



IN THE SUPREME COURT OF THE STATE OF DELAWARE

HEATHER RYBICKI,)
)
 Defendant – Below,)
 Appellant,)
)
 v.) **No. 332, 2014**
)
 STATE OF DELAWARE,)
)
 Plaintiff – Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE’S ANSWERING BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
NATURE AND STAGE OF THE PROCEEDINGS	1
SUMMARY OF THE ARGUMENT	2
I. THE SUPERIOR COURT CORRECTLY DENIED RYBICKI’S MOTIONS TO SUPPRESS.	6
II. THERE WAS SUFFICEINT EVIDENCE TO SUPPORT THE JURY’S VERDICT.....	14
III. THE STATE LAID THE PROPER FOUNDATION FOR THE ADMISSION OF THE RESULTS OF THE BLOOD ANALYSIS.....	17
IV. THE SUPERIOR COURT CORRECTLY INSTRUCTED THE JURY.....	21
CONCLUSION.....	28

TABLE OF CITATIONS

Cases

<i>Allen v. State</i> , 970 A.2d 203 (Del. 2009).....	21, 22
<i>Baker v. Reid</i> , 57 A.2d 103 (Del. 1947)	22
<i>Brinegar v. United States</i> , 338 U.S. 160 (1949).....	10
<i>Bullock v. State</i> , 775 A.2d 1043 (Del. 2001)	22
<i>Chao v. State</i> , 604 A.2d 1351 (Del. 1992).....	16
<i>Church v. State</i> , 2010 WL 5342963 (Del. Dec. 22, 2010)	14, 16, 26
<i>Claudio v. State</i> , 585 A.2d 1278 (Del. 1991)	21
<i>Clawson v. State</i> , 867 A.2d 187 (Del. 2005)	17
<i>Clendaniel v. Voshell</i> , 562 A.2d 1167 (Del. 1989).....	8
<i>Daniels v. State</i> , 1997 WL 776202 (Del. Dec. 4,1997).....	26
<i>Davis v. State</i> , 1994 WL 10980 (Del. Jan. 12, 1994)	15
<i>Dixon v. State</i> , 567 A.2d 854 (Del. 1989).....	14
<i>Durbin v. Shahan</i> , 2001 WL 34075378 (Del. Com. Pl. 2001)	19
<i>Firestone Tire and Rubber Co. v. Adams</i> , 541 A.2d 567 (Del. 1988).....	17
<i>Gordon v. State</i> , 604 A.2d 1367 (Del. 1992).....	15
<i>Hardin v. State</i> , 844 A.2d 982 (Del. 2004).....	14
<i>Hunter v. State</i> , 55 A.3d 360 (Del. 2012)	17
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983).	6, 7, 8

<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	14
<i>Keyser v. State</i> , 893 A.2d 956 (Del. 2006)	22
<i>LeGrande v. State</i> , 947 A.2d 1103 (Del. 2008)	6, 7
<i>Monroe v. State</i> , 652 A.2d 560 (Del. 1995).....	15
<i>Mullin v. State</i> , 2006 WL 2506358 (Del. Aug. 26, 2006)	24
<i>Norwood v. State</i> , 95 A.3d 588 (Del. 2014)	17
<i>Probst v. State</i> , 547 A.2d 114 (Del. 1988).....	22, 27
<i>Rivera v. State</i> , 7 A.3d 961, 966 (Del. 2010).....	6, 11, 13
<i>Sammons v. State</i> , 68 A.3d 192 (Del. 2013)	14
<i>Schmerber v. California</i> , 384 U.S. 757 (1966).....	12
<i>Shackleford v. State</i> , 1993 WL 65100 (Del. Mar. 4,1993)	21
<i>Sisson v. State</i> , 903 A.2d 288 (Del. 2006)	13
<i>Smith v. State</i> , 887 A.2d 470 (Del. 2005)	6
<i>Starkey v. State</i> , 2013 WL 4858988 (Del. Sep. 10, 2013)	7
<i>State v. Crespo</i> , 2009 WL 1037732 *7 (Del. Super. April 17, 2009)	12
<i>State v. Durrant</i> , 188 A.2d 526 (Del. 1963)	26
<i>State v. Holden</i> , 60 A.3d 1110 (Del. 2013).....	6, 7
<i>State v. Maxwell</i> , 624 A.2d 926 (Del. 1993).....	8, 10
<i>Williams v. State</i> , 98 A.3d 917 (Del. 2014).	7
<i>Winston v. Lee</i> , 470 U.S. 753 (1985).....	12

