NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DANIEL J. DOUGHERTY,	:	
Appellant	:	No. 1648 EDA 2016

Appeal from the Judgment of Sentence April 11, 2015
in the Court of Common Pleas of Philadelphia County,
Criminal Division, No(s): CP-51-CR-0705371-1999

BEFORE: BENDER, P.J.E., DUBOW and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED OCTOBER 31, 2017**

Daniel J. Dougherty ("Dougherty") appeals from the judgment of sentence entered following his conviction of two counts of second-degree murder and one count of arson.[1] We reverse Dougherty's judgment of sentence and remand for a new trial.

The trial court summarized the factual history underlying the instant appeal as follows:

> [O]n August 24, 1985, [] Dougherty was supposed to return to his girlfriend's home after attending an Alcoholics Anonymous meeting[,] and tend to his children, as well as the child of his live-in girlfriend, Kathleen McGovern [("McGovern")]. [] Dougherty did not go home. At approximately 11:30 p.m., [Dougherty] was in a bar when [] McGovern stormed in and angrily confronted him, telling Dougherty to get home with his kids because she was leaving him. McGovern returned to her Oxford Circle home, packed up some of her belongings and left with her child, leaving the two young Dougherty boys[2] asleep in

[1] 18 Pa.C.S.A. §§ 2502, 3301.

[2] The boys were aged three and four years old, respectively.

> their second-floor bedroom with a teenage babysitter. By 1:30 a.m.[,] the babysitter could stay no longer and returned to her residence next door, leaving a note for [Dougherty] and explaining to him what had occurred.
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> Leaving the bar, Dougherty did not go home, but to the home of his estranged wife, the mother of his two children, Kathleen Dippel [("Dippel")]. Dougherty pleaded with his estranged wife to come with him and take the children[,] as his girlfriend had kicked him out. Dougherty got mad at Dippel for not wanting to come with him and get the children in the middle of the night, and returned home. He did not stay, reappearing at the house of his wife. Dippel finally agreed and came with Dougherty to take custody of the two children. Once they got to McGovern's house, [Dougherty] asked Dippel to spend the night. [] Dippel declined Dougherty's advances and asked [Dougherty] to bring the children downstairs. Dougherty refused, unceasingly demanding Dippel to go upstairs to retrieve the children. In fear of being sexually assaulted by [Dougherty], Dippel refused to go upstairs. Weary of [Dougherty's] advances, Dippel left, barefoot and without the children. Thereafter, Dougherty was the only adult in the house while the children slept upstairs.
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> At approximately 3:57 a.m., police responded to reports of a fire at the residence. By the time the police responded, the house was in flames and [Dougherty was] outside of the house. When asked his name, Dougherty replied, "my name is mud and I should die for what I did." The two boys were found dead in their upstairs bedroom. The medical examiner concluded that the children died from smoke inhalation and carbon dioxide poisoning[,] and may have been burned while still alive.
>
> [Dougherty] was subsequently questioned by the police. Dougherty told them that after Dippel left, he fell asleep on the sofa, to be awoken by the noise of the fire on the drapes adjacent to the front window.

Trial Court Opinion, 9/1/16, at 3-5 (citations omitted, footnote added).

On July 21, 1999, more than 13 years after the fire, Dougherty was arrested and charged with arson, murder and related offenses. In October

2000, a jury found Dougherty guilty of two counts of first-degree murder[3] and arson. Dougherty was sentenced to death for his convictions of first-degree murder, and a concurrent sentence of 10-20 years in prison for his conviction of arson. The Pennsylvania Supreme Court affirmed Dougherty's judgment of sentence on direct appeal. ***Commonwealth v. Dougherty***, 860 A.2d 31 (Pa. 2004). On October 3, 2005, the United States Supreme Court denied Dougherty's Petition for *Certiorari*. ***Dougherty v. Pennsylvania***, 546 U.S. 835 (2005).

In 2005, Dougherty filed his first Petition for relief pursuant to the Post Conviction Relief Act ("PCRA").[4] The PCRA court dismissed Dougherty's Petition in April 2009. On appeal, the Pennsylvania Supreme Court remanded the matter for the appointment of a new PCRA judge and to develop the record. On February 7, 2012, upon the agreement of the parties, Dougherty's death sentences were vacated, and sentences of life in prison were imposed for each of Dougherty's murder convictions.

On remand, the PCRA court conducted hearings on Dougherty's claims of ineffective assistance of trial counsel. The PCRA court ultimately dismissed Dougherty's Petition on September 6, 2012. On appeal, this Court vacated the Order of the PCRA court, and remanded for a new trial.

[3] ***See*** 18 Pa.C.S.A. § 2502.

[4] 42 Pa.C.S.A. §§ 9541-9546.

Commonwealth v. Dougherty, 93 A.3d 520 (Pa. Super. 2013) (unpublished memorandum).

Following a jury trial, Dougherty was convicted of two counts of second-degree murder and one count of arson. For his convictions of second-degree murder, the trial court sentenced Dougherty to two consecutive terms of life in prison. For his conviction of arson, the trial court imposed a concurrent prison term of ten to twenty years. Thereafter, Dougherty filed the instant timely appeal, followed by a court-ordered Pa.R.A.P. 1925(b) Concise Statement of matters complained of on appeal.

