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Case Number 143,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S *CORRECTED* REPLY BRIEF

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I. NO RATIONAL TRIER OF FACT COULD FIND WINNINGHAM GUILTY BEYOND A REASONABLE DOUBT OF CRIMINALLY NEGLIGENT HOMICIDE BECAUSE THE STATE FAILED TO MEET ITS BURDEN TO PROVE THAT HIS CONDUCT CREATED A RISK OF DEATH SO GREAT THAT HE WAS GROSSLY DEVIANT FOR NOT RECOGNIZING THAT RISK.

The State's Answer does not dispute Winningham's position that his criminal negligence convictions required the State to prove he engaged in "abnormal risk taking." Op. Br. at 8; Answer at 9. Nor does the Answer question Winningham's characterization of his speed (barely above the limit) and four second period of inattention, as "an almost ubiquitous error surely familiar to most drivers." Op. Br. at 9; Answer at 10. Instead, the Answer challenges Winningham's sufficiency of the evidence claim by arguing (1) "facts and circumstances," combined with the speed and inattention considered by the trial court, push his negligence into the criminal realm (Answer at 11-13, 16); and (2) that Winningham's conviction is in line with other Criminally Negligent Homicide convictions in our State. Answer at 13—16.

A. *The additional "facts and circumstances" cited in the Answer do not suggest "abnormal risk taking" and are largely irrelevant to the magnitude of Winningham's negligence.*

In its candor, the State concedes the trial court did not find the additional "facts and circumstances" to be "relevant to Winningham's . . . state of mind," (Answer at 11-12); nonetheless, it provides the following descriptions of facts the "[e]vidence also established" without explanation of their significance. Answer at

11. The trial court had good reason not to rely on these facts: they are irrelevant or redundant references to facts already accounted for (speed and inattention).

- *Winningham carried a full load* (Answer at 12): The Answer does not argue the size of the load is relevant to Winningham's state of mind or acknowledge that (1) while the trailer may have been full, it was not particularly heavy (A212), or that (2) the State's own expert testified that the weight had no impact on the break timing. A301-02.

- *Winningham possessed an enhanced vantage of the roadway* (Answer at 12 and 16): Winningham's vantage point has no relevance to his state of mind because the alleged negligence stems from his failure to pay attention. His vantage point would only be relevant if he disputed what he would have been able to see had he properly paid attention.

- *Winningham's journey was rushed* (Answer at 12): This vague description does not advance the State's position. It does not dispute Winningham's claims that his speed was similar to most vehicles', and that he was not following too closely. Op. Br. at 4, 6. To the degree it refers to Winningham's speed alone, it is redundant. Op. br. at 14—15.

- *Winningham caused mass destruction* (Answer at 13, 16): The extent of the damage has no bearing on Winningham's state of mind; legal and responsible actions can cause "mass destruction," and both egregious negligence and intentional acts can cause nominal damage.

- *Winningham chose to program his vehicle to travel above the posted speed limit* (Answer at 16): This claim, which appears to reference the governor on Winningham's truck, is directly contradicted by the record. It was not Winningham who "cho[o]se to program" the governor (A177-78), and a governor is a cap, it does not cause a vehicle to travel at or above any speed. A governor set at 70 miles per hour, a legal speed on huge portions of our highway system, hardly indicates he was "removing himself from active driving."[1]

[1] The trial court declined to rely on the same unsupported claim after it was made by the trial prosecutor. A323-34.

Even if this Court considers these factors, which were not relied on by the trial court, the State has still not shown "a glaring or flagrant, deviation" from the reasonable person standard.[2] Winningham was negligent in failing to pay attention while driving slightly over the speed limit. Op. Br. at 7—15. But this negligence is not of the criminal type, even though, in this case, it resulted an absolute travesty.

B. ***None of the Criminally Negligent Homicide cases reviewed in the State's Answer support the convictions in this case.***

The parties agree that "inattention [while driving] could constitute criminal negligence depending on the circumstances in which the inattention occurred." Answer at 13. However, the Answer's suggestion that any Delaware case supports a finding of criminal negligence for the inattention in these circumstances, is misplaced. The cases in which Delaware courts have found inattentive driving to be criminally negligent all include, *in addition* to inattention, flagrant conduct (like driving significantly faster than the speed limit) not present in Winningham's case.

State v. Donato.[3] Answer at 13, n. 30. Donato was convicted based on a finding that he was distracted (for an unidentified period) while driving 62 miles per hour: 27 miles per hour, or nearly twice the 35 miles per hour speed limit.[4] Donato's speed distinguishes his conduct from Winningham's.

[2] Delaware Commentary § 231 at 33.
[3] *State v. Donato*, 1990 WL 140073 (Del. Super. Ct. Aug. 15, 1990).
[4] *Id.* at *1.

