kSTATE OF MAINE
KENNEBEC, ss.

SUPREME JUDICIAL COURT
Sitting as the Law Court

LAW COURT DOCKET NO. Ken.-24-423

STATE OF MAINE
APPELLEE

V.

MICHAEL E. GREENLEAF, JR.,
APPELLANT

ON APPEAL FROM MAINE UNIFIED CRIMINAL COURT
BRIEF OF APPELLEE

Meaghan Maloney, Esquire
District Attorney
Tracy DeVoll, Esquire
Bar No. 8771
Prosecutorial District IV
Kennebec County Courthouse
95 State Street
Augusta, Maine 04330
(207) 623-1156

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

OTHER SOURCES

PROCEDURAL HISTORY

On May 28, 2022, the Defendant was charged with Operating Under the Influence of Alcohol in violation of Title 29-A M.R.S.A § 2411(1-A)(A). On July 19, 2022, the Defendant was arraigned and pled not guilty to the charge. Appendix, page 4, hereinafter AP at ___. A jury trial was held on August 21 & 22, 2024, Justice Daniel Mitchell presiding. On August 22, 2024, the jury returned a verdict of guilty and the Defendant was convicted of Operating Under the Influence of Alcohol, as charged. AP at 9. The court imposed a sentence of a $500 fine and 150 day license suspension. *Id.* The Defendant filed a Notice of Appeal on September 11, 2024. AP at 10.

STATEMENT OF THE CASE

1. Evidence at trial:

On May 28, 2022, around 1:30 a.m. Waterville Police Officer Mikayla Hodge and Sgt. Kyle McDonald were working an overnight shift. See Trial Transcript, Volume I of II (hereinafter "TT1"), page 36. The officers were parked in The Concourse watching vehicle and pedestrian traffic leaving the bars when they observed a van traveling the wrong way on a one-way street. TT1, p. 37. Officer Hodge drove after the van and noticed that it was in the middle of two lanes. When Officer Hodge stopped the van, she saw that it had almost struck a curb. *Id*. When Office Hodge made contact with the driver, later identified as the Defendant, he told her he was coming from Cancun's, where he drank two Margaritas. TT1, p. 38. The Defendant told her his first drink was at 10 p.m. and his second at 11:15 p.m. TT1, pp. 40-41. When asked for his license, the Defendant handed Officer Hodge his wallet. Officer Hodge looked in the wallet and identified the Defendant with his license. TT1, p. 39. Officer Hodge had the Defendant get out of the van to have him perform Field Sobriety Tests. TT1, p. 40. When the Defendant got out, Officer Hodge noticed he had glossy, red eyes, an odor of alcohol on his breath, and he spoke extremely fast. *Id.* At trial, Officer Hodge described field sobriety tests, and their purpose. TT1, pp. 40-42.

Officer Hodge asked the Defendant questions to confirm he was a good candidate to perform filed sobriety tests. TT1, pp. 42-43. Officer Hodge described the first test given, HGN, and the results of the test. TT1, pp. 43-46. Officer Hodge stated that she observed six out of six clues. TT1, p. 45. Officer Hodge then explained that through her training, six clues indicated that the person was "over the legal limit and they're impaired and should not be driving." TT1, p. 46. Defense objected to that testimony citing *State v. Taylor*,1977 ME 101, 50 A.2d 907, stating the officer was not allowed to connect HGN to a numerical meaning. *Id*. The State argued that Officer Hodge did not assign a number to HGN. TT1, p. 47. The court stated that "I think as long as she hasn't used the number up until this point, it's fine." TT1, p. 47. After further discussions the Court said it would review T*aylor* and reserve ruling on the matter. TT1, pp. 47-49.

Officer Hodge then described the Walk And Turn test and the Defendant's performance on that test. The Defendant had two clues of impairment, he did not walk heel to toe, and he stepped off the line. TT1, pp. 49-51. Officer Hodge explained the third test the Defendant performed, the One Leg Stand. Officer Hodge observed the Defendant had all four possible clues, he swayed, hopped, put his foot down and was off balance. TT1, pp. 51-53. Officer Hodge had the Defendant perform an alphabet test and the Defendant completed the test as instructed. TT1, p.

