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Case Number 298,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN STEVENS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 298, 2024
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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Date: February 3, 2025

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NATURE AND STAGE OF THE PROCEEDINGS

Delaware State Police arrested Kevin Stevens ("Stevens") on December 18, 2022 for driving a motor vehicle while under the influence of drugs ("DUI") in violation of 21 *Del. C.* § 4177(a)and for driving with a suspended license in violation of 21 *Del. C.* § 2756(a). (A1 at DI 1). A New Castle County grand jury indicted Stevens on March 13, 2023 for the DUI and driving while suspended charges. (A1 at DI 5; A7-8).

Jury selection took place on March 25, 2024, and Stevens' trial commenced that same day. (A4-5 at DI 34, 35, 38). During trial, Stevens objected to the admission of the results of chemical testing of his blood for drugs, arguing that the State had failed to adequately establish a proper foundation for admitting the results because it did not introduce into evidence "bench note" documentation establishing that the preliminary enzyme-linked immunosorbent assay ("ELISA") and confirmatory liquid chromatograph tandem mass spectrometer ("LC-MS/MS") machines used to test Stevens' blood had been properly calibrated, similar to the documentation that the State routinely admitted in cases involving breath alcohol tests.[1] (A151-54; A167, A180). Following argument, the Superior Court overruled

[1] Prior to this objection, Stevens objected when the State initially notified the trial court that it intended to introduce the toxicology report itself into evidence on the grounds that it was cumulative because the State's witness was going to testify to the substance of the report. (A70-75). The trial court does not appear to have ruled on this objection (A75), and Stevens does not raise the issue on appeal.

Stevens' objection on the grounds that Stevens did not specifically request the "bench notes" and also overruled Stevens' objection in the absence of any evidence that "something was out of whack." (A154-55, A167, A181). On March 27, 2024, the jury found Stevens guilty as charged. (A4-5 at DI 38; A285-87). The Superior Court deferred sentencing until June 2024. (A4-5 at DI 38; A288-89).

On April 3, 2024, citing this Court's decision in *McConnell v. State*[2] for the first time, Stevens moved for a new trial arguing that the Superior Court erred by admitting the results of chemical testing of Stevens' blood for drugs because no "proof was offered by the prosecution and no documentary evidence of any calibrations of the lab equipment was tendered to lay the necessary foundation that the lab equipment used in Stevens' case had been calibrated and was functioning properly such that the blood analysis results produced and admitted into evidence were reliable." (A5 at DI 39; A293-99). On May 22, 2024, the Superior Court denied Stevens' motion, stating that the court "has reconsidered its trial ruling and sees nothing in [Stevens'] moving papers that causes the [c]ourt to believe the ruling was incorrect, or at the least, within the bounds of the [c]ourt's discretion." (A5 at DI 41; Exhibit B to Opening Br.).

On July 12, 2024, the Superior Court sentenced Stevens as a fourth DUI offender to two years at Level V, suspended after six months for one year of Level

[2] *McConnell v. State*, 1994 WL 43751 (Del. Feb. 3, 1994).

II probation. (A5 at DI 41, 42; Exhibit A to Opening Br.). Stevens appealed and filed his opening brief. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion in admitting the results of chemical testing of Stevens' blood for drugs over his objections that the State had failed to adequately establish a proper foundation for admitting the results because it did not introduce into evidence "bench note" documentation that the ELISA and LC-MS/MS machines used to test Stevens' blood had been properly calibrated. The State laid a sufficient foundation for the admission of the test results. The State presented all witnesses necessary to establish chain of custody, and the State presented testimony from the Analytical Chemists and Chief Forensic Toxicologist that the ELISA and LC-MS/MS machines were routinely checked and calibrated and were operating properly at the time of the testing. The State was not required to present any additional documentation at trial to verify the witnesses' testimony that the instruments were working correctly. Because the Superior Court had no reason to doubt the reliability of the test results, it did not abuse its discretion in admitting the test results over Stevens' objection.

STATEMENT OF FACTS

On the evening of December 18, 2022, Alexander Batt ("Batt") parked his vehicle in the Acme parking lot in Branmar Plaza in Wilmington after dropping his fiancé off near the doors of the Acme to go grocery shopping. (A32-34). While he was sitting in his parked vehicle, Batt observed a white pickup truck with a cap on the back come "[d]angerously close" and almost hit his vehicle before it ran into a vehicle parked about 15 or 20 feet from his car, causing that vehicle to move and damaging its front bumper. (A33-34, A44-48). After the truck hit the parked vehicle, the truck's driver, whom Batt identified in court as Stevens (A42-43), "seemed to nod out at the wheel, hunched over … for … 20 … [or] 30 seconds, and then put the vehicle in reverse and proceeded to drive away." (A34, A36).

Batt followed the pickup truck out of the Acme parking lot onto Marsh Road. (A36-37). When it reached the intersection with Silverside Road, the truck stopped at a green light while in the straight lane. (A37-38, A51-53). Batt could see Stevens hunched over in the truck's side mirrors. (A37-38, A52-53). When the light turned red about 20 or 30 seconds later, Stevens lifted his head up and drove through the intersection as another car swerved to avoid the truck. (A37-38). Batt followed the truck as it continued straight on Marsh Road and turned into the Graylyn Shopping Center. (A39). Instead of parking in a parking spot, Stevens parked his truck perpendicular to two open parking spots near the Rite Aid. (A39-40). Stevens then

slumped over for about 20 to 30 seconds before he exited from the truck and stumbled into the Rite Aid.[3] (A40).

Batt exited his vehicle and followed Stevens into the Rite Aid. (A40-41). Batt observed Stevens, who was slumped over with his hands on his knees, swaying while he asked no one in particular where the dog food was located. (A41-42, A55). Stevens then fell over and knocked over a display in the store and sat down on the ground with his head down. (A42). Batt asked the store manager to call the police. (A42).

Delaware State Police ("DSP") Trooper Sean Setting ("Trooper Setting") quickly responded to the Rite Aid, arriving at the store within about five minutes. (A57-59). Trooper Setting spoke to Batt, who directed him to Stevens and advised him that Stevens had been driving the white pickup truck that was parked outside the store obstructing traffic and that Batt had observed Stevens strike a vehicle with the truck in the Acme parking lot and pass out at a traffic light.[4] (A60, A100, A122).

Trooper Setting approached Stevens, who was still inside the Rite Aid, "slouched over by the front counter." (A122). Trooper Setting asked Stevens, who

[3] Stevens left the truck's ignition on when he went inside the Rite Aid. (A60).

[4] There were no reports to DSP of vehicle damage from a hit and run in Acme's parking lot that evening. (A101-02). Another DSP trooper canvassed the parking lot, but the officer could not locate the vehicle that Batt reported was struck by Stevens. (A101).

"had droopy eyelids [and] … was on the nod[,] [b]asically hunched over," to step outside the store.[5] (A60-61, A88).

