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Case Number 143,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN WINNINGHAM,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 143, 2022
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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Dated: September 13, 2022

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NATURE AND STAGE OF THE PROCEEDINGS

On September 8, 2020, a New Castle County grand jury returned an indictment charging Brian Winningham with two counts of Criminally Negligent Homicide, and one count each of Vehicular Assault Second Degree, Vehicular Assault Third Degree, Inattentive Driving, Following a Motor Vehicle Too Closely, and a Commercial Motor Vehicle Driver's Record of Duty Status violation.[1]

On September 28, 2021, Winningham, with the approval of the court and the consent of the State, waived trial by jury.[2] On September 30, 2021, following a two-day trial, the Superior Court found Winningham guilty of both counts of Criminally Negligent Homicide, Vehicular Assault Second Degree, Vehicular Assault Third Degree, and Inattentive Driving, and not guilty of following too closely and falsely reporting his duty status.[3] The Superior Court sentenced Winningham on April 1, 2022, to 23 years of incarceration, suspended after 4 months for probation, and imposed a fine for his traffic violation.[4]

Winningham appealed and filed an Opening Brief. This is the State's Answering Brief.

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[1] A1 at D.I. 1; A7-10.

[2] A3 at D.I. 16; A13-18.

[3] A4 at D.I. 17, 18; Ex. A to Op. Brf.

[4] A6 at D.I. 30, 31; Ex. B to Op. Brf.

SUMMARY OF THE ARGUMENT

I. Winningham's Argument is DENIED. Viewing the evidence in the light most favorable to the State, sufficient evidence supported finding Winningham guilty of Criminally Negligent Homicide beyond a reasonable doubt. Trial evidence established that Winningham: (1) drove a fully loaded tractor trailer, carrying approximately 25,000 pounds of cargo, on an interstate highway; (2) drove in a hurried or rushed manner, likely due to the fact that he was nearing the end of his allowed driving hours before a mandated 34 hour break; (3) drove his tractor trailer at a speed exceeding the posted limit; (4) occupied an elevated position in his driver's seat, affording him an enhanced view of the roadway before him; (5) removed his attention from the roadway for at least four seconds; and (6) failed to take any evasive action prior to crashing into a line of stopped, or slowed, vehicles. His gross inattention manifested criminal negligence and resulted in mass destruction. The Superior Court did not err.

II. Winningham's Argument is DENIED. The Superior Court did not materially misdescribe the element of criminal negligence in the context of criminally negligent homicide. Rather, the trial judge, sitting as both the factfinder and the legal and evidentiary gatekeeper, explained its findings as to both Winningham's homicide and assault charges. The trial court understood the elements it was required to address, and the record reflects the court properly applied the facts to the law. And,

following the verdict, when afforded the opportunity to do so, neither party sought clarification nor objected to the Superior Court's methodology.

STATEMENT OF FACTS[5]

In the late afternoon of September 24, approaching five o'clock p.m., [Winningham] was driving a tractor-trailer south on I-95. He left New Jersey earlier [that] afternoon after resting for several hours, and his tractor-trailer was fully loaded with freight to be delivered to Charlotte, North Carolina. It was a sunny, dry afternoon, and the roadway was not wet.

The tractor-trailer's camera showed [Winningham] was traveling at what appeared to me to be a somewhat hurried manner. The State established [Winningham] had eight hours left on a 70-hour, eight-day workweek, and when he reached that 70-hour threshold, he would be required to stop driving for approximately a day and a half. Charlotte was approximately eight hours from [Winningham's] starting point in New Jersey, so he was incentivized to travel with alacrity.

The data from the tractor- trailer, along with [Winningham's] own statement, shows he was traveling at approximately 68 to 70 miles per hour with the cruise control engaged at 70 miles per hour for at least the last minute before the collision. The posted speed limit for the section of I-95 was 65 miles per hour. Seventy miles

[5] The facts are taken verbatim from the transcript of the Superior Court's September 30, 2021, verdict. Corr. Op. Brf. Ex. A at 5-10.

per hour was the maximum speed the tractor-trailer could go because of the governor installed on the truck.