Statutes

21 *Del. C.* § 4177(a)(1)16

21 *Del. C.* §§ 4177 (c)(5)16

Rules

Del. Supr. Ct. Rule 8 14, 15

NATURE AND STAGE OF THE PROCEEDINGS

On September 16, 2013, a New Castle County Grand Jury returned a two-count indictment against Heather Rybicki alleging a third offense Driving Under the Influence (“DUI”) and Driving Without Insurance. A-1. On November 8, 2013, Rybicki filed her first Motion to Suppress. A-2. A second Motion to Suppress was filed on December 20, 2013. A-2. The State and Rybicki agreed that the suppression motions could be decided without a hearing, as both challenged the search warrant issued for Rybicki’s blood, requiring a four-corners analysis. A-2. On January 15, 2014, the Superior Court denied Rybicki’s motions to suppress. A-2. On January 17, 2014, Rybicki filed a Motion to Reargue the suppression issues, which was denied on February 18, 2014. A-3.

The matter proceeded to a jury trial on April 22, 2014. A-5. On April 23, 2014, a jury convicted Rybicki of felony DUI and the State entered a *nolle prosequi* on the remaining charge. A-5. That same day, Rybicki filed a motion for a new trial, which was denied when Rybicki was sentenced on May 23, 2014. A-6. The Superior Court sentenced Rybicki to three months incarceration followed by 18 months of decreasing levels of supervision. *Sentence Order*. Rybicki appealed her conviction. This is the State’s answering brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court correctly denied Rybicki's Motions to Suppress. The information presented within the four corners of the affidavit in support of the search warrant demonstrated that the police possessed probable cause to draw a sample of her blood. Moreover, the State met its burden in demonstrating that Rybicki's arrest was supported by probable cause under the totality of the circumstances.

II. Appellant's argument is denied. This Court should not consider Rybicki's sufficiency of the evidence claim as it was not properly preserved for appeal. Rybicki has failed to argue or invoke this Court's jurisdiction under the Supreme Court Rule 8 "interests of justice" exception. Notwithstanding Rybicki's waiver, there was sufficient evidence for the jury to return a guilty verdict.

III. Appellant's argument is denied. The Superior Court properly admitted evidence of Rybicki's blood alcohol content. The State laid an adequate foundation for the admission of the blood analysis.

IV. Appellant's Argument is denied. The Superior Court provided the jury with a correct statement of the law and did not improperly comment on the evidence.

STATEMENT OF FACTS

In the early morning hours of June 22, 2013, John Klingler (“Klingler”) was driving home from work when he witnessed a “cloud of dust” and a vehicle settle in the lanes of traffic across South College Avenue in Newark, Delaware.¹ Klingler, who is a volunteer firefighter, approached the vehicle and noticed it was damaged and leaking fluids.² Klingler observed Rybicki in the driver’s seat attempting to restart the vehicle.³ When Klingler made contact with Rybicki, she was disoriented, her speech was slurred and he noticed an odor of alcohol.⁴

Corporal Joseph Kendrick (“Kendrick”) of the Newark Police Department was dispatched to the single-car accident on South College Avenue.⁵ When he arrived at the accident scene, Kendrick observed Rybicki seated in the driver’s seat of a pickup truck which was facing perpendicular to the direction of travel on South College Avenue.⁶ The pickup truck had damage on its front-end and axle.⁷

¹ B7.

² B7-8.

³ B8.

⁴ B8.

⁵ B9-10.

⁶ B10-11.

⁷ B10.

Kendrick made contact with Rybicki and spoke with her.⁸ Rybicki seemed confused and Kendrick detected a strong odor of alcohol.⁹ Rybicki was unable to tell Kendrick what had happened and it took her a long time to gather the registration and insurance information for the truck.¹⁰ Because the truck was obstructing traffic and Rybicki's presence in the roadway was unsafe, Kendrick asked Rybicki to step out of the vehicle.¹¹ Rybicki complied and exited the truck.¹² Kendrick told Rybicki that he had to conduct field sobriety tests, however, Rybicki did not submit to any of the tests.¹³ At trial, Rybicki admitted to consuming "approximately four beers" at Tailgates bar in the hours leading up to the accident.¹⁴ She could not recall how the accident occurred.¹⁵

Kendrick was able to determine how Rybicki's truck came to rest on South College Avenue by observing and photographing the surrounding area.¹⁶ It

⁸ B11.

⁹ B11.

¹⁰ B11.

¹¹ B12.

¹² B12.

¹³ B12.

¹⁴ B37.

¹⁵ B37.

