

**MAINE SUPREME COURT**

**Sitting as Law Court**

PEN-24-467

STATE OF MAINE,  
Appellee,

V.

DAVID MACKENZIE,  
Appellant.

On Appeal from Penobscot Unified Criminal Docket

**Brief of Appellant,  
David MacKenzie**

Hunter J. Tzovarras  
Bar No. 4429  
1 Merchants Plaza, 302B  
Bangor, ME 04401  
(207) 941-8443  
[hunter@bangorlegal.com](mailto:hunter@bangorlegal.com)

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## I. PROCEDURAL HISTORY

On July 21, 2023, David MacKenzie was charged with Aggravated Operating Under the Influence (Class C), Aggravated Assault (Class B), Leaving the Scene of an Accident (Class C), and a Class D OUI. Mr. MacKenzie pleaded not guilty to the charges.

A three day jury trial was held on August 26-28, 2024. Prior to trial, the defense moved, by way of a motion in limine, to exclude the State from presenting opinion testimony that Mr. MacKenzie's estimated BAC was 0.08 or higher at the time of the accident. No chemical test was taken in this case. The defense argued the proper and admissible way to prove a BAC measurement under the statute is through a chemical test. After hearing argument, the court ruled:

Thank you. I think is a very interesting issue and I have given it a fair amount of thought.

Under Maine law there are two different ways the state can establish that a person is guilty of criminal OUI. First, that the person was operating a motor vehicle with an excessive -- excessive blood alcohol level, meaning .08 grams or more. And the second alternative is that the person operated a motor vehicle while under the influence of intoxicants. In this particular case the state has pled both alternatives. And we know that in this case the state is seeking to rely on expert testimony by Maria Pease and not on the results of a chemical test.

I have considered these—all the statutory provisions. I've considered the case law, including *Souther*, *Grigsby*,

*Richford*, and *Taylor*. I don't find any of these cases directly on point, but obviously they're very important to consider. In *Souther*, *Grigsby* and *Richford*, the state did not allege that the defendant was operating a motor vehicle with a blood alcohol level of .08 or more. In those three cases the only allegation was under the influence of intoxicants. And as I sit here right now, I don't remember whether *Taylor* had alleged both alternatives.

The blood alcohol test statute that was in effect at the time of *Grigsby* was Section 1312. 1312 is now broken up into Sections 2432 and 2521.

And I also should back up a moment. The language quoted by Mr.—or maybe not quoted, but argued by Mr. Tzovarras from *Taylor*, really was—was really dicta with respect to the result in that case.

There is a definition of alcohol level in Section 2401. The term alcohol level in that definition does not reference chemical test. The term chemical test is separately defined. The elements of criminal OUI are set forth in 2411 in article one of the statute. Thereafter the statutes continue and they set forth the elements of OAR, OAS, driving to endanger, refusing to stop, operating a motor vehicle causing death. We then go on to sections related to forfeiture and impoundment of motor vehicles.

Then we get to Article 3, which is judicial procedures. And this is the article that focuses on chemical test. 2432 is part of Article 3. And I'm going through that history and that statutory framework because of the context conclusions that were drawn in *Grigsby*.

The Legislature could have defined alcohol level as being alcohol level as determined by a chemical test. But they did not. The Law Court, to my knowledge, has not specifically held that alcohol level must be determined by a chemical test in the context of a case where the allegation by the state includes having an excess alcohol level. Therefore, in -- I had

not thought about it until this morning, but I do think there's also relevance as far as reckless conduct.

Therefore, I am finding that the state may establish alcohol level by something other than that a chemical test in a case such as this where it is alleged that the defendant fled the scene of the accident and did not submit to a chemical test.

(Trial Tr. Vol 1 p. 26-29).

The defense moved, through a motion in limine, to exclude the Widmark estimation as unreliable as it relates to Mr. MacKenzie. A hearing was held outside the presence of the jury.

The State chemist based the blood alcohol content (BAC) estimate on the Widmark formula, which uses average absorption, distribution and metabolism of alcohol to provide an estimation of someone's blood alcohol. (Tr. Vol. 1 p. 36, 45). The Widmark formula was developed in 1920-30s using population averages at that time period. (*Id.* 46).

