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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-953

Filed 16 September 2026

Jackson County, Nos. 21CRS000052-490, 21CR000053-490, 21CR000055-490,
21CR000063-490, 19CRS703218-490, 21IF000015-490

STATE OF NORTH CAROLINA

v.

JOHNNIE RAY ARCH, Defendant.

Appeal by Defendant from judgment entered 4 April 2024 by Judge Gregory R. Hayes in Jackson County Superior Court. Heard in the Court of Appeals 27 August 2025.

King & Moss, PLLC, by Attorney John W. Moss, for defendant-appellant.

Attorney General Jeff Jackson, by Assistant Attorney General John W. Congleton, for the State.

STADING, Judge.

Johnnie Ray Arch (“Defendant”) appeals from final judgment entered upon jury verdicts convicting him of hit-and-run causing property damage, felony death by motor vehicle, felony serious injury by motor vehicle, reckless driving, operating a motor vehicle without a license, and driving left of center. Defendant asserts that the trial court erroneously admitted the results of a blood test into evidence and

erroneously denied his motion to dismiss the hit-and-run charge. Defendant also maintains that he received ineffective assistance of counsel (“IAC”) because, at the outset of trial, his attorney did not timely file a written motion to suppress supported by an accompanying affidavit. After careful consideration, we conclude the trial court did not commit error and dismiss Defendant’s IAC claim without prejudice.

I. Factual & Procedural Background

This case involves two separate motor vehicle collisions involving Defendant. The first collision was relatively minor. The second collision, however, led to the death of Hazel Schultz (“Decedent”). On 28 January 2021, the Jackson County Grand Jury returned true bills of indictment charging Defendant with: hit-and-run causing property damage; felony death by motor vehicle; felony serious injury by motor vehicle; reckless driving; operating a motor vehicle without a license; and driving left of center. Defendant’s trial commenced on 1 April 2024, where the evidence tended to show that, on 15 July 2019, Defendant operated a Volkswagen Beetle on Webster Road where it meets State Road 1359 in Jackson County. As Defendant rounded a sharp turn, he crashed head-on into a Kia Sorento, carrying Elizabeth McGaha and Decedent.

Sergeant Rocky Dietz of the North Carolina State Highway Patrol responded to the scene of the accident. Upon arrival, Trooper Dietz saw a four-door Kia “with the passenger side . . . imbedded . . . against the guardrail,” and “a blueish or purplish-type Volkswagen Beetle on the . . . opposite side of the road.” He also

observed Defendant “sitting on a guardrail” talking to emergency medical services (“EMS”). At this time, Trooper Dietz learned that Defendant was “involved in the wreck,” and EMS planned to transport Defendant to a regional hospital. Trooper Dietz examined the scene, looking for tire marks, skid marks, debris, and the point of impact. After examining the scene, Trooper Dietz went to the hospital where Defendant had been transported to speak with the parties involved.

Kadamma Jackson testified that, before the head-on collision with the Kia Sorento, she observed a Volkswagen Beetle driving erratically off Webster Road near a Baptist Church—a short distance away from the intersection of the head-on collision. Ms. Jackson explained that she was driving down the road—following a sport utility vehicle (“SUV”)—and a Volkswagen Beetle was trailing her. Ms. Jackson noted that suddenly, the Volkswagen Beetle “zoom[ed]” from behind, attempting to pass her and the SUV. When attempting to pass, Ms. Jackson testified that the Volkswagen “sideswipe[d]” the SUV traveling in front of her. Ms. Jackson then saw the driver of the Volkswagen Beetle stop, reverse, and drive down an adjacent road. She noted that the driver of the Volkswagen was a male with “dark brown hair.” After seeing the accident, Ms. Jackson “turned back around” to assist the individuals in the SUV and observed a scrape on the side of their car.

Theodore Kubit, who was another person traveling near the intersection of Webster Road and State Road 1359, observed a blue Volkswagen traveling at a “high rate of speed.” Mr. Kubit noted that when the Volkswagen approached a curve, “it

spun out, did a 360, [and] ended up on the grass[.]” Mr. Kubit saw a man exit the Volkswagen, look for damage, and drive off. Mr. Kubit then followed the Volkswagen out of concern that “somebody might need help.” After driving about half a mile, Mr. Kubit came upon the scene of the head-on collision, where he observed three vehicles, including the Volkswagen. At trial, Mr. Kubit identified Defendant as the operator of the Volkswagen Beetle.

