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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

Court of Appeals of New Mexico  
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Mark Reynolds

4 **No. A-1-CA-41442**

5 **STATE OF NEW MEXICO,**

6 Plaintiff-Appellee,

7 v.

8 **STEPHEN CHARLES BAILEY,**

9 Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**

11 **Brett Loveless, District Court Judge**

12 Raúl Torrez, Attorney General

13 Santa Fe, NM

14 Tyler Sciara, Assistant Solicitor General

15 Albuquerque, NM

16 for Appellee

17 Bennett J. Baur, Chief Public Defender

18 Caitlin C.M. Smith, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

1 **OPINION**

2 **DUFFY, Judge.**

3 {1} Defendant Stephen Charles Bailey appeals his conviction for driving while  
4 intoxicated (DWI), contrary to NMSA 1978, Section 66-8-102(A) (2016), arguing  
5 that the results of his blood-alcohol test should have been excluded at trial because  
6 the phlebotomist who drew his blood was not authorized to do so under the Implied  
7 Consent Act, NMSA 1978, §§ 66-8-105 to -112 (1978, as amended through 2025).  
8 Defendant contends the phlebotomist, who owned and operated her own phlebotomy  
9 business, did not satisfy the statutory requirement of being “employed by a hospital  
10 or physician.” *See* § 66-8-103 (1967, amended 2025)<sup>1</sup> (“Only a physician, licensed  
11 professional or practical nurse or laboratory technician or technologist employed by  
12 a hospital or physician shall withdraw blood from any person in the performance of  
13 a blood-alcohol test.”). Under the facts and circumstances presented in this case, we  
14 agree. Because Defendant’s blood was not drawn by a person authorized to do so  
15 under Section 66-8-103, the results of the test are inadmissible. And because the  
16 admission of the results at trial prejudiced Defendant, we reverse his conviction on  
17 this ground and remand for a new trial.

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<sup>1</sup>The Legislature amended Section 66-8-103 in the 2025 Legislative Session, and the amendment took effect on June 20, 2025. This case concerns the pre-2025 version of the statute and all citations in this opinion refer to the version of Section 66-8-103 adopted in 1978, which remained in effect until the 2025 amendment.

1 {2} Defendant additionally challenges the district court’s authority to suspend his  
2 sentence and impose a term of probation because, at the time of sentencing,  
3 Defendant had already spent more time in pretrial custody than the maximum  
4 sentence allowed by statute. This issue is moot, and we decline to reach the merits  
5 in this appeal.

6 **BACKGROUND**

7 {3} In May 2021, Defendant was driving a tow truck in Albuquerque with a friend  
8 riding along in the passenger seat. After stopping at a gas station, the passenger either  
9 jumped or fell out of the passenger side door as Defendant was making a right turn  
10 out of the gas station. The passenger was run over by the rear wheels of the tow truck  
11 and died from his injuries. Defendant kept driving, but was stopped by a Bernalillo  
12 County Sheriff’s deputy shortly thereafter. When the deputy approached the driver’s  
13 side door of the tow truck, he noticed that Defendant had bloodshot and watery eyes,  
14 slurred speech, and smelled of alcohol. After conducting standardized field sobriety  
15 tests, the deputy arrested Defendant.

16 {4} Law enforcement obtained a warrant for a blood sample and transported  
17 Defendant to Lovelace Hospital, where Kim Shelby, a phlebotomist, drew  
18 Defendant’s blood for testing. The results of the test showed that Defendant’s blood  
19 alcohol content (BAC) was 0.21g/100ml. The State charged Defendant with one  
20 count of homicide by vehicle (DWI), contrary to NMSA 1978, Section 66-8-101(A),

1 (C) (2016), and one count of knowingly leaving the scene of an accident resulting in  
2 great bodily harm or death, contrary to NMSA 1978, Section 66-7-201(A), (B)  
3 (1989).

4 {5} Defendant moved to suppress the blood test results on the ground that Shelby  
5 was not authorized to draw blood because she was not “employed by a hospital or  
6 physician,” as required by Section 66-8-103. During an evidentiary hearing on  
7 Defendant’s motion, Shelby testified that she has owned her own phlebotomy  
8 business, Quick Draw LLC, since 2008 and has worked as a phlebotomist since  
9 1993. Shelby is the only phlebotomist performing blood draws for Quick Draw.  
10 Quick Draw contracts with law enforcement agencies to perform blood draws for  
11 DWI investigations.

12 {6} Quick Draw entered into a professional services agreement with the  
13 University of New Mexico Health Sciences Center (UNMHSC), which called for  
14 UNMHSC to provide a physician to serve as medical director for Quick Draw. The  
15 agreement stated that the medical director’s duties include overseeing the medical  
16 components of Quick Draw, developing and approving medical protocols, and being  
17 available to Quick Draw staff for questions related to medical direction. Quick Draw  
18 pays UNMHSC quarterly for the directorship.

