IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-133

Filed: 19 November 2019

Buncombe County, Nos. 14CRS80463-64

STATE OF NORTH CAROLINA

v.

JOSEPH MARIO ROMANO, Defendant.

Appeal by defendant from judgment entered 4 June 2018 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 4 September 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.*

*Meghan Adelle Jones for defendant-appellant.*

BERGER, Judge.

On April 19, 2016, this Court affirmed the trial court's pre-trial order granting Joseph Mario Romano's ("Defendant's") motion to suppress a State Bureau of Investigation ("SBI") test result. *State v. Romano*, 247 N.C. App. 212, 785 S.E.2d 168 (2016) ("*Romano I*"). Both parties subsequently sought review of *Romano I* to our Supreme Court, which "modified and affirmed," and remanded to our Court for "further remand to the trial court for additional proceedings." *State v. Romano*, 369 N.C. 678, 695, 800 S.E.2d 644, 655 (2017) ("*Romano II*").

This case is now before us for a second time to determine whether the trial court, upon remand from the State's interlocutory appeal, should have granted Defendant's motion to dismiss because the evidence the State deemed "essential to the case," the SBI test result, was ordered suppressed. Defendant also argues, in the alternative, that his supplemental motion to suppress medical records should have been granted because the original motion to suppress encompassed all records related to the blood draw on the day in question. We find no error.

Factual and Procedural Background

The factual history of this case has been discussed in *Romano I* and *Romano II*. We adopt and include the pertinent factual history from *Romano II*, discuss the procedural history of *Romano I* and *II*, and include additional procedural history as needed to understand the legal issues herein.

> The record shows that defendant stopped his vehicle at a congested intersection in the middle of the day, left the vehicle while wearing his sweater backwards, and proceeded to stumble across four lanes of traffic. Defendant had a bottle of rum in his possession, and had vomited on himself and in his vehicle before exiting the SUV. When police arrived, defendant was incoherent with slurred speech; his eyes were bloodshot; he smelled strongly of alcohol; and he could not stand or sit without assistance.
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> . . . .
>
> Defendant was arrested for driving while impaired (DWI), and, due to his extreme level of intoxication, defendant was transported to a hospital for medical treatment. Officer

> Bryson requested the assistance of Sergeant Ann Fowler, a Drug Recognition Expert.
>
> Defendant was belligerent and combative throughout his encounters with law enforcement and medical personnel. At the hospital, medical staff and law enforcement attempted to restrain defendant. Medical personnel determined it was necessary to medicate defendant to calm him down. Sergeant Fowler told the treating nurse "that she would likely need a blood draw for law enforcement purposes." Before defendant was medicated, Sergeant Fowler did not "advise[ ] [him] of his chemical analysis rights," "request[ ] that he submit[ ] to a blood draw," or obtain a warrant for a blood search. After defendant was medically subdued, the treating nurse drew blood for medical treatment purposes; however, the nurse drew more blood than was needed for treatment purposes and offered the additional blood for law enforcement use. Before accepting the blood sample, Sergeant Fowler attempted to get defendant's consent to the blood draw or receipt of the evidence, but she was unable to wake him. . . .
>
> Sergeant Fowler did not attempt to obtain a warrant for defendant's blood nor did she believe any exigency existed. Instead, she "expressly relied upon the statutory authorization set forth in [N.C.G.S. § ] 20-16.2(b)," which allows the taking and testing of blood from a person who has committed a DWI if the person is "unconscious or otherwise in a condition that makes the person incapable of refusal." After taking possession of defendant's blood, Sergeant Fowler "drove to the Buncombe County Magistrate's Office and swore out warrants for the present charges," and then returned to the hospital and served the warrants on defendant.

*Romano II*, 369 N.C. at 681, 693, 800 S.E.2d at 646-47, 654.

On January 26, 2015, Defendant filed a pre-trial motion to suppress "any analysis or the report thereof" resulting from the warrantless blood draw. On

February 3, 2015, the State filed a motion for Defendant's medical records related to treatment received on February 17, 2014, which the trial court granted. After a hearing on Defendant's motion to suppress, the trial court filed an order suppressing "[t]he blood seized by [Sergeant] Fowler and any subsequent test results performed on the same by the SBI Crime Laboratory."