¹⁶ B12-13.

appeared that Rybicki drove her truck out of a parking lot over a curb and a grass embankment onto South College Avenue where she stopped.¹⁷

Rybicki was transported to the Newark Police station, where she refused to submit to an Intoxilyzer test.¹⁸ Thereafter, Kendrick applied for and obtained a search warrant to draw a sample of Rybicki's blood for forensic testing.¹⁹ The blood was drawn by a phlebotomist in an interview room in the police station.²⁰ Rybicki's blood sample was later analyzed at the Delaware State Police Crime Lab by the lab's director, Julie Willey ("Willey").²¹ Willey's analysis revealed that Rybicki's blood alcohol content was 0.18.²²

¹⁷ B12.

¹⁸ B16.

¹⁹ B16.

²⁰ B16.

²¹ B25.

²² B30.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DENIED RYBICKI'S MOTIONS TO SUPPRESS.

Question Presented

Whether the trial judge abused her discretion by denying Rybicki's motions to suppress.

Standard and Scope of Review

This Court reviews a trial court's denial of a motion to suppress for abuse of discretion.²³ "Where the facts are not in dispute and only a constitutional claim of probable cause is at issue, this Court's review of the Superior Court's ruling is *de novo*."²⁴

Merits of the Argument

When considering a challenge to a search warrant, a reviewing court is required to examine the affidavit to ensure that there was a substantial basis for concluding that probable cause existed.²⁵ "A determination of probable cause

²³ *Rivera v. State*, 7 A.3d 961, 966 (Del. 2010).

²⁴ *State v. Holden*, 60 A.3d 1110, 1113 (Del. 2013). However, in *LeGrande v. State*, 947 A.2d 1103, 1108), this Court stated that "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

²⁵ *Smith v. State*, 887 A.2d 470, 473 (Del. 2005).

requires an inquiry into the ‘totality of the circumstances’ alleged in the warrant.”²⁶ Moreover, a magistrate’s determination of probable cause “should be paid great deference by reviewing courts” and should not, therefore, “take the form of a *de novo* review.”²⁷ “Notwithstanding this deference, the reviewing court must determine whether the magistrate’s decision reflects a proper analysis of the totality of the circumstances.”²⁸

The warrant granting Kendrick the authority to secure a sample of Rybicki’s blood included facts uncovered at the collision scene and at the police station. For the first time on appeal, Rybicki claims that because her initial detention was not supported by probable cause, any information obtained during that detention was “poison fruit.”²⁹ As a result, Rybicki argues, the warrant for the blood draw was tainted.³⁰ Rybicki’s argument is unavailing.

²⁶ *Starkey v. State*, 2013 WL 4858988, *3 (Del. Sep. 10, 2013) (citing *LeGrande*, 947 A.2d at 1008 (other citations omitted)).

²⁷ *State v. Holden*, 60 A.3d at 1114 (citing *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)).

²⁸ *Id.* (citing *LeGrande*, 947 A.2d at 1108).

²⁹ *Op. Brf.* at 10. While Rybicki challenged the magistrate’s probable cause finding below, neither of her suppression motions articulated her newly-minted “fruit of the poisonous tree” claim. To the extent that this Court considers Rybicki’s claim, the Superior Court’s ruling should be reviewed for plain error. *Williams v. State*, 98 A.3d 917, 920 (Del. 2014).

³⁰ Rybicki offers a “blended analysis” of both the arrest and search warrant claims. The State, however, will address each issue separately.

Probable Cause to Arrest

Rybicki claims that her initial detention amounted to a warrantless arrest unsupported by probable cause.³¹ A police officer has “probable cause to believe a defendant has violated 21 *Del. C.* § 4177 (Driving under the Influence of Alcohol) ‘when the officer possesses information which would warrant a reasonable man in believing that [such] a crime has been committed.’”³² Probable cause is measured, “not by precise standards, but by the totality of the circumstances through a case by case review of ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’”³³

In *State v. Maxwell*, this Court considered whether the police possessed probable cause to take a sample of the defendant’s blood based on their investigation of a fatal car accident and their interactions with the defendant.³⁴ The *Maxwell* Court recounted the following facts which it found were dispositive of the probable cause finding:

The record reflects that the police were summoned to the Bridge area at 12:14 a.m. Upon arrival at the accident scene, the police were informed by paramedics that all of the surviving victims, including the

³¹ *Op. Brf.* at 10.

³² *State v. Maxwell*, 624 A.2d 926, 929 (Del. 1993) (quoting *Clendaniel v. Voshell*, 562 A.2d 1167, 1170 (Del. 1989) (other citations omitted)).

³³ *Id.* at 928 (quoting *Illinois v. Gates*, 462 U.S. at 231) (other citations omitted).