Approximately four days after the head-on collision, Trooper Dietz learned that Decedent passed away due to surgical complications. Trooper Dietz testified that upon speaking with the owner of the Volkswagen Beetle,¹ he became suspicious that Defendant was impaired at the time of the collision. Trooper Dietz therefore secured a search warrant to obtain the blood samples taken from Defendant at the hospital. Upon obtaining the vials of blood, Trooper Dietz sent them to the North Carolina State Bureau of Investigation for additional testing. However, the blood could not be tested since there “was an insufficient amount of blood” in the vials. Trooper Dietz thus filed an additional search warrant “for the actual medical records,” which he later procured.

¹ During pretrial motions, defense counsel revealed that, after some investigation, he discovered that Defendant’s “girlfriend” was in fact Defendant’s wife, who had since passed away after Trooper Dietz’s interview. At trial, Trooper Dietz testified that the owner of the Volkswagen Beetle was Debbie Laws Burrell.

At the outset of trial on 1 April 2024, Defendant moved to suppress the blood samples obtained from the first search warrant. However, Defendant did not move to suppress the results of the subsequent search warrant, which yielded the medical records. The trial court denied Defendant's motion to suppress, noting that Defendant provided "late notice," failed to include a supporting affidavit,² and failed to contest the results obtained from the medical records.

Dr. William Selby, the laboratory director for the hospital, testified as to the hospital's procedure for drawing blood as well as the results contained in Defendant's medical records. Dr. Selby noted that Defendant's blood was drawn by a registered nurse. He added that a member of his laboratory staff subsequently tested the blood for ethanol as a part of Defendant's medical treatment; that the machine used to test for ethanol was properly calibrated and functioning at the time; and that Defendant's blood test revealed the presence of 138.4 milligrams of alcohol per deciliter of blood. An expert in the field of blood alcohol testing opined that such a figure equated to a blood alcohol concentration of "[0].11, and that would be grams per a hundred milliliters of whole blood."³

² A motion to suppress evidence "must state the grounds upon which it is made[] . . . [and] be accompanied by an affidavit containing facts supporting the motion." N.C. Gen. Stat. § 15A-977 (2025).

³ As discussed, Defendant was charged with, inter alia, felony death by motor vehicle and felony serious injury by motor vehicle. See N.C. Gen. Stat. §§ 20-141.4(a1), -141.4(a3) (2025). Under each statute, both charges require that "[t]he person was engaged in the offense of impaired driving under G.S. 20-138.1 or G.S. 20-138.2[.]" See *id.* Under the relevant statute, "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area

At the close of the State’s evidence, Defendant moved to dismiss all charges for insufficient evidence, which the trial court denied. Defendant renewed his motion at the close of all evidence, which the trial court also denied. After deliberation, the jury returned guilty verdicts convicting Defendant of all offenses. For the felony death by vehicle conviction, the trial court sentenced Defendant to 97–129 months in the department of adult correction. For the reckless driving, operating a motor vehicle without a license, and hit-and-run causing property damage convictions, the trial court sentenced Defendant to a consecutive term of 120 days. And for the felony serious injury by vehicle conviction, the trial court sentenced Defendant to a consecutive term of 25–39 months. Defendant timely entered his notice of appeal in open court.

II. Analysis

Defendant asserts the trial court plainly erred in admitting the results of his blood draw into evidence and erred in denying his motion to dismiss the hit-and-run causing property damage charge at the close of evidence. Defendant also contends that he received IAC because his trial attorney failed to timely file an appropriate motion to suppress supported by an accompanying affidavit. We consider each contention in turn.

A. Blood Evidence Foundation

within this State: . . . After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.” N.C. Gen. Stat. § 20-138.1 (2025).

Defendant contends the trial court committed plain error by admitting the results of his blood draw into evidence because the State failed to lay a proper foundation. *See* N.C. R. App. P. 10(a)(4).⁴ Defendant’s plain error argument asserts that “the State did not present evidence showing how the blood evidence was drawn, transported to the hospital’s pathology lab, and handled once received by the lab.” Defendant thus maintains the State “established no chain of custody as to the tested vial of blood.” We disagree.

