No. 127854

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RYAN J. HEINEMAN, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-19-0689 There on Appeal from the Circuit Court of the Twenty-Second Judicial Circuit, McHenry County, Illinois, No. 16 CF 629 The Honorable Sharon L. Prather, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
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NATURE OF THE CASE

A McHenry County jury found defendant guilty of two counts of aggravated driving under the influence (DUI) of alcohol resulting in a death. Count I rested on defendant's act of driving with a whole blood alcohol concentration of 0.08 grams per deciliter (g/dl) or more. Count II was based on defendant's act of driving while under the influence of alcohol. The circuit court sentenced him to six years of imprisonment on Count I and found that Count II merged. C372-73; R1162.[1] Defendant appeals from the Illinois Appellate Court's judgment affirming his conviction. No issue is raised regarding the charging instrument.

ISSUES PRESENTED FOR REVIEW

A blood alcohol concentration test examines either the concentration of alcohol in the entirety of a blood sample ("whole blood alcohol concentration") or in only the serum portion of the blood sample, which remains when the blood cells have been removed ("blood serum alcohol concentration"). To prove Count I, the People were required to establish that defendant's whole blood alcohol concentration was 0.08 g/dl or more. The People introduced the results of a test establishing defendant's blood serum alcohol concentration, which the jury then needed to convert to whole blood alcohol concentration. The issues presented are:

[1] The common law record is cited as "C__," the report of proceedings as "R__," the exhibits as "E__," and defendant's opening brief as "Def. Br.__."

1. Whether the trial court properly exercised its discretion by admitting into evidence a police officer's testimony that 20 Illinois Administrative Code § 1286.40 provides a conversion factor for converting blood serum alcohol concentration to whole blood alcohol concentration.

2. Whether the evidence sufficed to prove, for purposes of Count I, that defendant's whole blood alcohol concentration was 0.08 g/dl or more.

3. Whether, if the court erred in admitting the police officer's testimony about the conversion factor, this Court should (1) remand for entry of judgment on Count II, which turned on only whether defendant was under the influence of alcohol and was unaffected by the error; or (2) alternatively, remand for a new trial on both counts.

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). This Court allowed leave to appeal on January 26, 2022.

STATEMENT OF FACTS

Defendant drank alcohol at a party and thereafter drove and crashed his vehicle, causing the death of his passenger, Tanya McDonough. *See* C59-60; R576-77. He was charged with two counts of aggravated DUI resulting in death. C59-60. Count I alleged that he drove and crashed his vehicle "while the alcohol concentration in defendant's blood was 0.08 or more" g/dl in violation of 625 ILCS 5/11-501.2(a)(1). C59; *see* 20 Ill. Admin. Code § 1286.10 (noting that blood alcohol concentration refers to "grams of alcohol per 100

milliliters of whole blood," or g/dl). Count II alleged that he drove and crashed his vehicle while "under the influence of alcohol," in violation of 625 ILCS 5/11-501.2(a)(2). C60. Both charges were Class 2 felonies carrying sentences of 3 to 14 years in prison. C59-60 (citing 625 ILCS 5/11-501.1(d)(2)(g)).

The evidence at defendant's jury trial established that on the evening of June 25, 2016, defendant and McDonough hosted a party celebrating McDonough's birthday. R559, 630. They were neighbors and longtime friends. R586, 621, 627. There were about 20 people at the party, including McDonough's friends Lynette Courtney and Theresa Valez, McDonough's fiancé Thomas Rice, McDonough's aunt Michelle Moberg, and Michelle's teenaged son, Justin Moberg. R559-60, 583, 620, 626, 661.

All of the adults at the party were drinking alcohol. R561, 586-87, 666. Multiple witnesses testified that defendant had been drinking "all day" and consumed several "very tall glass[es]" containing "about a 50-50 mix" of Jack Daniels whiskey and Coke, as well as some "pretty strong" Jell-O shots containing vodka. R561, 576-77, 587-90, 631. Michelle, who worked as a bartender for 20 years, testified that defendant was drinking the "50-50" mix of "Jack and Coke" out of "big tumbler" about "three times the size of a normal beer mug." R583, 588-89. She observed defendant consume two Jell-O shots and drink one glass of the Jack and Coke mix right after she arrived at the party at 12:30 a.m. R589-90. In her decades-long career as a

bartender, Michelle had interacted with many intoxicated individuals, and she opined that defendant was intoxicated. R590. She explained that defendant was usually "pretty quiet" and "not very outspoken," but at the party "his eyes were glassy. He was very outspoken[,]" "bubbly[,]" and "giddy," which was "not normally his persona." R590, 591-92. Rice similarly saw defendant drinking alcohol; he believed that defendant was drunk because he was uncharacteristically "annoying" that night. R631, 638-39. Justin, Courtney, and Valez also saw defendant drinking at the party. R576-77, 623, 664.

As the party continued into the early morning hours of June 26, McDonough and her fiancé, Rice, began to argue. R592. McDonough was "agitated," so she left the party at approximately 1 a.m. and walked toward a family member's home. R562, 592. Because McDonough had been drinking, Justin and another teenager — both of whom were sober — left the party on foot to find her. R562. They eventually discovered McDonough lying in a roadside ditch and helped her stand up. *Id.*; R653. Defendant then approached in his Jeep and drove the vehicle into the ditch, running over two "decent size[d] trees" in the process. R562. McDonough entered the Jeep, and Justin cautioned defendant that it was not a good idea to drive because he had been drinking. *Id.* The two teenagers walked back to the party because they knew it was not safe to ride in defendant's car. *Id.*

Defendant drove McDonough back to the party, but Justin saw the pair depart shortly thereafter with defendant at the wheel of the Jeep. R564; *see* R593-94. Courtney and Valez explained that McDonough rarely drove a car because she did not have a driver's license and was "terrified" of driving; Valez recalled that McDonough had driven "once" over a decade earlier. R623, 666-67. Defendant later explained to police that he would not allow anyone drive his Jeep because it ran on a "special diesel" fuel, and that he had hidden the keys to the Jeep before the party. R744.

