NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA Appellee v. NOELLE CHEW Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 754 EDA 2018

Appeal from the Judgment of Sentence imposed January 18, 2018
In the Court of Common Pleas of Bucks County
Criminal Division at No: CP-09-CR-0001661-2017

BEFORE: BOWES, STABILE, and McLAUGHLIN, JJ.

MEMORANDUM BY STABILE, J.: **FILED MAY 1, 2019**

Appellant, Noelle Chew, appeals from the judgment of sentence the Court of Common Pleas of Bucks County imposed on January 18, 2018. Appellant challenges the sufficiency of the evidence, the propriety of certain evidentiary rulings, and the improper denial of a post-verdict, pre-sentence motion for extraordinary relief. Upon review, we affirm.

The trial court summarized the procedural background as follows:

> On August 9, 2017, following a three (3) day trial by jury, twenty-six (26) year old Appellant Noelle Chew was convicted of the following charges: murder of the third degree, homicide by vehicle driving under the influence, homicide by vehicle, DUI-general impairment, DUI highest rate of alcohol BAC .1 or higher, and involuntary manslaughter. The criminal charges resulted from a fatal head-on motor vehicle collision which took place at approximately 12:10 a.m. on January 21, 2017, which unfortunately resulted in the death of twenty-four (24) year old Damian Toalombo. This tragedy occurred on Route 309, in Hilltown Township, Bucks County, PA. Appellant had been driving in the wrong direction for approximately ten (10) minutes, after

> drinking alcohol at two (2) different establishments in the hours prior to the collision.
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> On January 18, 2018, following an extensive sentencing hearing,[1] Appellant . . . was sentenced on Count 1, murder of the third degree, to imprisonment at a state correctional facility for not less than six and one-half (6 1/2) years nor more than twenty-four (24) years. On Count 2, homicide by vehicle while DUI, she was sentenced to imprisonment at a state correctional facility for not less than five (5) years nor more than ten (10) years, to run concurrently with the sentence on Count 1. On Counts 3 and 4, no additional penalties were imposed. On Count 5, DUI highest rate of alcohol, Appellant was sentenced to imprisonment for not more than three (3) months nor more than five (5) years, to run concurrently with the sentences on Counts 1 and 2, along with a mandatory fine of one thousand five hundred dollars ($1,500).
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> . . . .
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> On February 6, 2018, [the trial court] denied Appellant's post-sentence motions. On February 22, 2018, Appellant filed this timely appeal to the Superior Court of Pennsylvania.

Trial Court Opinion, 2/6/18, at 1-3 (footnotes omitted).

The trial court summarized the factual background as follows:

> **1. Appellant consumed a substantial amount of alcohol during the evening and nighttime hours of January 20, 2017, leading up to the fatal crash.**
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> On January 20, 2017, Tiffany Bates had dinner with her friend, Appellant Noelle Chew. They had known each other since middle school, and that evening they had dinner together at TGI Friday's restaurant in Quakertown, PA. Ms. Bates testified that during dinner, at approximately 6:15 pm, Appellant drank a Long Island

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[1] Prior to sentencing, the trial court denied Appellant's oral motion for extraordinary relief. The oral motion for emergency relief was identical to a written motion for emergency relief, which Appellant filed on December 20, 2017. The trial court denied the written emergency relief motion on January 3, 2018.

Ice Tea. Ms. Bates stated that after dinner, the two went to another establishment, JT Bankers, in Perkasie, PA, arriving there at approximately 7:30 p.m. When they arrived, Appellant consumed a second Long Island Ice Tea. Ms. Bates testified that she left JT Bankers between 10-10:30 p.m. Before she left she witnessed Appellant consume her second Long Island Ice Tea at JT Bankers, which was Ms. Chew's third of the evening.

The jury also heard the testimony of Katie Outland, a bartender employed at JT Bankers. Ms. Outland knew Appellant from a prior job, where both had worked as bartenders. She testified that in addition to serving Ms. Bates and Appellant their respective wine and Long Island Ice Tea drinks when they arrived, she also served both Appellant and a male friend a "shot" of Fireball Cinnamon whiskey "at some point after nine o'clock."

Jared Giangiulio testified that he was the bartender who served Appellant the second Long Island Ice Tea at JT Bankers, at approximately 9:00 p.m. He explained the large amount of alcohol which goes into making a Long Island Ice Tea as five (5) half-shots: one half-shot of vodka, one half-shot of gin, one half-shot of tequila, one half-shot of rum, and one half-shot of triple sec. One Long Island Ice Tea drink, then, is the equivalent of two-and-one-half alcoholic drinks, which usually are made with (only) one shot of alcohol.

