[J-13-2016]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 33 WAP 2014
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered June 2, 2014, at No. 1312
	:	WDA 2012, affirming the Judgment of
v.	:	Sentence of the Court of Common Pleas
	:	of Allegheny County entered June 26,
	:	2012, at No. CP-02-CR-0013937-2010.
RYAN D. SAFKA,	:	
	:	95 A.3d 304
Appellant	:	
	:	ARGUED: October 6, 2015
	:	REARGUED: April 5, 2016

OPINION

MR. JUSTICE BAER **DECIDED: July 19, 2016**

Ryan D. Safka (Appellant) was the driver of an automobile that crashed killing three of his four passengers. The investigating police officer believed that Appellant's speed caused the accident. He, in part, relied upon data retrieved from the vehicle's Event Data Recorder (EDR) which, as fully elaborated upon herein, recorded the vehicle's speed for the five seconds prior to the airbag's deployment. In a non-jury vehicular manslaughter trial, after the evidence was closed, the trial court reopened it to permit the parties to present additional evidence concerning the reliability of the EDR data. The question presented herein is whether this was trial court error. We hold that

in this non-jury proceeding, the trial court had the discretion to reopen the record *sua sponte* to receive additional testimony to avoid a miscarriage of justice, and did not abuse its discretion by doing so. In this regard, we find this case analogous to Pennsylvania's well-established rule that upon request by either party, a court may reopen the record to prevent such a miscarriage of justice. See Commonwealth v. Baldwin, 58 A.3d 754, 763 (Pa. 2012) (holding that the reopening of a case after the parties have rested to take additional testimony is within the trial court's discretion, the exercise of which is couched in terms of preventing a failure or miscarriage of justice). Accordingly, the order of the Superior Court is affirmed.

At approximately 1:00 a.m. on February 22, 2011, Appellant was traveling with several teenage passengers on the Parkway West, I-376, toward downtown Pittsburgh when he lost control of his vehicle. As the car approached a bend in the road, it struck the jersey-barrier dividing the opposing lanes of traffic, careened back across its two lanes to the berm of the highway, where it struck a pile of snow that had accumulated under a guard rail, and vaulted airborne over the trees lining the roadway until it crashed on a steep hill adjacent to I-376. Appellant and one passenger survived. The other three passengers were killed.

Pennsylvania State Trooper Mark Kern, an accident reconstructionist, arrived at the scene shortly after the accident to determine its cause. Trooper Kern assessed the damage done to Appellant's vehicle and the roadway. From his calculations, he determined that Appellant's vehicle was traveling at approximately 67 miles per hour (mph) in a 50 mph zone when it hit the guardrail and left the roadway. In addition to his accident reconstruction calculations, Trooper Kern investigated whether Appellant's car

was equipped with an EDR, which is a device placed in the vehicle by the manufacturer to collect and record information about the operation of the vehicle's airbags. Trooper Kern learned that Appellant's vehicle was so equipped, and that the particular EDR model recorded the vehicle's speed for the five seconds prior to airbag deployment. Using his training and past experience with EDRs, Trooper Kern extracted the EDR, determined that it was undamaged, and downloaded its information. The data from the EDR corroborated Trooper Kern's belief that speed was a factor in the accident.

Appellant was charged with two counts of homicide by vehicle, three counts of involuntary manslaughter, one count of recklessly endangering another person,[1] and several other vehicle violations, including reckless driving, disregard of traffic lane, speeding, and driving at an unsafe speed.[2] The Commonwealth's theory of the case was that Appellant lost control of his vehicle due to speed in excess of the 50 mph speed limit. Appellant waived his right to a jury trial and proceeded to a bench trial, which commenced February 6, 2012. Although the Commonwealth disclosed the EDR data in discovery, the defense did not file any pretrial motions to challenge admission of this evidence.

Notwithstanding the lack of a pretrial challenge, counsel for Appellant questioned the reliability and accuracy of the data retrieved from the EDR in his opening statement. He did not argue that the evidence was not generally accepted in the scientific

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1 See 75 Pa.C.S. § 3732(a), 18 Pa.C.S. §§ 2504(a) and 2705.

