

NO. 25-373

DISTRICT 3

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

v.

BRANDON JOSEPH CREIGHTON

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From Pitt County

DEFENDANT-APPELLANT'S BRIEF

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DEFENDANT-APPELLANT'S BRIEF

ISSUES PRESENTED

- I. DID THE TRIAL COURT VIOLATE MR. CREIGHTON'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT ALLOWED A SUBSTITUTE ANALYST TO TESTIFY ABOUT THE RESULTS OF A BLOOD ALCOHOL TEST PERFORMED BY A NON-TESTIFYING ANALYST?
- II. DID THE TRIAL COURT PLAINLY ERR BY NOT INSTRUCTING THE JURY ON THE INTERVENING NEGLIGENCE OF ARIANA KING?
- III. DID THE TRIAL COURT ERR BY DENYING MR. CREIGHTON'S MOTION TO DISMISS THE CHARGES OF FELONY DEATH BY VEHICLE AND FELONY SERIOUS INJURY BY VEHICLE FOR INSUFFICIENCY OF THE EVIDENCE?

STATEMENT OF THE CASE

Mr. Creighton was charged with felony serious injury by vehicle in 23CRS1163. In 23CRS284161, he was charged with driving while impaired, reckless driving, exceeding a safe speed, and failure to maintain lane control. He was charged with felony death by vehicle in 23CRS284168. The indictments allege the offenses occurred on 17 April 2023. (R pp 2–7).

On 15 April 2024, Mr. Creighton was tried before the Honorable Marvin K. Blount, III, Judge of Superior Court, and a jury. The court dismissed the charge of exceeding a safe speed in 23CRS284161. (T Vol. 5 p 683). The jury returned verdicts finding Mr. Creighton guilty of the remaining charges. (T Vol. 5 pp 763–65; R pp 12–15).

On 25 April 2024, Judge Blount sentenced Mr. Creighton to imprisonment for a minimum of 64 months and a maximum of 89 months in case 23CRS284168, felony death by vehicle. He imposed a consecutive sentence of a minimum of 16 months and a maximum of 29 months in case 23CRS1163, felony serious injury by vehicle. In case 23CRS284161, the court arrested judgment upon the conviction of driving while impaired, consolidated the reckless driving and failure to maintain lane control convictions, and imposed a probationary sentence of 45 days consecutive to the sentence in 23CRS1163. (T Vol. 6 pp 787–88; R pp 18–24).

Mr. Creighton gave oral notice of appeal in open court on 25 April 2023 and filed a written notice of appeal the same day. (T Vol. 6 pp 788–894; R p 27).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Defendant appeals from a final judgment of the Superior Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) and N.C. Gen. Stat. § 15A-1444(a).

STATEMENT OF FACTS

A. *Overview.*

This matter arose from a multiple-vehicle traffic accident on US Highway 264 in Pitt County, North Carolina. Highway 264 is a dual-lane highway with two northbound lanes and two southbound lanes separated by a grass median.

Mr. Creighton's car and a pickup truck operated by Ariana King collided while traveling in the northbound lanes of Hwy 264. The collision caused Ms. King's truck to cross the median where it collided with a southbound vehicle operated by Gene Herring. Mr. Herring suffered serious injuries. His passenger, Delores Pearce, was killed.

The disputed factual issues at trial revolved around whether Mr. Creighton was driving while impaired and the proximate cause of the collision.

B. *Ariana King's testimony about the collision.*

Ms. King was nineteen when she testified. She testified that on 17 April 2023, she was driving her boyfriend's pickup truck on her way to pick him up from work. She recalled seeing Mr. Creighton's car at the intersection as they turned onto Hwy 264. She testified he was driving "a little erratically." (T Vol. 4 pp 505–508).

Ms. King testified that as she and Mr. Creighton turned onto Hwy 264, he was in the "inside" lane, and she was in the "outside" lane. However, shortly after the turn, she moved to the inside lane, and he moved over to the outside lane. After that, she had little memory of what happened before the accident. She recalled seeing Mr. Creighton's car out of her passenger side window "getting a little bit closer," so she tried to "move over a little bit." She testified there "was really nothing that I could have done in that moment and I lost control of the truck and veered off." She remembered flipping over a couple of times and landing upside down. (T Vol 4 pp 509-10).

Ms. King testified she saw the front part of Creighton's car near where the driver's window was when the accident happened. She did not know whether their vehicles were even with each other or side-by-side and did not see any vehicle try to merge in front of her. (T Vol. 4 p 511).

Ms. King testified she was speeding but did not know how fast. She

thought she told the police she was driving below 70 miles per hour. She could not remember if she had her accelerator pedal pressed to the floor or if she was traveling close to 90 miles per hour at the time of the accident. (T Vol. 4 pp 509, 513, 515–16, 520–21).

Trooper Smith testified that Ms. King told him she was going 60 to 62 miles per hour at the time of the accident. (T Vol. 3 pp 319-20). The State's reconstruction expert, David Emory, testified that the event data recorder from Ms. King's truck showed speeds between 80 and 90 miles per hour in the five seconds before and during the crash with her accelerator at "100 percent" meaning "all the way to the floor." (T Vol. 4 pp 465–66, 479– 82). Mr. Creighton's expert, Johnnie Hennings, agreed that Ms. King's truck data recorder showed speeds between 81 and 90 miles per hour during the five seconds leading into the collision with her accelerator at "100 percent." (T Vol. 5 pp 633–35).

C. *Mr. Creighton's testimony about the collision.*

Mr. Creighton testified that he was driving from his home to his cousin's home on the day of the accident. He recalled seeing Ms. King's truck behind him in the right lane at the intersection where they turned onto 264. He testified he initially went 45 miles per hour, then increased his speed to 62 and set his cruise control when he reached the 55 mph zone.

Mr. Creighton testified that as he approached the accident area, a fire truck ahead of him was slowing to make a turn, so he merged into the left or “fast” lane, increasing his speed as he did so. He testified he checked his side mirror before merging and saw no vehicle in the lane. He testified his car had “blind spot detection” and the warning indicator was not blinking. (T Vol. 4 pp 544–48). As he merged into the lane, he heard or felt a thud or pop. His car turned sideways, and he quickly saw the grill of a vehicle. His airbag deployed, and his car began flipping. Mr. Creighton testified he believed he was entirely in the left lane when he heard the thud or pop. (T Vol. 4 pp 544–549).

Trooper Smith testified Mr. Creighton reported his speed as 62 mph at the time of the accident. (T Vol. 3 p 299). The State’s expert testified that the data recorder from Mr. Creighton’s car showed a speed of 75 mph seven seconds before its airbag deployed, then 78 mph and as high as 84 mph before going down to 66 mph as the last recorded speed. (T Vol. 4 pp 463–65, Mr. Creighton’s reconstruction expert testified that when Ms. King’s and Mr. Creighton’s vehicles collided, his car was traveling around 84 mph. (T Vol. 5 pp 657–58).

D. *Testimony by uninvolved witnesses.*

Mark Wilson testified that he was at a stop sign on Marine Drive,

waiting to pull onto Hwy 264. He testified that it appeared to him that Mr. Creighton's car clipped the front end of Ms. King's truck, and both vehicles then went through the median. (T Vol. 2 pp 93–94). A surveillance video from a camera at Mr. Wilson's business captured part of the accident and was admitted as evidence. (T Vol. 2 pp 102–04, 191; State's Exhibit 3).

