IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
JOHN CHARLES HEDGPETH,
Defendant-Appellant.

Coos County Circuit Court
14CR1014; A158196

En Banc

Richard L. Barron, Judge.

Argued and submitted September 6, 2016; resubmitted en banc November 20, 2017.

Emily P. Seltzer, Deputy Public Defender, argued the cause for appellant. With her on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Joanna L. Jenkins, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Egan, Chief Judge, and Armstrong, Ortega, Hadlock, DeVore, Lagesen, Tookey, Garrett, DeHoog, Shorr, James, and Powers, Judges, and Sercombe, Senior Judge.

SHORR, J.

Reversed.

Powers, J., dissenting.

SHORR, J.

Defendant appeals a judgment convicting him of driving under the influence of intoxicants (DUII). ORS 813.010.[1] In his second assignment of error, defendant argues that the trial court erred when it denied his motion for judgment of acquittal. Specifically, defendant argues that, based on the evidence presented at trial, no factfinder could have found beyond a reasonable doubt that defendant's blood alcohol content (BAC) was .08 percent or higher when he was riding or "driving" his motorcycle. On appeal, we conclude that, even though the fact that alcohol in the blood dissipates over time is common knowledge, that knowledge combined with the minimal evidence presented at trial in this case is not sufficient for a reasonable factfinder to find beyond a reasonable doubt that defendant's BAC was above .08 percent at the time he was driving. Accordingly, we reverse.[2]

The relevant facts are few and undisputed. Oregon State Police Trooper Dunlap stopped defendant for riding his motorcycle without a helmet. Following that stop, Dunlap took defendant into custody for DUII and brought defendant to the North Bend Police Department for a blood alcohol test using an Intoxilyzer. That test began approximately one hour and 45 minutes after defendant was initially stopped. The test indicated that defendant's BAC was .09 percent. Between the time that defendant was stopped and the time that his BAC was tested, Dunlap did not observe defendant consume any alcohol.

Defendant was charged by information with DUII. A short bench trial was held in which the state relied solely on a *per se* theory of intoxication—*i.e.*, that defendant was legally intoxicated under the relevant statute because he

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[1] ORS 813.010 has been amended since the acts that gave rise to the DUII charge in this case; however, because that amendment does not affect our analysis, we refer to the current version of that statute in this opinion.

[2] In his first assignment of error, defendant contends that the trial court erred when it excluded evidence that an individual's conversion ratio from the amount of alcohol in breath to the amount of alcohol in blood can be lower than the ratio used to calculate his BAC in this case. Because our disposition of defendant's second assignment of error makes any ruling on his first assignment unnecessary, we do not address that assignment.

had a .08 percent or higher BAC when he was riding his motorcycle. ORS 813.010(1)(a).[3]

In defendant's closing argument, he argued that the trial court could not convict him because the state's evidence was legally insufficient to prove that he was intoxicated in violation of ORS 813.010(1)(a) at the time that he was riding. Specifically, defendant noted that the only proof offered by the state was that defendant's BAC was .09 percent when measured one hour and 45 minutes after he had been driving and that defendant had not consumed any alcohol during that time. Defendant argued that there was no basis for a factfinder to determine, without further evidence, whether defendant had a .08 percent or higher BAC at the time that he was driving. The trial court, acting as a factfinder, rejected defendant's argument and convicted defendant, noting:

> "Well, in this case, I will find [defendant] guilty because the only evidence before me is what he blew, and I don't have evidence at all that suggests one way or the other what you do with * * * that to equate it with time of driving. But that's the evidence I have.
>
> "So, I'll find him guilty of that."

Defendant appealed.

As noted, on appeal defendant argues that the trial court erred in denying his motion for judgment of acquittal because no factfinder could infer beyond a reasonable doubt that defendant had a BAC of .08 percent or higher when he was riding his motorcycle.[4] Specifically, defendant contends

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[3] ORS 813.010(1)(b) and (c) provide that a person commits a DUII offense if the person drives a vehicle while "under the influence of intoxicating liquor, cannabis, a controlled substance or an inhalant" or any combination of those. This appeal has no bearing on those statutory provisions.