The State appealed the order and certified to this Court that the suppressed evidence was essential to the prosecution of the case. On April 19, 2016, our Court affirmed the trial court's order suppressing the evidence. *Romano I*, 247 N.C. App. at 212, 785 S.E.2d at 168. Both parties then petitioned our Supreme Court for discretionary review and our Supreme Court in *Romano II* ultimately "modified and affirmed" the decision of this Court, and remanded to our Court for "further remand to the trial court for additional proceedings." *Romano II*, 369 N.C. at 695, 800 S.E.2d at 655. Our Supreme Court held "that N.C.G.S. § 20-16.2(b) is unconstitutional under the Fourth Amendment as applied to defendant in this case," and as a result, the trial court correctly suppressed the SBI test result. *Id.* at 695, 800 S.E.2d at 655.

Prior to the decision in *Romano II*, on April 25, 2016, the State filed a second motion for medical records stating that the hospital's first production of medical records pursuant to the February 2015 order was for a date unrelated to the charged offense. Eventually, the proper medical records were produced. The State then

proceeded to try the case for habitual impaired driving and driving while license revoked after impaired driving without reliance on the suppressed SBI blood test.

Defendant filed a pre-trial motion to dismiss the charges on January 29, 2018. Defendant also filed a supplemental motion to suppress medical records and 911 calls (the "supplemental motion to suppress")[1] on February 6, 2018. At trial, the court denied Defendant's motion to dismiss, stating that "[o]bviously the ruling by the Supreme Court is binding on the [S]tate as to the evidence that was dealt with by the Court, but that does not prevent the [S]tate from proceeding to trial absent that evidence." The court also denied the supplemental motion to suppress.

Defendant's medical records, which included the results of a blood alcohol test performed by the hospital, were admitted into evidence at trial. The State tendered Paul Glover ("Glover") as an expert in blood alcohol testing. Glover testified about the instrumentation and methodology used by the treating hospital in testing Defendant's blood sample. After explaining how the hospital determined Defendant's alcohol concentration in milligrams per deciliter, Glover explained the method and formula used in converting it to grams per 100 milliliters of whole blood. Based on this formula, Glover testified Defendant had a blood alcohol level of .33 grams per 100 milliliters of whole blood.

[1] On appeal, Defendant only challenges the trial court's denial of his supplemental motion to suppress medical records. He does not challenge the trial court's decision relating to the 911 calls.

Defendant was found guilty of habitual impaired driving and driving while license revoked following impaired driving revocation. The trial court sentenced Defendant to fifteen to twenty-seven months imprisonment, and he was ordered to pay a $2,500.00 fine. Defendant appeals.

## Analysis

### I. Motion to Dismiss

Defendant first argues the trial court erred when it denied his motion to dismiss because this Court and our Supreme Court determined that the trial court properly suppressed the SBI test result conducted by law enforcement. Specifically, Defendant contends the State should not have been able to try the case against Defendant upon remand because the SBI test result, which the State deemed essential to convict Defendant, had been ordered suppressed. We disagree.

A motion to suppress is a type of motion *in limine*. *State v. McNeill*, 170 N.C. App. 574, 579, 613 S.E.2d 43, 46 (2005). A "decision on a motion *in limine* is not final" because "a ruling on a motion *in limine* is a preliminary or interlocutory decision which the trial court can change if circumstances develop which make it necessary." *Id.* at 581, 579, 613 S.E.2d at 46 (*purgandum*).

"A trial court's decision to grant a pretrial motion to *suppress* evidence 'does not mandate a pretrial dismissal of the underlying indictments' because '[t]he district attorney may elect to dismiss or proceed to trial without the suppressed evidence and

attempt to establish a *prima facie* case.' " *State v. Fowler*, 197 N.C. App. 1, 28-29, 676 S.E.2d 523, 545 (2009) (quoting *State v. Edwards*, 185 N.C. App. 701, 706, 649 S.E.2d 646, 650 (2007)). In addition, prior to trial, the State may also elect to appeal to this Court an order by the superior court granting a motion to suppress. N.C. Gen. Stat. § 15A-979(c) (2017). "The burden is on the State to show that it has the right to appeal and has appealed in accordance with the requirements of the statute." *State v. Judd*, 128 N.C. App. 328, 329, 494 S.E.2d 605, 606 (1998). Therefore, after a superior court grants a defendant's motion to suppress, the State may elect to dismiss the case, proceed to trial without the suppressed evidence, or appeal the order suppressing the evidence prior to trial.