Once outside, Trooper Setting asked Stevens if he had consumed any alcoholic beverages, and Stevens advised that he had not. (B1). Stevens also denied using any drugs, including Fentanyl, although he stated at one point that he had "ate penicillin." (B1; A232-34). Stevens also told Trooper Setting that he had not slept for three days. (B1).

Based on his observations, training, and experience, Trooper Setting believed that Stevens was impaired.[6] (A77). He thus conducted field sobriety tests with Stevens, administering the Horizontal Gaze Nystagmus ("HGN") Test and the Vertical Gaze Nystagmus ("VGN") Test.[7] (A82-87). Stevens exhibited zero of the six possible clues of intoxication on the HGN Test, which indicated to Trooper

[5] When later asked what he meant by "on the nod," Trooper Setting testified Stevens "was slouched over. Almost not coherent. He wasn't responding to verbal." (A88).

[6] Trooper Setting testified that he was certified in advanced roadside impaired driving enforcement and a certified drug recognition expert. (A83-84). Stevens objected to Trooper Setting offering an opinion that Stevens was under the influence of fentanyl, and Trooper Setting was not asked to give such an opinion after the parties' exchange with the court. (A77-82).

[7] Trooper Setting also administered the Romberg modified balance test, but he did not testify about whether he observed any clues of intoxication from that test. (A89-91.

Setting that "it wasn't alcohol, and that it could have been drug-related."[8] (A86-87). Trooper Setting also did not observe any clues of intoxication on the VGN Test, which indicated to him "[t]hat it was not alcohol-related." (A87).

Trooper Setting next attempted to administer the Walk and Turn Test and One-Leg Stand Test, but he was unable to administer these tests. (A87-88). According to Trooper Setting, when he discussed these tests with Stevens, Stevens "exhibited difficulty concentrating," and it "actually … seem[ed] like he fell asleep a few times." (A87-88). In further describing Stevens' demeanor, Trooper Setting stated that Stevens "was on the nod[, meaning he was "slouched over[,] [a]lmost not coherent, [and] [h]e wasn't responding to verbal," [and had] "[t]rouble … maintain[ing] balance." (A87-88).

The interactions between Trooper Setting and Stevens, including the administration of the field tests, was captured on Trooper Setting's body-worn camera, which was played at trial. (A61-62; B1). After administering the field tests, Trooper Setting placed Stevens under arrest for suspicion of driving under the influence.[9] (A91-92). Trooper Setting also learned that Stevens' driver's license was suspended. (A126-27).

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[8] The HGN and VGN Tests are standardized procedures that help law enforcement evaluate whether a person is impaired. (A83-87).

[9] Trooper Setting also examined Stevens' pickup truck, but he did not observe any obvious damage. (A103).

At the police station, Trooper Setting sought a search warrant to collect a sample of Stevens' blood. (A91-92). After obtaining the warrant, Trooper Setting watched the phlebotomist draw Stevens' blood at 8:35 p.m. (A92-94). After the phlebotomist concluded the draw, Trooper Setting sealed the kit and placed it in a locked evidence refrigerator. (A92-94). Stevens' blood was subsequently sent to the Delaware Division of Forensic Science ("DFS"), which tests blood and other biological specimens for the presence of drugs and alcohol. (A95, A131-35). The subsequent results of chemical testing of Stevens' blood for drugs revealed the presence of Flubromazepam (a Benzodiazepine) and Fentanyl (an Opoid). (A291).

Stevens testified that he "was in a bad state of mind" on December 18, 2022 and stopped at the Acme in Branmar Plaza to buy dog food for his dog who was in his truck. (A217-20). The price was "outrageous" so he left and stopped at the Rite Aid in the Graylyn Crest Shopping Center on his way home to purchase the dog food.[10] (A218-19). He claimed that he "absolutely" did not have any type of collision as he was leaving the Acme parking lot and denied that his vehicle struck a parked vehicle. (A219). He stated that, as an auto mechanic, he would have realized if he had struck another vehicle. (A219, A222).

Stevens testified that he parked sideways at the Rite Aid because he "was in a hurry" and "was just running in to get some dog food and [he] was going to be in

[10] Stevens mistakenly referred to the Rite Aid as a Walgreens. (A218-20).

and out." (A220). Stevens admitted that he "may have spoke in general, 'Where is the dog food' as [he] walked in [Rite Aid] [b]ecause [he] generally do[esn]'t go there." (A220). Stevens denied knocking over any displays in the store and said he did not fall down either. (A220-21). He claimed he did not know "[w]hat kind of vendetta [Batt] has against [him]." (A219).

Stevens testified that he told Trooper Setting to examine his truck because it was not damaged and he did not hit anything that night. (A222-23). Stevens also claimed that he "might have been a little upset due to the fact of [his] separation with [his] girlfriend and [he] had been up for an extended period of time[,] [b]ut all [he] was doing was going out and getting some dog food that night." (A223).

Stevens testified that Trooper Setting asked him to perform various tests outside of the Rite Aid. (A223). He claimed that Trooper Setting "kept on doing" the tests "six or seven times like he was trying [to] g[e]t [him] to mess up." (A223). When asked about the video showing him performing the tests, Stevens testified that he was "60 years old, it's cold outside, it's December, and you got me out here doing this talking about I ran into a car that I don't know what you're talking about." (A223).

Stevens also testified that he could not perform the Walk and Turn Test because he had his work boots on, and they had a steel toe preventing him from placing them in front of one another. (A224). He also told Trooper Setting that he

had a physical injury that would prevent him from satisfactorily performing that test because he had broken his kneecap earlier that year, which had required surgery and physical therapy. (A224-25, A228-29). Stevens denied drooping his head, claiming that he "was just hanging [his] head down like shaking it, man, because he was saying that stuff to me, like, Are you going to take the test? I'm going to take that as a no. I didn't even understand why he did it like that." (A225).

Stevens further testified that he attempted to perform the One-Leg Stand Test, but it was cold out and he had arthritis and pain when it is cold. (A229). He also claimed that he bent down during the testing because he accidentally dropped something out of his pocket. (A229-30).

Stevens testified that he had taken painkillers that day, which he had been prescribed for his knee injury, and "some kind of mental health" medication he had been prescribed because he had been "down in the dumps." (A227-28, A232-36). He claimed that he did not tell Trooper Setting that he had taken the painkillers because Trooper Setting had only wanted to know whether he was on illicit drugs and did not ask him about drugs prescribed by his doctor. (A232-34).

Stevens admitted that he was not supposed to be driving that day because his license was suspended. (A234). Stevens also admitted that he was convicted of fleeing police in Pennsylvania in 2020. (A234).

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE RESULTS OF THE CHEMICAL TESTING OF STEVENS' BLOOD FOR DRUGS.

Question Presented

Whether the Superior Court abused its discretion in admitting Stevens' blood drug test results over his objections that the State had failed to adequately establish a sufficient foundation for their admission.

