STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. PEN-24-467

STATE OF MAINE

APPELLEE

v.

DAVID MACKENZIE

APPELLANT

ON APPEAL FROM THE PENOBSCOT COUNTY UNIFIED CRIMINAL DOCKET, BANGOR, ME

BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

On July 15, 2023, between approximately 2:40 pm and 8:30 pm, defendant David Mackenzie (hereinafter "Mackenzie") consumed over two gallons of 4.2% alcohol by volume Miller High Life beer at Hide Tide Restaurant & Bar in Brewer, Maine. (III Tr. 32, 38.); (I Tr. 202.); State's Exhibit 1. Shortly after finishing his last drink, he stumbled slightly while exiting the bar, walked to the parking lot, got into his vehicle, and drove away from the Restaurant alone. (III Tr. 40-41, 48, 70.); (I Tr. 185-86.); State's Exhibit 2. Approximately ten minutes later, traveling between nine and eleven miles per hour over the twenty-five mile per hour speed limit on a residential street, he struck the victim, who was pushing a wheelbarrow full of hedge clippings across the street to discard in the woods on the other side. (III Tr. 21.); (II Tr. 170, 175-76.); (III Tr. 133.) The victim was pushed onto the windshield of the car and carried for a time before falling to the pavement. (I Tr. 241-42.) After hitting the victim, whose body left a significant crack in his windshield, Mackenzie stopped for approximately sixty seconds, likely surveyed the scene, and continued home. (III Tr. 44-48, 52.)

The crash was reported multiple times via 911, and crash reconstructionist John McEwen arrived on scene, conducted a reconstruction, and concluded in part based on the position of the wheelbarrow in the middle

of the road that Mackenzie was partially in the oncoming (westbound) lane when he hit the victim. (II Tr. 206-08, 283-86.) He further concluded that alcohol was a contributing factor in the crash. (II Tr. 208.) Police investigated the crash to determine who the driver of the offending vehicle was and did not make contact with Mackenzie for the first time until four days later, July 19, 2023. (III Tr. 28.)

At trial, the State presented the testimony of Maria Pease, a chemist with the Maine State Health and Environmental Testing Laboratory. (I Tr. 190.) Pease testified that when given an individual's drink history, weight, and sex, the Widmark formula is a widely accepted and oft-used method for *estimating* the blood alcohol level of an individual. (I Tr. 196-200, 232.) On voir dire, she testified that she estimated Mackenzie's blood alcohol level to be "around a [.]20." (I Tr. 42.) Having considered her testimony on voir dire, the court ruled that it would allow Pease to testify as to her opinion that that Mackenzie's blood alcohol level was "well above .08" but disallowed testimony as to an exact number. (I Tr. 77.) At trial, Pease testified as to her opinion that Mackenzie's blood alcohol level was .08 or more at 8:50 pm on the night of the crash.[1] (I Tr. 201.)

[1] On redirect examination, Pease stated that the drink time frame she used in her calculation was six hours. (I Tr. 234-35.) This closely comports with the evidence that Mackenzie arrived at the bar at

Mackenzie was charged by complaint on July 21, 2023. (A. 3.) He was indicted on September 27, 2023, (A. 4.), and the State sought and obtained a superseding incitement on March 27, 2024. (A. 6.) (mistakenly paginated A. 4.) Docket Call was held on August 8, 2024, and a jury was selected on August 9, 2024. (A. 6-7.) (A. 6. mistakenly paginated A. 4.) Following a three-day jury trial, Mackenzie was found guilty of aggravated assault, aggravated operating under the influence, leaving the scene of an accident involving serious bodily injury, and operating under the influence alleging a prior conviction on August 29, 2024. (A. 8.) This appeal timely follows. (A. 12.)[2]

2:36 pm and left at 8:28 pm. (III Tr. 35-38.) The first call reporting the crash was received at 8:39 pm, the same time that the GPS from Mackenzie's car placed him on scene. (III Tr. 21.)