19 {7} In 2017, Dr. Darren Braude became medical director of Quick Draw,  
20 replacing a previous doctor who had served as medical director from 2007-2017. In

1 response to defense counsel’s questioning, Shelby stated she does not work for and  
2 was not employed by Dr. Braude, but that Dr. Braude worked for her. Shelby also  
3 stated that Dr. Braude does not supervise her blood draws, and she does not speak  
4 with Dr. Braude unless she has questions. In a second hearing on the motion, defense  
5 counsel introduced billing statements showing that, dating back to July 2019, Dr.  
6 Braude had not billed Quick Draw for any hours or services.

7 {8} Shelby was also asked about her relationship to Lovelace Hospital. Shelby  
8 answered that she was not employed by Lovelace or any hospital. According to  
9 Shelby, Lovelace does not allow its nurses to perform blood draws for DWI  
10 investigations, and she goes into local hospitals for that purpose. Shelby stated that  
11 she receives permission from local hospitals to draw blood by advising the staff that  
12 she is with law enforcement, and that officers stay with her while she performs the  
13 blood draw.

14 {9} The district court entered a detailed order denying Defendant’s motion to  
15 suppress. The court found that Shelby was employed by a hospital or physician for  
16 the purpose of performing blood draws for DWI investigations, though the district  
17 court did not specify which entity or person employed Shelby. The court concluded  
18 that “Lovelace Hospital in Downtown Albuquerque entrusts Ms. Shelby to enter into  
19 their facility to perform the blood draws,” and that Shelby’s “working relationship

1 with both Dr. Braude and the Hospital achieves the Legislative goal of protecting  
2 the patient and ensuring she collects reliable samples for criminal investigations.”

3 {10} Defendant spent nearly two years in custody awaiting trial. The jury  
4 ultimately acquitted Defendant of leaving the scene of an accident and homicide by  
5 vehicle, but found Defendant guilty of the included offense of DWI (first). The  
6 district court sentenced Defendant to ninety days in the county jail, but suspended  
7 the sentence in full and placed Defendant on supervised probation for 364 days. The  
8 district court awarded 741 days of presentence confinement credit, but specified that  
9 “Defendant shall not receive pre-sentence confinement credit towards any period of  
10 probation.” Defendant filed a motion to reconsider, arguing that because he had  
11 spent more time in pretrial custody than the statutory maximum sentence (ninety  
12 days), there was effectively no sentence of incarceration left to suspend, and  
13 consequently, the district court lacked jurisdiction to impose a sentence of probation.  
14 The district court denied Defendant’s motion. Defendant appeals.

15 **DISCUSSION**

16 **I. The Phlebotomist Was Not “Employed by a Hospital or Physician”**  
17 **Within the Meaning of Section 66-8-103**

18 {11} Defendant contends the district court erred in failing to exclude evidence of  
19 his BAC because Shelby was not authorized to perform blood draws under Section  
20 66-8-103. “We review the district court’s decision to exclude or admit evidence for

1 an abuse of discretion.”<sup>2</sup> *State v. Warford*, 2022-NMCA-034, ¶ 10, 514 P.3d 31  
2 (alterations, internal quotation marks, and citation omitted). “A court abuses its  
3 discretion if it applies an incorrect standard, incorrect substantive law, or its  
4 discretionary decision is premised on a misapprehension of the law.” *State v. Adams*,  
5 2022-NMSC-008, ¶ 35, 503 P.3d 1130 (alteration, internal quotation marks, and  
6 citation omitted). “In determining whether the district court abused its discretion, we  
7 defer to the district court’s findings of fact if substantial evidence exists to support  
8 those findings, but we review the application of the law to the facts de novo.” *State*  
9 *v. Miera*, 2018-NMCA-020, ¶ 24, 413 P.3d 491. We likewise apply “a de novo

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<sup>2</sup>The State notes that the denial of a motion to suppress evidence is typically reviewed as a mixed question of law and fact. *See State v. Yazzie*, 2016-NMSC-026, ¶ 15, 376 P.3d 858 (“Appellate review of a motion to suppress presents a mixed question of law and fact.” (internal quotation marks and citation omitted)). But all recent blood draw cases have examined the issue under an abuse of discretion standard of review. *See, e.g., State v. Adams*, 2022-NMSC-008, ¶ 35, 503 P.3d 1130; *State v. Warford*, 2022-NMCA-034, ¶ 10, 514 P.3d 31; *State v. Garcia*, 2016-NMCA-044, ¶ 8, 370 P.3d 791. This is because our Supreme Court has distinguished “the phrases ‘motion to suppress’ or ‘suppress evidence’” as “terms of art which contemplate more than the simple exclusion of evidence. A motion to suppress presupposes that the evidence was *illegally obtained*” and “inadmissible because of the violation of a defendant’s constitutional right.” *City of Santa Fe v. Marquez*, 2012-NMSC-031, ¶ 27, 285 P.3d 637 (alterations, omission, internal quotation marks, and citation omitted). In this case, as in *Adams*, *Warford*, and *Garcia*, the district court was asked to determine whether the blood draw satisfied the requirements of the Implied Consent Act and not whether suppression of the blood alcohol evidence was required as a remedy for a violation of Defendant’s constitutional rights. Accordingly, as with *Adams*, *Warford*, and *Garcia*, we apply an abuse of discretion standard to evaluate the district court’s admission of the blood-alcohol results.