Here, the State elected to appeal the trial court's order suppressing the SBI result. Ultimately, both this Court and our Supreme Court agreed that the SBI result had been properly suppressed. These were *interlocutory decisions*, not final decisions, and did not preclude the State from proceeding to trial without the suppressed evidence upon remand. However, Defendant contends the State should not have appealed the order granting the motion to suppress unless the State did not think it could convict Defendant without the suppressed evidence because it certified that the suppressed evidence was "essential to the case" in its appeal. We disagree.

"[T]he State cannot appeal proceedings from a judgment in favor of the defendant in a criminal case in the absence of a statute clearly conferring that right,"

and statutes authorizing an appeal by the State in criminal cases "must be strictly construed." *State v. Dobson*, 51 N.C. App. 445, 446-47, 276 S.E.2d 480, 481-82 (1981). The statutory authority which permits the State to appeal from superior court to this Court is contained in Section 15A-1445 of the North Carolina General Statutes, which states in pertinent part:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:
>
> > (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
> > (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.
>
> (b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979.

N.C. Gen. Stat. § 15A-1445(a)(1)-(2), (b) (2017). Section 15-979 provides:

> (c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. The appeal is to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If there are multiple charges affected by a motion to suppress, the ruling is appealable to the court with jurisdiction over the offense carrying the highest punishment.

N.C. Gen. Stat. § 15A-979(c) (2017). Thus, Section 15A-979(c) sets out the jurisdictional requirements for this Court to hear the State's interlocutory appeal.

Failure to comply with jurisdictional rules requires dismissal of the appeal. *State v. Webber*, 190 N.C. App. 649, 652, 660 S.E.2d 621, 622 (2008) ("Unless jurisdictional prerequisites are met, an appeal must be dismissed.").

> [I]n looking at the purpose of N.C.G.S. § 15A-979(c), it is clear that this statute is intended to be a procedural safeguard for defendants against the State, rather than an insurmountable burden for the State. Our Courts have held that the certification requirement under N.C.G.S. § 15A-979(c) is paramount in that by failing to file a certificate pursuant to N.C.G.S. § 15A-979(c), the State may not pursue its appeal.

*State v. Williams*, 234 N.C. App. 445, 448, 759 S.E.2d 350, 352 (2014). Therefore, the certification requirements under Section 15A-979(c) are procedural safeguards to determine whether or not the State may pursue its *appeal*, not whether or not it may pursue its *underlying indictments*.

Here, the State complied with Section 15A-979(c)'s certification requirements by certifying that its appeal was not taken for the purpose of delay and that the evidence was essential to the case. Because the State complied with Section 15A-979(c)'s certification requirements, this Court had jurisdiction to hear the appeal and render a decision.

This Court's decision in *Romano I* affirmed the trial court's order. On discretionary review to our Supreme Court, it "modified and affirmed" the *Romano I*

decision, and remanded to this Court for "further remand to the trial court for additional proceedings." Even though this Court and our Supreme Court agreed the trial court properly suppressed the evidence, that did not impede the State from proceeding to trial without the suppressed evidence since our appellate courts' decisions on the motion to suppress were made prior to trial.

Thus, after our appellate courts, on interlocutory appeal, affirm a superior court order granting a motion to suppress, nothing in our statutes suggests that the State may not elect to proceed to trial without the suppressed evidence. If the General Assembly had intended such a procedure, it would have so provided. The practical result of Defendant's argument would require dismissal of every criminal case in which a defendant's pre-trial motion to suppress was granted and then upheld on appeal. Such a result is neither found in statute nor is it grounded in the realities of trial work. Trials are fluid and ever changing based on rulings by judges, availability of witnesses and evidence, and the skillfulness of the attorneys. A piece of evidence that was essential to trial strategy at one moment may not be significant at the next based on any number of factors. To bind a party to a theory before a trial ever begins runs counter to the practical realities of trial work. Instead, our statutes and case law dictate that once our appellate courts decide, on interlocutory appeal, whether a trial court properly ruled on a motion to suppress prior to trial, the State,

on remand, may elect to dismiss the case or, as here, proceed to trial without the suppressed evidence.

Because the State was not prohibited from proceeding to trial without the suppressed evidence, we now address whether the trial court erred when it denied Defendant's motion to dismiss. At trial, Defendant moved to dismiss the charges on the ground that the State was estopped from adjudicating its case against Defendant because the trial court suppressed the SBI test result, the evidence the State had previously deemed essential to its case. Defendant made no alternative argument. On appeal, Defendant renewed this same argument and makes no other argument regarding the motion to dismiss. *See State v. Walker*, ___ N.C. App. ___, ___, 798 S.E.2d 529, 532 (emphasizing this Court only reviews arguments raised before the trial court, especially if the argument made below is narrow in scope), *review denied*, 369 N.C. 755, 799 S.E.2d 619 (2017). As explained above, we hold the trial court's order suppressing the SBI test result did not prohibit or otherwise impede the State from proceeding to trial. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.