Widmark does not provide measurement of blood alcohol in grams for an individual. (*Id.* at 46). Only a chemical test provides measurement of BAC. (*Id.*). Chemical tests have a certain level of scientific certainty. (*Id.*) There is no level of scientific certainty to the Widmark formula. (*Id.*)

The State Chemist reached opinion that Mr. MacKenzie's blood alcohol level would be at least 0.08 at 8:50 p.m. on the day of the

accident. (*Id.* at 42-43). This estimate is based on an average male at Mr. MacKenzie's approximate weight. (*Id.* at 63).

Significant variables exist as to how alcohol can be distributed and eliminated throughout the body. (*Id.* at 45). Widmark does not consider a person's age, body mass index (BMI), and height, all of which can affect BAC. (*Id.* 48-51). The Widmark formula did not consider whether Mr. MacKenzie drank on empty or full stomach, which can affect absorption, distribution and elimination of alcohol. (*Id.* 53, 58). It has been suggested to update Widmark based on total body weight based on age, weight, height. (*Id.* 56).

Widmark is typically used for single dose spirits over a relatively short period of time. (*Id.* 51-52). Mr. MacKenzie drank ultra light beers over a six hour period. The scientific literature indicates more studies need to be done on social drinking involving more than one drink per hour. (*Id.* 62).

Widmark assumes 100 percent bioavailability of the alcohol consumed. (*Id.* 56-57). During social drinking over several hours bioavailability is always less than 100%. (*Id.* 57). Mr. Mackenzie drank socially over several hours, which would make the bioavailability of the alcohol less than 100%. (*Id.* 58).

The rate of consumption is very important in determining BAC. (*Id.* 58-59). The Widmark formula does not account for the pace at which MacKenzie consumed the light beers. (*Id.* 59).

People show an enormous variation in their responses to alcohol, including elimination. (*Id.* 59-60). The elimination rate used by the Widmark formula is 0.015 per hour. The scientific literature indicates elimination rates can vary from 0.09 to 0.25 per hour. (*Id.* 60).

The court admitted the Widmark estimate ruling:

I have -- I've considered these issues. I will allow Ms. Pease to testify to the blood alcohol level based upon her use of the scientific formula it was well above .08 but I'm not going to allow her to give an exact number. And the state may not rely upon the presumptions in 2432 with respect to the purpose of -- for purposes of the intoxications analysis.

(*Id.* 77-78).

Following the three day trial, the jury returned a guilty verdict on all counts.

On October 1, 2024, the court sentenced Mr. MacKenzie to 6 years all but 15 months suspended and 3 years of probation.

A Notice of Appeal was filed on October 11, 2024.

## **II. STATEMENT OF FACTS**

On July 15, 2023 David Mackenzie spends the afternoon, and early evening, at Hight Tide restaurant in Brewer. Over the course of six

hours, he consumes 12 Michelob Ultra Light beers in 22 ounce glasses. (Trial Vol. 1 at 120, 154, 157, 188). Michelob Ultra has a 4.2 percent alcohol content. (*Id.* 120). He drinks approximately one beer every half hour. (*Id.* 187). During this time, Mr. MacKenzie socializes and eats a basket of boneless chicken wings. (*Id.* 182). He leaves High Tide at 8:28 pm. (*Id.* 186) (Vol 3 at 36).

The State Chemist, Maria Pease, opined that at 8:50 p.m., Mr. MacKenzie's BAC would have been higher than 0.08. (Vol. 1 at 201). The Chemist opined people at 0.08 or higher are generally impaired by alcohol. (*Id.* 202).

After leaving High Tide, Mr. Mackenzie drives to Eastern Avenue in Brewer. As he is coming up Eastern Avenue, Ira Williams is pushing a black wheelbarrow across the roadway in a poorly lit area of the street. (Vol 2 at 43). It is nearly dark at time. (*Id.* 12). There is no crosswalk. (*Id.* 46). Mr. Williams is dressed in dark clothing. (*Id.* 42). Mr. Williams was not visible in the road because of the lighting and dark clothing. (*Id.* 44).

Mr. Mackenzie's car strikes Mr. Williams and the wheelbarrow as he is crossing the roadway. (Tr. Vol. 1 at 265) Mr. Williams went on to the hood of the car and fell off after about 15 feet. (*Id.* 241-42). The

black wheelbarrow and yard clippings were strewn across the roadway. (Tr. Vol. 2 at 44-45).