Raymond Virgo testified that he was in his car on Hwy 264 when he heard a noise like something hit something. He turned and saw a car airborne, cutting through trees, and wondered what made the car fly through the air like that. He also saw Ms. King's pickup truck, which he "guess[ed]" was clipped by Mr. Creighton's vehicle. (T Vol. 2 pp 110–11). In a written statement, Mr. Virgo said he saw Mr. Creighton's car hit Ms. King's truck. (T Vol. 2 pp 122–23). On cross-examination, Mr. Virgo agreed he heard a noise, turned, and saw Mr. Creighton's car in the air. After that, he turned further and saw Ms. King's truck. (T Vol. 2 pp 125–26).

E. *Conflicting Experts.*

Trooper David Emory testified for the State as an expert in accident reconstruction and CDR analysis. (T Vol. 4 p 448). He opined that Mr. Creighton caused the accident by coming over onto Ms. King's truck. (T Vol. 4 pp 477–78). During cross-examination, Trooper Emory admitted that the accident reconstructionist who authored the State's reconstruction report,

Trooper L.A. Peele, concluded that Ms. King attempted to change lanes and sideswiped Mr. Creighton. (T Vol. 4 pp 487–89).

Johnnie Hennings, a forensic engineer, testified for Mr. Creighton as an expert in accident reconstruction, accident analysis, and EDR analysis. (T Vol. 4 pp 603, 606). He opined that Mr. Creighton's car was mostly or completely established in the left lane, and Ms. King's truck came from left to right and struck Mr. Creighton's car. He opined that Ms. King's truck had been moving to the right for roughly 300 feet before the accident, and at its speed, it would have covered that distance and arrived at the point of impact in 2.3 seconds. (T Vol. 5 pp 641–442, 648, 651–52).

F. Opinions about whether Mr. Creighton was impaired.

Troopers Smith and Akers responded to the accident. Both testified to their opinion that Mr. Creighton was impaired. (T Vol. 3 pp 287, 367).

Mr. Creighton testified he had nothing to drink since approximately midnight and was not impaired. (T Vol 4 pp 545, 567, 570, 572–73). Melissa Stalls testified she saw Mr. Creighton while he was getting ready to take their son to therapy the morning of the accident and he showed no signs of impairment. (T Vol. 4 pp 587– 90). Brian Ankum testified when Mr. Creighton left his house at around 10:30 the night before the accident he was not impaired. (T Vol. 4 pp 596–98).

G. *Substitute Analyst Testimony.*

The State did not attempt to secure the presence and testimony of Analyst Naik, who performed the blood alcohol test in this matter. Instead, the State notified Mr. Creighton before trial that it would have a substitute analyst testify instead of Naik. (T Vol. 1 pp 5–8, T Vol. 3 pp 394–95). Mr. Creighton objected on Confrontation Clause grounds before trial. (R pp 9–10). The trial court deferred ruling on the issue until substitute Analyst O’Connell was called to testify. (T Vol. 1 p 7).

1. *Substitute Analyst O’Connell’s Voir Dire.*

Analyst O’Connell testified on voir dire that she reviewed Analyst Naik’s case file and Naik’s conclusions and analysis. (T Vol. 3 pp 395–98). She testified that an analyst performing a blood alcohol analysis would take the following steps:

- (1) take custody of the evidence;
- (2) take replicant samplings of that evidence with a set of quality control samples;
- (3) ensure that the instrument is prepared to run for that day and passes the initial set of quality controls before any cases are run.
- (4) prep the instrument to run the quality controls plus case samples.
- (5) pull the data from the instrument and upload it to the case files;

- (6) generate a quality control packet of the controls and everything that was run showing the instrument was working properly;
- (7) generate a worksheet on their findings based on the data;
- (8) from their worksheet, generate a report and put the case into review for administrative and technical review by another analyst. (T Vol. 3 pp 400–01).

Analyst O’Connell testified she did not perform or observe any of these steps herself, did not conduct any independent test, and was not present when Analyst Naik tested the blood sample in this case. (T Vol. 3 pp 401–02).

The trial court ruled Analyst O’Connell’s testimony would be admitted. (T Vol. 3 p 403).

2. *Substitute Analyst O’Connell’s testimony before the jury.*

Before the jury, Analyst O’Connell testified she was a forensic chemist at the North Carolina State Crime Laboratory and Analyst Naik’s supervisor. (T Vol. 4 pp 409, 422). Over Mr. Creighton’s objections, O’Connell testified the Crime Laboratory received a blood sample “associated with” Mr. Creighton. She testified the sample was placed in a refrigerator in the evidence control vault, and removed from the vault by someone to take it to the toxicology floor where it was placed in a secure refrigerator. The sample was then removed to open the kit and remove the tubes of blood. Next, the sample was assigned to

someone to be analyzed and was moved to a in-process refrigerator, where the analyst then removed the evidence to do the analysis. She testified she did not participate in or observe any of these steps. (T Vol. 4 pp 421–22, 434–35).

Analyst O’Connell testified that she reviewed the data, the chain of custody, all quality controls, and anything associated with the instrument related to this case. She testified she had no reason to believe Analyst Naik did not follow crime laboratory procedures. (T Vol. 4 pp 423–25). She testified that an unidentified analyst reviewed the setup and placement of the samples on the instrumentation to make sure that they were correct. She testified another unidentified analyst conducted the technical and administrative review after Naik’s report was generated. (T Vol. 4 pp 427–28).

Analyst O’Connell testified that she reviewed a graphical “headspace GC” printout contained in the case file and used an in-house form to import the alcohol numbers from that data to get an average of the alcohol that was present in the case. O’Connell testified she formed her “own independent opinion about the testing conducted of the blood sample from Mr. Brandon Joseph Creighton . . . by analyzing the data that was included in the case file.” (T Vol. 4 p 426, 430).

Analyst O’Connell testified that she reviewed Analyst Naik’s report and agreed with her findings. Analyst Naik’s report was admitted into evidence

over objection. O'Connell testified it showed Mr. Creighton's blood alcohol concentration was 0.20 grams of alcohol per hundred milliliters. (T Vol. 4 pp 430–33; R p 47).

H. *Mr. Creighton's motions to dismiss.*

Mr. Creighton moved to dismiss at the close of the State's evidence and renewed his motion at the close of all the evidence. The court denied his motions. (T Vol. 4 pp 535, Vol. 5 p 675–76).

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. CREIGHTON'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WHEN IT ALLOWED A SUBSTITUTE ANALYST TO TESTIFY ABOUT THE RESULTS OF A BLOOD ALCOHOL TEST PERFORMED BY A NON-TESTIFYING ANALYST.