[2] While Mackenzie pled not guilty to the original indictment on October 4, 2023, he proceeded to trial on the superseding indictment without having been formally arraigned. (A. 5.)

STATEMENT OF THE ISSUES PRESENTED

I. **Whether the trial court erred in allowing a chemist to testify as to her opinion that Mackenzie's BAC was above .08 when he hit a pedestrian, when Mackenzie's entire drink history was caught on surveillance footage, and when there was no breath or blood test result in evidence because he fled the scene of the crash?**

II. **Whether the chemist's testimony as to her use of the Widmark formula to determine Mackenzie's alcohol level was sufficiently reliable to be admissible, when she knew Mackenzie's approximate weight and complete drink history, and when her testimony was limited to her opinion that he was above a .08 at the time of the crash?**

III. **Whether the evidence was sufficient for a fact finder to find Mackenzie guilty of the crime of aggravated assault beyond a reasonable doubt, when he consumed over two gallons of beer before getting behind the wheel of his vehicle, proceeded to hit a pedestrian, and fled the scene, and when there was evidence that Mackenzie was operating outside of his lane of travel and speeding around the time of impact?**

ARGUMENT

I. The trial court did not err in allowing a chemist to testify as to her opinion that Mackenzie's BAC was above .08 when he hit a pedestrian, when Mackenzie's entire drink history was caught on surveillance footage, and when there was no breath or blood test result in evidence because he fled the scene of the crash.

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if such testimony will help the trier of fact to understand the evidence or to determine a fact in issue." M.R. Evid. 702. To be admissible, an expert's opinion must be relevant to an issue in the case. *State v. Napier*, 1998 ME 8, ¶ 5, 704 A.2d 869 (internal citations omitted). "[T]he court has scope of considerable breadth in deciding whether to admit opinion testimony of a defendant's blood-alcohol level, and its decision will be disturbed on appeal only on a clear showing of abuse of discretion." *State v. Richford*, 519 A.2d 193, 195 (Me. 1986) (citing *State v. Collin*, 441 A.2d 693 (Me. 1982)).

Mackenzie was charged by indictment with operating under the influence alleging either that he operated "while under the influence of intoxicants or 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 M.R.S. § 2411(1-A)(D)(1) (2023); (A.22.). He argues that pursuant to 29-A M.R.S. § 2431 (2023) and 29-A M.R.S. § 2432 (2023), a chemical test is the only valid, admissible evidence of

an individual's blood or breath alcohol content (hereinafter "BAC."). (Blue Br. 17-19.)

Mackenzie's argument fails for several reasons. First, neither sections 2431 nor 2432 state, either explicitly or by implication, that the only admissible evidence as to BAC is by chemical test. Section 2431 merely states that such tests, when properly administered, are admissible in evidence and constitute *prima facie* evidence as to the BAC of the individual tested. 29-A M.R.S. § 2431(1), (2)(C)(5) (2023). Likewise, section 2432 creates a presumption based upon a properly admitted test showing a BAC of 0.08 or greater. 29-A M.R.S. § 2432(3) (2023). In this case, the trial court limited the expert's testimony to an opinion that Mackenzie was above a .08 at the time of operation and stated that the testimony *did not* create a statutory presumption as to his intoxication. (I T. 77.) This was one proper way to marshal the evidence given the lack of chemical test and Pease's testimony regarding the reliability of Widmark as an estimate of BAC.

Mackenzie cites several cases which he contends support his argument that the only admissible evidence of BAC is the chemical test. Each of these cases differs significantly from the matter at hand in several key respects, and several of them support the State's argument. One such case is *State v. Grigsby*. There, Grigsby challenged a trial court ruling excluding from evidence

testimony from an expert as to Grigsby's BAC at the time of arrest. *State v. Grigsby*, 666 A.2d 503, 505 (Me. 1995). He also challenged the court's refusal to give an instruction, pursuant to 29-A M.R.S. § 1312(5)(A) (1995)[3], that "0.05% or less by weight of alcohol in an individual's blood at the time of arrest is prima facie evidence the individual is not under the influence of intoxicating liquor . . . ." *Id.* at 504. In affirming the ruling of the trial court, this Court reasoned that there was no allegation that Grigsby's BAC was 0.08 or greater. *Id.* at 505 ("The State, as in the present case, had offered no evidence of the defendant's blood-alcohol level."). Further, as Mackenzie noted, this Court found no error as to the refusal to give a jury instruction because there was no test, reasoning that expert testimony opining that the defendant's BAC was below .05 would have no *procedural effect* under statute because there was no chemical test.