Mr. Mackenzie's cell phone makes an automated 911 call at 8:39 p.m. (*Id.* 283-84). The 911 call is plotted on GPS to 27 Eastern Ave. (*Id.* 291). The GPS data obtained from Mr. MacKenzie's car shows the accident happened 8:39 p.m.. (Vol. 3 at 36). The sunset at 8:18 p.m. (Def. Ex 3/ Tr. Vol. 2 at 41-42).

Mr. MacKenzie's car stops on Eastern Ave for approximately 60 seconds after the accident. (Vol. 3 at 51-52).

Melanie Glidden, a nurse, is the first person on scene. (Vol. 2 at 251). She stops at the intersection of Chamberlain Street and Eastern Ave. (*Id.* 254). She sees a man lying in the roadway on Eastern Ave. (*Id.* 254-55, 256). She pulls over to help and call 911. (*Id.* 257-58).

A neighbor cleaning out his garage at the time, hears a loud screeching of tires and what sounded like someone yelling "get it off my hood." (*Id.* 10). He hears car door open. (*Id.* 14). The car was stationary when he first sees it. (*Id.* 20). He watches the car drive away at a normal speed. (*Id.* 14).

As a result of the accident, Mr. Williams incurs an open ankle fracture, pelvic fracture, and injuries to his spine and spleen. (Vol 2. At 82, 83, 87). Mr. Williams has surgery for the ankle fracture. (Tr. Vol. 2 at

89-91). He has a long recovery process due to an infection in his ankle causing set backs in his recovery. (Vol. 2 at 82). The doctor opined Mr. William's suffered a significant and serious ankle fracture that required extended convalescence. (Tr. Vol. 2 at 100).

The accident scene was forensically mapped. (Vol. 2 at 112, 126-27; State Ex 44). The forensic mapping places Mr. MacKenzie's car just slightly across the centerline of the roadway when it strikes the wheelbarrow. (Vol. 2 at 136-37; Sate Ex. 44). On cross-examination, the forensic mapper agrees the wheelbarrow would have been struck farther back on the roadway than where depicted in the mapping because the wheelbarrow would have moved forward after being struck and the yard clippings spilt out behind it. (Vol. 2 at 139, 140-41. The forensic mapper agrees it is more accurate the wheelbarrow was struck back towards the beginning of the driveway. (Vol. 2 at 140). The forensic mapper did not map, or know, where Mr. MacKenzie's car was positioned in the roadway at time the car strikes the wheelbarrow at beginning of driveway. (Vol. 2 at 140).

The State's accident reconstruction notes there is one streetlight on Eastern Avenue. (Vol. 2 at 167, 171). There is no lighting remotely close to where the accident occurred. (*Id.* 171). He described the lighting as "poor lighting at best." (*Id.* 171).

Mr. MacKenzie's car hits the wheelbarrow with the right corner fender. (*Id.* 196, 199). Mr. William's lands on hood and windshield. (*Id.* 199-200, 206). After initial impact, the vehicle swerves to left. (*Id.* 199-200). The dented black wheelbarrow is located just in front of the driveway of Mr. Williams' home. (*Id.* 175). The dent on wheelbarrow is on the right side indicating the side Mr. MacKenzie's car is traveling from when the accident happens. (*Id.* 175-176).

The State's reconstructionist testifies the average reaction time for a driver is 1.6 seconds. (*Id.* 190-91). Using time distance reaction at 25mph, Mr. MacKenzie would have needed 86 feet to stop without hitting the pedestrian or wheelbarrow crossing the dark roadway. (*Id.* 191-92). The re-constructionist never opines that Mr. MacKenzie would have had enough time to react and avoid the accident.

The reconstruction states it is: "very difficult to get the exact placement [of Mr. Williams in the road at time of impact]. But what it tells me is if you put the wheelbarrow impact site right there and you measure width of the vehicle over, it told me the vehicle was already over the double yellow line." (*Id.* 206-07).

As to the cause of the accident, the deconstructionist opines: "It's my opinion that based on lighting conditions, as well as the vehicle being operated by somebody under the influence and that a

pedestrian was in the roadway while they were in the other lane, they were still in the roadway." (*Id.* 208).

The State's reconstruction concludes: "David was travelling northbound and could not perceive Ira [Williams] before swerving and striking him." (Vol 2. at 221).

