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.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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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.

As explained in the People's opening brief, Peo. Br. 13-14,[1] courts should not find a statute facially unconstitutional when it is unnecessary to do so. *People v. Lee*, 214 Ill. 2d 476, 482 (2005). Defendant asserts that this avoidance principle is inapplicable to his case because there are no nonconstitutional grounds upon which to resolve his challenge to the blood and urine testing evidence admitted here. Def. Br. 16-18. Defendant is incorrect.

Lee held that the appellate court had erred in invalidating a municipal loitering ordinance as unconstitutionally vague because it was unnecessary to address whether the ordinance was facially unconstitutional; instead, Lee's convictions were properly reversed on the "more limited grounds" that the officers lacked probable cause for his arrest. 214 Ill. 2d at 477-78, 489. *Lee* thus confirms that, where possible, courts should reverse a conviction on the grounds that police violated a defendant's constitutional rights rather than facially invalidating legislation so as to avoid unnecessarily "compromising

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[1] As in the opening brief, "C._" refers to the common law record; "R._" refers to the report of proceedings; "Peo. Exh. _" refers to the People's trial exhibits; and "A_" refers to the appendix to the opening brief; additionally, "Peo. Br." refers to the People's opening brief and "Def. Br." refers to the defendant-appellee's brief filed in this Court.

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the stability of the legal system." *Id.* at 482, 489. Here, as in *Lee*, given that the parties agree that defendant's aggravated DUI conviction should be reversed because the police violated defendant's Fourth Amendment rights in gathering his blood and urine samples, the appellate court majority erred in addressing whether the police gathered those samples pursuant to facially invalid legislation (section 11-501.2(c)(2)).

Thus, 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 majority's opinion.

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

As discussed in the People's opening brief, Peo. Br. 14-18, should the Court reach the question of whether section 11-501.2(c)(2) is facially unconstitutional, it should hold that it is not because the statute is not unconstitutional in all of its applications, for even though it allows invalid chemical testing, it also allows valid testing.

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. Here, chemical testing under section 11-501.2(c)(2) can comport with

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the Fourth Amendment if conducted pursuant to a warrant, with the arrestee's consent, or under case-specific exigent circumstances. Peo. Br. 15, 17.[2] Because there are circumstances under which the provision can operate validly, it is not facially unconstitutional.

Defendant insists that such valid applications do not "cure" the statute's defect. Def. Br. 19-21. Defendant is correct that the Illinois provision does not direct officers to pursue search warrants, 725 ILCS 5/11-501.2(c)(2), does not grant arrestees the right to refuse testing, *People v. Jones*, 214 Ill. 2d 187, 202 (2005), and has been construed as "implicitly" or "effectively" adopting a rule that the dissipation of intoxicants presents a per se exigent circumstance justifying warrantless, nonconsensual chemical testing of the type rejected in *Missouri v. McNeely*, 569 U.S. 141 (2013), *see, e.g.*, *People v. Harrison*, 2016 IL App (5th) 150048, ¶¶ 21-23. But these facts confirm only that some testing conducted under the provision may violate the Fourth Amendment (as in this case). None of these facts renders the provision facially invalid because it does not *prevent* testing that complies with the Fourth Amendment. *See Lucien v. Briley*, 213 Ill. 2d 340, 342-45

[2] The United States Supreme Court may soon address whether warrantless chemical testing of a motorist is valid under the Fourth Amendment based on statutory implied consent when the motorist is unconscious and police have probable cause to believe that the motorist drove while intoxicated. *See* https://www.supremecourt.gov/search.aspx?filename=docket/docketfiles/html/public/18-6210.html (oral argument held in *Mitchell v. Wisconsin*, No. 18-6210, on April 23, 2019). Even if the Court decides that it is not, a motorist's voluntary agreement to submit to testing (i.e., decision not to withdraw implied consent) remains a possible valid operation of the statute.

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(2004) (extended-term sentencing provision not facially unconstitutional because it did not preclude compliance with *Apprendi v. New Jersey*, 530 U.S. 466 (2000): although the provision permitted *Apprendi* violations, it also permitted courts to comply with *Apprendi*).

