

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

:

:

Vs. :

No. CR-1459-2016

:

MARK ANTHONY MILLER,
Defendant :

:

Seth Miller, Esquire
Edward Olexa, Esquire

Counsel for Commonwealth
Counsel for Defendant

MEMORANDUM OPINION

Matika, J. - January 10, 2020

This memorandum opinion is as the result of the Defendant, Mark A. Miller (hereinafter "Miller"), filing an appeal¹ to this Court's finding the Defendant guilty of the offenses of Driving Under the Influence - General Impairment, a violation of 75 Pa.C.S.A. § 3802 (a)(1) and Careless Driving, a violation of 75 Pa.C.S.A. §3714(a) and sentencing him accordingly. For the reasons stated herein, we would request the Appellate Court to affirm the decision of the undersigned as to both the verdict rendered and sentence imposed.

¹ While the Appellant has attached copies of the sentence orders related to both the D.U.I. and Careless Driving charges, nowhere does the Appellant allege errors relative to the Careless Driving therefore, the Court will take the position that Appellant is not taking issue with that charge as part of this Appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On June 2, 2016, Trooper Richard Mrak of the Pennsylvania State Police, filed a criminal complaint against Miller alleging that on February 28, 2016, Miller violated various sections of the Pennsylvania Vehicle Code, 75 Pa. C.S.A. §101 et. seq., specifically 75 Pa.C.S.A. §3802(a)(1), 75 Pa.C.S.A. §3802(c)² and 75 Pa.C.S.A. §3714(a). Eventually on August 9, 2019, a bench trial was held.

At that trial, the Commonwealth called four (4) witnesses. The first witness called was Tammy Foland (hereinafter "Foland"). Foland testified that she was travelling home to Kunkletown from McAdoo when while in Tresckow, Banks Township, Carbon County, she observed a white in color vehicle pull out in front of her on Tresckow Road.³ She then noticed this vehicle pulling away.⁴ She then observed this vehicle slow down but not stop at the stop sign at the intersection of Oak Street and Chestnut Street and then

² As the result of an omnibus pre-trial motion filed by Miller, this Court granted a motion to suppress evidence of a blood draw and the resultant BAC tests. Consequently, on the day of the bench trial, the Commonwealth nol prossed this charge on the record.

³ Tresckow Road turns into Oak Street approaching Tresckow.

⁴ Foland described her observations of this white vehicle as it pulled out in front of her. She testified that after that occurred, she heard the acceleration of the vehicle's engine and watched as it increased the distance between itself and Foland, who was driving the speed limit.

watched it turn left onto Chestnut Street. At that point, Foland lost sight of this vehicle but eventually saw it on Market Street as she again began travelling in the same direction as the white vehicle.

As Foland turned onto Market Street, she seen this white vehicle in front of her, several blocks away. Foland testified that when she was approximately one-half mile, or five blocks away, she observed and heard a crash . . . the white vehicle colliding with the vehicle driven by Caitlyn Kehley (hereinafter "Kehley").

The Commonwealth next called the affiant, Trooper Richard Mrak (hereinafter "Mrak"). While not an expert in crash investigations, Mrak testified that he had some training and experience in crash scene investigations having taken courses in the State Police Academy and having investigated 15-20 crashes in his career.

Mrak testified that he received a call for an accident at the intersection of Market and Pine Streets in Tresckow, Banks Township, Carbon County. Upon arriving, he observed two vehicles, a white Infinity with front end damage and a blue Subaru with passenger side damage and a rather large debris field. He also testified that he went to an ambulance on scene where Miller was being attended to by EMS personnel. Upon opening the door of the ambulance, Mrak smelled a strong odor of alcohol. Miller indicated

to Mrak that he was the driver of the white vehicle and that he had consumed 6-8 beers before operating his vehicle that day. Mrak also observed Defendant's bloodshot eyes and heard the Defendant converse with a slurred and deliberate speech. No field sobriety tests were performed due to injuries Miller sustained in the accident.