A. *Standard of Review.*

Alleged violations of constitutional rights are reviewed de novo. *State v. Garner*, 252 N.C. App. 393, 400, 798 S.E.2d 755, 760 (2017). On de novo review, the court considers the matter anew and freely substitutes its judgment for that of the trial court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

B. *Preservation of Issue.*

Mr. Creighton filed notices and a motion before trial objecting to testimony at trial about a blood alcohol test of Mr. Creighton's blood by an

analyst who did not perform the test. (R pp 8–10). At trial, Mr. Creighton objected to the testimony of Analyst O’Connell about a blood alcohol test performed by Analyst Naik. Mr. Creighton asserted such testimony violated his rights under the Sixth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution. (T Vol. 3 p 393). The trial court denied Mr. Creighton’s motion. (T Vol. 3 p 403). Mr. Creighton renewed his objection before the jury. (T Vol. 4 pp 413–16, 418, 420–21, 423–33, 440–41). Mr. Creighton preserved this issue for appellate review.

C. *Argument.*

1. *Applicable Law.*

In *Smith v. Arizona*, the United States Supreme Court held:

A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them.

Smith v. Arizona, 602 U.S. 779, 802–03 (2024) (internal citations omitted).

Smith recognized that the Confrontation Clause applies only to testimonial hearsay, an out-of-court statement offered for its truth. A

statement is testimonial if, given all the relevant circumstances, the principal reason it was made, its “primary purpose,” was focused on a future use in court. *Id.* at 800–02; *see also*, *State v. Craven*, 367 N.C. 51, 57, 744 S.E.2d 458, 461 (2013) (citation omitted) (holding lab reports created solely for an evidentiary purpose made to aid a police investigation were testimonial).

Before *Smith*, our Supreme Court held that the Sixth Amendment’s Confrontation Clause was not violated when an expert witness testified relying upon another analyst’s statements as the basis for their opinion. *State v. Ortiz-Zape*, 367 N.C. 1, 8–9, 743 S.E.2d 156, 161–62 (2013). *Smith* rejected that view, explicitly holding that a State may not introduce the testimonial out-of-court statements of a forensic analyst through a surrogate analyst who did not participate in their creation, even if they are presented as the basis for the surrogate expert opinion. *Smith v. Arizona*, 602 U.S. 779, 802–03 (2024).

Thus far, this Court has considered one case since *Smith v. Arizona* involving a substitute analyst’s testimony. In *State v. Clark*, a substitute analyst opined that a substance was methamphetamine. He based his opinion upon statements made by a non-testifying analyst in her lab report. He never performed any testing on the substance himself. *State v. Clark*, 909 S.E.2d 566, 567, (N.C. Ct. App. 2024), *temp. stay allowed*, No. 323P24-1, 909 S.E.2d

323 (N.C. 2024). The lab report itself was not introduced. *Id.* at 568.

This Court held in *Clark* that the non-testifying analyst's statements introduced through the substitute analyst were testimonial hearsay and, under *Smith*, the trial court erred by admitting them. *Id.* at 570–71.

2. *The trial court allowed the State to introduce testimonial hearsay through Substitute Analyst O'Connell in violation of Mr. Creighton's constitutional right to confront the witnesses against him.*

“If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts.” *Smith v. Arizona*, 602 U.S. 779, 795 (2024). Substitute Analyst O'Connell testified to out-of-court statements by Analyst Naik. The statements would only support O'Connell's opinion if they were true.

O'Connell testified to Naik's statements that she received Mr. Creighton's unaltered blood sample, tested it using accepted scientific methods and procedures, and obtained a test result showing the sample had a blood ethanol concentration of 0.20 grams of alcohol per hundred milliliters of blood.

O'Connell did not participate in or observe any step of Naik's testing. (T Vol. 4 pp 400–02, 423, 434–35). Nonetheless, she testified to Naik's statements:

1. that she received Creighton's blood sample (T Vol. 4 pp 420–24);
2. that she followed testing procedures and practices reasonably relied upon by experts in the field (T Vol. 4 pp 424–27);
3. that two unidentified analysts reviewed her work (T Vol. 4 pp 426–28);
4. that she obtained a test result showing that Creighton's blood sample contained a blood alcohol concentration of 0.20 grams of alcohol per hundred milliliters of blood. (T Vol. 4 pp 429–33).

Here, to paraphrase *Smith v. Arizona*, “the jury could credit”

O'Connell's opinion that Creighton's blood alcohol concentration was .20 only because it accepted the truth of what Naik reported about her lab work (as conveyed by O'Connell. If Naik had lied about all those matters, O'Connell's expert opinion would have counted for nothing. See *Smith v. Arizona*, 602 U.S. 779, 798 (2024).

Moreover, not only was O'Connell allowed to testify to Naik's factual statements, Naik's report itself was admitted into evidence. The report contained her factual statements that she was a chemical analyst duly authorized to analyze a person's blood to determine the blood alcohol concentration of an impairing substance, had a permit to do so, analyzed Creighton's blood by methods approved by the North Carolina State Crime

Laboratory and the Department of Health and Human Services, and determined that Creighton's blood alcohol concentration was .20 per hundred milliliters using "HS-GC." (T Vol. 4 p 432; R p 47).

The testimony of the substitute analyst the Supreme Court found was offered for its truth in *Smith v. Arizona* is very similar to O'Connell's testimony here. The substitute analyst in *Smith* did not perform any independent tests. He was familiar with the lab's general practices but had no personal knowledge about the analyst's testing of the seized items. What he knew came only from reviewing the records of the analyst who performed the tests. *Smith v. Arizona*, 602 U.S. 779, 796 (2024).

Like the substitute analyst in *Smith*, O'Connell did not perform any independent tests. She was familiar with the lab's general practices but had no personal knowledge about Naik's testing of the blood sample. What she knew came only from reviewing Naik's records.

Here, O'Connell's opinion was predicated on the truth of the statements that Naik received Creighton's blood sample transferred to her by multiple hands, tested it following certain protocols, and obtained a certain result. All of this information relied upon the truth of Naik's statements. Naik's statements were hearsay offered for its truth.

Naik's report was testimonial hearsay. The primary purpose of Naik's

testing and her report was to create evidence for use at Mr. Creighton's trial. Her lab report states it is only to be used in connection with an official criminal investigation. She sent her report to the District Attorney. Her report references N.C.G.S. § 20-131.1(c1), the statute addressing the admissibility of a chemical analysis of blood in court. (R p 47).

Analyst Naik's report, expressly prepared for a criminal investigation to produce evidence for court, was testimonial.

The trial court's admission of O'Connell's testimony and Naik's report was error and violated Mr. Creighton's constitutional right to confront the witnesses against him.

3. *The State cannot show that the violation of Mr. Creighton's constitutional confrontation right was harmless beyond a reasonable doubt.*

The State has the burden to show the trial court's rulings that violated Mr. Creighton's constitutional rights were harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b). The State must show there is no possibility that the erroneous admission of substitute analyst O'Connell's testimony and analyst Naik's lab report might have contributed to Mr. Creighton's conviction. *See State v. Hooper*, 318 N.C. 680, 682, 351 S.E.2d 286, 288 (1987) (citation omitted). The State cannot do so.

A person commits felony death by vehicle if they: (1) unintentionally

cause the death of another person (2) were engaged in the offense of impaired driving, and (3) the commission of the offense of impaired driving is a proximate cause of the death. N.C. Gen. Stat. § 20-141.4(a1)(1)–(3) (2023). *State v. Moody*, 911 S.E.2d 96, 101 (2024).

Felony serious injury by vehicle requires proof of a serious injury while the defendant was engaged in the offense of impaired driving which was a proximate cause of the injury. N.C. Gen. Stat. § 20-141.4(a3)(1–3) (2023).