The jury also heard the testimony of Tina Sabatini, who has owned JT Bankers for twenty (20) years. She corroborated Mr. Giangiulio's testimony that a Long Island Ice Tea is equivalent to two-and-one-half alcoholic drinks. Additionally, she testified that a review of the receipts from the bar that evening accurately evidenced the drinks consumed by Appellant, as testified to by the bartenders on staff that night.

Christian Cagliari testified that he had been dating Appellant for nearly one (1) year as of January 20, 2017. He arrived at JT Bankers between 9 and 9:30 p.m. that night. Mr. Cagliari testified that when Appellant left the bar "around elevenish", she was angry and pissed. Emotional." They were involved in an argument at that time and Appellant essentially told Mr. Cagliari that she was ending their relationship. Despite Mr. Cagliari testifying at trial that he only witnessed Appellant drinking water at JT Bankers, and that he did not believe she was intoxicated when she left the bar, a review of his text conversation with

Appellant on the night of January 20, 2017, into the early morning hours of January 21, 2017, when Mr. Toalombo was killed, presented a different story. Mr. Cagliari claimed that it was only after-the-fact that he assumed Appellant was intoxicated. Upon review of the Commonwealth's text exhibit, Mr. Cagliari admitted that the [e]xhibit accurately reflected his text conversation with Appellant on January 21, 2017. Mr. Cagliari read several sections of the texted messages, including his writings which repeatedly stated: "Please tell me where you're at so I can come get you." "you should never have drove." ". . . hope you get home safe." ". . . I know you're drunk right now and you don't mean half the stuff you say . . . please at least let me know when you make it home?" In response at that time, Appellant called Mr. Cagliari a "snitch" for listening to her parents, and repeatedly cursed at him, telling him she had found a new relationship. Mr. Cagliari testified that although Appellant did not answer many of his repeated (19) phone calls, he and Appellant were on the phone when he heard the crash, followed by Appellant crying.

Appellant's aunt, Patricia Chew, testified that she called Mr. Cagliari prior to the crash because she was concerned about Appellant, who had called her prior to the crash and was crying hysterically. Patricia Chew asked Appellant to pull off the road. While she was not immediately concerned that Appellant was drunk, approximately twenty-five (25) minutes later, she began to think so.

2. Despite repeated warnings, Appellant had been driving the wrong way on Route 309 for approximately ten (10) minutes prior to the head-on fatal crash.

The jury heard the testimony of Peter Granite, who was driving northbound on Route 309 around midnight on January 21, 2017. He described the highway (Route 309) as consisting of two (2) southbound travel lanes and two (2) northbound lanes, divided by a concrete barrier. He was driving in the right lane of the northbound section, and he described his confusion as he realized that Appellant was driving southbound toward him in the left northbound lane. Fearing that he would scare Appellant into driving into his lane, he therefore waited to honk and flash his lights at her until their vehicles were very close. Mr. Granite testified that as Appellant drove past him, he pressed upon his horn continuously in order to alert and warn her. He testified that while it may have been a "little bit" foggy, there were no weather

> conditions that evening which created any difficulties in seeing other vehicles.
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> Thomas Murray, who was traveling southbound on Route 309 that night, also testified. He explained to the jury that while he was traveling southbound, he observed Appellant also traveling southbound, but on the wrong side of the concrete barrier, in the northbound lanes. He described how he positioned his car alongside Appellant's car, and flashed his lights and beeped his horn five or six (5 or 6) times in an effort to get her attention. He described the weather as a clear night, without rain or snow. Mr. Murray testified he observed ten (10) to fifteen (15) vehicles traveling northbound which passed Appellant's southerly traveling car. Appellant's vehicle made no evasive maneuvers, but some of the properly traveling northbound vehicles swerved as they approached Appellant's vehicle. Mr. Murray observed the crash that resulted in Mr. Toalombo's death.
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> Mamadou Diallo was also travelling southbound on Route 309 that night. He testified that there were no weather conditions that prevented him from properly entering onto Route 309, or from safely traveling on the highway that night. Upon realizing Appellant was driving on the wrong side of the road, he positioned himself in an effort to draw her attention to the reality that she was travelling on the wrong side of the highway. He estimated that he followed Appellant's vehicle for at least ten (10) minutes. He testified that he was "beeping [his] horn, trying to make her stop. Because one of her windows was down so I was waving my hand . . . to let her know she was traveling on the wrong track." Mr. Diallo testified that at one point Appellant turned and looked at him because he was waving his hand, but she continued to drive the wrong way. Mr. Diallo observed that Appellant escaped hitting at least three (3) vehicles, ". . . a big truck that was coming. She missed that. And there was like two other small cars that she had missed." Recalling his witness statement provided to the police officer the night of the crash, Mr. Diallo confirmed that he observed two (2) tractor trailers take evasive actions to avoid hitting Appellant's vehicle. Like Mr. Murray, Mr. Diallo observed the crash that killed Mr. Toalombo. Mr. Diallo did not observe any fog while he traveled on Route 309 in the area where the crash occurred.

