STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Patrick C. Fant, III, Circuit Court Judge
Appellate Case No. 2024-001106

THE STATE,

Respondent,

vs.

MARCUS CHRISTOPHER WHITE,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

"Whether the court erred by permitting a forensic toxicologist to opine Appellant's blood alcohol levels reflected material and appreciable impairment, where the witness based his conclusions on 'key assumptions'—that Appellant had stopped drinking two hours before the crash and had little to no food—which did not apply, since the testimony was unreliable under Rule 702, SCRE and this testimony was highly prejudicial given the disputed evidence of impairment?"

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the trial judge somehow abuse his discretion or otherwise reversibly err by admitting expert opinion testimony from a forensic toxicologist when: (1) the testimony and evidence establishing Appellant's actual and predicted blood alcohol concentration levels at different points in time on the night of the incident was admitted without objection; (2) the limited opinion testimony that was actually challenged during trial was properly admitted, reliable, and based on the well-known scientific understanding of the recognized effects alcohol has on an individual when consumed; and (3) any error in the admission of the challenged testimony was entirely harmless when considering the nature of that evidence in conjunction with the other substantial evidence of intoxication presented during trial without objection?

STATEMENT OF THE CASE

In October of 2021, Appellant Marcus Christopher White was arrested following an investigation into a car crash that resulted in multiple fatalities, including the death of a five-year-old child, along with significant injuries. In January of 2023, the Greenville County Grand Jury indicted Appellant for two counts of felony driving under the influence resulting in death and two counts of felony driving under the influence resulting in great bodily injury. On June 17, 2024, a jury trial was commenced in the Greenville County Court of General Sessions with the Honorable Patrick C. Fant, III, circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty-five years along with a $10,100 fine for each count of felony driving under the influence resulting in death and fifteen years along with a $5,100 fine for each count of felony driving under the influence resulting in great bodily injury. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

At approximately 9:40 p.m. on the night of October 15, 2021, Tasj-Hamiel Trimmier, who had just finished making a DoorDash delivery, began to make a left turn from Brown Road onto Piedmont Highway, a four-lane roadway with a speed limit of forty-five miles per hour, in her Chevy Impala. (Tr. p. 68; p. 90; p. 94; p. 156; State's Ex. # 37 (Report)). At that time, Tasj-Hamiel's mother, Tondalayo, was in the vehicle's front passenger seat while Tasj-Hamiel's three young children were all restrained in child seats in the rear. (Tr. p. 58; State's Ex. # 37).

Meanwhile, at the same time Tasj-Hamiel was attempting to turn onto Piedmont Highway, Appellant was speeding down that roadway toward its intersection with Brown Road in his own vehicle—a Chevy Malibu—at *seventy-eight to eighty* miles per hour,[1] which was well above the posted speed limit.[2] (Tr. p. 90; pp. 154-155; State's Ex. # 39 (Vehicle Data Report)). Unlike Tasj-Hamiel, Appellant did not have any passengers with him, but, next to him, he did have a bottle of Crown Royal liquor. (Tr. p. 74; p. 92; State's Ex. # 20 (Photograph); State's Ex. # 21 (Photograph)). Unfortunately, that liquor bottle was *not* unopened and, instead, by then only had two-thirds of its content remaining. (Tr. p. 92). And, before getting behind the wheel of his car that night, Appellant—by his own later admission—had consumed at least one cocktail made with Crown Royal liquor along with perhaps[3] "a beer or two." (Tr. p. 234).

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[1] According to a dubious claim made by Appellant, that was purportedly "the speed of traffic." (Tr. p. 236).

[2] In fact, Appellant's speed was in excess of the permissible speed limit on *any* South Carolina roadway, including our state's interstate highways. See S.C. Code Ann. § 56-5-1520(B)(1) (setting the maximum speed limit for interstate highways in South Carolina at seventy miles per hour).

[3] Later on during trial, Appellant—after initially claiming to have only had a "beer or two" in addition to a single cocktail—admitted on cross-examination he was not certain as to exactly how many beers he consumed on the night of the incident. (Tr. p. 234; p. 242).

