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Case Number 68,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GABRIEL PARDO,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 68, 2016**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: September 30, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

On November 24, 2014, a New Castle County grand jury indicted Gabriel Pardo ("Pardo") on charges of Manslaughter, Leaving the Scene of a Collision Resulting in Death, Reckless Driving and six counts of Endangering the Welfare of a child. A-001. Prior to trial, Pardo filed a motion to dismiss the Leaving the Scene of a Collision Resulting in Death charge, claiming it was unconstitutional. B384-86. The Superior Court denied Pardo's motion. A-012. After a nine-day bench trial, the Superior Court convicted Pardo of all charges. A-012. Pardo filed a post-trial motion for judgment of acquittal which the court denied on November 10, 2015. A-012; A-016. On January 15, 2016, the Superior Court sentenced Pardo to an aggregate eight years incarceration followed by decreasing levels of supervision. Exhibit A to *Op. Brf.* Pardo appealed his convictions. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. Section 4202 of Title 21 of the Delaware Code is not unconstitutional. While the language of section 4202 does not identify a *mens rea*, it is not a pure strict liability statute requiring analysis of its penalties under *Morissette*.

II. Appellant's argument is denied. The trial court did not abuse its discretion when it included language from 11 *Del. C.* §421 regarding voluntary intoxication in its manslaughter instruction. The instruction was a correct statement of the law and was supported by evidence that Pardo had been consuming alcohol prior to striking and killing Phillip Bishop with his car.

III. Appellant's argument is denied. The Superior Court correctly denied Pardo's motion for judgment of acquittal. Viewed in the light most favorable to the State, the evidence was sufficient for rational trier of fact to that Pardo was guilty beyond a reasonable doubt.

IV. Appellant's argument is denied. The trial judge did not err by denying Pardo's request for a missing evidence instruction. The evidence complained of was not "missing" and did not meet the criteria required to give a *Lolly-Deberry* instruction.

STATEMENT OF FACTS

On September 12, 2014, Gabriel Pardo ("Pardo") struck Phillip Bishop ("Bishop") with his motor vehicle and, without stopping his car, left the scene of the collision as Bishop lay dying on the side of the roadway. B15-16; B262. Pardo's children were in his vehicle at the time of the crash. B124.

Phillip Bishop, an avid bicyclist, rode his bicycle to and from his job at the Pure Bread Cafe every workday. B7. At night, Bishop rode with reflective material and lights positioned on both his bike and his body. B8. According to his co-worker, Kimberly Greene, Bishop departed from work on his bicycle shortly after 8 p.m. on September 12, 2014. B8. That evening, Shannon Athey ("Athey") was driving northbound on Brackenville Road in Hockessin, Delaware, when she saw a flashing light, debris, a red reflector, and clothing strewn across the road. B10. She slowed her car and saw a person laying in the road. B10. Athey stopped her car and noticed that there were other people at the scene. B11. Patrick Ritchie ("Patrick") was driving northbound on Brackenville Road with his wife, Dierdre. She saw a bicycle in the road. B15. Patrick stopped the car, he and Dierdre got out, and Patrick yelled "There's someone in the road. Call 911." B15. Dierdre, a registered nurse, called 911 and immediately attempted to provide emergency medical aid to Bishop. B16. According to Dierdre, Bishop was not breathing and had no pulse. B17. Bishop was pronounced dead at the scene. B31. Dr. Jenny Vershvovsky performed an autopsy

and concluded that Bishop died from multiple blunt force injuries to a variety of locations on his body, including his lungs, kidneys, brain, neck, and extremities. B139-41.

Corporal Kurt Hussong ("Cpl. Hussong") of the New Castle County Police Department responded to the scene shortly after emergency responders and assumed the role of chief investigating officer. B31. Using crime scene analysis and crash reconstruction techniques, Cpl. Hussong determined that Bishop was riding his bicycle within the proper designated southbound lane of travel. B45. Cpl. Hussong concluded that Pardo drove his vehicle outside his designated lane of northbound travel and moved so far in to the opposite lane of oncoming traffic that his driver side tires departed the roadway to the left and left impressions on the shoulder of the road. B45. Pardo's account of the accident confirmed that he drove his vehicle into the oncoming lane of travel on the evening of the collision. B301.

In the afternoon prior to the accident, Pardo invited a co-worker, Pardo Yesenia McCall ("McCall"), to a celebratory meal. B76. The pair left work early and went to the Border Café, where, over the course of several hours, they ate a meal and consumed alcoholic drinks. B77. Pardo drank beer, margaritas and shots of tequila. B78; B101-03; State's Trial Exhibit 57. After paying for their food and drink, Pardo and McCall left the restaurant. B78. Pardo drove to the ACME

supermarket in the Lantana Square shopping center to pick up his children for the weekend. B247.

