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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLAYBON LEWIS ATWATER, JR.

APPELLANT

APPELLATE CASE NO. 2021-001320

RECORD ON APPEAL

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INDEX

INDEX	i
TRIAL TRANSCRIPT DATED NOVEMBER 1-4, 2021	1
DEFENSE MOTION IN <i>LIMINE</i> TO SUPPRESS OFFICER TESTIMONY EVIDENCE	19
TESTIMONY (<i>IN-CAMERA</i>)	
CHRISTOPHER SHICK	
Direct Examination by Mr. Debusk	22
Cross-Examination by Mr. Truslow	27
Redirect Examination by Mr. Debusk	31
Examination by the Court	32
Recross-Examination by Mr. Truslow	33
ARGUMENT BY MR. DEBUSK	34
COURT’S RULING DENYING MOTION IN <i>LIMINE</i> TO SUPPRESS OFFICER TESTIMONY EVIDENCE	36
DEFENSE MOTION TO DISMISS PURSUANT TO S.C. CODE § 56-5-2953 (A)	37
TESTIMONY	
BRYAN FLOYD (<i>IN-CAMERA</i>)	
Direct Examination by Mr. Debusk	44
Cross-Examination by Mr. Truslow	51
Redirect Examination by Mr. Debusk	58
ARGUMENT BY MR. TRUSLOW	60
REPLY BY MS. HARTE	63
COURT’S RULING DENYING MOTION TO DISMISS PURSUANT TO S.C. CODE § 56-5-2953 (A)	66
DEFENSE MOTION TO SUPPRESS FIELD SOBRIETY TEST	69
ARGUMENT BY MR. DEBUSK	71
TESTIMONY	
JAKE HOARD (<i>IN-CAMERA</i>)	
Direct Examination by Ms. Harte.....	73

DEFENSE WITHDRAWAL OF MOTION TO SUPPRESS FIELD SOBRIETY TEST	78
DEFENSE MOTION TO SUPPRESS VIDEO OF DEFENDANT FROM BA ROOM	79
TESTIMONY	
BRYAN FLOYD (<i>IN-CAMERA</i>)	
Direct Examination by Mr. Debusk	82
ARGUMENT BY MR. TRUSLOW	83
REPLY BY MR. DEBUSK	84
COURT’S RULING ADMITTING VIDEO OF DEFENDANT WITH REDACTION AND DENYING THE MOTION TO SUPPRESS	84
DEFENSE MOTION TO LIMIT ALCOHOL CONTENT EVIDENCE	86
ARGUMENT BY MR. DEBUSK	86
COURT’S RULING DENYING MOTION TO LIMIT EVIDENCE	87
DEFENSE MOTION TO SEQUESTER WITNESSES	93
COURT’S RULING GRANTING MOTION	94
OPENING STATEMENT BY MS. HARTE	99
OPENING STATEMENT BY MR. TRUSLOW	105
TESTIMONY	
DAVUD SCHNELL	
Direct Examination by Ms. Harte	114
JENNIFER McCLUNG	
Direct Examination by Ms. Harte	126
WILLIAM MARCUS LEE	
Direct Examination by Mr. Debusk	133
Cross-Examination by Mr. Truslow	148
Redirect Examination by Mr. Debusk	151
Recross-Examination by Mr. Truslow	153
TED DILLARD KERLEY	
Direct Examination by Ms. Harte	154

Cross-Examination by Mr. Truslow	159
Redirect Examination by Ms. Harte	161
TASHA ANN GRAINGER	
Direct Examination by Mr. Debusk	164
Cross-Examination by Mr. Truslow	169
Redirect Examination by Mr. Debusk	175
DARREN MAXWELL	
Direct Examination by Ms. Harte.....	177
Cross-Examination by Mr. Truslow	182
Redirect Examination by Ms. Harte	187
YOLANDA PADILLA	
Direct Examination by Mr. Debusk	189
Cross-Examination by Mr. Truslow	193
Redirect Examination by Mr. Debusk	197
Recross-Examination by Mr. Truslow	199
DEMI STEWARD-RISSO	
Direct Examination by Mr. Debusk	200
DEMI STEWARD-RISSO (<i>IN-CAMERA</i>)	
Direct Examination by Mr. Truslow	203
Examination by the Court.....	204
DEMI STEWARD-RISSO	
Continued Direct Examination by Mr. Debusk.....	205
OBJECTION TO HEARSAY BY MR. TRUSLOW	206
ARGUMENT BY MR. DEBUSK.....	208
COURT’S RULING ALLOWING TESTIMONY UNDER RULES 801(D)(2), 803(5), AND 8030(6).....	209
TESTIMONY	
DEMI STWARD-RISSO	
Continued Direct Examination by Mr. Debusk.....	210
Cross-Examination by Mr. Truslow	213
ADAM CZERWINSKI	
Direct Examination by Mr. Debusk	215

STEVEN MARK OSTIN	
Direct Examination by Mr. Debusk	221
CHRISTOPHER SHICK	
Direct Examination by Mr. Debusk	226
DOCTOR ERIC EASON	
Direct Examination by Ms. Harte.....	239
Cross-Examination by Mr. Truslow	248
BRYAN FLOYD	
Direct Examination by Mr. Debusk	253
Cross-Examination by Mr. Truslow	268
Redirect Examination by Mr. Debusk	277
Recross-Examination by Mr. Truslow	278
SHANNON MARIE KOCHER	
Direct Examination by Mr. Debusk	283
Cross-Examination by Mr. Truslow	287
CHIRS SENGLE	
Direct Examination by Ms. Harte.....	288
JAKE HOARD	
Direct Examination by Ms. Harte.....	292
Cross-Examination by Mr. Truslow	316
Redirect Examination by Ms. Harte	334
SARAH PRESTON	
Direct Examination by Mr. Debusk	336
JESSICA KAPP	
Direct Examination by Mr. Debusk	345
DUSTIN SMITH	
Direct Examination by Mr. Debusk	350
STATE RESTS	365
DEFENSE MOTION FOR DIRECTED VERDICT	367
ARGUMENT BY MR. DEBUSK	368
COURT’S RULING DENYING MOTION FOR DIRECTED VERDICT	372
TESTIMONY COLLOQUY WITH DEFENDANT	372

DEFENDANT DECLINES TO TESTIFY	375
DEFENSE RENEWS MOTION FOR DIRECTED VERDICT.....	376
COURT’S RULING DENYING MOTION FOR DIRECTED VERDICT	376
MOTION TO REOPEN BY MR. DEBUSK.....	395
COURT’S RULING GRANTING THE STATE’S MOTION TO REOPEN.....	395
TESTIMONY	
BRYAN FLOYD	
Direct Examination by Mr. Debusk	408
Cross-Examination by Mr. Truslow	414
JAKE HOARD	
Direct Examination by Ms. Harte.....	415
Cross-Examination by Ms. Truslow.....	416
JAKE HOARD (<i>IN-CAMERA</i>)	
Direct Examination by Mr. Truslow	419
JAKE HOARD	
Continued Cross-Examination by Mr. Truslow	427
Redirect Examination by Ms. Harte	432
Recross-Examination by Mr. Truslow	438
STATE RESTS	442
DEFENSE RENEWS MOTION FOR DIRECTED VERDICT.....	443
COURT RENEWS RULING DENYING MOTION FOR DIRECTED VERDICT	443
DEFENSE RESTS	445
CLOSING ARGUMENT BY MR. DEBUSK.....	446
CLOSING ARGUMENT BY MR. TRUSLOW	466
VERDICT	497
DEFENSE RENEWAL OF MOTION FOR DIRECTED VERDICT	499
COURT RENEWS RULING DENYING MOTION FOR DIRECTED VERDICT	499

COURT’S RULING DENYING MOTION FOR A NEW TRIAL.....	499
SENTENCING	514
INDICTMENT AND SENTENCE SHEET FOR FELONY DUI- GBI	515
INDICTMENT AND SENTENCE SHEET FELONY DUI- DEATH	519
CERTIFICATE OF COUNSEL	523
[STATE’S EXHIBITS #1, #21, #28, #36, AND #37 ARE ON FILE WITH THIS COURT]	

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF HORRY) 2019-GS-26-02899, 02900

STATE OF SOUTH CAROLINA,)

Plaintiff,)

Transcript of Record

vs.)

November 1-4, 2021

CLAYBON LEWIS ATWATER,)

JR.,)

Defendant.)

B E F O R E:

Honorable Steven H. John
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Rachel G. Harte, Esquire
George H. DeBusk, Esquire
Attorney for Plaintiff

T. Kirk Truslow, Esquire
Attorney for Defendant

Kay H. Richardson
Circuit Court Reporter

INDEX

1	<u>I N D E X</u>	
2	<u>NOVEMBER 1, 2021 - DAY ONE</u>	<u>Pg.</u>
3	Voir Dire	10
4	Jury Selection	40
5	By the Court	46
6	Motions	50
7	Christopher Shick	
8	Direct by DeBusk	55
9	Cross by Truslow	60
10	Redirect by DeBusk	64
11	By the Court	65
12	Recross by Truslow	66
13	Argument by DeBusk	67
14	By the Court	68
15	Motions	69
16	Bryan Floyd	
17	Direct by DeBusk	77
18	(State's 51 Published - Audio not transcribed.).....	81
19	Cross by Truslow	84
20	Redirect by DeBusk	91
21	Argument by Truslow	93
22	Argument by Harte	96
23	By the Court	97
24		
25		

State v. Atwater - 2019-GS-26-02899, 02900

3

INDEX

1	<u>I N D E X</u>	
2	<u>NOVEMBER 2, 2021 - DAY TWO</u>	<u>Pg.</u>
3	Motions	102
4	Jake Hoard	
5	Direct by Harte	106
6	(State's 31 Published - Audio Not Transcribed.).....	110
7	Bryan Floyd	
8	Direct by DeBusk	115
9	(State's 30 Published - Audio Not Transcribed.).....	115
10	Argument by Truslow	116
11	Argument by DeBusk	117
12	By the Court	117
13	Motions	119
14	By the Court	120
15	(State's 28 Published - Audio Not Transcribed.).....	121
16	By the Court	124
17	Opening by Harte	132
18	Opening by Truslow	138
19	By the Court	146
20	David Schnell	
21	Direct by Harte	147
22	Jennifer McClung	
23	Direct by Harte	159
24	William Marcus Lee	
25	Direct by DeBusk	166

INDEX

1	<u>I N D E X</u>	
2		<u>Pg.</u>
3	William Marcus Lee	
4	Cross by Truslow	181
5	Redirect by DeBusk	184
6	Recross by Truslow	186
7	Ted Dillard Kerley	
8	Direct by Harte	187
9	Cross by Truslow	192
10	Redirect by Harte	194
11	Tasha Ann Grainger	
12	Direct by DeBusk	197
13	Cross by Truslow	202
14	Redirect by DeBusk	209
15	Darren Maxwell	
16	Direct by Harte	210
17	Cross by Truslow	215
18	Redirect by Harte	220
19	Yolanda Padilla	
20	Direct by DeBusk	222
21	Cross by Truslow	226
22	Redirect by DeBusk	230
23	Recross by Truslow	232
24	Demi Steward-Risso	
25	Direct by DeBusk	233

State v. Atwater - 2019-GS-26-02899, 02900

5

INDEX

1	<u>I N D E X</u>	
2		<u>Pg.</u>
3	Demi Steward-Risso	
4	In Camera Examination by Truslow	236
5	By the Court	237
6	Direct by DeBusk	238
7	Cross by Truslow	246
8	Adam Czerwinski	
9	Direct by DeBusk	248
10	Steven Mark Ostin	
11	Direct by DeBusk	254
12	Christopher Shick	
13	Direct by DeBusk	259
14	Eric Eason	
15	Direct by Harte	272
16	Cross by Truslow	281
17	By the Court	282
18	<u>NOVEMBER 3, 2021 - DAY THREE</u>	
19	Bryan Floyd	
20	Direct by DeBusk	286
21	Cross by Truslow	301
22	Redirect by DeBusk	310
23	Recross by Truslow	311
24	Shannon Marie Kocher	
25	Direct by DeBusk	316

1	<u>I N D E X</u>	
2		<u>Pg.</u>
3	Shannon Marie Kocher	
4	Cross by Truslow	320
5	Chris Sengle	
6	Direct by Harte	321
7	Jake Hoard	
8	Direct by Harte	325
9	Cross by Truslow	349
10	Redirect by Harte	367
11	Sarah Preston	
12	Direct by DeBusk	369
13	By the Court	376
14	Jessica Kapp	
15	Direct by DeBusk	378
16	Dustin Smith	
17	Direct by DeBusk	383
18	By the Court	398
19	Motions	408
20	Claybon Atwater, Jr.	
21	By the Court	405
22	Motions	408
23	Charge Conference	409
24	<u>NOVEMBER 4, 2021 - DAY 4</u>	
25	By the Court	430

State v. Atwater - 2019-GS-26-02899, 02900

7

INDEX

1	<u>I N D E X</u>	
2		<u>Pg.</u>
3	Bryan Floyd	
4	Direct by DeBusk	441
5	Cross by Truslow	447
6	Jake Hoard	
7	Direct by Harte	448
8	Cross by Truslow	449
9	Redirect by Harte	465
10	Recross by Truslow	471
11	Motions	476
12	By the Court	478
13	Closing by DeBusk	479
14	Closing by Truslow	499
15	By the Court	511
16	Charge to Jury	512
17	By the Court	529
18	Verdict of the Jury	530
19	Motions	532
20	Sentencing	533
21	Certificate of Court Reporter	548
22		
23		
24		
25		

State v. Atwater - 2019-GS-26-02899, 02900
INDEX

8

<u>E X H I B I T S</u>				
	<u>No.</u>		<u>ID</u>	<u>EV</u>
1				
2				
3	P1	DVD - Floyd Bodycam	101	292
4	P2	Large Aerial Photo		154
5	P3	1 Photo		150
6	P4	1 Photo		151
7	P5	1 Photo		152
8	P6	1 Photo		152
9	P7	1 Photo		165
10	P8	1 Photo		172
11	P9	1 Photo		172
12	P10	1 Photo		172
13	P11	1 Photo		172
14	P12	1 Photo	Not ID or E	
15	P13	1 Photo		173
16	P14	1 Photo	Not ID or E	
17	P15	1 Photo		172
18	P16	1 Photo		172
19	P17	1 Photo	Not ID or E	
20	P18	1 Photo		174
21	P19	1 Photo		174
22	P20	1 Photo		174
23	P21	1 Photo		174
24	P22	1 Photo		300
25	P23	1 Photo	298	318

