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PENNSYLVANIA SUPREME COURT
EASTERN DISTRICT
No. ______ E.D. ALLOC. DKT 2019

COMMONWEALTH OF PENNSYLVANIA Respondent	)	____ **EAL 2019**
	)	**3553 EDA 2017**
v.	)	**CP-39-CR-0000423-2016**
MATTHEW WOLFE Petitioner	)	**Trial court: Banach, K.L.**

Petition for Allowance of Appeal

Petition for Allowance of Appeal from the January 31, 2019 Unpublished Superior Court Panel Opinion (3553 EDA 2017) Affirming the Judgment of Sentence Entered by the Honorable Kelly L. Banach of the Lehigh County Common Pleas Court, Criminal Division, CP-39-CR-0000423-2016 dated 6-13-17

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TABLE ON CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF JURISDICTION 1

ORDER OR OTHER DETERMINATION IN QUESTION 1

PROCEDURAL HISTORY 1

QUESTIONS PRESENTED 3

RELEVANT FACTS FOR QUESTIONS PRESENTED 4

STATEMENT OF REASONS FOR ALLOWING APPEAL 18

REASONS FOR ALLOWING APPEAL 20

CONCLUSION 39

CERTIFICATE OF SERVICE 39

CERTIFICATE OF COMPLIANCE 39

TABLE OF AUTHORITIES

CASES

Chambers v. Mississippi, 410 U.S. 284 (1973) 21

Commonwealth v. Chambers, 599 A.2d 630 (Pa. 1991) 16, 20

Commonwealth v. Serge, 837 A.2d 1255 (Pa. Super. 2003) 13

Commonwealth v. Thompson, 281 A.2d 856 (Pa. 1971) 4, 19, 23, 34

Fisher v. Perez, 947 So.2d 648 (Fla. App. 2007) 18

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 4

Smith v. Texas, 543 U.S. 37 (2004) 38

Wardius v. Oregon, 412 U.S. 470 (1973) 20, 28

CODES/RULES/STATUTES

Pa.R.A.P. 302(a) 20

Pa.R.A.P. 1114(a) 18

Pa.R.A.P. 1114(b)(3) 18

Pa.R.A.P. 1114(b)(4) 20

Pa.R.Crim.P. 605(B) .... *passim*

42 Pa. C.S. § 742 1

JOURNAL ARTICLES

Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1 (2009) 22

Comment, *Shaken to the Core: Emerging Scientific Opinion and Post-Conviction Relief in Cases of Shaken Baby Syndrome*, 42 ARIZ. ST. L.J. 1305 (2011) 23

STATEMENT OF JURISDICTION

Matthew Wolfe's *Petition for Allowance of Appeal* is properly before the Court. Pa. C.S. § 724(a).

ORDER OR OTHER DETERMINATION IN QUESTION

Matthew Wolfe seeks review of the Superior Court's January 31, 2019 unpublished opinion (3553 EDA 2017),[1] affirming the judgment of sentence entered by the Honorable Kelly L. Banach of the Lehigh County Common Pleas Court, Criminal Division, CP-39-CR-0000423-2016.

PROCEDURAL HISTORY

On March 7, 2016, the Commonwealth arraigned Mr. Wolfe on one-count of third-degree murder and one count of endangering the welfare of a child. The charges stemmed from the November 18, 2013 death of Mr. Wolfe's three-month-old daughter Quinn.

Mr. Wolfe pleaded not guilty, but on January 26, 2017 a jury convicted him of both counts. Scott Wilholm represented Mr. Wolfe at trial.

On March 17, 2017, Judge Banach sentenced Mr. Wolfe.

On March 27, 2017, Mr. Wolfe filed his post-sentencing motions.[2]

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[1] A copy of the Superior Court's opinion is attached to this petition but is also included in the *Reproduced Record* attached to this petition. Rpp. 166-180.

[2] Rpp. 4-16.

On June 13, 2017, Judge Banach resentenced Mr. Wolfe because her initial sentence represented an illegal sentence. Judge Banach sentenced Mr. Wolfe to 18 to 36 years for the third-degree murder conviction and a consecutive 2 to 4 years for the endangering the welfare of a child conviction.[3]

On October 10, 2017, Judge Banach denied Mr. Wolfe's post-sentencing motions.

On October 31, 2017, Mr. Wolfe appealed.[4]

On December 6, 2017, Mr. Wolfe filed his *Concise Statement of Errors on Appeal*.[5]

On December 22, 2017, Judge Banach filed her opinion.[6]

On January 31, 2019, the Superior Court issued its opinion affirming his convictions.[7]

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[3] Rpp. 1-3.
[4] Rpp. 17-19.
[5] Rpp. 20-22.
[6] Rpp. 23-46.
[7] Rpp. 166-180.

QUESTIONS PRESENTED

Question #1: Under Pa.R.Crim.P. 605(B), what is the proper analysis a trial court must use when assessing the impact of a "critical" absentee expert witness to determine whether the "critical" expert's absence at trial will render the defendant's trial unfair?

Question #2: When the defendant's criminal case hinges on a "battle of the experts," and the defendant's expert refuses to appear at trial and testify on the defendant's behalf due to a family medical emergency or some other reason, is the defendant's trial rendered unfair under Pa.R.Crim.P. 605(B) and his due process right to a fair trial violated when (1) the trial court "remedies" the situation by having a non-expert, lay person, *i.e.*, trial counsel, read the defense expert's complicated, pre-trial report into the record (a) with no explanation of the report's complex medical terms, findings, and opinions, and (b) no opportunity to use demonstrative exhibits to make the report's findings and opinions more comprehensible to the fact-finder, (2) the Commonwealth was permitted to question its own two experts and, in fact, used more than ten demonstrative exhibits while doing so, and (3) the trial court instructed the jury that when "judging" the "credibility" of the Commonwealth's and defense's experts it had to consider such things as (a) "how well" the expert "remember[ed] and describe[d] the things about which he or she *testified*" about, (b) whether "the witness *testif[ied]* in a convincing manner," and (c) "[w]as his or her *testimony* uncertain, confused, self-contradictory or evasive."

RELEVANT FACTS FOR QUESTIONS PRESENTED

"Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." *McKeiver v. Pennsylvania*, 403 U.S. 528, 531 (1971). "The proceeding in which [Mr. Wolfe] was adjudged guilty did not embrace the fundamental conception of a fair trial" because, by the trial court not granting a mistrial and therefore proceeding with Mr. Wolfe's trial in Dr. Manion's absence, Mr. Wolfe was "not afforded an opportunity to present *fully* his version of events which led to his arrest[.]" *Commonwealth v. Thompson*, 281 A.2d 856, 858 (Pa. 1971) (emphasis added). The Court, therefore, should grant Mr. Wolfe's petition, hear his case, and grant him a new trial where he can properly and meaningfully vindicate his right to a fair trial by "fully" presenting his innocence and his "version of events" that resulted in Quinn's utterly tragic death on November 18, 2013.

In Quinn Wolfe's brief three months of life, someone physically abused her to the point where she had to be airlifted to a hospital in Philadelphia on November 12, 2013. Tragically, Quinn passed away on November 18, 2013 as a result of significant head and body injuries. The two people who spent the most time with Quinn were her parents: Cristin Sanchez and Matthew Wolfe. Sanchez had a documented history of depression and anxiety and was seeing a therapist those three months after Quinn's

birth,[8] while Mr. Wolfe had no mental health history and had a reputation in the community as being a peaceful and loving father.[9]

Detectives interviewed both, but both denied inflicting Quinn's fatal injuries. Moreover, the doctor who had initially examined Quinn, Dr. Adam Columbo, opined that her injuries had probably been inflicted within five days of November 12, 2013.[10] Based on Dr. Columbo's opinion, though, detectives lacked probable cause to arrest either Sanchez, Mr. Wolfe, or Sanchez's parents who watched Quinn at times during this period. Consequently, Quinn's death investigation remained stagnant for more than two years.[11]

That changed, though, when detectives learned the Lehigh County Child Advocacy Center had hired a new doctor named Dr. Debra Esernio-Jenssen. Detectives sent Quinn's medical records to Dr. Esernio-Jenssen in November 2015. After reviewing the medical records, Dr. Esernio-Jenssen claimed she was able to time-date Quinn's injuries, and that her time-dating revealed that only one person could be responsible for Quinn's death: Mr. Wolfe.[12]

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[8] Rpp. 58-62. To preserve space and words, counsel cites to Mr. Wolfe's opening brief to the Superior Court, which contains a comprehensive *Statement of Facts*.
[9] Rpp. 90, 127-129.
[10] Rp. 68.
[11] Rpp. 71-72.
[12] Rpp. 73-74.

A brief summary of November 12, 2013 is needed to fully understand Dr. Esernio-Janssen's opinion. On November 12, 2013, Sanchez left the house at 10:00 a.m. for an appointment with her therapist, Dr. Dr. Holly Warholic, leaving Mr. Wolfe alone with Quinn. After her appointment, Sanchez, who is a nurse, went to work at St. Luke's hospital. At noon, Mr. Wolfe called Sanchez, but got her voicemail. He left a message saying Quinn did not "seem right." Mr. Wolfe called Sanchez's work number and finally got a hold of her at 1:08 p.m., at which point he told her Quinn did not "seem right." Mr. Wolfe told her he had fed Quinn, placed her back in her crib, took a fifteen-minute shower, and checked on her after the shower. When he checked on her, he realized she had vomited. As they talked, though, Mr. Wolfe told Sanchez that Quinn appeared better. Although Sanchez thought Mr. Wolfe was overreacting, to ease her mind, Sanchez asked Mr. Wolfe to bring Quinn to St. Luke's so she could examine her. Mr. Wolfe arrived at St. Luke's with Quinn at 2 p.m.[13]

These times are relevant because, according to Dr. Esernio-Jenssen, she was able to do something no doctor was able to do in the two years after Quinn's death: she time-dated Quinn's injuries to the narrow two-hour span between 10:00 a.m. and noon on November 12, 2013 – the two hours Mr. Wolfe had Quinn in his care before he called Sanchez at noon. After receiving Dr. Esernio-Jenssen's opinion, detectives

[13] Rpp. 64-71.

stopped viewing Sanchez and her parents as suspects and arrested Mr. Wolfe on December 22, 2015 – more than two years after Quinn's death.[14]

Before trial, Mr. Wolfe's trial counsel retained Dr. William Manion for $6,500 to review Quinn's medical reports and injuries and to opine whether it was possible to time-date Quinn's injuries to the narrow two-hour time span – between 10:00 a.m. and noon – on November 12, 2013. Dr. Manion reviewed Quinn's medical records and injuries and opined that Quinn's injuries presented with characteristics indicating they had been inflicted well before November 12, 2013, meaning Dr. Esernio-Jenssen's opinion was incredible.[15]

Heading into trial, the only evidence implicating Mr. Wolfe in Quinn's death was Dr. Esernio-Jenssen's opinion. The Commonwealth had no motive either. If anyone had a motive to harm Quinn, it was Sanchez due to her significant history of depression and anxiety. Indeed, Sanchez was on Zoloft at the time of Quinn's death because she suffered from a significant case of post-partum depression after Quinn's birth.[16] Thus, Mr. Wolfe's liberty and freedom depended on how the jury viewed Dr. Esernio-Jenssen's and Dr. Manion's credibility and trial presentation.

[14] Rp. 74.
[15] Rpp. 78-86.
[16] Rpp. 58-62.

At trial, the Commonwealth's last witness was none other than Dr. Esernio-Jenssen. During her testimony, the prosecutor used ten demonstrative exhibits to help her visually persuade the jury that her time-dating testimony was valid and accurate. Dr. Esernio-Jenssen told jurors that Quinn's fatal injuries were inflicted between 10:00 a.m. and noon on November 12, 2013, meaning only one person could have inflicted them: Mr. Wolfe.[17]

When it came time for Dr. Manion to testify, he was a no-show, despite the fact he had repeatedly told trial counsel he would be at trial on January 24, 2017. Dr. Manion was a no-show again on January 25, 2017, despite the fact he had told trial counsel the night before (January 24th) he was driving to Allentown that night and would be in court to testify on January 25th. Later that morning (January 25th), trial counsel spoke with Dr. Manion who told him he had personal reasons for his absence, but assured trial counsel he would be in Allentown later that day (January 25th) and would testify the next day on January 26th.[18]

On January 26, 2017, Dr. Manion was a no-show again. Trial counsel called his cell phone three times, but each resulted in a message indicating Dr. Manion's voicemail was full. Co-counsel (Toth) also called Dr. Manion at least ten times but could not get through to him. Both trial and co-counsel called Dr. Manion's hospital, but their calls went to voicemail. When trial counsel finally contacted Dr. Manion, he told trial

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[17] Rpp. 75-76.
[18] Rpp. 78-80.

counsel he had a family medical emergency regarding his bulimic daughter and that he would not be appearing in court that week.[19]

Trial counsel did not subpoena Dr. Manion because his contract stipulated he had to testify on Mr. Wolfe's behalf at trial. Trial counsel presented the trial court with Dr. Manion's contract that specified the dates and locations of Mr. Wolfe's trial. The trial court held that Dr. Manion had willfully failed to appear. The trial court instructed her law clerk to research the case law regarding "what happens when a critical defense witness fails to appear[.]" The trial court gave trial counsel fifteen minutes to research the case law. The prosecutor, in the meantime, argued that Dr. Manion's absence did not warrant a mistrial, but the trial court questioned that argument stating that if the jury convicted Mr. Wolfe without Dr. Manion's testimony, Dr. Manion's absence would create a clear issue for direct appeal.[20]

The prosecutor suggested having Dr. Manion's report read into the record and have the parties stipulate that, if Dr. Manion had testified, his testimony would have conformed to his report. Trial counsel disagreed and moved for a mistrial under Pa.R.Crim.P. 605(6) and due process, arguing that merely reading Dr. Manion's report into the record was "completely inappropriate" because a significant part of assessing a witness's credibility is watching his or her live testimony.[21] Also, trial counsel feared

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[19] Rpp. 78-80, 81-82.
[20] Rp. 80.
[21] Rp. 81.

the jury may interpret Dr. Manion's absence as Dr. Manion not wholly believing in his findings and conclusions. Lastly, without Dr. Manion's presence, trial counsel said he could not ask him specific questions about Dr. Esernio-Jenssen's trial testimony and opinions.[22] The prosecutor argued a mistrial was too extreme of a remedy and suggested the trial court grant a continuance.[23]

The trial court denied the mistrial motion because: (1) the defense created the prejudice to Mr. Wolfe, (2) Dr. Manion was an unreliable witness, and (3) granting a mistrial under these facts created bad precedent. The trial court said if it granted a mistrial, other attorneys may try to make their witnesses unavailable so they could easily stop a case that was going badly for their client.[24]

The trial court said it would grant a continuance, but trial counsel would have to obtain a material witness warrant for Dr. Manion, and the trial court would continue the case until Dr. Manion was brought in.[25] The prosecutor objected to a continuance because its rebuttal witness, Dr. Lori Frasier, was unavailable the rest of the week and the following week.[26] The trial court agreed, stating it would be difficult to bring the jurors back into court once deputies had served the warrant on Dr. Manion and brought him to court to testify.[27]

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[22] Rpp. 81-84.
[23] Rp. 81.
[24] Rp. 82.
[25] Rp. 82.
[26] Rpp. 82-83.
[27] Rp. 83.