Standard and Scope of Review

This Court reviews a trial court's evidentiary rulings for abuse of discretion.[11]

Merits of Argument

At trial, the State presented testimony by DFS Analytical Chemists Sean Braydman ("Braydman"), Grant Fehnel ("Fehnel"), Matthew Fox ("Fox"), and Shrhonda Ellis ("Ellis"), and DFS Chief Forensic Toxicologist Jessica Smith ("Smith"), regarding the complete chain of custody for Stevens' blood sample, which was drawn within a few hours of his having operated a motor vehicle on December 18, 2022, and the initial drug screening and the subsequent confirmatory chemical testing for drugs conducted on Stevens' blood sample.

[11] *See Hofmann v. State*, 2023 WL 4221525, at *3 (Del. June 27, 2023); *Rybicki v. State*, 119 A.3d 663, 672 (Del. 2015); *McNally v. State*, 980 A.2d 364, 370 (Del. 2009).

DFS Analytical Chemist Braydman testified that he received Stevens' blood sample from DSP and entered the sample into DFS's toxicology analysis log. (A132, A135-38). Braydman testified that the sample was properly sealed when he received it from DSP and that he followed the procedures used by the lab to ensure a complete chain of custody and that there was no tampering. (A132, A135-38). Braydman also testified that a chain of custody report was prepared for Stevens' blood sample and authenticated the report. (A134-35).

After Stevens' blood sample had been logged in, DFS Analytical Chemist Fehnel performed a routine, preliminary ELISA drug screen on the sample, which tests for 18 drug classes or compounds to help narrow down the scope of testing done in cases. (A140-44). Fehnel testified that DFS does not conduct a preliminary test to make sure that the machine used for ELISA testing is working correctly, but they do use "standards" and "Quality Control samples" during the testing, which "specifically need to be within range for this as positive or negative for that batch to be considered acceptable." (A142-43). DFS also evaluates additional criteria on the raw data produced by the machine, which needs to be within a certain range for it to be acceptable. (A143). Any potential positives found during the screen are subsequently subjected to additional confirmation testing. (A144).

Fehnel testified that the machine used to conduct the ELISA screen of Stevens' blood sample was working correctly. (A143-44). He also explained that

there were no signs of tampering when he removed the evidence to perform the screen. (A143-44). Fehnel also testified that he followed laboratory procedures when he handled and tested Stevens' blood sample. (A144-45). When the State asked Fehnel about the results obtained from the ELSIA drug screen, Stevens requested "some *voir dire* before we get to that." (A145-46).

During *voir dire*, Stevens questioned Fehnel about the procedure that was done to ensure that the machine used to conduct the ELISA screen was operative and functioning properly. (A146-51). Fehnel explained that there was not any initial check on the machine to ensure that it was functioning, but there are parameters that they have to check that have to be within range when they get the results back, which constitutes confirmation that the machine was functioning properly. (A147-48). If the target levels are not met, then that array fails and must be repeated. (A147-48). Stevens asked Fehnel if he had any documentation that these checks were performed after the analysis of Stevens' blood sample was done, and that the machine was working within the manufacturer's specifications. (A148-49). Fehnel responded that DFS saves "raw data" documentation "to make sure that the instrument was running correctly and that [DFS's] calibrators and [DFS's] standards with known amounts of drug in them were detected correctly."[12] (A149). Fehnel explained that

[12] Fehnel explained that the calibrators have known amounts of drug in them. (A149).

DFS chemists "run four in duplicate" prior to every run, which is how DFS determines whether or not something is positive or negative. (A149). Fehnel further stated that he ran those calibrators through the machine prior to conducting the initial testing on Stevens' blood sample. (A150). He testified that documentation existed in the form of the raw data showing that these calibrations were done and that the target levels were hit, and thus the machine was functioning properly. (A150-51). He did not have that data with him, however, and explained that the raw data is not something DFS "normally include[s] in the discovery packet." (A151).

Stevens then requested a sidebar and objected to the admission of the ELISA results on the grounds that a sufficient foundation for admissibility had not been laid by the State. (A151-55). Stevens argued that the State was required to lay the same type of foundation for the chemical testing of Stevens' blood sample for drugs as that required in a DUI case involving the analysis of a defendant's breath sample by an Intoxilyzer to determine blood alcohol content in which calibration logs were routinely admitted demonstrating the Intoxilyzer was properly functioning. (A151-55). Specifically, Stevens contended that the State failed to establish a proper foundation because the State failed to produce documentation to prove that the lab equipment that Fehnel used to conduct the initial ELISA drug screen of Stevens' blood sample had been properly calibrated and was in proper working order at the time of the testing:

[Defense Counsel]: Your Honor, I am going to object to the analysis coming in because when we have a DUI case with a blood draw or even with a breath reading they usually will bring in the person from the State lab and they will put the 0.5 percent solution in and the 0.10 percent solution in and it shows the results were within the target level and the machine is functioning properly. Here we don't have any of that. We have testimony that it was done. And I think if it needs to be done and proven with the data in hand for a DUI breath case, it should be the same for a blood case involving alleged drugs in the blood system.

And he is indicating he doesn't have documentation of it. He has done it. I don't think that is sufficient to give an opinion.

(A151-52). The following exchange then took place during the sidebar:

[Prosecutor]: Your Honor, … I anticipate he would testify that the chemical was within spec, which is why he didn't rerun the test.

He testified that there is a minimal cut off and a maximal cut off. And, so, you know, him testifying that … his opinion is that it is in spec, and he is following the standard operating procedures that the lab prescribes would support that.

[Defense Counsel]: We have a machine that kicks out these results. There is no proof that the machine kicked out the results. That is my point, Your Honor.

The Court: You [Prosecutor] didn't respond to [defense counsel's] argument, that the machine is like an Intoxilyzer. It produces – it runs its own self-analysis. The Intoxilyzer produces a strip with the unknowns. This one does, too, but it is not present. So, why not?

[Prosecutor]: He used the standards and controls, Your Honor. He just doesn't normally produce them as part of the discovery packet.

The Court: Did you make a request, [defense counsel]?

[Defense Counsel]: I did make a discovery request.

> The Court: Did you make a request for the bench notes from this lab report; a specific request?
>
> [Defense Counsel]: I requested everything, Your Honor.
>
> The Court: Right. Okay.
>
> [Defense Counsel]: Any tests, I think was my language.

(A152-53). Following this exchange, the Superior Court overruled Stevens' objection on the grounds that Stevens did not specifically request the bench notes and also overruled his objection in the absence of any evidence that "something was out of whack":

> The Court: ["Any tests"] [is] the standard.
>
> There hasn't been a specific request. I am going to overrule the objection.
>
> I think if you want the bench notes or the lab notes – and I remember a few years back when this was all fairly fresh, I think it was in a case that the request for the bench notes was standard and the Medical Examiner's office would produce a disk. I don't think we have disks anymore, but there is such a thing as a request for bench notes. They do exist. They can be had. You didn't ask for them.
>
> I am overruling the objection.
>
> Now having said all of this, should you have some evidence, or should you want to make further post-trial inquiry there has been a miscarriage of justice here because the bench notes were out of whack, I will certainly hear it. But you haven't raised the specter that this was anything other than ordinary, regular tests taken ordinarily and regularly.
>
> So unless there is some evidence that something was out of whack, I am going to overrule it.

