

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

ROBERT ALLEN NESMITH, JR.

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1095 WDA 2013

Appeal from the Judgment of Sentence January 28, 2013
In the Court of Common Pleas of Beaver County
Criminal Division at No(s): CP-04-CR-0000363-2012

BEFORE: GANTMAN, P.J., FORD ELLIOTT, P.J.E., and OLSON, J.

MEMORANDUM BY GANTMAN, P.J.:

FILED JUNE 10, 2014

Appellant, Robert Allen Nesmith, Jr., appeals from the judgment of sentence entered in the Beaver County Court of Common Pleas, following his jury trial convictions for homicide by vehicle, involuntary manslaughter, recklessly endangering another person ("REAP"), homicide by vehicle while driving under influence, and two (2) counts of driving under influence of alcohol or controlled substance ("DUI").¹ We affirm.

The relevant facts and procedural history of this case are as follows. At around 10:00 p.m. on September 10, 2010, Christopher Pisarchick and his girlfriend, Kelly Zimmerman, met up with their friend, Tracie Milligan-

¹ 18 Pa.C.S.A. §§ 3732, 2504, 2705; 75 Pa.C.S.A. §§ 3735, 3802(a)(1), and 3802(a)(2), respectively.

McDowell, in the parking lot outside the Eastvale Inn. Ms. Milligan-McDowell arrived in a silver 2003 Chevrolet Corvette. As they stood outside making plans for later in the evening, Appellant came out of the bar. Ms. Milligan-McDowell, who knew Appellant, introduced him to Mr. Pisarchick and Ms. Zimmerman. Appellant and Ms. Milligan-McDowell then left in her Corvette. At around 11:30 p.m., the entire group met up again at Stiletto's strip club in New Brighton. Ms. Milligan-McDowell had been drinking and said she could not drive. She wanted to drop her Corvette off at Appellant's house. Appellant drove the car to his house with Ms. Milligan-McDowell in the passenger seat. Mr. Pisarchick and Ms. Zimmerman followed them to Appellant's house in a different car. Everyone except Appellant got into Mr. Pisarchick's car to go back to Stiletto's. As the three of them were about to leave, Appellant waved them down and asked for the keys to the Corvette so he could retrieve a bottle of vodka from the trunk. Ms. Milligan-McDowell handed Appellant the keys and told him not to drive the car. Appellant assured her that he would not drive the car and would leave the door unlocked and the keys under the floor mat. The three others returned to Stiletto's. After the club closed, they went to Ms Milligan-McDowell's house and remained there until approximately 10:00 a.m. the next morning.

At around 2:00 a.m., Appellant's friend, Christopher Turner, sent a text message to his girlfriend, Ashley Mosely, which indicated Appellant was picking him up in a "random Corvette." At some time around 4:00 a.m.,

Appellant was driving Ms. Milligan-McDowell's Corvette in excess of 100 MPH down Marion Hill Road in Daugherty Township. The road had a 35 MPH speed limit. Appellant veered off the road and struck, in succession, a concrete lamppost, flagpole, split rail fence, and large stone marker. The vehicle made contact with these objects on the passenger side. Appellant was ejected from the vehicle as it rolled over several times and came to rest on its roof. Mr. Turner was a passenger in the car at the time of the accident.

Two individuals, Kyle Blankenbicker and Kevin Boehm, were at Mr. Boehm's house just off Marion Hill Road when the accident occurred. After hearing the crash, they immediately ran to the scene of the accident and saw the Corvette, which was on fire. Appellant was lying in a driveway forty to fifty feet away from the vehicle. Mr. Turner was hanging out of the driver side window from the waist up and unresponsive. Mr. Blankenbicker pulled Mr. Turner out of the car and laid him underneath a nearby tree. Police were dispatched to the scene of the accident at 4:22 a.m. Emergency medical personnel arrived to transport Appellant and Mr. Turner to a hospital. Mr. Turner died from his injuries by the time he reached the hospital.

At 5:59 a.m., hospital staff drew Appellant's blood for testing. Appellant's blood serum alcohol level was found to be 0.102%. Dr. James Smith, who testified as an expert in forensic pathology for the

Commonwealth, converted this value to a “whole blood” blood alcohol content (“BAC”) of between 0.082% and 0.097%. He then related this range of values back two hours and determined that Appellant’s BAC was between 0.112% and 0.137% at the time of the accident.

A subsequent search of the damaged Corvette turned up a pair of sweatpants and a black tennis shoe. The sweatpants were caught on the passenger side of the center console, having come off Mr. Turner as Mr. Blankenbicker pulled him from the car. Police recovered the shoe from the passenger side of the vehicle where it was wedged between the center console and the frame of the vehicle. DNA testing and a receipt provided by Ms. Mosely confirmed the shoe also belonged to Mr. Turner.

