IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
v.	)	**DOCKET NO. 306929**
	)	
JUSTIN WHALEY,	)	**JUDGE BOYD PATTERSON**
	)	
Defendant.	)	**DIV. III**
	)	

MOTION FOR NEW TRIAL & MEMORANDUM OF LAW IN SUPPORT

The Defendant, Justin Whaley, by and through his attorneys of record, Davis & Hoss, P.C., pursuant to Tennessee Rule of Criminal Procedure 33, hereby files this Motion for New Trial and Memorandum of Law in Support.

Under Rule 33 of the Tennessee Rules of Criminal Procedure, a motion for new trial is made to give the trial court an opportunity to correct errors that occurred during the trial. *Ricks v. State*, 882 S.W.2d 387, 393 (Tenn. Crim. App. 1994). As the Tennessee Supreme Court has explained, "[a] motion for new trial should set forth the factual grounds on which error is alleged, the legal grounds on which the trial court based its actions, and 'a concise statement asserting the legal reasons why the court's decision was improper.'" *State v. Lowe-Kelley*, 380 S.W.3d 30, 34 (Tenn. 2012).

As grounds for this Motion, Mr. Whaley would show the following issues warrant a new trial:

(1) Mr. Whaley's blood alcohol content (BAC) report should have been suppressed because the search warrant for the blood draw lacked probable cause, was facially deficient and based on misleading/incomplete information in violation of the Fourth

Amendment to the United States Constitution and Article I § 7 of the Tennessee Constitution and *Franks v. Delaware,* 438 U.S. 154 (1978); *State v. Little*, 560 S.W.2d 402, 407 (Tenn. 1978);

(2) The BAC report (and any expert extrapolation thereof) should have been suppressed as unreliable under Tennessee Rules of Evidence 403 and 703 given the four-hour delay between the accident and the blood draw and the low results of .020% (with a rate of error of +/- .002%);

(3) The modified jury view of the accident scene without full road closures should not have been granted over defense counsel's objections under Tennessee Rule of Evidence 403;

(4) The trial court issued an improper jury instruction on the ignorance or mistake of fact defense in violation of the Sixth Amendment to the United States Constitution and Article I § 6 of the Tennessee Constitution;

(5) The trial court erred in denying Defendant's Motion to Exclude the Testimony of Christopher Smith (TDOT) in violation of Tennessee Rules of Evidence 403 and 701; and

(6) Under the "thirteenth juror" rule of the Tennessee Rules of Criminal Procedure 33(f), the evidence does not support the verdict of the jury.

FACTS

1. At approximately 5:40 a.m. on July 3, 2018, Mr. Whaley struck James Brumlow's vehicle. *See* Trial Transcript at 195.

2. Immediately thereafter, at approximately 5:41 a.m., Mr. Whaley called 911 to report that he had been involved in an accident where another party was injured. Mr. Whaley

informed the dispatcher that he had gotten turned around and had been traveling the wrong way on Highway 111. The Defendant further stated that he had been traveling from a friend's house and they had been drinking the night before. Mr. Whaley stated that he stayed over at his friend's house until he was safe to drive. He stated that he was 100% sober. *See* Trial Trans. at 133, Trial Exh. 29.

3. At 5:47 a.m. the first officers arrived on the scene. *See* Trial Trans. at 154; Trial Exh. 35.

4. At least twelve law enforcement officers, three EMS workers, and one firefighter responded to the scene. No field sobriety tests were conducted. *See id.*

5. There was no evidence of physical impairment at the scene. *See id.* at 165, 512. One police officer recalled smelling an odor of alcohol on Mr. Whaley's person but could not recall telling anyone else about it, one EMT noted a "hint" of alcohol on Mr. Whaley's person, and a paramedic performed an assessment on Mr. Whaley and testified that he noticed no evidence of impairment and no odor of alcohol. *See id.* at 190-91, 480, 523-24.

6. At all times, Mr. Whaley was fully compliant and cooperative with law enforcement. *See id.* at 234; *see also* 10/3/23 Motion Hearing Transcript at 100-101.

7. At approximately 6:00 a.m., Officer Jeremy Wright with the Soddy Daisy Police Department arrived on the scene. *See* Trial Trans. at 195-97.

8. At approximately 6:50 a.m., at the direction of his superior officers, Officer Wright arrested Mr. Whaley for reckless endangerment. Officer Wright took Mr. Whaley into custody, placed him in handcuffs, read him his Miranda rights, and put him into his patrol car. *See id.* at 119, 121, 198-99, 204; s*ee also* 10/3/23 Motion Hearing Trans. at 98.

9. Officer Wright testified that he did not have reasonable suspicion of impairment to perform a field sobriety test on Mr. Whaley at the scene. *See* Preliminary Hearing Transcript at 52-54.

10. Officer Wright transported Mr. Whaley to the Soddy Daisy Police Department around 6:54 a.m. *See* Trial Trans. at 204.

11. Officer Wright did not smell alcohol on the defendant at the scene. While transporting Mr. Whaley to the Soddy Daisy Police Department, Officer Wright noticed an odor of intoxicant coming from Mr. Whaley's person, from the back seat area of the patrol car. *See id.* at 205.

12. During transport, Officer Wright asked Mr. Whaley about alcohol in his system to which Mr. Whaley responded that he had been drinking the night before but had slept it off and that he did not think any alcohol was in his system. *See id.* at 206-07; 244.

13. At around 7:30 a.m., while completing booking paperwork at the Soddy Daisy Police Department, Officer Wright was instructed to fill out an affidavit for a search warrant to obtain blood. *See id.* at 212.

14. During his 1.5 hours in the booking room together, Officer Wright did not smell any alcohol on Mr. Whaley. *See id.* at 273.

15. During Mr. Whaley's 1.5 hours at the Soddy Daisy Police Department, a breathalyzer machine was available, but no one used it. *See id.* at 170, 229.

16. At approximately 8:45 a.m., Officer Jeremy Wright submitted an Affidavit for a search warrant requesting blood be drawn from Mr. Whaley. Officer Wright avers in the Affidavit that he believed there to be a DUI violation under Tenn. Code Ann. § 55-10-401. The Affidavit states:

> On Tuesday July 3, 2018 Justin Whaley was involved in a motor vehicle crash which resulted in the death of the other driver. Mr. Whaley was driving north on highway 111 in the south bound lane when the head-on collision occurred. I smelled an odor of unknown intoxicant emanating from Mr. Whaley's person and, after being read his Miranda rights, Mr. Whaley admitted to consuming alcohol the night before this event.

See Trial Trans. at 231, Trial Exh. 42.

17. The Affidavit also states that Officer Wright had been duly employed with the Soddy Daisy Police Department for 10 years. *Id.* Officer Wright later testified that this was the first search warrant he had ever filled out. *See* 10/3/23 Motion Hearing Transcript at 93.

18. At the preliminary hearing, pretrial motion hearing, and at trial, Officer Wright testified that he did not have probable cause for a DUI. *Compare* Trial Exh. 42 *with* Trial Trans. at 266, 10/3/23 Motion Hearing Trans. at 107, and Preliminary Hearing Trans. at 53-54.

19. Shortly thereafter, the search warrant was signed and a local firefighter was asked to perform the blood draw but refused due to a conflict of interest. *See* Trial Trans. at 217, 221.

20. At approximately 9:05 a.m., 1.5 hours after arriving at the Soddy Daisy Police Department, Officer Whaley transported Mr. Whaley to the Hamilton County Jail for a blood draw. *See id.* at 218-19.

21. Four hours after the accident, at 9:40 a.m., Mr. Whaley's blood was drawn at the Hamilton County Jail. *See id.* at 225, Trial Exh. 40. Officer Wright testified at trial that this four-hour delay in testing was not caused by Mr. Whaley and that Mr. Whaley was cooperative and communicated clearly at the scene and while in custody. *See id.* at 234; *see also* 10/3/23 Motion Hearing Trans. at 100-101.

22. While Mr. Whaley's blood was being drawn, around 9:40 a.m., Officer Wright received a text message from his superior officer, Sergeant Workman, instructing him to un-arrest Mr. Whaley. *See* Trial Trans. at 171-72; 223.

23. This instruction came from the District Attorney's Office. *See id.* at 171.

24. In his eleven years as an officer, this was the first time Officer Wright arrested then un-arrested a subject. *See id.* at 265.

25. In his 20 years as an officer, this was the first time Sergeant Workman had a subject arrested and un-arrested hours later. *See id. at 174-75.*

26. After taking Defendant's blood, Officer Wright transported Mr. Whaley back to the Soddy Daisy Police Department and subsequently un-arrested Mr. Whaley, releasing him without charge. *See id.* at 267.

27. Mr. Whaley's test blood alcohol content (BAC) test results came back at .020g%. *See id.* at 225, Trial Exh. 40. His toxicology results came back negative. *See id.* at 304-305, Trial Exh. 48.

PROCEDURAL HISTORY

Motion to Suppress BAC Results – Warrant Deficiencies

1. On June 17, 2019, Defense Counsel filed a Motion to Suppress the blood alcohol results on the basis that the warrant failed to allege probable cause for a criminal offense as required under both State and Federal Constitutions.[1]

2. On September 12, 2023, Defense Counsel filed a *Franks* Motion to Suppress alleging that the warrant included false statements, misrepresentations, and material omissions.

[1] At the preliminary hearing, Municipal Court Judge Lasley found there to be "very slight probable cause." *See* Preliminary Hearing Trans. at 33.

3. On October 3, 2023, following a hearing on these issues, this Court denied Defendant's motions to suppress (finding probable cause for the warrant and no false statements/material omissions under *Franks). See* 10/3/23 Motion Hearing Trans. at 120-22.

Motion to Suppress BAC Results –Unreliability of Results/Extrapolation

4. On May 3, 2019, Defense Counsel filed a Motion to Suppress the BAC test results on the basis that the four-hour delay in testing rendered the results unreliable and that the low level .020 g% result rendered extrapolation unreliable.

5. In support of this Motion, Defense Counsel attached a report from toxicologist Roy Moore stating that it was unreliable to extrapolate upon a test result so low as a .020 g%. *See* 5/3/19 Motion to Suppress, Exh. C.