State v. Atwater - 2019-GS-26-02899, 02900
INDEX

9

1	<u>E X H I B I T S</u>		
2	<u>No.</u>	<u>ID</u>	<u>EV</u>
3	P24 SLED BA Report		345
4	P25 Miranda Rights - 04/06/19 18:28		332
5	P26 Miranda Rights - 04/06/19 19:22		295
6	P27 SLED Urine/Blood Report	297	319
7	P28 DVD - Shick Bodycam		268
8	P29 DVD - Floyd Bodycam		296
9	P30 DVD - Floyd Dashcam	113	
10	P31 DVD - Hoard - BAC video	110	
11	P32 DVD - Store Camera - McClung		162
12	P33 DVD - Compilation of Clips		163
13	P34 Excerpt from Transcript - Defendant Statement		244
14	P35 Excerpt from Transcript - Defendant Statement		
15	with redactions		244
16	P36 State's 31 with redactions		346
17	P37 State's 30 with redactions		292
18	P38 Chain of Custody		371
19	P39 Toxicology Report		392
20	P40 Search Warrant		444
21	S41 DVD - Floyd - Search Warrant		443
22	S42 DataMaster Inspection Report		468
23	C1 Note from Jury		
24	C2 Note from Jury		
25			

State v. Atwater - 2019-GS-26-02899, 02900
VOIR DIRE

10

1 **NOVEMBER 1, 2021 - DAY 1 OF 4**

2 **ON THE RECORD @ 3:27 P.M.**

3 **VOIR DIRE:**

4 THE COURT: All right, ladies and gentlemen, we're going
5 to start the selection process regarding this matter. It is
6 the State of South Carolina versus Claybon Lewis Atwater, Jr.
7 Now, regarding the particular matter, the state has charged
8 the defendant with two crimes and issued two indictments
9 regarding these matters. Now, before I talk about the
10 indictments, let me tell you, the indictments are merely the
11 charging documents, the documents which bring the matter to
12 Court. They are not evidence and cannot be considered by
13 anyone as evidence in the case. The only reason I'll read
14 anything to you from them is to see if you happen to know
15 anything about this case or there's something you need to
16 bring to the Court's attention, and we'll go over those
17 questions that y'all filled out in just a second. But the
18 State of South Carolina has charged the defendant with the
19 crime of felony driving under the influence with death. The
20 state charges that Claybon Lewis Atwater, Jr. did in Horry
21 County, on or about April 6, 2019, drive a motor vehicle while
22 under the influence of alcohol, drugs, or a combination of
23 both and did an act forbidden by law and/or neglected a duty
24 imposed by law in the driving of the vehicle, which act or
25 neglect approximately caused the death of Donna Schnell, S-C-

State v. Atwater - 2019-GS-26-02899, 02900
VOIR DIRE

11

1 H-N-E-L-L, to wit; the defendant failed to yield the right of
2 way, violation of the Code of Laws, State of South Carolina,
3 1976, as amended.

4 The state has also charged that the defendant, Claybon
5 Lewis Atwater, Jr. committed the crime of felony driving under
6 the influence great bodily injury in that he did, in Horry
7 County on or about April 6th, 2019, drive a motor vehicle
8 while under the influence of alcohol, drugs, or a combination
9 of both, and did an act forbidden by law and/or neglected a
10 duty imposed by law in the driving of the vehicle, which act
11 or neglect approximately caused great bodily injury to David
12 Schnell, S-C-H-N-E-L-L, to wit; failure to yield right of way,
13 violation of the Code of Laws for the State of South Carolina,
14 1976, as amended.

15 Is there any member of the jury panel that knows anything
16 about this case, has any information about this case; is there
17 anything you need to bring to the Court's attention at this
18 time?

19 (REPORTER'S NOTE: No response.)

20 THE COURT: All right. We will go to the juror questions
21 then or questionnaires that the Court asked you fill out, and
22 I'll just call you up one at a time and you'll come forward
23 and come right up here and we'll talk about the juror duties
24 in general and the response that you gave.

25 So, Juror Number 19, Bobby Ballard, come forward.

State v. Atwater - 2019-GS-26-02899, 02900
JURY SELECTION

45

1 Number 62, Ashley Causey.
2 What say the state?
3 MR. DEBUSK: Please present the juror.
4 THE CLERK: Defense?
5 MR. TRUSLOW: Please seat the juror.
6 THE CLERK: Please be seated in the juror box.
7 THE COURT: All right, counsel, we're gonna have two
8 alternates, and on each alternate it will be one and two on
9 each alternate.
10 THE CLERK: Number 60, Bethany Carleton.
11 What say the state?
12 MR. DEBUSK: Please present the juror.
13 THE CLERK: Defense?
14 MR. TRUSLOW: Please excuse the juror from this
15 particular case.
16 THE CLERK: You're excused from this particular case.
17 Number 27, Loraine Beaty.
18 What say the state?
19 MR. DEBUSK: Please excuse the juror.
20 THE CLERK: You're excused from this particular case.
21 397, Shaniya Vereen.
22 What say the state?
23 MR. DEBUSK: Please present the juror.
24 THE CLERK: Defense?
25 MR. TRUSLOW: Please seat the juror.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

46

1 THE CLERK: Please be seated in the juror box.

2 THE COURT: All right, Ms. Green, you're one of the
3 alternates.

4 Go ahead.

5 THE CLERK: Number 228, Tami MacDonald.

6 What say the state?

7 MR. DEBUSK: Please present the juror.

8 THE CLERK: Defense?

9 MR. TRUSLOW: Please seat the juror.

10 THE CLERK: Please be seated in the juror box.

11 THE COURT: All right, Ms. McDonald, you're the other
12 alternate. Thank you.

13 All right. So, regarding this, the jury as impaneled in
14 this particular matter, is there any objections from the
15 state?

16 MR. DEBUSK: None from the state, Your Honor.

17 THE COURT: From the defense?

18 MR. TRUSLOW: No, Your Honor.

19 THE COURT: All right. Very good. I find the jury has
20 been properly impaneled pursuant to *Batson v. Kentucky* and *JEB*
21 *v. Alabama*.

22 BY THE COURT:

23 THE COURT: All right, ladies and gentlemen, we're going
24 as the jury for this particular case. The first thing I'm
25 gonna do is ask you to go back to the jury room and select

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

47

1 your foreperson for this particular jury. So, let me tell you
2 very briefly what the foreperson's duties and responsibilities
3 are. If we're here in the courtroom and the jury needs
4 attention to some matter, witness needs to speak up or the
5 lawyers or whatever the issue is, the foreperson will raise
6 your hand, get the Court's attention and we'll handle the
7 matter whatever it is. If you're back in the jury room and
8 some issue or matter comes up, there will be a pad and pen
9 provided to you in there, you write out a note, you sign it
10 and give it to the bailiff. It will come to me, and we'll
11 handle that matter whatever it is. When we've gone through
12 the evidentiary portion of the trial, we've heard all the
13 witnesses come forward and testify under oath, and if there
14 had been any kind of physical evidence, documents or something
15 that might have been introduced into this case, and we've gone
16 through the evidentiary portion, then we have the closing
17 arguments of the attorneys and then you've got the charge on
18 the law. I will give you the law that you will apply to the
19 facts and evidence you have heard in this particular case.
20 So, after that, I'll give the case to you, submit the case to
21 you for your deliberations and your unanimous decision.
22 You'll go back to the jury room. At that point in time, the
23 foreperson's job and responsibilities and duties change in
24 this regard. The foreperson is gonna act like the chairperson
25 at a meeting. You guide the discussions, if necessary; make

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

48

1 sure that everybody that wants to has an opportunity to speak,
2 remembering that the foreperson's voice and vote on the issues
3 carries no more weight than every other member of the jury.
4 Everybody is equal in that regard, but the foreperson remains
5 in charge, again, to guide the discussions, if necessary.
6 Again, write out a note and send it to the Court, if
7 necessary.

8 Once the jury has well and truly deliberated and you've
9 reached your unanimous decision in this particular matter, the
10 foreperson is gonna take the printed verdict form that the
11 Court will provide to you and either check the appropriate
12 block or write out the appropriate words; and thereafter sign
13 your name as the foreperson indicating that that verdict is
14 indeed the unanimous verdict of each and every member of the
15 jury in this particular case.

16 So, understanding the basic duties and responsibilities
17 of the foreperson -- now, the two alternates, ladies you can
18 vote on who the foreperson is but, being the alternates, the
19 two of you cannot be the foreperson. Everybody else is
20 eligible. Please accompany the bailiff back to the jury room,
21 select your foreperson, knock on the door, and let the bailiff
22 know who it is. All right?

23 Thank you very much.

24 (REPORTER'S NOTE: Jury exits courtroom @ 4:23 p.m. The
25 following takes place outside the presence of the jury.)

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

49

1 THE COURT: All right, ladies and gentlemen of the jury
2 panel that was not selected for this particular case, as I
3 indicated to you earlier today, this will be the only trial
4 that we conduct this particular week. So, I will excuse you
5 from your jury service at this time.

6 Thank you very much.

7 (REPORTER'S NOTE: Jury Venire exits courtroom @ 4:25 p.m.)

8 THE COURT: Counsel, could y'all come up here and talk to
9 me for one second, please?

10 (REPORTER'S NOTE: Bench conference is held off the record in
11 the presence of but outside the hearing of the jury.)

12 THE COURT: So, we'll take a short break for about five
13 minutes, and then we'll come back and we'll get started on the
14 motions.

15 MR. TRUSLOW: Yes, sir.

16 MR. DEBUSK: Thank you, Your Honor.

17 THE COURT: Thank you.

18 **RECESS @ 4:27 P.M.**

19 *****OFF THE RECORD*****

20 **ON THE RECORD @ 4:35 P.M.**

21 (REPORTER'S NOTE: The following takes place outside the
22 presence of the jury.)

23 THE COURT: Counsel, the jury has selected Juror Number
24 39 to be the foreperson, that's Daniel Boorn, the foreperson.

25 MOTIONS:

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

50

1 All right. So, let's look at the list of motions first
2 and then Mr. Truslow, you can tell me if we're still
3 proceeding on these or not, and then we'll see which ones we
4 may hear today and what we'll save for tomorrow.

5 We do have the *Jackson v. Denno* hearing on the
6 defendant's statements. So, you want to proceed with that
7 one?

8 MR. TRUSLOW: Yes, sir.

9 THE COURT: All right. Very good. And you got your
10 motion to suppress the field sobriety test administered at the
11 police department?

12 MR. TRUSLOW: Yes, sir.

13 THE COURT: Okay.

14 MR. TRUSLOW: My motion about the client's statements I
15 think go with the *Jackson v. Denno* hearing.

16 THE COURT: All right, sir.

17 MR. TRUSLOW: So, those are kind of one and the same.

18 THE COURT: Right. Right. Okay. The issue about
19 suppressed evidence that the defendant posed an escape risk, I
20 mean I've ruled that we're not gonna be talking about that in
21 the trial unless for some reason it might become an issue
22 because of -- if the defendant testifies, you know, because of
23 some question or answer, but ---

24 MR. TRUSLOW: Yes, sir. If we open the door.

25 THE COURT: --- in the state's presentation of the case

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

51

1 we'll not be talking about that.

2 Then you have the motion to suppress evidence of
3 defendant's statement of alcohol consumed prior to the
4 collision. I'm assuming that will come up in the *Jackson v.*
5 *Denno*, I mean, that would -- that's part of his statement?

6 MR. TRUSLOW: Yes, sir. That would be covered of that.

7 THE COURT: All right. So, then ---

8 MR. TRUSLOW: It's just two different points in time.

9 THE COURT: Right. Right. But that's when -- that's
10 when I'll hear about that.

11 MR. TRUSLOW: Yes, sir.

12 THE COURT: Okay. So, you just make that point then.

13 All right. Motion to suppress evidence based on an
14 unlawful arrest. You going to proceed on that?

15 MR. TRUSLOW: Yes, sir.

16 THE COURT: All right. Motion in limine to suppress
17 evidence of defendant switching seats. Who -- who would be
18 testifying to that from the state, Mr. DeBusk?

19 MR. DEBUSK: Multiple witnesses and the defendant's own
20 the statement, Your Honor.

21 THE COURT: Okay. Oh, from the defendant's statement,
22 also?

23 MR. DEBUSK: Yes, sir.

24 THE COURT: Okay. And then ---

25 MR. DEBUSK: The civilian witnesses, Your Honor.

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

52

1 THE COURT: So, people at the scene?

2 MR. DEBUSK: Yes, sir.

3 THE COURT: Said they saw that?

4 MR. DEBUSK: Yes, sir.

5 THE COURT: Okay. All right. Very good. All right.

6 So, if it's gonna come up in his statement, we'll probably
7 need to leave that to the one when we do *Jackson v. Denno*
8 then.

9 MR. TRUSLOW: Yes, sir.

10 THE COURT: All right. So, with that, why don't we --
11 why don't we proceed on the motion to suppress evidence based
12 on an unlawful arrest.

13 MR. TRUSLOW: All right, Your Honor. I think the license
14 suspension evidence is probably moot as well, if they're not
15 proceeding on that charge.

16 THE COURT: Right.

17 MR. TRUSLOW: So, that would be off.

18 THE COURT: All right. Very good.

19 MR. TRUSLOW: Your Honor, the motion, there's two motions
20 to -- well, the motion for unlawful arrest is not to dismiss,
21 it would just maybe result in that. It would be to suppress
22 everything after the arrest.

23 THE COURT: All right.

24 MR. TRUSLOW: And the position would be that the state
25 did not -- when he was arrested, as we contend when it was,

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

53

1 that there was not sufficient probable cause to arrest him at
2 that time. And just in summary, real briefly, the first
3 interaction with my client is with Officer Shick. My client
4 is speaking with him, presents him at some point with
5 identification, who he is, and then he asked to sit down.
6 He's just been in this accident, and he sits on the curb, and
7 momentarily -- Officer Shick next handcuffs him and places him
8 in the back of the patrol car. Thereby, and I would submit
9 under arrest, given the case law on what it means to obstruct
10 your ability to move around at that point. He is Mirandized
11 by Officer Shick twice at that point.

12 Now, prior to being handcuffed, from being -- he says in
13 his report, he says he wants to be able to control his actions
14 and he's in investigative detention, has him sit on the curb.
15 The video showed that he actually asked to sit down and was
16 told to sit on the curb. But momentarily after that, he's
17 handcuffed and put in the backseat of the patrol car where
18 he's left after he's Mirandized by Officer Shick. At that
19 point, Officer Shick indicates that he goes to check on the
20 status of his driving privileges.

21 So, our position is, there's nothing in the report by
22 Officer Shick about him having any problems walking or any
23 odor of alcohol or any slurred speech. That comes later with
24 another officer. So, we would contend that, at that point, he
25 is in custody in the back of the police car. The next officer

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

54

1 that comes along is told to investigate the felony DUI
2 portion. He goes to the car, re-Mirandizes, asks a few
3 questions, then takes him from that car in his handcuffs to
4 his patrol car and takes him to jail.

5 So, I'm not sure what he's under arrest there for, but
6 perhaps felony DUI, I'm not sure, but our position is that
7 when he is handcuffed in the backseat of Officer Shick's
8 patrol car, he was under arrest. He certainly was not free to
9 leave and -- and based on the objection -- the objective
10 factors under the law, not subjective, but it's based on what
11 a reasonable man would believe that he was free to leave at
12 that point, or whether he was under arrest. We're at a
13 collision. When he gets out of the car, he didn't want to
14 walk that way, because he didn't want to see the body in the
15 road, which we know from this point on, he's clearly upset
16 because now he feels he's being arrested, and I don't know
17 what any other obvious reasonable man would think having been
18 in detention sitting on the curb and then raised up from the
19 ground and handcuffed and placed in the backseat of a patrol
20 car where the next move is to the jail.