Dale Syphers a professor of physics at Bowdoin College conducted an accident reconstruction for the defense. (Vol. 3 at 108). Professor Syphers has been conducting accident reconstruction for 35 years and worked on between 250-300 cases. (*Id.* 109).

Professor Syphers determines Mr. MacKenzie's car is completely in its travel lane at time of accident. (Vol. 3 at 128-29). He concludes the wheelbarrow is in the travel lane and Mr. Williams is pushing it standing just barely to left of centerline completely in the travel lane. (*Id.* 129-30).

Professor Syphers is able to determine Mr. Mackenzie is travelling at 34-36 mph at the time of the accident. (*Id.* 133). The speed limit on Eastern Avenue is 25mph. (Vol 2 at 170).

Professor Syphers concludes, Mr. Mackenzie had between 2 and 2.5 seconds to see the wheelbarrow and react within 1.8 to 2.3 seconds, which is a normal reaction time at civil twilight. (*Id.* 136). Mr. MacKenzie reacts by taking an evasive maneuver to the left, applying

the brakes, but it is too late to avoid hitting the wheelbarrow and Mr. Williams in the roadway. (Id. 153).

### III. **ISSUES ON APPEAL**

1. Did the court err in admitting the Widmark BAC estimate to prove David MacKenzie's BAC measurement for an excessive alcohol level on the OUI charges when no chemical test was taken?
  
2. Did the court err in admitting the Widmark BAC estimate when the Widmark formula is not specific to Mr. MacKenzie's BAC?
  
3. Was the evidence sufficient to prove beyond a reasonable doubt Mr. Mackenzie acted recklessly in causing serious bodily injury to support the Aggravated Assault charge?

#### **IV. SUMMARY OF ARGUMENT**

This Court has always held a chemical test is the proper form of evidence to measure a person's blood or breath alcohol measurement. The trial court erred in allowing the State to present a BAC estimate using the Widmark formula as evidence of an excessive alcohol level on the OUI charges. The Widmark formula is not specific to Mr. MacKenzie and has no degree of scientific certainty. The statutory scheme and caselaw require a chemical test as the means of measuring and proving BAC.

The evidence was insufficient for the jury to find beyond a reasonable doubt Mr. Mackenzie committed the offense of aggravated assault. There was no evidence he intentionally or knowingly hit Mr. Williams with his car. Mr. Mackenzie's driving was not reckless or the but for cause of the injuries. Mr. MacKenzie was driving 32-34 mph in a 25 mph zone in his lane when he came across a dark object in a poorly lit area in his travel lane. He reacted by applying the brakes and moving to the left when he hit Mr. Williams and the wheelbarrow he was pushing across the roadway. The State's expert concluded Mr. MacKenzie could not see Mr. Williams in the road or have time to react before hitting him. All of the aggravated assault cases involving a

motor vehicle encompass egregious driving or intentional acts. Mr. MacKenzie was not driving in a reckless manner, and his driving was not the but for cause of Mr. Williams' injuries. The accident occurred because Mr. Williams was in the roadway in a poorly lit area just before nightfall.

## **V. LAW AND ARGUMENT**

### **1. A Chemical Test is the Proper and Admissible Way to Measure a Person's BAC as Evidence of an Excessive Alcohol Level.**

The court erred in allowing the state to present an estimate of Mr. MacKenzie's blood and breath alcohol measurement based on the Widmark formula to prove the 0.08 or higher element of the OUI charges.

The State charged Mr. MacKenzie with aggravated OUI, and OUI, alleging both under the influence of intoxicants, and having a BAC of 0.08 or higher. In order to establish the latter, the State must prove: "A person ...operates a motor vehicle ... while having an alcohol level of 0.08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath." 29-A MRSA §2411. The State offered no chemical test measuring Mr. MacKenzie's breath or blood alcohol level.

Maine law provides a chemical test is the admissible form of evidence to prove BAC. "Test results showing a confirmed positive drug or metabolite presence in blood or urine or alcohol level at the time alleged are admissible in evidence." 29-A MRSA §2431(1).

In order for a test to be admissible, the statute sets forth the following requirements:

The following provisions apply to the analysis of blood, breath and urine, and the use of that analysis as evidence.

A laboratory certified or licensed in accordance with section 2524 conducting a chemical analysis of blood, breath or urine to determine an alcohol level or the presence of a drug or drug metabolite may issue a certificate stating the results of the analysis.