6. On September 18, 2019, Judge Barry Steelman heard arguments from counsel and expressed the need for live testimony. *See* 9/18/19 Motion to Suppress Hearing Trans. at 43-44.

7. On September 25, 2019, the Motion hearing resumed. The State called Officer Jeremy Wright of the Soddy Daisy Police Department and submitted a report from toxicologist Dr. Kenneth Ferslew who opined that, using retrograde extrapolation, Mr. Whaley's BAC at the time of the accident was a .088 g% (there was no range, just this number). *See* Dr. Ferslew's Report.

8. On November 25, 2019, Judge Steelman entered an Order recognizing the four-hour delay and the low results as a potential problem, noting: "a delay of 4 hours between the accident and the BAC test and a BAC test result below the per-se limit significantly diminishes probative value" of the test. Judge Steelman ruled that these low results were "inadmissible without retrograde extrapolation" and "that the prosecution's expert's retrograde extrapolation from the defendant's 0.02% BAC is inadmissible without more *pre-trial* information about whether or not

and why he shares the other experts' concerns regarding the unreliability of retrograde extrapolation from 0.02% or 0.03% BAC and whether or not and why he recognizes any point at which retrograde extrapolation becomes unreliable." *See* 11/25/19 Order at 4.

9. On August 17, 2020, Judge Steelman heard testimony on this issue from defense expert Dr. Jimmie Valentine and prosecution expert Dr. Kenneth Ferslew.

10. Both experts testified that retrograde extrapolation (using Widmark kinetics) is reliable to a point and that it ceases to be reliable once blood alcohol levels get low (wherein Michaelis-Menten kinetics apply). However, they disagreed about the point at which extrapolation becomes unreliable. *See* 8/17/20 Motion to Suppress Hearing Trans. at 22.

11. Dr. Ferslew maintained that retrograde extrapolation only becomes unreliable *under* .020%. He testified that reliable extrapolation can be performed on a .02% result but ends "at about a .02." *See id.* at 67. Dr. Ferslew testified that "if you extrapolate at less than this, you're getting a false reading." *Id.* at 23. Dr. Ferslew testified that a .020% would be the lowest point at which extrapolation could be performed reliably and that he would not attempt to calculate a .0198%. *Id.* at 77. Dr. Ferslew also testified that the defendant's lack of impairment at the scene had no bearing on his analysis. *Id.* at 37-40.

12. Dr. Valentine maintained that retrograde extrapolation (using Widmark kinetics) varies by individual and can become unreliable at .02 or even .025%. *Id.* at 46.

13. Dr. Valentine explained that once somebody gets down to a .02% level, the elimination rate is more variable and one cannot extrapolate back given the uncertainty of how long one could be and stay at a .02. *Id.* at 53-54.

14. Dr. Valentine testified that, based on Mr. Whaley's low .02% results, "using this retrograde extrapolation is just not very...scientific." *Id.* at 48.

15. Dr. Valentine noted that there is a rate of error on the BAC test of -/+ .002% and that this rate of error could put the result below .020%. *Id.* at 48, 60.

16. Dr. Ferslew, in response, dismissed this concern as "semantics of the numbers" because "[i]t's out in the third decimal." *Id.* at 67, 76.

17. On February 3, 2021, Judge Steelman entered a lengthy order denying Defendant's Motion, finding that both Dr. Ferslew's retrograde extrapolation and Dr. Valentine's critique thereof had scientific validity. *See* 2/3/21 Order at 15. Judge Steelman made note, however, that Dr. Ferslew relied on less recent authority, less recent research, and did not consider the defendant's lack of impairment at the scene. *Id.* at 9, 15. Judge Steelman recognized that there is a disagreement in the scientific community about this method, but that "this division has not prevented the admission of evidence of retrograde extrapolation in Tennessee." *Id.* at 8.

18. In the Court's reasoning, Judge Steelman dismissed Dr. Valentine's concerns about the error rate as follows:

> The Court, however, also questions the fairness of Dr. Valentine's concern about the possibility that one of the tests of the defendant's blood was less than .020g%, at least to any extent that that concern is severable from his concern about the reliability of retrograde extrapolation at or near 0.020 g% in general. The defendant's BAC of 0.020 g% being an average of two tests, if the result of one of the tests of the defendant's blood was less than 0.020 g% then the result of the other test was necessarily more than 0.020g%. Of course, if the result of one of the tests of the defendant's blood was not less than 0.020 g%, then the result of neither test was less or more than 0.020%.

See id. at 11.

19. The TBI report reflects that two tests were analyzed. Results of both tests had rates of error of +/- .002g% at a minimum of a 99.73% confidence level. *See* Trial Trans. at 225, Trial Exh. 40. There were no indications from the experts that the uncertainty rate had anything to do with the averaging of test results. At the suppression hearing, Dr. Valentine merely explained that

the report reflected that if you ran the test 100 times, 99 times you would end up in the range of .018%-.022%. *See* 8/17/20 Motion to Suppress Hearing Trans. at 60.

20. With regard to the delay in testing, Judge Steelman found that the four-hour delay was "not unreasonable in the circumstances, including the fatal nature of the accident." *See* 2/3/21 Order at 6. The Court gave no further explanation other than citing to an unpublished case: *State v. Scott*, No. M200602067CCAR3CD, 2008 WL 4253722 (Tenn. Crim. App. Sept. 17, 2008).

21. Ultimately, Judge Steelman allowed Dr. Ferslew to testify as long as the expert "consistently state[s] the retrograde extrapolation as a range of values, not a single value, and d[id] not suggest without knowledge of the defendant's actual elimination rate that the defendant's actual elimination rate was the average elimination rate and on condition that the prosecutor and the prosecution expert do not misstate the measurement uncertainty and confidence level..." *See* 2/3/21 Order at 15.

22. On October 23, 2023, Defense Counsel filed a Motion *in limine* regarding this issue asking this Court to exclude Dr. Ferslew's testimony as unreliable or, in the alternative, to exclude his testimony regarding anterograde extrapolation and limit his testimony to the range of .056 to .088%. This Court granted Defendant's Motion, in part, by excluding testimony about anterograde extrapolation, but allowed Dr. Ferslew to testify to the entire range discussed in the earlier motion hearing: .056-.120%. *See* Trial Trans. at 7-9, 15, 20.

Pretrial Motion – Jury View

23. On October 3, 2023, upon Motion of the State, the parties agreed to a jury view of the route that Mr. Whaley drove leading to the ultimate accident scene. This agreement was contingent on certain parameters: that the roadways were closed and the view took place in the

dark (mimicking the dark, limited traffic occurring in the early hours of the time of the accident). *See* 10/3/23 Motion Hearing Trans. at 124, 126-27.

Pretrial Motion to Exclude Testimony of Christopher Smith (TDOT)

24. On September 13, 2023, Defense Counsel filed a Motion to Exclude the Testimony of TDOT Safety Manager Christopher Smith under Rules 401 and 403 of the Tennessee Rules of Evidence.

25. On October 3, 2023, the Court heard arguments on this Motion. Defense raised concerns that Mr. Smith's testimony exceeded the bounds of a lay witness in violation of Rule 701 and had the potential to unfairly prejudice Mr. Whaley. *See id.* at 59-72.

26. The trial court denied this Motion on October 3, 2023. *See id.* at 72.

Trial

27. The trial began October 23, 2023.

28. The results of the .020% blood alcohol test were admitted into evidence. *See* Trial Trans. at 225, Trial Exh. 40.

29. With regard to the report, the TBI toxicologist testified that if one tested this sample 99 times out of 100 you would end up in the range of .0180-.022.%. The toxicologist also explained that test #1 resulted in a .0203 (meaning the low range with the rate of error would have been a .0183) and test #2 resulted in a .0201(meaning the low range with the rate of error would have been a .0181). As TBI reports to the third decimal, this resulted in a reported average of .020%. *Id.* at 308-10.

30. The jury also heard testimony from Dr. Ferslew, who testified that if the BAC is a .02% or greater, then the Widmark formula applies. And if the BAC is less than .02%, the Widmark

formula does not apply. He then applied the Widmark formula to the BAC level of .020%, extrapolated back four hours, and offered a resulting range of .056-.120%. *Id.* at 334, 348.

31. The jury asked about the -/+ .002% error rate during Dr. Ferslew's testimony, asking: "Plus or minus .002 means that Mr. Whaley's blood alcohol content could also be viewed as .018?" *Id.* at 381-82.

32. Dr. Ferslew demurred and responded to this jury question by providing a range: .018-.022%. *Id.* at 382.

33. Dr. Valentine testified that retrograde extrapolation can be reliable for certain levels of BAC, "but when you get to low BAC levels:.020% or below or even .030, the results become unreliable." *Id.* at 544, 546-7.

34. In his 40 years of experience, Dr. Valentine had never seen retrograde extrapolation used on a .020% result. *Id.* at 553.

35. Dr. Valentine also testified that all facts must be considered to determine impairment – not just blood levels alone. *Id.* at 569.

36. A jury view was scheduled for October 25, 2023 at 7:00 p.m. A couple of hours prior, at 4:30 p.m., this Court contacted the parties by text message, notifying them that the Hamilton County Sherriff's Department stated that there was not enough manpower to close both northbound and southbound lanes of traffic and that Highway 111 and 27 would be closed southbound only. *See* Defendant's Objections to Modified Jury View & Defendant's Exh. A.

37. Counsel for the defendant objected, raising concerns that "with open 27 northbound traffic the situation will be completely different than it was on July 3 at 5:40 a.m. with no traffic. There will be cars and lights and there is no way for us to address that. The jury can't unsee that." *Id.*

38. The Court offered to amend the instructions and the script to be read to the jury to reflect the changes in traffic control. Counsel for defendant requested that his objections be put in the record:

> I need to put on the record my objection. The agreement was that northbound traffic would be shut down. The jury heard this afternoon that there are millions of cars that travel through this intersection. They will see many cars traveling through this intersection tonight. The state of the proof is there were no cars traveling northbound on July 3. There will be no witnesses who will testify to cars being northbound in the early morning on July 3. We are presenting the jury tonight with a very different scene and respectfully there's no way to properly instruct.