During the 20 minutes [Winningham] was traveling before the collision he passed at least seven other tractor-trailers. No other tractor-trailer passed [Winningham]. As [Winningham] was approaching the exit for 896, a silver or gray car moved into [Winningham's] lane of travel, which was the far right lane, also denoted Lane 4.

[Winningham] recalled seeing that car enter Lane 4 , but he did not recall seeing it leave that lane and in fact believed that the car entered the lane in such a way that he was unable – that [Winningham] was unable to avoid hitting it, despite trying to brake.

The evidence is completely contrary. First, the gray car is not one of the cars involved in the collision. Second, the gray car did not get particularly close to [Winningham's] vehicle or cause him to have to slow down at all. Third, the car moved out of [Winningham's] lane of travel at [] least five seconds before the collision. And fourth, [Winningham] did not attempt to brake before the collision.

At least five seconds before the collision the gray car moved out of [Winningham's] lane of travel. At this time the lane to [Winningham's] left, which was denoted Lane 3, and the improved shoulder on [Winningham's] right were

entirely clear of nearby vehicles. [Winningham] could have moved into either Lane 3 or onto the improved shoulder without colliding with other vehicles.

In Lane 4, however, traffic was stopped completely or nearly completely due to vehicles waiting to exit onto 896. A line of vehicles was stopped in Lane 4. There's no evidence the drivers of any of those vehicles had difficulty seeing stopped traffic in front of them or bringing their cars to a safe and complete stop.

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Those stopped vehicles are visible on the video at least four seconds before the collision. Given the relatively low quality of the video, the clear day, and the fact that the video shows things in much smaller proportion than in real life, it is likely that those stopped vehicles would have been visible to [Winningham] more than four seconds before the collision.

Moreover, [Winningham's] post-collision statement suggested he was looking away from the roadway for at least five seconds since he did not recall seeing the gray vehicle move out of Lane 4.

The ACM data from the vehicles involved in the collision shows that the vehicles were stopped for at least five seconds before the collision occurred.

[Winningham] was not impaired by drugs or alcohol at the time of the collision. Nothing in his phone records indicates he was using his phone in the time period immediately preceding the collision. [Winningham] recently had completed

a sustained off duty period during which time he could have rested, so the Court cannot conclude beyond a reasonable doubt that fatigue was a factor.

[Winningham's] statement that he removed his eyes from the roadway momentarily to reach for a drink was the only statement he gave in this case. Given the other demonstrable inaccuracy in [Winningham's] statement, however, the Court accords little weight to this explanation.

The video and the data obtained from the tractor-trailer, combined with Sergeant Alexander's testimony and accident reconstruction, show beyond a reasonable doubt that [Winningham] did not engage his brakes or attempt to avoid the collision in any way. At the time the collision occurred, [Winningham's] cruise control was engaged, and he was traveling in the far right lane at a speed of approximately 67 miles per hour.

As a result of the speed and force of the collision, [Winningham's] tractor-trailer struck three separate vehicles in succession. The force of the collision pushed Vehicle 1, the vehicle struck first, across the entire roadway, where it ultimately stopped on the far left shoulder. Albert Frankel, who was driving Vehicle 1, died at the scene.

Vehicle 2, the next vehicle in succession, was struck and forced right, down and then up an embankment. The driver of Vehicle 2, Linda Asamoah, was paralyzed from the neck down as a result of the collision. Ms. Asamoah's minor

daughter, Roselyn Adjei-Owusu, died two days later as a result of the injuries she sustained in the collision.