Dougherty presents the following claims for our review:

> 1. [The Pennsylvania Superior Court] found [Dougherty's] original trial counsel constitutionally ineffective for failing to adequately cross-examine Assistant Fire Marshal John Quinn [("Quinn")] at Dougherty's first trial in 2000. Because Dougherty never had a full and fair opportunity to cross-examine Quinn, did the trial court violate the Confrontation Clause when it permitted Quinn's prior recorded testimony, including the constitutionally ineffective cross-examination, from 16 years ago to be read to the jury over Dougherty's objections?
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> 2. In 2015, shortly before Dougherty's second trial, the Commonwealth's expert at the first trial, [] Quinn, acknowledged through counsel that the field of fire science had advanced "incalculably" since his original testimony in October 2000. Did the trial court commit reversible error under Pennsylvania Rule of Evidence 702 when it (1) allowed Quinn's 16-year-old recorded "expert" testimony to be read to the jury[;] and (2) instructed the jury at the 2016 trial that Quinn was testifying as an expert?
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> 3. Before his second trial, Dougherty proffered evidence that the Commonwealth's expert at the first trial, [] Quinn, employed principles that were not generally accepted in the field of fire science either at the time he testified in 2000 or at the time the

> Commonwealth sought to reintroduce that testimony in 2016. Did the trial court commit reversible error by admitting this testimony without holding a hearing to determine if Quinn's methodology was "generally accepted in the relevant field[,]" as required under ***Frye v. United States***[, 293 F. 1013 (D.C. Cir. 1923),] and Pennsylvania Rule of Evidence 702(c)?
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> 4. Did the trial court commit reversible error when it admitted an inflammatory photograph of the burned bodies of Dougherty's deceased children, even though the photograph lacked any probative value and other, less inflammatory, evidence was available?
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> 5. Did the trial court commit reversible error under [Pa.R.E.] 404(b)(1) when it permitted the testimony of two women that Dougherty was physically abusive to them in the past, particularly where the Commonwealth told the jury in closing that this character evidence establishes "who this man is," *i.e.*, the kind of person who "gets violent, especially against women when they don't do what he wants them to do[,]" and Dougherty was not charged with any acts of violence towards women?
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> 6. Did the trial court commit reversible error by allowing the Commonwealth[,] during closing statements[,] to compare Dougherty's expert witness to, among other things, a charlatan, a prostitute, and an adulterer, despite constitutional due process guarantees that prohibit prosecutors from engaging in unduly prejudicial or inflammatory rhetoric at trial?

Brief for Appellant at 2-4.

In his first claim, Dougherty asserts that the trial court improperly permitted the prior trial testimony of Quinn, a Philadelphia Assistant Fire Marshal, to be read to the jury. ***Id.*** at 22. Dougherty points out that this Court had "deemed his trial counsel ineffective for inexplicably opting to 'wing it' during cross-examination of the Commonwealth's expert, [] Quinn." ***Id.*** According to Dougherty, the trial court improperly permitted the Commonwealth to present Quinn's same testimony, including defense

counsel's ineffective cross-examination, to the jury. ***Id.***; ***see also id.*** at 24 (wherein Dougherty points out that this Court deemed his prior trial counsel ineffective for failing to consult with a fire expert in preparing to cross-examine Quinn at the first trial).

Regarding the admission of Quinn's testimony, Dougherty argues that the trial court violated the Confrontation Clause of the Sixth Amendment to the United States Constitution, as he was deprived of a full and fair opportunity to cross-examine Quinn. ***Id.*** at 23. In addition, the reading of Quinn's testimony deprived Dougherty of the opportunity to effectively cross-examine Quinn, this time with the assistance of a fire expert. ***Id.*** at 24. According to Dougherty, "[t]he result was that trial counsel's failure to elicit expert fire testimony deprived [Dougherty] of the opportunity to discredit entirely the testimony that was the sole basis for concluding that the fire was arson." ***Id.*** (internal quotation marks and citation omitted).

The Commonwealth counters that at the retrial, in addition to Quinn's prior testimony, they presented the expert testimony of fire investigator Thomas Schneiders ("Schneiders"), who testified that there was no "flashover" in this fire. Brief for the Commonwealth at 17. The Commonwealth acknowledges that Schneiders "based his independent opinion on his examination of [] Quinn's photographs, interviews and report." ***Id.*** The Commonwealth points out that Schneiders validated Quinn's methodology, and "independently concluded that the fire was set in

three separate locations." ***Id.*** at 21. The Commonwealth additionally asserts that Schneiders challenged the defense expert's conclusions regarding flashover. ***Id.***

Whether the admission of prior testimony violates a defendant's rights under the Confrontation Clause is a question of law, for which our standard of review is *de novo* and our scope of review is plenary. ***Commonwealth v. Yohel***, 79 A.3d 520, 530 (Pa. 2013).

"Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[5] ***Crawford v. Washington***, 541 U.S. 36, 68-69 (2004). The Confrontation Clause of the Sixth Amendment of the United States Constitution, made applicable to the states via the Fourteenth Amendment,[6] provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him…." U.S. CONST. amend XVII.[7] Interpreting the Confrontation Clause, the United States Supreme Court explained that

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[5] The Supreme Court defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." ***Crawford***, 541 U.S. at 51.

[6] ***See Pointer v. Texas***, 380 U.S. 400, 403 (1965).

[7] Although Dougherty has not premised his argument on Article I, Section 9 of the Pennsylvania Constitution, that section similarly provides that "[i]n all criminal prosecutions the accused hath a right . . . to be confronted with the witnesses against him. . . ." PA. CONST. art. I, § 9.

"[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." ***Crawford***, 541 U.S. at 59; ***see also Bullcoming v. New Mexico***, 564 U.S. 647, 664-68 (2011) (holding that the Confrontation Clause was violated where the state introduced a blood-alcohol analysis report through the surrogate testimony of a second analyst, where that analyst had not certified the report or performed or observed the testing); ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 311 (2009) (holding that the defendant was entitled to confront forensic analysists who had prepared a report regarding the weight of cocaine seized, absent a showing that the analysts were unavailable and that the defendant had a prior opportunity to cross-examine them).