Id. at 1-2 & Defendant's Exh. A.

39. The jury view took place a few hours later at approximately 7:30 p.m. The trial judge began by noting "conditions this evening will perfectly mirror those of that particular morning...traffic conditions may differ. Traffic volume would have been different at 7:30 in the evening than it would have been at 5:40 in the morning...You must take all of these differences into account." *See* Trial Trans. at 493-94.

40. Once at the point of the u-turn and the location of the accident, this Court stated: "There would have been little to no northbound traffic the morning of July 3, 2018 at the time..." *Id.* at 495-97.

41. Counsel for the Defendant described the subsequent jury view as follows:

> At the jury view, cars were traveling northbound on Highway 27. Cars and trucks had their lights on. Traffic noise was loud. Vehicle traffic northbound on highway 27 was steady and non-stop. This occurred at two locations. First, at the location where the Defendant made his U-turn, and second at the location where the crash occurred. To Defense Counsel, the sound of the traffic was so pronounced it made it difficult to hear the Court. Vehicle traffic and lights were a constant presence to the jury. Vehicle traffic was non-stop throughout the view. Vehicle headlights illuminated the road. The effect of the traffic during the view was significant and prejudicial to the Defendant.

See Def.'s Obj. To Modified Jury View at 2.

42. Christopher Smith, Safety Manager with TDOT and witness for the State, testified about the roadway and introduced a photo of the scene with labels. *See* Trial Trans. at 389-91.

43. The State asked Mr. Smith for his opinion as to why there were no wrong-way/do-not-enter signs on the pertinent portion of the highway. Defense Counsel objected while Mr. Smith responded that "They're not called for by the standard. And the orientation of the road is not such that someone could..." *Id.* at 397. The Court overruled said objection. *Id.*

44. Steven Becker (accident reconstructionist for the defense) testified that there was no erratic driving indicating impairment in the driving data. *See id.* at 668.

45. At the close of the State's proof, Defense Counsel moved for acquittal on Count 1 (vehicular homicide) and Count 8 (DUI). *Id.* at 503. The Court denied said motion. *Id.* at 509.

46. On October 26, 2023, the Court granted defense counsel's request for a mistake of fact jury instruction, but supplemented the standard Tennessee Pattern Instruction with two sentences regarding "involuntary intoxication" and deviated from the standard Tennessee Pattern Instruction by not setting forth the required mental states for each of the charged and included offenses. *Id.* at 687-88, 740.

47. Defense counsel objected to this modification and the Court overruled said objection. *See id.* at 681-91.

48. On October 27, 2023, the jury found the defendant guilty of vehicular homicide by intoxication, reckless driving (2 counts), driving on a divided highway, speeding, driving under the influence, and reckless vehicular homicide. *Id.* at 818-19.

49. This Court, as the 13th juror, concurred with the jury's verdict. *Id.* at 820.

LAW & ARGUMENT

1. SEARCH WARRANT FOR BLOOD DRAW IMPROPER

Respectfully, Mr. Whaley submits that this Court erred in admitting his blood alcohol content (BAC) results in violation of his rights under the Fourth Amendment to the United States Constitution and Article I § 7 of the Tennessee Constitution.

The legitimate expectation of privacy related to a blood draw is well-established and a warrant, in this case, was required. *Birchfield v. North Dakota*, 579 U.S. 438, 455 (2016); *See also Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (recognizing that a blood draw is a Fourth Amendment search).

"In cases where the defendant advocates the suppression of evidence obtained pursuant to a search warrant, the burden is on the accused to prove by a preponderance of the evidence: (1) the existence of a legitimate expectation of privacy in the place or property from which the items sought to be suppressed were seized; (2) the identity of the items sought to be suppressed; and (3) the existence of a constitutional or statutory defect in the search warrant or the search conducted pursuant to the warrant." *State v. Boyd*, No. W2003-02444-CCA-R9CD, 2004 WL 541128, at *2 (Tenn. Crim. App. Mar. 17, 2004) (citing *State v. Evans,* 815 S.W.2d 503, 505 (Tenn.1991); *State v. Harmon,* 775 S.W.2d 583, 585–86 (Tenn.1989)).

As set forth herein, the defects in the underlying search warrant are twofold: (A) the search warrant for the blood draw was facially deficient by lacking probable cause and (B) the affiant officer intentionally or recklessly submitted an affidavit knowing there was no probable cause and misrepresented/omitted material statements, evidence and information that, if properly included, would have refuted probable cause for a DUI offense.

A. The affidavit for the search warrant failed to sufficiently allege probable cause that evidence of a crime would be present in Mr. Whaley's blood.

The Fourth Amendment to the United States Constitution and Article I § 7 of the Tennessee Constitution guarantee the right of people to be secure in their persons, houses, papers and possession from unreasonable searches and seizures. To ensure that guarantee, the Fourth Amendment requires that search warrants issue only "upon probable cause, supported by Oath or affirmation." Similarly, Article I, Section 7 of the Tennessee Constitution precludes the issuance of warrants except upon "evidence of the fact committed." Therefore, under both the federal and state constitutions, no warrant is to be issued except upon probable cause. *State v. Henning*, 975 S.W.2d 290, 294 (Tenn. 1998) (citations omitted).

Probable cause has been defined as "a reasonable ground for suspicion, supported by circumstances indicative of an illegal act." *Id.* at 294 (quoting *Lea v. State,* 181 S.W.2d 351, 352 (1944)). Probable cause is "more than a mere suspicion," *State v. Lawrence*, 154 S.W.3d 71, 76 (Tenn. 2005), but less than absolute certainty. *State* v. *Melson,* 638 S.W.2d 342, 350 (Tenn. 1982).

The Tennessee Rules of Criminal Procedure require that "a finding of probable cause supporting issuance of a search warrant must be based on evidence included in a written and sworn affidavit." *Henning*, 975 S.W.2d at 294; Tenn. R. Crim. P. 41(c). *See also* Tenn. Code Ann. § 40-6-103 ("A search warrant can only be issued on probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched."); Tenn. Code Ann. § 40-6-104 ("The affidavits [forming the basis of the search warrant] must set forth facts tending to establish the grounds of the application, or probable cause for believing the grounds exist.")

"[T]he sufficiency of a search warrant affidavit is to be determined from the allegations

contained in the affidavit alone." *Henning,* 975 S.W.2d at 297 (Tenn.1998). Tennessee courts have explained that "[t]he affidavit must present facts from which a 'neutral and detached magistrate, reading the affidavit in a common sense and practical manner' may determine the existence of probable cause for issuance of the search warrant." *State v. Carter,* 160 S.W.3d 526, 533 (Tenn. 2005) (quoting *Henning,* 975 S.W.2d at 294).

An affiant's words should be given their natural meaning and interpretation. *State v. Smith,* 477 S.W.2d 6, 8 (Tenn. 1972). Further, "[t]o ensure that the magistrate exercises independent judgment, the affidavit must contain more than mere conclusory allegations by the affiant." *Henning,* 975 S.W.2d at 294. *See also State v. Abernathy,* 159 S.W.3d 601, 603 (Tenn. Crim. App. 2004) ("Also, essential to the process of obtaining a search warrant is the requirement that the affidavit recite sufficient underlying facts and circumstances to enable the issuing magistrate to "perform his detached function and not serve merely as a rubber stamp for the police.") (internal citation omitted).

Instead, an affidavit seeking to establish probable cause for a search warrant must "set forth facts from which a reasonable conclusion might be drawn that the evidence is in the place to be searched." *State v. Tuttle,* 515 S.W.3d 282, 300 (Tenn. 2017) (*quoting State v. Smith,* 868 S.W.2d 561, 572 (Tenn. 1993). In other words, the affidavit must demonstrate a nexus between the criminal activity, the place to be searched, and the items to be seized. *Id.* at 300-01. (citing *State v. Saine,* 297 S.W.3d 199, 206 (Tenn. 2009)(citing *State v. Reid,* 91 S.W.3d 247, 273 (Tenn. 2002); *Smith,* 868 S.W.2d at 572). *See also United States v. Acklen,* 690 F.2d 70 (6th Cir.1982); *see, e.g., Illinois v. Gates,* 462 U.S. 213 (1983); *Spinelli* v. *United States,* 393 U.S. 410 (1969).

The reviewing standard is whether the magistrate had a substantial basis for concluding that a search warrant would uncover evidence of wrongdoing. *Spinelli,* 393 U.S. at 418; *State* v. *Jacumin*, 778 S.W.2d 430, 432 (Tenn. 1989).

In the context of driving under the influence, sufficient probable cause arises from multiple factors indicating physical impairment. *See e.g., State v. Bell*, 429 S.W.3d 524, 535 (Tenn. 2014) (sufficient probable cause found where defendant was driving the wrong way on a divided highway, smelled of alcohol, and admitted to drinking "more than he should have" that night); *State v. Shutt*, No. M2011-01211-CCA-R3-CD, 2012 WL 3255085, *4 (Tenn. Crim. App. Aug. 10, 2012) (sufficient probable cause found where defendant was pulled over for speeding, an "obvious" odor of alcohol emanated from the defendant's vehicle, defendant admitted to drinking that evening, defendant had bloodshot eyes, his speech was "a little thick," and he was swaying/unsteady at the scene); *State v. Willis*, No. M2012-01577-CCA-R3-CD, 2013 WL 1645740 *6 (Tenn. Crim. App. Apr. 17, 2013) (sufficient probable cause where defendant weaved/crossing fog line several times, admitted to drinking on the night in question, and performed poorly on a field sobriety test); *State v. Crisp*, No. M2013-01339-CCA-R3-CD, 2014 WL 3540646 *7 (Tenn. Crim. App. July 17, 2014) (sufficient probable cause found where defendant was involved in a head-on collision, the defendant smelled of alcohol and had red eyes, the defendant admitted to drinking, and several beer cans and a half-empty whiskey bottle were found strewn from the passenger side door of the car); *State v. Jones*, No. M2017-005377-CCA-R3-CD, 2018 WL 1512063 (Tenn. Crim. App. Mar. 27, 2018) (sufficient probable cause found where defendant was driving with a broken headlight, an odor of alcohol emanated from the defendant, the defendant's eyes were bloodshot, he swayed and lost his balance upon existing the

vehicle, he was speaking with a slight slur as he answered deputy's questions, and failed HGN test).