For example, in finding an extended-term sentencing provision could operate in compliance with *Apprendi* — which held 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 a jury, 530 U.S. at 490 — *Lucien* cited *People v. Ford*, 198 Ill. 2d 68 (2001). 213 Ill. 2d at 345. *Ford* noted that although Ford's extended-term sentencing factor had *not* been found beyond a reasonable doubt, the resulting sentence did not violate *Apprendi* because finding that factor had not increased his sentence exposure: he had also been found death eligible beyond a reasonable doubt under a different provision. 198 Ill. 2d at 69, 74-75. Thus, *Lucien* demonstrates that the challenged provision *itself* need not require the act that demonstrates compliance with the constitutional standard to avoid facial invalidation.

Here, as in *Lucien*, section 11-501.2(c)(2) can result in constitutionally valid chemical testing if the officer (1) obtains a search warrant, (2) documents case-specific exigent circumstances, or (3) acts pursuant to the arrestee's consent; it is irrelevant that the provision itself does not direct the officer to take such action.

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Defendant's assertion that the provision is so inconsistent with *McNeely* as to be "inherent[ly] defect[ive]" and justify its facial invalidation, Def. Br. 19-23, is incorrect. For example, in *People v. Cannon*, the appellate court considered the validity of a statutory hearsay exception for statements by child victims in the wake of the changes wrought by *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that Confrontation Clause requires testimonial statements to be subject to cross-examination and abrogating rule of *Ohio v. Roberts*, 448 U.S. 56 (1980), that sufficient indicia of reliability can compensate for lack of cross-examination). 358 Ill. App. 3d 313, 315, 318 (1st Dist. 2005). The statutory provision allowed (and still allows) admission of such hearsay upon a sufficient showing of reliability and *either* the victim's testimony *or* the victim's unavailability along with corroboration. 725 ILCS 5/115-10. In analyzing section 115-10, the *Cannon* court rejected the defendant's argument that portions reflecting the *Roberts* rule so pervaded the provision as to render it facially invalid. 358 Ill. App. 3d at 319. Instead, because statements could be admitted in compliance with *Crawford* when the victim testified, the court refused to invalidate the entire statute. *Id.* at 319-20; *see also id.* at 321 (noting that "[i]t is not for us to forego salvaging a constitutional portion of a statute, otherwise salvageable, even though it may be more expedient for the legislature to redraft the statute in its entirety") (citing *Hill v. Cowan*, 202 Ill. 2d 151, 156 (2002)).

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Defendant's lone out-of-state case — which does not acknowledge the distinction between facial and as-applied challenges, Def. Br. 20 (citing *Byars v. State*, 336 P.3d 939, 946-47 (Nev. 2014) (provision making implied consent irrevocable and permitting reasonable use of force to obtain warrantless chemical testing "unconstitutional" because it "allows" testing in violation of Fourth Amendment)) — is unpersuasive. Indeed, the weight of the authority is to the contrary. *See, e.g.*, *State v. Havatone*, 389 P.3d 1251, 1253, 1255 (Ariz. 2017) (provision permitting warrantless, nonconsensual chemical testing of unconscious DUI suspects facially constitutional: it can be constitutionally applied when case-specific exigent circumstances exist); *State v. McCumber*, 893 N.W.2d 411, 417-19 (Neb. 2017) (same for provision permitting warrantless, nonconsensual chemical testing of motorists); *Gore v. State*, 451 S.W.3d 182, 188-89 (Tex. Ct. App. 2014) (provision requiring chemical testing of arrestees facially constitutional: it can be constitutionally applied because it does not mandate warrantless testing).

Instead, reversal of the appellate court's facial invalidation of the provision fits comfortably within well-established principles. Time and again, this Court has reiterated that the mere fact that a statute may operate invalidly under some circumstances is insufficient to demonstrate that it is facially unconstitutional. *See, e.g.*, *Hill*, 202 Ill. 2d at 157. Relatedly, "[s]tatutes enjoy a strong presumption of constitutionality, and courts must construe statutes in order to uphold their constitutionality whenever

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possible." *Id.* Because defendant does not contest the sole relevant fact — that section 11-501.2(c)(2) permits constitutionally valid testing pursuant to a warrant, with an arrestee's consent, or under case-specific exigent circumstances, Def. Br. 19 — this Court should hold that the provision is facially constitutional.