A person qualified to operate a self-contained, breath-alcohol testing apparatus may issue a certificate stating the results of an analysis of a test that the person administered.

A certificate issued in accordance with paragraph A or B, when duly signed and sworn....

§2431(2).

Section 2432 sets forth the evidentiary weight of such chemical tests and is titled: "Alcohol level; confirmed positive drug or metabolite **test results**; evidentiary weight." (Emphasis added).

The statutory sections cited above require a chemical test, pursuant to Section §2431(2) and 2432, to prove a person's BAC measurement.

"Statutory interpretation is a question of law that we review de novo. When interpreting a statute, our single goal is to give effect to the Legislature's intent in enacting the statute. The first step in statutory interpretation requires an examination of the plain meaning of the statutory language in the context of the whole statutory scheme. Then, only if the statutory language is ambiguous—that is, reasonably susceptible to more than one interpretation—will we consider other indicia of legislative intent." *State v. Beaulieu*, 2025 ME 4, ¶ 15 (internal citations and quotations omitted).

The statutory language is clear. A chemical test is required to establish a person's blood or breath alcohol level measured in grams of alcohol. The statutory element requires the accused to have an "alcohol level of 0.08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath." 29-A MRSA §2411. The statute states: "**Test results** showing a confirmed positive drug or metabolite presence in blood or urine or alcohol level at the time alleged are admissible in evidence." 29-A MRSA §2431(1) (emphasis added).

If the legislature intended the Widmark formula, or other estimations, to be admissible proof of a person's BAC, it would have included such evidence under Section 2431.

This Court has always held a chemical test is the proper way to measure a person's BAC, under both the current statutory scheme, and the former 29-A MRSA 1312.

In *State v. Grigsby*, 666 A. 2d 503 (Me 1995), the Court held: "{W}e find no merit in Grigsby's contention that the trial court erred in refusing his proposed instruction tracking the language of section 1312(5)(A). As its context indicates, evidence of an individual's blood-alcohol content has procedural effect under subsection 5 **only when it is obtained as a result of a scientific test administered contemporaneously with an arrest.**" *Id.* at 505 (emphasis added); see also *State v. Richford*, 519 A. 2d 193, fn1 (Me 1986).

"The statute [29-A MRSA 1312] suggests that the proper way to test for an exact blood alcohol level is by chemical analysis of blood, breath, or urine." *State v. Taylor*, 1997 ME 81 ¶ 13. In *Taylor*, the Court found error in admitting testimony as to the estimated BAC based on the results of the horizontal gaze nystagmus (HGN) test results.

Officer Green reported that the National Highway Traffic Safety Administration recognizes the test. Officer Green testified that, in his experience and training, four or more "clues" correlates with a 77 percent probability that the subject will test .10% blood alcohol by weight or higher. He also testified that in his experience in testing hundreds of people, only once or twice had someone had six clues but a blood alcohol level of less than .10%.

*Id.* at 7.

Trial court granted judgment of acquittal on the 0.08 element. "During its instructions to the jury, the court indicated that 'there is no evidence of a blood alcohol test or as to what the defendant's blood alcohol level was at that time, and you should not speculate as to what it would have been if a test in fact had been taken.'" *Taylor* at fn 3.

On Appeal, this Court held: "We agree with Taylor that using HGN results to precisely quantify blood alcohol content is improper." *Taylor*

¶ 13.

The statute suggests that the proper way to test for an exact blood alcohol level is by chemical analysis of blood, breath, or urine. In distinguishing those tests from the HGN test, the court in *State v. Superior Court* realized that blood-alcohol levels tested under these methods "is to be determined deductively from analysis of bodily fluids, not inductively from observation of involuntary bodily movements." 718 P.2d at 181. Because no one can verify the officer's HGN test reading and because we are cognizant that there are other possible causes of nystagmus, the results of an HGN test are admissible only as evidence supporting probable cause to arrest without a warrant or as circumstantial evidence of intoxication. The HGN test may not be used by an officer to quantify a particular blood alcohol level in an individual case.

*Id.*

The Court has excluded the admission of BAC estimations based on the Widmark formula when a chemical test was not in evidence. See *State v. Souther*, 169 A. 3d 927 (Me. 2017).