2 See 75 Pa.C.S. §§ 3736(a), 3309(1), 3362, and 3361.

community as required in Pennsylvania for the admission of novel scientific evidence.[3] Rather, defense counsel focused on the lack of certification or calibration, which is generally required for, *inter alia*, other methods of testing a defendant's speed, such as a radar device, or to measure intoxication by, for example, a breathalyzer. Notes of Testimony (N.T.), 2/6/2012, at 11-12 ("It is our position, Judge, that [the EDR] is not held to the standard of other instrumentations in the Commonwealth of Pennsylvania."); id. at 12 ("In this case, Judge, they are looking at a box that is not certified, not calibrated. We would submit it lacks the certain reliability."). The prosecutor argued that these concerns pertained to the weight of the evidence rather than its admissibility. Id. at 12-13. Interpreting the defense argument as an oral motion *in limine* challenging the admissibility of the EDR data, the trial court stated that it would consider the matter and rule on it when the Commonwealth introduced the EDR evidence.[4]

Trooper Kern was qualified as an expert in the field of accident reconstruction and testified for the Commonwealth. Considering the weight of the car and the distance it traveled while airborne, other physical observations from the accident reconstruction, and his calculations of what speed would send a vehicle airborne for the distance it

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[3] The "Frye test" was first announced in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and adopted in Pennsylvania in Commonwealth v. Topa, 369 A.2d 1277 (Pa. 1977). Under Frye, novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community. Grady v. Frito-Lay, Inc., 839 A.2d 1038, 1043-44 (Pa. 2003).

[4] Throughout the trial, the trial court's uncertainty regarding the EDR data reflects its concern both with a threshold determination of the data's admissibility, premised on Frye, and with its obligation as fact-finder to assign a quantum of weight to this particular piece of evidence if it was indeed admissible. These dual concerns animated the trial court's consideration of the EDR data, as apparent from the court's questions during the development of the evidence, as explained herein.

traveled, Trooper Kern opined that Appellant was traveling at least 67 mph when the car left the roadway.

Turning to the data he retrieved from the EDR, Trooper Kern testified that it corroborated his conclusion that Appellant was speeding. Although he was unable to explain precisely how the device recorded data, Trooper Kern testified generally about how it functions and his experience downloading data from other EDRs. With regard to the data he downloaded from the EDR in Appellant's vehicle, Trooper Kern explained that it recorded Appellant's speed five seconds before the airbags deployed, which he believed was when the vehicle hit the jersey-barrier dividing the opposing lanes of traffic. This data reflected that at five seconds before deployment, the vehicle was traveling 106 mph; at four seconds before deployment, it was traveling 100 mph; at three seconds before deployment, it was traveling 94 mph; at two seconds before deployment, it was traveling 87 mph; and at one second before deployment, it was traveling 70 mph. Trooper Kern testified that this supported his opinion that Appellant lost control of his vehicle due to excessive speed. During cross-examination, defense counsel attempted to cast doubt on the reliability of data retrieved from an EDR generally. Trooper Kern testified that there is no uniformity within the automotive industry regarding the data an EDR will record, and that the EDR is not calibrated or certified for accuracy by an independent agency. The Commonwealth also presented the testimony of Appellant's surviving passenger, who stated his belief that Appellant was traveling between 70 and 80 mph in the 50 mph zone just prior to the accident.

After the Commonwealth rested its case, the trial court permitted Appellant and the prosecutor to revisit the motion *in limine*, which defense counsel characterized as a

motion for judgment of acquittal. Defense counsel argued that without testing, certification, or calibration, and with a lack of uniformity among manufacturers, data derived from the EDR was not reliable and should not be admitted. The Commonwealth responded that EDRs are not meant to be certified or calibrated. Rather, an EDR is installed during a vehicle's manufacture, where it remains for the life of the automobile. The trial court denied Appellant's motion *in limine* and stated that it was the court's obligation as fact-finder to determine how much weight to give the EDR data. Appellant chose not to testify, or to present evidence.

Closing arguments proceeded on February 7, 2012, during which the trial court indicated its concern that Trooper Kern was not clear about how data was recorded onto the EDR and suggested that additional testimony about the general operation of EDRs would be helpful. The trial court explained that it was not revisiting the motion *in limine*, but was concerned with what weight the court should give to "some amorphous module that someone gathers data from." N.T., 2/7/2012, at 153. Following closing arguments, the trial court stated that it would review the matter overnight.