53. The Defendant then was given the task of counting backwards from 93 to 79 and he did not complete the test as instructed; he counted back to 69. TT1, p. 53.

In addition to the field sobriety tests Officer Hodge asked the Defendant to rate himself on a scale of 0 to 10, 0 being completely sober and 10 being fall-down drunk. The Defendant rated himself a 4. TT1, p. 54. The Defendant further described his condition as feeling "buzzed," but not drunk. *Id*. As a result of her observations, Officer Hodge stated that she "believed that he was over the legal limit and he was impaired." TT1, p. 55. Officer Hodge then placed the Defendant under arrest and took him to the Waterville Police Department for an intoxylizer test. *Id*. Officer Hodge then described the intoxilyzer test procedure, including the mouth check and the 15-minute observation period. TT1, pp. 55-56. During the wait period the Defendant spoke to Officer Hodge, asking if he could "sleep it off" and said he was worried, and didn't want to get charged. TT1, p. 58. The Defendant then blew into the intoxilyzer and the result was .13 BAC. TT1, p. 61.

The State then played a portion of a recording of the Defendant in the intoxilyzer room at the Waterville Police Department. TT1, pp. 64-66. The Defendant made statements in the booking room video that were incriminating, consistent with his concerns about being over the limit and facing an OUI charge. The video was admitted into evidence without objection. TT1, p. 66.

Reviewing the time frame in this case, Officer Hodge stated that she stopped the Defendant at 1:30 in the morning, TT1, pp. 67, 74, and the wait period for the intoxylizer test was 1:55. a.m. TT1 p. 74. The first Intoxylizer reading was at 2:15 a.m., and the second reading was at 2:18 a.m. *Id*.

Sgt. Kyle McDonald testified that he was parked near Officer Hodge and also observed the Defendant driving his van the wrong way around 1:30 a.m. TT1, p. 98. Sgt. McDonald arrived as back up shortly after Officer Hodge stopped the Defendant. TT1, p. 99.

Waterville Police Officer Blake Wilder was the site coordinator for the Intoxylizer Instrument at the Waterville Police Department in May of 2022. TT1, p. 103. Officer Wilder testified that in May 2022, the Intoxilyzer was performing as it should be. TT1, p. 105. Reviewing the Intoxilyzer paperwork for the Defendant's test, Officer Wilder saw nothing to indicate the intoxilyzer was not working properly. TT1, p. 108. State's Exhibit 1, the Defendant's intoxilyzer test result of .13 BAC was admitted into evidence without objection. *Id*.

Defense called DHHS Chemist Maria Pease. By agreement, Ms. Pease was qualified as an expert. TT1, p. 118. On direct by Defense counsel Ms. Pease stated the Defendant's alcohol level (BAC) would most likely be different when he drove at 1:30 a.m., than at 2:18 a.m., at the completion of the intoxylizer test. TT1, p. 123.

Given the lack of details provided on direct, Ms. Pease could not opine whether the Defendant's BAC was higher or lower at 2:18 am compared to 1:30 a.m. TT1, p. 125. However, on cross, considering the details in this case (the Defendant's self reported drink history - first drink at 10 p.m., and the second drink at 11:15 p.m.), Ms. Pease did form an opinion. TT1, pp. 128-129. Ms. Pease stated that with the Defendant's drink history, by the time he took the intoxylizer test at 2:18 a.m., his BAC was declining, meaning his BAC would have been higher while driving. TT1, pp. 128-129, 137-140. Ms. Pease also stated that the Defendant had to have drunk more than two standard drinks to test .13 BAC. TT1, pp. 132-133.