(A153-55).

The State then resumed its direct examination of Fehnel, and Fehnel testified that the ELISA drug screen of Stevens' blood sample tested presumptively positive for Benzodiazepines, cocaine, and Fentanyl. (A155). Because DHS's procedures required a secondary confirmation of the results, Fehnel logged the sample back into the evidence refrigerator for other DHS Chemists to run the confirmatory tests for these drugs.[13] (A155-57). On cross-examination, Fehnel testified that Benzodiazepines and Fentanyl are found in prescription medications. (A157).

DHS Analytical Chemist Fox conducted a Fentanyl confirmation test on Stevens' blood sample using a Liquid Chromatograph Tandem Mass Spectrometer ("LC-MS/MS"). (A162-67). Fox testified that he did not observe any signs of tampering with the sample before he performed the test and testified about chain of custody. (A164-67). Fox also testified that he conducted quality of assurance checks and quality control measures before he performed the test. (A166).

When Fox was asked about the result of his confirmatory testing, Stevens raised a similar lack of foundation objection to the LC-MS/MS results that he raised during the sidebar before Fehnel testified about the ELISA drug screening results.

[13] The cocaine in the confirmatory test performed by DFS Analytical Chemist Laura Choquette-Miller ("Choquette-Miller") was an inactive metabolite so the State did not question Choquette-Miller when she testified about the chain of custody (A158-62) about the results of her confirmatory testing for cocaine at trial. (A169-171).

(A167). The Superior Court overruled Stevens' objection, holding that the same ruling applied. (A167). Fox then testified that the test confirmed the presence of Fentanyl.[14] (A167-68).

During cross-examination, Fox testified that the LC-MS/MS has a "daily calibration requirement," and the machine is calibrated using a series of known substances prior to running any samples on the instrument. (A173-74). Fox also testified that he personally calibrated the LC-MS/MS machine before running Stevens' blood sample. (A173-74). Fox further testified that documentation is produced for such calibration tests, but that he did not have it with him in court. (A174-75). Fox also testified that Fentanyl can be prescribed. (A176).

DHS Analytical Chemist Ellis conducted a Benzodiazepine confirmation test on Stevens' blood sample using a LC-MS/MS. (A176-82). Ellis testified that she did not observe any signs of tampering with Stevens' sample before she performed the confirmatory test and testified about chain of custody. (A180).

Ellis testified that the control samples used to calibrate a LC-MS/MS are run at the same time as the testing is done, that she ran controls when she tested Stevens'

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[14] Fox testified that he detected three compounds: Fentanyl, Norfentanyl, and a compound called 4-ANPP. (A167-68). Stevens objected to the testimony regarding 4-ANPP because such substance is not a controlled substance and requested a curative instruction. (A168-72). The trial court agreed to give the instruction and subsequently instructed the jury to disregard the reference to 4-ANPP, stating "[t]hat is not part of this case. Just view it as a stray comment. It has nothing to do with this case at all." (A172).

blood sample, and that the machine was working correctly. (A179-80). Ellis also testified that before she performed the confirmatory testing using Stevens' blood sample, she ran tests to confirm that the LC-MS/MS machine was working correctly. (A180).

When the State asked Ellis about the result of her confirmatory testing, Stevens raised the same lack of foundation objection to the LC-MS/MS results that he had previously raised. (A180). Ellis asked to see the lab report to refresh her recollection, and Stevens again reserved his prior objection. (A180-81). After refreshing her recollection, Ellis testified that the test confirmed the presence of Flubromazepam, a Benzodiazepine. (A181-82).

During cross-examination, Ellis confirmed that she checked the LC-MS/MS machine to make sure it was working before she performed the confirmatory testing on Stevens' blood sample. (A182). Ellis also ran a sample test on the machine prior to doing her testing to ensure it was functioning properly, and Ellis testified that the machine printed out documentation that showed that it was functioning properly. (A184-85). When asked whether she had any of that documentation with her in court, Ellis testified that she did have it with her.[15] (A185).

Stevens then asked Ellis if the machine generated any other type of data that would indicate whether there were any malfunctions during the course of the testing

[15] The documentation was not introduced into evidence.

of a particular sample, and Ellis answered "[y]es. That would be our control samples that are run at the same time. So if something was off, we would know based on those control samples which have known concentration values in them." (A185-86). Ellis did not have those results with her in court. (A186). Ellis also testified that Benzodiazepines are a prescription medication. (A186).

Smith, the Chief Forensic Toxicologist and Laboratory Manager of the DFS, who was responsible for certifying final toxicology reports and interpreting the results, testified that she received the results from all the testing done on Stevens' blood sample for final certification and review. (A187-91). As part of her review, she examined the raw data to ensure that the results were entered in DFS's database system correctly. (A191). Smith testified that, after reviewing the results, she prepared a written report certifying that Stevens' blood tested positive for Benzodiazepine and Fentanyl. (A192-94). Smith's certified report stated that "[a]ll positive results have been corroborated by a secondary test and/or case information unless otherwise noted."[16] (A197-98, A292). Smith testified that she could state

[16] Smith's report also certified that DFS's laboratory is accredited by the ANAB [ANSI National Accreditation Board] in accordance with the recognized ISO/IEC [International Organization for Standardization] 17025 standard and the ABFT Forensic Toxicology Laboratory Accreditation Requirements." (A291). And, Smith's report certified that it was prepared "by a person qualified under standards and analyzed under procedures approved by the DFS." (A292).

with scientific certainty that Benzodiazepine and Fentanyl were in Stevens' blood sample. (A194).

On cross-examination, Smith testified that the LC-MS/MS machines undergo daily maintenance and that "when we do a confirmatory batch we are running calibrators." (A201). Smith explained that, "[o]n a given batch we will have known samples and unknowns, the case samples. But we run blanks in between to ensure that there is no cross-contamination or carryover [from prior tests]." (A201-02). When Stevens asked Smith if she had the documentation with her "here today to prove that," Smith testified that she had "the batch packet, the case file with all of the raw data, [which included "documentation that on each of those days [that Stevens' blood sample specimens were run,] the machines were checked through calibrators or through this pretesting analysis to make sure they were functioning properly,"] in [her] bag" that she had with her in the courtroom.[17] (A202-03). Smith also stated that "we have extensive acceptance criteria[,] [a]nd the fact that the results were reported on the final report means that all of the acceptance criteria was met for reporting purposes." (A202-03).