After some time, Justin and Michelle repeatedly called both defendant and McDonough, but neither answered their cell phones. R564-67, 595, 632. At 2:53 a.m., defendant called and spoke with Justin and Michelle; using the speakerphone mode, he said that he had been in an accident, he was hanging upside down and pinned behind the Jeep's steering wheel, and he did not know where he was. R565, 567, 595, 604. Michelle could hear McDonough screaming in the background, but defendant said he did not know who was screaming, and that no one was in the car with him. R565, 595-96. Defendant was reminded that McDonough had been in the car with him, R595, and Justin asked defendant to activate his phone's location tracking function, but defendant failed to do so and stated he could only see pornography on his phone, R597. After calling the police, Justin and Michelle left to look for the accident scene. R596-98.

Rice also repeatedly tried to call defendant and McDonough, but his initial calls went unanswered. R632, 635-36. Then, at 3:28 a.m., defendant finally answered his phone. E20. Rice said that defendant sounded "drunk" and "not himself" during the call because he "kept joking around" and told Rice, "I can look at porn on my phone." R636-37. Rice then called 911. R637.

At approximately 6 a.m., an off-duty paramedic, Steve Holtz, was driving to work when he noticed defendant standing by the side of the road. R540. He found it "peculiar" that defendant was just standing there, staring off into the woods, so he pulled over. R540-41. He noticed a body in a ditch about 20 to 30 yards from defendant. R541. He asked defendant what happened and if the person in the ditch was okay, but defendant seemed "confused" and replied, "I don't know." R542, 545. Holtz called 911 and went to check on the person lying in the ditch. R543. There, he saw a motionless woman who had sustained "significant injuries" to her legs and had no pulse. R543-44. He then noticed a car off in the woods that was lodged "up in a tree." R545. When asked where he and McDonough had come from, defendant replied that he "did not know why they were out there" and claimed that they "shouldn't have left" the party. R545-46. Holtz noted defendant's "confusion." R553.

Emergency personnel arrived and secured the scene. R554, 716, 729. Paramedics assessed defendant's injuries and concluded that they were consistent with an automobile accident. R719-21; *see* R685-86. Defendant's

left shoulder displayed "redness," and there was an abrasion on his lower right abdomen where a seat belt likely restrained him. R720-21. Defendant told Officer Jason Hintz that he was not sure how he got to the scene of the crash and could not say who was driving but stated that "nobody should have been driving." R944-45. Hintz did not smell alcohol on defendant's breath but had a "very limited conversation" with defendant. R961. Defendant gave Hintz his cell phone, but Hintz could not access its contents because defendant provided two incorrect passwords. R950-51.

Defendant was transported to a hospital, *see* R684-85, 1015, where an emergency room physician, Dr. Archana Reddy, diagnosed him with a concussion and observed various injuries on his face and torso, R1023-24. Dr. Reddy also ordered a blood serum alcohol concentration test because defendant appeared intoxicated. R1015-16. She explained that it was "hospital protocol" for physicians to order a blood serum test rather than a whole blood test. R1025.

A nurse, Kathleen Bolanowski, drew defendant's blood at 7:24 a.m., noting that defendant's breath smelled like alcohol, and sent the sample to the hospital lab where an analysis revealed a blood serum alcohol concentration level of 155 mg/dl (*i.e.*, 0.155 g/dl). R690-91; E192. Both Dr. Reddy and Bolanowski considered that "elevated level" to be consistent with alcohol intoxication; Bolanowski further testified that anything above 80

mg/dl demonstrated intoxication. R690-91, 1016. Dr. Reddy testified that, in her "clinical opinion," defendant was "intoxicated." R1027.

Officer Jack Zumwalt interviewed defendant at the hospital following the blood alcohol test. R740-41. Defendant signed a waiver of his *Miranda* rights at 8:16 a.m., E194, and gave the officer his account of the events leading up to the crash, R740-43. Defendant admitted that he drank three to four glasses containing a mixture of Jack Daniels whiskey and Coke and consumed some Jell-O shots at the party. R743. Defendant explained that he kept spilling the "Jack and Coke" drinks, so he never consumed a full cup. *Id*. Defendant remembered being at the party and waking up in a ditch, but nothing else. R745. Zumwalt described defendant's speech as "thick-tongued" and "cotton mouth[ed]," and noted that his eyes were "glassy and bloodshot." R743.

A forensic pathologist conducted McDonough's autopsy and ruled that her cause of death was multiple injuries sustained in a car accident. R1065. The pathologist noted extensive injuries to McDonough's legs, torso, and head, including various bone fractures in McDonough's right shoulder. R1074-75.

Officer Marc Fisher, a 19-year veteran of the City of McHenry Police Department who oversaw the investigation, then testified. R752, 1029-39. The prosecutor asked Fisher if he was familiar with "20 Illinois Administrative Code, Section 1286.40," to which Fisher replied, "Yes."

R1030. Fisher stated that he became familiar with section 1286.40 after receiving "training throughout the years." R1037. The prosecutor next asked if that code section contained "a mathematical formula for the conversion of blood serum or blood plasma alcohol concentration to a whole blood equivalent," and Fisher again responded in the affirmative. R1030. When the prosecutor asked what that formula was, defense counsel objected, arguing that Fisher had not "been qualified as an expert to make that determination." R1030.

Outside of the presence of the jury, and relying on *People v. Stipp*, 349 Ill. App. 3d 955 (3d Dist. 2004), the prosecutor argued that Illinois law did not require expert testimony to establish the conversion factor that the jury could use to convert defendant's blood serum test result to his whole blood alcohol concentration. R1031-32; *see Stipp*, 349 Ill. App. 3d at 958 (explaining that "whole blood is the standard unit required" to identify a violation of section 11-501 of the Vehicle Code, and serum alcohol concentration test results are admissible to show a violation "where evidence is presented that converts the results into whole blood equivalents"). The prosecutor explained that the conversion factor provided in the administrative code (1.18) was part of a simple "mathematical equation" used to convert a blood serum concentration test result to its whole blood equivalent. R1032. The prosecutor further noted that the result of defendant's blood serum test was received into evidence without objection

and that, using the conversion factor, "anyone with a calculator" could determine the whole blood equivalent. *Id.* The court, relying on *Stipp*, overruled defense counsel's objection and allowed Fisher's testimony. R1033.