The Defendant chose to testify. TT1, p. 145. The Defendant said he was out in Waterville on May 28, 2022, to celebrate his achievements. TT1, p. 146. He and a friend ordered Margaritas around 10 p.m. and another around 11 p.m. TT1, p. 147. The Defendant described the drinks as "pretty strong." *Id*. On cross the Defendant admitted his drinks were "very big" and that he felt buzzed. TT1, p. 156. The Defendant further described the drinks as a double or a triple, "like in a goldfish bowl," and said he felt affected by the drinks. TT1, p. 157.

After the close of evidence, the court brought up Defense's objection to Officer Hodges' testimony regarding HGN, and that according to her training six clues indicated "that they're over the legal limit and impaired and should not be driving." TT1, p. 46. Defense cited *State v. Taylor*, 1997 ME 81, 694 A.2d 907,

arguing Officer Hodge could not say "over an 08." TT1, p. 163. The court thought Defense was construing *Taylor* too broadly, and an officer could make a general statement, such as Officer Hodge made in this case. TT1, pp. 164-165. The court believed *Taylor* was about officers getting specific about the BAC. *Id.* The court found the officer's testimony was fair and allowed it. TT1, p. 166.

2. <u>Jury Deliberations:</u>

Following closing arguments, the court advised the jury of instructions that had previously been approved by both the State and Defense. TT1, pp. 190-202. (Alexander Maine Jury Instruction Manual.) The jury retired to deliberate at 3:15 p.m. TT1, p. 202. At 4:16 p.m. the court and parties convened to discuss the first note from the jury, Note #1. TT1, p. 202. The note said, "Can we have a copy of the statement for OUI, Impaired or .08?" *Id*. The court interpreted the note to mean the jury was "looking for clarification on the definition of intoxication…" *Id.* After further discussions with the parties the court decided to reinstruct the jury about the crime of OUI. TT1, p. 205.

The court addressed the jury's first Note stating:

> Please be seated. Okay. Ladies and gentlemen of the jury, the Court has received the note from the foreperson. The court has reviewed the note. The Court has also discussed the note with counsel in this case. And the Court believes that the way to address the note is to review with you again the instruction on when a person is impaired for the purposes of the operating under the influence law in the State of Maine.

> And so I'm going to carefully reread that instruction to you. And I'm hopeful that that will provide the information that you need to the extent that you're looking for clarification, that it provides the clarification. And okay? Operating under the influence. A person is guilty of operating under the influence if the State proves beyond a reasonable doubt that the defendant operated a motor vehicle, and at the time of the operation, the defendant had a blood alcohol content .08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath or was under the influence of alcohol. That is the definition of impaired driving under the statute.

TT1, pp. 206-207.

The jury retired again at 4:23 p.m.

The jury gave the court a second note, Note # 2, and the parties reconvened at 5:32 to review it. TT1, p. 207. The second note said, "What happens if we can't come to a unanimous decision? We seem to be deadlocked." TT1, pp. 207-208. The court proposed reading the standard Alexander jury instruction, 8.6, addressing that issue. TT1, p. 208. The court read the instructions to counsel, and all were in agreement with that response to the second note. TT1, p. 210.

At 5:32 p.m. the court gave the following instruction:

> Thank you. Please be seated. Ladies and gentlemen of the jury, I have received the most recent note from the foreperson, which indicates that you're having some difficulty reaching a unanimous decision. I'm going to give you a further instruction, and I am going to send you back once again to try to reach a decision. And that is standard practice, okay? I'm not -- not singling this particular jury out. Let me give you the following instruction. Members of the jury, your note indicates the difficulties you are having agreeing upon a verdict. Let me make some observations that may be helpful for your consideration when you