[4] Defendant never made a formal motion for judgment of acquittal but, rather, argued to the trial court in his closing statement that the state's evidence was legally insufficient to sustain a conviction. However, as we have previously noted, in a bench trial, "as long as a defendant clearly raises the issue" of the legal sufficiency of the evidence at trial in closing argument, we will treat that argument as a preserved motion for judgment of acquittal. *State v. Forrester*, 203 Or App 151, 155, 125 P3d 47 (2005), *rev den*, 341 Or 141 (2006). We understand defendant's argument to the court to be based on the legal insufficiency of the evidence.

that it is speculative to find that his BAC was above the legal limit at the time he was driving based on the results of a blood alcohol test that he took one hour and 45 minutes later. In response, the state contends that, under prior case law, the trial court was entitled to infer based on the record before it that defendant's BAC when he was riding was at least as high as the BAC measured by defendant's later blood alcohol test. We agree with defendant and reverse.

"The sufficiency of the evidence is a question of law." *State v. Reynolds*, 250 Or App 516, 520, 280 P3d 1046, *rev den*, 352 Or 666 (2012). We review "questions of the sufficiency of the evidence in a criminal case following a conviction by examining the evidence in the light most favorable to the state to determine whether a rational trier of fact, accepting reasonable inferences and reasonable credibility choices, could have found the essential element of the crime beyond a reasonable doubt." *State v. Cunningham*, 320 Or 47, 63, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995). However, "[i]f the state has sought to establish an element of a criminal offense by reasonable inference, * * * whether sufficient evidence supports the inference is a question for a court to decide." *State v. Guckert*, 260 Or App 50, 55, 316 P3d 373 (2013), *rev den*, 354 Or 840 (2014).

Here, the state attempted to establish an element of its DUII case by inference. That is, the state contends that, based on defendant's blood alcohol test result of .09 percent obtained one hour and 45 minutes after defendant was driving, the fact that defendant had not consumed any alcohol during that intervening time, and the common knowledge that alcohol dissipates over time, a reasonable factfinder could infer that defendant's BAC was .08 percent or higher at the time that he was riding his motorcycle.

The state is allowed to rely on "circumstantial evidence and reasonable inferences flowing from that evidence" to prove an element of a crime. *State v. Bivins*, 191 Or App 460, 466, 83 P3d 379 (2004). However, "[t]here is a difference between inferences that may be drawn from circumstantial evidence and mere speculation." *Id.* at 467 (internal quotation marks omitted). "Reasonable inferences are permissible; speculation and guesswork are not." *Id.* The line

between reasonable inferences and impermissible speculation "'is drawn by the laws of logic.'" *Id.* (quoting *Tose v. First Pennsylvania Bank, N.A.*, 648 F2d 879, 895 (3d Cir), *cert den*, 454 US 893 (1981), *abrogated on other grounds by Griggs v. Provident Consumer Discount Co.*, 459 US 56, 103 S Ct 400, 74 L Ed 2d 225 (1982)). As a result, the issue before us is whether mere logic renders probable that, when a person's BAC is .09 percent one hour and 45 minutes after he drove and he has not consumed alcohol over that period, that person's BAC was at least .08 at the time that he was driving. *See Bivins*, 191 Or App at 467 (noting that, if there is a "*logical probability* that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts" (internal quotation marks omitted; emphasis added)).

We begin by noting that we agree with the proposition, as does the dissent, that it is common knowledge that alcohol dissipates from the body over time. 290 Or App at 409 (Powers, J., dissenting). That proposition has long been recognized, at least in *dictum*, by Oregon courts. *See, e.g.*, *State v. Eumana-Moranchel*, 352 Or 1, 11, 277 P3d 549 (2012) (noting, in *dictum*, that BAC at the time of driving can be proven with a combination of a chemical analysis and "an inference that blood alcohol rates dissipate over time"); *State v. Parker*, 317 Or 225, 232 n 9, 855 P2d 636 (1993) (noting, in *dictum*, that "[i]t is common knowledge that the level of alcohol in the blood and alcohol's effect on a person's behavior dissipate over time" (internal quotation marks omitted)); *State v. Conway*, 75 Or App 430, 435, 707 P2d 618, *rev den*, 300 Or 451 (1985) (noting, in *dictum*, that it is "common knowledge that alcohol dissipates" over time).