Just seconds later, Appellant careened into the driver's side of Tasj-Hamiel's vehicle at extreme high speed. (Tr. p. 70; p. 80; p. 88; State's Ex. # 37). Indeed, Appellant's vehicle was still travelling at seventy-eight miles per hour only half a second before the collision occurred, and Appellant did not even begin to brake until that point. (Tr. pp. 155-156; State's Ex. # 39). Predictably, the high-speed collision caused catastrophic damage to both cars, and Tasj-Hamiel's vehicle was flung across two lanes of travel. (Tr. p. 96; State's Ex. # 7 (Photograph); State's Ex. # 22 (Photograph); State's Ex. # 27 (Photograph)). It ultimately came to rest a substantial distance from where it was struck with one of its tires now situated on the sidewalk. (Tr. p. 70; State's Ex. # 3 (Photograph); State's Ex. # 4 (Photograph); State's Ex. # 26 (Photograph)).

After witnessing the collision, Crystal Wardlaw, who had been travelling along Piedmont Highway in the opposite direction from Appellant[4] at the time, stopped her own vehicle, quickly called 911, and rushed to Tasj-Hamiel's car to check on the people inside. (Tr. p. 68; pp. 70-72). Unfortunately, none of the adults and children inside were responsive. (Tr. p. 72).

Around the same time, Appellant also called 911 and reported a bad car crash had occurred. (Tr. pp. 84-85; State's Ex. # 8 (911 Call Recording)). During the call, Appellant advised the dispatcher he was "kinda out of it" and asserted he was bleeding. (State's Ex. # 8). Following that, Appellant looked inside Tasj-Hamiel's vehicle before approaching Wardlaw and remarking: "This is fucked up." (Tr. pp. 73-74). According to Wardlaw, Appellant then "just went about his business." (Tr. pp. 73-74).

A short time later, emergency responders began arriving at the scene, and, due to the extent of their injuries, all the occupants of Tasj-Hamiel's vehicle were quickly rushed to the

[4] Notably, despite having a clear view, Wardlaw did not see Appellant's headlights prior to the collision, and it was unclear whether they were on that night. (Tr. pp. 70-71; p. 81; p. 110). However, during trial, Appellant claimed his headlights were, in fact, activated. (Tr. p. 237).

hospital. (Tr. p. 100). Tragically, Kaison, one of Tasj-Hamiel's five-year-old twin boys, suffered an "internal decapitation" due to the collision and was killed. (Tr. pp. 130-132; State's Ex. # 35 (Autopsy Report)). Similarly, Tondalayo suffered numerous fractures due to the wreck, and she died just a few weeks later at the hospital. (Tr. pp. 133-135; State's Ex. # 36 (Medical Records)). Meanwhile, Kayson, Kaison's twin brother, had his femur broken in the crash, and Tasj-Hamiel sustained multiple fractures, including to her ribs, pelvis, and femur. (Tr. pp. 105-106; State's Ex. # 10 (Medical Records); State's Ex. # 11 (Medical Records)).

Although initially able to talk with people at the scene and provide his driver's license and registration, Appellant ended up being taken to the hospital, too, subsequent to the crash. (Tr. p. 93; p. 107; State's Ex. # 23 (Photograph); State's Ex. # 24 (Photograph)). After he arrived there, multiple troopers from the South Carolina Highway Patrol noticed Appellant smelled like the odor of alcohol and had "glassy, bloodshot eyes." (Tr. p. 101; p. 114). Based on that, Trooper Aaron Campbell conducted a horizontal gaze nystagmus test, which is a component part of standard field sobriety testing, and observed four out of a possible six "clues" suggestive of a high level of alcohol in Appellant's system. (Tr. pp. 114-117).

Around approximately 10:46 p.m. that night, hospital personnel collected a blood sample from Appellant for medical purposes. (Tr. p. 200; State's Ex. # 47 (Medical Records)). Based on the results of that independent medical analysis, Appellant's blood alcohol concentration roughly an hour after the crash was 0.15 percent. (Tr. pp. 200-201).

Due to the troubling details that had been uncovered in the investigation up to that point, the troopers elected to obtain arrest warrants for Appellant along with a search warrant to obtain a sample of his blood. (Tr. p. 102; p. 118; Arrest Warrants). Once the warrants had been obtained, Appellant was advised of his constitutional rights and his implied consent rights at the

hospital. (Tr. p. 102). However, Appellant refused to cooperate and declined to sign the implied consent form. (Tr. pp. 102-103; State's Ex. # 34 (Advisement of Rights Form)). Nevertheless, pursuant to the search warrant and a little over five hours after the crash, a qualified nurse at the hospital collected an investigative blood sample from Appellant, and that sample was secured and taken for analysis. (Tr. pp. 188-190; p. 198). The analysis of the sample collected at 3:00 a.m. revealed Appellant—whom nothing suggested had consumed any alcohol since the crash—*still* had a blood alcohol concentration of 0.084 percent by that point. (Tr. pp. 188-190; p. 197; State's Ex. # 44 (Forensic Report)).