Here, the State alleged that Mackenzie operated with a BAC equal to or greater than 0.08. (A. 22.) Thus, testimony from an expert as to his BAC was relevant whereas it was not in *Grigsby*. More importantly, however, the trial court in this case complied with this Court's holding in *Grigsby* by affirmatively stating that the expert's opinion as to BAC was admissible but carried no

[3] 29-A M.R.S. § 1312 was repealed and replaced in 1995. *See* §§ 1311-A, 1312. Repealed. Laws 1993, c. 683, § A-1 (eff. Jan. 1, 1995) (codified at 29-A M.R.S. § 2432 (2023)).

procedural effect. (I T. 77.) ("And the state may not rely upon the presumptions in 2432 with respect to the purpose of – for purposes of the intoxications analysis.") *Grigsby* supports the trial court action in this case.

In *State v. Taylor*, after taking judicial notice of the admissibility of the results of a properly administered horizontal gaze nystagmus test, this Court limited what that same test could be used to prove, holding that "using HGN results to precisely quantify blood alcohol content is improper." *State v. Taylor*, 1997 ME 81, ¶ 13, 694 A.2d 907. The Court cited section 1312 as standing for the principle that "the proper way to test for an *exact* blood alcohol level is by chemical analysis . . ." *Id.* It reasoned in part that a chemical test is controlled and verifiable in several ways that HGN is not. *Id.* (reasoning that HGN has other causes, and that the original officer's work is not subject to review or confirmation). *Id.*

This court's ruling comported with *Taylor*. As argued *supra*, the trial court did not allow the State's expert to give an "exact" BAC, limiting her testimony to an opinion—if true—that the level was "well above .08." (I T. 77.) This balance was appropriate given the state of the evidence. In addition, the Widmark formula is different in kind from the horizontal gaze nystagmus test. Where HGN has causes unrelated to alcohol consumption, the Widmark formula is specifically designed to estimate a person's BAC and serves no other

purpose. Further, the vehicle of delivery to the fact finder is important. Here, a chemist testified as to her application of a scientific formula designed to estimate BAC and arrived at an estimation of Mackenzie's BAC. In *Taylor*, a police officer with no training outside of academy instruction testified to how HGN correlates with a specific BAC based up that training. *Id.* ¶ 14. The *Taylor* court recognized the inherent unreliability of HGN when used to estimate BAC in holding that the officer's estimate in that case "lacked scientific basis." *Id.* Such is not the case here, and *Taylor* does not require reversal of this court's holding.[4]

Mackenzie next cites *Souther* to support his argument. *State v. Souther*, 2017 ME 184, 169 A.3d 927. In that case,

> 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 . . . with about a 5% alcohol content would have a peak blood alcohol concentration of 0.05%.

Id. ¶ 4. The State rejected the stipulation, and the trial court excluded the testimony on the grounds that it would risk confusing the jury. *Id.* ¶ 5. In

[4] This Court in *Taylor* also noted the distinction between inductive testing such as HGN and deductive testing such as chemical analysis. *Taylor*, 1997 ME 81, ¶ 13, 694 A.2d 907. HGN, the Court reasoned, is only admissible as evidence of probable cause or as circumstantial evidence of intoxication because it requires observation on the part of the officer which is not verifiable or readily subject to review. Notably, the Widmark formula is another example of a deductive test more closely analogous to chemical testing, though admittedly not as precise.

