No. 123525

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate
	)	Court of Illinois, First
Plaintiff-Appellant,	)	District, No. 1-14-2837
	)	
v.	)	There on Appeal from the
	)	Circuit Court of Cook
	)	County, No. 10 CR 1904
RALPH EUBANKS,	)	
	)	The Honorable Timothy
Defendant-Appellee.	)	Joyce, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

LEAH M. BENDIK
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-5029
eserve.criminalappeals@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

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NATURE OF THE CASE

Defendant Ralph Eubanks was convicted of first degree murder, failure to report a motor vehicle accident involving death or injury, and aggravated driving under the influence (DUI). A majority of the appellate court reversed defendant's aggravated DUI conviction and held that section 11-501.2(c)(2) of the Vehicle Code was facially unconstitutional because it permits compelled chemical testing without a warrant. The majority also reversed defendant's murder conviction and remanded for a new trial, holding that defendant was entitled to an instruction on the lesser-included offense of reckless homicide. Finally, the majority reduced the felony class of defendant's failure-to-report conviction, holding that the People could not establish that defendant failed to report the accident within 30 minutes without improperly using evidence of his post-arrest silence. The People appeal from the appellate court's judgment. No question is raised on the pleadings.

ISSUES PRESENTED

1. Whether the majority erroneously found section 11-501.2(c)(2) (625 ILCS 5/11-501.2(c)(2)) facially invalid because this finding was unnecessary to resolve the case and because the provision can be constitutionally applied.

2. Whether, in reversing defendant's first degree murder conviction, the majority misapplied the abuse-of-discretion standard of review in concluding that the trial court erroneously rejected a jury instruction on the lesser-included offense of reckless homicide.

3. Whether the majority erred by granting relief on an argument defendant raised for the first time in his reply brief in holding that, because he had been arrested before the reporting period had elapsed, the failure-to-report conviction infringed upon his right against self-incrimination.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). On September 26, 2018, this Court allowed the People's petition for leave to appeal. *People v. Eubanks*, 108 N.E.3d 801 (Table) (Ill. 2018).

STATUTORY PROVISION INVOLVED

> § 11-501.2. Chemical and other tests.
> . . .
>
> (c)(2). Notwithstanding any ability to refuse under this Code to submit to these tests or any ability to revoke the implied consent to these tests, if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in actual physical control of a person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof has caused the death or personal injury to another, that person shall submit, upon the request of a law enforcement officer, to a chemical test or tests of his or her blood, breath or urine for the purpose of determining the alcohol content thereof or the presence of any other drug or combination of both.
>
> This provision does not affect the applicability of or imposition of driver's license sanctions under Section 11-501.1 of this Code.

625 ILCS 5/11-501.2(c)(2) (2009).

Other relevant provisions are reproduced in the appendix, including 720 ILCS 5/9-1(a)(2) (2009) (knowing first degree murder) (A38); 720 ILCS 5/4-5 (2009) (knowledge) (A38); 720 ILCS 5/9-3(a) (2009) (reckless homicide)

(A38-39); 720 ILCS 5/4-6 (2009) (recklessness) (A39); and 625 ILCS 5/11-401(a)-(d) (2009) (failure to report: motor vehicle accidents involving death or personal injuries) (A39-40).[1]

STATEMENT OF FACTS

On December 21, 2009, a hit-and-run accident occurred involving two pedestrians; Maria Worthon was killed, and her son Jeremiah Worthon was injured. A1-2. Defendant, alleged to be the driver, was indicted on 59 counts, including the first degree murder of Maria, aggravated DUI causing death to Maria and great bodily harm to Jeremiah, and failure to report a motor vehicle accident involving death or personal injury. C.121-83. Defendant moved to suppress the results of blood and urine tests as unconstitutional searches because police did not obtain a warrant, no exigent circumstance justified the failure to obtain a warrant, and he did not consent to the testing. C.425-30. Defendant also moved to declare section 11-501.2(c)(2) unconstitutional — both facially and as applied to him — because it failed to make chemical testing contingent on a warrant, exigent circumstances, or the defendant's consent. C.431-34.

At the hearing on the motions, the parties stipulated to the underlying facts, including the circumstances of defendant's arrest and the chemical testing. R.YY2-8. Defendant did not dispute that the police had probable

[1] "C._" refers to the common law record; "R._" refers to the report of proceedings; "Peo. Exh. _" refers to the People's trial exhibits; "A_" refers to the appendix to this brief; and "Def. App. Ct. AT Br.," "Peo. App. Ct. AE Br.," and "Def. App. Ct. Reply Br." refer to the appellate court briefs, certified copies of which have been filed in this Court under Rule 318(c).

cause to arrest him for DUI. R.YY9-10. Defendant argued that under *Missouri v. McNeely*, 569 U.S. 141 (2013), (1) such chemical testing cannot be conducted absent a warrant or an exception to the warrant requirement, (2) dissipation of intoxicants *alone* cannot be considered an exigent circumstance, and (3) no exigent circumstance existed here. R.YY11-15, 19-23. The People responded that the death of Maria and the injury of Jeremiah constituted the requisite exigent circumstances and compelled blood and urine testing were permissible, R.YY15-19; alternatively, the People argued that the court should apply the good-faith exception to the exclusionary rule, R.YY24.

The trial court denied defendant's motions, holding that section 11-501.2(c)(2) was constitutional because nonconsensual chemical testing was permissible. A18-20. The court also held that Maria's death and Jeremiah's injury placed additional responsibilities upon the police, creating exigent circumstances that rendered the warrantless, compelled testing constitutional, despite the lapse of time between defendant's arrest and the sampling of his blood and urine. A20-26.

Defendant represented himself at the ensuing jury trial, R.ZZ5-27 (admonishments and attorney waiver), where the evidence showed that shortly before 9:00 p.m. on December 21, 2009, Chicago Police Officers Brian Murphy and Chris Wertepny observed a green Pontiac with no headlights traveling at a high rate of speed. R.CCC17-22, EEE31-33. The officers

activated their emergency lights and stopped the car in a residential area with high-rise, multi-unit apartment buildings. R.CCC22-23. Murphy saw two occupants sitting in the car's front seat. R.CCC22. As the officers approached the Pontiac, it sped away. R.CCC23, EEE33. The officers returned to their car, then saw the Pontiac run a stop sign at a busy intersection, but quickly lost sight of it. R.CCC23-25. Murphy notified dispatch that the Pontiac had sped away and provided the license plate number. RCCC24, EEE34-35.

Around the same time, Felix Worthon walked to the bus stop to meet his wife, Maria Worthon, with their six-year-old son, Jeremiah. R.AAA22-26. As the family walked home, Maria briefly stopped near their church to speak to a friend, Maurice Glover. R.AAA27, CCC10-12. Afterward, as Maria and Jeremiah crossed the street, a car approached at about 80 to 90 m.p.h. with no headlights on. R.CCC14. The car struck Maria without stopping; Maurice saw Maria's body hurtling through the air. *Id.*; R.AAA29. Felix ran to Maria and asked Maurice to check on Jeremiah, who was under a parked car. R.AAA30, CCC14-15. Jeremiah's head and ear were bleeding, and he was spitting up blood. R.AAA29-30.

Madeline Moratto and Alex Montejo testified that, around 9:00 p.m. on December 21, 2009, they were walking on the sidewalk in a residential area near the intersection of Greenview and Greenleaf. R.BBB69-71, 91-92. They heard a loud impact and saw a car with no headlights drive away without

stopping; Madeline estimated the car's speed at around 80 m.p.h., while Alex estimated it as between 60 and 70 m.p.h. R.BBB73-76, 93-95.

Officers Murphy and Wertepny, who had continued patrolling after losing sight of the Pontiac, arrived at the intersection of Greenview and Greenleaf and learned that a car had struck two pedestrians. R.CCC25-26, EEE34-35. The witnesses' description of the offending vehicle matched the Pontiac that had fled their earlier traffic stop, R.EEE34-35, and Murphy informed dispatch of the development, R.CCC26.

Around 9:00 p.m., Officers Escher and Troman received a radio call of a hit-and-run accident at the intersection of Greenview and Greenleaf that included a description of the car and its license plate number. R.CCC41-43. They spotted the car in a nearby alley and pursued it. R.CCC44-45. Although they were traveling around 50 m.p.h., they were unable to keep up with the Pontiac. R.CCC45-47. A short time later, they saw it hit a couple of parked cars on both sides of the street before coming to a stop. R.CCC47-48; *see also* R.CCC86. One person exited the car and ran away; Troman chased that person while Escher verified that no one else was in the car. R.CCC48-49; *see also* R.CCC69, 86-87. Police took the person, later identified as defendant, into custody. R.CCC49-50, 69-70, 87-89.

Calvin Tanner was in defendant's car when it hit Maria and Jeremiah. R.AAA54-56. Calvin and his cousin, Dennis Jeter, were good friends with defendant. R.AAA47-49, BBB98-99, 102. On December 21, 2009, defendant

drove Calvin in Dennis's 1998 green Pontiac to the home of Calvin's and Dennis's grandmother, where they met Dennis. R.AAA50-51, BBB99-100, 103. At the house, Calvin and Dennis drank alcohol, but claimed not to have seen whether defendant was drinking because many people were there. R.AAA52-53, BBB105.

Around dinnertime that evening, defendant drove Calvin to the north side of Chicago. R.AAA53-54. Calvin testified that defendant was driving "[p]retty kinda fast" because he was on the expressway. But in both his statement to a prosecutor and his grand jury testimony, Calvin stated that defendant was driving fast in a residential area; Calvin's grand jury testimony had defendant driving about 50 to 60 m.p.h. R.AAA55, 81, BBB13-14. Calvin testified that when they approached a church near Greenview and Greenleaf, defendant struck something. R.AAA55-56. Calvin said "I hope you didn't do what I thought you did," R.AAA56, and defendant responded, "It's too late," R.AAA64. Calvin knew that they had hit a person. R.AAA56-57, 83, BBB22. The front windshield was smashed, and Calvin had glass and blood on him. R.AAA57, BBB19. At Calvin's request, defendant stopped the car. R.AAA57-58, EEE69. Calvin told defendant to go back to the scene with him, but defendant refused. R.AAA58, 77-78, BBB22. Calvin testified that he exited the car, called Dennis, and told him that his car had been wrecked when it had hit something. R.AAA.58-59, BBB108. In his statement to prosecutors that night, Calvin stated that he told Dennis he thought that

defendant had just killed somebody. R.AAA84-85. Calvin testified that Dennis met him, and together they went back to the scene and spoke to police; defendant was not with them. R.AAA59, 68, BBB109-10. Calvin told police, and testified at trial, that defendant was driving the car when it hit Maria and Jeremiah. R.AAA65, BBB23.

Maria was pronounced dead at the scene. R.DDD117. Maria's injuries included fractures of almost every bone in her skull and multiple fractures of her right arm, both legs, and her pelvis, as well as multiple abrasions and lacerations. R.EEE17-20. An assistant medical examiner testified that Maria's cause of death was multiple injuries sustained due to an automobile striking her. R.EEE5, 13, 30.

Officer John Ventrella testified that, at midnight at the police station, defendant refused to take a breathalyzer test or provide a blood or urine sample for testing; defendant smelled like alcohol and had a carefree, joking demeanor. R.DDD7, 12, 15-17. Around 3:00 a.m., Ventrella took defendant to a hospital to obtain blood and urine samples, but defendant refused to allow the nurse to draw his blood. R.DDD16-17. At 4:10 a.m., with the help of security officers, the nurse drew defendant's blood while he was handcuffed and his arm was held down. R.DDD18. Defendant refused to urinate, and the nurse told him that if he did not, he would be catheterized. R.DDD19. A catheter was ordered around 5:00 a.m., but defendant urinated on his own at 5:20 a.m. in Ventrella's presence. R.DDD19-20. Defendant's blood and urine

samples were submitted for testing, R.DDD20; police did not obtain a warrant to take these samples, R.YY10, 17, 33. Back at the police station, defendant told Ventrella that he had drunk a fifth of Hennessey. R.DDD22; Peo. Exh. 29.

A forensic toxicologist testified that although defendant's blood tested negative for alcohol or drugs, his urine sample, which was not tested for alcohol, tested positive for the presence of THC and its major metabolite, MDMA; his urine also tested positive for MDA and benzoylecgonine, a cocaine metabolite.[2] R.YY7, DDD60-61, 63, 66-68, 84. The toxicologist explained that the body converts drugs to metabolites to rid the body of the drugs and to stop their "pharmacologic activity." R.DDD69. Metabolites can be active, in that they still physically affect the body and brain, or inactive, in that they do not affect the body and brain. *Id.* THC is found in both marijuana and in a drug prescribed to counter chemotherapy side effects. R.DDD71. None of the substances found in defendant's blood is available over the counter. *Id.*

Defendant testified at trial that on December 21, 2009, he drank between a pint and a quart of Hennessey. R.EEE148-49. That night, he, Calvin, and Dennis drove to Calvin's apartment. R.EEE136. According to defendant, Calvin and Dennis left him at Calvin's apartment to save a parking space, so he was not in the car when it hit Maria and Jeremiah.

[2] THC stands for tetrahydrocannabinol, the active chemical in cannabis; MDMA stands for methylenedioxymethamphetamine, commonly known as ecstasy; and MDA stands for methylenedioxyamphetamine. R.DDD68.

R.EEE136, 139, 146-47. While waiting, defendant received a phone call from Calvin, who told him that he had just been in an accident. *Id.* Calvin told him where he was, and defendant started walking there. R.EEE137. Defendant explained that police were everywhere, and he started to run because he "had some weed." *Id.* Defendant testified that the police tackled him, took him to the police station, and later charged him with the offenses. R.EEE137-38. Defendant also admitted that he had used marijuana a week earlier and ecstasy around two days prior to the crash. R.EEE152. He denied using cocaine but acknowledged that it could have been mixed with the ecstasy. *Id.*

At the jury instructions conference, defendant requested an instruction on reckless homicide as a lesser-included offense of first degree murder. A27-28. The trial court denied the request, finding there was no evidence that would allow the jury to find defendant guilty of the lesser offense and not guilty of the greater offense, in part, given defendant's denial that he was in the car at the time of the collision. A30-36.

The jury found defendant guilty of first degree murder, aggravated DUI resulting in the death of Maria Worthon, aggravated DUI resulting in great bodily harm to Jeremiah Worthon, and aggravated leaving the scene of an accident involving death or personal injury ("failure to report"). R.FFF92. After merging the conviction for aggravated DUI resulting in Maria's death into the first degree murder conviction, R.LLL5-6, the court sentenced

defendant to consecutive prison terms of 30, six, and four years, respectively, R.LLL63-65, 73-74.

Defendant appealed, arguing that (1) the trial court erred by refusing to instruct the jury on reckless homicide as a lesser-included offense of first degree murder; (2) there was insufficient evidence to prove that he failed to report the collision to police within 30 minutes; (3) section 11-501.2(c)(2), authorizing warrantless, nonconsensual chemical testing, was unconstitutional on its face and as applied to him; and (4) improper comment by the prosecutor denied him a fair trial. A1.

The appellate court majority granted defendant relief on the first three issues and declined to reach the fourth. A1, 12. The majority reversed defendant's first degree murder conviction and remanded for a new trial, holding that defendant was entitled to the reckless homicide jury instruction because there was some evidence that he acted recklessly in causing Maria's death. A4-6. Second, the majority reduced defendant's failure-to-report conviction from a Class 1 to a Class 4 felony, reasoning that because he was arrested around ten minutes after the accident, the People could not prove that defendant failed to report the accident within half an hour without impermissibly introducing evidence of his post-arrest silence. A6-7, 12. Finally, the majority held that section 11-501.2(c)(2) was facially unconstitutional because it permits warrantless compelled chemical testing in all cases in which an officer has probable cause to believe that a driver

under the influence has caused death or personal injury to another. A7-11. The majority held that the blood and urine test results should have been suppressed, and therefore reversed defendant's aggravated DUI conviction, because the samples were taken without a warrant, consent, or exigent circumstances, and the good-faith exception did not apply. A11-12.

The dissenting justice disagreed on all three points. First, she would have held that defendant was not entitled to a reckless homicide instruction because he denied that he was even present at the scene. A12-16 (Pucinski, J., dissenting). Second, defendant raised a sufficiency, not a self-incrimination, challenge to the failure-to-report conviction, and the evidence was sufficient: the jury reasonably could have inferred defendant's failure to report from his denial that he was at the scene. A16-17 (Pucinski, J., dissenting). Third, while agreeing that the chemical testing results should have been suppressed, the dissenting justice concluded that it was error to find section 11-501.2(c)(2) facially unconstitutional because it was unnecessary to do so. A17 (Pucinski, J., dissenting).

ARGUMENT

I. The Majority Made Two Errors in Finding Section 11-501.2(c)(2) of the Vehicle Code Facially Unconstitutional.

A. It Was Unnecessary to Find Section 11-501.2(c)(2) Facially Unconstitutional to Resolve the Case.

Courts should not "'compromise the stability of the legal system'" by finding a statute facially unconstitutional when it is unnecessary to do so. *In re E.H.*, 224 Ill. 2d 172, 179 (2006) (quoting *People v. Lee*, 214 Ill. 2d 476, 482 (2005)). But that is exactly what the majority did below.

The majority found section 11-501.2(c)(2) of the Vehicle Code (625 ILCS 5/11-501.2(c)(2) (2009)) facially unconstitutional under *Missouri v. McNeely*, 569 U.S. 141 (2013), because it "permits" warrantless, compelled chemical testing when a police officer has probable cause to believe that a motorist under the influence caused death or personal injury to another person. A11. But upon finding that taking defendant's blood and urine samples violated the Fourth Amendment under *McNeely* (in the absence of (1) consent, a warrant, or exigency to validate the search, or (2) applicability of the good-faith exception to the exclusionary rule), A7-12, the majority should have reversed the trial court's judgment denying defendant's motion to suppress the test results and reversed the aggravated DUI conviction without addressing the facial constitutionality of section 11-501.2(c)(2). Even if section 11-501.2(c)(2) "permit[ted]" the unconstitutional taking of samples, the court should have declined to review its facial constitutionality upon

concluding that the sampling here violated the Fourth Amendment, i.e., finding the provision unconstitutional as applied. *Lee*, 214 Ill. 2d at 477-78, 485-89 (reversing appellate court's facial invalidation of Joliet's drug-loitering ordinance and affirming on the more limited ground that officers lacked probable cause to arrest Lee for violating it).