At another in-chambers conference, trial counsel objected to the trial court's refusal to grant a mistrial but said if the trial court did not change its mistrial ruling, he would reluctantly go along with the Commonwealth's suggestion of reading Dr. Manion's report into the record, provided the Commonwealth did not object to anything in the report.[28]

Thus, the trial court instructed the jury that Dr. Manion was an expert witness retained by the defense for the purpose of testifying at trial, but due to an "unforeseen personal emergency," he was unavailable to testify.[29] The trial court also told jurors that after discussing all possible scenarios, the parties had agreed to read Dr. Manion's report into the record. The trial court also explained that both parties had agreed that if Dr. Manion had testified, he would have been qualified as an expert in "the area of forensic pathology" and his testimony would have been consistent with his report.[30] The trial court, notably, reiterated – twice more – that Dr. Manion's absence was "was unforeseen." The trial court also told jurors it could "not make any negative conclusions" due to Dr. Manion's absence.[31]

Before reading Dr. Manion's report (D-14) into the record, trial counsel read several portions of his CV/resume (D-13) into the record. Trial counsel then listed the twenty-four sources that formed the basis of Dr. Manion's findings and opinions. Trial

[28] Rp. 83.
[29] Rp. 83.
[30] Rpp. 83-84.
[31] NT, Trial, 1/25/2017, p. 60.

counsel then read Dr. Manion's key opinion, which was that Dr. Esernio-Jenssen's testimony regarding when Quinn's injuries had been inflicted was incorrect because it was not based on the facts or "sound medical conclusions."[32]

During its closing jury instructions, the trial court instructed the jury to rely on its credibility assessments of the experts in situations like this where the experts' opinions conflicted:

> In this case, the testimony and opinions of the experts you heard from seem to conflict with each other. If you find that the conflict is more than superficial, that the conflict is real and irreconcilable, you may decide what parts, if any, of the contradictory testimony and opinions you choose to believe. In doing this, you should consider the relative credibility of each expert and his or her *testimony* and opinions.[33]

The trial court told jurors to "consider" the following "factors" when "judging credibility and deciding whether or not to believe [a witness's] testimony":

> Was the witness able to see, hear or know the things about which he or she *testified*. How well could the witness remember and describe the things about which he or she *testified*.
>
> Was the ability of the witness to see, hear, know, remember or describe those things [*while testifying*] affected by youth, old age or any physical, mental or intellectual deficiency.
>
> Did the witness *testify* in a convincing manner. How did he or she look, act and speak while *testifying*. Was his or her *testimony* uncertain, confused, self-contradictory or evasive.[34]

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[32] Rp. 84.
[33] Rp. 95.
[34] Rpp. 95-96.

The jury convicted Mr. Wolfe of third-degree and endangering the welfare of a child. On appeal, Mr. Wolfe argued the trial court abused its discretion and violated his due process right to a fair trial by not granting a mistrial due to Dr. Manion's "unforeseen personal emergency." Specifically, because his case turned on how the jury viewed the reliability and credibility of the opposing experts, Dr. Manion's absence rendered his trial unfair, even if the defense was somehow at fault for Dr. Manion's "unforeseen personal emergency."

The Commonwealth, Mr. Wolfe argued, had a constitutionally significant unfair advantage by having Dr. Esernio-Jenssen testify in person, where she was able to use demonstrative exhibits to explain her time-dating opinion. "Demonstrative evidence" is that which is "tendered for the purpose of rendering other evidence *more comprehensible* to the trier of fact." *Commonwealth v. Serge*, 837 A.2d 1255, 1261 (Pa. Super. 2003) (emphasis added). Likewise, the Commonwealth presented Dr. Lori Frasier as a rebuttal witness in an attempt to discredit Dr. Manion's report.

In its written opinion, the trial court disagreed for the following reasons: (1) it gave trial counsel "ample time" to "present evidence and call witnesses," (2) trial counsel "had no legitimate explanation" for Dr. Manion's "failure to appear," (3) Dr. Manion's "failure to appear" was not "completely unforeseen," (4) granting a mistrial, based on these facts, would potentially create bad precedent, and (5) reading Dr. Manion's report into the record protected Mr. Wolfe's fair trial right because (a) the

report "was presented without any opportunity for cross-examination" and (b) it had "provid[ed]" to Mr. Wolfe "a favorable cautionary instruction."[35]

The Superior Court gave short shrift to this claim because it simply quoted from the trial court's opinion and added:

> The trial court's analysis is well reasoned and we find no basis upon which to grant Wolfe relief. Here, it is significant that Dr. Manion's CV and report were presented to the jury by reading them into the record and numerous accommodations were made by the trial court.[36]

The Superior Court, moreover, found it important that "Dr. Manion's report was presented without the opportunity of cross-examination" and that the "trial court gave multiple instructions to the jury regarding Dr. Manion that the jury is presumed to have followed."[37] In the end, the Superior Court said because Mr. Wolfe's "expert evidence was presented to the jury," he received a "fair and impartial trial."[38]

Mr. Wolfe believes the trial court and Superior Court inadequately assessed the detrimental impact caused by Dr. Manion's absence. Having a non-expert, lay person read a complicated forensic report into the record, with no explanation of the complex medical terminology used in the report, and no use of demonstrative exhibits to make the report's findings and conclusions more comprehensible, cannot possibly mean Mr.

[35] Rpp. 37-39.
[36] Rp. 176.
[37] Rp. 177.
[38] Rp. 177.

Wolfe's "expert evidence was presented to the jury" in constitutionally fair manner. Moreover, the trial court and Superior Court only considered the *way* Mr. Wolfe's "expert evidence was presented to the jury," it did not consider the *numerous advantages* the Commonwealth received as a result of Dr. Manion's absence.

The problem, however, is that this Court has not been presented with a fact pattern like this one – ever. Trial counsel and undersigned counsel have searched in vain for a Pennsylvania case factually congruent with Mr. Wolfe's. Their searches, unfortunately, produced no cases. With no Pennsylvania case on point, trial counsel had to reference a Florida civil case in support of Mr. Wolfe's post-sentencing motion. Likewise, the trial court presumably found no Pennsylvania cases to draw from because, had it identified any, one would think it would have referenced them in its opinion and explained how they supported its position upholding its refusal to grant a mistrial. Ditto regarding the Superior Court, as it simply cut and pasted the trial court's opinion and then wrote two paragraphs that mimicked the trial court's opinion.

With no case on point, Mr. Wolfe believes the trial court and Superior Court lacked the proper guidance on how to assess the impact of an absentee defense expert, especially when the defense expert represented the defendant's strongest and most realistic hope of raising reasonable doubt. Thus, Mr. Wolfe is petitioning this Court to grant review so it can articulate – *for the first time* – the proper legal analysis trial courts must undertake when assessing the impact of an absentee defense expert.

A mistrial is required "when an incident is of such a nature that its unavoidable effect is to deprive appellant of a fair trial." *Commonwealth v. Chambers*, 599 A.2d 630, 637 (Pa. 1991); Pa.R.Crim.P. 605(B). Thus, under Rule 605B, the trial court must examine whether the "incident" at issue rendered the defendant's trial unfair. If so, the mistrial must be granted. Most mistrial requests, though, concern inappropriate comments/testimony by the trial court, prosecutor, and witnesses or the introduction/mentioning of inadmissible/prejudicial evidence. In these situations, the trial court can generally assess the impact of the inappropriate comments/testimony and inadmissible/prejudicial evidence because it heard and saw the comments/testimony, it heard and saw the inadmissible/prejudicial evidence, it heard and saw all the other evidence, and it observed the fact-finders throughout the trial as all these things occurred.

The impermissible comments/testimony and inadmissible/prejudicial evidence cases, though, are fundamentally different than when a witness fails to appear, particularly the defendant's most important "reasonable doubt" witness, due to a family medical emergency or some other reason outside the defendant's control. Regardless the reason for the witness's absence, the trial court must still, somehow, assess the impact of the witness's absence, assuming it is even possible to do so meaningfully and fairly.

To make matters more complicated, what if (1) the defendant's case hinged on a "battle of the experts" and (2) the absentee witness is none other than the defendant's star expert who represents his strongest and most realistic hope of raising reasonable doubt because the expert's opinion is being presented to discredit the Commonwealth's expert's opinion and to provide the jury with, what the defendant believes to be, a more medically accurate opinion regarding the most fundamental trial issue? In Mr. Wolfe's case, the fundamental trial issue concerned Quinn's injuries, namely *when* were they inflicted and *is it medically possible* to time-stamp her injuries to a narrow two-hour period between 10 a.m. and noon on November 12, 2013.

Simply put, while one hopes what happened to Mr. Wolfe will not be a reoccurring theme in Pennsylvania criminal cases, in the unfortunate event it does happen again, the trial courts need guidance from this Court on how to assess the impact of a critically important absentee witness, be it an expert or an exculpatory fact witness, when determining whether the critical witness's absence renders the defendant's trial unfair under Pa.R.Crim.P. 605(B) and due process principles.

Consequently, Mr. Wolfe presents two questions of *first impression* for the Court's consideration:

> **<u>Question #1</u>: Under Pa.R.Crim.P. 605(B), what is the proper analysis a trial court must use when assessing the impact of a "critical" absentee defense witness to determine whether the "critical" witness's absence will render the defendant's trial unfair?**

<u>Question #2</u>: When the defendant's criminal case hinges on a "battle of the experts," and the defendant's expert refuses to appear at trial and testify on the defendant's behalf due to a family medical emergency or some other reason, is the defendant's trial rendered unfair under Pa.R.Crim.P. 605(B) and his due process right to a fair trial violated when (1) the trial court "remedies" the situation by having a non-expert, lay person, *i.e.*, trial counsel, read the defense expert's complicated, pre-trial report into the record (a) with no explanation of the report's complex medical terms, findings, and opinions, and (b) no opportunity to use demonstrative exhibits to make the report's findings and opinions more comprehensible to the fact-finder, (2) the Commonwealth was permitted to question its own two experts and, in fact, used more than ten demonstrative exhibits while doing so, and (3) the trial court instructed the jury that when "judging" the "credibility" of the Commonwealth's and defense's experts it had to consider such things as (a) "how well" the expert "remember[ed] and describe[d] the things about which he or she *testified*" about, (b) whether "the witness *testif[ied]* in a convincing manner," and (c) "[w]as his or her *testimony* uncertain, confused, self-contradictory or evasive."

STATEMENT OF REASONS FOR ALLOWING APPEAL

There is a "special and important" reason, Pa.R.A.P. 1114(a), to grant review in Mr. Wolfe's case: his two questions presented are ones of "first impression." Pa.R.A.P. 1114(b)(3). Trial counsel, undersigned counsel, the trial court, and the Superior Court all did not find a single Pennsylvania case on point. Instead, trial counsel referenced a Florida civil case, *Fisher v. Perez*, 947 So.2d 648 (Fla. App. 2007), in Mr. Wolfe's post-

sentencing motion.[39] *Fisher*, though, is not fully congruent with Mr. Wolfe's case because it is a civil case and there are fundamental constitutional differences between the burdens of proof in civil and criminal cases and the trial rights bestowed to criminal and civil defendants.

Likewise, trial counsel and undersigned counsel both cited *Commonwealth v. Thompson*, 281 A.2d 856 (Pa. 1971) in Mr. Wolfe's post-sentencing motion and opening brief to the Superior Court.[40] While *Thompson* makes clear a defendant must be "afforded an opportunity to present fully his version of events which led to his arrest," *id.* at 858, *Thompson* is also not fully congruent with the problem presented in Mr. Wolfe's case. *Thompson* dealt with the trial court usurping the defendant's case-in-chief and preventing him from presenting additional evidence in his favor. This did not happen in Mr. Wolfe's case. The trial court did not *directly* prevent Mr. Wolfe from introducing evidence. Instead, the trial court permitted Mr. Wolfe's trial to proceed even though it knew Mr. Wolfe had no way of "fully" presenting "his version of events" without Dr. Manion's presence at trial.

Additionally, while there is no Pennsylvania case on point, Mr. Wolfe believes the trial court and Superior Court utilized the wrong "fairness" and/or "prejudice" analysis to determine whether Dr. Manion's absence rendered his trial unfair under state and federal law. While Mr. Wolfe hopes what happened to him will not happen to

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[39] Rpp. 7-9.
[40] Rpp. 6-7, 95.

other criminal defendants, it is bound to happen again at some point, meaning the lower courts need guidance from this Court. Put differently, the questions presented are of "substantial public importance" requiring a "prompt and definitive resolution" by this Court. Pa.R.A.P. 1114(b)(4).

Lastly, Mr. Wolfe's case is procedurally sound, making it a perfect vehicle for the Court to address these questions of first impression. Mr. Wolfe raised and fairly presented his Pa.R.Crim.P. 605(B) and due process arguments to the trial court and Superior Court as required by Pa.R.A.P. 302(a).[41] Thus, the questions presented are properly before this Court.

REASONS FOR ALLOWING APPEAL

I. The trial court erred and violated Mr. Wolfe's Pa.R.Crim.P. 605(B) and due process rights by refusing to grant his request for a mistrial after his most important witness, Dr. William Manion, failed to appear for trial, despite repeatedly giving trial counsel verbal and written assurances he would appear at trial and testify on Mr. Wolfe's behalf. 1. U.S. Const. amdts. 6, 8, 14; Pa. Const. art. I, § 9, 23.

A. The mistrial and due process standards

A mistrial is required "when an incident is of such a nature that its unavoidable effect is to deprive appellant of a fair trial." *Commonwealth v. Chambers*, 599 A.2d at 637; Pa.R.Crim.P. 605(B). This simply begs the question of what constitutes a "fair trial" under due process principles. Due process, notably, "speak[s] to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

[41] Rpp. 6-11, 91-101.

Likewise, due process in the criminal trial context is "the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

Mr. Wolfe's case is a quintessential example of how Dr. Manion's absence shifted the "balance of forces" so in favor of the Commonwealth that it rendered Mr. Wolfe's trial fundamentally unfair. Likewise, once this prejudicial shift occurred, the trial court should have stopped the trial because, at that point, Dr. Manion's absence deprived Mr. Wolfe of a "fair opportunity" to "defend against" Dr. Esernio-Jenssen's time-dating testimony.