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

As discussed in the People's opening brief, Peo. Br. 21-22, despite acknowledging the applicable abuse-of-discretion standard of review, A5, ¶ 33 (citing *People v. McDonald*, 2016 IL 118882, ¶ 42), the appellate majority employed what can only be fairly described as de novo review of the trial court's refusal to instruct the jury on reckless homicide, A5, ¶¶ 35, 37, 38. Defendant acknowledges this argument, Def. Br. 24, but does not dispute this characterization of the majority's analysis, *id.* at 24-36.

Instead, defendant claims that the circuit court's decision reflected an abuse of discretion in three ways: (1) ignoring evidence of recklessness and resolving a factual question, *id.* at 25-30; (2) considering evidence unrelated to recklessness, *id.* at 30-33; and (3) relying on facts not in evidence, *id.* at 34-36. As explained below, defendant's objections do not demonstrate that the circuit court abused its discretion. *See also* Peo. Br. 22-32.

The key difference between first degree knowing murder and reckless homicide centers on the *degree of risk* of death or great bodily harm that

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defendant knows is created by his conduct: knowing murder occurs when the defendant's acts created a "strong probability" of death or great bodily harm, while reckless homicide occurs when the defendant's acts were only "likely" to cause, i.e., created a "substantial risk" of, such harm. Peo. Br. 19-21. A defendant is entitled to a jury instruction on a lesser-included offense if there is some record evidence that, if believed by the jury, would reduce the crime charged to the lesser offense. *McDonald*, 2016 IL 118882, ¶ 25. The reviewing court should reverse the trial court's judgment refusing to instruct on a lesser offense only if the denial was "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *Id.*, ¶¶ 32, 42.

The Trial Court Did Not Ignore Evidence of Recklessness

First, defendant faults the trial court for allegedly ignoring evidence that defendant was intoxicated and that the collision occurred in a "quiet" area and for resolving a relevant factual dispute about whether a U-Haul truck obstructed the street. Def. Br. 25-30. Defendant's contentions do not demonstrate that the trial court abused its discretion.

The trial court did not ignore evidence regarding intoxication; there simply was no such evidence. Regarding evidence about drugs, the People's opening brief explained that this Court should not consider the evidence that multiple drugs were found in defendant's urine (but not his blood) hours after the collision because the parties agree that this evidence should have been suppressed. Peo. Br. 9, 28. Defendant effectively concedes this point by

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failing to make any affirmative argument in response. *See, e.g.*, *People v. Relerford*, 2017 IL 121094, ¶ 34 (party "essentially concedes" point of law "by failing to present any argument to the contrary").

Regarding alcohol, while there was evidence that defendant had *ingested* alcohol that day, there was no evidence that defendant was *intoxicated* or that he was intoxicated *at the time of the collision*. 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 21, R.EEE134-35, 142, 148-49; *see also* Peo. Exh. 29. This testimony, inconclusive as to both the amount of alcohol consumed and when defendant consumed it, was not accompanied by any evidence raising an inference that defendant was impaired in any way. Thus, it was not an abuse of discretion to deem this negligible evidence as constituting no evidence of intoxication. *McDonald*, 2016 IL 118882, ¶¶ 9-10, 55, 57 (where defendant cited his intoxication — evidenced only by friend's testimony that he "drank a few beers" with defendant several hours before crime — as some evidence of recklessness to justify involuntary manslaughter[3] instruction, trial court did not abuse its discretion in refusing instruction given "dearth of evidence of recklessness"); *see also People v. Gosse*, 119 Ill. App. 3d 733, 736-37 (2d Dist. 1983) (distinguishing evidence of

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[3] Involuntary manslaughter and reckless homicide differ only 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).

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drinking or drug use from evidence of impairment of faculties).[4] Defendant fails to acknowledge this crucial distinction between evidence of ingestion of intoxicants versus evidence of resulting intoxication. Def. Br. 26-27.