21 THE COURT: All right, sir. Solicitor, do you wish to
22 call a witness?

23 MR. DEBUSK: Yes, Your Honor. We'd call Officer Shick.

24 THE COURT: Officer, please come around and be sworn.

25 THE CLERK: Please raise your right hand and place your

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

55

1 left hand on the Bible.

2 CHRISTOPHER SHICK, HAVING BEEN DULY
3 SWORN TESTIFIES AS FOLLOWS:

4 THE CLERK: State your name for the Court and spell it,
5 please.

6 MR. SHICK: Lance Corporal Christopher Shick, S-H-I-C-K.

7 DIRECT EXAMINATION OF CHRISTOPHER SHICK BY MR. DEBUSK:

8 Q: Officer Shick, were you involved in the investigation of
9 the action that killed Donna Schnell on April 6th of 2019?

10 A: Yes, sir; I was.

11 Q: What was your role at the scene?

12 A: I was dispatched to the scene to investigate the crash.

13 Q: What is your -- what are your duties as an officer of
14 North Myrtle Beach?

15 A: I'm a traffic enforcement officer for the city. My
16 primary duties are crash investigation and traffic
17 enforcement.

18 Q: Okay. Now, in this case, what was the call that you
19 responded to?

20 A: A motor vehicle accident for a motorcycle versus a car.

21 Q: At that time, did you have any suspicion of driving under
22 the influence?

23 A: I did not.

24 Q: Did you encounter the defendant at the scene?

25 A: Yes, sir; I did.

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

56

1 Q: Before you encountered the defendant, did an individual
2 identify themselves as the driver to law enforcement and to
3 you?
4 A: Yes, sir; that's correct.
5 Q: Who was that person?
6 A: A young lady, Ms. Espada.
7 Q: Okay. Was she in the car with the defendant at the time?
8 A: She was when I made contact; yes, sir.
9 Q: Now, after she identified herself as the driver, did you
10 get any information contrary to her being the driver?
11 A: I did; yes, sir.
12 Q: From whom?
13 A: There were several witnesses that were on scene that I
14 met with prior to speaking to Ms. Espada.
15 Q: Uh-huh, (affirmative response).
16 A: That identified a male as the driver and not the female.
17 Several of them said that the two had switched post-accident.
18 Q: When you first encountered the defendant, did you -- what
19 was your purpose of talking to him?
20 A: To determine who was the driver of the car at the time?
21 Q: Did you ask him?
22 A: I did.
23 Q: Who did say was driving the car when you first asked him?
24 A: When I began speaking with him, he stated that, I believe
25 he said it was his wife, that Ms. Espada was the driver at the

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

57

1 time of the crash.

2 Q: At that point, did you decide to Mirandize him?

3 A: I did; yes, sir.

4 Q: Why?

5 A: Because at that point, I knew the seriousness of the
6 crash, due to the nature of the injuries, it was obvious that
7 Ms. Schnell was significantly injured and so was Mr. Schnell.
8 So, based upon that and that he was, in my opinion, at that
9 point, was possibly lying to me about who the driver was, I
10 Mirandized him to protect everybody's rights.

11 Q: He's lying to police about who was driving an offense?

12 A: It is; yes, sir.

13 Q: Okay. Now, as you questioned him, did there come a time
14 when you handcuffed him?

15 A: Yes, sir; I did.

16 Q: Why did you do that?

17 A: When I -- initially when I separated him and Ms. Espada,
18 with my first contact with the defendant, he was seated in the
19 passenger seat. He provided me a North Carolina ID car at my
20 request, and we started our interaction there through the
21 window. A short time into our interaction, Ms. Espada had a
22 seat in the driver's front seat and said she wasn't feeling
23 well. So, I asked her if she needed EMS. At that point, to
24 separate the two apart, I asked the defendant to step out and
25 move to the rear of the car and I also got ahold of another

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

58

1 officer that was on scene and requested EMS to tend to Ms.
2 Espada because she said she was having, I think it was chest
3 pains is what she told me. At that point, I moved him to the
4 rear of the car to separate the two of them.

5 Q: What did you do after you separated them?

6 A: Well, while I was speaking with him, he requested to sit
7 on the curb. So, I told him, yes, he could have a seat on the
8 curb, and we continued our conversation. At that point, I
9 Mirandized him, or attempted to Mirandize him. I do that
10 utilizing a card that's in my pocket, and while I was
11 mirandizing him, he kind of interrupted me several times and I
12 was trying to get him to pause and let me read the card to
13 him. In the process of mirandizing him, he and Ms. Espada
14 started having a conversation back and forth because they were
15 in close proximity. She was in the driver's door and he was
16 seated kind of right at the tail of the car on the curb, so
17 they were close, and they started having a conversation back
18 and forth to the point where I could no longer conduct an
19 interview. At that point, he was stood up and placed in
20 handcuffs and I removed him from that area back away from the
21 scene in the police car where I could have an interaction
22 uninterrupted with him.

23 Q: Now, at that time, was he under arrest?

24 A: He was not. He was in investigative detention.

25 Q: Did you inform him of that?

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

59

1 A: I did.

2 Q: Why did you feel the handcuffs were necessary?

3 A: Because I needed to secure his movements. I was afraid
4 that he may be a flight risk based upon the fact of several
5 issues that had occurred that concerned me. I've been a
6 police officer almost 17 years. So, I can tell when somebody
7 is looking for, what I consider looking for an escape route,
8 looking around. He was moving around on scene before we got
9 there, and then the proximity of the car from where the
10 collision was to where the final rest of the car was. The car
11 had been driven down the road a little ways and stopped
12 instead of stopping at the crash scene. All those things kind
13 of had me concerned that he may be a flight risk at the time.

14 Q: So, you felt it was necessary for reasons of the flight
15 ---

16 A: Correct.

17 Q: --- and for -- to -- to restrain him?

18 A: That is correct; yes, sir.

19 Q: But, at that point, you did not arrest him?

20 A: No. He was in investigative detention.

21 Q: Did you ultimately general to a probable cause to arrest
22 him?

23 A: I did; yes, sir.

24 Q: And was he placed under arrest later?

25 A: He was later; yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - CROSS BY TRUSLOW

60

1 Q: But when you first placed the cuffs on him, it was just
2 investigative detention; is that correct?

3 A: That's correct. And, I had to remove him from where we
4 were at, because on at least two different occasions, he and
5 the Ms. Espada continued to converse back and forth while I
6 was trying to conduct my investigation. So, I had to remove
7 him from that situation.

8 Q: And at that point, was he still maintaining the story
9 that you have reason to believe was false?

10 A: Yes; that's correct.

11 Q: Please answer any questions.

12 THE COURT: Mr. Truslow?

13 CROSS-EXAMINATION OF CHRISTOPHER SHICK BY MR. TRUSLOW:

14 Q: So, was -- had you determined there were any facts that
15 you saw that you thought he was looking for an escape route as
16 you put in your report; was that prior to or after he sat on
17 the curb?

18 A: That was prior to and during that time while I was
19 interviewing him at the rear of the car, he was kind of
20 leaning on the car, but he was looking around, checking
21 different directions. That's conduct that's common in my
22 experience in somebody trying to look for an escape route.

23 Q: So, I mean, is that what you based it on at that point in
24 time is him looking around?

25 A: A combination of things, yes, sir, that ---

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - CROSS BY TRUSLOW

61

1 Q: Let me back up. Three -- before he was put on -- sat on
2 the curb, okay, what prior to that, led you to believe that he
3 was looking for an escape route?

4 A: The part about where he moved his car. When the vehicle
5 left the collision location and drove down the road.

6 Q: How far down the road?

7 A: I didn't measure it, so I can't give you an exact
8 distance.

9 Q: Would it surprise you that it was 20 feet?

10 A: It was probably a little longer than that from the
11 collision location.

12 Q: Thirty feet; I'm going by the MAIT report?

13 A: Maybe somewhere in that ballpark. I don't know what the
14 exact number were, sir.

15 Q: All right. And do you know whether that's where it wound
16 up after the collision; did you see anybody move the vehicle?

17 A: I did not.

18 Q: Okay. That's what I'm asking you.

19 A: Yes, sir.

20 Q: All right. So, then he was handcuffed. Why? Ro
21 restrain him?

22 A: He was handcuffed for two reasons; one was to restrict
23 his movements, yes, sir, because I was afraid he may be a
24 flight risk. And at that point, I had his North Carolina ID
25 card in my hand.

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - CROSS BY TRUSLOW

62

1 Q: Right.

2 A: That he presented to me; it wasn't a driver's license, it
3 was an ID card. At that point, based upon that ID in his hand
4 and statements from his spouse in our conversation before
5 about him not having a license, I was starting to believe that
6 he was not a licensed driver.

7 Q: All right. So, Ms. Espada told you he didn't have ad
8 license or that it was revoked?

9 A: I believe she told me that he had no license and I asked
10 her why.

11 Q: Right.

12 A: And she responded something about a DUI in the past. I'd
13 have to look at the report.

14 Q: Would you arrest somebody for no driver's license in
15 possession or write them a ticket?

16 A: It wasn't no driver's license in possession, it was, at
17 that point ---

18 Q: I'm going back to what Ms. Espada told you. Did she tell
19 you he didn't have a license or that he was under suspension?

20 A: I believe she said he doesn't have a license.

21 Q: Okay. And then subsequent to that, he was handcuffed,
22 and the reason is, according to you, he was an escape route
23 risk because he was looking around, correct?

24 A: Correct.

25 Q: And the vehicle was twenty or thirty feet away from where

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - CROSS BY TRUSLOW

63

1 the collision took place, but you didn't see him move it,
2 correct?

3 A: I did not.

4 Q: And he was there with you and asked to sit down on the
5 curb, correct?

6 A: That is correct, he did.

7 Q: That's before you handcuffed him?

8 A: That is correct.

9 Q: So, he's sitting down next to you on the curb and at that
10 point, you get him up and handcuff him and put him in the
11 patrol car, correct?

12 A: Yes.

13 Q: Okay. And you handcuffed him, partly at least you say,
14 so he wouldn't go anywhere; you took custody of him, correct?

15 A: Yes, sir.

16 Q: And put him in the backseat of the patrol car, correct?

17 A: Yes, sir.

18 Q: Then you said in your report, you went from there to
19 check and see what the status of his license was, correct?

20 A: That's correct.

21 Q: Okay. And do you know from being on the scene, where he
22 went from your patrol car; who he went with?

23 A: I do not.

24 Q: Okay.

25 A: To be correct, sir, it wasn't my patrol car. I operate a

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - REDIRECT BY DEBUSK

64

1 motorcycle.

2 Q: But it was a patrol car?

3 A: It was a patrol car. I believe it was Officer Osten's,
4 but I'm not positive on whose car he was sitting in.

5 Q: That's all I have, Your Honor.

6 THE COURT: Redirect?

7 MR. DEBUSK: Yes, Your Honor.

8 REDIRECT EXAMINATION OF CHRISTOPHER SHICK BY MR. DEBUSK:

9 Q: So, at the point when you placed him under investigative
10 detention, Ms. Espada had already told you he didn't have a
11 license and it was something to do with a DUI; is that
12 correct?

13 A: Yes, sir.

14 MR. TRUSLOW: Objection.

15 THE COURT: I -- I understand that. It's cross-
16 examination. Based on the questions that have already been
17 asked, I'm going to allow it.

18 BY MR. DEBUSK:

19 Q: And he also handed you a North Carolina ID card; is that
20 correct?

21 A: Yes, it was an identification card, not a driver's
22 license.

23 Q: So, at that point, you suspected, a, he was lying to you
24 about who was driving, and, b, he was driving under
25 suspension, and c, he was looking around for an escape route.

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - BY THE COURT

65

1 A: Correct. At that point, I didn't know if he was under
2 suspension or if he just was driving without a license; it
3 could be either one. But at that point, I believe he did not
4 have a valid license.

5 Q: Those -- those were still under investigation?

6 A: That is correct, yes, sir.

7 Q: And you placed him under investigative detention; is that
8 correct?

9 A: That is correct.

10 Q: And did you inform him multiple times he was under
11 investigative -- investigative detention?

12 A: Yes, sir, I did.

13 Q: Okay. And why did you pick Officer Osten's patrol car to
14 place him in?

15 A: It was the closest secure location I could place him.

16 Q: Okay. Thank you.

17 EXAMINATION BY THE COURT:

18 THE COURT: All right. Corporal, I want to ask you a
19 couple of questions.

20 A: Yes, sir.

21 THE COURT: Before you put the handcuffs on him and put
22 him in, as you described, investigative detention, had you
23 already talked to other witnesses about who was driving the
24 vehicle?

25 A: Yes, sir; I had.

State v Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - RECROSS BY TRUSLOW

66

1 THE COURT: Okay. And before, again, you put the
2 handcuffs on and as you described, put him in investigative
3 detention, had any of those witnesses talked to you about the
4 defendant's car moving from the accident scene?

5 A: Yes. One witness that I spoke with said that the crash
6 occurred, the vehicle stopped; the motorcycle obviously was
7 crashed and the vehicle had stopped; and then a short time
8 later, the vehicle moved.

9 THE COURT: Okay. All right. So, at the time that you
10 placed the handcuffs on him and put him in the other officer's
11 patrol car, was he under arrest or under investigative
12 detention?

13 A: At that time, he was under investigative detention. I
14 was trying to determine if he had a valid license.

15 THE COURT: All right. Thank you.

16 A: Yes, sir.

17 THE COURT: Anything on those questions asked by the
18 Court?

19 MR. DEBUSK: No, Your Honor.

20 MR. TRUSLOW: Can we ---

21 THE COURT: Yes, sir.

22 RECROSS-EXAMINATION OF CHRISTOPHER SHICK BY MR. TRUSLOW:

23 Q: I would like to ask which witness told you the car moved?

24 A: I'd have to look at my notes. I believe it was Mr.
25 Kerley, the gentleman in the truck I believe was the one. I'd

State v Atwater - 2019-GS-26-02899, 02900
ARGUMENT BY DEBUSK

67

1 have to look at my notes.

2 Q: And then one follow-up was when -- if you disagree with
3 my position here, when was he arrested?

4 A: Shortly after, I don't know what the timeframe was, after
5 he was placed in the car, and I stepped away to determine what
6 his driver's license status was. A short time after that we
7 determined that he was either suspended or driving without a
8 license. At that point, is when the arrest took effect.

