IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-1319

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID DWIGHT JACKSON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SCOTT J. BEATTIE (MOTION TO SUPPRESS)
THE HONORABLE DAVID PORTER (TRIAL), JUDGES

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Therefore, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal by the defendant David Jackson from his convictions for homicide by vehicle (operating while intoxicated alternative), in violation of Iowa Code section 707.6A(1) (2021); leaving the scene of an accident resulting in death, in violation of Iowa Code section 321.261(4) (2021); and operating a motor vehicle without the owner's consent, in violation of Iowa Code section 714.7 (2021). Sentencing Order; Notice of Appeal; App. 34-38; 39.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On August 9, 2020, Bounleua Lovan was driving a Polaris Slingshot, a three-wheeled motorcycle, north on MLK when he was

struck by a Prius driven by David Jackson. Tr. II, 35:2 – 36:24; 52:12-23.

Timothy Gilbert was traveling south on MLK on August 9, 2020 when he noticed a "reverse-trike" motorcycle and a black Prius also traveling south on MLK. The Prius was staying right behind Gilbert or trailing right behind hm in his blind spot, so he was paying attention to it. Tr. II, 31:19-25; 33:14 – 34:23; 36:18-22. The Prius stayed alongside him for half to three-quarters of a mile. Other than driving in his blind spot, Mr. Gilbert observed that the Prius driver was driving normally. Tr. II, 40:7-20. MLK is a two-way street with four lanes of traffic. Tr. II, 36:1-4. Mr. Gilbert and the Prius driver were going 35 to 40 miles per hour. "All of a sudden," the Prius accelerated and started to cross the double yellow line into oncoming traffic. The Prius kept accelerating and crossed two or three lanes of traffic. Tr. II, 35:2-25; 36:5-9.

Mr. Gilbert observed the motorcyclist and other oncoming motorists trying to get out of the way of the Prius, but the Prius was moving so fast the motorcyclist could not avoid it and it hit the motorcyclist head-on and slammed him up against a telephone pole. The Prius jumped the curb and the driver kept going until he hit a

building. Tr. II, 36:10-24. “Not once” did Gilbert see the Prius’ brake lights illuminate or see the driver try to stop. Tr. II, 36:1– 37:1. Gilbert assumed that the Prius driver might have been suffering from a medical problem. Tr. II, 37:2-7; 41:9-12.

Mr. Gilbert stopped and ran over to check on the motorcyclist. He did not see the driver of the Prius because he was focused on the other driver. Tr. II, 37:2-14; 38:10-15.

Another motorist, Ashley Hobbs, observed the aftermath of the collision. Ms. Hobbs did not see the impact, but she saw the three-wheeler hit a light pole and saw the driver slump over. She saw the other driver drive over the curb, through a parking lot, and into the side of a building. Tr. II, 42:5 – 44:23. Ms. Hobbs pulled into the parking lot and ran over to the car. The car was a four-door vehicle, and the driver was the only occupant. Tr. II, 7:14-21. As she reached out to open the driver’s side car door, the driver “popped out kind of in a daze” and stood up “just looking around as if he was confused a little bit.” Tr. II, 44:9 – 45:8; 45:15-20; 47:17-21. Ms. Hobbs later identified Jackson as the driver. Tr. II, 52:12-23. Ms. Hobbs thought Jackson looked “out of it,” either from the car crash or “being off something else.” Tr. II, 46:17-22.

Ms. Hobbs told Jackson that she wanted to make sure he was okay. He told her, "I wasn't in the vehicle," "I wasn't driving that vehicle." Tr. II, 45:9-14; 47:2-9. Jackson turned around and got back into the car; he appeared to be searching for something. Ms. Hobbs got nervous and called over her friend. Jackson then pulled out a bag from the car and started to walk away. Tr. II, 47:22 – 48:14.

Ms. Hobbs tried to stop Jackson, asking if he wanted to wait for the ambulance. He again stated that he was not driving the vehicle. At that point, Ms. Hobbs called 911 and gave the dispatcher a description of Jackson. She was still looking at Jackson as she gave the description. Tr. II, 48:7-19. Jackson walked to the senior citizen home that was next to the building he had hit. She lost sight of Jackson as he walked around the senior center. Tr. II, 48:20 – 49:2.

When the police arrived, Ms. Hobbs pointed out the direction Jackson had gone. She stayed at the scene until police returned and walked with her up the hill by the senior center, where police had Jackson in handcuffs. Ms. Hobbs identified Jackson as the driver of the car. Tr. II, 49:3-22; 52:12-23.

Des Moines Police Officers Brian Cuppy and Christopher Latham were working together and were close by when the crash

occurred. The officers were the first officers to get to the scene. Tr. II, 56:9-25; 58:5 – 59:14. As Officer Cuppy was still looking for witnesses, Officer Latcham told him he was going to go look for the driver of the car. Officer Cuppy stayed at the scene to make sure witnesses did not leave. Tr. II, 60:1-13.

Officer Latcham testified that he heard the dispatch about the collision and he and Officer Cuppy were at the scene within one to two minutes. Tr. II, 63:13-19; 64:5-7; 67:10 – 68:1. At the scene, he saw a group of people attending to someone by a telephone pole and saw that a car had struck a building. He spoke with Ms. Hobbs at the scene who told him that the driver of the car had run from the vehicle and gave him a description. The officer left to see if he could find the driver, though he believed he was probably long gone. Tr. II, 68:7-21; 70:13-14.

Officer Latcham walked past the senior center and located Jackson sitting outside the building. Tr. II, 70:15 – 72:4; Exh. 6 (video from body camera); App. --. The officer began to give Jackson commands and, at first, Jackson complied. Tr. II, 72:2-9. But then Jackson ran. He ran into a pillar on the building and that caused him to turn around and the officer was then able to catch him. Tr. II, 73:4

– 22. Jackson asked the officer what was going on. Tr. II, 73:18-22. Two other officers took custody of Jackson and then Officer Latcham collected belongings that Jackson had left behind when he ran. Those items were a bag, a cell phone, a sports drink, and a lighter. Tr. II, 74:2-9.

Des Moines Police Officer Nathan Nemmers also responded to the report of the collision. He assisted Officer Latcham by handcuffing Jackson and securing him in the back of a patrol car. Tr. II, 157:13-15; 158:3-5; 162:21 – 163:21. The officer had completed specialized training in investigation of impaired driving. Tr. II, 158:10-15. He observed signs that Jackson could be under the influence of drugs or alcohol. He observed that Jackson had bloodshot, watery eyes, "seemed a little paranoid," exhibited some erratic behavior, and was sweating profusely. The officer did not smell any odor of alcohol. Tr. II, 163:24 – 164:8. The air conditioning was on in the squad car that he put Jackson into. Tr. II, 177:16-21. Officer Latcham had told Officer Nemmers that he attempted to use pepper spray on Jackson, but Officer Nemmers did not observe any indication that Jackson had been pepper sprayed, though he

acknowledged that pepper spray can cause bloodshot, watery eyes, sweating, and anger. Tr. II, 175:21 – 176:22.

Jackson repetitively stated that he was being shot at or he was going to be shot. Officer Latcham had held Jackson at gunpoint, but he was not being held at gunpoint at the time he was making those statements. Tr. II, 164:13 – 165:6.

Jackson was taken to Broadlawns Medical Center. Officer Nemmers went to Broadlawns to investigate Jackson for suspected operating while intoxicated. Tr. II, 166:2 – 167:2. Officer Nemmers spoke to Jackson at the hospital. Jackson was "generally pretty incoherent." The officer asked Jackson if he knew how the accident occurred and Jackson stated that he does not drive. Jackson did not acknowledge that there had been a collision and was not able to tell the officer where he had been or what had occurred. The officer was not able to get any coherent responses from Jackson. Tr. II, 167:6-18; 168:4 – 169:4.

Officer Nemmers did not attempt to conduct field sobriety testing of Jackson because Jackson was incoherent and unable to follow any commands or instructions and it was clear to the officer from trying to talk to Jackson that he was not going to be able to

perform field tests. Tr. II, p. 169:18 – 170:4. Officer Nemmers requested a warrant to withdraw a sample of Jackson's blood and stayed at the hospital to facilitate collection of the blood specimen. Tr. II, 170:5-10.