Pardo's ex-wife, Catherine, testified that Pardo arrived at the ACME parking lot that evening to pick up their children. B110. Pardo took the children into the supermarket before heading to his house on Brackenville Road. B111. Pardo left the store with his three sons and drove northbound on Brackenville Road. B123. On their way to Pardo's house, one of his sons saw something fall on top of the car. B124. The windshield suddenly cracked and everyone in the car was "freaking out." B123.

At trial Pardo explained that when driving on certain parts of Brackenville Road, he intentionally travels partially into the oncoming lane of travel. B278; B301. He admitted that he intentionally drove outside of his lane of travel, crossing the yellow line that evening. B301. Pardo acknowledged that, on the night of the accident, he was involved in a collision that caused serious damage to his car. B262. He did not stop his car until he arrived at his home and he did not notify the police that he had been in an accident until the following morning. B266. Pardo told police he might have struck a deer or a tree branch and testified at trial that he thought he had struck a stick. B266.

As part of his investigation, Cpl. Hussong examined the crash scene and recovered an Audi emblem and pieces of the Audi's front grille from the debris field

on Brackenville Road. B44. He also examined Pardo's car, an Audi. B49. The car was missing pieces of its front grille and the Audi emblem. B50. There was damage to the hood – two dents that were the same size as the handlebars of Bishop's bicycle. B50. The windshield was also damaged in two places, indicating that after he was hit by the Audi, Bishop's body struck the windshield in two different places. B195. Cpl. Hussong also examined Bishop's bicycle and determined that it had been struck from the front because the front fork of the bicycle's frame was bent in, the front wheel was damaged and there was no damage to the rear wheel. B40.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT 21 *Del. C.* § 4202 IS CONSTITUTIONAL.

Question Presented

Whether 21 *Del. C.* § 4202, a statute requiring individuals involved on traffic collisions resulting in injury or death, is unconstitutional.

Standard of Review

This Court reviews the claims challenging the constitutionality of a statute *de novo*.[1]

Merits of the Argument

A New Castle County grand jury indicted Pardo, *inter alia*, for one count of Leaving the Scene of a Collision Resulting in Death in violation of 21 *Del. C.* § 4202.[2] Section 4202 reads, in pertinent part:

> (a) The driver of any vehicle involved in a collision resulting in injury or death to any person shall immediately stop such vehicle at the scene of such collision. Said stop should be made as close to the scene of the collision as possible without obstructing traffic more than necessary. The driver shall give the driver's name, address and the registration number of the driver's vehicle and exhibit a driver's license or other documentation of driving privileges to the person struck or the driver or occupants of any vehicle collided with and shall render to any person injured in such collision reasonable assistance, including the carrying of such person to a hospital or physician or surgeon for medical or surgical

[1] *Steckel v. State*, 882 A.2d 168, 170 (Del. 2005).

[2] A-001.

> treatment if it is apparent that such treatment is necessary or is requested by the injured person, or by contacting appropriate law-enforcement or emergency personnel and awaiting their arrival.
>
> * * *
>
> (c) Whoever violates subsection (a) of this section when that person has been involved in a collision resulting in death to any person shall be guilty of a class E felony. The provisions of § 4206(a) or § 4217 of Title 11 or any other statute to the contrary notwithstanding, the sentence for such offense shall include a period of incarceration of not less than 1 year and the first 6 months of any sentence imposed shall not be suspended.[3]

In his pretrial motion to dismiss the Leaving the Scene of a Collision Resulting in Death charge, Pardo claimed that "the statutory enactment found in 21 *Del. C.* § 4202(a)(c) is patently unconstitutional."[4] He argued that the statute violated due process under the state and federal constitutions because it subjected a defendant to a felony conviction carrying a mandatory period of incarceration for a strict liability offense.[5] The Superior Court rejected Pardo's argument, holding:

> The United States Supreme Court has applied a two-prong test to determine whether a strict liability offense violates a defendant's due process rights. Under the test laid out in *Morissette*, "a strict liability offense is not deemed to violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch a defendant's reputation." The two-prong test is satisfied here because a six-month minimum mandatory prison term is a relatively

[3] 21 *Del. C.* § 4202.

[4] B384.

[5] B384-85.