II. Motion to Suppress

Defendant also contends, in the alternative, the trial court erred when it denied his supplemental motion to suppress and admitted Defendant's medical records, which contained the results of a blood alcohol test performed by the hospital.

He specifically contends the trial court's order granting his first motion to suppress included the suppression of *all records* related to the blood draw from the day in question. We disagree.

Generally, our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). However, in this case, the trial court did not make written findings of fact and conclusions of law. While neither party challenges the trial court's lack of written findings and conclusions of law when it ruled on Defendant's supplemental motion to suppress, we need to address it in order to apply the appropriate standard of review.

When a trial court is deciding a motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2017). A trial court is not required to enter a written order denying a motion to suppress "[i]f the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence." *State v. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015). "If these two criteria are met, the necessary

findings of fact are implied from the denial of the motion to suppress." *Id.* at 83, 770 S.E.2d at 104 (citations and quotation marks omitted). "If there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows." *Id.* at 83, 770 S.E.2d at 104 (citations and quotation marks omitted). "[A] material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected." *State v. Baker*, 208 N.C. App. 376, 384, 702 S.E.2d 825, 831 (2010). "[A] material conflict in the evidence does not arise when the record on appeal demonstrates that defense counsel cross-examined the State's witnesses at the suppression hearing." *Id.* at 383, 702 S.E.2d at 830.

In the present case, defense counsel requested the hearing on his supplemental motion to suppress be heard during a *voir dire* of Glover to determine whether he was an expert in blood alcohol testing. Prior to the *voir dire* hearing, Defendant challenged the relevancy and prejudicial impact the medical records would have as a whole and challenged the State's ability to lay a proper foundation for Glover to opine on the results of the blood alcohol test performed by the hospital. In response, the State argued the medical records would be introduced under the business record exception to the hearsay rule. The State further argued a proper foundation would be laid for both the medical records and the results of the blood alcohol test performed

by the hospital. In order to lay a foundation, the manager of the hospital's medical records department testified regarding the management of hospital records. Additionally, a medical technologist testified regarding the hospital's methods and procedures for conducting laboratory tests. After the *voir dire* hearing concluded, the trial court admitted Glover as an expert. The trial court then made an oral ruling from the bench and denied Defendant's supplemental motion to suppress and provided the following rationale:

> At this time I'm also going to rule as to the medical records. I'm going to rule that the medical records are admissible as well as the blood test results contained therein, that they are, indeed, an exception under *Crawford*. That they are not testimonial because they were not – the blood wasn't taken for the purposes of testimony in court or for the treatment of the Defendant on this date, and there has been no indication for lack of trustworthiness in those medical records, the testing of the blood. So I will allow the medical records to be admitted. I will deal with any issues with regard to any portion of those that may be more prejudicial than probative should that become a question and the jury wants to see the whole disk.

Although minimal, this rational does provide sufficient findings and conclusions to review on appeal. Also, there were no material conflicts in the evidence as Defendant did not challenge the legitimacy of the medical records. After cross-examining Glover during *voir dire*, defense counsel stated that there was nothing wrong with the actual medical records but continued to contend that a proper foundation had not been laid. The trial court then concluded the medical records were not testimonial or lacking in trustworthiness. It also reserved any issues

regarding whether any portion of the medical records were more prejudicial than probative.

Because the trial court provided its rationale from the bench and there were no material conflicts in the evidence presented at the hearing on Defendant's supplemental motion to suppress, the trial court was not required to enter a written order. Therefore, we now review the trial court's conclusions of law.

Defendant contends the holding in *Romano II* stands for the position that the trial court's order granting Defendant's first motion to suppress included the suppression of all records related to the blood draw because *Romano II* contained the following two statements: (1) "the trial court correctly suppressed the blood evidence and any subsequent testing of the blood that was obtained without a warrant," *Romano II*, 369 N.C. at 692, 800 S.E.2d at 653, and (2) "we affirm as modified herein the Court of Appeals' opinion affirming the trial court's order suppressing any testing of defendant's blood." *Id.* at 695, 800 S.E.2d at 655. Defendant's argument is misplaced.