Similarly, our Supreme Court has long recognized that prior testimony is admissible against the defendant only if the defendant had a "full and fair" opportunity to examine the witness. ***Commonwealth v. Bazemore***, 614 A.2d 684 (Pa. Super. 1992). In ***Commonwealth v. Mangini***, 425 A.2d 734 (Pa. 1981), our Supreme Court addressed whether testimony of a currently unavailable witness, given at the defendant's first trial, could be introduced at the defendant's second trial. ***Id.*** at 737. In that case, the second trial was made necessary by prior counsel's ineffectiveness for failing to either request a competency hearing for a witness, or to object to that witness's competency on the record. ***Id.*** Our Supreme Court held that the witness's

prior testimony could not be used, where "the use in the present trial of the very testimony which has been indelibly stamped with prior counsel's ineffectiveness is offensive to our sense of justice and the notion of fair play." ***Id.*** at 738. The Supreme Court cautioned, however, that "our holding today is not a *per se* rule requiring exclusion of any testimony from a prior trial wherein trial counsel had been ineffective." ***Id.*** at 739. To the contrary, the resolution of a similar claim in a different case would require an examination of "all of the factual variables … to determine if the ineffectiveness so tainted the testimony sought to be introduced as to affect its reliability or to otherwise render its subsequent use unfair." ***Id.*** at 738 (footnote omitted).

Subsequently, in ***Bazemore***, our Supreme Court concluded that the defendant was denied a full and fair opportunity to cross examine a witness, whose prior testimony was offered at trial, where the defendant was denied access to vital impeachment evidence at or before the time of the prior proceeding. ***Bazemore***, 614 A.2d at 688. In ***Bazemore***, witness Melvin Hauser ("Hauser"), had testified at the defendant's preliminary hearing. ***Id.*** at 685. Defense counsel cross-examined Hauser at that hearing. ***Id.*** However, defense counsel was unaware, or had not been informed, of evidence that could impeach Hauser, *i.e.*, that Hauser had made a prior inconsistent statement to police; that Hauser had a criminal record; and that the Commonwealth, at the time of the preliminary hearing, was

contemplating filing criminal charges against Hauser for homicide and criminal conspiracy, involving the same incident. ***Id.*** Prior to trial, Hauser invoked his Fifth Amendment right against self-incrimination, thereby rendering him unavailable as a witness. ***Id.*** In response, the defendant filed a motion *in limine* seeking to preclude the Commonwealth from using Hauser's preliminary hearing testimony at trial. ***Id.*** The trial court granted the motion, after which the Commonwealth filed an appeal. ***Id.*** On appeal, this Court vacated the order of the trial court. ***Id.***

On allowance of appeal, our Supreme Court explained that "the opportunity to cross-examine must be *fair*[,] given the circumstances of the particular matter[,] in order for such cross-examination to be deemed adequate[.]" ***Id.*** at 686 (emphasis in original).

> The real basis for the admission of testimony given by a witness at a former trial is to prevent the miscarriage of justice where the circumstances of the case have made it unreasonable and unfair to exclude the testimony. It naturally follows that testimony from the former trial should not be admitted if to do so would result in a miscarriage of justice.

Id. (quotation marks and citation omitted). This exception, though, "is predicated on the indicia of reliability normally afforded by adequate cross-examination. … [W]here … that indicia of reliability is lacking, the exception is no longer applicable." ***Id.*** at 687 (internal quotation marks and citation omitted). The ***Bazemore*** Court emphasized that where the admission of prior testimony is being sought as substantive evidence against the accused, "the standard to be applied is that of *full and fair opportunity* to cross-

examine." ***Id.*** (emphasis in original); ***accord Commonwealth v. Cruz-Centeno***, 668 A.2d 536, 542-43 (Pa. Super. 1995) (recognizing that where the defense, at the time of the prior testimony, "was denied access to vital impeachment evidence … a full and fair opportunity to cross examine the unavailable witness may be deemed to have been lacking" during the prior testimony).

Here, on prior appeal, this Court reviewed Quinn's testimony in the context of Dougherty's claim of ineffective assistance of trial counsel. In that appeal, Dougherty argued that "trial counsel's failure to retain either a consulting or testifying expert in fire science left counsel unprepared against Quinn's testimony, which comprised the most compelling evidence of [Dougherty's] guilt." ***Dougherty***, 93 A.3d 520 (unpublished memorandum at 9). This Court agreed, observing, *inter alia*, that

> [g]iven that fourteen years had passed, counsel should have determined whether the science which formed the basis of Quinn's opinions in 1985 was subject to new theories which had been developed in the forensic fire community. Regardless[,] the lack of investigation into the science precluded trial counsel from ever understanding whether the science was accurate, the main claim asserted by [Dougherty]. Because fourteen years had passed, the reliability of the evidence itself[,] or the science underlying it[,] should have been important in addressing the arson charge.
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> * * *
>
> [I]f counsel had retained either a consulting or testifying fire expert, he could have mounted a convincing challenge to the substance of the charges arrayed against his client. **As the PCRA court noted, the scientific evidence proffered by Quinn was "the fulcrum of the whole case" against**

> **[Dougherty], and Quinn's conclusions "were the lynchpin" to the charges against [Dougherty].** Trial Court Opinion, 9/11/12, at 27. In a capital case[,] such as the present matter at the time of trial, mounting a meaningful challenge to the scientific component of the Commonwealth's case should have been the top priority of any competent defense lawyer. **Through informed cross-examination or, alternatively, presentation of a fire expert, counsel could have demonstrated to the jury that Quinn overlooked the effects of flashover and full-room involvement in a compartment fire. Such testimony would tend to show that Quinn incorrectly identified multiple points of origin for the fire, that his conclusions lacked scientific underpinning, and that his opinions conflicted with principles of forensic fire investigation that were widely accepted at the time of trial.** This, in turn, would have provided counsel with an evidentiary foundation from which to assert that the fire had a single point of origin and that the cause of the fire was accidental or, at best, undeterminable….