> small penalty and a conviction for this offense is not such that a defendant's reputation would be "gravely besmirched."[6]

Ultimately, the court found that the statute was constitutional as written and as applied to Pardo.[7]

On appeal, Pardo presents the same claim, arguing that section 4202 is "unconstitutional because it is a strict liability offense that results in a felony conviction with a possible sentence of one to five years [imprisonment], six months of which is mandatory."[8] He contends that the five-year maximum penalty is not a "relatively small" period of incarceration and that a felony conviction, in and of itself, leads to a "gravely besmirched" reputation. His argument is unsupported by extant law. The Superior Court correctly concluded that section 4202 is constitutional.

In Delaware, there is a "strong judicial tradition . . . in support of a presumption of the constitutionality of a legislative enactment."[9] To that end, Pardo has the burden of rebutting the strong presumption of validity and constitutionality which

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[6] *State v. Pardo*, 2015 WL 6945310, at *2 (Del. Super. Nov. 9, 2015) (quoting *Morissette v. United States,* 342 U.S. 246, 256 (1952)).

[7] *Id.*

[8] *Op. Brf.* at 11.

[9] *Snell v. Engineered Systems & Design, Inc.*, 669 A.2d 13, 17 (Del. 1995).

accompanies all duly enacted statutes.[10] Given the presumption of validity and this Court's "duty to read statutory language so as to avoid constitutional questionability and patent absurdity," Pardo is unable to rebut this presumption.[11]

In *Hoover v. State*, this Court considered whether 21 *Del. C.* § 4176A was unconstitutionally vague because it failed to require proof of a state of mind, thus imposing liability for "operation of a vehicle causing death when, in the course of driving or operating a motor vehicle or OHV in violation of any provision of [chapter 41 of the Motor Vehicle Code]."[12] The *Hoover* court applied a two-step analysis to determine whether section 4176A is unconstitutionally vague, considering "whether the terms of the statute are sufficiently explicit to inform those subject to the statute of the prohibited conduct" and "whether the terms of the statute are so vague that persons of common intelligence must guess at the statute's meaning and would differ as to its application."[13] The Court ultimately concluded that the section 4176A was not unconstitutionally vague, holding:

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[10] *McDade v. State*, 693 A.2d 1062, 1065 (Del. 1997) (stating "[a] legislative act is presumed to be constitutional").

[11] *State v. Sailer*, 684 A.2d 1247, 1250 (Del. 1995) (quoting *Moore v. Wilmington Housing Authority*, 619 A.2d 1166, 1173 (Del. 1993) (internal quotes omitted)).

[12] *Hoover*, 958 A.2d 816, 819 (Del. 2008) (quoting 21 *Del. C.* § 4176A) (internal quotes omitted)).

[13] *Id.* at 820–21.

> The absence of a state of mind requirement in section 4176A does not make the statute void for vagueness. The United States Supreme Court has held that legislatures may make the commission of an act a criminal offense even in the absence of criminal intent. Delaware courts also have held that the question of intent with respect to statutory crimes is largely for the legislature to decide.
>
> * * *
>
> This Court has held that motor vehicle statutes are enacted for the public safety. Therefore, because section 4176A is part of the state's motor vehicle code, it falls within the class of statutes that relate to the public safety and welfare and need not require a specific state of mind.
>
> * * *
>
> Section 4176A is not unconstitutionally vague because its terms are sufficiently explicit to give a person of common intelligence notice of the proscribed conduct.[14]

While the Court determined that section 4176A is not unconstitutionally vague, it specifically left open the question of "whether a sentence of thirty months in prison is a 'relatively small' penalty that would not violate the due process rights of a person who lacked intent to commit a crime, under *Morissette*."[15]

Here, Pardo argues this Court's assessment of the constitutionality of section 4202 must be analogous to its prior analysis of section 4176A because section 4202 "is also a strict liability offense." Not so. "'[S]trict liability' traffic offenses are not

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[14] *Id.* at 823-24 (citing *United States v. Balint,* 258 U.S. 250, 251–52 (1922); *State v. Tabasso Homes,* 28 A.2d 248, 254 (Del. Gen. Sess. 1942); *Wright v. Moore*, 931 A.2d 405, 408 (Del. 2007).

[15] *Id.* at 824 (quoting *Morissette* 342 U.S. at 256).

offenses with no criminal intent element. They do not require the specific intent or wrongful purpose that is an element of other crimes, but they do require the defendant to have voluntarily committed the act that the statute prohibits, which typically involves driving at a particular time and place or in a particular way."[16]

Section 4202 must, necessarily, be read in conjunction with Section 4201 of Title 21 which requires that:

> The driver of any vehicle involved in a collision resulting in *apparent damage* to property shall immediately stop such vehicle at the scene of the collision. Said stop should be made as close to the scene of the collision as possible without obstructing traffic more than necessary. The driver shall immediately undertake reasonable efforts to ascertain whether any person involved in the collision was injured or killed.[17]

Read *in pari materia*, sections 4201 and 4202 impose upon drivers involved in collisions the duty to assess the nature and consequences of a collision before continuing on their journey. While section 4202 does not expressly refer to a required mental state on the part of the defendant, it nonetheless requires that the driver have knowledge of the accident.