The Commonwealth charged Appellant with homicide by vehicle, homicide by vehicle while DUI, involuntary manslaughter, REAP, two (2) counts of DUI, and various related summary offenses. On September 17, 2012, Appellant filed a motion *in limine* to exclude the testimony of Detective Robert Chamberlain, one of the Commonwealth’s experts. The court denied the motion the following day. Following a three-day trial, on September 20, 2012, a jury convicted Appellant of homicide by vehicle, homicide by vehicle while DUI, involuntary manslaughter, REAP, and two (2) counts of DUI. The court also found Appellant guilty of the summary offenses of driving while operating privilege is suspended or revoked—DUI

related, driving vehicle at safe speed, maximum speed limits, careless driving, and reckless driving.²

Sentencing took place on January 28, 2013. For the offense of homicide by vehicle while DUI, the court sentenced Appellant to a term of three (3) to six (6) years' imprisonment. The court imposed a consecutive sentence of one (1) to two (2) years' imprisonment for the homicide by vehicle conviction. For the REAP conviction, the court sentenced Appellant to a period of probation of two (2) years, to run consecutive to the homicide by vehicle conviction. The involuntary manslaughter conviction merged with the homicide by vehicle conviction. Likewise, the court merged the DUI convictions with the homicide by vehicle while DUI. The court imposed a concurrent term of imprisonment of ninety (90) days on the conviction for driving while operating privilege is suspended or revoked—DUI related, and fines for the remaining summary offenses. Thus, Appellant received an aggregate sentence of four (4) to eight (8) years' imprisonment followed by two (2) years' probation. On February 7, 2013, Appellant timely filed a post-sentence motion, which the court denied on June 4, 2013. Appellant filed a timely notice of appeal on July 2, 2013. The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b); Appellant timely complied.

² 75 Pa.C.S.A. §§ 1543, 3361, 3362, 3714, and 3736, respectively.

Appellant raises the following issues for our review:

1. WHETHER THE TRIAL COURT IMPROPERLY PERMITTED DETECTIVE CHAMBERLAIN TO TESTIFY AS TO HIS OPINION THAT APPELLANT WAS THE DRIVER, DURING THE CRASH THAT RESULTED IN THE DEATH OF CHRISTOPHER TURNER, WHERE HIS OPINION WAS NOT BASED ON SCIENTIFIC, TECHNICAL OR SPECIALIZED KNOWLEDGE BEYOND THAT POSSESSED BY THE AVERAGE LAYPERSON, HE DID NOT SET FORTH IN A REPORT HIS GROUNDS FOR SAID OPINION AND HE WAS SIMPLY NOT QUALIFIED TO RENDER SUCH AN OPINION?
2. WHETHER THE TRIAL COURT ERRED IN PERMITTING JAMES SMITH, M.D. TO TESTIFY AS TO HIS OPINION THAT APPELLANT WAS THE DRIVER OF THE VEHICLE, OR THAT THE EVIDENCE WAS CONSISTENT WITH APPELLANT BEING THE DRIVER, AT THE MOMENT OF THE CRASH THAT TOOK THE LIFE OF CHRISTOPHER TURNER, WHERE HIS REPORT PROVIDED NO NOTICE AT ALL THAT HE WOULD BE PROVIDING SUCH OPINION TESTIMONY?
3. WHETHER THE EVIDENCE WAS INSUFFICIENT AS TO HOMICIDE BY VEHICLE-DUI RELATED?
4. WHETHER THE EVIDENCE WAS INSUFFICIENT AS TO 75 PA.C.S.A §§ 3802(A)(1), (A)(2) AND (B)?

(Appellant's Brief at 5).

The following principles guide our analysis and review of the trial court's evidentiary rulings:

Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and a reviewing court will not reverse the court's decision on such a question absent a clear abuse of discretion. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.

Commonwealth v. Harris, 884 A.2d 920, 924 (Pa.Super. 2005), *appeal denied*, 593 Pa. 726, 928 A.2d 1289 (2007) (internal citations and quotation marks omitted).

The Pennsylvania Rules of Evidence govern the admission of expert testimony as follows:

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
- (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
- (c) the expert's methodology is generally accepted in the relevant field.

Pa.R.E. 702. Pennsylvania Rule of Evidence 705 provides:

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

If an expert states an opinion the expert must state the facts or data on which the opinion is based.

Pa.R.E. 705.

After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the Honorable John P. Dohanich, we conclude Appellant's first and second issues merit no relief.

The trial court's opinion comprehensively discusses and properly disposes of these issues. (**See** Trial Court Opinion, filed June 27, 2013, at 6-15) (finding **(1)** Detective Chamberlain investigated and prepared reports on nearly 100 motor vehicle crashes, including almost twenty vehicular homicide cases; he had extensive training in field of accident reconstruction, which included sixteen-hour course on occupant kinematics; he was certified as accident reconstructionist; he was recognized as expert in accident reconstruction in prior vehicular homicide case without objection; Detective Chamberlain's background and experience qualified him to testify as expert in field of accident reconstruction; in both his report and testimony, Detective Chamberlain outlined facts upon which his conclusions were based; he examined accident scene; he observed extensive damage to passenger side of Corvette, which left driver side as only escape route after crash; he observed victim's shoe and sweatpants in passenger compartment of vehicle; he took into account speed and path of vehicle and injuries sustained by victim; Detective Chamberlain's report and testimony clearly set forth facts and methodology supporting his conclusion that Appellant was driver of Corvette and Mr. Turner was passenger at time of accident; Commonwealth provided Detective Chamberlain's report to defense counsel well in advance of trial, which provided Appellant with notice and opportunity for independent review of Detective Chamberlain's findings and conclusions; **(2)** Dr. Smith's expert testimony with respect to positions of occupants of

