No. 09-10876

IN THE

Supreme Court of the United States

DONALD BULLCOMING,
Petitioner,

v.

NEW MEXICO,
Respondent.

On Writ of Certiorari to the Supreme Court of New Mexico

JOINT APPENDIX

GARY K. KING
Attorney General of New Mexico

ANN MARIE HARVEY
Assistant Attorney General
Counsel of Record
aharvey@nmag.gov

JAMES W. GRAYSON
Assistant Attorney General

M. VICTORIA WILSON
Assistant Attorney General

P.O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6932

Attorneys for Respondent New Mexico

JEFFREY L. FISHER
Counsel of Record
STANFORD LAW SCHOOL
Supreme Court Litigation Clinic
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

SUSAN D. ROTH
NEW MEXICO PUBLIC DEFENDER DEPARTMENT
301 N. Guadalupe Street
Santa Fe, NM 87501
(505) 827-3909

Attorneys for Petitioner Donald Bullcoming

PETITION FOR CERTIORARI FILED MAY 12, 2010
CERTIORARI GRANTED SEPTEMBER 28, 2010

TABLE OF CONTENTS

SUPREME COURT OF NEW MEXICO.

No. 31,186.

STATE OF NEW MEXICO,
Plaintiff-Respondent,

v.

DONALD BULLCOMING,
Defendant-Petitioner.

Feb. 12, 2010.

OPINION

MAES, Justice.

{1} Defendant, Donald Bullcoming, appeals his conviction of aggravated DWI, a fourth-degree felony, contrary to NMSA 1978, Section 66-8-102 (2005, prior to amendments through 2008). Of the three issues that Defendant raises, the main question presented in this appeal is whether a laboratory report of Defendant's blood draw results is testimonial evidence subject to the Confrontation Clause. We first addressed this issue in *State v. Dedman*, 2004-NMSC-037, ¶¶ 30, 45-46, 136 N.M. 561, 102 P.3d 628, and followed the United States Supreme Court case in *Crawford v. Washington*, 541 U.S. 36 (2004), to hold that (1) blood alcohol reports are public records and (2) they are non-testimonial under *Crawford* because public records are not "investigative or prosecutorial" in nature. We reverse our holding in *Dedman* in light of the recent United States Supreme

Court case of *Melendez-Diaz v. Massachusetts*, which held that the certificates reporting the results of forensic analysis were "quite plainly affidavits" and thus "there [was] little doubt that [they] fall within the 'core class of testimonial statements,'" governed by the Confrontation Clause. 129 S. Ct. 2527, 2532 (2009) (5-4 decision) (quoting *Crawford*, 541 U.S. at 51). Although the blood alcohol report was testimonial, we conclude that its admission did not violate the Confrontation Clause, because the analyst who prepared the report was a mere scrivener who simply transcribed the results generated by a gas chromatograph machine and, therefore, the live, in-court testimony of another qualified analyst was sufficient to satisfy Defendant's right to confrontation.

{2} As to Defendant's other two issues, we hold that while Officer Snowbarger was never formally accepted as an expert witness, the parties understood he was being treated as an expert witness, and could give his opinion regarding the cause of the accident without witnessing it. We further hold that although the trial court erred in admitting Defendant's brother's (Brother) out-of-court hearsay statements, we find this error to be harmless because of the overwhelming evidence against Defendant. We affirm Defendant's convictions.

I. FACTS AND PROCEDURAL HISTORY

{3} We begin with a summary of the facts that the jury reasonably could have found at Defendant's trial. The facts will be further developed in the discussion of the issues. Defendant's vehicle rear-ended Dennis (Randy) Jackson's vehicle while stopped at the intersection of 30th Street and Farmington Avenue in Farmington, New Mexico. Mr. Jackson exited his vehicle to exchange insurance information with De-

fendant. Mr. Jackson noticed the smell of alcohol on Defendant's breath and his bloodshot eyes, and instructed his wife to call police. When Defendant was informed that police were on their way, Defendant excused himself to the restroom.

{4} Officer Marty Snowbarger of the Farmington Police Department responded to the call, learned that Defendant had left the accident scene, and went to find him. Officer Snowbarger drove his motorcycle in the direction where Defendant was seen walking. He first encountered and questioned Brother, who had been a passenger in the vehicle and also had left the accident scene. Brother explained to Officer Snowbarger that Defendant was the driver of the vehicle at the time of the accident, and pointed east to indicate the direction that Defendant had fled. Soon thereafter, Officer Snowbarger spotted Defendant crossing a nearby bridge at a quick pace and followed him behind a building that was east of the bridge. Officer Snowbarger noticed that Defendant exhibited signs of intoxication such as watery, bloodshot eyes, slurred speech, and smelled the odor of alcohol coming from Defendant. Defendant was taken back to the accident scene in a patrol vehicle. Officer David Rock, who had recently arrived to the accident scene, noticed that Defendant swayed while walking toward the sidewalk. Officer Rock noticed Defendant's bloodshot eyes and the odor of alcohol coming from Defendant's breath and then asked Defendant if he had been drinking that day. Defendant responded that he had a drink at 6:00 a.m., but had not been drinking since then. The Defendant performed a series of field sobriety tests, which he failed. Defendant was arrested for DWI and transported to the Farmington police station for booking. Because Defendant refused to take a breath test, Officer Rock

obtained a search warrant to perform a blood alcohol test. Defendant had a blood alcohol content (BAC) of 0.21gms/100ml, well over the legal limit of 0.08gms/100ml. Defendant was convicted by jury of DWI and sentenced to a prison term of two years.

{5} Defendant appealed to the Court of Appeals raising five issues:

> (1) that the district court erred in denying a motion for mistrial based on the prosecutor's improper comment on silence in closing argument, (2) that the district court abused its discretion by allowing testimony by a police officer about the cause of an accident involving Defendant when the officer did not witness the accident, (3) that the district court erred in admitting into evidence blood draw results when the analyst who prepared the results was not available to testify, (4) that the district court erred in admitting into evidence the hearsay statement of Defendant's brother, and (5) that the State did not sufficiently prove Defendant's four prior DWI convictions.

State v. Bullcoming, 2008-NMCA-097, ¶ 1, 144 N.M. 546, 189 P.3d 679. The Court of Appeals determined that (1) the prosecutor was commenting on Defendant's pre-arrest silence, which is permissible for impeachment purposes, *id.* ¶ 7; (2) the officer was properly qualified as an expert witness and could provide his opinion about the cause of the accident, *id.* ¶ 11; (3) the blood alcohol report was non-testimonial, and thus its admission did not violate the Confrontation Clause, *id.* ¶ 17; (4) Brother's statements were not hearsay because they were not

offered for the truth of the matter asserted and their admission did not prejudice Defendant, *id.* ¶ 19; and (5) that there was sufficient evidence to prove Defendant's prior convictions, *id.* ¶ 27. The Court of Appeals concluded that Defendant's claims were without merit and affirmed his conviction. *Id.* ¶¶ 1, 28. Defendant's petition for certiorari raised five issues. We granted certiorari to consider the following three issues: (1) whether the trial court abused its discretion by allowing Officer Snowbarger to testify regarding the cause of Defendant's accident; (2) whether the trial court erred in admitting the blood draw results as a business record, over defense counsel's confrontation objection, when the analyst who prepared the results was not available to testify; and (3) whether the trial court erred in admitting, over defense counsel's objection, hearsay testimony through Officer Snowbarger of an eyewitness, Brother, who did not testify at trial.

II. DISCUSSION

A. Whether the Trial Court Erred in Admitting the Blood Draw Results as a Business Record, Over Defense Counsel's Confrontation Objection, When the Analyst Who Prepared the Results Was Not Available to Testify

{6} At trial, the State presented the Report of Blood Alcohol Analysis of Defendant's blood through Gerasimos Razatos, an analyst for the New Mexico Department of Health, Scientific Laboratory Division, Toxicology Bureau (SLD), who helps in overseeing the breath and blood alcohol programs throughout the state. The report is a two-page document and was admitted into evidence as Exhibit 1. It is attached to this opinion for reference. The first page is composed

of Part A and Part B. Part A contains chain of custody information, specifically identifying the arresting officer, the donor, the person who drew the donor's blood, and the date, time, and place of the blood draw. Part A also specifies the information sought by the officer and the location where the results are to be sent.

{7} Part B has four parts that primarily provide chain of custody information. The receiving employee signs the first section of Part B, certifying the type of specimen that was received, how it was received, whether the seal was intact, and that the employee complied with the procedures delineated in paragraph two of the second page of Exhibit 1. The analyst signs the second section of Part B, certifying that the seal of the sample was received intact and was broken in the laboratory, that the analyst followed the procedures in paragraph number three on the second page of Exhibit 1, and that the test results were recorded by the analyst. A reviewer signs the third section of Part B, certifying that the analyst and the analyst's supervisor are qualified to conduct the analysis and that the established procedures had been followed. Finally, a laboratory employee signs the fourth section of Part B, certifying that a legible copy of the report had been mailed to the donor. Finally, the second page of Exhibit 1 identifies the method used for testing the blood sample and details the procedures that must be followed by laboratory personnel.

{8} The analyst who prepared Exhibit 1 did not testify at Defendant's trial because he "was very recently put on unpaid leave." However, Razatos, who had no involvement in preparing Exhibit 1, testified about Defendant's BAC and the standard procedures

of the laboratory. He testified that the instrument used to analyze Defendant's blood was a gas chromatograph machine. The detectors within the gas chromatograph machine detect the compounds and the computer prints out the results. When Razatos wasasked by the prosecutor whether "any human being could look and write and just record the result," he answered, "Correct." On cross-examination he also testified that this particular machine prints out the result and then it is transcribed to Exhibit 1. Both the nurse who drew the blood and the officer who observed the blood draw and who also prepared and sent the blood kit to SLD, testified at trial and were available for cross-examination.

{9} Defendant objected to the admission of Exhibit 1 because the analyst who performed the test was not at trial to testify, which he argued would violate Defendant's constitutional right to confrontation. He also argued that, because Exhibit 1 was prepared in anticipation of trial, it did not qualify as a business record. The trial court admitted Exhibit 1 as a business record exception to the rule against hearsay. Rule 11-803(F), (H) NMRA. The trial court also held that the admission of Exhibit 1 was not prohibited by *Crawford.* Exhibit 1 was shown to the jury.

{10} Whether Exhibit 1 was admitted in violation of the Confrontation Clause of the United States Constitution is a question of law which we review de novo. *State v. Rivera*, 2008-NMSC-056, ¶ 10, 144 N.M. 836, 192 P.3d 1213.