It is undisputed that defendant's blood and urine samples were taken in violation of the Fourth Amendment and that insufficient evidence supported defendant's aggravated DUI conviction upon suppression of the blood and urine testing results. Thus, under the principle of constitutional avoidance from *Lee* and *E.H.*, this Court should (1) reverse defendant's aggravated DUI conviction without addressing whether section 11-501.2(c)(2) is facially unconstitutional, and (2) vacate the corresponding portion of the appellate court's opinion. *Lee*, 214 Ill. 2d at 489 (vacating appellate opinion that improperly considered facial invalidity of ordinance) (citing *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 157 (2002) (vacating portions of lower court judgments that improperly addressed class certification issue)).

B. Section 11-501.2(c)(2) Is Not Facially Unconstitutional.

Standard of Review: A de novo standard of review applies to the legal question of whether a statute is unconstitutional. *People v. Relerford*, 2017 IL 121094, ¶ 30.

As discussed, it is unnecessary to address the facial constitutionality of section 11-501.2(c)(2) because this case can be resolved without doing so. But

if this Court reaches the question of whether section 11-501.2(c)(2) is facially unconstitutional, the Court should hold that it is not because even though it allows invalid chemical testing, it also allows valid testing.

The Fourth Amendment prohibits unreasonable searches, *People v. Watson*, 214 Ill. 2d 271, 279 (2005), and it is well established that the taking of a blood or urine sample from a suspected intoxicated driver constitutes a Fourth Amendment search, *Schmerber v. California*, 384 U.S. 757, 767 (1966) (blood); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989) (urine). Although the Fourth Amendment permits warrantless breath tests incident to a DUI arrest, the same is not true for blood tests, because they are more invasive. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178, 2184 (2016). Thus, warrantless sampling for use as evidence in a criminal investigation is reasonable only if an exception to the warrant requirement — such as exigent circumstances or consent — applies. *McNeely*, 569 U.S. at 147-49 (warrantless blood test valid under exigent circumstances); *see also Birchfield*, 136 S. Ct. at 2186 (remanding one defendant's case to state court to determine whether consent to warrantless blood test was voluntary); *People v. Harris*, 2015 IL App (4th) 140696, ¶ 49 (warrantless blood test valid with voluntary consent).

A statutory provision is facially unconstitutional only if there are no circumstances in which it can be validly applied. *People v. Davis*, 2014 IL 115595, ¶ 25 (citing *Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 306 (2008)).

It necessarily follows that a facial challenge fails if any situation can be identified in which the provision validly applies. *Davis*, 2014 IL 115595, ¶ 25. In contrast, an as-applied challenge contests the application of the provision in the particular context of a defendant's case. *Napleton*, 229 Ill. 2d at 306. As a result, facial invalidity is more difficult to establish. *Davis*, 2014 IL 115595, ¶ 25.

For example, in *Lucien v. Briley*, 213 Ill. 2d 340, 342-45 (2004), this Court considered whether an extended-term sentencing provision was facially unconstitutional in light of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that any fact, other than a prior conviction, that increases criminal defendant's punishment must be submitted to and found proved beyond a reasonable doubt by jury). This Court held that the provision was not facially unconstitutional given that it did not preclude compliance with *Apprendi*: although the provision permitted *Apprendi* violations, it also permitted courts to follow *Apprendi*. *Lucien*, 213 Ill. 2d at 344-45.

Section 11-501.2(c)(2) is facially valid because it can be validly applied. The version[3] of section 11-501.2(c)(2) applicable here provided:

> Nothwithstanding any ability to refuse under this Code to submit to these tests or any ability to revoke the implied consent to these tests, if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in actual physical control of a person under the

[3] Effective August 22, 2011, the phrase "the law enforcement officer shall request, and" was added before the statutory phrase "that person shall submit. . ." *See* P.A. 97-471; 625 ILCS 5/11-501.2(c)(2) (2018). The amended provision is also facially constitutional for the reasons described in this section.

> influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof has caused the death or personal injury to another, that person shall submit, upon the request of a law enforcement officer, to a chemical test or tests of his or her blood, breath or urine for the purpose of determining the alcohol content thereof or the presence of any other drug or combination of both.
>
> This provision does not affect the applicability of or imposition of driver's license sanctions under Section 11-501.1 of this Code.

625 ILCS 5/11-501.2(c)(2) (2009). Like the statute in *Lucien*, section 11-501.2(c)(2) is facially valid because even if it permits chemical testing in violation of the Fourth Amendment (as in this case),[4] the provision also permits blood and urine testing that complies with the Fourth Amendment, that is, pursuant to a warrant, with the arrestee's consent, or under exigent circumstances. Because the statute permits and does not prevent such constitutionally valid chemical testing, it is facially constitutional.

The Fourth District's decision evaluating the facial validity of a similar implied consent provision, section 11-501.6(a) of the Vehicle Code, in *People v. Hasselbring*, 2014 IL App (4th) 131128, is also instructive. Section 11-501.6(a) authorizes law enforcement to pursue chemical testing of drivers ticketed or arrested for *any* Vehicle Code violation if it involved an accident resulting in personal injury or fatality. *See* 625 ILCS 5/11-501.6(a) (2010). The provision does not require probable cause or even reasonable suspicion to

[4] The People do not dispute that the chemical testing was conducted in violation of the Fourth Amendment given the absence of a warrant, consent, or adequate exigent circumstances. Moreover, given the prohibition on using physical force to obtain nonconsensual samples, the good-faith exception to the exclusionary rule is inapplicable here. *See* A11-12 (quoting *People v. Jones*, 214 Ill. 2d 187, 201 (2005)).

believe that the driver was under the influence of an intoxicant. *Id.* The Fourth District upheld the provision's validity against a facial challenge upon noting that such a challenge must fail if a provision can be applied constitutionally and concluding that it could be constitutionally applied because the defendant could and did consent to the testing. *Hasselbring*, 2014 IL App (4th) 131128, ¶¶ 39-43. Moreover, the provision did not create what *McNeely* prohibited, i.e., a per se exception to the Fourth Amendment's warrant requirement. *Id.*, ¶ 42.

The majority's attempts to distinguish *Hasselbring*, A10, fail. First, *Hasselbring* is consistent with the People's argument that a provision should not be facially invalidated under *McNeely* unless it creates a per se exception to the warrant requirement and can never be applied in a constitutional manner, neither of which is true of section 11-501.2(c)(2). Second, the fact that Hasselbring voluntarily consented to testing and this defendant did not does not justify a different result. Rather, both implied consent provisions can operate in accordance with the Fourth Amendment because under both statutes, a driver *may* consent to chemical testing. That this particular defendant did not consent to chemical testing has no bearing on his facial challenge.

II. The Trial Court Did Not Abuse Its Discretion in Declining to Give a Jury Instruction for the Lesser-Included Offense of Reckless Homicide.

Standard of Review: When a trial court has found insufficient evidence to justify the giving of a jury instruction, the reviewing court applies an abuse-of-discretion standard of review, meaning that reversal is appropriate only if the denial was "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. McDonald*, 2016 IL 118882, ¶¶ 32, 42.

Defendant was charged with first degree murder, C121, and requested a jury instruction for the lesser-included offense of reckless homicide, A27-28, which the trial court declined to give, A30-36. As relevant here, C465, a defendant commits first degree murder when he acts to cause the death of an individual without lawful justification knowing "that such acts create a strong probability of death or great bodily harm to that individual or another," 720 ILCS 5/9-1(a)(2) (2009) (A38). Thus, a person commits knowing murder, though lacking the conscious objective of killing someone, given his conscious awareness that his acts create a strong risk of another's death or great bodily harm. *See*, *e.g.*, *People v. Deacon*, 130 Ill. App. 3d 280, 287-88 (2d Dist. 1985); *see also* 720 ILCS 5/4-5 (2009) (A38). A defendant commits reckless homicide by unintentionally killing another with a vehicle when his actions are "likely to cause death or great bodily harm to some individual, and he performs them recklessly." 720 ILCS 5/9-3(a) (2009) (A38-39); *People*

v. Wilson, 143 Ill. 2d 236, 245 (1991). A person acts recklessly when he "consciously disregards a substantial and unjustifiable risk . . . and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (2009) (A39); *Wilson*, 143 Ill. 2d at 246.

Both offenses reflect awareness: knowing murder involves knowledge, while reckless homicide involves a conscious disregard of a substantial risk. *People v. Oelerich*, 2017 IL App (2d) 141281, ¶ 61 (in comparing these offenses, noting that "[t]o consciously disregard something, one must *know* it") (emphasis in original). Thus, the key difference between the two offenses centers on the *degree of risk* of death or great bodily harm that the defendant knows is created by his conduct. *People v. Alsup*, 373 Ill. App. 3d 745, 750 (5th Dist. 2007) (citing *People v. Mifflin*, 120 Ill. App. 3d 1072, 1077 (4th Dist. 1984)). Knowing murder occurs when the defendant's acts created a "strong probability" of death or great bodily harm, while reckless homicide occurs when the acts were "likely" to cause death or great bodily harm, i.e., a substantial risk. *Id.* (citing *Mifflin*, 120 Ill. App. 3d at 1077). A "strong probability" is more than a "substantial risk." *Oelerich*, 2017 IL App (2d) 141281, ¶ 62. One can act knowing that there was a "substantial risk" of death or great bodily harm caused by one's conduct without knowing of a "strong probability" of such consequences. *Id.* Whether a defendant's acts

created a strong probability of death or great bodily harm is a question of fact. *See*, *e.g.*, *People v. Thomas*, 266 Ill. App. 3d 914, 926 (1st Dist. 1994).

A defendant is entitled to a jury instruction on a lesser-included offense if there is some evidence in the record that, if believed by the jury, would reduce the crime charged to a lesser offense. *McDonald*, 2016 IL 118882, ¶ 25. After correctly reciting the applicable legal standards, A30-31, the trial court analyzed the record evidence and concluded that there was "no evidence" of recklessness, so the reckless homicide instruction would not be given. A31-36; *see also* R.GGG18-19. The appellate court majority reversed. A4-6.

A. In Evaluating the Jury Instruction Issue, the Majority Failed to Give the Deference Required by the Applicable Abuse-of-Discretion Standard of Review.

Despite acknowledging the applicable abuse-of-discretion standard of review, A5, ¶ 33 (citing *McDonald*, 2016 IL 118882, ¶ 42), the majority's analysis instead employed what can only be fairly described as de novo review. The majority found "sufficient evidence" that defendant acted recklessly to warrant the instruction, A5, ¶ 35; commented that defendant's actions were "sufficiently comparable" to those in another case such "that a rational jury could find that [defendant] acted recklessly," *id.*, ¶ 37; and found that the trial court "erred" in denying the requested instruction, *id.*, ¶ 38. All of this language confirms that the majority improperly made its own independent assessment — i.e., conducted de novo review — of whether

there was any evidence to support the reckless homicide instruction. *See McDonald*, 2016 IL 118882, ¶ 32) (under de novo standard, reviewing court employs same analysis that trial court would perform, which is "completely independent" review that does not require any deference to trial court's reasoning or judgment).

This Court should disapprove the persistent notion that a trial court abuses its discretion by declining a lesser-included offense instruction whenever the reviewing court concludes that there is some evidence supporting it. Inherent in that notion is that the reviewing court should undertake an independent assessment of the record to determine whether there is some evidence to support the instruction. Instead, consistent with the abuse-of-discretion standard, the reviewing court should review the relevant evidence, but only to evaluate whether the trial court's factual finding that there was no evidence of the lesser offense was so "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *McDonald*, 2016 IL 118882, ¶¶ 32-33, 42.

B. The Trial Court's Refusal to Instruct on Reckless Homicide Was Not Arbitrary, Fanciful, or Unreasonable.

This Court should hold that the trial court did not abuse its discretion in declining to give a reckless homicide instruction. In finding no evidence of reckless homicide, the trial court concluded that the evidence showed that defendant was driving *so* dangerously, in light of the circumstances and the severity of the harm inflicted, that he could only have concluded that his

conduct posed the greater degree of risk inherent in knowing first degree murder. *See People v. Chambers*, 2016 IL 117911, ¶ 75 ("[r]eview for abuse of discretion is proper when the trial court . . . must . . . make a judgment call"); *see also*, *e.g.*, *Thomas*, 266 Ill. App. 3d at 926 (whether defendant's acts satisfied greater standard for knowing first degree murder rather than reckless homicide is question of fact).

The trial court's oral ruling confirms that it undertook precisely this analysis, A31-36; *see also* R.GGG17-19, and that its conclusion was not arbitrary, fanciful, or unreasonable. When evaluating whether a driver involved in a fatal accident was appropriately convicted of knowing first degree murder, reviewing courts cite such factors as disregarding rules of the road, road conditions, and traffic signals; speeding; and fleeing police. *See*, *e.g.*, *Alsup*, 373 Ill. App. 3d at 748-49, 751, 753-54 (given sufficient evidence for greater offense, refusing to reduce knowing murder conviction to reckless homicide; jury instructed on both offenses); *Thomas*, 266 Ill. App. 3d at 925-27 (same).

Fleeing from police tends to show consciousness of guilt. *See People v. Harris*, 52 Ill. 2d 558, 561 (1972). And fleeing from police after inflicting injury — instead of calling for help or checking on victims — is more consistent with awareness of the higher risk of harm inherent in knowing murder. *Cf. People v. Whiters*, 146 Ill. 2d 437, 439-40 (1992) (court erred in

refusing to give involuntary manslaughter[5] jury instruction given that evidence of recklessness included not only characteristics of interaction between defendant and victim, but also that, after stabbing victim once, defendant screamed that she did not mean to hurt him and called for help).

And the degree of dangerousness posed by a defendant's driving correlates to the extremity of the injuries inflicted on the victims. *See People v. Ward*, 101 Ill. 2d 443, 449, 451-53 (1984) (affirming rejection of involuntary manslaughter jury instruction in murder case and finding no evidence of recklessness, in part because "sickening severity" of injuries inflicted "negat[ed] any suggestion" that conduct was merely reckless); *see also*, *e.g.*, *People v. Fenderson*, 157 Ill. App. 3d 537, 548 (5th Dist. 1987) (similar).

Here, defendant, who lacked a valid driver's license, sped away from a presumptively valid traffic stop and down residential streets for nine blocks without headlights, failed to stop at any of eight stop signs (including at the busy intersection of Greenview and Howard), and failed to apply his brakes at any time, including after he plowed into Maria and Jeremiah. A31-32; R.BBB94-96, CCC14, 22-25, 31, 37-38, EEE33-34, 82, 84. Defendant was traveling at such a high rate of speed that the officers who conducted the traffic stop lost sight of his car within seconds, R.CCC23-25, and eyewitnesses, including front-seat passenger Calvin Tanner, variously estimated his speed as between 50 to 90 m.p.h, R.BBB13-14 (Tanner: 50 to 60

[5] Involuntary manslaughter and reckless homicide differ only in the means by which death is recklessly caused, in that death for the latter offense is caused through the driving of a vehicle. *See* 720 ILCS 5/9-3(a) (2009) (A38-39).

m.p.h.), BBB73-76 (Moratto: 80 m.p.h.), BBB93-95 (Montejo: 60 to 70 m.p.h.), CCC14 (Glover: 80 to 90 m.p.h.). In fact, one eyewitness heard tires squealing and engine acceleration shortly before the impact, R.BBB73, suggesting that defendant sped up before he hit Maria and Jeremiah. A traffic investigator drove the same stretch of Greenview and found it difficult to maintain even a relatively low speed of 30 m.p.h. because it was a "tight street" with many intersections, all of which had stop signs. R.EEE83-85. Tanner, who typically did not wear a seatbelt when riding with defendant, reached for his seatbelt and tried to brace himself because defendant's driving that night scared him. R.AAA82, BBB14, 59. And the trial court reasonably inferred from the fact that the collision occurred at 9 p.m. that defendant could reasonably expect that pedestrians would be outside at the time. A34-35; R.BBB69-71, 91-92. An investigator who arrived at the scene approximately 90 minutes after the collision noted that the pavement was already wet, it was cold, and it had just begun snowing. R.DDD94-95, 97.

Defendant's collision with Maria and Jeremiah was undeniably severe. Defendant's car propelled Maria's body high into the air and a great distance from the point of impact. A32; R.BBB74-75 (Moratto: body went 30 feet in air, 100 yards distant), R.BBB94 (Montejo: body went up through overhanging tree branches), R.CCC14 (Glover: body traveled in air to other side of street), R.DDD134 (measuring Greenleaf as 30 feet wide). Maria suffered numerous fractures of her pelvis, arms, legs, and skull — exposing

and scattering parts of her brain — as well as numerous abrasions and lacerations. A32; R.EEE5, 13, 17-20; *see also* R.CCC14 (Glover: parts of brain were scattered), R.DDD108-09 (photographs with strewn brain matter described). The collision also caused serious injuries to Jeremiah. At the time of trial over four years after the collision, Jeremiah continued to receive therapy for traumatic brain injury and took medication to discourage seizures; for two months after defendant's crime, Jeremiah used a wheelchair because he could not walk. R.AAA1, 35-37.

Following the collision, defendant continued his efforts to evade law enforcement: after police spotted his car in a nearby alley, defendant sped away at roughly 50 m.p.h. until he later stopped upon crashing into several parked cars; defendant then fled on foot. R.CCC44-49, 69, 79-89. Defendant also failed to echo passenger Tanner's concern for the victim, rejecting Tanner's request to stop and return to the scene, noting that "It's too late." R.AAA57-58, 64, 77-78, BBB22, EEE69.

This evidence supports the conclusion that defendant was aware of the serious risks caused by his dangerous driving. Thus, the trial court did not arbitrarily or unreasonably determine that defendant could only have viewed such driving as posing a strong probability — rather than merely a substantial risk — of serious injury or death. Although there is a dearth of precedent addressing whether a trial court abused its discretion in denying a lesser-included offense instruction on reckless homicide, analogous

involuntary manslaughter instruction cases support the trial court's ruling here. *See*, *e.g.*, *McDonald*, 2016 IL 118882, ¶¶ 44-57 (trial court did not abuse its discretion in refusing involuntary manslaughter instruction given that defendant confronted and blocked victim from leaving; swung knife at victim and stabbed him three times, including once in cheek deep enough to strike carotid artery, even though defendant was intoxicated; and after stabbing defendant called for help and told victim, "Please don't die"); *Ward*, 101 Ill. 2d at 449, 451-53 (affirming rejection of involuntary manslaughter jury instruction in murder case and finding no evidence of recklessness, in part because "sickening severity" of injuries inflicted during beating of child victim "negat[ed] any suggestion" that conduct was merely reckless).