³⁴ *Id.* at 927-28.

driver, had been taken to the hospital. The initial investigating officers spoke individually with two witnesses, who reported that Maxwell had told them that he was the driver of the vehicle and that he had been drinking. One of the witnesses reported that Maxwell had appeared dazed. Officer Cassidy, who was trained in accident reconstruction, determined that the accident involved only one vehicle and was caused by the driver losing control of the vehicle as he attempted to negotiate a turn after crossing the Bridge. Upon inspection of the overturned vehicle, the investigating officers noticed a strong odor of alcohol, as well as several empty and full containers of beer. One of the investigating officers was then dispatched from the accident scene with directions to proceed to the hospital for purposes of obtaining a blood alcohol test of Maxwell, the driver.³⁵

The *Maxwell* Court ultimately found that those facts supported a finding that the police possessed probable cause to believe that Maxwell was driving under the influence of alcohol, thereby permitting them to have his blood drawn.³⁶

Here, the Superior Court reviewed the affidavit in support of the search warrant prepared by Kendrick when making its probable cause determination. The court found that:

[t]he police officer personally observed the aftermath of a one-vehicle accident in which Defendant was the driver. Because of the position of the vehicle, it appeared that the driver lost control and ended up over an embankment, struck a curb and came to rest across traffic lanes. The nature of the accident, combined with the officer's personal observation of an odor of alcohol on Defendant's breath, constitute probable cause to believe that Defendant was under the influence of

³⁵ *Id.* at 930.

³⁶ *Id.*

alcohol at the time of the accident, and that evidence of alcohol consumption could be obtained from a test of Defendant's blood.³⁷

The Superior Court's examination of the totality of the circumstances presented reveals that based upon Kendrick's investigation, observations, interaction with Rybicki, and her refusal to submit to any field sobriety or breath tests, and rational inferences drawn therefrom, Kendrick "possessed a quantum of trustworthy factual information, 'sufficient in themselves to warrant a man of reasonable caution' to conclude that probable cause existed to believe [Rybicki] was driving under the influence of alcohol at the time of the accident."³⁸ The Superior Court correctly found that Kendrick possessed probable cause.

The Search Warrant (Blood Draw)

After detaining Rybicki, Kendrick applied for a search warrant to perform a blood draw. The affidavit in support of the warrant application states:

This Affiant responded to a one vehicle accident at S. College Ave. just north of Rt. 4. This Affiant observed the suspect's vehicle, a 2010 black [N]issan [R]ogue, Delaware registration #743036, went up and over a grass embankment from the park and ride parking lot striking the curb and coming to rest facing [westbound] across the

³⁷ A-34. While Rybicki attempts to offer evidence outside the affidavit as well as possibly innocent explanations for the accident, such evidence (1) was not presented below for the Superior Court's consideration and is outside the record; and (2) should not be considered by this by this Court. See *LeGrande v. State*, 947 A.2d at 1108 (after-the-fact examination of an affidavit should not take the form of a *de novo* review); *Maxwell*, 624 A.2d at 930 (elimination of innocent explanations "is not a condition precedent to a finding of probable cause").

³⁸ *Maxwell*, 624 A.2d at 931 (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)).

[northbound] lanes on S. College Ave. This Affiant contacted the driver, Heather Rybicki, and could smell an odor of alcoholic beverages emanating from her breath. Ms. Rybicki refused all field sobriety tests, preliminary breath test and Intoxilyzer 5000.

WHEREFORE, your affiant believes there is probable cause that the above-named defendant is presently under the influence of alcohol and/or drugs and requests a search warrant to draw the above-named defendant's blood be issued.

Rybicki contends that the search warrant contained information obtained during the initial detention, which she now claims was illegal, and argues that the Superior Court erred when it considered that information in its probable cause analysis. The State disagrees.

As this Court noted in *Rivera v. State*,

Search warrants are issued only upon a showing of probable cause. An affidavit submitted in support of a search warrant application must set forth facts that, within the affidavit's four corners, are sufficient for a neutral magistrate to conclude that "a crime has been committed and that the property sought to be seized would be found in a particular place." In determining whether probable cause exists, the magistrate must apply a "totality of the circumstances" test to decide if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." In so doing, the magistrate may draw reasonable inferences from the affidavit's factual allegations.³⁹

"The constitutional analysis in blood extraction cases hinges on three prongs: (1) probable cause to believe a suspect is driving under the influence; (2) a search

³⁹ 7 A.3d at 966-67 (citations omitted).

warrant or a recognized exception under the Fourth Amendment; and (3) reasonableness.⁴⁰ Here, all three prongs were met.

The affidavit in support of the search warrant contained sufficient information for the issuing magistrate to determine that Kendrick possessed probable cause to believe that Rybicki was driving under the influence. He observed the aftermath of a single-car accident in which it appeared that Rybicki drove out of a parking lot, over a curb and grass embankment and came to a stop perpendicular to the flow of traffic in the middle of South College Avenue. Kendrick smelled alcohol on Rybicki's breath at the accident scene and she refused all field sobriety and breath tests.