This Court reviews “unpreserved issues for plain error when they involve . . . rulings on the admissibility of evidence.” *State v. Davenport*, 386 N.C. 454, 465, 904 S.E.2d 738, 747 (2024) (quoting *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996)). Our jurisprudence establishes the following three-part test when conducting plain error review:

First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a “probable impact” on the outcome, meaning that “absent the error, the jury probably would have returned a different verdict.” Finally, the defendant must show that the error is an “exceptional case” that warrants plain error review, typically by showing that the error seriously affects “the fairness, integrity or public

⁴ While Defendant objected at trial, the basis of such objection was that the search warrant for Defendant’s blood test was issued without probable cause. On appeal, however, Defendant maintains that the trial court erred by admitting such evidence without a sufficient foundation. Since the latter argument was not raised on appeal, Defendant’s correctly acknowledges that it is unpreserved for appellate review. *See State v. Howard*, 228 N.C. App. 103, 107, 742 S.E.2d 858, 860 (2013) (citing *State v. Lawrence*, 365 N.C. 506, 527, 723 S.E.2d 326, 334 (2012)); *see also State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) (citing *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995)).

reputation of judicial proceedings.”

State v. Reber, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (citation modified).

“It is well settled in this jurisdiction that the effect of alcohol in the blood stream as shown by proper chemical tests is competent evidence on the question of intoxication.” *Robinson v. Life & Cas. Ins. Co.*, 255 N.C. 669, 672, 122 S.E.2d 801, 803 (1961); *see also* N.C. Gen. Stat. § 20-139.1 (2025) (“This section does not limit the introduction of other competent evidence as to a person’s alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.”). That said, “whether or not a blood alcohol test is admissible depends upon a showing of compliance with conditions as to relevancy in point of time, tracing and identification of specimen, accuracy of analysis, and qualification of the witness as an expert in the field.” *Robinson*, 255 N.C. at 672, 122 S.E.2d at 803; *State v. McDonald*, 151 N.C. App. 236, 239, 565 S.E.2d 273, 275 (2002). Put differently, “a foundation must be laid before this type of evidence is admissible.” *Robinson*, 255 N.C. at 672, 122 S.E.2d at 803.

“The expert witness who offers the results of these types of scientific tests must be in a position to [explain] the way the test is conducted, attesting its scientific reliability, and vouching for its correct administration in *the particular case.*’” *Johnson v. Charles Keck Logging*, 121 N.C. App. 598, 601, 468 S.E.2d 420, 422 (1996) (alteration in original) (citation omitted). But the witness who lays the foundation for such blood evidence need not be the person who actually drew the blood in

question. *See State v. Grier*, 307 N.C. 628, 632, 300 S.E.2d 351, 354 (1983) (“We do not interpret *Robinson* to hold that the person who draws the blood must testify in every case in order to establish a proper foundation for the admission of this evidence.”). Additionally, “any weakness in the chain of custody relates only to the weight of the evidence and not to its admissibility.” *Id.* at 633, 300 S.E.2d at 354 (citation modified); *see also State v. Campbell*, 311 N.C. 386, 389, 317 S.E.2d 391, 392 (1984) (noting that “any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility”).

The North Carolina Supreme Court has addressed proper foundation for blood tests. *See, e.g., State v. Drdak*, 330 N.C. 587, 411 S.E.2d 604 (1992). In that case, the defendant crashed his motor vehicle after drinking several alcoholic beverages. *Id.* at 589–90, 411 S.E.2d at 606. As a result, the defendant was transported to a local hospital where his blood was drawn as part of “a routine series of laboratory tests[.]” *Id.* at 590–91, 411 S.E.2d at 606. Upon analyzing the defendant’s blood, the medical technologist concluded his blood alcohol concentration “was 0.178 grams per milliliter of blood.” *Id.* at 591, 411 S.E.2d at 606. The defendant unsuccessfully moved to suppress the introduction of this evidence at trial by arguing that it was inadmissible. *Id.* at 592, 411 S.E.2d at 607. On appeal, a prior panel of this Court determined that the motion to suppress was erroneously denied since the blood test was not conducted in accordance with N.C. Gen. Stat. §§ 20-16.2 and 20-139.1. *Id.* In reversing that decision, the North Carolina Supreme Court noted that such an interpretation ran

afoul of N.C. Gen. Stat. § 20-139.1(a), which allows for other types of chemical testing in addition to the procedures set out for implied-consent offenses:

This contention of the defendant flies squarely in the face of the plain reading of the statute, N.C.G.S. § 20-139.1(a), which states: “This section does not limit the introduction of other competent evidence as to a defendant’s alcohol concentration, including other chemical tests.” This statute allows other competent evidence of a defendant’s blood alcohol level in addition to that obtained from chemical analysis pursuant to N.C.G.S. §§ 20-16.2 and 20-139.1.