During Appellant's ensuing trial for multiple counts of felony driving under the influence ("DUI"), testimony and evidence was presented detailing the circumstances surrounding the fatal crash on the night of October 15, 2021, including about the excessive and unlawful speed at which Appellant was driving at the time of the collision, the terrible injuries sustained by Appellant's adult and juvenile victims, the open and partially-consumed bottle of liquor found next to the driver's seat in Appellant's vehicle, the detectable odor of alcohol emanating from Appellant after the crash, the glassy and bloodshot appearance of Appellant's eyes at that time, and Appellant's refusal to sign the implied consent form after being advised of the consequences of failing to cooperate. (Tr. pp. 17-19; pp. 67-81; pp. 86-118; pp. 125-135; pp. 137-169; Indictments). In addition to that, the recording of the 911 call Appellant placed on the night of the incident was admitted into evidence and played for the jury, which enabled the jurors to hear how Appellant sounded at that time along with his candid remark admitting he was "kinda out of it." (Tr. pp. 82-85; State's Ex. # 8). Furthermore, Investigator Valerie McManis, a member of the South Carolina Highway Patrol's Piedmont Multi-Disciplinary Accident Investigation Team ("MAIT") and an expert in accident reconstruction and collision dynamics, explained her

calculations of the data connected to the collision established it could have been avoided had Appellant simply been driving at the posted speed limit. (Tr. pp. 170-186).

After all that testimony and evidence had been introduced, the solicitor presented testimony from Kevin Selinsky, a forensic toxicologist at the South Carolina State Law Enforcement Division ("SLED"). Toward the outset of his testimony, Selinsky was—without objection—qualified as an expert in forensic toxicology.[5] (Tr. p. 193). He then—again without objection—explained he analyzed the blood collected from Appellant for investigative purposes and the results of his analysis established Appellant had a blood alcohol concentration of 0.084 percent a little over five hours after the wreck. (Tr. pp. 194-198). Likewise, yet again without objection, Selinsky recounted the results of analysis of the medical blood draw showed Appellant's blood alcohol concentration was 0.15 percent roughly an hour after the collision. (Tr. pp. 200-201).

In addition to that, Selinsky discussed retrograde—or "back"—extrapolation and stated it constituted an "educated hypothesis" of what an individual's blood alcohol concentration "could

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[5] Upon Selinsky being qualified as an expert, the trial judge presented the following instruction to the jury:

> [L]adies and gentlemen of the jury, as I have told you before with other experts, a person cannot give opinion testimony and when a person testifies, they must testify as to what they either saw, heard or sensed by smell. However, there is an exception when someone is qualified because of education or experience and they are permitted to give their opinion in certain areas if the Court qualifies them in that way.
>
> This witness will be qualified in the area of forensic toxicology to give an opinion testimony in this area. However, that does not mean that you must accept the opinion, but it is evidence for you to use in any way you see fit and give the weight and credibility you believe is appropriate.

(Tr. p. 193).

have possibly been around the time of the accident." (Tr. p. 198). As to retrograde extrapolation, Selinsky explained it relied upon "several key assumptions," including an assumption the individual was in the "elimination phase" and, thus, had not ingested any alcohol for roughly two hours before the pertinent time. (Tr. p. 198). Selinsky further explained his retrograde extrapolation calculations were, in fact, peer-reviewed, including the ones he performed in Appellant's case. (Tr. p. 201). Following that, Selinsky's calculations were—expressly without objection[6]—admitted into evidence, and the expert opined Appellant's blood alcohol concentration at the time of the accident would have been between 0.136 percent and 0.215 percent based on the average alcohol elimination rates of 0.10 to 0.25 percent per hour. (Tr. pp. 202-203; State's Ex. # 45 (Extrapolation Calculations)). However, he qualified his calculations by reiterating they were based on the specified "pre-assumed assumptions." (Tr. pp. 202-203). Notably though, since two separate analyses were performed in Appellant's case, Selinsky was also able to confirm the results of the analysis of the medical blood draw were consistent with and fell within the range of his retrograde extrapolation calculations, which were based off calculations done from the results of the investigative blood draw analysis. (Tr. pp. 202-203).