1 standard to review any interpretations of law underlying the evidentiary ruling.”  
2 *State v. Garcia*, 2023-NMCA-010, ¶ 11, 523 P.3d 650 (internal quotation marks and  
3 citation omitted). To the extent we must interpret the Implied Consent Act, our  
4 review is de novo. *See Adams*, 2022-NMSC-008, ¶ 9.

5 **A. Section 66-8-103 Requires That a Phlebotomist Be “Employed by a**  
6 **Hospital or Physician”**

7 {12} “A predicate for the admission of a blood test result in a DWI case is that the  
8 test be performed ‘pursuant to the Implied Consent Act.’” *State v. Garcia*, 2016-  
9 NMCA-044, ¶ 23, 370 P.3d 791 (quoting § 66-8-110(A)). The Implied Consent Act  
10 provides that “[o]nly the persons authorized by Section 66-8-103 . . . shall withdraw  
11 blood from any person for the purpose of determining its alcohol or drug content.”  
12 Section 66-8-109(A). Turning to Section 66-8-103, “[o]nly a physician, licensed  
13 professional or practical nurse or laboratory technician or technologist employed by  
14 a hospital or physician shall withdraw blood from any person in the performance of  
15 a blood-alcohol test.” Phlebotomists are “laboratory technician[s] within the  
16 meaning of Section 66-8-103” so long as they (1) have “adequate training and  
17 experience,” and (2) are “employed by a hospital or physician.” *Warford*, 2022-  
18 NMCA-034, ¶ 19.

19 {13} In this case, the parties do not dispute that Shelby possesses the necessary  
20 training and experience to perform blood draws. The only question we must answer  
21 is whether Shelby was “employed by a hospital or physician,” and in particular,

1 whether Shelby’s relationship with either Lovelace or UNMHSC and Dr. Braude  
2 satisfies this requirement.

3 {14} To date, *Warford* is the only case to have examined what it means to be  
4 “employed” for purposes of the Implied Consent Act. In *Warford*, this Court  
5 considered whether a phlebotomist employed by TriCore, a contractor used by a  
6 hospital to perform blood draws, was “employed by a hospital.” *Id.* ¶¶ 1, 7. The  
7 defendant argued that the phlebotomist must be *directly* employed by a hospital or  
8 physician to satisfy the employment requirement in Section 66-8-103. *Warford*,  
9 2022-NMCA-034, ¶ 23. This Court disagreed, concluding that “the term ‘employ’  
10 is ambiguous” and can mean “‘to commission and entrust with the performance of  
11 certain acts or functions’ in addition to its often-used meaning ‘to hire.’” *Id.* ¶¶ 23-  
12 24 (quoting *Employ*, *Black’s Law Dictionary* (11th ed. 2019)) (alterations omitted).  
13 Applying this meaning, the Court held that the phlebotomist was employed by a  
14 hospital because the hospital “entrusted her with the performance of blood draws  
15 during her shifts, even if [the hospital] did not hire her directly.” *Id.* ¶ 25. The Court  
16 based its entrustment determination on evidence establishing that the hospital  
17 contracted with TriCore, which in turn hired the phlebotomist to work inside the  
18 hospital “to perform legal blood draws, trained her in blood-draw procedures, and  
19 determined she was qualified to perform blood draws, including legal blood-draw  
20 tests.” *Id.*

1 {15} The Court in *Warford* concluded its analysis by examining its construction in  
2 light of the purposes of the Implied Consent Act, which are to “deter driving while  
3 intoxicated” and to “aid in discovering and removing from the highways the  
4 intoxicated driver.” *State v. Trujillo*, 1973-NMCA-076, ¶ 21, 85 N.M. 208, 510 P.2d  
5 1079 (internal quotation marks and citation omitted). Further, our Supreme Court  
6 has indicated that the Legislature’s intended purpose for Section 66-8-103  
7 “encompasses two goals: (1) to protect patients subject to a blood draw and (2) to  
8 ensure the collection of a reliable blood sample for use in DWI prosecutions.”  
9 *Adams*, 2022-NMSC-008, ¶ 22. Given these purposes, our Supreme Court has  
10 indicated that Section 66-8-103 should be interpreted “to broaden, not narrow, the  
11 category of individuals authorized to draw blood.” *Adams*, 2022-NMSC-008, ¶ 23;  
12 *see also State v. Wiberg*, 1988-NMCA-022, ¶ 13, 107 N.M. 152, 754 P.2d 529  
13 (recognizing that narrowly construing Section 66-8-103 would “significantly and  
14 unnecessarily limit the classes of individuals who could assist in furthering the  
15 statute’s legislative purpose”). In view of these overarching legislative goals, the  
16 *Warford* Court concluded that its assessment that the phlebotomist was an employee  
17 of the hospital under the circumstances was “consistent with the dual purposes of  
18 [Section 66-8-103]—i.e., ensuring the safety of [the d]efendant and ensuring the  
19 reliability of the blood test.” *Warford*, 2022-NMCA-034, ¶ 26.