> return to the jury room. First of all, the amount of time you've spent in deliberations so far is not unusual for this type of case. Responsible deliberation requires a thorough discussion of all issues and points of view. The fact that you have taken this amount of time suggests you are doing your job responsibly. As I indicated in my closing instructions, the verdict you reached must represent the considered judgment of each of you as a juror. In order to return a verdict, that verdict must be unanimous. Whether the verdict is not guilty or guilty, all 12 of you must agree, as you are aware. It is your duty as jurors to talk with one another and to deliberate with a view toward reaching an agreement if you can do so without sacrificing your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, keep an open mind. Do not hesitate to reexamine your own views and change your opinions if you are convinced that your opinion -- your particular opinion is erroneous. But -- but do not surrender your honest belief as to the weight or effect of evidence solely because -- That's -- that's a sign, right? When they flick the lights, you don't (indiscernible) but you can't stay here. But do not surrender your honest belief as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Remember at all times (indiscernible) instructions, you are not partisans, okay? You are judges of the facts. Your sole interest is to determine the facts, determine whether the State has proven the charge beyond a reasonable doubt based on the evidence in the case. Keep these observations in mind as you return to the jury room for further deliberations.

TT1, pp. 211-213.

The jury was then released to continue deliberations at 5:50 p.m. TT1, p 213.

The jury sent a third note, Note # 3, stating, "May we have a copy of the arrest report? *Id*. The court discussed, with counsel, a response and ultimately decided to respond with, "No, we cannot do that." TT1, pp. 213-215.

The court then met with counsel to go over a fourth note, Note # 4. TT1, p. 215. It said, "The information that is necessary to achieve a unanimous decision is not in evidence. We are deadlocked. The jury is at eight, four, split. This split had not changed by one single vote in two hours and 20 minutes." *Id.* The court and counsel had a lengthy discussion about how to respond to the note. There was discussion about the court declaring a mistrial, but ultimately all agreed against that, and to reading additional instructions to assist the jury in their deliberations. TT1, pp. 215-228. However, there were disagreements as to what those additional instructions would be. Defense objected to a rereading of the charge. TT1, p. 223, In addition to rereading the presumption of innocence and burden of proof, Defense asked for a 6-12 instruction, regarding missing witnesses. TT1, pp. 225-226, 231-232, 235, 240, TT2, p. 12. The court found that instruction was not "on point" and declined to read it. TT1, p. 226.

The jury was brought back at 6:56 p.m. and the court read the following instructions:

> Ladies and gentlemen of the jury, I've received the last note that came in. Court has had some extended discussion with the parties about it. First of all, I want to say that it is absolutely clear to the court that you are approaching this task in a very serious and conscientious fashion. And the court appreciates that and -- and understands that. The court also understands that you've been at it for a while, okay? And it will not go on indefinitely, I promise you. That being said, there are a couple of portions of the instructions that I provided to you that I am going to repeat. And let me -- let me get to those. First of all, with regard

to the presumption of innocence and the burden of proof in this case, the law presumes the defendant to be innocent. The defendant, although accused, begins the trial with a clean slate with no evidence against him. This presumption of innocence alone is sufficient to acquit the defendant unless you decide that the defendant's guilt is proven beyond a reasonable doubt after careful consideration of all the evidence in this case. The State is not required to prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is just what the words imply, a doubt based on reason and common sense. It is not a doubt based upon mere guess, surmise, or bare possibility. It is a doubt which a reasonable person without bias, prejudice or interest, and after conscientiously weighing all the evidence, would entertain as to the guilt of the accused. To convict the defendant of a criminal offense, the evidence must be sufficient to give you a conscientious belief that the charge is almost certainly true. You must consider only the evidence in the case in reaching your verdict. With respect to operating under the influence, a person is guilty of operating under the influence if the State proves beyond a reasonable doubt that the defendant operated a motor vehicle and at the time of the operation the defendant had a blood alcohol content of .08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath or was under the influence of alcoholic beverages. State -- Maine State Law does not prohibit drinking and driving. The question is whether someone was under the influence. If a person is under the influence, they -- pardon me -- a person is under the influence if that person's senses, their physical and mental faculties are impaired, however slightly or to any extent, by the alcohol that person had to drink. The State does not have to prove that the person was falling-down drunk. The State need only prove beyond a reasonable doubt that -- that the person's physical and mental capacities -- faculties were impaired as I have described. And then finally, what I want to say to you is if after further consideration, you're able to reach a verdict, you should report that to the court in accordance with my closing instructions and these further instructions. If, after further deliberations, you still believe that you cannot reach a verdict, you should advise me of that in writing. I'm going to send you back again and ask you to -- to deliberate further and communicate with the court when you're ready to do so.

