IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
vs.	:	NO. 017 CR 2004
	:	
FRANK J. RUBINO,	:	
Defendant	:	

Gary F. Dobias, Esquire — Counsel for Commonwealth
Assistant District Attorney

Matthew J. Mottola, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – February 17, 2015

On September 9, 2014, Frank J. Rubino (the "Defendant") was found guilty by a jury of two counts of driving under the influence (hereinafter "DUI")[1] for which he was sentenced on November 17, 2014, to a period of imprisonment of no less than forty-eight (48) hours nor more than six (6) months.[2] In Defendant's Post-Sentence Motion filed on November 21, 2014,

[1] 75 Pa.C.S.A. §§ 3731(a)(1) (General Impairment - Incapable of Safe Driving) and 3731(a)(4)(i) (Blood Alcohol Content of 0.10% or Greater). Although repealed by the Act of September 30, 2003, P.L. 120, No. 24, § 14, effective February 1, 2004, Section 3731 applies as the offense occurred on August 16, 2003. Trial was originally scheduled for March 7, 2005, however, Defendant failed to appear, prompting a bench warrant to be issued for his arrest. Defendant was subsequently apprehended, bail was set, and trial commenced on September 8, 2014.

[2] This sentence was imposed on Defendant's conviction of Count 1 of the information, which alleges a violation of 75 Pa.C.S.A. § 3731(a)(1). No sentence was imposed on Defendant's conviction for violating 75 Pa.C.S.A. § 3731(a)(4)(i), Count 2 of the information, which merged for sentencing purposes with his conviction under Count 1. Commonwealth v. Dobbs, 682 A.2d 388, 392 (Pa.Super. 1996) (holding that where a single act is charged, a defendant cannot be sentenced for violating two subsections of the same statute, despite the fact that the evidence supports both convictions); Commonwealth v. Rhoades, 636 A.2d 1166, 1168 (Pa.Super. 1994) (same).

Defendant moved to arrest judgment or, in the alternative, for a new trial on two grounds: (1) the evidence was insufficient to convict Defendant of driving under the influence with a blood alcohol content (hereinafter "BAC") over 0.10%, and (2) this court's ruling admitting Defendant's admission to owning and driving the vehicle involved in a one-car accident violated the *corpus delicti* rule. Defendant's Post-Sentence Motion was denied the same date it was filed.

Upon Defendant's appeal from the judgment of sentence, we directed Defendant to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). Defendant has complied. In his Concise Statement, Defendant repeats the same two issues previously raised in his Post-Sentence Motion. For the reasons that follow, we believe the appeal is without merit.

FACTUAL AND PROCEDURAL BACKGROUND

On August 16, 2003, at approximately 1:19 A.M., Officer Michael Fedor of the Kidder Township Police Department was dispatched to the scene of a one-car motor vehicle accident along Moseywood Road – a two lane road - in Kidder Township, Carbon County. (N.T., 9/9/14, pp.59-61, 72). Officer Fedor arrived at the scene at approximately 1:31 A.M., whereupon he noted the following: there were no adverse weather conditions, the posted speed limit was 25 miles per hour, the road curved

towards the left, a single vehicle had gone off the right side of the road striking a tree. *Id.* at 60-61, 72. At the time Officer Fedor arrived, a second vehicle was parked parallel to the road behind where the first vehicle had missed the turn. This second vehicle belonged to a passing motorist who stopped to render assistance after the accident had occurred. *Id.* at 61.

Maryann Gile, who had been a passenger in the vehicle which struck the tree, was sitting in this other vehicle when Officer Fedor arrived and requesting medical assistance. (N.T., 9/9/14, p.62). Officer Fedor called for an ambulance and Ms. Gile was subsequently transported from the scene while Officer Fedor continued his investigation. *Id.* at 63-64, 73-74. Officer Fedor did not interview Ms. Gile about the accident before she was transported for treatment, nor was she interviewed afterwards. *Id.* at 74. Ms. Gile died in April of 2013[3] and, therefore, was unavailable to testify at trial. *Id.* at 63.

