IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	No. 1804014579
DYRON GREEN,	)	
	)	
Defendant.	)	

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 Judgment of Acquittal. 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, the State's Response, and Defendant's reply. 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

On July 12, 2019, Defendant filed Defendant's Motion for Judgment for Acquittal. The State responded to Defendant's motion on August 6, 2019. Defendant filed a Reply to the State's Response on August 23, 2019.

In his motion, Defendant argues that the State's evidence was insufficient to prove his guilt beyond a reasonable doubt because the blood sample obtained from Defendant was improperly collected and processed. According to Defendant, this "improper procedure" affected the accuracy of the test results, resulting in a reading of more ethanol than was present in Defendant's blood. Defendant contends that the State failed to show compliance with the manufacturer's protocol. Defendant further argues that the opinion of the State's expert witness—Director of the Delaware State Crime Law, Julie Willey—that Defendant's blood sample was properly mixed fails to meet the standard of "reasonable scientific probability." Finally, Defendant argues that the State's evidence—without blood test results—is insufficient for a finding of guilt beyond a reasonable doubt.

In response, the State contends Defendant's argument about compliance with the blood tube manufacturer's instructions is untimely because that argument is a foundational question that governs the evidence's admissibility. The State argues that Defendant waived his right to challenge the evidence's foundation because he agreed, on the record, to the admission of the blood test result, failed to object to the admission of the blood test result during the trial, and reserved the right to challenge only the accuracy of the results. Next, the State argues that the jury instructions did not require the State to prove beyond a reasonable doubt that the tested blood was "properly collected and stored." In the alternative, the State contends that a

reasonable jury could have found the State proffered sufficient evidence to prove that the tested blood was properly collected and stored. Finally, the State argues that, even without the blood test results, there was sufficient evidence for a jury to find Defendant guilty beyond a reasonable doubt.

In his reply, Defendant argues that the State laid an insufficient foundation for the admission of the blood test results. Defendant further argues that the jury instructions, as given, *could have* led the jury to misunderstand the State's burden of proof regarding the blood collection process.

Standard of Review

The Court will grant a motion for acquittal, brought pursuant to Delaware Superior Court Criminal Rule 29, where there is insufficient evidence to sustain a verdict of guilt.[1] Evidence is sufficient when a rational trier of fact could "have found the essential elements of the crime beyond a reasonable doubt."[2] The "evidence, together with all legitimate inferences therefrom, must be considered from the point of view most favorable to the State."[3] The Court "does not distinguish between direct and circumstantial evidence of defendant's guilt."[4]

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[1] Super. Ct. Crim. R. 29.
[2] *Conyers v. State*, 396 A.2d 157, 160 (Del. 1978) (quoting *State v. Biter*, 119 A.2d 894, 898 (Del. Super. 1955)).
[3] *Carter v. State*, 933 A.2d 774, 777 (Del. 2007) (citing *Poon v. State*, 880 A.2d 236, 238 (Del. 2005)).
[4] *Conyers*, 396 A.2d at 160 (quoting *Biter*, 119 A.2d at 898).

Discussion

Defendant argues that the blood test results introduced by the State constitute insufficient evidence to support a conviction for driving under the influence.[5] Defendant's arguments focus on the admissibility, reliability, and weight of the evidence. Defendant has not, and indeed cannot, claim that this Court erred in admitting the blood test results.[6] The Court finds, however, that Defendant's arguments come close to crossing this line.

Defendant relies on *Clawson v. State*, *Hunter v. State*, and *State v. Fountain* to support his argument that the State failed to provide a proper foundation for the admission of the blood test results. In *Clawson v. State*, the Delaware Supreme Court reviewed the trial judge's admission of test results from an Intoxilyzer machine over defendant's timely objection.[7] In *Hunter v. State*, the Supreme Court reviewed the

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[5] Def.'s Mot. J. Aquit. 1, 12.

[6] Under Rule 103 of Delaware's Uniform Rules of Evidence:

> (a) **Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) If the ruling admits evidence, a party, on the record:
>
> (A) *timely objects or moves to strike*; and
>
> (B) states the specific ground, unless it was apparent from the context;

Del. R. Evid. 103(a)(1) (emphasis added). Defendant agreed to the admission of the blood test results and did not object to the admission of any of the State's evidence. State's Resp. Def.'s Mot. J. Acquit. ¶ 20. Thus, the Defendant is prohibited from arguing here that the evidence was improperly admitted and the Court refuses to entertain any arguments to that extent.