After Miller left, Mrak conducted a crash scene investigation. Mrak testified that he was able to determine that Miller was the driver of the white vehicle that was previously observed on Market Street by Foland. Mrak was able to determine the point of impact of the collision and observed that there were no tire marks of any sort leading up to the point of impact. According to Mrak, after the point of impact and coming from Miller's vehicle were twenty-six (26) feet of tire marks, including four (4) feet of the marks from "speed braking."⁵ Mrak also testified that there was a large debris field around the scene indicative of a high-speed collision and that the speed limit on Market Street was 35 mph.

⁵ Mrak explained this term by stating, "So I saw no tire marks on East Market Street leading up to the point of impact from unit two. At the point of impact, which was easily observable from very dark, what I will call for lack of a better word full tire marks, about four feet in length, maybe five give or take, which indicates speed braking, which means there was no attempt to slow down prior to the point of impact, at which point the brakes locked up, the tires stopped rotating and the force of the vehicle - the force of the weight down on the vehicle from making such a sudden stop pushes the front end of the vehicle down, causing excessive skid marks as well as gouge marks from something underneath the vehicle dragging across the asphalt."

The Commonwealth also presented a pair of photographs depicting the final resting place of the vehicles as well as the skid marks created after the point of impact. Additionally, the Commonwealth entered into evidence a zip drive containing a series of video clips from cameras mounted on the home located on the corner where the collision occurred. These video clips show the vehicles as they each drove to and through the intersection, including the crash itself and its aftermath.

Finally, Mraz testified that it was his opinion⁶ that Miller was operating his vehicle in an impaired fashion due to alcohol consumption and that Miller was incapable of operating that vehicle safely.

On cross-examination, Mrak admitted that his initial investigation led him to believe that Kehley was solely responsible for the crash, having pulled out from the intersection from Pine Street onto Market Street without fully stopping. Mrak opined at that time that Kehley was the cause for the collision. This opinion later changed after reviewing videos⁷ of the accident as

⁶ Mraz' opinion was based on the totality of the circumstances: strong odor of alcohol in the ambulance where Miller was getting medical attention, bloodshot eyes, slurred and deliberate speech, Miller's admission that he drank 6-8 beers before driving, the fact that the evidence suggested a high speed collision (confirmed by the video), the distance traveled by Miller's vehicle after impact, speed braking from Miller's vehicle and the lack of tire marks before the point of impact.

⁷ In Mrak's opinion, these videos showed Miller traveling near the center of the roadway at the time of the collision and did so without any attempt to

well as receiving the BAC results⁸ and completing his investigation, all culminating in the withdrawal of the citation filed against Kehley and the filing of the charges against Miller.

Next, the Commonwealth called Kehley to testify. Kehley, a newly licensed driver, testified that on the day in question, she was coming home from a friend's house when she came upon the intersection in question, having driven that area approximately one hundred times before to and from school. Kehley testified that as she approached Market Street, she stopped at the stop sign. Being unable to fully see up Market Street in the direction from which the Miller car was driving, she pulled forward.⁹ After looking left, then right, she noticed Miller's car approximately 4-5 blocks away and having travelled this road before believed she could safely cross the intersection. Kehley then pulled onto Market Street only to be struck by Miller's vehicle.

Lastly, the Commonwealth called Michael Nagy (hereinafter "Nagy") to testify. Nagy testified that he was at the intersection of Pine Street and Market Street on his way to a friend's house.

slow his vehicle down as he (Miller) approached Kehley, who Miller claims "came out of nowhere."

⁸ These results were suppressed pursuant to order of court dated June 4, 2018 and while forming a basis for Mrak to charge Miller, these same results were not permitted to be introduced at trial.

⁹ Kehley testified that there were cars parked on the right of her at this intersection and could not see if traffic was coming from that direction, thus she pulled forward to get a better view.

Nagy further testified that he heard a vehicle coming towards him on Market Street and that it sounded like this vehicle was "speeding up". Nagy testified further that he witnessed the collision of the Miller and Kehley vehicles.

