NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MICHAEL F. HARTMAN,	:	No. 3086 EDA 2011
Appellant	:	

Appeal from the Judgment of Sentence, November 9, 2011,
in the Court of Common Pleas of Bucks County
Criminal Division at No. CP-09-CR-0002871-2010

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., AND ALLEN, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: March 1, 2013

Appellant, Michael F. Hartman, was convicted of two counts of homicide by vehicle, two counts of involuntary manslaughter, three counts of recklessly endangering another person ("REAP"), and numerous summary violations. Herein, he appeals from the judgment of sentence of the Court of Common Pleas of Bucks County imposed on November 9, 2011. We affirm.

The tragic facts of this matter, as summarized by the trial court, are as follows:

> On September 20, 2009, around 7:00 p.m. on a dry summer evening, in Upper Makefield Township, a fatal accident occurred. Elizabeth K. Rawicz (hereinafter "Mrs. Rawicz") and her 7 year old son Seth Rawicz (hereinafter "Seth"), lost their lives, in an automobile operated by their husband/father, Scott Rawicz (hereinafter "Mr. Rawicz"), who also sustained serious injuries. Mr. Rawicz and his family were on their way home to Bridgewater, New Jersey

from his brother's house in Holland, Pennsylvania, where they were visiting for the day to celebrate Rosh Hashanah, the Jewish New Year. Mrs. Rawicz was seated in the front passenger seat next to her husband, Seth was seated in a booster seat behind Mrs. Rawicz and everyone was wearing a seatbelt. Mr. Rawicz testified that they were driving at approximately 45 miles per hour (hereinafter "MPH") down Washington Crossing Road, traveled quite often by Mr. Rawicz when visiting his brother, when he noticed a car tailgating him. At that time, two cars passed the Rawicz car, at a "high rate of speed," on the left. Then Mr. Rawicz noticed a "third car coming up and veer to the left." Mr. Rawicz testified that he looked out his rear-view mirror, saw the third car coming, and "abruptly [the third car] pulled to the left." Mr. Rawicz testified that next, "[a]ll of a sudden I heard [a] screeching noise. My wife said, "Oh, my God," and then I felt and heard a collision with my car."

Appellant had been driving the third vehicle, a Mustang, behind the Mustangs of Mr. Jason Kuttner (hereinafter "Mr. Kuttner" who testified during trial and Mr. Tim Glen (hereinafter "Mr. Glen"). According to the testimony of the Commonwealth's expert witness, accident reconstructionist, Sergeant Steven Mawhinney (hereinafter "Sergeant Mawhinney"), a patrol sergeant and crash reconstructionist for Briston Township Police Department, Appellant's vehicle, in attempting to pass Mr. Rawicz on the left, went onto the grass outside of the opposite lane. Sergeant Mawhinney opined that as Appellant's car was reentering the roadway, "it rotated from the overcorrection, when [Appellant] was off the roadway, put[ting] the car into a spin." (Appellant corroborated this testimony of the sequence of events.) According to Sergeant Mawhinney, Appellant's vehicle was "out of control when it regained the roadway." Appellant was driving approximately 52-57 MPH when his vehicle reentered the roadway and Mr. Rawicz's vehicle was traveling at a range of 37-45 MPH when Appellant's Mustang struck his car. Sergeant Mawhinney stated that

although he did not know where Appellant initiated the pass, there was a "No Passing" sign located 198 feet before the first mark on the road.

Sergeant Mawhinney opined that Appellant lost control of his vehicle as a result of driver error, steering input, and Mr. Rawicz did not contribute to this crash at all. Sergeant Mawhinney added that "[t]he decisions by [Appellant] to drive at the speed greater than the vehicle in front of him, greater than the posted speed, to pass in a no-passing zone, led to him losing control of his vehicle; then upon losing control of his vehicle, reentering the roadway, and then entering a space assigned to Mr. Rawicz." Notably, there were stipulations reached, among others, that according to a mechanical inspection of the vehicles involved in the accident by Officer John Trindle of Falls Township Police Department there were no mechanical defects that in any way would have contributed to the crash.

Appellant was taken to St. Mary's Medical Center (hereinafter "St. Mary's") complaining of neck, back, and abdominal pain, but was alert, oriented, and "hemodynamically stable" the entire time, according to Christopher Mellon (hereinafter "paramedic Mellon"), his treating paramedic at the scene. Paramedic Mellon noted that Appellant was "verbally aggressive" throughout the treatment and course of transport to St. Mary's. Paramedic Mellon also noted that Appellant expressed that he had "one beer a couple hours ago." Similarly, Officer Mary K. Carchidi (hereinafter "Officer Carchidi") testified that after the accident, while she was at St. Mary's and spoke with Appellant, she "detected a[n] odor of alcohol on his breath." When Officer Carchidi asked Appellant if he consumed any alcohol that evening, he stated that he did have "maybe one or two beers" around "1:00 when the Eagles game ended." Officer Carchidi testified that she informed Appellant that "the Eagles game probably started at 1:00 and ended around 4:00," at which time Appellant stated "probably around 4:00 is when he had his last beer."