After the jury's verdict, Stevens moved for a new trial. (A293-99). Stevens again argued that the Superior Court erred by admitting the results of chemical testing of Stevens' blood because the State failed to establish a proper foundation to

[17] The documentation was not introduced into evidence.

demonstrate that the results of the tests were reliable. (A294-97). Citing this Court's decision in *McConnell*, Stevens contended that the Superior Court erred in admitting the evidence because the State failed to present documentary evidence of the required calibrations and certifications of the proper functioning of the LC-MS/MS machines used by the DFS lab to conduct its analyses of Stevens' blood sample.[18] (A294-97). After the State filed its opposition (A300-07), the Superior Court denied Stevens' motion, stating that:

> Numerous witnesses from the Lab testified at trial, to the chain of custody, the lab equipment, and the lab report, which contained the results of all the testing. In succession, several testified that while the equipment is routinely checked and calibrated, they did not have the records of such checking and calibration with them in the courtroom. The last Lab witness who testified to the final report however, did. She offered to produce to defense counsel on the spot, but counsel demurred.
>
> At trial, defense counsel objected to the admission of the lab report on the grounds that a sufficient foundation for admissibility had not been laid; that much like the calibration logs routinely admitted in breath alcohol tests to show the functioning of the machine, the [S]tate should be required to admit the calibration studies on the laboratory machinery to demonstrate all was in proper working order The Court overruled the objection when made at trial and the same arguments are repeated here, to the same result.
>
> To be clear, the argument is not the chain of custody; it is the foundation upon which the lab analysis was conducted – were the machines used operating properly? Each witness testified that they were. What was missing from their testimony was their "bench notes,"

[18] In his motion for a new trial, Stevens mistakenly called the Liquid Chromatograph Tandem Mass Spectrometer ("LC-MS/MS") "gas chromatograph and mass spectrometers." (*See* A296).

> the data routinely collected demonstrating graphically what the witnesses testified to orally.
>
> It is not clear whether these bench notes were requested in routine discovery under Rule 16. Had it been requested and not provided, one supposes Rule 16 would have been invoked and that dispute would have been resolved pretrial. As it was, however, the defense had no evidence whatsoever that there was anything untoward in the functioning of the machine, the performance of the witnesses in doing their jobs, or the results and conclusions reached by the testifying expert witness.

(Exhibit B to Opening Br.). The court also distinguished *McConnell*, stating:

> The only case cited to the Court by the defense in its post-trial brief is *McConnell v. State*, a case involving a breath test and the well-known intoxilyzer machine. The argument was that the trial court should not have admitted the intoxilyzer results without evidence that the "standard solutions" containing known samples were checked to determine their validity. The Court said that "McConnell presented no evidence, and has not contended, that the calibration checks performed by the State Chemist with the "standard solutions" were improper. In the absence of evidence to the contrary, there is a presumption that the State Chemist acted carefully and in a prudent manner." Again, this was a case cited by the *defense*.

(*Id.*). The court concluded that it "has reconsidered its trial ruling and sees nothing in [Stevens'] moving papers that causes the Court to believe the ruling was incorrect or, at the least, within the bounds of the Court's discretion." (*Id.*).

On appeal, Stevens argues that the Superior Court "contravened a clear mandate from this Court and erred as a matter of law by applying the wrong foundational admissibility standard to liquid chromatograph tandem mass spectrometer blood intoxicant testing results." (Opening Br. 10-14). Relying on this

Court's decision in *McConnell*, which he claims established a "brightline rule" requiring the presentation of the State Chemist's certifications that a breath intoxilyzer machine operated accurately, Stevens contends that *McConnell* is "equally applicable to LC-MS/MS results." (*Id.* 11). Stevens thus claims that the State Chemist's certified proof of calibration is a foundational requirement for introducing a blood-intoxicant testing device. (*Id.*). Therefore, Stevens contends that the Superior Court erred by admitting the LC-MS/MS testing results after finding that the foundational requirements for such testing were "deemed satisfied by *testimony about* calibration or the certification process without the [introduction of the] actual calibration logs or the [State Chemist's] certification" demonstrating that the LC-MS/MS machine was "operating accurately." (*Id.* 11-12). Stevens' claims are unavailing.

Steven does not appear to argue about the ruling on the preliminary ELISA results. To the extent Stevens challenges the Superior Court's ruling on his objection to the admission of the ELISA results, he has waived this claim on appeal for failure to brief this issue.[19] Regardless, the Superior Court did not abuse its discretion by admitting the preliminary ELISA results for the same reasons set forth below that the court did not err by admitting the LC-MS/MS testing results.

[19] Supr. Ct. R. 14(b)(vi)(A)(3).

For scientific evidence to be admissible under the Rules of Evidence, a trial court must find the evidence sought to be admitted relevant and reliable.[20] Thus, "[w]hen … evidence is obtained from the use of a scientific instrument, expert testimony is necessary to establish the reliability and accuracy of the instrument."[21]

Here, the State presented expert testimony about the accuracy and reliability of the chemical tests performed on Stevens' blood sample for drugs using the LC/MS-MS machines and the ELISA machine. Analytical Chemist Fehnel testified that he was familiar with the ELISA machine he used and that he ran calibrators through the machine prior to conducting the initial testing on Stevens' blood sample. (A150). While the State did not introduce the raw data demonstrating that the machine was calibrated, Fehnel testified that these calibrations were done and that the target levels were hit, and thus the machine was functioning properly. (A150-51). Analytical Chemists Fox and Ellis both testified that they were familiar with the LC/MS-MS machines that they used to conduct confirmation testing for drugs identified in the initial screen. (A162-86). Although the State did not introduce the

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[20] D.R.E. 401, 402, 702; *Tolson v. State*, 900 A.2d 639, 645 (Del. 2006); *State v. Fountain*, 2016 WL 4542741, at *5 (Del. Super. Ct. Aug. 30, 2016); *see also Hofmann*, 2023 WL 4221525, at *3; *Santiago v. State*, 510 A.2d 488, 488-89 (Del. 1986).

[21] *Tolson*, 900 A.2d at 645; *see also Bowersox v. State*, 2013 WL 1198083, at *2 (Del. Mar. 25, 2013) (finding jury instruction not erroneous that provided that the State was required to prove that testing of the defendant's blood for alcohol with a gas chromatograph was done pursuant to proper protocol by a qualified person).

records verifying the chemists' testimony of such checking and calibration, Fox and Ellis testified that the machines are routinely checked and calibrated and the equipment was working correctly when they tested Stevens' blood sample for drugs. (A162-86). Each expert also testified that they used standards and controls to verify that the LC/MS-MS machines they used were working correctly at or about the time they performed their confirmation tests for Fentanyl and Benzodiazepine. (A162-86).