The defense called one witness, David Pavelko (hereinafter "Pavelko"). Pavelko is a retired police chief, having worked in and around Luzerne County for approximately thirty-eight (38) years. He currently works for the Hazleton Area School District. Because of his experience in crash reconstruction, he was qualified as an expert in collision analysis and reconstruction. Pavelko testified that prior to rendering his opinion and testifying in Court, he viewed the intersection in question, Mrak's crash report, the videos and the preliminary hearing transcript. During his testimony, Pavelko admitted that he was unable to determine a speed, exact or estimated, for Miller's vehicle, but also agreed that it was in excess of the speed limit. Pavelko stated that in his opinion, Miller took evasive action by swerving to the left to avoid Kehley's vehicle, an action which Pavelko viewed as evidence of safe driving. Pavelko also opined that the reason there were no skid marks was because Miller's reaction time to Kehley pulling her vehicle into his path of travel was only about 1.5 seconds, too short a period of time for Miller to brake.

On cross-examination, Pavelko acknowledged several things

raised by the Commonwealth: 1) if Miller was driving at a safe speed, damage from the collision would have been less severe; 2) alcohol consumption and a resultant impairment could negatively impact an otherwise reasonable 1.5 second reaction time and 3) Miller had a longer distance line of sight to see Kehley's car.

After the conclusion of the testimony, this Court found the Defendant, Mark Anthony Miller guilty of Driving Under the Influence - Incapable of Driving Safely, a violation of 75 Pa.C.S.A. §3802(a)(1) with an accident and Careless Driving, 75 Pa.C.S.A. §3714(a). Sentencing occurred on November 15, 2019. On that date, Miller was sentenced¹⁰ to a period of incarceration on the DUI charge of not less than thirty (30) days nor more than six (6) months of incarceration in the Carbon County Correctional Facility and a \$25.00 fine on the Careless Driving Offense.

No post sentencing motions were filed to these sentences, however, on November 21, 2019, Miller filed the instant appeal. With the concurrence of the Commonwealth, Miller was permitted to remain free on bail pending the resolution of the appeal.

On November 26, 2019, this Court directed Miller to file his concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925 within twenty-one (21) days from that date. On

¹⁰ Other aspects of this sentence which was to take effect on November 22, 2019, included certain terms and conditions as are outlined in the order of sentence dated November 15, 2019.

December 9, 2019, Miller requested a sixty (60) day enlargement of the period of time to file this concise statement which this Court denied.¹¹

On December 16, 2019, Miller filed his initial concise statement. In that statement he alleges two errors by the Court in finding Miller guilty of the D.U.I. charge: 1) that the evidence was insufficient to sustain that conviction; and 2) that this guilty verdict was against the weight¹² of the "unrefuted" expert testimony and evidence presented by Miller.

Thereafter, Miller filed a timely and permissible supplemental concise statement on January 6, 2020 which added a third issue that the Court erred in overruling Miller's objection to testimony by Mrak about statements, admissions and/or confessions made by Miller as violative of the *corpus delicti* rule.

This Court will address these three points *seriatim*.

¹¹ Miller contended that because the stenographer who was responsible for preparing the transcript was out on medical leave, and unable to lodge the notes of testimony within the time to file the concise statement, he needed an additional sixty (60) days. In support, Miller cites to Pa.R.A.P. 1925(b)(2) which allows a court, for good cause shown, to " . . . enlarge the time period initially specified or permit an amended or supplemental statement to be filed." While this Court agrees, the delay in lodging the notes of testimony may be good cause to grant some relief pursuant to his rule, it does not preclude the filing on some matters complained of on appeal. Merely by filing the appeal, Miller must have already formulated some basis for claiming this Court erred. Further, the Court afforded Miller the opportunity to file an amended or supplemental statement once the notes of testimony are lodged, which he did on January 6, 2020.

¹² This is the first time Miller has raised "a weight of the evidence" argument.

LEGAL DISCUSSION

I. VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE

"When reviewing a sufficiency of the evidence claim, the appellate court must review all of the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commonwealth, as the verdict winner." *Commonwealth v. Teems*, 74 A.3d 142, 144 (Pa. Super. Ct. 2013) (citation omitted). "Evidence will be deemed to support the verdict when it establishes each element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt." *Id.* It is not necessary, however, for the Commonwealth to preclude every possibility of innocence or prove the defendant's guilt to a mathematical certainty. *Commonwealth v. Williams*, 871 A.2d 254, 259 (Pa. Super. Ct. 2005) (citation omitted).