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[16] *State v. Ogilvie*, 734 S.E.2d 50, 53 (Ga. 2012).

[17] 21 *Del. C.* § 4201(a) (emphasis added). While Pardo was not charged with a violation of Section 4201 of Title 21, the obligations imposed by Section 4202, necessarily, include the requirement that an individual involved in a crash stop to, at a minimum, examine the result of the crash.

The legislative debate preceding the enactment of sections 4201 and 4202 clearly demonstrates the intended elements of section 4202. The absence of a *mens rea* in a statute defining a crime does not equate with legislative intent, and, in certain situations, further examination may be necessary. A reviewing Court may "refer to parts of the legislative record to establish the purpose of legislation where the record reveals more information about the enactments."[18] The debate on the Senate floor preceding the passage of Senate Bill 154 ("SB 154") during the 141st General Assembly highlights the purpose of 21 *Del. C.* § 4202.[19] Prior to the passage of SB 154. Legislators questioned the reach and application of the statute, and some voiced concern with respect to the serious consequences associated with a conviction.

Deputy Attorney General Steven P. Wood, called as a witness by the bill's sponsor, addressed Senators' concerns. Responding to Senator Bonini, Mr. Wood explained the purpose of the bill:

> When you read Section 4201 and 4202 together, what they instruct drivers in Delaware is if you are involved in an accident, you have to stop and ascertain whether or not an injury has occurred. And if an injury has occurred, there are certain things you are supposed to do. Under this legislation, if it passes, if you are involved in an accident and you flee the scene without stopping and ascertaining whether an

[18] *Hoover*, 958 A.2d at 820.

[19] 141st General Assembly, Senate Floor Debate on House Bill No. 154 (Audio CD recording included as Exhibit "A") (CD Tracks SB 154_141st_Senate debate 1.mp3 ("SB 154 Senate Debate Track 1") and SB 154_141st_Senate debate 2.mp3 ("SB 154 Senate Debate Track 2")).

> injury has occurred, or, if you flee the scene after you've learned an injury has occurred, and the person dies, you would be punishable, you would be facing a sentence of one to three years, one to five years, in jail. Under the existing law, as it is right now, that penalty is one to three years in jail. So the change is really only at the upper end, not at the bottom end.[20]

Later, Senator Still inquired as to what constitutes "fleeing" as contemplated by the bill, and Mr. Wood offered:

> The point of the existing legislation is to ensure that if you are involved in an accident which results in injury to somebody else, that you will do what I would hope one's conscience would lead one to do anyway which is stay around and render any necessary assistance and then stay around so that the police can begin their investigation.[21]
>
> *****
>
> The intent of the legislation is to ensure that people who are injured in accidents will get help. And usually the only person who is available to secure that help is the driver of the other vehicle. The intent is to get people to stay and the intent of Senate Bill 154 is to reduce what is currently an incentive to flee the scene if you are in fact intoxicated, because the penalties are less if you flee than if you stay.[22]
>
> *****
>
> They are aimed at the person who hits somebody in their car and then takes off because they are intoxicated and is trying to avoid criminal prosecution. And the avoidance of criminal prosecution is more important to them than the life of the person that they have just

[20] SB 154 Senate Debate Track 1 at 6:26 – 7:11.

[21] *Id.* at 8:35

[22] *Id.* at 9:47.

> threatened by causing the accident or being involved in the accident in the first place.[23]

Reviewing the legislative record and reading section 4202 in conjunction with section 4201, it is clear that the legislature did not intend to enact a statute that imposes a criminal penalty on a driver who, regardless of their knowledge of an accident or injury, would be strictly liable for the outcome. Because section 4202 is not a strict liability offense as contemplated by *Morissette*, this Court need not determine whether the penalties set forth in subsection (c) are "relatively "small" or whether they "gravely besmirch" a defendant's reputation.[24]

Section 4202 imposes a requirement that a driver have knowledge of the accident or collision resulting in physical injury or death before he can be held criminally responsible. Indeed, "[i]n many jurisdictions where [similar] statutes do not contain the terms "knowingly," or "willfully" or similar language, courts have held that a driver must have had knowledge of the collision or accident before he can

[23] *Id.* at 11:29.

