IN THE SUPREME COURT OF THE STATE OF DELAWARE

DALE GUILFOIL,	§	
	§	No. 461, 2015
Defendant Below-Appellant,	§	
	§	Court Below:
v.	§	Superior Court of the
	§	State of Delaware
STATE OF DELAWARE,	§	
	§	
Plaintiff Below-Appellee.	§	Cr. I.D. No. 1407004778

Submitted: March 9, 2016
Decided: March 11, 2016

Before **STRINE**, Chief Justice; **HOLLAND** and **VALIHURA**, Justices.

O R D E R

This 11th day of March 2016, upon consideration of the appellant's briefs, the State of Delaware's response, and the record below, it appears to the Court that:

(1) On June 8, 2015, a jury convicted the appellant, Dale Guilfoil ("Guilfoil"), of Driving A Vehicle While Under the Influence of Alcohol and/or Drugs in violation of 21 *Del. C.* § 4177.[1] The Superior Court sentenced Guilfoil to fifteen years at level 5, suspended after six years at level 5, and followed by one year at supervision level 3. Guilfoil filed this appeal from June 3 and 8, 2015 bench rulings of the Superior Court. He requests that this Court reverse his conviction and remand his case for a new trial.

[1] The Sentence Order identified this as Guilfoil's seventh DUI offense. The record shows that there were additional DUI offenses, but that a lesser number was used for sentencing purposes.

(2) On appeal, Guilfoil raises five issues. *First*, he argues that the State withheld exculpatory or impeachment evidence in violation of *Brady v. Maryland*.[2] *Second*, Guilfoil contends that his right of confrontation was denied in violation of the Sixth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution. *Third*, he asserts that the trial court abused its discretion by admitting testimony with respect to horizontal gaze nystagmus ("HGN") testing without a proper evidentiary foundation. *Fourth*, Guilfoil urges that the Superior Court abused its discretion by barring defense counsel from arguing a purportedly reasonable inference based upon the record. *Fifth*, he argues that the trial court erred as a matter of law when instructing the jury on the "operating" and "operability" of a motor vehicle. We AFFIRM the judgment of the Superior Court.

(3) On July 6, 2014, Maria Egger ("Egger") hosted a yard sale at her home in Hartly, Delaware. At the conclusion of the sale, Egger observed a white truck in her driveway. Guilfoil was in the driver's seat "pressing on the gas" and revving the engine while a female companion of his was "in front of the truck trying to push it."[3] After unsuccessfully attempting to persuade Guilfoil to stop pressing on the gas and his female

[2] 373 U.S. 83 (1963).

[3] At trial, Guilfoil testified that he heard a "pop" when trying to back the truck out of Egger's driveway. He testified that, upon feeling he was "stranded," he began drinking because "[i]t was hot and [he] was frustrated and [his] back was hurting." Further, Guilfoil testified that he suffered from "sciatic nerve damage," in addition to "a pinched nerve in [his] neck, C-7 on both sides, and . . . a herniated disk in an S-1 joint in the back." According to Guilfoil, on July 6, 2014, he had a cane with him, which Detective Weinstein did not permit him to use when outside of the vehicle.

companion to step away from the vehicle, Egger backed her car into another part of the driveway and called the police.[4]

(4) Detective Michael Weinstein ("Detective Weinstein"), then a member of the Delaware State Police Patrol Division at Troop 3 ("Troop 3"), responded to the call. When Detective Weinstein approached the truck, he observed "several open beer cans inside the vehicle." Detective Weinstein stated to Guilfoil: "You've been drinking today." Guilfoil, who had "bloodshot, glassy eyes," admitted that he had been. Guilfoil also admitted that he had been driving.[5] Further, Detective Weinstein testified that, when Guilfoil exited the truck, he had difficulty maintaining his balance, slurred speech, a strong odor of alcohol emanating from his person, and had urinated in his pants.[6]

(5) Detective Weinstein performed an HGN field sobriety test on Guilfoil, who was unable to maintain his balance during the administration of the test and had to lean on his vehicle.[7] Detective Weinstein testified that he "observed six clues" of impairment when performing the test, and stated that "[a]nything more than four clues indicates that

[4] Egger testified that she observed Guilfoil attempting to smoke a cigarette, which he repeatedly dropped before "pick[ing] up another one and light[ing] it . . . ."

