q. And there are a lot of little hearts and likes at the bottom of it. Is that correct? I'll bring it back over. I know it's far away.

A. Thank you. Yes.

Q. And on this there are it looks like 12 pictures and videos. I'm getting that with that plus eight down there of different animals in the clinic. Is that right?

A. That's accurate.

Q. So this actually was not a post about you at all, correct?

A. It was not sent to me, no.

Q. Well, and it wasn't about you, correct? Posted on August 4th. The day before your argument with Ms.

Papp she posted just-another-crazy-day-at-the-office post and that's what you're referring to, correct?

A. Well, it's my animal and in a Facebook messenger

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[60] Q. So you do agree, then, that you believed that Dr. Papp had committed malpractice. Is that correct?

A. That wasn't for me to determine. That's for –

Q. Well, but that's what your attorney said on your behalf, correct, that Dr. Papp committed malpractice when she treated Flash?

A. I knew at the time that a medication went into my dog, he started having seizures, he goes off medication, he stops having seizures.

Q. And you're confident enough, then, to demand that she pay for that, right, I mean you believe it's her fault?

A. The combination of the –

Q. Is that a yes, Mr. Hoover, that you believe it's her fault that your dog had seizures? It's a very simple question.

A. I'm not a medical professional. I can't make that determination. That's why I asked the questions of an impartial veterinarian.

Q. Okay. And it was on that basis that you authorized your attorney to demand payment for Flash's injuries based on Dr. Papp's care, correct?

A. At the same time I also requested a bill for the services that were provided to Nick.

Q. Mr. Hoover, I'm gonna ask my question again. It's a pretty simple question.

[61] Your demand in January of 2021 and which you had been demanding back from the first conversation in the parking lot was that she acknowledge her fault, that she was at fault for Flash's seizures. Isn't that correct? It's a simple question.

ATTORNEY PERRUCCI: Judge, I just want to object. I feel like it's been asked and answered numerous times at this point.

THE COURT: Overrule at this point, but restate your question.

BY ATTORNEY READY:

Q. You believed and said in the parking lot on August 5th, 2020, that my client committed malpractice in regards to Flash. Maybe you didn't use the word malpractice, but that's what you communicated, correct?

A. I believe your client prescribed the medication that caused his seizures and he stopped taking the medicine and he stopped having seizures.

Q. And you communicated that you believed that was cause and effect to Dr. Papp, correct?

A. In the letter that was in there.

Q. And you also did it in the parking lot that day when you snatched the leash of the dog out of her hand and took him back in the car, right?

A. I don't recall doing that. I told her I would [62] seek my legal options.

Q. Okay. Your legal options about her, correct?

A. My legal options are about her. It was the communication between the two of us.

Q. Okay. So you mentioned the cost that you had incurred. Let me just ask you this.

You mentioned in these Facebook messages that there was some reference to your financial information and also about your wife's I guess traffic tickets of some sort, correct?

A. Yes.

Q. You acknowledge that everything that was in this message was public record about you, correct?

A. I believe that they are public record. I found it alarming that somebody would go to that extent to put that into my Facebook messages.

Q. There was nothing in those messages that was private, that somebody would have had to go into a medical file or go into the private records at Noah's to get, right? Everything that was sent to you was public information, right? Anybody Googling could have found it, right?

A. I would say most people could.

Q. Okay, yeah. So public record, right?

A. Um-hum.

Q. Okay. And was there anything in here – I can ask [63] it like this.

You received I believe you testified – I wanna make sure I get it all right – you received the Facebook message we've been talking about, right? There was a Facebook post the day before?

A. Um-hum.

Q. There was an e-mail, right?

A. Yes.

Q. And there was a text message to you with a video of the dog that said the word abuse. Is that correct?

A. Yes.

Q. You're not claiming there was any other contact between you and Dr. Papp, right?

A. Just the phone call and the disagreement in front of the office.

Q. And other than those, nothing further. Is that right?

A. That's correct.

Q. You didn't – in these Facebook messages Dr. Papp told you you can block me if you got a problem with this. Why did you not block her?

A. As stated before, I'm not real tech savvy and I thought that if I blocked her her message would disappear. And –

Q. And why would that have been a problem? If the [64] messages were bothering you, why wouldn't you want them to disappear?

A. Because at least three times, maybe two times at that point I had asked her to stop communication and it became a preservation of evidence type situation.

Q. So that you could call the police and so that they could prosecute her for harassment, right?

A. If the police officer wanted to read the Facebook messages, I wanted to make sure any and all evidence was preserved for his – I mean, I would have documented accordingly.

Q. So you didn't block her because you wanted to make sure there was plenty of evidence seized to prosecute her for her speech. Is that right?