[24] While the Superior Court found that section 4202 is constitutional under *Morissette*, this Court can affirm on different grounds. *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361 (Del. 1995).

be held accountable under the statute."[25] As a result, Pardo's claim that section 4202 is unconstitutional fails.

[25] *People v. Nunn*, 396 N.E.2d 27, 30–31 (Ill. 1979) (citing *Kimoktoak v. State* 584 P.2d 25 (Alaska 1978); *State v. Wall,* 482 P.2d 41 (Kan. 1971); *State v. Martin*, 440 P.2d 429 (Wash. 1968); *State v. Lemme,* 244 A.2d 585 (R.I. 1968); *Herchenbach v. Commonwealth,* 38 S.E.2d 328 (Va. 1946) "There are other jurisdictions which go beyond this requirement and in addition require that the accused have knowledge that an injury or death was involved." *Id.* (citing *State v. Minkel,* 230 N.W.2d 233 (S.C. 1975); *State v. Etchison,* 195 N.W.2d 498 (N.D. 1972); *Campbell v. Westmoreland Farm, Inc.*, 270 F.Supp. 188 (E.D.N.Y. 1967); *People v. Holford*, 403 P.2d 423 (Cal. 1965)). *See also, State v. Porras*, 610 P.2d 1051, 1054, (Ariz. App. 1980); *Commonwealth v. Woosnam*, 819 A.2d 1198, 1206 (Pa. Super. 2003).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT INCLUDED LANGUAGE FROM 11 *Del. C.* § 421 IN THE MANSLAUGHTER INSTRUCTION.

Question Presented

Whether the trial judge abused her discretion by including an accurate statement of the law regarding voluntary intoxication in the manslaughter instruction.

Standard of Review

"This Court reviews the trial judge's decision to give jury instructions in a precise form for abuse of discretion."[26]

Merits of the Argument

"In Delaware, "[a] defendant has no right to have the jury instructed in a particular form. However, a defendant is entitled to have the jury instructed with a correct statement of the substantive law.'"[27] "[A] fundamental underpinning to all jury instructions [is that] there must be a factual basis in the record to support the instruction."[28]

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[26] *Brown v. State*, 49 A.3d 1158, 1159 (Del. 2012) (citing *Wright v. State*, 953 A.2d 144, 148 (Del. 2008)).

[27] *Hoskins v. State*, 102 A.3d 724, 730–31 (Del. 2014) (quoting *Claudio v. State*, 585 A.2d 1278, 1282 (Del. 1991) (other citations omitted)).

[28] *Erskine v. State*, 4 A.3d 391, 394–95 (Del. 2010).

At trial, the State requested that the trial judge include language from 11 *Del. C.* § 421 in its manslaughter instruction. Section 421 provides:

> The fact that a criminal act was committed while the person committing such act was in a state of intoxication, or was committed because of such intoxication, is no defense to any criminal charge if the intoxication was voluntary.[29]

Pardo objected, and the trial judge overruled his objection stating:

> It is my judgment that, based on the evidence presented in this case, there has been a fair amount of evidence regarding the defendant's alcohol consumption and whether or not he was impaired at the time of the incident in question as a result of his alcohol consumption.[30]

On appeal, Pardo appears to echo trial counsel's argument that intoxication was not an element of manslaughter and the court abused its discretion when it incorporated language from section 421 in its instruction. Thus, as fact finder, the trial judge was not permitted to consider his alcohol consumption at all. Pardo is wrong.

The trial judge was permitted to consider all the facts in evidence (including Pardo's alcohol consumption) and draw reasonable inferences from those facts in reaching a verdict.[31] The additional language of section 421 was a correct statement of the law and it correctly limited the court's consideration of such evidence (i.e.

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[29] 11 *Del. C.* § 421.

[30] A-221.

[31] *Poon v. State*, 880 A.2d 236, 238 (Del. 2005)

Pardo's voluntary intoxication could not be considered as a defense to the charge). Pardo offers no support for his theory that the trial judge was not permitted to consider his alcohol consumption. Rather, he simply contends that "the Court did not consider all the facts in evidence."[32] Much of his argument highlights evidence presented at trial that supported his theory of the case. The court, sitting as fact finder, rejected his theory in finding him guilty. It is the sole province of the fact finder to accept or reject the testimony of witnesses and to give whatever weight it deems appropriate to the testimony of any witness.[33] And, despite Pardo's invitation to this Court to reconsider the trial evidence, on appeal, the Court "will not substitute [its] judgement for the fact finder's assessments . . ."[34]

Here, the trial judge properly considered evidence of Pardo's alcohol consumption as it related to his state of mind, finding:

> It is not an element of the offenses before the Court that the defendant was impaired or intoxicated, and the Court does not so find. The Court does note that, "while under the influence" in Delaware statutory law means a person is less able than the person ordinarily would have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle. Based on the record evidence, including the defendant's own testimony, the Court

[32] *Op. Brf.* at 19.