9 Q: Okay.

10 A: And I believe he was notified by another officer of that.

11 Q: Do you know when he was arrested for felony DUI?

12 A: I don't -- I don't have anything to do with that portion
13 of the case.

14 Q: Okay.

15 THE COURT: All right. You may step down, sir.

16 A: Thank you.

17 THE COURT: Any other witnesses, Solicitor?

18 MR. DEBUSK: No, Your Honor.

19 THE COURT: All right. Very good. Arguments from the
20 state?

21 ARGUMENT BY DEBUSK:

22 MR. DEBUSK: Your Honor, the officer has articulated
23 reason why he held the defendant and placed him under
24 investigative detention. In this case, he was lying about who
25 was driving, he had moved -- the car had been moved from the

State v Atwater - 2019-GS-26-02899, 02900
BY THE COURT

68

1 area of the collision some distance down the street, it looks
2 like about at least 80 feet from the point of the collision on
3 -- on the map, and he had not been able to produce a license
4 and he had to check -- he had reason to believe that he may be
5 under suspension. That's why he needed to investigate these
6 things and he felt that based on his experience and his
7 training and the actions of the defendant, that he might be a
8 flight risk. He did that to secure his presence at the scene
9 while he conducted a further investigation, and that's the
10 very purpose of investigative detention.

11 THE COURT: All right, sir.

12 Any brief reply, Mr. Truslow?

13 MR. TRUSLOW: No, sir.

14 RULING OF THE COURT:

15 THE COURT: All right, sir. Based upon the matters
16 presented to the Court, the Court does find that the -- at the
17 time that the officer placed the handcuffs on the defendant
18 and put him in the patrol car, he had more than sufficient
19 information to place him under investigative detention, that
20 being information from a witness that he may have moved the
21 car, the actions of the defendant as observed by the officer.
22 He said in his experience, looking around, that he had found
23 that in the past to be indicative of someone looking to -- for
24 an escape route. That he only had an ID. He clearly could
25 not produce a driver's license at that point in time. And

State v Atwater - 2019-GS-26-02899, 02900
MOTIONS

69

1 there was also information that the defendant was not being
2 forthcoming with police as to being the driver of the vehicle
3 at that point in time. So, clearly there was more than
4 sufficient information for investigative detention. I do not
5 find that the defendant was under arrest at that time, though
6 his motions were controlled, he was not under arrest, but
7 under proper investigative detention. So, therefore, the
8 motion of the defense to suppress the evidence based on
9 unlawful arrest is denied.

10 MOTIONS:

11 THE COURT: All right. So, you had a -- you had a motion
12 to suppress evidence of a field sobriety test administered at
13 the police department?

14 MR. TRUSLOW: Yes, sir.

15 THE COURT: Okay.

16 MR. TRUSLOW: So, what would be left would be the field
17 sobriety test suppression motion, and the dismissal under 56-
18 29-53, which I would just think might go first, which would be
19 dispositive.

20 THE COURT: All right. If you want to argue that, I'll
21 be glad to hear from you.

22 MR. TRUSLOW: Okay. And -- and then I wanted to add that
23 I have a motion that comes out of this last motion hearing the
24 testimony, which we can hear after or now, which would be to
25 suppress the breath alcohol content results of the breath

State v Atwater - 2019-GS-26-02899, 02900
MOTIONS

70

1 machine based upon insufficient probable cause to test his
2 breath, which is required to run that machine and that test.
3 He was told in the police car heading to the police station
4 that he was taking him to get a breath test. So, if he was
5 not under arrest for DUI, then there's no probable cause to
6 give him a breath test.

7 THE COURT: Well, this officer didn't -- I haven't heard
8 who placed him under arrest ---

9 MR. TRUSLOW: Yes, sir. Well, I just -- I'm telling the
10 motion I have.

11 THE COURT: I understand that, but this officer obviously
12 didn't place him under arrest. You'd have to hear from the
13 officer that placed him under arrest what he was being
14 arrested for.

15 MR. TRUSLOW: Yes, sir.

16 THE COURT: And why he was being taken to the police
17 department at that point in time.

18 MR. TRUSLOW: Yes, sir.

19 THE COURT: All right.

20 MR. TRUSLOW: Which may come up at the time they present
21 the evidence prior to, but I can move forward with the other
22 motion.

23 THE COURT: All right. Go ahead.

24 MR. TRUSLOW: Your Honor, Section 56-5-2953 of the South
25 Carolina Code is a code section commonly referred to as

State v Atwater - 2019-GS-26-02899, 02900
MOTIONS

71

1 mandatory video recording statute. It took some time to take
2 grip because it calls for a dismissal in that case if -- if a
3 proper video recording is not produced from the incident, and
4 we're just talking about the incident, it also speaks to the
5 video of the breath test, but I'm speaking about the incident
6 site video. It took a number of trips to the Supreme Court
7 for them continually saying that we understand that that's a
8 pretty serious remedy, but that's the legislative intent of
9 this law. So unlike other evidentiary issues, the legislature
10 intended for a drastic result, because they wanted to have
11 evidence created of the incident. And, if you don't do it or
12 don't do it properly, then the case is dismissed and they
13 meant to have that remedy, and the Supreme Court has said they
14 meant to. That section applies to situations of DUI, DUAC,
15 and felony DUI under 2945. So, you can imagine some people's
16 reaction when the felony DUI cases made their way up to the
17 Supreme Court, because it is a drastic remedy. However, in
18 more than one case, the Supreme Court has said, the same deal
19 applies; if you don't have a proper video recording, and
20 there's not one of four statutory exceptions, then it's
21 dismissal.

22 There are two cases primarily -- a lot of cases have said
23 that with regards to DUI. With regard to felony DUI, there
24 are two primary cases that I would point to. Court's
25 indulgence?

State v Atwater - 2019-GS-26-02899, 02900
MOTIONS

72

1 THE COURT: Yes, sir.

2 MR. TRUSLOW: One is the case of -- I had some good
3 momentum going and I lost it -- *State v. Key*, K-E-Y, is one.

4 THE COURT: And so give me the Southeastern 2d cite?

5 MR. TRUSLOW: Let me -- let me back up, Your Honor, *State*
6 *v. Manning*.

7 THE COURT: Okay.

8 MR. TRUSLOW: And I just have the South Carolina cite,
9 400 S.C. 257, it's Court of Appeals, 2012. And then *Teamer*,
10 T-E-A-M-E-R, *v. State*, 416 S.C. 171, 2016 S.C. Supreme Court.

11 THE COURT: All right. You don't have the Southeast
12 site?

13 MR. TRUSLOW: No, sir.

14 THE COURT: All right. Tell me the South Carolina cite
15 again.

16 MR. TRUSLOW: That's 416 S.C. 171. And the next is *State*
17 *v. Henkel*, H-E-N-K-E-L and that is 774 S.E.2d 458. And we
18 have then *State v. Key*, which is K-E-Y, and I just had it
19 here. It is -- okay. *State v. Key*, I don't have the cite
20 right now, Your Honor. I can get it in a second. I jumbled
21 up here, but it is a South Carolina Supreme Court case that
22 was issued May 13th of 2020, which was a felony DUI case.
23 That's the most recent felony DUI case dealing with that
24 statute section.

25 So, Your Honor, when you look at, I think it's the

State v Atwater - 2019-GS-26-02899, 02900
MOTIONS

73

1 *Manning* case or one of those two cases, they say that -- it's
2 a felony DUI case, and they say -- they actually -- they
3 didn't reverse the Trial Court, but they reversed partially
4 and said, oh, no, if there's not an exception, the clear
5 remedy is dismissal. The only issue in that case was whether
6 there was an exception under Subsection (b) of that code
7 section, and they enumerated four -- four exceptions. One was
8 if the officer provided an affidavit sworn that the video
9 equipment was inoperable and reasonable measures had
10 maintained -- been made to maintain the equipment in an
11 operable condition; two, was if the officer gave a sworn
12 affidavit that the defendant needed emergency medical
13 treatment; the third one was in cases of traffic accidents,
14 road stops, checkpoints, that the video -- and this is an
15 important one, began to -- the video recording start as soon
16 as practical under the circumstances. In that case, it says
17 that an example of as soon as practical is if the videos are
18 running, it was practical. And in this case, there is ample
19 video, but not an ample audio, but none of it with my client,
20 and the statute was designed specifically to create evidence
21 of that incident site, and it requires that any field sobriety
22 test given be on there, which we didn't have at the incident
23 site, but it also requires Miranda be on there. They want to
24 capture my client's conduct, and there is case law that
25 requires that you show Miranda. There's one case that didn't

State v Atwater - 2019-GS-26-02899, 02900
MOTIONS

74

1 have audio, and you see the officer giving Miranda, but you
2 don't hear it. The opposite is also true. So, those are the
3 exceptions. The other exception is exigent circumstances,
4 which case law says that the exigent circumstances need to be
5 shown by the state and they did not put the burden on the
6 defense. And the last exception was the totality of the
7 circumstances, and, Your Honor, if you look at the two felony
8 DUI cases, or three, they are -- they come close to our case.
9 However, in the same respect, it couldn't be further away. In
10 the primary case, I believe it's the last one, the officers --
11 the arresting officer was never on the scene with the
12 defendant, which went to the totality of the circumstances.
13 They'd taken him off to the hospital, by the time the
14 arresting officer got there, and then he goes to the hospital
15 and deals with him about the arrest.

16 In our case, Your Honor, my client is there. He's been
17 Mirandized three or four times, not on video. He has been
18 questioned, he has been handcuffed, he's been put in the
19 patrol car, he's been taken out of that car, walked to another
20 car where they say that he had slurred speech. They say he
21 was unsteady on his feet, but they -- but they didn't video
22 record any of his conduct, and you cannot see him walking to
23 the car properly to assess his conduct, and you cannot see him
24 receiving Miranda, nor the officer. You can hear it.

25 One second, Your Honor.

1 And I've -- well, I did a written memorandum, but I'm
2 just going on the oral motion now.

3 THE COURT: Yes, sir.

4 MR. TRUSLOW: But I -- the other one though, it's not --
5 and I've said that the statute reads 2945 and there's cases on
6 felony DUI that say it as well, but the really landmark case I
7 wanted to cite was *City of Rock Hill v. Suchenski*, S-U-C-H-E-
8 N-S-K-I, and the only cite I have is 374 S.C. 12. I've
9 already given you *Manning* and *Henkel* and -- and the last case
10 that makes clear with the Court, the Supreme Court said on the
11 remedy being a -- I forget in a word what kind of remedy, but
12 they -- a drastic remedy maybe, was *Town of Mount Pleasant v.*
13 *Roberts*, 713 S.E.2d 278, which is a 2011 Supreme Court case.
14 And I've already given you the *Teamer* case, and I think *Teamer*
15 is the one I'm pointing to mostly as a felony DUI case. It
16 was not dismissed, because they did find exception, but if you
17 look at the facts of that case, you couldn't not have an
18 exception for totality of circumstances, but you don't have
19 any of that in this case, any of it. *Teamer* could not be more
20 distinguishable, and that case, *Teamer v. State*, is actually
21 an argument that his case should be dismissed. If you look at
22 it in terms of, what's the term, inverse assumptions. It's
23 clear what they're saying here. Had *Teamer* been this case, it
24 would've been different.

25 THE COURT: All right, sir.

State v Atwater - 2019-GS-26-02899, 02900
MOTIONS

76

1 MR. TRUSLOW: Each of the factors that they point to in
2 *Teamer* that sustain an exception for the totality of the
3 circumstances are not present in our case, and are the exact
4 opposite. And ample, plenty of time was available to capture
5 this on video.

6 So, lastly, I just wanted to point out, which I think I
7 have, that because it's such a drastic remedy, that the
8 Supreme Court has dealt with this issue, and they have
9 analyzed it under 2945, felony DUI, as well as 2930 DUI, and
10 they have clearly interpreted the legislative intent for the
11 rule and the violation, the four exceptions, and the remedy.
12 So, that's our presentation on that issue.

13 THE COURT: All right.

14 Solicitor?

15 MR. DEBUSK: Your Honor, Ms. Gainey will actually argue
16 this one, but we feel that the Court -- be beneficial to the
17 Court hear the testimony of Officer Floyd before deciding
18 this.

19 THE COURT: All right. Call him forward.

20 MR. DEBUSK: The state calls Officer Floyd.

21 THE COURT: Come around and be sworn.

22 THE CLERK: Please raise your right hand and place your
23 left hand on the Bible.

24 BRYAN FLOYD, HAVING BEEN DULY SWORN

25 TESTIFIES AS FOLLOWS:

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

77

1 THE CLERK: State your name and spell it for the Court,
2 please.

3 MR. FLOYD: Bryan Floyd, B-R-Y-A-N, F-L-O-Y-D.

4 DIRECT EXAMINATION OF BRYAN FLOYD BY MR. DEBUSK:

5 Q: Officer Floyd, who is your employer?

6 A: City of North Myrtle Beach Department of Public Safety.

7 Q: What are your duties?

8 A: I'm currently assigned to swing shift patrol.

9 Q: How about back in April of 2019?

10 A: I was in the same capacity.

11 Q: Okay. Did you respond to an accident where Donna Schnell
12 was killed?

13 A: Yes, sir.

14 Q: Was that on April 6th, 2019?

15 A: Yes, sir.

16 Q: What was your role at the scene?

17 A: I arrived on the scene to try to assist Corporal Shick
18 with anything he would need from working the collision,
19 directing traffic, whatever they happened to need at that
20 point. When I arrived on the scene, I was asked by one of the
21 officers to transport or standby with the gentleman whenever
22 he was in the back of the patrol car.

23 Q: Okay. At any point did you speak with the defendant?

24 A: Yes, sir.

25 Q: How did you speak with him?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

78

1 A: I went over -- he was already placed in the back of the
2 patrol car, I opened the door and spoke with him right then
3 and there.

4 Q: Okay. Were you wearing a body-worn camera at that time?

5 A: Yes, sir; I was.

6 Q: Okay. At that point, did you notice anything?

7 A: Yes, sir. He had slurred speech, he was kind of slumped
8 over. It appeared like he was having a hard time staying
9 awake. I could smell the odor of alcohol immediately come out
10 of the vehicle.

11 Q: Now, let me ask you something. To your knowledge, on
12 that day, did Officer Shick, who was the first one to speak to
13 him, did he have a functioning sense of smell?

14 A: To my knowledge, he did not.

15 Q: Is that a medical issue?

16 A: Yes, sir.

17 Q: Okay. So, when you smelled the alcohol, and you were the
18 first one to get some idea that he had been drinking?

19 A: Yes, sir.

20 Q: Okay. Based on those three things, you felt he had an
21 issue, and did you interview him about those things?

22 A: At that point, I Mirandized him, or I attempted to
23 Mirandize him. He cut me off, so I re-Mirandized him
24 completely. I asked him a couple of questions, and he advised
25 he had been drinking earlier that day.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

79

1 Q: Okay. And what did you do with that information?

2 A: I then closed the door, went back and spoke with ---

3 THE COURT: Would you move closer to the microphone,
4 please?

5 A: I went back and spoke with Lance Corporal Shick and
6 advised him that he was possibly under the influence of
7 alcohol.

8 Q: Okay. Did you interact with the defendant again?

9 A: Yes, sir. I went back after that and ---

10 Q: I forgot to ask you. Which car was in the back of?

11 A: He was in the back of Officer Osten's vehicle.

12 Q: Okay. And you left him there when you went back to talk?

13 A: Yes.

14 Q: What happened?

15 A: After I went and spoke with Lance Corporal Shick, I -- we
16 had a discussion about doing a field sobriety test with him.
17 Between him and the supervisor on scene, it was determined
18 that he was possibly a flight risk, so we decided to not do
19 field sobriety tests on the scene.