A. I wasn't certain how to block her and I'm not certain if I do block her if the group of that portion of evidence would disappear. I don't know how that works with that.

Q. These messages, other than having been shown to the jury here today and having been shown to the police, to Ms. Perrucci, to myself as part of the discovery process, you agree that these messages were never shown to anyone else, correct?

ATTORNEY PERRUCCI: Objection, relevance. I mean –

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[72] her actions?

A. Yes, she did. And what I specifically remember from that day is that – one thing that she said to me is that she probably should have stopped communicating with Mr. Hoover after he asked her to, but what she said was that her mouth often gets her in trouble.

Q. Okay.

A. Something along those lines.

Q. Did she say anything else about admitting that it was –

A. What she did say to me, she said that – I explained what the possible outcomes were going to be, which I do with just about any type of investigation that I am conducting. I explained what the possible outcomes would be and then she told me that she would accept whatever consequences come from her actions.

Q. Okay. I'm going to show you what is Commonwealth's Exhibit 9. Can you tell me what that is?

A. This looks to be a text message that includes a video and the word abuse sent.

ATTORNEY PERRUCCI: And, Your Honor, I didn't mention this, but defense does stipulate to the authenticity of the text message.

THE COURT: Very well.

[73] BY ATTORNEY PERRUCCI:

Q. Does it say when she sent this or were you aware of the time?

A. So this does not say the date. However, this was one of the images that was sent – one of the screenshots that was sent to my work e-mail from Mr. Hoover and it says today at 5:24 p.m., is when that was sent.

Q. Okay.

THE COURT: And what day is today?

THE WITNESS: Which would have been August the 5th of 2020.

THE COURT: Thank you.

BY ATTORNEY PERRUCCI:

Q. So that was before she sent the Facebook messages?

A. I believe so, yeah, maybe like 10 minutes before.

Q. Okay. And what did she say in that text message?

A. What is said is abuse.

Q. I'm also going to show you what is Commonwealth's Exhibit 10. It's the same thing as defense's Exhibit 1. Can you tell me what that is?

A. This is the Facebook post from Kathryn Papp which says she is feeling tired at Noah's Ark Veterinary Center. It says: Yesterday at 10:46 p.m. And then the comment on top of the I guess 12 images attached says: Yet another crazy one. So grateful for wonderful pet owners.

[74] Q. Okay. Can you tell me if this is a shareable post, meaning had anyone shared this Facebook post?

A. Based on this, yes, one person had shared that. And it looks like it can be shared, according to my knowledge of Facebook.

Q. And just on your personal knowledge of Facebook, when someone shares a post what does that mean?

A. That means that, one, it goes out to any feed of any single person that they are friends with and usually it is public, something that can be seen by the general public.

Q. And you said it was tagged with some – with a location, correct?

A. Yes, tagged with a feeling and the location of Noah's Ark.

Q. Based on your personal knowledge, when you tag a location or a person, what does that usually do on Facebook?

A. One, it posts on –

Q. Does it share?

A. Yes, it posts on that, whether it's a location or a business or a person, it posts on their page.

ATTORNEY PERRUCCI: Court's indulgence.

BY ATTORNEY PERRUCCI:

Q. That Facebook post has a video on it, correct?

A. Yes, I believe.

Q. Was that the same video that was sent in the text

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[84] THE DEFENDANT: I do understand.

THE COURT: So the bottom line is very simple. You have the absolute right to remain silent if that's your choice. You have the absolute right to testify if that's your choice. Do you understand you have both options?

THE DEFENDANT: I do understand, Your Honor.

THE COURT: What I advise anyone in your situation to do before making up your mind, discuss it with your attorney and get his input and his advice on what you should do, but you have to understand that in the final analysis it's not your attorney's decision that counts, it's your decision that counts. Do you understand that?

THE DEFENDANT: I do understand.

THE COURT: And it has to be a free, knowing, voluntary decision. Do you understand that?

THE DEFENDANT: I understand, Your Honor.

THE COURT: Do you have any questions about your rights that you would like to ask me, your right to testify or not to testify?

THE DEFENDANT: No, Your Honor.

THE COURT: Very well. Counsel, anything you'd like to add at this point?

ATTORNEY READY: No, Your Honor.

THE COURT: Very well. Thank you very much. We'll take a recess.

[85] ATTORNEY READY: Your Honor, the only other thing I'd do if the Commonwealth – has the Commonwealth rested at this time?

ATTORNEY PERRUCCI: Yes, I did rest.

THE COURT: Yeah, she had rested.

ATTORNEY READY: Your Honor, we'll be offering a motion for a judgment of acquittal. I can offer my reasons for that right now or we can come back, the Court's preference.