1 {16} Defendant urges us to apply additional criteria to evaluate the employment  
2 relationship, including whether a hospital or physician (1) directly or indirectly pays  
3 the technician, (2) directly or indirectly supervises the technician, and (3) exercises  
4 some authority over the technician. Our Supreme Court considered these same  
5 arguments in *State v. Johnson*, 2009-NMSC-049, 147 N.M. 177, 218 P.3d 863, a  
6 case that presented a close factual analogue to the employment circumstances in  
7 *Warford*. In *Johnson*, the defendant allegedly struck three private security guards on  
8 a high school campus and was charged with battery on school employees, contrary  
9 to NMSA 1978, Section 30-3-9(E) (1989). *Johnson*, 2009-NMSC-049, ¶ 1. The  
10 question presented was whether the security guards, who provided services at the  
11 school pursuant to a contract with the school board, were school employees. *Id.* ¶ 2.  
12 The Court of Appeals concluded the guards were not school employees based on  
13 “cases that analyze whether an employer-employee relationship exists by  
14 determining whether the employer had the right to control the details of the work to  
15 be performed by the employee.” *Id.* ¶¶ 2, 6. The Supreme Court, however, declined  
16 to rely on “technical employment law” right to control tests. *See id.* ¶ 8 (internal  
17 quotation marks and citation omitted). The Court looked instead to the ordinary  
18 meaning of the term “employee,” which “is one who provides services to another in  
19 exchange for compensation.” *Id.* ¶ 12. Applying this definition, the Court concluded  
20 that an “employee” for purposes of Section 30-3-9 “includes those who have been

1 hired directly . . . in exchange for wages or a salary and, in some cases, those who  
2 provide services . . . in exchange for compensation, provided their services further  
3 the legislative purpose of [the statute].” *Johnson*, 2009-NMSC-049, ¶ 12. The Court  
4 determined that the security guards promoted “the State’s articulated policy to make  
5 schools safe places for learning,” and, based on both the plain language and purpose  
6 of the statute, concluded that “security guards providing services at a school pursuant  
7 to a contract with the school board are included within the definition of ‘school  
8 employee’ in Section 30-3-9.” *Johnson*, 2009-NMSC-049, ¶ 17.

9 {17} *Warford* and *Johnson* are congruent in their analysis in that both Courts  
10 looked to the ordinary meaning of the terms “employ” and “employee,” and arrived  
11 at complementary conclusions—that an employee includes not only those who have  
12 been hired directly, but may also include, under certain circumstances, persons who  
13 are not directly employed. *Warford*, 2022-NMCA-034, ¶ 23; *Johnson*, 2009 NMSC-  
14 049, ¶ 12. We think it is appropriate to incorporate *Johnson*’s definition of  
15 “employee” into the criteria used to evaluate whether someone is “employed by a  
16 hospital or physician” under the Implied Consent Act. Thus, in light of *Johnson*, we  
17 agree with Defendant that the provision of services in exchange for compensation is  
18 a relevant consideration when evaluating whether the employment requirement in  
19 Section 66-8-103 is satisfied. *See Johnson*, 2009-NMSC-049, ¶ 12. Nonetheless,  
20 neither *Johnson* nor *Warford* relied on employment law principles of supervision

1 and control to define the employment relationship, and in both cases, an employment  
2 relationship was found to exist even without the sort of direct or indirect supervision  
3 and control Defendant advocates for. *See Warford*, 2022-NMCA-034, ¶ 25;  
4 *Johnson*, 2009-NMSC-049, ¶¶ 7-17. Consequently, while supervision and control  
5 may be relevant to the Section 66-8-103 analysis, we decline to hold that the absence  
6 of supervision and control is dispositive.

7 {18} With these principles in mind, we turn to address Shelby’s relationships with  
8 Lovelace, UNMHSC, and Dr. Braude.

9 **B. Lovelace Hospital**

10 {19} The district court concluded that “Lovelace Hospital in Downtown  
11 Albuquerque entrusts . . . Shelby to enter into their facility to perform the blood  
12 draws,” and that such a relationship “achieves the Legislative goal of protecting the  
13 patient and ensuring she collects reliable samples for criminal investigations.”  
14 Defendant maintains there is no evidence of an employment relationship between  
15 Lovelace and Shelby. The State contends that an entrustment-based employment  
16 relationship exists, similar to *Warford*.