After the jury returned to the courtroom, the prosecutor asked Fisher: "[I]s there a mathematical formula for conversion of blood serum or blood plasma alcohol concentration to a whole blood equivalent?" R1035. Fisher replied that there was and explained that "You would divide the blood serum level, which in this case is .155, by 1.18 to get a [.]131." *Id.* Fisher confirmed that, under the Illinois Vehicle Code, the legal limit for whole blood alcohol concentration was 0.08 g/dl and stated that defendant's whole blood alcohol concentration test result of 0.131 g/dl exceeded that limit. *Id.* Defendant thereafter presented no testimony or evidence challenging the conversion factor.

During the jury instruction conference, defense counsel tendered a non-pattern instruction modeled after Illinois Pattern Jury Instruction (IPI) No. 23.30A, which would have directed the jury that it was not required to accept the conversion factor set forth in section 1286.40. R1045.

The court declined to give defendant's proposed instruction, reasoning that no special instruction was required because the conversion factor was introduced through Fisher's testimony, and "[t]he jury is free to accept or reject [that] testimony in the same manner that they would accept or reject the testimony of any other witness." R1050. The court reiterated that an

expert was not needed to introduce the conversion factor, because it "is a mathematical equation," and "not something that the jury would need an expert to explain to them or . . . something out of the ordinary knowledge that the jury would possess." R1048; *see also* R1049 (noting that "jurors can apply the conversion rate by themselves without having an expert witness explain it").

The court then instructed the jury that it could accept or reject the testimony of any witness. *See* C350. Without objection, the court also gave IPI 23.30, which instructed the jurors that if they determined that defendant's blood alcohol concentration was 0.08 g/dl or more, then they "may presume that the defendant was under the influence of alcohol," but also that they "never are required to make this presumption." C363. IPI 23.30 also instructed jurors that the presumption "has no application to the offense of driving with an alcohol concentration of 0.08 or more" and, therefore, that they "should not consider th[at] presumption" when deliberating on Count I. C363.[2]

[2] Defendant mistakenly labels this instruction 23.30A and omits the portion that informed the jury that it was not required to presume that evidence showing defendant's blood alcohol concentration was at or above 0.08 g/dl means that he was under the influence of alcohol. Def. Br. 6-7; *see* C363. Defendant also omits the portion that informed the jury that they should not rely on this presumption with respect to their deliberations on Count I. C363; *see also People v. Heineman*, 2021 IL App (2d) 190689, ¶ 68.

The prosecutor argued in closing that the trial evidence demonstrated that defendant was guilty of both counts of aggravated DUI. *See* R1097-1122. As to Count I, the prosecutor emphasized that defendant's blood alcohol concentration was 0.131 g/dl — well above the legal limit — more than four hours after the crash. R1120. As to Count II, the prosecutor summarized the trial evidence that showed defendant had been drinking large "Jack and Cokes" and Jell-O shots before the fatal accident, and that he was intoxicated when he chose to get behind the wheel with McDonough in his vehicle. R1121-22.

The jury found defendant guilty of both counts. R1162; C372-73. The court merged Count II into Count I and sentenced defendant to six years in prison. C441.

Defendant appealed and argued, as relevant here, that the court abused its discretion by admitting Fisher's testimony about the conversion factor. *Heineman*, 2021 IL App (2d) 190689, ¶ 49. Defendant asserted that "Fisher had no expertise, knowledge, or authority to tell the jury what factor to use" or to explain to the jury "how to convert serum blood alcohol concentration into [a] whole blood alcohol concentration." *Id.* ¶ 51. In defendant's view, the only acceptable manner for a court to admit the conversion factor into evidence was via expert opinion testimony or judicial notice. *Id.* ¶ 53. And defendant contended that, without expert testimony, the People failed to prove that his whole blood alcohol concentration was at or

above 0.08 g/dl. *Id.* ¶ 1.

The appellate court affirmed, in a 2-1 decision. *Id.* ¶¶ 1, 77. It held that Fisher's lay testimony about the conversion factor was proper because it was informed by "facts within Fisher's personal knowledge," *id.* ¶ 61, since he "testified that he followed the regulation in accordance with his training" and "experience as a police officer," *id.* ¶¶ 73, 75. Under *Stipp* and related cases, the court explained, the People were not limited to establishing evidence of the conversion factor via expert opinion testimony or judicial notice. *Id.* ¶ 65. The court further noted that "Fisher's testimony did not stray into areas that required any scientific, technical, or other specialized knowledge" that would have required expert testimony. *Id.* ¶ 75. And his testimony could not be considered "incompetent hearsay" because a witness's recitation of "information in a statute or administrative regulation is not hearsay" under Illinois Rule of Evidence 802. *Id.* ¶ 64.

Dissenting, Justice Brennan would have held that expert testimony was required to introduce section 1286.40's conversion factor into evidence because the number was a product of "scientific, technical, or other specialized knowledge." *Id.* ¶¶ 109, 113. In Justice Brennan's view, Fisher's testimony was improperly admitted lay opinion testimony because "Fisher perceived nothing in the course of investigating defendant that related to the conversion factor. Rather, Fisher relied upon his training and knowledge of the Administrative Code in opining as to the conversion factor." *Id.* ¶ 110; *see*

also id. ¶ 113 (describing Fisher's testimony as "incompetent and inadmissible").

STANDARDS OF REVIEW

"Evidentiary rulings are within the trial court's discretion and will not be reversed absent a clear abuse of discretion," *People v. Wheeler*, 226 Ill. 2d 92, 132 (2007), which will be found only "when the trial court's decision is arbitrary, fanciful or unreasonable or when no reasonable person would agree with the trial court's position," *People v. Brand*, 2021 IL 125945, ¶ 36 (citation omitted).