Rybicki attempts to introduce facts outside the four-corners in support of her argument.⁴¹ For the first time on appeal, Rybicki contends that had a hearing been held in Superior Court, this would have been a reverse-*Franks* situation requiring this Court to determine whether the warrant needed to be reconstructed with material information omitted by the police.⁴² The case before the Court simply

⁴⁰ *State v. Crespo*, 2009 WL 1037732, at *7 (Del. Super. April 17, 2009) (citing *Schmerber v. California*, 384 U.S. 757, 768 (1966); *Winston v. Lee*, 470 U.S. 753, 760-61 (1985)).

⁴¹ *Op. Brf.* at 16-19.

⁴² In the so-called reverse-*Franks* situation, “if the defendant establishes by a preponderance of the evidence that the police knowingly and intentionally, or with reckless disregard for the truth, omitted information material to a finding of probable cause, the reviewing court will add the omitted information to the affidavit and examine the affidavit with the newly added information

requires an analysis of the four-corners. Taking Rybicki's argument to its logical end, the evidence which was obtained by the police during her "illegal" arrest amounts to her refusal to submit to the Intoxilyzer 5000 test. Even if this Court were to determine that such evidence was improperly considered by the magistrate issuing the search warrant, there was still sufficient evidence for the Superior Court make the probable cause determination.⁴³ Kendrick's observation of Rybicki's truck in the roadway, the odor of alcohol, her refusal to submit to field sobriety tests and the preliminary breath test all occurred prior to her refusal of the Intoxilyzer 5000 test. When viewed under the totality of the circumstances, Rybicki's refusal of the preliminary breath test, coupled with Kendrick's observations of the accident scene and alcohol on Rybicki's breath amounted to a reasonable belief that she was driving under the influence of alcohol. The Superior Court correctly concluded that "the affidavit . . . set forth sufficient facts to believe that there was a fair probability that evidence of a crime would be found in Defendant's blood."⁴⁴ The Superior Court's probable cause finding was correct.

to determine whether the affidavit still gives rise to probable cause." *Rivera*, 7 A.3d at 968 (citing *Sisson v. State*, 903 A.2d 288, 300 (Del. 2006)).

⁴³ Indeed, a review of the Superior Court's decision reveals that the presiding judge did not consider Rybicki's refusal of the field sobriety and breath tests. A-34-35.

⁴⁴ A-35.

II. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

Question Presented

Whether the evidence presented at trial, viewed in the light most favorable to the State, supports the jury's guilty verdict.

Standard and Scope of Review

This Court ordinarily reviews a claim of insufficiency of the evidence to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."⁴⁵ Rybicki concedes that she did not raise this issue below. "This Court will not review any question 'not fairly presented to the trial court' unless the interests of justice require such review."⁴⁶ However, when the interests of justice require review, this Court reviews issues not fairly presented to the Superior Court for plain error.⁴⁷

Merits of the Argument

"A claim of insufficiency of evidence is reviewable only if the defendant first presented it to the trial court, either in a motion for a directed verdict or a Rule 29 motion for judgment of acquittal. Absent any such motion, the claim is

⁴⁵ *Church v. State*, 2010 WL 5342963, at *1 (Del. 2010) (citing *Dixon v. State*, 567 A.2d 854, 857 (Del. 1989) ; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

⁴⁶ *Hardin v. State*, 844 A.2d 982, 990 (Del. 2004) (quoting Delaware Supreme Court Rule 8).

⁴⁷ *Sammons v. State*, 68 A.3d 192, 194 (Del. 2013).

waived.”⁴⁸ Because Rybicki has not provided any cause for her failure to raise this issue in the Superior Court by way of a motion for directed verdict or motion for judgment of acquittal, her claim is waived.⁴⁹ And, while this Court may excuse a waiver “if it finds that the trial court committed plain error requiring review in the interests of justice,” Rybicki has made no showing that the Superior Court committed plain error which would warrant review of the claim.⁵⁰

Even if Rybicki had not waived this issue, her claim fails on its merits. The State presented sufficient evidence to establish that Rybicki was driving under the influence of alcohol. The evidence adduced at trial demonstrated that Rybicki lost control of her truck and drove it over an embankment. When Kendrick first observed the truck it was in the middle of South College Avenue facing perpendicular to the flow of traffic. The truck was damaged and Rybicki, the sole occupant of the truck, was seated in the driver’s seat. Rybicki responded slowly to requests to produce her driving documentation and Kendrick had to remove her from the roadway. When Kendrick spoke with Rybicki, he detected a strong odor of alcohol coming from her breath. At the accident scene, Rybicki refused all field sobriety tests and the preliminary breath test. After being transported to the

⁴⁸ *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995) (citing *Gordon v. State*, 604 A.2d 1367, 1368 (Del. 1992); Del. Supr. Ct. R. 8).