> Harking back to the accident scene, after the impact from Appellant's car, the Rawicz car had hit a tree. Mr. Rawicz testified that he could not move his hips, Mrs. Rawicz was semi-conscious, and Seth was "just drooping in the car seat." Mr. Rawicz hoped Seth had simply "[fallen] asleep on the way." Seriously injured, Mr. Rawicz was helplessly trapped in his seat as several bystanders, who included two nurses, an orthopedic surgeon, and a medic, attended to Mrs. Rawicz and to Seth, who was unconscious and being given CPR. Seth was airlifted from the scene en route to Children's Hospital of Philadelphia, but ultimately taken to St. Mary's because it was determined that he would not survive the trip to Philadelphia. Seth died very shortly thereafter. Seth was Mr. Rawicz's only child. Mr. Rawicz was taken to St. Mary's with bilateral pelvis, sacrum, sternum, and right metatarsal injuries. Mrs. Rawicz, who had sustained trauma to the brain, was also taken to St. Mary's, where six days later on September 26, 2009, Mr. Rawicz had to make the decision to remove his wife from life support.

Trial court opinion, 2/6/12 at 4-7 (citations omitted).

Appellant was charged with two counts of homicide by vehicle, two counts of involuntary manslaughter, three counts of recklessly endangering another person, and numerous summary violations. Pre-trial motions were filed by both appellant and the Commonwealth. A hearing on the motions was held on December 1 and 2, 2010. The trial court found the following was precluded from trial: evidence of prior ARD dispositions, evidence that appellant modified his Mustang, the results of the blood alcohol test, and any reference to a chemical test. The trial court held that evidence regarding appellant's vehicle other than any modifications was admissible (such as the particular make and model). The court also found that evidence regarding

appellant's consumption of alcohol was permitted, such as the EMT and officer's testimony regarding a faint odor of alcohol and appellant's admissions concerning having consumed alcohol on the date in question.[1]

A jury trial was held and the aforementioned facts were presented. In addition to several character witnesses who testified on appellant's behalf, appellant, who was 48 years of age at the time of trial, testified in his own defense. (Notes of testimony, 1/31/11 at 48.) Appellant explained that on the date in question he met with a few friends, Mr. Kuttner and Mr. Glen, to go for a short ride in the evening. Appellant observed Mr. Kuttner and Mr. Glen each pass the Rawicz vehicle and reenter the northbound lane. He then explained:

> After [Mr. Glen] passed, I watched to see that he got back in position in front of the Toyota, and then I immediately pass the Toyota as well. I was over -- I tend-- when I pass I tend to stay more to the left just to give the other car as much room as possible.
>
> I got past the Toyota so that he was back in the area in my blind spot, and then I began to look in the rear-view mirror to see if I could clear to go back into the northbound lane. . . . I looked back straight and I had a great clear vision in front of me. It was a beautiful day. And I looked a couple of times, and then I felt a sort of a joggle in the back of my car. And at that point when I focused straight ahead-- I think I was looking in the mirror when that happened. When I focused straight ahead again, I realized that I am . . . off the edge of the road, and

[1] The Commonwealth sought a continuance, stating that it was substantially handicapped by the trial court's ruling. The continuance was granted; however, the Commonwealth subsequently decided not to appeal and on January 27, 2011, a jury was selected.

> so then I steered gently back to the right, but the car moved much more than I steered it, almost like it got hung up or something. So at that point it was --you know the car hit the Toyota then immediately.

Notes of testimony, 1/31/11 at 57-58.

On cross-examination, appellant denied telling the EMT that the Rawicz vehicle swerved. (***Id.*** at 62.) Appellant also denied that he told the EMT and Officer Carchidi that a deer jumped out in front of his vehicle. (***Id.*** at 62, 66.) Appellant stated that he was not aware of his speed as he attempted to pass the Rawicz vehicle but he did acknowledge that when the crash occurred he was not in a legal passing zone. (***Id.*** at 65.) Appellant did not deny that he told the paramedic he had consumed a beer a few hours before the accident; nor did he deny telling the officer that he had consumed one or two beers during the Eagles game. He also explained that he would not let the paramedic attempt to put an I.V. in his arm after the paramedic missed several times. (***Id.*** at 68.)

The defense also presented the expert testimony of James Halikman, an accident reconstructionist. Halikman agreed with Sergeant Mawhinney's testimony on the speed appellant's vehicle was traveling as it attempted to come back into the lane of travel; however, he disagreed that speed was a consideration in the case. (***Id.*** at 104-105.) He opined that if appellant's vehicle had been traveling at 45 MPH, the accident would still have occurred. (***Id.*** at 10-6.) Rather, it was his opinion that the accident occurred due to

appellant losing control of his car when he was off the roadway. (***Id.*** at 107.)