Id. (unpublished memorandum at 14, 15-16) (emphasis added). Thus, Dougherty, through counsel's ineffectiveness, was not afforded a full and fair opportunity to cross-examine Quinn.

Contrary to the Commonwealth's assertions, the taint of counsel's ineffectiveness was not alleviated through the additional testimony of its expert, Schneiders. At the re-trial, in addition to the prior testimony of Quinn, the Commonwealth presented the testimony of Schneiders, a fire investigator. A substantial portion of Schneiders's testimony focused on Quinn's investigation, or, rather, what Quinn's investigation would have entailed. For example, the prosecutor asked Schneiders to testify regarding

the actions undertaken by Quinn to investigate the fire. N.T. (Morning), 3/28/16, at 32.[8] Schneiders, however, responded as follows:

> [Schneiders]: [] Quinn—when we process the scene now that the fire is out and it's clear of smoke and steam and, you know, usually some—you never really clear it initially. You start your search of the house.
>
> …
>
> And with that—all the firefighting operations is [*sic*] halted. Everybody don't touch [*sic*] nothing.
>
> So they would fog it out. And fogging it out, basically, you put a water stream in a window, bring it in the house, and put on a big fog pattern that acts as an exhaust to get smoke out. Then you look for hotspots. Sometimes you have to turn things over that are on fire still, and things have collapsed through the course of the fire where the material degrades, and also you have the steam and the smoke. So you are running around trying to put out the little—we call them "hotspots" after the fire.
>
> So everybody calms down. You take a real hard look at everything, and [] Quinn would do that and did.
>
> In fact, this house, he searched the areas of the house, and now we are looking for patterns. And one of the things that fire investigators do, you look for—you count from areas—let's say least burned to the heaviest burned. What we mean is when you search through the house, what you are going to look for is, well, what was on fire and what was not on fire. That's what we call the least to the heaviest amount of damage.
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> So, Quinn would go in the basement. They would go in the first floor, then the third. So you are doing this assessment and looking around the house. So you do all three, sometimes in different orders. The order doesn't matter.

[8] Both volumes of the Notes of Testimony of March 28, 2016, are designated as "Volume 1." Consequently, we will designate the first volume as "Morning," and the second volume as "Afternoon."

> So then you look at this house, and you look at a house … it's a little house. So this house doesn't have any windows on the side of the house. It only has windows front and back. … So you are taking that all into consideration.
>
> But to get back to where I was a second ago, the first thing you do is, you look at—and you get your line and see what was on fire, [and] what wasn't on fire. So when we work from what we call the least amount of damage to the heaviest amount of damage.

Id. at 32-34. Schneiders's testimony continued in the same manner. For example, Schneiders testified that

> [w]hen we say the least amount of damage, you—[] Quinn based—looked at the heater, the electric fuse panel. He looked at the other items in the basement, and you could effectively see that there was—really the fire didn't start there because of that's, guaranteed, the least amount of damage in the basement/garage.
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> * * *
>
> Q. [The Commonwealth]: [] Schneiders, in terms of walking through the living room and dining room, which had the most damage of the two?
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> A. [Schneiders]: Without a doubt, the living room, and the dining room second to that.
>
> Q. What did [] Quinn do and see? And walk us through that.
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> A. Well, again, we are looking at burn patterns, fire patterns, but we use "burn" and "fire" interchangeably.
>
> You are looking at—like I said earlier, as a firefighter, you learn the typical way that a fire—and you draw in experience. You have to. And you see what a fire would look like if it started in a couch or what it would look like in a loveseat, and it's basically furniture that everyone has in their house.
>
> And then, like, this was—the dining room table was somewhat unique. It was a very sturdy, heavy, wooded—almost

> like a bench, like a picnic-bench-type thing. It wasn't a picnic bench[,] but resembled that, heavy pieces of wood. And, you know, wood is obviously combustible.
>
> And then there was other furniture in the living room. There was a cocktail table, [and] TV.
>
> The dining room, there was bureau and china cabinet. The dining room was paneled, the wood paneling on top of the plaster, so you would look at that.
>
> And then you are really looking for something we call a V-Pattern. It's like the letter V. The fire resembles that. That's like the fingerprinting that we are looking for. We are looking for this fire pattern and the burn. Again, it will burn things in its path. That's what we are talking about, the amount of consumption as opposed to lack of consumption next to it.
>
> Like sometimes—and, here, you could see the fire patterns were on the wall, and you could see some areas, definite lines of demarcation.

Id. at 35, 41-43.

In his testimony, Schneiders did confirm that Quinn documented the location of various items following the fire, and interviewed witnesses. ***Id.*** at 57-58. Schneiders further testified that Quinn took samples of the floor and carpeting, and sent those to the laboratory for analysis. ***Id.*** at 60. Schneiders stated for the jury Quinn's opinion regarding the origin of the fire. ***Id.*** at 61-62. Finally, when asked whether he agreed with Quinn's "sentiments as to where and how the fire was caused[,]" Schneiders confirmed that he did, explaining that

> I did a tremendous amount of research, looking at the pictures, thinking about myself, if I was in this house first as a firefighter …. Then I would think to myself first, as an investigator, what I would do, and what I did see and see if he—all the steps would

> be taken, and they were, to see if the methodology was reasonable, and it was.