In one case, fewer factors indicating impairment were involved, but the arresting officer's DUI experience and training were convincing. *See State v. Evetts*, 670 S.W.2d 640, 641-42 (Tenn. Crim. App. 1984)(sufficient probable cause found where the arresting officer smelled alcohol on the defendant's breath and determined that the defendant was the cause of the accident, with court noting that the arresting officer had 18 years of experience in law enforcement and over 1,000 arrests for DUI).

On the other hand, probable cause for driving under the influence has been held insufficient and evidence suppressed where based on "not a strong odor, but an odor of alcohol" and a car accident/leaving the scene. *State v. Sides*, No. E2000-01422-CCA-R#-CD, 2001 WL 523375 *3 (Tenn. Crim. App. May 16, 2001). Similarly, the existence of a traffic violation/accident alone is not sufficient to support a finding of probable cause for driving under the influence. Order Granting Motion to Suppress, *State v. Williamson*, Doc. No. 313268 (Hamilton County Criminal Court, Division II, Dec. 13, 2023).

In the present case, Officer Wright's affidavit fails to allege probable cause of a suspected DUI violation. The facts that Officer Wright includes as the basis for probable cause of a violation of DUI are:

- A collision after Mr. Whaley was traveling north on highway 111 in the southbound lane;
- An "odor of unknown intoxicant emanating from Mr. Whaley's person";[2] and
- Admission of "consuming alcohol the night before this event."[3]

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[2] As discussed in Part 2, this ground was only noted *after* Officer Wright arrested Mr. Whaley for reckless endangerment.

[3] *Id.*

See Trial Trans. at 231, Trial Exh. 42. As for Officer Wright's experience – the affiant merely states that he has been "duly employed with the Soddy Daisy Police Department for 10 years." *See id.* There is no information in the affidavit about Officer Wright's DUI experience or arrests. He later testified that it was the first search warrant he had ever filled out. *See* 10/3/23 Motion Hearing Trans. at 93. The affidavit is silent as to field sobriety tests, the suspect's appearance at the scene of the accident, the suspect's demeanor, the suspect's speech, his ability to walk, his ability to remove his driver's license from his wallet, or any of the other hundreds of descriptions that law enforcement officers put in DUI affidavits.

Rather, the current affidavit only alleges a smell of alcohol from Mr. Whaley's person (not his breath), and a statement that at some date and time the previous day Mr. Whaley had consumed alcohol. There is nothing in the Affidavit that explains "the night before this event" or when that supposedly occurred. There is nothing that describes how much Whaley consumed "the night before this event." Accordingly, this case is a far cry from the probable cause found in *Bell, Shutt, Willis, Crisp, and Jones* (all of which include multiple indicators of impairment at the time of the traffic violation). Here, there were no physical indications that Mr. Whaley was intoxicated, nor did he admit to drinking just prior to the accident or being drunk at the time of the accident.

Instead, this case is more in line with *Sides* – where a vague odor of alcohol and a car accident was not sufficient to support a finding of probable cause. *State v. Sides*, No. E2000-01422-CCA-R#-CD, 2001 WL 523375 *3 (Tenn. Crim. App. May 16, 2001); *See also* Order Granting Motion to Suppress, *State v. Williamson*, Doc. No. 313268 (Hamilton County Criminal Court, Division II, Dec. 13, 2023)(examining cases and finding the existence of a traffic violation/accident alone not sufficient to support a finding of probable cause for driving under the influence). Finally, while the *Evetts* case had very few grounds, it can be distinguished because

the arresting officer had over 18 years of DUI experience, including 1,000 DUI arrests. Here, no such DUI experience is noted.

Respectfully, the search warrant is facially deficient in that it fails to set forth probable cause a nexus that alcohol is likely to be in Whaley's blood and should be suppressed.

B. <u>The affiant made false statements/misrepresentations and/or omitted material information from his affidavit that, if properly included, would have refuted probable cause for a DUI offense.</u>

Ultimately, a magistrate must rely on accurate information in making a probable cause determination. *State v. Norris,* 47 S.W.3d 457, 469 & n. 4 (Tenn. Crim. App. 2000). Therefore, even if the search warrant is facially valid, the fruits of a search warrant should be excluded when the affidavit in support of the search warrant includes deliberately or recklessly false statements by the affiant, which are material to the establishment of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *State v. Little*, 560 S.W.2d 402, 407 (Tenn. 1978).

An affidavit, sufficient on its face, may be impeached only by showing "(1) a false statement made with intent to deceive the [c]ourt, whether material or immaterial to the issue of probable cause," or "(2) a false statement, essential to the establishment of probable cause, recklessly made." *Little*, 560 S.W. 2d at 407. Recklessness may be established by showing that a statement was false when made and that affiant did not have reasonable grounds for believing it, at that time. *Id.* In the context of recklessly false statements, a defendant must show that the reckless statements were necessary to the finding of probable cause in order to be entitled to relief. *Franks*, 438 U.S. at 155-56; *see State v. Smith*, 867 S.W.2d 343, 350 (Tenn. Crim. App. 1993). Allegations of negligence or innocent mistakes are insufficient to invalidate a search warrant. *Franks*, 438 U.S. at 171.

While courts have recognized that the rationale of *Franks* and *Little* should extend to material omissions in an affidavit, "an affidavit omitting potentially exculpatory information is less likely to present a question of impermissible official conduct than one which affirmatively includes false information." *State v. Yeomans*, 10 S.W.3d 293, 297 (Tenn. Crim. App. 1999) (citing 2 LaFave, *Search and Seizure* § 4.4(b) (3d ed. 1996), and *United States v. Atkin*, 107 F.3d 1213, 1217 (6th Cir. 1997)). The burden is on the defendant to establish the allegation of an intentionally or recklessly false statement by a preponderance of the evidence. *Yeomans*, 10 S.W.3d at 297 (citing *Franks*, 438 U.S. at 156).

In this case, Office Wright filled out a search warrant for a blood draw for driving under the influence after he was instructed to arrest Mr. Whaley for reckless endangerment. He swore on the affidavit that he believed there to be a DUI violation and went on to list three items as probable cause for DUI –

- A collision after Mr. Whaley was traveling north on highway 111 in the southbound lane
- An "odor of unknown intoxicant emanating from Mr. Whaley's person"; *(noticed by Office Wright only after Mr. Whaley was arrested for reckless endangerment and placed in the affiant's patrol car)* and
- Admission of "consuming alcohol the night before this event." *(information learned only after Mr. Whaley was arrested for reckless endangerment and in transit to the Soddy Daisy Police Department)*

See Trial Trans. at 231, Trial Exh. 42 (notations added in italics)

The magistrate signed the warrant about an hour after it was drafted, and blood was taken about an hour after that. After the blood draw, Mr. Whaley was returned to the Soddy Daisy Police Department where he was un-arrested for reckless endangerment at the direction of the District Attorney's office. *See* Trial Trans. at 171-72, 223. Given these facts, Counsel for Mr. Whaley respectfully submits that the following issues amount to *Franks* violations and that Mr. Whaley's BAC should have been suppressed:

i. *False Statement about Probable Cause for DUI*

First, the affiant swore there was probable cause for DUI, but later testified, under oath, that he did not have probable cause for DUI. *Compare* Trial Exh. 42 *with* Trial Trans. at 266, 10/3/23 Motion Hearing Trans. at 107. Officer Wright also testified that he did not believe there was even enough reasonable suspicion of impairment to cause him to perform a field sobriety test on Mr. Whaley at the scene. *See* Preliminary Hearing Trans. at 52-54. It is undisputed that not one of the dozen officers on the scene administered a field sobriety test.

Accordingly, the sworn affidavit in this case includes more than a typo or innocent mistake. Officer Wright signed a document swearing to certain facts that he knew were not true. Certain facts that were essential to a finding of probable cause. Whether intentional or reckless, this falsity is at the core of the probable cause issue and should have warranted suppression under *Franks*.

ii. *Unlawful Arrest for Reckless Endangerment Used as Tool for Illegal Blood Draw*

Second, Officer Wright misrepresented key information, evidence and facts to the Magistrate. In addition to including the language about DUI in the affidavit, Office Wright failed to include that he was booking Mr. Whaley for reckless endangerment (leading the magistrate to believe that Mr. Whaley had been arrested for DUI rather than reckless endangerment). *See* Trial Trans. at 231, Trial Exh. 42.

At the time of Mr. Whaley's 2018 arrest, the elements of the crime of Reckless Endangerment were as follows:

> A person commits an offense who recklessly engages in conduct that places or may place another person in imminent danger of death or serious bodily injury.

Tenn. Code Ann. § 39-13-103(a) (2013).

Tennessee cases about reckless endangerment and vehicles often involve a defendant driving recklessly in an attempt to evade arrest. *See State v. Cunningham*, No. M2013-02844-CCA-R3CD, 2014 WL 3729904, at *6 (Tenn. Crim. App. July 25, 2014)(collecting cases) (sustaining a reckless endangerment conviction upon proof that the defendant forced the police officer to drive into an oncoming lane of traffic and deliberately rammed into the police vehicle). Other cases involve a driver performing an illegal maneuver with evidence that they knew it was illegal. *See State v. Krasovic*, No. M2013-00607-CCA-R3CD, 2014 WL 2931694, at *5 (Tenn. Crim. App. June 26, 2014) (reckless endangerment conviction sustained where defendant attempted to pass another vehicle, on a hill, after dark, in a no-passing zone (crossing a double yellow line)); *State v. Stewart*, No. E201500820CCAR3CD, 2016 WL 6087654, at *9–10 (Tenn. Crim. App. Oct. 18, 2016) (reckless endangerment conviction sustained where defendant used a short-cut he had used "a thousand times before," ignoring a "do not enter" sign, and driving the wrong way into oncoming traffic).