To convict Mr. Creighton of driving while impaired under N.C.G.S. 20-138.1 the State had to prove that Mr. Creighton drove while under the influence of an impairing substance or, that he was driving after having consumed sufficient alcohol that he had, at any relevant time after the driving, an alcohol concentration of 0.08 or more. N.C. Gen. Stat. § 20-138.1(a). The statute provides that the results of a chemical analysis are sufficient evidence to prove a person’s alcohol concentration. *Id.*

It is impossible to know which prong of N.C.G.S. Section 20-138.1 the jury relied upon to convict Mr. Creighton of driving while impaired. However, had the trial court excluded substitute analyst O’Connell’s testimony, the blood test results would not have been before the jury. The jury would have had to rely solely upon the appreciable impairment prong of N.C.G.S. Section 20-138.1. The evidence of appreciable impairment was sharply conflicting.

Troopers Smith and Akers both testified that, in their opinion, Mr. Creighton was impaired.

Mr. Creighton testified he had nothing to drink since approximately midnight and was not impaired. (T Vol 4 pp 545, 567, 570, 572–73). Melissa Stalls testified she saw Mr. Creighton while he was getting ready to take their son to therapy the morning of the accident, and he showed no signs of impairment. (T Vol. 4 pp 587– 90). Brian Ankum testified that Mr. Creighton was not impaired when he left his house at around 10:30 the night before the accident. (T Vol. 4 pp 596–98). Thus, it is impossible to know whether the jury would have convicted Mr. Creighton of driving while impaired had his blood test results not been improperly admitted.

Moreover, even if the jury found Mr. Creighton was guilty of driving while impaired under the appreciable impairment prong of N.C.G.S. Section 20-138.1, the improperly admitted blood test results may have affected the jury's determination of whether his impairment was a proximate cause of the accident.

Lay witnesses did not definitively resolve the proximate cause of the accident. Ms. King and Mr. Creighton each testified that the other caused the accident. Mark Wilson testified it “appeared” to him that Mr. Creighton's car struck Ms. King's truck. Raymond Virgo testified he first saw Mr. Creighton's

car airborne — thus after the collision occurred.

Three experts disagreed on proximate cause. David Emory, the State's reconstruction expert opined that Mr. Creighton caused the accident by "coming over onto Ms. King's truck." (T Vol. 4 pp 477–78). However, during cross-examination he admitted the State's reconstructionist who wrote the report, Trooper Peele, reached the opposite conclusion. Trooper Peele concluded that Ms. King attempted to change lanes and sideswiped Mr. Creighton. (T Vol. 4 pp 487–89). Johnnie Hennings, Mr. Creighton's reconstruction expert, opined that Ms. King caused the accident by coming up from behind Mr. Creighton at approximately 90 mph and striking Mr. Creighton after he was mostly or completely established in the left lane. Notably, he opined that Ms. King had been moving to the right for roughly 300 feet before the accident and, at her speed, she would have covered that distance and arrived at the point of impact in 2.3 seconds. (T Vol. 5 pp 641–442, 648, 651–52).

Mr. Creighton testified he checked his mirror and saw the lane clear when he moved into the left lane. He could not have seen a truck 300 feet behind him — the length of a football field — or known that Ms. King had pinned her accelerator to the floor, was approaching at nearly 90 mph, and would be at his position in just 2.3 seconds.

Improper admission of Mr. Creighton's blood test results showing a high blood alcohol concentration may have influenced the jury decision that his impairment was a proximate cause of the accident. It cannot be said beyond a reasonable doubt that it did not.

Mr. Creighton was prejudiced by the denial of his constitutional right to confront the witnesses against him where there was conflicting evidence about both whether he was impaired and, if so, whether his impairment was a proximate cause of the accident.

II. THE TRIAL COURT PLAINLY ERRED BY NOT INSTRUCTING THE JURY ON THE INTERVENING NEGLIGENCE OF ARIANA KING.

A. *Standard of Review and Request for Plain Error Review.*

Mr. Creighton did not preserve this issue for appellate review by requesting a jury instruction or objecting to the jury instructions. N.C. R. App. P. 10(a)(2); *State v. Reber*, 386 N.C. 153, 157, 900 S.E.2d 781, 785 (2024). Mr. Creighton requests plain error review. Plain error is a fundamental error typically affecting the fairness, integrity, or public reputation of judicial proceedings. A defendant must show that a fundamental error occurred that had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict and that the error is an exceptional case that warrants plain error review. *Id.* at 158, 900 S.E.2d at 786 (citation omitted).

B. *Argument.*

Contributory negligence is not a defense in a criminal action. *State v. Hollingsworth*, 77 N.C. App. 36, 38–39, 334 S.E.2d 463, 465 (1985) (citation omitted). However, the intervening negligence of another may insulate the defendant from criminal liability if it is such as to break the causal chain of defendant’s negligence. *Id.*

This is not a case of overwhelming evidence that if Mr. Creighton was impaired, his impairment caused the collision. Here, there was ample evidence from which a reasonable juror could have found that Ms. King’s negligence in coming from behind him at up to 90 mph with her accelerator “floored” and failing to keep a proper lookout broke the causal chain initiated by any negligence by or impairment of Mr. Creighton thus insulating him from criminal liability. However, the jury was not instructed to consider this possibility raised by the evidence.

In *State v. Hollingsworth*, the defendant admittedly had been drinking. He had a blood alcohol level of .19. The defendant was driving north in the outside lane of a four-lane divided highway. He pulled past a Datsun traveling in the inside lane and moved into the inside lane. His rear bumper struck the front bumper of the Datsun, pushing it onto the median. As the Datsun attempted to move back into the northbound lane, the defendant’s car

went airborne across the median, landed in the southbound lane, and was struck by a southbound vehicle driven by Jerry Pew. The two passengers in the defendant's car were killed. *Id.*, at 37–38, 334 S.E.2d at 464–65.

The defendant in *Hollingsworth* testified he was stalled in the southbound lane for five to ten seconds before Pew's car struck his. Mr. Pew testified that there was a two to three-second lapse from when he saw the defendant's car until he collided with it. The Datsun driver testified thirty seconds passed from the time the defendant struck his bumper to the time of the collision in the southbound lane. *Id.* at 39–40, 334 S.E.2d at 466.

Mr. Hollingsworth was convicted of manslaughter and appealed. This Court held that the trial court erred by not instructing the jury on the possibility that Pew's negligence could be an insulating cause of the two deaths. The court noted that a motorist is required to exercise due care to keep a reasonable and proper lookout in the direction of travel and is held to the duty of seeing what he ought to have seen. *Id.* The court, assuming the truth of Pew's testimony that he had two to three seconds to react, said there might still have been enough time for Pew to apply the brakes or swerve around the defendant's car, but he did not attempt to do so. The court held it was for the jury to decide whether Pew was negligent and, if so, whether his negligence constituted the sole proximate cause of the deaths of the

passengers in the defendant's car. The court granted the defendant a new trial. *Id.* at 40, 334 S.E.2d at 466).

