**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA,<br><br>Appellee<br><br>v.<br><br>ROBERT CARTER,<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>No. 2373 EDA 2013 |

Appeal from the Judgment of Sentence entered April 19, 2013,
in the Court of Common Pleas of Philadelphia County,
Criminal Division, at No(s): CP-51-CR-0007203-2011

BEFORE: GANTMAN, P.J., ALLEN and FITZGERALD*, JJ.

MEMORANDUM BY ALLEN, J.: **FILED JULY 15, 2014**

Robert Carter ("Appellant") appeals from the judgment of sentence imposed after a jury convicted him of third-degree murder, homicide by vehicle, causing an accident involving death while not properly licensed, three counts of aggravated assault by vehicle, three counts of aggravated assault as a felony of the first degree, recklessly endangering another person, and receiving stolen property.[1] We affirm.

The trial court recounted the trial testimony as follows:

> On April 5, 2011, at approximately 7 p.m., Philadelphia Police Officers Joseph Rapone and Bill Postowski were

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[1] 18 Pa.C.S.A. § 2502(c), 75 Pa.C.S.A. §§ 3732(a), 3742.1(a), 3732.1(a), and 18 Pa.C.S.A. §§ 2702(a), 2705, and 3925(a).

*Former Justice specially assigned to the Superior Court.

patrolling the area of Southwest Philadelphia. They were parked at the corner of 55th Street and Kingsessing Avenue when they observed a silver Acura driving down the street. As Acuras are commonly stolen vehicles in Philadelphia, Officer Rapone ran the license plate of the Acura through the patrol vehicle's computer. The computer report indicated that the Acura had been stolen in Upper Darby. Officer Rapone immediately activated the lights and sirens on his patrol car and began following the car, which was driven by [Appellant]. Instead of pulling over, [Appellant] ran a stop sign and accelerated. Officers Rapone and Postowski continued pursuing [Appellant] for a number of blocks, during which [Appellant] continued to accelerate, ultimately reaching speeds of 75 to 80 miles per hour, and disobeyed traffic signals. Officer Rapone called for backup. During the chase, Officer Rapone observed that the car had two occupants: [Appellant] who was driving, and another person, later identified as Kalil Sephes, who was sitting in the front passenger seat.

When [Appellant] reached the corner of 58th Street and Chester Avenue, he ran a red light, smashing into the right passenger side of a Hyundai Sonata driven by David Gordon, Jr. Officers Rapone and Postowski, who had been approximately one block away when the crash occurred, arrived at the scene moments later. The silver Acura that [Appellant] had been driving was pinned against a wall on the northwest corner of 58th Street and Chester Avenue. Mr. Sephes had been ejected from the vehicle and was lying next to the passenger side of the Acura. It was immediately apparent that he was deceased. [Appellant] was trapped in the driver's seat of the vehicle.

As Officer Rapone was attempting to extract [Appellant] from the vehicle, he heard a voice say "help," and discovered that an elderly woman, later identified as Henrietta Davis, was trapped underneath the Acura. Ms. Davis had been waiting for a trolley at the corner of 58th Street and Chester Avenue along with her friends, Lena Campbell and Leslie Downer. When [Appellant's] Acura crashed into the wall on the corner, Ms. Davis and Ms. Campbell had been hit by the car and trapped. Police were able to extricate them from the wreckage of the Acura, which was mangled and burning. Mr. Downer had been hit by the Acura and was lying on the ground near the car.

> [Appellant] was cut from the driver's seat of the Acura [by] using the jaws of life.
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> All of the victims were taken to area hospitals except for Kalil Stephes, who was pronounced dead at the scene by paramedics. His cause of death was a torn brain stem. Ms. Davis, who was 79 years old, had suffered a broken leg, a concussion, a broken nose, and fractured ribs. Lena Campbell, who was 82 years old, suffered a concussion and fluid in her abdomen. Leslie Downer, who was 85 years old, suffered a cranial hemorrhage, a broken jaw, a fractured rib, and soft tissue swelling. Mr. Gordon, who was 29 years old, suffered a broken leg.

Trial Court Opinion, 10/30/13, at 2-4 (citations to notes of testimony omitted).

On February 13, 2013, a jury convicted Appellant of the above charges.[2] On April 19, 2013, the trial court sentenced Appellant to an aggregate term of twenty-five to fifty years of imprisonment. Appellant filed a post-sentence motion, which the trial court denied on August 6, 2013. This timely appeal followed. Both Appellant and the trial court have complied with Pa.R.A.P. 1925.