[7] *Clawson v. State*, 867 A.2d 187, 192 (Del. 2005).

trial judge's admission of defendant's blood test results over defendant's pretrial motion to suppress and timely objection to admission of such evidence at trial.[8] In *State v. Fountain*, this Court granted defendant's motion to suppress, holding that the State did not lay a proper foundation for admission of the blood test results because the phlebotomist failed to use normal procedures.[9]

Clawson, *Hunter*, and *Fountain* all deal with issues of admissibility of scientific evidence raised either upon timely objection from defense counsel or in a pretrial motion to suppress. Each case clarifies that the State must show the user complied with the manufacturer's instructions in order to lay a proper evidentiary foundation for scientific test results.[10] In each case, the defendant prevailed because the defendant demonstrated, in a timely manner, that the State failed to meet this burden.[11]

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[8] *Hunter v. State*, 55 A.3d 360, 364–65 (Del. 2012).
[9] *State v. Fountain*, 2016 WL 4542741, at *9 (Del. Super. Aug. 30, 2016).
[10] *Hunter*, 55 A.3d at 365–66 ("Following the manufacturer's use requirements ensures the reliability of the scientific test."); *Clawson*, 867 A.2d at 192 ("[P]art of the process for making the [Intoxilyzer] test results reliable was compliance with the manufacturer's protocol for the twenty-minute observation period."); *Fountain*, 2016 WL 4542741, at *3 ("[W]hen performing a scientific test, deviations from protocol threaten the test's validity where the result determines a central issue, i.e., a BAC above the legal limit, and it cannot be based upon unreliable evidence.").
[11] In *Clawson*, the arresting officer failed to follow the manufacturer's instructions when he did not observe the defendant for an uninterrupted twenty minutes after the Intoxilyzer test began. *Clawson*, 867 A.2d at 192–93. In *Hunter*, the phlebotomist failed to follow the manufacturer's instructions when she used expired vacutainer tubes in a blood test kit and shook the blood tube "vigorously." *Hunter*, 55 A.3d at 366. In *Fountain*, the phlebotomist failed to follow the

Defendant characterizes his argument as one of "insufficient evidence." In reality, however, Defendant alleges that the State laid an improper foundation for the admission of the blood test results because the State failed to show that the phlebotomist complied with the manufacturer's instructions.[12] Defendant argues that because the foundation was inadequate for this evidence, that it "cannot possibly sustain admissibility of the evidence in the context of providing the key (nuclear) element of the Prosecution for probable cause."[13] Defendant's foundational arguments are untimely and improperly raised.

In the instant case, Defendant neither timely objected to the admission of Defendant's blood test results nor moved *in limine* to exclude the blood test results. Instead, defense counsel reserved the right to challenge the result's accuracy.[14] In *Bowersox v. State*, the Delaware Supreme Court upheld the trial court's finding that defendant waived his right to claim that the blood test was unreliable because it was

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manufacturer's instructions when she punctured the blood test tube before the needle was in defendant's arm. *Fountain*, 2016 WL 4542741, at *9.

[12] Throughout his motion, Defendant emphasizes how it is "critically important" for the state to have shown strict compliance with the manufacturer's instructions. Def.'s Mot. J. Acquit. 3–4, 6–10; Def.'s Reply State's Answering Mem. Responding to Def's Mot. J. Acquit 1–2. This is a foundational concern. *Hunter*, 55 A.3d at 365–66 ("Following the manufacturer's use requirements ensures the reliability of the scientific test. It is this guarantee of reliability and accuracy that is the *foundational cornerstone to the admissibility of the results* of a scientific test." (emphasis added)).

[13] Def.'s Reply State's Answering Mem. Responding to Def's Mot. J. Acquit 2.

[14] Trial Tr. 13:12–21, July 9, 2019; State's Resp. Def.'s Mot. J. Acquit. ¶ 20.

improperly drawn and maintained.[15] The trial court found that the defendant waived this argument because he made a tactical decision not to object to the admissibility of the blood test on this ground during trial.[16] The Court finds that Defendant made a similar tactical decision in this case.[17] Defendant had an opportunity to object to the admission of the blood test results and the expert testimony at trial or before trial in a motion *in limine*. Defendant did neither; instead, he reserved right to challenge the test results. Because Defendant decided not to object to the blood test results or the expert testimony on this ground at trial, the Court finds he waived his right to bring such argument now in a Rule 29 motion for judgment of acquittal.