In a footnote the State acknowledges that ***State v. Kester,*** the case it views as most like Winningham's, does not even address the sufficiency of the evidence.[5] Answer at 16, n.42. *Kester* is a review of that defendant's sentence, which briefly mentions the facts, and followed a plea, not a trial. Because of *Kester*'s procedural posture, it is not necessary to distinguish its facts, but they are nonetheless remarkably different. One of the key points made in Winningham's trial, and Opening Brief is that he drove only a few a miles per hour over the speed limit. Op. Br. at 14—15. In contrast, Kester drove her tractor trailer "at highway speed" while on a non-highway road. The superior court's characterization of Kester's speed suggests abnormal risk taking, and her failure to anticipate a stop on a road with traffic lights is distinguishable from Winningham's failure to stop at an unpredictable traffic jam in the middle of a highway.

Like its use of *Kester*, the Answer's reliance on the inattentive driving-based conviction upheld in ***Hazzard v. State***[6] is misplaced because the *Hazzard* Court was not addressing a challenge to the sufficiency of the evidence. Instead, Hazzard claimed the trial judge's statement that the "conduct was inadvertent and personally negligent" indicated that the State proved only simple negligence.[7] In the context of addressing this unique issue, the *Hazzard* Court described the defendant's conduct

[5] *State v. Kester*, 2002 WL 386316 (Del. Super. Ct. Mar. 8, 2002).
[6] *Hazzard v. State*, 456 A.2d 796, 797 (Del. 1983).
[7] *Id.*

(these descriptions are included in the Answer at 14) and found that the judge's statement was not a "ruling on the defendant's guilt, but . . . [a] rejection of the State's theory that the defendant actually saw the victim's automobile, disregarded the risk and tried to 'beat him across.'"[8]

In ***Sharpley v. State***[9] the Superior Court found that four seconds of inattention (the same as Winningham's) and speeding 16 miles per hour over the speed limit (a far more severe speeding violation than Winningham's) was insufficient to prove criminal negligence. The Answer's attempt to distinguish *Sharply* by arguing, unlike Sharply, Winningham was driving "imprudently" is unsupported by the record. Answer at 15. The *Sharpley* Court's consideration of driving "imprudently" was as a contrast to "traveling purposefully with a specific destination in mind."[10] Winningham's driving –for employment purposes, and in compliance with the extremely demanding regulations of his industry– was as purposeful as it comes.[11] Nor does the reason for Winningham's inattention make his driving more "imprudent" than Sharpley's (who was apparently looking at the "alternator gauge"), as the only reason presented – believed or not – was the relatively innocuous one put forth by Winningham. A152, 354, Ex. A at 8—9.

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[8] *Id.*
[9] *State v. Sharpley*, 2009 WL 406797 (Del. Super. Ct. Jan. 30, 2009).
[10] *Id.* at *3.
[11] *See* Delaware Commentary § 631 at 178 ("[when it comes to criminal negligence, "[m]uch will depend upon the nature and social utility of the defendant's conduct.").

II. THE TRIAL COURT VIOLATED WINNINGHAM'S RIGHT TO DUE PROCESS WHEN IT CONVICTED HIM OF CRIMINALLY NEGLIGENT HOMICIDE WITHOUT HOLDING THE STATE TO ITS BURDEN OF PROVING THAT HE NEGLIGENTLY FAILED TO PERCEIVE A RISK OF DEATH POSED BY HIS CONDUCT.

Winningham's Opening Brief argued that the law described in the verdict misstates the *mens rea* element of the Criminally Negligent Homicide charges, and that the trial court's ultimate findings, which align with that misstatement, show the law was both misunderstood and misapplied. Therefore, the judge unconstitutionally convicted Winningham of two homicides without proof of the requisite mental state.

The Answer disputes this argument without identifying any record support for its position. The State argues: **(A)** this issue was waived by trial counsel; and **(B)** this Court should assume the trial court applied the law differently than described in that court's own detailed decision. Despite uncontradicted language to the contrary, the Answer claims the trial court required the State to prove criminal negligence as to a risk of death as required for Criminally Negligent Homicide.

The Answer is wrong on both accounts: the issue was not waived, and there is no reasonable interpretation of this record other than that the trial court improperly conflated the *mens rea* elements of Criminally Negligent Homicide and Vehicular Assault.

A. *There is no merit to the Answer's Plain Error/Waiver Argument.*

The waiver argument, which simply ignores the Opening Brief's treatment of the issue, is an act of desperation fueled by the State's inability to effectively address the merits. Winningham preserved this issue at his bench trial by arguing for the proper standard, pleading not guilty, and asking the trial court to issue specific findings. Op. Br. at n.35. The Answer suggests trial counsel "had no question the court understood its function and correctly applied the law to the facts of the case" because "after announcing its verdict and addressing ministerial matters, the court asked the parties, 'Is there anything further before we adjourn?' Winningham's counsel replied, 'No, Your Honor.'" Answer at 20; Ex. A at 19.