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *Davis v. State*, 1994 WL 10980, at * 2 (Del. Jan. 12, 1994)).

Newark Police Department, Rybicki refused to submit to the Intoxilyzer 5000 test. As a result, Kendrick sought and subsequently obtained a search warrant for a blood draw on Rybicki. Her blood was analyzed at the Delaware State Police Crime Lab and her blood alcohol concentration was found to be 0.18 – more than twice the legal limit under 21 *Del. C.* § 4177. At trial, Rybicki admitted to consuming “four beers” prior to driving her truck and she had no recollection of how the accident occurred.

“Following a jury trial, the standard of appellate review is deferential to the extent that ‘the jury is the sole trier of fact responsible for determining witness credibility, resolving conflicts in testimony and for drawing any inferences from the proven facts.’”⁵¹ Here, “a rational trier of fact, viewing the evidence in the light most favorable to the State, could find ... beyond a reasonable doubt” that Rybicki was, “because of alcohol or drugs or a combination of both, less able than [she] would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of [her] vehicle.”⁵² As a result, Rybicki’s sufficiency of the evidence claim fails.

⁵¹ *Church*, 2010 WL 5342963 at *1 (quoting *Chao v. State*, 604 A.2d 1351, 1363 (Del. 1992)).

⁵² *Id.* at *2 (quoting 21 *Del. C.* §§ 4177(a)(1), (c)(5)).

III. THE STATE LAID THE PROPER FOUNDATION FOR THE ADMISSION OF THE RESULTS OF THE BLOOD ANALYSIS.

Question Presented

Whether the Superior Court abused its discretion by admitting the results of the analysis performed on Rybicki's blood sample.

Standard and Scope of Review

This Court reviews the Superior Court's evidentiary rulings for an abuse of discretion.⁵³ "[W]hen a court has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused."⁵⁴

Merits of the Argument

Establishing an adequate evidentiary foundation for the results of scientific testing is a clear prerequisite to their admission.⁵⁵ Indeed, "[i]t is the guarantee of reliability and accuracy that is the foundational cornerstone to the admissibility of the results of a scientific test."⁵⁶

For the first time on appeal, Rybicki makes a specific challenge to the foundation presented by the State for the admission of the blood results at trial.

⁵³ *Norwood v. State*, 95 A.3d 588, 594 (Del. 2014).

⁵⁴ *Firestone Tire and Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

⁵⁵ *Hunter v. State*, 55 A.3d 360, 365 (Del. 2012); *Clawson v. State*, 867 A.2d 187 (Del. 2005).

⁵⁶ *Hunter*, 55 A.3d at 365.

Prior to the admission of the results of the blood analysis performed at the Delaware State Police Crime Lab, Rybicki lodged the following objection:

DEFENSE COUNSEL: I object on the grounds that the State has failed to lay a proper legal foundation for the introduction of blood tests.

THE COURT: What are they missing?

DEFENSE COUNSEL: I am not here to teach them. They have the burden of doing it and . . .

THE COURT: Well, in order for me to rule on the objection though - I mean . . .

DEFENSE COUNSEL: I know you're going to overrule me, because I can't give you specifics, then they cure the problem, so I'd rather -

* * *

DEFENSE COUNSEL: I know you're going to overrule me because I haven't articulated a specific reason of the objection so the record will be what the record is.

THE COURT: Well, I am overruling the objection because I don't have any basis upon which to sustain it.⁵⁷

Rybicki was either unwilling or unable to state a specific basis for her objection to the admission of the blood results. Now, however, Rybicki claims that the State failed to establish that the needles used during the blood draw were sterile.

This same argument was made in *Durbin v. Shahan*.⁵⁸ In *Durbin*, the Court of Common Pleas considered an appeal from a Division of Motor Vehicles hearing

⁵⁷ B28-29.

in which Durbin was administratively found to have violated 21 *Del. C.* § 4177.⁵⁹ On appeal, Durbin argued that “the State failed to show in the DMV administrative record for foundational purposes that the needle inserted into Durbin’s skin was sterile and therefore, was fatal to the foundation attempted to be laid by the State Police Officer in presenting the State’s case.”⁶⁰ The Court of Common Pleas found that “the factual specificity as to the sterility of the hypodermic needle is not required as a foundational requirement” for admission of the blood analysis evidence.⁶¹

Here, Kendrick testified that he unsealed the blood draw kit and gave it to the phlebotomist.⁶² The phlebotomist testified that he received the kit from Kendrick and that he followed the standard protocol for blood collection.⁶³ Kendrick observed the phlebotomist wipe Rybicki’s arm with a non-alcohol iodine wipe and then use a needle from the previously-sealed kit to draw her blood.⁶⁴ There was no indication from any witness that would suggest that the needle used

⁵⁸ 2001 WL 34075378 (Del. Com. Pl. 2001).

