

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
R. Knox McMahon, Circuit Court Judge

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THE STATE,

Respondent, **S.C. Supreme Court**

vs.

CHRISTOPHER MANNING,

Petitioner.

Appellate Case # 2012-213685

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

ISSUES ON APPEAL1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

ARGUMENT.....7

 I. The arresting officer was not required to provide an affidavit concerning the reason why Petitioner’s conduct at the scene of the accident was not videotaped where law enforcement did not arrive at the scene of the accident until after Petitioner was transported to the emergency room.....7

 II. Law enforcement had probable cause to believe Petitioner committed felony DUI and therefore, the trial court did not err in denying the motion to suppress the blood test results12

 III. The trial court did not err in denying Petitioner’s motion for mistrial and the issue is not preserved, especially since Petitioner failed to timely raise his motion to sever and refused a curative instruction15

 IV. The trial court’s charge to the jury on implied consent was not a comment on the facts and the charge as a whole was not misleading and was free from error..19

CONCLUSION.....22

STATEMENT OF ISSUES ON APPEAL

I.

The arresting officer was not required to provide an affidavit concerning the reason why Petitioner's conduct at the scene of the accident was not videotaped where law enforcement did not arrive at the scene of the accident until after Petitioner was transported to the emergency room.

II.

Law enforcement had probable cause to believe Petitioner committed felony DUI and therefore, the trial court did not err in denying the motion to suppress the blood test results.

III.

The trial court did not err in denying Petitioner's motion for mistrial and the issue is not preserved, especially since Petitioner failed to timely raise his motion to sever and refused a curative instruction.

IV.

The trial court's charge to the jury on implied consent was not a comment on the facts and the charge as a whole was not misleading and was free from error.

STATEMENT OF THE CASE

Petitioner Manning was indicted by the Lexington County Grand Jury of Felony Driving Under the Influence resulting in Death. Manning was tried by jury on May 11-13, 2010 and convicted as charged. The Honorable R. Knox McMahon sentenced Petitioner to eighteen years imprisonment.

Manning appealed his conviction and sentence to the Court of Appeals. The Court of Appeals affirmed the conviction and sentence in an opinion filed August 1, 2012. Manning petitioned for rehearing. The petition was denied, but the original opinion was withdrawn and substituted with a new opinion on October 10, 2012. State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012).

STATEMENT OF FACTS

Petitioner Manning and his friend, Jake Hill, had drinks together after Manning finished his shift as a cook at a private bar. Manning and Jake left in Manning's SUV to go swimming. Manning crashed his SUV at a sharp curve, severely injuring himself and killing Jake.

Heather Fairchild was the first witness to testify before the jury. She was a bartender at Boondocks, a private club. She was tending bar on the night of July 31 into the morning hours of August 1, 2009. She started serving Manning around 10:30 or 11:00 p.m. that night after Manning finished his shift as a cook. Manning, Jake, and others drank together for several hours. They drank beer and shots of liquor. Fairchild testified that Manning drank a good amount of alcohol. Although she contended he was not stumbling, Fairchild testified that in her opinion, Manning was impaired that night. She testified she was familiar with the vehicle Manning drove to work and noticed it in the parking lot. Her shift ended at 4:45 a.m. Manning and Jake left shortly before then. Jake did not have a vehicle, he walked to the club that night. Manning said he had his car, and they made plans to drive to a boat ramp to go swimming. ROA. pp. 129-142.

Elizabeth Grayson Simmons from the Lexington County EMS arrived at the accident scene at 4:57 a.m. She noticed the strong smell of alcohol as she approached Manning. Manning's nose was split open and she saw a wound as big as a fist in his abdomen. She could see his intestines. A firefighter who also responded fetched a long-spine board to carry Manning from the field. Manning said "I f'ed up. I should have never done this. Look what I've done." Simmons could smell alcohol when he spoke. ROA. pp. 156-172, pp. 175-176 (direct quote: ROA. p. 168, lines 18-19).