The standard of review for a sufficiency claim is well-settled:

A challenge to the sufficiency of the evidence is a question of law, subject to plenary review. When reviewing a sufficiency of the evidence claim, the appellate court must review all of the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commonwealth, as the verdict winner. Evidence will be deemed to support the verdict when it established each element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. The Commonwealth need not preclude every possibility of innocence or establish the defendant's guilt to a mathematical certainty. Finally, the trier of fact while passing upon the credibility of witnesses

and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Teems, 74 A.3d at 144-45 (quoting *Commonwealth v. Toland*, 995 A.2d 1242, 1245 (Pa. Super. 2010)).

In the case *sub judice*, Miller posits three errors by the Court *vis-a-vis* his insufficiency argument: 1) that the Court erred in relying upon the fact that there was a crash as evidence that Miller was incapable of safe driving; 2) that there was insufficient evidence to allow the Court to conclude that alcohol "caused the speed, which in turn caused the crash"; and 3) that, in general, alcohol consumption rendered Miller incapable of safely driving.

Here, Miller was convicted of Driving Under the Influence of Alcohol to such a degree that rendered him incapable of safe driving. 75 Pa.C.S.A. § 3802 (a)(1).

In order to prove a violation of this section, the Commonwealth must show: (1) that the defendant was the operator of a motor vehicle and (2) that while operating the vehicle, the defendant was under the influence of alcohol to such a degree as to render him or her incapable of safe driving. To establish the second element, it must be shown that alcohol has substantially impaired the normal mental and physical faculties required to safely operate the vehicle. Substantial impairment, in this context, means a diminution or enfeeblement in the ability to exercise judgment, to deliberate or to react prudently to changing circumstances and conditions.

Commonwealth v. Smith, 831 A.2d 636, 638 (Pa. Super. 2003) (emphasis added) (quoting *Commonwealth v. Palmer*, 751 A.2d 223, 228 (Pa. Super. 2000)), *appeal denied*, 841 A.2d 531 (Pa. 2003).

As it relates to the type, quality and quantum of evidence that it required to prove a general impairment violation under §3802 (a)(1), the Court in *Commonwealth v. Segida*, 985 A.2d 871 (Pa. 2008), further stated:

Section 3802(a)(1), like its predecessor [statute], is a general provision and provides no specific restraint upon the Commonwealth in the manner in which it may prove that an accused operated a vehicle under the influence of alcohol to a degree which rendered him incapable of safe driving The types of evidence that the Commonwealth may proffer in a subsection 3802 (a)(1) prosecution include but are not limited to, the following: the offender's actions and behavior, including manner of driving and ability to pass field sobriety tests; demeanor, including toward the investigating officer; physical appearance, particularly bloodshot eyes and other physical signs of intoxication; odor of alcohol, and slurred speech. Blood alcohol level may be added to his list, although it is not necessary and the two hour time limit for measuring blood alcohol level does not apply. Blood alcohol level is admissible in a subsection 3801(a)(1) case only insofar as it is relevant to and probative of the accused's ability to drive safely at the time he or she was driving. The weight to be assigned these various types of evidence presents a question for the fact-finder, who may rely on his or her experience, common sense, and/or expert testimony. Regardless of the type of evidence that the Commonwealth proffers to support its case, the focus of subsection 3802(a)(1) remains on the inability of the individual to drive safely due to consumption of alcohol-not on a particular blood alcohol level.

Commonwealth v. Teems, 74 A.3d at 145 (quoting *Commonwealth v. Segida*, 985 A. 2d at 879)).

In this case, the evidence presented by the Commonwealth consisted of: 1) observations¹³ by a disinterested third party (Foland), the investigation¹⁴ of Mrak and his opinion¹⁵ on whether

¹³ These observations consisted of a white vehicle (later determined to be driven by Miller) pulling out in front of Foland, "pulling away" and accelerating in such a manner that it created distance between them, a failure to stop at a clearly posted stop sign and after losing sight of this vehicle but picking it up again on Market Street, seeing and hearing the accident in question.