In this case, aside from the collision itself, the grounds for Mr. Whaley's initial arrest and subsequent un-arrest are unclear. It is undisputed, however, that Officer Wright was instructed to arrest and did arrest Mr. Whaley for reckless endangerment. *See* Trial Trans. at 119, 121, 198-99, 204; 10/3/23 Motion Hearing Trans. at 98. Once handcuffed and Mirandized, Mr. Whaley was placed in Officer Wright's patrol car and, only then, did Officer Wright notice an odor of alcohol from Mr. Whaley's person. Also, only *after* Mr. Whaley was arrested and read his Miranda rights did Officer Wright hear that Mr. Whaley had been drinking the night before.

After unlawfully arresting Mr. Whaley for reckless endangerment, Officer Wright filled out a search warrant application for a blood draw using this post-arrest information as grounds for probable cause for DUI. After the warrant was secured and his blood drawn, Mr. Whaley was

subsequently un-arrested for reckless endangerment per the District Attorney's Office. The grounds for this un-arrest are also unclear. Ultimately, it is undisputed that Mr. Whaley was never charged/indicted with reckless endangerment.

Such statements made after an unlawful arrest for reckless endangerment should not have been included in the DUI search warrant application. Doing so created the false impression for the magistrate that Mr. Whaley had been arrested for DUI. Whether intentional or reckless, this falsity is at the core of the probable cause issue and warrants suppression under *Franks*.

iii. *Material Omissions Regarding Lack of Impairment*

Third, Officer Wright failed to include that Mr. Whaley acted normally at the scene, called 911, attempted to render aid, spoke clearly, communicated with police and others and in all ways conducted himself in an orderly and sober manner. *See* Trial Trans. at 234; *See* 10/3/23 Motion Hearing Trans. at 100-101. Also, Officer Wright failed to advise the magistrate that no field sobriety tests were administered. Officer Wright failed to advise the magistrate that he did not smell the odor of alcohol, or see any signs of impairment, during his 1.5 plus hour time with Mr. Whaley at the Soddy Daisy Police Department after arrest.

All of these false, misleading, and omitted facts are material to the issue of impairment which is critical to the probable cause analysis. Accordingly, the BAC results should have been suppressed under *Franks*.

2. LOW RESULTS OF BLOOD DRAW (.020g%) FOUR HOURS AFTER ACCIDENT, AND ANY EXTRAPOLATION THEREOF, SHOULD HAVE BEEN EXCLUDED AS UNRELIABLE

Even if underlying the warrant is valid, the blood draw in this case lacks probative value/is unreliable and should have been excluded for two reasons: (A) the four hour delay between the accident and the blood draw (through no fault of the defendant) is unreasonable rendering results

unreliable and (B) retrograde extrapolation as applied to the low results (.020g%) of said blood draw taken four hours after the accident is unreliable.

A. <u>The four-hour delay between the accident and the blood draw (through no fault of the defendant) is unreasonable and should have been excluded as unreliable.</u>

Tennessee Rule of Evidence 403 provides that otherwise admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

Considering this rule, Tennessee courts require that, for a blood alcohol test to be admissible, it must be "administered at a **reasonable time** after the defendant has been driving." *State v. Greenwood,* 115 S.W.3d 527, 532–33 (Tenn. Crim. App. 2003)(holding "a proper blood alcohol test administered at a reasonable time after the defendant has been driving, which reflects a blood alcohol content of .10% or higher, constitutes circumstantial evidence upon which the trier of fact may, but is not required to, convict the defendant of DUI").

In *Greenwood*, for example, the Tennessee Court of Criminal Appeals held that a 55-minute delay between the defendant driving and the blood test (to which the defendant consented) was reasonable and that the jury could infer from the .12% result that the defendant's blood alcohol level was above 0.10% percent at the time he was driving. *Id.*

Though no bright line rule has been established regarding reasonability, cases addressing this issue generally hold tests administered within a couple of hours after driving to be reasonable. *See State v. Briceno,* No. E2022-004414-CCA-R3-CD, 2023 WL 4444698 at *9 (Tenn. Crim. App. July 11, 2023) (less than 1 hour delay reasonable); *State v. Ralph,* 347 S.W.3d 710, 716-17 (Tenn. Crim. App. 2010) (less than 1 hour delay reasonable); *State v. Barton,* No. W202001273CCAR3CD, 2021 WL 5115511, at *6 (Tenn. Crim. App. Nov. 4, 2021) (1.5 hour

delay reasonable); *State v. Bridges*, No. E2019-01003-CCA-R3-CD, 2021 WL 928467 at *1-2 (Tenn. Crim. App. March 11, 2021) (less than 2 hour delay reasonable); *State v. Dickey*, No. W2005-00722-CCA-R3CD, 2005 WL 3533325 (Tenn. Crim App. Dec. 22, 2005) (2 hour delay reasonable).[4]

This approach is in line with a former state law requiring police to administer a blood test within two hours of arrest or initial detention. *See* Tenn. Code Ann. § 55-10-406(a)(1)(2006); *State v. McCloud*, 310 S.W.3d 851, 862 (Tenn. Crim. App. 2009). This also aligns with cases involving challenges to warrantless blood draws on the basis of exigent circumstances, with courts noting the unreliability of test results involving delays of 2-3 hours. *See e.g., State v. Martin*, 2017 WL 1957810, *7 & n. 2 (Tenn. Crim. App. May 11, 2017) (citing *Missouri v. McNeely*, 569 U.S. 141, 156 (2013))(noting warrantless blood draw was reasonable to prevent delay of over three hours before defendant's blood could be preserved as evidence of DUI, noting long intervals raise questions about the accuracy of expert extrapolation).

Counsel is aware of only two unreported cases addressing this issue with delays greater than two hours, both of which involve a delay involving the defendant. *See State v. Bookout*, No. W2016-01694-CCA-R3-CD, 2017 WL 1103050, *1-2 (Tenn. Crim. App. Mar. 24, 2017) (three-hour delay held reasonable where the defendant had difficulty complying with the officer at the scene and attempted to run away); *State v. Blake*, No. W2004-01253-CCA-R3-CD, 2005 WL 1467907, *2-3 (Tenn. Crim. App. June 21, 2005) (six-hour delay between the time of defendant's crash into a guard booth and the blood draw in the hospital held reasonable where the defendant attempted to flee the scene and passed out in the police car).

[4] All of these cases involve BAC levels above the *per-se* limit.

In this case, the defendant was present at the scene and was compliant with law enforcement at all times. *See* Trial Trans. at 234. No law enforcement felt it necessary to administer any field sobriety tests. *Id.* at 154, 159-61. After leaving the scene, the defendant spent 1.5 hours at the Soddy Daisy Police Department where a breathalyzer machine was available, but not used. Here, the four-hour delay had nothing to do with the defendant and should have been excluded as unreasonable per *Greenwood.*

In the November 2019 Order, Judge Steelman properly recognized this delay as a problem: "a delay of 4 hours between the accident and the BAC test and a BAC test result below the *per-se* limit significantly diminishes probative value" of the test. *See* 11/25/19 Order at 3. However, rather than excluding the results as unreasonable – the Court held that the defendant's low test results (.020 g%) were "inadmissible without retrograde extrapolation." *Id.* The problem with this finding, as discussed in the next section, is that retrograde extrapolation at this low level of .020 g% is itself unreliable.

In a subsequent February 2021 Order, Judge Steelman held that this four-hour delay after the accident (noting a three-hour delay following arrest) was "not unreasonable in the circumstances, including the fatal nature of the accident." *See* 2/3/21 Order at 6. The Court did not explain why the delay was justified. Instead, the Court cited to *State v. Scott*, No. M200602067CCAR3CD, 2008 WL 4253722 (Tenn. Crim. App. Sept. 17, 2008).

In *Scott*, however, the defendant did not raise the issue of reliability regarding delay in testing on appeal. The court of appeals noted this missed opportunity:

> We note that the defendant has not raised a challenge to the reliability of the retrograde extrapolation analysis from samples drawn hours after the wreck. *See generally Greenwood,* 115 S.W.3d at 533 **(noting that blood samples must be obtained a reasonable time after driving in question)**; Keller, 46 S. Tex. L.Rev. at 117

(noting difficulty of obtaining reliable extrapolation when sample and driving incident are more than one hour apart).

State v. Scott, 2008 WL 4253722 at *18 & n.1 (emphasis added).

To further distinguish that case, two blood draws were actually performed in *Scott*. 2008 WL 4253722 at *7-8. The first blood draw was about 3 hours after the crash with a .065% result. The second blood draw was about 3.5 hours after the crash with a .04% result. The defendant in *Scott* also tested positive for cocaine and amphetamines. *See id.* at *15 & n.1. No drugs were detected in Mr. Whaley's toxicology report. *See* Trial Trans. at 304-05, Trial Exh. 48.

Ultimately, the blood draw results in this case should have been excluded as the blood draw was not procured within a reasonable time and the trial court should reconsider this ruling.

B. Retrograde extrapolation of the 0.020% result should have been excluded as unreliable.

In his November 2019 Order, Judge Steelman rightly expressed concern that retrograde extrapolation was unreliable given the low 0.02% result, initially finding "the prosecution's expert's retrograde extrapolation from the defendant's 0.02% BAC is inadmissible without more pre-trial information about whether or not and why he shares the other experts' concerns regarding the unreliability of retrograde extrapolation from 0.02% or 0.03% BAC and whether or not and why he recognizes any point at which retrograde extrapolation becomes unreliable." *See* 11/25/19 Order at 4.

On August 17, 2020, Judge Steelman heard evidence from experts from both sides on this issue – Dr. Jimmie Valentine for the defense and Dr. Kenneth Ferslew for the prosecution. On February 3, 2021, Judge Steelman denied Defendant's Motion to Suppress on this issue and erroneously allowed Dr. Ferslew to offer retrograde extrapolation in his testimony at trial. *See* 2/3/21 Order at 15.

Rules 702 and 703 of the Tennessee Rules of Evidence address the admissibility of opinion testimony of expert witnesses. Rule 702 states in pertinent part: "If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tennessee Rule of Evidence 703 requires the expert's opinion to be supported by trustworthy facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *State v. Scott*, 2008 WL 4253722 at *14.