On January 31, 2011, appellant was found guilty of all counts and on April 27, 2011, the trial court found appellant guilty of the summary offenses. On November 9, 2011, the trial court reconsidered appellant's sentence and imposed a sentence of 15 to 36 months' on each count of homicide by vehicle to run consecutively.[2]

Appellant filed a notice of appeal on November 22, 2011 and a timely concise statement of matters complained of on appeal. (Docket #2, 4.) The following issues have been presented on appeal:

> A. Whether the trial court abused its discretion and/or erred as a matter of law by denying Appellant's motion in limine to preclude any reference to Appellant's consumption of alcohol or to the odor of alcohol on Appellant's breath, where there was no evidence establishing a causal connection between Appellant's consumption of alcohol and the subsequent accident, and where no expert evidence was offered by the Commonwealth to address whether Appellant was intoxicated, and the evidence therefore was unduly prejudicial?

[2] Appellant was initially sentenced on April 27, 2011 and the trial court imposed a sentence of three to seven years of incarceration with conditions that appellant pay the costs of prosecution and restitution to Mr. Rawicz of $12,750. Appellant filed post-sentence motions requesting an acquittal, a new trial, and reconsideration of sentence. On July 26, 2011, the court vacated its original sentence and on August 24, 2011, the trial court imposed a sentence of 16 to 42 months on each count of homicide by vehicle to run consecutively. On September 6, 2011, appellant again filed a motion seeking reconsideration of sentence. A hearing was held on October 13, 2011, over the Commonwealth's objection.

B. Whether the trial court abused its discretion and/or erred as a matter of law by denying Appellant's motion in limine in part, thereby allowing testimony referencing the horsepower and torque of Appellant's vehicle, where such evidence was unduly prejudicial?

C. Whether the Commonwealth committed prosecutorial misconduct by eliciting improper testimony during trial regarding Appellant's right to remain silent, in violation of the appellant's rights under the Fifth Amendment to the United States Constitution, and whether the Commonwealth committed prosecutorial misconduct by asking Appellant whether his vehicle had been modified, in direct violation of the pre-trial order of the trial court prohibiting any reference to "modifications"?

D. Whether there was insufficient evidence to support the convictions on all of the charges contained within the information, where the evidence presented by the Commonwealth merely showed that Appellant was traveling between fifty-two and fifty-seven miles per hour in a forty-five mile per hour zone, and that he began his pass in a legal passing zone?

E. Whether the trial court abused its discretion and/or erred as a matter of law when it sentenced Appellant in the aggravated range of the sentencing guidelines where there was inadequate record support for any aggravating factors?

Appellant's brief at 5-6.[3]

[3] Additional issues contained in his Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A. statement have not been presented by appellant to our court in his brief; hence, we deem them to have been abandoned.

Appellant first argues that the trial court erred in admitting evidence of his alcohol consumption prior to the accident; specifically, his statements that he had consumed "one or two beers" before the accident and testimony from the EMT and police regarding the detection of a "faint odor of alcohol" on appellant's breath after the accident. Appellant argues this evidence was prejudicial as there was no evidence establishing a causal connection between appellant's consumption of alcohol and the accident. Appellant claims such evidence was unduly prejudicial, as the Commonwealth did not introduce expert testimony to address whether appellant was intoxicated. (Appellant's brief at 24-25.)

"A motion ***in limine*** is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered." ***Commonwealth v. Freidl***, 834 A.2d 638, 641 (Pa.Super. 2003) (citation omitted). We review the grant of such a motion "by applying the scope of review appropriate to the particular evidentiary matter at issue." ***See Commonwealth v. Lockuff***, 813 A.2d 857, 860 (Pa.Super. 2002), ***appeal denied***, 573 Pa. 689, 825 A.2d 638 (2003) (citation omitted). We may reverse rulings on the admissibily of evidence only if it is shown that the trial court abused its discretion. ***See id.***

As such, in considering the trial court's ruling we note that:

> The basic requisite for the admissibility of any evidence in a case is that it be competent and relevant. Though 'relevance' has not been precisely or universally defined, the courts of this

> Commonwealth have repeatedly stated that evidence is admissible if, and only if, the evidence logically or reasonably tends to prove or disprove a material fact in issue, tends to make such a fact more or less probable, or affords the basis for or supports a reasonable inference or presumption regarding the existence of a material fact.

Freidl, 834 A.2d at 641 (citation omitted).

Pennsylvania Rule of Evidence 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence." Pa.R.E., Rule 403, 42 Pa.C.S.A. "'Unfair prejudice' means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." ***Id.***, Comment.