This argument misreads the record. After issuing its verdict the trial court moved on to discuss sentencing, order a PSI, and schedule the next hearing. Ex. A at 18—19. Then, immediately before recessing the court, the judge asked "[i]s there anything further before we adjourn?" The judge's question was a cordial act of respect given to the attorneys, not an invitation to reargue previously decided issues.

B. *The record clearly shows the trial court applied an incorrect definition of "criminal negligence" with respect to Criminally Negligent Homicide.*

The trial court's own statements reflect that Winningham's Criminally Negligent Homicide convictions are based on the erroneous position that the required *mens rea* is criminal negligence as to a risk of death *or physical injury*. Op. Br. at 22—24; Ex. A at 11—12. The State does not deny that "proof that an act is

criminally negligent as to a risk of serious physical injury is *per se* insufficient for Criminally Negligent Homicide" in its Answer to this Court (Op. Br. at 18), but the flawed position is exactly what the prosecutor argued for during trial: "Counts 1, 2, 3, and 4 [are] all bound by the same criminal negligence standard." A31.

The Answer's take on this claim, "it is clear that the Superior Court understood its obligation to assess whether Winningham . . . manifested a risk of death which he failed to perceive," is strongly worded but almost entirely unsupported. Answer at 20. The Answer fails to identify a single statement from the trial court suggesting it found, or required the State to prove, Winningham "failed to perceive a risk of death" with criminal negligence.[12] According to the Answer:

> *The Superior Court clearly assessed criminal negligence as it applied to both the homicide and the assault charges . . . is* [] *reflected by the verdict, which the court announced as to each individual charge*. Answer at 19—20.

The State is grasping at straws by relying on the fact that the trial court issued individual guilty verdicts, as opposed to declaring "Winningham is guilty on counts one through four." Individual verdicts are the prevailing norm, not proof that

[12] Although, as recognized in the Answer (at 22), "the risk of death from driving on a highway is beyond dispute," "a risk of death," is insufficient to support a criminally negligent homicide conviction. *Cannon v. State*, 181 A.3d 615, 624 (Del. 2018) (finding trial court erred by "focus[ing] almost entirely on whether there was a risk of death inherent in Tracy's conduct—not whether that risk was so readily apparent that failing to recognize it would be grossly abnormal . . . what matters is the nature and degree of that risk, not just that the risk was present.").

different standards, let alone the proper standards, were applied to each count. Finally, it is not even clear that the State's desired interpretation of the record– the trial court "combin[ed] criminal negligence as to death with criminal negligence as to injury" (Answer at 20)— supports the conclusion that the proper standard was applied. The distinct definitions of "criminal negligence" in Criminally Negligent Homicide (Counts 1 and 2), and Vehicular Assault, (Counts 3 and 4) are such that it is impossible, consistent with the controlling statutes, to "combine" the *mens rea* elements. Op. Br. at 17—19.

The position advocated for in the Answer reflects not what the trial judge stated, but what the State *wishes* the judge stated. Tellingly, the State argues that *Harris v. Rivera*'*s* precept – judges are presumed to "follow their own instructions when they are acting as factfinders"[13] – does not apply to this case. Op. Br. at 23. The State's attempt to distinguish *Harris* reflects a recognition that the judge's "own instructions," if presumed to be followed, would require reversal. This Court should presume the trial court followed the law as it described because there is no other reasonable conclusion. According to the Answer, *Harris* only suggests judge's follow instructions "typically provide[d] to juries." Answer at 22. This reading of *Rivera* is overly restrictive and unsupported by *Rivera* itself. More importantly, it is illogical to assume a trial court applied a different rule than it said it was applying.

[13] *Harris v. Rivera*, 454 U.S. 339, 346 (1981).

Finally, the procedural context of this particular verdict, Super. Ct. Crim. R. 23(c) supports a strict interpretation of the language used therein. "When a trial judge . . . makes specific findings of fact and conclusions of law . . . the findings must cover every essential element of the offense,"[14] and "ought to be complete."[15] When they are not, this Court reverses.[16] Accordingly, the trial court's specific "findings of fact and conclusions of law" are detailed, and generally go beyond what was required. In this context, it makes little sense to assume, as the State has, that when it came to *the only element in dispute*, whether Winningham "failed to perceive a risk of death" with criminal negligence, the judge used shorthand. The better, and only reasonable interpretation of the record, is that the trial court meant what it said, it applied the wrong standard, and it did not make a specific finding that Winningham "failed to perceive a risk of death" with criminal negligence.

[14] *Stoner v. State*, 213 A.3d 585, 589 (Del. 2019).
[15] *Scott v. State*, 117 A.2d 831, 833 (1955).
[16] *Dolan v. State*, 925 A.2d 495, 501 (Del. 2007) (reversing burglary conviction predicated on judge's R. 23(c) findings which failed to specifically determine if defendant intended to commit a crime "before or at the time he broke into and entered the" victim's home).

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

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