Corvette was limited to explanation that injuries sustained by victim were consistent with damage to passenger side of vehicle; in addition to performing autopsy, Dr. Smith received photographs of damage to vehicle and information that vehicle was struck on passenger side and one of occupants was ejected; Dr. Smith's autopsy report did not specifically state victim's injuries were consistent with victim sitting in passenger seat, but Appellant was aware Commonwealth's theory alleged Appellant was driver of vehicle and Mr. Turner was passenger; Appellant was provided with photographs depicting damage to vehicle, autopsy report which specified victim's injuries, and Detective Chamberlain's accident reconstruction report; Dr. Smith's testimony that victim's injuries were consistent with victim sitting in passenger seat did not amount to unfair surprise or violate pretrial discovery requirements under Pa.R.Crim.P. 573(B)). Accordingly, we affirm Appellant's first and second issues on the basis of the trial court's opinion.

In his third and fourth issues, Appellant challenges the sufficiency of the evidence with respect to his convictions for DUI and homicide by vehicle while DUI. Appellant takes issue with Dr. Smith's testimony regarding Appellant's BAC. Appellant asserts Dr. Smith was not qualified to provide expert testimony on Appellant's BAC. Appellant further argues Dr. Smith's "relation back" testimony rested on unfounded assumptions with respect to the time of the accident and whether, at that time, Appellant had absorbed all of the alcohol he consumed. According to Appellant, "Dr. Smith's strange

understanding of relation-back—just round off numbers, multiply and add—was incompetent evidence to arrive at a whole blood alcohol content above .10 or even .08 at the time of driving.” (Appellant’s Brief at 43). Appellant concludes the evidence was insufficient to prove he was DUI and alcohol consumption caused the accident and death of the victim, and he is entitled to a judgment of acquittal on these offenses. We disagree.

With respect to Appellant’s sufficiency challenge:

The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant’s guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the [finder] 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. Jones, 874 A.2d 108, 120-21 (Pa.Super. 2005) (quoting ***Commonwealth v. Bullick***, 830 A.2d 998, 1000 (Pa.Super. 2003)).

Section 3802 of the Vehicle Code provides:

§ 3802. Driving under influence of alcohol or controlled substance

(a) General impairment.—

(1) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the individual is rendered incapable of safely driving, operating or being in actual physical control of the movement of the vehicle.

(2) An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.08% but less than 0.10% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. § 3802. The Vehicle Code defines the offense of homicide by vehicle while DUI as follows:

§ 3735. Homicide by vehicle while driving under influence

(a) Offense defined.—Any person who unintentionally causes the death of another person as the result of a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) and who is convicted of violating section 3802 is guilty of a felony of the second degree when the violation is the cause of death and the sentencing court shall order the person to serve a minimum term of imprisonment of not less than three years. A consecutive three-year term of imprisonment shall be imposed for each victim whose death is the result of the violation of section 3802.

75 Pa.C.S.A. § 3735.

The standard of review of a trial court's admission or exclusion of evidence is as follows:

Questions concerning the admissibility of evidence lie within the sound discretion of the trial court, and a reviewing court will not reverse the court's decision on such a question absent a clear abuse of discretion. An abuse of discretion is not merely an error of judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.

Commonwealth v. Hyland, 875 A.2d 1175, 1185-86 (Pa.Super. 2005), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005) (internal citations and quotation marks omitted). Additionally, "[t]o constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party." ***Commonwealth v. Robertson***, 874 A.2d 1200, 1209 (Pa.Super. 2005).

Finally, to preserve a claim of error for appellate review, a party must make a specific objection to the alleged error before the trial court in a timely fashion and at the appropriate stage of the proceedings; failure to raise an objection results in waiver of the underlying issue on appeal. ***Commonwealth v. Charleston***, 16 A.3d 505 (Pa.Super. 2011), *appeal denied*, 612 Pa. 696, 30 A.3d 486 (2011); ***Commonwealth v. Shamsud-Din***, 995 A.2d 1224 (Pa.Super. 2010). ***See also Commonwealth v. Whitaker***, 878 A.2d 914 (Pa.Super. 2005), *appeal denied*, 586 Pa. 738, 891 A.2d 732 (2005) (stating defendant must make timely and specific objection

to introduction of challenged evidence at trial to preserve claim for review).