Defendant also complains that the trial court ignored (1) Madeline Moratto's testimony that the accident occurred on a "quiet, residential street," and (2) Calvin Tanner's inconsistent statements regarding whether a U-Haul truck obstructed the street at the time of the accident. Def. Br. 28-29 (citing R.AAA55, BBB70, EEE37). That Moratto used the phrase "quiet neighborhood" when describing the street, R.BBB70, did not demonstrate that defendant would have viewed the street as one in which his driving posed little danger to pedestrians. Instead, her description must be understood alongside the rest of her testimony describing the area. *Cf. People v. Johnson*, 218 Ill. 2d 125, 141 (2005) (claim of improper remarks by prosecutor evaluated in context of entire closing argument).

Indeed, Moratto's testimony included several details suggesting the likelihood that pedestrians would be present, including that it was a residential street containing houses and apartment buildings, she and her boyfriend were themselves walking on that street on their way to a restaurant, and she saw a family walking and other people walking their dogs. R.BBB69-70, 72. She also noted that it was a narrow, two-way street with stop signs at every corner and cars parked on both sides. R.BBB70-71.

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[4] As explained in the opening brief, here there is similarly evidence only of drug ingestion, not drug intoxication. Peo. Br. 28-31.

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Thus, Moratto's testimony provided no basis to conclude that defendant would have a viewed the area as one in which his dangerous driving would pose only a lesser "substantial risk" of death or great bodily harm due to the absence of pedestrians. *See* Peo. Br. 19-21.

Defendant also claims that the jury needed to resolve whether a U-Haul truck obstructed the street at the time of the accident because he would have "less culpability" for his offense if it were harder for him to see pedestrians. Def. Br. 29-30. Not so. That a U-Haul truck obstructed his view of pedestrians instead would suggest that defendant's high rate of speed posed a *higher* degree of risk, and not the lesser degree of risk inherent in reckless homicide. *Cf. Roddy v. Chicago and N.W. R.R.*, 48 Ill. App. 3d 548, 552-53 (1st Dist. 1977) (decedent could not be found free of contributory negligence given failure to slow down when approaching truck obscuring view of traffic).

The Trial Court Did Not Consider Evidence Unrelated to Recklessness

Second, defendant faults the trial court for considering evidence allegedly unrelated to recklessness, namely, the severity of the victims' injuries, defendant's flight from police, and defendant's testimony. Def. Br. 30-33. Defendant's contentions do not demonstrate that the trial court abused its discretion.

In the related context of deciding whether an involuntary manslaughter instruction is warranted in a knowing murder case, certain

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factors are consistently identified as relevant: "(1) the disparity in size and strength between the defendant and the victim, (2) the duration of the altercation and the severity of the victim's injuries, (3) whether the defendant used a weapon, (4) whether the defendant inflicted multiple wounds, and (5) whether the victim was defenseless." *McDonald*, 2016 IL 118882, ¶ 52. On multiple occasions, this Court has affirmed the trial court's rejection of an involuntary manslaughter instruction because the means by which the defendant inflicted harm on the victim and the severity of the resulting injuries confirmed that the defendant could not have perceived his conduct as posing only the lesser risk of harm inherent in recklessness. *See, e.g.*, *McDonald*, 2016 IL 118882, ¶¶ 44-57 (even though defendant was intoxicated and, after stabbing victim, called for help and told victim, "Please don't die," trial court did not abuse its discretion in refusing involuntary manslaughter instruction given that defendant confronted and blocked victim from leaving and stabbed him three times, with one wound deep enough to strike carotid artery); *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 during beating of child victim "negat[ed] any suggestion" that conduct was merely reckless).

Defendant resists the analogy to involuntary manslaughter, claiming that a defendant's infliction of harm through stabbings or beatings involves a

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level of "control" absent from a vehicle collision. Def. Br. 31-32. But a defendant controls how he drives just like he controls how he fights with a victim; in neither context can a defendant be certain about the seriousness of injuries that could result from his conduct.