Dr. Manion's *live testimony* represented the linchpin of Mr. Wolfe's defense. Without it, Mr. Wolfe could not receive a fair trial. Reading Dr. Manion's report into the record did not cure the prejudice. Rather, it accentuated it because by depriving Mr. Wolfe of a full and fair opportunity to present Dr. Manion's report in a manner that made his findings and conclusions easily comprehensible by the jury. The Commonwealth was able to do this with its two experts with the help of their live testimony, ten demonstrative exhibits, and rebuttal testimony. Dr. Manion's absence, however, deprived Mr. Wolfe of all these credibility enhancing tools.

B. This case turned on the jury's assessment of the experts' credibility, which required that both parties be afforded the same tools and processes to establish and/or enhance their expert's credibility

The Commonwealth's case against Mr. Wolfe hinged entirely on Dr. Esernio-Jenssen testimony. Indeed, detectives said Quinn's death investigation sat dormant for two years because, before Dr. Esernio-Jenssen entered the fray, they could not eliminate

Sanchez, her parents – Lori Sanchez and Gary Sanchez, and Mr. Wolfe as possible suspects who could have inflicted Quinn's fatal injuries.

Detectives could not eliminate these four people because they could not find an expert who had the ability – or better yet, willingness – to date-stamp Quinn's injuries to such a narrow, two-hour time frame, thus eliminating all suspects but one. However, this is exactly what Dr. Esernio-Jenssen did. She told detectives and the jury that Quinn's head injuries had to be inflicted between 10 a.m. and noon on November 12, 2013 – the exact time Quinn was in Mr. Wolfe's care.

With the Commonwealth's case based solely on the opinion of a single expert, the need for a defense expert was obvious, especially in a shaken baby-type case where *date-stamping* certain injuries, particularly intercranial injuries, is inexact and quite subjective. *Cf.* Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 Wash. U. L. Rev. 1, 10 (2009). One commentator recently explained the significance of *date-stamping injuries* in these types of child death cases:

> SBS proponents maintain that any person is capable of inflicting this type of abuse "[i]n the flick of an instant," even someone of "flawless character." If this is truly the case, then evidence regarding timing of the injury is essential to a sound conviction. If an even-tempered individual with no prior history of violence is capable of such an act, and if such significant injury can in fact be produced in as little as two or three seconds, *then anything but the most precise and reliable timeline leaves the possibility that someone other than the accused could be responsible.* The potential for a lucid interval between injury and presentation of observable symptoms creates a possibility for alternate theories that should rise to the level of reasonable doubt in perhaps a significant number of cases.

> Where new science has thus created debate where near-unanimity previously existed, the potential to affect the jury verdict is high.

Comment, *Shaken to the Core: Emerging Scientific Opinion and Post-Conviction Relief in Cases of Shaken Baby Syndrome*, 42 Ariz. St. L.J. 1305, 1324-1325 (2011) (footnotes omitted).

Cognizant of the need to rebut Dr. Esernio-Jenssen's narrow date-stamping opinion, trial counsel retained Dr. Manion ten months before trial and paid him a $6,500 appearance fee to review Quinn's medical records and injuries and to testify on Mr. Wolfe's behalf at trial if his findings and opinions supported Mr. Wolfe's defense. Dr. Manion reviewed Quinn's medical records and other documentation. Based on the nature of Quinn's injuries, particularly her brain injuries, Dr. Manion opined that Quinn's injuries were likely inflicted days or weeks before November 12, 2013.

The jury obviously received Dr. Manion's findings and conclusions, but the way the jury received them rendered Mr. Wolfe's trial unfair under Pa.R.Crim.P. 605(B) and due process principles. Having a non-expert, lay person, *i.e.*, trial counsel, read into the record a forensic report's findings and conclusions regarding a very complex issue, *i.e.*, intercranial brain injuries and when they could have been inflicted, prevented Mr. Wolfe from "*fully*" presenting his "version of events" regarding how and when Quinn suffered her fatal injuries. As *Thompson* makes clear, due process requires that the defendant be "afforded an opportunity to present *fully* his version of events which led to his arrest." *Commonwealth v. Thompson*, 281 A.2d at 858 (emphasis added).

This is especially true in a case like this one where Mr. Wolfe's freedom turned on the jury's assessment of Dr. Esernio-Jenssen's and Dr. Manion's credibility. Indeed, during the closing jury instructions, the trial court instructed the jury to rely on its credibility assessments when evaluating conflicting expert opinions:

> In this case, the testimony and opinions of the experts you heard from seem to conflict with each other. If you find that the conflict is more than superficial, that the conflict is real and irreconcilable, you may decide what parts, if any, of the contradictory testimony and opinions you choose to believe. In doing this, you should consider the relative *credibility* of each *expert* and his or her *testimony* and opinions.[42]

The trial court then told the jury it should "consider" the following "factors" when "judging credibility and deciding whether or not to believe" an expert's testimony and opinion(s):

> Was the witness able to see, hear or know the things about which he or she *testified*. How well could the witness remember and describe the things about which he or she *testified*.
>
> Was the ability of the witness to see, hear, know, remember or describe those things [*testified* about] affected by youth, old age or any physical, mental or intellectual deficiency.
>
> Did the witness *testify* in a convincing manner. How did he or she look, act and speak while *testifying*. Was his or her *testimony* uncertain, confused, self-contradictory or evasive.[43]

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[42] NT, Trial, 1/26/2017, p. 109.
[43] NT, Trial, 1/26/2017, pp. 101-102.

As the trial court's instructions make clear, evaluating an expert's credibility rests primarily, if not entirely, on whether the expert "testified," and if he or she did, whether they did so "in a convincing manner." Moreover, every credibility factor mentioned in the trial court's instructions focused on the expert's *live trial testimony*. These considerations, without question, unfairly skewed, to the Commonwealth's substantial advantage, the jury's credibility assessments of the experts. And let's be honest, the Commonwealth's advantage is more aptly described as windfall.

The jury had a wealth of testimony and demonstrative exhibits to rely on when assessing Drs. Esernio-Jenssen's and Frasier's credibility and the reliability of their findings and opinions. The prosecutor, importantly, used ten demonstrative exhibits (C-11 to C-20) to help Dr. Esernio-Jenssen verbally and visually explain her findings and opinion so they were more comprehensible for the jury.[44]

For Dr. Manion, however, the jury had a single report that was read verbatim into the record by a lay person, *i.e.*, trial counsel, with no demonstrative exhibits or explanations/definitions regarding the report's complex medical phrases, findings, and conclusions. Put differently, a hard copy and cold reading of Dr. Manion's report prevented trial counsel from using demonstrative exhibits to verbally and visually explain the nature of Quinn's injuries and why they were likely inflicted days or weeks before November 12, 2013. Thus, the inability to use demonstrative exhibits to visually

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[44] NT, Trial, 1/23/2017, pp. 31-39.

explain Dr. Manion's findings and opinions, prevented Mr. Wolfe from making Dr. Manion's findings and opinions more comprehensible to the jury.

Similarly, the absence of Dr. Manion's in-court testimony prevented trial counsel from asking Dr. Manion questions relating to Dr. Esernio-Jenssen's *trial testimony* – with the intent of undermining her *trial testimony* and pre-trial report. Thus, while the findings and conclusions in Dr. Manion's report obviously differed from Dr. Esernio-Jenssen's pre-trial report, his report did not and could not rebut her *trial testimony*.

The best way to understand the unfairness of this deprivation is to view what the Commonwealth did *after* trial counsel had read Dr. Manion's report into the record. The Commonwealth presented Dr. Lori Frasier for the sole purpose of rebutting Dr. Manion's findings and conclusions. Indeed, the prosecutor asked Dr. Frasier numerous questions relating to Dr. Manion's findings and conclusions. Dr. Frasier answered these questions - *in the jury's presence* - by continually challenging or discrediting Dr. Manion's findings and conclusions.[45]

In the end, then, the Commonwealth (1) had its two experts testify before the jury, (2) it used demonstrative exhibits during their testimony to make their findings and opinions more comprehensible, and (3) it presented a rebuttal expert who repeatedly claimed Dr. Manion's report was unreliable and wrong. Mr. Wolfe,

[45] NT, Trial, 1/25/2017, pp. 80-135.

unfortunately, did not have the ability to do any of these "credibility enhancing" tasks due to Dr. Manion's absence and the trial court's refusal to grant a mistrial.

It is this *asymmetry*, created by the absence of Dr. Manion's *in-court testimony*, that made Mr. Wolfe's trial fundamentally unfair under state and federal law. More specifically, the asymmetry impacted the jury's credibility assessments of Dr. Esernio-Jenssen, Dr. Frasier, and Dr. Manion to Mr. Wolfe's detriment and the Commonwealth's windfall. The jury, for instance, had the luxury of relying on not only live testimony, but ten demonstrative exhibits when assessing Dr. Esernio-Jenssen's credibility and the reliability of her date-stamping testimony. The demonstrative exhibits helped the jury better comprehend her testimony, which made her testimony appear credible. The logic is simple: the easier the jury can comprehend an expert's opinion(s), the easier it is for the jury to find the expert and her opinion(s) credible and reliable. Comprehension and credibility, therefore, are two peas in a pod.

When it came to assessing Dr. Manion's credibility, however, the jury did not have the luxury of (1) demonstrative exhibits, (2) testimony from him explaining unfamiliar and complex medical terms, (3) his assessment of Dr. Esernio-Jenssen's trial testimony, or (4) his responses to the Commonwealth's criticisms of his report. Rather, the jury only had trial counsel's verbatim reading of the report into the record and the actual report.[46]

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[46] Dr. Manion's report was marked D-14 and admitted into evidence. NT, Trial, 1/26/2017, p.16.

The jury, therefore, did not have the necessary facts, demonstrative exhibits, and live testimony to *equally* comprehend Dr. Manion's, Dr. Esernio-Jenssen's, and Dr. Frasier's findings and conclusions. The *inequality* in the jury's credibility determinations rendered Mr. Wolfe's trial fundamentally unfair because it gave the Commonwealth an unconstitutional advantage over the most important issue at Mr. Wolfe's trial: the experts' credibility. Due process, as mentioned, "speak[s] to the balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. at 474. Here, there was no "*balance* of forces." Instead, the scales of justice tilted entirely to the Commonwealth's side, rendering Mr. Wolfe's trial unfair under Pa.R.Crim.P. 605(B) and due process principles.

C. The trial court and Superior Court focused on the wrong factors when determining whether Mr. Wolfe received a fair trial

The trial court identified four things that it said removed all unfairness or prejudice created by Dr. Manion's absence: (1) it gave Mr. Wolfe "ample time" to "present and call witnesses,"[47] (2) it allowed Mr. Wolfe to present Dr. Manion's report "without any opportunity for cross-examination,"[48] (3) it "suggested" to the jury that Dr. Manion's absence was due to an "unavoidable personal emergency,"[49] and (4) it gave Mr. Wolfe a "favorable cautionary instruction" when it told jurors it could not draw "negative conclusions" against Mr. Wolfe or Dr. Manion based on Dr. Manion's

[47] Rp. 37.
[48] Rp. 38.
[49] Rp. 38.

absence.[50] The Superior Court affirmed based on these exact reasons. The Superior Court, for instance, said "it was important to point out… that Dr. Manion's report was presented without the opportunity for cross examination" and that trial court "gave multiple instructions" to the jury.[51]

These factors miss the point. The starting must be Mr. Wolfe's due process right to a fair trial.

1. The time allotted to a defendant to present his defense has little, if any, probative value to the question of whether the defendant's trial was rendered unfair when his most important defense witness failed to appear due to a family medical emergency

How much time the trial court gave the defendant to present his defense at trial, has nothing to do with whether a defense expert refuses to appear at trial. For instance, the trial court could have given trial counsel two weeks to procure Dr. Manion's appearance. If Dr. Manion still refused to appear after two weeks, even after being served a bench warrant, and the trial court still refused to declare a mistrial, Mr. Wolfe's trial would still be unfair, despite being afforded two weeks to procure Dr. Manion's appearance. Thus, the time allotted to a defendant to present his evidence and witnesses cannot answer the question of whether a critical defense witness's absence at trial rendered the defendant's trial unfair.

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[50] Rp. 38.
[51] Rp. 177.

2. That Dr. Manion's report was not subject to cross-examination does not mean the Commonwealth was deprived of an opportunity to discredit the report's findings and conclusion because the Commonwealth did exactly this when it called Dr. Frasier as a rebuttal witness and Dr. Frasier repeatedly claimed Dr. Manion's finding and conclusions were wrong or not based on accurate facts

The trial court's and Superior Court's heavy focus on the fact Dr. Manion's report was not subject to cross-examination is a red herring. It creates the illusion the Commonwealth was entirely deprived of any opportunity to undermine or discredit Dr. Manion's report. Nothing could be further from the truth. The Commonwealth did just this when it called Dr. Frasier as a rebuttal witness, who repeatedly called in question various aspects of Dr. Manion's report, plainly suggesting to the jury he premised his report on incorrect facts and unsound medical reasoning.[52]

If anything, the lack of cross-examination *prejudiced* Mr. Wolfe. The questions the Commonwealth asked Dr. Frasier about Dr. Manion's report during its rebuttal, would have, presumably, been directed at Dr. Manion directly had he testified. Without Dr. Manion's live testimony, though, it prevented Dr. Manion from confronting and addressing the Commonwealth's concerns and criticisms head on in the jury's presence. Had Dr. Manion addressed these questions, the jury, for all we know, could have found his answers competent, reliable, and convincing, which could have shifted the jury's credibility assessment in favor of Dr. Manion rather than Dr. Esernio-Jenssen. Thus,

[52] NT, Trial, 1/25/2017, pp. 80-135.

in Dr. Manion's absence, the Commonwealth was free to argue – *with no counter-argument* from Mr. Wolfe or Dr. Manion – that Dr. Manion based his report on inaccurate, incomplete, and/or misleading facts and unsound medical reasoning. In the end, then, it was the Commonwealth who benefited from the lack of cross-examination and Dr. Manion's absence.

In short, the trial court's and Superior Court's focus on the lack of cross-examination showed an inherent imbalance in both court's perspectives on Mr. Wolfe's trial. Both courts took the myopic view that the lack of cross-examination harmed the Commonwealth, but neither court stepped back to consider the bigger picture and how, exactly, the lack of cross-examination *helped* and *benefited* the Commonwealth far more than it helped Mr. Wolfe.