Here, there was evidence that:

- (1) Mr. Creighton checked the left lane and saw it was clear before he began moving into it. His lane warning indicator did not detect any vehicle in the left lane.
- (2) Mr. Creighton's car was "mostly or completely in the left lane before Ms. King struck him with her truck.
- (3) Ms. King came from approximately 300 feet behind Mr. Creighton's car in just 2.3 seconds, accelerating up to 90 mph with her accelerator "floored," striking his car.

The jury could have found that Mr. Creighton could not have seen Ms. King's truck and made a safe move into the left lane, but the sole or intervening cause of the accident was Ms. King's recklessly driving at 90 mph and failing to keep a proper lookout for cars ahead of her. Here, as in *Hollinsworth*, it was for the jury to decide the issue upon appropriate instructions.

The trial court is required to instruct the jury on "all substantive and material features of the crime with which a defendant is charged." *State v. Carey*, 273 N.C. App. 593, 597, 849 S.E.2d 111, 114 (2020) (citing and quoting

State v. Bogle, 324 N.C. 190, 196, 376 S.E.2d 745, 748 (1989)). Felony death by vehicle and felony serious injury by vehicle both require the State to prove that the defendant “was engaged in the offense of impaired driving under G.S. 20-138.1” and that the commission of the impaired driving offense was the proximate cause of the accident causing the death or injury. N.C. Gen. Stats. §§ 20-141.4(a1)(1–3).

Mr. Creighton testified and argued that Ms. King caused the accident. The evidence clearly raised whether she was the sole proximate cause of the accident, a concurring cause, or an intervening cause. Mr. Creighton was entitled to have the jury consider, under appropriate instructions, whether Ms. King’s negligence was an intervening cause of the accident. Mr. Creighton was entitled to have his theory of the case submitted to the jury, not just the State’s theory. *See State v. Tioran*, 65 N.C. App. 122, 125, 308 S.E.2d 659, 661–62 (1983) (new trial where jury not instructed on intervening negligence and it was perhaps the strongest line of defense.)

This was a close case on proximate cause. Other than Ms. King’s claim she did not remember her speed, the evidence was undisputed that she was driving in an egregiously reckless manner. Had the jury been instructed that it could find her negligence the intervening cause of the accident, it is probable that it could not have been satisfied beyond a reasonable doubt of

Mr. Creighton's guilt and returned verdicts acquitting him of the felony offenses. He is entitled to a new trial.

III. THE TRIAL COURT ERRED BY DENYING MR. CREIGHTON'S MOTION TO DISMISS THE CHARGES OF FELONY DEATH BY VEHICLE AND FELONY SERIOUS INJURY BY VEHICLE FOR INSUFFICIENCY OF THE EVIDENCE.

A. *Standard of Review.*

The trial court's denial of a motion to dismiss is reviewed de novo because whether the State presented substantial evidence of each essential element of the offense is a question of law. *State v. Bradsher*, 382 N.C. 656, 658, 879 S.E.2d 567, 569 (2022). Under a de novo standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *State v. Walters*, 276 N.C. App. 267, 270, 854 S.E.2d 607, 610 (2021) (citation omitted).

B. *Preservation of Error.*

Mr. Creighton moved to dismiss at the close of the State's evidence and renewed his motion at the close of all the evidence. The court denied his motions. (T Vol. 4 pp 535, Vol. 5 p 675–76). Under Rule 10(a)(3), his motions preserved all issues related to the sufficiency of the evidence for appellate review. *State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020).

C. *Argument.*

This Court reviews the denial of a motion to dismiss to determine, *inter alia*, whether the State presented substantial evidence of each essential element of the offense charged. “Substantial evidence” is the amount of evidence necessary to persuade a rational juror to accept a conclusion. The evidence is considered in the light most favorable to the State, and the State is entitled to every reasonable inference that may be drawn from the evidence. Evidence unfavorable to the State is not considered *State v. Corrothers*, 295 N.C. App. 192, 201, 905 S.E.2d 237, 244–45, (2024) (citations omitted). Evidence is not substantial if it is sufficient only to raise suspicion or conjecture, even though the suspicion aroused by the evidence is strong. *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008) (citation omitted).

The State suggested to the jury that proof Mr. Creighton was impaired was sufficient to prove his impairment was a proximate cause of the accident.

MS. ASKINS: Why was the impaired driving a proximate cause of Delores's death and Gene's injury? Well, because he shouldn't have been driving at all, right? It's the impaired driving itself, by itself, which is illegal. So you go back there and you say, well, I don't know if it was the impairment that caused the crash or not. But the point is he is driving while impaired. That is illegal. He should not have been driving a car at all in that state. He shouldn't have been on the road at all in that state.

(T Vol. 5 p 718).

However, proof of impaired driving standing alone is not substantial

evidence that the impaired driving was a proximate cause of the accident. Even in a civil case where the burden of proof is only a preponderance of the evidence, “[m]ere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision.” *Atkins v. Moye*, 277 N.C. 179, 186, 176 S.E.2d 789, 794 (1970) (citing *State v. Lowery*, 223 N.C. 598, 27 S.E.2d 638 (1943)).

As argued previously, to prove either felony death by vehicle or felony serious injury by vehicle, the State must prove that the defendant’s impaired driving was a proximate cause of the accident. A proximate cause is a cause that produced a result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed. *State v. Leonard*, 213 N.C. App. 526, 530, 711 S.E.2d 867, 871 (2011) (citing and quoting *State v. Powell*, 336 N.C. 762, 771–72, 446 S.E.2d 26, 31 (1994)).

In *State v. Lowery*, a prosecution for manslaughter arising from a motor vehicle accident resulting in a death, there was evidence the defendant “was drinking pretty heavy.” *State v. Lowery*, 223 N.C. 598, 602, 27 S.E.2d 638, 641 (1943). However, our Supreme Court held

conceding that there is some evidence of the intoxication of the

defendant, there is no evidence on this record of reckless driving or other misconduct on the part of the defendant *resulting from intoxication* which shows such proximate causal relation between the breach of the statute and the death of Mrs. Rohr.

State v. Lowery, 223 N.C. 598, 603, 27 S.E.2d 638, 641 (1943) (emphasis added).

Assuming *arguendo* that Mr. Creighton was impaired, the State failed to offer substantial evidence that his impairment was a proximate cause of the accident. The State's accident reconstruction expert did not testify that alcohol impairment played any role in the accident. (T Vol. 4 pp 448–78). The State's evidence was that the accident happened because Mr. Creighton changed lanes and struck Ms. King's truck. The State did not offer evidence that he changed lanes and struck Ms. King because he was impaired.

The State did not offer evidence that Mr. Creighton's vehicle operation was affected by any impairment at the time of the collision. Ms. King testified that when they both pulled onto Hwy 264 from an intersection, she remembered that "once we had started going down the road, he was driving a little erratically." She offered no explanation of what that meant. She did not testify he was weaving in his lane or describe any manner of unsafe driving. Had she been a law enforcement officer, her testimony would not have provided reasonable grounds to suspect he was impaired and stop his vehicle, much less prove he was operating his vehicle in an unsafe manner because of

impairment. *See State v. Derbyshire*, 228 N.C. App. 670, 678, 745 S.E.2d 886, 891 (2013) (citation omitted) (there must be additional specific articulable facts beyond mere weaving for there to be reasonable suspicion to stop vehicle); *compare State v. Fields*, 219 N.C. App. 385, 388–89, 723 S.E.2d 777, 779–80 (2012) (reasonable grounds for stop where defendant’s driving was so erratic that other drivers were forced to take evasive maneuvers to avoid the defendant’s car).