After discussing—without objection—Appellant's actual and calculated blood alcohol concentration levels at different times, Selinsky began discussing how alcohol affects individuals in a more general sense. (Tr. p. 203). Once again without objection, Selinsky instructed alcohol "generally affects people in the same manner" and an individual's reaction time, memory, balance, and "things along that line" tend to decrease or worsen as the individual's blood alcohol

[6] To be clear, when the retrograde extrapolation calculations were offered into evidence by the solicitor, defense counsel responded: "No objection, Your Honor." (Tr. p. 202). Hearing that, the trial judge admitted the calculations "[w]ithout objection." (Tr. p. 202).

concentration rises. (Tr. pp. 203-204). Likewise, Selinsky—without objection—explained someone who was a heavy drinker might not appear impaired to another individual when performing more simple tasks but their impairment would be more obvious when performing more complex tasks such as driving or performing field sobriety tests. (Tr. p. 204).

Following that, the solicitor asked Selinsky whether—in his opinion and when "looking at those ranges, those numbers, those values"—Appellant was materially and appreciably impaired at the time of the collision. (Tr. p. 205). At that point, defense counsel objected, asserting he did not believe the expert could make such a determination "just based on his calculations" and noting the expert was neither at the scene nor personally saw Appellant. (Tr. p. 205). In response, the trial judge conducted an in camera hearing on the matter. (Tr. p. 205).

During that hearing, defense counsel candidly conceded Selinsky "certainly" could testify to all the things to which he had already testified. (Tr. pp. 205-206). Nonetheless, defense counsel maintained he did not believe Selinsky could offer an opinion specifically related to Appellant because he did not personally know how much alcohol Appellant had consumed, he did not personally know how frequently Appellant drank, and he acknowledged a number of variables "go into" the analysis. (Tr. pp. 205-206). In rebuttal, the solicitor explained a forensic toxicology expert could, in fact, offer an opinion about impairment from the blood alcohol concentration level evidence that had already been introduced. (Tr. p. 206). In reply, defense counsel clarified "the heart of [his] objection" was an inference level is just one of many factors for a jury to consider when determining whether someone is materially and appreciably impaired. (Tr. pp. 206-207). After considering the specific arguments presented, the trial judge overruled defense counsel's objection. (Tr. p. 207).

As the trial continued forward, the solicitor again asked Selinsky if, "[b]ased on the numbers" involved, Appellant was materially and appreciably impaired. (Tr. p. 208). Selinsky responded:

> What, ultimately, I can testify to is the number on the report, which is .084. So at that time, he was materially and appreciably impaired. I can't say for certain whether or not he was or wasn't using back extrapolation, but I can say if he was anywhere in that range of .136 and .215, then yes, he was materially and appreciably impaired.

(Tr. p. 208).

Thereafter, on cross-examination, defense counsel elicited testimony establishing Selinsky's retrograde extrapolation calculations relied upon assumptions Appellant had not consumed any alcohol for two hours prior to the incident, Appellant had an overall healthy liver, and Appellant had consumed little to no food. (Tr. pp. 210-211). In response to defense counsel's questioning, Selinsky further acknowledged he did not know anything about: (1) Appellant's height, weight, or overall health; (2) whether Appellant took any prescribed medications; (3) the frequency of Appellant's consumption of alcohol; (4) whether Appellant drank alcohol on the preceding night; (5) when and what Appellant ate throughout the day on the date of the incident; (6) the time Appellant started and stopped drinking on the date of the incident; (7) whether Appellant was eating while he was drinking; (8) the ambient temperature on the date of the incident; and (9) the specific type of alcoholic beverages Appellant drank that night. (Tr. pp. 211-212). However, Selinsky further noted his retrograde extrapolation calculations used an elimination rate range that was "scientifically accepted" and designed to cover "the most members of the population as possible." (Tr. pp. 213-214). Beyond that, defense counsel questioned Selinsky about his awareness of various publications addressing

retrograde extrapolation, and, in response to that questioning, Selinsky acknowledged some others have had "issues" with retrograde extrapolation generally. (Tr. pp. 217-218).