Trial Court Opinion, 2/6/18, 3-7 (citations to record omitted).

Appellant avers that the Commonwealth failed to prove beyond a reasonable doubt that the *mens rea* element of the third-degree murder charge (*i.e.*, malice) was met. Specifically, Appellant argues that, under current law, a defendant acts with the required malice in connection with traffic accidents if defendant's reckless behavior continues after the accident or shows indifference with regard to an obvious risk. Appellant's Brief at 26-27. Under this standard, Appellant argues, the evidence was insufficient to establish that Appellant acted with malice. We disagree.

Our review of a challenge to the sufficiency of the evidence to support a conviction requires that we determine "whether the evidence admitted at trial, and all the reasonable inferences derived therefrom viewed in favor of the Commonwealth as verdict winner, supports the jury's finding of all the elements of the offense beyond a reasonable doubt." ***Commonwealth v. Cash***, 137 A.3d 1262, 1269 (Pa. 2016) (citation omitted).

> In the DUI context, [the Supreme Court] has held that the decision to drive while under the influence of alcohol and/or a controlled substance does not, standing alone, constitute malice. In ***Commonwealth v. O'Hanlon***, [653 A.2d 616 (Pa. 1995),] a drunk driver ran a red light and struck another vehicle, seriously injuring the other driver. We found this evidence to be insufficient to sustain a conviction of aggravated assault. ***O'Hanlon***, 653 A.2d at 618. We observed that neither "ordinary negligence" nor "mere recklessness" is sufficient to satisfy the *mens rea* of aggravated assault. ***Id.*** at 617–18. Instead, we found that the crime "requires a higher degree of culpability, *i.e.*, that which considers and then disregards the threat necessarily posed to human life by the offending conduct," and entails "an element of deliberation or conscious disregard of danger[.]" ***Id.*** at 618.

> [F]or the degree of recklessness contained in the aggravated assault statute to occur, the offensive act must be performed under circumstances which almost assure that injury or death will ensue. The recklessness must, therefore, be such that life threatening injury is essentially certain to occur. This state of mind is, accordingly, equivalent to that which seeks to cause injury.

Id. The ***O'Hanlon*** Court found that the requisite *mens rea* is only met in circumstances where "the defendant could reasonably anticipate that serious bodily injury or death would be the likely and logical consequence of his actions . . . [but] the consequence was ignored." ***Id.***

[The Supreme Court] subsequently decided ***Commonwealth v. Comer***, [716 A.2d 593 (Pa. 1998)], another case challenging the sufficiency of the evidence to support a conviction of aggravated assault that occurred while the defendant was driving under the influence of alcohol and controlled substances. The defendant in ***Comer***, who drove after drinking and ingesting "muscle relaxers," struck two people who were waiting for a bus, killing one and seriously injuring the other. ***Id.*** at 595. He was observed just prior to the accident traveling at a high rate of speed, in excess of the speed limit. His right tire rubbed against the curb and his car veered off the road, crashing through a bus stand and into a brick wall, striking the two pedestrians in the process.

The ***Comer*** Court found that the evidence was insufficient to prove that the defendant acted with malice. The accident occurred immediately after he was observed speeding and his tire rubbed along the curb. ***Id.*** at 597. Examining his behavior before and after the accident, the Court found no evidence "that he was aware of his reckless conduct" and that he "considered, then disregarded, the threat to the life of the victim." ***Id.*** at 596–97. Finding the facts to be sufficiently similar to those in ***O'Hanlon***, we concluded that the conviction of aggravated assault must be reversed. ***Id.***

Nearly two decades have passed since we last examined whether, and under what circumstances, the decision to drive under the influence of alcohol and/or a controlled substance rises to the level of malice. Our review of the case before us and the arguments presented reveal no basis to deviate from the holdings announced

> in ***O'Hanlon*** and ***Comer*** that the *mens rea* generally associated with the decision to drive under the influence is ordinary recklessness and does not constitute malice. This Court, in ***O'Hanlon*** and ***Comer***, applied the longstanding definition of malice requiring a heightened level of recklessness, and applied it to the facts of those cases. We reaffirm the distinction between ordinary recklessness and malice announced in these cases.

Commonwealth v. Packer, 168 A.3d 161, 170-71 (Pa. 2017).