¹⁴ The investigation conducted by Mrak as relayed by him revealed the following: strong odor of alcohol emanating from within the ambulance where Miller was being treated, Miller drove the white vehicle involved in the crash, Miller admitted to consuming 6-8 beers before driving his vehicle, Miller's eyes were bloodshot and his speech was slurred and deliberate, the speed on Market Street was 35 mph, the videos of the intersection showed a violent crash with Miller's vehicle colliding with the passenger side of Kehley's vehicle, that there were no skid marks from Miller's vehicle prior to the point of impact, that there was twenty-six (26) feet of skid marks emanating from Miller's vehicle after the point of impact including 4 feet of speed braking marks and a large debris field caused by the collision.

¹⁵ Mrak was asked for his opinion as to whether or not he believed that Miller was "impaired by alcohol to the point that if effected (sic) his ability to drive" and Mrak responded that he felt that Miller "was impaired due to the amount of alcohol he had consumed and was incapable of driving his vehicle safely." In support of this opinion Mrak offered the following:

. . .
A. Well, it was based on a good spectrum of things. So we will start with the physical observations that I made during the interview period, which included the strong odor of alcohol, the bloodshot eyes, which again is typically indicative of heavy alcohol consumption, the slurred speech and deliberate speech, the admission that he had drank approximately six to eight beers prior to driving the vehicle.

Then you take the scene evidence. So, we have a very large debris field, which indicates a high speed collision. You have the distance that was traveled by unit two post impact. So what I mean by that is unit two, Mr. Miller's vehicle was traveling at such an excessive rate of speed that it carried enough force that he was able to blast unit one, lifting her off the ground and spinning her two to three times. He still had enough momentum to carry his vehicle another two houses down the roadway. We take into account as well the lack of any tire marks leading up to point of impact from Mr. Miller's vehicle on East Market Street. You have the evidence of speed braking, which again, shows that he was traveling at a very high rate of speed, shown no indications of slowing down just prior to the point of impact. You take into account the video evidence that we just saw. You can see unit one, she stops at the stop sign. She makes

Miller was under the influence of alcohol to such a degree that it rendered him incapable of driving safely, videos of the collision, the testimony of Kehley, and Nagy, a third party who witnessed the collision.

In this case, there was both direct evidence and circumstantial evidence presented by the Commonwealth for the Court to consider. From that circumstantial evidence the Court can draw reasonable inferences. Expounding on inferences to be made from circumstantial evidence, the Pennsylvania Superior Court in *Commonwealth v. Teems* stated:

"We remind [Defendant], however, that our jurisprudence does not require fact-finders to suspend their powers of logical

a slow careful entrance into the roadway. There's still a pause in between as she enters the roadway before Mr. Miller's vehicle comes into the scene and impacts her vehicle. Again, you can see how she slowly enters the roadway. Mr. Miller traveled a fair distance, several hundred feet on his way down that roadway. He had a straight roadway. He had no visual impairment leading up to the point of impact. He had more than enough time to slow down. He had more than enough time to make any minimal number of adjustments to try to avoid hitting unit one. That indicates impaired perception, because he had a long distance with which to make this call or this observation that he was unable to do so. Nobody purposely impacts another vehicle.

You take into account, again, the excessive high rate of speed both that we observed on the video and by all witness accounts, in a densely populated residential area. Again, nobody purposely goes out to hurt anybody. So that indicates to me impaired judgment. I have to assume that Mr. Miller on any other given day would never purposely try to hurt anyone. So it was either purposely done or he made a choice that day that he would not normally make, so again, impaired judgment. . . .

So at that point, you have physical impairment. You have impaired judgment. You have impaired perception. So based on those totality of circumstances that I had, I felt that both elements of 3802(a)(1) have been met, in that Mr. Miller by, again, witness statements, and by his own admission, was in operation of a motor vehicle, and that Mr. Miller, again, by his own admission, imbibed in a sufficient amount of alcohol that rendered him incapable of driving that vehicle safely.

reasoning or common sense in the absence of direct evidence. Instead, juries may make reasonable inferences from circumstantial evidence introduced at trial."