Subsequent to Selinsky's testimony, the State rested its case. (Tr. p. 219). Following that, the defense offered several witnesses. (Tr. pp. 224-243). First, Latoya White, Appellant's wife, recounted Appellant met her at her brother's house for dinner after work on the night of the incident and arrived around 7:00 p.m. to 7:30 p.m. (Tr. pp. 225-227). Although she had no knowledge as to whether Appellant had any alcoholic beverages before arriving, she confirmed Appellant ate food and she only personally "witnessed" him have a cocktail made with Crown Royal liquor and a beer that night after he arrived. (Tr. pp. 227-228). She also personally opined he did not "appear" to be under the influence of alcohol or "the least bit impaired" from what she observed. (Tr. pp. 228-229). Similarly, Lamar Vance, Appellant's brother-in-law and Latoya's brother, confirmed Appellant came to his house on the night of the incident, ate food, and consumed "[p]robably" a couple of drinks.[7] (Tr. p. 231). He further confirmed Appellant left his home with a bottle of Crown Royal liquor that night and, at least in his view, did not seem to be under the influence or impaired. (Tr. pp. 231-232). Finally, Appellant testified on his own behalf and admitted he had "a Crown and Coke" and "a beer or two" at his brother-in-law's house prior to the incident, which he claimed was "all [he] had." (Tr. p. 234). Appellant further asserted he did "[n]ot at all" feel impaired or under the influence when he left around 9:30 p.m., he was merely going with the "speed of traffic" as he was rocketing down the highway that night, and the fatal collision purportedly occurred because Tasj-Hamiel's car suddenly "just shot out" in front of him. (Tr. pp. 235-237; pp. 240-241).

[7] Along with Appellant, Vance confirmed he and others at his house that night were also drinking alcohol. (Tr. p. 231).

At the conclusion of that testimony, the defense rested, and the parties presented their closing arguments to the jury. (Tr. p. 243; pp. 245-263). During the defense's, defense counsel conceded the State "did present some blood alcohol evidence through the toxicologist." (Tr. p. 252). Nevertheless, defense counsel contended the toxicologist acknowledged the ranges he gave were "not precise" and asserted that was true because the toxicologist did not have all the information. (Tr. p. 252). Defense counsel further argued to the jury 0.08 percent is "simply an inference level" while other things can be considered when determining impairment.[8] (Tr. pp. 252-253).

Following that, the trial judge instructed the jury on the applicable law. (Tr. pp. 263-276). In doing so, the trial judge carefully explained the jurors had the exclusive duty to determine the value, weight, and truth of the evidence presented and reiterated they were free to disregard an expert's opinion if they chose to do so. (Tr. p. 264; pp. 270-272).

The case was then submitted to the jury. (Tr. p. 277). Ultimately, after roughly three-and-a-half hours of deliberations, the jury unanimously convicted Appellant as indicted of all four counts of felony DUI. (Tr. p. 277; pp. 285-286). Subsequently, during the sentencing proceedings, Appellant personally addressed the court, apologized, and claimed he *thought* he was "okay to drive" on the night of the tragic incident. (Tr. pp. 294-295).

[8] After defense counsel's remarks, the solicitor elected to waive the State's opportunity for reply. (Tr. p. 263).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing a trial judge's evidentiary ruling on appeal, an appellate court will not reverse absent a clear abuse of discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Patterson, 425 S.C. 500, 507, 823 S.E.2d 217, 221 (Ct. App. 2019) (citation and internal quotations omitted).

ARGUMENT

The trial judge did not abuse his discretion or otherwise reversibly err by admitting expert opinion testimony from a forensic toxicologist because: (1) the testimony and evidence establishing Appellant's actual and predicted blood alcohol concentration levels at different points in time on the night of the incident was admitted without objection; (2) the limited opinion testimony that was actually challenged during trial was properly admitted, reliable, and based on the well-known scientific understanding of the recognized effects alcohol has on an individual when consumed; and (3) any error in the admission of the challenged testimony was entirely harmless when considering the nature of that evidence in conjunction with the other substantial evidence of intoxication presented during trial without objection.