[5] Detective Weinstein testified that, when he first arrived, the vehicle was on, the engine was revving, and the keys were in the ignition. Guilfoil admitted to Detective Weinstein that he had driven from Kohouts Drive to Egger's home on Myers Drive.

[6] Guilfoil also had "difficulty manipulating his fingers" when attempting to retrieve his identification, ultimately providing Detective Weinstein with business cards. Detective Weinstein also asked Guilfoil to spell his name, which he spelled: "D-A-L-E G-U-I-F-O-I-L." Further, Detective Weinstein testified that Guilfoil recited the alphabet when asked to perform a counting test.

[7] The record reflects that Officer Weinstein also administered a portable breath test ("PBT"), which indicated a blood alcohol content ("BAC") of .205.

there is a 77 percent likelihood that the defendant's blood alcohol content is greater than .10."[8]

(6) On July 6, 2014, after performing the HGN field sobriety test, Detective Weinstein transported Guilfoil to Troop 3 to obtain a blood sample. Detective Weinstein observed Hal Blades ("Blades"), a phlebotomist, obtain the sample. On July 16, 2014, the sample was transferred from Troop 3 to the Delaware State Police Crime Laboratory by James Daneshgar ("Daneshgar"). The analysis performed on the blood sample revealed that Guilfoil had a BAC of 0.19.

(7) Shortly before trial, the State informed defense counsel that Daneshgar was subject to discipline by his employer, the Office of the Chief Medical Examiner ("OCME"), for recreational drug use. Defense counsel requested that the prosecution produce Daneshgar to testify regarding his handling of Guilfoil's blood sample.[9] Before trial, Guilfoil made an oral motion *in limine* to exclude the analysis of his blood sample, arguing that the State made untimely and incomplete disclosures with respect to Daneshgar in violation of *Brady*. Further, Guilfoil argued that evidence relating to his blood sample was inadmissible because the State failed to produce a necessary witness under 21 *Del. C.* § 4177. The Superior Court denied Guilfoil's motion *in limine* with respect to the alleged *Brady* violation, reasoning that the State disclosed the OCME's discipline of Daneshgar in writing before trial, that the jury would be able to consider the information, that any delay by the State in providing the information was inadvertent, and

[8] A63.
[9] Defense counsel also requested that the prosecution produce the phlebotomist, Blades.

that the defense had "adequate time to use such information at trial . . . ." Nonetheless, the court ordered the State to provide defense counsel with Daneshgar's address, enabling the defense to subpoena Daneshgar.

(8) The case proceeded to a two-day jury trial on June 3 and 8, 2015. At trial, Detective Weinstein testified as to the procedures followed in performing the HGN field sobriety test, the standards for such test as set forth by the National Highway Traffic Safety Administration ("NHTSA"), and the results of his HGN test on Guilfoil. Guilfoil objected to Detective Weinstein's testimony on the basis of Delaware Rule of Evidence ("D.R.E.") 702, inadequate foundation for expert testimony, and a failure to identify an expert witness in discovery. In overruling the objection, the Superior Court found that Detective Weinstein's testimony met the foundational requirements regarding the standards as set forth by the NHTSA for HGN testing, and that Detective Weinstein administered the test in accordance with the NHTSA standards.

(10) In addition to denying Guilfoil's *Brady* argument for a second time at trial, the Superior Court denied the motion *in limine* with respect to Guilfoil's challenge under 21 *Del. C.* § 4177(h)(4), reasoning that "[a]lleged breaks or deficiencies in the chain of custody in this case go to the weight of the evidence rather than its admissibility. Here, the evidence satisfies the [Superior] Court that there is a reasonable probability that the evidence is properly identified and was not altered or tampered with."