Id. at 63. Immediately thereafter, Schneiders stated his opinion that there was no "flashover" on the second floor of the building. ***Id.*** at 69.

Schneiders then reviewed photographs of the scene taken after the "mop up operation." ***Id.*** at 72. From these photographs, Schneiders testified about Quinn's documentation of the crime scene, the purpose for Quinn's actions in investigating and documenting the scene, and Schneiders's own description of what the photographs revealed. ***See id.*** at 75-126. Describing the photograph of the bodies of the victims, Schneiders opined that, from the lack of burning to the bodies, there was no flashover on the second floor. ***Id.*** at 126. Finally, Schneiders testified that based upon his examination of all the facts, he classified the fire as "incendiary," with three points of origin. N.T. (Afternoon), 3/28/16, at 11-12.

At the new trial, Dougherty, with the assistance of experts, cross-examined Schneiders about the basis for his opinion. Schneiders's testimony provided no opportunity to challenge Quinn's investigation, as Schneiders testified as to what he thought Quinn "would have" done during the investigation. Dougherty could not effectively cross-examine Schneiders regarding the scientific basis for Quinn's opinions. As this Court recognized, in addressing Dougherty's PCRA appeal,

> the issue of whether the August 24, 1985 fire was caused by arson was **the** bedrock inquiry at [Dougherty's] trial[,] and Quinn's testimony supplied the scientific support for the

> Commonwealth's contention that the fire was intentionally started and that [Dougherty] was the individual who ignited it. In failing to acquaint himself with the relevant forensic principles or, alternatively, to present an expert in fire science, [Dougherty's] counsel essentially allowed the Commonwealth to prove the most critical elements of its case without meaningful challenge by the defense. Moreover, if trial counsel had undertaken an informed cross-examination of Quinn, and/or presented testimony from an expert in fire science, there is a reasonable possibility that such efforts would have had the spillover effect of causing the jury to view testimony regarding [Dougherty's] admissions through a more skeptical lens or, at least, view such testimony as expressions of [Dougherty's] moral regret or remorse, and not inculpatory declarations of his legal guilt….

Dougherty, 93 A.3d 520 (unpublished memorandum at 20-21) (emphasis in original).

Viewed in this light, the record does not support the conclusion that Dougherty had a "full and fair" opportunity to cross-examine Quinn during the first trial. Dougherty was deprived of this opportunity through the violation of his Sixth Amendment right to effective counsel. In addition, Schneiders's testimony did not remove the taint caused by counsel's ineffectiveness. Applying ***Bazemore*** and its progeny, we conclude that the trial court erred in admitting the prior testimony of Quinn at Dougherty's re-trial.

Our analysis, however, does not conclude at this point. We next look to determine whether the error in admitting Quinn's prior testimony was harmless.

> If an appellate court concludes beyond a reasonable doubt that the error could not have contributed to the verdict, the error is

> harmless. However, if there is a reasonable possibility that the error may have contributed to the verdict, it is not harmless. The Commonwealth bears the burden of establishing harmlessness beyond a reasonable doubt. Specifically, we will find harmless error where:
>
> > (1) the error did not prejudice the defendant or the prejudice was *de minimis*;
> >
> > (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or
> >
> > (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Commonwealth v. Hicks, 156 A.2d 1114, 1156 (Pa. 2017) (internal quotation marks and citations omitted).

As set forth above, during much of his testimony, Schneiders testified as to what Quinn would have done during his investigation, and validated Quinn's conclusions. The error in admitting Quinn's testimony was prejudicial to Dougherty, and the prejudice was not *de minimis*. Quinn's testimony was not merely cumulative at the second trial, as much of Schneiders's testimony focused on Quinn's methods and investigation. Finally, we cannot conclude that the properly admitted evidence of guilt was so overwhelming, and the prejudicial effect was so insignificant, that the error could not have contributed to the verdict. ***See id.*** For this reason, we are constrained to conclude that the trial court erred in admitting the prior testimony of Quinn at Dougherty's re-trial, and the error was not harmless.

Accordingly, we reverse Dougherty's judgment of sentence and remand for a new trial.

In his second and third claims of error, Dougherty challenges the admission of Quinn's prior testimony. As we have concluded that the trial court erred in admitting Quinn's prior testimony, we need not address Dougherty's second and third claims.

In his fourth claim of error, Dougherty argues that the trial court erred in permitting the Commonwealth to publish an inflammatory photograph of the burned bodies of Dougherty's children. Brief for Appellant at 42. Dougherty argues that the photograph was inflammatory and had no evidentiary value. ***Id.*** at 44. Dougherty argues that the photograph depicted "the charred bodies of young children in their undergarments in the bed where they died." ***Id.*** Dougherty points out that, in closing arguments, the prosecutor acknowledged that the photograph was "just too horrific—I showed you one time, I will not again." ***Id.*** (citation omitted).

Regarding the evidentiary value of the photograph, Dougherty states that the Commonwealth offered the photograph as evidence that (1) if flashover had occurred …, it would have occurred upstairs as well as downstairs; (2) no flashover occurred upstairs; and therefore (3) no flashover occurred." ***Id.*** at 45. Dougherty argues that this evidence was irrelevant because his expert acknowledged that no flashover occurred on the second floor. ***Id.*** Thus, the photograph offered no essential evidence.

Id. Dougherty further argues that the error in admitting the photograph was not harmless, because even the Commonwealth conceded that displaying the photograph on a large screen carried the risk of "creating a scene in the courtroom[;]" and the photograph was not cumulative, as no other photograph of the burned victims was offered at trial. ***Id.*** at 48.