As gatekeeper, a trial court's role "is to ensure that 'an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *State v. Scott,* 275 S.W.3d 395, 401–02 (Tenn. 2009) (citing *Brown v. Crown Equip. Corp.,* 181 S.W.3d 268, 275 (Tenn.2005)) (quoting *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)). As such, a court "must assure itself that the [expert's] opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation." *State v. Scott,* 275 S.W.3d at 401–02 (quoting *McDaniel v. CSX Transp., Inc.,* 955 S.W.2d 257, 265 (Tenn.1997))

The admissibility of expert evidence depends on several interrelated factors: expert qualifications; analytical cohesion; methodological reliability; and foundational reliability. *Id.* In this case, there is no dispute that both experts were qualified. The issue here involves (i) the reliability of retrograde extrapolation to a BAC result of .020% and (ii) the facts upon which Dr. Ferslew applied his method.

i. *Dr. Ferslew's methodology - the application of Widmark kinetics to a BAC result of .020% - is unreliable.*

"Extrapolation involves the use of scientific evidence to relate the blood alcohol level at the time of testing back to the time of operation of the vehicle." *Greenwood*, 115 S.W.3d at 531–32 (citations omitted). As noted by the Tennessee Court of Appeals, "The scientific community is divided on whether extrapolation evidence is sufficiently reliable." *Id.* at 531–32 (Tenn. Crim. App. 2003) (citing Mark Montgomery & Mark Reasor, *Retrograde Extrapolation of Blood Alcohol Data: An Applied Approach,* 36 J. Toxicology and Environmental Health 281–292 (1992)).

Judge Steelman, in his February 2021 Order, was correct that "this division in opinion has not prevented the admission of evidence of retrograde extrapolation in Tennessee." *See* 2/3/21 Order at 8. And, the reliability of retrograde extrapolation itself is not being challenged here. Instead, the reliability of such extrapolation to a test performed four hours after the defendant was driving with a .020% result is at issue.

At the Motion to Suppress hearing, experts on both sides agreed that reliable retrograde extrapolation is possible during any time that Widmark kinetics apply (wherein the alcohol elimination rate is constant and blood-alcohol concentration declines linearly). They also agreed that at a certain point, when BAC reaches lower levels, this linear decline ceases, Michealis-Menten kinetics apply, the elimination rate is no longer constant and reliable retrograde extrapolation is no longer possible. *See* 8/17/20 Motion to Suppress Hearing Trans. at 22.

The point at which extrapolation becomes unreliable is at issue. The prosecution's expert, Dr. Ferslew, testified that reliable extrapolation can be performed on a .02% result, but ends "at about a .02." *Id.* at 67. Dr. Ferslew testified that "if you extrapolate at less than this, you're getting a false reading." *Id.* at 23. Dr. Ferslew testified that a .020% would be the lowest point at which extrapolation could be performed reliably. and that he would not attempt to calculate a .0198%.

Id. at 77. Dr. Ferslew also testified that the defendant's lack of impairment at the scene had no bearing on his analysis. *Id.* at 37-40.

The expert for the defense, Dr. Jimmie Valentine, disagreed. Dr. Valentine testified that retrograde extrapolation (using Widmark kinetics) varies by individual and can **cease to apply at .02 or even .025%.** *Id.* at 46. Dr. Valentine explained that once somebody gets down to a .02% level, the elimination rate is more variable and one cannot extrapolate back given the uncertainty of how long one could be and stay at a .02%. *Id.* at 53-54. Dr. Valentine stated, based on these low .02% results, "using this retrograde extrapolation is just not very...scientific." *Id.* at 48.

Dr. Valentine's position aligns with other scientific literature and caselaw, including a book that Dr. Ferslew himself co-authored and to which he refers to as his "Bible,"- Garriott's Medicolegal Aspects of Alcohol, Fifth Edition, **which includes the .02 number in the top of the range for which retrograde extrapolation is unreliable.** *Id.* at 29; *See* Trial Trans. at 356. ("The BAC decreases to reach a concentration of about .10 or .20, the time course changes to a curvilinear function.")(emphasis added).

Similarly, the Tennessee Handbook on DUI notes that **at some point, .02-.03%, respectively, retrograde extrapolation becomes unreliable**. *See* TN handbook on DUI, DUI: Crime and Conseq. in Tenn. 6.5, n. 16 (citing in part David T. Stafford, Ph.D., "Blood Alcohol Concentration: Retrograde Extrapolation, III," For the Defense, Vol. 16, No. 5 (July -Aug. 2002)(emphasis added). The Oregon Court of Appeals has also held that "**a retrograde extrapolation also requires a test result exceeding a .02 BAC because "a person can hover at .01, .02 for several hours.**" *State v. Trujillo*, 271 Or.App. 785, 787 n.5 (Or. App. 2015) (emphasis added). Another defense expert, toxicologist Ronald L. Moore, whose report was attached to the Defendant's original Motion to Suppress, also concluded "it is inappropriate to do retrograde

extrapolation from BAC's of 0.02 and lower. Because elimination slows down at this level and lower." *See* Defendant's Motion to Suppress, Exh. C.

In addition to the proven unreliability of the Widmark analysis with low BAC results, Dr. Ferslew's unwillingness to consider the defendant's lack of impairment at the scene runs contrary to state law. *See Greenwood*, 115 S.W.3d at 532 ("evidence of the defendant's physical condition at the time of arrest or at the time of the administration of the test is relevant to the issue of blood alcohol content"). Defense expert Dr. Valentine, on the other hand, took note of the lack of impairment at the scene as additional scientific evidence of a low blood alcohol level and further reason not to apply Widmark kinetics in what would be, at the very least, a close case. *See* 8/17/20 Motion to Suppress Hearing Trans. at 63-64.

In spite of this information, Judge Steelman denied Defendant's Motion to Suppress, finding that both Dr. Ferslew's retrograde extrapolation from the .020g% and Dr. Valentine's critique thereof had scientific validity. However, the trial court noted that Dr. Ferslew relied on less recent authority, less recent research, and noted that Dr. Ferslew would not consider the defendant's lack of impairment at the scene. *See* 2/3/21 Order at 9, 15.

At the beginning of trial, before this Court, Defense Counsel filed a Motion *in Limine* renewing its motion to exclude Dr. Ferslew's testimony regarding retrograde extrapolation. As an alternative, counsel asked that this Court clarify Judge Steelman's prior order (at a time when the case involved different prosecutors) requiring that Dr. Ferslew testify only about retrograde extrapolation as a "range of values." *Id.* at 15; *See* Mot. *in Limine* at 6-7.

Defense argued that Dr. Ferslew's testimony regarding ranges be limited to a top end of .088 g% -- the number included in his original report, rather than the range discussed during the Motion to Suppress hearing (.056 g%-.120 g%). Defense reasoned that this would allow for a

minimum to average elimination rate and avoid a higher elimination rate which would have been unfair to Mr. Whaley as his actual elimination rate was unknown. *See* Motion *in Limine* at 3-7; *see also* Trial Trans. at 7-9. In ruling on the Defendant's motion, the trial court refused to limit the range to which Dr. Ferslew could testify to .056 g% - .088 g%, finding instead that Judge Steelman was referring to the range of .056 g% - .120 g% where .088 g% fell in the middle. *See* Trial Trans. at 9, 20.

Dr. Ferslew, at trial, testified that if the BAC is a .02% or greater, then the Widmark formula applies. And if the BAC is below a .02, the Widmark formula does not apply. *See id.* at 348. He then applied Widmark kinetic formula to the BAC level of .020%, extrapolated back four hours, and reached a resulting range of .056% to .120%. *See id.* at 334. Such testimony was highly prejudicial to Mr. Whaley and confusing to the jury. Because Dr. Ferslew's methodology was unsound, the BAC results and his extrapolation should have been excluded as unreliable. At the very least, Dr. Ferslew should have been confined to the range of .056 g% - .088 g% as Mr. Whaley's actual elimination rate was unknown.

ii. *The foundation upon which Dr. Ferslew's bases his calculations is unreliable.*

Even if there was some scientific validity to Dr. Ferslew's methodology, the underlying facts upon which he relies to apply said methodology are unreliable.

4-hour delay in testing

First, the delay of four hours calls into question the reliability of the basis for expert analysis in this case. As noted by the Tennessee Court of Criminal Appeals:

> **[The] majority of experts agree that the potential for error increases significantly when an attempt is made to extrapolate blood alcohol levels back more than one hour,** and consideration of individual characteristics of "many" of the specific factors is necessary for an accurate determination with a sample that is remote in time. Kimberly S. Keller, "*Sobering Up*

Daubert: Recent Issues Arising in Alcohol-Related Expert Testimony," 46 S. Tex. L.Rev. 111, 117-18 (2004).

Scott, 2008 WL 4253722 at *17. In *Scott*, it should be noted that the appellate court suggests that delay in testing relating to retrograde extrapolation could be an important point on appeal. *Id.* at *18 & n.1. This issue regarding testing delays and reliability has also been noted by the United States Supreme Court in *Missouri v. McNeely*: "While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation." 569 U.S. 141, 156 (2013).

Error Rate

Second, the BAC report in this case reveals a result of 0.020%g ethyl alcohol. *See* Trial Trans. at 225, Trial Exh. 40. The report notes that this amount "is the average of two tests +/- 0.002 Gram% certainty." *Id.* Given that the experts agreed that extrapolating on any test below .020% would be unreliable, this error rate reveals a possibility that Mr. Whaley tests were actually below the .020% figure at .018%.[5] This concern was expressed by Dr. Valentine, the defense expert, at the motion to suppress hearing, noting that "the uncertainty in measurement would put us below .02." *See* 8/17/20 Motion to Suppress Hearing Trans. at 60.

When asked about this error rate at the suppression hearing, Dr. Ferslew dismissed this concern as "semantics of the numbers." because "[i]t's out in the third decimal." *Id.* at 67, 76. However, Dr. Ferslew acknowledged that this error rate could put the results below the point at which Widmark kinetics apply. *Id.* at 30. And he ultimately stated that he would not attempt to calculate anything less than a .020% result. *Id.* at 77.

[5] Dr. Ferslew misstated that the uncertainty range was .0198-.022%. *See* 8/17/20 Motion to Suppress Hearing Transcript at 26. Judge Steelman corrected this number in the subsequent order [.018g%-0.022g%]. *See* 2/3/21 Order at 11.