Moreover, there was no evidence that defendant had a diminished appreciation for the risk posed by his dangerous driving. Defendant instead testified that he was not in the car at the time of the collision. R.EEE136, 139, 146-47. Consequently, had the jury believed him, it would have acquitted him of first degree murder; his testimony provided no basis for the jury to have found him guilty of the lesser offense even if that option had been presented. *See Ward*, 101 Ill. 2d at 449, 451-53 (finding no evidence of recklessness, in part due to defendant's testimony that he did not touch the victim on day in question because, if believed, it would have instead resulted in acquittal); *see also*, *e.g.*, *Fenderson*, 157 Ill. App. 3d at 548 (similar).

The only other evidence *potentially* relevant to whether defendant was aware of only a lesser risk posed by his conduct was the People's evidence that multiple drugs were found in defendant's urine hours after the collision. R.YY7, DDD60-61, 63, 66-68, 84. But because defendant argues — and the People agree — that this evidence should have been suppressed, it has no bearing on the issue of defendant's awareness of risk. Defendant may not seek reversal of his first degree murder conviction in reliance on chemical testing evidence that should have been excluded. *Cf. People v. Appelt*, 2013 IL App (4th) 120394, ¶ 91 (quoting *United States v. Goldman*, 563 F.2d 501, 503 (1st Cir. 1977) ("A defendant cannot have it both ways. If he talks, what he says or omits is to be judged on its merits or demerits, and not on some artificial standard that only the part that helps him can later be referred to.") (internal quotation marks omitted)). Thus, this Court should not consider the chemical testing evidence in analyzing whether defendant had a diminished appreciation of the risk posed by his dangerous driving.

In any event, the chemical testing evidence provides no support for a reckless homicide instruction. As discussed, hours after the collision, defendant's blood tested negative for drugs and his urine tested positive for THC and its major metabolite, MDMA; MDA; and benzoylecgonine, a cocaine metabolite. R.YY7, DDD60-61, 63, 66-68, 84. A forensic toxicology expert explained that THC causes a relaxed state of mind, light euphoria, and a delayed sense of time. R.DDD87. MDMA has stimulant properties, causes

euphoria, and decreases inhibitions. *Id.* MDA is similar to MDMA and has some stimulant properties. *Id.* Cocaine is a stimulant. R.DDD88. The urine test looked only for the presence of drugs; it did not provide an amount of the substances. R.DDD90. Thus, the testing did not reveal when defendant took the drugs or the quantity found in defendant's urine. *Id.* Defendant testified that he ingested marijuana a week earlier and ecstasy around two days before the collision. R.EEE152.

As for alcohol, defendant's blood tested negative, and his urine was not tested for it. R.DDD61-62, 66. Defendant told Officer Ventrella that he drank a fifth of Hennessey, R.DDD22, and defendant testified that he drank between a pint and a quart of Hennessey "earlier in the day" on December 21st, R.EEE134-35, 142, 148-49; *see also* Peo. Exh. 29. A forensic toxicology expert testified that it takes between four to eight hours for a person to fully metabolize a blood alcohol level of .08. R.DDD86.

Thus, the chemical testing evidence does not establish that defendant would have underappreciated the strong probability of death or serious injury posed by his extremely dangerous driving. While defendant claimed to have consumed alcohol on December 21, 2009, by his own testimony he did so earlier in the day, and he could have metabolized the alcohol by the time he hit Maria at 9 p.m. And the evidence revealed that the drugs had been metabolized from defendant's bloodstream to his urine. No evidence addressed whether the drugs would have affected defendant at this stage of

the metabolic process. No evidence addressed whether the drugs in question were of a type and present in a quantity that might affect his perception of the riskiness of his behavior.[6] And it is unsurprising that defendant did not present such evidence, given that he instead claimed that he was not in the car at the time of the collision. R.EEE136, 139, 146-47.

Therefore, the chemical testing evidence would not have supported a reckless homicide instruction. *Cf.*, *e.g.*, *People v. Workman*, 312 Ill. App. 3d 305, 306, 310, 312 (2d Dist. 2000) (reversing conviction for DUI (driving under influence of drug(s) to degree rendering driver incapable of driving safely) given insufficient evidence that defendant drove under influence of lorazepam, conflicting evidence about whether defendant ingested drug that day, and no evidence about drug's "physiological effects, the amount required to produce any significant effect, or how the drug would affect a person's ability to drive safely"); *People v. Vanzandt*, 287 Ill. App. 3d 836, 837, 845 (5th Dist. 1997) (reversing conviction for DUI (driving under influence of alcohol and drug combination to degree rendering driver incapable of driving safely) given insufficient evidence that defendant drove under influence of insulin, because although witnesses testified that he ingested insulin that

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[6] That the People did not present evidence about what effect the drugs (if any) had on defendant at the time of the collision is unsurprising. Many of the aggravated DUI charges — including count 33, for which a conviction was entered, C157, 465 — required only a showing of "any amount" of certain drugs in his system (including in his urine), and not that such drugs caused intoxication or unsafe driving. *See* C142-45, 157-68 (charges citing 625 ILCS 5/11-501(a)(6) (2009) (requiring "any amount" of certain drugs in driver's breath, blood, or urine)).

evening, no evidence was presented indicating that insulin alone or in combination with alcohol would render person incapable of driving safely).

In reversing the trial court here, the majority principally relied on *People v. Belk*, 203 Ill. 2d 187 (2003), A5-6, but *Belk* is inapposite. *Belk* addressed whether aggravated possession of a stolen motor vehicle can qualify as a predicate "forcible felony" for felony murder. 203 Ill. 2d at 189. Statutory authority and case law reflected that an otherwise non-violent offense could constitute a forcible felony when the perpetrator intended to use force to escape, for example because he committed the felony while armed. *Id.* at 192-94 (citing 720 ILCS 5/2-8 (1996); *People v. Golson*, 32 Ill. 2d 398, 407-08 (1965)). This Court held that such evidence was lacking in Belk's case because there was no indication that, when driving a stolen van in a dangerous fashion to elude police, he contemplated using force or violence against a person. *Id.* at 195. Notably, in doing so, this Court distinguished two cases, like the present one, in which defendants fleeing police in stolen vehicles were convicted of knowing first degree murder given resulting fatal accidents, because the knowledge of risk required for knowing first degree murder is less than that required to qualify a felony as a forcible felony. *Id.* at 196-97. Thus, *Belk* provides no guidance about the issue presented here. *See Alsup*, 373 Ill. App. 3d at 751-53 (distinguishing *Belk* given that it involved felony murder conviction instead of knowing murder).

Thus, the trial court did not act in an arbitrary, fanciful, or unreasonable manner in finding "no evidence" to support giving a reckless homicide instruction, and its decision to reject a reckless homicide instruction should be affirmed.

III. The Appellate Court Erred in Reducing Defendant's Failure-to-Report Conviction.

Defendant was convicted of failure to report[7] in that he failed to stop or remain at the scene of the accident resulting in death or injury and that he failed to report specified details of the accident at a nearby police station within 30 minutes of the accident; the offense is a Class 1 felony because the accident caused Maria's death, 625 ILCS 5/11-401(a), (b), (d) (2009) (A39-40). R.FFF92; C122, 150, 350, 465. Noting that police arrested defendant approximately ten minutes after the collision, the appellate majority held that the People "cannot" demonstrate that defendant failed to report the accident within 30 minutes given that "any evidence" of defendant's post-arrest silence is inadmissible. A6-7. As a result, the majority reduced the conviction to the Class 4 felony version of the offense that requires the driver

[7] This offense, failure to report an accident resulting in death or injury, shortened to "failure to report" in this brief, is also sometimes referred to as aggravated leaving the scene of an accident involving death or personal injury. *See*, *e.g.*, I.P.I. Criminal Nos. 23.07 & 23.08; C334-35, 350; R.FFF92. Although two record documents note that this conviction was a Class 2 felony, C122, 465, these appear to be typographical errors. During sentencing, the trial court specified that this was a Class 1 felony, R.LLL63; the charge for which conviction was entered (count 26) stated that the accident involved Maria's death, C150, 465, rendering it a Class 1 felony, 625 ILCS 5/11-401(d) (2009) (A40); and both the majority and defendant referred to the conviction as a Class 1 felony, A7, 12; Def. App. Ct. AT Br. at 25.

in an accident causing death or injury to stop at the scene and provide "reasonable assistance" as detailed in section 11-403. A7 (citing 625 ILCS 5/11-401(a), (c) (2009) (A39); 625 ILCS 5/11-403 (2009)).

A. Defendant Forfeited a Self-Incrimination Challenge to His Failure-to-Report Conviction by Raising It for the First Time in His Appellate Court Reply Brief.

Defendant's opening appellate court brief challenged his failure-to-report conviction solely on the basis that the People provided insufficient evidence that he failed to report the accident at a police station within 30 minutes. Def. App. Ct. AT Br. at 25-28; *see also* 625 ILCS 5/11-401(b) (2009) (A39). After noting that the People's responsive brief primarily relied on *People v. Moreno*, 2015 IL App (2d) 130581, defendant's reply brief — for the first time — encouraged the appellate court to decline to follow *Moreno,* citing concerns about defendant's right against self-incrimination. Def. App. Ct. Reply Br. at 7. Despite an objection from the dissent that defendant had challenged his failure-to-report conviction only on sufficiency grounds, A16, the majority reduced defendant's failure-to-report conviction on self-incrimination grounds, A6-7. This Court should reverse the majority's holding because defendant forfeited any self-incrimination challenge to this conviction.

It is firmly established that an appellant forfeits any issue raised for the first time in his reply brief. *People v. Thomas*, 116 Ill. 2d 290, 303-04 (1987); *People v. English*, 2011 IL App (3d) 100764, ¶ 22 (citing *Holliday v.*

Shepherd, 269 Ill. 429, 436 (1915)); *see also* Ill. Sup. Ct. R. 341(h)(7). And for good reason: an appellant who raises an issue only in a reply brief deprives the appellee of an opportunity to respond to the new argument. *English*, 2011 IL App (3d) 100764, ¶ 22.

Nor can defendant avoid his forfeiture by characterizing his self-incrimination argument as a response to the People's reliance on *Moreno*. Moreno challenged his failure-to-report conviction only on sufficiency grounds, *Moreno*, 2015 IL App (2d) 130581, ¶¶ 1, 6, 10, 12, and the appellate court evaluated only the sufficiency of the evidence, *id.* at ¶¶ 23-28. In rejecting Moreno's argument that there was insufficient evidence that he failed to report the accident before his police interview, the appellate court concluded that the trier of fact could have reasonably inferred that he did not previously report it because he continued to deny his involvement during the interview. *Id.* at ¶¶ 23-25. The People relied on this portion of *Moreno* to argue for a similar inference here, given that defendant denied involvement during his police statement 90 minutes after the collision. Peo. App. Ct. AE Br. at 31-32. *Moreno* never mentioned self-incrimination or the Fifth Amendment. 2015 IL App (2d) 130581, ¶¶ 11-28. Thus, defendant cannot reasonably claim that the People's citation of *Moreno* invited the new self-incrimination argument raised for the first time in his reply brief.

B. This Court Should Reinstate Defendant's Conviction for Class 1 Failure to Report.

1. This offense does not infringe on arrestees' right against self-incrimination.

Standard of Review: Generally, a reviewing court applies de novo review to the legal question of whether a defendant's constitutional rights were violated. *People v. Hale*, 2013 IL 113140, ¶ 15.

Forfeiture aside, this Court should reject the majority's conclusion that defendant's failure-to-report conviction violated his right against self-incrimination because police arrested him before the 30-minute reporting period had elapsed. The majority did not consider whether or when defendant received *Miranda* warnings, whether or when he invoked his right to silence, or the content of his later statements to police. A6-7. In effect, the majority found this offense unconstitutional as applied to *any* defendant arrested before the expiration of the reporting period. *Id.* This Court should reject that holding because compelled disclosure of the information required under section 11-401(b) before or after arrest does not offend the Fifth Amendment.

The Self-Incrimination Clause of the Fifth Amendment, provides that no "person . . . shall be compelled in any criminal case to be a witness against himself." *Pennsylvania v. Muniz*, 496 U.S. 582, 588 & n.5 (1990). The privilege protects a person from being compelled to provide the State with testimonial or communicative evidence, either when testifying in a criminal

courtroom or when subjected to informal compulsion by law enforcement officers during in-custody questioning. *Id.* at 589 (citing *Schmerber*, 384 U.S. at 761; *Miranda v. Arizona*, 384 U.S. 436, 461 (1966)).

In the context of the failure-to-report statute, drivers are compelled to provide information to police, not through interrogation, but through the criminal penalties that can be imposed upon failure to report. But such information is not testimonial because the primary purpose behind the statute's information-gathering is regulatory, not to assemble evidence for a future criminal prosecution. *See Ohio v. Clark*, 135 S. Ct. 2173, 2179-80 (2015) (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006) (statement elicited during police interrogation is testimonial if primary purpose in police seeking information is to establish events potentially relevant to later criminal prosecution)). And because only non-testimonial evidence is involved, no Fifth Amendment concern arises in enforcing the failure-to-report statute, even in a post-arrest custodial situation.

A driver involved in an accident involving death or bodily injury must report to a police station within 30 minutes of the accident[8] "the place of the accident, the date, the approximate time, the driver's name and address, the registration number of the vehicle driven, and the names of all other occupants of such vehicle." 625 ILCS 5/11-401(b) (2009) (A39). Decades ago,

[8] The start of the 30-minute period can be delayed if the driver is hospitalized and incapacitated during the initial 30 minutes after the accident, 625 ILCS 5/11-401(b) (2009) (A39), but defendant has never claimed such incapacity here.

this Court upheld a similar provision that required the driver of a vehicle that was in an accident involving vehicle damage to stop and provide her name, address, vehicle's registration number, and license to a person attending any vehicle that was hit. *People v. Lucus*, 41 Ill. 2d 370, 371-72 (1968) (citing Ill. Rev. Stat. 1965, ch. 95½, pars. 134-35). In rejecting the defendant's self-incrimination challenge, this Court noted that "an important" purpose of the statute, applicable to all drivers, was regulatory: ensuring that the owner of a damaged vehicle learns the identity of driver of the vehicle that caused the damage. *Id.* at 373. This Court also reasoned that the statute did not require the driver to discuss the circumstances of the accident beyond identifying herself and that many accidents do not also involve crimes. *Id.* at 374.

Three years later, the United States Supreme Court considered and rejected a similar self-incrimination challenge to a California statute that required drivers to stop and give their name and address at the scene of a vehicle accident. *California v. Byers*, 402 U.S. 424, 425-26 (1971). A four-justice plurality rejected the challenge on the grounds that disclosure of one's name and address is a "neutral act" that is neither testimonial nor communicative and that any later arrest or charge depends on "different factors and independent evidence." *Id.* at 431-34 (Burger, C.J., with three justices concurring). The plurality emphasized that the provision (1) served important regulatory and administrative purposes — rather than primarily

criminal law purposes — namely promoting the satisfaction of civil liabilities arising from accidents and (2) applied to all drivers, not just those suspected of committing crimes. *Id.* at 430-31.[9] The *Byers* plurality position has become binding law; a majority of the Court later cited it with approval for the principle that obedience to a regulatory requirement like reporting an accident does not "clothe such required conduct with the testimonial privilege" even if incriminating evidence is the byproduct of that obedience. *United States v. Hubbell*, 530 U.S. 27, 35 & n.16 (2000). *Lucus* and *Byers* thus confirm the primary purpose behind compelling all drivers involved in accidents — notably including accidents that did not involve criminal behavior — to provide certain basic factual information. That primary purpose is to help manage the civil liabilities that flow from such accidents, *not* to gather proof for a future criminal prosecution. As a result, even though the statute compels drivers to report this information to police, no Fifth Amendment concerns are raised because the information is not testimonial.

[9] Justice Harlan concurred on different grounds. While finding that the requisite information was testimonial and raised a real potential of self-incrimination especially from the driver's point of view, he nonetheless concluded that there was insufficient basis to extend the privilege against self-incrimination to appropriate regulatory schemes like the one at issue. *Byers*, 402 U.S. at 437-39, 448, 458 (Harlan, J., concurring in the judgment). He, too, noted that the driver's duty to report does not relieve the State from investigating and proving that the driver's behavior was criminal. *Id.* at 457-58.

It is therefore unsurprising that such reporting statutes are widespread, *see Byers*, 402 U.S. at 425 (noting "stop and report" statutes are in effect in all 50 states and in D.C.), and that they have consistently withstood self-incrimination challenges, *see*, *e.g.*, *Commonwealth v. Long*, 831 A.2d 737, 746 (Pa. Sup. Ct. 2003) (noting "numerous other jurisdictions" have rejected Fifth Amendment challenges to their respective statutes and collecting cases). Such cases include statutes tailored to accidents resulting in bodily injury or death and those that require a driver to report *to the police*. *See, e.g., Creary v. State*, 663 P.2d 226, 228-30 (Alaska App. Ct. 1983) (addressing accidents involving injury or death and requiring report to police); *State v. Greenberg*, 607 P.2d 530, 533-35 (Kan. App. Ct. 1980) (same); *Banks v. Commonwealth*, 230 S.E.2d 256, 259 (Va. 1976) (addressing accidents involving injury and requiring report to police); *People v. Samuel*, 277 N.E.2d 381, 383-84, 386 (N.Y. 1971) (addressing all accidents and requiring report to police).[10]

Rejection of the Fifth Amendment challenge here is also consistent with a categorical exception the Supreme Court has developed to the *Miranda* requirement. To protect the privilege against self-incrimination

[10] Although the Massachusetts Supreme Judicial Court affirmed vacatur of a similar failure-to-report conviction on Fifth Amendment grounds, it did so in large part due to a fact not present under the Illinois scheme: the defendant's failure-to-report charge addressed his failure to respond to a letter from police, issued six weeks after the accident, that set a one-week deadline for him to submit an accident report, a process that started *after* the same authorities had already began criminally prosecuting him for vehicular homicide. *Commonwealth v. Sasu*, 536 N.E.2d 603, 604, 606 (Mass. 1989).

during custodial questioning by law enforcement, *Miranda* requires police to inform suspects of certain rights, including the right to remain silent, during pretrial questioning by police. But in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), the Court recognized what is sometimes called the "routine booking questions" exception to *Miranda*. Muniz, a DUI arrestee, gave incriminating responses during booking at the police station before police had given him *Miranda* warnings, which included asking him to provide his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. *Muniz*, 496 U.S. at 584-86. The Court held that asking Muniz to state the date of his sixth birthday (prior to *Miranda* warnings) violated the Fifth Amendment because the confusion he displayed in struggling to answer was incriminating in that it reflected his intoxication. *Id.* at 592-93. But the Court held that the remaining questions fell within a "routine booking question" exception: exempt from *Miranda* were questions seeking biographical information needed to complete the booking process because they were reasonably related to police administrative concerns, i.e., record-keeping. *Id.* at 600-02.