We review a challenge to the trial court's admission of photographs under an abuse of discretion standard. ***See Commonwealth v. Solano***, 906 A.2d 1180, 1191 (Pa. 2006). When considering the admissibility of photographs of a homicide victim, which by their very nature can be unpleasant, disturbing, and even brutal, the trial court must engage in a two-step analysis:

> First a [trial] court must determine whether the photograph is inflammatory. If not, it may be admitted if it has relevance and can assist the jury's understanding of the facts. If the photograph is inflammatory, the trial court must decide whether or not the photographs are of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Commonwealth v. Tharp, 830 A.2d 519, 531 (Pa. 2003) (citation omitted). "Although the possibility of inflaming the passions of the jury is not to be lightly dismissed, a trial judge can minimize this danger with an appropriate instruction, warning the jury members not to be swayed emotionally by the disturbing images, but to view them only for their evidentiary value." ***Commonwealth v. Pruitt***, 951 A.2d 307, 319 (Pa. 2008).

Our review of the record discloses that at trial, the Commonwealth offered two reasons for admission of the photograph of the victims' bodies: (1) to demonstrate the thoroughness of Quinn's investigation; and (2) to show that no extreme heat or smoke reached the second floor of the structure, thereby negating the defense's assertion that a flashover had occurred. ***See*** N.T. (Morning), 3/24/16, at 6 (wherein the prosecutor argued that the photographs "are relevant to show the condition of the bodies as they were found. It's important for the issue in terms of how the fire started, the damage to the house, and, you know, the resulting damage, not only to the house, but also to the victims themselves."), 7 (wherein the prosecutor argued that the photographs "go to exactly what [Quinn] did that day. He took multiple pictures of the bodies exactly where they were positioned when he went there[.]"). In opposing the admission of the photographs, however, defense counsel agreed as to the condition of the second floor, and argued that another, less inflammatory photograph was available to the Commonwealth:

> [Defense counsel]: … I don't think there's a dispute that the starting point is, are the photos inflammatory? And I don't think there's any dispute that they are inflammatory. They are horrible to look at.
>
> So then the question is, are they of such essential, probative value? And I submit to you that they are not.
>
> First and foremost, … the Commonwealth, at the first trial[,] conceded that there was no evidentiary value. They did not go at all to the cause of this fire, how this fire started. … [N]one of the experts talk about looking at the bodies having

> any evidentiary value with respect to how this fire started. That's number one.
>
> Number two, [the Commonwealth] asserts that's somehow probative with respect to the completeness or the thoroughness of [] Quinn's investigation. All of the testimony that [] Lentini will have is with respect to documenting those things that go to how this fire started, the burn patterns, those things that are asserted.
>
> Again, the condition of the bodies is not asserted by any expert of having probative value or any relevance with respect to that, so whether they were documented or not does not go to that at all.
>
> Finally, there's the issue of flashover[,] and the suggestion that … the photograph is probative of that issue. Again, [the prosecutor] conceded that our expert never contended that there was flashover on the second floor, so whether the boys photos show [that] there isn't doesn't provide any evidentiary value[,] because we are not suggesting that there was flashover up there. And even if this [c]ourt is inclined to suggest that there was some that the [c]ourt or the jury needs to see if there was flashover, notwithstanding that[,] we concede that there was not, there is a photo in evidence that is not nearly as inflammatory. That's C-9G, which shows white areas of the mattress.
>
> So, for all these reasons, Judge, we think [] the Court should not admit the photograph.

Id. at 11-13.

Our own review of the record discloses that at trial, the Commonwealth introduced the photographs during the testimony of the Chief Medical Examiner, Samuel Gulino, M.D. ("Dr. Gulino"). Dr. Gulino described, in detail, the condition of the victims' bodies following the fire. ***See id.*** at 103-05, 115-16. After describing the results of autopsies of the victims, Dr. Gulino opined that each victim died of smoke inhalation. ***See***

id. at 113, 118. Immediately thereafter, the trial court issued the following cautionary instruction:

> Ladies and Gentlemen of the jury, photos are about to be put in evidence for the purpose of showing the conditions of the scene as well as to help you understand the testimony of the witnesses who refer to it.
>
> I will warn you, they are not pleasant to look at; however, you should not let it stir up emotions to the prejudice of [Dougherty]. Your verdict must be based on a rational and fair consideration of all the evidence and not on passion or prejudice against [Dougherty], the Commonwealth, or anyone else connected with this case.

Id. at 119-20. The Commonwealth then asked Dr. Gulino to describe the condition of the victims, as shown in the photograph. ***Id.*** at 121-22. Dr. Gulino then opined that neither child was exposed to direct flame, but, rather, to smoke and intense heat. ***Id.*** at 122.

Subsequently, the Commonwealth's fire expert, Schneiders, referred to the photograph during his testimony. When asked what could be understood from the photograph of the victims, Schnieders stated that

> the lack of burning to the bodies; the fact that you could still see their underwear, the plastic diaper. You could still see the bedding. The bedding would have ignited. You could still see the other material right below the mattress. You could still see the pillows. I cannot—I can identify the pillow the boy's head was on.

N.T. (Morning), 3/28/16, at 126. Schneiders testified that the photograph "clearly documents, without a doubt, that there was not flashover up on the second floor in this compartment—the whole house is a compartment." ***Id.***

In its Opinion, the trial court stated the following rationale for admitting one photograph of the victims:

> The defense strategy in the present case was to attack the Commonwealth's expert's determination that there were three points of origin of the fire and that to propose that because of the phenomena of flashover and full room involvement, it was impossible to determine the cause of the fire. The Commonwealth's experts explained that the staircase, which was part of the room set ablaze, would have acted like a chimney, and with the severe heat rising in the room, the amount of heat and smoke going up the staircase would have been considerable. The photograph of the two children on the bed depicts one of the children wearing pullups[,] which were still white and the other child wearing a diaper with the plastic still intact, negating the defense expert's hypothesis. If the extreme heat required by the defense was present, it would be expected that the plastic diaper would have melted and the white pullup would have been grey at best. Clearly[,] the photograph was a necessary element for the Commonwealth to debunk the defense expert's explanation. Thus, the probative value of the evidence is unequivocal.