[33] *Id.* (citing *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992) (other citations omitted).

[34] *Id.* (citations omitted).

> finds the defendant was under the influence of alcohol after consuming six to seven alcoholic drinks within 1.5 to 5 hours of the accident.

This evidence demonstrated Pardo's state of mind. The inclusion of the voluntary intoxication language in the manslaughter instruction was an accurate statement of the law that was supported by the facts in evidence.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PARDO'S MOTION FOR JUDGMENT OF ACQUITTAL.

Question Presented

Whether, viewed in the light most favorable to the State, any rational trier of fact could find Pardo guilty of manslaughter beyond a reasonable doubt.

Standard and Scope of Review

This Court "review[s] the denial of a motion for judgment of acquittal *de novo* to determine 'whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt.'"[35] This Court "does not distinguish between direct and circumstantial evidence of a defendant's guilt" for purposes of that inquiry.[36]

Merits of the Argument

On appeal, Pardo claims that in denying his motion for judgment of acquittal, the trial judge failed to consider:

> testimony by the defendant that he adopted his driving strategy [of driving on the wrong side of the road], dependent upon the lighting and terrain conditions of Brackenville Road, enabling him to have "sufficient time" to adjust to the changing condition brought forth by an

[35] *Milton v. State*, 2013 WL 2721883, *2 (Jun. 11, 2013) (quoting *Monroe v. State*, 28 A.3d 418, 430 (Del. 2011); *Seward v. State*, 723 A.2d 365, 369 (Del. 1999)).

[36] *Id.*

> oncoming vehicle by, quickly and safely, returning to his designated lane of travel.[37]

He also argues that the court improperly considered: (1) testimony that Bishop was "lawfully riding" his bicycle on Brackenville Road, even though "no one *concluded* based on the evidence that Mr. Bishop was lawfully riding;" and (2) John Pardo's tape recorded statement, admitted pursuant to 11 *Del. C.* § 3507.[38] Pardo's contentions lack merit.

In a trial, "[i]t [is] up to the [finder of fact] to assess the testimony of [the witnesses], determine the credibility of the testimony, and draw *any* permissible inferences from that testimony ... ."[39] And, "it is within the jury's discretion to accept one portion of a witness' testimony and reject another part."[40] Here, the court, sitting as fact-finder, was free "to accept or reject any or all of the sworn testimony, as long as the [court] 'consider[ed] all of the evidence presented.'"[41] Pardo's contention that

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[37] *Op. Brf.* at 19.

[38] *Op. Brf.* at 22-25.

[39] *Milton*, 2013 WL 2721883, at *2 (quoting *Monroe*, 28 A.3d at 430) (internal quotations omitted) (emphasis in original).

[40] *Id.* (quoting *Pryor v. State*, 453 A.2d 98, 100 (Del. 1982) internal quotations omitted).

[41] *Id.* (quoting *Pryor*, 453 A.2d at 100).

the trial judge failed to consider his "driving strategy" lacks record support. When reaching its verdict, the court addressed Pardo's "driving strategy" as follows:

> The defendant conceded on cross that, while driving, by straddling the double yellow line may be safer for him, it does not take into account other persons' vehicles, bicycles traveling in an opposite direction, and it is not safe for them. The defendant made a conscious decision to use more of the roadway than was legally available to him.[42]

The court, having considered all of the evidence, rejected Pardo's "driving strategy" defense and determined beyond a reasonable doubt that Pardo possessed a reckless state of mind when he chose to "driv[e] over the center lane while exceeding the speed limit, after consuming alcohol."[43] A rational trier of fact could have inferred that based on the sworn testimony adduced at trial.

Pardo's arguments regarding evidence that was improperly considered by the court are likewise unavailing. The trial judge concluded that Bishop "was lawfully riding his bicycle on the roadway."[44] While Pardo makes much of whether Bishop was properly using illumination devices, the trial judge did not make a specific determination about Bishop's lighting. However, he concedes that there was "an abundance of testimony regarding Mr. Bishop's lighting" and, "[t]here is no doubt

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[42] B364.

[43] B364-65.

[44] B362.

that he had a lamp affixed to his helmet and that he had a flashlight."[45] Based on the testimony adduced at trial from several witnesses, the trial judge was permitted to draw inferences about Bishop's lighting and ultimately conclude that Bishop was "lawfully riding."