3. The trial court's "favorable" instructions not to draw adverse inferences due to Dr. Manion's absence did not cure the prejudice created by Dr. Manion's absence because these instructions conflicted with the trial court's instructions regarding how the jury was to "judge" and "weigh" the experts' credibility

The trial court's "favorable" instructions to the jury not to draw adverse inferences against Mr. Wolfe's culpability and Dr. Manion's credibility, based on Dr. Manion's absence, did not cure the prejudice created by Dr. Manion's absence.

First, not drawing adverse inferences from Dr. Manion's absence was the least of Mr. Wolfe's concerns. Having the jury *not* hear and see his most important witness's testimony regarding the most important issue at trial, *i.e.*, the timing of Quinn's injuries,

was his most pressing concern for Mr. Wolfe. Put differently, by the time the trial court gave her no adverse inference instructions, Mr. Wolfe's trial had already been rendered unfair, so these instructions were too little, too late and they did not remove the unfairness created by Dr. Manion's absence.

Second, the trial court's closing instructions nullified the no adverse inference instructions. The trial court, as mentioned, instructed the jury that when opposing experts "conflict with each other" it "should consider the relative credibility of each expert and his or her *testimony* and opinions."[53] The trial court then told the jury to "consider" the following "factors" when "judging" the expert's "credibility and deciding whether or not to believe [the expert's] testimony": (1) whether the expert was "able to see, hear or know the things about which he or she *testified*"; (2) whether the expert "could… remember and describe the things about which he or she *testified*"; (3) whether the expert's "ability… to see, hear, know, remember or describe those things [he or she *testified* about were] affected by youth, old age or any physical, mental or intellectual deficiency"; (4) whether the expert "*testif[ied]* in a convincing manner"; (5) how did the expert "look, act and speak while *testifying*"; and (6) whether the expert's "*testimony*" was "uncertain, confused, self-contradictory or evasive."[54]

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[53] NT, Trial, 1/26/2017, p. 109.
[54] NT, Trial, 1/26/2017, pp. 101-102.

Each "credibility" factor, remarkably, requires the jury to focus on the expert's *in-court testimony*. Thus, while the trial court instructed the jury not to draw adverse inferences regarding Dr. Manion's credibility, if jurors are presumed to follow the trial court's instructions, as the Superior Court emphasized,[55] how could the jury's assessment of Dr. Manion's credibility not be adversely affected by his total absence from trial when each "credibility" factor required the jury to focus on the manner in which the he *testified at trial*.

Stated differently, if the jury is repeatedly told to assess an expert's credibility by examining and considering multiple aspects of his or her *trial testimony*, yet the expert never testified, how can the jury fairly and meaningfully assess the non-testifying expert's credibility – without drawing any sort of adverse inferences based on his absence?

The answer is simple: although the jury is presumed to follow the trial court's instructions, this is only true when the instructions are *congruent with* one another and can both be followed. Here, the trial court's "no adverse inference" instructions are *incongruent* with its assessing "credibility" instructions. Thus, following one set of instructions, required the jury to disregard the other set of instructions. The trial court and Superior Court, however, never examined this incongruency and asked whether it rendered Mr. Wolfe's trial unfair because the incongruency all but forced the jury to

[55] Rp. 177.

draw adverse inferences and conclusions against Dr. Manion's credibility – and the entire case turned on the jury's assessment of the opposing experts' credibility.

4. The Superior Court's claim that Mr. Wolfe's "expert evidence was presented to the jury" is wrong because, by proceeding with the trial in Dr. Manion's absence, Mr. Wolfe could not "fully" present his "version of events" that resulted in his arrest as required by *Thompson*

The Superior Court's claim that Mr. Wolfe's "expert evidence was presented to the jury," simply begs the question of how due process defines "evidence" in the criminal trial context. According to *Thompson*, a defendant's due process right to present evidence in his favor is properly vindicated *only* when he can "present *fully* his version of events which led to his arrest[.]" *Commonwealth v. Thompson*, 281 A.2d at 858. This did not happen at Mr. Wolfe's trial.

The trial court in *Thompson* altogether stopped the defendant's presentation of evidence and declared him guilty before the defendant was able to "present fully his version of events which led to his arrest." The trial court did not stop Mr. Wolfe from presenting evidence in his favor, as in *Thompson*. However, its refusal to grant a mistrial based on Dr. Manion's absence, and its endorsement of the Commonwealth's suggestion of simply reading Dr. Manion's report into the record, had the same *impact* on Mr. Wolfe as the trial court's actions in *Thompson* had on that defendant. By forcing Mr. Wolfe to proceed with his trial without his most critical defense witness's *testimony* regarding his report, findings, and conclusions, Mr. Wolfe could not "present fully" what he believed to be the true timing and origins of Quinn's fatal injuries.

In other words, "fully" presenting his "defense evidence" encompassed the subsidiary and commonsensical *right* to present evidence regarding Dr. Manion's *credibility*. As the trial court's own instructions explained, assessing an expert's credibility is based entirely on how that expert *testified* at trial. Thus, by proceeding with Mr. Wolfe's trial without Dr. Manion's in-court testimony, this deprived Mr. Wolfe of his ability to "fully" present his most critical defense evidence regarding Quinn's injuries because he was completely deprived of presenting evidence regarding Dr. Manion's credibility.

Consequently, the Superior Court's claim Mr. Wolfe received a fair trial because the "defense's expert evidence was presented to the jury" is inaccurate and wrong.

D. What a proper "fairness" or "prejudice" analysis should focus on in cases where the defendant's most critical expert refuses to appear

Mr. Wolfe respectfully presents what he believes to be a proper "fairness" or "prejudice" analysis in those cases where a critical defense expert refuses to appear or testify on the defendant's behalf.

First, Mr. Wolfe believes the analysis should start with how the absentee expert factored into the defendant's defense at trial. Mr. Wolfe concedes that not all defense experts – or their absence – will render a defendant's trial unfair. Here, however, Mr. Wolfe's freedom all but depended on Dr. Manion appearing and educating the jury – *verbally and visually* – about why Quinn's injuries were very likely inflicted days or weeks before November 12, 2013. The absence of Dr. Manion's live testimony prevented Mr.

Wolfe from fully presenting evidence regarding Dr. Manion's credibility – and this case, as mentioned, turned entirely on how the jury assessed Dr. Manion's and Dr. Esernio-Jenssen's credibility. Thus, this leads to Mr. Wolfe's next consideration.

Second, the trial court should focus on whether the defendant's case represented a true "battle of the experts," where the Commonwealth's and the defendant's case depended entirely on an expert's or experts' opinions. Here, the Commonwealth did not arrest and prosecute Mr. Wolfe for more than two years after Quinn's death because no expert would do what Dr. Esernio-Jenssen did, *i.e.*, time-stamp Quinn's injuries into a remarkably narrow two-hour time frame from 10 a.m. to noon on November 12, 2013. Thus, the Commonwealth's case depended entirely on Dr. Esernio-Jenssen's time-dating opinion. Mr. Wolfe's freedom, therefore, depended entirely on discrediting this opinion by introducing expert testimony of his own establishing that Quinn's fatal injuries were likely inflicted days or weeks before November 12, 2013.

Third, the question should not be restricted to whether the defendant's "expert evidence was presented to the jury," which is how the trial court and Superior Court approached the issue. Instead, the question should also encompass how the Commonwealth, directly or indirectly, benefited from the defense expert's absence. Here, as mentioned, the Commonwealth obtained a windfall of benefits:

No use of demonstrative exhibits: By simply reading Dr. Manion's report into the record, the Commonwealth obtained a significant credibility enhancing advantage, *i.e.*, this process prevented trial counsel from using demonstrative exhibits to make Dr.

Manion's findings and conclusions more comprehensible to the jury. The prosecutor, on the other hand, used ten demonstrative exhibits while conducting his direct-examination of Dr. Esernio-Jenssen. Advantage: Commonwealth.

Unable to directly address the Commonwealth's criticisms: As noted, the inability to cross-examine Dr. Manion benefited the Commonwealth greatly. It deprived Dr. Manion from comprehensively, intelligently, and convincingly addressing the Commonwealth's criticisms of his report head on – *in front of the jury*. Again, for all we know, had Dr. Manion had this opportunity, and had he addressed and answered each criticism in a straightforward, fact-based, intelligent way, this could have easily swung the jury's credibility assessment of the experts in his favor – which, by proxy – would have benefited Mr. Wolfe and, likely, raised reasonable doubt. Again, though, we will never know this due to the trial court's erroneous refusal to grant a mistrial. Advantage: Commonwealth.

The trial court's instructions: Collectively, the trial court's instructions, particularly those dealing with how the jury should "judge" an expert's "credibility," overwhelmingly benefited the Commonwealth because every "credibility" instruction told jurors to focus on the expert's *trial testimony* when "judging" their credibility. Advantage: Commonwealth.

The adverse inference: Based on the trial court's incongruent "no adverse inference" and "credibility" instructions, the jury could not, logically or ethically, adhere to both sets of instructions. *Cf. Smith v. Texas*, 543 U.S. 37, 46 (2004) (explaining how it is unreasonable to believe or presume that a jury was able to "give effect" to two sets of instructions where one set required the jury to consider the defendant's mitigation evidence, but the other set required the jury to disregard the defendant's mitigation evidence).

Thus, there is a very real likelihood the jury disregarded the former (no adverse inference) for the later (credibility). And the adverse inference regarding Dr. Manion was obvious to all parties, *i.e.*, Dr. Manion refused to appear on Mr. Wolfe's behalf because he was not buying what trial counsel was asking him to sell to the jury regarding Quinn's injuries. If jurors believed Dr. Manion was not buying what he was supposed to be selling to them, the next immediate inference is that Dr. Manion presumably believes Mr. Wolfe inflicted – or likely inflicted – Quinn's injuries. Advantage: Commonwealth.

CONCLUSION

WHEREFORE, Mr. Wolfe respectfully requests that the Court grant his petition based on one or both of his questions presented.

Respectfully submitted this the 18th day of February, 2019.

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CERTIFICATE OF SERVICE

On February 18, 2019, counsel e-filed this pleading on PAC-File. By e-filing the pleading, the Lehigh County District Attorney's Office received email notification of this filing and a PDF copy of Mr. Wolfe's pleading.

CERTIFICATE OF COMPLIANCE

Counsel certifies Mr. Wolfe's petition is under 9,000 words.

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MATTHEW WOLFE	:	
Appellant	:	No. 3553 EDA 2017

Appeal from the Judgment of Sentence June 13, 2017
In the Court of Common Pleas of Lehigh County
Criminal Division at No(s): CP-39-CR-0000423-2016

BEFORE: GANTMAN, P.J., LAZARUS, J., and OTT, J.

MEMORANDUM BY OTT, J.: **FILED JANUARY 31, 2019**

Matthew Wolfe appeals the judgment of sentence imposed on June 13, 2017, in the Court of Common Pleas of Lehigh County. A jury found Wolfe guilty of third-degree murder and endangering the welfare of a child, stemming from the death of his two-month-old daughter.[1] The trial court sentenced Wolfe to an aggregate term of 20 to 40 years' imprisonment. In this appeal, Wolfe raises six claims, challenging the trial court's denial of his request for a mistrial, refusal to charge the jury on involuntary manslaughter, several evidentiary rulings, and alleging cumulative prejudice. Based on the following, we affirm.

The facts are well known to the parties and are set forth in an extensive summary in the trial court's opinion. Therefore, we simply reiterate portions

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[1] 18 Pa.C.S. §§ 2502(c), and 4304(a)(1), respectively.

of the trial court's detailed factual summary to provide context for the claims raised in this appeal:

> On November 12, 2013, at approximately 2:00 p.m., Quinn Wolfe, a two-month-old infant girl, was transported by her father, Matthew Wolfe, hereafter [Wolfe], to St. Luke's Hospital located in Bethlehem, Lehigh County, Pennsylvania. Cristen Sanchez, the infant's mother, was employed by St. Luke's Hospital and the baby was brought to her by [Wolfe]. Shortly after arriving at the hospital, Dawn Bast, a registered nurse, observed the infant to be in distress and instructed her mother to take the infant to the emergency department immediately. When the infant was examined in the emergency room, multiple traumatic injuries were discovered on the infant's body. The infant was listed in critical condition and flown to St. Christopher's Hospital in Philadelphia, Pennsylvania. On November 18, 2013, approximately six days later, the infant Quinn was taken off life support and pronounced dead. An autopsy revealed that neurotrauma was the cause of death. A homicide investigation followed.
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> ****
>
> Whitehall Township Police Department launched an investigation immediately upon the child's arrival in Philadelphia. The case involved interviewing witnesses, medical records, and gathering information relating to the death of the infant. Detective Kevin Smith of the Lehigh County District Attorney's Office interviewed [Wolfe] while Quinn was being treated at St. Christopher's Hospital in Philadelphia, Pennsylvania. The interview was audio and video recorded and played for the jury. [Wolfe] denied shaking Quinn. The investigation stalled. Detectives faced difficulty on the timeline of Quinn's injuries and the burden of proof to make an arrest. In 2015, the case was resumed when a child abuse expert [Dr. Debra Esernio-Jenssen] was able to identify when the lethal event took place which caused Quinn's unfortunate death. On December 22, 2015, [Wolfe] was arrested for the murder of his baby daughter Quinn Wolfe.
>
> Commonwealth expert Dr. Debra Esernio-Jenssen was asked to review Quinn's medical records. Dr. [Esernio-]Jenssen is a pediatrician and Section Chief of Child Protection Medicine at Lehigh Valley Hospital. Dr. [Esernio-]Jenssen is board certified in

pediatrics and child abuse pediatrics. Dr. [Esernio-]Jenssen reviewed the medical records and history provided to the medical providers at both St. Luke's and St. Christopher's Hospital. Dr. [Esernio-]Jenssen discussed the process of evidence-based medicine. She explained it significant that [Wolfe] provided a history that indicated that his baby, Quinn, fed uneventfully three (3) to three and a half (3½) ounces, was put down on her back, and was fine. Dr. [Esernio-]Jenssen testified that a baby who suffered severe significant brain trauma that ultimately led to her demise would not be able to take three (3) to three and a half (3½) ounces of formula uneventfully and act normally. A child that suffers abusive head trauma would immediately show signs or symptoms. The infant would not have been able to feed, open her eyes, or be alert after suffering from such severe neurologic injuries. Dr. [Esernio-]Jenssen further explained that the lethal event occurred between a time she was acting "normal" and the time when she was brought to the hospital. Based upon a review of the circumstances Dr. [Esernio-]Jenssen opined the baby was grasped, violently shaken, and slammed. The only person that was alone with Quinn at such time was [Wolfe].

During cross-examination the Defense was permitted to impeach Dr. [Esernio-]Jenssen in a variety of ways. However, the Defense was not permitted unfettered cross-examination of the witness.