17 {20} Shelby’s relationship with Lovelace is readily distinguishable from the  
18 phlebotomist’s relationship with the hospital in *Warford*. Lovelace does not contract  
19 with or employ Quick Draw in any capacity. Shelby did not perform blood draws  
20 for Lovelace. *Cf. Warford*, 2022-NMCA-034, ¶ 25 (noting that the laboratory placed

1 the phlebotomist at the hospital “to perform the hospital’s blood draws”). Instead, as  
2 the district court found, *law enforcement* contracts with Quick Draw to perform  
3 blood draws for DWI investigations. Shelby does not work regularly inside  
4 Lovelace, and there is no evidence that Shelby received training in Lovelace’s blood-  
5 draw procedures as an employee of Quick Draw. In short, there is simply no  
6 evidence in this case of the sort of relationship that allowed this Court to conclude  
7 the phlebotomist was employed (entrusted) by the hospital in *Warford*.

8 {21} We understand the State to argue that entrustment can be inferred from the  
9 following: (1) Shelby previously worked for Quest Labs at Lovelace Westside  
10 Hospital, (2) Lovelace does not allow its nurses to conduct blood draws for DWI  
11 investigations, and (3) local hospitals permit Shelby to enter their premises to  
12 perform blood draws for DWI investigations. None of these facts, individually or  
13 collectively, establish that Lovelace entrusted Shelby to perform blood draws.

14 {22} Shelby’s previous employment with Quest, while relevant to her training and  
15 experience, *see Adams*, 2022-NMSC-008, ¶ 1, does not establish that Lovelace  
16 entrusted Shelby to perform blood draws after she left Quest—almost a decade  
17 before the blood draw in this case. Likewise, although the State contends that  
18 Lovelace does not permit its own nurses to draw blood,<sup>3</sup> this fact does not establish

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<sup>3</sup>Shelby was not asked to provide a foundation for her testimony regarding Lovelace’s policies and procedures in 2021, and no witness from Lovelace was called to testify about Lovelace’s policies and procedures.

1 that Lovelace entrusted *Shelby* to perform blood draws. Finally, the State relies on  
2 *Shelby*'s affirmative response when asked whether "local hospitals" permit her to  
3 enter and perform blood draws for law enforcement. This generalized statement does  
4 not establish that *Shelby* was permitted by *Lovelace*, specifically, to draw blood from  
5 patients in its facilities. Moreover, when asked on cross-examination what authorizes  
6 her to go into a hospital to draw blood, *Shelby* testified that she advises the nurse for  
7 the patient that she is there to draw blood for *law enforcement*, that she is their  
8 phlebotomist. *Shelby* did not testify specifically about how she gained access to  
9 Defendant at Lovelace. Even if we assume that she advised Defendant's nurse that  
10 she was there to draw blood for law enforcement, as was apparently her general  
11 practice, we are not persuaded that such a practice constitutes permission by  
12 Lovelace. See *Permission*, *Black's Law Dictionary* (12th ed. 2024) (defining  
13 "permission" as "[t]he act of permitting; the official act of allowing someone to do  
14 something" or "[a] license or liberty to do something; authorization"). Further, the  
15 State has not provided any argument as to why permission, even if it existed in this  
16 case, is tantamount to employment, particularly in the absence of other indicia of  
17 entrustment. See *Warford*, 2022-NMCA-034, ¶¶ 23-25; *Johnson*, 2009-NMSC-049,  
18 ¶¶ 12, 17.

19 {23} For all of the foregoing reasons, we conclude the State's evidence does not  
20 establish that Lovelace "entrusts" *Shelby*, as the district court found. Accordingly,

1 because the facts of record do not demonstrate that Shelby was employed by  
2 Lovelace, we conclude the district court abused its discretion in finding that  
3 Lovelace employed Shelby for purposes of Section 66-8-103. *See State v. Samora*,  
4 2016-NMSC-031, ¶ 37, 387 P.3d 230 (stating that an abuse of discretion occurs  
5 when an evidentiary ruling “is clearly against the logic and effect of the facts and  
6 circumstances of the case”).

7 **C. UNMHSC and Dr. Braude**

8 {24} The State also submits that Shelby was employed by UNMHSC or Dr.  
9 Braude. The State’s briefing on this point is sparse and relies heavily on Shelby’s  
10 extensive training and experience. Even though Shelby has considerable experience,  
11 she is not authorized to draw blood under Section 66-8-103 unless she is also  
12 employed to do so by a hospital or physician. *See Adams*, 2022-NMSC-008, ¶¶ 1,  
13 34. As we explain, Shelby’s arrangement with UNMHSC and Dr. Braude does not  
14 satisfy Section 66-8-103’s employment requirement.

15 {25} Quick Draw is a single member LLC where Shelby is the owner and sole  
16 phlebotomist, meaning Shelby is self-employed. Through her business, she entered  
17 into a professional services agreement with UNMHSC to obtain the services of a  
18 physician to “perform the duties of a Medical Director as required by the New  
19 Mexico Statutes for Implied Consent.” Considering there is no “medical director”  
20 requirement in the Implied Consent Act, it appears from the face of the agreement

1 that Shelby was seeking to comply with Section 66-8-103 by contracting with a  
2 hospital for the services of a physician.