TT1, pp. 236-238.

After that instruction the court decided to allow the jury to use their phones to contact loved ones and make any necessary arrangements. TT1, p. 241. The jury was then out until 7:44 when the court received a fifth note, Note # 5. It said, "Can we have the full court's transcript of Officer Hodge's testimony?" TT1, p. 241. The court checked and was told that the Officer's testimony would take about an hour. *Id*. Defense counsel objected to that request. TT1, p. 241-242. The State thought it was a reasonable request and might answer the questions that the jury appeared to be looking for in order to make a decision. TT1, p. 243. The court thought it was a reasonable request and "not unusual or unprecedented" for the jury to hear playback of testimony. *Id.* The audio recording of Officer Hodge's testimony was determined to be around 50 minutes, and the court decided to let the jury go home and listen to the recording the following day. TT1, p. 246. Defense objected to sending the jury home. TT1, pp. 244-247. The time was 7:45 p.m. and the court decided it would read an instruction from Alexander, 8.5 for separation after deliberation, and send the jury home for the night. *Id*.

The jury was brought back in at 7:53 p.m. and told they would hear Officer Hodge's testimony the following day and would be released for the night after instructions. TT1, pp. 247-248. However, before the court could do that, it was handed a sixth note, Note # 6, by the court officer. TT1, p. 248. The foreperson spoke up and said the note that was just handed over was not intended for the court

at that time, saying "not till we –not till we got an answer to the last one." *Id*. The court then handed that note back to the foreperson. *Id*. The court then informed the jury that their request from Note #5 would be granted and they would hear Officer Hodge's testimony. *Id*. The court then said that the jury had been deliberating for five hours and had not had dinner, so they would be released until the following morning, at which time they would hear Officer Hodge's testimony. TT1, p. 249. The court then read standard instructions and dismissed the jury at 8 pm. TT1, pp. 250-252.

The following morning the court met with counsel to discuss how to proceed, and to put on the record what happened the night before with Note #6. Trial Transcript, Volume II of II (hereinafter "TT2"), page 4. The court stated that it had not yet determined whether the note was formally submitted. *Id*. Defense counsel again asked for a 6.12 instruction and a repeat instruction regarding the presumption of innocence and the burden of proof. TT2, pp. 9, 11-13. The court declined to give the 6.12 instruction or reinstruct the other instructions requested. TT2, pp. 10-13.

At 9:30 a.m. the jury returned to the courtroom and the court advised them that they were going to hear Officer Hodge's testimony. TT2, p. 14. Prior to the playback, the court asked the foreman if he had note #6, and he said he did not. TT2, p. 15. Officer Hodge's testimony was replayed, ending at 10:27 a.m. *Id*. The court then gave the following instructions:

> All right. So thank you, ladies and gentlemen. That concludes the replay of Ofc. Hodge's testimony. Before I send you back, I am going to read to you one further instruction. This is a repeat of an instruction that we had, and it has to do with communication between you and the court, okay? So please pay attention. And this is the -- this is the instruction. If during your deliberations you want to communicate with me, you should send a note signed by your foreman through one of the court officers. No member of the jury should ever attempt to communicate with me by any way except a signed writing, and I will not communicate with any member of the jury about issues in the case, except in writing or orally here in open court. Also, please understand that our court officers and staff cannot communicate with you about the merits of the case or the issues you are deciding. Finally, remember that you must not tell anyone, not even me, how you stand individually or collectively on the question of guilt or innocence until after you have reached a unanimous verdict or until you are otherwise discharged. So with that, before I have you recess, I'm going to have a brief sidebar with the lawyers, okay? So just give us a moment. Thank you.

TT2, pp. 15-16.

After the instructions, the court talked to counsel sidebar about whether the jury should resume deliberations before hearing testimony regarding Note #6. TT2, p. 17. The court and counsel agreed that the jury should start deliberations. TT2, p. 18. The jury resumed deliberations at 10:31 a.m. TT2, p. 19.