Trial Court Opinion, 9/1/16, at 15.

Upon review, we conclude that the trial court improperly admitted the photograph at trial. Contrary to the trial court's reasoning, defense counsel conceded that no flashover had occurred on the second floor of the structure. Further, there was another, less inflammatory photograph available to show the lack of flashover to the mattress under the bodies. The photograph was of no additional evidentiary value to the jury, in light of the testimony of Dr. Gulino and Schneiders as to the condition of the bodies. Under these circumstances, the inflammatory nature of the photograph outweighed its evidentiary value.

Finally, we conclude that the trial court's cautionary instruction did not alleviate its inflammatory nature. As the prosecutor acknowledged in his closing argument, the photo was "just too horrific –I showed you one time, I will not again …." N.T. (Morning), 3/31/16, at 62. For this reason, we conclude that the trial court abused its discretion in admitting the photograph of the victims at trial. We therefore reverse the judgment of sentence on this basis as well, and remand for a new trial.

In his fifth claim of error, Dougherty challenges the admission of the testimony of his ex-girlfriend, McGovern, and his ex-wife, Dippel, "regarding alleged incidents of past physical abuse by Dougherty, particularly in instances where they had confronted him about his alcohol consumption." Brief for Appellant at 50. First, Dougherty challenges McGovern's testimony regarding his demeanor, when he drank, as "nasty" and "belligerent," and her statement that he sometimes became physical when drinking. ***Id.*** at 51. Regarding Dippel's testimony, Dougherty challenges her description of his temperament, while drinking, as "horrible," and her assertion that when drinking, he would punch her and become violent. ***Id.*** Dougherty argues that the only purpose of this testimony was to show that he was the kind of person who would kill his children. ***Id.*** Dougherty additionally points out that the prosecutor used this evidence in his closing argument. ***Id.*** at 51-52.

Dougherty asserts that the evidence was not admissible under Pa.R.E. 404(b). Brief for Appellant at 52. Dougherty disputes the trial court's justification for admitting this evidence, *i.e.*, that Dougherty's "pattern of alcohol[-]induced violence toward women who had challenged his drinking was clearly admissible to show motive, revenge, intent and malice." ***Id.*** at 52 (citation omitted). Dougherty counters that

> the Commonwealth did not invoke those reasons, and instead advocated exclusively for the impermissible inference that (1) when women confronted Dougherty about his drinking, he often responded with violence; so (2) it is more likely that when McGovern and Dippel confronted Dougherty about his drinking on August 24, 1985, he responded by starting the fire.

Id. Dougherty argues that the testimony was offered to "prove the character of a person in order to show action in conformity therewith, the specific inference prohibited by Rule 404(b)." ***Id.*** at 52-53 (internal quotation marks omitted).

First, we observe that Dougherty failed to object to the testimony of Dippel on this basis, or the prosecutor's use of McGovern's testimony in his closing argument. Accordingly, those specific arguments are waived. ***See*** Pa.R.E. 302(a) (stating that an issue cannot be raised for the first time on appeal); ***see also Commonwealth v. Baumhammers***, 960 A.2d 59, 84 (Pa. 2008) (stating that "the absence of a specific[,] contemporaneous objection renders [an] appellant's claim waived.") (citation omitted)). We therefore will address Dougherty's preserved claim.

> "Evidence is admissible if it is relevant — that is, if it tends to establish a material fact, makes a fact at issue more or less probable, or supports a reasonable inference supporting a material fact — and its probative value outweighs the likelihood of unfair prejudice." ***Commonwealth v. Boczkowski***, 577 Pa. 421, 846 A.2d 75, 88 (Pa. 2004) (citations omitted). Admissibility of evidence is within the sound discretion of the trial court and we will not disturb an evidentiary ruling absent an abuse of that discretion. ***Commonwealth v. Arrington***, 624 Pa. 506, 86 A.3d 831, 842 (Pa. 2014), ***citing Commonwealth v. Flor***, 606 Pa. 384, 998 A.2d 606, 623 (Pa. 2010)….

Commonwealth v. Hicks, 156 A.3d 1114, 1125 (Pa. 2017).

Pennsylvania Rule of Evidence 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Pa.R.E. 404(b)(1).

> [E]vidence of prior bad acts, while generally not admissible to prove bad character or criminal propensity, is admissible when proffered for some other relevant purpose so long as the probative value outweighs the prejudicial effect." ***Boczkowski***, 846 A.2d at 88. ***See also Arrington***, 86 A.3d at 842, *citing* Pa.R.E. 404(b)(1); ***Commonwealth v. Morris***, 493 Pa. 164, 425 A.2d 715, 720 (Pa. 1981) (law does not allow use of evidence which tends solely to prove accused has "criminal disposition"). Such evidence may be admitted to show motive, identity, lack of accident or common plan or scheme. ***Arrington***, 86 A.3d at 842, *citing* Pa.R.E. 404(b)(2); ***Commonwealth v. Briggs***, 608 Pa. 430, 12 A.3d 291, 337 (Pa. 2011) (Rule 404(b)(2) permits other acts evidence to prove motive, lack of accident, common plan or scheme and identity). In order for other crimes evidence to be admissible, its probative value must outweigh its potential for unfair prejudice against the defendant, Pa.R.E. 404 (b)(2), and a comparison of the crimes proffered must show a logical connection between them and the crime currently charged. ***Arrington***, 86 A.3d at 842.