In the light most favorable to the State, the evidence showed Mr. Creighton was impaired. Proving impairment alone leaves the question of whether it was a proximate cause of the accident to speculation and conjecture. The State did not offer evidence that his impairment affected his driving, caused him to change lanes, or otherwise proximately caused the accident. The trial court erred by denying his motion to dismiss the charges of felony death by vehicle and felony serious injury by vehicle.

CONCLUSION

Mr. Creighton’s convictions of felony death by vehicle, felony serious injury by vehicle, and driving while impaired should be vacated and he should be granted a new trial.

Respectfully submitted this 28th day of April 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellant certifies that the foregoing brief, which is prepared using a proportional serif font, contains less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

Electronically Filed
W. Michael Spivey
Attorney for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original of Defendant-Appellant's Brief has been filed on the date shown below pursuant to Appellate Rule 26(a)(2) by utilizing the Courts' electronic filing site.

I further hereby certify that on the date shown below I served the Defendant-Appellant's Brief upon Daniel P. O'Brien, Special Deputy Attorney General, at his current email address: dobrien@ncdoj.gov.

This the 28th day of April 2025.

Electronically Filed
W. Michael Spivey
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APPENDIX

Excerpts from the direct examination of
Substitute Analyst O'Connell App. 1–4

Excerpts from the direct examination of
Substitute Analyst O'Connell App. 5–8

Excerpts from the direct examination of
Substitute Analyst O'Connell App. 9–19

1 THE COURT: The Witness may testify as tendered.

2 MR. ASKINS: Your Honor, if I could approach the
3 Witness?

4 THE COURT: You may.

5 Q. Ms. O'Connell, I have placed in front of you two
6 separate pieces of paper which are separately marked as
7 State's Exhibits 32 and 33. Would you look at those
8 documents, please?

9 A. (Witness complies.)

10 Q. Do you recognize those documents?

11 A. Yes, sir, I do.

12 Q. And what do State's Exhibits 32 and 33 appear to
13 be?

14 A. So State's Exhibit 32 is a copy of the electronic
15 chain of custody that was generated in this case and State's
16 Exhibit 33 is a copy of the evidence received of the
17 evidence coming into the laboratory.

18 Q. And are you able to tell whether or not those two
19 documents pertain specifically to one case?

20 MR. WARD: Judge, in this particular case, the
21 defendant would object under the Sixth Amendment
22 confrontation clause in article 1, section 23, to substitute
23 analyst testimony regarding the file.

24 THE COURT: The objection is duly noted and
25 overruled. Go ahead.

1 Q. Go ahead, ma'am?

2 A. So in each of the State's Exhibits they contain
3 the unique laboratory identification number for the case.
4 In this case they both have our 202304963 which indicates
5 that they are related to this specific case.

6 Q. So for any case that comes into the Crime
7 Laboratory is it assigned a unique laboratory case number?

8 A. Yes, sir. So when evidence is received into the
9 laboratory it comes in through our evidence control unit.
10 They check to make sure that the request for laboratory
11 examination has been completed properly and fully. They
12 also make sure that the DWI blood kit is in a sealed
13 condition. Once they make sure that it meets all of our
14 acceptance criteria to come into the laboratory it gets
15 assigned its own unique laboratory identification number
16 which starts the electronic chain of custody to track its
17 progress throughout laboratory.

18 Q. So are State's Exhibit 32 and 33 documents related
19 to the chain of custody for evidence in that unique case
20 number?

21 MR. WARD: Objection under confrontation clause in
22 article 1, section 23.

23 THE COURT: Overruled.

24 Q. Go ahead.

25 A. Yes, sir, they are.

1 Q. And who generates those documents?

2 A. So State's Exhibit 33, which is the evidence
3 transfer receipt, is generated automatically through our
4 forensic Advantage computer software. So once the evidence
5 is received into the laboratory it generates this document
6 on its own and imports it into this unique laboratory case
7 file. The electronic chain of custody is started when the
8 evidence is received into the laboratory and assigned a
9 unique laboratory identification number. Then every step of
10 the process when someone removes it from storage they put in
11 a unique password to them which gives their electronic
12 signature and creates the next entry in the chain of
13 custody.

14 Q. Do State's Exhibits 32 and 33 appear to be
15 complete and accurate?

16 MR. WARD: Objection on the same grounds, Your
17 Honor.

18 THE COURT: Overruled.

19 A. Yes, sir, they do.

20 Q. And do they reflect the chain of custody for the
21 item of evidence that you referenced in the Crime
22 Laboratory?

23 MR. WARD: Same objection.

24 THE COURT: Overruled.

25 A. Yes, sir, it does.

1 MR. ASKINS: Move to admit 32 and 33.

2 MR. WARD: Objection on the same grounds.

3 THE COURT: Objection is overruled. 32 and 33 are
4 received.

5 Q. So, Ms. O'Connell, can you explain, using State's
6 Exhibit Number 33 if necessary, how blood is received into
7 the Crime Laboratory and what happens to it once it's
8 received in the lab?

9 A. So when blood is received into the laboratory it
10 comes in either through courier mail or a hand to hand
11 transfer. Once it is received through the evidence control
12 unit and it gets assigned this unique laboratory
13 identification number starting the chain of custody, it is
14 placed in a refrigerator in a secure evidence vault. At
15 that time it sits there until someone from the toxicology
16 section comes down and removes that kit and brings it up to
17 storage in the toxicology section secure refrigerators.
18 From there the kit is open to remove the tubes of blood from
19 the kit. The description of the kit as well as the
20 condition of the tubes and any name that was on the tube is
21 documented in the case file. The tubes are then placed in a
22 clear Ziploc bag which is heat sealed and initialed and
23 dated by the person who opened it. It is then placed back
24 in storage until it is assigned to an analyst to be worked.
25 At that point the analyst takes the evidence into their

1 themselves that ensure the integrity of the specimen inside
2 of them?

3 A. So the tubes obviously have the grey-stoppered
4 vacutainer or to say grey stopper, that tube is under vacuum
5 so when the blood is initially drawn that stopper does not
6 need to be removed. They also contain a preservative in an
7 anticoagulant in the tube to help keep that evidence as
8 close to it was at the time it was drawn.

9 Q. Have you reviewed the chain of custody and the
10 case paperwork for this specific matter?

11 A. Yes, sir, I have.

12 Q. Is there any indication that there was problems
13 with the evidence itself as it came into the laboratory or
14 the chain of custody as it was received?

15 MR. WARD: Objection; confrontation clause,
16 article 1, section 23.

17 THE COURT: Overruled.

18 A. No, sir, there is no indication of any problems
19 with this case.

20 Q. So once the evidence is assigned to a specific
21 analyst, what is the next step in the process?

22 A. So once it is assigned to an analyst they take
23 custody of the evidence and remove one of the tubes of blood
24 from that heat-sealed bag. They then will take a replicate
25 sampling of the blood evidence along with quality control

1 samples and run that on an instrument known as a headspace
2 gas chromatograph, or headspace GC for short. This gives us
3 a generated piece of data for each sample which then can be
4 looked at and analyzed to generate a worksheet and a report
5 on the findings.