Instantly, Appellant made no objection to Dr. Smith's qualifications as an expert in forensic pathology. Likewise, Appellant failed to object to the admission of any of Dr. Smith's relation back testimony, in which he explained his methodology for determining Appellant's BAC at the time of the accident. (**See** N.T. Trial, 9/19/12, at 229-40). **See also Commonwealth v. Freidl**, 834 A.2d 638 (Pa.Super. 2003) (explaining relation back testimony refers to scientific method by which defendant's BAC at time of driving is extrapolated from results of chemical testing performed at later time). Consequently, to the extent Appellant argues Dr. Smith was unqualified and his relation back testimony was inadmissible, these claims are waived. **See Charleston, supra; Whitaker, supra.**

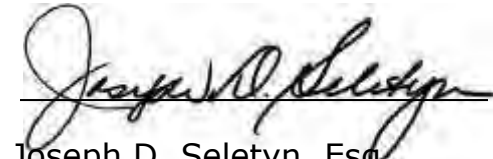
Moreover, the Commonwealth presented sufficient evidence for the jury to convict Appellant of DUI and homicide by vehicle while DUI. Appellant's blood was drawn for testing on September 11, 2010, at 5:59 a.m. The results revealed a blood serum alcohol level of 0.102%, which Dr. Smith converted to a whole blood BAC of between 0.082% and 0.097%. Dr. Smith then used information that the accident occurred approximately two hours earlier to determine Appellant's BAC at the time of the accident. Taking into account the variation in time required for a person's body to break down alcohol, Dr. Smith concluded Appellant's BAC at the time of the crash was no lower than 0.112%.

The evidence of record supports the finding that the accident occurred no more than two hours before 5:59 a.m., when Appellant's blood was drawn. Kyle Blankenbicker testified that he heard the crash around 4:00 a.m. (N.T. Trial, 9/18/12, at 40-41). Mr. Turner's friend, Bradley Pauletich, testified that he received a text message from Mr. Turner's phone at 3:52 a.m. (*Id.* at 249-50). Mr. Turner's girlfriend at the time, Ashley Mosely, testified that her last communication with Mr. Turner was "more towards like 4:15 that morning." (*Id.* at 230). Police were dispatched to the scene of the accident at 4:22 a.m. Thus, the evidence was sufficient for the jury to conclude Appellant's BAC was above the legal limit of 0.08% within two hours of the accident.

Additionally, the record evidence suggests Appellant had started drinking well before the accident occurred. Appellant was seen emerging from a bar at around 10:00 p.m. At some time after 11:30 p.m., Appellant asked Ms. Milligan-McDowell for the keys to the Corvette so he could retrieve a bottle of vodka. Furthermore, Appellant drove the Corvette in excess of 100 MPH in a 35 MPH zone. The jury could view this evidence together with Appellant's BAC results and conclude his alcohol consumption lowered his inhibitions and rendered him incapable of safe driving. Thus, the evidence was sufficient for the jury to convict Appellant of all DUI-related charges. ***See Jones, supra.*** Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.

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

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/10/2014

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY,
P E N N S Y L V A N I A
CRIMINAL DIVISION

COMMONWEALTH OF	:	
PENNSYLVANIA	:	
	:	No. 363 of 2012
v.	:	
	:	
ROBERT ALLEN NESMITH, JR.	:	

MEMORANDUM OPINION

DOHANICH, J.	June 27, 2013
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The defendant, Robert Allen Nesmith, Jr., was convicted by a jury on September 20, 2012, of homicide by vehicle/driving under the influence, 75 Pa.C.S. §3735(a); homicide by vehicle, 18 Pa.C.S. §3732(a); involuntary manslaughter, 18 Pa.C.S. §2504(a); recklessly endangering another person, 18 Pa.C.S. §2705; and two counts of driving under the influence, 75 Pa.C.S. §3802(a)(1) and §3802(a)(2), respectively. In addition, the court found the defendant guilty of the five summary offenses of operating privileges suspended resulting from a driving-under-the-influence conviction, 75 Pa.C.S. §1543(b)(1); driving at a safe speed, 75 Pa.C.S. §3361; maximum speed, 75 Pa.C.S. §3362(a)(2); careless driving, 75 Pa.C.S. §3714(a); and reckless driving, 75 Pa.C.S. §3736(a). All of the charges against the defendant arose from his

operation of a 2003 Chevrolet Corvette in an easterly direction in excess of 100 miles per hour on September 11, 2010, at approximately 4:24 A.M. in the area of 4125 Marion Hill Road, a two-lane public roadway, in Daugherty Township, Beaver County, during which the vehicle crossed over into the westbound lane, left the roadway, and in succession, struck a concrete lamp post, flag pole, rail fence and large stone marker all on the passenger side, rolled over several times and came to rest on its roof, resulting in the death of Christopher Turner, the sole passenger.

On January 28, 2013, the court imposed sentences of not less than three years nor more than six years on the charge of homicide by vehicle/driving under the influence, not less than one year nor more than two years for homicide by vehicle to run consecutive to the sentence for homicide by vehicle/driving under the influence, and two years' probation for the offense of recklessly endangering another person to run consecutive to the periods of incarceration. The aggregate sentence resulted in imprisonment of not less than four years nor more than eight years followed by two years' probation.

The defendant filed a timely motion for post-sentence relief in which he alleged the following:

(1) That the court erred in permitting Detective Robert Chamberlain to testify as an expert in the area of accident reconstruction, because Detective Chamberlain (a) had never previously testified when his qualifications were challenged in voir dire; (b) provided no factual testimony to support his conclusions and no scientific method or equation to permit cross-examination of his conclusions; and (c) testified to the seating positions of the occupants when he provided no report to permit the opportunity to conduct an independent review of his conclusions.

(2) That the trial court erred in allowing James Smith, M.D., a forensic pathologist, to testify as to the positions of the occupants in the vehicle at the time of the crash when Dr. Smith (a) was not an expert in the field of accident reconstruction or occupant kinematics; and (b) failed to submit a report outlining specific facts and circumstances which led to his conclusion that the defendant was the operator of the vehicle.