In reviewing the sufficiency of the evidence, this Court defers to the jury's verdict and will reverse a conviction only if no rational juror could have convicted defendant. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009) (citing *Jackson v. Virgini*a, 443 U.S. 307, 318-19 (1979)).

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion by Admitting Fisher's Testimony.

Through Fisher's testimony, the People properly introduced into evidence the mathematical factor that the Illinois Department of State Police has determined should be used to convert the results of a blood serum alcohol test into its whole blood equivalent. Fisher had personal knowledge of this conversion factor, and his testimony did not offer a lay opinion or otherwise "stray into areas that required any scientific, technical, or other specialized

knowledge," such that an expert would be required to testify. *Heineman*, 2021 IL App (2d) 190689, ¶ 75. Moreover, the testimony was probative in resolving a key fact at issue during trial: whether defendant's whole blood alcohol concentration was at or above the statutory limit of 0.08 g/dl. And Fisher's testimony about the content of a regulation was not inadmissible hearsay, since a regulation is not a "person" or "declarant." Accordingly, the court did not abuse its discretion when it admitted this testimony.

A. Serum alcohol concentration test results must be converted to whole blood concentration results, and section 1286.40 provides that conversion factor.

Two tests are commonly used to measure a defendant's blood alcohol concentration: (1) a blood serum alcohol concentration test, and (2) a whole blood alcohol concentration test. *See People v. Thoman*, 329 Ill. App. 3d 1216, 1218 (5th Dist. 2002). "Blood serum is . . . a constituent part of whole blood; specifically, it is that which remains after the red and white blood cells and other particulate matter have been removed." *People v. Green*, 294 Ill. App. 3d 139, 145 (1st Dist. 1997). The "lack of red and white blood cells and other particulate matter serves to increase the relative percentage of water within blood serum which, because alcohol has an affinity for water, results in higher alcohol concentration levels in blood serum than in whole blood." *Id.* (citation omitted). Thus, a blood serum test will always yield a blood alcohol concentration result higher than that of a whole blood test. *Id.*

Although the Illinois Vehicle Code does not define the term "blood,"

Illinois courts have interpreted that word to refer to "whole blood" rather than "serum blood," *id.*; *Thoman*, 329 Ill. App. 3d at 1218; this definition is consistent with that provided by 20 Illinois Administrative Code § 1286.10 ("'Blood Alcohol Concentration' or 'BAC' means grams of alcohol per 100 milliliters of whole blood (Section 11-501.2(a)(5) of the Illinois Vehicle Code [625 ILCS 5/11-501.2(a)(5)])"). Accordingly, to show that a defendant is guilty under section 5/11-501(a)(1) because his whole blood alcohol concentration was 0.08 g/dl or greater, the People must present "[e]vidence of a defendant's whole blood alcohol concentration level," either "from actual whole blood alcohol concentration test results or from blood serum alcohol concentration test results converted into whole blood equivalents." *Thoman*, 329 Ill. App. 3d at 1218.

In addition, where a blood serum test was used, the People must introduce a conversion factor into evidence so the trier of fact can convert the defendant's blood serum test result to its whole blood equivalent. *See People v. Olsen*, 388 Ill. App. 3d 704, 715 (2d Dist. 2009) ("evidence of a blood serum alcohol concentration is generally useful only if there is evidence of a conversion factor to a whole blood alcohol concentration"). Illinois courts have consistently recognized that since "a blood serum alcohol concentration test result can predictably be anywhere from 12% to 20% higher than a whole blood alcohol concentration test result, blood serum concentration test results are converted by dividing [the serum test result] by a corresponding factor

between 1.12 to 1.20[,]" *Thoman*, 329 Ill. App. 3d at 1218-19 (citation omitted); *People v. Menssen*, 263 Ill. App. 3d 946, 953 (4th Dist. 1994) (acknowledging range of 1.12 to 1.20); *see Green*, 294 Ill. App. 3d at 146 n.2 (noting 1.16 is the average value in the scientifically acceptable range).

In 2001, the Illinois Department of State Police enacted 20 Illinois Administrative Code § 1286.40, which provides that "[t]he blood serum or blood plasma alcohol concentration result will be divided by 1.18 to obtain a whole blood equivalent." Since then, courts have permitted the People to introduce proof of this conversion factor by expert testimony, by lay testimony, or by asking the circuit court to take judicial notice of the conversion factor. *See People v. Luth*, 335 Ill. App. 3d 175, 177 (4th Dist. 2002) (introducing conversion factor into evidence via expert testimony); *Stipp*, 349 Ill. App. at 956-57 (introducing conversion factor into evidence via lay testimony); *Olsen*, 388 Ill. App. 3d at 706 (introducing conversion factor into evidence via judicial notice).

B. Defendant has forfeited any challenge to the Department of State Police's selection of 1.18 as the applicable conversion factor, which, in any event, establishes a reasonable, defendant-friendly number.

As an initial matter, to the extent defendant suggests that the Department of State Police did not have the authority to enact section 1286.40 or that the Department's selection of the 1.18 conversion factor is unreasonable, *see* Def. Br. 14-17, any such arguments would be forfeited

because defendant did not raise them in his motion for a new trial or his brief below. *People v. Robinson*, 223 Ill. 2d 165, 173-74 (2006) (issue not raised in post-trial motion or appellate brief is forfeited and will not be considered).

Forfeiture aside, these arguments fail. The appellate court has held that the "regulation providing a conversion factor falls within the Department of State Police's authority to develop 'standards' and 'approve satisfactory techniques or methods' for the chemical analysis of blood and to 'prescribe regulations as necessary to implement this Section.'" *Olsen*, 388 Ill. App. 3d at 715 (citation omitted); *see also Heineman*, 2021 IL App (2d) 190689, ¶ 62 (section 1286.40 "is a valid exercise of the Department of State Police's authority to implement statutory law as delegated to it by the legislature").