Firefighter Nathan Prouse testified that he was the first responder on the scene. The vehicle was in a field about 60 to 70 feet off the road and severely damaged. Two bodies lay in the field. EMS arrived almost simultaneously and went to Jake, quickly determining he was dead. Prouse approached Manning, who lay closer to the wreck. Prouse asked Manning if anyone else other than the victim was riding with Manning. Manning replied: "No, no, it was just me and my buddy who was riding with me. It was just me and my buddy." ROA. pp. 188-193 (direct quote: tr. p. 193, lines 17-19). Manning kept saying "I f-ed up" repeatedly. ROA. p. 195.

Another firefighter, Victor Tomaino, helped carry Manning on the spine board. He heard Manning repeatedly say "I f-ed up" and at one point, heard Manning say "I should not have been driving." ROA. p. 212. The Coroner's Office declared Jake dead, with the approximate time of death as 4:30 a.m. ROA. p. 228.

Lance Corporal Quest Hallman was the first officer on the scene of the crash, but Manning was already gone. It took Hallman about twenty-five to thirty minutes to respond to the scene, it was rainy and he was careful, but he did exceed the speed limit slightly. He arrived on the scene and could already see the reflectors of the crashed vehicle, but was directed to the vehicle by emergency personnel. ROA. pp. 235-237. Hallman explained as follows:

But . . . fire services said, hey, here's the car. They showed me the victim and said the other – the driver had been transported, which I pretty much assumed because I had passed the ambulance while I was en route to the scene.

ROA. p. 237, lines 17-21.

Jake's body was about fifty to seventy-five feet away from the wrecked vehicle. It

appeared to Corporal Hallman that the vehicle left the road and flipped. The engine and transmission became unbolted from the vehicle and lay next to it. ROA. pp. 237-239. The odor of alcohol emanated from the vehicle. Hallman directed Trooper Baker to the hospital where Baker determined Manning to be the individual from the wreck. From Hallman's ensuing investigation, Hallman determined the address for Manning's driver's license and the registration for the vehicle were the same. The following testimony was elicited from Hallman in front of the jury:

Q: Okay. Now, you are still investigating this particular incident. Without going into any conversations that you had with some of these individuals, did you speak with anyone else that was still on the scene?

A: I did.

Q: Okay. During that course of – well, were you still investigating this incident to determine who was the driver?

A: Yes, sir.

Q: Okay. And after speaking with them and conducting your investigation, did you ultimately charge Mr. Christopher Manning –

A: I did.

Q: – with felony D.U.I.?

A: I did.

ROA. p. 251, line 11 - p. 252, line 1.

Manning was not in Corporal Hallman's presence at the time, so he directed Trooper Baker, who was at the hospital, to have Manning's blood drawn. ROA. p. 252. Corporal Hallman explained why he directed Trooper Baker to do this as follows: "In my experience and my determination, I determined him as the driver of the vehicle. And with

there being a death involved, a legal blood sample was drawn. . . .” ROA. p. 252, lines 16-21.

Manning’s blood alcohol content was .173%. ROA. p. 409. As the forensic toxicologist testified, at this level of intoxication, an individual’s reaction time would be slowed, their vision would be impaired, and their judgment adversely affected. ROA. pp. 409-410.

Corporal James O’Donnell of the South Carolina Highway Patrol testified as an expert in accident reconstruction. He determined that the vehicle veered off to the right of a left hand curve, traveled on the shoulder, struck a culvert, became airborne and flipped several times, ultimately traveling about 535 feet from where it left the road to the resting spot. The vehicle was going about 89 m.p.h. when it reached the curve. O’Donnell noted that the driver has more obstacles than a passenger would to keep from being ejected. He also testified that the steering wheel could have caused Manning’s injuries in the abdomen. ROA. pp. 424-440; pp. 458-460.

Manning did not testify or call any witnesses in his defense.

ARGUMENT

I.

The arresting officer was not required to provide an affidavit concerning the reason why Petitioner's conduct at the scene of the accident was not videotaped where law enforcement did not arrive at the scene of the accident until after Petitioner was transported to the emergency room.