Pardo also argues that the trial judge improperly considered John Pardo's recorded statement offered into evidence under 11 *Del. C.* § 3507. He claims that the statement was "improperly admitted" "without a ruling on whether or not the statement was admissible. Pardo does not advance a legal argument to support his contention that the recorded statement was improperly admitted. He nonetheless maintains that the court should not have considered the recorded statement. Simply labeling the recorded statement as "double hearsay" and "damning" does not render it inadmissible or otherwise improperly before the fact finder.[46]

Accordingly, because a rational trier of fact could determine, based on the record evidence, that Pardo acted with a reckless state of mind when he struck and

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[45] *Op. Brf.* at 23.

[46] "Virtually all evidence is prejudicial—if the truth be told, that is almost always why the proponent seeks to introduce it—but it is only *unfair* prejudice against which the law protects." *State v. Sullins*, 2007 WL 2083657, at n.26 (Del. Super. July 18, 2007) (quoting *United States v. Pitrone*, 115 F.3d 1, 8 (1st Cir. 1997) (internal quotes omitted)).

killed Bishop with his car, the trial judge did not err in denying Pardo's motion for judgment of acquittal.

IV. A MISSING EVIDENCE INSTRUCTION WAS NOT REQUIRED.

Question Presented

Whether Bishop was entitled to a missing evidence instruction because the police failed to collect pieces of plastic from the crime scene that were later discovered by a reporter and given to the police.

Standard and Scope of Review

This Court reviews a trial court's denial of a request for a missing evidence instruction *de novo*.[47]

Merits of the Argument

During the course of the trial, Bishop requested a missing evidence instruction due to the State's failure to collect or preserve pieces of plastic from the crash scene that were later turned over to police by a reporter who collected the pieces.[48] The trial judge considered Pardo's argument and ultimately denied his request.[49] On appeal, Pardo argues that the evidence was not "collected" because it was initially

[47] *Weber v. State*, 38 A.3d 271, 274 (Del. 2012); *McCrey v. State*, 2008 WL 187947, at *2 (Del. Jan. 3, 2008); *Turner v. State*, 2006 WL 453247, at *1 (Del. Feb. 24, 2006).

[48] B320.

[49] B320; B360.

picked up by a reporter and later provided to police.[50] He claims that the police failed to document the exact location of the pieces of plastic and that he was entitled to an inference that the "missing" evidence would have been exculpatory.[51] Pardo is mistaken.

In *Deberry v. State*[52], this Court set forth the following three-part paradigm to examine missing evidence claims:

> (1) would the requested material, if extant in the State's possession, be discoverable by the defense either under Del. Super. Ct. Crim. R. 16, or *Brady*?[53]
>
> (2) if so, did the government have a duty to preserve the material?
>
> (3) if there was a duty to preserve, was the duty was breached, and what consequences should flow from a breach.[54]

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[50] *Op. Brf.* at 39.

[51] *Op. Brf.* at 30.

[52] 457 A.2d 744 (Del. 1983).

[53] *Brady v. Maryland*, 373 U.S. 83 (1963). While *Deberry* placed *Brady* into the framework, subsequent decisions of this Court have found that any analysis under *Brady* is "is a fruitless exercise because the evidence is no longer available." *Hunter v. State*, 55 A.3d 360, 368 (Del. 2012) (citing *Johnson v. State*, 27 A3d. 541, 545-46 (Del. 2011)).

[54] *Deberry*, 457 A.2d at 750. In *Lolly v. State*, 611 A.2d 956 (Del. 1992), this Court extended the State's duty under *Deberry* to not only preserve evidence but to collect evidence as well.

In determining the consequence for a breach, a trial court should engage in a separate three-part analysis which considers:

> (1) the degree of negligence or bad faith involved;
>
> (2) the importance of the missing evidence considering the probative value and the reliability of secondary or substitute evidence that remains available; and
>
> (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.[55]

"The remedy for a failure to preserve potentially exculpatory evidence is a missing evidence instruction [which] requires that the jury infer that had the evidence been preserved, it would have been exculpatory to the defendant."[56]

When announcing its verdict, the court addressed Pardo's request for a *Lolly-Deberry* instruction as follows:

> The defendant has challenged Corporal Hussong's testimony in part on the base of the so-called missing evidence. Specifically, the defendant challenges whether, in forming his opinion, Corporal Hussong should have considered evidence collected by a third party, a news reporter. Corporal Hussong testified that the State did collect and preserve this evidence. The Court finds that the defendant is not entitled to a *Deberry-Lolly* instruction, because, one, the State did not fail to collect and preserve the evidence; and, two, the defendant is not entitled to an inference that the evidence would have been exculpatory.[57]

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[55] *Hunter,* 55 A.3d 360 at 368 (citing *Johnson* 27 A.3d at 545-46)).