In ***Packer***, the Supreme Court noted:

> Packer huffed DFE [difluoroethane] both immediately prior to and while operating a vehicle on a public highway. She knew, from the clearly marked label and the bittering agent added to the Dust–Off, that this product was not intended to be ingested. She further knew, from her numerous prior experiences with huffing, that the effects of DFE on her were immediate, debilitating and persisted for ten to fifteen minutes following inhalation. Moreover, she knew that huffing had caused her to lose consciousness on other occasions in the past.
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> With all of this knowledge about DFE and the immediate and overwhelming effects it had on her, she nonetheless made the conscious and informed decision to huff four or five bursts of DFE, inhaling the chemical for a total of fourteen to twenty-four seconds within a five-minute timespan. She inhaled immediately before driving on a public roadway and again while temporarily stopped at a red light. Precisely what had previously occurred after huffing happened to her again on the night in question—after inhaling her final bursts of DFE at the red light and proceeding to drive her vehicle on the public highway, she lost consciousness. Predictably, without control of her vehicle, she killed Snyder.
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> Viewing the evidence, as we must, in the light most favorable to the Commonwealth, her awareness of the particular dangers her conduct posed is further demonstrated by her behavior before and after the accident. ***See Comer***, 716 A.2d at 596–97. The record reflects that after huffing in the Walmart parking lot but before driving, she paused to ask Shutak how much he trusted her. N.T., 10/29/2014, at 210. The record further reflects that immediately following the accident (after she regained consciousness), she lied about what happened, asked about the detectability of DFE in her

> bloodstream, and repeatedly asked if she was going to jail. ***Id.*** at 99, 124–25, 129, 148, 155, 162–63.
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> This is not a typical case of ordinary recklessness that arises when someone chooses to drive while intoxicated. ***See O'Hanlon***, 653 A.2d at 618; ***Comer***, 716 A.2d at 597. Packer consciously disregarded an unjustified and extremely high risk that her chosen course of conduct might cause a death or serious bodily injury. ***See O'Hanlon***, 653 A.2d at 618; [***Commonwealth v. Santos***, 876 A.2d 360, 364 (Pa. 2005)]. Because of Packer's history of losing consciousness after huffing and her knowledge of the immediacy of the effects of huffing on her, she "could reasonably anticipate that serious bodily injury or death would be the likely and logical consequence of [her] actions ... [but] the consequence was ignored." ***O'Hanlon***, 653 A.2d at 618. ***See also Commonwealth v. Levin***, 816 A.2d 1151, 1153 (Pa. Super. 2003) (the defendant's decision to drive after smoking marijuana and drinking alcohol, which caused him to black out and kill a pedestrian, knowing that combining the two caused him to black out in the past, constituted malice sufficient to support his third-degree murder conviction).

Id. at 171.

As in ***Packer***, we conclude that the facts of the instant case are distinguishable from ***O'Hanlon*** and ***Comer*** such that the trial court did not err in concluding that Appellant acted with the malice necessary to support her conviction of third-degree murder. ***Id.*** at 171.

The trial court, in response to Appellant's challenge to the sufficiency of the evidence challenge, noted the following:

> It is clear . . . that the overwhelming testimony and evidence presented in the instant case, included Appellant's .24 BAC, three (3) times the legal limit as of the time of the crash, along with the eyewitness testimony regarding how long Appellant traveled on the highway in the wrong direction of traffic, the eyewitness testimony of other drivers on the road who for extended periods immediately preceding the crash tried to get Appellant's attention and warn her she was travelling in the wrong direction, and the

> testimony of Appellant's aunt and boyfriend who described their warnings to her that she was driving while intoxicated prior to the crash. These facts, in combination with the testimony establishing any significantly dangerous or deceptive road conditions or climatic conditions[,] which would have potentially contributed to Appellant entering a highway and continuing to drive in the wrong direction for 10 minutes prior to the crash, were more than sufficient for the jury to find that Appellant acted with malice.

Trial Court Opinion, 2/6/18, at 12.

Indeed, as explained in detail above, the record shows that Appellant consumed a substantial amount of alcohol during the evening and nighttime hours preceding the fatal crash. Despite the large amount of alcohol in her system, and her emotional conditions, around 11 p.m., Appellant got into a car and drove.

In the meantime, Appellant's boyfriend repeatedly attempted to reach her over the phone. She did not answer most of his calls, but they were on the phone when the accident occurred. Appellant's boyfriend also sent her several text messages, telling her, *inter alia*, that "I know you are drunk" and that she "should never have drove."

While driving, Appellant was also on the phone with her aunt. Appellant was crying hysterically. Appellant's aunt asked Appellant to pull off the road. While the aunt did not immediately recognize that Appellant might have been drunk at that time, later on she began to think Appellant was indeed drunk.

A driver (Mr. Granite) testified that the highway, in the area where the accident occurred, consists of two southbound travel lanes, a concrete barrier, and two northbound travel lanes. He testified that he was driving northbound

on the right side of the northbound lane when he saw Appellant driving southbound on the left side of the northbound lane. When the vehicles were fairly close, intending to alert and warn Appellant, Mr. Granite began to honk and flash lights, and continued to do so even after she drove past him.