Moreover, as defendant appears to recognize, *see* Def. Br. 13-14, 16, the Department's selection of 1.18 as the conversion factor falls comfortably within the scientifically acceptable range of conversion factors. *See, e.g.*, *Menssen*, 263 Ill. App. at 953 (acknowledging a scientifically acceptable range of 1.12 to 1.20); *Petraski v. Thedos*, 382 Ill. App. 3d 22, 25 (1st Dist. 2008) (acknowledging scientifically acceptable range between 1.09 and 1.22). If anything, the Department's adoption of a conversion factor at the higher end of this range is favorable to defendants because its application will potentially yield a whole blood alcohol concentration that is *lower* than what is actually the case.

Nor is Illinois an outlier in establishing a conversion factor of 1.18, despite defendant's apparent suggestion otherwise. *See* Def. Br. 16. North Carolina uses the same conversion factor, *see State v. Cardwell*, 133 N.C. App. 496, 499 (N.C. App. 1999) (noting that State Bureau of Investigation uses a conversion factor of 1.18 for converting blood serum test result into whole blood equivalent), and West Virginia uses a conversion factor that is less favorable to defendants, *see* W. Va. CSR § 64-10-8.2.4 (establishing conversion factor of 1.16 for conversion of blood serum test result into whole blood equivalent). And other States also establish conversion factors to be used in DUI prosecutions. *See*, *e.g.*, 17 Cal. Code Regs. § 1220.4(e) (establishing conversion factor of 1.3 for determining urine alcohol concentration).

To the extent defendant believes that the conversion factor was incorrect, he was free to argue this point in the trial court or to introduce evidence calling the conversion factor into question or supplying a different one. Indeed, defendant's jury was instructed that it was free to accept or reject Fisher's testimony, which introduced the conversion factor and the calculation that showed that defendant's whole blood alcohol concentration exceeded the statutory limit of 0.08 g/dl. *See* C350 (instruction informing jury it could accept or reject the testimony of any witness). Defendant was also free to introduce his own expert or other evidence at trial to argue that a different conversion factor should apply in his case. *See, e.g.*, *Luth*, 335 Ill.

App. 3d at 177, 180 (defense expert testified that a conversion factor of 1.60 could be applied); *Commonwealth v. Kohlie*, 811 A.2d 1010, 1015 (Pa. Super. 2002) (observing that a defendant seeking to challenge the validity of a conversion factor used in a DUI prosecution may present a witness or cross-examine the state's witness). Defendant likely declined to present such expert testimony because, under any theoretically acceptable conversion factor, his whole blood alcohol concentration would exceed the legal limit of 0.08 g/dl. As the appellate court noted, "[w]hether the highest or the lowest conversion rate" in the accepted range of 1.12 to 1.20 "is used to convert defendant's blood serum alcohol concentration into a whole blood equivalent, the results are all well above 0.08 — ranging from 0.129 to 0.138." *Heineman*, 2021 IL App (2d) 190689, ¶ 71. Indeed, even had defendant introduced expert testimony establishing "an inordinately favorable conversion factor" of 1.60, his whole blood alcohol concentration would have been 0.097 g/dl and thus over the lawful limit. *Id.* ¶ 72 (citing expert testimony described in *Luth*, 335 Ill. App. 3d at 177, 180).

Defendant also suggests that section 1286.40 creates an unconstitutional mandatory presumption, Def. Br. 18, but this argument is forfeited because he did not raise it in a post-trial motion. *Robinson*, 223 Ill. 2d at 173-74.

Forfeiture aside, defendant's argument is meritless, because section 1286.40 creates at most a permissive, not a mandatory, presumption, and

therefore presents no constitutional problem. *See Olsen*, 388 Ill. App. 3d at 717 ("the application of the 1.18 conversion factor is not a mandatory presumption, but rather a permissive presumption that the [trier of fact] need not accept"). "A presumption is a legal device that permits or directs the finder of fact to assume the existence of a presumed or ultimate fact once certain predicate or basic facts have been established." *People v. Watts*, 181 Ill. 2d 133, 141 (1998). A permissive presumption "is one where the fact finder is free to accept or reject the suggested presumption," whereas a mandatory presumption "is one where the fact finder is not free to reject the proffered presumption." *People v. Hester*, 131 Ill. 2d 91, 99-100 (1989) (citations omitted). As discussed, the jury was instructed that it could either accept or reject Fisher's testimony regarding the conversion factor, so it clearly was not a mandatory presumption. *See* C350. And for a permissive presumption to be valid, there need only be "a rational connection between the facts proved and the facts presumed." *Hester*, 131 Ill. 2d at 99 (citations and internal quotation marks omitted). The conversion factor selected by the Department of State Police is rationally based on the scientifically established range.

Accordingly, forfeiture aside, defendant's challenges to the propriety of the conversion factor selected by the Department fail.

C. Illinois law permitted the admission of the conversion factor through Fisher's testimony.

1. The conversion factor was properly introduced through Fisher's lay testimony.

Defendant's challenges to the admission of the conversion factor through Fisher's testimony are similarly misplaced. Fisher's lay testimony setting forth the conversion factor was properly admitted because it was based on his personal knowledge. Fisher did not assert any opinion regarding the scientific basis for or correctness of the conversion factor. But even if Fisher's recitation of a number contained in a regulation can be considered opinion testimony, it was admissible under Illinois Rule of Evidence 701. It therefore was not an abuse of discretion for the trial court to admit it.

As the appellate court recognized, Fisher's testimony did not assert any opinions, nor did it "stray into areas that required any scientific, technical, or other specialized knowledge[,]" such that an expert would be required. *Heineman*, 2021 IL App (2d) 190689, ¶¶ 73, 75. Fisher, the lead investigator in defendant's case, testified that he knew hospital staff had administered a blood serum alcohol concentration test to defendant. R1029-30, 1036. Based on his experience and training as a police officer, he testified that section 1286.40 set forth a conversion factor that governed the conversion of a blood serum test result into its whole blood equivalent. R1030, 1035. Fisher demonstrated his familiarity with this conversion factor

when he agreed that the number was part of a "mathematical formula for conversion of blood serum or blood plasma alcohol concentration to a whole blood equivalent" and explained that, in order to calculate defendant's whole blood equivalent, one must simply "divide the blood serum level, which in this case is .155, by 1.18 to get a [.]131." R1035. Fisher also stated that defendant's whole blood alcohol concentration of 0.131 g/dl exceeded the legal limit of 0.08 g/dl. *Id.* Nothing about this testimony required Fisher to state an opinion, much less offer an opinion based on scientific, technical, or other specialized knowledge.