20 Q: Were there other issues such as safety at the scene?

21 A: Yes, sir. There was a lot of people on the scene. It
22 was in the middle of Highway 17 in the middle of April. I
23 believe it was bike week if I remember correctly. It was a
24 very busy timeframe. So, we decided for his safety, as well
25 as officer safety and the safety of the public we were not

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

80

1 going to do field sobriety tests at that moment.

2 Q: Okay. So, what did you do next?

3 A: I trans -- I moved the defendant from Osten's vehicle to
4 my patrol vehicle. Once I placed him in the back of my patrol
5 vehicle, I advised him he was under arrest and then
6 transported him to the North Myrtle Beach Department of Public
7 Safety's jail.

8 Q: And during that time is your body camera activated?

9 A: Yes, sir.

10 Q: Did it record correctly?

11 A: Did it record correctly?

12 Q: Yes.

13 A: So, there is a video anomaly with the video that it looks
14 almost like a rainbow on the video. You can see people and
15 you can hear the audio and you can see vehicles, but the
16 actual color is distorted.

17 Q: Was that anything -- was that a problem with the
18 equipment?

19 A: There was a problem with the equipment that I had no
20 knowledge of prior to the incident.

21 MR. DEBUSK: Your Honor, at this time, we would like to
22 publish the video and just watch it to see ---

23 THE COURT: All right. Go ahead.

24 BY MR. DEBUSK:

25 Q: There's no one here to -- it's going to take a moment to

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

81

1 get the ---

2 THE COURT: Well, whatever it takes.

3 MR. DEBUSK: I'm sorry, Your Honor. The audio tech left
4 and we're struggling.

5 BY MR. DEBUSK:

6 Q: I forgot to ask you, Officer Floyd, do you recognize this
7 video?

8 A: Yes, sir.

9 Q: How do you recognize it?

10 A: I initialed after watching it.

11 Q: Did you review this?

12 A: Yes, sir.

13 Q: Is that a fair and accurate representation of the --
14 recording on your body camera?

15 A: Yes, sir.

16 MR. DEBUSK: At this we'd publish -- ask to publish?

17 THE COURT: All right, sir.

18 MS. HARTE: Your Honor, is this obstructing your view at
19 all?

20 THE COURT: It's fine.

21 STATE'S EXHIBIT NUMBER 1

22 MARKED FOR IDENTIFICATION

23 (REPORTER'S NOTE: State's 1 published to the Court. Audio
24 not transcribed herein.)

25 MR. DEBUSK: Your Honor, the pauses are on the first

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

82

1 part. It's on a portable drive and ---

2 THE COURT: You can't -- stop it to say something.

3 MR. DEBUSK: Could you stop for a moment. Your Honor,
4 it's not playing back well because of the hard drive -- if we
5 copy it onto the hard -- if we copy it onto the hard drive of
6 the computer, it will play much better. Would you like us to
7 do that or continue playing the video.

8 THE COURT: Well, obviously, we need the best recording
9 that you can produce and the one that you would be showing a
10 jury.

11 MR. DEBUSK: This would be it, Your Honor, but it's the
12 second portion when we play it from desktop or ---

13 THE COURT: Well, you've got to -- you've got to ---
14 (REPORTER'S NOTE: State's 1 published for the Court. Audio
15 not transcribed herein.)

16 BY MR. DEBUSK:

17 Q: Let me ask you a couple of questions, Officer, while this
18 is loading -- Officer Floyd, while this is loading. While
19 you're Mirandizing him, why was he partially out of the view
20 of the camera?

21 A: Because he continued to lay down and like lean over in
22 the seat. You'll hear me say to him several times, hey, you
23 need to sit up, you need to sit up; that's because he
24 continued to like slouch over as if he was falling asleep or
25 with his eyes closed. That's why I continuously tried to get

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

83

1 him to sit up for me. Plus, where my body camera sits on my
2 person, the older cameras we had kind of angled up a little
3 bit more.

4 Q: But you did attempt to get him up into the view of the
5 camera?

6 A: Yes, sir.

7 Q: But you're making camera view while you read him his
8 Miranda, correct?

9 A: What was that?

10 Q: Part of his body was in the -- remained during the
11 entirety of your ---

12 A: Yes, sir.

13 Q: What's the second encounter?

14 A: After I go and have a brief conversation with Lance
15 Corporal Shick and Lance Corporal Hall -- or Hale, excuse me,
16 I'm sorry -- about him being possibly under the influence, I
17 then walk back and escort him from that patrol vehicle to my
18 patrol vehicle, so I can transport him to the police
19 department.

20 Q: Okay.

21 (REPORTER'S NOTE: State's 1 published to the Court. Audio
22 not transcribed herein.)

23 BY MR. DEBUSK:

24 Q: You mentioned he was hesitant to get out with the body
25 there; was Ms. Schnell's body still on the scene?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

84

1 A: Yes, sir; she was parked directly behind the patrol -- or
2 she was laying in the roadway behind the patrol vehicle with a
3 cover over her.

4 Q: And this issue of the multicolored -- is that a problem
5 you had with this camera before?

6 A: That was one of our older cameras. I had no idea about
7 that. When we got back and we actually started reviewing the
8 cameras and I noticed it and my supervisor noticed it, and we
9 brought it directly over to our IT Department so they can
10 replace the camera or figure out why it was doing that.

11 Q: So, it was taken out of service after you discovered the
12 problem?

13 A: Yes, sir.

14 Q: Thank you. Please answer any questions defense might
15 have?

16 THE COURT: Cross-examination?

17 CROSS-EXAMINATION OF BRYAN FLOYD BY MR. TRUSLOW:

18 Q: So, officer, why did you tell him that he was under
19 arrest for DUI before you said DUS?

20 A: That was just -- I misspoke whenever I said it.

21 Q: Okay. Well, why didn't you arrest him for DUI?

22 A: I don't have an answer to why I didn't tell him DUI at
23 that moment, sir.

24 Q: You arrested him for driving under suspension, correct?

25 A: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

85

1 Q: Who told you his license was suspended?
2 A: Officer Shick.
3 Q: Okay. Do you know that to be a fact?
4 A: He told me that he had checked it through NCIC.
5 Q: So, you'd be surprised if it wasn't suspended?
6 A: Yes, sir.
7 Q: Okay. When did you arrest him for DUI, felony DUI?
8 A: He was notified that he was placed under felony DUI once
9 he was in the DataMaster room.
10 Q: Okay. Don't you arrest somebody for DUI before they go
11 in that room?
12 A: I don't quite understand.
13 Q: Isn't somebody arrested for DUI before they go in to give
14 a breath sample; don't you need that cause to bring him in
15 there?
16 A: I had reason to believe he was under the influence ---
17 Q: Right.
18 A: --- to further investigate the felony DUI. That's why we
19 brought him into that room.
20 Q: If somebody who was not drinking at all and you arrest
21 them for DUS, do you bring them into the BA room to give a
22 breath test?
23 A: No, sir. There was a discussion between myself, Officer
24 Shick, and the on-scene supervisor about doing field sobriety
25 tests, and we decided to do field sobriety tests because he

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

86

1 was a possible flight risk within the DataMaster room; that
2 way they could be recorded.

3 Q: Okay. So, why didn't you give him a field sobriety test
4 on scene like every other case?

5 A: Again, sir, because there was a belief that -- it was for
6 safety reasons for him and for other people, as well as him
7 being a possible flight risk, we decided to do them at the
8 police department inside the DataMaster room.

9 Q: Tell me about the safety issue; what safety issues were
10 present that aren't present in every DUI case where you give
11 field sobriety tests at the incident site?

12 A: During this scene, sir, we were actually in the middle of
13 Highway 17 near 45th Avenue South. It was a very busy day; it
14 was about 4 o'clock, I believe, in the afternoon, if I
15 remember correctly. There was quite a few witnesses that were
16 all on scene, there was cars on both sides, there was
17 emergency personnel on scene trying to work, do lifesaving
18 stuff for Mr. Schnell as well as officers out there trying to
19 direct traffic. So, it was just a very busy scene. If he
20 would've tried to flee the scene at that point, there could've
21 been an incident of an officer or him being struck by a
22 vehicle.

23 Q: Have you ever given field sobriety tests on Highway 17 in
24 the summertime?

25 A: Not on Highway 17, sir, we try to move over to a parking

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

87

1 lot or somewhere off the highway.

2 Q: Okay. And you couldn't move over to the parking lot in
3 this situation?

4 A: Again, sir, due to the fact that he was already in
5 detention and he was a prior flight risk or a flight risk ---

6 Q: Was it a flight risk or his safety?

7 A: It was both, sir.

8 THE COURT: Mr. Truslow, you ask a question, you let the
9 witness completely answer it, and then you can ask another
10 one.

11 MR. TRUSLOW: Yes, sir.

12 A: It was a combination of both, that he was a flight risk
13 as well as it was brought up by the supervisor that it was a
14 possible safety risk.

15 BY MR. TRUSLOW:

16 Q: Have you ever had a case in your career before this one
17 that you didn't give field sobriety tests because of safety
18 reasons on the road?

19 A: Yes, sir.

20 Q: Okay. Was it because it was too much traffic?

21 A: For different reasons, yes, sir, we've had other
22 incidences where we haven't done field sobriety tests of
23 someone that is already detained. Normally, we do not take
24 them out of handcuffs to do field sobriety tests at that
25 point.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

88

1 Q: In fact, isn't it true that you had a conversation with
2 your supervisor that you wouldn't have to do field sobriety
3 tests if you just arrest him for DUS; didn't you have that
4 conversation? Then you could do it later in the BA room?

5 A: I do not recall.

6 Q: Huh?

7 A: I do not recall.

8 Q: Did you hear yourself on the video say, we'll do them
9 there; we're gonna do them there?

10 A: Yes, sir, but we were talking ---

11 Q: Is that what you were talking about?

12 A: We were talking about doing field sobriety tests; yes,
13 sir.

14 Q: Do you know there's a video tape of y'all having that
15 conversation, that you'd got him for DUS, so just arrest him
16 and take him and do that later?

17 A: There is -- there is a part of that video, yes, sir, of
18 myself, Officer Shick, and Officer Hale having that
19 discussion, yes, sir.

20 Q: All right. So, no question about it, on this video, you
21 arrest him for driving under suspension?

22 A: Yes, sir.

23 Q: Okay. And you don't think you arrested him again during
24 the trip to the police department for anything else, do you?

25 A: I don't understand the question.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

89

1 Q: Did you arrest him between the time you just got in the
2 car here with him to the police station, did you arrest him
3 again for any other offense?

4 A: No, sir.

5 Q: And how far of a distance do you think you walked from
6 the one car to the other car in that video in this situation?

7 A: Maybe 15 or 20 feet.

8 Q: And you wrote in your report he was unsteady on his feet,
9 right?

10 A: Yes, sir.

11 Q: Can we see that on the video?

12 A: You're not able to see that on the video because I'm
13 actually holding him in an escort position walking him to the
14 other vehicle.

15 Q: So, it's not on video?

16 A: No, sir.

17 Q: Okay. But you get to testify to it -- well, I'm sorry,
18 you answered that. All right. So, whose responsibility is it
19 to have themselves on the video; is it your responsibility to
20 videotape under this statute or his responsibility to get
21 himself on video?

22 A: It's our responsibility to put him on the video.

23 Q: So, when you say you tried to get him up so he was on
24 video, did you know he was not on video?

25 A: At that time, no, sir, I didn't. When my body camera is

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

90

1 on, I don't have a way to review video at that point.

2 Q: So, you weren't trying to get him up to get on video?

3 A: I was trying to get him to sit up, yes, sir, so I -- the
4 video would be able to see him.

5 Q: So, do you know he wasn't on the video then?

6 A: Again, sir, I don't have a way to view it on scene to
7 clarify one way or another. It's not like a dashcam video.

8 Q: Okay. Last question, if you knew that he was being
9 recorded properly, you wouldn't move him or try to get him to
10 move to get on video?

11 A: I was trying to get him to move, sir, for several
12 reasons. One because he continued to lay down, I was afraid
13 he was going to fall asleep.

14 Q: Uh-huh, (affirmative response).

15 A: Two, because he was saying he was having a hard time
16 passing out and breathing, so that's ---

17 Q: Was he checked by EMS?

18 A: I believe so, sir, prior to my arrival, but I'm not sure.

19 Q: All right. You don't know if he was?

20 A: What's that, sir?

21 Q: You don't know if he was checked by EMS up to that point?

22 A: Again, sir, I'm not a hundred percent sure.

23 Q: All right. Do you know which side the motorcycle
24 collided into at forty miles an hour of their vehicle, what
25 side?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - REDIRECT BY DEBUSK

91

1 A: No, sir. I'm not -- I didn't ---

2 Q: You don't know what side of the car the motorcycle hit?

3 A: Again, I believe it was the driver's side, but I was not
4 working any part of the wreck at that portion, sir.

5 MR. TRUSLOW: That's all the questions I have, Your
6 Honor.

7 THE COURT: Any redirect?

8 MR. DEBUSK: Yes, Your Honor.

9 REDIRECT EXAMINATION OF BRYAN FLOYD BY MR. DEBUSK:

10 Q: The point you were moving him from one car to the other,
11 at that point have you generated probable cause to believe he
12 might be under the influence?

13 A: Yes, sir; I had.

14 Q: What was that based on?

15 A: It was based on the smell of alcohol coming from the car
16 where he was placed at; it was based on his slurred speech;
17 his demeanor, his overall demeanor of slouching down, being
18 kind lethargic. And then again, once I stood him up, he
19 actually ---

20 Q: Before you stood him up, did he also state that he had
21 been drinking?

22 A: Yes, sir. He had already been read Miranda and stated he
23 had been drinking.

24 Q: Did he mention drinking beer and shots?

25 A: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - REDIRECT BY DEBUSK

92

1 Q: Okay. So, at that point, you generated probable cause
2 ---

3 A: Correct.

4 Q: --- and that's when you took over to the other officers
5 and talked to them?

6 A: Yes, sir.

7 Q: And when you moved him from one vehicle to the other, you
8 were behind him and he was visible on the camera, correct?