We also agree that a factfinder can rely on that common knowledge in determining whether the state has sustained its burden of proof. "The jury is entitled to draw inferences from matters of common knowledge." *Dodge v. Tradewell Stores*, 256 Or 514, 516, 474 P2d 745 (1970). Thus, although a factfinder may not use personal knowledge as a substitute for evidence not provided by the state, "triers of fact are entitled to draw inferences from facts directly proved based on their common knowledge, experience, or personal

observation." *State v. Clelland*, 214 Or App 151, 159, 162 P3d 1081 (2007). However, we do not agree that the factfinder's common knowledge can bear the weight that the state would require it to bear, and that it *must* bear if we are to conclude that the evidence adduced at trial was sufficient to support defendant's conviction.

The fact that blood alcohol dissipates does not logically lead to any conclusion regarding a specific person's earlier BAC at a specific time. The fact that blood alcohol dissipates is notable for what it does not tell the court. It does not, for example, by itself inform the court whether, *at any given time*, a person's blood alcohol is dissipating or increasing. After all, it is also a matter of common knowledge that, before a person's blood alcohol can dissipate, alcohol must accumulate in the blood. *See generally State v. Trujillo*, 271 Or App 785, 353 P3d 609, *rev den*, 358 Or 146 (2015) (discussing scientific evidence regarding blood alcohol accumulation and dissipation); *State v. Baucum*, 268 Or App 649, 343 P3d 235, *rev den*, 357 Or 550 (2015) (same). More significantly—and largely due to the last point—the fact that blood alcohol dissipates says nothing about whether a person's BAC at any given time was higher, lower, or the same as when it was measured sometime later. Thus, without more, a factfinder has no way to determine if defendant's BAC was still rising, but under .08, *at the time he was driving* and peaked later before falling to .09 at the time of the BAC test.

Further, while it may be common knowledge that alcohol accumulates and dissipates in the blood over time, we can safely conclude that the precise *rates* of alcohol accumulation or dissipation in the blood are not matters of common knowledge. *See Eumana-Moranchel*, 352 Or at 9, 14 (noting the expert testimony in that case that explained the general rate of alcohol accumulation and elimination in the blood following the time of consumption and holding that the state should have been able to call their expert on retrograde extrapolation); *cf. State v. O'Key*, 321 Or 285, 296, 899 P2d 663 (1995) (holding that the Horizontal Gaze Nystagmus (HGN) test for possible intoxication is a scientific technique distinguished from other field sobriety tests because science, "rather than common knowledge," provides its legitimacy). Nor is it commonly known the extent to which those rates

could be affected by other factors, such as the intoxicated person's gender and weight, among other factors.

Furthermore, no additional "predicate" facts in this case could help a factfinder determine defendant's BAC at the time he was driving. *See Bivins*, 191 Or App at 469 (referring to narrative or historical facts that inform what inferences may reasonably be drawn as "predicate facts"). The only facts presented to the court were that defendant's BAC was .09 percent approximately one hour and 45 minutes after he was driving, and that he had not consumed any additional alcohol during that time.

The difficulty in this case is that the state proceeded solely on a *per se* theory under ORS 813.010(1)(a), which required the state to prove that defendant's BAC was .08 or higher at the time of driving, a minimum calculated amount of alcohol in the bloodstream at a particular time. Without additional evidence guiding the trier of fact on rates of accumulation and dissipation either through an expert's "retrograde extrapolation" or perhaps other admissible evidence that could lead to a permissible inference of likely BAC at the time of driving based on the subsequent Intoxilyzer test, the factfinder cannot, at least on this record, apply the common knowledge that blood alcohol goes up and down over time to make a reasonable inference about *when* defendant's BAC likely reached .08 or above and whether that occurred while defendant was driving. *See State v. Miller*, 289 Or App 353, 359, ___ P3d ___ (2017) (holding that a jury's educated guess in determining a particular distance based only on estimates and the use of the Pythagorean Theorem was too speculative where the statute required proof that defendant was within 25 feet of the protected person).