Petitioner Manning argues that his felony DUI charge should have been dismissed because the arresting officer should have provided an affidavit concerning the failure to videotape Manning's conduct at the incident site. Manning misconstrues the statute. Videotaping was not required because law enforcement did not arrive at the incident site until after Manning was transported to the hospital. Manning's argument fails because no part of the statute applies where a defendant leaves the incident site before law enforcement arrives.¹ Since Manning allowed himself to be taken to the hospital for treatment before law enforcement arrived, law enforcement was not required to execute an affidavit.

Under S.C. Code Ann. § 56-5-2953:

(A) A person who violates Section 56-5-2930, 56-5-2933, or

1 In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers. D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 482 S.E.2d 558 (1997) *overruled on other grounds by* Evins v. Richland County Historic Preservation Comm., 341 S.C. 15, 532 S.E.2d 876 (2000).

56-5-2945 must have his conduct at the incident site and the breath test site video recorded.

(1)(a) The video recording at the incident site must:

(i) not begin later than the activation of the officer's blue lights;

In the instant case, since law enforcement arrived after Manning left the incident site, blue lights were activated, if at all, after Manning left. There was no conduct to videotape, post-activation of the blue lights, at the incident site. The statute does not apply in the instant case.

Since the petition for writ of certiorari was filed, this Court issued its opinion in State v. Elwell, Op. No. 27259 (S.C. Sup.Ct., filed May 29, 2013). In that case, this Court determined whether video recording at the site of the breath test is required past the point a DUI suspect refuses the breath test. This Court found it was not required, noting the legislative purpose of section 56-5-2953 "is to create direct evidence of a DUI arrest." Id. at 4 (internal quotations and citations omitted). This Court noted that once the suspect refuses a breath test, "the evidence gathering portion is over." Id. Accordingly, this Court found the video recording excluding post-refusal recording sufficient, concluding: "To require otherwise would result in the officer having to undergo a useless and absurd act." Id.

Like Elwell, for the law enforcement officer to make a video recording when a DUI suspect is not present at the incident site runs counter to the legislative purpose of the statute. It only applies when there is actual conduct by the suspect to videotape. The statute is not implicated in the instant case.

Further, Manning misconstrues the requirements to meet the exceptions found in §

56-5-2953(B), which are set out as follows:

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video equipment at the time of the arrest or probable cause determination, . . . was in an inoperable condition, . . . , in the alternative, submits a sworn affidavit that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of circumstances;

The videotaping was not done at the incident site because Manning was not there. Under the plain language of the statute, the arresting officer is required to submit an affidavit when videotaping is not performed only if: (1) videotaping equipment is inoperable, (2) the person needed emergency medical treatment, or (3) exigent circumstances existed.

The problem was not that the equipment was inoperable, so that provision does not apply. Law enforcement was never in a position to determine, first hand, whether Manning needed emergency medical treatment or whether another exigent circumstance existed; therefore, the arresting officer is not required to submit an affidavit concerning a

subject to which neither he nor other law enforcement officers have first-hand knowledge. Manning is in a superior position to determine if emergency medical treatment was needed, because he was there. By the time law enforcement arrived, there was no conduct to record. Manning allowed himself to be taken from the scene by emergency personnel.

The facts of the case are more aligned with the next set of enumerated exceptions, where the blue lights are not activated due to road blocks, traffic accident investigations, and citizen arrests, and where video recording is required once practicable. Manning was removed by individuals other than law enforcement and law enforcement was investigating an obvious traffic accident. In the instant case, video recording never became practicable at the site, since Manning was not there, and therefore video recording never needed to begin.

The Court of Appeals found as follows:

Despite the failure to provide an affidavit under subsection B, the video recording was not required because Corporal Hallman was conducting an investigation of a traffic accident and Manning was arrested at the hospital. See §56-5-2953(B) (“In circumstances including, but not limited to, . . . traffic accident investigations . . . , where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal.”).

Manning, 400 S.C. at 266, 734 S.E.2d at 318.