A second driver (Mr. Murray), who was driving in the southbound lane, saw Appellant driving southbound in the northbound lane. Mr. Murray positioned his car alongside Appellant's car, flashed his lights, and beeped in order to get her attention. Murray saw some vehicles traveling northbound in the northbound lanes swerving as they approached Appellant's vehicle traveling southbound.

A third driver (Mr. Diallo), who was also driving in the southbound lane, upon realizing that Appellant was driving in the wrong lane, positioned himself in an effort to draw Appellant's attention. Diallo followed Appellant's vehicle for at least ten minutes, while beeping his horn and waving his hand. One of Appellant's windows was down. At one point, Appellant looked at the third driver as he was waving his hand but she continued to drive the wrong way. Diallo saw a few vehicles nearly miss Appellant's vehicle, before crashing into victim's vehicle.

None of these witnesses noticed any weather condition that might have played a role in the accident.

In light of the forgoing, we conclude this is not a case solely of recklessness arising from driving under the influence. Indeed, Appellant was

driving on the highway under the influence at night on the wrong side of the road for an extended period of time, despite being asked to stop driving, despite numerous drivers attempting to draw her attention to the fact she was driving on the wrong side of the highway, and despite nearly crashing into a few incoming vehicles. Nevertheless, Appellant did not stop her vehicle until she killed someone.

Viewing the evidence in the most favorable light to the Commonwealth, Appellant consciously disregarded her boyfriend's and aunt's pleas to stop the vehicle, consciously disregarded multiple warnings from other drivers,[2] and consciously disregarded the havoc she created on the highway.[3] Indeed, she

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[2] A finding of malice is supported where an accused drives recklessly immediately prior to the accident and ignores the request of another to stop driving. ***Commonwealth v. Pigg***, 571 A.2d 438, 442 (Pa. Super. 1990); ***Commowealth v. Urbanski***, 627 A.2d 789 (Pa. Super. 1993). In ***Urbanski***, we noted:

> [T]he properly admitted trial testimony reveals a dangerously high blood alcohol level and a clear road surface combined with erratic driving and repeated refusals to give up the wheel. Appellant was or should have been aware of the danger that could result from driving so fast and so recklessly, especially after having had so much to drink. Even if he was not aware, his wife repeatedly reminded him of the danger and asked many times if she could drive the car. But appellant recklessly disregarded her pleas and the probability of a tragic result. His conduct in the car was the very type of conduct that the definition of malice describes.

Id. at 793-94.

[3] As noted, Appellant nearly missed a few vehicles, while others had to take last-second evasive action to avoid colliding with Appellant.

kept driving, uncaring for any of it. Appellant's conduct, therefore, under the circumstances above-described, displayed conscious disregard for an unjustified and extremely high risk that her actions might cause death or serious bodily injury. This is no different from firing a gun in a crowd or playing Russian roulette. Indeed, driving under the influence for an extended period of time on the wrong side of the highway at nighttime despite all sorts of warnings against it is "virtually guaranteeing some manner of accident will occurr through the intentional doing of an uncalled-for act in callous disregard of its likely harmful effects on others." ***Packers***, 168 A.3d at 409 (citations omitted). ***See also Urbanski***, ***supra***; ***Pigg***, ***supra***.

Appellant mentions several factors that might have played a role in the accident. Specifically: (1) foggy night, possibly rainy night; (2) Appellant was distraught; (3) Appellant thought boyfriend would be driving her home; and (4) Appellant did not intend to drive on the wrong side of the road. Appellant's Brief at 28-29.

These circumstances, even if true, do not affect the sufficiency of the evidence analysis, but the weight of the evidence. At any rate, in a sufficiency of the evidence challenge, we have to look at the evidence in the light most favorable to the Commonwealth, the verdict winner, not Appellant. Additionally, there are at least two witnesses who testified that on the evening in question, it was a clear night, with no rain or snow affecting visibility. ***See*** Trial Court Opinion, 2/6/18, at 6.

Even if another witness stated that it was indeed a rainy and foggy night, ***see*** Appellant's Brief at 28, it was for the jury to decide questions of fact and to resolve possible inconsistencies in the testimony.

Appellant claims that she had a few drinks, knowing that someone else would drive her home, not planning on driving after imbibing such a large amount of alcohol. Not stated, there, however, is the acknowledgment that she knew she should not be driving with a few drinks in her system, yet she decided to drive. Also, not acknowledged is the fact her boyfriend and her aunt also asked her to stop driving.