THE COURT: No, you can offer it right now. Go ahead.

ATTORNEY READY: Your Honor, based on what we've heard, the only conduct that has been established has been speech. The only things that have been said have been that she said some things that were really mean, that she did it by Facebook message and she also did it by e-mail and that that's the reason that she was charged with a crime.

It was admitted on the stand by Mr. Hoover that there was no physical altercation, there was no physical violence. Nothing in these messages contains a threat. Nothing in these messages contains anything that would be an exception under current First Amendment case law.

Now, although, Your Honor, we filed a motion to dismissing this case that we have noted we'd be bringing back at the close of the Commonwealth's case in chief. I [86] understand the Court probably has not had a chance to review that motion, but –

THE COURT: Well, I did review it and I know – was that the motion that Judge Evans heard?

ATTORNEY READY: That's correct.

THE COURT: And he had denied the motion?

ATTORNEY READY: That's correct. He said it would be more appropriate because at the time there were some allegations that maybe there was gonna be some kind of conduct or something else than we decided at this stage.

So I'm bringing it back at this time believing that they have not established anything that could rise to the level of crime under the First Amendment. Allowing Ms. Papp to be prosecuted based on what she says is in and of itself a violation of the First Amendment.

So we believe it should be thrown out for those reasons and also on the basis of the Pennsylvania Constitution protections are co-extensive. So for those reasons I would move for dismissal.

THE COURT: All right. Thank you. Commonwealth.

ATTORNEY PERRUCCI: Judge, the statute is with the intent to harass, annoy or alarm another with repeated communications. She was charged with harassment, Subsection A7, which is the repeated communications.

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[92] other posts in any significant way?

A. Not at all.

Q. And you said another crazy one. Would you tell the jury what were you referring to?

A. Another crazy day because I had posted it – we didn't get out of there till 11:30 that night because we had seen so many cases. It's been crazy with COVID. We've been overbooked for months and months.

Q. Why is COVID – just briefly, why did COVID mean that there was an uptick in work?

A. A lot of people adopted pets during COVID. And because of the protocols where they couldn't come into the – the owners could not be in the room, it took longer because of communication, being on the phone, doing the examination, going back and forth and then the billing and discharging.

Q. Okay. So on August 4th had you ever heard of or met Mark Hoover?

A. No.

Q. Okay. That day you interacted with his wife. Is that correct?

A. Yes, Mrs. Elizabeth Hoover.

Q. Elizabeth Hoover. And what were your interactions like with her?

A. Fine. Good, actually. Flash was in a big run right next to my desk. So they had actually, when they [93] dropped him off, ask that he be provided with a five-gallon water bucket, so a really big one like you would paint out of from Home Depot. And the dog was provided with that and a cute black lab hanging out.

I heard slurping all the time and then I turned around and looked at him before this exam and he was drinking his own urine, had already finished the bucket and was drinking his urine. So I saw that patient first. I was very concerned.

Q. What was your conclusion that you communicated to Mrs. Hoover?

A. I called her. I told her I was very concerned about two possibilities. Diabetes insipidus would be the first one and another hormonal problem would be the second one and I sent her the video I sent.

And I'm more concerned about the first one because he seemed to be blind. His retinas are likely detached. Humans do it, too, for seizures and things like that. You put a light in their eye to see if it dilates or constricts and this dog, when you put the bright light in his eye the pupil stayed dilated.

Q. That's the video that you've posted here. Is that correct?

A. Correct.

Q. That's the one you sent to Mrs. Hoover on the 4th [94] of August?

A. Correct.

Q. And then you sent again the following day on the 5th of August, right?

A. Correct.

Q. That's all the same video. Is that right?

A. It is.

Q. So the –

A. It's the only video.

Q. Okay. And you recommended – was the medication your only recommendation or did you offer them options?

A. No, we spoke at length actually. The female owner had told me that diabetes insipidus had been

actually brought up in the past and I said in this case the options are, number one, there's a blood test that's called an ACTH –

Q. I'm gonna stop you for a second. You gave her several options. Is that right?

A. Three options, yes.

Q. I won't bore our jury with all of the options, but you gave her several options. She chose the medication; is that right?

A. Correct, after being told about all the possibilities of side effects and what to expect.

Q. Okay. Were seizures among those side effects?

A. No.

[95] Q. The following day you saw Nick; is that right?

A. Correct.

Q. And you had interactions then with Mark Hoover as a result, right?

A. At the end. I actually spoke with Mrs. Hoover in the morning because as soon as I realized Nick had the same owner I called to check up on Flash.

Q. Okay. And what did you observe in this second dog that made you concerned?

A. Something – the dog was overweight, but had specific lumps that are located and almost always associated with liver disease and hypothyroidism.