affirming the ruling of the trial court, this Court noted that, as with *State v. Grigsby*, 666 A.2d 503 (Me. 1995), the State had not alleged a test of 0.08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath. *Id.* ¶ 11. Without that allegation, there was no nexus between the amount of alcohol consumed and impairment as alleged in the State's complaint. *Id.* "Recognizing that deficiency," Souther argued that the testimony was appropriate by virtue of section 2432(1)'s edict that an alcohol level of .05 or less is prima facie evidence that the person "is not under the influence of alcohol." *Id.* ¶ 12; 29-A M.R.S. § 2432(1) (2023). As with *Grigsby*, this Court rejected that claim, finding that section 2432 has no procedural effect in the absence of a chemical test. *Souther*, 2017 ME 184, ¶ 12, 169 A.3d 927.

Souther is simply the logical extension of this Court's holding in *Grigsby*. It adds nothing new to the analysis, and the case at hand is distinguishable in all of the same ways. First, the State charged Mackenzie with operating with a BAC of .08 or more. (A. 22.) Second, the trial court properly rejected the "procedural effect" implicated when an individual is subject to chemical testing. 29-A M.R.S. § 2432 (2023).

State v. Tibbetts is persuasive. 604 A.2d 20 (Me. 1992). In that case, the trial court admitted testimony from a chemist who used the Widmark formula to conduct a retrograde calculation of Tibbetts' BAC at the time of a crash when

he was tested as having a BAC of 0.18% two hours later. *Id.* at 21. In affirming the ruling of the trial court, this Court noted the "considerable breadth in deciding whether to admit opinion testimony of a defendant's blood-alcohol level . . . ." *Id.*

Mackenzie attempts to distinguish this case because the State had presented a chemical test and was offering the testimony of the chemist as a retrograde calculation to "rebut the defense theory" of the case. (Blue Br. 23.) First, in the purely legal sense of the term there is no indication this was "rebuttal" testimony as opposed to having been offered in the State's case-in-chief. *Id.* Second, the existence of a chemical test from two hours after the crash has no bearing on the admissibility of testimony regarding the Widmark formula. As the *Tibbetts* court made clear, there are two considerations when assessing the admissibility of expert testimony, whether "the proffered opinion address[es] an issue of consequence in the case in away that is helpful to the jury . . . " and whether the witness is sufficiently qualified to offer the opinion. *Id.* at 22. If, as Mackenzie contends, title 29-A designates a chemical test the only way "to establish a person's blood or breath alcohol level measured in grams of alcohol . . . " then Widmark testimony is inadmissible regardless of the existence of a chemical test. (Blue Br. 19.) Indeed, Mackenzie's argument—that the existence of a chemical test somehow opens the door to Widmark

testimony—implicitly acknowledges that the true concern is the reliability of the testimony, argued *infra.*[5] (Red Br., Issue II.)

The arguments made above are dispositive. However, there is one obvious and practical reason to reject Mackenzie's contention: the only reason there is no BAC available in this case is because he fled the scene of a crash involving serious bodily injury. Had he stayed on scene and awaited the arrival of law enforcement, the State would have been able to present either evidence of a chemical test or evidence of refusal to take a chemical test. That it could not is a circumstance of Mackenzie's creation, and he should not benefit from his misdeed where the opinion testimony was reliable enough to be admissible.

Defense argues that should this Court affirm the ruling of the trial court, the State will be able to circumvent the clear legislative prerogative for a chemical test so long as it knows a defendant's sex, weight, and drink history. (Blue Br. 24.) For the following two reasons, this is a baseless appeal to fear. First, given the choice between a chemical test carrying the presumptions outlined by statute and discussed *supra* and an estimation of an individual's

[5] The only possible distinction between the retrograde calculation of which Mackenzie approves and the type of calculation performed here is the existence of a chemical test as a benchmark. All of the reliability concerns Mackenzie raised on voir dire and during testimony–the metabolism of the individual, the water content of the body, the consumption of food, etc.—would exist in a retrograde calculation. Mackenzie must distinguish *Tibbetts* because this Court has already approved of testimony regarding the use of the Widmark formula, but that distinction truly goes not to statutory analysis, but to reliability concerns.