Judge Steelman inquired about this error rate as well and, in its Order stated:

> Nor does the court understand Dr. Ferslew's dismissal of the third decimal as negligible when TBI reports BAC to the third decimal, 0.020 g% and he himself assumes an elimination rate with a third decimal ... and reports his retrograde extrapolations ... to the third decimal.

See 2/3/21 Order at 11.

However, the court disregarded the error rates on the report based on an incorrect assumption as to how this average was obtained:

> The Court, however, also questions the fairness of Dr. Valentine's concern about the possibility that one of the tests of the defendant's blood was less than .020g%, at least to any extent that that concern is severable from his concern about the reliability of retrograde extrapolation at or near 0.020 g% in general. **The defendant's BAC of 0.020 g% being an average of two tests, if the result of one of the tests of the defendant's blood was less than 0.020 g% then the result of the other test was necessarily more than 0.020g%. Of course, if the result of one of the tests of the defendant's blood was not less than 0.020 g%, then the result of neither test was less or more than 0.020%.**

Id. (emphasis added).

The TBI report reflects that two tests were analyzed. Results of both tests had rates of error of +/-0.002 g% at a minimum of a 99.73% confidence level. *See* Trial Trans. at 225, Trial Exh. 40. There were no indications from the experts at the motion hearing that the uncertainty rate had anything to do with averaging the test results. How the TBI arrived at an average was not discussed at the Motion to Suppress hearing. Instead, Dr. Valentine explained that the language on the report reflected that if you ran this test 100 times, 99 times you would end up in the range of .018-.022%. *See* 8/17/20 Motion to Suppress Hearing Trans. at 60. The trial court based its reasoning, in part,

on an incorrect assumption regarding test averages, *sua sponte*.[6] Accordingly, the evidence should have been suppressed.

At trial, the jury picked up on this uncertainty rate and, following Dr. Ferslew's testimony, asked this question: "Plus or minus .002 means that Mr. Whaley's blood alcohol content could also be viewed as .018?" *See* Trial Tran. at 381-82. Dr. Ferslew demurred and, instead of answering yes or no, stated that if one tested this sample 99 times out of 100 you would end up in the range of .018-.022%. *Id.* at 382.

Respectfully, the BAC results (and related extrapolation) should have been suppressed and a new trial is warranted. The methodology employed to extrapolate at .020% is unreliable or, at best, at the very limits of testing. Even if Widmark kinetics could reliably be applied at a .020%, the data suggests an error rate of +/-.002% placing Mr. Whaley's test results as low as .018% (and below the range of reliable extrapolation per both Dr. Valentine and Dr. Ferslew). Further, the delay in testing adds to the uncertainty as does the lack of evidence of impairment. This evidence had low probative value, caused confusion for the jury, and unfairly prejudiced Mr. Whaley and should have been excluded.

3. IMPROPER JURY VIEW

The trial court erred in allowing the jury to view the defendant's driving route and the scene of the accident when the highway had not been properly cleared of traffic, over the objections of the defendant. In Tennessee, during a trial, parties may request that the jury leave the courthouse and view the scene of the alleged crime: "The object of the jury in viewing the scene is to make

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[6] As for averaging, at trial, the TBI toxicologist testified that test #1 resulted in a .0203 (meaning the low range with the rate of error would have been a .0183) and that test #2 resulted in a .0201 (meaning the low range with the rate of error would have been a .0181) *See* Trial Trans. at 308-310. As the TBI reports to the third decimal, this resulted in a reported average of .020%.

clear the situation as to which they are uncertain or confused, and the information thus obtained certainly constitutes evidence." *Watson v. State,* 61 S.W.2d 476, 477 (Tenn.1933) (reversing conviction for unauthorized jury view). As evidence, such jury views should be excluded if their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Tenn. R. Evid. 403.

However, a view by the jury is rare in civil cases and rarer still in criminal trials. *State v. Barger*, 874 S.W.2d 653, 655 (Tenn. Crim. App. 1994). Jury views should not be granted except pursuant to an express statute or by consent of both parties. *State v. Shaw*, 619 S.W.2d 546, 548 (Tenn. Crim. App. 1981):

> Although the weight of authority holds that unless a view is prohibited, the taking of a view rests in the sound discretion of the court, we have Tennessee authority indicating that the court should have consent by both parties before exercising its discretion on granting a view. Higgins and Crownover Tennessee Procedure in Law Cases, sec. 1338 et seq. (1937); Caruthers History of a Lawsuit, sec. 346 (8th ed. 1963); *Watson v. State*, supra.

Id. at 548. (holding trial court erred in granting jury view over defendant's objection).

More specifically, "[w]hile the defendant may request a view, it may be denied in the discretion of the court." View by the Jury, 10 Tenn. Prac. Crim. Prac. & Procedure § 27:126 (2023). *See also State v. Miller,* 1998 WL 902592, *8 (Tenn. Crim. App. Dec. 29, 1998); *State v. Andrews*, 1987 WL 27514 *3 (Tenn. Crim. App. Dec. 15, 1987); *Boyd v. State*, 475 S.W.2d 213, 222 (Tenn. Crim. App. Aug. 20, 1971); *State v. Wright*, No. W2013-00433-CCA-R3CD, 2014 WL 1168579 *6 (Tenn. Crim. App. Mar. 21, 2014) (defendant's motion for a jury view properly denied).

Ultimately, "[t]he consent of all parties is required and thus a view may not be taken, absent agreement by the defendant." View by the Jury, 10 Tenn. Prac. Crim. Prac. & Procedure § 27:126

(2023). Accordingly, cases involving a jury view over a defendant's objection are very rare. *See Shaw*, 619 S.W.2d at 548 (noting no reported cases where a jury view was granted over the objection of a defendant). *Cf. State v. Yokley*, No. E2009-02646-CCA-R3CD, 2011 WL 2120096, *30-31 (May 20, 2011)(unreported case where jury view granted over objection of defendant after a full hearing on defendant's objection, with no discussion of *Shaw* or issue of consent raised).

In this case, on October 3, 2023, the parties agreed to a jury view of the defendant's route and ultimate scene of the accident provided that the roadways were closed and the view took place in the dark (mimicking the dark, limited traffic occurring around 5:40 a.m., the time of the accident). *See* 10/3/23 Motion Hearing Trans. at 124-27.

A jury view was then scheduled for October 25, 2023 at 7:00 p.m. A couple of hours prior, at 4:30 p.m., the trial court contacted the parties by text message, notifying them that the Hamilton County Sherriff's Department stated that there was not enough manpower to close both northbound and southbound lanes of traffic and that Highway 111 and 27 would be closed southbound only. *See* Def. Obj. To Modified Jury View, Exh. A.

Counsel for the defendant objected, raising concerns that "with open 27 northbound traffic the situation will be completely different than it was on July 3 at 5:40 am with no traffic. There will be cars and lights and there is no way for us to address that. The jury can't unsee that." *Id.*

The Court offered to amend the instructions and the script to be read to the jury to reflect the changes in traffic control. Counsel for the Defendant requested that his objections be put in the record:

> I need to put on the record my objection. The agreement was that northbound traffic would be shut down. The jury heard this afternoon that there are millions of cars that travel through this intersection. They will see many cars traveling through this intersection tonight. The state of the proof is there were no cars traveling northbound on July 3. There will be no witnesses who will

> testify to cars being northbound in the early morning on July 3. We are presenting the jury tonight with a very different scene and respectfully there's no way to properly instruct.

Id. at 1-2 & Defendant's Exh. A.

The jury view took place a few hours later at approximately 7:30 p.m. This Court began by noting "conditions this evening will not perfectly mirror those of that particular morning... traffic conditions may differ. Traffic volume would have been different at 7:30 in the evening than it would have been at 5:40 in the morning.... You must take all of these differences into account." *See* Trial Trans. at 493-94.

Once at the point of the u-turn and the location of the accident, this Court stated: "There would have been little to no northbound traffic the morning of July 3, 2018 at the time...." *Id.* at 495, 497.

Counsel for the Defendant described the subsequent jury view as follows:

> At the jury view, cars were traveling northbound on Highway 27. Cars and trucks had their lights on. Traffic noise was loud. Vehicle traffic northbound on highway 27 was steady and non-stop. This occurred at two locations. First, at the location where the Defendant made his U-turn, and second at the location where the crash occurred. To Defense Counsel, the sound of the traffic was so pronounced it made it difficult to hear the Court. Vehicle traffic and lights were a constant presence to the jury. Vehicle traffic was non-stop throughout the view. Vehicle headlights illuminated the road. The effect of the traffic during the view was significant and prejudicial to the Defendant.

See Def. Obj. To Modified Jury View at 2.

In this case, the defendant objected to the modified jury view out of concern that traffic conditions would vary too greatly from the early morning hours of the accident. The court noted counsel's objections and went forward with the modified jury view in error. A modified view should not have been taken without consent of the defendant. View by the jury, 10 Tenn. Prac.

Crim. Prac. & Procedure § 27:126 ("The consent of all parties is required and thus a view may not be taken, absent agreement by the defendant.")(citing *Shaw*, 619 S.W.2d at 548).

Though the trial court made an effort to guard against potential juror confusion and unfair prejudice by warning the jury that traffic volume could be different, the warning did not cure the problem. The jury was left with the impression of a well-lit roadway given the steady flow of traffic and headlights. Accordingly, the trial court erred and a new trial is warranted.

4. <u>TESTIMONY OF CHRISTOPHER SMITH SHOULD HAVE BEEN EXCLUDED</u>

On September 13, 2023, Defense Counsel filed a Motion to Exclude the Testimony, and related photo/exhibit, of Christopher Smith – safety manager with the Tennessee Department of Transportation (TDOT). The trial court denied this Motion in error. *See* 10/3/23 Motion Hearing at 55-72.

The Tennessee Rules of Evidence provide that lay witnesses may only testify as to facts and may not give opinions. More specifically: "If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Tenn. R. Evid. 701(a). Furthermore, Rule 403 of the Tennessee Rules of Evidence allows for the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Tenn. R. Evid. 403.