74 A.3d 142, 148 (Pa. Super. 2013) (citing *Segida*).

In drawing reasonable inferences from this circumstantial evidence, the Court is tasked with determining what effect or role alcohol may have had on Miller's ability to drive safely on the date in question. The Court must consider what affect alcohol consumption had or did not have on such human actions as: judgment, concentration, comprehension, coordination, vision and hearing and reaction time. It is not unreasonable for a court in hearing and seeing the evidence presented by the Commonwealth that Miller's consumption of alcohol: 1) reduced his ability to think clearly, reason and make smart decisions and exercise caution, attributes necessary for safe driving; 2) limited his ability to concentrate on multiple tasks such as speeding and being attentive to the actions of other motorists around him, both critical to safe driving; 3) lessened his ability to comprehend things such as stop signs or a potentially dangerous driving situation - one where his ability to respond appropriately and slow down, stop suddenly or swerve out of the way of a crash would be necessary; 4) reduced coordination of fine motor skills which makes it more difficult to respond to emergency situations; 5) lowered auditory or

visualization skills and the ability to judge distances, both necessary to avoid a collision; and 6) reduced reaction time which results from reflexes, comprehension and the ability to react quickly to changing driving conditions due to alcohol consumption.

Based upon the totality of the testimony and evidence presented by the Commonwealth and the reasonable inferences that can be drawn from that testimony, it was and continues to be the determination of the court that the Commonwealth presented sufficient evidence to sustain a conviction for a violation of §3802(a)(1) of the Vehicle Code by the Defendant.

II. VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE

Miller next contends that the testimony of his expert, David Pavelko supported contrary conclusions to that presented by the Commonwealth and as found by this Court and for that reason the weight of that evidence overrode that of the Commonwealth and that it was error for the Court to conclude otherwise.

As previously noted, Miller did not raise this issue either at Sentencing or in a post sentence motion. To the extent Miller now seeks to raise a weight of the evidence claim as referenced above, such claim had to be preserved either in a post-sentence motion, by a written motion before sentencing, or in an oral motion at sentencing. *Commonwealth v. Giron*, 155 A.3d 635, 638 (Pa. Super. 2017). Since Defendant did not file post-sentence motions

or preserve his challenge to the weight of the evidence in a written motion or orally at sentencing, the claim has been waived, and requires no further discussion. *Id.* at 638.

Even assuming *arguendo* that this issue was somehow preserved by Miller, when a claim that the verdict is contrary to the weight of that evidence, one concludes that there is sufficient evidence for that verdict but claims that the verdict is against the weight of the evidence. *Commonwealth v. Zapata*, 290 A.2d 114, 117 (Pa. 1972).

A weight of evidence claim concedes that the evidence is sufficient to sustain the verdict, but seeks a new trial on the ground that the evidence was so one-sided or so weighted in favor of acquittal that a guilty verdict shocks one's sense of justice. *Commonwealth v. Widmer*, 560 Pa. 308, 318-20, 744 A.2d 745, 751-52 (2000); *Commonwealth v. Champney*, 574 Pa. 435, 443-44, 832 A.2d 403, 408-09 (2003). On review, an appellate court does not substitute its judgment for the finder of fact and consider the underlying question of whether the verdict is against the weight of evidence, but, rather determines only whether the trial court abused its discretion in making its determination. *Widmer*, 560 Pa. at 321-22, 744 A.2d at 753; *Champney*, 574 Pa. at 444, 832 A.2s at 408.

Commonwealth v. Lyons, 79 A.3d 1053, 1067 (Pa.2013), cert. denied, 134 S. Ct. 1792 (U.S. 2014).

Our Supreme Court has long recognized that,

[b]ecause the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable

reasons for granting or denying a new trial is the lower court's conviction or that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

This does not mean that the exercise of discretion by the trial court in granting or denying a motion for a new trial based on a challenge to the weight of the evidence is unfettered. In describing the limits of a trial court's discretion, we have explained [,] [t]he term "discretion" imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused where the course pursued represented not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill-will.