Smith, the Chief Forensic Toxicologist and Laboratory Manager, also testified that she reviewed the testing protocols used by the Analytical Chemists and authored a report certifying that Stevens had Flubromazepam, a Benzodiazepine, and Fentanyl, an Opioid, in his blood sample taken a few hours after Stevens' arrest. (A187-202). Smith's report confirmed that "[a]ll positive results had been corroborated by a secondary test and/or case information." (A291). Smith also testified that "we have extensive acceptance criteria[,] [a]nd the fact that the results were reported on the final report means that all of the acceptance criteria was met for reporting purposes." (A202-03).

Based on this testimony, the Superior Court had no reason to doubt the accuracy and reliability of the calibration checks performed by the State Chemists or the ELISA and LC/MS-MS results and did not abuse its discretion in admitting the ELISA and LC/MS-MS test results over Stevens' objections.

Furthermore, the trial court informed Stevens when it overruled his objection during trial that it would "certainly hear" any evidence post-trial that the "bench notes were out of whack." (A154-55). Notably, Stevens failed to present any evidence in his motion for a new trial (A294-97), or on appeal that suggests that the "bench notes," which Smith offered to give defense counsel during trial, contained "anything untoward in the functioning of the machine, the performance of the witnesses in doing their jobs, or the results and conclusions reached by the testifying expert witness." (Exhibit B to Opening Br.). "[T]here is a well-established presumption that, in the absence of evidence to the contrary, those responsible for certain services to the public will carry out their duties in a proper, careful and prudent manner."[22] Stevens' arguments do not overcome that presumption.

On appeal, Stevens does not cite any case law or statute addressing the foundation for admitting drug testing results from ELISA and LC/MS-MS machines. Nor is there any indication in the record that suggests that the ELISA and LC/MS-MS machines were not calibrated and properly working, as the State's expert witnesses testified. Instead, Stevens points to this Court's decision in *McConnell* addressing the necessary foundation for admitting intoxilyzer breath tests administered by police officers and argues that the Superior Court "contravened a clear mandate from this Court" by not applying *McConnell* to require such a

[22] *Cedeno v. State*, 2023 WL 6323598, at *3 (Del. Super. Ct. Sept. 27, 2023).

foundation requirement for drug tests conducted on "blood-intoxicant testing device[s]," including the LC/MS-MS machines. (Opening Br. 10-14). Stevens contends that "the trial court suggested [during trial], and the prosecutor did not dispute that [*McConnell*] is equally applicable to LC-MS/MS results." (*Id.* 11). Stevens further contends that the Superior Court misread *McConnell* in denying his motion for a new trial and wrongly concluded that *McConnell*'s rule only applies if the opposing party contends that the testing device was not properly calibrated. (*Id.* 13-14). Stevens' claims are unavailing. The record does not reflect that the Superior Court or the prosecutor found *McConnell* "equally applicable." (*See* A151-55, A300-05, Exhibit B to Opening Br.). And, even if the Superior Court misinterpreted *McConnell* in denying Stevens' motion for a new trial, *McConnell* is still inapplicable.

In *McConnell*, the defendant was arrested for driving under the influence of alcohol.[23] The arresting officer administered an intoxilyzer test to the defendant, and the results of the test showed a blood alcohol content of 0.12%.[24] At trial, the State did not admit expert testimony from the State Chemist who calibrated the intoxilyzer machine, but instead verified the intoxilyzer was working correctly using the police department's log reflecting that before and after the defendant's test, the

[23] *McConnell*, 1994 WL 43751, at *1.

[24] *Id.*

State Chemist had certified that the intoxilyzer machine was operating properly and accurately.[25] This Court found that the Superior Court did not err in admitting the log and intoxilyzer test result into evidence over the defendant's objection that the State had failed to provide an adequate foundation to demonstrate that the results of the test were accurate because the State failed to provide evidence that the "standard solutions" used to calibrate the intoxilyzer machine by the State Chemist were checked to determine their validity.[26] Citing this Court's decision in *Best v. State*,[27] this Court explained that "[i]t is well-established in Delaware that the prerequisite to introducing the result of an intoxilyzer test into evidence is to present the certifications of the State Chemist that the intoxilyzer machine was operating accurately before and after testing the breath of the defendant on trial."[28] This Court ruled that there was no error because the State provided that evidentiary foundation at trial, and the defendant failed to present any evidence that the "calibration checks performed by the State Chemist with the 'standard solutions' were improper."[29] Noting that "[i]n the absence of evidence to the contrary, there is a presumption that the State Chemist acted carefully and in a prudent manner," the Court concluded that

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[25] *Id.*

[26] *Id.*

[27] *Best v. State*, 328 A.2d 141 (Del. 1974).

[28] *McConnell*, 1994 WL 43751, at *1.

[29] *Id.*

the record reflects that the trial court properly exercised its discretion in admitting the certifications of the State Chemist and the results of the defendant's intoxilyzer test into evidence.[30]

During trial, while he compared the ELISA and LC-MS/MS machines to Intoxilyzers because they produce their "own self-analysis," Stevens did not cite *McConnell* when he objected to the lack of backup "proof" that the ELISA and LC-MS/MS machines were properly calibrated and functioning. (A151-55, A167, A180). Thus, there was no discussion during trial regarding *McConnell* by the trial court or the prosecutor. Rather, the court focused on whether Stevens had requested the "bench notes," and overruled Stevens' objection because Stevens' standard request for discovery did not encompass the "bench notes."[31] (A153-55). Although

[30] *Id.*

[31] In *Oliver v. State*, 60 A.3d 1093, 1094-1100 (Del. 2013), this Court found that the State's conceded failure to produce the State's expert forensic chemist's notes to his final "summary" report describing his conclusions in a drug case, which included a "series of laboratory reports that revealed the underlying data[,] … showed how [he] reached his conclusion that one of the substances was indeed cocaine[, and] … indicated that [the chemist] relied in part on another technician's analysis of the tested substances to reach his conclusions," where the defense requested "any written report (including all preliminary notes made by the examiner)" in discovery constituted reversible error, because had the State timely produced the requested notes, the defendant "would have been aware that an additional chemist was involved in the testing process [and] … could have investigated that chemist's actions and reputation." Here, unlike in *Oliver*, the Superior Court found during trial that Stevens did not request the "bench notes" documentation, and there was no issue raised concerning any additional chemists who were involved in the testing process. (*See* A151-55; B2-3). In any event, Stevens does not raise any claims on appeal over discovery. Rather, his sole claim concerns admissibility. *See Cedeno*, 2023 WL

the court permitted Stevens the opportunity to later raise any evidence that the bench notes did not establish the reliability of the testing done on Stevens' blood, he did not raise any such evidence in his post-trial motion for a new trial or in this appeal. And, Stevens had the opportunity to review the bench notes during trial. (A202-03).