After calling for the ambulance, Officer Fedor approached the Defendant, whom Officer Fedor witnessed standing between the open driver's door and driver's side compartment of the crashed vehicle when he first arrived at the accident scene. (N.T., 9/9/14, p.65). Upon Officer Fedor's request, Defendant produced

[3] At trial the Commonwealth and Defendant stipulated Ms. Giles died from causes unrelated to the accident. (N.T. 9/9/2014, pp. 62-63).

his driver's license, proof of insurance, and a registration evidencing the vehicle was registered in his name. *Id.* at 65-66, 100. Officer Fedor detected an odor of alcohol on Defendant's breath and asked if Defendant had consumed any alcohol. *Id.* at 66. In response to the Officer's questions, Defendant admitted to drinking that evening and also that he was the driver of the car. *Id.* at 66, 68-69. At trial Officer Fedor opined that based upon his training and experience as a police officer, as well as his observations of Defendant, Defendant was under the influence of alcohol to a degree that rendered him incapable of safe driving. *Id.* at 70-71.

Defendant was transported to Geisinger Wyoming Valley Hospital where his blood was drawn at 3:11 A.M. to test for alcohol content. (N.T., 9/9/14, pp.69-70). Cathy Sweeney, a medical technologist at Hazleton General Hospital, tested Defendant's blood using an Abbott TDX machine. *Id.* at 85-87.[4] The results of this test revealed a BAC by weight of 102 milligrams per deciliter or 0.102%. *Id.* at 88; Commonwealth Exhibit No. 1. At trial Ms. Sweeney testified that she believed the testing equipment has a margin of error of ten percent based upon what her supervisor advised her, but that she had never

[4] At trial the parties stipulated that Hazleton General Hospital was an approved testing facility whose accreditation was verified by reference to the Pennsylvania Bulletin, Volume 33, No. 28, dated July 12, 2003. (N.T., 9/9/14, pp.84-85). At the Commonwealth's request, this fact was judicially noticed. *Id.*

seen any documentation independently corroborating that figure. *Id.* at 90-91. She also testified that given this margin of error, Defendant's actual BAC ranged between 0.092% and 0.112%. *Id.* at 90.

Defendant testified that he was owner of the vehicle but was not the driver that night. (N.T., 9/9/14, p.95.) Defendant testified that he normally does not drive on the advice of his doctor and that Ms. Gile would often drive him around. *Id.* at 100-101, 104. According to Defendant, that evening a man named John (the Defendant did not know John's surname) was driving Defendant's vehicle. *Id.* at 98. Defendant claimed that he and Ms. Gile had met John at a nightclub earlier in the evening and invited him to go fishing. *Id.* at 95-98. Defendant further testified that he was asleep in the back seat of his vehicle and was awakened by the crash. *Id.* at 98.

Defendant testified that approximately five minutes after the accident a passing motorist stopped to render assistance. (N.T., 9/9/14, p.106). According to Defendant, he was sitting in this vehicle when the ambulance arrived, not Ms. Gile, because Ms. Gile was trapped in the crashed vehicle. Defendant also testified that the ambulance personnel extricated Ms. Gile from the crashed vehicle before Officer Fedor's arrival. *Id.* at 99-100, 104. Defendant denied standing near the crashed car at the time the Officer arrived and further denied ever stating

that he was the driver. *Id.* at 100-101, 104-105. Lastly, Defendant testified that John left the scene of the crash before the Officer arrived and he never saw John again. *Id.* at 101-103.

Prior to opening statements at his trial, Defendant moved to preclude his statements to the police that he was the owner and driver of the car in question on the basis of the *corpus delicti* rule. (N.T., 9/9/14, p.3). The court discussed the matter with counsel in chambers, and the court reserved ruling on the motion until the Officer testified. *Id.* at 16. During the Officer's testimony, Defendant objected to the Officer being questioned about Defendant's admission that he was the driver of the vehicle which struck the tree. *Id.* at 66-67. A discussion at sidebar ensued and the court overruled the objection and allowed the question to be asked. *Id.* at 66-68.

DISCUSSION

1. WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT DEFENDANT OF DRIVING UNDER THE INFLUENCE – BAC GREATER THAN 0.10%

Defendant first argues that the evidence was insufficient to support his conviction of driving under the influence with a BAC greater than 0.10%, 75 Pa.C.S.A. § 3731(a)(4)(i), because the margin of error for the BAC test administered was ten percent, thus rendering the jury's conclusion that he operated the vehicle with a BAC of 0.10% or greater wholly speculative.

In evaluating a claim that the evidence was insufficient, the court "must determine whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt." Commonwealth v. Sloan, 67 A.3d 808, 814 (Pa.Super. 2013) (citation omitted). Section 3731 of the Motor Vehicle Code, as it existed at the time of the offense, provides in relevant part:

> (a) Offense defined.-A person shall not drive, operate or be in actual physical control of the movement of a vehicle in any of the following circumstances:
> * * *
> (4) While the amount of alcohol by weight in the blood of:
> (i) an adult is 0.10% or greater. . . .