BAC based upon imperfect information, no State actor would choose the latter. If Mackenzie's BAC had been part of the evidence in this case the State would have used it and foregone expert testimony as to the Widmark formula. Second, if a chemical test is unavailable due to some State error, action or inaction, the trial court would be well within its discretion to disallow Widmark testimony.

If the trial court did err in the admission of the expert testimony, the error was harmless. Error is harmless "if it is highly probable that the error did not affect the jury's verdict." *State v. Phillipo*, 623 A.2d 1265, 1268 (Me. 1993) (citing *State v. True*, 438 A.2d 460, 467 (Me. 1981)). While Mackenzie asserts that there was "minimal evidence" to suggest his impairment, the jury watched as, over the course of approximately six hours, Mackenzie drank over two gallons of beer, stumbled—albeit slightly— on his way to his vehicle, and drove away from the restaurant, eventually hitting a pedestrian and fleeing the scene. (Blue Br. 25.); (I Tr. 202.); (III Tr. 70.); (II Tr. 14, 33.). Even absent testimony as to BAC, the jury possessed sufficient evidence to believe that Mackenzie's mental or physical faculties were impaired, however slightly, by the alcohol he consumed that night. Indeed, given his drink history—"like twenty" standard beers as the chemist testified—the conclusion is inescapable. (I Tr. 213-14.)

29-A M.R.S. § 2431 *et seq.* are silent on the admissibility of testimony regarding the Widmark formula. They require a chemical test to trigger certain

presumptions and procedural effects. It does not follow that, in the absence of a test, no testimony as to BAC is admissible. Such testimony is subject to the same considerations as all other expert testimony: the helpfulness of the information, and the qualification of the expert. Here, the trial court was well within its discretion to allow the testimony, and its ruling should be affirmed.

II. The chemist's testimony as to her use of the Widmark formula to determine Mackenzie's alcohol level was sufficiently reliable to be admissible, when she knew Mackenzie's approximate weight and complete drink history, and when her testimony was limited to her opinion that he was above a .08 at the time of the crash.

The rules of evidence favor the admissibility of expert testimony "whenever it is relevant and can be of assistance to the trier of fact." *State v. Williams*, 388 A.2d 500, 503 (Me. 1978) (internal citation omitted). "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 . . . ' and 'whether the proffered witness is properly qualified to give the opinion sought.'" *Tibbetts*, 604 A.2d 20, 22 (Me. 1992) (internal quotations omitted). "An expert's opinion is not required to be stated with any special degree of certainty; lack of certainty by the expert witness affects the weight accorded the testimony, not its admissibility." *Id.* (internal citation omitted). The prerequisite for the admission of expert testimony is a showing of sufficient reliability to allow the testimony to be relevant and

helpful to the finder of fact and to avoid prejudice or confusion of the issues. *See State v. Boutilier*, 426 A.2d 876, 879 (Me. 1981). The decision whether to admit expert testimony is reviewed for "a clear showing of abuse of discretion." *Tibbetts*, 602 A.2d at 22 (quoting *State v. Richford*, 519 A.2d 193, 195 (Me. 1986)); (quoting *State v. Franklin*, 463 A.2d 749, 754-55 (Me. 1983)); (quoting Field & Murray, *Maine Evidence*, § 702.1 at 262 (1987)).

This Court discussed the admissibility of expert testimony at length in *State v. Irving*, 2003 ME 31, 818 A.2d 204. In that case, Irving was charged with manslaughter, and the State sought to introduce evidence of the speed at which Irving was driving leading up to the crash that killed his passenger. *Id.* ¶¶ 4-5. On appeal Irving argued that the court erred in admitting the expert testimony because the State's crash reconstructionist based his estimation of speed on unreliable science. *Id.* ¶ 10. In affirming the ruling of the trial court, this Court reasoned in relevant part that the State's expert was qualified and that other experts in the case acknowledged the reliability of the scientific principle at issue, evidencing the requisite degree of reliability to render the testimony admissible. *Id.* ¶ 14.