3 {26} The contractual arrangement between Quick Draw and UNMHSC, however,  
4 strongly supports Shelby’s testimony that she is not employed by Dr. Braude, but  
5 instead, that Dr. Braude works for her. UNMHSC provides services to Quick Draw,  
6 namely, a medical director, in exchange for compensation. *See Johnson*, 2009-  
7 NMSC-049, ¶ 12 (stating that “an ‘employee’ is one who provides services to  
8 another in exchange for compensation”). Shelby pays UNM Medical Group  
9 quarterly for “services provided” under the professional services agreement, and Dr.  
10 Braude is able to bill Quick Draw for his time. The State presented no evidence that  
11 Shelby or Quick Draw provides any services to UNMHSC or Dr. Braude, and Shelby  
12 receives no compensation from them. Based on the employment structure described  
13 by Shelby and set forth in the professional services agreement, nothing about the  
14 contractual arrangement between Quick Draw, Shelby, UNMHSC, and Dr. Braude  
15 supports the conclusion that UNMHSC or Dr. Braude is Shelby’s employer. *See id.*

16 {27} During oral argument, the State argued that under *Warford*, this Court could  
17 conclude that Dr. Braude entrusted Shelby with performing blood draws because Dr.  
18 Braude agreed to serve as medical director for Quick Draw and signed Quick Draw’s  
19 policies and procedures. According to the State, these acts signal Dr. Braude’s  
20 approval of how Shelby was performing blood draws, which amounts to

1 entrustment. We are not persuaded that these nominal actions demonstrate an  
2 entrustment-type employment relationship similar to *Warford*.

3 {28} First, we cannot agree that Dr. Braude’s acceptance of his role as Quick  
4 Draw’s medical director is evidence of entrustment. The State would have us  
5 conclude, in essence, that Dr. Braude employed Shelby because he agreed to work  
6 for her. Putting aside the illogic of such a conclusion, we need only look to *Warford*  
7 to understand that entrustment entails more than merely contracting with someone.

8 And unlike *Warford*, Dr. Braude and Shelby’s working arrangement contains no  
9 indicia that Dr. Braude was functionally Shelby’s employer. Dr. Braude did not hire,  
10 train, evaluate, or even work in the same location as Shelby, and there is no  
11 indication that she performed blood draws for Dr. Braude’s practice. *Cf. Warford*,  
12 2022-NMCA-034, ¶¶ 25-26. The State relies on the fact that Dr. Braude signed  
13 Quick Draw’s venipuncture procedures, and thus approved of how Shelby was  
14 performing blood draws. But there is nothing in the record indicating that Dr. Braude  
15 ever observed Shelby perform a blood draw or otherwise had direct knowledge of  
16 how she performed blood draws in practice. Consequently, though Dr. Braude may  
17 have approved of Quick Draw’s policies and procedures on paper, we cannot agree  
18 with the State’s position that such approval extends to how Shelby was “going about  
19 performing these blood draws,” and we cannot conclude that a mere review of a

1 company's policies and procedures is sufficient to establish entrustment-type  
2 employment.

3 {29} What is more, under the terms of the professional services agreement, Quick  
4 Draw, not UNMHSC or Dr. Braude, is responsible for ensuring that all  
5 phlebotomists are trained in accordance with state requirements. As both the owner  
6 of and the sole phlebotomist working for Quick Draw, Shelby was effectively  
7 responsible for her own training. And while the State argues that Dr. Braude  
8 "provides support for questions and issues that arise" and Shelby is able to confer  
9 with him "to ensure that her blood draws are in accordance with approved medical  
10 practices," the record does not show that either of these contingencies occurred.  
11 Shelby testified she never had an issue that required a call;<sup>4</sup> and from July 2019  
12 through May 2022, Dr. Braude provided no billable hours to Quick Draw,  
13 demonstrating that for at least the two years prior to Defendant's blood draw and  
14 one year after, Shelby was responsible for ensuring her own compliance with  
15 approved medical practices. In sum, the State has not presented evidence of  
16 entrustment that would allow us to conclude that UNMHSC or Dr. Braude  
17 functioned directly or indirectly as Shelby's employer. *See Miera*, 2018-NMCA-  
18 020, ¶ 24.

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<sup>4</sup>Shelby testified that she called Dr. Braude once with a question about whether a transfusion makes a difference in the draw, but did not specify when that call occurred.