{11} The United States Supreme Court in *Crawford* held that the Confrontation Clause prohibits the admission of "testimonial statements" unless the declarant is unavailable to testify, "and the defen-

dant had had a prior opportunity for cross-examination." 541 U.S. at 53-54. Though the Court declined to definitively state what constitutes a "testimonial" statement, it described the various formulations of the core class of testimonial statements covered by the Confrontation Clause. *Id.* at 51-52.

{12} In *Dedman*, we followed *Crawford* to hold that (1) blood alcohol reports prepared by SLD are public records, and (2) they are non-testimonial under *Crawford* because public records are not "investigative or prosecutorial" in nature. *Dedman*, 2004-NMSC-037, ¶¶ 30, 45-46. We first determined that the reports were admissible because they fell within the hearsay exception for "public records" since they "follow a routine manner of preparation that guarantees a certain level of comfort as to their trustworthiness." *Id.* ¶ 24. Second, though we recognized that the "right of confrontation requires an independent inquiry that is not satisfied by a determination that evidence is admissible under a hearsay exception," we essentially held that blood alcohol reports were not subject to the Confrontation Clause for the same reasons that we considered them to be public records. *Id.* ¶ 25. We determined that the main concern of the Confrontation Clause was the "'[i]nvolvement of government officers in the production of testimony with an eye toward trial,' because this provide[d] a 'unique potential for prosecutorial abuse.'" *Id.* ¶ 29 (quoting *Crawford*, 541 U.S. at 56 n. 7). Since blood alcohol reports are not prepared by law enforcement personnel and are neither investigative nor prosecutorial, they do not present the same potential for abuse. *Id.* ¶¶ 29-30. Thus, we concluded that the blood alcohol tests in question were non-testimonial because, as public records, their preparation was "routine, non-

adversarial, and made to ensure an accurate measurement." *Id.* ¶ 30.

{13} While this appeal was pending, the United States Supreme Court in *Melendez-Diaz* considered whether a certificate prepared by a forensic laboratory analyst fell within the core class of testimonial statements identified in *Crawford*. *Melendez-Diaz*, 129 S. Ct. at 2532. The plurality held that the certificates, which reported the results of forensic analysis showing that the substance found in seized bags was cocaine of a certain weight, were "quite plainly affidavits" and thus "[t]here [was] little doubt that [they] fall within the 'core class of testimonial statements,'" governed by the Confrontation Clause. *Id.* Justice Scalia delivered the opinion of the Court in which Justices Stevens, Souter, Thomas and Ginsburg joined. Justice Thomas filed a concurring opinion adhering to his position in *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment), that "[t]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring) (internal quotation marks and citation omitted). Because the certificates in question were "quite plainly affidavits," Justice Thomas agreed with the majority that they fall within the core class of testimonial statements. *Id.*

{14} The other four Justices that joined Justice Thomas to form the plurality went further, stating that the certificates were testimonial because they were "'made under circumstances which would lead an objective witness reasonably to believe that the

statement would be available for use at a later trial,'" *id.* at 2531 (quoting *Crawford*, 541 U.S. at 52), and were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,'" *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)). They reasoned that the Sixth Amendment only contemplated "two classes of witnesses—those against the defendant and those in his favor" and that "there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 2534. Forensic evidence is neither immune from manipulation nor inherently "neutral." *Id.* at 2536.

{15} On the other hand, the dissent authored by Justice Kennedy distinguishes between "conventional witness[es]," which he defines as those "who [have] personal knowledge of some aspect of the defendant's guilt," and laboratory analysts who perform tests. *Id.* at 2543 (Kennedy, J., dissenting). Kennedy also focused on the policy implications of requiring laboratory analysts to testify, and argued that *Melendez-Diaz* "threatens to disrupt forensic investigations across the country and to put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician . . . simply does not or cannot appear." *Id.* at 2549.

{16} *Melendez-Diaz* throws into doubt our assessment in *Dedman* that blood alcohol reports as public records are inherently immune from governmental abuse. First, *Melendez-Diaz* clarified that "analysts' certificates—like police reports generated by law enforcement officials—do not qualify as business or public records" because they are "calculated for use

essentially in the court, not in the business." *Id.* at 2538 (internal quotation marks and citation omitted). Though "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status, . . . that is not the case if the regularly conducted business activity is the production of evidence for use at trial." *Id.* Second, *Melendez-Diaz* made clear that the same concerns of governmental abuse which exist in the production of evidence by law enforcement exist in the production of forensic evidence. The Court noted that "[a] forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution." *Id.* at 2536. For these reasons, we conclude that *Dedman's* determination that blood alcohol tests are non-testimonial does not comport with the Supreme Court's ruling in *Melendez-Diaz*, and *Dedman* is overruled.

{17} The State argues that *Melendez-Diaz* can be distinguished from the case at bar because the forensic reports in *Melendez-Diaz* were sworn affidavits and Exhibit 1 in the present case is not a sworn document. The State argues that *Melendez-Diaz* was a plurality opinion and, therefore, the holding "may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976); *accord Marks v. United States*, 430 U.S. 188 (1977). The narrowest grounds for the holding are found in Justice Thomas's concurrence. He joined the majority because he agreed that the reports in question were "plainly affidavits," and thus clearly were "formalized testimonial materials" governed by the Confrontation Clause. *Melendez-Diaz*, 129 S. Ct. at 2543 (Thomas, J., concurring). The

State therefore argues that, because Exhibit 1 in the present case was not an affidavit sworn by the declarant, it is not within the formalized testimonial materials described in *Melendez-Diaz* and, therefore, not subject to the Confrontation Clause.

{18} Contrary to the State's argument, an affidavit is merely listed as one of several examples of "formalized testimonial materials" described in *Melendez-Diaz*, 129 S. Ct. at 2532 ("[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions." (internal quotation marks and citation omitted)). Even prior to *Melendez-Diaz*, it was made clear in *Crawford* that "the absence of oath was not dispositive" in determining if a statement is testimonial. *Crawford*, 541 U.S. at 52. Exhibit 1 in this case, like the certificates in *Melendez-Diaz*, are "formalized testimonial materials" in that they were made "for the purpose of establishing or proving some fact." *Melendez-Diaz*, 129 S. Ct. at 2532 (internal quotation marks and citation omitted). In *Melendez-Diaz*, the certificates were offered to prove that "the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine." *Id.* Likewise, in the present case, Exhibit 1 was offered to prove that Defendant had a BAC of 0.21 gms/100ml. As in *Melendez-Diaz*, Exhibit 1 was "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* (internal quotation marks and citation omitted). Therefore, Exhibit 1 in the present case, like the certificates in *Melendez-Diaz*, are testimonial despite the fact that they are unsworn.

{19} However, the Confrontation Clause permits the admission of testimonial statements "so long as the declarant is present at trial to defend or explain it." *Crawford*, 541 U.S. at 59 n.9 (citation omitted). Although the analyst who prepared Exhibit 1 was not present at trial, the evidence revealed that he simply transcribed the results generated by the gas chromatograph machine. He was not required to interpret the results, exercise independent judgment, or employ any particular methodology in transcribing the results from the gas chromatograph machine to the laboratory report. *Cf. Melendez-Diaz*, 129 S. Ct. at 2537-38 (stating that the methodology used in generating the reports "require[d] the exercise of judgment and present[ed] a risk of error that might be explored on cross-examination"); *State v. Aragon*, No. 31,187, slip op. at 25 (N.M. Sup. Ct. February 12, 2010) (holding that "[t]he determinations of whether a substance is narcotic and its degree of purity . . . must be classified as 'opinion,' rooted in the assessment of one who has specialized knowledge and skill"). Thus, the analyst who prepared Exhibit 1 was a mere scrivener, and Defendant's true "accuser" was the gas chromatograph machine which detected the presence of alcohol in Defendant's blood, assessed Defendant's BAC, and generated a computer printout listing its results. *See United States v. Moon*, 512 F.3d 359, 362 (7th Cir. 2008) ("[T]he Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though the interpretation of those data may be testimonial."); *United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009) ("The raw data generated by the diagnostic machines are the 'statements' *of the machines* themselves, not their operators."); *United States v. Hamilton*, 413 F.3d

1138, 1142-43 (10th Cir. 2005) (concluding that the computer-generated header information accompanying pornographic images retrieved from the Internet "was neither a 'statement' nor a 'declarant'"). Under these circumstances, we conclude that the live, in-court testimony of a separate qualified analyst is sufficient to fulfill a defendant's right to confrontation. *See People v. Rutterschmidt*, 98 Cal. Rptr. 3d 390, 411-12 (Cal. Ct. App. 2009), *review granted and opinion superseded by People v. Rutterschmidt*, 220 P.3d 239 (2009) (holding that the testimony of a qualified analyst who did not prepare the defendant's toxicology report was admissible under the Confrontation Clause).

{20} In this case, Razatos, an SLD analyst, was qualified as an expert witness with respect to the gas chromatograph machine and the SLD's laboratory procedures. Razatos provided live, in-court testimony and, thus, was available for cross-examination regarding the operation of the gas chromatograph machine, the results of Defendant's BAC test, and the SLD's established laboratory procedures. Additionally, Razatos could be questioned about whether the operation of the gas chromatograph machine required specialized skill that the operator did not possess, involved risks of operation that might influence the test results, and required the exercise of judgment or discretion, either in the performance of the test or the interpretation of the results. Because Razatos was a competent witness who provided live, in-court testimony, we conclude that the admission of Exhibit 1 did not violate the Confrontation Clause.

{21} We recognize that, in addition to Defendant's BAC test results, Exhibit 1 also contained information regarding chain of custody. However, in

Melendez-Diaz, the United States Supreme Court indicated that chain of custody information may not be testimonial under the Confrontation Clause.[1] The Court stated that

> [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," *post*, at 2546, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, *ibid.*, from *United States v. Lott*, 854 F.2d 244, 250 (C.A.7 1988), "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

Melendez-Diaz, 129 S. Ct. at 2532 n.1.

{22} In the present case, the jury heard live, in-court testimony from the officer who arrested Defendant and the nurse who drew Defendant's blood. Although Defendant had the opportunity to cross-examine

---

[1] We are also referring to the Committee on Rules of Criminal Procedure the task of drafting a notice-and-demand rule comparable to those seemingly noted with approval in *Melendez-Diaz*, 129 S. Ct. at 2541.

these individuals regarding the chain of custody, he did not do so. Indeed, the record reflects that Defendant was willing to stipulate that the nurse "drew the blood . . . properly." To the extent that Defendant based his Confrontation Clause claim on the chain of custody information contained in Exhibit 1, it is clear that his objection was simply pro forma.