Justin Grodnitzky works in the toxicology section at the Iowa Division of Criminal Investigation Crime Laboratory. He tested Jackson's blood specimen. He found less than 10 nanograms of Lorazepam per milliliter of blood. Tr. III, 15:11-13. Lorazepam, also known as Ativan, is a prescription drug used to treat anxiety and is also used as sedative and for muscle relaxation. Tr. III, 23:13-16.

Mr. Grodnitzky also found 104 nanograms of methamphetamine and 16 nanograms of amphetamine per milliliter of blood. Tr. III, 15:11-13; 21:11 – 22:8. Methamphetamine is broken down in the body to amphetamine at about ten to twenty percent, so he believed it most likely that the amphetamine he found in Jackson's blood was actually from the methamphetamine having been broken down to amphetamine. Tr. III, 22:15-25**.** Methamphetamine is often used to treat obesity, narcolepsy, and ADHD-type disorders. The therapeutic range for methamphetamine is 20 to, at most, 50 milliliters; it really should not exceed 50 milliliters. Tr. p. III, 25:20 –

26:16. He could not say whether Jackson was intoxicated, however, as that would depend on Jackson's tolerance of the drug. Tr. III, 26:17-24.

Bryan Wickett is a Des Moines police officer and an accident reconstructionist. Tr. III, 28:8 – 30:5. He investigated the collision in this case. Tr. III, 30:20 – 31:3. The collision occurred near the intersection of Martin Luther King, Jr. Boulevard (MLK) and Hickman Road. Tr. III, 35:21 – 36:4; Exh. 37 (photograph); App.--. When he arrived at the scene, he found a Polaris Slingshot up against a light pole and a Toyota Prius against the wall of a building on the east side of MLK. Tr. III, 32:11-24.

Mr. Wickett was able to determine that the Prius had been traveling south on MLK and the motorcycle had been traveling north. Tr. III, 36:11 – 37:2; Exh. 36 (photograph/diagram); App. --. He determined that the Prius crossed the centerline and hit the motorcycle in the curb-side lane on the northbound side of the road. The Prius then went up over the curb, across a drive, and ended up resting against a building. Tr. III, 37:3 – 38:22. The Slingshot was moved ten feet from the point of collision. The Prius continued for

another 220 feet from the point of collision before hitting the building. Tr. III, 71:5-16.

Mr. Wickett also obtained a warrant to access the Prius' "black box." Tr. III, 48:9 – 49:5. He was able to determine that Jackson was going 57 miles per hour when he hit the Slingshot. Five seconds earlier, Jackson had been going 49 miles per hour. Jackson never took his foot off the gas pedal; the accelerator pedal was at a constant percentage until the Prius hit the building. Jackson was driving 57 miles per hour when he hit the Slingshot. Jackson never applied the brakes. Tr. III, 52:2 – 54:15; 66:3 – 67:19; 70:6-20; 80:7-25. The speed limit in that area is 30 to 35 miles per hour. Tr. III, 79:9-17.

The path of the Prius and information from the black box showed that Jackson did not turn the steering wheel to attempt to avoid the collision with the Slingshot or with the building. Tr. III, 60:24 – 63:14; 66:7-10; 67:24 – 68:5. The road curves in the area where Jackson crossed the center line, but Jackson did not follow the curve. He continued to drive straight, which put him on a path into oncoming traffic where he struck the Slingshot. Tr. III, 81:15 – 82:18. Only one seat of the Prius was occupied, the driver's seat. The driver's seat belt was latched. Tr. III, 53:16 – 54:3. Mr. Wickett determined

that the Slingshot was traveling at or below the speed limit at the time of the collision. Tr. III, 55:10-24.

Patrick Downey was the owner of the black Prius Jackson was driving on August 9. Carrie Halfpop, one of Mr. Downey's tenants, took off with his keys and stole the car in July of 2020. Tr. III, 7:10 – 8:5; 12:3-17. He reported the car stolen. About a month later, the police called and informed him that they had found his car and that it had been involved in an accident. Tr. III, 8:3-23. Mr. Downey did not know Jackson and did not give him permission to drive his car. Tr. III, 9:14 – 10:21; 13:14-19. Mr. Downey does not ever let anyone use his car. Tr. III, 13:3-12.

Jackson testified at his trial. He testified that he was fifty-two years old. Tr. III, 131:9-15. He testified that he has prior convictions for a drug tax stamp offense, operating a motor vehicle without the owner's consent, two eluding offenses, and two theft offenses. Tr. III, 133:13-23. Mr. Jackson, who played basketball in college and played professionally in the CBA, is six feet six inches tall and weighs 255. He considered himself to be in good condition. Tr. III, 132:14-18; 134:11 – 135:5. However, he testified, he "caught the Corona" and had some

breathing issued afterwards. He "blacked out" at work, the last time at the end of July. Tr. III, 135:6-22.

Jackson testified that he blacked out twice. The last time was when he was working at Hy-Vee Fresh in Ankeny and one of his co-workers saw him stumble. Jackson testified that he was "kind of dizzy" and lost consciousness and, when he came to, he was slumped over his machine. Tr. III, 156:25 – 158:19. The other time was at the home of his daughter. His daughter roused him and told him that she had been talking to him for two or three minutes and he had not responded. Tr. III, 158:7-17.

Jackson's blackout at work took place on July 26. Tr. IV, 26:17 – 27:3; Tr. III, 161:12-23. Because of his blackout at work, Jackson was required to leave work, get a COVID test, and quarantine. Tr. III, 135:6-22; 160:3-16. He got his test the next day, August 27. Tr. III, 161:12-23. Jackson's COVID test was negative, but he was instructed to quarantine for fourteen days. Tr. III, 160:23 – 161:8. He saw a doctor and was diagnosed with rhabdomyolysis, which required him to stay hydrated. Tr. III, 136:1-5.

Jackson's COVID quarantine period ended on August 9. That day, he played with his grandchildren, walked to the corner store,

then watched television and took a nap. He felt "fine." Tr. III, 136:17 – 137:6.

Jackson walked to the home a friend who lived a couple doors down and borrowed a car from Shelley Smith. He did not have a driver's license and knew that he was not supposed to drive. Tr. III, 137:7-25. He borrowed the car to run a few errands. He testified that he did not know the car was stolen. Tr. III, 138:7-15. Jackson intended to go to Broadlawns Medical Center to get a note for work stating that he had taken his COVID test. He needed a note from his doctor to get paid for the time he was in quarantine. Tr. III, 140:14 – 141:1.

Jackson testified that on August 9, he was driving to Broadlawns. He remembered that he drove down Euclid, stopped at the intersection of Euclid and MLK, then turned left and drove south on MLK. Jackson felt fine, was breathing well, and thought he was driving well. Tr. III, 141:5-15. He testified that he started to have tightness in his chest, his breathing became restricted, and he passed out behind the wheel. He did not remember blacking out. His next memory was hearing the loud noises of the airbags deploying and struggling with his seat belt. Tr. III, 141:16 – 142:11.

When he came to, Jackson testified, his ears were ringing, his head was throbbing, his glasses had been knocked off his face, he "couldn't breathe" and he was "in shock." He did not know where he was or what had happened, but he knew he was in trouble. Tr. III, 142:12 -23.

He wiggled out from his seat belt and got out of the car. When he stood up, he felt "dizzy" and was "dazed." He saw a woman standing in front of him and he could see that she was saying something, but he could not hear her and could not comprehend what she was saying. Tr. III, 142:18 – 143:7. He did not recall speaking to the woman. Tr. III, 143:15-20.

Jackson testified that he knew that he had hit the wall, but did not know that he had hit anyone. He testified that he did not remember anything after he passed the Hy-Vee store and got to the top of the hill on MLK. When he came to, he realized that he had hit a concrete wall, wrecked the car, and he could not breathe. He did not see the Slingshot when he got out of the car. Tr. III, 144:8-25.