As stated above, Defendant claims only that the evidence was insufficient to establish that the amount of alcohol by weight in his blood was 0.10% or greater at the time he was driving.

The fact that Defendant's blood was drawn for testing of its alcohol content more than two hours after Defendant had been driving does not invalidate the result of the BAC test or otherwise render it inadmissible. Pursuant to 75 Pa.C.S.A. § 3731(a.1)(2) then in effect, chemical testing of a driver's blood drawn within *three* hours of when the vehicle was driven is *prima facie* evidence of the BAC at the time the vehicle was

driven.[5] Additionally, expert testimony relating back a defendant's BAC from the time of testing to the time defendant was driving was not required under 75 Pa.C.S.A. § 3731(a.1)(2). *See* Commonwealth v. Yarger, 648 A.2d 529, 531-32 (Pa. 1994).

As construed by the Pennsylvania Supreme Court, Section 3731(a)(1) created "a permissible inference" that the BAC of a blood sample drawn within three hours of driving is also a measure of the BAC at the time of driving. Commonwealth v. MacPherson, 752 A.2d 384, 392 (Pa. 2000). According to the Supreme Court, this inference did not shift the burden of proof or the burden of production from the Commonwealth to the defendant. *Id.* Furthermore, the jury, as the finder of fact, was free to ignore this inference. *Id.*

Turning next to Defendant's claim regarding the margin of error, a challenge premised on the margin of error (also known as the variance) present in a chemical test used to determine BAC implicates the weight of the evidence, not its sufficiency. *See* Commonwealth v. Sloan, 607 A.2d 285, 293 (Pa.Super. 1992); Commonwealth v. Mongiovi, 521 A.2d 429, 431 (Pa.Super. 1987). Challenges to the weight of the evidence are distinct from

[5] Defendant has not argued that the sample was not drawn within three hours of when the accident occurred. Nor would the evidence support such an argument. Defendant left the Galleria where he had been drinking at approximately 1:00 A.M. (N.T., 9/9/14, p.97). Further, Officer Fedor arrived on scene at 1:31 A.M., *id.* at 72, and Defendant testified the accident occurred approximately twenty minutes before Officer Fedor arrived. *Id.* at 106. Defendant's blood was drawn at 3:11 A.M. *Id.* at 70.

sufficiency challenges and must be separately raised. *See* Pa.R.Crim.P. 606, 607.[6]

As to whether the evidence was sufficient to convict given the ten percent margin of error, the Superior Court has held the Commonwealth "need not preclude every possibility of innocence" or establish the defendant's guilt to a mathematical certainty. Commonwealth v. Johnson, 833 A.2d 260, 264 (Pa.Super. 2003) (citations omitted). In the instant case, the jury was presented with the BAC test results and testimony regarding the test's margin of error for it to weigh. Under the standard for judging the sufficiency of the evidence, this was sufficient for the jury to find that Defendant drove, operated, or was in actual control of a vehicle while the amount of alcohol in his blood by weight was 0.10% or greater. *See* Commonwealth v. Sibley, 972 A.2d 1218, 1219-20 (Pa.Super. 2009) (holding that the variance in the BAC test did not render the test result so infirm that it could not reasonably support the verdict); *cf.* Commonwealth v. Landis, 89 A.3d. 694 (Pa.Super. 2014) (upholding a defendant's weight of the evidence challenge to a jury's verdict convicting defendant, *inter alia*, of DUI - highest rate

[6] "Failure to properly preserve [a weight of the evidence] claim will result in waiver." Commonwealth v. Sherwood, 982 A.2d 483, 494 (Pa. 2009). Here, Defendant did not raise a separate weight of the evidence challenge prior to sentencing or in his Post-Sentence Motion, which challenge must be raised before the trial court to be preserved. Commonwealth v. Lewis, 45 A.3d 405, 410 (Pa.Super. 2012).

of alcohol, where defendant's BAC was .164 with a ten percent margin of error, reflecting a range between .147 and .180).[7]

2. WHETHER THE COURT ERRED IN ADMITTING INCUPATORY STATEMENTS BY DEFENDANT IN VIOLATION OF THE *CORPUS DELICTI* RULE

Defendant argues the court erred in admitting Defendant's statements that he owned and operated the vehicle because the Commonwealth did not first establish the *corpus delicti* of driving under the influence.