6 Q. And are you or other agents able to determine
7 whether or not a specific specimen contains the presence of
8 alcohol?

9 A. Yes, sir, we are using that headspace gas
10 chromatograph.

11 Q. And that process, are you able to quantify the
12 alcohol concentration in the blood sample?

13 A. Yes, sir, we are.

14 Q. In the process that you've described, is it a
15 scientific process?

16 A. Yes, sir, it is and it's widely used in the
17 scientific community and accepted.

18 Q. Is the North Carolina Crime Laboratory an
19 accredited institution?

20 A. Yes, sir, it is.

21 Q. And is the same process used in analyzing every
22 blood sample that comes to the Crime Laboratory for the
23 presence of alcohol?

24 A. Yes, sir, it is the same process that's followed
25 every time.

1 Q. And is this a process that you are personally
2 familiar with?

3 A. Yes, sir, I am.

4 Q. Is that a process that you have personally done or
5 completed yourself?

6 A. Yes, sir, it is.

7 Q. So are you able to tell whether or not a blood
8 specimen was received at the Crime Laboratory associated
9 with a person by the name of Brandon Joseph Creighton?

10 MR. WARD: Objection; confrontation clause,
11 article 1, section 23.

12 THE COURT: Overruled.

13 A. Yes, sir, I am.

14 Q. And was a blood sample received at the Crime
15 Laboratory?

16 MR. WARD: Same objection.

17 THE COURT: Overruled.

18 A. Yes, sir, it was.

19 Q. Are you able to determine or does the
20 documentation in State's Exhibit 32 or 33 indicate when that
21 sample was received at the Crime Laboratory?

22 MR. WARD: Objection; same objection.

23 THE COURT: Overruled.

24 A. Yes, sir. State's Exhibit 32, which is the
25 electronic chain of custody, shows that it was received on

1 April 20th, 2023.

2 Q. And does State's Exhibit Number 33 show what
3 happened with that specific blood sample once it was
4 received at the Crime Laboratory?

5 MR. WARD: Same objection.

6 THE COURT: Overruled.

7 A. State's Exhibit 33 doesn't because that's the
8 evidence transfer sheet, but State's Exhibit 32, which is
9 the chain of custody, does document every step of the
10 process.

11 Q. And in looking at State's Exhibit Number 33 can
12 you tell us where this sample went once it was received at
13 the Crime Laboratory?

14 MR. WARD: Same objection.

15 THE COURT: Overruled.

16 A. So once it was received into the laboratory it was
17 initially placed in a refrigerator in the evidence control
18 vault. From there the next transfer was when it was removed
19 from someone for the toxicology section to bring it up to
20 the toxicology floor where it was placed in a toxicology-
21 secure refrigerator. It was then removed again to open the
22 kit and remove the tubes of blood. And then once it was
23 assigned to be analyzed it was moved to a in-process
24 refrigerator, where the analyst then removed the evidence to
25 do the analysis.

1 her work?

2 A. Yes, sir, I have had the opportunity to review her
3 work in the past.

4 Q. And where is she now if you know?

5 A. She is currently on approved leave on a cruise.

6 Q. Is she out of the country?

7 A. As far as I'm aware her cruise was taking her out
8 of the country, yes, sir.

9 Q. So were you asked to become involved with this
10 specific case as a substitute analyst?

11 A. Yes, sir, I was.

12 Q. And what does that mean with regard to your
13 involvement in the case?

14 A. So once I was asked to be a substitute for Ms.
15 Naik on this case, I reviewed it start to finish, including
16 doing my own technical and administrative review. So I
17 reviewed ever piece of data, the chain of custody, all
18 quality controls, and anything associated with instrument in
19 relation to this case.

20 Q. And are you able to determine whether or not Ms.
21 Naik examined the blood specimen that was assigned to
22 Brandon Joseph Creighton?

23 MR. WARD: Objection under the sixth amendment
24 confrontation clause, article 1, section 23.

25 THE COURT: Overruled.

1 A. Yes, sir, I am based on the unique laboratory
2 identification number.

3 Q. And was she able to detect the presence of alcohol
4 in that sample?

5 MR. WARD: Same objection.

6 THE COURT: Overruled.

7 A. Yes, sir, she was able to detect the presence.

8 Q. And did she generate a report of her findings from
9 her analysis of that sample?

10 MR. WARD: Same objection.

11 THE COURT: Overruled.

12 A. Yes, sir, she did generate a report on her
13 findings.

14 Q. Now in reviewing her – in reviewing her work, did
15 she conduct the testing and analysis in this case in this
16 same manor in which you had previously done testing and
17 analysis of blood samples?

18 MR. WARD: Objection; same objection.

19 THE COURT: Overruled.

20 A. Yes, sir, based on all the data that was included
21 in the case file, I have no reason to believe that she did
22 not follow our procedures that are in place at the Crime
23 Laboratory.

24 Q. And are those the same procedures that you
25 followed as an analyst when you were conducting testing?

1 A. Yes, sir, they are.

2 Q. Are the same testing practices and principles
3 followed in every single blood case that is submitted to the
4 Crime Lab for analysis?

5 MR. WARD: Objection; same objection.

6 THE COURT: Overruled.

7 A. Yes, sir, they are. They are also the only
8 procedures that we train our analysts in.

9 Q. So, Ms. O'Connell, the testing procedures and
10 practices that Ms. Naik used, are they of the kind that is
11 reasonably relied upon by experts in that field in forming
12 your opinions?

13 MR. WARD: Objection.

14 THE COURT: Overruled.

15 A. Yes, sir, they are. They are relied upon and used
16 widely in the scientific community.

17 Q. So you said that you reviewed the analysis and
18 results from Ms. Naik's work?

19 A. Yes, sir, that's correct.

20 Q. Was there anything in her work that appeared to
21 not follow the testing practices and principles used by the
22 Crime Lab?

23 MR. WARD: Objection under the confrontation
24 clause in article 1, section 23.

25 THE COURT: Overruled.

1 A. No, sir, they were not.

2 Q. So after you reviewed Ms. Naik's work, were you
3 yourself able to form your own independent opinion about the
4 testing conducted of the blood sample from Mr. Brandon
5 Joseph Creighton?

6 MR. WARD: Same objection.

7 THE COURT: Overruled.

8 A. Yes, sir, I was by analyzing the data that was
9 included in the case file.

10 Q. When you say analyzing the data, can you elaborate
11 a little more about that?

12 MR. WARD: Same objection.

13 THE COURT: Overruled.

14 A. Yes, sir, I can. So when the samples are run on
15 the headspace GC it gives a graphical printout which
16 includes any alcohol that may have been present as well as
17 its quantity. I then use our in-house form to import – and
18 import the alcohol numbers from that data to get an average
19 of the alcohol that was present in the case.

20 Q. Are you able to determine whether or not the equip
21 – instrumentation used by Ms. Naik was within compliance
22 according to the Crime Laboratory specifications and rules?

23 MR. WARD: Same objection.

24 THE COURT: Overruled.

25 A. Yes, sir, I am. So we have quality controls that

1 are run prior to any cases going on an instrument, as well
2 as quality controls at the beginning and end of each set of
3 cases that are analyzed. And in this case all quality
4 control material was met and followed as well as prior to
5 the instrument being certified for case samples, a second
6 analyst reviews everything and all the set up of the
7 instrumentation to make sure it was set up properly and
8 ready to run.