The order referred to in *Romano II* states the following: "The blood seized by [Sergeant] Fowler and any subsequent test results performed on the same by the SBI Crime Laboratory is hereby suppressed." Therefore, the testing our Supreme Court referred to concerned any *law enforcement testing* conducted on the blood Sergeant Fowler seized. We further note the question of whether Defendant's medical records,

including blood testing results by medical personnel, should have been suppressed was not before this Court or our Supreme Court.[2] The only issue addressed in *Romano I* and *II* was whether the blood seized by Sergeant Fowler and subsequent *law enforcement testing* on the blood seized was properly suppressed.

The trial court correctly concluded the admittance of Defendant's medical records did not violate Defendant's rights under *Crawford v. Washington*, 541 U.S. 36 (2004).

"The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, . . . provides that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' " *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009) (quoting *Crawford v. Washington*, 541 U.S. at 51). "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.*

Medical reports created for treatment-related purposes are not testimonial statements for Confrontation Clause purposes. *Id.* at 312 n.2 (stating "medical

[2] We note the trial court granted the State's first motion seeking Defendant's medical records on February 9, 2015. On March 31, 2015, the State filed its notice of appeal from the order suppressing the SBI test result. Then, on April 25, 2016, prior to the filing of *Romano II*, the State filed a second motion for medical records stating that the hospital's first production of medical records pursuant to the February order was for a date unrelated to the charged offense. It is unclear when the proper medical records were actually produced. Nonetheless, it is clear the State did not have the medical records it sought before it filed its notice of appeal from the order suppressing the SBI test result to this Court or before it petitioned for discretionary review to our Supreme Court.

reports created for treatment purposes" are not testimonial in nature).[3] Furthermore, medical records may qualify as business records, *State v. Miller*, 80 N.C. App. 425, 428, 342 S.E.2d 553, 555 (1986), and therefore, may be admissible as an exception to hearsay under the business records exception if properly authenticated. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2017).

> Business records stored electronically are admissible if (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

*State v. Crawley*, 217 N.C. App. 509, 516, 719 S.E.2d 632, 637 (2011) (citation and quotation marks omitted). "There is no requirement that the records be authenticated by the person who made them." *Id.* at 516, 719 S.E.2d at 637-38.

At trial, the State called the nurse who withdrew Defendant's blood on the day in question and a custodian of the hospital's medical records as witnesses. Their testimony showed that the nurse on duty withdrew the blood sample under routine procedure; a doctor of the hospital ordered that a serum alcohol test be conducted of the blood sample; the hospital's serum alcohol test was performed about an hour after

[3] Although unpublished, the following two cases similarly held the admittance of the defendants' medical records did not violate their rights under *Crawford v. Washington* or *Melendez-Diaz v. Massachusetts*: *State v. Wood*, 225 N.C. App. 268, 736 S.E.2d 649 (2013) and *State v. Howard*, 237 N.C. App. 617, 767 S.E.2d 704 (2014).

the blood draw; and the results of the serum alcohol test were recorded in milligrams per deciliter and uploaded to Defendant's medical file. Thus, the blood test was conducted by the hospital and the records documenting the results of the blood test were for medical treatment purposes and made and kept in the ordinary course of business. The trial court did not err in holding that Defendant's confrontation rights were not violated by the admission of his medical records.

Even if the results of a blood alcohol test performed by the hospital were considered testimonial, Defendant's rights were not violated under *Crawford* or *Melendez-Diaz*. When "the State seeks to introduce forensic analyses, '[a]bsent a showing that the analysts [are] unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them' such evidence is inadmissible under *Crawford*." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 305 (2009) (quoting *Melendez-Diaz*, 557 U.S. at 311). However,

> when an expert gives an opinion, it is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence. Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant

> has the opportunity to cross-examine the expert. We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely surrogate testimony parroting otherwise inadmissible statements.

*State v. Ortiz-Zape*, 367 N.C. 1, 8-9, 743 S.E.2d 156, 161-62 (2013) (*purgandum*).

In the present case, the analyst who performed the hospital's blood alcohol test was not available to testify about the results of her chemical analysis. However, the State called Glover, an expert in blood alcohol testing, to testify about his opinion regarding Defendant's blood alcohol level. On *voir dire*, Glover testified he was familiar with the two methods of testing blood for alcohol and he was familiar with the hospital's policies and procedures for testing blood samples. After testifying about how the hospital determined Defendant's alcohol concentration in milligrams per deciliter, Glover explained the method and formula used in converting it to grams per 100 milliliters of whole blood. Based on the formula, Glover testified Defendant had a blood alcohol level of .33 grams per 100 milliliters of whole blood.