Again, appellant was charged with homicide by vehicle, involuntary manslaughter, and REAP - each of these crimes requires the Commonwealth to demonstrate that a defendant acted recklessly. The Commonwealth argued that appellant's admissions, as well as the observations of the EMT and police officer, were relevant to establish the element of recklessness. Recklessness is defined in the Crimes Code as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the

> actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

18 Pa.C.S.A. § 302(b)(3).

With these principles in mind, we must first determine whether the evidence of alcohol consumption is relevant. The trial court relies on ***Commonwealth v. Scofield***, 521 A.2d 40 (Pa.Super. 1987), ***appeal denied***, 517 Pa. 593, 535 A.2d 82 (1987), and ***Commonwealth v. Surina***, 652 A.2d 402 (Pa.Super. 1995). In ***Scofield***, this court held that evidence of Scofield's ingestion of alcohol was sufficient to establish recklessness for purposes of convictions of aggravated assault and REAP arising out of a car accident. Scofield was not found legally intoxicated but he had taken drugs capable of producing an enhancement effect when ingested after alcohol. While traveling north on Broad Street in Philadelphia, Scofield's car scraped up against the left front bumper of a parked car, producing sparks. His car then traveled another ten feet, swerved onto the sidewalk and struck a building.

A bystander, who saw the victim under the right front fender, approached and told Scofield to "cut the car off," to which Scofield responded, "Look brother, give me a chance, leave me alone, I am all fucked up." The bystander attempted to put his hands inside Scofield's car to turn off the ignition, at which point Scofield became belligerent, hitting at the bystander and trying to bite him. Scofield then revved the engine and tried

to put the car in reverse; however, his efforts were thwarted by a flat tire his car sustained in the accident. The victim was seriously injured, requiring the amputation of his leg. ***Scofield***, 521 A.2d at 41.

Although Scofield's blood alcohol content ("BAC") was only .004, a drug test revealed two different types of barbiturates in his urine and the officer at the scene testified that he had an odor of alcohol on his breath, spoke with a thick tongue, had a hard time standing and had to be helped from his vehicle. ***Id.*** at 42. It was determined that the results of the breathalyzer were insufficient to prove that appellant was driving under the influence; however, this court found the test result to be probative of recklessness. Specifically, we noted that "[w]hile evidence of drinking is alone insufficient to establish driving under the influence, it most certainly may be considered in determining whether the appellant was driving while consciously disregarding a substantial and unjustifiable risk of injury to others." ***Id.*** at 43 (citations omitted).

Likewise in ***Surina***, we held that "a breathalyzer test establishing BAC is relevant and admissible, not only in DUI prosecutions, but also in prosecutions of drivers for other crimes" where recklessness is a material element of that offense. ***Surina***, 652 A.2d at 402. A panel of this court determined that the defendant was held for trial on the charges of aggravated assault, simple assault, and REAP. Each of the crimes required the Commonwealth to prove the defendant acted recklessly. Thus, the court

upheld the defendant's conviction and the evidentiary ruling to admit into evidence his BAC of .120%, despite the lack of charge relating to DUI, as relevant in determining recklessness. ***Id.*** at 402-403.

While the trial court acknowledges that certain facts from ***Scofield*** and ***Surina*** can be distinguished, it finds the cases are analogous as "each involved traffic offenses and similarly required an element of recklessness to be proven." (Trial court opinion, 2/6/12 at 10.) "Appellant's willingness to operate his motor vehicle after consuming alcohol is a factor in his conscious disregard for the safety of others on the road." (***Id.*** at 10-11.) We cannot find that the trial court abused its discretion when finding the evidence of appellant's alcohol consumption prior to the accident admissible to establish recklessness under Section 3732.

Our finding of relevant does not end our inquiry. Appellant claims that the evidence of alcohol consumption unfairly prejudicial. Appellant refers us to civil case law stating that where recklessness is at issue, proof of intoxication is relevant, but the mere fact of consuming alcohol is inadmissible as unfairly prejudicial. (Appellant's brief at 25-26.) ***See Fisher v. Dye***, 386 Pa. 141, 125 A.2d 472 (1956); ***Balla v. Sladek***, 381 Pa. 85, 93, 112 A.2d 156, 160 (1955); ***Landy v. Rosenstein***, 325 Pa. 209, 216, 188 A.2d 858, 859 (1937); ***Cusatis v. Reichert***, 406 A.2d 787, 788-

789 (Pa.Super. 1979)[4]. However, appellant does not acknowledge that these cases find that intoxication and physical impairment may be established by circumstantial evidence. ***See, e.g., Surowiec v. General Motors Corporation***, 672 A.2d 333 (Pa.Super. 1996) (evidence that party consumed 32 ounces of beer, had blood alcohol of .082% one and one-half hours after accident and expert testimony sufficient to establish intoxication); ***Burke v. Buck Hotel, Inc.***, 742 A.2d 239 (Pa.Cmwlth. 1999) (police officer's testimony about person's physical condition and admission in deposition that person had consumed large quantity of alcohol); ***Chicchi v. Southeastern Pennsylvania Transp. Auth.***, 727 A.2d 604, 607 (Pa.Cmwlth. 1999) (circumstantial evidence sufficient to establish intoxication due to cocaine). While appellant's blood alcohol content was below the legal limit at the time of the accident, the record contains circumstantial evidence of impairment. Officer Carchidi and the EMT testified that they smelled a faint odor of alcohol on appellant's breath. Appellant admitted at the scene, at the hospital, and at the trial that he consumed alcohol prior to the accident. The Commonwealth offered testimony that appellant evidenced confusion as to how many beers he consumed and when he drank them. Testimony also established that