Additionally, the Court of Appeals correctly found that the totality of circumstances exception applied to the instant case because law enforcement was not at the incident site before Manning was taken away by medical personnel. Id., 400 S.C. at 266, 734 S.E.2d at 318-19.

Manning's reliance on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) is misplaced. In that case, the Supreme Court did not review whether the totality of circumstances exception applied, as determined by the magistrate, because the reviewing circuit court did not address the issue in its order and the City failed to preserve the issue. In the instant case, the totality of circumstances issue applies and, further, the statute only applies when the defendant is found at the incident site, not when he has absconded or was already taken away by medical personnel. Accordingly, the trial court did not err.

II.

Law enforcement had probable cause to believe Applicant committed felony DUI and therefore, the trial court did not err in denying the motion to suppress the blood test results.

Manning alleges law enforcement did not have probable cause to believe Manning was the driver of the vehicle. However, evidence at trial shows otherwise. S.C. Code Ann. § 56-5-2946 provides, in relevant part, as follows:

Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

Corporal Hallman testified that when he arrived at the scene, a strong smell of alcohol emanated from what remained of the vehicle. At the hospital, Trooper Baker smelled the odor of alcohol on Manning. ROA. pp. 267-268. Jake was undoubtedly dead. Corporal Hallman spoke with the emergency personnel who heard Manning's comments implicating himself as the driver. ROA. pp. 251-252.² The DMV records tied the vehicle to Manning's residence.³

2 There was some confusion as to whether emergency personnel relayed this information to Baker or Hallman or both. See ROA. p. 83, p. 85, p. 269, pp. 335-337. However, whether thru direct conversation with emergency personnel or relayed by Baker, it is apparent that Hallman became aware that emergency personnel heard statements indicating Manning was the driver when determining that Manning's blood should be taken.

3 Manning claims in his brief that Hallman was not aware of the matching addresses at the time he requested Baker to get the blood test. However, Hallman testified he had this information at the time he determined probable cause. ROA. p. 94, lines 4-10, p. 96, lines 3-4.

This Court should apply a deferential standard, reversing only where the trial court's ruling is not supported by evidence found in the record. See State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (setting out the standard that should be applied for motions to suppress on Fourth Amendment grounds). The trial court's factual findings that relate to this analysis should be reviewed for clear error only. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000) (finding review of Fourth Amendment issue that was largely a question of fact should be reviewed like any other trial court's factual findings and should be reversed only if there is clear error).

"Probable cause to arrest without a warrant generally exists when facts and circumstances within an arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested." State v. Cuevas, 365 S.C. 198, 203, 616 S.E.2d 718, 721 (Ct. App. 2005) (citation omitted).

"Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officers disposal." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911 (1996). "Probable cause turns not on the individual's actual guilt or innocence, but on whether the facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of the crime." Jackson v. City of Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005). "The determination of probable cause is not an academic exercise in hindsight." Id., 366 S.C. at 667, 623 S.E.2d at 659.

"The term 'probable cause' does not import absolute certainty." State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1996). "Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities, not

certainties.” Id. “A finding of probable cause may be based upon less evidence than would be necessary to support a conviction.” Lapp v. South Carolina Dept. of Motor Vehicles, 387 S.C. 500, 692 S.E.2d 565 (Ct. App. 2010).

“In other words, a police officer has probable cause to arrest without a warrant where he in good faith believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise.” Cuevas, 335 S.C. at 204, 616 S.E.2d at 721 (Internal quotations and citations omitted).

Abundant information supported Corporal Hallman’s determination of probable cause. Manning and the wreck smelled of alcohol, and the address for his driver’s license and the registration were identical. That alone should be sufficient for probable cause. However, evidence supports that Corporal Hallman was informed that Manning indicated to emergency personnel he was the driver, adding further evidence for Hallman to establish probable cause. The information within Corporal Hallman’s knowledge was sufficient to establish probable cause and the evidence in the record supports the trial court’s ruling.