{23} We reiterate that the admissibility of Exhibit 1 under the Confrontation Clause was dependant on the live, in-court testimony of a qualified analyst. Clearly, had Razatos not been present to testify, Exhibit 1 would not have been admissible because Defendant would not have had the opportunity to meaningfully cross-examine a qualified witness regarding the substance of the exhibit. A defendant cannot cross-examine an exhibit. However, because Razatos did testify, Defendant's right of confrontation was preserved and the admissibility of the exhibit depends on the application of our rules of evidence.

{24} Rule 11-703 NMRA provides, in relevant part, that

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.* Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's

> opinion substantially outweighs their prejudicial effect.

(Emphasis added.); *see also Coulter v. Stewart*, 97 N.M. 616, 617, 642 P.2d 602, 603 (1982) ("While experts may rely on hearsay under Rule 703, the hearsay itself is not admissible."). Thus, Exhibit 1 properly was admitted under Rule 11-703 if it contains facts or data of the type reasonably relied upon by experts in the field and its probative value substantially outweighs its prejudicial effect.

{25} As previously explained, the results of the gas chromatograph machine BAC test do not constitute expert opinion, but, rather, constitute facts or data of the type reasonably relied upon by experts in the field. *Cf. Aragon*, No. 31,187, slip op. at 25 (holding that an analyst could not rely on an out-of-court statement of another analyst, regarding whether a substance is narcotic and its degree of purity, because the out-of-court statement was the expert opinion of a non-testifying analyst). Moreover, the trial court reasonably could have found that the probative value of Exhibit 1 in assisting the jury to evaluate Razatos's testimony substantially outweighed its prejudicial effect. Accordingly, Razatos properly relied on the gas chromatograph machine results in his testimony and the trial court did not abuse its discretion in admitting Exhibit 1 into evidence.

{26} Although we find no error in the present case, we strongly suggest that, in future cases, the State admit into evidence the raw data produced by the gas chromatograph machine to supplement the live, in-court testimony of its forensic analyst. With the admission of this raw data, which is not subject to the constraints of the Confrontation Clause, the jury will be able to ascertain first hand the accuracy and

reliability of the analyst's testimony regarding a defendant's BAC.

B. Whether the Trial Court Abused its Discretion by Allowing Officer Snowbarger to Offer His Opinion Testimony as to the Cause of the Accident

{27} The issue that Defendant raises on appeal is whether the trial court properly qualified Officer Snowbarger as an expert witness pursuant to Rule 11-702 NMRA, and, if not, whether his testimony as to the cause of the accident was properly admitted. The following facts are relevant to this claim. During trial, defense counsel objected to Officer Snowbarger offering his opinion regarding the cause of the accident because "[t]here [was] no foundation for it. He's not an expert." The trial court then requested that the State lay a foundation to qualify him as an expert. After Officer Snowbarger testified about his experience and training in traffic reconstruction, defense counsel continued to object and was overruled by the trial court. The officer then testified that his "opinion [was] that the driver of the vehicle was not paying attention to the vehicle in front of him, or his driving habits." The prosecutor followed up asking, "[W]ere you able to formulate an opinion based on your observations as to why the driver was not paying attention?" The officer responded, "Having contacted him and observed the things that I've testified to, I believe that he was under the influence of some kind of intoxicating liquor."

{28} Whether a witness possesses the necessary expertise or a sufficient foundation has been established to permit a witness to testify as an expert witness is a matter entrusted to the sound discretion of the trial court. *Sanchez v. Molycorp, Inc.*, 103 N.M.

148, 152, 703 P.2d 925, 929 (Ct. App. 1985). Absent an abuse of discretion, a reviewing court will not disturb the trial court's decision to accept or reject such testimony. *Id.*

{29} Rule 11-702 only requires that the proponent of the testimony demonstrate that the expert has acquired sufficient "knowledge, skill, experience, training or education" so that his testimony will aid the fact finder. To the extent that Defendant is challenging Officer Snowbarger's qualifications as an expert witness, he offers no reason why Officer Snowbarger does not have the proper qualifications to testify as an expert witness. Instead, Defendant argues that only "an expert accident reconstructtionist" could offer testimony regarding the cause of the accident. At trial, Officer Snowbarger testified that, because he is in the traffic division of the police force, he has attended "a series of schools to become a traffic crash reconstructionist" and holds "certifications as a traffic crash reconstructionist." In addition, he testified that his primary duty was "to investigate traffic collisions from the very minor all the way up to fatal crashes." Defense counsel did not conduct *voir dire* examination or otherwise challenge his qualifications. Therefore, we cannot say that the trial court abused its discretion in qualifying Officer Snowbarger as a expert witness. Furthermore, we note that the jury was free to weigh every aspect of Officer Snowbarger's qualifications in their evaluation of his testimony, and any perceived deficiencies in his qualifications would be "relevant to the weight accorded by the jury to [the] testimony and not to the testimony's admissibility." *State v. Torrez*, 2009-NMSC-029, ¶ 18, 146 N.M. 331, 210 P.3d 228 (internal quotation marks and citation omitted).

{30} Defendant also challenges the admission of Officer Snowbarger as an expert witness, because the trial court failed to formally accept him as an expert. However, Defendant in his briefing before this Court fails to show what formalities are required to put the parties on notice that the trial court is accepting a witness as an expert. We reject the implication that there are formal, talismanic words that must be uttered in order to signal the court's acceptance of a witness as an expert. Instead, we determine that a witness may testify as an expert as long as the circumstances are such that the parties are on notice of the court's acceptance of that witness as an expert. In the present case, given defense counsel's objection to Officer Snowbarger's testimony on the basis that he is "not an expert," the foundation subsequently laid by the officer at the trial court's request, and the trial court's decision to overrule the defense counsel's continued objection, we conclude there was sufficient notice to the parties that the trial court was accepting Officer Snowbarger as an expert witness.

{31} Accordingly, we conclude that the trial court properly accepted Officer Snowbarger as an expert witness and did not abuse its discretion by allowing him to offer his opinion testimony as to the cause of the accident.

C. Whether the Trial Court Erred in Admitting Brother's Out-of-Court Statements

{32} The third issue that Defendant raises on appeal is whether Officer Snowbarger's testimony regarding Brother's out-of-court statements was improperly admitted because it contained impermissible hearsay and violated the Confrontation Clause. At trial, Officer Snowbarger testified that when he came in contact with Brother

and questioned him about the accident and where Defendant had gone, Brother "pointed in the direction of east, [and] said that [Defendant] had been driving the vehicle." Defense counsel objected to the statement as being hearsay, but the trial court overruled the objection and instructed the jury that Officer Snowbarger's statement "[was] not for the truth . . . but to show why . . . the officer did what he did."

{33} We first address Defendant's hearsay issue. This Court reviews the admission of hearsay for an abuse of discretion by the trial court. *State v. Salgado*, 1999-NMSC-008, ¶ 5, 126 N.M. 691, 974 P.2d 661. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Rule 11-801(C) NMRA. "An out-of-court statement is inadmissible unless it is specifically excluded as non-hearsay under Rule 11-801(D) or falls within a recognized exception in the rules of evidence, or is otherwise made admissible by rule or statute." *State v. McClaugherty*, 2003-NMSC-006, ¶ 17, 133 N.M. 459, 64 P.3d 486 (citation omitted).

{34} The State argues that the statements were offered to show why the police officer acted as he did and not for its truth; therefore, they were properly admitted as non-hearsay. In *State v. Rosales*, 2004-NMSC-022, ¶ 16, 136 N.M. 25, 94 P.3d 768, this Court noted that "[e]xtrajudicial statements or writings may properly be received into evidence, not for the truth of the assertions therein . . . but for such legitimate purposes as that of establishing knowledge, belief, good faith, reasonableness, motive, effect on the hearer or reader, and many others." In addition, the evidence must have some proper probative effect upon or relevancy to an issue in the

case in order to be admissible. Rule 11-402 NMRA; *State v. Alberts*, 80 N.M. 472, 475, 457 P.2d 991, 994 (Ct. App. 1969). Courts have been especially reluctant to allow testimony of a police officer to explain his conduct during the course of the investigation, because there is high potential for abuse by prosecution to admit highly prejudicial and otherwise inadmissible hearsay and the evidence is seldom relevant. *State v. Otto*, 2007-NMSC-012, ¶ 28, 141 N.M. 443, 157 P.3d 8 (Chavez, J., dissenting) ("In criminal cases the prosecution is fond of offering evidence of inculpatory out-of-court assertions as 'background' to explain why law enforcement agents decided to investigate a defendant. Such evidence is seldom relevant." (quoting David F. Binder, *Hearsay Handbook*, § 2:10, at 2-40 (4th ed. 2001))); *see Alberts*, 80 N.M. at 475, 457 P.2d at 994 ("The naming of defendants as persons engaged in 'illegal marijuana traffic,' for the purpose of showing why [an officer] conducted an investigation, is not a legitimate reason for admitting [hearsay] testimony."); *see also State v. Blevins*, N.E.2d 1105, 1108 (Ohio Ct. App. 1987) ("[T]he potential for abuse in admitting such statements is great where the purpose is merely to explain an officer's conduct during the course of an investigation.").

{35} Despite the trial court's instruction to the jury that Officer Snowbarger's statements should not be considered for their truth, we find no other purpose for admitting these statements other than to prove that Defendant was the driver of the vehicle and headed east, as opposed to north to the creek, as he claimed in his testimony. The police officer's reason for pursuing Defendant was not a relevant issue at trial, therefore, the statements were hearsay and inadmissible.

{36} However, evidence admitted in violation of our hearsay rules is grounds for a new trial unless the error was harmless. *See State v. Downey*, 2008-NMSC-061, ¶ 39, 145 N.M. 232, 195 P.3d 1244. Where a defendant has established a violation of court rules, non-constitutional error review is appropriate, and a reviewing court should only conclude that a non-constitutional error is harmless when there is no *reasonable probability* the error affected the jury's verdict. *State v. Barr*, 2009-NMSC-024, ¶¶ 47-48, 146 N.M. 301, 210 P.3d 198.

{37} To determine whether there is a reasonable probability that a non-constitutional error contributed to a verdict, the appellate courts should consider whether there is "(1) substantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear minuscule; and (3) no substantial conflicting evidence to discredit the State's testimony." *Id.* ¶ 56 (footnote omitted). No one factor is determinative, but all three factors when considered in conjunction with one another "provide a reviewing court with a reliable basis for determining whether an error is harmless." *Id.* ¶ 55. In applying these factors, we must not re-weigh the evidence against a defendant, but rather determine "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* ¶ 57 (citation omitted). "Accordingly, in some circumstances where, in our judgment, the evidence of a defendant's guilt is sufficient even in the absence of the trial court's error, we may still be obliged to reverse the conviction if the jury's verdict appears to have been

tainted by error." *State v. Macias*, 2009-NMSC-028, ¶ 38, 146 N.M. 378, 210 P.3d 804.