Jackson recalled that he got back in the car to try to find his glasses. He found them and grabbed them, along with a bag that had Gatorade and juices in it and got back out. Tr. III, 143:8-12. When he

got out, Jackson knew he had to get to the hospital and thought he saw Broadlawns, but it was actually a senior living facility. Tr. III, 143:24 – 144:22. Jackson testified that he "couldn't … catch my breath" and started walking to the "hospital," he was searching for his phone to call his daughter, but he could not find his phone. Tr. III, 145:4-16.

Jackson testified that he did not know what was going on and thought he was at the hospital. He testified that his balance and equilibrium was steady, but he was hearing a steady ringing sound. He walked to the building he thought was Broadlawns and tried to get in. When he got into the lobby, the inside door was locked and there was a code he had to use to get inside. He entered the code and stood there looking for his phone. He did not understand why he could not get in, so he went back outside. He testified that he was sitting there trying to figure things out. At some point, he got up and walked partially around the building. He thought he was looking for his phone, but he did not remember for sure. Tr. III, 145:17 – 147:24. He went back and sat down. Tr. III, 147:24 – 148:3.

While Jackson was sitting outside the senior center, a police officer approached him. Jackson asked the officer what was going on

and initially complied with the officer's commands to get down. Jackson testified that he got on his knees but did not want to lay down on his chest because he "couldn't breathe" and was trying to figure out why the officer was making him lie down, anyway. Tr. III, 148:4 – 149:4.

Jackson testified that he "always [has] a little apprehension when the police are coming at" him because he knows it is not going to be a positive experience. Tr. III, 149:5-14. The officer was screaming at Jackson and had his pepper spray pointed at him and was telling him that he was going to spray him. Tr. III, 149:15 – 151:10. Jackson took off running and the officer sprayed him with pepper spray. Jackson testified that he was sprayed in his face, mouth, nose, and ears and it was burning him up. He testified, "I am a pretty big guy, but it put me down." Tr. III, 149:19 – 150:15. Jackson ran to a pillar to hide, but hit the pillar. He went back the other direction and tried to hide behind a brick wall. He testified that he was worried about being shot. Tr. III, 150:9 – 151:16. Once he stopped behind the brick wall, Jackson complied with the officer's directives and he was taken into custody and put into a police cruiser. Tr. III,

151:22 – 152:5. Jackson testified that he lost his glasses when officers took him into custody. Tr. III, 153:6-15.

Inside the squad car, Jackson testified, he was "burning up" and he was having trouble breathing. He testified that he had sweat pouring down his face and tears coming from his eyes. He asked the officer to help him, and the officer allowed a woman to get him a bottle of water. The officer took the bottle from the woman and poured it on Jackson's face. Jackson testified that the water caused pepper spray to pour down his face and onto the front of his stomach and he thought he went into shock again. When he came to, he was at Broadlawns Medical Center. Tr. III, 152:6-21.

Jackson testified that he was admitted to the ICU at Broadlawns. He testified that the reason for the admission was that his heart rate had dropped and "was at 34, …. They said they were waiting to see if my heart was going to stop again." He testified that he received treatment throughout the next day. Tr. III, 153:24 – 154:7.

Jackson attempted to explain the methamphetamine found in his system. He denied that he took any drugs on August 9 or that he was intoxicated on anything that day. He believed the

methamphetamine detected in his blood specimen was from a "X" pill he took three or four days before August 9. Tr. III, 154:8 – 155:9. An "X" pill is ecstasy. Tr. IV, 31:7-12. Jackson testified that the pill must have had methamphetamine in it. Tr. IV, 32:17-21. Jackson denied that he was "in any way impaired, intoxicated, unable to drive" when he decided to drive on August 9. Tr. III, 155:2-14. He testified that, "I had an accident. I had a medical emergency …. But I never intended, was not intoxicated, to run and hit a man." Tr. III, 155:22 – 156:2.

On rebuttal, the State called Dale Peterson. Mr. Peterson works for Wellpath, a medical group contracted with the Polk County jail. He serves as the health services administrator for the Polk County jail. In that capacity, he oversees all of the medical and mental health staff for the jail and is responsible for keeping the medical business records for persons incarcerated in the jail. Tr. IV, 58:2 – 59:14.

Jackson was admitted to the Polk County jail on August 10, 2020. He was transferred to the jail from Broadlawns Medical Center. Tr. IV, 59:15-22. As is the normal practice, Jackson's discharge records from Broadlawns accompanied him to the jail and were entered into his medical records at the jail. Tr. IV, 59:23 – 61:2. His

full records from Broadlawns were received later. Tr. IV, 66:13 – 67:4.

Jackson's discharge records reflect that he was admitted to Broadlawns Medical Center for polysubstance abuse, rhabdomyolysis, and because he had been in a motor vehicle crash. Tr. IV, 70:14-22. He explained that rhabdomyolysis typically occurs with damage to the muscular system, typically when the person is dehydrated. The typical treatment is large amounts of fluids. Tr. IV, 70:25 – 71:11.

Mr. Peterson testified that Jackson's records did not reflect that Jackson had any difficulty with breathing. His records show that Jackson's vital signs were taken at the hospital. Hospital records show that his vitals were stable and within normal limits. His blood oxygen level was ninety-eight percent. The records did not show that Jackson had a history of blacking out or losing consciousness and did not indicate that jail staff should keep Jackson under observation for blacking out. Tr. IV, 61:12 – 63:13.

Mr. Peterson testified that Wellpath staff working under contract with the jail conducted an initial screening of Jackson. As a result, he was placed in the alcohol and opioid detoxification program. Tr. IV, 63:23 – 64:2. The detoxification protocols are

started any time a patient states that they have been using opioids, alcohol, or "benzos." Tr. IV, 64:12-15. Jackson's jail medical records stated that Jackson was placed in the detoxification protocols due to his self-reported use of opioids or alcohol. Tr. IV, 65:11-25.

ARGUMENT

I. The Search Warrant Authorizing Withdrawal of a Sample of Jackson's Blood Is Supported by Probable Cause.

Preservation of Error

The State does not challenge preservation of Jackson's claim that the search warrant contained false information. Jackson raised that claim in the district court and the court ruled on it. *See* Motion to Suppress; Order on Motion to Suppress; App. 11-17; 18-22.

The State does challenge preservation of Jackson's claim that the search warrant application omitted material information that would have cast doubt on the magistrate's finding of probable cause. Jackson did not raise that claim in the district court. *See* Motion to Suppress; App. 11-17. Neither did the district court rule on any such claim. Order on Motion to Suppress; App. 18-22. That claim is, therefore, waived. *Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues

must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Scope and Standard of Review

The Court reviews constitutional questions de novo, based on the totality of the circumstances. *State v. McNeal,* 867 N.W.2d 91, 99 (Iowa 2015). "The test for probable cause is 'whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there.'" *State v. Baker,* 925 N.W.2d 602, 613 (Iowa 2019) (quoting *State v. Gogg,* 561 N.W.2d 360, 363 (Iowa 1997)).

The standard for review of search warrants is deferential. *State v. Bracy,* 971 N.W.2d 563, 564 (Iowa 2022). The Court does not make an independent determination of probable cause. *McNeal,* 867 N.W.2d at 99 (quoting *Gogg,* 561 N.W.2d at 363). Rather, the Court "consider[s] whether the grant of the warrant had a substantial basis under the totality of the circumstances as disclosed in the warrant application." *Bracy,* 971 N.W.2d at 564.

When reviewing a warrant application, the Court "examine[s] only the information actually presented to the judge." *Bracy,* 971 N.W.2d at 567 (internal quotation and citation omitted). It "do[es]

not strictly scrutinize the sufficiency of the underlying affidavit." *Id.* "[T]he affidavit of probable cause is interpreted in a common sense, rather than a hypertechnical, manner." *Id.* The Court "draw[s] all reasonable inferences to support the judge's finding of probable cause and decide[s] close cases in favor of upholding the validity of the warrant." *Id.* at 567-68.

Merits

David Jackson challenges the district court's denial of his motion to suppress the result of a blood test obtained under a search warrant. He alleges that the officer who completed the search warrant affidavit recklessly included incorrect information and omitted material facts. He argues that had the officer not included the incorrect information and included the omitted information, the affidavit would not have supported a finding of probable cause. The Court should reject his claim. Jackson was required to prove that the affiant intentionally or recklessly included false information in the search warrant. The district court found that the false information was included only negligently, and the record supports the court's finding. Further, Jackson waived any challenge to omitted evidence as he did not raise that claim in the district court. Moreover, even if

the false information is excised from the warrant application, and the omitted information is considered, the application supplies probable cause for issuance of the warrant. Therefore, the Court must reject Jackson's challenge to the district court's suppression ruling.