(11) During closing argument, defense counsel asserted that, in view of the alleged problems with the truck's transmission, the vehicle was "inoperable" and, thus, Guilfoil "could not control it." The prosecution objected to the defense's argument that

the truck's transmission was "broken," contending that such an assertion requires expert testimony. Defense counsel urged that he was arguing "inferences from the facts." The Superior Court sustained the objection "with regard to particulars about an issue being with the transmission," and instructed the jury to disregard that portion of the defense's closing argument.

(12) "We review a trial court's ruling admitting or excluding evidence for [an] abuse of discretion."[10] In the event that we conclude that the trial court abused its discretion, "we must then determine whether there was significant prejudice to deny the accused of his or her right to a fair trial."[11] This Court reviews an alleged constitutional violation relating to a trial court's evidentiary ruling *de novo*.[12]

(13) Guilfoil argues that information concerning the OCME's disciplining of Daneshgar for recreational drug use constituted *Brady* material, and that the State failed to provide such material to the defense in a timely and complete manner. "Under *Brady* and its progeny, the State's failure to disclose exculpatory and impeachment evidence that is material to the case violates a defendant's due process rights."[13] "There are three components of a *Brady* violation: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the

[10] *Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015) (citing *Fuller v. State*, 860 A.2d 324, 329 (Del. 2004)).
[11] *Id.* (quoting *Johnson v. State*, 878 A.2d 422, 425 (Del. 2005)) (internal quotation marks omitted).
[12] *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006) (citing *Johnson*, 878 A.2d at 427).
[13] *Wright v. State*, 91 A.3d 972, 987 (Del. 2014) (citations omitted).

State; and (3) its suppression prejudices the defendant."[14] Daneshgar was disciplined for conduct unrelated to his employment at the OCME and which did not implicate tampering with evidence. We, therefore, agree with the trial court that it would be "tenuous" to conclude that Daneshgar's use of marijuana constituted exculpatory or impeachment evidence favorable to Guilfoil. Assuming, for the sake of argument, that such information did constitute exculpatory or impeachment evidence, the State provided it to the defense two days prior to trial. Assuming further that exculpatory or impeachment evidence had been suppressed, Guilfoil cannot establish that information with respect to Daneshgar's recreational drug use "create[d] a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[15]

(14) Guilfoil argues that the trial court abused its discretion when it denied his motion to exclude the State's blood testing evidence. At trial, when the State moved to submit Guilfoil's blood test results, defense counsel objected, contending that Daneshgar was required to appear as a necessary trial witness "to authenticate the chain [of custody] and show that there [was not] any alteration" of the sample.[16] The Superior Court

[14] *Starling v. State*, 2015 WL 8758197, at *12 (Del. Dec. 14, 2015) (citations omitted) (internal quotation marks omitted).
[15] *Id.* (citation omitted) (internal quotation marks omitted) (emphasis removed).
[16] 21 *Del. C.* 4177(h)(4) provides:

> In a criminal proceeding, the prosecution shall, upon written demand of a defendant filed in the proceedings at least 15 days prior to the trial, require the presence of the Forensic Toxicologist, Forensic Chemist, State Police Forensic Analytical Chemist, or any person necessary to establish the chain of custody as a witness in the proceeding. The chain of custody or control of evidence defined in this section is established when there is evidence sufficient to eliminate any

overruled the objection. To establish the chain of custody, the State is "required to eliminate possibilities of misidentification and adulteration, not absolutely, but as a matter of reasonable probability."[17]

> We have never interpreted [Delaware's chain of custody law] as requiring the State to produce evidence as to every link in the chain of custody. Rather, the State must simply demonstrate an orderly process from which the trier of fact can conclude that it is improbable that the original item has been tampered with or exchanged.[18]

In this case, Daneshgar's presence at trial was not necessary to establish the chain of custody. The Superior Court found that "testimony of the investigating officer and the state chemist established that the blood was drawn from the defendant, properly marked and initialed with a tamper[-]proof seal both on the outside envelope and the vial itself, and those seals were not broken when first received by the Delaware State Police lab and also, separately, were not broken immediately before the time of testing." We agree that the State demonstrated an orderly process eliminating any reasonable probability that the evidence had been tampered with, altered, or misidentified. Therefore, the trial court did not abuse its discretion in admitting Guilfoil's blood test results.