⁵⁹ *Id.*

⁶⁰ *Id.* at *3.

⁶¹ *Id.*

⁶² B16.

⁶³ B4-5.

⁶⁴ B16.

in Rybicki's case was not sterile; nor is there a statutory requirement which requires testimony about the sterility of the needle used in a blood draw. Rybicki's suggestion that the proper foundation for the admission of the blood result requires a specific witness affirmation regarding the sterility of a needle is without merit. The Superior Court properly exercised its discretion when the results of the blood analysis were admitted into evidence.

IV. THE SUPERIOR COURT CORRECTLY INSTRUCTED THE JURY.

Question Presented

Whether the jury instructions regarding the testing equipment and Rybicki's refusal to submit to field sobriety and breath tests were accurate statements of the law.

Standard and Scope of Review

When a defendant lodges a timely objection to a jury instruction, “[t]he standard and scope of review is whether the instruction, considered as a whole, was a correct statement of the present substantive law.”⁶⁵ Rybicki objected to the instruction regarding her refusal to submit to field sobriety and breath tests.⁶⁶ However, contrary to her assertion, Rybicki did not object to the instruction regarding the testing equipment.⁶⁷ Because Rybicki did not object to the testing equipment instruction, this Court reviews for plain error.⁶⁸ “In order for an error

⁶⁵ *Shackleford v. State*, 1993 WL 65100, at *2 (Del. Mar. 4, 1993) (citing *Claudio v. State*, 585 A.2d 1278, 1282 (Del. 1991)).

⁶⁶ B43-47.

⁶⁷ B43-47.

⁶⁸ *Allen v. State*, 970 A.2d 203, 219 (Del. 2009).

to be plain, the error must affect substantial rights of the defendant and therefore have an effect on the trial's outcome.”⁶⁹

Merits of the Argument

“Implicit in every jury instruction is the fundamental principle that the instruction applies to the specific facts in that particular case and contains an accurate statement of the law.”⁷⁰ Moreover, a “charge to the jury will not serve as grounds for reversible error if it is ‘reasonably informative and not misleading judged by common practices and standards of verbal communication.’”⁷¹

The Gas Chromatograph*⁷² *Instruction

For the first time on appeal, Rybicki challenges the Superior Court's instruction to the jury regarding the testing methods used in the analysis of her blood. She claims that instructing the jury regarding the scientific reliability of the method used for testing in her case impermissibly “elevat[ed] that scientific procedure such that the State [did] not have to prove the reliability of the

⁶⁹ *Id.* at 220. (citing *Keyser v. State*, 893 A.2d 956, 959 (Del. 2006)).

⁷⁰ *Bullock v. State*, 775 A.2d 1043, 1053 (Del. 2001).

⁷¹ *Probst v. State*, 547 A.2d 114, 120 (Del. 1988) (quoting *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947)).

⁷² The term “gas chromatograph” was not used in trial by the analyst who tested Rybicki's blood, although that was the instrument used for the testing.

procedure.”⁷³ Rybicki acknowledges that “Delaware recognize[s] the efficacy of that procedure in evaluating blood alcohol content,” however, she nonetheless argues that an instruction advising the jury that the methods were based on scientifically sound principles was improper.⁷⁴ Rybicki is mistaken.

At trial, the State called Julie Willey (“Willey”).⁷⁵ Willey testified that (1) the sample of Rybicki’s blood which she received from the Newark Police did not appear to be tampered with; (2) the device she used to analyze Rybicki’s blood was working properly when the blood was tested; (3) there did not appear to be any contamination with regard to Rybicki’s blood; (4) routine maintenance is performed on the testing devices; and (5) the lab participates in proficiency testing.⁷⁶ At the close of evidence, the Superior Court instructed the jury, in part:

In this case, the State presented the results of a test that uses scientifically sound method[s] of measuring the alcohol content of a person’s blood. The State is not required to prove the underlying scientific reliability of the method used. The State is required, however, to establish that the proper blood collection and testing protocols were followed, that the testing device was in proper working order and the testing device was correctly operated by a qualified person at the time of the test.⁷⁷

⁷³ *Op. Brf.* at 31.

⁷⁴ *Op. Brf.* at 30.

⁷⁵ B25.

⁷⁶ B27-29.