Just as there is no Fifth Amendment violation in police seeking biographical information about an arrestee who has not yet been given *Miranda* warnings, *id.*, this Court should hold that no Fifth Amendment violation results from gathering basic factual information from drivers in

vehicle accidents, including those who have been arrested on criminal charges related to the accidents within the reporting period.

2. Defendant's conviction was supported by sufficient evidence.

Standard of Review: In evaluating a sufficiency-of-the-evidence challenge, the reviewing court determines whether, after viewing the evidence in the light most favorable to the prosecution, a rational jury could have found the elements of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). Under the *Jackson* standard, the reviewing court "must" make reasonable inferences from the record in favor of the prosecution, though an inference that favors defendant can be made if it is the only reasonable inference based on the record. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Circumstantial evidence meeting this standard can sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009).

As explained, although defendant had challenged the sufficiency of the People's proof that defendant failed to report the accident within 30 minutes, the appellate court reduced the Class 1 felony failure-to-report conviction on self-incrimination grounds. The sufficiency issue is addressed here because this Court could evaluate it now to avoid a remand to the appellate court. *See*, *e.g.*, *People v. Peterson*, 2017 IL 120331, ¶ 36 (instead of remanding, addressing issue that appellate court erroneously declined to reach because complete record was before Court and matter was fully briefed).

To convict a defendant of the Class 1 felony version of failure to report, the People must prove that defendant (1) knowingly (2) drove a vehicle that was involved in an accident (3) that resulted in death; (4) failed to immediately stop his vehicle at the accident scene and remain until he fulfilled his duties to give information and render aid; and (5) failed to report specified information related to the accident within 30 minutes at a nearby police station. 625 ILCS 5/11-401(a), (b), (d) (2009) (A39-40); *People v. Digirolamo*, 179 Ill. 2d 24, 37-40 (1997) (holding that failure to report requires defendant's knowledge both that vehicle he drove was in an accident and that a person was involved in the accident). Defendant contested the sufficiency of the evidence only as to the element of failing to report to police within 30 minutes. Def. App. Ct. AT Br. at 25-28.

Under the *Jackson* standard, this Court should uphold defendant's Class 1 felony failure-to-report conviction. Officer Dan Postelnick arrived at the police station around 11:20 p.m. on the night of the accident to assist with this case. R.EEE73-75. He testified that after speaking to other officers, he learned that defendant had reported nothing about the accident. R.EEE75, 77-78. This evidence, alone, is sufficient proof of the contested element. *See People v. Farris*, 82 Ill. App. 3d 147, 156 (4th Dist. 1980) (circumstantial evidence supported failure to report: officer testified that police files contained no report and defendant told police later that he immediately left scene of accident, providing sufficient basis to infer guilt).

Other evidence also raised a reasonable inference that defendant did not report the accident during the statutory 30-minute period. At 10:30 p.m., approximately 90 minutes after the accident, defendant denied involvement in the accident, as reflected in a videotaped exchange at the police station:

> Defendant: You could've let me go. That would have been nice. (laugh)
>
> Officer: Can't do that.
>
> Defendant: I didn't do anything. I'm still trying to figure out what I'm being charged with.

Peo. Exh. 27, 1:14. And defendant testified at trial that he was not even in the car, much less driving, at the time of the accident. R.EEE136-38, 147-48. Defendant's denials of involvement after the reporting period expired raise a reasonable inference that he did not report the accident within 30 minutes. *Moreno*, 2015 IL App (2d) 130581, ¶ 25 (given defendant's denial of involvement during later taped interview "the trier of fact could have reasonably inferred that he did not previously report [the accident]"); *see also People v. Gutierrez*, 105 Ill. App. 3d 1059, 1064 (2d Dist. 1982) (defendant denied involvement in accident in every communication with law enforcement during statutory reporting period, raising reasonable inference that he had not reported it); *People v. Johnson*, 79 Ill. App. 2d 226, 230-31 (2d Dist. 1967) (similar); A16 (Pucinski, J., dissenting) (similar). Thus, the majority erred in reducing defendant's Class 1 felony failure-to-report conviction because there was sufficient evidence to support it.

CONCLUSION

For these reasons, the People of the State of Illinois respectfully ask this Court to (1) reverse the part of the First District's judgment that (a) invalidated section 11-501.2(c)(2) of the Vehicle Code on its face, (b) reversed defendant's conviction for first degree murder, and (c) reduced his conviction for failure to report a motor vehicle accident from a Class 1 to a Class 4 felony, and (2) affirm the part of the judgment that reversed defendant's conviction for aggravated DUI.

February 13, 2019

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

LEAH M. BENDIK
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-5029
LBendik@atg.state.il.us

Counsel for Plaintiff-Appellant
People of the State of Illinois

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 44 pages.

/s/ Leah M. Bendik
LEAH M. BENDIK
Assistant Attorney General

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2017 IL App (1st) 142837

Appellate Court of Illinois,
First District,
SECOND DIVISION.

The PEOPLE of the State of Illinois, Plaintiff–Appellee,
v.
Ralph EUBANKS, Defendant–Appellant.

No. 1–14–2837
|
December 26, 2017

Synopsis

Background: Defendant was convicted in the Circuit Court, Cook County, No. 10-CR-1904, Timothy Joseph Joyce, J.P., of first degree murder in connection with the hit-and-run death of a pedestrian, failure to report a motor vehicle accident involving death or injury, and aggravated driving under the influence. Defendant appealed.

Holdings: The Appellate Court, Mason, J., held that:

remand of defendant's conviction for first degree murder was required for jury to consider lesser offense of reckless homicide;

state could not use defendant's post-arrest silence to prove that he did not report accident at police station within half an hour, as required to establish failure to report an accident;

statute imposing warrantless and nonconsensual blood and urine tests on drivers who caused death or personal injury to another while driving under the influence violated state and federal constitutions;

no exigent circumstances existed to justify warrantless search; and

good faith exception to exclusionary rule did not apply to allow admission of test results.

Reversed and remanded.

Pucinski, J., dissented, with opinion.

West Codenotes

Held Unconstitutional
625 Ill. Comp. Stat. Ann. 5/11-501.2(c)(2)

Appeal from the Circuit Court of Cook County, Illinois. No. 10 CR 1904, Honorable Timothy Joseph Joyce, Judge Presiding.

OPINION

JUSTICE MASON delivered the judgment of the court, with opinion.

*1 ¶ 1 Defendant Ralph Eubanks was arrested after a hit-and-run accident that killed Maria Worthon and injured her six-year-old son, Jeremiah Worthon. Witnesses estimated Eubanks to have been driving at 60 to 90 miles per hour. After his arrest, Eubanks was forcibly subjected to blood and urine tests, the latter of which tested positive for cannabis, ecstasy, and cocaine metabolite.

¶ 2 Following a jury trial, Eubanks was found guilty of first degree murder, failure to report a motor vehicle accident involving death or injury, and aggravated driving under the influence. On appeal, he argues (i) the trial court erred by not instructing the jury on reckless homicide as a lesser-included offense of first degree murder, (ii) his conviction for failure to report an accident must be reversed where the State failed to prove that he did not report the accident at a police station within half an hour, (iii) the statute authorizing warrantless, nonconsensual blood and urine tests is unconstitutional, both on its face and as applied in Eubanks's case, and (iv) improper comments by the prosecutor denied Eubanks a fair trial.

¶ 3 We agree with Eubanks on the first three points and, therefore, need not reach the fourth. Accordingly, we (i) reverse Eubanks's conviction for first degree murder and remand for a new trial on that charge, (ii) reduce his

conviction for Class 1 failure to report an accident to the Class 4 version of the offense in the same statute (625 ILCS 5/11–401(a), (c) (West 2008)), and (iii) reverse Eubanks's conviction for aggravated driving under the influence.

¶ 4 BACKGROUND

¶ 5 Suppression Hearing

¶ 6 Before trial, Eubanks moved to suppress the result of his blood and urine tests, arguing that the tests were an unconstitutional search because Eubanks did not consent to be tested, the police did not have a warrant, and there were no exigent circumstances excusing the failure to obtain one. Eubanks also filed a motion to declare unconstitutional section 11–501.2(c)(2) of the Illinois Vehicle Code (625 ILCS 5/11–501.2(c)(2) (West 2008)), the statute under which the testing was performed:

> "[I]f a law enforcement officer has probable cause to believe that a motor vehicle driven by or in actual physical control of a person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof has caused the death or personal injury to another, that person shall submit, upon the request of a law enforcement officer, to a chemical test or tests of his or her blood, breath or urine for the purpose of determining the alcohol content thereof or the presence of any other drug or combination of both."

¶ 7 At the hearing on Eubanks's motions, the parties did not present evidence but proceeded by way of stipulation to the following facts. On December 21, 2009, at 9:05 p.m., Eubanks was arrested in connection with a hit-and-run accident that killed Maria and injured Jeremiah. The police had probable cause to arrest Eubanks for driving under the influence. At the police station, Eubanks refused to take a breathalyzer test or to submit to blood and urine tests. At 2:53 a.m., an officer took Eubanks to the hospital, telling him that he was required by law to submit to blood and urine tests. Eubanks was physically restrained by hospital security and a blood sample was taken at 4 a.m. The nurse then asked for urine, but Eubanks refused to urinate. The nurse threatened to catheterize him. As she approached him with a catheter, he urinated, and a sample was collected at 5:20 a.m. The samples were sent to the crime lab for analysis. Eubanks's blood produced negative results for alcohol or any illegal substance, but his urine tested positive for cannabis, ecstasy, and cocaine metabolite.

*2 ¶ 8 The trial court denied Eubanks's motions to suppress his test results and to declare section 11–501.2(c)(2) unconstitutional.

¶ 9 Trial

¶ 10 Shortly before 9 p.m. on December 21, 2009, in the Rogers Park neighborhood of Chicago, Felix Worthon was walking home with his wife Maria and their son Jeremiah near the intersection of Greenview and Greenleaf Avenues. Maria and Jeremiah stopped to talk to Maurice Glover, a man from their church. Felix crossed the street ahead of them. As he was crossing, he heard a sound behind him; he turned around and was nearly hit by a car. The car struck Maria and Jeremiah and kept going without stopping. The force of the impact knocked Maria's body a block away. Maria died immediately, and Jeremiah suffered permanent injuries.

¶ 11 Madeline Moratto and Alex Montejo were walking down the sidewalk when they witnessed the collision. Moratto estimated the car's speed to be 80 miles per hour, and Montejo estimated it at 60 miles per hour. Both testified that the car's headlights were off, and it did not stop or slow down after the collision. Glover, who also witnessed the collision, estimated the car's speed at 80 to 90 miles per hour.

¶ 12 Calvin Tanner was a passenger in the car with Eubanks when the collision occurred. Tanner and his cousin, Dennis Jeter, were friends with Eubanks. Jeter owned a green Pontiac, which he loaned to Eubanks a few days before the accident occurred. On December 21, 2009, Tanner and Jeter were at their grandmother's house with Eubanks. The three had earlier purchased vodka together.

Tanner and Jeter both drank, but neither could remember whether Eubanks had anything to drink.

¶ 13 That night, Eubanks took Jeter's car to drive Tanner to pick up a futon. Officers Brian Murphy and Chris Wertepeny, on patrol in an unmarked squad car, observed Eubanks shortly before 9 p.m. driving at high speed with no headlights. The officers curbed his vehicle, but when they exited their squad car and approached, Eubanks drove away southbound at a high rate of speed. He sped through the next intersection—a "busy intersection," according to Murphy—without stopping at the stop sign. The officers lost sight of his car within seconds.

¶ 14 At the intersection of Greenview and Greenleaf, after speeding by a church with a U–Haul truck parked in front, Eubanks struck Maria and Jeremiah. The impact knocked out the car's entire front windshield; Tanner had glass in his mouth and was bleeding. Fearing that they had struck a person, Tanner said to Eubanks, "I hope you didn't do what I thought you did." Eubanks told him, "It's too late," and continued driving without slowing or stopping.

¶ 15 After driving the car down an alleyway, Eubanks finally stopped and both men got out. Tanner called Jeter and told him, "Your car's been wrecked." Tanner also told Eubanks that he should return to the site of the collision, but Eubanks refused. Eubanks got back in the car without Tanner and drove away.

¶ 16 Jeter arrived and Tanner brought him to the scene of the accident, where they saw a body on the ground covered by a blanket. Both men spoke to police. Tanner told them that he was a passenger in the vehicle involved in the collision and that Eubanks was the driver. He denied telling police that the vehicle was going 60 to 70 miles per hour and that nothing was obstructing their view. Jeter told the police that he had loaned his vehicle to Eubanks.

*3 ¶ 17 Meanwhile, officers Jennifer Escher, Scott Pierson, and Patrick McHugh were on patrol when they received a radio call about a hit-and-run accident involving a green Pontiac with license plate H37583. Escher saw the Pontiac in an alleyway and approached it at 50 miles per hour, but the Pontiac sped away, and she lost sight of it. Escher, Pierson, and McHugh all saw the Pontiac on Newgard Avenue. Pierson drove his squad car in front of the Pontiac. The Pontiac went into reverse, lost control, and, in Pierson's words, "started ping-ponging off parked cars." Eubanks jumped out of the Pontiac and attempted to flee on foot, but he was apprehended by Officer John Ventrella and taken into custody at 9:05 p.m.

¶ 18 At 10:30 p.m., Ventrella interviewed Eubanks at the police station. Eubanks appeared carefree and "relatively unaffected by the whole incident." Ventrella testified that he could smell alcohol on Eubanks but did not offer any opinion as to whether he was intoxicated. At the time the case was being directed by officers from the major accident unit, other officers were conducting various aspects of the investigation, such as interviewing witnesses to the hit-and-run accident.

¶ 19 At 12 a.m., Ventrella informed Eubanks that he was under arrest for driving under the influence, and he read him his motorist rights. Ventrella asked Eubanks to take a breathalyzer test, but Eubanks refused; Eubanks also refused to submit blood and urine for testing. At that point, Ventrella "basically stood by and waited for instruction" from the major accident unit.

¶ 20 Later, Ventrella was instructed to bring Eubanks to the hospital to obtain blood and urine samples from him, which he did at 2:57 a.m. When a nurse approached Eubanks to draw blood, Eubanks became combative and pulled his arm away. Security officers entered and restrained him, allowing the nurse to draw his blood at around 4 a.m. Eubanks also refused to give a urine sample, claiming that he could not urinate. A catheter was ordered for him; as the nurse approached to insert the catheter, Eubanks urinated on his own at 5:20 a.m.

¶ 21 Eubanks was taken back to the police station, and Ventrella again spoke with him at 5:54 a.m. A video of this conversation was played for the jury in which Eubanks asked to go to the bathroom, explaining that he earlier drank a quart of Hennessy.

¶ 22 Forensic scientists with the Illinois State Police laboratory testified that Eubanks's blood sample tested negative for any alcohol or drugs, but his urine sample tested positive for cannabis and its metabolite, ecstasy and its metabolite, and cocaine metabolite. Colleen Lord, who in 2009 was a forensic scientist working for the Illinois State Police laboratory, explained that the body converts drugs to metabolites over time as part of the metabolic process.

¶ 23 Eubanks, testifying on his own behalf, stated that Jeter was the driver that night and that Eubanks was not present for the crash. According to Eubanks, on December 21, 2009, Jeter called Eubanks and asked him to return his car so that Jeter could take Tanner to go pick up a futon. Eubanks met Jeter and Tanner at their grandmother's house, where they had drinks together. All three of them went to Tanner's apartment. Then Jeter and Tanner left to get the futon, while Eubanks stayed behind to save Jeter's parking space for him.

¶ 24 After they left, while Eubanks was still standing outside in the parking space, he received a call from Tanner, who said that they had been in an accident. Eubanks started walking toward the accident scene. As he neared the area, police also arrived on the scene. Eubanks ran away from them because he was carrying marijuana. The police chased him, tackled him, and brought him to the police station.

*4 ¶ 25 On cross-examination, Eubanks reiterated that he was nowhere near the car crash when it occurred; at 9 p.m., he was standing in a parking spot waiting for Jeter and Tanner to return. Regarding his drug and alcohol usage, he admitted that on the day of the accident he drank a quart of Hennessey. He smoked marijuana a week before the accident (but not on that day) and also took an ecstasy pill two days prior. He denied taking any cocaine, though he speculated that the ecstasy pill might have been mixed with cocaine.

¶ 26 At the jury instructions conference, Eubanks requested that the jury be instructed on reckless homicide as a lesser included offense of first degree murder. The court denied his request, stating that if the State's evidence was believed, Eubanks's actions "could only create a strong probability of death or great bodily harm to some individual."

¶ 27 The jury found Eubanks guilty of first degree murder, failure to report a motor vehicle accident involving death or injury, and aggravated driving under the influence. Eubanks was sentenced to 40 years' imprisonment.

¶ 28 ANALYSIS

¶ 29 We address three contentions Eubanks raises on appeal: (i) his conviction for first degree murder should be reversed because the trial court failed to instruct the jury on reckless homicide as a lesser-included offense; (ii) his conviction for failure to report an accident must be reversed where the State failed to prove that he did not report the accident at a police station within half an hour; and (iii) his conviction for aggravated driving under the influence must be reversed because the warrantless, nonconsensual testing of Eubanks's blood and urine was an unconstitutional search inside his body.

¶ 30 Reckless Homicide Instruction

¶ 31 Eubanks first argues that he was entitled to a jury instruction on reckless homicide since there was some evidence that he acted recklessly in causing Maria's death. The State argues that the instruction was properly denied since there was no evidence of recklessness presented at trial. We agree with Eubanks.