Irving is instructive. Here, while only one expert testified, her credentials were not questioned. Further, she testified that the Widmark formula has been used for a long time and is widely used within the professional community to

estimate alcohol levels in individuals. (I Tr. 36-37, 64, 197-99, 231-33.) She testified that the consensus in the community is that the formula is accurate to provide an estimate of BAC. *Id.* Indeed, Mackenzie acknowledges the widespread use of the Widmark formula, having made use of a seminal text discussing the method on cross-examination during voir dire. (I Tr. 43, 55.) Given this testimony, the trial court did not err in finding the testimony sufficiently reliable to be relevant.[6]

Mackenzie was able to, and in fact did, raise all the concerns of reliability referenced in his brief on cross-examination of the State's expert. (Blue Br. 26-28.) As a result, the jury retired to the deliberation room with both the expert's opinion and the limitations of that opinion to consider. Given that the science underlying the expert's testimony was sufficiently reliable to be relevant, those limitations do not amount to an abuse of discretion on the part of the trial court in admitting the testimony, and as this Court stated in *Tibbetts*, such concerns go to the "weight accorded the testimony, not its admissibility." *Tibbetts*, 604 A.2d at 22.

III. The evidence was sufficient for a fact finder to find Mackenzie guilty of the crime of aggravated assault beyond a reasonable doubt, when he consumed over two gallons of beer before getting

[6] By contrast, this Court has ruled expert testimony inadmissible where there was no evidence offered as to the reliability of the scientific method employed in calculating the speed of a vehicle, and where the trooper admitted to using a method at odds with his own training manual. *See Boutilier*, 426 A.2d at 878.

behind the wheel of his vehicle, proceeded to hit a pedestrian, and fled the scene, and when there was evidence that Mackenzie was operating outside of his lane of travel and speeding around the time of impact.

When reviewing a challenge to the sufficiency of the evidence supporting a conviction, "[this Court] view[s] the evidence presented at trial in the light most favorable to the verdict to 'determine whether any trier of fact rationally could find beyond a reasonable doubt every element of the offense charged.'" *State v. DesRosiers*, 2024 ME 77, ¶ 21, 327 A.3d 64 (quoting *State v. Pelletier*, 534 A.2d 970, 972 (Me. 1987)). Mackenzie is guilty of aggravated assault if he "did intentionally, knowingly, or recklessly cause bodily injury to [another] that created a substantial risk of death or extended convalescence necessary for recovery of physical health." (A. 22.); 17-A M.R.S. § 208(1)(A) (2023). "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 M.R.S. § 35(3) (2023). Finally, "when causing a result is an element of a crime, causation may be found when the result would not have occurred but for the conduct of the defendant, operating either alone or concurrently with another cause." 17-A M.R.S. § 33(1) (2023).

Contrary to Mackenzie's contention, there was ample evidence from which a properly instructed jury could conclude that Mackenzie recklessly

caused serious bodily injury to the victim by driving a vehicle while intoxicated after having consumed two gallons of 4.2% Miller High Life. (I Tr. 202.) Apart from the drink history, video footage, and expert testimony itself, the jury could have concluded based upon the evidence that Mackenzie was traveling over the speed limit at the time he hit the victim, (III Tr. 133.), was not operating within his lane at the time he hit his victim, (II Tr. 206-08.), and that—based upon body camera footage showing lighting conditions directly after the accident— but for his intoxication Mackenzie would have seen the victim in time to stop his vehicle or otherwise maneuver so as to avoid injury.[7] *See* State's Exhibit 36. While Mackenzie references a single isolated point from the testimony of the State reconstructionist, he ignores that same witness's opinion that Mackenzie was not entirely in his lane at the time of the crash and that alcohol was a contributing factor. (II T. 206-08.) That the victim was in the road and contributed to his injury does not foreclose conviction so long as the jury could have concluded that the accident would not have happened *but for* Mackenzie's conduct. *See* 17-A M.R.S. 33(1) (2023).