At the pre-trial motion hearing, defense counsel raised concerns about Mr. Smith's testimony exceeding the bounds of a lay witness in violation of Rule 701 and having the potential to unfairly prejudice the defendant by leading the jury to believe that he was an expert. 10/3/23 Motion Hearing Trans. at 59-72. The trial court overruled this objection. *Id.* at 72.

At trial, Mr. Smith did just that. He testified about the roadway and the State introduced a photo of the scene with labels that he made on the picture—suggesting that he had some expert authority. *See* Trial Trans. at 389-391. Then, the State asked Mr. Smith for his opinion as to why there were no wrong-way/do-not-enter signs on the pertinent portion of the highway. Defense Counsel objected while Mr. Smith responded that "They're not called for by the standard. And the orientation of the road is not such that someone could..." *See id.* at 397. Accordingly, the State's lay witness gave improper opinion testimony on a critical issue – testimony that defense counsel tried to prevent in its earlier Motion.

This Court, therefore, erred in allowing Mr. Smith to testify and a new trial is warranted.

5. JURY INSTRUCTION ON IGNORANCE OR MISTAKE OF FACT IMPROPER

Per the defendant's request, this Court issued a jury instruction on ignorance or mistake of fact. However, in so doing, this Court improperly supplemented the standard Tennessee Pattern Instruction with two sentences regarding "involuntary intoxication" and failed to set forth the required mental states for each of the charged and included offenses (further deviating from the standard pattern instruction). *See* 7 Tennessee Prac. Pattern Jury Instr. T.P.I. Crim .40.01.

In Tennessee, a trial court's failure to give a complete and clear jury charge is reversible error. *State v. Lyons,* No. M2014-00178-CCA-R3CD, 2015 WL 475158, at *11–12 (Tenn. Crim. App. Feb. 4, 2015). The Tennessee Criminal Court of Appeals has recently explained:

> A trial court has a "duty to give a complete charge of the law applicable to the facts of the case." *State v. Harris,* 839 S.W.2d 54, 73 (Tenn.1992). **Anything short of a complete charge denies a defendant his constitutional right to trial by a jury.** *State v. McAfee,* 737 S.W.2d 304, 308 (Tenn.Crim.App.1987). However, Tennessee law does not mandate that any particular jury instructions be given so long as the trial court gives a complete charge on the applicable law. *See State v. West,* 844 S.W.2d 144, 151 (Tenn.1992). **A charge is prejudicial error "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law."** *State v.*

> *Hodges,* 944 S.W.2d 346, 352 (Tenn.1997) (citing *State v. Forbes,* 918 S.W.2d 431, 447 (Tenn.Crim.App.1995); *Graham v. State,* 547 S.W.2d 531 (Tenn.1977)). In determining whether jury instructions are erroneous, this court must review the charge in its entirety and invalidate the charge only if, when read as a whole, it fails to fairly submit the legal issues or misleads the jury as to the applicable law. *State v. Vann,* 976 S.W.2d 93, 101 (Tenn.1998).

Id. (emphasis added).

In this case, the Court issued the following instruction supplementing the standard pattern instruction with two sentences (in bold):

> Included in the defendant's plea of not guilty is his plea that his acts constituting the offense charged were the result of ignorance or mistake of fact.
>
> Ignorance or mistake of fact is a defense to prosecution if such ignorance or mistake negates the culpable mental state of the charged or included offense. **Ignorance or mistake of fact is not a defense to prosecution if such ignorance or mistake of fact results from voluntary intoxication. "Voluntary intoxication" means intoxication caused by a substance that the person knowingly introduced into the person's body, the tendency of which to cause intoxication was known or ought to have been known.**
>
> In this case, the State must prove beyond a reasonable doubt the required culpable mental state of the defendant.
>
> Although a defendant's ignorance or mistake of fact may constitute a defense to the charged or an included offense, the defendant may be convicted of the offense for which the defendant would be guilty if the fact were as the defendant believed.
>
> Ignorance or mistake of a fact of law is never a defense to prosecution.
>
> If evidence is introduced supporting the defense of ignorance or mistake of fact, the burden is on the state to prove beyond a reasonable doubt that the defendant did not act through ignorance or mistake of fact.
>
> If from all the facts and circumstances you find the defendant acted through ignorance or mistake of fact, or if you have a reasonable doubt as to whether the defendant acted through ignorance or mistake of fact, you must find him not guilty.

See Trial Trans. at 740 (emphasis added). Defense counsel objected to this language on grounds that went beyond the general pattern instructions and misstated the law. *Id.* at 686-87.

The trial court also failed to set forth the required mental states for each of the charged and included offenses (further deviating from the standard pattern instructions). The Tennessee Pattern Jury Instruction on mistake of fact is as follows:

> Included in the defendant's plea of not guilty is *[his][her]* plea that *[his][her]* acts constituting the offense charged were the result of ignorance or mistake of fact.
>
> Ignorance or mistake of fact is a defense to prosecution if such ignorance or mistake negates the culpable mental state of the *[charged][included]* offense.
>
> In this case, the state must prove beyond a reasonable doubt the required culpable mental state of the defendant **which is [insert definition of specific mental state required for charged and included offenses].**
>
> Although a defendant's ignorance or mistake of fact may constitute a defense to the offense *[charged][included]*, the defendant may be convicted of the offense for which the defendant would be guilty if the fact were as the defendant believed.
>
> Ignorance or mistake of a fact of law is never a defense to prosecution.
>
> If evidence is introduced supporting the defense of ignorance or mistake of fact, the burden is on the state to prove beyond a reasonable doubt that the defendant did not act through ignorance or mistake of fact.
>
> If from all the facts and circumstances you find the defendant acted through ignorance or mistake of fact, or if you have a reasonable doubt as to whether the defendant acted through ignorance or mistake of fact, you must find *[him][her]* not guilty.

7 Tennessee Prac. Pattern Jury Instr. T.P.I. Crim 40.01 (emphasis added).

With regard to the defense of ignorance or mistake of fact, Tennessee Code Annotated section 39-11-502 provides, in pertinent part:

> [I]gnorance or mistake of fact is a defense to prosecution if the ignorance or mistake negates the culpable mental state of the charged offense.

Tenn. Code Ann. § 39-11-502(a)(2021).

In this case, this Court erred by failing to include the mental states for the crimes alleged in this instruction. This required the jury to determine which mental state applied to which charge. This was confusing, if not misleading per *Lyons*.

In any event, the mental state required for most of the crimes at issue here, is "reckless."[7] Tennessee Code Annotated defines "reckless," in this context, as follows:

> "Reckless" refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

Tenn. Code Ann. § 39-11-302(c) (2021).

Tennessee Code further clarifies that:

> If recklessness establishes an element of an offense and the person is unaware of a risk because of voluntary intoxication, the person's unawareness is immaterial in a prosecution for that offense.

Tenn. Code Ann. § 39-11-503(b) (2021).

Accordingly, voluntary intoxication (if found) negates a mistake of fact defense for these charges. However, adding these two sentences in the mistake of fact section and later omitting the required mental states for charged and included offenses was confusing to the jury. Further,

[7] One lesser included offense is criminally negligent homicide.

including the "voluntary intoxication" language in the mistake of fact instruction may have misled the jury—taking away any consideration that Mr. Whaley may have made a mistake and was not intoxicated in doing so. As a result, the trial court erred and, especially considering other issues outlined in this memorandum, a new trial is warranted.

6. EVIDENCE DOES NOT SUPPORT THE VERDICT OF THE JURY

Tennessee Rule of Criminal Procedure 33(f) provides, in part that "[t]he trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence." Tenn. R. Crim. P. 33.

As the Tennessee Supreme Court has explained,

> In a motion for new trial, in contrast to an appellate court's review of the sufficiency of the evidence after judgment has been entered, a trial court assesses the weight of the evidence before it enters judgment on a jury verdict of guilt; in this respect, the trial judge is acting as the "thirteenth juror" and has the authority to grant a new trial if it disagrees with the jury about the weight of the evidence.

State v. Stephens, 521 S.W.3d 718, 726–27 (Tenn. 2017). As the "thirteenth juror," the trial judge is not required to consider the evidence in a light most favorable to the prosecution. Instead, the "trial judge is free to weigh the evidence and assess credibility of witnesses in the same manner as any other juror." See § 30:4. Motion for new trial—Grounds, Tn. Criminal Trial Practice § 30:4 (2023-2024 ed.)(citing *State v. Ellis*, 453 S.W.3d 889 (Tenn. 2015)(internal citation and punctuation omitted). Fundamentally, the purpose of the "thirteenth juror rule," is to be a safeguard against a miscarriage of justice by the jury. *State v. Price*, 46 S.W.3d 785, 823 (Tenn. Crim. App. 2000).

Ultimately, this is a vehicular homicide by intoxication case with no evidence of physical impairment. Dozens of law enforcement personnel were present at the scene, many interacted with Mr. Whaley, and no one performed any field sobriety tests. Once arrested and taken into custody

for reckless endangerment, Mr. Whaley sat at the Soddy Daisy Police Department for 1.5 hours – with a breathalyzer machine nearby. No one performed a breathalyzer test (or asked).

Instead, the jury was left to deliberate with a blood alcohol test result of .020% taken four hours after the accident and the unreliable extrapolation of the State's expert, Dr. Ferslew. In short, the crux of this case involved confusing scientific evidence involving a questionable method applied to unreliable data.

Under the "thirteenth juror" rule of the Tennessee Rules of Criminal Procedure 33(f), the defendant respectfully requests that the trial court act as a safeguard against a miscarriage of justice, find the evidence does not support the verdict of the jury, and grant this motion for a new trial.

CONCLUSION

Based on the law and arguments herein, both individually and in cumulative fashion, counsel for the Defendant respectfully requests a new trial in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lee Davis, hereby certify that a true and accurate copy of the foregoing has been served via first class U.S. mail, postage prepaid, and/or via e-mail delivery to the following:

Hamilton County District Attorney's Office
Parker Garrett, Assistant District Attorney
Brian Finlay, Assistant District Attorney
600 Market Street, Suite 310
Chattanooga, TN 37402

On this the 26th day of January, 2024.

LEE DAVIS