The next morning, February 8, 2012, the trial court indicated that it was not prepared to return a verdict due to questions raised in Appellant's motion *in limine*. Because Appellant had not filed a formal pre-trial motion or raised a Frye challenge, which would have permitted the court to assess the acceptability of EDR data in the scientific community,[5] the trial court explained that it was unable to resolve the admissibility, and, if admissible, the appropriate weight to afford the EDR data. N.T., 2/8/2012, at 159. Moreover, the court explained that there was no Pennsylvania

[5] See supra, n.3.

precedent to guide it. Accordingly, the trial court *sua sponte* decided to reopen the record and continue the trial in two weeks for the limited purpose of providing both parties the opportunity to present expert testimony about the accuracy and reliability of information recorded by the EDR.

Trial reconvened on February 21, 2012, limited to the presentation of evidence regarding the reliability and accuracy of EDRs (hereafter, the foundational evidence). The Commonwealth called Richard Ruth as an expert.[6] Mr. Ruth explained that EDRs generally record a time-series of information immediately prior to an airbag's deployment, and were originally intended to assist manufacturers in understanding whether their airbag systems were working properly. He testified that their use in accident reconstruction has been endorsed by the National Highway Safety Transportation Administration.[7]

Turning to the facts of this case, Mr. Ruth testified that he had reviewed the data Trooper Kern retrieved from the EDR in Appellant's vehicle and opined that it was an

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[6] Mr. Ruth, a retired engineer from Ford Motor Company, received specialized training in accident reconstruction through his employment at Ford, received additional training from Ford and elsewhere relative to the operation of EDRs, taught police officers and other accident reconstructionists how to read and interpret information from EDRs in the context of accident reconstruction, and has authored numerous papers regarding EDRs.

[7] Although the trial court indicated that it was reopening the record to receive evidence to assist it in determining how much weight to afford the EDR data, it appears that when Mr. Ruth testified, the parties and the trial court were conducting what in substance was a Frye hearing. The first half of Mr. Ruth's testimony detailed the extent to which EDRs are routinely relied upon in the scientific field of accident reconstruction, and the second half was specific to the EDR model installed in Appellant's car and the data it revealed. It is fair to say that at this juncture, the trial court was concerned with both admissibility pursuant to Frye, and with the evidence's weight, two intertwined aspects of the case due to the trial court's dual roles in this bench trial.

accurate recording of Appellant's speed in the five seconds before the airbags deployed. Although Mr. Ruth agreed with Trooper Kern regarding the speed of Appellant's vehicle prior to airbag deployment, he opined that the airbags deployed not when the vehicle hit the jersey-barrier as Trooper Kern testified, but when the vehicle struck the trees after being vaulted over the guardrail.

On cross-examination, Mr. Ruth testified that although EDRs are not inspected, certified, or calibrated, there was no need for such inspection, certification, or calibration. According to Mr. Ruth, EDRs transmit data digitally, so it is either on and collecting data, or it is not functioning and not recording data. In addition, Mr. Ruth explained that the EDR is constantly recording vehicle readings for five second periods, which are continually overwritten unless the airbag is deployed. Once the airbags deploy, the last five seconds are permanently recorded.

At the conclusion of Mr. Ruth's testimony, Appellant presented no evidence. The trial court confirmed its tentative decision that the EDR data was admissible based on Mr. Ruth's testimony that this evidence is generally accepted in the relevant scientific community.[8] The parties presented argument about the weight the trial court should afford the EDR data. Following argument, the trial court found Appellant guilty of all counts and sentenced him to an aggregate sentence of 30 to 72 months' imprisonment followed by four years of probation.

Appellant appealed to the Superior Court, challenging, among other things, the trial court's decision to reopen the record after the parties had rested. According to Appellant, by reopening the record, the trial court improperly injected itself into the

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[8] See Frye, 293 F. at 1013, supra, n.3.

proceedings to permit the Commonwealth to supply additional evidence without which a not guilty verdict would have been rendered.