Because the limited evidence presented by the state in this case does not include *any* evidence bearing on the movement of alcohol through defendant's body or the presence of alcohol in defendant's body at the time or shortly before defendant drove, *Eumana-Moranchel*, *Parker*, and *Conway* do not inform our analysis. Without that additional evidence, it does not follow solely as a matter of probability and logic that a person whose BAC is measured at .09 percent would have necessarily had a BAC of at least

.08 percent an hour and 45 minutes earlier if he or she consumed no alcohol during that intervening time period.

The dissent asserts that there are "multiple reasonable inferences" that can be drawn by a factfinder regarding defendant's BAC at the time of driving, including that: (1) defendant's BAC could have been lower than the later test result (supporting an acquittal); (2) it could have been higher than the later test result (supporting a conviction); or (3) it could have been the same as the later test result (also supporting a conviction). 290 Or App at 414 (Powers, J., dissenting). While it is true that we generally let the factfinder draw the inferences from the evidence, without more information, there is nothing but speculation that guides a factfinder to select from one of those three possible inferences. It could be that defendant's BAC was still rising and had not reached .08 at the time that he was pulled over and, thus the first inference—that defendant's BAC was lower than the later test result—is correct. It could be that defendant's BAC had reached .08 or .09 at the time that he was pulled over, peaked either then or later, and was falling at the time of the test, as we can generally infer that alcohol ultimately dissipates over time. The factfinder is left to speculate.

The trial court erred in denying defendant's motion for a judgment of acquittal.

Reversed.

POWERS, J., dissenting.

In this case that involves the "sometimes faint" line between permissible inferences and impermissible speculation, I respectfully dissent from the court's holding that the evidence was insufficient for a reasonable factfinder to conclude that defendant's blood alcohol content (BAC) was over the legal limit of .08 percent when he was driving his motorcycle. In my view, a reasonable factfinder could infer that defendant's BAC was over the legal limit at the time that he was driving based on the later-administered blood alcohol test that registered his BAC at .09 percent and where it was undisputed that he had not consumed any additional alcohol between the time that he was stopped and the time that

he was tested. *See State v. Eumana-Moranchel*, 352 Or 1, 10, 227 P3d 549 (2012) (observing, in *dictum*, that, when a breath test taken after the time of driving establishes that it was over the legal limit, a "jury may infer that the driver's BAC while driving *was at least as high* as the later test result" (emphasis added)).

The Supreme Court's reasoning in *Eumana-Moranchel* is informative. In that case, the court considered "whether the state [could] introduce an expert's testimony to prove that [a] defendant's [BAC] was over the legal limit of .08 percent when a police officer stopped him for driving erratically, even though [that] defendant's BAC was *under* the legal limit at the time of his breath test, approximately an hour and a half later." 352 Or at 3 (emphasis added). Specifically, the court considered whether testimony regarding retrograde extrapolation—that is, the process by which an expert estimates a person's BAC while driving based on a later-administered breath or blood test—was a permissible way for the state "to connect the breath test result to the statutory requirement of a BAC of .08 percent or more at the time of driving." *Id.* at 9-10.

The court began its analysis by noting that "[s]omething more is necessary to connect [a] breath test result to the statutory requirement of a BAC of .08 percent or more at the time of driving" because "it is virtually always the case that the chemical test of the breath or blood is administered some time *after* the person has stopped driving." *Id.* at 9-10 (emphasis in original). Then, citing *dicta* from an earlier case for the proposition that "the fact that blood alcohol dissipates over time is common knowledge," the court recognized that it had previously

> "suggested that, when a breath test taken after the time of driving establishes a BAC of .08 percent or higher, the trier of fact reasonably may infer the necessary connection. That is, the jury may infer that the driver's BAC while driving was at least as high as the later test result."