(3) That the jury's verdicts were against the weight of the evidence as to all counts due to conflicting testimony from Commonwealth witnesses.

In his brief in support of the post-sentence motion, the defendant complains that no report was authored by Detective Chamberlain nor disclosed by the Commonwealth through discovery as required by Rule 573(B)(1)(e) of the

Pennsylvania Rules of Criminal Procedure, 42 Pa.C.S., outlining the manner in which Detective Chamberlain reached his conclusion regarding the seating positions of the occupants of the vehicle, and that the defendant was the operator of the car, thus depriving him the opportunity to secure an independent analysis to test Detective Chamberlain's conclusions. The defendant also alleges that Detective Chamberlain's conclusions were heard for the first time at trial. The defendant further argues in his brief that the forensic pathologist testified with respect to the seating positions of the occupants without a report setting forth that conclusion contrary to Rule 573(B)(1)(e). In support of his claim that the verdicts were against the weight of the evidence, the defendant refers to the testimony of two witnesses who appeared at the accident scene shortly after the crash, claiming that the witnesses related that the victim was the operator of the vehicle. Additionally, he highlights the testimony of Officer Scott Sullivan of the New Brighton Borough Police Department indicating that he focused on the defendant as the driver while at the scene. Following oral argument, the court denied the defendant's post-sentence motion by order entered June 4, 2013. This opinion is filed in support of the court's previous order.

Upon completion of jury selection on September 17, 2012, the defendant presented a motion in limine to exclude the opinion of Detective Chamberlain

pertaining to the identities of the driver and passenger of the vehicle on the basis that Detective Chamberlain's investigative report failed to set forth specific facts to support his conclusions that the defendant was the operator and Christopher Turner was the passenger and failed to explain the analytical principles or techniques utilized in reaching his conclusion. Upon review of the defendant's motion in limine and Detective Chamberlain's report, and after hearing the arguments of counsel, the court denied the defendant's motion in limine and directed that Detective Chamberlain would be permitted to testify regarding his findings and conclusions.

On the second day of trial, the Commonwealth called Detective Chamberlain as a witness. Counsel for the defendant requested that Detective Chamberlain be examined by voir dire outside of the presence of the jury as to his qualifications in the field of accident reconstruction. The court granted the defendant's request and Detective Chamberlain was subject to both direct and cross-examination regarding his training and experience in accident reconstruction. Subsequently, Detective Chamberlain testified as to his qualifications in the presence of the jury at which time the court recognized him as an expert in the field of accident reconstruction over the objection of the defendant.

To qualify as an expert, a witness need only have a reasonable pretention to specialized knowledge on a subject for which expert testimony is admissible. Commonwealth v. Bowser, 425 Pa.Super. 24, 40, 624 A.2d 125, 134 (1993), quoting Commonwealth v. Pearsall, 368 Pa.Super. 327, 332, 534 A.2d 106, 109 (1987), overruled on other grounds, Commonwealth v. Garcia, 403 Pa.Super. 280, 588 A.2d 951 (1991) (en banc). An expert's pretention to specialized knowledge may be based upon practical, occupational or other experiential training; the expert need not have gained expertise through academic training. Id. A court bases its determination solely on whether the witnesses' opinions will aid the trier of fact in finding the truth of the issues involved. Commonwealth v. Petroll, 696 A.2d 817 (Pa.Super. 1997), citing Commonwealth v. Berrena, 421 Pa.Super. 247, 251, 617 A.2d 1278, 1280 (1992).

The defendant initially argues that Detective Chamberlain had never previously testified when his qualifications had been challenged, although he concedes that Detective Chamberlain had offered testimony as an expert by stipulation in a prior case with facts nearly identical to those of the instant case. During voir dire, Detective Chamberlain provided a curriculum vitae admitted as Commonwealth's Exhibit 76-A outlining a summary of the training which he had undergone in the area of accident reconstruction. In 2004, Detective Chamberlain

attended three separate trainings of 40 hours each for a total of 120 hours in accident investigation, a 40-hour training on collision reconstruction, two trainings on traffic accident photography of eight hours and 16 hours, respectively, and one training of eight hours for traffic accident investigation involving lamp examination. Additionally, in 2005, Detective Chamberlain completed a digital photography workshop of eight hours, crash data retrieval systems training of 24 hours, commercial vehicle accident investigation of 40 hours, motorcycle accident investigation of 24 hours, and basic crash zone diagraming for 16 hours. Detective Chamberlain attended training conducted by the Institute for Law Enforcement Education through the Pennsylvania Department of Transportation in 2007 on the topics of occupant kinematics for 16 hours, seatbelt analysis, airbag deployment and child restraints for 16 hours, on-scene and homicide-by-vehicle collision investigation refresher for 8 hours, technical and advanced analysis collision investigation refresher for 16 hours, technical and advanced analysis collision investigation for 80 hours and traffic collision reconstruction for 80 hours. In 2008, Detective Chamberlain completed through the Institute for Law Enforcement Education a traffic collision reconstruction training of 80 hours and total station diagraming/CAD zone diagraming software for 40 hours. Detective Chamberlain further completed the Institute for Law Enforcement Education course on

motorcycle collision investigation in 2010 for 24 hours. Detective Chamberlain's experience included 15 years in law enforcement, nine years of which has been as a detective with the Beaver County District Attorney's Office, during which he investigated over 100 motor vehicle crashes, prepared reports for less than 100 vehicle accidents and investigated less than 20 vehicle homicide cases. He is certified by the Pennsylvania Institute for Law Enforcement Training as an accident reconstructionist. Detective Chamberlain testified on one prior occasion involving homicide by vehicle in which he was recognized as an expert in accident reconstruction, without objection.