Appellant claims she did not intend to drive on the wrong side of the road. However, she did, and someone died as result of her extreme conduct. Nonetheless, Appellant was not charged with or convicted of intentionally killing the victim. She was charged with and convicted of acting with malice, which, by definition, is not an intentional killing. ***See***, ***e.g.***, 18 Pa.C.S.A. § 2502(c); ***Commonwealth v. Young***, 431 A.2d 230, 232 ("If there was an unlawful killing with (legal) malice, express, or implied, that will constitute murder even though there was no intent to injure or kill the particular person who was killed and even though his death was unintentional or accidental . . .") (citation omitted); ***Pigg***, 571 A.2d at 441 ("Malice consists of 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.").

Appellant discounts the warnings given by other drivers because these "attempts were made from the other side of the road divided by a partition." Appellant's Brief at 29. Appellant, however, misreads the record. As noted above, Mr. Granite testified that he was driving on the right side of the northbound lane when he saw Appellant driving on the left side of the northbound lane. N.T. Trial, 8/8/17, at 66-67, 71. Thus, contrary to Appellant's representation, at least one attempt to draw her attention was made by a driver driving in the same lane. Additionally, Mr. Diallo, who was driving in the southbound lane of Route 309, testified that he was waving his hand and beeping his horn trying to draw Appellant's attention, and that at one point Appellant turned and looked at him, but continued to drive the wrong way. N.T. Trial, 8/8/17, at 82. Obviously, if Mr. Diallo and Appellant were able to look at each other, the barrier was not an impediment to Appellant's ability to note the warnings coming from the other side of the highway.

In conclusion, viewing the evidence in the light most favorable to the Commonwealth, we conclude the evidence supported a finding that Appellant acted with the requisite malice to support her conviction of third-degree murder.

Appellant next argues that the trial court failed to provide proper jury instructions regarding the *mens rea* required in connection with a third-degree murder charge. In particular, Appellant argues the trial court erred in

providing the standard malice and third-degree murder instructions. Rather, the trial court should have provided jury instructions consistent with ***Commonwealth v. Kling***, 731 A.2d 145, 147-48 (Pa. Super. 1999), ***Commonwealth v. McHale***, 858 A.2d 1209 (Pa. Super. 2004), and ***O'Hanlon***, ***supra***. We disagree.

There is no indication, as Appellant seems to suggest, that the definition of malice in connection with third-degree murder resulting from a car accident is different from the "standard" malice required in any other third-degree murder situation. None of the cases relied upon by Appellant supports her contention.[4]

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[4] In ***Kling***, we noted:

> Malice exists where there is 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." [***Pigg***, 571 A.2d at 441]. Where malice is based on a reckless disregard of consequences, it is not sufficient to show mere recklessness; rather, it must be shown the defendant consciously disregarded an unjustified and extremely high risk that his actions might cause death or serious bodily injury. ***See Commonwealth v. Scales***, [648 A.2d 1205, 1207 (Pa. Super. 1994)] (regarding third degree murder). A defendant must display a conscious disregard for almost certain death or injury such that it is tantamount to an actual desire to injure or kill; at the very least, the conduct must be such that one could reasonably anticipate death or serious bodily injury would likely and logically result. ***See O'Hanlon***, [653 A.2d at 618] (regarding aggravated assault).

Kling, 731 at 147-48.

Additionally, and most importantly, our Supreme Court in ***Packer*** noted, "[t]his Court, in ***O'Hanlon*** and ***Comer***, applied the longstanding definition of malice requiring a heightened level of recklessness, and applied it to the facts of those cases. We reaffirm the distinction between ordinary recklessness and malice announced in these cases." ***Packer***, 168 A.3d at 171.

Packer makes it clear that drunk driving alone is not sufficient to prove the level of recklessness required for malice. However, drunk driving accompanied by conscious disregard of an unjustified and extremely high risk that the chosen course of conduct might cause a death or serious bodily injury amounts to malice. Here, the trial court provided a comprehensive definition

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In ***McHale***, we noted:

> [R]eckless conduct will not support a finding of malice unless the conduct in question poses a very high likelihood that death or injury will result. For when such a considerable risk of injury or death has been created and then callously disregarded, the actor demonstrates that he essentially cares not whether he maims or kills another, and when a person consciously creates such a high likelihood that injury or death will ensue, or continues his actions after realizing he has created such a risk, he exhibits the "wickedness of disposition, hardness of heart and cruelty" that is the hallmark of malice. In point of fact, the actor may not actually intend that anyone be injured or killed, but by continuing to act in that fashion the actor demonstrates that he simply does not care whether harm befalls another. Consequently, when injury or death does in fact ensue from the actor's conduct, the law justly attaches criminal culpability that falls just short of intentionality, *i.e.*, maliciousness.

Id. at 1213-14.

of malice, which included the language reiterated in ***Packer***, and consistent with ***Kling***, ***McHale***, and ***O'Hanlon***. ***See*** Trial Court Opinion, 2/6/18, at 13-16.[5] Accordingly, Appellant's challenge to the propriety of the jury instructions is without merit.