The Defense expert, Dr. William Manion, did not appear for trial. On or about March of 2016 the Defense retained Dr. Manion as an expert witness. On Saturday, January 21, 2017, Dr. Manion confirmed his court appearance through email correspondence with the Defense. On Monday, January 23, 2017, Dr. Manion was scheduled for a dinner reservation with defense counsel but never arrived. When defense counsel reached out, Dr. Manion assured the Defense that he would be present for trial. On Tuesday, January 24, 2017, Dr. Manion did not show for his scheduled court appearance. All attempts to contact Dr. Manion failed until approximately 11:30 a.m., when defense counsel received a call on his cellular telephone. Dr. Manion apologized and vowed that he would be present for court the following day. On Wednesday, January 25, 2017, Dr. Manion again failed to appear and the Defense requested a mistrial. This Court considered a continuance for a material witness warrant, but learned Dr. Manion is from out-of-state and was never subpoenaed. Further continuances would also prejudice the Commonwealth because their rebuttal expert

would be unavailable. After a lengthy discussion in chambers, a solution was provided by the Commonwealth stipulating to Dr. Manion's expert report. Dr. Manion's report was subsequently read verbatim to the jury. [The Court explained to the jury that Dr. Manion had experienced an unforeseen personal emergency that kept him from appearing, and would be unable to appear for the next couple of days. Defense counsel was permitted to present portions of Dr. Manion's CV and the entire report consisting of ten pages and a conclusion.]

Dr. Manion is an expert in forensic pathology. He reviewed the relevant medical records and other documents to formulate an opinion on whether [Wolfe] caused the death of his daughter Quinn Wolfe by purportedly inflicting injuries upon her on November 12, 2013. Dr. Manion did not believe that Dr. [Esernio-]Jenssen's opinion was supported by the facts or by sound medical conclusions. In his opinion, Quinn likely suffered a small subdural hematoma that later bled in an acute fashion when Quinn choked on her formula and had a spell of hypoxia in the crib. Dr. Manion believed, to a reasonable degree of medical certainty, that Quinn's injuries were not inflicted on that day, but rather were days or weeks old.

The Commonwealth called Dr. Lori Frasier in rebuttal. Dr. Frasier is employed by Penn State Health Medical Center, Penn State Health Children's Hospital, and Penn State Hershey College of Medicine, as a physician, pediatrician, child abuse pediatrician, and a professor of pediatrics. She is board certified as a pediatrician. Dr. Frasier reviewed Dr. Manion's report, Dr. Esernio-Jenssen's report, and the medical records for Quinn Wolfe. Dr. Frasier indicated Dr. Manion relied on records attributed to Dr. McColgan of St. Christopher's Hospital. When Dr. Frasier reviewed Dr. McColgan's report she noticed discrepancies. Dr. Frasier called Dr. McColgan. She was surprised by some of the statements Dr. Manion attributed to Dr. McColgan, partly because they seemed outside the norm of what a child abuse pediatrician would say.

Dr. Frasier clarified Dr. Manion's conclusion to the jury. However, Dr. Frasier explained that there was no sound evidence-based medicine that supported a cough or choke could cause a rebleed of an existing subdural hematoma. In addition, Dr. Manion was misleading when discussing no acute fractures. Quinn's skull fracture was an acute or new fracture. The child's leg had a fracture, called a metaphyseal fracture, near her ankle which was

> deemed acute. The metaphyseal fracture stands out because it is an injury highly indicative of an abusive event. Further, Dr. Manion failed to address the eye pathology reports of eye damage.
>
> Dr. Frasier opined, to a degree of medical certainty, that Quinn suffered a serious violent head injury in the moments before she became symptomatic from which she never recovered. If Quinn was already injured, she would not have been able to take a bottle. She would not have interacted with her environment in any way that was normal for a child of her age. Her color would have been off, her muscle tone would have been abnormal, and she would have looked like a child in distress. She would never have looked "normal" after the event occurred. In her opinion, it was clear that Quinn suffered from shaking and impact.
>
> On January 26, 2017, [Wolfe] was found guilty of Murder in the Third Degree and Endangering the Welfare of a Child.

Trial Court Opinion, 12/22/207, at 4, 11-15 (footnotes omitted).

Following the jury verdict, Wolfe filed a post-sentence motion, which was denied, and this appeal followed.[2]

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[2] This Court notes that the trial court initially sentenced Wolfe on March 17, 2017. After Wolfe filed his post-sentence motion on March 27, 2017, the trial court, on April 20, 2017, entered an order vacating the judgment of sentence. On June 13, 2017, the trial court re-sentenced Wolfe and entered a separate order finding the previously filed, March 27, 2017, post-sentence motion to be timely filed in light of the resentencing. On July 13, 2017, the Commonwealth filed a response in opposition to Wolfe's March 27, 2017 post-sentence motion. On October 10, 2017, the trial court denied Wolfe's post-sentence motion. On October 17, 2017, the trial court entered an amended order, denying the post-sentence motion and directing Wolfe to file an appeal within thirty days. Wolfe filed a notice of appeal on October 31, 2017.

In light of the foregoing procedure, namely, that after Wolfe filed his post-sentence motion, the trial court vacated the original sentence, resentenced Wolfe, and issued an order finding the previously filed post-sentence motion to be pending, we are compelled to call attention to Pennsylvania Rule of Criminal Procedure 720(B)(3), which provides that "[t]he

Wolfe raises the following six claims:

1. The trial court erred and violated Mr. Wolfe's state and federal due process rights by refusing to grant his request for a mistrial after his most important witness, Dr. Williams Manion, failed to appear for trial, despite repeatedly informing trial counsel he would appear.

2. The trial court erred and violated Mr. Wolfe's state and federal due process rights by refusing to charge the jury with involuntary manslaughter despite the fact Mr. Wolfe presented sufficient evidence to warrant an involuntary manslaughter charge.

3. The trial court erred and violated Mr. Wolfe's state and federal due process rights by prohibiting Mr. Wolfe from presenting Dr. Holly Warholick[3] to discuss the nature and severity of Cristen Sanchez's post-partum depression.

4. The trial court erred and violated Mr. Wolfe's state and federal due process and confrontation rights by prohibiting Mr. Wolfe from cross-examining Dr. Esernio-Jenssen regarding seven cases where courts and experts contradicted her shaken baby and/or child abuse findings.

5. The trial court erred by striking the entirety of Mr. Wolfe's character testimony regarding his peaceful and non-violent reputation. Appellate counsel was ineffective for failing to raise this claim in Mr. Wolfe's concise statement of errors.

6. The trial court's cumulative errors violated Mr. Wolfe's state and federal due process right to a fundamentally fair trial.

Wolfe's Brief at 2.

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judge shall not vacate sentence pending decision on the post-sentence motion."

[3] The correct spelling is Dr. Holli Warholic.

In his first issue, Wolfe contends the trial court erred and violated his state and federal due process rights by refusing to grant his request for a mistrial after his most important witness, Dr. William Manion, failed to appear for trial, despite repeatedly informing trial counsel he would appear.

> The following standards apply to our review of a trial court's denial of a motion for a mistrial:
>
> The trial court is vested with discretion to grant a mistrial whenever the alleged prejudicial event may reasonably be said to deprive the defendant of a fair and impartial trial. In making its determination, the court must discern whether misconduct or prejudicial error actually occurred, and if so, … assess the degree of any resulting prejudice. Our review of the resulting order is constrained to determining whether the court abused its discretion. Judicial discretion requires action in conformity with [the] law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason.
>
> "The remedy of a mistrial is an extreme remedy required only when an incident is of such a nature that its unavoidable effect is to deprive the appellant of a fair and impartial tribunal."

Commonwealth v. Bozic, 997 A.2d 1211, 1225-26 (Pa. Super. 2010) (citations omitted), *appeal denied*, 13 A.3d 474 (Pa. 2010), *cert. denied*, 563 U.S. 1025 (2011).

As stated above, after Dr. Manion failed to appear at trial, trial counsel moved for a mistrial, which the trial court denied, and Dr. Manion's report was read into the record by trial counsel. Wolfe maintains this case turned on the jury's assessment of the experts' credibility and, therefore, the trial court's ruling was in error.

Wolfe argues "Dr. Manion's *live testimony* represented the linchpin of Mr. Wolfe's defense [and w]ithout it, Mr. Wolfe could not receive a fair trial." Wolfe's Brief at 39 (italics in original). Wolfe contends that the reading of Dr. Manion's report into the record did not cure the prejudice, but rather accentuated it because it deprived Wolfe of a full and fair opportunity to present Dr. Manion's findings in a light most favorable to him. Wolfe asserts this case turned upon the jury's assessment of the experts' credibility, which required both parties be afforded the same tools and processes to establish and/or enhance their expert's credibility. Specifically, Wolfe argues the Commonwealth's case hinged on the testimony of one witness, Dr. Esernio-Jenssen, the Commonwealth's expert, who time-dated the victim's injuries. Wolfe claims he retained Dr. Manion whose opinion disputed Dr. Esernio-Jenssen's, but the manner in which the jury received Dr. Manion's findings and conclusions violated his due process rights. Wolfe asserts "due process requires that the defendant be 'afforded an opportunity to present *fully* his version of events which led to his arrest.'" Wolfe's Brief at 43, *citing* ***Commonwealth v. Thompson***, 281 A.2d 856, 858 (Pa. 1971). Wolfe argues his "version of events" required Dr. Manion's in-court testimony. Moreover, he asserts the reading of the report did not allow trial counsel the ability to use demonstrative exhibits nor the ability to question Dr. Manion regarding Dr. Esernio-Jenssen's trial testimony in order to rebut her testimony. As such, Wolfe contends the jury did not have the requisite tools for its assessment of

Dr. Manion, and this unfairly skewed the jury's credibility assessment regarding Dr. Esernio-Jenssen.

The Honorable Kelly L. Banach, in her Pa.R.A.P. 1925(a) opinion, expounded upon the rationale that she placed on the record at the time it denied the motion for mistrial:

> In *Thompson*, defendant appealed his criminal conviction as a violation of fundamental due process because he was foreclosed from presenting evidence. *Com. v. Thompson*, 444 Pa. 312, 316, 281 A.2d 856, 858 (1971). There, defendant was found guilty immediately after testifying and precluded from presenting any further evidence. Our Supreme Court vacated the sentence finding that a defendant should be afforded an opportunity to present fully his version of events including the ability to call witnesses on his behalf or have counsel make arguments to the court. *Id.*
>
> This Court, unlike *Thompson*, did not seek to limit or preclude the Defense from presenting evidence. The Defense was given ample opportunity to present evidence and call witnesses. [Wolfe's] expert was scheduled to testify but failed to appear through no fault of this Court. This Court made significant efforts to accommodate the Defense. When it was discovered that Dr. Manion was missing, this Court excused members of the jury for a break.[43] The Defense could not reach their witness. This Court then excused the jury for an early lunch.[44] It soon became clear the witness was not coming. This Court then adjourned early hoping to provide [Wolfe] additional time to locate his missing witness and present evidence on his behalf.[45] The delay of trial did not provide relief as [Wolfe's] expert failed to appear again on Wednesday, January 25, 2017. Unfortunately, this Court has no power over an out-of-state witness who was not subpoenaed. Therefore, [Wolfe's] assertion that this Court foreclosed evidence, after having provided ample opportunity to bring in the witness, and with no explanation for the witness's failure to appear, is without merit.

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[43] The recess occurred at 10:38 a.m.

> [44] This Court hoped to divert the jury's attention as attempting to secure witnesses for the afternoon rather than reveal the defense expert witness was missing.
>
> [45] Court was adjourned at 3:41 p.m.

****

… Here, although this Court provided sufficient time for the defense to locate their expert, defense counsel had no legitimate explanation for his failure to appear. A remedy was available and utilized. The Commonwealth agreed to have Dr. Manion's report read into the record in its entirety. This evidence was presented without any opportunity for cross-examination. This Court accommodated the defense by permitting this type of evidence, suggesting to the jury that Dr. Manion had an unavoidable personal emergency that prevented him from appearing in court, and subsequently providing a favorable cautionary instruction. These accommodations were sufficient given the circumstances.

The Court further disagrees with [Wolfe's] description of Dr. Manion's failure to appear as completely unforeseen. Defense counsel attached his correspondence with Dr. Manion in support of his motion for a new trial. In March of 2016, Defense counsel reached out to Dr. Manion. The defense did not hear back from Dr. Manion in April, May, or June despite being paid. On June 20, 2016, Dr. Manion's lack of communication was alarming enough that the defense considered hiring another expert. Sometime in July of 2016, when Dr. Manion was informed he would be replaced he finally made contact. Defense counsel's difficulty with Dr. Manion is apparent throughout the year. Defense counsel had to continually follow-up with Dr. Manion to respond to his communications and repeatedly had to request his written opinion. Dr. Manion subsequently missed the Court's November 1, 2016 deadline for a written report. According to defense counsel, Dr. Manion habitually ignored emails, did not return phone calls, and did not keep scheduled telephone conferences. After reviewing the exhibits, it seems clear that Dr. Manion's failure to appear at trial can hardly be described as unforeseeable.

Finally, the Court expressed concern about the precedent that would be established in granting a mistrial based on a witness

> failing to appear for court. In such cases, should either side feel that things were not "going their way," the sudden disappearance of a witness would open the door to potential manipulation.[51]
>
> ---
>
> [51] The defense or prosecution could utilize a mistrial to extend the time to prepare a new trial approach or simply get a new jury.
>
> ---
>
> Therefore, [Wolfe's] contention that this Court erred by failing to grant a mistrial because his expert continuously failed to appear is without merit and he is entitled to no relief.

Trial Court Opinion, 12/22/2017, at 15–18 (some footnotes omitted).

The trial court's analysis is well reasoned and we find no basis upon which to grant Wolfe relief. Here, it is significant that Dr. Manion's CV and report were presented to the jury by reading them into the record and numerous accommodations were made by the trial court.

Prior to the reading to the jury of Dr. Manion's CV and report by trial counsel, the trial court instructed the jury: "Dr. Manion has experienced an unforeseen personal emergency that kept him from appearing yesterday. He is unable and hasn't appeared today. And we don't believe that he will appear within the next couple of days, such that he is not available to us. It's something, again, that was unforeseen." N.T., 1/25/2017, at 34–35. The trial court proceeded to present the parties' stipulation that, "If called to testify, Dr. Manion would testify consistently with his report that will shortly

be read into the record.[4] It is further stipulated between all the parties that if Dr. Manion were called to testify, he would be qualified as an expert in the area of forensic pathology and he would be permitted to testify in the area of forensic pathology as an expert." ***Id.*** at 36. Dr. Manion's CV and his report were then read into the record by trial counsel, and thereafter the trial court reiterated to the jury: "You should not make any negative conclusions based on the fact that Dr. Manion was not available to be here today to testify and to support his report. Again, what we became aware of is an unforeseen emergency that kept him from being here both yesterday and today. And it's something that was beyond the control of both parties." ***Id.*** at 60.