The instant case is indistinguishable from *Petroll*, supra, in which the Superior Court rejected a similar argument of the defendant that the accident reconstructionist had previously been qualified on only one other occasion. The *Petroll* court ruled that the trial court properly could have concluded that the trooper's training and experience, which was much like Detective Chamberlain's in the present case, provided her with sufficient knowledge to testify as an expert in the field of accident reconstruction. Based upon Detective Chamberlain's extensive training, investigative experience and his prior testimony in, albeit, one previous but nearly similar case, he was amply qualified to testify as an expert in the field of accident reconstruction.

The defendant further avers that Detective Chamberlain's conclusions of the defendant being the operator of the vehicle and the victim being the passenger were unsubstantiated. In both his report and his testimony, Detective Chamberlain outlined the facts upon which his conclusions were based. He indicated that he conducted an examination of the accident scene with Officer Sullivan, the prosecutor and primary investigator at the site of the crash. He examined the vehicle and observed extensive damage to the passenger side, the location of the victim's shoe and sweatpants in the passenger compartment of the vehicle, and that the driver's side of the vehicle provided the only escape route after coming to rest. The retrieval of the victim's shoe required that the frame be pried apart. The sweatpants were located upon a second examination of the car. Detective Chamberlain also took into account the speed and path of the vehicle and the injuries sustained by the victim. On pages 6 and 7 of his report, admitted as Commonwealth Exhibit 76, Detective Chamberlain set forth a summary of his findings as follows:

The roadway evidence is indicative of the 2003 Chevy Corvette traveling East on Marion Hill Road which is a two lane roadway separated by a double yellow line and white fog lines in either direction. After the 2003 Chevy Corvette lost control it crossed over the West bound lane of travel. The said 2003 Chevy Corvette's passenger side impacted a 2' concrete/rock light pole at the end of the driveway for the residence of 4123 Marion Hill Road. The said Chevy Corvette continued traveling at a sideways angle across a small

yard impacting a flag pole and split rail fencing. The said vehicle continued across the driveway area of 4125 Marion Hill Road where the same said vehicle struck at the end of the driveway a large marker rock with the passenger side rear bumper/fender. After striking the marker rock the said vehicle continued up a small hill and through the front yard of 4125 Marion Hill Road which offered evidence consistent with the 2003 Chevy Corvette flipping several times before coming to rest upside down in the front yard of 4125 Marion Hill Road and near the front yard of 4127 Marion Hill Road.

During the travel path and rotation of the 2003 Chevy Corvette the operator/driver of the vehicle Robert Nesmith Jr. was ejected from the vehicle and landed in the driveway of 4127 Marion Hill Road. The passenger Christopher Turner was removed from under or within the 2003 Chevy Corvette from the driver's side door. Major damage was caused to the passenger side of the vehicle leaving the driver's side as the only access or escape route from the vehicle. A black canvass Polo shoe was also removed from the passenger side compartment of the Corvette. The shoe had to be removed by prying the frame of the vehicle apart.

The minimum speed was calculated based on roadway markings and evidence left from the travel path of the 2003 Chevy Corvette. The minimum speed was determined to be approximately 110 mph upon initial impact based on Critical Speed Calculations and scientific formulas.

During the execution of a search warrant on the 2003 Chevy Corvette a download of the vehicles airbag control module was conducted and verified the speed of the vehicle to be between 105 and 133 mph during the sequence of recorded events.

Based on the evidence and information collected along with the analysis of the collision, it is determined that the vehicle collision was the result of the 2003 Chevy Corvette traveling at a speed greater than the posted speed limit for the roadway. The speed along with the design of the roadway resulted in the operator of the vehicle losing control and leaving the roadway. Based on the physical evidence it

was clear that the 2003 Chevy Corvette rolled several times ejecting the operator Robert Nesmith. The passenger was identified as Christopher Turner which was based on the injuries that Turner sustained during the collision and evidence produced during the investigation. These combined factors substantiated Christopher Turner's seating position as passenger and Robert Nesmith as the operator.

The above findings were confirmed by Detective Chamberlain's in-court testimony. Thus, Detective Chamberlain's report and testimony clearly set forth facts and the methodology upon which he based his conclusions that the defendant was the operator and the victim was the passenger in the automobile. Moreover, Detective Chamberlain consulted with Trooper Randy Michel of the Pennsylvania State Police and Michael Hanik, both accident reconstructionists, to confirm his findings and conclusions.