A search warrant must be supported by probable cause. Fourth Amendment to the United States Constitution; Iowa Const. art. I, § 8. Our Court uses the totality-of-the-circumstances standard to determine whether officers established probable cause for issuance of a search warrant. *Baker,* 925 N.W.2d at 613–14. The test for probable cause is "whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there." *Baker,* 925 N.W.2d at 613 (internal quotation and citations omitted). The judge "'is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information,' probable cause exists." *Baker,* 925 N.W.2d at 613 (quoting *Gogg,* 561 N.W.2d at 363, in turn quoting *Illinois v. Gates,* 462 U.S. 213, 238 (1983)).

In determining whether there was probable cause for a search warrant, the Court reviews the information actually presented to the judge and determines whether the issuing judge had a substantial basis for concluding that probable cause existed. *Baker,* 925 N.W.2d at 613-614 (citing *McNeal,* 867 N.W.2d at 99). In reviewing the warrant application, the Court "interprets the affidavit of probable cause in a common sense, rather than in a highly technical manner." *Baker,* 925 N.W.2d at 614. The Court draws all reasonable inferences to support the judge's finding of probable cause and decides close cases in favor of upholding the validity of the warrant. *Id.*

In *Franks,* the Supreme Court developed a means to examine the truthfulness of an affiant in presenting evidence to a magistrate in support of issuance of a search warrant. *State v. Niehaus,* 452 N.W.2d 184, 186–87 (Iowa 1990). A *Franks* inquiry is limited to a determination of whether the affiant was purposely untruthful with regard to a material fact in his or her application for the warrant or acted with reckless disregard for the truth. If the reviewing court finds that the affiant intentionally or recklessly falsified the challenged information, the offensive material must be deleted, and the remainder of the warrant is reviewed to determine whether probable

cause existed. *Bracy,* 971 N.W.2d at 568 (citing *Franks v. Delaware,* 438 U.S. 154, 158, 171-172 (1978)). Our Court has adopted the *Franks* standard for resolving allegations that the officer provided false information in the warrant application. *Bracy,* 971 N.W.2d at 568.

"Under *Franks,* intentionally false statements and false statements made with a reckless disregard for the truth are treated the same. The issuing magistrate must have been misled into believing the existence of certain facts which enter into [her or] his thought process in evaluating probable cause." *State v. Case,* No. 19-0378, 2020 WL 5651560, *10 (Iowa Ct. App. Sept. 23, 2020) (internal quotation and citations omitted). Under this standard, an innocent or negligent misstatement is inadequate to challenge the validity of a search warrant. *Niehaus,* 452 N.W.2d at 187; *and see State v. McPhillips,* 580 N.W.2d 748, 751 (Iowa 1998).

Jackson points out that the warrant application contained incorrect information. Attachment A to the search warrant affidavit included information regarding the results of field sobriety testing. *See* Search Warrant Application, Attachment A; App. 43. At Jackson's suppression hearing, the affiant-officer testified that he did not perform field sobriety testing on Jackson. Supp. Tr. 11:10-15. He

testified that he re-used a previous warrant application to prepare his affidavit in this case and inadvertently failed to delete that portion of the prior affidavit. Supp. Tr. 12:10-18.

The district court found that the affiant-officer did not consciously provide the magistrate with false information or act with reckless disregard for the truth. Instead, the court found, the officer "committed a scrivener's error (albeit a significant one) by including information from a previous warrant and failing to note it in proof reading the affidavit." Order on Motion to Suppress at p. 3; App. 20. The court's ruling was correct and should be upheld. *Cf. United States v. Waker,* 534 F.3d 168, 172 (2nd Cir. 2008) (erroneous dates on search warrant application did not invalidate warrant as they were minor scrivener's errors or the product of clerical inadvertence).

Despite its finding that the officer-affiant did not consciously or recklessly provide false information, the district court went on to address whether the warrant would be supported by probable cause if the challenged evidence were not considered. The court concluded that, even without the incorrect evidence regarding field sobriety test results, the warrant application still supported a finding of probable

cause. Order on Motion to Suppress at pp. 3-4; App. 20-21. The district court's ruling was correct.

Excising the information regarding the field sobriety tests, the remaining evidence is sufficient to establish probable cause. That evidence includes that Jackson crossed the center double-yellow line of the road and struck a motorcycle, killing the cyclist. Warrant Application, Attachment A-1; App. 42. Jackson was observed to have bloodshot, watery eyes, his speech was mumbled, he was unsteady on his feet, his emotions were visibly excited, and his judgment was impaired. Jackson displayed behavior that the affiant-officer knew to be consistent with drug use: he was sweating profusely, grinding his teeth, and was unable to remain still. In addition, Jackson was incoherent; he was unaware that he had been involved in an accident and did not know why he was at the hospital. Warrant Application, Attachment A-2; App. 43. That evidence was far more than sufficient to establish probable cause for issuance of a search warrant for withdrawal of a blood specimen from Jackson to test for the presence of a controlled substance. The Court should uphold the district court's denial of Jackson's motion to suppress the result of Jackson's blood test.

Jackson also argues, however, that the warrant is not supported by probable cause because the affiant-officer omitted information that Jackson had been sprayed with pepper spray while at the scene. As argued above, Jackson waived that claim by failing to raise it in the district court. Nonetheless, because the Court may choose to reach the merits of that claim, the State addresses it.

The officer-affiant was not required to advise the magistrate that Jackson was sprayed with pepper spray. "[A]n officer applying for a search warrant 'is not required to present all inculpatory and exculpatory evidence to the magistrate,' only that evidence which would support a finding of probable cause." *State v. Green,* 540 N.W.2d 649, 657 (Iowa 1995) (quoting *State v. Johnson,* 312 N.W.2d 144, 146 (Iowa App.1981)); *accord Baker,* 925 N.W.2d at 615. "Omissions of fact constitute misrepresentations only if the omitted facts 'cast doubt on the existence of probable cause.'" *Green,* 540 N.W.2d at 657 (quoting *State v. Ripperger,* 514 N.W.2d 740, 745 (Iowa App. 1994) (in turn quoting *United States v. Ellison,* 793 F.2d 942, 948 (8th Cir. 1986)). Failure to disclose information in a warrant application can constitute a misrepresentation if the failure to disclose results in a misconception or, in other words, if the omission

produces the same practical effect as an affirmative statement. *Baker,* 925 N.W.2d at 616.

Jackson has not shown that there was a failure to disclose that amounted to a misrepresentation. First, Jackson did not show that Jackson was sprayed with pepper spray. At the suppression hearing, the affiant was asked if he was aware on the scene that Jackson had been pepper sprayed. He responded, "Yeah, I think my initial understanding was … some innocent bystanders had been pepper sprayed, but I assumed he had received –." At trial, Des Moines Police Officer Christopher Latcham testified that he located Jackson and then pursued Jackson as he fled from an area near the collision. The officer testified that twice he attempted to spray Jackson with pepper spray. Tr. II, 68:11 – 69:2; 71:5 – 73:22; 78:10-18. But, when asked whether the pepper spray came into contact with Jackson, the officer responded, "Honestly, I don't know. I was trying to. In certification, you're not really shooting at a moving target with the [pepper spray] cannister, but I would assume at some point, I had made some contact with him." Tr. II, 78:19-24. That evidence did not show that Jackson was sprayed with pepper spray.

The officer-affiant did not have an obligation to disclose to the issuing magistrate that it was possible that Jackson had been sprayed with pepper spray. Jackson has not shown that the information contained in the affidavit regarding Jackson's bloodshot, watery eyes was untruthful. Evidence disputing the cause of Jackson's bloodshot eyes does not establish that the information was false. Therefore, that information should not be excised from the warrant application in reviewing whether the warrant was supported by probable cause. *Ripperger,* 514 N.W.2d at 745.