While Wolfe argues the reading of Dr. Manion's report limited the jury's assessment of Dr. Manion's credibility, it is important to point out, as did the trial court, that Dr. Manion's report was presented without the opportunity for cross examination. Furthermore, the trial court gave multiple instructions to the jury concerning Dr. Manion that the jury is presumed to have followed. ***See Commonwealth v. Chamberlain***, 30 A.3d 381, 422 (Pa. 2011). Importantly, in this case, the defense's expert evidence was presented to the jury and, under the circumstances of this case, we find Wolfe has failed to demonstrate he was deprived of a fair and impartial trial. Accordingly, we

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[4] The record reflects that, notwithstanding the stipulation, Wolfe preserved his mistrial issue. ***See*** N.T., 1/25/2017, at 25-26.

discern no abuse of discretion on the part of the trial court in denying Wolfe's motion for the extreme remedy of a mistrial.

The remaining issues likewise warrant no relief. Issues Two, Three, and Four are fully addressed and properly rejected by the trial court and we decline to address them further. ***See*** Trial Court Opinion, 12/22/2017, at 18–25 (finding: (Issue 2) There was a substantial lack of evidence to support a charge of involuntary manslaughter — although Wolfe attempts to support the claim based upon Dr. Esernio-Jenssen's testimony as to whether the shaking of a child is an intentional act, there was no evidence suggesting the infant's injuries were caused by reckless or grossly negligent conduct in that the evidence revealed the child was not only shaken but subjected to an impact capable of causing a skull fracture; (Issue 3) The potential testimony of Dr. Holly Warholic as to the nature and severity of Cristen Sanchez's postpartum depression was prohibited as cumulative and collateral, and the court was mindful of the confidentiality of the witness's medical records; and (Issue 4) The limitation on the cross-examination of Dr. Esernio-Jenssen, regarding prior cases where the court ruled in favor of the opposing party and allegedly rejected Dr. Esernio-Jenssen's opinion was proper since rejection of Dr. Esernio-Jenssen's opinion in favor of a different opinion hardly classifies as a "misdiagnosis" or establishes bias, and Wolfe had established that in Dr. Esernio-Jenssen's prior court testimony her opinion had not always been

accepted, and that she appears a majority of time on behalf of the Commonwealth).

With regard to Issue Five, we find that because this claim was not raised in Wolfe's Pa.R.A.P. 1925(b) statement, it is waived, ***see*** Pa.R.A.P. 1925(b)(4)(vii), and we further conclude Wolfe's ineffectiveness claim in this regard must be deferred to collateral review. ***See Commonwealth v. Grant***, 813 A.2d 726, 738 (Pa. 2002) ("[A]s a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review."). ***See also Commonwealth v. Holmes***, 79 A.3d 562, 563-564 (Pa. 2013) (discussing the limited circumstances in which ineffectiveness of counsel claims may be addressed on direct appeal). Hence, we decline to review Wolfe's ineffectiveness claim, and dismiss that claim without prejudice to Wolfe's ability to seek relief pursuant to the Post Conviction Relief Act.

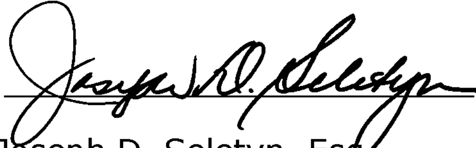
Finally, Issue Six is a claim of cumulative error. However,

> [w]e have repeatedly held that:
>
> an appellant cannot bootstrap a series of meritless claims into a cumulative claim of error. ***See Commonwealth v. Rolan***, 2008 PA Super 291, 964 A.2d 398, 411 (Pa.Super. 2008) ("No **number** of **failed** claims may **collectively** attain merit if they could not do so **individually**.") (quoting ***Commonwealth v. Williams***, 532 Pa. 265, 615 A.2d 716, 722 (Pa. 1992)) (emphasis in original).

Commonwealth v. Patterson, 180 A.3d 1217, 1233 (Pa. Super. 2018), *quoting* ***Commonwealth v. Kearney***, 92 A.3d 51, 62 (Pa. Super. 2014), *appeal denied*, 101 A.3d 102 (Pa. 2014). Therefore, we reject Wolfe's final claim.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/31/19

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	
vs.	No. 423/ 2016 3553 EDA 2017
MATTHEW WOLFE Appellant	

ORDER

AND NOW, this 22nd day of December, 2017, it appearing that the Appellant has filed a Notice of Appeal in the above-captioned matters; and it further appearing that the accompanying Memorandum Opinion satisfies the requirements of Pa.R.A.P. 1925(a);

IT IS HEREBY ORDERED that the Clerk of Courts-Criminal shall transmit the record in the above-captioned matter to the Superior Court forthwith.

By the Court:

Kelly L. Banach, J.

2017 DEC 22 PM 2:25

12/24/17 EAD

PERSONAL DELIVERY:
COLL PROS LCP C 330pm

REGULAR MAIL:
Cooler 200pm

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	
vs.	No. 423/ 2016 3553 EDA 2017
MATTHEW WOLFE Appellant	

OPINION

Kelly L. Banach, J.:

On March 7, 2016, the Appellant was arraigned on one count of Murder in the Third Degree[1] and one count of Endangering the Welfare of a Child.[2] On April 7, 2016, the Appellant filed Omnibus Pretrial Motions (hereinafter "OPTM"), and an OPTM Hearing was held on April 22, 2016, wherein the Court took the matters under advisement. On June 30, 2016, the Court denied the OPTM by order and opinion. On January 17, 2017, a Jury Trial commenced and on January 26, 2017, the Appellant was found guilty of both charges.

On March 27, 2017, Appellant filed a Motion for New Trial. On June 13, 2017, this Court resentenced Appellant to 18 to 36 years for Murder in the Third Degree, and a consecutive 2 to 4 years for Endangering the Welfare of a Child.[3] On June 13, 2017, the Court further ordered that motions previously filed were to be considered timely in light of the resentencing, including the Appellant's Post-Sentence Motion. On October 10, 2017, the Appellant's Post-Sentence Motion was denied.

[1] 18 Pa.C.S.A. §2502(c).
[2] 18 Pa.C.S.A. §4304(a)(1).
[3] The Defendant was initially sentenced to serve a concurrent 20 to 40 year sentence for both counts. The Defendant was resentenced to take into account the required consecutive nature of Endangering the Welfare of a Child pursuant to 42 Pa.C.S.A. §9711.1.

On October 31, 2017, the Appellant filed a Notice of Appeal. On December 6, 2017, the Appellant timely filed his Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). Appellant alleges that this Court erred in denying his request for a mistrial after the defense expert, Dr. William Manion, failed to appear for court. Appellant also alleges that this Court erred in failing to instruct the jury on the charge of Involuntary Manslaughter as an "alternative" to Murder in the Third Degree. Appellant further that alleges this Court erred with evidentiary rulings by prohibiting the testimony of Dr. Holly Warholic, and limiting cross-examination of Dr. Debra Esernio-Jenssen about alleged prior "misdiagnoses."

This Opinion follows.

SUMMARY OF THE FACTS

On November 12, 2013, at approximately 2:00 p.m., Quinn Wolfe, a two-month-old infant girl, was transported by her father, Matthew Wolfe, hereafter Appellant, to St. Luke's Hospital located in Bethlehem, Lehigh County, Pennsylvania. Cristen Sanchez, the infant's mother, was employed by St. Luke's Hospital and the baby was brought to her by Appellant. Shortly after arriving at the hospital, Dawn Bast, a registered nurse, observed the infant to be in distress[4] and instructed her mother to take the infant to the emergency department immediately. When the infant was examined in the emergency room, multiple traumatic injuries were discovered on the infant's body. The infant was listed in critical condition and flown to St. Christopher's Hospital in Philadelphia, Pennsylvania. On November 18, 2013, approximately six days later, the infant Quinn was taken off life support and pronounced dead. An autopsy revealed that neurotrauma was the cause of death. A homicide investigation followed.

Quinn Wolfe was born on August 20, 2013. Quinn resided with both her mother Cristen, who was 29 years old, and her father, Appellant Matthew Wolfe, at 1296 Forest Road in Whitehall Township, Lehigh County, Pennsylvania. Quinn's parents were in a steady unmarried relationship and became engaged at the end of 2012. Quinn's mother Cristen worked for St. Luke's Hospital, Bethlehem Campus, as a Registered Nurse (RN).[5] Quinn's father, Appellant Matthew Wolfe, was employed by Air Products.[6] Quinn's typical weekly routine involved her father watching her after her mother went to work before 12:00 p.m. Shortly before 3:00 p.m. her father would

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[4] Dawn Bast testified that Quinn was limp and nonresponsive.
[5] Cristen's work schedule was Monday through Friday from 12:00 p.m. to 8:00 p.m.
[6] Defendant's work schedule was Monday through Friday 3:00 p.m. to 11:00 p.m.

drop her off with her grandparents. Around 8:30 p.m. her mother would pick Quinn up from her grandparents and take her home.

On September 5, 2013, Quinn's parents brought her to the pediatrician's office for a follow-up visit due to increased crying and general fussiness. Cristen worried that the infant was possibly colicky. Dr. Anna Linderman examined Quinn. Bruising was discovered on the infant's torso. Appellant explained to Cristen that he had recently dropped the baby and had to catch her. Dr. Linderman did not make an issue out of the bruising and the infant was prescribed Axid to assist with any eating and reflux concerns.

On October 2, 2013, before Cristen Sanchez returned to work[7] she had a postnatal checkup with Holly Warholic, D.O. Cristen reported that she had a past medical history of anxiety disorder and depression. Cristen was diagnosed with mastitis[8] and postpartum depression. During cross-examination, Cristen was asked if she was diagnosed with a moderate case of postpartum depression. Cristen testified that she thought it was "mild." Cristen's postnatal records[9] showed that Dr. Warholic wrote moderate. Cristen was prescribed 25 milligrams of sertraline, also known as Zoloft, once a day. On October 11, 2013, Cristen went back to Dr. Warholic and the amount of medication was increased to 50 m.g.

On November 11, 2013, the day prior to the infant being brought to the hospital, she was in the care of four individuals – her parents and grandparents. That day, Cristen Sanchez and Appellant brought Quinn to the pediatrician's office around 10:10 a.m. before Cristen left for work. Dr. Kenneth Toff examined Quinn and

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[7] Cristen had eight (8) weeks off work after birth.
[8] Cristen described Mastitis as breast inflammation due to a clogged milk duct.
[9] Marked for identification as "D-1".

described it as a normal exam and that Quinn looked fine.[10] Cristen informed Dr. Toff of the continuing issues with Quinn including fussiness and difficulty eating. Dr. Toff discussed gastroesophageal reflux. The pediatrician was also concerned about Quinn's rate of weight gain. Quinn was considered small.[11] After addressing the reflux and weight issues, Dr. Toff informed the parents to increase the frequency of the Axid drops. Cristen took Quinn home and left for work.[12] Appellant watched the baby for a few hours. When Appellant left for work, Quinn was dropped off with her grandparents at 2010 Fairlane Avenue, Bethlehem, Pennsylvania.

At 7:20 p.m., Cristen left work and drove approximately four miles to the grandparent's house to pick up baby Quinn. Cristen stayed for around an hour and described Quinn as "fine, cooing, smiling, and looking all around." Grandparents did not report any problems or anything unusual about Quinn. Cristen brought Quinn home around 8:30 p.m. At that time, Appellant was still at work. Cristen placed the baby in her boppy[13] on the sofa. Cristen attempted to feed Quinn but it was a struggle. At 9:00 p.m. the baby was given a bath and Cristen took a picture[14] of Quinn in her bath. Around 10:00 p.m., the child was placed in bed and went to sleep.

Around 11:00 p.m., Appellant left work. Before he arrived home, baby Quinn had awoken and began crying. When Appellant came in from work and heard the crying, Cristen described Appellant as "angry." Cristen let the baby cry because it had only been going on for a few minutes. Cristen recalls that Appellant seemed annoyed with her that Quinn was crying. Appellant went upstairs to Quinn's room to feed her

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[10] Dr. Toff stated Quinn was undressed, weighed, and examined. He did not notice any bruising.

[11] Quinn weighed nine (9) pounds and thirteen (13) ounces.

[12] According to Cristen's time card she arrived to work at 11:52 a.m. and left work at 7:20 p.m.

[13] A boppy was described by Cristen Sanchez as a "C" shaped pillow that supports babies and can be used during breast feeding.

[14] Photograph of Baby Quinn was marked and admitted as Commonwealth Exhibit "C-1."

and the baby went back to bed. Cristen continued to watch television and then went to bed.

On November 13, 2013, at approximately 4:00 a.m. Cristen awoke to cries from the baby monitor. Cristen got up to take care of Quinn. Cristen fed Quinn about an ounce of formula.[15] Cristen held baby Quinn and rocked her for a little while and then the baby went back to sleep. Cristen described Quinn as her normal self. At approximately 4:30 a.m., Cristen left the room and went back to sleep.

Around 9:15 a.m.,[16] Cristen woke up for her appointment with her OB/GYN. Cristen didn't physically go to Quinn's room but checked on her through the baby monitor. At approximately 10:00 a.m., Cristen left the house and stopped at Babies-R-Us to pick up formula.[17] Cristen then went to her OB/GYN for a follow-up appointment and met with Dr. Warholic. Cristen told Dr. Warholic she noticed a difference from taking the Zoloft for her depression and she was feeling better. Cristen left the appointment and arrived at St. Luke's Hospital at 11:59 a.m.

Sometime after 1:00 p.m., Cristen recalls the Appellant reaching out to her about Quinn. Appellant made several calls to Cristen's cell phone.[18] Appellant was finally able to make contact with Cristen through her work phone. Appellant sounded very worried, and said "Quinn doesn't seem right." Appellant told Cristen he fed Quinn and that she threw up. Cristen told Appellant if Quinn was really not right then she should be taken to the ER. Appellant didn't think Quinn needed to be taken ER.

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[15] Cristen testified that she switched from breast milk to formula but the timeframe is not specific.

[16] Cristen informed the police her alarm was set for 9:15 a.m., but she hit the snooze button a couple of times before getting out of bed.

[17] A Babies-R-Us receipt showed Cristen purchased formula and giraffe rattle on November 12, 2013, at 10:27 a.m. Cristen clarified that she stopped at the store for formula but grabbed the rattle in the checkout aisle.

[18] Cristen explained she would keep her cell phone in a drawer at work where she kept her coat and purse because she was not permitted to have it with her.