The defendant's final argument as to Detective Chamberlain's testimony is that the Commonwealth failed to submit a report sufficient to permit the defendant the opportunity for an independent review of his conclusions in violation of Rule 573(B)(1)(e). The court is mindful of our Supreme Court's pronouncement that the purpose of our discovery rules is to permit parties in criminal matters to be prepared for trial; trial by ambush is contrary to the spirit and letter of those rules and will not be condoned. Commonwealth v. Shelton, 536 Pa. 559, 640 A.2d 892 (1994). In the instant case, Detective Chamberlain's report was provided by the

Commonwealth well in advance of trial in discovery to defense counsel, who was therefore aware of the findings and conclusions, and was free to engage an expert in the field of accident reconstruction to review Detective Chamberlain's findings and conclusions. He chose not to do so, and thus, this assertion is without merit.

The defendant next complains that permitting Dr. Smith, the forensic pathologist, to testify as to the positions of the occupants of the vehicle was error. However, a review of Dr. Smith's testimony reveals that his opinion was limited to a statement that the injuries sustained by the victim were consistent with him being the passenger because of the damage to the passenger side of the vehicle and the victim's injuries as documented in his autopsy report. Dr. Smith did not opine that the victim was the passenger or that the defendant was the driver. The record reveals that the court sustained defense objections to questions propounded by the assistant district attorney to Dr. Smith regarding the positions of the occupants and directed the jury to disregard any answers to those questions. Dr. Smith testified he received photographs of the vehicle, and information that the automobile left the road and was struck on the passenger side, one of the occupants was ejected from the vehicle, and the victim was observed exiting the vehicle. He described the victim's injuries based on the autopsy as a compound fracture of the right ankle in which the bone had broken through the skin, fractured left femur and fracture of

front and rear pelvis. Dr. Smith opined that the cause of death was blood loss from the multiple fractures and the manner of death was accidental. He further indicated that the injuries suffered by the victim would have been consistent with the indentation on the passenger side of the automobile.

Dr. Smith has performed in excess of 3,000 autopsies and testified in more than 100 previous cases. Notably, the defendant stipulated to his qualifications as a forensic pathologist. Dr. Smith's opinion that the victim's injuries were consistent with being the passenger at the time of the crash is indistinguishable from the opinions rendered by physicians in Commonwealth v. Gonzales, 463 Pa. 597, 602-603, 345 A.2d 691, 693-694 (1975) (physician permitted to testify as to the distance from which a shot was fired from a weapon), and Commonwealth v. Guess, 273 Pa.Super. 72, 75-76, 416 A.2d 1094, 1096 (1979) (physician who examined a gunshot wound suffered by a decedent may give his opinion regarding the direction and distance from which such wounds were inflicted), despite neither being qualified as a ballistics expert. Because Dr. Smith's opinion was based not only on his autopsy which revealed the injuries he described that were sustained by the victim, but also facts of record, including viewing photographs depicting the damage to the automobile and information provided by the police, his opinion was admissible as within his area of expertise, notwithstanding that he was not trained

in accident reconstruction. As indicated in Gonzales and Guess, the defendant's claim goes merely to the weight to be accorded Dr. Smith's testimony and not to its admissibility.

The defendant further challenges Dr. Smith's testimony on the basis that the autopsy report contained no reference regarding the opinion that he rendered as to the victim's injuries being consistent with sitting in the passenger seat. The defendants in Commonwealth v. Freeman, 289 Pa.Super. 375, 433 A.2d 499 (1981), and Commonwealth v. Stith, 434 Pa.Super. 501, 644 A.2d 193 (1994), made similar arguments. The trial court in Freeman permitted the Commonwealth's ballistics expert to testify as to the trigger weight of the weapon used in the homicide when the information was not contained in his pre-trial report. The Superior Court determined that the fact that the ballistics expert did not refer to the specific trigger weight test in his report did not make it inadmissible, and furthermore, the defendant was not prejudiced by the testimony, because his defense of self-defense was not diminished. In Stith, the trial court permitted the toxicological expert to testify regarding the related-back blood alcohol content even though the expert's report did not specifically refer to the related-back blood alcohol content. The Superior Court ruled that the report of the expert toxicological evaluation gave the defendant fair notice that the expert would

testify about the driver's blood alcohol content at the time of driving, because implicit in the report's reference to the driver's impaired judgment while driving was the assumption that the expert planned to offer an opinion about related-back blood alcohol content. In the instant case, the defendant was aware that the Commonwealth's theory alleged that he was the driver of the vehicle and the victim was the passenger. In addition, the defendant was provided with photographs depicting the damage to the vehicle, the autopsy report specifying the victim's injuries and Detective Chamberlain's accident reconstruction report. Based upon the documentation provided to the defendant, Dr. Smith's opinion that the victim's injuries were consistent with him being the passenger in the vehicle by reason of the extensive damage to the passenger side of the vehicle can hardly be claimed as a surprise or ambush prohibited by Rule 573. Furthermore, the defendant alleges prejudice but specifies no basis upon which he was harmed.

Lastly, the defendant asserts that the verdicts rendered by the jury were against the weight of the evidence, citing in his post-sentence motion conflicting testimony from Commonwealth witnesses and Officer Sullivan's focus on the defendant as the operator while on the scene without substantiating evidence to support such a conclusion.