In his motion for a new trial, Stevens first raised *McConnell* (A293-97), and the State argued that *McConnell* was inapplicable because it involved a breath intoxilyzer machine and the State presented testimony here that the instruments used were working correctly and had been properly calibrated. (A304-05). Although the Superior Court did not address those arguments, this Court may affirm the Superior Court's ruling on alternative grounds different from those articulated by the Superior Court.[32]

As argued by the State below, *McConnell*, which involves a breath intoxilyzer used by a police officer in the field, is inapposite to cases involving blood-intoxicant testing devices, including LC-MS/MS machines, which test a defendant's blood for drugs in a laboratory.[33] Breath intoxilyzers are performed by police officers, not the

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6323598, at *4 (distinguishing *Oliver* because issue in *Oliver* concerned adequacy of a remedy for a discovery violation, not admissibility determination).

[32] *See Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

[33] *See Santiago*, 510 A.2d at 489-90 (rejecting defendant's argument that chemist's testimony failed to lay an adequate foundation for the Superior Court to conclude the gas chromatograph used to test his blood for alcohol was reliable, finding that defendant's reliance on *Best*, 328 A.2d 141, an Intoxilyzer case cited in *McConnell*, was misplaced because *Best* "involved scientific processes to be used and testified

chemists who performed the calibrations of the intoxilyzer equipment in their laboratory. Because "[t]he State need not produce the State Chemist at trial to testify about the calibration tests [for breath intoxilyzers] and can instead rely on the business records exception to the hearsay rule,"[34] absent testimony by the State Chemist, Delaware law requires the State to "introduce the certifications of the State Chemist that the intoxilyzer was operating accurately before and after testing the breath of the defendant."[35] That is not the case here.[36]

Unlike in *McConnell*, where the chemist did not testify that the Intoxilyzer was operating accurately at the time of the breath test, the State presented testimony establishing the complete chain of custody of Stevens' blood sample, including

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to by a lay person with no understanding of how the equipment functions, [and] [u]nder those circumstances, the State had to lay a foundation showing the accuracy of the result obtained which served as precedent in later cases where a lay person used the same equipment").

[34] *State v. Hartman*, 2010 WL 1053625, at *3 (Del. C.P. Mar. 5, 2010) (citing *State v. Trawick*, 845 A.2d 505, 508-09 (Del. 2004)).

[35] *See Cahill v. State*, 2009 WL 3334902, at *2 (Del. Super. Ct. Aug. 31, 2009) (citing *McConnell*, 1994 WL 43751, at *1); *Best*, 328 A.2d at 143 (holding that trial judge did not err in admitting calibration tests showing that breath intoxilizer had been checked by state chemist as operating properly, even though state chemist was not present at trial).

[36] *See* 21 *Del. C.* § 4177(h)(4) (eff. Apr. 13, 2021 to June 29, 2024) (providing defendant with right to demand the presence of "the Forensic Toxicologist, Forensic Chemist, State Police Forensic Analytical Chemist, or any other person necessary to establish the chain of custody as a witness in the proceeding"); *State v. Munden*, 891 A.2d 193, 197-201 (Del. Super. Ct. 2005) (noting difference for chain of custody requirement for breath intoxilyzer and blood sample cases).

testimony from the Analytical Chemists Fehnel, Choquette-Miller, Fox, and Ellis, who performed the testing on Stevens' blood sample.[37] These witnesses testified that they followed standard procedures, properly calibrated the ELISA and LC/MS-MS machines, and ensured that the machines were in proper working order when they tested Stevens' blood samples. The State also presented testimony from the Chief Forensic Toxicologist, Smith, who certified that the results were accurate and the tests were performed properly.

Alternatively, as the State argued below in its opposition to Stevens' motion for a new trial, the State laid a proper foundation for admitting the results of the chemical testing done on Stevens' blood sample under 21 *Del. C.* § 4177(h)(1). (A302-03). Although the Superior Court did not reach this issue, this Court may affirm the Superior Court's ruling on alternative grounds different from those articulated by the Superior Court.[38]

[37] Stevens demanded that the State present everyone in the chain of custody as witnesses.

[38] *See Unitrin*, 651 A.2d at 1390.

The statutory requirements for the acceptance into evidence of the results of a blood test are found in 21 *Del. C.* § 4177(h)(1) and (2).[39] Those provisions, which were enacted after this Court's decisions in *Best* and *McConnell*,[40] state:

> (h)(1) For the purpose of introducing evidence of a person's alcohol concentration or the presence or concentration of any drug pursuant to this section, a report signed by the Forensic Toxicologist, Forensic Chemist or State Police Forensic Analytical Chemist who performed the test or tests as to its nature is prima facie evidence, without the necessity of the Forensic Toxicologist, Forensic Chemist or State Police Forensic Analytical Chemist personally appearing in court:
>
> > a. That the blood delivered was properly tested under procedures approved by the Division of Forensic Science, or the Delaware State Police Crime Laboratory;
> >
> > b. That those procedures are legally reliable;
> >
> > c. That the blood was delivered by the officer or persons stated in the report; and,
> >
> > d. That the blood contained the alcohol, drugs or both therein stated.

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[39] § 4177(h) only refers to DUI cases where a blood sample was drawn. *Munden*, 891 A.2d at 199-200; *see also* 21 Del. C. § 4177(h) (eff. Apr. 13, 2021 to June 29, 2024). The Superior Court has found that the "legislature intentionally omitted inclusion of the words breath and urine in this section." *Munden*, 891 A.2d at 199-200.

[40] "Section 4177(h) was enacted on July 8, 1994." *See Munden*, 891 A.2d at 200 n. 25. "It, too as the current version, referred to chain of custody in 10 *Del. C.* § 4331." *Id.* "That section was enacted on May 31, 1994 as part of §§ 4330–4332, 69 Del. Laws C. 237." *Id.* According to the Superior Court, "[t]he cross reference in § 4177(h) to § 4331 show the legislature clearly meant the procedures in (h) to apply only to test results when blood was drawn and where the charge was driving under the influence of drugs." *Id.* "When re-enacted in May 1995 (at that time it was subsection (g) not (h)) the same interrelationship was retained." *Id.*

> (2) Any report introduced under paragraph (h)(1) of this section must:
>
> > a. Identify the Forensic Toxicologist, Forensic Chemist or State Police Forensic Analytical Chemist as an individual certified by the Division of Forensic Science, the Delaware State Police Crime Laboratory or any county or municipal police department employing scientific analysis of blood, as qualified under standards approved by the Division of Forensic Science, or the Delaware State Police Crime Laboratory to analyze the blood;
> >
> > b. State that the person made an analysis of the blood under the procedures approved by the Division of Forensic Science or the Delaware State Police Crime Laboratory; and
> >
> > c. State that the blood, in that person's opinion, contains the resulting alcohol concentration or the presence or concentration of any drug with the meaning of this section.
>
> Nothing in this subsection precludes the right of any party to introduce any evidence supporting or contradicting the evidence contained in the report entered pursuant to paragraphs (h)(1) and (2) of this section.[41]

Delaware courts have found that 21 *Del. C.* § 4177(h)(1) supplants the Business Records Rule found in Rule 803(3) of the Delaware Rules of Evidence and does not require specific foundation requirements.[42] Section 4177(h)(1) only requires the report to "identify the Forensic Chemist."[43]

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[41] 21 *Del. C.* § 4177(h)(1)-(2) (eff. Apr. 13, 2021 to June 29, 2024).