Cristen was concerned by the way Appellant was speaking and requested Quinn be brought to her before Appellant left for work. Cristen thought Appellant was overreacting but wanted to put her mind at ease.

When Appellant arrived with Quinn at St. Luke's Hospital it was apparent that something was wrong. Quinn was unresponsive. Appellant explained that he fed Quinn, put her on her back before he went to take a shower, and then when he saw her again she had thrown up. The nurses who worked with Cristen told her that Quinn needed to be taken to the emergency room. Cristen felt faint and was helped into a wheelchair by R.N. Alicia Ortiz and taken down to the emergency room.

Quinn Wolfe was brought to exam room #10 of the emergency department. Dr. Adam Colombo was the responding physician. He first noticed Quinn inactive with a disturbing and distressful cry.[19] Quinn's body temperature was low and considered hypothermic. A chest x-ray showed multiple rib fractures in various stages of healing consistent with non-accidental trauma.[20] A skeletal survey revealed acute[21] fractures to the infant's ulna and tibia. A CAT scan of Quinn's head revealed an acute skull fracture, a subdural hematoma, and small subarachnoid hemorrhage.[22] The CAT scan further revealed concerning cerebral and cerebellar infarcts, extensive damage to the primary hemisphere of the brain due to cell death from a lack of oxygen.

Dr. Colombo revealed these findings to Quinn's parents. Appellant explained that a month prior he had caught Quinn from falling and in the attempt to catch her

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[19] Dr. Colombo described Quinn's cry as *crie du chat*, or cry of the cat, a high pitched shrill sound used to describe a particular type of brain development abnormality in newborns.
[20] Dr. Colombo indicated it's not easy to break a baby's ribs because an infant's bones and cartilage are flexible.
[21] Dr. Colombo described an acute injury as an injury that occurred within the last week, particularly in young healthy individuals, with no confounding factors.
[22] Dr. Colombo described a subdural hematoma as a pocket of blood underneath the layers that surround the brain and subarachnoid hemorrhage as bleeding in the tissues surrounding the brain.

grabbed her chest and squeezed hard enough to hear her creak. Dr. Colombo recalled Appellant appeared incredulous while expressing concern to Cristen that he would be blamed for this. Cristen and Appellant were informed that Children and Youth would be contacted.[23] Appellant remarked that he thought he would be going to jail.

Quinn was transported by helicopter to St. Christopher's Hospital to be cared for in the neonatal intensive care unit. Neither Cristen nor Appellant traveled in the helicopter with infant Quinn. Both parents traveled to the hospital by separate cars. When Cristen arrived and saw Quinn she looked completely different. It appeared Quinn was in a vegetative state.[24]

On November 16, 2013, Appellant reached out to his friend, Dino Forst, when Quinn was in serious condition at the hospital. At trial, the text messages between Appellant and Dino were shown to the jury.[25] Appellant informed Dino that he thought he was a bad dad. Appellant shared that he was worried there would be an investigation and he would have to go to jail. On November 18, 2013, Quinn was taken off life support. Appellant texted Dino informing him that Quinn had died. Dino was concerned about all of the information about Quinn and went to the local police station to report it. Dino further testified to a meeting with Appellant at the restaurant Braveheart in Hellertown, Pennsylvania after Quinn's death. There, Dino and Appellant discussed what may have happened to Quinn, with Appellant explaining that the baby was thrown like a rag doll.

Dr. Aaron Rosen, a forensic pathologist, performed Quinn's Autopsy. Dr. Rosen conducted both an external and internal examination of the infant's body. The

[23] When Cristen was alone with Defendant she recalled that he stated "don't throw me under the bus."

[24] Cristen described that Quinn's eyes were completely swollen shut, she was intubated, and hooked up to tubes and a heart monitor.

[25] Cell phone text messages marked as C-3.

external examination revealed swelling in the right upper eyelid with a green bruise. There was some bleeding noted near the eye and abrasions, or scratches, over the back left corner of the scalp.

During the internal examination Dr. Rosen noted wounds caused by blunt impact.[26] There was a fracture of the right parietal bone[27] with bruising present. Beneath that, there was a corresponding fracture approximately 3 inches long. A small quarter inch fracture on the left side of the head on the left temporal bone was noted.[28] The infant had bleeding between the two hemispheres of the brain referred to as subdural hemorrhage. There was soft tissue bleeding surrounding the right optic nerve as well as pinpoint bleeding at the back of the left eye. An examination of the infant's neck revealed additional hemorrhage overlying the C-1 vertebrae.[29]

During an examination of the infant's musculoskeletal system, Dr. Rosen noted older injuries. There were a number of calluses on numerous bones of the infant. Dr. Rosen indicated calluses would form as a response to healing after being fractured. The infant had calluses located on the ribs, right clavicle, and left tibia.[30] Dr. Rosen testified, in his opinion to a degree of medical certainty, that the cause of death was neurotrauma.[31]

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[26] Dr. Rosen indicated the wounds section of his report described recent or acute injuries. He explained acute is a medical term used to give a description of time anywhere from minutes to hours, and possibly as old as 24-48 hours. He further described subacute, 3 days to a week, and chronic referring to a week, two weeks, or more.
[27] Dr. Rosen described this fracture location as upper half of the right side of the head.
[28] Dr. Rosen described this fracture location as lower half of the left side of the head.
[29] Dr. Rosen described this injury location as the cervical vertebrae of the spine and first one underneath the skull.
[30] The right clavicle and the ribs were in similar stages of healing. The tibia's healing was not as advanced as the other bones.
[31] Trauma inflicted to the neurological system which would include the brain, spinal cord, and eyes.

Whitehall Township Police Department launched an investigation immediately upon the child's arrival in Philadelphia. The case involved interviewing witnesses, medical records, and gathering information relating to the death of the infant. Detective Kevin Smith of the Lehigh County District Attorney's Office interviewed Appellant while Quinn was being treated at St. Christopher's Hospital in Philadelphia, Pennsylvania. The interview was audio and video recorded and played for the jury.[32] Appellant denied shaking Quinn. The investigation stalled. Detectives faced difficulty on the timeline of Quinn's injuries and the burden of proof to make an arrest. In 2015, the case was resumed when a child abuse expert was able to identify when the lethal event took place which caused Quinn's unfortunate death. On December 22, 2015, Appellant was arrested for the murder of his baby daughter Quinn Wolfe.

Commonwealth expert Dr. Debra Esernio-Jenssen was asked to review Quinn's medical records. Dr. Jenssen is a pediatrician and Section Chief of Child Protection Medicine at Lehigh Valley Hospital. Dr. Jenssen is board certified in pediatrics and child abuse pediatrics.[33] Dr. Jenssen reviewed the medical records and history provided to the medical providers at both St. Luke's and St. Christopher's Hospital. Dr. Jenssen discussed the process of evidence-based medicine.[34] She explained it significant that Appellant provided a history that indicated that his baby, Quinn, fed uneventfully three (3) to three and a half (3½) ounces, was put down on her back, and was fine. Dr. Jenssen testified that a baby who suffered severe significant brain trauma that ultimately led to her demise would not be able to take three (3) to three

[32] Commonwealth Exhibit C-7 is a CD containing the interview of Defendant.

[33] Pediatrics is the study of all aspects of the health of children from infancy to adulthood. Child abuse pediatrics is a subspecialty for the evaluation of all aspects of child maltreatment including physical abuse, sexual abuse, Munchausen Syndrome by Proxy, neglect, etc.

[34] Dr. Jenssen explained that evidence-based medicine is the evaluation of clinical findings and medical history provided at the time of presentation in light of the scientific and peer reviewed literature as well as the physician's own clinical experience.

and a half (3½) ounces of formula uneventfully and act normally. A child that suffers abusive head trauma would immediately show signs or symptoms. The infant would not have been able to feed, open her eyes, or be alert after suffering from such severe neurologic injuries. Dr. Jenssen further explained that the lethal event occurred between a time she was acting "normal" and the time when she was brought to the hospital. Based upon a review of the circumstances Dr. Jenssen opined the baby was grasped, violently shaken, and slammed.[35] The only person that was alone with Quinn at such time was Appellant.

During cross-examination the Defense was permitted to impeach Dr. Jenssen in a variety of ways. However, the Defense was not permitted unfettered cross-examination of the witness.[36]

The Defense expert, Dr. William Manion, did not appear for trial. On or about March of 2016 the Defense retained Dr. Manion as an expert witness. On Saturday, January 21, 2017, Dr. Manion confirmed his court appearance through email correspondence with the Defense. On Monday, January 23, 2017, Dr. Manion was scheduled for a dinner reservation with defense counsel but never arrived.[37] When defense counsel reached out, Dr. Manion assured the Defense that he would be present for trial. On Tuesday, January 24, 2017, Dr. Manion did not show for his scheduled court appearance. All attempts to contact Dr. Manion failed until approximately 11:30 a.m., when defense counsel received a call on his cellular

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[35] The child's head impacted a surface.

[36] The Defense wanted to inform the jury that Dr. Jenssen was sued while they were not aware of the results of the lawsuits. The Commonwealth countered that any lawsuits were dismissed. The Commonwealth's objection was therefore sustained. In addition, the Defense wanted to characterize family court cases that did not rule in her favor as a "misdiagnosis." This was also not permitted. The Defense was specifically told they could ask if her opinion was rejected and how many times, but that the details of any particular case would not be permitted.

[37] Defense counsel reserved a room for his expert at the Holiday Inn located a few blocks from the courthouse.

telephone. Dr. Manion apologized and vowed that he would be present for court the following day. On Wednesday, January 25, 2017, Dr. Manion again failed to appear and the Defense requested a mistrial. This Court considered a continuance for a material witness warrant, but learned Dr. Manion is from out-of-state and was never subpoenaed. Further continuances would also prejudice the Commonwealth because their rebuttal expert would be unavailable.[38] After a lengthy discussion in chambers, a solution was provided by the Commonwealth stipulating to Dr. Manion's expert report. Dr. Manion's report was subsequently read verbatim to the jury.[39]

Dr. Manion is an expert in forensic pathology. He reviewed the relevant medical records and other documents to formulate an opinion on whether Appellant caused the death of his daughter Quinn Wolfe by purportedly inflicting injuries upon her on November 12, 2013. Dr. Manion did not believe that Dr. Jenssen's opinion was supported by the facts or by sound medical conclusions. In his opinion, Quinn likely suffered a small subdural hematoma that later bled in an acute fashion when Quinn choked on her formula and had a spell of hypoxia in the crib. Dr. Manion believed, to a reasonable degree of medical certainty, that Quinn's injuries were not inflicted on that day, but rather were days or weeks old.

The Commonwealth called Dr. Lori Frasier in rebuttal. Dr. Frasier is employed by Penn State Health Medical Center, Penn State Health Children's Hospital, and Penn State Hershey College of Medicine, as a physician, pediatrician, child abuse

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[38] The Commonwealth explained their rebuttal expert was ready, as scheduled, but unavailable the next few days.

[39] The Court explained to the jury that Dr. Manion had experienced an unforeseen personal emergency that kept him from appearing, and would be unable to appear for the next couple of days. Defense counsel was permitted to present portions of Dr. Manion's CV and the entire report consisting of ten pages and a conclusion.

pediatrician, and a professor of pediatrics. She is board certified as a pediatrician.[40] Dr. Frasier reviewed Dr. Manion's report, Dr. Esernio-Jenssen's report, and the medical records for Quinn Wolfe. Dr. Frasier indicated Dr. Manion relied on records attributed to Dr. McColgan of St. Christopher's Hospital. When Dr. Frasier reviewed Dr. McColgan's report she noticed discrepancies. Dr. Frasier called Dr. McColgan. She was surprised by some of the statements Dr. Manion attributed to Dr. McColgan, partly because they seemed outside the norm of what a child abuse pediatrician would say.

Dr. Frasier clarified Dr. Manion's conclusion to the jury.[41] However, Dr. Frasier explained that there was no sound evidence-based medicine that supported a cough or choke could cause a rebleed of an existing subdural hematoma. In addition, Dr. Manion was misleading when discussing no acute fractures. Quinn's skull fracture was an acute or new fracture. The child's leg had a fracture, called a metaphyseal fracture, near her ankle which was deemed acute. The metaphyseal fracture stands out because it is an injury highly indicative of an abusive event.[42] Further, Dr. Manion failed to address the eye pathology reports of eye damage.

Dr. Frasier opined, to a degree of medical certainty, that Quinn suffered a serious violent head injury in the moments before she became symptomatic from which she never recovered. If Quinn was already injured, she would not have been able to take a bottle. She would not have interacted with her environment in any way that was normal for a child of her age. Her color would have been off, her muscle tone

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[40] Dr. Frasier did not take the exam for board certification in child abuse pediatrics because she wrote the exam.

[41] Dr. Manion's conclusion, as explained by Dr. Frasier, was that Quinn had a pre-existing brain injury and then choked on her formula. Quinn stopped breathing and that caused severe damage to her brain from lack of oxygen.

[42] The metaphyseal fracture is caused by the arms or legs violently flailing back and forth when the child is shaken.

would have been abnormal, and she would have looked like a child in distress. She would never have looked "normal" after the event occurred. In her opinion, it was clear that Quinn suffered from shaking and impact.

On January 26, 2017, Appellant was found guilty of Murder in the Third Degree and Endangering the Welfare of a Child.

DISCUSSION AND CONCLUSIONS OF LAW

Motion for Mistrial after Failure of Defense Expert to Appear for Trial

The Appellant alleges that the Court erred in denying his Motion for a Mistrial after his forensic expert, Dr. William Manion, failed to appear for court. Appellant argues that he did not receive a fair and impartial trial because his expert was his sole essential witness who failed to appear without justification and/or explanation. Appellant cites *Com. v. Thompson* and a Florida civil case of *Fisher v. Perez* in support of his contentions.

"A mistrial is an extreme remedy that is required only where the challenged event deprived the accused of a fair and impartial trial." *Com. v. Travaglia*, 28 A.3d 868, 879 (Pa. 2011). The denial of a motion for mistrial is reviewed under an abuse of discretion standard. *Id.*

In *Thompson*, defendant appealed his criminal conviction as a violation of fundamental due process because he was foreclosed from presenting evidence. *Com. v. Thompson*, 444 Pa. 312, 316, 281 A.2d 856, 858 (1971). There, defendant was found guilty immediately after testifying and precluded from presenting any further evidence. Our Supreme Court vacated the sentence finding that a defendant should be afforded an opportunity to present fully his version of events including the ability to call witnesses on his behalf or have counsel make argument to the court. *Id.*

This Court, unlike *Thompson*, did not seek to limit or preclude the Defense from presenting evidence. The Defense was given ample opportunity to present evidence and call witnesses. Appellant's expert was scheduled to testify but failed to appear through no fault of this Court. This Court made significant efforts to accommodate the Defense. When it was discovered that Dr. Manion was missing, this Court excused members of the jury for a break.[43] The Defense could not reach their witness. This Court then excused the jury for an early lunch.[44] It soon became clear the witness was not coming. This Court then adjourned early hoping to provide Appellant additional time to locate his missing witness and present evidence on his behalf.[45] The delay of trial did not provide relief as Appellant's expert failed to appear again on Wednesday, January 25, 2017. Unfortunately, this Court has no power over an out-of-state witness who was not subpoenaed. Therefore, Appellant's assertion that this Court foreclosed evidence, after having provided ample opportunity to bring in the witness, and with no explanation for the witness's failure to appear, is without merit.