1 {30} Lastly, we reject the State’s contention that “narrowly defin[ing] ‘employ’ to  
2 exclude . . . Shelby and her business would undermine the Legislative goals and  
3 purpose behind the Implied Consent Act.” Our holding honors and gives force to an  
4 express limitation the Legislature saw fit to impose—that laboratory technicians,  
5 including phlebotomists, must be employed by a hospital or physician in order to  
6 draw blood for purposes of the Implied Consent Act. *See* § 66-8-103. As Defendant  
7 observes, the Legislature chose to place this additional requirement on qualified  
8 medical professionals who are not otherwise licensed by the state. *Cf. Wiberg*, 1988-  
9 NMCA-022, ¶ 14 (holding that Section 66-8-103 does not require a licensed nurse  
10 to be employed by a hospital or physician and noting that “[t]he requirements to be  
11 a licensed professional nurse or registered nurse are sufficiently rigorous to fulfill  
12 the purpose of Section 66-8-103, that is, the safety of the subject and the reliability  
13 of the sample”). The employment requirement thus furthers the Legislature’s two-  
14 fold purpose in enacting Section 66-8-103: ensuring the safety of the subject and the  
15 reliability of the sample. *See Adams*, 2022-NMSC-008, ¶ 20. Given this, we view  
16 both the statute’s plain language and its purpose to support the conclusion that  
17 Section 66-8-103 does not authorize Shelby to draw blood for DWI investigations  
18 because neither she nor her business were employed to do so by a hospital or  
19 physician.

1 {31} For the foregoing reasons, we hold that the evidence does not establish that  
2 Shelby was employed, within the meaning of Section 66-8-103, by Lovelace,  
3 UNMHSC, or Dr. Braude at the time she drew Defendant’s blood, and therefore we  
4 reverse the district court’s contrary conclusion. *See Garcia*, 2016-NMCA-044, ¶ 8  
5 (stating that “when there is no evidence that necessary foundational requirements  
6 are met, an abuse of discretion occurs” (internal quotation marks and citation  
7 omitted)). Because the State has not met its burden of proving that Defendant’s  
8 “blood was drawn by a person authorized to do so under Section 66-8-103, . . . the  
9 results of the test are . . . inadmissible.” *See Garcia*, 2016-NMCA-044, ¶ 23.

10 **D. The Error Was Not Harmless**

11 {32} In light of our holding, we must consider whether the error was harmless. *See*  
12 *State v. Tollardo*, 2012-NMSC-008, ¶ 25, 275 P.3d 110 (“Improperly admitted  
13 evidence is not grounds for a new trial unless the error is determined to be  
14 harmful.”); *State v. Salazar*, 2023-NMCA-026, ¶ 19, 527 P.3d 693 (“An erroneous  
15 evidentiary ruling is not grounds for a new trial unless the error was prejudicial rather  
16 than harmless.” (internal quotation marks and citation omitted)). “[A] non-  
17 constitutional error is harmless when there is no reasonable *probability* the error  
18 affected the verdict.” *Tollardo*, 2012-NMSC-008, ¶ 36 (internal quotation marks and  
19 citation omitted). “To determine the likely effect of the error, we must evaluate all  
20 of the circumstances, including, as relevant here, the importance of the [evidence] to

1 the prosecution’s case, other evidence of the defendant’s guilt to understand the role  
2 of the error within the context of the trial, and the cumulative nature of the error.”  
3 *Salazar*, 2023-NMCA-026, ¶ 19. “Defendant bears the initial burden of  
4 demonstrating that he was prejudiced by the error.” *State v. Astorga*, 2015-NMSC-  
5 007, ¶ 43, 343 P.3d 1245.

6 {33} Defendant was convicted of DWI under the “impaired to the slightest degree”  
7 standard, which required the State to prove that “[D]efendant was under the  
8 influence of intoxicating liquor, that is, as a result of drinking liquor [D]efendant  
9 was less able to the slightest degree, either mentally or physically, or both, to  
10 exercise the clear judgment and steady hand necessary to handle a vehicle with safety  
11 to the person and the public.” *See* § 66-8-102(A), (C)(1); UJI 14-4501(2) NMRA.  
12 Although evidence of Defendant’s blood-alcohol content is not required to prove  
13 this charge, a defendant’s “BAC remains relevant in cases where [DWI] is based on  
14 a defendant’s impairment to the slightest degree” to show that the defendant had  
15 alcohol in their system “and, regardless of the numerical BAC, . . . to show that the  
16 defendant’s poor driving was a result of drinking liquor.” *State v. Franklin*, 2020-  
17 NMCA-016, ¶ 10, 460 P.3d 69 (internal quotation marks and citation omitted).

18 {34} Defendant argues that the admission of his blood-alcohol content was  
19 prejudicial because the evidence featured heavily throughout the trial and the State,  
20 in closing argument, “encouraged the jury to rely on the blood evidence to find that

1 [Defendant] was impaired to the slightest degree.” We agree. During trial, the State  
2 introduced evidence that Defendant’s BAC was 0.21g/100ml, more than two and a  
3 half times the legal limit. The BAC evidence was not cumulative of other evidence  
4 admitted at trial, and the State placed significant emphasis on it. The State called  
5 two witnesses to testify at length regarding blood alcohol analysis and procedures,  
6 as well as the process of retrograde extrapolation to determine Defendant’s BAC at  
7 the time of the accident. Additionally, two sheriff’s deputies testified extensively  
8 about their department’s procedures for obtaining a blood warrant, retrieving the  
9 blood evidence from the hospital, and delivering the blood kit to the substation where  
10 it is picked up for testing. As well, Shelby testified regarding her process for drawing  
11 blood and about performing the blood draw on Defendant.