9 Q. So for this specific case does that mean that
10 there have been three separate analysts who reviewed the
11 data?

12 MR. WARD: Objection.

13 THE COURT: Overruled.

14 A. Yes, sir, so the actual analyzing analyst who did
15 the sampling and analysis, there is another analyst who
16 actually reviews the set up and everything on the
17 instrumentation and there's a third analyst who actually
18 does a technical administrative review of the whole case
19 file prior to it getting released and sent out to the
20 courts.

21 Q. So are you, yourself, that third analyst?

22 A. In this case, no, sir, I am not.

23 Q. So you're saying that beyond the initial testing
24 and analysis by Ms. Naik, there were two other analysts that
25 reviewed her work?

1 MR. WARD: Objection.

2 THE COURT: Overruled.

3 A. That's correct. One analyst reviewed the set up
4 and placement of the samples on the instrumentation to make
5 sure that they were correct and then a third analyst
6 conducted the technical and administrative review after the
7 report was generated prior to it being released.

8 Q. And how does the Crime Laboratory report alcohol
9 concentration in blood?

10 A. So the alcohol report gets reported out as a
11 truncated amount to two decimal places. We also include the
12 untruncated version as well with a plus or minus which
13 includes our uncertainty of measurement which accounts just
14 for the natural variation in the instrumentation.

15 Q. So what is the level or standard of alcohol
16 concentration and blood used by the crime laboratory? I
17 guess let me ask it a different way. Is alcohol
18 concentration reported in grams?

19 A. Yes, sir. It is reported in grams per hundred
20 milliliters.

21 Q. Hundred milliliters of blood?

22 A. That's correct.

23 Q. How is that different from how it's reported in
24 breath?

25 A. So breath is a 1 to 2100 ratio compared to blood.

1 So you get the same value typically using a breath test as
2 you would in the blood. It's just a different ratio.

3 Q. So in blood, alcohol is reported as a
4 concentration per hundred milliliters of blood?

5 A. Yes, that's correct. It's reported as grams per
6 hundred milliliters.

7 Q. And how about in breath?

8 A. In breath I don't really know off the top of my
9 head what the units are, I just know it is a 1 to 2100 ratio
10 compared to breath and blood.

11 Q. And, Ms. O'Connell, was Agent – based on your
12 review of the case file and of the work from Agent Naik, was
13 Agent Naik able to detect the presence of alcohol in the
14 blood sample from Brandon Joseph Creighton?

15 MR. WARD: Same objection.

16 THE COURT: Overruled.

17 A. Yes, sir, Ms. Naik was able to.

18 Q. And did she report the concentration of alcohol in
19 that blood sample?

20 MR. WARD: Same objection.

21 THE COURT: Overruled.

22 A. Yes, sir, she did.

23 Q. And did she generate a report detailing her
24 findings for that blood sample?

25 MR. WARD: Objection.

1 THE COURT: Overruled.

2 A. Yes, sir, a report was generated in this case.

3 Q. And have you reviewed the final report for this
4 case?

5 A. Yes, sir, I have.

6 Q. And based upon your own independent review and
7 analysis in this case do you concur with or disagree with
8 the findings from Agent Naik?

9 MR. WARD: Objection; confrontation clause,
10 article one, section 23.

11 THE COURT: Overruled.

12 A. Yes, sir. So after complete review of the case
13 file, my opinion generated was in agreeance with the one
14 that Ms. Naik reported.

15 Q. And based upon your review of the case file and
16 the data did you form your own independent opinion and reach
17 your own conclusion as to what the results of the blood
18 alcohol analysis was?

19 MR. WARD: Same objection.

20 THE COURT: Overruled.

21 A. Yes, sir, I did.

22 MR. ASKINS: Your Honor, may I approach the
23 Witness?

24 THE COURT: You may.

25 Q. Ms. O'Connell, I have handed you what's marked as

1 State's Exhibit 34; would you look at that document, please?

2 A. (Witness complies.)

3 Q. Do you recognize it?

4 A. Yes, sir, I do. This is a copy of the notarized
5 report that was generated in this case.

6 Q. How do you know that?

7 A. So it includes information for the investigating
8 officer and agency as well as the location, type of case,
9 the suspect's name is listed as Brandon Joseph Creighton, as
10 well as it has the unique laboratory identification number
11 of R202304963.

12 Q. Does that appear to be the same case number that
13 is associated in the other records you referenced?

14 MR. WARD: Same objection.

15 THE COURT: Overruled.

16 A. Yes, sir, it is the same case number.

17 Q. And does State's Exhibit 34 appear to be a
18 complete and accurate report from the analysis of that blood
19 sample?

20 MR. WARD: Objection; same objection.

21 THE COURT: Overruled.

22 A. Yes, sir, it does.

23 Q. And does State's Exhibit Number 34 contain the
24 results and conclusions from Agent Naik?

25 MR. WARD: Objection; same objection.

1 THE COURT: Overruled.

2 A. Yes, sir, it does, under number 3 on the report.

3 Q. And, Ms. O'Connell, do you independently agree
4 with the numeric reported conclusions contained in State's
5 Exhibit 34?

6 MR. WARD: Object under the confrontation clause,
7 article one, section 23.

8 THE COURT: Overruled.

9 A. Yes, sir, my opinion was in agreeance with what is
10 listed on this report.

11 MR. ASKINS: Judge, we move to introduce State's
12 Exhibit 34.

13 MR. WARD: We would object under the same grounds,
14 Your Honor.

15 THE COURT: Overruled. 34 is received.

16 MR. ASKINS: Move to publish State's Exhibit
17 Number 34.

18 MR. WARD: Same objection.

19 THE COURT: Overruled. Okay, you may proceed.

20 MR. ASKINS: Judge, I have sufficient copies for
21 each of the jurors. I'm going to ask the bailiff to hand
22 those out, please.

23 THE COURT: Okay, Mr. Bailiff.

24 Now, Ladies and Gentlemen of the jury, I want to remind
25 you of my earlier instruction. If when an exhibit is given

1 to you to examine, you are to examine it carefully,
2 individually, and without comment, okay. You'll each have
3 your own copy.

4 Everybody good?

5 Go ahead.

6 Q. Ms. O'Connell, does State's Exhibit Number 34
7 indicate what the reported alcohol concentration was?

8 MR. WARD: Objection; same objection.

9 THE COURT: Overruled.

10 A. Yes, sir, it does.

11 Q. And where is that on State's Exhibit Number 34?

12 A. It is listed under number 3.

13 Q. And what was the reported alcohol concentration
14 for Brandon Joseph Creighton?

15 MR. WARD: Objection under the confrontation
16 clause, article one, section 23.

17 THE COURT: Overruled.

18 A. The blood ethanol concentration was 0.20 grams of
19 alcohol per hundred milliliters as defined by the statute.
20 The blood ethanol concentration was 0.206 ± 0.006 grams of
21 alcohol per hundred milliliters.

22 MR. ASKINS: Thank you, ma'am. No further
23 questions.

24 THE COURT: Okay. Cross-examination?

25 MR. WARD: Ask the Bailiff to retrieve the