[4] Our research does not reveal any criminal cases in which the evidence to establish recklessness consisted merely of evidence of alcohol consumption, as opposed to intoxication, and where the defendant raised the issue of unfair prejudice.

appellant was verbally aggressive with medical staff while being treated. Thus, the trial court did not abuse its discretion in allowing the admission of evidence that appellant had been drinking alcohol and smelled of alcohol prior to driving as the evidence was relevant to the ***mens rea*** requirement regarding the charges at issue. Such evidence was more probative than prejudicial.

Further, even disregarding appellant's alcohol consumption, the evidence indicates that appellant was driving recklessly. Aimed to pass the Rawicz vehicle for the purpose of following his driving companions, appellant exceeded the posted speed limit when he passed the Rawicz vehicle, which was traveling no more than 45 MPS in a posted 45 MPH limit zone. While appellant may have begun his pass in a legal passing zone, he proceeded to pass the Rawicz vehicle in a no-passing zone. A "no passing" sign was located 198 feet before the impact area, and the center lines changed from dashed to two-solid indicating a no-passing zone. His driving created a substantial risk of serious bodily injury to the victims. These facts provided a sufficient basis for the jury to infer that appellant had consciously disregarded a substantial risk of bodily injury by acting in a reckless manner without regard for the safety of others. ***See Commonwealth v. Eichelberger***, 528 A.2d 230 (Pa.Super. 1987) (holding that where defendant crossed center line, ran into oncoming vehicles, and had blood

alcohol content of .09%, the evidence supported conviction for homicide by vehicle). His claim is without merit.

Appellant's second issue also challenges a portion of the trial court's ruling on his motion ***in limine***; specifically, appellant sought to preclude testimony or evidence regarding modifications he made to his vehicle prior to the accident. After a thorough review of the record, the briefs of the parties, the applicable law, and the well-reasoned opinion of the trial court, it is our determination that there is no merit to the questions raised on appeal. The trial court's opinion comprehensively discusses and properly disposes of this question. Accordingly, we adopt that opinion as our own and affirm the second issue on that basis. (***See*** trial court opinion, 2/6/12 at 11-13.)

Next, appellant claims that prosecutorial misconduct occurred when the Commonwealth intentionally elicited improper testimony regarding appellant's right to remain silent. (Appellant's brief at 31.) Appellant challenges the prosecutor's re-direct examination of Officer Carchidi, concerning appellant's pre-arrest refusal to continue to speak to her without a lawyer. Appellant expressly challenges the following testimony:

> Q: That conversation in the hospital on the 20th in which you said you detected a faint odor, you said that conversation was around 8:30?
>
> A: Yes.
>
> Q: P.M.?

A: Yes.

Q: At any point in that conversation did [Appellant] say anything to you about getting charged for that crash?

A: Yes. Well, I responded - -

MR. BUSICO: Objection, Your Honor.

THE COURT: What's the objection?

MR. BUSICO: The objection is beyond the scope of the cross examination.

MR. SALZER: I don't believe so. He directly referenced the conversation that was had in the hospital.

MR. BUSICO: About her –

THE COURT: About the alcohol.

MR. BUSICO: Right.

THE COURT: I'll overrule the objection.

Q: Go ahead ma'am.

A: I asked [Appellant]—I responded back to [Appellant's] room. And I asked him if he was meeting friends in the Crossing. And he said no, he—he said no, they were with him going to the Crossing together. And then after that, he told me, he said, "I should probably get a lawyer"—

MR. BUSICO: Objection, Judge.

THE COURT: Sustained.

Q: Did he say anything about being charged?

MR. BUSICO: Objection, Your Honor,

> MR. SALZER: That was already overruled, I believe, Your Honor.
>
> THE COURT: Is that the same objection, beyond the scope?
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> MR. BUSICO: Well, that's part of it. There's also another part of it.
>
> THE COURT: All right.
>
> (The following occurred at sidebar out of the hearing of the jury)
>
> MR. BUSICO: The basis of the objection is as follows: Number one — number one, the Defendant's comment at this stage about the conversation with this officer about whether he is going to be charged, should or should not get a lawyer, number one, it's about a lawyer.
>
> * * *
>
> THE COURT: Objection is sustained.

Notes of testimony, 1/28/11 at 90-92.