Finally, Vehicle 3, which was driven by Daniel Jason, was struck multiple times by [Winningham's] tractor-trailer. Vehicle 3 also went right, down and up an embankment before coming to a stop. As a result of the injuries he sustained in the accident, Mr. Jason suffered a sprained neck, a concussion, herniated and bulging discs, and a ringing in his ears. Two years after the accident he continues to suffer from migraines, has difficulty concentrating and multitasking and has not been released to resume working.

I. SUFFICIENT EVIDENCE SUPPORTED WINNINGHAM'S CRIMINALLY NEGLIGENT HOMICIDE CONVICTIONS

Question Presented

Whether *any* rational trier of fact, viewing the evidence in the light most favorable to the State, could find Winningham guilty of criminally negligent homicide beyond a reasonable doubt.

Standard and Scope of Review

"[W]here the defendant has entered a plea of 'not guilty' but fails to formally move for a judgment of acquittal in a bench trial, the issue of the sufficiency of the evidence will be reviewed the same as if there had been a formal motion for a judgment of acquittal."[6] This Court "will review the claim . . . to determine 'whether *any* rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt.'"[7]

Merits of the Argument

Winningham concedes his "inattention was negligent," but contends "he did not engage in the 'abnormal' risk taking which forms the basis of Criminally Negligent Homicide[, and] [t]hus, Counts 1 and 2 must be reversed."[8] He is wrong.

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[6] *Williamson v. State*, 113 A.3d 155, 158 (Del. 2015).

[7] *Id.* (quoting *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995) (quoting *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991))).

[8] Corr. Op. Brf. at 8.

To support a conviction for Criminally Negligent Homicide, the State must establish that "with criminal negligence, the person causes the death of another person."[9] "A person acts with criminal negligence with respect to an element of an offense when the person fails to perceive a risk that the element exists or will result from the conduct. The risk must be of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[10] Thus, "to be criminally negligent, [Winningham's] conduct must have posed a risk of death 'of such a nature and degree that [his] failure to perceive it constitute[d] a gross deviation from the standard of conduct that a reasonable person would observe in the situation.'"[11] "For criminally negligent homicide, it is sufficient that death was caused by the defendant as a result of his abnormal failure to perceive a risk that death would result from his conduct."[12]

Winningham argues that "failing to pay attention on the road – even on a highway, and even while going 67 mph – is an almost ubiquitous error surely familiar to most drivers. The result of [his] conduct was an undeniable catastrophe,

[9] 11 *Del. C.* § 631.

[10] 11 *Del. C.* § 231(a).

[11] *Cannon v. State*, 181 A.3d at 615, 620 (Del. 2018) (quoting 11 *Del. C.* § 231(a)).

[12] Delaware Criminal Code with Commentary 33 (1973).

but his negligence simply did not rise to a criminal level."[13] Winningham further contends that "the circumstances and features of his state of mind were indistinguishable from a routine 'fender bender.'"[14] But these propositions are untenable because they fail to fully consider the facts and circumstances surrounding his September 24, 2019 crash. "To be sure, whether a defendant was criminally negligent is a question of fact, firmly committed to the factfinder to decide."[15] Winningham's conduct resulted in something much greater than a "routine fender bender," and his inattention was profound.

The Superior Court noted the following factors relevant to Winningham's criminally negligent state of mind:

- *Speed*: While "not substantially above the posted speed limit, it was a high rate of speed, particularly given the lane of travel, the fact of an approaching exit, the type of vehicle [Winningham] was driving, the time of day, that is, near rush hour, and the amount of other traffic on the roadway."[16]

- *Sustained Inattention*: Winningham "completely removed his attention from the roadway for at least four seconds"[17] while driving at a high rate of speed in the far right lane. "[T]his period of inattention exceeded mere negligence and was a gross deviation from what a reasonable person would observe."[18]

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[13] Corr. Op. Brf. at 9.

[14] Corr. Op. Brf. at 12-13

[15] *Cannon*, 181 A.3d at 625.

[16] Ex. A at 12.

[17] *Id.* at 12-13.

[18] *Id.* at 13.