Appellant contends the trial judge reversibly erred by permitting Selinsky, the forensic toxicology expert, to opine "Appellant's blood alcohol levels reflected material and appreciable impairment[.]" As support for that contention, Appellant maintains Selinsky's opinion testimony purportedly was unreliable and constituted pure "conjecture" because the "[n]umbers" upon which the expert's opinion was based came from blood draws taken "well after" the collision and the key assumptions upon which the expert relied in performing his retrograde extrapolation calculations were supposedly inapplicable based on Appellant's personal claims about what he had done on the date of the incident. Significantly, there are multiple problems with Appellant's current attempt to now obtain a reversal of his convictions on appeal. First, the vast majority of Selinsky's expert testimony—including his testimony concerning Appellant's blood alcohol concentration "[n]umbers" at various points on the night of the incident—was admitted into evidence without objection and, thus, cannot appropriately be challenged for the first time on appeal, including on reliability grounds. Second, the limited portion of Selinsky's testimony that was actually challenged during trial was inherently reliable and properly admitted as it was based on the well-known scientific understanding of how alcohol affects an individual as the individual's blood alcohol concentration rises. Third and finally, any conceivable error in the admission of the challenged portion of Selinsky's testimony was entirely harmless because—

even assuming it was somehow problematic or inadmissible—that limited testimony could not possibly have had any impact on the outcome of Appellant's trial in light of all the other compelling evidence of intoxication that was presented. Accordingly, there were and are no valid grounds upon which Appellant's conviction can now be reversed on appeal. Appellant's convictions should be affirmed.

In South Carolina, "[e]xpert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." Id. at 445-446, 699 S.E.2d at 175.

Rule 702 of the South Carolina Rules of Evidence governs the admission of expert testimony in our state. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). Pursuant to that rule, expert testimony is admissible under the following circumstances:

> If scientific, technical, or other specialized knowledge will 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 thereto in the form of an opinion or otherwise.

Rule 702, SCRE. In light of that, a trial judge—"[w]hen admitting scientific evidence under Rule 702, SCRE"—must find: (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. Council, 335 S.C. at 20, 515 S.E.2d at 518; see State v. Jones, 343 S.C. 562, 572, 541

S.E.2d 813, 819 (2001) ("Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.").

In the case sub judice, Appellant is currently challenging the reliability of the State's expert's testimony Appellant's blood alcohol concentration levels reflected material and appreciable impairment. Significantly, when addressing and considering that particular complaint, it is important to emphasize what evidence and testimony was *not* challenged during trial. Specifically, defense counsel did *not* object during the trial itself to: (1) Selinsky's testimony Appellant's blood alcohol concentration a little over five hours after the collision was 0.084 percent; (2) Selinsky's testimony Appellant's blood alcohol concentration approximately an hour after the collision was 0.15 percent; or (3) Selinsky's testimony his retrograde extrapolation calculations suggested Appellant's blood alcohol concentration at the time of the collision would have been in the range of 0.136 percent and 0.215 percent based on "scientifically accepted" alcohol elimination rates in the general population. Likewise, during trial, defense counsel did *not* object to Selinsky's testimony establishing a higher blood alcohol concentration in an individual causes a corresponding decrease in that individual's reaction time, memory, balance, and "things along that line." Instead of objecting, defense counsel either remained silent or expressly confirmed he had no objections to that testimony and evidence before expressly affirming to the trial judge Selinsky could "certainly" properly testify—as he had already done—to all that information. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (explaining a party waives any objection the party may have had to

evidence by stating "no objection" when that evidence is introduced); see also Winters v. Fiddie, 394 S.C. 629, 639, 716 S.E.2d 316, 321-322 (Ct. App. 2011) ("[U]nobjected to trial error cannot be advanced as grounds for a new trial."). Accordingly, because defense counsel *conceded* to the admissibility—and, thus, the requisite reliability—of all that testimony and evidence during trial, he cannot now complain about its admission on appeal. See State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (explaining an issue conceded at trial cannot later be asserted on appeal).