(15) Guilfoil argues that his right of confrontation, as provided by the Sixth Amendment to the United States Constitution, was denied because Daneshgar was not

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> reasonable probability that such evidence has been tampered with, altered or misidentified.

[17] *Tricoche v. State*, 525 A.2d 151, 153 (Del. 1987) (citing *Tatman v. State*, 314 A.2d 417, 418 (Del. 1973); *Clough v. State*, 295 A.2d 729, 730 (Del. 1972)).
[18] *Milligan*, 116 A.3d at 1242 (quoting *Demby v. State*, 695 A.2d 1127, 1131 (Del. 1997)) (alteration in original).

required to appear at trial.[19] The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"[20] In *Crawford v. Washington*,[21] the United States Supreme Court held that the Confrontation Clause ensures a defendant's right to confront all those who bear testimony against him.[22] We have recognized "that not every individual who may have relevant testimony for the purpose of establishing chain of custody must appear in person as part of the prosecution's case."[23] That is, "not everyone who 'laid hands' on the evidence need testify to satisfy the Confrontation Clause."[24] Accordingly, we find Guilfoil's claim to be unpersuasive for three reasons. *First*, Daneshgar did not provide testimonial statements[25] against Guilfoil that were admitted in his absence at trial. *Second*, the Confrontation Clause "does not require each and every individual who

[19] Guilfoil also refers to Article I, § 7 of the Delaware Constitution, but relies upon federal law and does not make any arguments based upon the language or history of the Delaware Constitution. Conclusory assertions that the Delaware Constitution has been violated are waived on appeal. *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005) (citations omitted).
[20] U.S. Const. amend. VI.
[21] 541 U.S. 36 (2004).
[22] *Id.* at 51.
[23] *Milligan*, 116 A.3d at 1239 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009)).
[24] *Id.* at 1240 (quoting *Melendez-Diaz*, 557 U.S. at 311 n.1).
[25] In *Crawford*, the United States Supreme Court identified various formulations of the core class of "testimonial" statements to include:

> *[E]x parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]

Crawford, 541 U.S. at 51-52 (internal citations omitted) (internal quotation marks omitted).

possessed the evidence to provide live testimony in order to establish chain of custody."[26] *Third*, as discussed above, Daneshgar's testimony was not necessary for the State to authenticate the blood test results and eliminate the possibility of misidentification or adulteration as a matter of reasonable probability.[27]

(16) Guilfoil next argues that the Superior Court abused its discretion by admitting the results of Guilfoil's HGN test without a proper evidentiary foundation.[28] At trial, the State moved to qualify Detective Weinstein as an expert in the administration of the HGN test. Guilfoil objected, asserting that the State failed to lay the proper evidentiary foundation for expert testimony under D.R.E. 702.[29] In *Zimmerman v. State*,[30] this Court concluded that "the HGN test is scientific, [and] a proper foundation for testimony about it must be laid. Therefore, 'prior to the admission of HGN evidence

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[26] *Milligan*, 116 A.3d at 1240.
[27] *See Demby*, 695 A.2d at 1131.
[28] Before trial, Guilfoil moved to suppress the results of his blood test for lack of probable cause. The Superior Court denied the motion, finding that, "even without the NHTSA standardized field sobriety tests and the results of the PBT, the evidence was sufficient to establish that [Detective Weinstein] had probable cause to believe the defendant was driving under the influence." A138 (citing *Miller v. State*, 4 A.3d 371, 374-75 (Del. 2010) ("Excluding the results from the PBT and HGN tests, the alcoholic odor from two or three feet away, glassy watery eyes, failed walk-and-turn and one-legged standing tests, and Miller's admission of having consumed two beers about two hours before sufficiently supported probable cause that Miller drove under the influence of alcohol.")).
[29] D.R.E. 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[30] 693 A.2d 311 (Del. 1997).