Commonwealth v. Clay, 64 A.3d 1049, 1055 (Pa. 2013) (citations and emphasis omitted).

"The trier of fact while passing on the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence." *Commonwealth v. Andruliewicz*, 911 A.2d 162, 165 (Pa. Super. 2006).

In the case *subjudice*, Pavelko's testimony lead to his opining that the collision occurred because of the fact that Kehley entered the intersection, after pulling out from the stop sign into the path of Miller's vehicle and that the speed of Miller's vehicle was a contributing factor. Later, Pavelko went on to state, without a credible basis for it, that Miller's alcohol consumption did not

contribute to the severity of the crash. Pavelko also testified that as a former police officer, he never experienced persons under the influence speeding while driving a vehicle; usually they drive slower, he claimed. Pavelko also testified that his observations of the collision suggest that Miller did attempt to avoid the collision as his vehicle seemed to be in the middle of the road.

This Court did not find these statements and opinions particularly credible or weighty, in light of our review of the sufficient evidence presented by the Commonwealth. As stated earlier, we drew reasonable inferences from the testimony and evidence presented that alcohol did play a role, in affecting Miller's ability to drive and also, but for that alcohol consumption, the collision may never have happened. Had Miller been able to exercise better judgment, comprehend his surroundings and been able to react, the accident would not have occurred. While Pavelko claimed he never experienced a "speeding drunk", common sense suggests otherwise; to think that individuals driving while under the influence are that cautious all the time and drive slow is naive.

III. CORPUS DELICTI RULE

Next Miller argues that the Court erred in allowing Mrak to testify about statements made by Miller while in the ambulance and being treated by EMS personnel in violation of the corpus delicti

rule.¹⁶ In his supplemental concise statement Miller identifies one such statement, that being his response regarding how much alcohol he may have consumed prior to driving. The other statement that this Court was able to glean from the record that Miller may contend was admitted erroneously, was that Miller indicated that he was the driver of the white Infinity.

In *Commonwealth v. Ware*, 329 A.2d 258, 274 (1974), the Court stated that the *corpus delicti* rule is that "a criminal conviction may not be based on the extra judicial confession or admission of the Defendant unless it is corroborated by independent evidence establishing the *corpus delicti*", or body of the crime.

"The *corpus delicti* rule is two tiered; it must first be considered as a rule of evidentiary admissibility using a *prima facie* standard, and later, under a beyond a reasonable doubt standard, as one of proof for the fact-finder's consideration at the close of the case. Before introducing an extra judicial admission, the Commonwealth is not required to prove the existence of a crime beyond a reasonable doubt. Rather, it is enough for the Commonwealth to prove that the injury or loss is more consistent with a crime having been committed than not.

While the burden of establishing the *corpus delicti* is not equivalent to the Commonwealth's ultimate burden of proof, "the evidence of a *corpus delicti* is

¹⁶ "The *corpus delicti* rule is a rule of evidence. The *corpus delicti* rule places the burden on the prosecution to establish that a crime has actually occurred before a confession or admission of the accused connecting him to the crime can be admitted. The *corpus delicti* is literally the body of the crime; it consists of proof that a loss or injury has occurred as a result of the criminal conduct of someone. The criminal responsibility of the accused for the loss or injury is not a component of the rule. The historical purpose of the rule is to prevent a conviction based solely upon a confession or admission, where in fact no crime has been committed. The *corpus delicti* may be established by circumstantial evidence. *Commonwealth v. Rivera*, 828 A.2d 1094, 1103-04 (Pa. Super. 2003), appeal denied, A.2d 406 (Pa. 2004) (citation omitted).

insufficient if it is merely equally consistent with non[-]criminal acts as with criminal acts. Furthermore, it is axiomatic that the *corpus delicti* may be proved by circumstantial evidence."

Commonwealth v. Zugay, 745 A.2d 639, 653 (Pa. Super. 2000) (internal citations omitted).