Meanwhile, during trial, the *only* opinion testimony defense counsel actually sought to keep out was Selinsky's expert opinion conveying his view a person with the different blood alcohol concentration levels the unobjected-to evidence established Appellant had at various points of the night of the incident—all of which were above 0.08 percent—would lead to material and appreciable impairment. Critically, such an expert opinion was—and is—in no way controversial or unreliable and, instead, was based on the well-known scientific understanding of the recognized effects alcohol has on the human body when consumed.[9] See, e.g., People v. Turntine, 325 Cal. Rptr. 3d 462, 467-468 (Cal. App. Dep't Super. Ct. 2024) (recognizing expert testimony opining *anyone* with a blood alcohol concentration of .05 percent was under the influence for purposes of driving was science-based and "within the bounds of judicial discretion to admit"); Adams v. State, 808 S.W.2d 250, 252 (Tex. App. 1991) (affirming the admission of expert testimony indicating "anyone with an alcohol concentration of 0.08 grams per 100 milliliters of blood would be intoxicated"). Indeed, such an opinion is fully consistent with South Carolina law and the inferences it recognizes can validly be drawn purely from an

[9] Significantly, the well-known nature of that scientific understanding may be exactly why defense counsel did not even attempt to challenge or call into question Selinsky's earlier testimony indicating a higher blood alcohol concentration level would lead to effects such as decreased reaction times. (Tr. pp. 203-204).

individual's blood alcohol concentration level. See S.C. Code Ann. § 56-5-2950(G)(1) (stating, for purposes of DUI prosecutions in South Carolina, it "may be inferred" a person was under the influence of alcohol if the person's blood alcohol concentration at the time of a chemical analysis of breath or other bodily fluids was .08 percent or higher). Therefore, the trial judge did not abuse his discretion by permitting that non-controversial and scientifically-supported opinion testimony, and the grounds upon which Appellant based his objection to it were matters that—at most—affected the testimony's weight as opposed to its admissibility. See Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 414-415, 697 S.E.2d 558, 561-562 (2010) (finding expert testimony relying on retrograde extrapolation to opine a particular individual was grossly intoxicated at a certain time was properly admitted and concluding the circumstantial evidence presented during trial "provided reasonable support" for the testimony); State v. White, 311 S.C. 289, 295, 428 S.E.2d 740, 743 (Ct. App. 1993) ("White asserts the trial court erred in allowing the state's forensic toxicologist, who qualified as an expert witness, to give an opinion concerning the rate at which a 150–pound man would eliminate alcohol and in allowing him to testify as to the effects of benzodiazepine when used in combination with alcohol after he admitted that different 'benzos' have different effects and he did not know which benzodiazepine White had taken. The trial court committed no error in either regard. White's complaints about the toxicologist's testimony go to the weight of the evidence and not to its admissibility."); see also State v. Burgess, 5 A.3d 911, 916 (Vt. 2010) ("Although retrograde extrapolation is generally considered to meet the admissibility requirements of Daubert, defendant argues that we should nevertheless exclude such evidence here. According to defendant, the testimony from the State's expert is unreliable because it fails to take into consideration a number of important factors, such as the amount of food defendant ate and his drinking pattern before operation. The

trial court agreed and noted that information critical to this calculation would include the amount and time of food, if any, consumed at or near the period of time the Defendant consumed alcohol and it must be known when the Defendant commenced drinking and stopped drinking and the total number and type of drinks consumed. Though the court was correct that this information would undoubtedly make for a more accurate analysis, that is an issue that goes to the weight of the evidence, and the court went too far in holding that the test results here were unreliable as a matter of law." (citation, brackets, and internal quotations omitted)).

However, even assuming the highly-limited opinion testimony that was actually challenged was *somehow* improperly admitted by the trial judge, any error in that regard was entirely harmless when considering the nature of that limited testimony in conjunction with all the *other* evidence presented during Appellant's trial. Specifically, in addition to Selinsky's limited testimony opining Appellant was impaired at the time of the incident *if* his blood alcohol concentration was as high as it was projected to have been, the unobjected-to evidence and testimony presented during trial established Appellant's blood alcohol concentration was nearly double the legal limit in South Carolina and throughout the nation just an hour or so after the collision, was *still* over the legal limit more than five hours after the collision, and was retroactively calculated to have been no less than 0.136 percent and as much as 0.215 percent when he rammed his vehicle into the car carrying his victims at an exceedingly high speed. See State v. Lavoie, 880 A.2d 432, 435 (N.H. 2005) ("[B]ased upon the results of a blood alcohol test at a certain time, an expert can calculate the estimated blood alcohol at an earlier time."); State v. Trujilo, 353 P.3d 609, 617 (Or. Ct. App. 2015) (concluding formulaic retrograde extrapolation is "scientifically valid"); Burgess, 5 A.3d at 915 (recognizing "retrograde extrapolation is legitimate science"); State v. Giese, 854 N.W.2d 687, 693 (Wis. Ct. App. 2014) (explaining