In its Rule 1925(a) opinion, see Pa.R.A.P. 1925(a), the trial court explained that Appellant did not file a motion to suppress, or any other motion to prevent the Commonwealth from offering the EDR data into evidence. Rather, Appellant waited until the day of trial to make an assertion which the trial court treated as an objection to admissibility. The trial court noted that it permitted the Commonwealth to admit the EDR data and reserved consideration of the weight of the evidence. It is apparent from the trial court's Rule 1925(a) opinion that when the trial court reopened the record to assess the weight of evidence it had already admitted, it acted out of an abundance of caution in this bench trial to afford the criminal defendant the opportunity to respond to its concerns.[9]

The trial court further asserted that it had the discretion to reopen the evidentiary portion of the case at any time before it rendered the verdict. See Baldwin, 58 A.3d at 763 ("the reopening of a case after the parties have rested, for the taking of additional testimony, is within the trial court's discretion. . ."); Commonwealth v. Rizzi, 586 A.2d 1380 (Pa.Super. 1991) (it was appropriate for a trial court to permit the Commonwealth to reopen the case to introduce into evidence the cocaine the defendant was charged with selling to an informant "to avoid a miscarriage of justice."). Moreover, the trial court

[9] Our reading of the record reflects that when the trial court reopened it, questions regarding both admissibility and weight were to be again considered. We see no impropriety in the trial court's reassessment of both questions in its good faith attempt to reach the correct decision, as discussed infra.

disagreed with Appellant's assertion that the foundational EDR evidence was the difference between verdicts of guilty and not guilty.

The Superior Court affirmed the trial court.[10] Preliminarily, it recognized that although it was not disputed that the trial court has discretion to reopen the record upon a party's request, there was no case law permitting it to do so on its own initiative. Commonwealth v. Safka, 95 A.3d 304, 309 (Pa. Super. 2014). In addressing Appellant's argument that the trial court had no discretion to open the record *sua sponte*, the Superior Court faulted Appellant for failing to confront how the timing of his objection hampered the trial court's ability to evaluate the EDR data. The Superior Court reasoned that, by failing to file a pre-trial motion, despite knowing the Commonwealth intended to rely on the EDR data, the Superior Court reasoned that Appellant forfeited his opportunity to have the trial court explore the foundational evidence necessary to determine whether EDR data is accurate, reliable, and generally accepted in the scientific community. Thus, according to the Superior Court, the trial court was left with little time to assess such questions, and, using its discretion to assess the admissibility of evidence, admitted the EDR data subject to a later determination of whether there was a sufficient foundation to establish the technology's accuracy and reliability.

The Superior Court held that the Rules of Evidence endorse such a practice. See Pa.R.E. 104(b) ("When the relevance of evidence depends on whether a fact

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[10] The first issue before the Superior Court was whether the trial court erred in admitting the EDR data in violation of Frye. See Commonwealth v. Safka, 95 A.3d 304, 307 (Pa.Super. 2014). The Court rejected the argument, holding, based on Mr. Ruth's testimony, that there was abundant support to conclude that EDR technology is not novel science. Id., 95 A.2d at 308. Appellant has not appealed this determination.

exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later."); Pa.R.E. 104 cmt. (providing that the trial court must assess preliminary questions of admissibility and "is not bound by evidence rules, except those on privilege."); Pa.R.E. 611(a) (affording the trial court "reasonable control over the mode and order of examining witnesses and presenting evidence . . .").

Judge, now Justice, Wecht, dissented. Considering that evidence of the reliability and accuracy of the EDR went to preliminary questions of admissibility, the dissent opined that it made little sense for the trial court to hear this evidence after the evidentiary record was closed, and faulted the Commonwealth for not including this evidence during the evidentiary phase of trial. Believing the Commonwealth was bound to the evidence it introduced at trial, which he did not believe established the reliability and accuracy of the EDR, the dissent would have held that the trial court erred by re-opening the case, and would have vacated the judgment of sentence.

Appellant appealed to this Court, raising one issue for our review: whether the trial court erred after the close of evidence by *sua sponte* reopening the record for the presentation of additional evidence. Appellant argues that the trial court did not have the discretion to reopen the record in this case, and that it therefore committed an error of law which requires that his judgment of sentence be vacated. Although Appellant agrees that a trial court generally has discretion to permit a party to reopen its case prior to the entry of a final judgment, he argues that there is no authority which permits a court to do so *sua sponte*. It makes no difference to Appellant's argument if the case proceeds as a bench or jury trial. In this respect, Appellant argues that the lack of a jury

does not grant the court *carte blanche* authority to develop a record to its liking. According to Appellant, if the trial court was not satisfied with the Commonwealth's evidence once it rested, it should have evaluated the case based upon the evidence presented, and found Appellant not guilty.