{38} First, we examine whether there was substantial evidence to support the conviction without reference to the improperly admitted evidence. The jury could have reasonably relied on Mr. Jackson's testimony that immediately after the accident and before Defendant left the accident scene, Defendant had blood shot eyes and alcohol on his breath, in reaching its conclusion that Defendant was intoxicated at the time of the accident even before he left the accident scene. Additionally, a reasonable jury could have considered this testimony coupled with the testimony of the two arresting officers to conclude that Defendant was intoxicated to the slightest degree at the time of the accident. Based on the testimony of Mr. Jackson and Officer Snowbarger that Defendant was only away from the accident scene for approximately ten minutes when he was found by the officer, the jury could have reasonably concluded that this would not be enough time for Defendant to cross the street, walk around, climb over a fence, walk to the side of the creek, and drink a pint and a half-gallon of vodka, as Defendant claimed at trial.

{39} The second factor requires us to assess the impermissible evidence in light of the permissible evidence, the disputed factual issues, and the essential elements of the crime charged. Our focus is not limited to the quantity of impermissible evidence, but, rather, encompasses the quality of that evidence and its likely impact on the jury. *See State v. Moore*, 94 N.M. 503, 505, 612 P.2d 1314, 1316 (1980) (recognizing that "a trial can be prejudiced by testimony lasting but a fraction of a second"). We

conclude that the improperly admitted statements were insignificant in comparison to the permissible evidence because they did not relate to centrally disputed facts in the case. First, the parties did not dispute that Defendant was driving the vehicle at the time of the accident; therefore, Brother's statement that Defendant was driving had no impact on the jury's resolution of any disputed factual issue. Second, the fact that Brother pointed east while Defendant testified that he headed north is not inconsistent with Defendant's claim that he became intoxicated during his flight from the accident scene, especially considering that Defendant testified that he "walked around" before heading to the creek, where he encountered the men with whom he drank. Thus, this minor discrepancy, even if noticed by the jury, is not one which would have tainted their determination of Defendant's guilt.

{40} Finally, we address the third factor, namely, whether there was substantial conflicting evidence to discredit the State's testimony. There is no conflicting evidence regarding the fact that Defendant was driving the vehicle at the time of the accident. The only conflicting evidence regarding which direction Defendant went when he fled the accident was Defendant's testimony that he went north instead of east. Considering the minimal probative value of the hearsay testimony and the strength of the countervailing evidence, we conclude that the trial court's error in admitting the hearsay statements was harmless.

{41} We next address Defendant's Confrontation Clause claim. Generally, whether out-of-court statements are admissible under the Confrontation Clause is reviewed de novo, as a question of law. *State v. Ruiz*, 120 N.M. 534, 536, 903 P.2d 845, 847 (Ct. App.

1995), *abrogated by State v. Martinez*, 2007-NMSC-025, 141 N.M. 713, 160 P.3d 894. However, because counsel did not object under the Confrontation Clause in the trial court, this Court must review the issue under fundamental error. *State v. Osborne*, 111 N.M. 654, 662, 808 P.2d 624, 632 (1991). "Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." *State v. Baca*, 1997-NMSC-045, ¶ 41, 124 N.M. 55, 946 P.2d 1066, *overruled on other grounds by State v. Belanger*, 2009-NMSC-025, ¶ 36, 146 N.M. 357, 210 P.3d 783. Defendant concedes that there was no material issue rising to the level of fundamental error with regard to Brother's statement that Defendant was driving when the accident occurred; therefore, we do not address this question. However, Defendant argues that there was a material issue concerning Brother's indication that Defendant headed east, because Defendant, to the contrary, testified at trial that he headed north, climbed over a fence, and then met the Native American men that he drank with by the creek. The Defendant claims that this statement prejudiced Defendant's case because "the direction Mr. Bullcoming walked in, where Mr. Bullcoming ended up, and how long he was gone, were critical to the jury's determination of guilty." As mentioned above, this statement had little probative value especially in light of the other evidence presented by the prosecution. Thus, we conclude that there was no fundamental error, because Defendant was not prejudiced in a significant way by the admission of the statement.

CONCLUSION

{42} We conclude that the blood alcohol report, prepared by an analyst who simply transcribed the results generated by a gas chromatograph machine, properly was admitted into evidence through the live, in-court testimony of a separate qualified analyst. We further conclude that, although Officer Snowbarger was never formally qualified as an expert witness, the parties understood that he was testifying as an expert witness and, thus, he could opine regarding the cause of the accident without witnessing it. Finally, though the trial court erred in admitting Brother's out-of-court hearsay statements, the error was harmless. Thus, we affirm Defendant's conviction.

IT IS SO ORDERED.

PETRA JIMENEZ MAES, Justice

WE CONCUR: EDWARD L. CHAVEZ, Chief Justice, PATRICIO M. SERNA, RICHARD C. BOSSON, and CHARLES W. DANIELS, Justices. N.M., 2010.

COURT OF APPEALS OF NEW MEXICO.

No. 26,413.

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

DONALD BULLCOMING,
Defendant-Appellant.

June 4, 2008.
Certiorari Granted, No. 31,186, July 21, 2008.

OPINION

WECHSLER, Judge.

{1} As per the Corrected Judgment, Sentence, Order Partially Suspending Sentence and Commitment to the Department of Corrections, Defendant Donald Bullcoming was convicted of the offense of Aggravated Driving While Under the Influence of Intoxicating Liquor and sentenced based on four prior DWI convictions. He appeals, raising five issues: (1) that the district court erred in denying a motion for mistrial based on the prosecutor's improper comment on silence in closing argument, (2) that the district court abused its discretion by allowing testimony by a police officer about the cause of an accident involving Defendant when the officer did not witness the accident, (3) that the district court erred in admitting into evidence blood draw results when the analyst

who prepared the results was not available to testify, (4) that the district court erred in admitting into evidence the hearsay statement of Defendant's brother, and (5) that the State did not sufficiently prove Defendant's four prior DWI convictions. We affirm Defendant's conviction. In doing so, we agree with the district court's use of the preponderance of the evidence standard in addressing Defendant's prior DWI convictions.

BACKGROUND

{2} Defendant was arrested after an automobile accident in which Defendant, while driving his sibling's vehicle, ran into another truck at an intersection. After the accident, the other driver got out of his truck and went back to the vehicle that Defendant was driving and asked for Defendant's license and registration. The other driver noticed the smell of alcohol coming from Defendant's vehicle. When the other driver returned to his truck, he asked his wife to call the police. As the other driver examined the rear end of his truck for damage, Defendant and his sister approached him. The other driver spoke with both of them and obtained insurance information. The other driver smelled alcohol emanating from Defendant and also observed that Defendant had bloodshot eyes. When the other driver told Defendant that he needed to get a police report and had called the police, Defendant excused himself, saying that he needed to go to the restroom, and went across the street toward a medical complex. The other driver testified that the police brought Defendant back to the scene of the accident approximately ten minutes later.

{3} Defendant testified that he had not been drinking for about ten hours that day. He said that

he was driving because the others in the vehicle had been drinking and were drunk. According to Defendant, the odor of alcohol in the vehicle came from them, rather than him. Defendant further testified that he left the scene after the other driver told him that the police had been called because he was afraid that he was going to be arrested. Defendant knew he had an outstanding warrant because he had violated his probation in Oklahoma by leaving that state. He walked to a creek where he met other men who were drinking vodka, and he testified that he drank with them for about thirty minutes and that they drank about a pint and a half gallon. He was picked up by the police when he returned to the road. He was intoxicated when he was given field sobriety tests back at the scene of the accident.

COMMENT ON SILENCE

{4} In closing argument, on rebuttal, the prosecutor argued that Defendant did not tell the police officers anything about drinking vodka with others. He argued that if Defendant had told the officers that he "was just back in the bushes with three or four guys and I drank a whole load of vodka," and "I'll show you," one of the officers could have gone to the bushes and investigated and asked the others if Defendant had been drinking. Defendant objected on Fifth Amendment grounds. The district court then stated: "Ladies and gentlemen of the jury, . . . Defendant has a right to remain silent and be presumed innocent. And, you are not to infer from counsel's argument that . . . Defendant had any duty to say anything." After the district court excused the jury, Defendant moved for a mistrial, contending that the prosecutor's argument was "so prejudicial and so in violation

of the law, of the constitution," that it justified a mistrial. The district court denied the motion, stating that the comment was only a casual comment that was cured by its instruction to the jury.

{5} On appeal, Defendant argues that the comment was not casual; rather, Defendant asserts that its calculation was demonstrated by the prosecutor's questioning of Officer Martin Snowbarger about his conversation with Defendant. When, as here, the facts are not in question, the issue of whether the prosecutor made an improper comment on the defendant's silence is a question of law that we review de novo. *State v. Foster*, 1998-NMCA-163, ¶ 8, 126 N.M. 177, 967 P.2d 852. We may affirm the district court if it was correct for any reason, as long as the basis for such ruling was raised before the district court. *State v. Granville*, 2006-NMCA-098, ¶ 12, 140 N.M. 345, 142 P.3d 933.

{6} We now review the record, which demonstrates that the prosecutor's comment related to Defendant's pre-arrest, as opposed to his post-arrest, silence. Officer Snowbarger first encountered Defendant on the other side of a bridge away from the scene of the accident and spoke with him at that time. He requested another police car to transport Defendant back to the accident scene. He arrived back at the scene at the same time as Defendant and was there during the time that Officer David Rock administered field sobriety tests to Defendant. Officer Snowbarger testified that he issued Defendant three citations but that he did not issue a citation for DWI. Officer Rock testified that when he arrived at the scene, Defendant was still in a police car. Officer Rock removed Defendant from the car, observed him walk to the sidewalk, and asked him, "Have you had anything to

drink today?" Defendant responded that he "had one this morning at 6:00 a.m." Officer Rock wrote Defendant's response in his report. Officer Rock then administered the field sobriety tests. After completing the tests, Officer Rock concluded that Defendant was intoxicated and impaired, arrested him, and took him to the police station for booking. Although Officer Rock's testimony is not clear as to the exact location where he read Defendant his rights under the New Mexico Implied Consent Act, he testified that he did so after arresting Defendant. Ultimately, he obtained a warrant and took Defendant to the emergency room for a blood alcohol test.