Prior to trial, Souther proposed a stipulation as to her peak blood alcohol content at the time that she was driving and sought to admit expert testimony that, applying the Widmark formula, a 115-pound female who consumed one sixteen-ounce beer (the size of the open container that was between Souther's feet when she was stopped) with about a 5% alcohol content would have a peak blood alcohol concentration of 0.05%. She argued that this evidence would be relevant to the issue of impairment and noted that Maine law prescribes presumptions of impairment or non-impairment for certain blood alcohol levels. See 29-A M.R.S. § 2432 (2016).

*Id.* at 928-29. The trial court excluded such evidence because no chemical test was in evidence and the 0.08 or higher element was not alleged.

In upholding the exclusion of the Widmark testimony as to the defendant's estimated BAC, the Court in *Souther* held: "Here, because the evidence did not include scientific blood alcohol test results as required by *Grigsby*, section 2432 is unavailable to provide the missing element in Souther's offer of proof." *Id.* at 931.

*Grigsby*, *Taylor* and *Souther* all establish a chemical test is required to measure a person's BAC under the statute. The Court has never

allowed the State to prove a person's BAC by Widmark formula alone, or something other than a DHHS approved chemical test.

In *State v. Tibbetts*, 604 A.2d 20 (Me. 1992), the Court upheld the State chemist testifying about retrograde extrapolation regarding the defendant's estimated BAC at the time of driving, because the defense had challenged the significance of 0.18 chemical test.

Here, Tibbetts's blood-alcohol content at the time of the accident was the central question before the jury, and the significance of a 0.18% test result obtained approximately two hours after the accident was an issue of consequence in the case. The trial court properly determined that the effects of alcohol absorption, dilution, and elimination on blood-alcohol concentrations over a period of time is beyond the common knowledge of a layperson and that the opinion of an expert with special knowledge in this area could be helpful to the jury's determination.

*Id.* at 22.

Unlike this case, the *Tibbetts* case involved the admission of a chemical test. The Widmark formula was admitted to rebut the defense theory. The Widmark formula was not admitted as a replacement for a valid chemical test as in this case.

Based on the above precedent, the court erred in allowing the State to offer the Widmark formula as proof of a measurement of Mr. MacKenzie's BAC being 0.08 or higher.

Allowing admission of the Widmark formula to prove a defendant's BAC would effectively do away with the requirements of breath and blood tests in cases where the State has evidence of the defendant's consumption, gender, and weight. In cases where a defendant made statements as to what he or she drank, the State could offer a BAC estimate based on Widmark to establish the 0.08 or higher element. This could not have been the legislature's intent in enacting the OUI statute, Section 2411, and the chemical testing and weight statutes, Sections 2431 and 2432. The statutes specifically reference a chemical test.

The error in admitting the Widmark formula is not harmless because the State charged both the impairment and excessive blood alcohol elements of the OUI statute.

An error is harmless "if it is highly probable that the error did not affect the jury's verdict." *State v. Phillippo*, 623 A.2d 1265, 1268 (Me.1993) (citing *State v. True*, 438 A.2d 460, 467 (Me.1981)).

The Court in *Taylor* found the error in admitting the BAC testimony based on the HGN test harmless because: "Taylor admitted consuming alcohol and had an odor of alcohol on his breath. He performed poorly on the walk-and-turn test, the one-leg stand test, and reciting the alphabet. His speech was slow and thick. Taylor then

refused to take a breathalyzer test at the station. Moreover, the court entered a judgment of acquittal on the charge of operating with a blood alcohol level of .08% or greater." *Taylor* 15.

In this case, there was minimal evidence, at best, that Mr. MacKenzie was impaired. All three bartenders who served Mr. MacKenzie testified they observed no signs of impairment. The jury reviewed video from the bar in which Mr. Mackenzie sat, stood and walked with little or no signs of impairment.

Unlike in *Taylor*, the court instructed on the 0.08 or higher element. It cannot be determined the jury did not base its OUI conviction on the 0.08 element rather than the impairment element. Therefore, the Court should not find the error harmless.

**2. The Widmark Formula Lacks Relevance and Reliability as it Relates to Mr. MacKenzie's BAC.**

The court erred in admitting the Widmark estimation because it is based on limited information, potentially incorrect information, and incomplete information. The formula used is not specific to Mr. Mackenzie and does not provide a reliable estimation of his BAC.