- *Failure to take evasive action*: "He never slowed the truck or attempted to avoid traffic by moving to the improved shoulder or Lane 3, which was clear of traffic."[19]

Evidence also established:

- *Winningham carried a full load*: Winningham drove a truck towing a fully loaded trailer carrying 25,000 pounds of cargo packaged in 2,187 cartons.[20]

- *Winningham possessed an enhanced vantage of the roadway*: From the driver's seat of the truck, Winningham was "at an elevated level and he's able to see beyond what's directly in front of him."[21] Winningham had "a clear view. He's . . . elevated. There's no obstructions."[22]

- *Winningham's journey was rushed*: Based upon federal motor carrier regulations, Winningham was nearing the end of his maximum weekly drive time; at the time of his departure on September 24, he had eight hours of drive time remaining before a mandated "34 hour restart" during which time he could not drive.[23] His journey from New Jersey to North Carolina would take "[a]bout eight hours for a car, . . . [or] 10 hours for a truck."[24] As he drove southbound, Winningham passed passenger cars and tractor trailers.[25] No other tractor trailers passed Winningham during his journey.[26]

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[19] *Id*.

[20] A212.

[21] A159-60, A161.

[22] A166.

[23] A229, A241.

[24] A230.

[25] A155, A353 (State's Trial Ex. 62).

[26] *Id*.

- *Winningham caused "mass destruction:"* A veteran member of the Delaware State Police Commercial Motor Vehicle Enforcement Unit observed on his arrival, "[i]t was mass destruction of the commercial vehicle. In [his] entire career [he had] never seen destruction to a commercial vehicle like that."[27]

Winningham argues that the court erred by finding the "consequences of his inattention" elevated his state of mind from negligent to criminally negligent.[28] He contends that his speed and failure to respond to impending danger were "consequences of [his] inattention," not additional aggravating factors.[29] And, by citing to other factual scenarios, he seeks to impose a formulaic approach to the factfinder's determination of criminal negligence. But, Delaware courts agree that "inattention [while driving] could constitute criminal negligence depending on the circumstances in which the inattention occurred."[30] While the cases proffered by Winningham shed some light on where a factfinder may find criminally negligent conduct, the assessment is driven by the facts of the case.

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[27] A206.

[28] Corr. Op. Brf. at 11.

[29] Corr. Op. Brf. at 11.

[30] *State v. Sharpley*, 2009 WL 406797, at *2 (Del. Super. Ct. Jan. 30, 2009) (quoting *State v. Donato*, 1990 WL 140073 (Del. Super. Ct. Aug. 15, 1990) (citing *Hazzard v. State*, 456 A.2d 796, 797 (Del. 1983)).

In *Hazzard v. State*, this Court found the record clearly established criminal negligence where:

> The defendant approached an intersection of a four lane highway in broad daylight on a clear day. The intersection was controlled by both a stop sign and a flashing red light. After stopping and failing to see the victim's automobile the defendant entered the intersection and a collision ensued.[31]

The Court summarized its findings, stating "[t]he failure to see an oncoming automobile, at an unobstructed intersection controlled by both a stop sign and flashing red light, in broad day light constitutes criminal negligence."[32]

Winningham cites *Sharpley v. State* in support of reversal.[33] In *Sharpley*, the defendant drove a Dodge Ram pickup truck 16 miles over the posted limit and failed to stop at a stoplight.[34] As he drove toward the stoplight, he "believed he saw his alternator gauge 'jump' (a problem he had encountered in the past) and looked down at the gauge to determine if there was a problem."[35] While his attention was directed to the gauge, a light controlling intersecting traffic turned red for Sharpley.[36] He looked up, saw the light was red, attempted to stop, and attempted to "swerve to the

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[31] *Hazzard*, 456 A.2d at 797.

[32] Id.

[33] Corr. Op. Brf. at 12.

[34] *Sharpley*, 2009 WL 406797, at *1-2.