{7} The prosecution may use a defendant's pre-arrest silence for impeachment purposes without infringing upon his or her Fifth Amendment rights. *See State v. Gonzales*, 113 N.M. 221, 229, 824 P.2d 1023, 1031 (1992); *Foster*, 1998-NMCA-163, ¶¶ 13-14. Although the transcript does not reflect exactly when Defendant was given his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), we assume that it was not until after Officer Rock arrested him.

{8} With this factual predicate, we conclude that the context of the prosecutor's statement in rebuttal shows that he was only referencing Defendant's pre-arrest silence. First, the prosecutor discussed the police officers' ability to investigate by going to the bushes and asking anyone found there if Defendant had been drinking. That time period was, by necessity, limited, because anyone present in the bushes had the ability to leave that area. Second, although a police investigation may certainly continue after an arrest, the prosecutor's discussion was limited to the police officers' investigation in the context of this case, which impliedly referenced only the

investigation at the scene when the officers had the present ability to return to the bushes while someone with knowledge of Defendant was still present. Third, the prosecutor made reference to Defendant's statement to Officer Rock that he had not had anything to drink since 6:00 a.m. That statement was a pre-arrest statement.

{9} Thus, from the factual context, as well as the wording of the prosecutor's argument, we conclude that it reasonably related only to Defendant's pre-arrest silence. It did not merit a granting of Defendant's motion for a mistrial.

OFFICER SNOWBARGER'S TESTIMONY ABOUT THE CAUSE OF THE ACCIDENT

{10} Defendant contends that Officer Snowbarger was not qualified to offer opinion testimony concerning the cause of the accident because he was not qualified as an expert and, testifying as a lay witness, he could not testify about causation because he did not witness the accident. Officer Snowbarger testified at trial as the State's witness. He was dispatched to and observed the accident scene. After being informed that Defendant had left the scene, he also left the scene, located Defendant, and requested the transport of Defendant back to the scene by another officer. Defense counsel objected when the prosecutor asked Officer Snowbarger if he was able to form an opinion about the cause of the accident. Upon the district court's inquiry as to a ground for the objection, defense counsel stated, "There's no foundation for it. He's not an expert." The prosecutor offered to lay a foundation, and Officer Snowbarger testified that he was assigned to the traffic division and had the primary duty of investigating traffic accidents. He testified that he had received training in basic

accident reconstruction and traffic crash reconstruction and was certified as a traffic crash reconstructionist. Officer Snowbarger also testified that he had formed opinions as to the contributing factors to Defendant's accident, and when asked to state his opinions, defense counsel again objected, stating, "I would still object, Your Honor." The district court overruled the objection. Accordingly, Officer Snowbarger testified to his opinion as to the contributing factors of Defendant's accident, stating that "the driver of the vehicle was not paying attention to the vehicle in front of him, or his driving habits." When asked if he was able to formulate an opinion based on his observations as to why the driver was not paying attention, again over objection, Officer Snowbarger testified that he believed that the driver "was under the influence of some kind of intoxicating liquor."

{11} We do not agree with Defendant's contention that Officer Snowbarger was not qualified as an expert to provide his opinion about the cause of the accident. Under Rule 11-702 NMRA, a witness may testify as to an expert opinion if the "specialized knowledge" of the witness "will assist the trier of fact" and the witness is qualified as an expert to provide the opinion by virtue of "knowledge, skill, experience, training or education." The district court, in its discretion, decides whether a witness qualifies as an expert under Rule 11-702. *State v. Downey*, 2007-NMCA-046, ¶ 11, 141 N.M. 455, 157 P.3d 20, *cert. granted*, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459. When defense counsel raised the issue of Officer Snowbarger's qualifications by objecting for lack of foundation, the prosecutor elicited his qualifications. Officer Snowbarger testified about his training and his certification as a traffic crash

reconstructionist. Defense counsel then only restated her earlier objection of lack of foundation. She did not seek to engage Officer Snowbarger in a voir dire examination or otherwise challenge his qualifications. The district court acted within its discretion in allowing Officer Snowbarger's causation testimony based on the foundation laid concerning his qualifications.

{12} Nor did the district court abuse its discretion because the prosecutor did not formally proffer Officer Snowbarger as an expert witness. The prosecutor clearly presented the issue to the district court. He asked Officer Snowbarger about whether he had formed any opinions about the cause of the accident. After laying a foundation for testimony about his opinion, the prosecutor asked Officer Snowbarger to state his opinions. There was no lack of clarity concerning the scope of the question calling for Officer Snowbarger's expertise or of the relationship of his qualifications to his ability to present an opinion in response to the question. Defendant does not indicate how a formal proffer would have served any meaningful purpose or how he was prejudiced by the absence of a formal proffer. *See State v. Garcia*, 76 N.M. 171, 176, 413 P.2d 210, 213-14 (1966) (explaining that the district court has substantial discretion, based on its perception of the offered expert's qualifications, in deciding whether to allow or deny the testimony of such a witness); *see also State v. Gregoroff*, 951 P.2d 578, 580-81 (Mont. 1997) (concluding that the district court did not abuse its discretion in admitting the expert testimony of a law enforcement officer even though she was never "formally offer[ed]" as an expert witness by the prosecution).

BLOOD DRAW RESULTS

{13} The State introduced evidence of the analysis of the blood sample taken from Defendant through the testimony of an analyst of the New Mexico Department of Health Scientific Laboratory Division, Toxicology Bureau. The witness was not the analyst who performed the analysis of the blood sample and did not prepare the blood analysis report admitted into evidence. Defendant objected to the analyst's testimony on the basis that it violated Defendant's right of confrontation. Defendant further objected to the receipt of the blood analysis report as a business record because it was prepared in anticipation of litigation. The district court allowed the report to be admitted into evidence as a business record.

{14} On appeal, Defendant argues that the district court erred in allowing the blood draw results. Relying on *Crawford v. Washington*, 541 U.S. 36 (2004), he contends that testimonial statements may not be introduced against a defendant at trial unless both the declarant is unavailable and the defendant has had the opportunity to cross-examine the declarant. According to Defendant, the State did not prove that the analyst who prepared the report was unavailable to testify at trial, and Defendant did not have the opportunity to cross-examine that analyst. Defendant further acknowledges that our Supreme Court has decided this issue in *State v. Dedman*, 2004-NMSC-037, 136 N.M. 561, 102 P.3d 628, but argues that decisions in other states following *Crawford* have reached a different result than our Supreme Court in *Dedman*. We note that although Defendant argued in the district court that the witness's testimony should have been excluded

because of late disclosure, Defendant does not raise that ground as a basis for reversal on appeal.

{15} We begin and end our legal analysis with *Dedman* because it is dispositive. In *Dedman*, the nurse who had withdrawn blood from the defendant for testing by the Scientific Laboratory Division (SLD) was not available to testify at trial. *Dedman*, 2004-NMSC-037, ¶¶ 3-4. The SLD toxicologist testified at trial that the blood alcohol report was the product of the "regularly conducted business activity" of SLD. *Id*. ¶ 43. Our Supreme Court held that there was no indication the report was untrustworthy or unreliable and further held that the report was admissible under the public records exception to the hearsay rule. *Id.* ¶¶ 24, 44. It stated that "ordinarily a blood alcohol report is admissible as a public record and presents no issue under the Confrontation Clause because the report is non-testimonial and satisfies" the test of *Ohio v. Roberts*, 448 U.S. 56 (1980), *abrogated by Crawford*, 541 U.S. 36, concerning the admission of hearsay evidence under the Confrontation Clause. *Dedman*, 2004-NMSC-037, ¶ 45.

{16} In this case, the SLD toxicologist testified that the report was used and kept in the ordinary course of SLD's business and also testified about the procedure used in preparing the report. As in *Dedman*, there was no evidence that there was any deviation from ordinary practice or that the report was untrustworthy or unreliable. *See id.* ¶ 44. We are bound by *Dedman*, a decision of our Supreme Court, and we therefore do not address the opinions of other states on the issue. *See State v. Manzanares*, 100 N.M. 621, 622, 674 P.2d 511, 512 (1983) (explaining that this Court is bound by the precedents of our

Supreme Court "even when a United States Supreme Court decision seems contra").

{17} We do not agree with Defendant's argument at oral argument that *State v. Almanza*, 2007-NMCA-073, 141 N.M. 751, 160 P.3d 932, is inconsistent with *Dedman.* In *Almanza*, because of short notice to subpoena the chemist to appear at trial, the prosecution introduced the telephonic testimony of a New Mexico State Crime Lab chemist concerning the character of the substance the state alleged was illegal drugs. *Almanza*, 2007-NMCA-073, ¶¶ 1-3. This Court held that the testimony violated the defendant's confrontation rights. *Id.* ¶¶ 1, 12-13. However, *Almanza* did not involve the issue of the testimonial nature of a report admissible under *Roberts.* As discussed in *Dedman*, the blood alcohol report in the present case was non-testimonial and prepared routinely with guarantees of trustworthiness. *See Dedman*, 2004-NMSC-037, ¶ 44.

HEARSAY STATEMENT OF DEFENDANT'S BROTHER

{18} Officer Snowbarger testified, over Defendant's objection, to statements that were told to him by Defendant's brother, who did not testify at trial. He testified that Defendant's brother told him that Defendant had been driving the vehicle and pointed in the direction that Defendant had gone from the scene. The district court responded to Defendant's hearsay objection by instructing the jury that the testimony was not for the truth of the statements; rather, it served to show that it caused Officer Snowbarger to take further action. Defendant did not make a Confrontation Clause objection.

{19} We review the admission of hearsay evidence under an abuse of discretion standard. *State v. Torres*, 1998-NMSC-052, ¶ 15, 126 N.M. 477, 971 P.2d 1267, *overruled on other grounds by State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 23, 136 N.M. 309, 98 P.3d 699. The district court did not abuse its discretion in allowing this testimony. First, it did not allow hearsay testimony because it instructed the jury not to accept the testimony for the truth of what Defendant's brother said. Rule 11-801(C) NMRA (defining hearsay as "a statement . . . offered in evidence to prove the truth of the matter asserted"). Second, even if the testimony had been hearsay, there was no prejudice to Defendant. *See Clark v. State*, 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991) (noting that error in the admission of evidence in a criminal case must be prejudicial and not harmless and that standard is met "if there is a reasonable possibility that the evidence complained of might have contributed to the conviction"). There was no material issue that Defendant had been driving the vehicle or had left the scene in a particular direction.