Further "as the courts of this Commonwealth have routinely stated, the *corpus delicti* rule places two distinct burdens on the Commonwealth. The first arises during the Commonwealth's presentation of the evidence and concerns the admissibility of the evidence, while the second arises before the factfinder's deliberations and concerns the quantum of evidence necessary before a factfinder may consider a defendant's extrajudicial confession."

Comm. v. Chambliss, 847 A.2d 115, 121 (Pa. Super. 2004).

Here, Mrak's testimony demonstrated that when he arrived on scene, he observed what appeared to have been an accident scene. He noticed two vehicles and a large debris field. He also noticed one ambulance nearby. Mrak further testified that when he opened the door to the ambulance and "stepped one foot in" he could smell a strong odor of alcohol emanating from within. He also observed Miller being attended to by the EMS workers. At that point in his testimony, Mrak was asked by the Assistant District Attorney if he (Mrak) asked him (Miller) any questions, to which Mrak began to state, "so I asked him if he was the individual who was driving

the white Infinity and he indicated . . ." before defense counsel objected. The Court overruled that objection¹⁷ and allowed Mrak to complete his answer to which he indicated that Miller acknowledged that he was the driver of the white Infinity.

Mrak further testified that he inquired of Miller about his travels that day and Miller responded that he was coming from his brother's home in Junesdale. Mrak then began his testimony regarding alcohol consumption by Miller with the following: "Due to the amount of alcohol I could smell, the odor of it, at that point, I started asking him, you know, had he been drinking prior to getting behind the wheel. And he indicated ". . .", at which time defense counsel imposed another objection. Once again that objection was overruled¹⁸ and Mrak was allowed to testify that Miller admitted to having six to eight beers before operating his vehicle.

Prior to the admission of these statements regarding Miller driving the white Infinity and the quantity of his alcohol consumption, the Commonwealth presented evidence that: 1) an accident had occurred at the intersection of Pine and Market Streets; 2) a white vehicle struck the other vehicle at that

¹⁷ While the explanation by the Court on why the objection was being overruled may have been erroneous, the end result was the same since at that point the Commonwealth has established by preponderance of the evidence that a crime was committed.

¹⁸ See above footnote.

intersection; and 3) once entering into the ambulance where Miller was being attended to, Mrak smelled a strong odor of alcohol from within. Based upon this circumstantial evidence and reasonable inferences to be drawn therefrom, the Commonwealth proved by a preponderance of the evidence the *corpus delicti* of the crime of D.U.I. without Defendant's admission regarding his alcohol consumption or driving. Thus, it was proper to allow Defendant's admissions at that point, thus satisfying the first prong of the *corpus delicti* rule.

Prior to taking a recess to deliberate its verdict, the Court allowed both counsel opportunities to make closing arguments to the Court. In defense counsel's closing argument, while he referenced his client's alcohol consumption statement, he never argued that without it, the Commonwealth can still prove beyond a reasonable doubt that the crime of D.U.I. had occurred, thus invoking the *corpus delicti* argument again. Notwithstanding, the Court would have nonetheless considered Miller's admission regarding his alcohol consumption and driving in its deliberations as we believe the quantity of the other evidence presented, including Mrak's statement regarding his smelling of a strong odor of alcohol in the ambulance where Miller was being treated and other evidence of Miller driving, would be sufficient to prove Miller guilty of D.U.I. beyond a reasonable doubt. All that

considered, Miller's admissions could be looked at as "corroborative surplusage."

CONCLUSION

It is this Court's opinion as it was at the trial, that the sufficiency and weight of the evidence presented by the Commonwealth leads to one conclusion: Miller's consumption of alcohol impaired his ability to judge, concentrate, comprehend, coordinate, and properly react while driving his vehicle - actions which caused him, in turn, to speed and collide with the vehicle of Caitlin Kehley - a violation of §3802(a)(1) of the Vehicle Code.

Further, it is this Court's determination that allowing Trooper Mrak to testify to statements made by the Defendant, did not violate the *corpus delicti* rule.

We would, therefore, ask the Appellate Court to affirm this Court's Verdict and Sentence on the D.U.I. charge.

BY THE COURT:



Joseph J. Matika, J.