12 {35} During closing argument, the State emphasized that when considering  
13 whether Defendant was impaired, the jury should take into account the “great deal  
14 of testimony about the blood results,” in conjunction with other evidence of  
15 Defendant’s intoxication, including body camera footage of the stop and  
16 Defendant’s performance on the field sobriety tests. The State suggested that the jury  
17 should view the evidence collectively, but the prosecution referenced Defendant’s  
18 blood alcohol results at least two more times during closing argument as proof that  
19 Defendant was highly impaired while driving. Given the substantial role the blood  
20 alcohol evidence played at trial and the State’s reliance on that evidence to support

1 the DWI charge, there is a reasonable probability that the blood test results  
2 contributed to Defendant's conviction, even in the face of other evidence of  
3 impairment. Therefore, we conclude Defendant has met his initial burden of  
4 establishing prejudice. *See id.*; *Salazar*, 2023-NMCA-026, ¶ 20.

5 {36} The State did not address the harmfulness of the error or otherwise respond to  
6 Defendant's showing of prejudice. Accordingly, because Defendant made a showing  
7 of prejudice, and the State has not advanced any countervailing argument as to why  
8 the error can be viewed as harmless, we conclude the error was not harmless. *See*  
9 *Salazar*, 2023-NMCA-026, ¶ 23.

## 10 **II. The Sentencing Issue is Moot**

11 {37} Defendant additionally contends that his sentence was illegal. He argues that  
12 DWI carries a maximum sentence of ninety days for a first offense, and he was  
13 entitled to 741 of presentence confinement credit. *See* § 66-8-102(E). Defendant  
14 maintains that the district court was required to apply any presentence confinement  
15 credit to his sentence, and because he had already spent more time in pretrial custody  
16 than the statutory maximum sentence, the district court judge did not have authority  
17 to suspend his sentence and impose 365 days probation. *See id.*; *see also* NMSA  
18 1978, § 31-20-3 (1985) (authorizing suspended sentences); *State v. Nieto*, 2013-  
19 NMCA-065, ¶¶ 5, 7-8, 303 P.3d 855 (discussing the interplay of presentence  
20 confinement credit, suspended sentences, and probation and holding that

1 presentence confinement credit “need not be credited against the probation time  
2 ordered by the district court”).

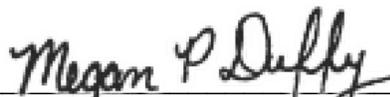
3 {38} The parties acknowledge this issue is moot because Defendant has completed  
4 his sentence. *See McAneny v. Catechis*, 2023-NMCA-055, ¶ 24, 534 P.3d 1007 (“As  
5 a general matter a case is moot when no actual controversy exists and the court  
6 cannot grant relief to the parties.”). Defendant invites us to apply a mootness  
7 exception on the basis that this case presents an issue of substantial public interest  
8 and is capable of repetition and likely to evade review. *See White v. Farris*, 2021-  
9 NMCA-014, ¶ 34, 485 P.3d 791. We acknowledge that both exceptions may be  
10 applicable in cases such as this. However, our review of moot cases is discretionary,  
11 and we decline to exercise our discretion to decide the issue in this case because  
12 neither party has addressed the issue in a manner that would allow us to render a  
13 decision on the merits of such a significant question. *See id.* Defendant provides  
14 some argument in support of his position, but he has not addressed the significant  
15 implications of a decision in his favor on the trial court’s sentencing discretion or  
16 the potential collateral consequences of holding that a district court does not have  
17 authority to suspend a sentence when a defendant has spent more time in pretrial  
18 custody than the maximum statutory period of confinement. The State did not  
19 address the merits of the issue at all, arguing only that the issue is moot and should

1 not be reviewed. Based on the briefing, we decline to exercise our discretion to reach  
2 the merits of the sentencing issue in this case.

3 **CONCLUSION**

4 {39} For the foregoing reasons, we reverse Defendant’s conviction for driving  
5 while intoxicated. Because Defendant has not challenged the sufficiency of the  
6 evidence supporting his conviction, and because we are satisfied that substantial  
7 evidence supported his conviction, we remand for a new trial consistent with this  
8 opinion. *See State v. Revels*, 2025-NMSC-021, ¶ 21, 572 P.3d 974 (holding that  
9 double jeopardy does not bar retrial where appellate reversal is predicated “on any  
10 grounds other than evidentiary insufficiency”).

11 {40} **IT IS SO ORDERED.**

12   
13 \_\_\_\_\_  
MEGAN P. DUFFY, Judge

14 **WE CONCUR:**

15   
16 \_\_\_\_\_  
JENNIFER L. ATTREP, Judge

17   
18 \_\_\_\_\_  
SHAMMARA H. HENDERSON, Judge