Id. at 592, 411 S.E.2d at 607.⁵ The Supreme Court then stated that “[f]or the results of the blood test in the present case to be admissible, the State must produce evidence as to a proper foundation to sustain its admissibility.” *Id.*

In reviewing the record, the Supreme Court held that the State provided an adequate foundation supporting the blood test’s admissibility. *Id.* at 592–93, 411 S.E.2d at 607–08. The Supreme Court noted that the following evidence established a sufficient foundation:

The State showed that the hospital’s blood alcohol test was performed less than an hour after the defendant’s car crashed into the tree, that an experienced phlebotomist withdrew the blood sample under routine procedure pursuant to the doctor’s orders, and that a trained laboratory technician analyzed the blood sample using a Dupont Automatic Clinical Analyzer which was capable of

⁵ The cited statutory provisions are: N.C. Gen. Stat. § 20-16.2(a) (“Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense.”); and N.C. Gen. Stat. § 20.139.1(a) (“In any implied-consent offense under G.S. 20-16.2, a person’s alcohol concentration or the presence of any other impairing substance in the person’s body as shown by a chemical analysis is admissible in evidence. This section does not limit the introduction of other competent evidence as to a person’s alcohol concentration or results of other tests showing the presence of an impairing substance, including other chemical tests.”).

testing either whole blood or serum. The result was 0.178 grams per milliliter of blood. The result was recorded and relayed to the attending physician by computer screen in order to assist him in his determination of appropriate treatment of the defendant. The results of the test were made a part of the medical records of the hospital in the defendant's case. This evidence meets the requirements necessary to provide a proper foundation for the admission of the blood alcohol test results.

Id. at 592, 411 S.E.2d at 607–08.

Here, as in *Drdak*, the State provided sufficient evidence to establish a foundation for the admission of the results of Defendant's blood test. *See id.* The record reflects that Defendant was admitted to the hospital at 11:53 a.m. Dr. Selby, who directed the hospital laboratory that performed the test, testified to the following at trial as an expert witness in pathology: ethanol testing is conducted on-site when ordered by a provider; ethanol testing is "standard" at the laboratory and contains certain procedures for the collection of blood; once an order for an ethanol test is generated, the blood is drawn, placed in labeled tubes, and transported to the laboratory either through a tube system or by hand; the lab was accredited at the time of testing Defendant's blood; the laboratory's ethanol testing procedure uses an "Abbott analyzer" machine and an enzymatic method; the laboratory conducted daily tests to ensure the accuracy of the Abbott analyzer, and the Abbott analyzer was functioning properly on the day in question; enzymatic methods of measuring alcohol are standard to the industry; a registered nurse drew Defendant's blood in the emergency room; the test was ordered at 12:18 p.m. on the date of the accident; the

nurse drew Defendant's blood at 12:23 p.m.; a laboratory technician tested the blood thereafter that same day, which Dr. Selby confirmed by reviewing the data in "the machine analyzer"; the test yielded a result of 138.4 milligrams per deciliter of blood; and the results of the test were made a part of Defendant's medical record. Under this record, we conclude that the State offered sufficient evidence establishing a foundation for introducing the results of Defendant's ethanol test into evidence. *See Robinson*, 255 N.C. at 672, 122 S.E.2d at 803; *see also Johnson*, 121 N.C. App. at 601, 468 S.E.2d at 422.

Even though Dr. Selby did not personally conduct the test, he was "in a position to 'explain the way the test [was] conducted, attest[] [to] its scientific reliability, and vouch[] for its correct administration in *the particular case*.'" *Johnson*, 121 N.C. App. at 601, 468 S.E.2d at 422 (citation modified); *see also Grier*, 307 N.C. at 632, 300 S.E.2d at 354 ("We do not interpret *Robinson* to hold that the person who draws the blood must testify in every case in order to establish a proper foundation for the admission of this evidence."). Indeed, Dr. Selby confirmed how the test was conducted, the accuracy of the Abbott analyzer on the day in question, the reliability of using enzymatic methods of ethanol testing in the industry, and its administration in this particular case. *See Johnson*, 121 N.C. App. at 601, 468 S.E.2d at 422.