Instead, Fisher's testimony was entirely based on his recollection of a public regulation that governed his investigation of defendant's conduct. Such lay testimony about the content of laws and regulations is commonly admitted in this jurisdiction and others. *See, e.g., People v. Ebert*, 401 Ill. App. 3d 958, 961, 965 (2d Dist. 2010) (police officer's testimony about administering Breathalyzer test demonstrated "substantial compliance" with regulation governing its use); *People v. Hall*, 2011 IL App (2d) 100262, ¶¶ 7, 11-12 (similar); *People v. Fonner*, 385 Ill. App. 3d 531, 534, 538-39, 543 (4th Dist. 2008) (similar); *Langenbau v. Med-Trans Corp*. 167 F. Supp. 3d 983, 1006 (N.D. Iowa 2016) (lay witnesses may "refer to the contents of regulations applicable to a regulated industry in which they work or which they were charged to comply with, if they have sufficient personal knowledge of the existence and contents of those regulations"); *Houston Aquarium, Inc.*

v. OSHRC, 965 F.3d 433, 438-39 (5th Cir. 2020) (compliance officer's testimony about standard, for purposes of establishing Aquarium's noncompliance with standard, was admissible lay testimony).

True, the conversion factor is ultimately derived from scientific studies. But the same is true of many testing devices that produce results about which police officers commonly testify. An officer may testify about his use of a device to measure a driver's rate of speed, *People v. Donohoo*, 54 Ill. App. 3d 375, 377-78 (5th Dist. 1977) (People are not required to introduce expert testimony on scientific accuracy of speed gun); *People v. Abdallah*, 82 Ill. App. 2d 312, 317 (1st Dist. 1967) (operator of radar instrument does not have to be expert in science underlying instrument to explain instrument's use), or a field test to determine the presence of a controlled substance, *People v. Harrison*, 26 Ill. 2d 377, 379-80 (1962) (police officers' testimony regarding positive result of field test was "competent evidence" of presence of narcotics); *People v. Vazquez*, 180 Ill. App. 3d 270, 277 (1st Dist. 1989) (police officer's testimony that he conducted field test that established presence of cocaine sufficient to prove substance was narcotic); *People v. $1,002.00 U.S. Currency*, 213 Ill. App. 3d 899, 902-04 (4th Dist. 1991) (testimony by police officers that they performed field test on substance that tested positive for heroin was sufficient to establish presence of controlled substance), or the administration of a roadside test to judge impairment, *People v. Buening*, 229 Ill. App. 3d 538, 545-46 (5th Dist. 1992) (police officer's testimony describing

administration of horizontal gaze nystagmus test was admissible to show evidence of intoxication). As these cases illustrate, a trial court does not err by admitting a lay witness's testimony even if it is based, in part, on the outcome of a scientific process.

Further undercutting defendant's contention that expert testimony is required to discuss the conversion factor is the fact that, as he concedes, *see* Def. Br. 15, 18-19, a trial court may take judicial notice of section 1286.40. Judicial notice may be taken only where a fact is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ill. R. Evid. 201. And as the appellate court noted in this case, if defendant were "correct in concluding that establishing the conversion factor requires expert testimony," a court could never take judicial notice of the conversion factor "because a judicially noticed fact must be 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Heineman*, 2021 IL App (2d) 190689, ¶ 75 (quoting Ill. R. Evid. 201(b)); *see also Abdallah*, 82 Ill. App. 2d at 317 (rejecting argument that expert testimony establishing the reliability of the Doppler principle was required and instead holding that a court may take judicial notice of that principle); *People v. Cash*, 103 Ill. App. 2d 20, 22 (5th Dist. 1968) (similar); *People v. Luna*, 2013 IL App (1st) 072253, ¶ 84 (holding

that a trial court may properly take "judicial notice of the general acceptance of the ACE-V [fingerprint identification] methodology" because of its widespread acceptance within the relevant scientific community). In other words, that, as defendant admits, section 1286.40's conversion factor is susceptible to judicial notice necessarily means that it is not a matter of opinion and thus expert testimony is not required for its admission. *See Thoman*, 329 Ill. App. 3d at 1220.

Finally, even if Fisher's testimony could be considered an opinion, as the dissent suggested, *Heineman*, 2021 IL App (2d) 190689, ¶¶ 108-09 (Brennan, J., dissenting), it still would be admissible under Illinois Rule of Evidence 701. Under that rule, lay opinion testimony that is not based on scientific, technical, or other specialized knowledge is admissible if it is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or to the determination of a fact in issue. Ill. R. Evid. 701; *see People v. Brown*, 200 Ill. App. 3d 566, 578 (1st Dist. 1990) (citation omitted). Illinois courts have repeatedly upheld the admission of lay opinion testimony where these requirements are met. *See, e.g., People v. Jaynes*, 2014 IL App (5th) 120048, ¶¶ 51-53 (detective's testimony about the similarities of handwritten letters properly admitted into evidence); *People v. Taylor*, 2013 IL App (1st) 110166, ¶¶ 20-22 (officer's testimony about whether a bulletproof vest was made with ballistic material properly admitted into evidence); *People v. Richardson*, 2013 IL App (2d)

120119, ¶¶ 11-23 (similar).

Fisher's testimony satisfied the requirements of Rule 701. His recitation of a number contained in a public regulation and his subsequent use of that number in an elementary mathematic equation was not based on any scientific, technical, or other specialized knowledge — any more so than an officer's opinion that someone was driving at speeds exceeding the posted limit. Fisher did not rely on the science underlying the regulation, and there is no question that such testimony was helpful to the jury. Accordingly, even if Fisher's testimony could be characterized as lay opinion testimony, the trial court did not abuse its discretion admitting it.