Assuming *arguendo* that Defendant can raise this argument, the Court finds that the State satisfied its foundational burden. The evidence before the court shows that the instructions included with the blood test kit mandate only that the tube be "mixed properly."[18] Although his testimony conflicted on the number of times that the phlebotomist inverted the tube, Trooper Abrenica testified that the phlebotomist inverted the test tube.[19] Defendant did not object to the admission of Trooper

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[15] *Bowersox v. State*, 2013 WL 1198083, at *2 (Del. Mar. 25, 2013) ("When a party consciously refrained from objecting as a tactical matter this Court deems the claim to be waived." (internal citations omitted)).
[16] *Id.* The trial court made this finding in its decision on defendant's Rule 29 motion. *Id.*
[17] Trial Tr. 13:12–21, July 9, 2019; State's Resp. Def.'s Mot. J. Acquit. ¶ 20.
[18] Trial Tr. 130:11–14, July 9, 2019.
[19] Trial Tr. 46:6–10, 83:16–23, 87:1–6 (stating that the phlebotomist inverted the tube), 87:22–23, 88:1–12, July 9, 2019; State's Resp. Def.'s Mot. J. Acquit. ¶ 7.

Abrenica's testimony.[20] The credibility and weight of Trooper Abrenica's testimony was for the jury to decide.[21] The Court instructed the jury of its responsibility to resolve conflicts in testimony and that the State needed to show that the tested blood was "properly collected and preserved."[22] The Court declines to overturn the jury's determination on Defendant's proffered basis.

Finally, even without the blood test results, the State still produced enough evidence for a rational juror to find Defendant guilty beyond a reasonable doubt. Under 21 *Del C.* § 4177, it is illegal for a person to drive a vehicle while "under the influence of alcohol."[23] The State must only "produce enough evidence to allow a reasonable trier of fact to conclude that the defendant's ability to drive safely was impaired by alcohol. Investigative tests, such as a chemical or sobriety test, are not necessary to prove the impairment required by statute."[24] Here, the State produced enough evidence for a rational trier of fact to conclude that Defendant was under the influence of alcohol. The State showed that: Defendant was asleep in the driver's

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[20] State's Resp. Def.'s Mot. J. Acquit. ¶ 20 ("Defendant likewise never objected during trial to the admission of *any* of the State's evidence." (emphasis added)); *see* Trial Tr. 23–90, 13:12–21, 52:8–21, July 9, 2019.

[21] *Lobianco v. State*, 2006 WL 520015, at *2 (Del. Mar. 3, 2006); *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980) ("It has long been our law that the jury is the sole judge of the credibility of the witnesses and responsible for resolving conflicts in testimony.").

[22] Jury Instrs. 7, 11, July 10, 2019.

[23] 21 *Del. C.* § 4177(a)(1).

[24] *Stevens v. State*, 129 A.3d 206, 210 (Del. 2015) (internal quotation marks omitted) (quoting *Lewis v. State*, 626 A.2d 1350, 1355 (Del. 1993)).

seat of his vehicle around 1:00 a.m. with the car in drive in the roadway; Defendant smelled of alcohol and had bloodshot eyes; Defendant was unresponsive to Trooper Abrenica's presence; and a beer can fell off the back of Defendant's truck as he drove away from Trooper Abrenica; and Defendant did not understand initially that he was being pulled over.[25] The totality of these circumstances allowed the jury to reasonably infer that Defendant was under the influence.[26]

Conclusion

For the aforementioned reasons, Defendant's Motion for Judgment of Acquittal for the conviction of Driving a Vehicle while under the Influence of Alcohol or with a Prohibited Alcohol Content is **DENIED.**

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.

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[25] Trial Tr. 28–30, 34–37, 40–44, 67, July 9, 2019; State's Resp. to Def.'s Mot. J. Acquit. ¶¶ 4–6.

[26] According to the Delaware Supreme Court:

> When a defendant argues that the evidence is insufficient to support the verdict, the relevant inquiry is whether, considering the evidence in the light most favorable to the State, including all reasonable inferences to be drawn therefrom, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Stevens, 129 A.3d at 210.