[35] *Id.* at 1.

[36] *Id*.

left to avoid the traffic entering the intersection."[37] His efforts were unsuccessful and he struck a Chrysler PT Cruiser broadside as it crossed in front of him; both occupants of the PT Cruiser died as a result of the crash.[38] Sitting as factfinder, the Superior Court concluded that "the State did not prove beyond a reasonable doubt that [Sharpley's] failure to perceive the risk of death resulting from his conduct constituted a 'gross deviation' from the standard of conduct that a reasonable person would observe in the situation."[39]

One could argue *Hazzard* and *Sharpley* are at odds; but, of course, these outcomes reflect the reasoned assessment of the factfinder and, if the outcomes are inconsistent, the reasoning of this Court in *Hazzard,* as opposed to the Superior Court's determination in *Sharpley* must prevail. Nonetheless, unlike the defendant in *Sharpley*, Winningham drove his tractor trailer "imprudently" on his journey through Delaware.[40] And, while there was an absence of evidence on several key points in *Sharpley*,[41] here, ample evidence supports the Superior Court's conclusion

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[37] *Id*.

[38] *Id.* at *2.

[39] *Id.* at *3.

[40] Finding Sharpley not guilty of Criminally Negligent Homicide, the Superior Court commented that "there is no evidence that he was operating his vehicle imprudently or unlawfully." *Id.*

[41] *See id*. at n.17.

that Winningham's grossly inattentive and dangerous driving amounted to Criminally Negligent Homicide.

The criminal conviction of a truck driver for Criminally Negligent Homicide under similar circumstances is not unprecedented in Delaware. In *State v. Kester*,

> Defendant was a long-haul truck driver. For reasons that remain unclear, but which do not involve substance abuse or excessive speed, Defendant plowed her tractor trailer, at highway speed, into an SUV that was stopped at a brightly lit traffic light. The horrific crash killed two of the SUV's occupants in a terrible way.[42]

Here, Winnington, for at least 4 seconds, ceased to perform the most basic function of a driver – to pay attention to the roadway. The fact that he was driving a tractor trailer cannot be ignored: (1) he maintained a position in the truck's cab providing him an enhanced vantage of the roadway, and (2) the size and weight of his vehicle could – and here, did – produce carnage far exceeding a passenger vehicle. And, Winningham chose to program his vehicle to travel above the posted limit, further removing himself from active driving. Viewing the evidence in the light most favorable to the State, a rational factfinder could, and did, find Winningham guilty of Criminally Negligent Homicide beyond a reasonable doubt.

[42] *State v. Kester*, 2002 WL 386316 (Del. Super. Ct. Mar. 8, 2002). Kester's convictions were the result of a guilty plea, and the facts were offered by the Superior Court in an order denying her motion for a reduction of sentence.

II. THE TRIAL COURT DID NOT MATERIALLY MISDESCRIBE AN ELEMENT OF CRIMINALLY NEGLIGENT HOMICIDE

Question Presented

Whether the Superior Court violated Winningham's right to due process by, in a single sentence, explaining the element of criminal negligence as it applied to charges involving death and physical injury.

Standard and Scope of Review

Questions of law and claims of a constitutional violation are reviewed *de novo*.[43] "[This Court] generally decline[s] to review contentions not raised below and not fairly presented to the trial court for decision unless [the Court] find[s] that the trial court committed plain error requiring review in the interests of justice."[44] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[45] The interests of justice exception embodied in Delaware Supreme Court Rule 8 is applied "parsimoniously, and only where a trial court's failure to confront

[43] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

[44] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010). Del. Supr. Ct. R. 8.