¶ 32 Initially, Eubanks does not argue that the evidence is insufficient to convict him of first degree murder, nor could he reasonably do so. See *People v. Alsup*, 373 Ill. App. 3d 745, 754, 311 Ill.Dec. 483, 869 N.E.2d 157 (2007) (evidence was sufficient to support conviction for first degree murder where defendant stole a van and led police on a high-speed chase, disregarding traffic control devices and trying to ram a police car); *People v. Thomas*, 266 Ill. App. 3d 914, 926–27, 204 Ill.Dec. 437, 641 N.E.2d 867 (1994) (evidence was sufficient to support conviction for first degree murder where defendant led police on high-speed chase down congested street, ran red light at intersection without slowing down, and collided with car traveling in cross-traffic); *People v. Stevens*, 324 Ill. App. 3d 1084, 1093, 259 Ill.Dec. 146, 757 N.E.2d 1281 (2001) (evidence supported defendant's guilty plea to first degree murder where "defendant drove a stolen car at speeds in excess of 100 miles an hour, drove it on the shoulder of an expressway, weaved through traffic, refused to stop for marked police units, and drove it into the rear of the victim's vehicle"). Rather, Eubanks argues that there was sufficient evidence of his recklessness that the jury should have been instructed on both reckless homicide and first degree murder. Indeed, in both *Alsup* and *Thomas*, the trial court determined that there was sufficient evidence of recklessness to issue an instruction on reckless homicide to the jury. *Alsup*, 373 Ill. App. 3d at 754, 311 Ill.Dec. 483, 869 N.E.2d 157; *Thomas*, 266 Ill. App. 3d at 925, 204 Ill.Dec. 437, 641 N.E.2d 867.

*5 ¶ 33 A defendant is entitled to an instruction on a lesser-included offense if there is some evidence in the record that, if believed by the jury, would reduce the crime charged to a lesser offense. *People v. McDonald*, 2016 IL 118882, ¶ 25, 412 Ill.Dec. 858, 77 N.E.3d 26. That is, the evidence must permit a rational jury to acquit the defendant of the greater offense but still find him guilty of the lesser offense. *People v. Patel*, 366 Ill. App. 3d 255, 275, 303 Ill.Dec. 560, 851 N.E.2d 747 (2006); see also *People v. Martin*, 236 Ill. App. 3d 112, 177 Ill.Dec. 533, 603 N.E.2d 603 (1992) (trial court errs in giving a lesser-offense instruction where the evidence would support either a conviction on the greater offense or a verdict of not guilty, but not a conviction on the lesser offense). When the trial court determines that there is insufficient evidence to justify giving a jury instruction, we review that determination for abuse of discretion. *McDonald*, 2016 IL 118882, ¶ 42, 412 Ill.Dec. 858, 77 N.E.3d 26.

¶ 34 The primary distinction between first degree murder and reckless homicide is the mental state of the defendant. *People v. Pollard*, 2015 IL App (3d) 130467, ¶ 27, 393 Ill.Dec. 231, 33 N.E.3d 975. Under section 9–1(a)(2) of the Criminal Code of 1961, a defendant commits first degree murder when he kills an individual without lawful justification and "knows that such acts create a strong probability of death or great bodily harm to that individual or another." 720 ILCS 5/9–1(a)(2) (West 2008). It is not necessary that defendant intended to kill or that he was certain that someone would die as a result of his actions. *Alsup*, 373 Ill. App. 3d at 753, 311 Ill.Dec. 483, 869 N.E.2d 157. As this court has explained:

> " 'A person who knows, *i.e.*, is consciously aware, that his acts create a strong probability of death to another may not have such death as his conscious objective or purpose. [Citation.] He may simply not care whether the victim lives or dies. Under these circumstances, the person would be guilty of murder although the death was caused "unintentionally." ' " *Id.* at 753–54, 311 Ill.Dec. 483, 869 N.E.2d 157 (quoting *People v. Deacon*, 130 Ill. App. 3d 280, 287–88, 85 Ill.Dec. 549, 473 N.E.2d 1354 (1985)).

On the other hand, a defendant commits reckless homicide when he unintentionally kills an individual through use of a motor vehicle and his actions "are likely to cause death or great bodily harm to some individual, and he performs them recklessly." 720 ILCS 5/9–3 (West 2008). A person acts recklessly when "he consciously disregards a substantial and unjustifiable risk * * * and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4–6 (West 2008). The question of whether a defendant acted knowingly or recklessly is typically a question to be resolved by the finder of fact (*People v. Jones*, 404 Ill. App. 3d 734, 744, 344 Ill.Dec. 403, 936 N.E.2d 1160 (2010); see *People v. DiVincenzo*, 183 Ill. 2d 239, 253, 233 Ill.Dec. 273, 700 N.E.2d 981 (1998) ("inferences as to defendant's mental state are a matter particularly within the province of the jury")), as is the question of whether the defendant's acts create a "strong probability" of death or great bodily harm or whether they are merely "likely" to cause such a result (*Alsup*, 373 Ill. App. 3d at 750, 311 Ill.Dec. 483, 869 N.E.2d 157).

¶ 35 We find that there was sufficient evidence of Eubanks's recklessness to instruct the jury on reckless homicide. In this regard, we are guided by our supreme court's decision in *People v. Belk*, 203 Ill. 2d 187, 271 Ill.Dec. 271, 784 N.E.2d 825 (2003). Belk stole a van and, while being pursued by police at a high rate of speed, crashed into another vehicle, killing both occupants. At the time of the crash, Belk was under the influence of alcohol and driving at over 100 miles per hour in an area with "numerous restaurants and other establishments that were still open for business." *Id.* at 190, 271 Ill.Dec. 271, 784 N.E.2d 825. There were other cars on the street that pulled to the side as Belk raced past, as well as many nearby pedestrians. *Id.*; *People v. Belk*, 326 Ill. App. 3d 290, 292, 260 Ill.Dec. 39, 760 N.E.2d 118 (2001).

*6 ¶ 36 Although Belk was convicted of felony murder, our supreme court held that Belk's act of stealing the van was not a "forcible felony." *Belk*, 203 Ill. 2d at 195, 271 Ill.Dec. 271, 784 N.E.2d 825. The court also stated that the evidence "would support an inference that Belk acted recklessly and contemplated that in attempting to elude police he was likely to cause death or great bodily harm, an inference that clearly supports a conviction for reckless homicide pursuant to section 9–3 of the Code." *Id.* (citing 720 ILCS 5/9–3 (West 1996)). Thus, the court reduced Belk's felony murder conviction to reckless homicide. *Id.* at 191, 198, 271 Ill.Dec. 271, 784 N.E.2d 825.

¶ 37 Eubanks's actions are sufficiently comparable to Belk's actions that a rational jury could find that Eubanks acted recklessly. Both defendants fled from police at a high

rate of speed (60 to 90 miles per hour for Eubanks, 100 miles per hour for Belk). At no point did either defendant apply the brakes or attempt to slow down before the fatal collision (see *Belk*, 326 Ill. App. 3d at 292, 260 Ill.Dec. 39, 760 N.E.2d 118). In fact, Belk's flight from police was arguably more dangerous than Eubanks's since Belk was in an area with numerous establishments open for business and other vehicular and pedestrian traffic was present, while Eubanks was in a "quiet neighborhood."

¶ 38 Another instructive case is *People v. Gittings*, 136 Ill. App. 3d 655, 91 Ill.Dec. 207, 483 N.E.2d 553 (1985). While intoxicated, Gittings led a police officer on a high-speed chase in an area with several small hills and curves. He was going in excess of 85 to 90 miles per hour, where the posted speed limit was 35 miles per hour and there was a cautionary 20 miles per hour speed limit on curves. It was night and Gittings did not have his headlights on. His car plunged down a ravine, killing his passenger. Under these facts, the court upheld his conviction for reckless homicide. *Id.* at 661, 91 Ill.Dec. 207, 483 N.E.2d 553. As with *Belk*, *Gittings* bears many of the same indicia of recklessness as the present case: a high-speed chase at night without headlights, under circumstances where high speed posed particular risks to those in the vicinity of the defendant. See also *People v. Beck*, 295 Ill. App. 3d 1050, 230 Ill.Dec. 419, 693 N.E.2d 897 (1998) (evidence was sufficient to support conviction for reckless homicide where defendant, while intoxicated, was driving at night in the wrong lane of traffic with his headlights off and collided with an oncoming vehicle). Thus, particularly in light of the principle that inferring a defendant's mental state is typically within the province of the jury (*DiVincenzo*, 183 Ill. 2d at 253, 233 Ill.Dec. 273, 700 N.E.2d 981), we find that the trial court erred in denying Eubanks's request for an instruction on reckless homicide.

¶ 39 The State nevertheless argues that the evidence of first degree murder was so strong that any failure to instruct on the lesser offense would have been harmless, citing *People v. Washington*, 375 Ill. App. 3d 243, 249, 313 Ill.Dec. 916, 873 N.E.2d 540 (2007). The jury in *Washington* was instructed on armed robbery and on robbery, but the trial court denied defendant's request for an instruction on theft. *Id.* at 247, 313 Ill.Dec. 916, 873 N.E.2d 540. The jury found defendant guilty of armed robbery. *Washington* held that, although the denial of a theft instruction was in error, such error was harmless in light of the jury's verdict. The court explained that "theft is a simple deprivation of property; robbery is a deprivation of property, plus force or the threat of force; and armed robbery is the deprivation of property, plus force or the threat of force, plus the use of a dangerous weapon." *Id.* at 249, 313 Ill.Dec. 916, 873 N.E.2d 540 (citing 720 ILCS 5/16–1(a)(1), 18–1(a), 18–2(a) (West 2002)). Since the jury convicted defendant of armed robbery rather than simple robbery, it must have believed that he used force or the threat of force as well as a dangerous weapon. Thus, the jury would not have found defendant guilty of theft even if given that option. *Id.* at 250, 313 Ill.Dec. 916, 375 Ill.App.3d 243. *Washington* is distinguishable because nothing in the record indicates whether the jury in this case would have found Eubanks to be guilty of reckless homicide had that instruction been given.

*7 ¶ 40 The dissent asserts that a defendant is not entitled to a lesser-included instruction if his theory of the case is that someone else committed the crime at issue. But, as noted, a defendant need only show "*some evidence* in the record" that would reduce the crime to the lesser offense (emphasis in original) (*McDonald*, 2016 IL 118882, ¶ 25, 412 Ill.Dec. 858, 77 N.E.3d 26), regardless of whether that evidence was proffered by himself or by the State. For instance, in *People v. White*, 311 Ill. 356, 143 N.E. 108 (1924), there was an altercation at a party in which the village mayor was fatally shot. White was charged with the mayor's murder. In his defense, White testified that he did not have any gun that night and did not shoot the mayor. Nevertheless, *White* held that a lesser-included instruction on manslaughter was proper. *Id.* at 363–64, 143 N.E. 108; see *People v. Garcia*, 188 Ill. 2d 265, 270–71, 242 Ill.Dec. 295, 721 N.E.2d 574 (1999) (citing *White* with approval); see also *People v. Rogers*, 286 Ill. App. 3d 825, 829–31, 222 Ill.Dec. 200, 677 N.E.2d 13 (1997) (in defendant's prosecution for first degree murder, where defendant at trial denied any involvement in the shooting and presented an alibi defense, it was not improper for trial court to find him guilty of the lesser, mitigated offense of second degree murder).

¶ 41 Accordingly, we reverse Eubanks's conviction for first degree murder and remand for a new trial on that charge.

¶ 42 Failure to Report an Accident

¶ 43 Eubanks next contends that his conviction for failure to report the accident within half an hour must be reversed because he was arrested around 10 minutes after the accident and any evidence of his postarrest silence cannot be used against him. We agree.

¶ 44 When reviewing a defendant's challenge to the sufficiency of the evidence, we must decide whether, after viewing the evidence in the light most favorable to the prosecution, a rational jury could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *People v. Wheeler*, 226 Ill. 2d 92, 114, 313 Ill.Dec. 1, 871 N.E.2d 728 (2007). It is not our place to retry the defendant; rather, the jury has the responsibility to determine witness credibility, the weight to be accorded to conflicting testimony, and the inferences to be drawn from the evidence. *People v. Steidl*, 142 Ill. 2d 204, 226, 154 Ill.Dec. 616, 568 N.E.2d 837 (1991).

¶ 45 Eubanks was convicted under section 11–401 of the Illinois Vehicle Code (625 ILCS 5/11–401 (West 2008)), which provides that it is a Class 1 felony for a driver to both (1) flee the scene of a motor vehicle accident resulting in death and (2) fail to report the accident at a police station or sheriff's office within half an hour of the accident. See *People v. Patrick*, 406 Ill. App. 3d 548, 558, 353 Ill.Dec. 581, 956 N.E.2d 443 (2010) ("evidence that defendant failed to report the accident within one-half hour of the accident * * * [is] a required element to support a section 11–401(b) conviction").

¶ 46 The trial evidence shows that at 8:58 p.m., Glover informed a 911 operator that two pedestrians had been struck by a car. At 9:05 p.m., Eubanks was taken into custody, as established by the arrest report as well as police radio traffic introduced into evidence by the State. The State argues that there is sufficient evidence to infer that Eubanks did not report the accident within half an hour, either before or after his arrest. But under Illinois law, a defendant's postarrest silence is " 'not admissible for *any* purpose in the State's case in chief.' " (Emphasis added.) *People v. Simmons*, 293 Ill. App. 3d 806, 811, 228 Ill.Dec. 546, 689 N.E.2d 418 (1998) (quoting *People v. Strong*, 215 Ill. App. 3d 484, 488, 158 Ill.Dec. 878, 574 N.E.2d 1271 (1991)); see also *People v. Nesbit*, 398 Ill. App. 3d 200, 212, 338 Ill.Dec. 311, 924 N.E.2d 517 (2010) ("Illinois courts have consistently ruled that the State is prohibited from questioning or commenting on a defendant's postarrest silence," with limited exceptions for impeachment that are not relevant here).

¶ 47 *People v. Brady*, 369 Ill. App. 3d 836, 308 Ill.Dec. 356, 861 N.E.2d 687 (2007), is readily distinguishable. Brady, while drag racing with another motorist, caused the other motorist to crash. Brady then fled the scene of the accident and was not arrested until three days later—long after the time period provided for in section 11–401(b) (625 ILCS 5/11–401(b) (West 2002)). *Brady*, 369 Ill. App. 3d at 840, 308 Ill.Dec. 356, 861 N.E.2d 687. Thus, Brady's conviction for leaving the scene of an accident was not contingent on evidence of his postarrest silence.

***8** ¶ 48 *People v. Young*, 2012 IL App (1st) 092124-U, ¶¶ 38–39, 2012 WL 6935259, the other case cited by our dissenting colleague, is an unpublished order pursuant to Illinois Supreme Court Rule 23(b) (eff. July 1, 2011) and, therefore, is "not precedential." Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011). Rule 23 further prohibits the citation of unpublished orders except in limited circumstances. *Id.* *Young* found the evidence was sufficient to convict defendant of leaving the scene of an accident where defendant attempted to flee on foot but was arrested within minutes and did not report the accident either before or after his arrest. We disagree with *Young*'s reasoning for the reasons stated above and note that *Young* did not address the admissibility of defendant's postarrest silence.

¶ 49 Since any evidence of Eubanks's postarrest silence is not admissible (*Nesbit*, 398 Ill. App. 3d at 212, 338 Ill.Dec. 311, 924 N.E.2d 517; *Simmons*, 293 Ill. App. 3d at 811, 228 Ill.Dec. 546, 689 N.E.2d 418; *Strong*, 215 Ill. App. 3d at 488, 158 Ill.Dec. 878, 574 N.E.2d 1271), the State cannot establish that Eubanks failed to report the accident within half an hour. Accordingly, we reduce Eubanks's Class 1 felony conviction to the Class 4 version of the offense in the same statute, which requires that a driver in an accident causing injury or death stop at the scene and provide "reasonable assistance" as set forth in section 11–403. 625 ILCS 5/11–401(a), (c), 11–403 (West 2008).

¶ 50 Constitutionality of Blood and Urine Tests

¶ 51 Following his arrest, Eubanks was subjected to warrantless, nonconsensual blood and urine tests pursuant to section 11–501.2(c)(2) of the Illinois Vehicle

Code (625 ILCS 5/11–501.2(c)(2) (West 2008)), which mandates such tests whenever "a law enforcement officer has probable cause to believe that a motor vehicle driven by * * * a person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof has caused the death or personal injury to another." Eubanks argues that this section is unconstitutional, both on its face and as applied in his case. He therefore contends that he is entitled to a reversal of his conviction for aggravated driving under the influence and a new trial on the first degree murder charge. As we have already determined that Eubanks is entitled to a new trial on the first degree murder charge, we confine our analysis to the effect of the nonconsensual blood and urine tests on his conviction for aggravated driving under the influence.

¶ 52 The constitutionality of a statute is a question of law that we review *de novo*. *People v. Sharpe*, 216 Ill. 2d 481, 486–87, 298 Ill.Dec. 169, 839 N.E.2d 492 (2005). The party challenging the statute bears the burden of proving that it is unconstitutional. *People v. Aguilar*, 2013 IL 112116, ¶ 15, 377 Ill.Dec. 405, 2 N.E.3d 321. Moreover, a facial challenge to the constitutionality of a statute "must fail if any situation exists where the statute could be validly applied." *People v. Davis*, 2014 IL 115595, ¶ 25, 379 Ill.Dec. 381, 6 N.E.3d 709. While we would normally defer to the trial court's findings of fact and credibility determinations (*People v. Almond*, 2015 IL 113817, ¶¶ 55, 63, 392 Ill.Dec. 227, 32 N.E.3d 535) because the parties stipulated to the facts presented at the suppression hearing, we apply a *de novo* standard of review. *People v. Coats*, 269 Ill. App. 3d 1008, 1012, 207 Ill.Dec. 595, 647 N.E.2d 1088 (1995) ("Inasmuch as the facts in this case [presented at suppression hearing] are stipulated, we will apply the *de novo* standard of review."). We may consider evidence presented at trial as well as at the suppression hearing. *Almond*, 2015 IL 113817, ¶ 55, 392 Ill.Dec. 227, 32 N.E.3d 535.

¶ 53 The fourth amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const., amend. IV; see *Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (warrant requirement generally applies to searches within the human body, such as blood tests). Similarly, under article I, section 6, of the Illinois Constitution, "[t]he people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches [and] seizures." Ill. Const. 1970, art. I, § 6. Under both of these constitutional provisions (see *People v. Caballes*, 221 Ill. 2d 282, 313–14, 303 Ill.Dec. 128, 851 N.E.2d 26 (2006) (article I, section 6, is interpreted in limited lockstep with the fourth amendment)), a warrantless search " 'is *per se* unreasonable unless it is a search conducted pursuant to consent, a search incident to arrest, or a search predicated upon probable cause where there are exigent circumstances which make it impractical to obtain a warrant.' " *People v. Ferral*, 397 Ill. App. 3d 697, 706, 336 Ill.Dec. 800, 921 N.E.2d 414 (2009) (quoting *People v. Alexander*, 272 Ill. App. 3d 698, 704, 209 Ill.Dec. 65, 650 N.E.2d 1038 (1995)). The State bears the burden of showing the existence of exigent circumstances. *People v. Davis*, 398 Ill. App. 3d 940, 948, 338 Ill.Dec. 207, 924 N.E.2d 67 (2010); see also *People v. Foskey*, 136 Ill. 2d 66, 75, 143 Ill.Dec. 257, 554 N.E.2d 192 (1990) ("The circumstances must militate against delay and justify the officers' decision to proceed without a warrant.").