Recognizing the lack of precedent to support his legal argument that the trial court lacked authority to reopen the record *sua sponte*, Appellant instead relies on cases from two other jurisdictions holding that a trial court cannot *sua sponte* consider adjudicating an uncharged, lesser included offense,[11] and cannot *sua sponte* reopen the record after closing arguments to take judicial notice of a fact necessary to establish an element of the crime.[12]

Confronting the Superior Court Majority's analysis, Appellant argues that neither Rule 611 nor 104 of the Pennsylvania Rules of Evidence provides the required authority for the trial court to reopen the record absent a request to do so by the parties. See Pa.R.E. 611, 104. Appellant further attempts to deflect responsibility from defense counsel's day-of-trial motion *in limine* by echoing the dissent's position that the burden is always on the party seeking admission of the evidence to establish its admissibility. The Commonwealth was aware of Appellant's challenge to the reliability of the EDR

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[11] See Ramsey v. State, 996 A.2d 782, 785 (Del. 2010) (holding, in a bench trial, that the trial judge should not consider adjudicating an uncharged, lesser-included offense unless specifically requested to do so by a party).

[12] See State v. Lovejoy, 1996 WL 52896, at *9 (Ohio Ct.App. Feb. 8, 1996), *rev'd on other grounds*, 683 N.E.2d 1112 (Ohio 1997) (in a bench trial on the charge of having a weapon under disability, it was error for the trial court to reopen the evidence *sua sponte* after closing arguments to take judicial notice of a prior offense to supply a crucial fact the state had failed to prove).

data yet chose not to call an expert to support it during the evidentiary phase of trial.[13] According to Appellant, this was the Commonwealth's burden, and the trial court was without authority to open the record to give the Commonwealth a further opportunity to place evidence on the record regarding the EDR. According to Appellant, the trial court improperly injected itself into the trial as an advocate for the Commonwealth. See Commonwealth v. Elmore, 362 A.2d 348 (Pa. 1976) (holding that in a jury trial, the trial court's aggressive questioning of a witness's identification "went well beyond the court's limited role and placed the court in the role of an advocate," thus requiring a reversal of the conviction).

The Commonwealth responds that the trial court had the discretion to reopen the record, and that it did not abuse this discretion when it provided both sides the opportunity to present foundational evidence regarding the reliability of EDRs. In making this argument, the Commonwealth focuses on several factors: the rules of evidence grant the trial court discretion to oversee the admission of evidence; Appellant challenged the admissibility of the evidence in an oral motion *in limine* at the commencement of trial; and a judge has more leeway with regard to the admission of evidence in a bench trial.

Like the Superior Court Majority, the Commonwealth asserts that Pennsylvania Rules of Evidence 611(a) and 104 vest the trial court with discretion to control the presentation of evidence and to reserve ruling on questions of admissibility. See Pa.R.E. 611, 104. Consistent with this discretion, the Commonwealth observes that the

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[13] In this respect, Appellant does not acknowledge that the Commonwealth, having prevailed on admissibility at the start of trial, had no reason to support the admitted evidence with expert testimony.

trial court is permitted a more active role in the trial than Appellant envisions, noting that it can even call and question its own expert witnesses. See Pa.R.E. 614(a) (providing that the trial court may, with notice to the parties, call a witness on its own or at a party's request); Pa.R.E. 706 (providing that where the court has appointed an expert witness, the court may call that witness to testify).

Moreover, the Commonwealth emphasizes that in this case, there were no written motions filed before trial to focus the court's consideration on the unique evidentiary question before trial began. According to the Commonwealth, by presenting the oral motion *in limine* at the start of trial, defense counsel put the trial court in the difficult position of evaluating the admissibility of EDR data without hearing any foundational evidence regarding this technology, which had yet to be ruled admissible by Pennsylvania appellate courts. As the trial court observed at the end of the trial, the record did not contain foundational evidence regarding the accuracy and reliability of the EDR. The Commonwealth argues that the trial court acted properly and within its discretion to permit both parties an opportunity to supplement the record to address questions of admissibility and weight.[14]

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[14] Justice Donohue, in dissent, criticizes the Commonwealth for failing to present an EDR expert in its case-in-chief, Dissenting Opinion by Justice Donohue at 11; however, the dissent ignores that the trial court admitted this evidence into the record and was deferring its ruling on how much weight to give the evidence. Moreover, the trial court was ready to decide the case in the Commonwealth's favor at the close of the evidence, see Trial Court Opinion at 7, which included the EDR evidence indicating that Appellant was speeding. We find the dissent's criticism of the Commonwealth for not calling an EDR expert unwarranted when it had achieved admission of the EDR, and was content to allow the trial court to assess its weight in evaluating the State's case. Indeed, it properly evaluated its case given that the trial court was ready to render a guilty verdict before deciding to give Appellant another opportunity to explore the issue.