9 A: Yes, sir.

10 Q: But his whole body wasn't invisible ---

11 A: Correct.

12 Q: --- was visible?

13 A: Yes, sir; his whole body was not.

14 Q: Yes, sir. Thank you.

15 THE COURT: Anything on those questions?

16 MR. TRUSLOW: No, sir.

17 THE COURT: All right, sir, you may step down.

18 All right. You have video of the defendant at the police
19 station?

20 MR. DEBUSK: Yes, Your Honor; we do.

21 THE COURT: Okay.

22 MR. DEBUSK: I'm sorry, Your Honor, it's ---

23 THE COURT: Yeah, did you video him regarding the ---

24 MR. DEBUSK: He was videoed in the breathalyzer room,
25 Your Honor.

State v. Atwater - 2019-GS-26-02899, 02900
ARGUMENT BY TRUSLOW

93

1 THE COURT: Okay.

2 MR. DEBUSK: That video is downstairs.

3 MR. TRUSLOW: There is a BA video in Section 2 of that
4 statute. He was video recorded there.

5 THE COURT: All right. So, you're not arguing that?

6 MR. TRUSLOW: No, sir. We're arguing the incident site
7 video. Yes, sir.

8 THE COURT: Okay. So, all right. So, okay, I just want
9 to be clear because the statute says both. So, you're arguing
10 under 56-5-2953(A) that the person who operates a vehicle
11 while under the influence of alcohol must have his conduct at
12 the incident site recorded. You're not talking about the
13 second part of the breath test site?

14 MR. TRUSLOW: Yes, sir.

15 THE COURT: Obviously, you agree that was done?

16 MR. TRUSLOW: That's correct.

17 THE COURT: All right. Very good. Okay. All right.
18 Thank you.

19 Any further witnesses then?

20 MR. DEBUSK: None, Your Honor.

21 THE COURT: All right.

22 Further argument, Mr. Truslow?

23 ARGUMENT BY TRUSLOW:

24 MR. TRUSLOW: Yes, sir. So, under that statute because I
25 don't think I've said it for the record, where you left off

State v. Atwater - 2019-GS-26-02899, 02900
ARGUMENT BY TRUSLOW

94

1 reading, it says the video recording at the incident site must
2 not begin later than the activation of blue lights. It later
3 says as soon as practical and case law says if it's videoing,
4 then it's practical. It must include the arrest of a person
5 for violation of section -- DUI, section with DUAC of probable
6 cause determination that a person violated felony DUI, and it
7 must show the person being advised of Miranda warnings.

8 Last, I wanted to cite *State v. Gordon*, which is 777
9 S.E.2d 376. And in *Gordon*, the Court upheld a dismissal where
10 they said that in an HGN eye test that the suspect's head must
11 appear on video during that test. I think that's very similar
12 to this case here.

13 In addition to that, going to the exceptions, lastly, I
14 would say that after the testimony in regards to any possible
15 exceptions, when they talk about this video equipment having
16 an issue, there's been absolutely no testimony of any
17 reasonable efforts taken to maintain the equipment in an
18 operable condition, and that's been very important in these
19 cases, and we have no evidence of that, Your Honor. And I
20 would point out in *Gordon*, the Supreme Court said although
21 they said it should be dismissed because of the head not being
22 on video, they said, however -- to let you know, the Court
23 went on to state that even if the video of the field sobriety
24 test is of poor quality, that a submission is more prejudicial
25 than probative. The remedy is not to dismiss then, but to

State v. Atwater - 2019-GS-26-02899, 02900
ARGUMENT BY TRUSLOW

95

1 instead, the remedy is to redact the field sobriety test from
2 the video, talking about the portions that are not good to
3 watch, and exclude testimony about the test.

4 So, as backup remedy, but I think we've satisfied the
5 statute and it's not his duty to put himself on the videotape;
6 it's the state's duty, and I don't see an exception that
7 applies in the case law of any of the cases dealing --
8 particularly the cases dealing with felony DUI and the statute
9 2953.

10 THE COURT: I want to -- before I hear from the state, I
11 want to be clear and understand. Field sobriety tests were
12 administered in the BA room; is that correct?

13 MR. DEBUSK: Yes, Your Honor.

14 THE COURT: All right. So, are we arguing that?

15 MR. TRUSLOW: Well, not in terms of that statute. That
16 goes to the motion we have about the field sobriety test in
17 terms of it's separate -- I mean, in terms of it's irrelevant
18 and more prejudicial because they weren't done right, a
19 separate issue.

20 THE COURT: All right. Okay. All right. All right.

21 MR. TRUSLOW: And I believe the incident site -- the case
22 law is that the field sobriety tests are video recorded like
23 the Miranda warnings if done. So, if they weren't done,
24 that's why I'm not arguing they should have been done on video
25 because I think it's -- if they're done on the incident site,

State v. Atwater - 2019-GS-26-02899, 02900
ARGUMENT BY HARTE

96

1 they have to be captured, the same with Miranda.

2 THE COURT: All right.

3 Go ahead, Solicitor.

4 ARGUMENT BY HARTE:

5 MS. HARTE: Thank you, Your Honor. We would argue that
6 we did comply with the statute. First and foremost with part
7 1(A), not being the blue lights on being activated. Judge,
8 this was an accident. The officer didn't have time to
9 activate the blue lights. The defendant was placed under
10 arrest for DUS. There is that probable cause determination
11 that is made on the video. Judge, this is videoed. It's not
12 of the quality that Mr. Kirk Truslow would prefer, but you can
13 see the defendant and you can identify him, you can see his
14 body, you can see him laying down in the car, you can hear him
15 being read his Miranda. Furthermore, Judge, we do have those
16 exceptions that apply. You've heard testimony from the
17 officer that this was a traffic accident. So, that's
18 exception number three. Furthermore, we would argue that this
19 fits under exception number four, totality of the
20 circumstances. Not only was there a traffic accident, Your
21 Honor, you heard testimony from this officer, this is on a
22 busy highway, Highway 17. You have a two-vehicle collision,
23 you have witnesses everywhere, you have both victims at the
24 scene who are -- medical personnel are trying to work on, you
25 have the deceased victim that is still laying in the roadway,

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

97

1 traffic is everywhere; it was a safety hazard. So, the
2 totality of the circumstances and it being a traffic accident,
3 we feel like it fits under that exception.

4 Furthermore, Your Honor, he was not arrested at that time
5 for driving under the influence; he was arrested for driving
6 under suspension. The blood alcohol test and the field
7 sobriety tests -- and I know we're going to deal with that at
8 a later time -- all of that is recorded in a controlled
9 environment at the police department.

10 THE COURT: All right. Thank you. All right. So ---

11 MS. HARTE: And, Judge, lastly, and I think I said this
12 at the beginning, this was not originally a DUI stop; this was
13 not a normal traffic situation where an officer saw someone
14 swerving or pulled them over for just a normal traffic stop;
15 this was a collision where police arrived on the scene and
16 they were trying to determine what was going on, Your Honor.

17 RULING OF THE COURT:

18 THE COURT: All right. Thank you. All right. 56-5-
19 2953, Subsection (A) says a person who violates 56-5-2930, 56-
20 5-2933, or 56-5-2945 must have his conduct at the incident
21 site and the breath test site video recorded, and it said it
22 must not begin later than the activation of blue lights,
23 including field sobriety tests administered, including the
24 arrest of the person for the violation of 56-5-2930 or 2933 or
25 probable cause determination that the person violated the

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

98

1 section 56-5-2945 and show the person being advised of his
2 Miranda rights. And the next part of it is about the breath
3 tests.

4 Now, in this particular case, we're talking about the
5 incident site. This was a traffic accident investigation.
6 This was not a stop of the defendant for a driving under the
7 influence violation. The traffic accident had occurred, the
8 officers were investigating the traffic accident, and were
9 proceeding in that regard. They developed information during
10 the investigation of the traffic accident that the defendant
11 did not have a valid driver's license. He did not have the
12 ability to drive a vehicle in the State of South Carolina.
13 They also had the opportunity to give the defendant multiple
14 Miranda warnings. Those are clearly on the record. I
15 understand that the quality of the video is not the best, but
16 that was -- the officer did not know of that issue. The Court
17 finds that the proper video was attempted and taken, even
18 though it's not the best quality, it does show the defendant
19 clearly; he is given his Miranda warnings; he does agree to
20 talk to the officer without the presence of a lawyer; he
21 answers questions about prior drinking; he -- the officer then
22 -- and during that encounter, had the opportunity to observe
23 him and did have probable cause.

24 Regarding the issue of driving under the influence, even
25 though he was not arrested until the -- he was transported to

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

99

1 the police department. I do find that they -- there were
2 valid concerns about safety of the defendant at the scene,
3 safety of the officers at the scene, issue about potential of
4 a flight risk. There -- it was a busy scene. EMS --
5 obviously there was a deceased person immediately near where
6 the defendant was in a patrol car, and he obviously didn't --
7 clearly did not want to walk that way and see that. There was
8 EMS working on another victim with great bodily injury. So, I
9 find that the 29 -- I'm sorry -- 56-5-2953, Subsection(A) was
10 followed by the officers. Again, the issue about the quality,
11 though it's not the best, it clearly shows all of the
12 necessary information and content of the defendant when he was
13 arrested for driving under suspension, and we'll deal with the
14 video recording breath test site at a later motion. But the
15 motion to dismiss based upon Section 56-5-2953(A) regarding
16 the video recording at the incident site is denied for the
17 reasons stated, as well as the -- all of the testimony of
18 Officer Bryan Floyd. I've incorporated all of his testimony
19 in the Court's ruling.

20 MR. DEBUSK: Your Honor, just to save some time for
21 tomorrow, there were two of the statements that we're gonna
22 bring in *Jackson v. Denno* hearings for, and we would of course
23 argue they were voluntary statements because he had been given
24 Miranda both by Officer Floyd when he first opened the door,
25 and previously by Officer Shick. These statements he made on

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

100

1 the back of the car were freely and voluntarily given, and we
2 would ask you to make the *Jackson v. Denno* determination just
3 to save time for tomorrow.

4 THE COURT: Well, I appreciate that, but that's, you
5 know, we'll hear the arguments. I will take -- you know, I
6 don't know that we need to replay this testimony. I've heard
7 it, it was under oath when it was presented to the Court, so
8 there would be no necessity to revisit those issues as far as
9 testimony.

10 MR. DEBUSK: Thank you.

11 THE COURT: You can just refer to the prior testimony
12 that we already heard now in your arguments.

13 MR. DEBUSK: Yes, sir.

14 THE COURT: Okay. All right. So, I'll see you back
15 tomorrow morning at 9 o'clock. Be in the courtroom at 9
16 o'clock. Now, Mr. Truslow, you need to communicate with the
17 bonding company ---

18 MR. TRUSLOW: Yes, sir.

19 THE COURT: --- regarding the status of Mr. Atwater, and
20 you'll need to tell me when we start court tomorrow that the
21 bonding company is going to stay on the bond. If they will
22 not stay on the bond, he will be delivered into the custody
23 and control of the Horry County Sheriff's Office.

24 Thank you very much.

25 MR. TRUSLOW: Yes, sir; I will

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

101

1 MS. HARTE: Thank you, Judge.

2 COURT REPORTER: We need to mark that, George.

3 MR. DEBUSK: Your Honor, for the record, we're going to
4 mark the exhibit for hearing.

5 THE COURT: Yes.

6 MR. DEBUSK: State's 1.

7 STATE'S EXHIBIT NUMBER 1

8 ADMITTED INTO EVIDENCE FOR PRETRIAL ONLY

9 THE COURT: Mr. Truslow?

10 MR. TRUSLOW: Yes, sir.

11 THE COURT: You might as well move into the rest of this
12 argument first thing tomorrow morning.

13 MR. TRUSLOW: All right.

14 THE COURT: And all the things that are encompassed about
15 that as far as the, you know, the video, the field sobriety
16 test; we'll deal with all of that tomorrow morning.

17 MR. TRUSLOW: All right, sir.

18 THE COURT: All right. Thank you.

19 END OF DAY 1

20 RECESS @ 5:58 P.M.

21 *****OFF THE RECORD*****

22 NOVEMBER 2, 2021 - DAY 2 OF 4

23 ON THE RECORD @ 9:03 A.M.

24 (REPORTER'S NOTE: The following takes place outside the
25 presence of the jury.)

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

102

1 THE COURT: All right. Where's the defendant?

2 MR. TRUSLOW: I don't know, Your Honor.

3 THE COURT: All right. Well ---

4 MR. TRUSLOW: I'll call real quick.

5 THE COURT: That's all right. We're gonna get started
6 with the motions.

7 MR. TRUSLOW: All right.

8 THE COURT: All right. So, regarding your motion to
9 suppress the evidence of the field sobriety test administered
10 at the police department.

11 MOTIONS:

12 MR. TRUSLOW: Yes, sir. The motion, Your Honor, is based
13 on Rule 401. I'm not going into any issues and the grounds of
14 expert stuff or science, because it's non-testimonial in
15 nature. However, in terms of relevancy and prejudicial, 403,
16 the balancing test, and 401, irrelevant or not relevant, the
17 field sobriety test -- and I've got documentation, I can make
18 it an exhibit if need be. It is used commonly by law
19 enforcement to detect if somebody is impaired or not. The
20 three -- the whole point of these tests, Your Honor, is that
21 they are standardized tests. There's not much science behind
22 them. However, the little that there is states that the three
23 tests commonly used as a whole are the walk and turn, the one-
24 leg stand, and the horizontal gaze nystagmus test. Those
25 three when used in conjunction together have some, apparently,

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

103

1 reliability.

2 In this case, Your Honor, the one-leg stand and the walk
3 and turn were the only two given. The third one was not
4 given. And the only studies out there say that when that's
5 the case, it affects the entire research that they have done.
6 And in fact, the one-leg stand becomes -- it's reliability
7 becomes sixty-eight percent; the walk and turn becomes sixty-
8 four percent if -- if -- if you don't have all three. So,
9 what we have here, in a case where my client is looking at
10 twenty-five years in prison, you have evidence that's going in
11 that is gonna say that he's impaired, further evidence of
12 impairment.

13 Now, when you look at probative value, they've got blood
14 and they've got breath evidence. So, the -- the need for that
15 field sobriety evidence comes down at that point. It becomes
16 just cumulative evidence. There's blood evidence as well as
17 breath evidence. In addition to that, the prejudicial nature
18 of it stands for itself. The terms of its reliability when
19 taken out of -- taken not all three as a group, the
20 reliability of sixty-eight percent and sixty-four percent is
21 pretty weak, and I would argue irrelevant, because the battery
22 of tests not given together. So, we would say under Rule 401,
23 it should be inadmissible as well as 403 if a balancing test
24 is needed.

25 THE COURT: All right.

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

104

1 Solicitor?

2 MR. DEBUSK: Your Honor, in this case, they gave you the
3 walk and turn and the one-legged stand, and the defendant said
4 he could do no more tests, so there wasn't a chance to get the
5 third one if they were inclined. The liabilities may be
6 something to bring an expert to -- to attack the -- and argue
7 those tests before the jury. That's not -- admissibility,
8 that's an issue for the jury to decide. In this case, we have
9 a blood alcohol of .11 and .105. If the defendant wishes to
10 stipulate that that shows he was impaired, that's fine, but I
11 think he's gonna argue that he's not despite the blood alcohol
12 reading. In which case, the performance of the field sobriety
13 test becomes very probative, Your Honor. So, I think it is an
14 issue for the jury to decide. It's relevant.