[56] *McNair v. State* 710 A.2d 197, 199 (Del. 1998) (citations omitted).

[57] B360.

The Superior Court's ruling was correct. The pieces of plastic, initially collected by a reporter, were not "missing" and the police did not fail to preserve the evidence. According to Pardo, he was entitled to a *Lolly-Deberry* instruction because the police did not "collect evidence in the traditional way that evidence is collected." His unsupported contention that evidence collected by a third party does not qualify as "collected" under *Deberry*, ignores a myriad of situations in which police collect evidence. Under Pardo's theory, for example, a *Lolly-Deberry* instruction would be required in a murder case in which a concerned citizen found the murder weapon on the street and brought it into the police station because the police did not "collect" the evidence in a "traditional way." This hardly makes sense.

Applying the *Deberry* analysis to this case, the Superior Court did not have reach the first question because it determined that "the State did not fail to collect and preserve the evidence."[58] The court's initial finding that the evidence was "collected" obviated the need to perform the remaining analysis under *Deberry*. The Superior Court correctly ruled that a missing evidence instruction was not required.

[58] B360.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be affirmed.

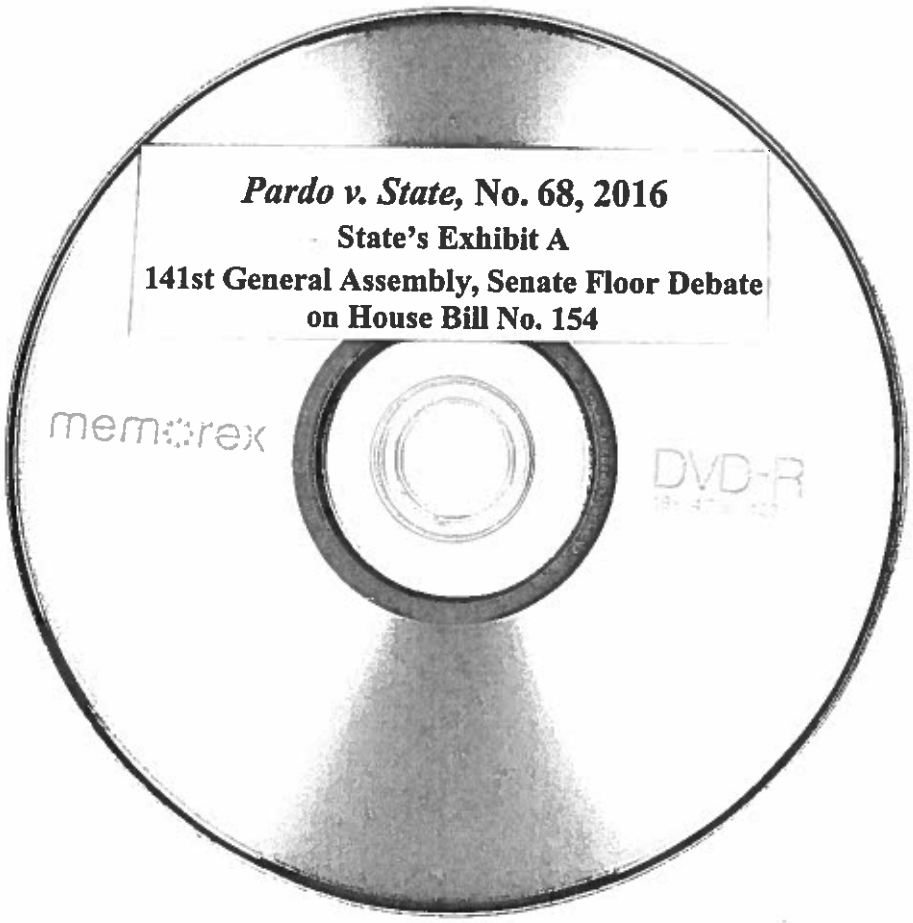
/s/ Andrew J. Vella
ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: September 30, 2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GABRIEL PARDO,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 68, 2016
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

EXHIBIT A to STATE'S ANSWERING BRIEF
(submitted on disk)



Ex. A

CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on this 30th day of September, 2016, he caused one copy of the attached *State's Answering Brief* to be delivered via Lexis/Nexis File and Serve and one hard copy including disk via U.S. Postal Service to the following persons:

Julianne E. Murray, Esq.
Murray Phillips, PA
215 E. Market Street
Georgetown, DE 19947
Attorney for Appellee

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Deputy Attorney General
ID No. 3549
Department of Justice
820 North French Street
Wilmington, DE 19801
(302) 577-8500