Glover testified that in order to form his opinion, he needed the time of the incident, the time of the blood collection, and the hospital's reported blood concentration. He explained, in order to answer these questions and reach his opinion, he reviewed Defendant's medical records and the District Attorney's documentation surrounding the investigation, including photographs and statements. He also testified he relied on his background and experience and medical literature on blood testing for alcohol. Thus, these sources allowed Glover to form an

independent opinion obtained through his own analysis. Moreover, defense counsel was able to cross-examine Glover and did cross-examine him. Because Glover's testimony was based on his own expert opinion, Defendant's right to confront the witnesses against him was not violated. *See State v. Pless*, ___ N.C. App. ___, ___, 822 S.E.2d 725, 732-33 (2018) (determining the defendant's confrontation rights were not violated when a chemist, who did not perform the chemical analysis of the seized substance, testified at trial because she provided an independent basis for her opinion).

Accordingly, the trial court did not err when it denied Defendant's supplemental motion to suppress.

Defendant further contends the admittance of the medical records was prejudicial because, without the results of the blood test performed by the hospital, there is a reasonable possibility that the jury would not have convicted Defendant. *See* N.C. Gen. Stat. § 15A-1443(a) (2017). He specifically contends that, without the result of the blood test performed by the hospital, there was insufficient evidence that he operated the vehicle while under the influence of an impairing substance. This argument is without merit.

"A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date

of this offense." N.C. Gen. Stat. § 20-138.5(a) (2017). The essential elements of driving while impaired under Section 20-138.1 are: "(1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002) (citation omitted). A defendant 'drives' a vehicle when "he is in actual physical control of a vehicle which is in motion or which has the engine running." *State v. Fields*, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985). Actual physical control of a vehicle can be evidenced by showing that "the defendant sat behind the wheel of the car in the driver's seat and started the engine." *Id.* at 406, 335 S.E.2d at 70. Thus, "once the car engine is running, the person behind the steering wheel is considered to be driving or operating the car." *Brunson v. Tatum*, 196 N.C. App. 480, 486, 675 S.E.2d 97, 101 (2009).

Here, the trial court instructed the jury it could find Defendant guilty of impaired driving as follows:

> First, that the Defendant was driving a vehicle. Second, that the Defendant was driving that vehicle upon a highway or street within this state. Third, that at the time the Defendant was driving that vehicle, the Defendant: A, was under the influence of an impairing substance. Alcohol is an impairing substance. Defendant is under the influence of an impairing substance when the Defendant has consumed a sufficient quantity of that impairing substance to cause the Defendant to lose the normal control of the Defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties. *And/or* B, had consumed

> sufficient alcohol that at any relevant time after the driving the Defendant had an alcohol concentration of 0.08 or more grams of alcohol per 100 milliliters of blood. The relevant time is any time after the driving that the driver still has in the driver's body alcohol consumed before or during driving.

(Emphasis added).

In order to prove its case, the State introduced a witness who testified that he called 911 to report that another driver wearing a gray sweater almost hit him while at an intersection. The same witness further testified that the same driver then stopped in the middle of the road, got out of the car with a bottle of alcohol in hand, and stumbled off. A sergeant with the Asheville Police Department testified when he arrived on scene that, although the vehicle was off and a key was not in the ignition, vomit was all over the steering wheel and that the hood of the vehicle was warm to the touch. Another sergeant testified that Defendant was wearing clothing that matched the description provided by the caller. After hearing this evidence, coupled with the fact that Defendant had been incoherent with slurred speech, had bloodshot eyes, smelled strongly of alcohol, and had been unable to stand or sit without assistance, there is not a reasonable possibility that the jury would not have convicted Defendant of driving while impaired.

The holding in *Romano II* did not preclude the introduction of Defendant's medical records into evidence. The trial court did not err when it admitted the medical records, including the results of the blood alcohol test performed by the

hospital, and admittance of the medical records did not prejudice Defendant's case. Therefore, the trial court did not err when it denied Defendant's supplemental motion to suppress medical records.

## Conclusion

The trial court did not err when it denied Defendant's motion to dismiss the charges and Defendant's supplemental motion to suppress his medical records.

NO ERROR.

Judges INMAN and MURPHY concur.