***9** ¶ 54 Eubanks does not dispute that the police had probable cause to believe that he was driving under the influence. Rather, he argues that there were no exigent circumstances that made it impractical to obtain a warrant. More specifically, he argues that (i) causing death or personal injury to another individual does not constitute a *per se* exigency and (ii) the State did not sustain its burden of showing exigent circumstances in his particular case.

¶ 55 The United States Supreme Court has considered whether exigent circumstances existed to justify a warrantless blood draw in both *Schmerber*, 384 U.S. 757, 86 S.Ct. 1826, and *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). In *Schmerber*, the Court's answer was yes; in *McNeely*, the Court's answer was no. Because the parties rely heavily upon these cases, we discuss them in detail.

¶ 56 Schmerber was arrested at a hospital on suspicion of driving under the influence while receiving treatment for an accident in which both he and his passenger had suffered injuries. *Schmerber*, 384 U.S. at 758 & n.2, 86 S.Ct. 1826. Over Schmerber's objection, an officer ordered a blood sample taken from him without a warrant. The

Supreme Court held that, under the circumstances, the warrantless blood draw was constitutional:

> "The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence [citation]. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." (Internal quotation marks omitted.) *Id.* at 770–71, 86 S.Ct. 1826.

¶ 57 After *Schmerber*, some courts, including our supreme court, held that the dissipation of blood alcohol or other substances from the bloodstream in DUI cases constitutes a *per se* exigency that justifies an exception to the warrant requirement. *People v. Jones*, 214 Ill. 2d 187, 196, 291 Ill.Dec. 663, 824 N.E.2d 239 (2005) (stating that "*Schmerber* made it 'clear that a compulsory blood test does not violate any constitutional rights of an individual' " (quoting *People v. Todd*, 59 Ill. 2d 534, 544, 322 N.E.2d 447 (1975))). But this interpretation of *Schmerber* was explicitly rejected by the Supreme Court in 2013 in *McNeely*, 569 U.S. 141, 133 S.Ct. 1552. See *People v. Harrison*, 2016 IL App (5th) 150048, ¶¶ 21, 405 Ill.Dec. 362, 58 N.E.3d 623, 23 (recognizing that *Jones* was abrogated by *McNeely*).

¶ 58 McNeely was arrested for driving erratically. The arresting officer, without attempting to obtain a warrant, drove McNeely to the hospital and obtained a blood sample from him. In analyzing whether this was a constitutionally permissible search, the Court stated that, "consistent with general Fourth Amendment principles, * * * exigency in [the context of a DUI investigation] must be determined case by case based on the totality of the circumstances." *McNeely*, 569 U.S. at 145, 133 S.Ct. 1552. The Court also clarified that "[i]n finding the warrantless blood test reasonable in *Schmerber*, we considered all of the facts and circumstances of the particular case and carefully based our holding on those specific facts." *Id.* at 151, 133 S.Ct. 1552.

*10 ¶ 59 The State urged the Court to eschew the totality-of-the-circumstances approach in DUI cases and instead adopt a rule that exigent circumstances exist in all DUI cases because blood alcohol content evidence is "inherently evanescent." *Id.* The Court rejected any such categorical approach, stating:

> "It is true that as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated. * * *
>
> But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. [Citation.] We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber*, not to accept the considerable overgeneralization that a *per se* rule would reflect. [Citation.]
>
> * * * Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would be no plausible justification for an exception to the warrant requirement." (Internal quotation marks omitted.) *Id.* at 152–54, 133 S.Ct. 1552.

The Court also noted that, in the years since *Schmerber*, technological advances have been developed that enable officers to obtain warrants more expeditiously. *Id.* at 154, 133 S.Ct. 1552. Thus, the Court held that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Id.* at 156, 133 S.Ct. 1552. Since the arresting officer, in his testimony before the trial court, did not attempt to obtain a warrant and did

not identify any factors that would have caused delay in securing a warrant, the Court affirmed the trial court's finding that no exigency existed. *Id.* at 163–65, 133 S.Ct. 1552.

¶ 60 The State argues that *McNeely* is distinguishable because the Illinois blood-draw statute only mandates chemical testing when the driver has killed or injured another person, a factor not present in *McNeely*. In essence, the State proposes replacing the *per se* rule rejected in *McNeely* with another *per se* rule: exigent circumstances necessarily exist whenever there is probable cause to believe an individual has been driving under the influence of alcohol or other intoxicants *and*, in doing so, has injured or killed another individual. Eubanks, on the other hand, argues that *McNeely* rejected any such categorical approach.

¶ 61 *McNeely* is clear that courts should undertake a "careful case-by-case assessment of exigency" instead of "accept[ing] the considerable overgeneralization that a *per se* rule would reflect." (Internal quotation marks omitted.) *Id.* at 152–53, 133 S.Ct. 1552; see also *Birchfield v. North Dakota*, 579 U.S. ——, ——, 136 S.Ct. 2160, 2174, 195 L.Ed.2d 560 (2016) (reaffirming *McNeely*'s holding that "the exigent-circumstances exception must be applied on a case-by-case basis"). Other jurisdictions have interpreted *McNeely* as disapproving of all categorical or *per se* applications of the exigent-circumstances exception to the warrant requirement for compelled chemical testing. For instance, in *Aviles v. State*, 443 S.W.3d 291 (Tex. Ct. App. 2014), the Texas Court of Appeals struck down a statute that mandated a warrantless blood draw for any drunk-driving suspect who had been convicted of drunk driving on two or more prior occasions. The court explained that the statute "flies in the face of *McNeely*'s repeated mandate that courts must consider the *totality* of the circumstances of each case." (Emphasis in original.) *Id.* at 294. See also *Weems v. State*, 434 S.W.3d 655, 665 (Tex. Ct. App. 2014) (*McNeely* "clearly proscribed what it labeled categorical or *per se* rules for warrantless blood testing, emphasizing over and over again that the reasonableness of a search must be judged based on the totality of the circumstances presented in each case" (emphasis omitted) (citing *McNeely*, 569 U.S. at 151–56, 133 S.Ct. 1552)); *State v. Stavish*, 868 N.W.2d 670, 680 (Minn. 2015) (the fact of a fatality in a drunk-driving case does not, by itself, create an exigency sufficient to justify a warrantless blood draw).

*11 ¶ 62 The State argues that the Fourth District "came to the opposite conclusion" in *People v. Hasselbring*, 2014 IL App (4th) 131128, 386 Ill.Dec. 843, 21 N.E.3d 762. We disagree with the State's reading of *Hasselbring* and also find the case inapposite because the defendant consented to chemical testing.

¶ 63 After Hasselbring collided with a fellow motorcyclist, an officer asked him to provide blood and urine samples for testing. Hasselbring consented. *Id.* ¶ 8. The samples tested positive for cocaine metabolite, and Hasselbring was convicted of aggravated driving with a drug, substance, or compound in his breath, blood, or urine. On appeal, Hasselbring argued that the Illinois implied consent statute (625 ILCS 5/11–501.6(a) (West 2010)) was unconstitutional under *McNeely*. That statute provides that a driver involved in an accident resulting in personal injury or death, and issued a traffic ticket for that accident, is deemed to have given consent for a blood-alcohol test. *Hasselbring*, 2014 IL App (4th) 131128, ¶ 36, 386 Ill.Dec. 843, 21 N.E.3d 762.

¶ 64 In holding that the implied consent statute was constitutional, *Hasselbring* found that the statute did *not* create a *per se* exception to the fourth amendment's warrant requirement and, therefore, did not run afoul of *McNeely*. *Id.* ¶ 42. The court explained that, although consent is implied by default under section 5/11–501.6(a), a driver may choose to withdraw his consent and refuse an officer's request to provide a blood sample. *Id.* Hasselbring, on the other hand, chose to consent to the officer's request. Since consent is a well settled exception to the fourth amendment's warrant requirement, the chemical testing was constitutional. *Id.* (citing *People v. Pitman*, 211 Ill. 2d 502, 523, 286 Ill.Dec. 36, 813 N.E.2d 93 (2004)); *cf. Byars v. State*, 336 P.3d 939, 946 (Nev. 2014) (Nevada's implied consent statute, unlike the Illinois statute, did not allow a driver to withdraw consent; on this basis, the Nevada Supreme Court held that the "so-called consent cannot be considered voluntary" and the implied consent statute is unconstitutional under *McNeely*).

¶ 65 Contrary to the State's argument, *Hasselbring* does not stand for the proposition that a statute purporting to create a *per se* exigency is constitutional under *McNeely*. Moreover, *Hasselbring* is clearly distinguishable from the present case, where Eubanks never consented to chemical testing and, in fact, had to be physically restrained by

security personnel before a blood sample could be taken and refused to give urine until the nurse ordered a catheter and approached Eubanks, still restrained, to insert it.

¶ 66 Therefore, we hold that, under *McNeely*, section 11–501.2(c)(2) is unconstitutional on its face, insofar as it permits compelled chemical testing without a warrant in all cases where an officer has probable cause to believe that a driver under the influence has caused death or personal injury to another. No doubt some such cases will involve exigencies, but when such cases arise, the State can and should prove the existence of an exigency on a case-by-case basis rather than relying upon the " 'considerable overgeneralization' " (*McNeely*, 569 U.S. at 153, 133 S.Ct. 1552 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997))) engendered by the current statute. See also *Birchfield*, 579 U.S. at ——, 136 S.Ct. at 2183 ("the exception for exigent circumstances * * * has always been understood to involve an evaluation of the particular facts of each case").

*12 ¶ 67 The facts of this case are illustrative since they do not reflect any exigency that would have prevented officers from obtaining a warrant. Eubanks was taken into custody at 9:05 p.m. Tanner gave a statement to police at around 10 p.m. in which he informed them that Eubanks was the driver in the fatal collision. At 12 a.m., Officer Ventrella spoke with Eubanks and informed him that he was under arrest for driving under the influence. Eubanks refused to take a breathalyzer test or submit blood and urine samples. Ventrella then "stood by and waited for instruction" from the major accident unit, which was directing the investigation. Nearly three hours passed before Ventrella brought Eubanks to the hospital at 2:57 a.m. Nothing in the record indicates that Ventrella or another officer could not have obtained a warrant in that three-hour period. The State invites us to speculate that obtaining a warrant could have been difficult due to the late hour, the time of year, and the severity of the collision. But there was no testimony to this effect at the suppression hearing or at trial—particularly since Ventrella, by his own admission, was waiting on standby. And it was the State's burden to show exigency, which, in the absence of any evidence that the State ever attempted to obtain a warrant, it failed to establish.

¶ 68 *Stavish*, 868 N.W.2d 670, cited by both parties in their briefs, is also illustrative because its facts contrast with the facts here. *Stavish* involved a single-vehicle rollover crash where the driver was seriously injured and his passenger was killed. The driver was brought to the hospital for treatment, where an officer obtained a blood sample from him without a warrant. *Id.* at 673. Applying the *McNeely* totality-of-the-circumstances approach, the Minnesota Supreme Court held that the passenger's death did *not* constitute an exigency justifying a warrantless blood draw. *Id.* at 680. But other exigencies existed: the defendant's medical condition "rendered his future availability for a blood draw uncertain" because it was possible that he would need to be airlifted to another hospital, and even if he stayed at the same hospital, further medical care could preclude officers from obtaining a blood sample. *Id.* at 678. Under those facts, the court held that the warrantless blood draw was constitutionally permissible. *Id.* at 680.

¶ 69 By contrast, Eubanks was taken into custody minutes after the accident and placed in an interview room at 10:30 p.m., where he remained for the next 4½ hours. There was no concern that he might become unavailable before a warrant could be obtained, nor did the officers attempt to obtain one in that span of time.

¶ 70 The State next argues that, even if section 11–501.2(c)(2) is unconstitutional, admitting the results of Eubanks's blood and urine samples was proper where officers took the samples in good faith reliance on Illinois law. Eubanks's arrest occurred in 2009, four years before *McNeely* was decided. Thus, the State argues that the arresting officers were entitled to rely on our supreme court's 2005 decision in *Jones*, 214 Ill. 2d 187, 291 Ill.Dec. 663, 824 N.E.2d 239, which held that warrantless chemical testing of suspects was permissible. Eubanks argues that, even under *Jones*, collecting blood and urine samples from him would not have been allowed since he physically resisted their collection.

¶ 71 Evidence obtained in violation of fourth amendment principles is subject to suppression under the judicially created exclusionary rule. *Davis v. United States*, 564 U.S. 229, 236, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). But the good-faith exception permits the introduction of such evidence when officers acted with an objectively reasonable good-faith belief that their conduct was lawful. *Id.* at 238, 131 S.Ct. 2419. The relevant inquiry is " 'whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances.' " *People v. LeFlore*, 2015 IL 116799, ¶ 25, 392 Ill.Dec. 467, 32 N.E.3d 1043 (quoting *Herring*

v. United States, 555 U.S. 135, 145, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)). In particular, "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Davis*, 564 U.S. at 241, 131 S.Ct. 2419; see also *LeFlore*, 2015 IL 116799, ¶¶ 27–29, 392 Ill.Dec. 467, 32 N.E.3d 1043 (adopting the reasoning of *Davis* in Illinois).

¶ 72 The State argues that the police could have reasonably relied on *Jones*, 214 Ill. 2d 187, 291 Ill.Dec. 663, 824 N.E.2d 239, as binding precedent authorizing the nonconsensual, warrantless taking of Eubanks's blood and urine. But *Jones* does not support the State's position. In *Jones*, the defendant verbally refused to give blood and urine samples but did not physically resist their collection. *Id.* at 190, 291 Ill.Dec. 663, 824 N.E.2d 239. Although *Jones* found that a nonconsensual blood draw was permitted by law, it also stated:

> ***13** "[O]ur holding in this case does not give law enforcement officers unbridled authority to order and conduct chemical tests. We do not suggest that a DUI arrestee's lack of a right to refuse chemical testing under section 11–501.2(c)(2) permits law enforcement officers to use physical force in obtaining blood, urine, and breath samples." *Id.* at 201, 291 Ill.Dec. 663, 824 N.E.2d 239.

Here, there is no question that physical force was used to obtain Eubanks's blood and urine samples. Eubanks was restrained by security officers and handcuffed to the hospital bed while blood was forcibly drawn from him. Similarly, with respect to the urine sample, it was only after the nurse approached Eubanks and threatened to catheterize him that he yielded and provided urine. The officers in this case could not have reasonably relied on *Jones* to authorize such conduct.

¶ 73 The State also argues that, at the time of Eubanks's arrest, other jurisdictions permitted officers to use reasonable force to obtain a blood draw when the officer had probable cause to believe that a driver was under the influence. See, *e.g.*, *State v. Worthington*, 138 Idaho 470, 65 P.3d 211, 214–15 (App. 2002). This is irrelevant, since a reasonably well-trained Illinois officer would have been aware that such actions were not authorized in Illinois under *Jones*.

¶ 74 Accordingly, the good-faith exception does not apply, and the results of Eubanks's blood and urine samples must be suppressed. On remand, Eubanks's new trial on the first-degree murder charge should exclude this evidence. Eubanks also argues, and the State does not contest, that his conviction for aggravated driving under the influence must be reversed outright, since there is insufficient evidence to prove the offense without the suppressed evidence. See *People v. Abdur–Rahim*, 2014 IL App (3d) 130558, ¶ 33, 384 Ill.Dec. 510, 16 N.E.3d 903 ("Because the State will be unable to prevail without the recovered evidence, we reverse defendant's conviction outright."). Thus, we reverse Eubanks's conviction for aggravated driving under the influence.

¶ 75 CONCLUSION

¶ 76 We find that the trial court erred in refusing to instruct the jury on the lesser included offense of reckless homicide since a rational jury could have found that Eubanks acted recklessly in causing Maria's death. We also find that the State could not establish that Eubanks failed to report the accident within half an hour without impermissibly introducing evidence of his postarrest silence. Finally, we hold that section 11–501.2(c)(2) of the Illinois Vehicle Code (625 ILCS 5/11–501.2(c)(2) (West 2008)) is unconstitutional on its face, insofar as it sets forth a categorical exception to the fourth amendment's warrant requirement of the kind rejected by the Supreme Court in *McNeely*, 569 U.S. 141, 133 S.Ct. 1552.

¶ 77 We therefore reverse Eubanks's conviction for first degree murder and remand for a new trial. We also reduce his conviction for Class 1 failure to report an accident to the Class 4 version of the offense in the same statute (625 ILCS 5/11–401(a), (c) (West 2008)). Finally, we reverse Eubanks's conviction for aggravated driving under the influence. Because of our resolution of these issues, we need not reach Eubanks's remaining contentions of trial error.

¶ 78 Reversed and remanded.

Presiding Justice Neville concurred in the judgment and opinion.

Justice Pucinski dissented, with opinion.

¶ 79 JUSTICE PUCINSKI, dissenting.

*14 ¶ 80 I. You Should Not Be Able to Get a Reckless Homicide Instruction for "Some Other Dude"

¶ 81 A "SODDIT," *i.e.*, "Some Other Dude Did It" defense, in my opinion, precludes a reckless homicide instruction. I do not see how you can get a reckless homicide instruction for some other unnamed person.

¶ 82 This defendant denied all along that he was in the car, that he was driving it, or that he was even at the scene of the accident. Therefore, I would affirm the trial court's decision to deny any reckless homicide instruction.

¶ 83 The defendant represented himself and did not propose any specific reckless homicide instruction, just argued to the court that one should be given. The State objected. The court denied his request.

¶ 84 The majority agrees with the defendant that the reckless homicide instruction should have been given. I disagree.

¶ 85 There are three Illinois Pattern Jury Instructions to which defendant could possibly have been referring: Illinois Pattern Jury Instruction, Criminal, No. 5.01 (approved Dec. 8, 2011) (hereinafter, IPI Criminal No. 5.01), Illinois Pattern Jury Instruction, Criminal, No. 7.09 (approved Dec. 8, 2011) (hereinafter, IPI Criminal No. 7.09), and Illinois Pattern Jury Instruction, Criminal, No. 7.10 (hereinafter, IPI Criminal No. 7.10). IPI Criminal No. 5.01, titled "Recklessness–Wantonness," states:

> "A person [(is reckless) (acts recklessly)] when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

IPI Criminal No. 7.09, titled "Definition of Reckless Homicide," states:

> "A person commits the offense of reckless homicide when he unintentionally causes the death of an individual [without lawful justification] by [(driving a motor vehicle) * * *] recklessly and in a manner likely to cause death or great bodily harm."