15 THE COURT: Who was -- who was the officer that conducted
16 the field sobriety test?

17 MR. DEBUSK: Officer Hoard, and he's in the courtroom,
18 Your Honor.

19 THE COURT: All right. Call him to the stand.

20 MR. DEBUSK: Yes, sir.

21 THE CLERK: Please raise your right hand and place your
22 left hand on the Bible.

23 JAKE HOARD, HAVING BEEN DULY SWORN
24 TESTIFIES AS FOLLOWS:

25 THE CLERK: State your name for the record and spell it,

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

105

1 please.

2 MS. HARTE: Judge, may we approach just briefly ---

3 THE COURT: Sure.

4 MS. HARTE: --- about this witness?

5 THE COURT: Yes, ma'am.

6 Mr. Truslow?

7 MR. TRUSLOW: Oh, sorry.

8 (REPORTER'S NOTE: Bench conference is held off the record in
9 the presence of but outside the hearing of the jury.)

10 THE COURT: I just -- y'all need to -- the arguments are
11 -- you've heard the arguments of counsel. Whatever you need
12 to do to respond. All right.

13 MR. TRUSLOW: Your Honor, if I could say one thing
14 quickly it might help.

15 THE COURT: Yes, sir.

16 MR. TRUSLOW: I understood Mr. DeBusk to say that he was
17 unable to do the test, so if we can redact those tests,
18 because part of the test is getting ready to do the test, in
19 fact, and the storing and all, but if they want to not use it,
20 if he was unable to do it, then that would solve everything.

21 THE COURT: No. I think -- and you correct me if I'm
22 wrong, Solicitor. What you're saying is the third test wasn't
23 conducted because, basically, the defendant said he wasn't
24 going to do anymore tests?

25 MR. DEBUSK: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

106

1 THE COURT: All right.

2 MR. TRUSLOW: So ---

3 THE COURT: They'd be able to -- we'll get -- so, you're
4 still arguing about the first two ---

5 MR. TRUSLOW: Yes, sir.

6 THE COURT: --- whether those can be shown to the jury.

7 So, go ahead, Solicitor.

8 MS. HARTE: Thank you, Your Honor.

9 DIRECT EXAMINATION OF JAKE HOARD BY MS. HARTE:

10 Q: Could you please state your name for the record, please,
11 sir?

12 A: Yes, ma'am. Jake Hoard, spelled H-O-A-R-D.

13 Q: Okay. And, Mr. Hoard, where were you working in April of
14 2019?

15 A: I was a public safety officer, a patrolman first class
16 with the City of North Myrtle Beach Department of Public
17 Safety.

18 Q: And did you have ---

19 MR. DEBUSK: And, Your Honor, I think for the record, I
20 think he hasn't been sworn in?

21 THE CLERK: Yeah, I swore him in.

22 MR. DEBUSK: I'm sorry, Your Honor.

23 THE COURT: I thought she did, but I just wanted to make
24 sure. Okay. All right. Go ahead.

25 BY MS. HARTE:

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

107

1 Q: Did you happen to have the occasion of coming in contact
2 with the defendant on April 6th of 2019?

3 A: Yes, ma'am; I did.

4 Q: Could you please tell me how that came about?

5 A: Yes, ma'am. I came into work and I assisted Officer
6 Floyd at the request of Sergeant Carrie Rose, with assisting
7 him with the felony DUI investigation as well as doing the
8 DataMaster breath testing, and I also did some field sobriety
9 testing in the BA room with the defendant.

10 Q: And what sort of qualifications do you have to administer
11 those tests?

12 A: At that time, I was a certified DataMaster operator, SFST
13 practitioner. I am also currently SFST instructor. I also
14 have worked, at this point in my career, probably 200 DUI and
15 OWI cases between the State of Michigan and the State of South
16 Carolina. I also am one of only two officers in the
17 department to receive a gold DUI award, unless that's changed
18 in the year since I've left. And I've also received the
19 bronze, silver, and the gold DUI Enforcement Hero Award for
20 the South Carolina Law Enforcement Officers Association.

21 Q: Okay, great, thank you. And is it typical when a
22 defendant enters the blood alcohol room to do field sobriety
23 tests?

24 A: Yes, ma'am.

25 Q: Okay. What -- is there any sort of factors that you

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

108

1 would look at in determining whether or not to perform that?

2 A: So, yes, ma'am; there are several factors. There's
3 actually a book, you can see it on the video, it's a red book
4 that walks the officer through the DataMaster procedure. It
5 just takes any sort of error that could happen between officer
6 to officer and you just file the instructions on that book.
7 Horizontal gaze nystagmus is not in that book, and I believe
8 that the reason being is because the way the DataMaster room
9 is set up for safety, the officer has to stay behind in the
10 secure area where it locks with a key, whereas the defendant
11 or arrestee has to be on the other side, and with that
12 barrier, due to safety and security, you wouldn't be
13 horizontal gaze nystagmus. However, there is lines and an "X"
14 in a box that allow for a really good tell of the walk and
15 turn and one leg stand.

16 Q: And how many of the field sobriety tests did you perform
17 in -- in the blood alcohol room?

18 A: What we did, we attempted the walk and turn, but the
19 defendant didn't think that he could walk nine steps in a
20 straight line and turn back, but it was still a validated
21 test, because during the time of instruction he demonstrated
22 two validated clues or indicators, and then we did the one leg
23 stand.

24 Q: Okay. And typically, do you do three tests?

25 A: Yes, ma'am. Typically, you do -- you do three tests, but

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

109

1 not on the DataMaster room.

2 Q: Okay.

3 A: Typically roadside, which I was not there roadside, but
4 in the DataMaster room, because of the security there, you
5 can't do all three tests.

6 Q: Okay. And did the defendant indicate to you that he was
7 unable to complete the field sobriety tests?

8 A: The walk and turn; yes, ma'am.

9 Q: Okay. And you were the officer that recorded the video
10 and operated the DataMaster system on April 6th, 2019?

11 A: Yes, ma'am. So, I activate the video equipment, but from
12 activation to when it's shut off, it's a neutral process
13 controlled by SLED. So, all I do is operate the machinery.

14 The video recording equipment and all of that is maintained by
15 the department in the South Carolina Law Enforcement Division.

16 Q: Okay. And have you had an opportunity to view what has
17 been marked as State's Exhibit 31?

18 A: Yes, ma'am.

19 Q: Okay. And is this your signature on it?

20 A: Yes, ma'am.

21 Q: And could you please tell the Court what is on this
22 recording?

23 A: That's going to be the start of the recording, the
24 defendant being escorted into the DataMaster room, all field
25 sobriety testing, advisement of implied consent, advisement of

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

110

1 Miranda warnings, incriminating statements the defendant made,
2 as well as his breath sample collection and procedures and
3 being escorted back to the jail, and then the ending of the
4 video.

5 Q: Okay. Thank you. And when you watched this, was this a
6 true and accurate depiction of the recording that you recorded
7 on April 6th, 2019?

8 A: Yes, ma'am.

9 MS. HARTE: Your Honor, at this time, the state moves to
10 enter State's Exhibit 31 into evidence and play it for the
11 Court.

12 THE COURT: Any objection for the purposes of the motion?

13 MR. TRUSLOW: No, Your Honor, for the motion.

14 THE COURT: You may do so.

15 STATE'S EXHIBIT NUMBER 31

16 ADMITTED INTO EVIDENCE FOR PRETRIAL ONLY

17 (REPORTER'S NOTE: State's 31 published for the Court. Audio
18 not transcribed herein.)

19 THE COURT: Is there considerable time before the
20 defendant ---

21 MS. HARTE: He's about to walk in, Your Honor. That's
22 actually him getting out of -- them getting out of the vehicle
23 and about to enter into the room right there.

24 (REPORTER'S NOTE: State's 31 published for the Court. Audio
25 not transcribed herein.)

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

111

1 MR. TRUSLOW: Your Honor, we're gonna withdraw the motion
2 at this point.

3 THE COURT: All right. Thank you. You can step down.

4 MR. TRUSLOW: I'm sorry for the confusion, Judge.

5 THE COURT: That's all right.

6 MR. DEBUSK: Your Honor, this video is also the subject
7 to one of the *Jackson v. Denno*.

8 THE COURT: Right. Don't take it out.

9 MS. HARTE: Do you want me to -- back up, Your Honor, I
10 know what point I just exited out of.

11 THE COURT: Right. So, just hold on one second.

12 So, Mr. Truslow ---

13 MR. TRUSLOW: Yes, sir.

14 THE COURT: The motion to limit or suppress the
15 defendant's statements, the *Jackson v. Denno* hearing, this
16 would be the statement, correct?

17 MR. TRUSLOW: Well, that motion was to the field sobriety
18 test. As to the statements ---

19 THE COURT: No, I understand that. I mean, the video we
20 just played ---

21 MR. TRUSLOW: Yeah, the statements on this we're not
22 contesting as well, but I do have a motion in regards to the
23 officer's statement that, in the beginning, your problem is
24 drinking and driving.

25 THE COURT: You want that redacted out of there?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

112

1 MR. TRUSLOW: Yes, sir.

2 THE COURT: Solicitor, let's -- however you can, if it's
3 -- I understand when we go to the trial, y'all need to find
4 where that is. You just mute that, at that point in time,
5 that brief part and just continue on with the video. You
6 don't need to cut and splice or -- but I -- but we will keep
7 that out of the -- the video, because that -- that goes into
8 the jury's determination. They're the ones to decide, not the
9 officer giving his opinion. Okay?

10 MR. DEBUSK: Yes, Your Honor.

11 THE COURT: All right. Anything else on the -- then the
12 either *Jackson v. Denno* or motion to limit or suppress the
13 defendant's statements?

14 MR. TRUSLOW: Only the issue in regards to after supposed
15 arrest on scene, that drive to the police department, because
16 in sticking with the law in the rest of these DUI cases and
17 matters, he is not advised that he's on video or audio tape
18 like he's required to be, and he is in the BA room, and he
19 doesn't know he's being video recorded, and he -- he's moaning
20 and upset and all that all the way to the police department.
21 So, we think it's irrelevant and he doesn't know he's being
22 video recorded and it's prejudicial and it outweighs the
23 probative value if it is relevant.

24 THE COURT: All right.

25 MR. TRUSLOW: That portion.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

113

1 THE COURT: Solicitor?

2 MR. DEBUSK: We haven't played that tape yet. Can we
3 call the witness and play that right now?

4 MR. TRUSLOW: We played that yesterday.

5 MR. DEBUSK: No, we didn't play his one from the car.

6 MR. TRUSLOW: Yeah, we did. The drive to the police
7 department.

8 MR. DEBUSK: There's a recording when he was in the car
9 from the in-car camera, audio of him talking to the officer.

10 MR. TRUSLOW: On the drive to the police department?

11 MR. DEBUSK: On the drive to the police department.

12 MR. TRUSLOW: We watched that.

13 MR. DEBUSK: I don't think we watched the one where --
14 the drive to the police department.

15 MR. TRUSLOW: All right.

16 THE COURT: Hold on a second.

17 MR. TRUSLOW: That's -- never mind.

18 MR. DEBUSK: For the record, Your Honor, that's gonna be
19 State's Exhibit 30 that we're referring to.

20 STATE'S EXHIBIT NUMBER 30

21 MARKED FOR IDENTIFICATION

22 THE COURT: So, you're talking about the video that
23 occurred on the drive there. We did listen to video and audio
24 yesterday when the defendant was in the vehicle ---

25 MR. TRUSLOW: The first patrol car.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

114

1 THE COURT: --- getting -- well, and in the second one,
2 getting ready to go to the North Myrtle Beach Public Safety
3 Department. Okay? So, we did hear that part. You're talking
4 about the actual drive from the scene to ---

5 MR. TRUSLOW: Yes, sir.

6 THE COURT: --- the station?

7 MR. TRUSLOW: Yes, sir.

8 THE COURT: Okay. Well, we didn't hear that.

9 MR. DEBUSK: No, sir.

10 THE COURT: All right. So, okay, well, then I need -- we
11 need to play that.

12 MR. DEBUSK: Officer Floyd.

13 MR. TRUSLOW: I don't object to playing it for this
14 motion hearing if that helps you to play it.

15 THE COURT: All right.

16 MR. DEBUSK: Your Honor, in that case, you want me to
17 publish it to the Court?

18 THE COURT: Okay. All right. So, come up and be sworn.

19 THE CLERK: Please raise your right hand and place your
20 left hand on the Bible.

21 BRYAN FLOYD, HAVING BEEN DULY SWORN

22 TESTIFIES AS FOLLOWS:

23 THE CLERK: State your full name and spell it for the
24 Court please.

25 MR. FLOYD: My name is Bryan Floyd; it's B-R-Y-A-N, F-L-

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

115

1 O-Y-D.

2 DIRECT EXAMINATION OF BRYAN FLOYD BY MR. DEBUSK:

3 Q: Officer Floyd, in your patrol car, do you have a camera
4 system in your patrol car?

5 A: Yes, sir; I do.

6 Q: Does it record what's going on in the patrol car?

7 A: Yes, sir; it does.

8 Q: Does it pick up what's being said in the backseat?

9 A: Yes, sir; it does.

10 Q: Is there a microphone in the backseat?

11 A: Yes; there is.

12 Q: Was that activated when you transported the defendant
13 from the scene of the accident to the Myrtle Beach jail?

14 A: Yes, sir.

15 Q: Is this a video of a fair and accurate representation of
16 that recording?

17 A: Yes, sir.

18 Q: Thank you.

19 (REPORTER'S NOTE: State's 30 published for the Court. The
20 following takes place outside the presence of the jury.

21 BY MR. DEBUSK:

22 Q: Officer Floyd was your body-worn camera on at the same
23 time as this car camera was on; was this also recorded on your
24 body camera?

25 A: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
ARGUMENT BY TRUSLOW

116

1 Q: But is the response of the defendant in the backseat
2 heard better on the car camera?

3 A: Yes, sir.

4 Q: Thank you.

5 THE COURT: Cross-examination?

6 MR. TRUSLOW: No, sir.

7 THE COURT: All right, sir. You may step down, sir.

8 All right. Arguments, Mr. Truslow?

9 MR. TRUSLOW: The argument would be, Your Honor, that the
10 evidence, if relevant, is cumulative. It's also outweighed by
11 the prejudice. It's unneeded with all the other evidence in
12 the case. Additionally, the law, when it comes to, he did
13 twice talk about the breath test, and if you look at section
14 56-5-2950, implied consent, it's improper information. He's
15 not told, as required in that statute, no breath test can
16 happen until they're told that I request the test, but you
17 have the right to refuse. So, twice, there's improper legal
18 information given to him as well. We say it was cumulative
19 and prejudicial in nature and outweighs any relevance, if
20 relevant, and it's confusing for the jury on the law by him
21 not being in conformance with 2950, which says no test can
22 occur, a breath test, unless they are told that they have the
23 right to refuse any test.

24 THE COURT: All right, sir.

25 Solicitor?

State v. Atwater - 2019-GS-26-02899, 02900
ARGUMENT BY DEBUSK

117

1 MR. DEBUSK: Your Honor, he was informed of his right to
2 refuse the breath test before he was offered the breath test.
3 When the officer in the breathalyzer room gave him his implied
4 consent rights. In this case it is probative. In that case,
5 in that recording, the defendant said in the backseat --
6 literally says you can take a test for the finds of alcohol.
7 It shows that he had awareness that he was under the -- that
8 he has alcohol in his system, which is a very important part
9 of the case, Your Honor. It is probative; it's not unduly
10 prejudicial; it's not cumulative because it doesn't say that
11 particular line in any other recording. We feel that it is --
12 he has been, at that point, read his Miranda rights four
13 times, and he was quite aware that he had the right to remain
14 silent.