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[5] In connection with the malice requirement, the trial court charged the jury as follows:

> For murder of the third degree, a killing is with malice if the perpetrator's actions show her wanton and willful disregard of an unjustified and extremely high risk that her conduct would result in death or serious bodily injury to another. In this form of malice the Commonwealth need not prove that the perpetrator specifically intended to kill another. The Commonwealth must prove, however, that the perpetrator, that being the defendant, took action while consciously, that is knowingly, disregarding the most serious risk she is creating, and that by her disregard of that risk the perpetrator demonstrated her extreme indifference to the value of human life.
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> Our courts have worded this malice definition differently. I'm going to read you another way that malice can be looked upon.
>
> For murder of the third degree, a killing is with malice if a perpetrator acts with wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty indicating an unjustified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life, you should consider all of the evidence regarding her words, her conduct, and the (attendant) circumstances that may show her state of mind based on the evidence that you have heard[.]

N.T Trial, 8/9/17, afternoon session, at 68-69.

Next Appellant argues that the trial court erred in excluding evidence of other similar accidents caused by drivers going the wrong way on Route 309. We disagree.

"The standard of review for a trial court's evidentiary rulings is narrow. The admissibility of evidence is solely within the discretion of the trial court and will be reversed only if the trial court has abused its discretion." ***Commonwealth v. Hanford***, 937 A.2d 1094, 1098 (Pa. Super. 2007).

The trial court, after hearing from the Commonwealth's crash reconstructionist expert,[6] rejected the contention, noting that "[i]t was Appellant's burden to establish substantial similarity between other accidents and the subject accident[.]" Trial Court Opinion, 2/6/18, at 17 (relying on ***Hutchinson v. Penske Truck Leasing Co.***, 876 A.2d 978 (Pa. Super. 2005)).[7] However, Appellant failed to do so. Specifically, the trial court noted the following:

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[6] The expert testified, *inter alia*, that there were 42 unconfirmed reports of vehicles traveling the wrong way that had been filed during prior seven years, and that "42 unconfirmed reports of drivers traveling in the wrong direction out of 81 million cars having traveled that highway did not render the area of Route 309 where Appellant drove her vehicle the wrong-way a dangerous stretch of road." Trial Court Opinion, 2/6/18, at 17 (citations to record omitted).

[7] ***See also Vernon v. Stash***, 532 A.2d 441 (Pa. Super. 1987):

> Evidence of prior accidents or occurrences is generally relevant to show the existence of a defect or dangerous condition or to demonstrate knowledge on the part of the defendant that the

> Appellant was unable to demonstrate that [the unconfirmed] reports of other drivers traveling the wrong way on Route 309 were at or near the accident situs in the instant case, nor was Appellant able to demonstrate similarity as to weather conditions as of the time of accidents, as to lighting conditions, or as to which exit ramp on which the drivers allegedly entered the wrong travel lanes. Importantly, Appellant made no proffer of a highway expert who could or would establish a causal connection between any roadway conditions such as inadequate and/or deceptive signage, and wrong-way travel on Route 309. . . . The evidentiary record established by Appellant in this case was wholly inadequate to permit [the trial court] to admit speculative, vague and ambiguous evidence of alleged similarities between the alleged incidents of wrong-way travel on Route 309 and the circumstances of the subject crash.

Trial Court Opinion, 2/6/18, at 18.

We agree with the above analysis and conclusions. Accordingly, we conclude that the trial court did not abuse its discretion in precluding the admission of evidence that other drivers had driven the wrong way on Route 309.

Finally, Appellant argues the trial court erred in not holding an evidentiary hearing on Appellant's post-verdict, pre-sentence oral motion for extraordinary relief, in which Appellant argued that trial counsel was

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> hazard existed. For such evidence to be admissible, however, the prior incidents must have taken place under the same or similar circumstances.

Id. at 446 (citations omitted); ***Valentine v. Acme Markets***, ***Inc.***, 687 A.2d 1157, 1162-63 (Pa. Super. 1997) (party introducing evidence of prior accidents involving same instrumentality has burden to establish similarity between prior accident and incident involving plaintiff before evidence is admitted).

ineffective for failing to raise Appellant's mental health conditions. According to Appellant, trial counsel's failure to employ a mental health expert constituted "*per se*" ineffective assistance, and the trial court erred in denying a hearing on this matter. We disagree.