IPI Criminal No. 7.10, titled "Issues in Reckless Homicide," states:

> "To sustain the charge of reckless homicide, the State must prove the following propositions:
>
> *First Proposition:* That the defendant caused the death of _____ [without lawful justification] by [(driving a motor vehicle) * * *]; and
>
> *Second Proposition:* That the defendant [(drove a motor vehicle) * * *] recklessly; and
>
> *Third Proposition:* That the defendant [(drove a motor vehicle) * * *] in a manner likely to cause death or great bodily harm.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable double, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

¶ 86 Each of these instructions involves the act of a person and the result of that act. In each of these instructions the jury is told, in essence, the defendant did it, but it was a reckless act, not intentional.

¶ 87 The majority relies on several cases. In *People v. Belk*, 203 Ill. 2d, 187, 271 Ill.Dec. 271, 784 N.E.2d 825 (2003), the defendant, a 16–year–old, stole a van and was actually being pursued at high speed by the police. He did not deny he was the driver of the van but asked for a reckless homicide instruction. He was convicted of felony murder based on a theory that aggravated possession of a motor vehicle is a forcible felony for felony

murder purposes. The appellate court reversed, saying that aggravated possession could not be a forcible felony and his conviction was reduced to reckless homicide.

***15** ¶ 88 In *People v. Pollard*, 2015 IL App (3d) 130467, 393 Ill.Dec. 231, 33 N.E.3d 975, the defendant admitted the actions and inactions that led to her baby's death but not the *mens rea.*

¶ 89 In *People v. Jones*, 404 Ill. App. 3d 734, 344 Ill.Dec. 403, 936 N.E.2d 1160 (2010), the defendant admitted fighting with the victim but claimed the victim's death was the result of the defendant's reckless action and not intentional.

¶ 90 In *People v. Stevens*, 324 Ill. App. 3d 1084, 259 Ill.Dec. 146, 757 N.E.2d 1281 (2001), the defendant admitted driving the car but said his actions leading to the death of the victim were reckless not intentional.

¶ 91 In *People v. Thomas*, 266 Ill. App. 3d 914, 204 Ill.Dec. 437, 641 N.E.2d 867 (1994), the defendant admitted driving the car but said he could not see the victims' car because of a hill in the way.

¶ 92 In *People v. Alsup*, 373 Ill. App. 3d 745, 311 Ill.Dec. 483, 869 N.E.2d 157 (2007), the defendant admitted driving the car and being responsible for the wreck that led to the death of the victim but that his behavior was reckless not intentional.

¶ 93 In *People v. Gittings*, 136 Ill. App. 3d 655, 91 Ill.Dec. 207, 483 N.E.2d 553 (1985), the defendant admitted driving the car that led to the death of a victim. He was charged with reckless homicide and convicted of reckless homicide. He was appealing his one year sentence.

¶ 94 In *People v. DiVincenzo*, 183 Ill. 2d 239, 233 Ill.Dec. 273, 700 N.E.2d 981 (1998), the defendant admitted interacting with the victim but denied killing him.

¶ 95 In all of these cases, the defendants admitted the actions that led to the death of their victims. They admitted they did it but said it was not intentional; it was reckless or provoked or self-defense.

¶ 96 In *People v. Washington*, 375 Ill App. 3d 243, 313 Ill.Dec. 916, 873 N.E.2d 540 (2007), the defendant admitted being at the scene of the robbery and being with the victim but his version of events differed from the victim's.

¶ 97 *People v. McDonald*, 2016 IL 118882, 412 Ill.Dec. 858, 77 N.E.3d 26, was slightly different. In his first trial the defendant was convicted of first degree murder and appealed. The appellate court reversed and remanded because of an erroneous jury instruction. The defendant did not testify. In his second trial the defendant was again convicted of first degree murder. He appealed, claiming that the trial judge erred in refusing to give the jury instructions on involuntary manslaughter and second degree murder due to serious provocation. The defendant maintained there was some evidence at trial that he acted recklessly in stabbing the victim, that is, the defendant argued that although he did the act it was reckless not intentional behavior. In his request for the jury instruction, he argued that there was enough evidence at trial that he acted recklessly.

¶ 98 Unlike Eubanks, who never admitted he drove the car, hit anyone with the car, or was anywhere near the car, the defendant in *McDonald* did not argue that he was not the one who stabbed the victim. He argued for two lesser included instructions that would clearly put him at the scene of the stabbing and clearly put him in action in the stabbing but without the mindset needed to prove first degree murder.

¶ 99 The appellate court affirmed. The supreme court held that the appropriate standard of review is abuse of discretion, reviewed the case under plain error, and affirmed, finding that "the appropriate standard for determining whether a defendant is entitled to a jury instruction on a lesser-included offense is whether there is some evidence in the record that, if believed by the jury, will reduce the crime charged to a lesser offense, not whether there is some credible evidence." (Emphasis omitted.) *McDonald*, 2016 IL 118882, ¶ 25, 412 Ill.Dec. 858, 77 N.E.3d 26.

***16** ¶ 100 Using that standard, the supreme court found that there was a "dearth" of evidence to support the defendant's involuntary manslaughter instruction. *McDonald*, 2016 IL 118882, ¶ 57, 412 Ill.Dec. 858, 77 N.E.3d 26. And the supreme court found that there was insufficient evidence to justify the requested jury instruction on second degree murder by serious

provocation. *McDonald*, 2016 IL 118882, ¶ 67, 412 Ill.Dec. 858, 77 N.E.3d 26.

¶ 101 In *People v. Martin*, 236 Ill. App. 3d 112, 177 Ill.Dec. 533, 603 N.E.2d 603 (1992), the defendant testified he was not at the scene of the death of the victim, did not do it, had an alibi, and that his statements to the police were beaten out of him. The victim died of blunt force trauma to the head and multiple stab wounds. At the jury instruction conference, the defendant requested instruction as to a "lesser included crime" but did not tender any specific instruction. When pushed by the trial judge, the defense suggested an involuntary battery instruction, which the trial court denied because the lesser included offense instructions were inconsistent with the defendant's alibi defense:

> " 'THE COURT: What lesser included?
>
> MR. VICTOR: Whatever they [the jury] can find.
>
> THE COURT: Well, what do you want? Don't tell me whatever they can find, they can charge him for battery I guess.
>
> MR. VICTOR: Battery. Involuntary.
>
> THE COURT: Where is there evidence of that in there? There isn't any evidence. He says he wasn't there, he didn't do it. How could the jury possibly find a lesser included verdict under those circumstances? If he said he was there and had a fight with him that is one thing, but he says he is not there. Why do you instruct them on a lesser included theory?
>
> MR. VICTOR: Okay, okay. I will buy that, I will withdraw it.' " *Martin*, 236 Ill. App. 3d at 118, 177 Ill.Dec. 533, 603 N.E.2d 603.

The defense did not object. After a jury trial, the defendant was found guilty of first degree murder. Defendant appealed, in part arguing that the trial court erred in not giving the lesser-included offense instructions.

¶ 102 Our colleagues in the First District sidestepped the question of whether an alibi defense precludes a lesser-included offense by finding that that issue was waived but went on that even if it were analyzed under plain error, the decision of the trial court would still not "save" the defendant because the evidence was not closely balanced (*Martin*, 236 Ill. App. 3d at 119, 177 Ill.Dec. 533, 603 N.E.2d 603) and the evidence was more than sufficient to support defendant's conviction for first degree murder. (*Martin*, 236 Ill. App. 3d at 120, 177 Ill.Dec. 533, 603 N.E.2d 603).

¶ 103 In its discussion of defendant's ineffective assistance of counsel claim, our colleagues seem to be troubled by the very inconsistency that exists in the case before us: that denying you committed the crime is inconsistent with a lesser-included offense instruction:

> "In the instant case, defendant's testimony was that he did not commit the crime. The principal contested issue at trial was his guilt or innocence, not whether he reasonably or unreasonably acted in self-defense. At no time during trial did defendant pursue the defense of second-degree murder or present any evidence to support self-defense. In fact the evidence that defendant argues supports a second-degree murder instruction was his own statement to the police which at trial he denied was true. Therefore, we cannot say that the possible tactical decision not to give a lesser-offense instruction on second degree murder was ineffective assistance." *Martin*, 236 Ill. App. 3d at 125, 177 Ill.Dec. 533, 603 N.E.2d 603.

***17** ¶ 104 Finally, the majority relies on *People v. Patel*, 366 Ill. App. 3d 255, 303 Ill.Dec. 560, 851 N.E.2d 747 (2006). Patel was charged with solicitation of murder for hire. He said he did not do it, that he at most was soliciting aggravated battery, and requested that instruction, which the court denied. His wife, the intended victim, fortunately suffered no harm as a result of his machinations. He did not deny that he did something. He just said it was not solicitation for murder for hire. He was convicted of solicitation to murder for hire. He appealed based on the judge's refusal of the lesser included instruction. The appellate court affirmed, holding that the defendant waived the argument but went on to conclude that even if they considered it under plain error: "A defendant is entitled to a lesser included offense instruction only if the evidence would permit a jury rationally to find the defendant guilty of the lesser included offense and acquit him or her of the greater offense." (Internal quotation marks omitted.) *Patel*, 366 Ill. App. 3d at 276, 303 Ill.Dec. 560, 851 N.E.2d 747. The court found that the evidence was not closely balanced and any failure to give the lesser included instruction was not prejudicial. *Patel*, 366 Ill. App. 3d at 276–77, 303 Ill.Dec. 560, 851 N.E.2d 747.

¶ 105 Here, the defendant denies he was in the car, drove the car, or was even there. The defendant was trying to elude the police, who were not giving chase at all, let alone a high speed chase.

¶ 106 The defense in oral argument argued that, because the State offered evidence that the defendant was the driver, he should be entitled to a reckless homicide instruction. But that allows the defendant to have it both ways: "I didn't do it. I wasn't even in the car. I wasn't even there. But, if you the jury, believe I was in the car even though I am telling you I wasn't, then the death of Maria wasn't intentional it was because I was being reckless." I do not believe this is logical or even supportable. I note that even after all of the evidence was presented in this case the defendant continued to argue, particularly during the jury instruction discussion with the judge, that he did not do it, was not in the car and was not the driver. His continued denials that he performed *any* act that lead to Maria's death make him, in my opinion, ineligible, for the reckless (act) instruction.

¶ 107 I do not believe the defendant should be able to get a reckless homicide instruction for the act of some unnamed other person.

¶ 108 II. The State Failed to Prove He Did Not Report an Accident

¶ 109 The majority undertakes a self-incrimination analysis of this charge. The defendant did not frame a self-incrimination argument, and I do not believe we can make one for him.

¶ 110 Instead the defendant argues in this regard that the State did not *prove* that he failed to make a timely report.

¶ 111 This is a circular argument since the defendant all along, and at every possible opportunity, has claimed he was not even in the car, let alone driving it, at the time of the accident. The accident occurred about 8:58 p.m. on the night in question. The defendant was apprehended a short distance from the accident scene at 9:05 p.m. and placed under arrest. Not only did he not report the accident at any time—let alone within one-half hour—he kept denying he was in the car, drove the car, or was anywhere near the accident. He continued this line of defense throughout the trial. It was perfectly within the jury's province to determine that he could not possibly have reported the accident since he kept denying he was even there.

¶ 112 Further, the self-incrimination argument will not work because that question has been determined by two cases and the majority is not taking issue with them: *People v. Brady*, 369 Ill. App. 3d 836, 308 Ill.Dec. 356, 861 N.E.2d 687 (2007), and *People v. Young*, 2012 IL App (1st) 092124-U, 2012 WL 6935259. We are not required to rely on the opinion of another appellate court district, but if we do not agree with it, we should at least say why. And, of course, even we cannot cite a Rule 23 order of our own court, but we can point to a persuasive analysis as informing our own.

¶ 113 In *Brady*, the defendant was drag racing with another young man at high speeds resulting in the other man's death. Brady was charged with several counts, among them failure to report the accident within the time required. The accident occurred on February 25, 2003, and Brady was arrested on February 28, 2003. At no time did he report the accident or that he was involved. Brady challenged the statute as an unconstitutional requirement for self-incrimination. The court reasoned that a "person who admits involvement in an accident does not also admit that he or she caused the accident. Accordingly, defendant's compliance with section 11–401(b), resulting in an implied admission of involvement in the motor vehicle accident, would not have amounted to a real danger of self-incrimination or provided the State with a link in the chain of evidence needed to prosecute him for the separate offence of aggravated reckless driving." *Brady*, 369 Ill. App. 3d at 852, 308 Ill.Dec. 356, 861 N.E.2d 687.

***18** ¶ 114 *Young* is closer to the facts in this case because Young was in custody shortly after an accident in which he was involved led to the death of another. In *Young*, our colleagues reached the same conclusion about the reporting requirement as in *Brady*. In *Young*, the defendant denied all along that he was the driver of the car involved in a fatal accident. The accident occurred on January 17, 2007, and the defendant was arrested by an officer who saw him get out of his car and leave the scene. The officer followed him and arrested him shortly after the accident. At no time did the defendant report the accident or his involvement. Our colleagues wrote, "Simply identifying himself as a driver involved in a fatal accident, as required by the statute, would not have been

a 'link in the chain of evidence needed to convict' him of a separate offense, where mere driving and identity did not form the basis of any criminal charges in the case." *Young*, 2012 IL App (1st) 092124-U, ¶ 52.

¶ 115 If Young and Brady were not subject to mandatory self-incrimination under the reporting requirement then I do not think defendant was either.

¶ 116 III. Unconstitutionality of Warrantless Blood and Urine Draw

¶ 117 The defendant argues, and the majority agrees, that section 11–501.2(c)(2) is unconstitutional because it permits warrantless, nonconsensual blood and urine draws from persons arrested in connection with a motor vehicle accident that resulted in the death of another person.

¶ 118 They rely on *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

¶ 119 Maybe this is the right case to determine that the statute is unconstitutional. But I do not think we need to go that far. Further, I think everyone is overlooking a very simple fact: driving a car and getting a driver's license to do it is a privilege, not a right, and the legislature is perfectly within its reasonable authority to determine what rules will apply. Maybe it would be better if the legislation prohibited use of unnecessary force to obtain the fluid samples or if it defined exigent circumstances or if it required everyone who applies for a driver's license or renews one in Illinois to sign a pre-consent to fluid samples in the event of any accident resulting in death or great bodily harm, but those are issues for the legislature.

¶ 120 I believe the record, briefs, and oral argument amply demonstrated that the police had sufficient opportunity to obtain a warrant. There are about 400 judges in Cook County. The State's Attorney's felony review unit operates 24 hours per day, seven days per week. It is simply not credible that the police could not find some way to find a judge to hear the question of the warrant between 9:05 p.m. when defendant was arrested and 4:10 a.m. when the blood was drawn with force and 5:20 a.m. when the urine sample was collected under pressure. For that reason, and that reason alone, I would grant the defendant's argument that the blood and urine draws were inadmissible.

¶ 121 I believe we can rule out the use of the fluid samples because we do not believe there were exigent circumstances. I do not, however, believe we are required to find the statute unconstitutional.

¶ 122 If you take the blood and urine out of the equation, that still does not solve the defendant's larger problem because then it would be reasonable for any trier of fact to determine that the defendant was unimpaired and making specific choices when he decided to drive at 60 to 80 miles per hour down a narrow residential street at 8:58 p.m. and fatally struck Maria and permanently disabled her son, Jeremiah. Maria would be just as dead and Jeremiah just as disabled if the defendant had randomly shot a gun and hit them. The car was his lethal weapon. He got behind the wheel of a car and started it on purpose. He drove it on purpose. He drove down that street on purpose. He sped down that street on purpose.

¶ 123 If his decision was not impaired, it was with knowledge. He knew he was driving too fast; his passenger told him. He knew it was a narrow residential street; he could see it.

***19** ¶ 124 For these reasons I believe the judge's denial of the defendant's lesser included offense instruction was correct and that defendant's convictions for first degree murder and failure to report an accident must be affirmed.

All Citations

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THE COURT: Are the parties in agreement that the injuries to Mr. Jeremiah Worthington were Type A injuries as defined in the statute?

MS. PIEMONTE: Yes.

THE COURT: The Court is prepared to make its ruling on both these motions. The Court has reviewed the very well-presented motions and response by the parties; excellent written presentation regarding the very interesting legal issues existing in this. I will rule first upon the motion to declare 625 ILCS 11-501.2(c)(2) unconstitutional. Then I will talk about the motion to suppress.

I believe that the statute is constitutional in spite of the well-presented arguments by Ms. Piemonte and Mr. Douglass in their written materials on Mr. Eubanks' behalf, and that's because McNeely actually does, as the State points out, reassert the authority of Schmerber, S-c-h-m-e-r-b-e-r, versus California, a case from the 1960s, in which a non-consensual blood draw was done in connection with a driving the influence investigation where there was a personal injury, and the State may well be correct and I may well be wrong that the actual defendant in that case was the person

injured.

Justice Brennan's opinion made it clear that that circumstance, the circumstance presented by that case, gave rise to an exception to the warrant requirement where there was an exigent circumstance regarding the potential dissipation of evidence, that is to say any alcohol or controlled substance in the tested individual's blood or other bodily fluids as presented in that particular case.

Schmerber has of course been relied upon to -- in support of other non-consensual blood bodily substance draws by our Supreme Court, which is acknowledged by the Court in People versus Jones, 214 Ill.2d. 187, a 2005 opinion, in which Justice Garmon wrote the opinion and pointed out that the legislature was aware of this Court's acceptance in People versus Todd of Schmerber's principle that non-consensual chemical testing is permissible, thus evincing both in Schmerber and subsequently confirmed in Todd and in Jones that the Illinois Supreme Court used Schmerber, and rightly so in my estimation, as permitting non-consensual chemical testing.

So the fact that 11-501.2(c)(2) does permit such non-consensual chemical testing, it is of

such a nature to the Court that I conclude it passes constitutional muster, notwithstanding the well-made arguments in writing and orally today on Mr. Eubanks' behalf. So the motion to declare the statute unconstitutional will be respectfully denied.