Id. at 10. The court went on to note, however, that, when the breath test indicates a BAC under .08 percent, more evidence may be necessary because the precise rate of dissipation "is not necessarily common knowledge." *Id.*

As the court continued its analysis, it once again reiterated that an inference that blood alcohol rates dissipate over time can serve as the necessary connection between a breath test and the defendant's BAC at the time that he or she was driving:

> "[ORS 813.010(1)(a)] requires the chemical analysis to 'show' the actual presence of alcohol in the blood at the time of driving; it does not merely require a certain instrument reading. That is, under the statute, the 'chemical analysis' is the numerical result that the machine produces together with an explanation of that result. That explanation can simply be an inference that blood alcohol rates dissipate over time."

Id. at 11 (emphasis omitted). The court also concluded that that explanation could also be "an expert's testimony explaining that retrograde extrapolation shows the actual presence of the prohibited percentage of alcohol in a driver's blood when he or she was driving." *Id.* As a result, the court held that "the state should have been permitted to offer the expert's testimony explaining retrograde extrapolation to establish that defendant's BAC was over .08 percent at the time he was driving." *Id.* at 14.

Applying the reasoning in *Eumana-Moranchel* here, the trial court, acting as a factfinder, could have inferred that defendant's BAC at the time that he was driving was at least as high as his BAC at the time that he took a breath test, based on the following evidence and permissible inference: (1) defendant's breath test was performed one hour and 45 minutes after he drove; (2) there was evidence that defendant had not consumed alcohol between the time that he was stopped and the time of his breath test; and (3) the permissible inference based on common knowledge that blood alcohol rates dissipate over time. *See also State v. Parker*, 317 Or 225, 232 n 9, 855 P2d 636 (1993) (stating, in *dictum*, that, where defendant took a breath test more than five hours after he crashed his car that indicated that he had a BAC of .07 percent, "[t]he state * * * did not need to call an expert on the dissipation of alcohol" because "[i]t is common knowledge that the level of alcohol in the blood and alcohol's effect on a person's behavior dissipate over time" (internal quotation marks omitted)). The majority opinion's

reasoning may be correct for cases in which a breath test registers a BAC *below* the legal limit, *viz.*, additional evidence beyond the results of the breath test becomes necessary because the precise rate of dissipation "is not necessarily common knowledge." *Eumana-Moranchel*, 352 Or at 10. But in this case, where defendant's BAC of .09 percent was over the legal limit one hour and 45 minutes after being pulled over and where there was no evidence that he had consumed alcohol after being stopped, there is, in my opinion, sufficient evidence to withstand a motion for judgment of acquittal.

That conclusion is also supported by our reasoning in *State v. Conway*, 75 Or App 430, 707 P2d 618, *rev den*, 300 Or 451 (1985), a case in which the defendant's .17 percent BAC was over the legal limit about 45 minutes after he was stopped. In *Conway*, we held that the trial court erred when it instructed the jury:

> "'If you find from the evidence that the chemical analysis of the defendant's breath obtained within a reasonable time after his arrest shows that the blood alcohol content was at a certain level, you may infer that the defendant's blood alcohol content was not less than that at the time of driving and arrest.'"

Id. at 432, 434. Notably, we determined that, although it was error for the trial court to instruct on such an inference in a *per se* intoxication case, "[t]he fact that it is error to instruct on the inference does not mean the jury is prohibited from drawing the inference." *Id.* at 435. In reaching that conclusion, we noted that "[t]he jury could *** have inferred, on the basis of common knowledge that alcohol dissipates and the fact that defendant had had nothing to drink between the time he was arrested and the time the test was given, that [his] blood alcohol level *was at least as high as* .17 percent" at the time he was stopped. *Id.* (emphasis added). Consequently, like the reasoning of *Eumana-Moranchel*, the reasoning in *Conway* also supports the conclusion that the trial court did not err in this case.