Hicks, 156 A.3d at 1125.

Here, the trial court rejected Dougherty's challenge to the prior bad-acts evidence, reasoning that "[Dougherty's] pattern of alcohol[-]induced violence toward[s] women who had challenged his drinking was clearly admissible to show motive, revenge, intent and malice." Trial Court Opinion, 9/1/16, at 22. When used as evidence of motive, our Supreme Court has explained that,

> [t]o be admissible under this exception, there must be a specific "logical connection" between the other act and the crime at issue which establishes that "the crime currently being considered grew out of or was in any way caused by the prior set of facts and circumstances." ***Commonwealth v. Martin***, 479 Pa. 63, 68-69, 387 A.2d 835, 838 (1978) (quoting ***Commonwealth v. Schwartz***, 445 Pa. 515, 522, 285 A.2d 154, 158 (1971)). In ***Martin***, for example, thirteen days prior to his murder, the victim had struck the appellant with a chair when the appellant was attempting to rob others. Our Supreme Court determined that this incident constituted a possible motive for the subsequent murder, as "the killing grew out of or was in some way caused by the prior incident." ***Id.*** at 69, 387 A.2d at 838.

Commonwealth v. Ross, 57 A.3d 85, 100 (Pa. 2012). The Supreme Court cautioned, however, that

> [t]he mere identification of similarities between the prior bad acts and the crime at issue, … does not establish motive. Instead, as indicated above, there must be a firm basis for concluding that the crime currently on trial "grew out of or was in any way caused by the prior set of facts and circumstances."

Id. at 101 (quoting ***Commonwealth v. Martin***, 387 A.2d 835, 838 (Pa. 1978)).

At trial, the Commonwealth presented the following testimony from McGovern, Dougherty's former girlfriend, McGovern:

Q. [The Commonwealth]: When [Dougherty] drank, how did he get? Tell us about his temperament?

[Defense counsel]: Objection

Q. Ma'am, tell the ladies and gentlemen of the jury when he drink, his temperament.

A. [McGovern]: He would get nasty.

Q. How would you describe "nasty" ma'am?

A. Belligerent, mean. I don't know.

Q. Would he get physical?

[Defense counsel]: Objection.

THE COURT: Overruled.

…

Q. … [Y]ou described his temperament when he was drinking, but let me ask you this: What was his temperament when you confronted him about the drinking when he was drinking?

A. I guess he didn't like it.

Q. Well, ma'am, we weren't there. You have to tell us, Ms. McGovern.

Just listen to my question. You have to tell the ladies and gentlemen of the jury, when he was drinking and you, [McGovern], confronted him, what was his response?

A. I –

Q. How did he respond?

A. He would get mad.

Q. How did he act? What was—how did he act?

A. Mad.

Q. Okay. Describe "mad."

Would he get physical when you confronted him about his drinking?

A. Sometimes.

N.T., 3/23/16, at 11-13. Over Dougherty's objection, the Commonwealth further confronted McGovern with her statement to police that Dougherty would hit her when she confronted him about its drinking. ***Id.*** at 89-90. In addition, the Commonwealth confronted McGovern about her prior testimony, wherein she stated that Dougherty became "nastier" when drinking. ***Id.*** at 94-95.

The above testimony does not establish that the alleged arson "grew out of or was in any way caused by the prior set of facts and circumstances" as to McGovern. ***See Ross***, ***supra***. There is no support for a conclusion that Dougherty's prior actions against McGovern evidenced his intent or malice as to the charge of arson. There is no evidence that Dougherty previously placed his children in harm's way when intoxicated, or that his violence, when drinking, extended to his children. Rather, the evidence was offered to show that because Dougherty became violent towards McGovern, who had confronted him about drinking, he was more likely to act in conformity therewith and set a fire and kill his children. Such use is not permitted under Rule 404(b). ***See*** Pa.R.E. 404(b). Accordingly, the trial

court abused its discretion in admitting the prior bad acts testimony of McGovern.

Where, as here, the cause of the fire was contested, we cannot deem this error harmless. We therefore reverse Dougherty's judgment of sentence on this basis as well, and remand for a new trial.

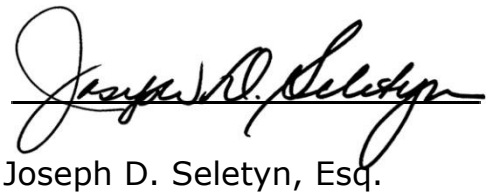
Finally, Dougherty claims that "[p]rosecutorial misconduct infected the trial and denied Dougherty a fair trial and due process of law." Brief for Appellant at 56. Dougherty claims that during closing arguments, the trial court improperly allowed the prosecutor to give personal and inappropriate opinions as to the credibility of Dougherty's witnesses. ***Id.*** at 57. In particular, Dougherty claims that the prosecutor compared his fire expert to a charlatan, a prostitute, a three-card monte dealer, and an adulterer. ***Id.*** at 58.

In its Opinion, the trial court addressed this claim and concluded that it lacks merit. ***See*** Trial Court Opinion, 9/1/16, at 23-28. We agree with the reasoning of the trial court, as set forth in its Opinion, and affirm on this basis as to Dougherty's sixth claim. ***See id.***

For the foregoing reasons, we are constrained to reverse Dougherty's judgment of sentence and remand for a new trial.

Judgment of sentence reversed. Case remanded for a new trial. Superior Court jurisdiction is relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/31/2017