In *Johnson*, which Defendant argues is analogous to this case, there were "several discrepancies which affect[ed] the reliability of the [blood] test results." *Id.* There, this Court noted that although not required to establish a proper foundation,

“inconsistencies with these critical test results warranted a more thorough development of the chain of custody of plaintiff’s blood sample.” *Id.* at 601, 468 S.E.2d at 423. These inconsistencies included the following: the expert witness who analyzed the blood “had not drawn blood in years and . . . didn’t know what happened to th[e] . . . blood”; the phlebotomist who drew the blood was not identified at trial; the manner in which the plaintiff’s blood was drawn was not elicited at trial; “the date and time of the test were incorrectly marked”; “the technologist blamed the inaccuracy on human error or a possible power failure in the laboratory”; there were genuine “questions as to whether the machine was correctly calibrated when plaintiff’s test was conducted”; “a power failure could have affected the machine’s calibration and incorrect calibration can affect the reliability of blood tests”; and “an inadequate number of controls may have been run on . . . [the] . . . specimen which could affect the reliability of [the] test results.” *Id.* at 601–02, 468 S.E.2d at 422–23 (citation modified). This Court thus determined that “under these facts, there is insufficient evidence to establish that this critical blood alcohol analysis was scientifically reliable or that it was correctly administered in ‘compliance with conditions as to relevancy in point of time, tracing and identification of specimen, [and] accuracy of analysis.’” *Id.* at 602, 468 S.E.2d at 423 (citation modified).

Unlike *Johnson*, there are no deficiencies as to the calibration of the machine at the time of testing, the time at which Defendant’s blood was drawn, the time at which Defendant’s blood was tested, the nurse who drew Defendant’s blood, or the

reliability of the test conducted. Instead, the concern with respect to chain of custody relate to who tested Defendant's blood and how it was transported to the laboratory. Although it is unclear which specific lab technician tested the blood or whether the blood sample was transported to the lab by hand or via the tube system, "any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392; *see also Grier*, 307 N.C. at 633, 300 S.E.2d at 354.

For all these reasons, we hold that the trial court did not plainly err by admitting the results of Defendant's blood test into evidence. Defendant's assignment of plain error is overruled.

B. Motion to Dismiss

Defendant next argues that the trial court erroneously denied his motion to dismiss the hit-and-run charge causing property damage at the close of evidence because there was insufficient evidence that he was the perpetrator of the charged offense. We disagree.

"Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation modified).

“The question for a court on a motion to dismiss for insufficient evidence ‘is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense.’” *State v. Tucker*, 380 N.C. 234, 236, 867 S.E.2d 924, 927 (2022) (citation omitted). “If so, the motion is properly denied.” *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). “However, if the evidence is sufficient ‘only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed.’” *State v. Campbell*, 373 N.C. 216, 221, 835 S.E.2d 844, 848 (2019).

“Substantial evidence exists when ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ In other words, substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Id.* at 220–21, 835 S.E.2d at 848. If the evidence presented is circumstantial,

the court must consider whether a reasonable inference of defendant’s guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citation modified).

“When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable

inferences.” *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004). Additionally, “the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.” *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455–56 (citation omitted).

In this case, Defendant was charged with and convicted of hit-and-run causing property damage. The relevant statute provides that:

(c) The driver of any vehicle, when the driver knows or reasonably should know that the vehicle which the driver is operating is involved in a crash which results:

(1) Only in damage to property; or

(2) In injury or death to any person, but only if the operator of the vehicle did not know and did not have reason to know of the death or injury;

shall immediately stop the vehicle at the scene of the crash. If the crash is a reportable crash, the driver shall remain with the vehicle at the scene of the crash until a law enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed, unless remaining at the scene places the driver or others at significant risk of injury.

....

A willful violation of this subsection is a Class 1 misdemeanor.

N.C. Gen. Stat. § 20-166(c) (2025).

In this case, Defendant does not challenge whether there is substantial evidence supporting each element of the charged offense; instead, he maintains there is insufficient evidence proving that he was the operator of the Volkswagen Beetle at

the time of the hit-and-run collision. *See, e.g., State v. Steelman*, 62 N.C. App. 311, 313, 302 S.E.2d 637, 638 (1983); *State v. Newton*, 207 N.C. 323, 327–28, 177 S.E. 184, 186–87 (1934); *State v. Royster*, 224 N.C. App. 374, 382, 737 S.E.2d 400, 406 (2012). Defendant maintains that Ms. Jackson’s testimony is insufficient for the purposes of identity because she did not identify Defendant as the driver who sideswiped the SUV at trial. However, Defendant’s argument overlooks that “[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation omitted); *see also, e.g., Newton*, 207 N.C. 323, 177 S.E. 184.