2. Fisher's testimony was non-hearsay.

Nor was Fisher's testimony "incompetent hearsay." *See* Def. Br. 17, Fisher's testimony reciting the contents of section 1286.40 is categorically non-hearsay. R1035. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c). A "statement" for purposes of the hearsay rule is "an oral or written assertion . . . or nonverbal conduct of a person, if it is intended by the person as an assertion"; a "declarant" is "a person who makes a statement." Ill. R. Evid. 801(a), (b). As the appellate court explained, "information in a statute or regulation is not hearsay because neither the legislature nor an executive branch state agency authorized to implement the statute is a 'person' or

'declarant.'" *Heineman*, 2021 IL App (2d) 190689, ¶ 64; *accord, e.g.*, *Aubert v. Elijah*, No. 07 C 1629, 2013 U.S. Dist. LEXIS 156527, at *7 (E.D. Cal. Oct. 30, 2013) ("Laws are not hearsay, because they are not assertions of anything. Therefore, State Regulations are not inadmissible as hearsay."); *Beck v. Shinseki*, No. 13 C 126, 2015 U.S. Dist. LEXIS 32053, at *32 n.16 (S.D. Ga. Mar. 16, 2015) ("[A] statute is not hearsay; it is not assertive.").

Fisher's testimony about how one would apply the conversion factor — by dividing defendant's blood serum alcohol concentration value (0.155 g/dl) by the conversion factor (1.18), to obtain the whole blood equivalent (0.131 g/dl), R1035 — is likewise non-hearsay. *See Carter v. Douma*, 796 F.3d 726, 735 (7th Cir. 2015) (testimony that describes verbal acts or instructions is not hearsay); *United States v. Moreno*, 233 F.3d 937, 940 (7th Cir. 2000) ("statements that . . . carry legal significance independent of the assertive content of the words used" are not inadmissible hearsay). Thus, the appellate court correctly rejected defendant's argument that Fisher's testimony was inadmissible hearsay. *Heineman*, 2021 IL App (2d) 190689, ¶ 64.

II. The Evidence Sufficed for a Rational Jury to Convict Defendant on Count I.

Because Fisher's testimony was properly admitted, the evidence plainly sufficed to convict defendant of driving a vehicle with a whole blood alcohol concentration of 0.08 g/dl or greater (Count I). Defendant's sufficiency challenge therefore fails.

Evidence is constitutionally sufficient if, construing it in the light most favorable to the prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). Under this standard, "a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume[ ] . . . that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *McDaniel v. Brown*, 558 U.S. 120, 133 (2010) (quoting *Jackson*, 443 U.S. at 326).

Here, a rational jury could convict defendant of aggravated DUI for operating a vehicle with a whole blood alcohol concentration of 0.08 g/dl or greater, which resulted in the crash that killed McDonough. As discussed in Section I.C, *supra*, Fisher's lay testimony was properly admitted. And a rational juror could credit that testimony. Fisher's testimony accurately set forth the conversion factor provided by section 1286.40, and his use of that number in a simple mathematical equation showed that defendant's whole blood alcohol concentration exceeded the lawful limit. Since the trial court acted within its discretion to admit Fisher's testimony, "it follows that defendant's sufficiency-of-the-evidence argument is without merit." *Olsen*, 388 Ill. App. 3d at 719.

This Court should reject defendant's request to "adopt the holding of *Thoman*" in resolving his sufficiency challenge. Def. Br. 21. In *Thoman*, the People introduced a blood serum alcohol concentration test but failed to

introduce *any* evidence of the defendant's whole blood alcohol concentration, and the appellate court held that the People failed to prove "an essential element of the charge of driving with a[whole blood alcohol] concentration of 0.08 or more." 329 Ill. App. 3d at 1220. Here, by contrast, the People presented evidence of defendant's whole blood alcohol concentration via Fisher's testimony regarding conversion of the blood serum alcohol concentration to the whole blood equivalent. *Thoman* is therefore inapposite.

III. Should This Court Find Fisher's Testimony Was Admitted in Error, It Should Remand for Imposition of a Sentence on Count II, or, Alternatively, for a New Trial on Both Counts.

If this Court holds that the trial court erred by admitting Fisher's testimony about the conversion factor, the Court should vacate defendant's conviction on Count I and remand for imposition of a sentence Count II, which was unaffected by any error. Alternatively, if this Court finds that both counts must be vacated, it should remand for a new trial on both counts.

A. If this Court finds that Fisher's testimony was admitted in error, it should vacate defendant's conviction on Count I and remand for imposition of a sentence on Count II, which was unaffected by any error.

The trial court merged Count II into Count I and imposed a sentence solely on Count I. C441. If this Court determines that Fisher's testimony was admitted in error, it should vacate defendant's conviction on Count I and remand for imposition of a sentence on Count II. Contrary to defendant's argument, any error in admitting Fisher's testimony would not entitle him to

a retrial on Count II, because the People overwhelmingly proved that count through other evidence.

When evidence is admitted in error, this Court must determine "whether, in spite of that error, evidence of defendant's guilt was so clear and convincing as to render the error harmless beyond a reasonable doubt." *People v. Dennis*, 181 Ill. 2d 87, 95-96 (1998).

Here, any error in admitting testimony concerning the conversion factor was harmless as to Count II because other evidence overwhelmingly established that defendant drove and crashed his vehicle (causing the victim's death) while "under the influence of alcohol," *see* 625 ILCS 5/11-501(a)(2). *People v. Sims*, 192 Ill. 2d 592, 628 (2000) (erroneous admission of testimony harmless where evidence of guilt was overwhelming).