While the jury was deliberating, court Officer Lindsay Lovering was called to testify about Note #6. TT2, p. 21. Officer Lovering stated that she went to the jury room to bring them back to the courtroom when she was told there was another note. TT2, p. 21. Officer Lovering was not sure which juror spoke to her, but someone slid the note towards her and she picked it up and carried it back to the courtroom.

Id. Officer Lovering said she carried the note into the courtroom and slid it towards the judge. TT2, p. 22. Officer Lovering said she read the note but did not remember what it said word for word. *Id.* Officer Lovering said the note had to do with being deadlocked, not being able to go forward. TT2, p. 23. Officer Lovering believed the jury generated Note # 6 while waiting for her to retrieve them, and when discussing the testimony regarding Officer Hodge. *Id.* Officer Lovering said the jury had started walking back to court before she was slid the note. TT2, p. 24. Officer Lovering said Note # 6 was not handled in the normal manner, saying, "that's not standard protocol on note passing to the parties." TT2, p. 25. Officer Lovering agreed that she would not normally hand a judge a note with everyone in the courtroom; normally she got the note in the jury room and she would tell the judge. TT2, pp. 24-25. Officer Lovering said that when she passed the court Note #6 she believed it was the foreman who said "we don't need to do that now, or something along the lines of we don't need that yet until we hear the testimony, or something along the lines." TT2, p. 25. Officer Lovering stated further, "I don't recall word for word what he said. It was just basically along the lines of, don't pass the note yet. We don't need the note to be read yet until we hear the previous testimony that they requested." TT2, p. 25.

After Officer Lovering's testimony, the court addressed counsel about their thoughts regarding whether the court should have accepted Note # 6, and the impact

it had on the case. TT2, p. 28. During that discussion there was notice of another Note. The court decided to continue the current discussion before reading Note # 7. *Id*. After discussion with counsel, the court stated that "under the circumstances that transpired, it was not intended to be a note that the court ought to look at at that point, and the court treated it as such." TT2, p. 29. The court also pointed out that the note no longer existed. *Id.* The court stated that the arguments did not change the court's position and "the court's finding is that that note was not delivered in the usual course, that it was not intended to be delivered as a note given all the circumstances." TT2, p. 32.

The court then read Note #7 which said, "we have reached a unanimous decision." *Id*. The Clerk asked if they had reached a unanimous verdict, and the Foreman said they had. TT2, p. 33. He said, "We found the defendant guilty of OUI." *Id*. Defense asked the jury be polled and the jurors individually confirmed their guilty verdicts. TT2, pp. 34-35.

ISSUES PRESENTED FOR REVIEW

I. Whether The Trial Court Properly Admitted HGN Testimony.

II. Whether The Trial Court's Jury Instructions were Permissible, and Whether The Court Properly Ascertained the Jury was Not Deadlocked.

ARGUMENT

I. The Trial Court Properly Admitted HGN Testimony and That Testimony Did Not Quantify the Defendant's BAC.

This Court reviews challenges to the admissibility of lay witness opinion testimony for abuse of discretion. *State v. Abdirahmon Abdullahi*, 298 A.3d 815, 826 (citing *State v. Patton*, 2012 ME, 101, ¶ 20, 50 A.3d 544). Officer Hodge testified that the first field sobriety test she had the Defendant perform was Horizontal Gaze Nystagmus (HGN). TT1, p. 43. Officer Hodge stated HGN provides information about whether a person is impaired. *Id*. Officer Hodge testified that the Defendant's HGN test results (six clues) indicated to her "that they're over the legal limit and they're impaired and should not be driving." TT1, p. 46. Defense objected to that testimony referencing *State v. Taylor*, 1997 ME 81, 694 A.2d 907, claiming it "connected to a numerical meaning." TT1, p. 46. The court withheld its ruling on the objection, choosing to re-read *Taylor* first. TT1, p. 48. Defense's objection was ultimately overruled. TT1, p. 166. The court determined that Defense's reading of *Taylor* was too broad, and "*Taylor* was about officers trying to get much more specific about the BAC." TT1, pp. 164-165.