[45] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

an issue 'is basic, serious and fundamental" in character and clearly results in "manifest injustice.'"[46]

Merits of the Argument

Winningham claims "the judge unconstitutionally convicted him of both homicide counts without finding that the State proved [criminal negligence as to death]."[47] He argues, "the judge affirmatively misstated the burden as requiring proof of criminal negligence as to the risk of death '*or physical injury*' and applied this mischaracterized law to the court's factual findings wherein the judge convicted Winningham of two Criminally Negligent Homicides for failing to perceive a 'risk of death *or serious physical injury.*"[48] He is wrong. The Superior Court correctly applied the law to the facts of this case and found the State met its burden, beyond a reasonable doubt, as to each element.

After announcing the facts established beyond a reasonable doubt, the Superior Court commented:

> [T]he primary issue before the Court is whether the defendant's conduct rose to the level of criminal negligence. *Since counts 1 through 4 turn on that standard, I will begin by addressing it.*

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[46] *Sabree Environmental & Construction, Inc. v. Summit Dredging*, LLC, 2016 WL 5930270, at *1 (Del. Oct. 12, 2016) (quoting *Cassidy v. Cassidy*, 689 A.2d 1182, 1184–85 (Del. 1997) (quoting *Wainwright*, 504 A.2d at 1100))).

[47] Corr. Op. Brf. at 16-17.

[48] Corr. Op. Brf. at 17.

> With respect to Counts 1 through 4, in order to prove the defendant acted with criminal negligence, the State must prove beyond a reasonable doubt that he failed to perceive that a risk of death or physical injury existed or would result from his conduct. In determining whether the State has met this standard, the Court must consider whether the risk is of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.[49]
>
> ***
>
> Here it is beyond dispute that the defendant's actions of traveling at a high rate of speed in a far right lane while approaching an exit and failing to maintain a proper lookout for other cars created an obvious risk of death or serious physical injury to the other motorists on the roadway.
>
> The defendant's failure to perceive that risk also was a gross deviation from the standard of conduct that a reasonable person would observe in the situation.
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> ***
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> [T]he Court finds that the State has established beyond a reasonable doubt the defendant caused the death of Albert Frankel and Roselyn Adjai-Owusu and the defendant's actions in causing their deaths was criminally negligent. Accordingly, the Court finds the defendant guilty of Counts 1 and 2.[50]

The Superior Court clearly assessed criminal negligence as it applied to both the homicide and the assault charges. The court's understanding of its obligation to assess the elements of each charge individually is further reflected by the verdict,

[49] Corr. Op. Brf. Ex. A at 12.

[50] Corr. Op. Brf. Ex. A at 11-14 (emphasis added).

which the court announced as to each individual charge. Then, after announcing its verdict and addressing ministerial matters, the court asked the parties, "Is there anything further before we adjourn?"[51] Winningham's counsel replied, "No, Your Honor."[52] The parties had no question the court understood its function and correctly applied the law to the facts of the case. And it is clear that the Superior Court understood its obligation to assess whether Winningham's prolonged inattention while driving a speeding, fully loaded truck manifested a risk of death which he failed to perceive. And, of course, his failure to perceive that risk, by his multiple acts of inattention and carelessness, reflect a gross deviation from the standard of care exercised by a reasonable person.

Winningham recognizes, "[d]riving on a highway necessarily includes a risk of death."[53] Nonetheless, citing *Cannon v. State*, Winningham contends the Superior Court erred by not more explicitly linking death to criminal negligence for the charge of Criminally Negligent Homicide.[54] But, *Cannon* is inapposite. In *Cannon*, the defendant physically attacked and struck her victim in "the 'close confines of the school bathroom' with its 'tile floors, walls and fixtures.'"[55] This Court explained:

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[51] Corr. Op. Brf. Ex. A at 19.

[52] *Id*.

[53] Corr. Op. Brf. at 9.

[54] Corr. Op. Brf. at 19.

[55] *Cannon*, 181 A.3d at 625.