Appellant argues the above statements elicited from this witness were deliberate and so prejudicial that this court should vacate appellant's sentence and dismiss the charges, or in the alternative grant him a new trial. This claim is waived. In such a case where the trial court has sustained the objection, even where a defendant objects to specific conduct, the failure to request a remedy such as a mistrial or curative instruction is sufficient to constitute waiver. ***Commonwealth v. Strunk***, 953 A.2d 577, 579-580 (Pa.Super. 2008), ***citing Commonwealth v. Jones***, 501 Pa. 162,

460 A.2d 739 (1983) (claim of prosecutorial misconduct waived where defense counsel immediately objected to the prosecutor's conduct but failed to request mistrial or curative instructions); ***Commonwealth v. Chimenti***, 524 A.2d 913, 921 (Pa.Super. 1987), ***appeal denied***, 516 Pa. 639, 533 A.2d 711 (1987) (issue was waived where defense counsel objected to a question posed by the prosecutor but failed to ask the trial judge to do anything further after the question had been answered).

Appellant also alleges prosecutorial misconduct occurred when the prosecutor asked appellant whether his vehicle had been modified in contravention of the trial court's ruling that the Commonwealth was not permitted to introduce evidence of vehicle modification. Again, appellant asks this court to vacate his sentence and dismiss the charges against him or grant him a new trial.

This claim of prosecutorial misconduct is also waived. Appellant objected to the prosecutor's question regarding whether the transmission was "heavily modified," and the trial court sustained the objection. (Notes of testimony, 1/31/11 at 80.) Defense counsel did not request a mistrial. As we stated in our analysis of the previous issue, where the trial court has sustained the objection, even where a defendant objects to specific conduct, the failure to request a remedy such as a mistrial or curative instruction is sufficient to constitute waiver. ***Strunk***, ***supra***; ***Chimenti***, ***supra***. No relief is due.

Next, appellant claims that the evidence was insufficient to support his convictions. Appellant suggests that the Commonwealth did not demonstrate the ***mens rea*** for homicide by vehicle, involuntary manslaughter or REAP. No relief is due.

We note our standard of review:

> The standard we apply in reviewing the sufficiency of 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 that of 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 trier 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. Helsel, 53 A.3d 906, 917-918 (Pa.Super. 2012), quoting ***Commonwealth v. Bricker***, 41 A.3d 872, 877 (Pa.Super. 2012) (citations omitted).

To sustain a conviction for homicide by vehicle, the Commonwealth needs to prove: 1) appellant drove in a manner that violated the vehicle

code; 2) appellant knew or should have known that the conduct violated the law; and 3) death was the probable cause of the vehicle code violation. ***Commonwealth v. Bowser***, 624 A.2d 125, 129 (Pa.Super. 1993), ***appeal denied***, 537 Pa. 638, 644 A.2d 161 (1994), ***cert. denied***, 513 U.S. 867 (1994). For involuntary manslaughter, a conviction will be upheld only where one does "an unlawful act in a reckless or grossly negligent manner." 18 Pa.C.S.A. § 2504. Finally, appellant was convicted of three counts of REAP, which is defined as: "A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa.C.S.A. § 2705.

Although Section 3732 mentions gross negligence, the essential ***mens rea*** of the offense is recklessness as "the concept of gross negligence is encompassed within the concept of recklessness. . ." ***Commonwealth v. Grimes***, 842 A.2d 432, 434 (Pa.Super. 2004), ***appeal denied***, ___ Pa.___, 864 A.2d 1203 (2004). Again, recklessness is defined in the crimes code as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

18 Pa.C.S.A. 302(b)(3). Indicia of unsafe driving can be sufficient to support a determination of recklessness, even when no accident or injury results. ***Commonwealth v. Jeter***, 937 A.2d 466, 468 (Pa.Super. 2007).

Appellant avers that he began his pass in a legal passing zone and "[t]he testimony presented by the Commonwealth at trial, viewed in the best light, could only show that Appellant attempted to pass the decedents' car, traveling no more than [7] to [12 MPH] in excess of the posted speed limit, and that Appellant was unfortunately unsuccessful in his attempt. Although appellant was technically speeding, his conduct lacked any indicia of recklessness and the required ***mens rea*** to support a finding of recklessness." (Appellant's brief at 42.) Appellant directs us to cases in which this court has reversed convictions for reckless driving and/or REAP due to insufficient evidence to support the ***mens rea*** of recklessness. ***See Commonwealth v. Greenberg***, 885 A.2d 1025 (Pa.Super. 2005) (reversing reckless driving conviction where there was no evidence that defendant had difficulty negotiating roadway or that he came close to striking other vehicles before losing control of his vehicle); ***Commonwealth v. Bullick***, 830 A.2d 998 (Pa.Super. 2003) (evidence was insufficient to support ***mens rea*** for reckless driving where evidence was entirely circumstantial and prosecution was based on skid marks that appeared to lead to damaged vehicle and on assumption that defendant was intoxicated at time of accident). No relief is due.