Ultimately, even stripped of the challenged evidence and considering the omitted evidence, the application still showed that Jackson crossed the center line of the road and struck a motorcycle, that his gait and balance were unsteady, that he was mumbling, that his emotions were visibly excited, that he incoherent and unaware that he had been involved in an accident and unaware why he was at the hospital. It also showed that Jackson displayed signs of drug impairment, including grinding his teeth, sweating, inability to stay still, and visibly excited emotions. Even if Jackson had shown that he had been pepper sprayed, the evidence also showed that pepper spray would not have caused Jackson to mumble, to have an unsteady gait

or unsteady balance, and would not have affected his judgment or his ability to reason, Supp. Tr. 22:8 – 23:18. The affiant-officer's observations of Jackson provided probable cause for issuance of a warrant to obtain a bodily specimen for drug testing. The district court properly denied Jackson's motion to suppress the fruit of that search. This Court should uphold that ruling and affirm Jackson's convictions.

II. The District Court Did Not Err in Admitting Testimony about Jackson's Medical Records to Rebut Jackson's Testimony That a Medical Condition, and Not Impairment, Caused Him to Cross the Center Line and Hit Another Vehicle; Even If the Court Had Erred, Any Error Would Be Harmless.

Preservation of Error

The State agrees that Jackson has preserved his claims that admission of testimony about his medical records was inadmissible hearsay and inadmissible under the Health Insurance Portability and Accountability Act (HIPAA). Those claims were raised and ruled upon in the district court. *See,* Tr. IV, 49:2 – 57:9.

However, Jackson has not preserved his claim that the challenged evidence was inadmissible under the Iowa physician-patient privilege statute, Iowa Code section 622.10 (2021). Jackson specifically based his privilege claim on the federal HIPAA provisions;

he did not raise a claim that the evidence was privileged under the Iowa statute. Neither did the district court consider or rule on any challenge under the Iowa statute. Consequently, Jackson the Court should reject Jackson's claim of privilege under section 622.10 without reaching its merits.

Standard of Review

Generally, the Court reviews the district court's evidentiary rulings for abuse of discretion. *State v. Einfeldt,* 914 N.W.2d 773, 778 (Iowa 2018). However, the Court reviews the admission of hearsay evidence for correction of errors at law. *State v. Buelow,* 951 N.W.2d 879, 884 (Iowa 2020). When hearsay is improperly admitted the error is presumed to be prejudicial unless the State shows the contrary. The State may show improperly admitted evidence was not prejudicial by proving the error was harmless beyond a reasonable doubt. *State v. Huser,* 894 N.W.2d 472, 495 (Iowa 2017); *State v. Paredes,* 775 N.W.2d 554, 560 (Iowa 2009).

Merits

Jackson challenges the district court's admission of testimony from Polk County jail health services administrator Dale Peterson about information contained in Jackson's discharge records from

Broadlawns Medical Center. Information about the treatment Jackson received at the hospital on the date he crossed the centerline and struck and killed a motorcyclist was provided to the jail by the hospital when Jackson was released from the hospital into the custody of the jail. That evidence was admitted to rebut Jackson's testimony that his driving was affected by a medical condition rather than intoxication. Jackson contends Mr. Peterson's testimony violated the federal Health Insurance Portability and Accountability Act (HIPAA) and the physician-patient privilege statute, Iowa Code section 622.10. He also contends that Mr. Peterson's testimony about his records was inadmissible hearsay. The Court should reject Jackson's claims. The district court did not err in admitting the testimony in the face of Jackson's objection that it would violate HIPAA as that act does not apply to the prosecution, and suppression or exclusion of evidence is not a remedy for violation of HIPPA. As noted, Jackson has waived any claim under the Iowa privilege statute and, even if he had not, Jackson waived that privilege by testifying that he was suffering from a medical emergency that caused the collision. The district court also did not err in admitting the challenged testimony over Jackson's hearsay objection. Moreover,

even if the court had erred in admitting Mr. Peterson's testimony, any error would be harmless given the very strong evidence of Jackson's guilt, including very strong evidence that drug impairment, rather than a medical condition, was the cause of the fatal crash.

At his trial, Jackson took the stand and testified that in 2020, he "caught the Corona" and had some breathing issues afterward. He "blacked out" at work "a few times." The last time he blacked out was at the end of July. As a result, he had to leave work, get a COVID test, and quarantine. Tr. III, 135:6-22; 156:25 – 158:19. Jackson also testified that he had been diagnosed with rhabdomyolysis, which required him to stay hydrated. Tr. III, 136:1-5.

Jackson testified that on August 9, his COVID quarantine was up, and he needed to get a doctor's note to get paid for his quarantine time. He was driving down Euclid Avenue towards Broadlawns Medical Center. He was feeling fine, driving well, and was breathing well. Tr. III, 136:14-24; 140:14 – 141:15. But, as turned onto MLK, he "started to have … tightness in my chest, my breathing became restricted, and I passed out, blacked out at the wheel." Tr. III, 141:7 – 142:6. The next thing Jackson remembered, he heard a "pop, a bang,

a loud noise, explosion" and he was surrounded by air bags and their contents and was struggling with his seat belt. Tr. III, 142:7-23.

Jackson testified that after his arrest, police took him to Broadlawns Medical Center. Tr. III, 151:25 – 152:21. Jackson testified that he was admitted to the ICU because his heart rate had dropped to 34 and his health care team was keeping him under observation to see if his heart was going to stop again. Tr. III, 153:24 – 154:4. He testified that he was had not taken any drugs on August 9, and that he was not intoxicated. He, "did not think I was in any way impaired, intoxicated, unable to drive." Tr. III, 155:2-14. He asserted that he had had a "medical emergency" that caused the "accident." Tr. III, 155:22 – 156:2.

On rebuttal, the State offered the testimony of Dale Peterson. Mr. Peterson is employed by Wellpath, which is a medical group contracted to provide care at the Polk County jail. Mr. Peterson works on-site at the jail as the health services administrator, overseeing all of the medical and mental health staff for the Polk County jail. In that capacity, he is responsible for the medical business records that are kept with respect to persons in the jail. Tr. IV, 58:13 – 59:10.

Mr. Peterson testified that Jackson was admitted to the Polk County jail on August 10, 2020; he came to the jail from Broadlawns Medical Center. Tr. IV, 59:15-22. If an arrestee has medical issues or concerns that need to be addressed prior to incarceration, law enforcement officers will take the arrestee to the hospital to be assessed and, if necessary, treated, and cleared for incarceration. When an inmate comes to the jail from a medical facility, the jail will receive the discharge instructions for the patient. Those instructions show what the inmate was treated for at the hospital and will show any follow-up appointments that are necessary, and will show any medications prescribed at the hospital. Tr. IV, 59:23 – 60:22.

Mr. Peterson testified that discharge instructions for Jackson were received from Broadlawns Medical Center when Jackson was admitted to jail. Tr. IV, 60:23 – 61:2. Mr. Peterson testified that those records showed that Jackson was admitted to Broadlawns for polysubstance abuse, rhabdomyolysis, and a motor vehicle accident. Tr. IV, 70:9-18. Rhabdomyolysis occurs with damage to the muscular system, typically during a state of dehydration. When the body is really "amped up" and the person is dehydrated, the muscles all start to break down at the same time and release large amounts of waste

products into the bloodstream. Typically, it is treated with large amounts of fluid. Tr. IV, 71:1-8.

Mr. Peterson also testified that Jackson's discharge records did not reflect that Jackson had any difficulty with breathing. Tr. IV, 61:3-11. The records showed that Jackson's heart rate was stable and within normal limits. His oxygen saturation was 98%, also within normal limits, indicating that he was breathing normally. There was no report that Jackson had a history of blacking out or losing consciousness. Tr. IV, 61:21 – 63:13. Based on Jackson's medical records, the jail put him on an alcohol and opioid detoxification protocol. The detoxification protocol is standard protocol for the jail any time a patient reports use of opioids or use of alcohol more frequently than one to five days a week. Tr. IV, 63:18 – 66:2.