retrograde extrapolation is generally accepted in the field of toxicology and has received "widespread admission by state courts"); see also State v. Vliet, 19 P.3d 42, 60 (Haw. 2001) ("We take judicial notice that Widmark's formula is widely viewed as reliable."). Critically, that powerful testimony was presented along with Selinsky's unobjected-to testimony confirming the commonly-understood and well-known fact a higher blood alcohol concentration level directly corresponds with a decrease in functioning. Additionally, Appellant personally admitted to the jury he had been drinking both liquor and beer over the course of the hours leading up to the crash, other testimony and evidence was presented establishing a partially-consumed-and-only-two-thirds-full bottle of the exact same type of liquor Appellant admitted he had been drinking that night was found in the front portion of Appellant's vehicle after the incident, and nothing presented during trial suggested Appellant either had only first begun consuming alcohol just moments before the crash or had anything to drink *after* slamming his car into his victims' car. Likewise, multiple troopers testified Appellant smelled of alcohol and had glossy bloodshot eyes after the wreck, testimony was presented confirming Appellant showed multiple signs of impairment during the only field sobriety test that was able to be performed, and Appellant personally stated he was "kinda out of it" on the 911 call recording that was introduced into evidence and played for the jury. Cf. State v. Degnan, 305 S.C. 369, 372, 409 S.E.2d 346, 348 (1991) (finding no prejudice resulted from the admission of Degnan's refusal to submit to a breathalyzer test when the other evidence presented during trial established Degnan had a strong odor of alcohol on her breath, had difficulty walking, slurred her speech, and admitted she drank five or six beers). Furthermore, testimony was presented establishing Appellant was recklessly operating his vehicle—potentially without its headlights on at nighttime—up to thirty-five miles per hour over the posted speed limit of forty-five miles per hour just seconds before the collision

and did not even begin to apply his brakes until *less than a second* before he crashed into victims, which supported a conclusion his reflexes had been materially and appreciably diminished by the alcohol he had consumed. See Anderson v. State, 442 S.C. 372, 379-380, 898 S.E.2d 218, 221 (Ct. App. 2024) ("The driving of a motor vehicle while under the influence of alcohol may be proven by circumstantial evidence."); see also State v. Dantonio, 376 S.C. 594, 604, 658 S.E.2d 337, 342 (Ct. App. 2008) (recognizing a felony driving under the influence conviction requires proof the defendant: (1) drove a vehicle while under the influence of alcohol, drugs, or both; (2) committed an unlawful act or neglected a lawful duty; and (3) caused the death or great bodily injury of another as a result of the act or neglect). Beyond that, the evidence and testimony presented established Appellant was uncooperative with the investigation into the incident and—despite the consequences that would entail as a result—refused to sign the implied consent form, which constituted compelling evidence of his own knowledge and recognition of his guilt. See State v. Kerr, 330 S.C. 132, 151-152, 498 S.E.2d 212, 222 (Ct. App. 1998) (recognizing the revocation of implied consent constitutes admissible evidence of guilt in South Carolina). Significantly, in light of all that *other* evidence clearly establishing Appellant's intoxication and accompanying guilt for the charged crimes, any conceivable error in the admission of the limited portion of Selinsky's testimony that was actually challenged during trial was entirely harmless and could have had no impact on the outcome of Appellant's case. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."); cf. City of Columbia v. Ervin, 330 S.C. 516, 522, 500 S.E.2d 483, 486 (1998) ("[I]n light of the overwhelming evidence of his intoxication, Ervin was not

prejudiced by the admission of his refusal to take the datamaster test."); State v. Wilson, 296 S.C. 73, 76, 370 S.E.2d 715, 716 (1988) (finding any error in the admission of blood test results was harmless because it was cumulative to other evidence of Wilson's intoxication, which included properly-admitted breathalyzer test results and testimony that Wilson admitted to drinking a half pint of Vodka).

Accordingly, since the limited expert opinion testimony that was challenged was inherently reliable and its admission could not have possibly had an impact on the outcome of Appellant's case when considering the other evidence and testimony admitted without objection, there are no proper grounds upon which Appellant's conviction could now be reversed on appeal. See State v. Rowland, 444 S.C. 84, 95, 905 S.E.2d 825, 830 (Ct. App. 2024) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."); State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) ("Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial."). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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