Corpus delicti is a rule of evidence that places the burden upon the Commonwealth to establish by a preponderance of the evidence that a crime has been committed before inculpatory statements of an accused connecting him to the crime can be admitted. Commonwealth v. Verticelli, 706 A.2d 820, 824 (Pa. 1998), *abrogated on other grounds by* Commonwealth v. Taylor, 831 A.2d 587 (Pa. 2003).

> 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.

[7] Even had Defendant raised a challenge to the weight of the evidence and been successful, this would be a pyrrhic victory in that such challenge would not affect Defendant's conviction under 75 Pa.C.S.A. § 3731(a)(1) (General Impairment). Further, as noted in footnote 1, *supra*, Defendant's conviction for violating 75 Pa.C.S.A. § 3731(a)(4)(i) merged with his conviction under 75 Pa.C.S.A. § 3731(a)(1). Consequently, Defendant was not sentenced for violating 75 Pa.C.S.A. § 3731(a)(4)(i).

Verticelli, 706 A.2d at 822-23 (citations omitted).[8]

"The purpose of the *corpus delicti* rule is to guard against the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed." Commonwealth v. Reyes, 681 A.2d 724, 727 (Pa. 1996) (citation and quotation marks omitted). "Concerning the admission of an accused's statement before the establishment of *corpus delicti*, the Pennsylvania Supreme Court has held that the order of proof is a matter within the realm of the trial judge's judicial discretion which will not be interfered with in the absence of an abuse of that discretion." Commonwealth v. Zelosko, 686 A.2d 825, 826 (Pa.Super. 1996) (citing Commonwealth v. Smallwood, 442 A.2d 222 (Pa. 1982)).

The *corpus delicti* rule is applied at two distinct levels: first, admissibility of defendant's statement and second, consideration of the statement by the fact finder.

> The first step concerns the trial judge's *admission* of the accused's statements and the second step concerns the fact finder's *consideration* of those statements. In order for the statement to be admitted, the Commonwealth must prove the *corpus delicti* by a

[8] On this point, the Superior Court in Commonwealth v. Friend, stated:

> The *corpus delicti* rule is not one of constitutional dimension, dealing with the quantity of evidence known at the time of the statement, nor is it a question of custody or investigative permissibility. The rule is one of trial evidence. It is not designed to circumscribe the gathering of evidence. Its applicability turns on the quantity of evidence, not the order of its gathering.

717 A.2d 568, 572 (Pa.Super. 1998).

> preponderance of the evidence. In order for the statement to be considered by the fact finder, the Commonwealth must establish the *corpus delicti* beyond a reasonable doubt.

Commonwealth v. Young, 904 A.2d 947, 956 (Pa.Super. 2006), *appeal denied*, 916 A.2d 633 (Pa. 2006) (quoting Commonwealth v. Rivera, 828 A.2d 1094, 1103-1104 n.10 (Pa.Super. 2003), *appeal denied*, 842 A.2d 406 (Pa. 2004)) (emphasis in original). Hence, a clear distinction exists between the burden of proof that the Commonwealth is required to meet before an inculpatory statement is *admitted* versus the burden of proof which must be met before the fact finder may *consider* the statement in assessing the defendant's guilt or innocence. Commonwealth v. Reyes, 681 A.2d at 727-29. Defendant's statement of errors complained of on appeal only questions application of the first phase of this rule.

With respect to the *admissibility* of extra-judicial inculpatory statements, the evidence used to establish the *corpus delicti* must be consistent with a crime, even though also consistent with an accident, so long as the evidence is more consistent with a crime than with an accident. Reyes, 681 A.2d at 727 (citing, *inter alia*, Commonwealth v. Byrd, 417 A.2d 173, 179 (Pa. 1980)). If the evidence proffered to support admission of an inculpatory statement is as consistent with an accident as it is with a crime, the quantum of proof required to admit the

statement - by a preponderance of the evidence – has not been met. *See also* Commonwealth v. McMullen, 681 A.2d 717, 722 (Pa. 1996). Stated differently, "[a]lthough independent corroborative evidence is insufficient if it is merely equally as consistent with accident as with crime, the prosecution has no duty to exclude the possibility of accident in order to establish the corpus delicti." Byrd, 417 A.2d at 179 (citations omitted).