Jackson contends that the district court erred in admitting Mr. Peterson's testimony about information contained in Jackson's medical records. He argues that the information was inadmissible hearsay and was also inadmissible as it was privileged under federal HIPAA provisions and the Iowa physician-patient privilege provided for in Iowa Code section 622.10. Jackson has not shown that the

district court abused its discretion in admitting the testimony of Dale Peterson.

A. HIPAA Does Not Bar Testimony about Information Contained in Jackson's Medical Records.

Jackson first argues that the discharge records from Broadlawns Medical Center were confidential under HIPAA and, therefore, the district court erred in admitting testimony about the content of those records. The Court should reject Jackson's claim that the evidence should have been excluded under the federal Health Insurance Portability and Accountability Act. HIPAA does not apply to prosecutors and, even it did, HIPAA does not contain a provision suppressing or excluding evidence obtained in violation of the act.

Jackson asserts that there is "no real question" that Jackson's discharge records are covered by HIPAA. However, the question is not whether the records are covered by HIPAA, but whether those records are subject to exclusion in a criminal trial. The vast weight of authority holds that they are not.

"HIPAA is a massive federal statute that consists of extensive regulations." *State v. Downs,* 2004-2402, 923 So. 2d 726, 728 (La. App. 1 Cir. Sept. 23, 2005). Those regulations identify and limit select

entities' capacity to disclose patients' medical records. *Downs* at 728. "Pursuant to 45 C.F.R. §§ 160.102 and 164.104, HIPAA regulations apply only to a health plan, a health care clearinghouse, and a health care provider who transmits any health information in electronic form in connection with a transaction." *Downs,* at 731; *and see Commonwealth v. Williams,* 2017 PA Super 382, 176 A.3d 298, 317 (2017). The regulations provide limited circumstances when disclosures are permitted for judicial and administrative proceedings. *Downs,* at 728 (citing 45 C.F.R. § 164.512). HIPAA does not create a privilege for patients' medical information; it merely provides the procedures to follow for the disclosure of that information from a "covered entity." *People v. Bauer,* 402 Ill. App. 3d 1149, 1158, 931 N.E.2d 1283, 1291 (2010) (citing *United States v. Bek,* 493 F.3d 790, 802 (7th Cir. 2007) and *Northwestern Memorial Hospital v. Ashcroft,* 362 F.3d 923, 925–26 (7th Cir. 2004)).[1]

Iowa has not considered whether HIPAA applies to prosecutors. Other courts that have considered the issue, however, have found

[1] An individual who believes his rights under HIPAA have been violated may file a complaint with the Office of Civil Rights, Department of Health and Human Services, the federal agency that enforces the regulations. *State v. Eichhorst,* 879 N.E.2d 1144, 1154–55 (Ind. Ct. App. 2008) (citing 45 C.F.R. § 160.306).

that HIPAA does not apply as prosecutors are not "covered entities." *See Downs,* 923 So. 2d at 731; *Williams,* 176 A.3d at 317; *State v. Carter,* 23 So.3d 798, 801 (Fla. 1st DCA 2009) ("'Covered entities' do not include law enforcement officers or prosecutors, and the conduct of these officials is not governed by HIPAA."); *Bauer,* 931 N.E.2d at 1291–92 ("Although HIPAA provides for penalties against entities that fail to comply with its provisions … law enforcement agencies, including the office of the State's Attorney, are not covered entities under HIPAA."). This Court should find that a county prosecutor is not a covered entity under HIPAA and that Jackson's medical records were not privileged under HIPAA.

Neither has Iowa considered whether evidence obtained in violation of HIPAA must be suppressed or excluded. Again, other courts that have considered the issue has found that the evidence is not subject to suppression or exclusion.

Exclusion of evidence is proper only where the statute violated provides for such exclusion, or where a constitutional violation has occurred. *Carter,* 23 So.3d at 801. "'HIPAA provides for criminal and civil penalties against entities that fail to comply with its provisions.'" *United States v. Yazzie,* 998 F. Supp. 2d 1044, 1116 (D.N.M. 2014)

(internal quotation and citation omitted). However, HIPAA does not create a privilege for patients' medical information; it merely provides the procedures to follow for the disclosure of that information from a "covered entity." *Bauer,* 931 N.E.2d at 1291–92 (HIPAA does not contain a remedy of suppression of evidence obtained in violation of the act). Suppression or exclusion of evidence in a criminal proceeding is not a remedy for violation of HIPAA. *State v. Eichhorst,* 879 N.E.2d 1144, 1154–55 (Ind. App. 2008) (finding that suppression of evidence is not a remedy for violation of HIPAA); *State v. Straehler,* 307 Wis.2d 360, 368, 745 N.W.2d 431, 435 (2007) ("HIPAA does not provide for suppression of the evidence as a remedy for a HIPAA violation"); *State v. Yenzer*, 40 Kan. App. 2d 710, 195 P.3d 271 (2008) ("[E]ven if Yenzer could show a HIPAA violation, the district court did not err in denying Yenzer's motion to suppress."); *Rodriguez v. State,* 469 S.W.3d 626, 635–36 (Tex. App. 2015) ("we cannot read the exclusionary rule into a statute when its remedial provision is silent on suppression."); *State v. Mubita,* 145 Idaho 925, 188 P.3d 867, 878 (2008) (finding that suppression of evidence is not the proper remedy for a HIPAA violation) (*abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr.,* 151

Idaho 889, 265 P.3d 502 (2011)); *United States v. Zamora,* 408 F. Supp. 2d 295, 298 (S.D. Tex. 2006) (HIPAA was not intended to be a means for evading criminal prosecution); *United States v. Yazzie,* 998 F. Supp. 2d at 1116 (stating that "suppressing medical records does not appear to be an appropriate remedy for a HIPAA violation"); *Elder–Evins v. Casey,* 2012 WL 2577589 (N.D. Cal. July 3, 2012) ("As other courts have noted, HIPAA does not have a suppression remedy. And where this is the case, it is inappropriate for the court to exclude evidence on this basis." (citation and footnote omitted)); *United States v. Streich,* 560 F.3d 926, 935 (9th Cir. 2009)(Kleinfeld, J., concurring)("HIPAA does not provide any private right of action, much less a suppression remedy.")).

Indeed, "when the Department of Health and Human Services (DHHS) promulgated the HIPAA regulations, it declared: 'We shape the rule's provisions with respect to law enforcement according to the limited scope of our regulatory authority under HIPAA, which applies only to the covered entities and not to law enforcement officials.'" *Rodriguez,* 469 S.W.3d at 635–36 (quoting 65 Fed. Reg. 82462, 82679 (Dec. 28, 2000) (agency's response to public comments in connection with promulgation of final rule)). "DHHS recognized that,

'under the HIPAA statutory authority, [DHHS] cannot impose sanctions on law enforcement officials or require suppression of evidence.'" *Rodriguez,* 469 S.W.3d at 635 (quoting 65 Fed. Reg. at 82679).

Testimony about information contained in Jackson's hospital records were not privileged under HIPAA as the county attorney is not a "covered entity" within the meaning of HIPAA. Even if Jackson's medical records had been obtained in violation of HIPAA, they would not be subject to exclusion or suppression on HIPAA grounds. The district court did not abuse its discretion in overruling Jackson's objection to the challenged evidence on the ground that it was privileged and inadmissible under HIPAA.

B. Jackson Failed to Preserve His Claim that His Medical Records Were Privileged under Iowa Code Section 622.10 and He Waived Any Privilege by Testifying that a Medical Condition Caused Him to Lose Control and Strike the Victim.

As noted above, Jackson failed to preserve his claim of privilege under Iowa Code section 622.10 as he did not argue in the district court that the testimony of Dale Peterson regarding information contained in Jackson's medical records was inadmissible under that statute. Instead, Jackson argued only that admission of Mr.

Peterson's testimony was barred by the federal HIPAA provisions. Accordingly, the Court should decline to reach Jackson's claim under section 622.10. However, should the Court choose to reach the merits of Jackson's claim, it should reject that claim as Jackson waived any privileged that might have applied under the Iowa statute.

Even if the Court could reach the merits of Jackson's claim that his medical records are privileged under Iowa Code section 622.10, he waived the protection of that privilege by testifying about his medical condition at the time that he was admitted to the hospital and testifying about the course of his treatment at the hospital.