"We review evidentiary rulings for clear error and an abuse of discretion." *Taylor*, 1997 ME 81, 10.

"A determination of admissibility encompasses two considerations: whether the proffered opinion address[es] an issue of consequence in the case in a way that is helpful to the jury in making its determination and whether the proffered witness is properly qualified to give the opinion sought." *Tibbetts*, 604 A. 2d at 22 (internal citation and quotations omitted).

The Widmark estimation was not relevant or helpful for the jury because it only provides an estimation based on an average male, and is not a measurement of BAC particular to Mr. MacKenzie.

Widmark uses average absorption, distribution and metabolism of alcohol to provide an estimation of someone's blood alcohol. (Tr. Vol. 1 p. 36, 45). Widmark does not provide measurement of blood alcohol in grams for an individual. (*Id.* 46). There is no level of scientific certainty to the Widmark formula. (*Id.*)

The BAC estimate is based on an average male at Mr. MacKenzie's approximate weight. (*Id.* 63). Significant variables exist as to how alcohol can be distributed and eliminated throughout the body. (*Id.* at 45). Widmark does not consider a person's age, body mass index (BMI), and height, all of which can affect BAC. (*Id.* 48-51). The Widmark formula did not consider whether Mr. MacKenzie drank on empty or full stomach, which can affect absorption, distribution and

elimination of alcohol. (*Id.* 53, 58). It has been suggested to update Widmark based on total body weight based on age, weight, height. (*Id.* 56).

Widmark is typically used for single dose spirits over a relatively short period of time. (*Id.* 51-52). Mr. MacKenzie drank ultra light beers over a six hour period. The scientific literature indicates more studies need to be done on social drinking involving more than one drink per hour. (*Id.* 62).

Widmark assumes 100 percent bioavailability of the alcohol consumed. (*Id.* 56-57). During social drinking over several hours bioavailability is always less than 100%. (*Id.* 57). Mr. Mackenzie drank socially over several hours, which would make the bioavailability of the alcohol less than 100%. (*Id.* 58).

Widmark formula does not account for the pace at which MacKenzie consumed the light beers. (*Id.* 59). The rate of consumption is very important in determining BAC. (*Id.* 58-59).

People show an enormous variation in their responses to alcohol, including elimination. (*Id.* 59-60). The elimination rate used by the Widmark formula is 0.015 per hour. The scientific literature indicates elimination rates can vary from 0.09 to 0.25 per hour. (*Id.* 60).

Based on all of the above the Widmark estimate is not relevant, or helpful for the jury, in determining whether Mr. MacKenzie had a blood or breath alcohol measurement of 0.08 grams or more.

3. **The Evidence was Insufficient to Prove Mr. MacKenzie Committed Aggravated Assault.**

The evidence was insufficient to prove beyond a reasonable doubt that Mr. MacKenzie's driving was reckless and the but for cause of the injuries.

Although the Court reviews the evidence "in the light most favorable to the State", the evidence is deemed insufficient if "a jury could [not] rationally find every element of the criminal charge beyond a reasonable doubt." *State v. DePhilippo*, 628 A.2d 1057, 1059 (Me.1993).

A person is guilty of aggravated assault if that person intentionally, knowingly or recklessly causes bodily injury to another that creates a substantial risk of death or extended convalescence necessary for recovery of physical health. 17-A MRSA § 208.

There was no evidence, or argument, that Mr. MacKenzie intentionally or knowingly struck Mr. Williams with his car. The only possible theory the jury could have convicted on was under the reckless element.

"A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result." 17-A MRSA § 35(3).

A person's recklessness causes a result when "the result would not have occurred but for the conduct of the defendant, operating either alone or concurrently with another cause." 17-A MRSA § 33(1).

There is no rational way the jury could have concluded Mr. MacKenzie's driving was reckless, or the but for cause of accident and injuries. The State's own reconstruction concluded: "David was travelling northbound and could not perceive Ira before swerving and striking him." (Vol 2. at 221).

The accident occurred in this case not because of Mr. MacKenzie's driving, but because Mr. Williams was pushing a black wheelbarrow across the travel lane in a poorly light area. The accident would not have occurred but for the conduct of Mr. Williams.