Additionally, the Commonwealth emphasizes that Appellant was tried by a judge, not a jury. Relying on the comment to Rule 104, the Commonwealth argues that the trial court, as fact-finder, should be empowered to hear any relevant evidence to resolve questions of admissibility. See Pa.R.E. 104 cmt. (providing that the trial court must assess preliminary questions of admissibly and "is not bound by evidence rules, except those on privilege."). See also Williams v. Illinois, 132 S.Ct. 2221 (2012) (observing the presumption that when the trial court is fact-finder, it has adhered to basic rules of procedure and will ignore any inadmissible evidence when making decisions).[15]

Relying on cases which affirmed a trial court's discretion to reopen the record upon a party's motion prior to verdict, the Commonwealth argues that the trial court has inherent discretion to determine if additional testimony is necessary to support a just resolution. See Commonwealth v. Chambers, 685 A.2d 96, 109-10 (Pa. 1996) (finding no abuse of discretion where the trial court in a jury trial permitted the Commonwealth to recall a witness to correct his prior testimony); Commonwealth v. Tharp, 575 A.2d 557, 559 (Pa. 1990) (finding no abuse of discretion where the trial court during a jury trial permitted the Commonwealth to reopen its case to present additional evidence concerning an element of the crime, despite a defense motion for demurrer);

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[15] The dissent by Justice Donohue views the trial judge as being in the same position as the jury, noting that a jury may not seek additional evidence following the close of evidence. Dissenting Opinion by Justice Donohue at 8. This is simply inaccurate. A trial judge in a bench trial serves the dual roles of judge and jury and has broad latitude over the case and the evidence. A jury could never seek to introduce evidence anytime at trial or otherwise, while the court is free to call a witness. Pa.R.E. 614(a) and 706. Jury and bench trials are simply different and we see nothing improper in the court's action allowing both parties to elaborate further on the reliability of admitted evidence.

Commonwealth v. Evans, 410 A.2d 1213, 1216 (Pa. 1979) (finding no abuse where the trial court in a jury trial allowed the Commonwealth to reopen the record after both parties had already rested their rebuttal/surrebuttal cases).

The Commonwealth further refutes Appellant's assertion that the trial court injected itself into the case as an advocate for the prosecution. According to the Commonwealth, the trial court merely allowed for additional evidence from both sides. As the EDR data had already been admitted, the Commonwealth emphasizes that it was the defense who benefited from the trial court's decision, not the prosecution.

Finally, in response to the suggestion by Appellant and the dissenting opinion in the Superior Court that without the EDR data, the verdict would have been not guilty, the Commonwealth asserts that there was sufficient evidence for a guilty verdict in the absence of the EDR data. Specifically, both Appellant's surviving passenger and Trooper Kern testified that Appellant had been speeding prior to the collision. Indeed, the trial court specifically disagreed that the foundational EDR evidence was the difference between verdicts of guilty and not guilty. Trial Court Opinion at 7.

In reviewing the trial court's decision to reopen the record, we determine whether the trial court committed an error of law, as Appellant advocates, or abused its discretion. If we find that the trial court had the discretion to reopen the record, we would proceed to determine whether the trial court abused that discretion by doing so. Commonwealth v. Mitchell, 902 A.2d 430, 452 (Pa. 2006) (providing that the admission of evidence is within the sound discretion of the trial court, and we may reverse only upon a showing that the trial court clearly abused its discretion). As we have explained, "[w]here the discretion exercised by the trial court is challenged on appeal, the party

bringing the challenge bears a heavy burden." Paden v. Baker Concrete Const., Inc., 658 A.2d 341, 343 (Pa. 1995) (quoting Echon v. Pennsylvania Railroad Co., 76 A.2d 175, 178 (Pa. 1950)). In this respect, "it is not sufficient to persuade the appellate court that it might have reached a different conclusion. . ." Id. Rather, one must go further and show an abuse of the discretionary power. "[A]n abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused." Id.