And the aptness of the analogy is confirmed by how seamlessly the involuntary manslaughter factors translate to the reckless homicide context. Two of the factors belying involuntary manslaughter are inherent in the collision of a motor vehicle and a pedestrian: the huge disparity in size and strength between the vehicle and the pedestrian, and the defenselessness of the pedestrian hit by the vehicle. And just as how in the involuntary manslaughter context some characteristics of the encounter increase the risk of harm — the duration of the altercation, the defendant's use of a weapon, and whether the defendant inflicted multiple wounds — characteristics of a defendant's driving similarly increase the risk of harm in the reckless homicide context. Thus, just as a defendant's more dangerous conduct might validly preclude an involuntary manslaughter instruction, a defendant's more dangerous driving might validly preclude a reckless homicide instruction. And as a result, the trial court appropriately considered both defendant's speeding, *see id.* at 27-28, and the severity of the injuries inflicted, *see id.* at 31-32, in this manner. Notably, while defendant challenges the applicability of this involuntary manslaughter analogy, he does *not* assert that, if such an analogy can be extended, the trial court arbitrarily and unreasonably

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concluded that his case involved such dangerous driving as to preclude the reckless homicide instruction. *Id.*

Relatedly, defendant's flight from police is relevant proof of his reaction to the harm inflicted on the victims, which in turn reflects on his understanding of the riskiness of his conduct. Defendant acknowledges that flight from police reflects consciousness of guilt, *id.* at 32, which correlates with both a lack of surprise at the harm caused and a primary concern about self-preservation consistent with a pre-existing understanding that his conduct posed a strong probability of causing great harm. In contrast, that someone reacts with surprise and comes to the aid of a victim injured by her acts supports the conclusion that she instead had acted with a belief that her conduct posed only a lesser risk of harm. *People v. Whiters*, 146 Ill. 2d 437, 439-40 (1992). Here, the record contains no indication that defendant was unaware, *see* Def. Br. 32, or even surprised that he hit pedestrians; instead, the record reveals that defendant was more concerned with avoiding police than aiding his victims, *see* R.AAA56-57, 64, 83, BBB22, CCC44-50, 69, 79-89. Thus, defendant's flight is appropriately considered as supporting the conclusion that he did not have a lesser understanding of the risk posed by his driving.

Finally, neither the People's opening brief nor the trial court echoed the dissent's legally unsupported assertion that the reckless homicide instruction was properly rejected because it was inconsistent with

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defendant's theory at trial, A13-16. Rather, the trial court correctly noted only the undisputed fact that defendant's testimony did not provide any evidence of recklessness — i.e., that he did not testify that he had some reason to have merely a lesser understanding of the risk his dangerous driving posed — given that he testified that he was not in the car at the time of the collision. A34. Thus, defendant's objection citing the dissent, Def. Br. 32-33, warrants no further consideration.

The Trial Court Did Not Rely on a Speculative Assumption

Third, defendant faults the trial court for relying on the assumption that there could have been many pedestrians present because the collision occurred a few days before Christmas. Def. Br. 34-35. But the trial court later clarified that it was not relying on the particular date of defendant's offense but instead on the fact that pedestrians could be expected to be present at 9:00 p.m. on whatever day or at whatever time of year. A35. Thus, the record rebuts defendant's argument that the trial court's decision rested on the particular date of his offense.

Defendant has thus failed to show that the trial court abused its discretion in declining to instruct the jury on reckless homicide, and the majority's contrary holding should be reversed.

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

A. The Appellate Court Improperly Adjudicated a Claim that Defendant Did Not Raise.

Defendant was convicted of Class 1 failure to report. 625 ILCS 5/11-401(a), (b), (d) (2009) (A39-40). R.FFF92; C122, 150, 350, 465. Noting that the police arrested defendant approximately ten minutes after the collision, the majority held that the State "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. The majority, in effect, found this offense unconstitutional as applied to *any* defendant arrested before the expiration of the 30-minute reporting period. Peo. Br. 35. The dissent faulted the majority for resolving the issue on self-incrimination grounds when defendant had instead challenged the sufficiency of the People's proof that defendant failed to timely report the accident. A16.