In *Newton*, the defendants were convicted of several charges, including hit-and-run after they struck two children with a motor vehicle. 207 N.C. at 325, 177 S.E. at 185. At the close of evidence, the defendants moved “for judgment of nonsuit,” which the trial court denied. *Id.* The defendants thereafter appealed, arguing there was insufficient evidence to establish that they were the perpetrators of the offenses at hand. *Id.* at 326, 177 S.E. at 185. The Court disagreed with the defendants, concluding there was sufficient circumstantial evidence supporting a reasonable inference that they were the operators of the motor vehicle. *Id.* at 328, 177 S.E. at 187. The Court noted the following pertinent evidence: two men were traveling toward the town of Farmville in a Ford roadster; a witness saw a Ford roadster with yellow wheels about a quarter mile away from the accident; another witness saw a dark-colored car with yellow wheels strike the children; about ten minutes later, a

Ford roadster with yellow wheels was discovered wrecked on the same highway; all witnesses testified to seeing a Ford roadster with yellow wheels; the defendants were near the vehicle when law enforcement arrived; and the defendants admitted that they were in another accident. *Id.* at 326–28, 177 S.E. at 185–87.

In *Steelman*, our Court faced a similar question. There, the defendant moved to dismiss all charges at the close of evidence, arguing the State “failed to offer sufficient evidence to prove his identity as the driver of the vehicle at the time the offenses were committed.” *Steelman*, 62 N.C. App. at 313, 302 S.E.2d at 638. The trial court denied the motion. *Id.* The defendant maintained this same argument on appeal. *Id.* Upon review thereafter, this Court discerned no error, reasoning that the following circumstantial evidence established a reasonable inference that the defendant operated the motor vehicle in question:

In the present case, as in *Newton*, there was apparently a period of time when no one saw the car involved in the offenses. The defendant in this case theorizes that during that interval, the driver and passenger could have switched positions. This argument ignores the uncontroverted fact that Officer Parsons and the highway patrolman both described the driver as male and the passenger as female. The defendant also submits that some unknown third person could have got out from behind the wheel and let defendant drive. We recognize that there are numerous possibilities as to what might have happened on the logging road that night. For circumstantial evidence to be sufficient to overcome a motion to dismiss, it need not, however, point unerringly toward the defendant’s guilt so as to exclude all other reasonable hypotheses. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). The evidence is sufficient to go to the jury if it gives rise to “a reasonable

inference of defendant's guilt." *State v. Rowland*, 263 N.C. 353, 358, 139 S.E. 2d 661, 665 (1965). We have reviewed the evidence in the light most favorable to the State and find it sufficient to support a reasonable inference of defendant's guilt and hence withstand defendant's motion to dismiss.

Id. at 313–14, 302 S.E.2d at 638–39.

As in *Newton* and *Steelman*, our de novo review leads us to hold that there is substantial evidence allowing a juror to reasonably infer that Defendant was the perpetrator of the charged offense. At trial, Ms. Jackson testified to observing a Volkswagen Beetle strike another vehicle and drive off on Webster Road, which was near the site of the head-on collision. She also testified that a man with "dark brown hair" operated the Volkswagen Beetle. Around the same time, Mr. Kubit observed a Volkswagen traveling erratically at a "high rate of speed" within the vicinity of the hit-and-run collision seen by Ms. Jackson. Mr. Kubit observed the vehicle spin out onto the grass when rounding a curve, where he saw "something come off the car." Mr. Kubit then saw a man exit the Volkswagen, look for damage, and drive away. Mr. Kubit followed the Volkswagen, attempting to "catch up with it" out of concern that somebody might need help. After driving for about half a mile, he discovered that the Volkswagen had been in a head-on collision with a vehicle wrapped against a guardrail. Mr. Kubit affirmatively identified Defendant as the operator of the Volkswagen.

When viewed together in the light most favorable to the State, these testimonies support an inference that Defendant operated the Volkswagen Beetle that sideswiped the SUV. Ms. Jackson’s testimony supports a reasonable inference that the Volkswagen she observed was the same vehicle seen by Mr. Kubit. Both witnesses identified the vehicle as a Volkswagen Beetle; saw the vehicle within a similar vicinity; and identified the driver as a male. *Steelman*, 62 N.C. App. 313, 302 S.E.2d at 638; *Newton*, 207 N.C. at 326–28, 177 S.E. at 185–87. In fact, the State presented evidence that confirmed the site of the head-on collision and the hit-and-run collision are geographically close to one another. Additionally, the fact that Mr. Kubit observed that the Volkswagen had been damaged after running off the road is consistent with the Volkswagen having been in another accident—such as the hit-and-run collision with the SUV seen by Ms. Jackson. Thus, a reasonable inference supports that Defendant operated the motor vehicle which caused the hit-and-run collision. *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