There are no Pennsylvania cases addressing whether a trial court, in a bench trial, may *sua sponte* reopen the record and provide the parties the opportunity to supplement it. Conversely, it is well-established that the trial court has discretion to permit either side to reopen the case to present additional evidence prior to the verdict, the exercise of which is directed at preventing a failure or a miscarriage of justice. Tharp, 575 A.2d at 558–59 ("[A] trial court has the discretion to reopen a case for either side, prior to the entry of final judgment, in order to prevent a failure or miscarriage of justice."); Baldwin, 58 A.3d at 763; Chambers, 685 A.2d at 109.

Moreover, the trial court in a non-jury trial has the authority to control the order and presentation of evidence. Rule 611 provides that the "[t]he court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence" for three purposes:

> (1) make those procedures effective for determining the truth;
> (2) avoid wasting time; and
> (3) protect witnesses from harassment or undue embarrassment.

Pa.R.E. 611(a).

In addition, Pennsylvania's evidentiary rules specify that trial courts make preliminary and, in due course, final decisions about the admissibility of evidence. Pa.R.E. 104(a) ("The court must decide any preliminary question about whether . . . evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege."). See also Commonwealth v. Alicia, 92 A.3d 753, 760 (Pa. 2014) ("The admissibility of evidence is within the sound discretion of the trial court. . . ."). By providing that the trial court is not bound by evidentiary rules in determining the admissibility of evidence, except those regarding privilege, Rule 104(a) recognizes that the judge "should be empowered to hear any relevant evidence to resolve questions of admissibility." Pa.R.E. 104 cmt.

Rules 614(a) and 706 further empower the trial court to call a witness on its own. Pa.R.E. 614(a) ("Consistent with its function as an impartial arbiter, the court, with notice to the parties, may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness."); Pa.R.E. 706 (permitting the trial court to appoint an expert witness and call that witness to testify). See also F.R.E. 614 cmt. (providing, in the federal counterpart to Pennsylvania Rule 614, that "the authority of the judge to call witnesses is well established. . . . And the judge is not imprisoned within the case as made by the parties.").

Additionally, we are mindful that in a bench trial, the trial court is acting in two distinct capacities: first, as the gate keeper, ruling on the admissibility of evidence; and second, as the fact-finder, affording weight to the admissible evidence. Because of the general discretion afforded to the trial court under the rules of evidence, and the trial

court's dual role in a non-jury trial, we hold that trial courts have the inherent discretion to reopen the record on their own and to grant the parties leave to supplement it with evidence regarding a particular issue, as long as neither party is prejudiced.[16] The trial court's discretion to reopen the record is not cabined by a party's request to do so. Rather, if the trial court believes that preventing a miscarriage of justice requires reopening the record, it has the discretion to do so.[17]

The record here is not precise regarding the trial court's actions. This is understandable. Trial courts do not have the luxury of prolonged study of the myriad evidentiary and procedural quagmires they face. Here, the trial court initially denied Appellant's untimely and undeveloped motion *in limine* to preclude evidence derived from the EDR, but indicated it would reconsider admissibility when the evidence was introduced. After considering all of the evidence in the case, and denying the motion to preclude the EDR evidence, however, the trial court decided that more testimony would assist it in ensuring its decision to admit the EDR data was correct, and to assess the weight to be afforded that data. Contrary to Appellant's protestations, the trial court never indicated that it could not reach a verdict without this evidence. Instead, it stated

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[16] Justice Donohue, in dissent, would hold as a matter of law that trial judges may never exercise discretion to open the record on their own once the parties have rested. The dissent supports this conclusion by noting that the party with the burden of proof is obligated to present all relevant evidence in support of such burden. Dissenting Opinion by Justice Donohue at 9. This same concern, however, would apply prior to the parties' closing and trial courts are permitted at this stage to call witnesses, including expert witnesses, on their own, Pa.R.E. 614(a) and 706. We see no basis to preclude a court from exercising its discretion in this regard at this later stage of the proceeding.