Appellant raises the following issues:

> A. WAS THE VERDICT OF THIS CASE AGAINST THE WEIGHT OF THE EVIDENCE?
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> B. SHOULD AN ARREST OF JUDGMENT BE GRANTED IN THIS CASE DUE TO A LACK OF SUFFICIENCY IN THE EVIDENCE?

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[2] The jury acquitted Appellant of one count of fleeing or attempting to elude a police officer. 75 Pa.C.S.A. § 3733(a).

> C. DID THE [TRIAL COURT] ERR IN ALLOWING THE COMMONWEALTH TO INTRODUCE EVIDENCE THAT APPELLANT HAD PREVIOUSLY OPERATED MOTOR VEHICLES, DIRT BIKES, ETC. ON PRIOR [OCCASIONS] AND THAT ON THOSE PRIOR [OCCASIONS] HAD FLED FROM THE POLICE AS EVIDENCE OF LACK OF MISTAKE AND STATE OF MIND?

Appellant's Brief at 5.

In his first two issues, Appellant argues that his convictions for third-degree murder and aggravated assault are against both the weight and the sufficiency of the evidence. In his supporting argument, Appellant conflates these claims. ***See*** Appellant's Brief at 12-14. Our Supreme Court has summarized:

> [I]t is necessary to delineate the distinctions between a claim challenging the sufficiency of the evidence and a claim that challenges the weight of the evidence. The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, whereas a claim challenging the weight of the evidence if granted would permit a second trial.
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> A claim challenging the sufficiency of the evidence is a question of law. Evidence will be deemed sufficient to support the verdict when it establishes each material element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. Where the evidence offered to support the verdict is in contradiction to the physical facts, in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law. When reviewing a sufficiency claim the court is required to view the evidence in the light most favorable to the verdict winner giving the prosecution the benefit of all reasonable inferences to be drawn from the evidence.

> A motion for new trial on the grounds that the verdict is contrary to the weight of the evidence, concedes that there is sufficient evidence to sustain the verdict. Thus, the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner. An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence, do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

***Commonwealth v. Widmer***, 744 A.2d 745, 751-52 (Pa. 2000) (citations and footnote omitted).

Given the above distinctions, we first address Appellant's sufficiency challenge. Our standard of review is well settled:

> 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***, 886 A.2d 689, 704 (Pa. Super. 2005), *appeal denied*, 897 A.2d 452 (Pa. 2006) (citations omitted).

As noted above, Appellant challenges the sufficiency of the evidence supporting his third-murder conviction, as well as his aggravated assault convictions. Appellant did not raise a challenge to the sufficiency of the evidence supporting his aggravated assault convictions in his Pa.R.A.P 1925(b) statement. Thus, because the trial court did not address the merits of the claim, and as the issue is inappropriately being raised for the first time on appeal, it is waived. ***See generally***, Pa.R.A.P. 302(a); ***Commonwealth v. Rolan***, 964 A.2d 398 (Pa. Super. 2008).

We therefore limit our discussion to Appellant's third-degree murder conviction. This Court has reiterated the elements of third-degree murder as follows:

> Murder in the third degree is an unlawful killing with malice but without the specific intent to kill. Malice is defined as: a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured[.] Malice may be found where the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause serious bodily injury. Malice may be inferred by considering the totality of the circumstances.

***Commonwealth v. Dunphy***, 20 A.3d 1215, 1219 (Pa. Super. 2011).

In support of his sufficiency challenge, Appellant argues:

> The evidence in this case was insufficient to prove beyond a reasonable doubt that Appellant possessed the requisite *mens rea*. There is no doubt that the Commonwealth recognized this problem with their case because they sought to have evidence of Appellant's prior brushes with the law introduced into evidence as prior bad acts. These incidents, the bulk of which occurred while Appellant was a juvenile, also involved flight from the police while [operating] a motor vehicle, a dirt bike, or an ATV (all terrain vehicle). While this evidence undoubtedly had a powerful impact on the jury it did not bolster the Commonwealth's allegation that Appellant knew his actions were of such a nature as to lead [to] serious bodily injury or death nor were they evidence of a mind heedless of social consequences. Rather, the evidence supported a finding that this was a reckless young man who liked to ride in vehicles (whether he owned them or had permission or not) and who feared apprehension by the police. In a society where the movie franchise called ***Fast and Furious*** celebrates people who drive fast and take risks, Appellant's actions were not so far from the norm that one could characterize him as someone who consciously disregarded the risk that his actions might cause serious bodily injury or death or that he was someone heedless of social consequences. The evidence does support a finding that this is a young man who deserves punishment for his actions but that his actions do not rise to the level of third degree murder[.]

Appellant's Brief at 14. We disagree.