Here, however, viewing the evidence in the light most favorable to the Commonwealth, as we must, we conclude that the evidence was certainly sufficient to prove that appellant consciously disregarded the probability that his driving could cause substantial risk of harm to others on the roadway. The testimony reflects that appellant was trying to catch up with his two friends, whose vehicles had both just passed the victims' vehicle. It is undisputed that appellant was traveling in excess of the posted speed limit and the victims' vehicle was traveling within the legal limit. The Commonwealth presented testimony that appellant's Mustang went off the roadway and re-entered the road at a speed of 52 to 57 MPH.

It was also undisputed that appellant's vehicle was not in a legal passing zone when his vehicle came into contact with the Rawicz car. In fact, a "no passing" sign was located 198 feet before the impact area, and the center lines changed from dashed to two solid lines indicating a no-passing zone. While there is no evidence as to where appellant initiated the lane change to pass the victims' vehicle, and no evidence of the location in which the vehicle left the road or how long it traveled in the grass before re-entering the road, the vehicle came into contact with the Rawicz vehicle in a no-passing zone. As the Commonwealth's expert opined:

> [t]he decisions by [Appellant] to drive at the speed greater than the vehicle in front of him, greater than the posted speed, to pass in a no-passing zone, led to him losing control of his vehicle; then upon losing control of his vehicle, reentering the roadway, and then entering a space assigned to Mr. Rawicz.

Notes of testimony, 1/28/11 at 222. While appellant's expert testified that "[t]he vehicle did not lose control because of speed," the jury was free to reject this testimony and accept the testimony of the Commonwealth's expert. No testimony was presented that Mr. Rawicz contributed to the accident in any way.

The Commonwealth also presented evidence that appellant had consumed alcohol prior to driving; in fact, appellant admitted to drinking alcohol although he remained unsure as to how many beers he had or exactly when he had consumed the beverages. The police officer and EMT testified that they smelled a faint odor of alcohol on appellant. Appellant evidenced confusion when speaking with Officer Carchidi as to when he had been drinking prior to the accident.

In summary, appellant's actions of driving in excess of the speed limit, in a no-passing zone without control of his vehicle, after consuming alcohol which made him appear impaired, are certainly sufficient for the jury to conclude that he grossly deviated from ordinary prudence and created a substantial risk of injury and death to those riding in the Rawicz vehicle. As the trial court points out, his course of conduct immediately prior to the accident violated several provisions of the Vehicle Code. His cumulative conduct was reckless as to place the victims in danger of death or serious bodily injury. The evidence supports the jury's findings beyond a reasonable doubt.

The final issue before this court is whether the trial court abused its discretion when sentencing appellant. "A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute." ***Commonwealth v. McAfee***, 849 A.2d 270, 274 (Pa.Super. 2004), ***appeal denied***, 580 Pa. 695, 860 A.2d 122 (2004) (citation omitted). When challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence. ***See Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa.Super. 2005). "Two requirements must be met before we will review this challenge on its merits." ***McAfee***, 849 A.2d at 274. "First, an appellant must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence." ***Id.*** "Second, the appellant must show that there is a substantial question that the sentence imposed is not appropriate under the Sentencing Code." ***Id.*** That is, "the sentence violates either a specific provision of the sentencing scheme set forth in the Sentencing Code or a particular fundamental norm underlying the sentencing process." ***Tirado***, 870 A.2d at 365.

We examine an appellant's Rule 2119(f) statement to determine whether a substantial question exists.[5] ***See id.*** "Our inquiry must focus on

[5] Rule 2119 provides the following, in pertinent part:

the reasons for which the appeal is sought, in contrast to the facts underlying the appeal, which are necessary only to decide the appeal on the merits." ***Id.***

In the present case, appellant's brief contains the requisite Rule 2119(f) concise statement, and, as such, is in technical compliance with the requirements to challenge the discretionary aspects of a sentence. In his statement, appellant asserts that the trial court abused its discretion by imposing consecutive aggravated range sentences on the two homicide by vehicle convictions as such was unreasonably and manifestly excessive. (Appellant's brief at 22.) Appellant argues the trial court misapplied the guidelines and avers he does not pose a future danger to society, he does not deserve a sentence beyond the standard offense gravity score, and he does not have unaddressed rehabilitative needs. (***Id.***) We find that appellant has raised a substantial question for our review. ***Commonwealth v. Archer***, 722 A.2d 203, 210-211 (Pa.Super. 1998). ***See Commonwealth***

> **(f) Discretionary aspects of sentence.** An appellant who challenges the discretionary aspects of a sentence in a criminal matter shall set forth in his brief a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of a sentence. The statement shall immediately precede the argument on the merits with respect to the discretionary aspects of sentence.

Pa.R.A.P., Rule 2119(f), 42 Pa.C.S.A.

v. Booze, 953 A.2d 1263, 1278 (Pa.Super. 2008) (allegation that court failed to state adequate reasons on the record for imposing aggravated range sentence raises a substantial question for our review).