Rule of Criminal Procedure No. 704, relating to oral motions for extraordinary relief,[8] in relevant part, provides:

> (B) Oral Motion for Extraordinary Relief.
>
> > (1) Under extraordinary circumstances, when the interests of justice require, the trial judge may, before sentencing, hear an oral motion in arrest of judgment, for a judgment of acquittal, or for a new trial.
> >
> > (2) The judge shall decide a motion for extraordinary relief before imposing sentence, and shall not delay the sentencing proceeding in order to decide it.
> >
> > (3) A motion for extraordinary relief shall have no effect on the preservation or waiver of issues for post-sentence consideration or appeal.

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[8] Here, the oral motion had been preceded by an identical written motion for extraordinary relief. "We note that Rule 704 **does not** permit the filing of a written motion for extraordinary relief before sentencing. Pa.R.Crim.P. 704 does not expressly prohibit written motions for extraordinary relief, although this Court has previously noted that such motions are not proper." ***Commonwealth v. Askew***, 907 A.2d 624, 627 n.7 (Pa. Super. 2006) (citations omitted) (emphasis added). As noted above, on December 20, 2017, Appellant filed a written motion for extraordinary relief, which the trial court denied on January 3, 2018. While we understand that Appellant's intention was not to "bombard the [trial court] with something [the trial court] hasn't seen," N.T. Sentencing, 1/18/18 at 5, and while we do not address the propriety of the trial court's disposal of the written motion, we note that this Court has previously held that entertaining such motion, when the motion did not comply with Rule 704, was misplaced and clearly disallowed by the Rules of Criminal Procedure. ***See id.***

Pa.R.Crim.P. 704(B)

The Comment to Rule 704(B), in relevant part, reads: "Although trial errors may be serious and the issues addressing those errors meritorious, *this rule is intended to allow the trial judge the opportunity to address only those errors so manifest that immediate relief is essential*." Pa.R.Crim.P. 704(B) Comment (emphasis added)

The trial court found that Appellant failed "to raise issues that were so extraordinary, obvious, or egregious as to merit immediate relief, wherein the interests of justice would be served by the trial court deciding the issues prior to sentencing." Trial Court Opinion, 2/6/18, at 20. We agree.

First,

> [t]his Court has repeatedly held that we will not allow such motions as a 'substitute vehicle' for raising a matter that should be raised in a post-sentence motion." . . . [T]his Court has determined that claims of ineffectiveness of counsel, as raised herein, should be raised via a post-sentence motion. ***See Commonwealth v. Celestin***, 825 A.2d 670, 674 (Pa. Super. 2003), *appeal denied*, 577 Pa. 686, 844 A.2d 551 (2004) (claims of ineffectiveness of counsel improperly raised as motion for extraordinary relief).

Commonwealth v. Grohowski, 980 A.2d 113, 115-16 (Pa. Super. 2009)

Additionally, the "general rule of deferral to PCRA review remains the pertinent law on the appropriate timing of review of claims of ineffective assistance of counsel." ***Commonwealth v. Holmes***, 79 A.3d 562, 563 (Pa. 2013). In ***Holmes***, the Supreme Court considered whether a trial court could ever entertain an ineffectiveness claim in the context of post-sentence

motions, and, concomitantly, whether this Court could entertain the claim on direct appeal. The Supreme Court concluded that a trial court may permit review of an ineffectiveness claim in only two circumstances. The first exception is where "there may be an extraordinary case where the trial court, in the exercise of its discretion, determines that a claim (or claims) of ineffectiveness is both meritorious and apparent from the record so that immediate consideration or relief is warranted." ***Id.*** at 577. The second exception provides that trial courts have discretion, upon good cause shown, if there are multiple or prolix claims of counsel ineffectiveness, and the defendant expressly waives PCRA review. ***See id.*** at 563-64.

As to the merits of her ineffective assistance of counsel claim, Appellant alleges that "[t]rial counsel's failure to employ the assistance of a mental health professional to gird the arguments and allegations made by the Commonwealth is *per se* ineffective assistance of counsel." Appellant's Memorandum of Law in Support of Motion for Extraordinary Relief at 17.

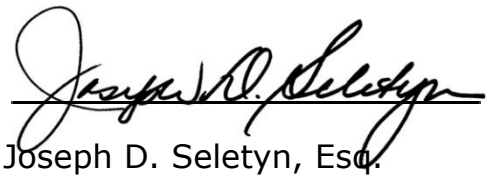
Interestingly, Appellant provides no authority in support of her *per se* ineffectiveness claim. Indeed, it is well settled that the "failure to call [an expert] witness is not *per se* ineffective assistance of counsel as such decision generally involves a matter of trial strategy." ***Commonwealth v. Lauro***, 819 A.2d 100, 105 (Pa. Super. 2003) (citation omitted). Additionally, Appellant provides no explanation why her claims of ineffective assistance of counsel cannot be addressed in a PCRA proceeding.

Accordingly, we conclude the trial court did nor err in denying Appellant's motion for extraordinary relief.

In light of the foregoing, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/1/19