**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| COMMONWEALTH OF PENNSYLVANIA<br><br>Appellee<br><br>v.<br><br>JONATHAN R. MILLER<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br>No. 865 MDA 21012 |

Appeal from the Judgment of Sentence March 16, 2012
In the Court of Common Pleas of Centre County
Criminal Division at No(s): CP-14-CR-0000873-2001

BEFORE: FORD ELLIOTT, P.J.E., PANELLA, J., and ALLEN, J.

MEMORANDUM BY PANELLA, J. Filed: February 21, 2013

Appellant, Jonathan R. Miller, appeals from the judgment of sentence entered on March 16, 2012, in the Court of Common Pleas of Centre County. We affirm.

Miller crashed his car into another vehicle in the parking lot of an adult entertainment club and drove off, but returned shortly thereafter. A state trooper arrived at the scene, placed Miller into custody, and took him for blood testing. Miller's BAC registered 0.282%. After a bench trial, the trial court convicted Miller of several DUI and other driving offenses. After sentencing, Miller filed a post-sentence motion, which the trial court denied. This timely appeal followed.

On appeal, Miller argues that the Commonwealth presented insufficient evidence to sustain his conviction for violation of 75 Pa.C.S.A. § 3802(c).

Our standard of review regarding sufficiency of the evidence claims is well settled.

> 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) (citation omitted).

Specifically, Miller contends that the Commonwealth failed to prove that "the blood test was performed on blood which was drawn from Defendant within 2 hours of the time that he last operated a vehicle." Appellant's Brief, at 7. We disagree. The evidence, when viewed in the light most favorable to the Commonwealth, proves that Miller's BAC was higher

than 0.16% within two hours of his operation of the vehicle, thus violating 75 Pa.C.S.A. § 3802(c)[1].

The parties stipulated at trial that Miller's blood was drawn at 3:50 a.m. and that the BAC was 0.282%. Therefore, the Commonwealth had to prove that Miller last operated a vehicle after 1:50 a.m.

Trooper Rowland testified that he received the dispatch from 911 at 2:30 a.m. and that he arrived at the scene of the accident at 2:49 a.m. ***See*** N.T., Trial, 2/14/12, at 28. Carl Swortwood, a defense witness, testified that the state trooper arrived "roughly 30 minutes" after the accident. ***Id***., at 65. Heather Holter, another defense witness, testified that the state trooper arrived "a half-hour, 45 minutes" after the accident. ***Id***., at 72.

According to the defense's own witnesses, the accident had to occur between 2:04 a.m. and 2:19 a.m.—times well within the two hour mandate set forth in § 3802(c). Miller, however, does not cite his witnesses. Instead, Miller cites to the testimony of a Commonwealth witness, John Dill, as the

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[1] Section 3802(c) states the following:

> **(c) Highest rate of alcohol.--**An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is 0.16% or higher within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. § 3802(c).

focus of his argument that the Commonwealth presented insufficient evidence.

Dill is the security supervisor at The Crossroads, the adult entertainment club where the accident took place. ***See id***., at 7. Dill testified that he observed the accident and that "immediately upon impact" he told an employee to call 911. ***Id***., at 15. Dill was asked if he knew the exact time of the accident and responded, "[n]o, because at that point I had no idea that I would have to articulate this later." ***Id***. Dill reiterated, however, that he had the employee phone 911 immediately after the accident occurred. ***See id***., at 15, 17. Dill observed the employee phone 911 using a cell phone. ***See id***., at 17. The cross-examination continued as follows:

> Q: And the last time you saw [Miller]?
>
> A: Time-wise?
>
> Q: Yeah. Right after the accident would have been about 12 o'clock, then?
>
> A: Yeah, pretty much.
>
> Q: Okay.
>
> A: I didn't make any notes or articulate this at that time, because I had no idea that it was going to come back to this.

***Id***., at 21.

Miller seizes on Dill's testimony that the accident occurred at midnight as the basis for his claim that the accident occurred outside the two hour

period of § 3802(c). But Dill also testified on direct examination that he did not know the exact time of the accident and further qualified his answer on cross-examination. ***See id***. Viewing Dill's testimony in its entirety reveals that he witnessed the accident and then immediately asked his employee to call 911, but is unclear as to the time of the accident. As noted, the state trooper received his dispatch from 911 at 2:30 a.m. Miller's own witnesses put the accident between 2:04 a.m. and 2:19 a.m.

We find such evidence, when viewed in the light most favorable to the Commonwealth, sufficient to sustain Miller's conviction of § 3802(c).[2]

Judgment of sentence affirmed.

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[2] Miller further argues that the evidence is insufficient to sustain his conviction under § 3802(c) because he offered evidence that he only drank *after* the accident. In so doing, Miller is actually raising a veiled weight of the evidence claim. In any event, Dill testified that Miller was visibly impaired from alcohol *before* the accident. ***See*** N.T., Trial, 2/14/12, at 12-14. The trial court, sitting as fact finder, obviously found Miller's evidence incredible.