{20} As to the Confrontation Clause, our review is de novo. *Torres*, 1998-NMSC-052, ¶ 20. In this case, we review for fundamental error because Defendant did not raise an objection in the district court. *See State v. Munoz*, 2006-NMSC-005, ¶ 12, 139 N.M. 106, 129 P.3d 142. Fundamental error exists in this context if Defendant's "innocence is indisputable or the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand." *State v. Hennessy*, 114 N.M. 283, 287, 837 P.2d 1366, 1370 (Ct. App. 1992) (internal quotation marks and citation omitted). No such circumstances exist in this case because, as we have stated, there was no material issue as to whether Defendant was driving

or whether he left the scene in a particular direction after the accident.

PROOF OF PRIOR DWI CONVICTIONS

{21} Sentencing for a DWI conviction in New Mexico is graduated depending on a defendant's prior convictions, if any. *See* NMSA 1978, § 66-8-102(E) to (J) (2005) (amended 2007). The district court found that Defendant had at least four prior convictions of DWI and sentenced him on the basis that his conviction in this case was his fifth DWI conviction. As a result, Defendant's conviction was for a fourth degree felony, subjecting him to a two-year term of imprisonment, which term was imposed by the district court. Section 66-8-102 (H).

{22} In proving prior DWI convictions for purposes of enhancing a DWI conviction, the state has the "initial burden of presenting evidence of the validity of each" of a defendant's prior DWI convictions. *State v. Gaede*, 2000-NMCA-004, ¶ 8, 128 N.M. 559, 994 P.2d 1177. If the state presents a prima facie case, the defendant may present contrary evidence. *Id.* The state continues to have the ultimate burden of persuading the district court, as factfinder, of the validity of each of the convictions. *Id.*

{23} Defendant argues on appeal that the State's evidence was insufficient to prove that Defendant had four prior convictions. As part of his argument, he asserts that the State had to prove the convictions to a standard of beyond a reasonable doubt rather than the lesser standard, to a preponderance of the evidence, that was used by the district court.

{24} Based on documents that were before the district court, the district court found that Defendant had been convicted of DWI in Elk City Municipal

Court, Andarko, Oklahoma, on December 30, 1993; in Clinton Municipal Court, Oklahoma, on April 17, 1995; in Blaine County Oklahoma, on September 28, 2003; and in Dewey County, Taloga, Oklahoma, on December 9, 2004. Defendant contested the use of the 1993 and 1995 convictions to the district court, but the district court found that the convictions were valid. On appeal, although Defendant notes the objections below, he does not argue that the district court erred except in its application of the standard of proof. We thus understand Defendant's argument to be that the validity of those convictions depends on the district court's proper application of the standard of proof.

{25} In making his standard of proof argument, Defendant acknowledges that the New Mexico Supreme Court, in *State v. Smith*, 2000-NMSC-005, 128 N.M. 588, 995 P.2d 1030, held that in proving prior convictions for habitual offender enhancement, the State need only meet the standard of preponderance of the evidence. Defendant further acknowledges this Court's statement in *State v. Sedillo*, 2001-NMCA-001, ¶ 5, 130 N.M. 98, 18 P.3d 1051, that proof beyond a reasonable doubt is not necessary to prove prior DWI convictions for sentencing in a DWI case. Defendant relies on cases of the United States Supreme Court starting with *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), holding that the proof of "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." According to Defendant, *Apprendi* was decided after *Smith*, and, in light of *Apprendi* and its United State Supreme Court progeny, *Sedillo* was wrongly decided.

{26} But, Defendant's argument disregards the express holding of *Apprendi*. In reaching its conclusion, the United States Supreme Court explicitly excluded "the fact of a prior conviction" from the type of facts that must be proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. In doing so, the United States Supreme Court expressly confirmed its earlier position in *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (explaining that the U.S. Constitution does not require prior convictions that increase a maximum penalty to be proved beyond a reasonable doubt), that facts of prior convictions do not fit within the same category as other facts that increase "the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490.

{27} A beyond a reasonable doubt standard does not apply to a finding of a prior DWI conviction for purposes of DWI sentencing. *See Sedillo*, 2001-NMCA-001, ¶¶ 5, 10. There is no indication in the record on appeal that there was insufficient evidence to support the district court's findings of Defendant's prior DWI convictions.

CONCLUSION

We affirm Defendant's conviction.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR: JONATHAN B. SUTIN, Chief Judge, and CELIA FOY CASTILLO, Judge. N.M.App., 2008.

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

[Filed DEC 15 2006]

No. 26,413
San Juan County
CR-05-937

STATE OF NEW MEXICO,
Plaintiff-Appellee,

vs.

DONALD BULLCOMING,
Defendant-Appellant.

TRANSCRIPT FROM AUDIO RECORDING
OF JURY TRIAL
November 16, 2005

[As corrected according to Counsel's review
of the audio recording, which is the official record
under New Mexico law]

BEFORE THE HONORABLE THOMAS J. HYNES
ELEVENTH JUDICIAL DISTRICT COURT

APPEARANCES

For the Plaintiff: PAUL WAINWRIGHT

For the Defendant: BLAISE SUPLER

* * * *

[128] THE COURT: Now, how about the jury instructions?

MS. SUPLER: I didn't see any problems with those. I do have a problem, though, with their next witness.

MR. WAINWRIGHT: Yeah. I think—

THE COURT: Wait. Wait. Wait. So, we don't have any problem with the—

MS. SUPLER: As we talked about taking out that one, I didn't see—

THE COURT: Okay. I took that one out. All right. Now, the next witness. What about the next witness?

[129] MR. WAINWRIGHT: We have an admissibility issue regarding the blood results.

THE COURT: Who's the next witness?

MR. WAINWRIGHT: A young Greek gentleman from the lab who—

THE COURT: He's here or he's on the phone?

MR. WAINWRIGHT: He's here. He's here.

THE COURT: Okay. And, he—what's the problem?

MR. WAINWRIGHT: He didn't—he's not Curtis that did the [analyst]. He's from the lab, and he's going to testify—

THE COURT: That this is a business record?

MR. WAINWRIGHT: Right.

THE COURT: All right. And, so, would you object to it coming in as a business record?

MS. SUPLER: I do, Your Honor.

THE COURT: And, the reason being?

MS. SUPLER: Because I think—I think the document itself violates the confrontation clause, the

chain of custody is not met, there's a different person whose signature on here is attesting to the fact that she received the vials and the seals were intact. That person is—I don't believe—planning on testifying.

THE COURT: No, they never—they would never bring that person in.

[130] MS. SUPLER: And, he can't—I submit he can't testify. He didn't do the analysis of this blood sample, so he can't—

THE COURT: Well, did he have any—what is his expertise?

MR. WAINWRIGHT: He—he runs the program.

THE COURT: All right.

MS. SUPLER: He is an analyst, but he didn't do this analysis.

THE COURT: I know. All right.

MR. WAINWRIGHT: The individuals don't do—the machine does the—it's like a breath test.

THE COURT: Yeah. And, he could tell us how the machine works?

MR. WAINWRIGHT: Correct.

THE COURT: All right. Well, I'm going to allow it as a business record. I don't think it's prohibited by—help me here—

MR. WAINWRIGHT: Judge, if you're asking me to get—

THE COURT: Case that the Defense—what's—*Crawford*. I don't think it's prohibited by *Crawford*, and that would be a good reason to appeal, because all those questions have to be answered. And, they're

not answered in *Crawford*, although I think *Crawford* said business records will be allowed. I think *Crawford* specifically—I think [131] they said, well—*Crawford* said, well, we will have to wait and answer all of these other questions later on, but some traditional hearsay exceptions—and I think they said—like business records, will continue to be allowed.

MS. SUPLER: But, Your Honor—I—and, isn't there an exception for business records that are prepared in anticipation of litigation, which is exactly what this is? I don't think this qualifies as a business record because of that. It—

THE COURT: Well, I think your—

MS. SUPLER: (Inaudible.)

THE COURT: —I think your—

MS. SUPLER: It's prepared clearly in anticipation of litigation.

THE COURT: I think your objection is noted, and it would be something that ought to be cleared up by the Court of Appeals, and this might be a good case to do it in. But, the other problem is, you admitted he was intoxicated. I'm not too sure why we—

MS. SUPLER: No.

THE COURT: —I—you admitted it in opening statement. (Inaudible.)

MS. SUPLER: But, Your Honor—but, Your Honor—that was based on our hearing yesterday and the ruling this morning that the analyst would be allowed to testify. I had [132] no idea—this is the first I learned when I met the—in fact, even when Mr. Wainwright told me the witness was out there, he didn't disclose to me it's not the analyst.

THE COURT: All right. Well, I'll—all right. All right. Well, I—you've made your record. You made your record.

MR. WAINWRIGHT: Thank you, Your Honor.

THE COURT: All right. Can you call in—

MS. SUPLER: All my point is, our opening and our defense in this case, may very well have been dramatically different had I known that the analyst was not available.

THE COURT: Well—you know, believe it or not—where's Mr. Wainwright—as hard as it may be to believe that when Mr. Wainwright and I started out in our practice of law, there were no breath tests or blood tests. They just brought in the cop, and the cop said, "Yeah, he was drunk." And, then, you decide. But, now—

MS. SUPLER: Right. And, be that as it may, the whole defense may have been different.

THE COURT: So, the question—the issue here is, I seriously doubt you're going to present any evidence that the Defendant wasn't intoxicated, but that remains to be seen.

MS. SUPLER: Okay.

MR. WAINWRIGHT: And, this is an implied consent [133] document, essentially, Your Honor.

THE COURT: What?

MR. WAINWRIGHT: It's pursuant to the implied consent law.

THE COURT: All right. Well, (inaudible).

MS. SUPLER: My client's signature isn't on it. It's not a statement of my client.

THE COURT: Bring in the jury. Please rise for the jury.

State call the next witness.

MR. WAINWRIGHT: The State would call Mr. Razatos, Your Honor.

THE COURT: Do you solemnly swear or affirm that the testimony you are about to give in the cause herein is the truth, the whole truth, and nothing but the truth, under penalty of law?

THE WITNESS: I do.

THE COURT: Have a seat and state your name, sir.

THE WITNESS: My name is Gerasimos Razatos.

FEMALE VOICE: Would you spell your last name?

THE WITNESS: R-a-z-a-t-o-s.

FEMALE VOICE: First name?

THE WITNESS: Gerasimos, G-e-r-a-s-i-m-o-s.

FEMALE VOICE: Thank you.

THE WITNESS: Uh-huh.