A true weight of the evidence challenge concedes that sufficient evidence exists to sustain the verdict but questions which evidence is to be believed. Commonwealth v. Lewis, 911 A.2d 558, 566 (Pa.Super. 2006), citing Commonwealth v. Hunzer, 868 A.2d 498, 506-507 (Pa.Super. 2005). The credibility of witnesses and the weight of evidence are determinations that lie solely with the trier of fact, who is free to believe all, part or none of the evidence. Lewis at 566, citing Commonwealth v. Williams, 854 A.2d 440, 445 (Pa. 2004). A new trial should be awarded only when the verdict is so contrary to the evidence as to shock one's sense of justice and the award of the new trial is imperative so that right may be given another opportunity to prevail. Commonwealth v. Causey, 833 A.2d 165, 173-174 (Pa.Super. 2003).

The defendant points to testimony from two witnesses who arrived simultaneously on the scene shortly after the crash and observed the victim attempting to extricate himself from the driver's side of the vehicle. In his brief, the defendant alleges that Kevin Boehm testified that the victim was the driver of the automobile, attempted to exit from the driver's side of the vehicle and was wearing tennis shoes, which was contrary to testimony from other witnesses. The defendant further avers that the second witness who arrived shortly after the accident, Kyle Blankenbicker, assisted the victim by pulling him from the driver's

side of the automobile. A review of the testimony of Kevin Boehm discloses that he did not testify that the victim was the driver of the car, contrary to the defendant's allegation. Mr. Boehm observed the victim attempting to remove himself from the driver's side of the vehicle while his body from his waist to his feet was inside of the car. Although testifying that he could not recall if the victim was wearing shoes, Mr. Boehm, when confronted with his preliminary hearing testimony, admitted that he had previously stated that the victim was wearing shoes when removed from the car. Mr. Blankenbicker testified that he saw the upper half of the victim's body outside of the driver's side of the vehicle with the lower half of his body within the car. He pulled the victim out of the vehicle, indicating that the victim's legs were under the dash. As Mr. Blankenbicker removed the victim, the sweatpants being worn by the victim became caught on something within the car and were pulled off, leaving the victim wearing basketball shorts, a tee shirt and no shoes. Mr. Blankenbicker observed the victim's broken right ankle and placed him near a tree approximately 20 feet from the car to await the emergency personnel. The defendant was found in a driveway approximately 40 to 50 feet from the vehicle.

The defendant further claims that the testimony of Officer Scott Sullivan that he initially focused on the defendant as the suspect without any evidence to support

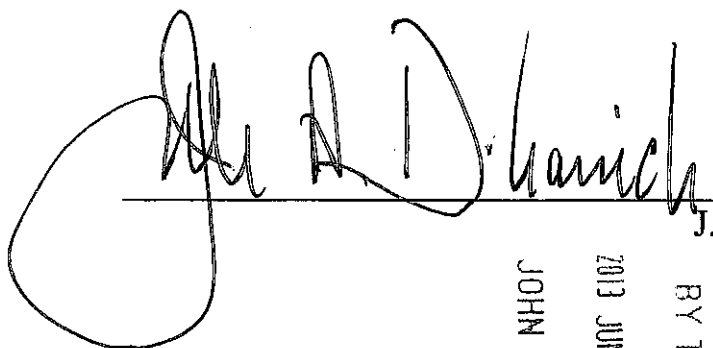
his assumption is sufficient to shock the conscience. The court notes that the charges against the defendant were not filed until January 23, 2012, more than 16 months after the accident. Officer Sullivan testified that the delay in filing charges was necessitated in order to locate and interview the various witnesses, prepare, serve and execute search warrants, await forensic results from the crime laboratory and receive and review various reports and records. The defendant also faults Officer Sullivan for failure to obtain forensic analysis of the grab bar and steering wheel of the vehicle to test for fingerprints or other evidence. Officer Sullivan clearly conducted a deliberate investigation prior to filing the charges against the defendant. The fact that he may have surmised that the defendant was the driver of the car based on his initial observations at the scene did not foreclose his continuing efforts to assure that he was in receipt of all relevant information prior to filing charges against the defendant. Although neither the grab bar nor the steering wheel was submitted to the crime laboratory for analysis, Officer Sullivan examined under a fluorescent light the grab bar, dashboard, steering wheel, air bag and visor and found nothing which could have been submitted for further testing.

The defendant, having conceded that sufficient evidence existed to sustain the verdicts in failing to challenge the sufficiency of the evidence, the court finds that the credibility of the testimony of Mr. Boehm, Mr. Blankenbicker and Officer

Sullivan was properly within the jury's province and was not so contrary to the evidence as to shock one's sense of justice.

The foregoing provides the basis on which the defendant's post-sentence motion was denied by the order of this court entered June 4, 2013.

BY THE COURT:

A handwritten signature in black ink, appearing to read "John P. Dohanich", is written over a horizontal line. A large, loopy flourish extends from the bottom left of the signature.

BY THE COURT
2013 JUN 27 P 2:44
JOHN P. DOHANICH
JUDGE

JUDY R. ENSLEN
CLERK OF COURTS
BEAVER CO. PENNSYLVANIA
2013 JUN 27 P 4:15