We acknowledge the remote possibility that another Volkswagen Beetle could have been driving on the road at the same time. *See Steelman*, 62 N.C. App. at 313, 302 S.E.2d at 638 (“We recognize that there are numerous possibilities as to what might have happened on the logging road that night.”). But “for circumstantial evidence to be sufficient to overcome a motion to dismiss, it need not . . . point unerringly toward the defendant’s guilt so as to exclude all other reasonable hypotheses.” *Id.*; *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455–56 (citation modified)

(noting “the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence”). To that end, neither Defendant nor the State elicited evidence at trial questioning whether other similar looking Volkswagen motor vehicles traveled State Road 1359 or Webster Road at the time of the collisions.

For these reasons, the trial court did not commit error by denying Defendant’s motion to dismiss the hit-and-run charge causing property damage. Defendant’s assignment of error is overruled.

C. IAC

Defendant last asserts that he received IAC because his trial attorney failed to timely file his motion to suppress and failed to support the motion with an accompanying affidavit. Defendant, however, maintains that because the cold record is insufficient for appellate review, we should dismiss his IAC claim without prejudice so that he may file a motion for appropriate relief in the superior court. We agree.

“Whether a defendant received IAC at trial is a question of law reviewable *de novo*.” *State v. Parker*, 290 N.C. App. 650, 653, 893 S.E.2d 544, 547 (2023) (citation omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Clemons*, 274 N.C. App. 401, 409, 852 S.E.2d 671, 676 (2020) (citation omitted).

“A defendant’s right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel.”

State v. Todd, 369 N.C. 707, 710, 799 S.E.2d 834, 837 (2017). Our jurisprudence establishes “a two-pronged test for determining whether a defendant has received ineffective assistance of counsel.” *Id.*; see also *State v. Blakeney*, 352 N.C. 287, 307–08, 531 S.E.2d 799, 814–15 (2000). That test provides:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). “Thus, both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim.” *Todd*, 369 N.C. at 711, 799 S.E.2d at 837.

As to the first prong, “this Court indulges the presumption that trial counsel’s representation is within the boundaries of acceptable professional conduct.” *State v. McNeill*, 371 N.C. 198, 219, 813 S.E.2d 797, 812 (2018) (citation omitted). Indeed, “counsel is given wide latitude in matters of strategy, and the burden to show that counsel’s performance fell short of the required standard is a heavy one for defendant to bear.” *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001) (citation modified). As for the second prong—prejudice, “the defendant must show that there

is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Allen*, 378 N.C. 286, 298–99, 861 S.E.2d 273, 283 (2021) (citation modified).

“In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal.” *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). “IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). That said, “should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent MAR proceeding.” *Id.* at 167, 557 S.E.2d at 525. Pertinent here, “we have shown reluctance to conduct direct review of an IAC claim when the claim is based on evidence admitted at trial after counsel’s failure to obtain a suppression hearing due to violations of Article 53.” *State v. Rivera*, 264 N.C. App. 525, 540, 826 S.E.2d 511, 521 (2019); *see also State v. Johnson*, 203 N.C. App. 718, 722, 693 S.E.2d 145, 147 (2010) (holding “we cannot properly evaluate defendant’s claim of ineffective assistance of counsel on direct appeal because no evidentiary hearing was held on defendant’s motion to suppress”).

Relevant here, Chapter 15A, Article 53 of the North Carolina General Statutes provides the rules and procedures pertaining to motions to suppress evidence. N.C. Gen. Stat. § 15A-971, *et seq.* (2025). A motion to suppress evidence “must be in writing and a copy of the motion must be served upon the State. The motion must state the grounds upon which it is made, [and] [t]he motion must be accompanied by an affidavit containing facts supporting the motion.” *Id.* § 15A-977(a) (2025). “If the State gives notice not later than 20 working days before trial of its intention to use evidence and if the evidence is of a type listed in G.S. 15A-975(b), the defendant may move to suppress the evidence only if” he raises the motion no “later than 10 working days following receipt of the notice from the State.” *Id.* § 15A-976(b) (2025).