That still leaves the motion to suppress the evidence in this instance, which goes, obviously, considerably beyond just the question of whether 11-501.2(c)(2) is or is not constitutional because it has to be viewed in the context of the subsequent case of Missouri versus McNeely and its application to the facts at hand, and as everybody has pointed out in argument, McNeely was what gets described in the United States Supreme Court's decision as a so-called routine DWI investigation, as they call it, because apparently it is DWI in Missouri; it is DUI here in Illinois, routine in the sense that it did not involve any type of accident, did not involve any circumstances such as that in Schmerber or here it involved personal injury either to the alleged offender or other persons.

Obviously you have got an instance here where there were not one, but two Type A injuries, that is to say death to Ms. Worthington and the Type A

injury to her son, Jeremiah Worthington. That places this substantially distinct from Missouri versus McNeely, and McNeely again acknowledges that Schmerber is still the law and that there are circumstances which will permit non-consensual chemical testing of a person's blood or bodily substances but they just didn't lie in the so-called routine DWI that is extent in McNeely.

I will say that I agree with Chief Justice Robert's opinion that concurred in part and dissented in part that McNeely really doesn't give a lot of precise -- a lot of direction regarding what precise circumstances would pass constitutional muster regarding non-consensual testing in circumstances such as we have here.

They talk -- the opinion talks about -- primarily about injuries and about circumstances that would require the police to have to do more -- to be called upon to do more than which would be normally attendant to a routine DUI investigation.

We certainly have those here. We have got not one substantial injury, but one death and a substantial Type A injury. There is no evidence regarding the circumstances of the arrest of

Mr. Eubanks from the time of this incident to the time he was arrested. No evidence with regard to where he was arrested relative to where Ms. Worthington was killed and Mr. Worthington was injured, but be that as it may, he was arrested at 9:05.

Other circumstances neither party has mentioned are the requirements of Section 103-2.1 of the Code of Criminal Procedure regarding electronically-recorded interrogation. Not only are such required in homicides -- or I should say murder investigations, but they are also required by statute, specifically referred to in 103-1-2.1, where the police conduct investigations under Clause (d)(1)(f) -- as in Frank -- of 11-501 of the Illinois Vehicle Code, which is to say, investigations into driving under the influence of alcohol or other substances in the case involving death.

I was hesitating for a moment. I wanted to see if that involved great bodily harm as well, but it doesn't. Certainly the police were obligated to conduct themselves pursuant to the electronically-recorded interrogation requirements as well, which is yet another responsibility that would not inure in a routine DUI investigation.

Doubtless this was a circumstance I think I can anticipate, even though it is not part of the stipulated testimony, that involved a lot of police officers, at least a lot relative to the routine DUI investigation, which often gets resolved by one, if not maybe one other officer. We have got an individual who is deceased, another individual who is seriously wounded as a Type A injury requiring medical treatment, presumably Chicago Fire Department personnel.

All this has to be coordinated by the police, often has to get coordinated by some lead police officer, whether that's a detective, the officer who was first responding or someone from the major accidents unit of the Chicago Police Department.

This took place in Chicago. Am I correct? Obviously it did. He was taken to Area 3 in the 24th District. I will presume that.

Those are the kind of circumstances that McNeely seems to allude to, in its somewhat imprecise way, that are of such a nature that would permit the police to dispense with any warrant requirement because the exigency of the circumstances and the additional responsibilities under such circumstances

that are placed upon the police impact their ability to prepare a complaint for search warrant, prepare a search warrant, find a judge on the evening of December 21, 2009.

I suppose I could say something about the holiday season, but my analysis doesn't depend upon whether this took place during the holiday season or whether it might take place during some other non-holiday season.

So it is certainly a circumstance, an investigation and a type of case that would seek to -- seem to evoke the principles set forth in Schmerber rather than the principles set forth in McNeely because of the different circumstances inherent here, even much more so than in Schmerber than in McNeely's routine DUI investigation involving no personal injury, in fact involving not even any property damage.

Ms. Piemonte makes the excellent point, however, that this is also a circumstance where there is a not unappreciable period of time that extends from, I guess, the two refusals, the one at 10:30 when he refuses the breathalyzer in the face of the warnings to motorist given in connection with DUI

arrests and again when he indicates he will refuse at 12:05 or 12:30.

12:05 I felt was the stipulated testimony, and he is not taken to the hospital until 2:53 a.m., roughly three hours later, and he gives the blood -- the blood is forcibly taken at 4:00 a.m. and then he is called upon to urinate at 4:56 and actually urinates at 5:20.

The point by the Defense being that this appreciable period of time, perhaps more so than that which might have been present in say Schmerber, tends to show that, because the passage of time is greater, the exigency becomes less and the opportunity to have gone during that time period to a magistrate and gotten a warrant perhaps increases so that the exigency is thus lessened. The relative conclusion that the Defense wants the Court to reach is that therefore a warrant should have been gotten by the time blood is forcibly taken at 4:00 a.m. and urine is given in the face of the threat at 5:20 a.m.

All that being said, the circumstances presented to the Court by virtue of the factual stipulation, the nature of the injuries, death of Ms. Worthington, are such that the passage of time in

the Court's estimation and all of the circumstances, that is the stated totality of the circumstances presented by this case, are such that the Court concludes that the police were still justified by exigency to take the blood and urine without Mr. Eubanks' consent and without a warrant.

The defendant's very well-presented motion in that regard will be respectfully denied.

Are you otherwise ready to proceed on Monday morning?

MS. VALENTE: Yes.

MS. PIEMONTE: Yes.

We have a motion regarding the graphic nature of the photographs in this case that's pending and also a Montgomery motion regarding his background.

THE COURT: Why don't we do this. The motion on the photographs, I suppose, from what you are saying, sounds like it is the kind of thing that may be admissible into evidence. You are talking about whether it gets presented to the jury.

MS. PIEMONTE: Yes.

THE COURT: We can take care of that after today, probably even after jury selection.

MS. PIEMONTE: Okay.

THE COURT: Anything else you wish to say in support of this? Hearing nothing I will consider you have no further argument. Your argument is denied. Your objection is denied. Your request that you not be tried by this jury is denied. Your argument is completely baseless.

It's made in this building with regularity by people who for some reason think that they can say that they belong to some particular group and therefore they are not subject to the jurisdiction of this Court. Nothing could be more wrong. This Court has personal and subject matter jurisdiction over you. Your objection is denied.

I.P.I. 7.01 is our next instruction?

MS. ROMITO: Yes, Judge.

THE COURT: People's Instruction 14, definition of murder. Now, I indicated yesterday during our informal jury instruction conference that I was considering the possibility that the jury would be instructed on the lesser offense, if lesser offense it is, of

reckless homicide.

So that if I decided to do this, the jury would be deciding on someone who is charged with first degree murder -- charged or found guilty rather of first degree murder or could be found guilty of reckless homicide or could be found not guilty of first degree murder and reckless homicide.

Is that what you're requesting, Mr. Eubanks?

THE DEFENDANT: Yes, your Honor.

THE COURT: What's the State's response?

MS. ROMITO: The State is objecting, Judge.

THE COURT: Do you wish to express your objection, please?

MS. ROMITO: Yes. There has been no evidence presented in this case to allow for a finding of what would be a lesser included offense. The State's case in chief demonstrated flight from police, which was deliberate and went on for over a mile before running over a woman out on the street.

Calvin Tanner didn't express

anything with respect to the mental state of the driver, and the defendant claims that he was not there. Therefore, the only thing that has been expressed to this Court is what would demonstrate a crime of first degree murder, performing the acts which caused the death, that created a strong probability of death or great bodily harm to an individual. There has been nothing to demonstrate recklessness in this case, and we believe it would be appropriate.

THE COURT: Do you wish to respond, Mr. Eubanks?

THE DEFENDANT: Yes.

THE COURT: Go ahead.

THE DEFENDANT: The defendant is -- first of all, is innocent until proven guilty. Secondly, the officer stated that he wasn't in pursuit of the individual. Therefore, he was not fleeing, whoever the alleged driver was.

Also, according to the toxicologist and their findings it was safe to assume that he was not under the influence because it was not in his system.

THE COURT: I don't recall any

testimony --

THE DEFENDANT: Well, it was out of my system. They said things were found in the urine and not in the bloodstream, meaning it was not in the body and I was not under the influence.

THE COURT: Anything further?

THE DEFENDANT: No, your Honor.

THE COURT: When faced with a request to instruct the jury on a lesser included offense the Court has to determine whether there is -- appellate and Supreme Court cases of this state sometimes use the phrase some evidence and sometimes use the phrase slight evidence that would lead a rational trier of fact to conclude that the lesser included offense is properly the finding than the greater offense in the initial case. In this instance we are talking about first degree murder versus reckless homicide.

Reckless homicide, the elements of which are set forth in 9-3 of the criminal code, indicates that a person who unintentionally kills an individual commits involuntary

manslaughter or reckless homicide if a motor vehicle is used if those persons acts, whether lawful or unlawful, which cause the death are such as are likely to cause death or great bodily harm to some individual and the person performing them performs them recklessly.

This is an instance where the evidence presented by the State tends to establish, if believed by some rational trier of fact, that the person driving this vehicle drove it -- I thought I counted nine blocks from was it Jonquil all the way down to Greenleaf?

MS. ROMITO: Yes.

THE COURT: Down that same street of Greenview to Greenleaf, correct?

MS. ROMITO: Yes.

THE COURT: At a rate of speed without any headlights so fast that the officers who had stopped the car at Greenview and Jonquil, just south of Jonquil, lost it in seconds. That car traveled so fast it was variously described as going from 60 miles an hour up to 90 miles per hour on a very narrow residential street in Chicago with parked cars almost continual down

each street. I shouldn't say each street. The parked cars continual down the last block on Greenview before Ms. Worthon and the young Worthon was struck.

However fast that car was traveling, it was traveling so fast that a number of things happened simultaneously. Every bone in Ms. Worthon's skull was fractured. Her pelvis was split. Numerous other bones and virtually all of her extremities sustained broken bones.

The impact was so severe that her head was split open and separate portions of her brain were left on Greenview north of Greenleaf while her body traveled one witness estimated 100 yards. Another witness estimated it at 100 feet by virtually the police witness testimony that the width of Greenleaf was 30 feet. Her body traveled clearly to the Court at least 50 feet through the air, as much as 18 feet high. Her brain matter was left on the north side of the intersection while the body traveled passed the south side of the intersection.

There is no evidence that the person who was driving that car braked in any manner.

THE DEFENDANT: Um --

THE COURT: You're done talking.

The person driving the car continued to speed away without any apparent decrease in speed until the person driving the car pulled into the alley where the police observed it and whoever was driving it, whether it was Mr. Tanner or Mr. Jeter or Mr. Eubanks, the car continued thereafter at a high rate of speed going down Newgard eventually crashing into numerous parked cars in an obvious effort to continue by the driver to evade the circumstances he or she had put into motion, whoever that might have been. The State's evidence tends to claim that that person was Mr. Eubanks.

Mr. Eubanks on the other hand claims that he was not in the car at the time this happened but was standing out in public nowhere near the purview by that point of Mr. Jeter or Mr. Tanner or anyone else with even tangential connection to this case when the police set upon him for no apparent reason by virtue of the fact that he, according to his claim, had no

connection with the car at that point.

Mr. Eubanks' testimony clearly establishes or clearly seeks to establish his belief that he never drove the car at the time that Ms. Worthon and her son Jeremiah were struck. Certainly Mr. Eubanks' testimony does not give the Court any basis upon which to conclude that there is some or slight evidence that Mr. Eubanks was driving the car in a manner which was only reckless.

Instead, the only evidence regarding how the car was being driven -- Mr. Eubanks' testimony cannot claim how it was that the car was being driven by virtue of his claim that he was nowhere near the intersection of Greenview and Greenleaf at the criminal moment.

The State's evidence in turn establishes what I just set forth in some length, which is that the driver put into or activated a set of circumstances where the person, whoever was driving that car, drove it so fast in a highly populated area at 9:00 o'clock at night four days before Christmas.

And the fact that it's before Christmas I mentioned not because that there is anything critical or heart tugging about the proximity of the Christmas holidays but because you would expect a certain number of people to be out at 9:00 o'clock at night on any weekday or weekend in the evening. I'm not even sure what day it was -- what day of the week it was.

Whether it was Christmas or New Year's, Ramadan, 4th of July, May 1st, or April 9th, any date you can snatch out of the air by throwing darts at the calendar, the fact of the matter is that whoever was driving that car could only conclude that in that very highly populated area, that very tightly constructed street filled with cars driving in that manner could only create a strong probability of death or great bodily harm to some individual.

The astounding thing about this case isn't that Ms. Worthon and her son was struck, the astounding thing in this case is that more people weren't struck. My point being is that there is no evidence, not sufficient evidence,

of recklessness so as to render it possible that the jury could reach a lesser included offense. Only that this is first degree murder or nothing or perhaps aggravated driving under the influence of alcohol, but it's not an issue of first degree murder or reckless homicide or not guilty. It's an issue of first degree murder or not guilty.

Consequently, I will deny Mr. Eubanks' request that the jury be instructed on the lesser offense of reckless homicide. Therefore, I will give 7.01, People's No. 14 over the defendant's objection.

7.02, People's 15. I fully appreciate, Mr. Eubanks, that you continue your objection in this regard regarding reckless homicide, the lesser included offense. In light of the fact that I'm not giving that I understand that you object therefore to I.P.I. 7.02, People's 15, but do you have any objection beyond that regarding the form of the instruction?

Although before you express one or not when I read the second proposition I'm not

TO THE APPELLATE COURT OF ILLINOIS
IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	No. 10 CR 1904
-vs-	)	Trial Judge: TIMOTHY JOYCE
RALPH EUBANKS	)	Attorney: RALPH EUBANKS, PRO SE, GINA PIEMONTE AND MARK DOUGLAS, ASSISTANT PUBLIC DEFENDERS

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:

APPELLANT'S NAME: RALPH EUBANKS

IR#: 1159003 D.O.B.: 03/07/1979

APPELLANT'S ADDRESS: ILLINOIS DEPARTMENT OF CORRECTIONS

APPELLANT'S ATTORNEY: OFFICE OF THE STATE APPELLATE DEFENDER

ADDRESS: 203 North LaSalle Street, 24th Flr., Chicago, Illinois 60601

OFFENSE: MURDER, AGG.DUI,DEATH, GREAT BODILY HARM, FAILURE TO REPORT A MOTOR VEHICLE ACCIDENT, DEATH

JUDGMENT: GUILTY AS CHARGED 1st Deg Murder Agg DUI Death [illegible]

DATE OF JUDGMENT & SENTENCE: AUGUST 22, 2014 30 yrs + conc to 6 yrs conc. to 4 yrs for a total of 40 yrs.

[signature]
APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL FOR INDIGENT DEFENDANT

Under Supreme Court Rules 605-608, Appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the Appellant; order the Clerk to prepare the Record on Appeal and to appoint counsel on appeal.

Appellate, being duly sworn, says that at the time of his/her conviction (s)he was and is unable to pay for the Record or to retain counsel for appeal.

FILED
CRIMINAL APPEALS
AUG 22 2014
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
DEPUTY CLERK

[signature]
APPELLANT'S ATTORNEY

ORDER

IT IS ORDERED the STATE APPELLATE DEFENDER is appointed as counsel on appeal and the Common Law Record and Report of Proceedings be furnished to Appellant without cost, within 45 days or receipt of this Order. Dates to be transcribed (list pretrial motion dates, jury waiver date, trial dates, and sentencing or judgment date):

1/10/11, 6/15/11, 7/24/12, 4/25/14, 4/28/2014 THRU 5/2/2014, 6/3/14, 6/6/2014, 7/22/2014, 8/22/2014.

ENTERED
JUDGE TIMOTHY JOSEPH JOYCE-1950
AUG 22 2014
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ORDER DATE: 8/22/14 ENTER: [signature] 1916

JUDGE

ADDITIONAL STATUTORY PROVISIONS INVOLVED

The Criminal Code of 1961 provides, in relevant part:

§ 9-1. First degree Murder—Death penalties—Exceptions—Separate Hearings—Proof—Findings—Appellate Procedures—Reversals.

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

. . .

(2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another;

720 ILCS 5/9-1(a)(2) (2009).

§4-5. Knowledge. A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his conduct, described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.

(b) The result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct.

Conduct performed knowingly or with knowledge is performed willfully, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

720 ILCS 5/4-5 (2009).

§ 9-3. Involuntary Manslaughter and Reckless Homicide.

(a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle or operating a snowmobile, all-terrain vehicle, or watercraft, in which case the person commits reckless homicide. A person commits reckless homicide if he or she

unintentionally kills an individual while driving a vehicle and using an include in a roadway, such as a railroad crossing, bridge approach, or hill, to cause the vehicle to become airborne.

720 ILCS 5/9-3(a) (2009).

§ 4-6. Recklessness. A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregards constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

720 ILCS 5/4-6 (2009).

The Vehicle Code provides, in relevant part:

§ 11-401. Motor vehicle accidents involving death or personal injuries.

(a) The driver of any vehicle involved in a motor vehicle accident resulting in personally injury to or death of any person shall immediately stop such vehicle at the scene of such accident, or as close thereto as possible and shall then forthwith return to, and in every event shall remain at the scene of the accident until the requirements of Section 11-403 have been fulfilled. Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any person who has failed to stop or to comply with the requirements of paragraph (a) shall, as soon as possible but in no case later than one-half hour after such motor vehicle accident, or, if hospitalized and incapacitated from reporting at any time during such period, as soon as possible but in no case later than one-half hour after being discharged from the hospital, report the place of the accident, the date, the approximate time, the driver's name and address, the registration number of the vehicle driven, and the names of all other occupants of such vehicle, at a police station or sheriff's office near the place where such accident occurred. No report made as required under this paragraph shall be used, directly or indirectly, as a basis for the prosecution of any violation of paragraph (a).

. . .

(c) Any person failing to comply with paragraph (a) shall be guilty of a Class 4 felony.

(d) Any person failing to comply with paragraph (b) is guilty of a Class 2 felony if the motor vehicle accident does not result in the death of any person. Any person failing to comply with paragraph (b) when the accident results in the death of any person is guilty of a Class 1 felony.

625 ILCS 5/11-401(a)-(d) (2009)

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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 13, 2019, the **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses of the persons named below:

Deepa Punjabi
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
1stdistrict.eserve@osad.state.il.us

Kimberly M. Foxx
State's Attorney of Cook County
Alan J. Spellberg
Sarah L. Simpson
Assistant State's Attorneys
Eserve.CriminalAppeals@cookcountyil.gov

Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen duplicate paper copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Leah M. Bendik
LEAH M. BENDIK
Assistant Attorney General