[17] Because we have resolved this issue on the basis of Pennsylvania law, we decline Appellant's invitation to review factually distinct, non-precedential decisions from other jurisdictions. See Ramsey, 996 A.2d at 785; Lovejoy, 1996 WL 52896, at *9.

that it wanted to hear more evidence concerning the admissibility and the weight to be afforded the EDR data. We find no abuse of discretion in the trial court affording both parties a full opportunity to introduce foundational evidence regarding EDRs to allow the court to decide thoughtfully both the admissibility and the weight of this evidence. The trial court's actions were consistent with its gate-keeper role of determining admissibility, its fact-finder role of assessing weight, and the discretion afforded by the Rules of Evidence and our precedent in analogous situations permitting a party to move to supplement the record, as long as the opposing party is not prejudiced. See Baldwin, 58 A.3d at 763; Chambers, 685 A.2d at 109; Tharp, 575 A.2d at 558–59.

Moreover, we agree with the Superior Court that because of the timing of Appellant's day-of-trial oral motion, the trial court was left without sufficient information or time to resolve an unfamiliar question of law.[18] [19] See Tr. Ct. Op. at 8 ("The quick research the Court's law clerk was able to do during the trial led this Court to conclude that additional evidence might be necessary for the Court to properly evaluate this evidence."). Because this was a novel legal issue which the trial court lacked time to resolve pre-trial due to the timing of Appellant's request, it was within its discretion to revisit the question and provide equal opportunity for both parties to respond to its

[18] See Pa.R.Crim.P. 579 (providing generally that an "omnibus pretrial motion for relief shall be filed and served within 30 days after arraignment. . .").

[19] The dissent by Justice Donohue questions the suggestion that Appellant's failure to file any pre-trial motion to exclude this evidence was problematic. Dissenting Opinion by Justice Donohue at 3 n.1. In the absence of such motion, however, the trial court admitted the evidence and reserved ruling on the weight to give it based upon whether it was shown at trial, presumably by Appellant, to be unreliable or inadmissible. It was, at least in part, Appellant's failure to attempt to exclude the evidence pre-trial through a motion in *limine*, Frye motion, or the like, that led to the trial court's struggle to determine, on its own, whether the evidence was admissible and what weight to give it.

concern. By reopening the record to permit the parties to present foundational evidence regarding the reliability and accuracy of EDRs, the trial court essentially gave the parties the opportunity to do what the timing of Appellant's oral motion *in limine* precluded: present preliminary testimony about the admissibility of the EDR data. Further, the trial court's actions were especially beneficial to Appellant, who had lost his untimely and inapt oral motion *in limine* during the trial and was essentially afforded a second chance to have the EDR data excluded.

We respectfully reject Appellant's position that the only proper remedy for inadequate foundational evidence was a verdict of not guilty. In Tharp, for example, the Commonwealth rested its case without putting in evidence that the defendant was over eighteen years of age, an element of the offense with which he was charged. 575 A.2d at 558. The defendant demurred, alleging that the Commonwealth failed to present sufficient evidence. Rather than ruling on the demurrer, the trial court permitted the Commonwealth to reopen the case to offer direct evidence of the defendant's age. On appeal, the defendant argued that trial court erred in failing to grant the demurrer and instead permitting the Commonwealth to introduce additional evidence. We rejected the defendant's argument, holding that it is within the trial court's discretion "to permit the Commonwealth to reopen its case for the purpose of meeting a demurrer interposed by the defense prior to ruling upon that motion." Tharp, 575 A.2d at 559. We did not hold that the trial court was instead required to grant the demurrer.

We see no meaningful distinction between the oft-cited scenario of reopening a record on a parties' motion and *sua sponte*, as discussed herein, as long as in both scenarios there is no prejudice to either party and, accordingly, justice is served.

Therefore, and consistent with Tharp, the trial court was not constrained to reject the EDR data, but had the discretion to afford the parties equal opportunity to respond to its concerns.[20] Accordingly, we hold that the trial court possessed the discretion to reopen the record *sua sponte* in order to permit both sides an opportunity to address the court's concern about the EDR data, and that it did not abuse its discretion in this case. We affirm the order of the Superior Court.

Chief Justice Saylor and Justice Todd join the opinion.

Justice Donohue files a dissenting opinion.

Justice Dougherty files a dissenting opinion.

Justice Wecht did not participate in the consideration or decision of this case.

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[20] We further question Appellant's assertion that the alternative to reopening the record was a not guilty verdict, as the trial court clearly stated that it "does not agree that the additional evidence was the difference between verdicts of not guilty and guilty." Tr. Ct. Op. at 7.