Here, the State provided Defendant notice that it planned to offer his hospital record into evidence on 12 October 2023.⁶ *Id.* Yet, defense counsel did not file his written motion to suppress until 1 April 2024—outside the ten-day limitation set out in subsection 15A-976(b). Additionally, the record tends to show defense counsel did not attach “an affidavit containing facts supporting the motion,” and did not challenge the subsequent search warrant by the State yielding the results of Defendant’s blood test. *Id.* § 15A-977(a). The trial court therefore denied Defendant’s motion at the outset of trial without conducting an evidentiary hearing:

THE COURT: [I]’ve looked through the file. At all

⁶ The record reflects that the notice of intent was filed on 12 October 2023. However, at trial, both the State and the trial court stated the notice was dated 20 May 2022. In any event, this discrepancy is immaterial.

times, . . . [Defendant] was represented by counsel, and the appropriate motion could have and should have been filed by those counsel. There is no affidavit included with the motion to suppress. And the search warrant at issue that the defendant seeks to suppress was really the issue related to the blood vials, and it doesn't even appear that that search warrant was going to be involved in this case since the blood vials, the crime lab determined, were insufficient for any samples, and so the search warrant is only going to deal with the medical records from the hospital. For all those reasons, that is, the late notice, the failure to include an affidavit, and the search warrant being for the blood vials and not the hospital records, the motion to suppress will be denied.

Even if we were to assume, without deciding, that these actions satisfy the first prong of *Strickland*, we are unable to discern whether Defendant suffered prejudice as a result. *See Rivera*, 264 N.C. App. at 535, 826 S.E.2d at 519 (holding “the record before us is insufficient for review of the prejudice prong of the *Strickland* test on direct appeal”). Defendant’s written motion to suppress was made on the basis that Trooper Dietz lacked probable cause to secure the July 2019 search warrant for the hospital’s blood samples. More specifically, Defendant challenged the warrant’s reliance upon statements from an interview between Trooper Dietz and Defendant’s unnamed girlfriend since no other evidence showed that Defendant was impaired at the time of the accident. The affidavit for the warrant provided the following:

[Trooper Dietz] has interviewed the girlfriend of [Defendant] and she told the officer that [Defendant] suffers from alcoholism and drinks every day. She further told this officer that he consumed alcohol the night preceding the collisions. She confirmed [Defendant] was diabetic and sometimes had low sugar readings.

The November 2020 search warrant for Defendant’s medical records relied on this *exact same information* from Defendant’s girlfriend. Thus, at the outset of trial, even though Defendant’s written motion did not request as such, defense counsel stated that his goal was “to suppress any evidence that was submitted by the hospital on [his] client.” Defense counsel therefore “requested an evidentiary hearing prior to the selection of the jury.”

Since an evidentiary hearing was not conducted, we do not have the benefit of Trooper Dietz’s testimony—or other potential witnesses—concerning the reliability of the information underlying the warrant. *State v. Jackson*, 249 N.C. App. 642, 648–49, 791 S.E.2d 505, 510 (2016); *Rivera*, 264 N.C. App. at 539, 826 S.E.2d at 521 (“The same concerns are present on direct appeal of an IAC claim when no suppression hearing has been conducted. This Court can only surmise who might have testified at the suppression hearing and what evidence that testimony would have elicited.”). We therefore cannot determine whether Defendant would have succeeded had defense counsel timely filed the written motion, attacked the relevant search warrant, and attached an accompanying affidavit.

Put differently, “we would have to hold, at least implicitly, that there was no legitimate possibility that additional relevant evidence would have been elicited had a suppression hearing been conducted in this case.” *Rivera*, 264 N.C. App. at 536, 826 S.E.2d at 519. As in *Rivera*, “we cannot know what evidence might have been produced in a hearing that never occurred[.]” *Id.* Additionally,

without a suppression hearing, the State is not given the opportunity to tailor its evidence and arguments in response to the arguments set forth in a defendant's motion to suppress. Further, the defendant's counsel cannot fully present his legal arguments, introduce evidence in support of his arguments, nor directly counter the State's evidence through cross-examination or the admission of contradictory evidence.

Id. Accordingly, we dismiss Defendant's IAC claim without prejudice. *See id.* at 541, 836 S.E.2d at 522 (citation modified) (dismissing "without prejudice to defendant's right to file a motion for appropriate relief in the superior court based upon an allegation of ineffective assistance of counsel").

III. Conclusion

We hold the trial court neither committed plain error by admitting the results of Defendant's blood test at trial, nor by denying Defendant's motion to dismiss the hit-and-run causing property damage charge at the close of evidence. And since the cold record is insufficient for our review of Defendant's IAC claim, we dismiss it without prejudice.

NO ERROR IN PART; DISMISSED IN PART.

Judges ZACHARY and WOOD concur.

Report per Rule 30(e).