Assuming the jury accepted the State's reconstructionist that Mr. Mackenzie's car was over the double yellow line at the time of the accident that does not establish recklessness. The wheelbarrow was in Mr. Mackenzie's travel lane. Mr. MacKenzie reacted by making an evasive maneuver to the left and applying the brakes. (Vol 3 at 153). This testimony was not contradicted. If Mr. Mackenzie crossed the

centerline, it was in an attempt to take evasive action to avoid a collision with the wheelbarrow in his travel lane

Professor Syphers concluded Mr. Mackenzie's reaction time was within the normal range for civil twilight. He would have had between 2 and 2.5 seconds to see the wheelbarrow and reacted within 1.8 to 2.3 seconds, which is a normal reaction time at civil twilight. (Id. 136). The State offered no evidence Mr. Mackenzie's reaction time was slow. Rather, the State's expert concluded Mr. MacKenzie, "could not perceive Ira before swerving and striking him." (Vol 2. at 221).

The State argued Mr. Mackenzie recklessly assaulted Mr. Williams by driving intoxicated. But driving intoxicated is not alone enough to establish the recklessness element. The State must prove beyond a reasonable doubt some affirmative action (i.e. manner of driving in this case) was reckless and caused the bodily injury.

There was no evidence the way Mr. MacKenzie was driving was reckless. He was traveling between 9-11 mph over the speed limit in a 25mph zone. He was traveling in his lane until he had to swerve left to take evasive action to avoid the wheelbarrow and pedestrian crossing his travel lane in a poorly lit area at near dark.

Operating under the influence does not alone suffice to establish recklessness. Rather, Mr. Mackenzie must have engaged in some sort of conduct (i.e. driving) that was reckless and caused the bodily injury.

"[A] death caused by one operating a motor vehicle while under the influence is not ipso facto the result of recklessness or criminal negligence as these culpable states of mind are defined in the criminal code." *State v. Longley*, 483 A. 2d 725, 732 (Me. 1984).

The Court has indicated driving while intoxicated is relevant to criminal negligence, but has never held it relevant to recklessness (especially in the context of an assault). "Whether a person was operating under the influence is relevant evidence which the fact-finder may consider in determining whether the operator of a motor vehicle is guilty of criminal negligence." *State v. Cheney*, 55 A. 3d 473, 482 (Me. 2012). There is no criminal negligence element to aggravated assault.

In all the cases where a defendant was convicted of an aggravated assault with a vehicle, there was egregious driving that established the recklessness, not mere intoxication. *State v. Pineo*, 798 A. 2d 1093 (Me. 2002) (defendant driving on the wrong side of the road causing head on collision.); *State v. Martin*, 916 A. 2d 961 (Me. 2007) (defendant driving 86 mph in wrong lane.); *State v. Bourgeois*, 639 A.

2d 634 (Me. 1994) (defendant intentionally drove car over an embankment with a passenger inside.).

The evidence in this case did not establish any reckless driving. The State's evidence was that Mr. Mackenzie would not have seen Mr. Williams or the wheelbarrow in time to avoid the accident, that Mr. Mackenzie took evasive action to avoid the accident. Mr. Mackenzie was going no more than 34 mph in a 25 mph, in his lane, slowed down, reacted within a normal time-frame, and tried to avoid hitting Mr. Williams by swerving left who was in his travel lane.

In the absence of any evidence of egregious driving, the jury could only have based its decision on the reckless element on the intoxication. But intoxication alone is insufficient to establish recklessness without actual reckless conduct (i.e. driving in this case).

Therefore, the Court should vacate the Aggravated Assault conviction for lack of sufficient evidence.

## **VI. CONCLUSION**

For all of the reasons set forth above, it is respectfully requested the Court vacate the OUI convictions (Counts 1 and 4) and remand for a new trial, and vacate and dismiss the Aggravated Assault conviction (Count 2) for insufficient evidence.

Dated: March 4, 2025

Respectfully submitted,

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Hunter J. Tzovarras  
Bar No. 4429  
1 Merchants Plaza, 302B  
Bangor, Maine 04401  
(207) 941-8443  
hunter@bangorlegal.com

## **CERTIFICATION OF SERVICE**

I hereby certify a copy of the above brief was electronically served on ADA Mark Rucci on March 6, 2025, and 2 copies were mailed to ADA Mark Rucci, 97 Hammond Street, Bangor, Maine 04401 on March \_\_\_\_, 2025

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Hunter J. Tzovarras