As acknowledged by the trial court, "[i]t is rare that a motor vehicle accident gives rise to a conviction of murder in the third degree. However, it is clear that in determining whether a murder in the third degree conviction should be upheld, all facts, including those before, during, and after the event, must be considered in order to determine whether the actor caused

the death of another 'with a conscious disregard of an unjustified and extremely high risk.'" Trial Court Opinion, 10/30/13, at 8 (*citing* ***Commonwealth v. Thomas***, 656 A.2d 514, 516 (Pa. Super. 1995)).

Considering the testimony provided by the Commonwealth, the trial court reasoned:

> Here, the evidence presented at trial clearly demonstrated that [Appellant] was driving the car that killed Mr. Seph[e]s and that he did so with malice. Officer Rapone testified that [Appellant], before running the red light and causing the accident that killed Mr. Seph[e]s and injured four other people, repeatedly accelerated and ran at least two stop signs while fleeing the police in a stolen vehicle. Officer Rapone also testified that at no point did he see [Appellant] brake. Another officer who witnessed the chase, Officer John Krewer, testified that [Appellant] was travelling at a speed of approximately 75 to 80 miles per hour through the residential neighborhood.
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> In addition, the [Pa.R.E.] 404(b) evidence [of prior bad acts] demonstrated that [Appellant] had, on three prior occasions, driven a vehicle erratically and then fled from police. Two of these incidents resulted in [Appellant] crashing the vehicle that he was driving. [T]his was compelling evidence that [Appellant] on the day of the incident here at issue, acted with the malice necessary for third-degree murder.

Trial Court Opinion, 10/30/13, at 9-10 (citations omitted).

Our review of the record and pertinent case law supports the trial court's conclusion. ***See***, ***e.g.***, ***Thomas***, 656 A.2d at 517-18 (upholding third-degree murder conviction for defendant, who, without attempting to brake, caused his vehicle to crash into a swing set where children were

playing); ***see also Dunphy***, 20 A.3d at 1219-20 (considering the totality of the circumstances of vehicle accident, evidence was sufficient to prove that the defendant had the requisite malice to support his conviction for third-degree murder). Thus, Appellant's sufficiency challenges fails.

Appellant next challenges the weight of the evidence supporting his convictions. "[A]ppellate review of a weight of the evidence claim normally involves examining the trial court's exercise of discretion in its review of the fact-finder's determinations[.]" ***Commonwealth v. Ross***, 856 A.2d 93, 99 (Pa. Super. 2004) (citation omitted). This Court has summarized:

> The determination of the weight of the evidence exclusively is within the province of the fact-finder, who may believe all, part, or none of the evidence. A new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. In this regard, the evidence must be so tenuous, vague and uncertain that the verdict shocks the conscience of the court.

***Ross***, 856 A.2d at 99 (citations omitted).

The trial court found no merit to Appellant's weight claim. ***See*** Trial Court Opinion, 10/30/11, at 11. We agree. In finding Appellant guilty, the jury clearly believed the Commonwealth's evidence offered to establish Appellant's *mens rea*. Because the evidence presented was not "tenuous, vague and uncertain," the trial court did not abuse its discretion in denying Appellant's post-sentence motion for a new trial. ***Ross***, 856 A.2d at 99. Thus, Appellant's weight claim is without merit.

In sum, Appellant's challenges to the weight and sufficiency of the evidence supporting his convictions are meritless. In his remaining claim, Appellant asserts that the trial court erred in permitting the Commonwealth to introduce evidence of Appellant's prior bad acts of fleeing the police. We disagree.

Our Supreme Court has summarized:

> Appellate courts typically examine a trial court's decision concerning the admissibility of evidence for an abuse of discretion. An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous. Typically, all relevant evidence, *i.e.*, evidence which tends to make the existence or non-existence of a material fact more or less probable, is admissible, subject to the prejudice/probative value weighing which attends all decisions upon admissibility. ***See*** Pa.R.E. 401; Pa.R.E. 402[.]