Defendant's brief reaffirms that he challenges only the sufficiency of the evidence, Def. Br. 37-39, exposing the defect in the majority's analysis: it adjudicated a claim neither raised nor briefed by any party, *see People v. Givens*, 237 Ill. 2d 311, 324-30 (2010) (appellate court erred by holding that trial counsel was ineffective for not challenging person's authority to consent to search when defense counsel instead contested voluntariness of person's consent). Thus, this Court should vacate the portion of the appellate court's decision containing the majority's self-incrimination analysis.

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B. Defendant's Class 1 Failure-to-Report Conviction Was Supported by Sufficient Evidence.

As explained in the opening brief, Peo. Br. 41-43, viewing the evidence in the light most favorable to the prosecution, a rational jury could have found beyond a reasonable doubt that defendant failed to report the collision within 30 minutes, *see 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. *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).

This Court should uphold defendant's Class 1 felony failure-to-report conviction because (1) defendant later denied involvement to police, Peo. Exh. 27, 1:14; *see also* R.EEE136-38, 147-48 (defendant's testimony denying presence in car), raising an inference that he failed to report; and (2) Officer Postelnick testified that he learned from other officers that defendant had reported nothing about the accident, R.EEE73-75, 77-78. *See also* Peo. Br. 41-43.

In this same context, the appellate court has held that it is reasonable to infer from a defendant's later denials of involvement that he did not timely report an accident. *People v. 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

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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). While defendant criticizes this inference as "speculation," Def. Br. 43, the mere fact that another sequence of events could have occurred does not render an inference unreasonable, *see, e.g.*, *People v. Pena*, 2014 IL App (1st) 120586, ¶¶ 20-22 (affirming conviction for aggravated battery of peace officer and rejecting claim that defendant accidentally spit on correctional officer; video captured sound of spitting immediately followed by officer's spontaneous remark, "he spit on me, man," and intentional spitting could be inferred from defendant's combative attitude and threat to kill the officer). Here, the inference that defendant did not report within 30 minutes given his later denials of involvement is made all the more reasonable by the fact that defendant refused Tanner's suggestion that they return to the scene of the collision, R.AAA58, 77-78, BBB22, the fact that defendant fled the police shortly after the collision, R.CCC44-50, 69, 79-89, and Officer Postelnick's testimony.

And inferring from defendant's later denial of involvement that he did not report the collision within 30 minutes does not implicate his right against self-incrimination, as defendant now claims. Def. Br. 38. Defendant fails to

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address the People's argument that section 11-401(b) requires reporting of only non-testimonial, basic factual information, as confirmed by United States Supreme Court and Illinois Supreme Court precedent rejecting Fifth Amendment objections to similar accident reporting provisions and by the analogous "routine booking questions" exception to *Miranda*, Peo. Br. 35-41. Def. Br. 44-47. Under this precedent, there is no Fifth Amendment concern in compelling even arrestees to provide such non-testimonial information. Defendant does not explain how inferring a failure to report from later denial of involvement in an accident can cause a Fifth Amendment violation when criminalizing the failure to report itself comports with the Fifth Amendment. And to the extent that he asserts that a Fifth Amendment concern arises whenever any defendant driver has been arrested within the reporting period for a crime connected to an accident, Def. Br. 45-47, he has shifted his argument to the very self-incrimination analysis of the failure-to-report statute that he forfeited, Peo. Br. 33-34, and that the majority conducted without briefing by the parties, *supra* Part III.A.

Thus, the majority erred in reducing defendant's Class 1 felony failure-to-report conviction because there was sufficient evidence to support it and the reporting requirement comports with the Fifth Amendment.

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CONCLUSION

For these reasons and those contained in their opening brief, 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 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.

May 2, 2019

Respectfully submitted,

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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(c) certificate of compliance, and the certificate of service, is 20 pages.

/s/ Leah M. Bendik
LEAH M. BENDIK
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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 May 2, 2019, the **Reply Brief 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 upon the following by transmitting a copy from my email address to the email addresses of the persons named below:

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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
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