> [T]he video reveals that the surroundings were not all that close. The attack took place in what appears to be a large area in the rear of the bathroom, and the girls do not come within a body-length of a sink or toilet. Had Tracy swung Alcee's head toward a wall or hurled her toward one of those fixtures, that may have been enough to give a reasonable person pause – and might suggest that Tracy would have been grossly deviant to have not thought twice. But the circumstances here were little different than if the attack had unfolded in a hallway outside of class.[56]

Here, the risk of death on a highway, particularly for one driving a loaded tractor trailer, is clear. Nonetheless, Winningham neglected his obligation as a driver while his truck sped nearly 100 feet forward on Interstate 95 for each second his attention was elsewhere.[57] With this acknowledged risk of death, Winningham traveled a distance greater than a football field and did nothing to adjust his course or react to the impending danger.[58]

As the trial prosecutor in Winningham's case commented when asked to differentiate this case from *Cannon,* before Winningham left the cabin of his truck:

> He actually doesn't know what happened in the other vehicles yet and his emotional reaction is I just killed a bunch of people. I mean, without

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[56] *Id*.

[57] Miles per hour may be reduced to feet per second to better understand the impact of Winningham's inattention. There are 5,280 feet in a mile and 3600 seconds in an hour; thus, a vehicle travels 1.467 feet per second at 1 mile per hour (5,280 ÷ 3,600) or 98.267 feet at 67 miles per hour (1.467 × 67). During Winningham's four seconds of inattention, his tractor trailer traversed 393.068 feet (4 × 98.267).

[58] An American football field is 360 feet long (including field of play and end zones). https://operations.nfl.com/the-rules/2022-nfl-rulebook/#rule1 (last viewed Sept. 12, 2022).

> him leaving his truck and actually knowing what the real end result of it was, he already knew what just the causation would have led to.[59]

In *Cannon*, this Court found the risk of death in a bathroom fight was not so apparent that it was grossly deviant for the defendant not to recognize it.[60] As recognized by Winningham, explained by the prosecutor, and, most importantly, as found by the court, the risk of death from driving on a highway is "beyond dispute."[61]

The court appreciated its responsibility and correctly applied the law to the facts of this case. Winningham cites to *Harris v. Rivera* for the proposition that "judges are presumed to 'follow their own instructions when they are acting as factfinders.'"[62] But, this quote, in context, reflects understanding that judges, when acting as factfinders, are presumed to follow the instructions they typically provide to juries – specifically, in *Rivera*, to not draw a negative inference from a defendant's failure to testify.[63] The United States Supreme Court was "not persuaded that an apparent inconsistency in a trial judge's verdict gives rise to an inference of irregularity in his finding of guilt that is sufficiently strong to overcome the well-established presumption that the judge adhered to basic rules of procedure."[64]

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[59] A336.

[60] *Cannon*, 181 A.3d at 624.

[61] Corr. Op. Brf. Ex. A at 12.

[62] Corr. Op. Brf. at 23 (citing *Harris v. Rivera*, 454 U.S. 339, 346 (1981)).

[63] *Rivera*, 454 U.S. at 346.

[64] *Id.* at 346-47 (internal citations omitted).

So, too, here. The Superior Court's announced verdict reflected its clear understanding of the task at hand – to assess whether Winningham was criminally negligent in causing Mr. Frankel's and Ms. Adjei-Owusu's death. Contrary to Winningham's argument on appeal, by combining criminal negligence as to death with criminal negligence as to injury in the context of a highway crash involving a tractor trailer crashing into the back of stopped, or nearly stopped, cars evidenced no confusion by the court. A formal instruction to a jury, as factfinder, may have been more clear; however, it is here that "we must presume that [the court] follow[s] their own instructions when acting as factfinders."[65] The record contains adequate evidence of Winningham's guilt and "the proceedings leading up to [his] conviction were conducted fairly."[66]

[65] *Id.* at 346.

[66] *Id.* at 348.

CONCLUSION

For the foregoing reasons, the State respectfully submits that this Court should affirm the judgment below.

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Dated: September 13, 2022

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4,855 words, which were counted by Microsoft Word.

Dated: September 13, 2022

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