Additionally, as the Court of Appeals correctly noted, evidence supports that Trooper Baker would have probable cause if he was determined to be the arresting officer: “based on a statement made to him by a Highway Patrol officer indicating Manning was the driver, his observations at the hospital that Manning smelled of alcohol, and his observations that Manning sustained trauma consistent with having been in an accident.” Manning, 400 S.C. at 268, 734 S.E.2d at 319. Accordingly, the ruling should be affirmed.

III.

The trial court did not err in denying Petitioner's motion for mistrial and the issue is not preserved, especially since Petitioner failed to timely raise his motion to sever and refused a curative instruction.

Manning committed two crimes that night. When he was arrested, he was in possession of a quantity of hydrocodone and acetaminophen, a schedule three controlled substance. Manning waited until after both indictments were read to the jury to move to sever the two charges. The trial court granted the severance. The trial court offered to give an instruction to the jury to disregard the severed charge. Seemingly as an afterthought, Manning moved for a mistrial. After the trial court denied the mistrial motion, Manning declined the curative instruction. Yet Manning claims reading both indictments prejudiced him. The issue should not be reviewed.

An issue is not preserved for review unless a contemporaneous objection is made to and ruled upon by the trial court. State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). A party cannot complain of court error created by his own conduct. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984). Reviewing courts do not sit to relieve self-inflicted wounds. Rish v. Rish by and Through Barry, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988) (Bell, J., concurring). The Court of Appeals correctly found that the objection to presenting both indictments was not timely raised. Manning, 400 S.C. at 269-70, 734 S.E.2d at 320.

Further, an issue is not preserved when the trial court's offer of a curative instruction is refused. State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996); see State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct. App. 1996) ("In rejecting the

trial court's offer to strike the testimony or give a curative instruction, [the defendant] waived any complaint he had to the challenged testimony").⁴

Manning waited for the indictments to be read before raising his challenge. Then he wanted a mistrial for the indictments being read to the jury. His objection to the reading of the indictments is too late, his alleged injury was self-inflicted. The trial court ruled as follows:

Well, I'm not going to get trapped into a mistrial. In that regard then, we're going to go forward. Now, you are not going to have it both ways. Either you want to go forward or you don't.

You didn't make that motion before the jury was qualified, and the Court is not going to be trapped like that. I'll be glad to give whatever instruction you want me to give them, but the case was called for trial in front of the Court. It was qualified.

There were no motions at the time, except one y'all brought up to me in chambers on the continuance. So if it prejudiced him, that's a self-inflicted wound. **That's not a wound inflicted by the State or by this Court.**

I'm not here to inflict any wounds on either the State nor the Defendant. I'll charge whatever you want in regard to that or I'll say nothing, but I don't see where it's – where the court could respond like that.

ROA. p. 108, lines 6-24 (emphasis added).

4 Manning argues that the Court of Appeals erred in finding that the issue was waived by waiving a curative charge. For the reasons listed above, Respondent disagrees. However, the Court of Appeals did not address the Respondent's argument in this regard, but found that the issue was not timely raised and that the trial court did not abuse its discretion on the merits.

The trial court did not abuse its discretion. “A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons.” State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). “The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way.” State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000). “A mistrial should only be granted when ‘absolutely necessary,’ and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.” State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted). “The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice.” State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

In the instant case, Manning cannot show prejudice. If Manning thought he was going to be prejudiced by going forward on the felony DUI charge, he would have accepted the offer for an instruction. Instead, as evidenced by Manning declining the instruction, Manning must have thought it was more likely the jury would not focus on the severed charge and did not want to call further attention to the matter. Further, mistrial was not dictated by manifest necessity. The jury had ample evidence to convict Manning for felony DUI and there is no doubt that he was convicted on the evidence presented to the jury at trial, and not a pretrial event. See generally, State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) (“[A] vague reference to a defendant’s prior [crimes] is not sufficient to justify a mistrial where there is no attempt by the State to introduce

evidence that the accused has been convicted of other crimes”).

The Court of Appeals correctly found: “the single reference to the schedule three drug charge contained in the indictments read at the beginning of trial does not constitute sufficient prejudice to justify a mistrial.” Manning, 400 S.C. at 270, 734 S.E.2d at 320. The Court of Appeals further found: “Ample evidence in the record supports Manning’s conviction for felony DUI, and there is no evidence the jury considered the severed drug charge in reaching its verdict.” Id., 400 S.C. at 269-70, 734 S.E.2d at 320.