In *Taylor*, the court recognized the reliability of the HGN test stating, "We are convinced that the Horizontal Gaze Nystagmus test is sufficiently reliable to be

admitted as evidenced in future cases." *Taylor*, 987 ME 81, ¶ 11, 694 A.2d 907. The court, however, did limit its use, prohibiting the HGN results to precisely quantify blood alcohol content. *Taylor*, 987 ME 81, ¶ 13, 926 A.2d 1173. In *State v. Just*, 2007 ME 91, 926 A.2d 1173, this court provided further guidance in the admissibility of HGN testimony. In *Just,* this court determined that the officer was permitted to testify that "the HGN test showed evidence of impairment or intoxication. " *Just* 2007 ME 91, ¶ 17, 926 A.2d 1173.

In the present case, Officer Hodge did not testify that the HGN test results were related to any number, or particular BAC. Officer Hodge said she was instructed that a result of six clues indicated that "they're over the legal limit and they're impaired and should not be driving." TT1, p. 46. Officer Hodge's use of "over the legal limit" does not refer to any number. On cross, Officer Hodge testified that she might charge a person with OUI if their BAC was under .08, "depending on what the—his limit was, the—the test result was." TT1, p. 89. Officer Hodge stated she could, and had, charged a person with OUI with a test below .08 so long as it was a .05 or above. *Id*. That testimony reveals that Officer Hodge's use of "over the legal limit" was not tied to a number, but to impairment. Although Defense kept arguing "over the legal limit" meant over .08, it did not. A person is guilty of OUI if they are impaired *or* .08 BAC or greater. 29-A M.R.S.A. § 2411 (1-A)(A). (*Emphasis added*). That is clearly what Officer Hodge was referring to, not a specific number.

Even if this Court determines that Officer Hodge's HGN testimony using the term "over the legal limit" was an error, it was harmless. M.R. Cim. P. 52(a). An error is determined to be harmless "if it is highly probable that the error did not affect the jury's verdict." *Taylor,* ¶15, (quoting *State v. Phillpo*, 623 A.2d 1265, 1268 (Me.1993)) As in *Taylor*, there was an abundance of evidence in this case without the HGN testimony, to convict the Defendant of Criminal OUI. The Defendant drove the wrong way down a road, straddled two lanes, almost hit a curb, had an odor of alcohol, glossy red eyes, admitted to drinking two very strong, very large margaritas, had numerous clues on his FSTs, said he felt buzzed, rated his intoxication level a 4 on a 0-10 scale, said he was trying to sober up, asked if he could sleep it off, and tested at .13 BAC.

II. The Trial Court's Communications with the Jury Were Procedurally Correct and Fair, and It Properly Ascertained the Jury Was Not Deadlocked.

The jury wrote the following notes:

Note # 1: Can we have a copy of the statement for OUI, impaired or .08? TT1, p. 202.

Note # 2: What happens if we can't come to a unanimous decision? We seem to be deadlocked. TT1, pp. 207-208.

Note # 3: May we have a copy of the arrest report? TT1, p. 213

Note # 4: The information that is necessary to achieve a unanimous decision is not in evidence. We are deadlocked. The jury is at 8, 4, split. This split has not changed by one single vote in 2 hours and 20 minutes." TT1, p. 215.

Note # 5: Can we have a full court's transcript of Officer Hodge's testimony? TT1, p. 241

Note # 6: The Note was discarded by the jury and the court did not read it. The note was not intended for the court when given to the Court Officer. It was prepared in case the court rejected the jury's request in Note # 5. TT1, p. 248. TT2, pp. 19-32.

Note #7: We have reached a unanimous decision. TT1, pp. 28, 32.