***Commonwealth v. Dillon***, 925 A.2d 131, 136-37 (Pa. 2007). "It is well settled that the admissibility of evidence is a matter addressed to the sound discretion of the trial court and may be reversed only upon a showing that the court abused that discretion." ***Commonwealth v. Wynn***, 850 A.2d 730, 733 (Pa. Super. 2004) (citations omitted). "Evidence is admissible if it is relevant—that is, if it makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact." ***Id.***

At Appellant's trial, the Commonwealth introduced the testimony from three police officers regarding prior occasions when Appellant, while

operating a motorized vehicle, fled from police. ***See*** N.T., 2/12/13, at 203-19. Although Appellant acknowledges that these prior bad acts were admissible, he argues that their probative value was outweighed by their prejudicial impact on the jury. Appellant's Brief at 10. According to Appellant: "In this case, where the evidence was overwhelming and largely uncontested, one must question the need for this evidence. The primary purpose of this evidence, it is submitted, was to prejudice the fact finders against Appellant and to blacken his image in their eyes." ***Id.***

The trial court rejected this claim, and reasoned:

> Among the purposes for which evidence of other acts may be offered is to demonstrate [a] defendant's intent, or to show absence of mistake or accident. Pa.R.E. 404(b)(2).
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> Where the charges against a defendant arise out of his operation of a motor vehicle, evidence of [a] defendant's prior conduct while driving motor vehicles may be admissible, under Rule 404(b), to demonstrate that [a] defendant's actions were malicious. ***Commonwealth v. Riggs***, 63 A.2d 776, 784-85 (Pa. 2013). In ***Riggs***, the defendant was charged with aggravated assault, and other charges, arising out of his operation of an automobile. In particular, the defendant fled from police at a high rate of speed, went through a red light, and crashed into another motor vehicle, seriously injuring its occupants. ***Id.*** at 782. On appeal, [the] defendant challenged the sufficiency of the evidence to establish that his reckless conduct rose to the level of malice required for first-degree aggravated assault, that being, sustained recklessness manifesting extreme indifference to the value of human life. The Superior Court, in upholding the conviction, concluded that evidence produced at trial under Rule 404(b) that the defendant, on three prior occasions, crashed his car after a high-speed police chase, was compelling proof that the defendant was aware of the risks involved in reckless

> driving. The 404(b) evidence, therefore, was the highly probative evidence that the defendant acted with recklessness that amounted to the malice required for aggravated assault. ***Id.*** at 785.
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> The case at bar is remarkably similar to ***Riggs***. The lead charge here, third-degree murder, like aggravated assault, required the Commonwealth to prove that [Appellant] acted with recklessness that rose to the level of malice, that is, that [Appellant] acted recklessly under circumstances manifesting an extreme indifference to the value of human life. ***See Commonwealth v. McHale***, 858 A.2d 1209, 1212-13 (Pa. Super. 2004) (malice required for both aggravated assault and third-degree murder is the same). Here, the 404(b) evidence showed that on three prior occasions, [Appellant] had fled from the police at a high rate of speed, after committing traffic violations. Two of these chases resulted in the crash of the vehicle that he was driving. Further, all three high-speed chases took place in extremely close physical proximity to the April 5, 2011, car accident here at issue. As in ***Riggs***, the evidence here of three prior incidents was highly probative of [Appellant's] awareness of the risks that he created during the incident that led to the charges in this case, and that he acted, therefore, with the mental state required for third-degree murder.
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> The Court thus properly found that the probative value of the evidence outweighed the potential of any unfair prejudice, and that the evidence was properly admissible under Rule 404(b).

Trial Court Opinion, 10/30/13, at 6-7 (citations to notes of testimony omitted).

Our review of the record supports the trial court's conclusion. Although Appellant acknowledges the ***Riggs*** decision, he does not attempt to distinguish it. In our view, the only pertinent distinction is the

unfortunate death of Appellant's passenger.[3] After reviewing the record, we cannot agree with Appellant's averment that, given the evidence introduced against him, "it is questionable whether he was found guilty of third-degree murder and aggravated assault based on the facts of the case or because he had a history of operating vehicles, sometimes at high speed, and fleeing from police." Appellant's Brief at 15. Indeed, as noted in n.2 ***supra***, the jury acquitted Appellant for fleeing and eluding police in this case. Thus, we are unable to conclude that the trial court abused its discretion in determining that the probative value of the evidence at issue outweighed any prejudice to Appellant.

In sum, the trial court properly admitted evidence of Appellant's prior high-speed chases, and this evidence, along with the testimony presented by the Commonwealth, demonstrates that Appellant's convictions were supported by sufficient evidence, as well as the weight of the evidence. We therefore affirm Appellant's judgment of sentence.

Judgment of sentence affirmed.

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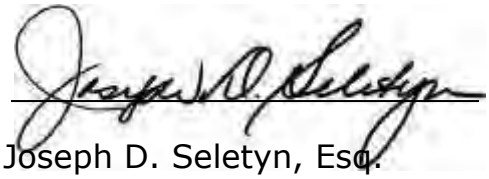
[3] Absent waiver of the claim, ***see supra***, our Supreme Court's decision in ***Riggs*** refutes Appellant's challenge to the sufficiency of the evidence supporting his aggravated assault convictions.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2014