Iowa Code section 622.10 provided in pertinent part as follows.

> 1. A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.
>
> 2. The prohibition does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred; nor does the prohibition apply to physicians or surgeons, physician assistants, advanced registered nurse practitioners, mental health professionals, or to the stenographer or confidential clerk of any physicians or surgeons, physician assistants, advanced registered nurse practitioners, or mental

> health professionals, in a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person. The evidence is admissible upon trial of the action only as it relates to the condition alleged.
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> * * * *

Iowa Code § 622.10 (2021).

Generally, waiver of the privilege may be express or implied. *Squealer Feeds v. Pickering,* 530 N.W.2d 678, 684 (Iowa 1995) (*abrogated on other grounds by Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.,* 690 N.W.2d 38, 44 (Iowa 2004)). An implied waiver occurs when a litigant asserts an issue that puts a communication in play. *Id.* Here, Jackson waived his physician-patient privilege when he testified that the collision was caused by a medical emergency rather than impairment with a drug and testified that medical staff discovered that he had a low pulse and kept him under observation to make sure his heart would not stop again.

The State recognizes that our Supreme Court has held that the mere denial of an element or factor of an opponent's case does not make that element or factor part of the case of the person making the denial such that the privilege is waived. *See Chung v. Legacy Corp.,* 548 N.W.2d 147, 150 (Iowa 1996). However, *Chung* is distinguishable

from this case. There, the plaintiff in a civil case filed an application for permission to take the deposition of the physician who treated the driver of the vehicle that struck Chung's vehicle. He also sought production of the driver 's medical records to show his condition and state of intoxication. That driver raised a claim of privilege. *Chung,* 548 N.W.2d at 148. Our Supreme Court held that "the mere act of denying the existence of an element or factor of an adversary's claim does not fall within the statutory [waiver] language" of Iowa Code section 622.10(2). *Chung,* 548 N.W.2d at 150. *Chung*, however, involved a mere general denial of the allegations of a civil petition. The Court did not consider whether a defendant in a criminal case waives the privilege when he takes the stand and makes claims about his medical condition that, if true, would tend to exculpate him. *Chung* does not control this case.

The State also recognizes that in *Roling,* a panel of our Court of Appeal rejected the State's argument that Roling, charged with operating while intoxicated and failure to yield, opened the door to admission of otherwise privileged medical records when he testified he was seeking medical help for sleep apnea, and he was unaware of the condition before the accident. The State argued the privilege

should be waived whenever a defendant puts his medical condition in issue as a defense to a charged crime. The panel rejected that argument.

In rejecting the State's argument, the Court relied upon the intent of section 622.10 to promote uninhibited and full communication between a patient and his doctor so the doctor will obtain the information necessary to competently diagnose and treat the patient. *State v. Roling*, No. 0-710, 2001 WL 98935, at *3 (Iowa Ct. App. Feb. 7, 2001). The purpose underlying our privilege statute is not hindered by recognizing an exception to the privilege where the defendant chooses to testify to his own medical condition. Disclosure of the medical information would remain fully within the control of the defendant; his or her medical records would not be disclosed so long as he or she does not open the door by testifying about them.

The Court should decline to follow *Roling*. First, the panel's decision in that case is not controlling authority. *See,* Iowa R. App. P. 6.904(2)(c); *and see State v. Lindsey,* 881 N.W.2d 411, 414, fn. 1 (Iowa 2016) (Recognizing that "[u]nder Iowa Rule of Appellate Procedure 6.904(2)(c), unpublished decisions of the court of appeals do not constitute binding authority on appeal."). Second, section

622.10 does not directly address the situation where a defendant seeks exclusion of his own medical records and, as noted, the purpose of the privilege statute would not be undermined by finding waiver in cases such as this.

The reasoning of *Roling* is not sound. As one leading commentator has stated,

> Doubtless, if the patient on direct examination testifies to or adduces other evidence of, the communications exchanged or the information furnished to the doctor consulted this would waive [privilege] in respect to such consultations.

1 McCormick on Evid. § 103 (8th ed.). Further, *McCormick* has noted that when "the patient in his or her direct testimony does not reveal any privileged matter respecting the consultation, but testifies only to physical or mental condition, existing at the time of such consultation," some courts hold that fairness requires a finding that the patient waived privilege by tendering to the jury his physical condition. *McCormick* notes other courts hold that the patient's testimony as to his or her condition without disclosure of privileged matter is not a waiver but points out that the approach finding waiver "has the merit of curtailing the scope of a privilege that some view as obstructive." *Id.*

This Court should hold that Jackson waived any privilege under section 822.10 when he testified that he blacked out just prior to striking the victim's motorcycle and when he testified that he was admitted to the ICU because his heart rate had dropped to 34 and his health care team was keeping him under observation to see if his heart stopped again. Tr. III, 153:24 – 154:4. Once Jackson made those claims, the State was entitled to rebut his testimony by adducing testimony showing that Jackson's medical records did not support his claims.

Should the Court reach the merits of Jackson's claim of privilege under the Iowa statue, the Court should hold that Jackson waived his privilege when he took the stand and testified that a medical condition caused his fatal collision, and that medical staff noted his condition and kept him under observation for it. A defendant should not be permitted to claim that he is not criminally culpable for his act as it was caused by a medical emergency and then use a claim of medical privilege to shield his claim from scrutiny.

C. The District Court Did Not Err in Rejecting Jackson's Hearsay Objection to Testimony About His Medical Records.

Jackson also contends that testimony about his medical treatment was inadmissible hearsay. Hearsay is:

> a statement that:
>
> (1) The declarant does not make while testifying at the current trial or hearing; and
>
> (2) A party offers into evidence to prove the truth of the matter asserted in the statement.

Iowa R. Evid. 5.801(c).

Initially, the State notes that Mr. Peterson's testimony that Jackson's medical records did not report that Jackson had any difficulty with breathing and did not report that Jackson had a history of blacking out or losing consciousness was not hearsay testimony. There was no "statement" by Jackson and, therefore, no hearsay as defined by Rule 5.801(a). Thus, the Court should reject Jackson's challenge to Dale Peterson's testimony that Jackson's discharge records did not reflect that Jackson had any difficulty with breathing, Tr. IV, 61:3-11, and that he did not report a history of blacking out or losing consciousness. Tr. IV, 61:21 – 63:13.

The Court should also reject Jackson's challenge to Mr. Peterson's testimony about information contained in Jackson's medical records. Mr. Peterson testified that Jackson's discharge show that Jackson's heart rate was stable and within normal limits and his oxygen saturation was 98%, within normal limits, indicating that he was breathing normally. Tr. IV, 61:21 – 63:13. His testimony fell within recognized exceptions to the rule against hearsay.

"Hearsay is not admissible unless any of the following provide otherwise: the Constitution of the State of Iowa; a statute; these rules of evidence; or an Iowa Supreme Court rule." Iowa R. Evid. 5.802. Exceptions to the rule against hearsay include exception for "records of a regularly conducted activity," "statements made for medical diagnosis or treatment," and "statement[s] of the declarant's then existing state of mind … or emotional, sensory, or physical condition." *State v. Buelow,* 951 N.W.2d 879, 884 (Iowa 2020) (quoting Iowa R. Evid. 5.803(3), (4), (6)).

In addition, a hearsay statement may, itself, include hearsay. "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule." Iowa R. Evid. 5.805. As Professor Doré explains,

> A common example of … double or multiple hearsay is a business record admissible under Rule 5.803(6) that includes statements by a declarant under no business duty to report. If the including statement, the business record, is admissible, the included statement will be admissible if it meets the requirements of another hearsay exception, such as present sense impression or excited utterances, statements of then-existing state of mind or statements for medical diagnosis or treatment. When each statement falls within an exception, the rule accepts the reliability of the including and included statements in combination.
>
> * * * *
>
> Not infrequently the included statement will be an opposing party's statement. Although a statement of a party-opponent is not hearsay by definition in rule 5.801(d)(2), the admissibility decision will be based on the same analytical framework applied to hearsay within hearsay. The including statement, if offered for the truth of the matter asserted, will require a hearsay exception. If a hearsay exception is found for the including statement, the included statement should be examined to determine if it is also hearsay and requires an exception or, although offered for its truth, is an opposing party's statement or other form of declaration not defined as hearsay.