the State must provide [a] proper foundation . . . by presenting testimony from an expert with specialized knowledge and training in HGN testing and its underlying principles. . . . [A] Delaware police officer with specialized training in HGN will suffice.'"[31]

(17) Here, the Superior Court abused its discretion when it overruled Guilfoil's objection. In *Zimmerman*, we expressly adopted the "expert qualification portions" of the Superior Court's decision in *State v. Ruthardt*.[32] There, the Superior Court held that general DUI training does not qualify officers to testify as experts on the HGN test.[33] In this case, Detective Weinstein only benefitted from the HGN training he received at the police academy.[34] Thus, his qualification as an expert was error. Although admitting the results of Guilfoil's HGN test without a proper evidentiary foundation was error, it was harmless beyond a reasonable doubt, in view of the overwhelming evidence—exclusive of the HGN test—in favor of conviction.[35] As noted above, Guilfoil admitted to

[31] *Id.* at 314 (citation omitted) (alterations in original and added).
[32] 680 A.2d 349 (Del. Super. 1996).
[33] *Id.* at 361 (emphasis added) (footnote omitted).
[34] Based upon the record before us, Detective Weinstein had 24 hours of general DUI training that only partly addressed HGN testing procedures. The HGN portion of the training is completed in two parts, according to Detective Weinstein. In the first part, NHTSA certified instructors explain "what causes nystagmus, they show [trainees] videos of what it looks like, and they go over it with [trainees] . . . in the classroom portion." In the second part, trainees simulate HGN testing on actors—some of whom consume alcoholic beverages—under the supervision of NHTSA certified instructors. *See Ruthardt*, 680 A.2d at 361 ("The [Superior] Court is not satisfied that three days (or twenty-four hours) of general DUI training, which only partly addresses HGN procedures, sufficiently qualifies officers to testify as experts on the correlation between alcohol ingestion and gaze nystagmus, how other possible causes might be masked, what margin of error has been shown in statistical surveys[,] and the cause of observed symptoms of nystagmus.").
[35] *See Harris v. State*, 113 A.3d 1067, 1078 (Del. 2015) (finding that, even if evidence was admitted by error, such error was harmless beyond a reasonable doubt); *see also Brummell v. State*, 2016 WL 286907, at *3 (Del. Jan. 22, 2016) (finding evidence sufficient to support a DUI conviction where the defendant was found unconscious in the driver seat, slurring his speech,

Detective Weinstein that he had been drinking on the day of his arrest,[36] the results of his PBT indicated a BAC of .205, and his blood test revealed a BAC of 0.19. Detective Weinstein observed "several open beer cans" inside Guilfoil's truck. Further, according to Detective Weinstein, in addition to producing business cards when asked for his identification, misspelling his name, and reciting the alphabet when requested to perform a counting test, Guilfoil had "bloodshot, glassy eyes," difficulty maintaining his balance, slurred speech, a strong odor of alcohol, "difficulty manipulating his fingers" when opening his wallet, and had urinated in his pants.

(17) Guilfoil contends that the Superior Court abused its discretion by barring defense counsel from arguing that the truck's transmission was "broken." During closing argument, defense counsel argued the following to the jury before the prosecution objected: "The transmission is one of the key aspects of the mechanical system of a vehicle. It enables it to go into gear, to move, and it was broken. And with the transmission being broken --[.]"[37] Defense counsel urged that he was "arguing inferences from the facts" and that an expert opinion was not required. The court sustained the objection "with regard to particulars about an issue being with the transmission . . . ." "On appeal, in the absence of a 'clear abuse of discretion or undue prejudice to the defendant, we will not interfere with the trial court's determination as to the proper

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unable to stand, and had, in addition to non-reactive pupils, white powder in his nose and in his car); *Stevens v. State*, 129 A.3d 206, 210-11 (Del. 2015) (finding evidence sufficient to support a DUI conviction where the defendant was in a car accident, could not explain where he was coming from, smelled of alcohol, was stumbling and slurring his words, and had glassy eyes).