[134] DIRECT EXAMINATION OF
GERASIMOS RAZATOS

BY MR. WAINWRIGHT:

Q Sir, would you please state your name? You already did that, I'm sorry. Okay. By whom are you employed?

A I work for the New Mexico Department of Health Scientific Laboratory Division, Toxicology Bureau.

Q Okay. And, how long have you been employed with that agency?

A Four years.

Q Okay. And, in what capacity are you employed by that agency?

A I'm one of the analysts, or one of the scientists at the laboratories.

Q. Okay. And, what are your job duties, sir?

A I—the bureau is in charge of overseeing the breath and blood alcohol programs, testing programs, for the State of New Mexico. So, as one of the analysts there, I help in overseeing the administration of these programs throughout the State. I also am required to give Court testimony, and teaching of law enforcement.

Q Okay. And, have you had any special training to acquire this position?

A I have a bachelors degree in science from the University of New Mexico, with minor studies in chemistry. [135] There's continuing education within the laboratories that we strive to attain. Plus, I'm a member of the society of forensic toxicologists, which is a national organization here in the United States that oversees forensic testing, and I've also attended a lot of meetings based on blood alcohol analysis.

Q Now, have you had occasion to review a blood alcohol analysis regarding Mr. Bullcoming?

A I have.

Q Okay. And, we've been through the testimony of the police officer as to what he does, and the nurse as to what she does. And, then, she handed it back to the police officer. How does your agency receive these particular kits?

A The particular blood kits can come to the laboratories either in person. The officer can actually bring them and drop them off to us. Or, we can receive them by mail. So—

Q Well, let me ask you this. How do you usually receive them from the Farmington area?

A Through mail.

Q Okay. Go ahead. And, what's the process after you receive it via the mail?

A So, what we do is, we will get the sample in the mail. There is a form that accompanies this blood sample. And, what we do is we make sure that the name on that [136] particular form corresponds with the name that's put on the blood vials.

MS. SUPLER: Your Honor, I'm going to object to what's done in the status quo. I don't object to what was done in this case.

MR. WAINWRIGHT: I'll rephrase the question, Your Honor.

THE COURT: All right.

BY MR. WAINWRIGHT: Sir, let me hand to you what has been marked for identification purposes as State's Exhibit 1. Is that—is that a document that you're familiar with?

A Yes.

Q Is that what we've just been talking about?

A Correct.

Q Okay. Now, the top portion of State's Exhibit 1 is filled out by the officer?

A Correct.

Q And, then, the nurse?

A Correct.

Q And, then, your agency takes it from there. Is that correct?

A Correct.

Q What's the next area that we deal with?

MS. SUPLER: And, I will object, based on my previous [137] argument.

THE COURT: Yes, ma'am. [And you may] continue the objection.

MS. SUPLER: I understand. I appreciate that. Thank you, Your Honor.

Q BY MR. WAINWRIGHT: Go ahead, sir.
A So, the very next section is the certificate of receiving employee. This is where the receiving employee receives the blood, whether it's in person or in mail.

Q. Well, let me ask you this. Is this document, State's Exhibit 1, used in the normal course of business at your agency?
A Yes, it is.
Q And, is this kept in the normal course of business at your agency?
A Yes, it is.
Q And, is this an official—essentially, an official State document?
A It is.
Q Okay. So, the—you tag it in, or you log it in. Is that correct?
A We do.
Q And, what's the next—what do you do next in the process?
A In the logging in process or—
[138] Q Well, what—is there more to it than just logging it in?
A Well, we log it in, we assign it a particular number. It's an identifying number that we use internally. And, then, we set it aside for analysis.
Q Okay. Now, what are you receiving?
A In this particular case—
Q Yes. Let's keep it to this particular case.
A A blood sample.

Q Okay. And, how do you receive the blood sample? What's in the kit that's sent to you?

A Two vials of blood and—

Q Why two vials?

A It's the standard that we have at the laboratories. We like to have two vials of blood. It's been set out by the director of the laboratories as two vials of blood.

Q Okay. And, how long do you keep that?

A Depending on the testing that we do, we have a different set that we will retain samples—blood samples that are done—just alcohol only, that we only do alcohol testing. We retain them for six months, unless otherwise noted by a Court. And, if we do drug testing on a particular sample, we hold them for one year, unless otherwise noted by a Court.

[139] Q Okay. Now, as it relates to the blood alcohol test, is all of the blood in the vials consumed in the analysis?

A No, it is not.

Q So, you retain the actual blood sample so you could retest it, or if someone else wants to test it, they can do it, too?

A Correct.

Q Okay. Does that happen?

A Yes.

Q Okay. Did it happen in this particular case?

A Not that I'm aware of.

Q Okay. So, what is the process? After you receive the two vials of blood, what do you do?

A If we can analyze them that very same day, we do, or else, we put them in a refrigerator until the next day for analysis.

Q Okay. Does that—does your document indicate the date that you received it?

A Yes, it does.

Q. What date did you receive it?

A It was received August the 16th, 2005.

Q Okay. And, when was the—when was the analysis done?

A The actual analysis was done August the 17th, 2005.

[140] Q Okay, now. Why is—so, this—you put it in a refrigerator?

A Uh-huh.

Q And, then, the next day you did the analysis?

A Correct.

Q Now, are we at that process now?

A We are.

Q Okay. Tell the jury what you—what your agency does—what you would—what you did regarding this specific sample.

A Well, we follow—we have a standard operating procedure. So, this happens with every sample.

MS. SUPLER: Objection. Again, to—

THE COURT: Overruled.

MS. SUPLER: —standard operating procedure.

BY MR. WAINWRIGHT: Just tell us what you did with this sample.

A We took this particular blood sample. We opened one of the vials. We took an aliquot, two aliquots [of small amounts]—two samples of the blood, two hundred microliters, so you're looking at point two mils, a very small amount that we use of the blood. We put it in a vial with an internal standard, which is used for the actual testing, as the identifying marks. We cap the sample in this particular vial, and put it on the instruments for [141] analysis.

Q Okay. Now, what—what instru—what type of vials are we putting it in?

A Little glass vials, about twenty mils.

Q Okay. And, how do you cap them?

A We have a Teflon septum, and, then, we crimp them with an aluminum top.

Q Okay. And, what machine do you place them in?

A We use a head space gas chromatograph with an auto sampler.

Q Okay. Now, in layman's terms, would you please tell the jury what that means?

A A gas chromatograph is an instrument—it's about the size of a microwave—and, what we're doing is, we're taking air space right above this particular sample, and shooting it into this microwave-size instrument. Within it, we have two columns. These particular columns have a sticky nature to them. As the compounds are traveling through them, being pushed by air, it'll latch on to a particular—it will allow a particular compound to go according to size. So, the smaller compounds come through first. Then, the bigger ones, and progressively. So, it's a timed type of procedure. And, on the other end of this column, within the gas chromatograph, we have the detectors, which actually detect the compounds, and the computer notifies us which [142] compounds those are.

Q Okay. And, does the machine itself indicate what the results are?

A Yes.

Q So, there's nothing that the human has to do, other than look at the machine and record the results?

A Correct.

Q Okay. And, were the results recorded on this particular document?

A Yes, they were.

Q And, can you tell the jury what the results were of this?

A The results were zero point two one grams of alcohol per one hundred milliliters of blood.

Q Okay. Now, you're aware of the implied consent law in the State of New Mexico. Is that correct?

A Yes, I am.

Q. And, you know what the—the presumptive intoxication level is in the State. Is that correct?

A Correct.

Q And, what is that?

A The per se level in our State is at point zero eight.

Q And, what is this again?

A The per se level.

[143] Q No. What was the results here?

A Oh. Point two one grams.

Q Okay. So, that mathematically would be more than twice the limit?

A Correct.

Q Okay. Now, what do you do after the test is completed, and you've eyeballed the machine and you've recorded the data?

A We record the data, as was brought out. After we record the data, all of our work gets reviewed by an independent person. A third person will review our work to make sure that the quality control nature that we have enacted is correct, that all those results are correct. And, that these particular samples—the results that we get for each sample—is within the limits that we have. Then, after the reviewers agreed with the work that we've produced, we actually fill out this particular form with the results. The reviewer signs the form, and, then, the results get mailed out.

Q Once the—once the material is prepared and placed in the machine, you don't need any particular expertise to record the results, do you?

A No.

Q I mean, any human being could look and write and just record the results?

[144] A Correct.

Q Or, the machine as with the Breathalyzer, can print out the results?

A Correct.

Q Does this particular machine print out the results, or is it an eyeball recorded?

A It prints out the results.

Q Okay. And, then, that is transposed from the printout of the machine to this document?

A Correct.

Q Now, do you have any expertise in the area of alcohol metabolism?

A Yes, I do.

Q And, my question is this.

MS. SUPLER: I'm going to object, Your Honor. I'm going to object—

THE COURT: (Inaudible)?

MS. SUPLER: I'd like to approach the bench on it.

THE COURT: Sure. [Come on up].

(Discussion at the bench.)
(In Open Court.)

BY MR. WAINWRIGHT: Sir, in your—in your area of expertise, is the blood—is the blood—is this machine more accurate than the intoxilyzer, than a breath test?

[145] A When you are dealing with alcohol samples, if you assume that the person is post-absorbtive, or

they're coming down, the difference is only five percent. So, you're looking at a difference in the third digit. So, they're accurate. They're both as equally accurate.

Q Okay. As far as your job is concerned.

A They're accurate.

Q And, can you tell us from the document when this blood was drawn?

A According to this document, the blood was drawn on August the 14th, 2005.

Q And, does it give a time?

A It states time of 1825.

Q Okay.

MR. WAINWRIGHT: Your Honor, I would move for the introduction of State's Exhibit 1.

MS. SUPLER: And, I've already explained it.

THE COURT: I think the objections have been made, and I will allow it. I will allow it.

MR. WAINWRIGHT: Your Honor, may I publish it to the jury?

THE COURT: You certainly may.

MR. WAINWRIGHT: Thank you, Your Honor. And, I pass the witness.

[146] CROSS-EXAMINATION OF GERASIMOS RAZATOS

BY MS. SUPLER:

Q Good afternoon.

MS. SUPLER: Your Honor, should I wait 'till the jurors are done, or do you want me to begin (inaudible) again.

THE COURT: Go ahead.

MS. SUPLER: Okay.

Q BY MS. SUPLER: Now, referring to State Exhibit Number 1, I have a copy in front of me, your signature doesn't appear anywhere on this exhibit. Correct?

A Correct.

Q You aren't Yvonne [Hudzinger] (phonetic), the person who indicates she received the sample from your lab. Correct?

A Correct.

Q And, you aren't the person that analyzed the sample, which would have been who?