Reviewing the jury notes above, the jury was looking for clarification regarding the charge of OUI (Note #1), and for a review of the evidence presented at trial (Notes # 3, #4, #5) . Although the jury was told not to indicate their split, they did. When addressing the Notes, the court gave standard Alexander Jury Instruction.

During the trial the Defendant did not request a mistrial after Notes #2 and #4. The Defendant agreed to further instruction by the court. The Defendant now argues Note # 6 was grounds for a mistrial even though Note # 6 was not officially given to, or read, by the court. It was clear from the court's discussions with the jury that Note # 6 was not a valid note and was not supposed to be passed to the court. It was only to be passed if their request in Note # 5 was denied by the court. The jury was ready to proceed with deliberations if the court granted Note # 5, allowing them to hear a replay of Officer Hodge's testimony. That is exactly what happened. After the readback of Officer Hodge's testimony the jury deliberated again, and soon after came back with a unanimous verdict. The jury was released to begin deliberations at 10:31 a.m. and in less than a half hour, while the court and counsel were still discussing Note #6, the jury reached a unanimous verdict. TT2, pp. 19, 28, 33.

In *State v. Braddick*, 794 A.2d 641 (2002), the Defendant argued the court erred when it gave supplemental instructions in response to a jury note indicating a possible deadlock. That note said, "We are a hung jury. We are looking for more information and do not feel it is available. We know this is not possible." *Id*. ¶ 2. The Defendant moved for a mistrial and was denied. Over defense objection, the court gave the standard Alexander Jury Instruction 8-6. (Jury Deadlock, Deliberations to Continue Instructions.) *Id*. In addition, the court told the jury that if needed, a readback of testimony or reinstructions were available. *Id*. Comparing that jury note to Note #4 in this case, they are very similar. In that case, *Braddick* objected to both the 8-6 instruction and the court's offer of a readback or reinstructions. This Court found that "given the jury's desire for more information … that was appropriate and not coercive." *Id*. ¶ 6. In *Braddick*, the Court further stated that "a jury may have then thought that a unanimous verdict would be impossible without more information, but that belief was not any different from the circumstance of a jury that thinks a unanimous verdict is impossible because, at that point, no jurors seem likely to change their minds. The fact that the jurors have indicated that they do not have enough information does not require a declaration of a mistrial. Instead giving the approved supplemental instruction is proper." *Id*. ¶ 5.

The Defendant now complains, though not on the record, that in response to Note # 5, the court did not instruct the jury "that continued deadlock was not

unacceptable to the court." Appellant's Brief p. 30. However, that instruction was given by the court previously in response to Note # 4, "If after further deliberations, you believe that you cannot reach a verdict, you should advise me of that in writing." TT1, pp. 238.

Defense arguments concerning Note # 6 are without merit. Discussions between the court and the foreman clearly establish that the Note was not intended to be passed. The Note was not read by the court and was discarded by the foreman. TT1, p. 248, TT2, p. 5. Even if the jury intended to indicate that they were deadlocked, there is no basis to assert that this would have resulted in a mistrial.

At no point during the trial did the Defendant move for a mistrial. After Note # 4, the court and counsel discussed the possibility of a mistrial, but ultimately the parties agreed that the court should reinstruct the jury and have them continue deliberations. TT1, pp. 218 -236.

CONCLUSION

For all the aforementioned reasons, this Court should affirm the Trial Court's judgment in this matter. Based on the above arguments, the State submits that Greenleaf's appeal should be denied.

Respectfully Submitted,

MAEGHAN MALONEY
District Attorney

DATED:

TRACY DeVOLL
Assistant District Attorney
Maine Bar No. 8771
95 State Street
Augusta, Maine 04330
(207) 623-1156

CERTIFICATE OF SERVICE

This brief was served on opposing counsel as required by Rule 1E of the Maine Rules of Appellate Procedure.

Dated this

/s/ TRACY DeVOLL
TRACY DeVOLL, ESQ.
Maine Bar No. 8771
tdevoll@kennebecda.com

Attorney for Appellee
TRACY DeVOLL
95 State Street
Augusta, Maine 04330
(207) 623-1156