IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRICK MULLIN,	§	
	§	No. 92, 2006
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0307011873
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: July 19, 2006
Decided: August 28, 2006
Revised: August 29, 2006

Before **STEELE,** Chief Justice, **BERGER** and **RIDGELY**, Justices.

O R D E R

This 29th day of August, 2006, on consideration of the briefs of the parties, it appears to the Court that:

1) Patrick Mullin appeals his conviction, following a jury trial, of driving under the influence of alcohol (DUI). He argues that the trial court violated Article IV, Section 19 of the Delaware Constitution by commenting on the evidence during jury instructions.

2) On July 16, 2003, Corporal John Forrester, of the Delaware State Police, observed Mullin driving a black vehicle and making a series of lane changes without

using a turn signal. Forrester pulled Mullin over and, as he approached the vehicle, Forrester noticed a strong odor of alcohol. Mullin was the only occupant of the vehicle. His eyes were glassy and bloodshot and Mullin was mumbling. Forrester asked Mullin to step out of the car and then conducted field sobriety tests, which Mullin failed. Forrester arrested Mullin and brought him back to Delaware State Police Troop 1, where he tested Mullin on an Intoxilyzer. The test showed that Mullin's blood alcohol level was .113, which was above the then legal limit of .10. Forrester charged Mullin with DUI and several traffic offenses.

3) At the conclusion of the trial, the court instructed the jury, in relevant part as follows:

> In order to find the defendant guilty of driving while under the influence of alcohol or with a prohibited alcohol content, you must find that the State has proven each of the following elements beyond a reasonable doubt: That the defendant drove a motor vehicle at or about the time and place charged in the indictment; and that the defendant was under the influence of alcohol or with a prohibited alcohol content at the time he drove the motor vehicle.
>
> Not every person who has consumed alcoholic beverages is under the influence as that phrase is used here. The evidence must show that the person has consumed a sufficient amount of alcohol to cause him to be less able to exercise the judgment and control that a reasonably careful person in full possession of his faculties would exercise in like circumstances.
>
> *It is not necessary that the person be drunk or intoxicated. Nor is it required that impaired ability to drive be demonstrated by particular*

> *acts of unsafe driving.* What is required is proof that the defendant's ability to drive safely was impaired by alcohol.
>
> * * * *
>
> The law provides that a person who drives a motor vehicle while his blood alcohol concentration is one tenth of a percent or more by weight, as shown by a chemical analysis of a breath sample taken within four hours of driving a motor vehicle, shall be guilty of driving under the influence of alcohol. This provision does not preclude a conviction based on other evidence.
>
> *In the case before you, there was evidence of the results of a test admitted, which tended to indicate .113 of one percent by weight of alcohol in the defendant's blood. The State presented the results of the Intoxilyzer which uses a scientifically sound method 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 by the Intoxilyzer. The State is required to establish that the Intoxilyzer was in proper working order and that it was correctly operated by a qualified person....*

4) Mullin argues on appeal, as he did at trial, that the italicized portions of the instructions quoted above constitute unfair comment on the evidence in violation of Article IV, Section 19 of the Delaware Constitution, which provides, "[j]udges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law."

5) In *Herring v. State*,[1] this Court described the types of jury instructions that are permitted, and those that are not:

[1]805 A.2d 872, 876 (Del. 2002) (Citations omitted.).

> Trial judges may properly combine a statement regarding a fact in issue with a declaration of law. Trial judges may not, however, comment on the facts in their charge to the jury since only juries are entitled to judge the facts. An improper comment or charge as to "matters of fact" is an expression by the court, directly or indirectly, that conveys to the jury "the court's estimation of the truth, falsity or weight of testimony in relation to a matter at issue."

Under these guidelines, the instruction that a person need not be drunk or drive unsafely to be guilty of DUI is not an improper comment on a matter of fact. Rather, it is an explanation of the relevant law – what it means to be "under the influence of alcohol."

6) The trial court's instruction on the Intoxilyzer comes closer to being objectionable. It is 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. The trial court also instructed the jury, however, that "there was evidence of the results of a test ... which tended to indicate .113 of one percent by weight of alcohol in the defendant's blood." That statement could be understood to convey the court's belief that Mullin tested over the legal limit for blood alcohol level, a fact that the jury must decide.

7) We are satisfied that any error in the Intoxilyzer instruction was harmless beyond a reasonable doubt.[2] There was no dispute about the fact that Mullin's Intoxilyzer test resulted in a reading of .113. The only issues with regard to the Intoxilyzer were whether the equipment was in working order and whether the test was properly administered. The trial court explained that the State had to prove both of those facts, and made no comment suggesting how the jury should decide them. Thus, the instruction did not infringe on the jury's determination of reliability, which was the only disputed fact associated with Mullin's blood alcohol level.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

[2]We note that the Superior Court's Pattern Jury Instruction makes no mention of the actual test result or what it tends to indicate: "In this case, the State presented the results of the [identify testing device] that uses a scientifically sound method of measuring the alcohol content of a person's blood....." The approach endorsed in the Pattern Jury Instruction would eliminate the possibility of impermissible comment by the court.