"In order to establish the *corpus delicti* of the crime of driving while intoxicated, the Commonwealth need only show that someone operated a motor vehicle while under the influence of alcohol." Commonwealth v. Zelosko, 686 A.2d at 826. This standard was met in Zelosko where the defendant was found lying on the road next to his running vehicle with an odor of alcohol and no other apparent operator nearby; also in Commonwealth v. DeLeon where following a one-car accident, with evidence of the vehicle having been driven in excess of the speed limit, the defendant was observed lying outside the vehicle with an odor of alcohol on his breath. 419 A.2d 82, 84 (Pa.Super. 1980). In Commonwealth v. Young, the following evidence was sufficient to establish the *corpus delicti* for DUI: defendant was seen standing on the driver's side of a vehicle registered in his name moments after the vehicle struck a utility pole, after which the defendant fled the scene on foot and was apprehended within an hour with the keys to the vehicle in his pocket, at

which time defendant exhibited signs of intoxication, and was later found to have a BAC of .170%. Commonwealth v. Young, 904 A.2d at 956-57 (Pa.Super. 2006), *appeal denied*, 916 A.2d 633 (Pa. 2006). *See also* Commonwealth v. Johnson, 833 A.2d 260 (Pa.Super. 2003) (where the Court determined that where two vehicles were involved in an accident, one of which was registered in defendant's name, and defendant was observed leaning against the driver's side door of this vehicle when the police arrived on scene shortly after the accident, a reasonable inference could be drawn that defendant drove his vehicle to where the accident occurred).

Compliance with the first step of the *corpus delicti* rule requires that the occurrence of a crime be independently evidenced before an inculpatory extra-judicial statement by the defendant will be admitted. Here, Defendant's vehicle was involved in a one-vehicle accident at approximately one o'clock in the morning with no adverse weather conditions present to explain why the driver would lose control of the vehicle in a 25 mile per hour speed zone. Officer Fedor testified that upon his arrival, shortly after the accident, Defendant was standing beside this vehicle on the driver's side and that the vehicle was registered in Defendant's name. Officer Fedor also testified that he detected an odor of alcohol emanating from Defendant's facial area, and that, based upon his observations

of Defendant, Defendant was under the influence of alcohol to a degree which rendered him incapable of operating a vehicle safely. Defendant's BAC, as determined from a blood draw taken approximately two hours after the accident, was 0.102%. Finally, Officer Fedor testified that Maryann Gile, the only other person present at the scene of the accident upon his arrival who was an occupant of the vehicle involved in the accident, was seated in another vehicle and was determined through his investigation to have been a passenger, not the driver, of Defendant's vehicle.

The lack of adverse weather conditions that could have contributed to the accident, the lateness of the hour, the nature of the vehicle crash, Defendant standing at the open driver's side door of his vehicle shortly after the accident, the vehicle being registered in Defendant's name, the clear inference that Defendant was the driver - no other person present at the accident scene fitting this description - and the odor of alcohol emanating from Defendant's breath are more consistent with a DUI than an accident.[9] As such, the *corpus delicti* for the charge of DUI was established by a preponderance of the evidence, thereby making Defendant's admission to Officer Fedor that he was the driver of the vehicle involved in the

[9] Defendant's claim that a third person, John, was driving the vehicle was clearly rejected by the jury, which it was free to do in passing upon Defendant's credibility.

accident and had been drinking earlier that evening admissible in evidence.[10]

CONCLUSION

In accordance with the forgoing, we conclude Defendant's contentions are without merit. Accordingly, we respectfully request the Court affirm the jury's verdict and deny Defendant's appeal.

BY THE COURT:

_____
P.J.

[10] To the extent Defendant claims on appeal that evidence of his admission to owning the vehicle involved in the accident violated the *corpus delicti* rule, Defendant appears to be objecting to Officer Fedor's testimony that the registration for the vehicle, which Defendant provided at the Officer's request, showed Defendant was the registered owner. First, Defendant never objected to the admissibility of this evidence when presented, rendering the issue waived. (N.T., 9/9/14, pp.65-66); Commonwealth v. Chambliss, 847 A.2d 115, 120 (Pa.Super. 2004). Had the issue not been waived, whether a vehicle owner exhibiting the vehicle's registration card to an investigating officer upon request as required by statute (*see* 75 Pa.C.S.A. § 6308(a) (duty of operator or pedestrian)) qualifies as a statement under the *corpus delicti* rule and, if so, whether such statement is inculpatory, would need to be decided. *See* Commonwealth v. Verticelli, 706 A.2d 820, 824 (Pa. 1998) (limiting the scope of the *corpus delicti* rule to inculpatory statements).