Accordingly, the trial court did not commit error.

IV.

The trial court's charge to the jury on implied consent was not a comment on the facts and the charge as a whole was not misleading and was free from error.

The trial court charged the exact language of the implied consent statute, S.C. Code Ann. § 56-5-2950 and Manning complains it was error as a comment on the facts. Even viewed in isolation, the jury was certain to understand that it was not a comment on the facts and understood its duty to make its own factual determination that Manning was the driver. However, looking at the charge as a whole, the trial court clearly charged the jury with the duty to determine if they were convinced beyond a reasonable doubt that Manning was the driver from their own view of the evidence.

The trial court included on its charge on the elements of felony DUI the following: "Felony D.U.I. requires proof of three elements: Number one, **the actor drives a vehicle** while under the influence of alcohol and/or drugs; . . ." ROA. p. 495, lines 1-3 (emphasis added). The trial court further instructed the jury as follows:

In every case tried in this court before a jury, the jury becomes the sole and exclusive judge of the facts in a case. A trial judge cannot intimate, state, comment on or make any statement to a trial jury about the facts in the case.

Since you the jury are the sole judge of the facts, you are not to infer from what I have said during the progress of this trial, in ruling upon the admissibility of evidence or otherwise, or anything that I now say during the course of this instruction to you that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case.

That is a matter solely for you the jury to determine. As jurors it is your duty to determine the effect, the value, the weight, and the truth of the evidence presented during this trial.

ROA. p. 498, line 24 - p. 499, line 15.

The trial court again charged the elements of felony DUI as follows:

... The State must first prove beyond a reasonable doubt that the Defendant drove a vehicle in this State while under the influence of alcohol and/or drugs.

An issue in this case is the identification of the Defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you may convict the Defendant.

The State must further prove beyond a reasonable doubt that the Defendant drove a vehicle while under the influence of alcohol and/or drugs. . . .

ROA. p. 504, lines 9-23.

In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987).

Article V, §21 of the South Carolina Constitution states: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." South Carolina law dictates a trial judge should refrain from any comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused. State v. Jackson, 297 S.C. 523, 377 S.E.2d 570, 572 (1989); State v. Smith, 288 S.C. 329,

342 S.E.2d 600, 601 (1986). However, jury instructions must be considered in their entirety and, if in their entirety they are free from error, then any potentially misleading portions do not constitute reversible error. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869, 874 (1994); Jackson, 377 S.E.2d at 572.

“A charge that states the legal conclusions that would result from the establishment of certain facts is not necessarily an improper charge, nor a mandate to the jury to assume the truth of the facts as stated.” State v. Dickey, 380 S.C. 384, 402, 669 S.E.2d 917, 927 (Ct. App. 2008). “The test is how a reasonable juror would have understood the charge.” Id.

In the instant case, the trial court charged the exact language of the statute and did not intimate his belief as to whether Manning was in fact the driver. His instructions as a whole clearly require the jury to make their own decision on whether evidence proved beyond a reasonable doubt that Manning was the driver. The instructions in their entirety were not misleading and were free from error. Accordingly, the trial court did not err.

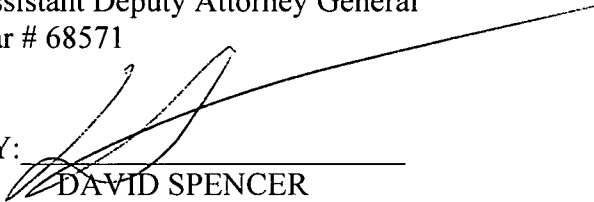
CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. If this Court should see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 30, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County

The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

CHRISTOPHER MANNING


PETITIONER.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

LaNelle DuRant, Esquire
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1330 Lady Street, Suite 401
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This 30th day of May, 2013


JEAN R. INDRIAGO
LEGAL ASSISTANT