Q. Now, there's been a lot of talk about – obviously your messages indicated you believed there was abuse. Would you tell the jury what you saw that made you think these dogs were being neglected or abused?

A. I actually don't – wouldn't call it abuse, because abuse in Pennsylvania is, you know, not providing food, water, shelter or access to veterinarian care. So I believe that the pets were being neglected because they were being brought in and requested for vaccine, yet a vaccine appointment requires a physical examination.

I do my physical examinations and when you find something that you worry giving a vaccine can cause a major problem, including death as a side effect, you notify the [96] owners, tell them you should look into this because I don't feel comfortable, I feel like it would be malpractice to vaccinate this animal in the face of what I believe is an underlying problem.

Q. In your experience, can neglect rise to the level of abuse?

A. It can, yes.

Q. When you saw these pets and you communicated this to Mr. Hoover, what was his response?

A. He was very upset immediately because I think – he just wanted – he just wanted the vaccines. That's what they requested, was just physical examination and vaccinations and to bring his dog home and I was giving him bad news and he was upset and didn't want me to do anything and said I'm coming to get my dog right now.

Q. So let's talk about the other tests that were run. There was some discussion about you having charged him for blood work and x-rays. Did you charge him for blood work and x-rays that he had not requested?

A. No, because I do not have anything – as the relief veterinarian I do not – I do not have anything to do with the billing. Literally we write down what we

do and the technicians and the front desk staff are separate.

And in this case I specifically ran the tests and wrote in my medical notes that – there was no treatment, by

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[168] We'll send the exhibits back with you, we'll send a fresh verdict slip back with you and I would ask you to deliberate further toward reaching a unanimous verdict in this case.

I appreciate your patience. I'm not trying to make life difficult for you, but under the circumstances we have to be assured that there is a unanimous decision, but I think that has to be reached by you after further deliberations. And if you can reach a unanimous verdict, so be it; if you can not, then you need to let us know.

We'll have the jury return to the deliberation room. And all alternates, again, thanks for your patience. Are you gonna stick around? Okay.

(The jury exited the courtroom at 12:03 p.m.)

THE COURT: Stand in recess until the jury notifies us otherwise.

THE COURTROOM CLERK: Court is in recess.

(The proceedings recessed at 12:04 p.m.)

THE COURT: So we have a verdict, is that what I heard? All right. Let's bring the jury down, please.

(The jury entered the courtroom at 12:20 p.m.)

THE COURT: Ladies and gentlemen, good [169] afternoon. It's our understanding you've reached a verdict. Juror Number 4, are you still the foreperson? All right, hand the slip to Mr. Cassell, please.

Could you kindly stand, please?

THE COURTROOM CLERK: In the case of the Commonwealth of Pennsylvania versus Kathryn Dana Papp, Docket Number 4780 CR 2020, at Count 1, Harassment, Communication Repeatedly in Another Manner, how do you find the defendant?

THE JURY FOREPERSON: Guilty.

THE COURT: Counsel, are you requesting a poll?

ATTORNEY READY: I am.

THE COURT: All right, very well. Ladies and gentlemen, we'll poll the jury.

THE COURTROOM CLERK: Ladies and gentlemen of the jury, in the case of Commonwealth of Pennsylvania versus Kathryn Dana Papp, Docket Number 4780 CR 2020, at Count 1, Harassment, Communication Repeatedly in Another Manner, Juror Number 1, how do you find the defendant?

JUROR NUMBER 1: Guilty.

THE COURTROOM CLERK: Juror Number 2, how do you find?

JUROR NUMBER 2: Guilty.

THE COURTROOM CLERK: Juror Number 3, how do you find?

JUROR NUMBER 3: Guilty.

[170] THE COURTROOM CLERK: Juror Number 4, how do you find?

JUROR NUMBER 4: Guilty.

THE COURTROOM CLERK: Juror Number 5, how do you find?

JUROR NUMBER 5: Guilty.

THE COURTROOM CLERK: Juror Number 6, how do you find?

JUROR NUMBER 6: Guilty.

THE COURTROOM CLERK: Juror Number 7, how do you find the defendant?

JUROR NUMBER 7: Guilty.

THE COURTROOM CLERK: Juror Number 8, how do you find the defendant?

JUROR NUMBER 8: Guilty.

THE COURTROOM CLERK: Juror Number 9, how do you find?

JUROR NUMBER 9: Guilty.

THE COURTROOM CLERK: Juror Number 10, how do you find?

JUROR NUMBER 10: Guilty.

THE COURTROOM CLERK: Juror Number 11, how do you find?

JUROR NUMBER 11: Guilty.

THE COURTROOM CLERK: And Juror Number 12, how

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