To be sure, the statements from *Eumana-Moranchel*, *Parker*, and *Conway* that support affirmance in this case are *dicta*. Those statements, however, are well reasoned and

comport with our observations on reasonable inferences. As we have explained previously:

> "In establishing [an] element, the state may rely on circumstantial evidence and reasonable inferences flowing from that evidence. An inferred fact must be one that the [factfinder] is convinced follows beyond a reasonable doubt from the underlying facts. But the requirement that the [factfinder] be convinced beyond a reasonable doubt does not mean that a particular inference must inevitably follow from the established facts. Rather, the established facts may support multiple reasonable inferences and, if they do, which inference to draw is for the [factfinder] to decide."

State v. Bivins, 191 Or App 460, 466-67, 83 P3d 379 (2004) (citations omitted).

The majority opinion attempts to distinguish *Eumana-Moranchel*, *Parker*, and *Conway* by attaching significance to the absence of evidence in this case "bearing on the movement of alcohol through defendant's body or the presence of alcohol in defendant's body at the time or shortly before defendant drove." 290 Or App at 406. As the majority opinion frames it, "[w]ithout that additional evidence, it does not follow solely as a matter of probability and logic that a person whose BAC is measured at .09 percent would have necessarily had a BAC of at least .08 percent an hour and 45 minutes earlier if he or she consumed no alcohol during that intervening time period." *Id.* at 406-07. That approach, however, runs contrary to *Bivins*, and therefore we should conclude that *Eumana-Moranchel*, *Parker*, and *Conway* are persuasive in this case.

First, *Bivins* explains that both circumstantial evidence and reasonable inferences flowing from that evidence may be used to establish an element of a crime. 191 Or App at 466. In this case, there is circumstantial evidence bearing on the movement of alcohol through defendant's system. Although there is no direct evidence in the record of how much alcohol defendant consumed or precisely when he consumed it, there is circumstantial evidence that he consumed some quantity of alcohol such that the later-administered breath test revealed a .09 percent BAC. That later-administered breath test tells us that, at some point, his BAC

violated the legal limit and further that his BAC exceeded the legal limit for some amount of time. The evidence does not tell us how long he was at or above the .08 percent BAC threshold or when he crossed that threshold, but the evidence is conclusive that he crossed the threshold. Further, it is not unreasonable to conclude that the alcohol he did consume would, at some point, leave or dissipate from defendant's system. Again, we do not know the precise rate of dissipation given the minimal evidence in the record, but not knowing the rate of dissipation is substantively different from the majority opinion's conclusion that this case "does not include *any* evidence bearing on the movement of alcohol." 290 Or App at 406 (emphasis in original).

Although the majority opinion requires "additional evidence guiding the trier of fact on rates of accumulation and dissipation," 290 Or App at 406, two hypotheticals show why additional evidence is not necessary. First, if a breath or blood test administered a mere nine minutes after a person drove—instead of one hour and 45 minutes later, which is presented in this case—revealed a .09 percent BAC, it would be reasonable to infer that the driver was over the legal limit at the time of driving.[1] Similarly, if a breath test established a .09 percent BAC nine hours after the person drove—and like this case, there was no evidence that the driver consumed any alcohol after the stop—it would be similarly reasonable to infer that the driver was over the legal limit at the time of driving given common knowledge that alcohol dissipates over time. In both hypotheticals, the

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[1] In practice, however, a chemical analysis of the breath or blood takes much more time to administer. As the Supreme Court explained:

> "[I]t is virtually always the case that the chemical test of the breath or blood is administered some time *after* the person has stopped driving. That is so for several reasons. First, a breath test may not be administered until after the driver actually has been arrested for DUII. In all cases, a certain amount of time will have passed after the stop and before the arrest, while a police officer investigates the crime. In addition, to test the driver, the police officer must use a specific machine, the Intoxilyzer 5000 or the Intoxilyzer 8000, which are the only breath test machines approved by the Oregon State Police for use in performing a chemical analysis of a person's breath, *** and which typically are located at the police station. Finally, before administering the test, the police officer must inform the person of the consequences of refusing to take a breath test, *** and then wait at least 15 minutes to be certain that the person has not taken anything by mouth, vomited, or regurgitated."