A According to the form, it says Curtis Caylor.

Q Okay. And, Curtis Caylor was very recently put on unpaid leave. Correct?

A Correct.

Q And, you don't know the reason why, do you?

A No, ma'am.

Q And, you aren't the reviewer, Ruth—

[147] A Luthy.

Q Luthy.

A Luthy.

Q Luthy. You aren't that person?

A Correct.

Q So, you didn't observe Mr.—tell me the analyst's name again.

A Caylor.

Q Caylor. You didn't observe him conduct the analyst—analysis, did you?

A Correct.

Q Okay. And, you didn't review his analysis as the reviewer signed off on this document?

A Correct.

Q So, what you've told us today about procedures, it's the way you conduct an analysis. Correct?

A No. It's the way the laboratory conducts analysis.

Q Well, sir, it's the way you're taught by the laboratory to conduct an analysis, correct?

A Correct.

Q But, you don't know unless you actually observe the analysis that someone else conducts, whether they followed that protocol in every instance, do you, sir?

A Correct.

Q And, again, you don't know why he's been placed on [148] unpaid leave, do you?

A Correct.

MS. SUPLER: No further questions at this time.

THE COURT: State.

MR. WAINWRIGHT: I have nothing further of this witness at this time, Judge.

THE COURT: Okay. Can the witness step down?

MR. WAINWRIGHT: He can step down, Judge. He's subject to recall.

THE COURT: Subject to recall. Okay. Thank you very much, sir. You're excused. Oh, I'm sorry. Come on back up here. I have a question from a juror. I kind of know how you're going to answer it, so let me ask the question, and, then, let counsel—either counsel object if they so choose.

MS. SUPLER: Would the Court allow us to hear the question up at the bench, and address it that way?

THE COURT: No. How long can it take to reach an alcohol level of point two one?

MS. SUPLER: Your Honor—

THE COURT: Is there any objections to the question?

MS. SUPLER: Yes, Your Honor, based on our conversation at the bench, at this time, I don't think that there's been a foundation established.

THE COURT: Well, let me ask a question [first]. Is [149] there any answer that you can give to that, that would be definitive?

THE WITNESS: No.

THE COURT: Okay. I'm going to leave it at that. Okay. You may step down.

MR. WAINWRIGHT: State rests, Your Honor.

* * * *

[197] [CLOSING ARGUMENT BY MS. SUPLER]

[MS. SUPLER]: And, then, we come to the blood analysis. Now, as you've heard, Mr. Bullcoming is not disputing that he drank vodka, a lot of vodka, after he got out of that car. But, can you even trust the blood analysis that you've received? You didn't hear from the analysis—the analyst who did it, because he's been put on unpaid leave, and we don't know why. You heard from another man who came in here and said, "Here's what the results were." And, he told you about what the protocol is in his lab, but he told you he didn't witness this analysis. So, do we even know that his blood alcohol level was as high as point two one? There's no dispute. We're not denying that he was drunk at the time the blood was drawn. But, he wasn't at the time he got out of that truck. And, that's the only moment that matters at the point he was driving.

But, looking at that report, even the part filled out by Officer Rock was that the arrest time is 1700 hours, which we now know is 5:00pm. Almost forty-five minutes after when this accident occurred. Much more consistent with what Mr. Bullcoming told you as to the time.

And, the witness—the analyst who did testify—who didn't do this report, who didn't do the analysis, talked about how the test can be read by anyone, it prints out a result, he told you. And, then, that's printed onto this form. Well, you'll—you'll be able to see this form that's number one for the State. It doesn't have any printed out point two one. It has a handwritten-in point two one, presumably by the man who's on unpaid leave, and we don't know why he's on unpaid leave. Could it be because he wasn't following protocol in the lab? We won't know that. We don't know the answer.

[Insert Fold-In]

SCIENTIFIC LABORATORY DIVISION
700 Camino de Salud, NE, P.O. Box 4700, Albuquerque, NM 87196-4700
Please type or print full information to avoid delay in report.

REPORT OF BLOOD ALCOHOL ANALYSIS

8-16-05 (Date Received) 0830 (Time Received) 800501450 (Lab. No.)

PART A-INFORMATION IN THIS BLOCK TO BE FILLED IN BY ARRESTING OFFICER

SEND LAB ANALYSIS REPORT TO:
Name: Farmington Police Dept. (Complete name of your agency)
Address: 900 municipal (Street or post office box number)
Farmington (City) NM (State) 87401 (Zip Code)

SEND COPY TO:
Donor's identification:
Name: Bullcoming (Last) Donald (First) L (Middle)
Address: 2011 Troy King # 207 (Street or post office box number)
Farmington (City) NM (State) 87401 (Zip Code)
Sex: M Weight: 210 Date of Birth: 5'11
SSN: 441605813 Place of arrest: 30th / Farmington
Dr. Lic.# 080582709 County: OK

ARRESTING OFFICER IDENTIFICATION:
Name: David Rock Date 8-14-05
Department: FPD Arrest Time: 1700 ☐AM ☒PM
Blood drawn by: LACOATES, RN Date blood drawn: 8.14.05
Place drawn: SJRMC Time blood sample drawn: 1825 ☐AM ☒PM
Blood draw witnessed by: [signature] (Signature)
REMARKS: check for blood Alcohol concentration
[signature] (Signature of arresting officer)

REASON SUSPECT STOPPED:
☐ Erratic Driving
☒ Accident ☐ Fatal ☐ Great Bodily Injury ☐ Other:
☐ Other:

Investigated or Witnessed by: Rock R643 (Signature)

INFORMATION BELOW IS TO BE FILLED IN BY DRAWER OF ANY BLOOD SAMPLE

I certify that on the date, time and place indicated above, I drew blood samples from the above named donor and that I marked and sealed the samples with the donor's name. The blood was collected using the entire contents of an SLD-approved blood collection kit in accordance with the instructions.

LACOATES, RN (Signature of blood drawer) Date 8.14.05 Title RN Employer Name SJRMC ER.

PART B- LABORATORY USE ONLY

CERTIFICATE OF RECEIVING EMPLOYEE

Specimen Blood ☑ ☐ Other ____ Received from ____
Received from: Via Mail ☑ In Person ☐ Other ☐ Other Remarks: ____
Seal Intact: Yes ☑ No ☐ If No, explain ____
I certify that on the date shown in the "date received" blank above, I received the sample which accompanied this report and followed the procedures set out on the reverse of this report, and the statements in this block are correct.
Yvonne Hautzinger (Signature of receiving employee)

CERTIFICATE OF ANALYST

The seal of this sample was received intact and broken in the laboratory: Yes ☑ No ☐ If No, explain ____
Remarks: ____
Blood sample: 0.21 Result of Analysis gms/100ml alcohol concentration in sample
I certify that I followed the procedures set out on the reverse of this report, and the statements in this block are correct. The concentration of alcohol in the sample is based on the grams of alcohol in one hundred milliliters of blood.
Date of analysis: 8/17/05
Analyzed by: [signature] (Signature of analyst)

PERKINS-ELMER, N. J. STATE'S EXHIBIT 1 State v. Bullcoming CR-2005-939-6

CERTIFICATE OF REVIEWER

I certify that the analyst who conducted the analysis in this case meets the qualifications required by the director of this laboratory to properly conduct such analyses; the supervisor of analysts is also qualified to conduct such analyses; and that the established procedure has been followed in the handling and analysis of the sample in this case.
Date 8/18/05 Reviewer: [signature]

CERTIFICATE OF MAILING

I certify that on this date I mailed a legible copy of this report to the donor, in accordance with the mailing procedure set out on the reverse of this report.
Date: 8-22-05 Laboratory Employee: Yvonne Hautzinger

SLD 705 (Rules of Procedure for the Mun[redacted], Rule 6-607; and Rules of Criminal Procedure for
Form # SLD 705 as amended, effective July 1,1999 (rev. 11/04)

Appendix D 31A

PROCEDURE

1. The laboratory named on the front of this report is a laboratory authorized or certified by the Scientific Laboratory Division of the Health Department to perform blood and alcohol tests. The agency has established formal procedures for receipt, handling and testing of blood samples to assure integrity of the sample, a formal procedure for conduct and report of the chemical analysis of the samples by the gas chromatographic method (_____) *(specify, if other method used)* and quality control procedures to validate the analyses. The quality control procedures include semi-annual proficiency testing by an independent agency. The procedures have the general acceptance and approval of the scientific community, including the medical profession, and of the courts, as a means of assuring a chemical analysis of a blood sample that accurately discloses the concentration of alcohol in the blood. The same procedures are applicable for samples other than blood if submitted for alcohol analysis. The analyst who conducts the analysis in this must meet the qualification required by the director of this laboratory to properly conduct such analyses. The supervisor of analysts must also be qualified to conduct such analyses.

2. When a blood sample is received at the laboratory, the receiving employee examines the sample container and:

   (a) determines that it is a standard container of a kit approved by the director of the laboratory;

   (b) determines that the container is accompanied by this report, with Part A completed;

(c) determines that the donor's name and the date that the sample was taken have already been entered on this report and on the container and that they correspond;

(d) makes a log entry of the receipt of the sample and of any irregularity in the condition of the container or its seals;

(e) places a laboratory number and the date of receipt on the log, on the container, and on this report, so that each has the same laboratory number and date of receipt;

(f) completes and signs the Certificate of Receiving Employee, making specific notations as to any unusual circumstances, discrepancies, or irregularities in the condition or handling of the sample up to the time that the container and report are delivered to the analysis laboratory;

(g) personally places the container with this report attached in a designated secure cabinet for the analyst or delivers it to the analyst.

3. When the blood sample is received by the analyst, the analyst:

(a) makes sure the laboratory number on the container corresponds with the laboratory number on this report;

(b) makes sure the analysis is conducted on the sample which accompanied this report at the time the report was received by the analyst;

(c) conducts a chemical analysis of the sample and enters the results on this report;

(d) retains the sample container and the raw data from the analysis;

(e) completes and signs the Certificate of Analyst, noting any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis;

(f) delivers this report to the reviewer.

4. The reviewer checks the calculations of the analysis, examines this report, signs the Certificate of Reviewer, and delivers the report to a laboratory employee for distribution.

5. An employee of the agency mails a copy of this report to the donor at the address shown on this report, by depositing it in an outgoing mail container which is maintained in the usual and ordinary course of business of the laboratory. The employee signs the certificate of mailing to the donor, and mails the original of this report to the submitting law enforcement agency.

6. The biological sample will be retained by the testing laboratory for a period of at least six (6) months pursuant to regulations of the scientific laboratory division.