Mackenzie contends that in this specific context, to sustain a conviction for aggravated assault based upon an allegation of recklessness, the State must

[7] Mackenzie's expert's argument rests in large part upon perception reaction time at civil twilight. In closing, the State pointed to body camera footage from Officer Rose which tended to show that lighting conditions shortly after the crash were better than suggested. (III Tr. 190-91.)

present more than the mere fact of driving while intoxicated. He cites *State v. Longley*, 483 A.2d 725 (Me. 1984), where this Court found error in a judge's assertion that drunk driving is criminally negligent and reckless *per se*, and *State v. Cheney*, 2012 ME 119, 55 A.3d 473, where this Court held that whether a person was operating under the influence is relevant to whether that person acted with criminal negligence.

Mackenzie errs in his reading of both cases. In fact, this Court in *Longley* affirmatively stated that intoxication is relevant as to the issue of *mens rea*. *Longley*, 483 A.2d at 731-32 ("The justice may have meant that the evidence he had heard proved that defendant's behavior (which clearly constituted operating under the influence) had been reckless and criminally negligent. Such an interpretation of the justice's statement is consistent with the settled Maine law that operating under the influence is relevant evidence which the factfinder may consider in determining whether the operator of a motor vehicle is guilty of criminal negligence.") (quotation marks omitted). The Court held only that drinking and driving does not establish recklessness or criminal negligence *per se*. Further, the *Cheney* Court did not say that intoxication is not relevant to recklessness. It merely said that it *is* relevant to whether the defendant in a manslaughter case acted with criminal negligence. *Cheney*, 2012

ME 119, ¶ 39, 55 A.3d 473. Given that the different *mens rea* have significant areas of overlap, this does nothing to undermine the State's verdict.

Mackenzie argues that because there is no evidence that he was *driving recklessly*, he cannot be found guilty of aggravated assault. This Court need not decide whether Mackenzie's intoxication alone was sufficient to establish recklessness, because Mackenzie's argument downplays the state of the evidence and improperly restricts the factfinder's consideration of the *totality* of that evidence. The jury need not have accepted the defense expert's testimony that, given the lighting conditions, Mackenzie stopped in an appropriate amount of time and could not have seen the victim before the collision. There was body camera footage that cast doubt upon that assertion. State's Exhibit 36. The jury need not have accepted the defense expert's testimony that Mackenzie was in his lane of travel when he hit the victim or that, to the extent he was not, it was the result of a last second evasive maneuver. That was a subject of disagreement. Finally, to the extent the jury considered Mackenzie's speed or operation and considered either or both problematic, it was free to consider the effect of the staggering amount of alcohol he consumed that night on those considerations. It was free to conclude that Mackenzie consciously disregarded a risk that, in drinking the amount of alcohol he consumed and getting behind the wheel of his vehicle, he risked, and

indeed did cause, serious bodily injury to another. It was free to conclude that his actions constituted "a gross deviation from the standard of conduct a reasonable and prudent person would observe" under the circumstances. 17-a M.R.S. § 35(3)(C). Thus, the verdict of the trial court should be affirmed.

CONCLUSION

The trial court properly admitted the State's expert's testimony as to Mackenzie's BAC after considering the reliability of the evidence and its helpfulness to the jury. In making this determination, the court exercised its discretion and limited the expert witness's testimony to an opinion that Mackenzie's BAC was greater than .08 at or around the time of the crash that injured the victim. The evidence was sufficient for the jury to find Mackenzie guilty of all charges in the State's indictment, and the verdict of the trial court should be affirmed.

Respectfully Submitted,

Dated: March 27, 2025

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CERTIFICATE OF SERVICE

As required by M.R. App. P. 7(c)(1), I have this 27th day of March,2025 sent a native .pdf version of this brief to the Clerk of the Law Court and attorney Hunter Tzovarras at the email address on record. Upon acceptance by the Clerk of the Law Court, I will deliver ten hard copies to the Law Court and two copies to opposing counsel attorney Hunter Tzovarras at 1 Merchants Plaza, 302B, Bangor, ME 04401.

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