Eumana-Moranchel, 352 Or at 9 (emphasis in original; citations omitted).

later-administered breath test revealing a .09 percent BAC logically can lead to a conclusion that the driver was over the legal limit at the time of driving without the need for additional evidence.[2] Why then does the majority opinion conclude that a breath test after an hour and 45 minutes after driving becomes too speculative for a reasonable factfinder to conclude that defendant was over the legal limit when he drove such that additional evidence is necessary to withstand a challenge to the sufficiency of the evidence?

One possible explanation is because the majority opinion looks for the conclusion to "follow solely as a matter of probability and logic" and that the conclusion "necessarily" would have had to occur. 290 Or App at 406. But those requirements run contrary to *Bivins*, which explains that "the requirement that the [factfinder] be convinced beyond a reasonable doubt does not mean that a particular inference must *inevitably* follow from the established facts. Rather, the established facts may support multiple reasonable inferences and, if they do, which inference to draw is for the [factfinder] to decide." 191 Or App at 467 (emphasis added; citations omitted).

Another possible explanation for the approach set out in the majority opinion involves the possibility that defendant's BAC was still rising at the time he was driving. Under that scenario, because whatever alcohol he consumed was still being absorbed, it is possible that his BAC was not .08 percent or higher when he was driving and that alcohol continued to enter his blood after he was stopped such that an hour and 45 minutes later he had a .09 percent BAC (either because his BAC peaked at some higher level and was on the way down or because it took that long to absorb sufficient alcohol to reach a .09). Although a plausible scenario—and

[2] It is worth noting that the Supreme Court has recognized that, "for purposes of the Oregon Constitution, the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw" depending on the circumstances of the case. *State v. Machuca*, 347 Or 644, 657, 227 P3d 729 (2010). Thus, it is difficult to square the reasoning of the majority opinion that alcohol dissipating "does not logically lead to *any* conclusion regarding a specific person's earlier BAC at a specific time," 290 Or App at 405 (emphasis added), with the court's recognition that, under our state constitution, the evanescent nature of a person's blood alcohol content can generally create an exigent circumstance.

possibly even a reasonable inference—given the state of the record in which there is neither evidence to establish how alcohol is absorbed and eliminated generally in the body, nor evidence specific to defendant, or someone similarly situated, on absorption and dissipation of alcohol, the majority opinion's reliance on the possibility of a rising BAC does not align with our standard of review. In reviewing the sufficiency of the evidence, we examine the evidence "in the light most favorable to the state to determine whether a rational trier of fact, accepting reasonable inferences * * * *could have* found the essential element of the crime beyond a reasonable doubt." *State v. Cunningham*, 320 Or 47, 63, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995) (emphasis added). Thus, because a rising-BAC explanation for the evidence is but one reasonable inference, under our standard of review, that interference alone cannot be the basis for the conclusion that the evidence is insufficient in this case.

The established facts in this case support multiple reasonable inferences about defendant's BAC when he was driving: it could have been lower than the later test result; it could have been "at least as high" as the later test result; or it could have been the same as the later test result. Because there are multiple reasonable inferences, the motion for judgment of acquittal should have been denied, as it was for the factfinder to decide "which inference to draw." *Bivins*, 191 Or App at 467.

In short, in analyzing the sufficiency of the evidence, because "we make no distinction between direct and circumstantial evidence as to the degree of proof required," *State v. Hall*, 327 Or 568, 570, 966 P2d 208 (1998), and because it is a reasonable inference that defendant's BAC was at least as high as the later-administered test result of .09 percent, the trial court did not err in denying defendant's motion for judgment of acquittal. Accordingly, I respectfully dissent.

DeVore, J., joins in this dissent.