⁷⁷ B48-49.

As Rybicki points out, the identical instruction was approved by this Court in *Mullin v. State*.⁷⁸ While that case involved the Intoxilyzer, the language was no different. The *Mullin* Court concluded that it was “entirely appropriate for the trial court to explain to the jury that Intoxilyzers are scientifically sound devices for measuring blood alcohol level, and that the State need not prove their scientific reliability.”⁷⁹ The analysis here is no different. As in *Mullin*, the State was still required to prove that the testing equipment was in working order and was properly administered. There was no comment by the Superior Court which suggested how the jury should decide those facts. As a result, “the instruction did not infringe on the jury’s determination of reliability.”⁸⁰

Rybicki has failed to demonstrate plain error. The Superior Court’s instruction was appropriate and did not impermissibly comment upon the evidence. The language in the instruction has previously been approved by this Court and Rybicki has failed to demonstrate why the Superior Court’s use of that language was improper in this case.

⁷⁸ 2006 WL 2506358 (Del. Aug. 26, 2006).

⁷⁹ *Id.* at *2.

⁸⁰ *Id.*

The Refusal Instruction

Rybicki next contends that the Superior Court's instruction regarding her refusal to submit to standardized field tests placed "unfair and undue emphasis" on that part of the State's case.⁸¹ She claims that while the State was free to argue the significance of her refusal to submit to the tests, the Superior Court's instruction served as an "endorsement" of the State's view of the evidence.⁸² Rybicki's argument is flawed.

When Kendrick asked Rybicki to perform the field sobriety tests at the accident scene, she refused.⁸³ When Rybicki was transported to the police station and Kendrick asked her to submit to the Intoxilyzer test, she refused.⁸⁴ Rybicki's refusal was clearly in evidence and the Superior Court gave the following instruction:

In this case, the State contends that the defendant refused to perform standardized field tests as requested by the investigating officer. Evidence of refusal of standardized tests is admissible in a DUI case as a circumstance that may or may not show consciousness of guilt. You may consider this evidence for this limited purpose only. You may not consider evidence of refusal as proof that the defendant probably committed the offense. The evidence of refusal, if proved, must be considered by you in light of all the other evidence. Whether

⁸¹ *Op. Brf.* at 32.

⁸² *Op. Brf.* at 32.

⁸³ B14.

⁸⁴ B16.

or not it shows consciousness of guilt and the significance attached to such evidence *are matters solely for your determination.*⁸⁵

The Superior Court's instruction was an accurate statement of the law and was not improper commentary on the evidence. In *Church v. State*, this Court held that "[a] defendant's refusal to submit to testing may be used for any relevant purpose, including to show consciousness of guilt."⁸⁶ Explaining the rationale behind the ruling, the *Church* Court stated:

The mere fact that evidence offered against an accused might be said to be prejudicial in the sense that it tends to incriminate him is no reason for its rejection in a criminal prosecution. Thus, subject to well-defined rules of evidence, it is proper in a criminal case to show defendant's conduct, demeanor, and statements, whether oral or written, his attitude and relations toward the crime, if there was one. These are circumstances that may be shown. Their weight is for the jury to determine. The fact that defendant declined to submit to a sobriety test is such a circumstance which a jury may consider.⁸⁷

The instruction in this case is similar to instructions given in cases in which there is evidence of flight. This Court has held that a trial court "may instruct the jury on defendant's flight where the record contains evidence of flight or concealment and the evidence reasonably supports the inference that defendant fled because of a consciousness of guilt and a desire to avoid accusation thereon."⁸⁸

⁸⁵ B49 (emphasis added).

⁸⁶ 2010 WL 5342963, at *2.

⁸⁷ *Id.* (quoting *State v. Durrant*, 188 A.2d 526, 529 (Del. 1963)).

⁸⁸ *Daniels v. State*, 1997 WL 776202, at *3 (Del. Dec. 4, 1997).

The same rationale applies here. The Superior Court correctly instructed the jury that Rybicki's refusal to submit to standardized field tests could be considered as a circumstance which *may or may not* demonstrate consciousness of guilt. The instruction placed no more undue emphasis on the evidence than a flight instruction would. Moreover, the Superior Court specifically instructed the jury that it could only be used for the limited purpose of considering whether or not Rybicki's refusal demonstrated consciousness of guilt. The instruction was a correct statement of the law under *Church* and was "reasonably informative and not misleading."⁸⁹

⁸⁹*Probst*, 547 A.2d at 120 (citations omitted).

CONCLUSION

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

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DATE: November 10, 2014

CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on this 10th day of November, 2014, he caused the attached *State's Answering Brief* to be delivered via Lexis/Nexis File and Serve to the following person:

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