[36] At trial, Guilfoil testified that, on July 6, 2014, he bought three 22-ounce bottles of beer, two shots of brandy, and cigarettes.

[37] A133.

bounds of closing argument.'"[38] In light of the record, the Superior Court did not abuse its discretion in limiting defense counsel's closing argument in the specific way that it did, and giving the defense the opportunity, as was taken, to make the more general argument that the truck was inoperable and was not within Guilfoil's physical control. Further, the Superior Court permitted the defense to argue that Guilfoil was "stranded" and "unable to drive anywhere." Consequently, the trial court did not abuse its discretion in limiting defense counsel's closing argument. Nor was Guilfoil subject to undue prejudice.

(18) Finally, Guilfoil argues that the Superior Court erred as a matter of law when it denied his additional jury instructions concerning the "operating" and "operability" of a motor vehicle. Specifically, he contends that the jury was not instructed that "an inoperable vehicle cannot be physically controlled, or how to analyze inoperability, despite the fact that both operability and inoperability must be analyzed in considering an allegation of operation or actual physical control of a vehicle."[39] "We review the trial court's denial of a requested jury instruction *de novo*."[40] Although "a defendant is not entitled to a particular instruction," he or she does have "the unqualified right to a correct statement of the substance of the law."[41] We will reverse only "if the

[38] *Anderson v. State*, 930 A.2d 898, 904 (Del. 2007) (quoting *Burke v. State*, 484 A.2d 490, 498 (Del. 1984)).
[39] Op. Br. 30-31. In his Reply Brief, Guilfoil contends that "the trial court declined to tell the jury that they could not convict [him] for driving under the influence for driving an inoperable motor vehicle unless the vehicle was only temporarily inoperable." Rep. Br. 11.
[40] *Smith v. State*, 2014 WL 2927349, at *1 (Del. June 25, 2014) (citing *Keyser v. State*, 893 A.2d 956, 960 (Del. 2006)).
[41] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1984) (citing *Miller v. State*, 224 A.2d 592, 596 (Del. 1966)).

alleged deficiency in the jury instructions undermined . . . the jury's ability to intelligently perform its duty in returning a verdict."[42] Accordingly, "'[a] trial court's jury instructions are not a ground for reversal if they are reasonably informative and not misleading when judged by common practices and standards of verbal communication.'"[43]

(19) In relevant part, the Superior Court provided the following instruction to the jury on the charge of driving while under the influence of alcohol:

> The terms "drive" or "drove" include driving, operating, or having actual physical control of a vehicle. These terms are not synonymous. They define different physical actions.
>
> The term "driving" is generally used to mean steering and controlling a vehicle while in motion.
>
> The term "operating" is generally given a broader meaning to include starting the engine or manipulating the mechanical or electronic devices of a standing vehicle.
>
> "Actual physical control" means exclusive physical power and present ability to operate, move, park, or direct whatever use or non-use was to be made of the motor vehicle at the moment.
>
> In considering whether or not the defendant was in physical control of the motor vehicle while under the influence of alcohol, you may consider the defendant's location in or by the vehicle, the location of the ignition keys, whether the defendant had been a passenger in the vehicle before it came to rest, who owned the vehicle, the extent to which the vehicle was operable, and if inoperable, whether the vehicle might have been rendered operable without too much difficulty so as to be a danger to persons or property.[44]

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[42] *Id.* (alteration in original) (internal quotation marks omitted) (internal citations omitted).
[43] *Smith*, 2014 WL 2927349, at *2 (quoting *Burrell v. State*, 953 A.2d 957, 963 (Del. 2008)).
[44] A130-31.

(20) The trial court's jury instructions were a correct statement of the law, enabled the jury to intelligently perform its duty in returning a verdict, and were reasonably informative and not misleading as a matter of common standards of verbal communication. The Superior Court's instructions contained the definition of "actual physical control" that followed the one set forth by this Court in *Bodner v. State*.[45] Guilfoil's claim that the trial court's jury instructions were legally insufficient is, accordingly, without merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ *Karen L. Valihura*
Justice

[45] 752 A.2d 1169 (Del. 2000).