[42] *Doran v. Shahan*, 2003 WL 23112340, at *4 (Del. C.P. May 12, 2003); *Durbin v. Shahan*, 2001 WL 34075378, at *4 (Del. C.P. Dec. 20, 2001).

[43] *Id.*

In this case, the Toxicology Report signed by Smith, the Chief Forensic Toxicologist and Laboratory Manager at DHS, established, at a minimum, *prima facie* evidence under section 4177(h)(1) that the chemical procedures were legally reliable, and the blood contained the drugs stated in the report. As the Superior Court noted, Stevens has not provided any evidence suggesting that the Report was untrustworthy or unreliable. Furthermore, although section 4177(h)(4) provides an exception to section 4177(h)(1) where the defendant, as in this case, makes a written demand upon the State at least 15 days prior to trial to require the presence of the forensic chemist or toxicologist at trial,[44] Stevens does not dispute that the State procured the presence at trial of all the forensic chemists in the chain of custody.

Finally, even if Stevens was able to establish that the Superior Court erred in admitting the results of the chemical testing of Stevens' blood for drugs without the introduction of the "bench notes," – which he has not done – any such error was harmless because Stevens did not dispute that he took a "drug" before he drove on the day of his arrest for a DUI. Specifically, Stevens did not dispute that he drove his truck on December 18, 2022 and testified that he took prescription medications that day to treat his pain and mental health. (A227-28, A232-36). Although Stevens claimed at trial that the medications were prescribed to him, "the fact that any person charged with violating this section is, or has been, legally entitled to use a drug shall

[44] *See* 21 *Del. C.* § 4177(h)(4) (eff. Apr. 13, 2021 to June 29, 2024).

not constitute a defense."[45] Nor is there a requirement that expert testimony be provided as to the amount of drug present in Stevens' system to provide impairment of his driving ability.[46]

Thus, the only issue at trial was whether Stevens was "under the influence of any drug" when he drove his truck on December 18, 2022.[47] To establish this, the State only had to "produce enough evidence to allow a reasonable trier of fact to conclude that [Stevens'] ability to drive safely was impaired by [a drug]. Investigative tests, such as a chemical or sobriety test, [were] not necessary to prove the impairment required by the statute."[48] Hence, Stevens' DUI conviction could be "based solely on a police officer's testimony concerning his observations of the defendant."[49]

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[45] 21 *Del. C.* § 4177(b)(1) (eff. Apr. 13, 2021 to June 29, 2024).

[46] *Tracy v. State*, 2011 WL 4826108, at *5 (Del. Super. Ct. Oct. 10, 2011) ("Neither the Delaware Code, nor Delaware case law requires a 'chemical test of blood, breath, or urine to determine the concentration or presence of alcohol or drugs' to convict someone for DUI.").

[47] Under 21 *Del. C.* § 4177(a)(2), it is illegal for a person to drive a vehicle while "under the influence of any drug."[47]

[48] *Stevens v. State*, 129 A.3d 206, 210 (Del. 2015) (internal quotation marks omitted) (quoting *Lewis v. State*, 626 A.2d 1350, 1355 (Del. 1993)); *Tracy*, 2011 WL 4826108, at *5; *State v. Hamilton*, 2013 WL 8844994, at *1 (Del. C.P. July 10, 2013); *Hartman*, 2010 WL 1053625, at *3.

[49] *Tracy*, 2011 WL 4826108, at *5.

Here, even without the evidence of the results of the chemical testing of Stevens' blood sample, Batt's testimony and Trooper Setting's observations and body-worn camera provided sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that Stevens was under the influence of a drug when he drove.[50] Batt testified that Stevens almost hit his vehicle before striking another parked vehicle. Batt also testified that he watched Stevens appear to slump over multiple times, for 20 to 30 seconds each time, as he drove away after hitting the other vehicle. Batt also testified that he saw Stevens drive through a red light and stop at a green light. In addition, Stevens parked his truck perpendicular across several parking spots in the Rite Aid parking lot, as seen in the body camera video. Batt also testified that Stevens knocked over a display inside the store and fell on the

[50] *See State v. Green*, 2019 WL 5273230, at *4 (Del. Super. Ct. Oct. 14, 2019) (finding sufficient evidence to convict the defendant under an impairment theory regardless of the admissibility of the blood alcohol test results); *Lefebvre v. State*, 19 A.3d 287, 291-92 (Del. 2011) (finding that probable cause existed to arrest defendant for DUI where defendant was convicted for DUI without chemical testing and defendant passed field tests); *Shaw v. State*, 2007 WL 866196, at *2 (Del. Mar. 23, 2007) (finding sufficient evidence to show that the defendant was under the influence at the time of the accident); *Tracy*, 2011 WL 4826108, at *5 (finding sufficient evidence existed in record to establish defendant's drug impairment despite absence of blood tests and lab reports); *Thoroughgood v. State*, 2010 WL 2355316, at *3 (Del. Super. Ct. June 1, 2010) (holding that rational trier of fact could have found evidence sufficient to establish defendant was under influence of alcohol even without evidence of results of intoxilyzer test), *aff'd*, 2010 WL 4157706 (Del. Oct. 22, 2010); *Hartman*, 2010 WL 1053625, at *3 (finding sufficient evidence to find defendant guilty of DUI without presentation of evidence of results of chemical test).

floor. When Trooper Setting spoke to Stevens a few minutes later, Trooper Setting concluded that Stevens was driving under the influence of drugs, noting that Stevens exhibited droopy eyelids, was hunched over, was "[a]lmost not coherent," "wasn't responding to verbal," and had trouble maintaining his balance. (A61, A87-88). Trooper Setting's body worn camera also showed Stevens slumping forward and nonresponsive at times when Trooper Setting asked him to perform field tests. While Stevens suggested that his behavior was attributable to the cold and to knee injuries that he previously suffered, it was the sole province of the jury to accept or reject any such claim.[51] Even without the drug results, the totality of the circumstances presented at trial allowed the jury to reasonably infer that Stevens drove under the influence of a drug in violation of 21 *Del. C.* § 4177(a)(2).[52]

[51] *Poon v. State*, 880 A.2d 236, 238 (Del. 2005) ("[I]t is the sole province of the fact finder to determine witness credibility, resolve conflicts in testimony and draw any inferences from the proven facts. The fact finder is free to reject all or part of any witness's testimony. The fact finder need not believe even uncontroverted testimony.").

[52] *See Green*, 2019 WL 5273230, at *4.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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Dated: February 3, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN STEVENS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 298, 2024
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9,997 words, which were counted by Microsoft Word.

Date: February 3, 2025

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