

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE, )  
 )  
 v. )  
 )  
 DYRON GREEN, )  
 )  
 Defendant. )

No. 1804014579

**ORDER**

AND NOW, TO WIT, this 14th day of October, 2019, **IT IS HEREBY ORDERED** as follows:

Before the Court is Defendant Dyron Green’s Motion for a New Trial. On July 10, 2019, a jury convicted Defendant of Driving a Vehicle while under the Influence of Alcohol or with a Prohibited Alcohol Content. The Court has reviewed Defendant’s motion and the State’s Response. For the following reasons, Defendant’s motion is **DENIED**.

**Background**

On April 23, 2018 around 1:20 a.m., Delaware State Police Trooper Abrenica observed a vehicle stopped in a turn lane. Trooper Abrenica activated his emergency lights, approached the driver, and discovered that the driver was unconscious with the truck in drive and his foot on the break. That driver was Defendant, Dyron Green. Trooper Abrenica returned to his vehicle and requested backup. Although Trooper Abrenica’s vehicle sat behind Defendant’s with its emergency lights

flashing for approximately four minutes, Defendant did not acknowledge Trooper Abrenica. While Trooper Abrenica waited in his vehicle for backup, the truck slowly rolled forward, out of the turn lane, and through an intersection. Trooper Abrenica pursued and engaged his siren; as Defendant drove away, Trooper Abrenica observed a beer can fall out of the back of Defendant's truck. Defendant pulled into a parking lot where Trooper Abrenica initiated another traffic stop.

When Trooper Abrenica interacted with Defendant he noticed that Defendant smelled of alcohol, had bloodshot eyes, and had a flushed face. Defendant refused to take field sobriety tests. Trooper Abrenica transported Defendant to the police station for a blood draw. At the station Trooper Abrenica observed the phlebotomist draw Defendant's blood. After testing for blood alcohol content, the Director of the Delaware State Crime Lab concluded that Defendant's blood from April 23, 2018 had a blood alcohol content of .17.

A jury trial in this matter occurred on July 9–10, 2019. On July 10, 2019, the jury found Defendant guilty of Driving a Vehicle while under the Influence of Alcohol or with a Prohibited Alcohol Content, a violation of 21 *Del. C.* § 4177(a).

#### **Parties' Assertions**

Defendant moves for a new trial, arguing that the standard jury instruction listing the elements of the offense of driving under the influence was overly broad. Defendant argues that there was sufficient evidence in this case to justify a more

specific jury instruction. In particular, Defendant argues that the evidence produced in the case mandated an instruction requiring the jury find that the ethanol in Defendant's blood was a result of Defendant's consumption of alcohol. Defendant also argues that the jury instructions, as given, violated his right to Due Process.

In response, the State requests Defendant's motion be denied, arguing that there is insufficient evidence on the record to warrant Defendant's jury instruction. Because the requested jury instruction would have been improper, the State argues, then Defendant cannot be prejudiced by its absence from the jury instructions. In the alternative, the State argues that the Court's pre-trial ruling precludes Defendant from arguing that the alcohol in his blood was not the result of alcohol consumption. Finally, the State contends that Defendant's Due Process argument is baseless.

### **Standard of Review**

This Court will grant a motion for a new trial, brought pursuant to Delaware Superior Court Criminal Rule 33, if the "interests of justice" so require.<sup>1</sup> Although the Court has discretion to grant a new trial, the movant must have asserted the new trial grounds during the preceding trial.<sup>2</sup> A new trial is warranted when the movant demonstrates that he or she suffered prejudice from the trial court's error.<sup>3</sup>

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<sup>1</sup> Super. Ct. Crim. R. 33.

<sup>2</sup> *State v. Halko*, 193 A.2d 817, 830 (Del. 1963); *State v. Ruiz*, 2002 WL 1265533, at \*2 (Del. Super. June 4, 2002).

<sup>3</sup> *State v. Montgomery*, 2019 WL 2207667, at \*2 (Del. Super. May 22, 2019).

## Discussion

Jury instructions must correctly state the law and enable the jury to perform its duty.<sup>4</sup> A party does not have a right to a particular instruction in a particular form, but a defendant does have the right to correct a statement of substantive law.<sup>5</sup> “A jury instruction on a particular issue is warranted when there is sufficient evidence in the record to support it.”<sup>6</sup>

There is not sufficient evidence in the record to support Defendant’s proposed jury instruction. Defendant insists that the Court should have required the jury find that Defendant’s blood alcohol level came from his consumption of alcohol and not another source.<sup>7</sup> During the cross-examination of the State’s expert witness—Director of the Delaware State Crime Lab, Julie Willey—defense counsel elicited the following response: “Ethanol is ethanol and it would appear the same way on the chromatogram.”<sup>8</sup> This single statement forms the basis of Defendant’s argument.<sup>9</sup> As the State correctly points out, this statement does not produce a

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<sup>4</sup> *Brown v. State*, 49 A.3d 1158, 1160 (Del. 2012); *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002) (“Generally, jury instructions must give a correct statement of the substance of the law and must be ‘reasonably informative and not misleading.’”).

<sup>5</sup> *Brown*, 49 A.3d at 1160; *Corbitt*, 804 A.2d at 1062.

<sup>6</sup> *Hitchens v. Cannon & Cannon, Inc.*, 1991 WL 32162, at \*3 (Del. Mar. 1, 1991).

<sup>7</sup> Def.’s Mot. New Trial ¶¶ 5–6.

<sup>8</sup> Trial Tr. 132:4–5, July 9, 2019.

<sup>9</sup> To the extent that Defendant’s argument is based on his status as a diabetic, the Court rejects Defendant’s argument on that ground as well. The Court gave Defendant leave to provide evidence of his medical condition and the effect this

sufficient evidentiary basis for Defendant's proposed jury instruction.<sup>10</sup> Additionally, defense counsel informed the Court that he had spoken with a "leading expert" about the types of medical conditions that could produce excess ethanol in a person's blood; Defendant never offered that expert's testimony into evidence.<sup>11</sup> Further, this expert would have been unable to offer an opinion about the source of Defendant's blood alcohol content on April 23 because the expert would have needed to conduct his own tests on the blood on April 23, which he did not do.<sup>12</sup> Because Defendant's proposed jury instruction has an improper evidentiary foundation, Defendant did not suffer prejudice from its absence. Accordingly, a new trial is not warranted.

Defendant has not alleged any facts that show a violation of due process or that the given jury instruction was overly broad. Therefore, the Court declines to address Defendant's Due Process argument.

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condition might have on the levels of ethanol in his blood. Defendant never provided such evidence to the Court. *See* Trial Tr. 1–7, 137–41, July 9, 2019; Trial Tr. 38–41, July 10, 2019. Defendant cannot base his motion for a new trial on evidence that was never presented to the Court.

<sup>10</sup> *See* State's Resp. to Def.'s Mot. New Trial ¶ 11 (identifying a litany of unanswered questions that, if answered, *would have* provided sufficient evidence for Defendant's proposed jury instruction). Notably, Ms. Willey was unable to say how fungus or additional ethanol would appear in someone's blood unless there was an issue with the blood test tube; there is also insufficient evidence that to show that was an issue with the blood test tube. Trial Tr. 118:7–17, July 9, 2019.

<sup>11</sup> Trial Tr. 137–38, July 9, 2019.

<sup>12</sup> Trial Tr. 138, July 9, 2019.

**Conclusion**

For the aforementioned reasons, Defendant's Motion for a New Trial is  
**DENIED.**

**IT IS SO ORDERED.**

  
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**Judge Calvin L. Scott, Jr.**