Appellant contends that this Court should be further persuaded by *Fisher v. Perez*, a Florida case where the defense expert failed to appear due to a medical issue. See *Fisher v. Perez*, 947 So. 2d 648, 649 (Fla. Dist. Ct. App. 2007.) The Florida court, in a discussion of due diligence, ruled defense counsel's actions appropriate given the circumstances. The defense did not subpoena the expert but had confirmed his attendance one day prior to being scheduled to testify. Later that day, the expert's office notified the defense that he would unable to testify due to a medical condition presented at the last minute. Although a subpoena would be evidence of due

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[43] The recess occurred at 10:38 a.m.

[44] This Court hoped to divert the jury's attention as attempting to secure witnesses for the afternoon rather than reveal the defense expert witness was missing.

[45] Court was adjourned at 3:41 p.m.

diligence, the Florida court noted that a subpoena would not have changed the expert's availability. The Appellate Court of Florida subsequently remanded the case for a new trial. *Id.*

Appellant's reliance on *Fisher* is misplaced. In *Fisher* the defense expert had a legitimate medical concern[46], was in contact with counsel, and the court was immediately notified. Here, although this Court provided sufficient time for the defense to locate their expert, defense counsel had no legitimate explanation for his failure to appear. A remedy was available and utilized. The Commonwealth agreed to have Dr. Manion's report read into the record in its entirety. This evidence was presented without any opportunity for cross-examination. This Court accommodated the defense by permitting this type of evidence, suggesting to the jury that Dr. Manion had an unavoidable personal emergency that prevented him from appearing in court, and subsequently providing a favorable cautionary instruction.[47] These accommodations were sufficient given the circumstances.

The Court further disagreed with Appellant's description of Dr. Manion's failure to appear as completely unforeseen. Defense counsel attached his correspondence with Dr. Manion in support of his motion for a new trial.[48] In March of 2016, Defense counsel reached out to Dr. Manion. The defense did not hear back from Dr. Manion in April, May, or June despite being paid. On June 20, 2016, Dr. Manion's lack of communication was alarming enough that the defense considered hiring another

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[46] Expert suffered complications from a recent back surgery, was partially paralyzed, highly medicated, and, as such, unable to testify the following day.
[47] This Court instructed the jury as follows "You should not make any negative conclusions based on the fact that Dr. Manion was not available to be here today to testify and to support his report. Again, what we became aware of is an unforeseen emergency that kept him from being here both yesterday and today. And it's something that was beyond the control of both parties." N.T. 1/25/16, at 60.
[48] Defendant's Post-Sentence Exhibit's A-Z and AA-KK.

expert. Sometime in July of 2016, when Dr. Manion was informed he would be replaced he finally made contact. Defense counsel's difficulty with Dr. Manion is apparent throughout the year. Defense counsel had to continually follow-up with Dr. Manion to respond to his communications and repeatedly had to request his written opinion.[49] Dr. Manion subsequently missed the Court's November 1, 2016 deadline for a written report. According to defense counsel, Dr. Manion habitually ignored emails, did not return phone calls, and did not keep scheduled telephone conferences.[50] After reviewing the exhibits, it seems clear that Dr. Manion's failure to appear at trial can hardly be described as unforeseeable.

Finally, the Court expressed concern about the precedent that would be established in granting a mistrial based on a witness failing to appear for court. In such cases, should either side feel that things were not "going their way," the sudden disappearance of a witness would open the door to potential manipulation.[51]

Therefore, Appellant's contention that this Court erred by failing to grant a mistrial because his expert continuously failed to appear is without merit and he should be entitled to no relief.

Involuntary Manslaughter Instruction

The Appellant claims that this Court erred in failing to instruct the jury on the charge of Involuntary Manslaughter as an alternative instruction to Murder in the Third Degree. Appellant describes the evidence against him as "wholly circumstantial" arguing that it would be impossible to prove his *mens rea*. The Commonwealth

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[49] Exhibit JJ, at ¶3.
[50] Exhibit JJ, at ¶7.
[51] The defense or prosecution could utilize a mistrial to extend the time to prepare a new trial approach or simply get a new jury.

contends that Appellant's evidence of Involuntary Manslaughter is speculative and that the evidence presented did not warrant the instruction.

Our Pennsylvania Supreme Court has firmly established "in a murder prosecution, an involuntary manslaughter charge shall be given only when requested, and where the offense has been made an issue in the case and the trial evidence reasonably would support such a verdict." *Com. v. White*, 490 Pa. 187, 185 (1980). Therefore, (1) Involuntary Manslaughter must be requested; (2) Involuntary Manslaughter must be an issue in the case; and (3) the trial evidence must reasonably support Involuntary Manslaughter.

The offense is made an issue "if any version of the evidence in a homicide trial, from whatever source, supports a verdict of involuntary manslaughter." *Com. v. Rogers*, 419 Pa.Super. 122, 135 (Pa. Super. 1992). The Defense argues that the testimony of Dr. Debra Esernio-Jenssen, Cristen Sanchez, and Dr. Kenneth Toff supports an involuntary manslaughter instruction.

Although Appellant requested the charge there is a substantial lack of evidence to support Involuntary Manslaughter. Involuntary Manslaughter is causing the death of another person as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner. See 18 Pa.C.S.A. § 2504(a). Appellant attempts to support the claim by pointing to the testimony of Dr. Jenssen as to whether the shaking of a child is an intentional event. Appellant argues that a baby is usually shaken in direct response to a moment in time when the child will not stop crying or has difficulty eating.[52] Both

[52] Defendant's brief at 10.

Dr. Toff and Cristen Sanchez testified that Quinn was colicky and had difficulty eating.

Dr. Jenssen testified:

> "The information about the symptoms and how they appear immediately are based on the confession studies. So there are more than sixteen (16) studies in the literature involving over three-hundred-sixty-five (365) confessions... various authors publish data where individuals that were perpetrators of shaken baby syndrome or abusive head trauma confess to what they did and what the symptoms were. And, universally, no matter where you were around the world, *they confessed that they shook infants because the infant was crying and they couldn't stand that the infant was crying* and that the symptoms that they saw were immediate, immediately. The most common was, like, limp, pale, seizing or lethargy. Those are the most common symptoms that were reported."

N.T. 1/23/17, at 47.

However, Appellant denied shaking the infant and further denied any wrongdoing. The defense theory was that Cristen Sanchez, not Appellant, was responsible for Quinn's death. Further, there was no evidence suggesting Quinn's injuries were caused by reckless or grossly negligent conduct. The evidence revealed a history of undiscovered abuse that ultimately led to an incident where the child was not only shaken, but subjected to an impact capable of causing a skull fracture. This is evidence of a killing with malice. As aptly pointed out by the Commonwealth, Dr. Fraser testified that "significant force" is required to cause the sort of injuries suffered, that her head "went violently back and forth and clearly struck something causing a skull fracture."[53] Hence, while the instruction was properly requested, the trial evidence did not reasonably support the charge and the Appellant should be entitled to no relief.

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[53] N.T. 1/25/17, at 101

Evidentiary Errors

Appellant claims this Court made errors in its evidentiary rulings at trial which cumulatively denied Appellant a fair trial. Specifically, Appellant argues that this Court erred by prohibiting Appellant from calling Holly Warholic, D.O., as to the nature and severity of Cristen Sanchez's postpartum depression; and prohibiting Appellant from cross-examining the Commonwealth's medical expert, Debra Esernio-Jenssen, M.D., regarding alleged "misdiagnoses."

The admissibility of evidence is solely within the discretion of the trial court, and a trial court's evidentiary rulings will be reversed on appeal only upon abuse of that discretion. *Com. v. Laird*, 605 Pa. 137, 168, 988 A.2d 618, 636 (2010). An abuse of discretion will not be found "merely because an appellate court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." *Id.* Moreover, "an erroneous ruling by a trial court on an evidentiary issue does not necessitate relief where the error was harmless beyond a reasonable doubt." *Com. v. Travaglia*, 611 Pa. 481, 28 A.3d 868, 873–74 (2011).

All relevant evidence is admissible, except as otherwise provided by law, and evidence that is not relevant is not admissible. Pa.R.E. 402. Evidence is "relevant" if it tends to prove or disprove a material fact. Relevant evidence is admissible if its probative value outweighs its prejudicial impact. *See Conroy v. Rosenwald*, 2007 PA Super 400, ¶ 14, 940 A.2d 409, 417 (2007). Further, relevant evidence may be excluded if its probative value is outweighed by its potential for unfair prejudice, defined as 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.*

The Court discussed the potential testimony of Dr. Holly Warholic at length in a sidebar conference.[54] There, the defense asserted, as it continues to assert in its brief, that Dr. Warholic would testify to the nature and severity of Cristen Sanchez's postpartum depression. At trial, Appellant was able to aptly show that Cristen was diagnosed with a moderate case of postpartum depression through her own testimony. Cristen Sanchez testified that she was prescribed Zoloft for postpartum depression. Cristen reported a history of anxiety disorder and depression. Cristen admitted she was diagnosed by Dr. Warholic. Cristen thought it was a "mild" case of postpartum depression, but after reviewing the medical records shown by defense counsel, she agreed that the records reflected a "moderate" case.[55]

Appellant failed to offer a sufficient offer of proof that would convince this Court that the purpose of the testimony was anything other than cumulative and collateral. *See* Pa.R.E. 403. In addition, the Court was mindful of the confidentiality of the witness's medical records. Since the proffered evidence would not tend to prove or disprove any material fact, and the defense conceded such testimony would not impeach the witness, this Court did not abuse its discretion in prohibiting the testimony of Dr. Holly Warholic.

The Court also discussed the limitation on the cross-examination of Dr. Debra Esernio-Jenssen, regarding "misdiagnoses" in prior court cases.[56] Appellant argues that his inquiry on cross-examination was relevant to demonstrate Dr. Jenssen's bias against Appellant in this case. Specifically, the Defense would show, through references to civil matters in which Dr. Jenssen previously testified, the bias against

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[54] N.T. 1/24/17, at 168
[55] N.T. 1/18/17 at 155-157.
[56] N.T. 1/23/17, at 64-74.

fathers of young children "in general" and the propensity to testify in favor of the Commonwealth.[57]

The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these rules. See Pa.R.E. 607(b). The United States Supreme Court has defined bias as "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *United States v. Abel,* 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). Pennsylvania courts have consistently recognized that evidence of bias is relevant to impeach the credibility of a witness. *Com. v. Rouse,* 2001 PA Super 248, ¶¶ 12-13, 782 A.2d 1041, 1045 (2001).

At trial, Appellant was permitted to cross-examine Dr. Jenssen and attack her credibility in a variety of ways until the Commonwealth objected to a discussion on civil lawsuits:

> *Q: And you testified in court cases, as you testified to on direct examination, right?*
> A: Yes
> *Q: And you've been qualified, as you are here today, as an expert in pediatrics, right?*
> A: And child abuse, yes.
> ...
> *Q: You've testified in family court cases, correct?*
> A: Dependency court, yes.
> *Q: And you've testified in civil court cases?*
> A: Umm --
> *Q: You are not sure?*
> A: I'm not sure.
> *Q: Criminal cases like today, right?*
> A: Yes.
> ...
> *Q: And your prior testimony in court has always been on behalf of a government agency, whether it's the District Attorney or Children and Youth or in New York the ACS, correct?*

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[57] Defendant's Brief at 12.

A: I would say the majority of the time. It was really –for – I mean, if you look at it, I'm really testifying on behalf of the child.

...

Q: You have never testified on behalf of an individual, correct; been subpoenaed by the individual like myself, to testify on behalf of an individual like Mr. Wolfe, correct?

A: Not that I'm aware of.

...

Q: Okay. Your prior testimony in court, you seem to focus on father as being the potential perpetrators of harm when you have the mother and a father as potential suspects; is that correct?

A: No, that's not correct at all. In fact, my paper was pointing out that there were equal numbers of perpetrators, 17 males and 17 females. Fathers are more likely to confess, they are more likely to be convicted. That has nothing to do with –

...

Q: Of course you have to consider all of that. We'll get to that. Now, your opinions as an expert in court have not always been accepted; is that correct?

A: Of course. There are times when I went to court in dependency court that somebody didn't agree with my medical opinion, but that's a judge. No dishonor to you, Judge. There are different circumstances. So when someone doesn't agree with my medical opinion, I don't go back to the medical record and change my diagnosis. My diagnosis is a medical diagnosis.

Q: So you have been rejected by courts for your opinion, correct?

A: I have.

Q: Okay. And your rejection has subjected you to civil lawsuits; is that correct?

[The Commonwealth]: Judge, I'm going to object at this point. Can we approach?

N.T. 1/23/17, at 64-74.

The Court discussed the objection at sidebar. The Commonwealth objected to the mention of civil lawsuits because Dr. Jenssen had been vindicated. The Court asked defense counsel if he knew the outcomes of these civil cases. Defense counsel could not say with certainty. On the other hand, the Commonwealth stressed any/all lawsuits were dismissed. Without a sufficient basis the Court sustained the objection.

Defense counsel then went on to discuss alleged 'misdiagnoses." When the Court inquired, the Defense explained that he had information regarding seven (7) family court cases involving Dr. Jenssen. In these family matters, the courts ruled in favor of the opposing party and allegedly rejected Dr. Jenssen's opinion. It appeared

that the Defense wanted to use these cases to prove that Dr. Jenssen's diagnoses were wrong and that she was not a credible expert. This Court noted that a rejection of Dr. Jenssen's opinion in favor of a different opinion hardly classifies as a "misdiagnosis,"[58] or establishes bias. Since Appellant was able to establish that Dr. Jenssen's opinion had not always been accepted, and that she appears a majority of the time on behalf of the Commonwealth the Court found no error in limiting the cross-examination to relevant evidence while prohibiting the details of extrinsic civil cases.

CONCLUSION

For all of the foregoing reasons, this Court would urge the Superior Court to dismiss the instant Appeal.

By the Court:

Kelly L. Banach, J.

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[58] At sidebar, this Court characterized the contest of experts as "reasonable minds will differ." N.T. 1/23/17, at 71.