7 IA PRAC § 5.805:1 (footnotes omitted).

The district court admitted Dale Peterson's challenged testimony on the ground that his testimony was not being admitted for the truth of the matters asserted and that it fell within the hearsay exception for then-existing state of mind or physical condition. Tr. 56:19 – 57:9. This Court may affirm admission of evidence if it was properly admissible on any ground. *State v. Fontenot,* 958 N.W.2d 549, 556 (Iowa 2021).

Jackson's medical records were admissible under the hearsay exception for business records. *See* Iowa R. Evid. 5.803(6). To admit a business record and avoid exclusion as hearsay, a party must establish a foundation for the record, including: (1) That it is a business record; (2) That it was made at or near the time of an act; (3) That it was made by, or from information transmitted by, a person with knowledge; (4) That it was kept in the course of a regularly conducted business activity; and (5) that it was the regular practice of that business activity to make such a business record. *State v. Fiems,* No. 18-2241, 2020 WL 1879700, *4-5 (Iowa Ct. App. Apr. 15, 2020) (citing *State v. Reynolds,* 746 N.W.2d 837, 841 (Iowa 2008)). The conditions must be "shown by the testimony of the custodian or another qualified witness" or be certified by the custodian. *Fiems*, 2020 WL 1879700 at *4 (quoting Iowa R. Evid. 5.803(6)(D)). The opposing party then has a chance to show the source of information or the preparation of the record indicate a lack of trustworthiness. *Fiems,* 2020 WL 1879700, at *4 (citing Iowa R. Evid. 5.803(6)(E)).

The testimony of Dale Peterson showed that Jackson's medical records were made when Jackson was admitted to the hospital after his arrest, the records were made by medical personnel at Broadlawns

Medical Center and that the records were made and transmitted by persons with knowledge of Jackson's condition. The records were also kept in the course of regularly conducted business activity on the part of Broadlawns and the Polk County jail, and it was the regular practice of the hospital and the jail to make and keep those business records. Mr. Peterson's testimony about those records was therefore admissible under the exception for records of a regularly conducted activity, Iowa Rule of Evidence 5.803(6). *State v. Buelow,* 951 N.W.2d 879, 884–85 (Iowa 2020); *see also In re Est. of Poulos,* 229 N.W.2d 721, 727 (Iowa 1975) ("We have long held that medical and hospital records are admissible, upon proper foundation, as an exception to the hearsay rule.").

Likewise, to the extent that that the medical records, and Mr. Peterson's testimony about them, relied upon the out-of-court statements of Jackson himself, Mr. Peterson's testimony did not run afoul of the rule against hearsay. The statements of a party opponent are not hearsay. *See* Iowa R. Evid. 801(d)(2); *and see State v. Tillman,* 532 N.W.2d 482, 484 (Iowa Ct. App. 1995).

To the extent that Jackson's medical records include information he provided regarding his current health, feelings, and

plans, that evidence was also admissible under the exception allowing for "[a] statement of the declarant's then existing state of mind … or emotional, sensory, or physical condition." Jackson's statements in the medical records regarding his current health, feelings, and plans are admissible under the exception allowing for "[a] statement of the declarant's then existing state of mind … or emotional, sensory, or physical condition." *Buelow*, 951 N.W.2d at 885 (quoting Iowa R. Evid. 5.803(3)).

Those portions of Jackson's records from Broadlawns Medical Center that report or rely on Jackson's own statements also fall within the exception for statements made for the purpose of medical diagnosis or treatment. *Buelow,* 951 N.W.2d at 884–85; *and see* Iowa R. Evid. 5.803(4)). Under this exception, a statement is admissible if it is "made for—and is reasonably pertinent to—medical diagnosis or treatment; and … [d]escribes medical history, past or present symptoms or sensations, or the inception or general cause of symptoms or sensations." Iowa R. Evid. 5.803(4)(A)–(B). Typically, such statements are "likely to be reliable because the patient has a selfish motive to be truthful" given that "the effectiveness of the medical treatment rests on the accuracy of the information imparted

to the doctor." *State v. Adams,* No. 21-0916, 2022 WL 5068010, at *4 (Iowa Ct. App. Oct. 5, 2022) (quoting *State v. Smith,* 876 N.W.2d 180, 185 (Iowa 2016) (citations omitted)).

Jackson has not shown that the district court erred in rejecting his hearsay objection to Dale Peterson's testimony about the contents of his medical records. Mr. Peterson's testimony that the records did not reflect that Jackson had any difficulty with breathing and that Jackson did not report that he had a history of blacking out or losing consciousness is not hearsay. Further, the records themselves fall with the business records exception to the rule against hearsay and information contained in those records that was supplied by Jackson falls within the exceptions for statements of a party opponent, statements of then-existing physical condition, and statements made for the purpose of diagnosis or treatment. The district court properly rejected Jackson's hearsay objection to Dale Peterson's testimony about the contents of Jackson's medical records.

D. Any Error in Admitting Testimony About the Contents of Jackson's Medical Records Was Harmless.

Finally, even if the court had erred in admitting the challenged testimony, any error would be harmless. A reversal is required for the

improper admission of evidence only if the exclusion affected a substantial right of a party. Iowa R. Evid. 5.103(a). "In a case of nonconstitutional error, the Court 'presume[s] prejudice—that is, a substantial right of the defendant is affected—and reverse[s] unless the record affirmatively establishes otherwise.'" *Buelow,* 951 N.W.2d at 890 (quoting *State v. Sullivan,* 679 N.W.2d 19, 30 (Iowa 2004)). This court has "relied on the existence of overwhelming evidence in finding harmless error." *Buelow,* 951 N.W.2d at 890 (quoting *State v. Parker,* 747 N.W.2d 196, 210 (Iowa 2008) (overwhelming guilt was present when multiple eyewitnesses identified the defendant, the defendant admitted to another that he committed the crime, and the defendant's alibi could not be corroborated)).

Here, there was overwhelming evidence that Jackson was driving the car that struck and killed a motorcyclist and overwhelming evidence that drug impairment, and not a medical condition, caused Jackson to cross the center line and strike the victim. That evidence is set out in detail in the statement of the facts, above. Briefly, witness Timothy Gilbert saw a black Prius cross the center line and strike a motorcyclist. Tr. II, 35:2-25; 36:5-24.

Witness Ashley Hobbs saw Jackson get out of the Prius. Tr. II, 47:14-21; 44:9 – 45:8; 45:15-20; 47:17-21. Jackson immediately denied that he had been driving. Tr. II, 45:9-14; 47:2-9. He then left the scene. Tr. II, 48:7-19.

Jackson had more than twice the therapeutic dose of methamphetamine in his system. Tr. III, 15:11-13; 21:11 – 22:8; 25:20 – 26:16. He also exhibited symptoms consistent with methamphetamine intoxication. Tr. II, 163:24 – 164:8. Further, Jackson never told anyone at the scene or officers that he was suffering from a medical emergency. In light of the overwhelming evidence of Jackson's guilt, he would not be prejudiced by any error in admitting testimony about his medical records.

The district court properly admitted testimony about the contents of Jackson's medical records. Those records were not subject to exclusion or suppression under federal HIPAA provisions. Jackson failed to preserve his challenge under the Iowa privilege statute and, even if the Court were to reach Jackson's claim under the Iowa statute, it should hold that Jackson waived his physician-patient privilege when he testified that he was suffering from a medical emergency at the time of the crash and to the actions of medical staff

in reaction to that claimed medical emergency. Jackson has also failed to show that testimony about the contents of his medical records was inadmissible hearsay. Consequently, the Court should reject Jackson's challenge to admission of testimony regarding his medical records and affirm his convictions.

CONCLUSION

The Court should affirm David Dwight Jackson's convictions for homicide by vehicle, operating a motor vehicle while Intoxicated, leaving the scene of an accident resulting in death, and theft in the second degree.

REQUEST FOR NONORAL SUBMISSION

Oral argument is unlikely to assist the Court in deciding the issue raised on appeal. Therefore, the State waives oral argument. However, if appellant is granted oral argument, counsel for appellee desires to be heard in oral argument, as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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