To begin, extensive testimony established that defendant was drunk before and after crashing his Jeep. Five witnesses testified that they saw defendant drinking during the hours leading up to the fatal accident. Specifically, Justin and Michelle Moberg saw defendant drinking several "very tall glass[es]" containing a "50-50 mix" of Jack Daniels and Coke and consuming "pretty strong" Jell-O shots. R561, 576, 587-90. Courtney and Valez similarly saw defendant drinking alcohol. R623, 664. Defendant also displayed obvious signs of intoxication: he had "glassy" eyes and was "very outspoken," "annoying," and "[g]iddy," which was uncharacteristic given his ordinarily "quiet[] demeanor." R590-92, 631, 638-39, 666. Both Rice and

Michelle, who had observed many drunk individuals during her 20-year experience as a bartender, opined that defendant was drunk at the party. R590, 638-39.

Later, at approximately 3 a.m., defendant acknowledged to a concerned Justin, Michelle, and Rice that he had been in an accident but could not describe his location. R565, 567, 595, 597, 604. He had no idea who was in the vehicle with him, R565, 595-96, and he was unable to activate the location feature on his phone; instead, he joked with the concerned callers about watching pornography. R597, 636. This was further evidence that defendant was intoxicated at the time of the accident.

Indeed, defendant was still drunk hours after the accident. When emergency personnel arrived at the scene of the accident at around 6 a.m., defendant appeared "confused" and could not describe what had happened or how he came to be at the accident scene. R542, 545, 945. He seemed unaware of or unconcerned about McDonough's lifeless body, which displayed clear signs of extensive trauma and was found only 20 to 30 yards away from where he stood. *See* R540-41, 543. And although Officer Hintz did not detect the odor of alcohol on defendant's breath, he acknowledged that he had only a "very limited conversation" with him at accident scene, R961, and defendant agreed with him that "nobody should have been driving" that night, R944-45.

Defendant was then transported to a hospital, where, Dr. Reddy testified, he appeared, in her "clinical opinion," to be "intoxicated." R1027.

And Bolanowski, who drew defendant's blood, could smell alcohol on his breath. R691. Defendant's test result revealed a blood serum alcohol concentration of 0.155g/dl,[3] which both Bolanowski and Reddy considered to be an "elevated level" consistent with intoxication. R690-91, 1016.

After defendant's blood was drawn, he was interviewed at the hospital by Officer Zumwalt, who noted that defendant's speech was "thick-tongued" and "cotton mouth[ed]," and his eyes were "glassy and bloodshot." R743. During that interview, defendant admitted that he had consumed several glasses of Jack Daniels and Coke, and Jell-O shots. *Id*.

The evidence also overwhelmingly established that defendant was driving the Jeep when it crashed. Justin observed defendant drive his Jeep throughout the evening, including one instance where he ran over two "decent size[d] trees" on the side of the road. R562-63, 565, 576. Courtney and Valez testified that McDonough never drove because she was fearful of operating a vehicle. R623, 667. And defendant admitted that he did not permit anyone else to drive his Jeep; he even hid his keys before the party started. R744. Defendant's injuries also were consistent with this evidence

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[3] To the extent defendant argues that he was prejudiced by the permissive presumption in IPI 23.30, *see* Def. Br. 25, which instructed the jury that it "may presume" defendant was under the influence of alcohol if his blood alcohol concentration "was 0.08 or more," C363, his contention is meritless. Defendant's blood serum alcohol concentration was nearly double the legal limit; thus, this Court can infer that the presumption played no role in the jury's finding of defendant's guilt on Count II, especially in light of the other evidence overwhelmingly showing defendant was under the influence of alcohol.

showing that he was the Jeep's driver at the time of the accident: he had bruising and redness on his right hip and left collarbone, where the driver's seat belt would have restrained him. R720-21, 1023-24.

Considering this weighty evidence, which includes the testimony of multiple witnesses, forensic evidence, and defendant's own statements to law enforcement and emergency personnel, there was no reasonable probability that the jury would have acquitted defendant of Count II had Fisher's testimony not been admitted. In other words, the admission of Fisher's testimony did not prejudice defendant with respect to Count II because it was cumulative of the other evidence showing he was driving under the influence of alcohol. *See Nassar v. County of Cook*, 333 Ill. App. 3d 289, 303-04 (1st Dist. 2002) (finding no prejudice where allegedly inadmissible testimony elicited during adverse examination of defendant was cumulative of previously introduced testimony). Accordingly, should this Court find that it was error to admit Fisher's testimony, it should remand this matter to the trial court so defendant can be sentenced on Count II.

B. In the alternative, should this Court reverse both of defendant's convictions, it should remand for retrial on both counts.

If this Court were to vacate both of defendant's convictions, it should remand for a new trial on both counts. Defendant's suggestion that a retrial should be barred on Count I lacks merit.

Double jeopardy principles permit a retrial where the evidence at the first trial was sufficient to prove defendant's guilt. *See*, *e.g.*, *People v. Drake*, 2019 IL 123734, ¶¶ 1, 21. Under a double jeopardy analysis, this Court must consider *all* of the trial evidence, including evidence admitted in error. *Id.* ¶ 28; *People v. Lopez*, 229 Ill. 2d 322, 367 (2008); *see also Lockhart v. Nelson*, 488 U.S. 33, 40-41 (1988); *People v. Olivera*, 164 Ill. 2d 382, 393-94 (1995). Consequently, a "retrial is permitted even though evidence is insufficient to sustain a verdict once erroneously admitted evidence has been discounted." *Olivera*, 164 Ill. 2d at 393.

Under this well-established rule, when determining whether defendant may be subject to retrial, this Court must consider Fisher's unrebutted testimony establishing that defendant's whole blood alcohol concentration exceeded the legal limit. Given that testimony, the evidence was sufficient, *see supra*, Section II, and double jeopardy does not bar a retrial.

CONCLUSION

This Court should affirm the appellate court's judgment. If this Court finds Fisher's testimony was admitted in error and overturns defendant's conviction on Count I, it should remand for imposition of a sentence on Count II. Should this Court overturn both of defendant's convictions, then it should remand for a retrial on both counts.

July 13, 2022

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RULE 341(c) CERTIFICATE

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) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 36 pages.

/s/ Alasdair Whitney
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CERTIFICATE 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 July 13, 2022, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which automatically served notice on counsel at the following e-mail address:

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