Our standard of review follows:

> The matter of sentencing is vested within the sound discretion of the trial court; we only reverse the court's determination upon an abuse of discretion. To demonstrate that the trial court has abused its discretion, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. Moreover, 42 Pa.C.S.A. § 9721(b) provides that the trial court must disclose, on the record, its reasons for imposing the sentence.

Commonwealth v. Hanson, 856 A.2d 1254, 1257 (Pa.Super. 2004) (citations and internal quotation marks omitted).

In imposing sentence, a sentencing court is required to consider "the particular circumstances of the offense and the character of the defendant." ***Commonwealth v. Widmer***, 667 A.2d 215, 223 (Pa.Super. 1995), ***rev'd on other grounds***. In particular, the court should "refer to the defendant's prior criminal record, age, personal characteristics and potential for rehabilitation." ***Id.*** Moreover, "[w]here the sentencing judge had the benefit of a pre-sentence report, [ ] it will be presumed that he 'was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.'" ***Id.*** A sentencing court must state its reasons for the sentence on the record. ***See***

id. A sentencing judge can satisfy the requirement that reasons for imposing sentence be placed on the record by indicating that he has been informed by the pre-sentencing report. ***See Commonwealth v. Egan***, 679 A.2d 237 (Pa.Super. 1996).

In the instant case, the trial court properly followed the above-mentioned mandates in imposing sentence and placed the reasons for sentencing appellant in the aggravated range on the record. (Trial court opinion, 2/6/12 at 25-27.)[6] The trial court explained that it evaluated the experts, appellant's character, letters of support, memoranda submitted by counsel, the testimony of character witnesses and appellant's testimony. The court also considered the sentencing guidelines and the penalties authorized. The court also considered appellant's lack of remorse and his adamancy that he was "railroaded." (***Id.*** at 27.) The court indicated that it was influenced by "on the impact upon the victim and the community as the most significant factors to the aggravated range sentence." (***Id.*** at 26, 28.) The court analyzed appellant's rehabilitative needs, especially his mental health needs, and concluded that they can be better treated in a state correctional institution. (***Id.*** at 28-29.)

Appellant avers that the court impermissibly considered his alleged lack of remorse to support its aggravated sentence. Appellant argues that

[6] In its opinion, the trial court notes that its reasoning for the sentence imposed on April 27, 2011 and later vacated remains relevant to the current sentence. (Trial court opinion, 2/6/12 at 26 n.24.)

his showing of remorse "may not have been the most conventional, [but] there was testimony that Appellant, on numerous occasions, placed flowers at a memorial which he had set up at the scene of the accident." (Appellant's brief at 46.) While claims that a sentence is based on the consideration of an impermissible factor have been found to constitute substantial questions, the consideration of a defendant's level of remorse has not been found to be an impermissible factor. ***Commonwealth v. Fullin***, 892 A.2d 843, 849–850 (Pa.Super. 2006); ***Commonwealth v. Griffin***, 804 A.2d 1, 11 (Pa.Super. 2002), ***cert. denied***, 545 U.S. 1148 (2005); ***Commonwealth v. Jones***, 433 Pa.Super. 266, 640 A.2d 914, 917 (1994); ***Commonwealth v. Minott***, 395 Pa.Super. 552, 577 A.2d 928, (1990). In fact, it is clearly within the trial court's sound discretion to assess a defendant's remorse, or lack thereof. ***Commonwealth v. Druce***, 796 A.2d 321, 337 (Pa.Super. 2002), citing ***Commonwealth v. Eicher***, 605 A.2d 337, 354 (Pa.Super. 1992), ***appeal denied***, 533 Pa. 598, 617 A.2d 1272 (1992) ("The sentencing court is in the best position to judge the 'defendant's character, [and his] displays of remorse, defiance or indifference.'"). Refusing to be remorseful can be considered an aggravating factor. ***Commonwealth v. Matroni***, 923 A2.d 444, 445 (Pa.Super. 2007).

Appellant also argues that the court took into account factors already contemplated by the guidelines, such as the impact on the victim and for his need for rehabilitation. At the outset, we note that these claims were not

included in appellant's Rule 1925(b) statement or in his Rule 2119(f) statement; rather appellant's sole sentencing claim was that there was inadequate record support for an aggravated sentence. Nevertheless, we perceive no merit to the concerns of "double-counting." For instance, the factors surrounding the victims' death and Mr. Rawicz were independent of those already contemplated in the guidelines and do not amount to double counting, but merely further analysis of the particular circumstances of the offense. ***See Griffin***, 804 A.2d at 10. ("[A] court is required to consider the particular circumstances of the offense and the character of the defendant.") The court is permitted to consider how the double vehicular homicide affected the victim and the community.

It is clear that the court considered the sentencing factors under Section 9721(b) and the guidelines. Additionally, having reviewed the sentencing court's actions and explanation in light of the offense at issue, appellant's history and characteristics, and the court's significant opportunity to observe appellant during his trial and sentencing, we find no abuse of discretion and will not disturb the sentence.

Judgment of sentence affirmed.