15 RULING OF THE COURT:

16 THE COURT: All right, sir. All right. Regarding the
17 video of the defendant that was recorded during the drive to
18 the North Myrtle Beach Public Safety Department, I am going to
19 allow it into evidence with one redaction. The reason to
20 allow it, clearly the defendant had been given his Miranda
21 warnings by the police officer that drove, previously by
22 another officer. He had it read to him and said he understood
23 it several times. So, there's no question about that. So, he
24 knew that he did not have to make any statements. He
25 voluntarily did so.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

118

1 Now, as to the issue of prejudicial value or probative
2 value, in that balancing test, I do find that the -- if
3 there's any prejudice to the defendant, it's far outweighed by
4 the probative value of the evidence, that being the conduct of
5 the defendant as well as his statements when he knew he did
6 not have to make any statements, including an indication that
7 is not found in any other part of the recordings. The officer
8 indicated to the defendant as to the breath test that he was
9 going to request that he take. The process actually took
10 place at North Myrtle Beach Public Safety Department, and --
11 where that officer did comply with the requirements before the
12 test was given.

13 Now, one thing I do need to be either -- since we don't
14 have time, you know, to redact it, you'll have to mute it when
15 the officer does indicate after he says the first time, this
16 is the first time when he says can request a field sobriety
17 test or you're gonna take some field sobriety tests at the
18 department. He goes on to say something to the effect of this
19 is your chance to show me you were good enough to drive.
20 Obviously, that's switching the burden of proof from the state
21 to the defense and you'll have to mute that part of it. I
22 didn't read -- you know, I haven't read the whole statement to
23 you, but you know the point that I'm talking about.

24 MR. DEBUSK: Yes, Your Honor, we may have time to
25 actually redact that.

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

119

1 THE COURT: However that is, but I'm just saying, you
2 know, however you do it, just ---

3 MR. DEBUSK: Understood, Your Honor.

4 THE COURT: Just take that part out. Okay?

5 All right. So, but with that, the Court denies the
6 motion with that exception.

7 All right. Further motions or arguments, Mr. Truslow?

8 MOTIONS:

9 MR. TRUSLOW: Yes, sir. We're making a motion now to
10 require the state to elect whether to use the breath test or
11 the blood test results given a couple of reasons. One, that
12 it is confusing in that it's two different readings. The
13 breath test is .11 and the blood test is a .105, and it is
14 cumulative evidence as well. And we believe under the rules,
15 the state should elect which evidence and which accusation to
16 make. If he had a blood alcohol content of .11 or a .105.

17 THE COURT: All right, sir.

18 Solicitor?

19 MR. DEBUSK: Your Honor, I don't think there's any basis
20 of law for forcing the state to elect between those two. The
21 state is required under the felony DUI laws to offer a
22 breathalyzer test. If -- if the -- the legislature had
23 anticipated it might go on to a blood test, they would've
24 discussed that once the breathalyzer test had been done, no
25 further test would be done. Clearly, they anticipated that

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

120

1 both would be done and both will be admissible. Otherwise,
2 there would be no reason for the requirement to offer a
3 breathalyzer test before.

4 THE COURT: All right, sir.

5 MR. DEBUSK: Thank you.

6 RULING OF THE COURT:

7 THE COURT: All right. Regarding that particular matter,
8 Mr. Truslow ---

9 MR. TRUSLOW: Yes, sir.

10 THE COURT: --- there is no requirement to require the
11 state to elect. And, as to any difference in the results, I
12 can only say that that could be an argument beneficial to the
13 defendant, that their results aren't the same and open some
14 argument for you.

15 MR. TRUSLOW: Yes, sir.

16 THE COURT: I don't know of any prejudicial value to the
17 -- to the defendant, and certainly the state has the
18 requirement to prove the elements of felony DUI regarding the
19 two charges, felony driving under the influence with death and
20 great bodily injury. And obviously, part of that proof is
21 that the defendant has violated the particular statutes that
22 are set forth and the evidence, there's no requirement to
23 limit the state in probative evidence of something that they
24 have to prove. So, I'm not going to limit them in the
25 presentation of either the breath or the blood test.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

121

1 Anything else?

2 MR. TRUSLOW: No, sir, Your Honor.

3 THE COURT: All right. Very good. All right.

4 MR. DEBUSK: Your Honor, we had one final statement ---

5 THE COURT: Sure.

6 MR. DEBUSK: --- for *Jackson v. Denno*, it's the fourth
7 one. It was taken by Officer Shick.

8 (To Mr. Truslow) Could you stipulate to replaying the
9 statement for the *Jackson v. Denno*.

10 MR. TRUSLOW: I can stipulate to playing it for the
11 motion.

12 THE COURT: All right. So -- all right. So ---

13 MR. DEBUSK: State's Exhibit 28, for the record; the last
14 one, dash camera was State's 30; this is State's 28.

15 THE COURT: Okay. So, State's 28. So, just so that
16 we're clear in the scheme of things, when was that statement
17 made?

18 MR. DEBUSK: When Officer Shick arrived on the scene, he
19 talked to the wife, and then he -- this is the time he talked
20 with the defendant, separated the wife -- from the wife,
21 placed in handcuffs and put in investigative detention.

22 THE COURT: All right. All right.

23 (REPORTER'S NOTE: State's 28 published for the Court.)

24 MR. TRUSLOW: Your Honor, this is the one I believe I
25 don't have an objection to.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

122

1 THE COURT: All right, sir.

2 MR. TRUSLOW: I'm sorry.

3 And, Judge, then I have two additional ---

4 THE COURT: All right. So, and again for the record,
5 that one is which one?

6 MR. DEBUSK: State's 28.

7 COURT REPORTER: State's 28.

8 THE COURT: All right. So, there's no objection to
9 State's 28. All right. Go ahead, Mr. Truslow?

10 MR. TRUSLOW: Your Honor, just so I -- I neglected to say
11 something that just came up in regards to the blood and
12 breath, but when I was telling -- when I was mentioning to the
13 Court Section 56-5-2950, Code of Laws, it states that if the
14 person is physically unable to provide a breath sample,
15 because he has an injured mouth, one; two, unconscious or
16 dead; or three, for any other reason considered acceptable by
17 the licensed medical personnel, then the arresting officer may
18 request a blood sample be taken. If they suspect drugs, they
19 can ask for the urine test. If a breath test is possible in
20 that statute, then there is no remedy or no route for a blood
21 test, once the breath is taken, if everything works well at
22 that, and he can do it. And that's right in the middle of
23 2950, first paragraph (A). It's about the fourth sentence,
24 fifth sentence.

25 THE COURT: Hold on a second. All right.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

123

1 Any other arguments, Mr. Truslow?

2 MR. TRUSLOW: No, sir, Your Honor.

3 THE COURT: All right. Solicitor?

4 MR. DEBUSK: I can't find -- implied consent statute is
5 prior to the defendant being offered a breath test, if he's
6 able to take it. There is an alternative right if he's not
7 able to take it, to take a blood test as a substitute, but
8 does not relieve the state of the requirement of offering the
9 breath test before proceeding to the -- to the search warrant
10 blood draw, Your Honor. And since both were anticipated in
11 the statutes as written, the state does not have to elect the
12 -- the legislature clearly anticipated that both would be
13 available in some cases when the defendant chose to accept the
14 breath test and blood test results ---

15 THE COURT: All right. So, the breath test was offered
16 and administered under 56-5-2950 and the sections thereafter,
17 correct?

18 MR. DEBUSK: Yes, Your Honor.

19 THE COURT: All right. And the blood test was by way of
20 a search warrant?

21 MR. DEBUSK: Yes, and -- and he also was -- informed
22 implied consent which was subject to that.

23 THE COURT: All right. But in this particular case, just
24 so I'm clear, in this particular case, the blood test came as
25 a result of a search warrant issued in this matter; is that

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

124

1 correct or not?

2 MR. DEBUSK: Yes, Your Honor.

3 MR. TRUSLOW: It is correct, Your Honor, although that's
4 a separate issue, because the search warrant is not -- does
5 not have a time on it. So, they'd be required then to lay
6 that foundation.

7 THE COURT: Well, if you've got -- if you're gonna bring
8 that matter to the Court and then you can file that motion.
9 Okay? And I'll be glad to hear it, but ---

10 MR. TRUSLOW: Yes, sir.

11 THE COURT: Since, you know, he was offered properly the
12 breath test, and obviously took it, knowing he could refuse,
13 the state proceeded to request a blood test through the search
14 warrant process and the state is not limited in its
15 presentation of evidence. I did not find it to be cumulative.
16 I find it well within the state's prerogative to present the
17 evidence it feels necessary to prove its case, and I don't see
18 that there's any prejudice to the defendant from either, or
19 the combination of the two, as I've indicated. If they have
20 conflicting results, and if there is any argument to be made,
21 it's on behalf of the defendant, not prejudicial to him.

22 All right. What other motions?

23 MR. TRUSLOW: Your Honor, no other motions. I did want
24 to take a moment before the jury came in and just put on the
25 record something.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

125

1 THE COURT: All right. Go ahead.

2 MR. TRUSLOW: For the record that, in this case, it's
3 been going on for some time. In regards of pleas, the defense
4 was made a plea offer to plead to felony DUI with death and
5 for a sentence of 20 years, and I wanted the record to reflect
6 that as we move forward to trial.

7 THE COURT: All right. So, I mean, was the -- was the
8 defendant arraigned at some point in time?

9 MR. TRUSLOW: I don't believe so, Your Honor.

10 MR. DEBUSK: Court's indulgence for a moment?

11 THE COURT: All right.

12 MR. TRUSLOW: I don't believe so, but I believe we
13 executed a written and signed by my client and myself
14 rejecting the 20 years ---

15 THE COURT: Rejecting the offer?

16 MR. TRUSLOW: --- in writing.

17 THE COURT: All right. So, that's fine. Then there's no
18 need for an arraignment then if the plea offer was given in
19 writing and then rejected in writing.

20 MR. TRUSLOW: Yes, sir.

21 THE COURT: And so -- and so, Mr. Truslow, you did that
22 obviously consulting with your client and he ---

23 MR. TRUSLOW: That's correct, Your Honor.

24 THE COURT: --- authorized you to reject the plea offer?

25 MR. TRUSLOW: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

126

1 THE COURT: All right. Very good. All right. Thank
2 you.

3 All right. We told the jury to come in at -- be ready to
4 come into the courtroom at 10:30, so we'll take a short break
5 and we will resume at 10:30 with the swearing of the jury at
6 that point in time. All right?

7 MR. TRUSLOW: Yes, sir.

8 THE COURT: Thank y'all very much.

9 **RECESS @ 10:08 A.M.**

10 *****OFF THE RECORD*****

11 **ON THE RECORD @ 10:34 A.M.**

12 MR. DEBUSK: Your Honor, we still have a room full of
13 witnesses here; are we sequestering or ---

14 THE COURT: Nobody has asked for it.

15 MR. TRUSLOW: I would ask for it, Your Honor.

16 THE COURT: Well, all right.

17 MR. TRUSLOW: Please.

18 THE COURT: All right. So, who is your chief
19 investigating officer?

20 MR. DEBUSK: Officer Shick ---

21 THE COURT: All right. He's allowed to stay.

22 MR. DEBUSK: And my victim, he's testifying first because
23 he is ---

24 THE COURT: Well, the victim ---

25 MR. TRUSLOW: Yeah. I have no objection.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

127

1 THE COURT: --- obviously can stay. The other witnesses
2 would need to leave the courtroom until they're called, and
3 once they are called, they can stay or leave as they choose.

4 MR. DEBUSK: I would make the same motion for the
5 witnesses on the defense side.

6 THE COURT: So, if there's any potential witnesses for
7 the defense, the same -- the same order.

8 MR. TRUSLOW: Yes, sir.

9 All right. Ask the jury to come in, please, sir.

10 (REPORTER'S NOTE: Jury enters courtroom @ 10:37 a.m.)

11 MR. TRUSLOW: Okay, Judge, we're ready.

12 BY THE COURT:

13 THE COURT: All right. Very good. Oh, Counsel, the jury
14 did request to take notes, so I'll give it to them at the
15 start of the evidence after the opening arguments.

16 MR. TRUSLOW: Yes, sir.

17 THE COURT: All right. Mr. Boorn, the jury has selected
18 you to the foreperson; is that correct?

19 JUROR 39: Yes, sir.

20 THE COURT: All right. So, you will always occupy that
21 particular seat when you come into the courtroom.

22 The two alternates, could y'all raise your hands, please?
23 You will always occupy those two seats when you come in. The
24 rest of you, ladies and gentlemen, the only sacred seats are
25 the foreperson, two alternates, the rest of you just got to

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

128

1 fill in. Probably though you will be occupying the same seats
2 because when we start the evidentiary portion, we're gonna
3 allow you to take notes. And so, we'll distribute those pads
4 and pens at that point in time, and when you come and go,
5 you're gonna put it down in your seat; you're not taking it
6 with you. So, I guess you will be occupying those same seats
7 wherever it is that you are now because of that.

8 So, the very first thing that's gonna happen is the
9 clerk's representative is gonna administer your oath to you.
10 So, if you would all please stand at this time.

11 (REPORTER'S NOTE: Jury is duly sworn.)

12 THE CLERK: Thank you. Please be seated.

13 THE COURT: Is there any member of the jury panel that
14 did not answer affirmatively to the oath given by the clerk's
15 representative? If you did not, please, stand. No juror
16 having stood, I find the jury properly sworn in this matter.

17 All right, ladies and gentlemen, I'm sure collectively
18 you're sitting there and you've got a question in your mind or
19 wondering what's my job; what am I supposed to do? You
20 collectively are going to be the judges of the facts of this
21 case. I will not indicate to you in any fashion what I think
22 the facts of this case are. That will be your job, duty, and
23 responsibility, to listen to the facts and evidence and make a
24 determination based on the law that the Court will give to you
25 at the very end. So, you'll take collectively, decide what

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

129

1 you decide are the facts of this case, you will apply that to
2 the law that the Court gives to you.

3 Now, a couple of things that I will instruct you about
4 are the two indictments that I read to you and I'm going to
5 remind you again, those charges, what I read to you at the
6 very beginning, not evidence. Evidence comes to you from the
7 witness stand. Okay? And, but when the state charged the
8 defendant with the two crimes, felony driving under the
9 influence with death, and felony driving under the influence
10 with great bodily injury. At that point in time, the burden
11 of proof came upon the State of South Carolina to prove the
12 defendant guilty of the crimes charged beyond a reasonable
13 doubt. The defendant, at that point in time, was presumed
14 innocent. The defendant is presumed innocent now. The
15 defendant is presumed innocent unless and until you believe
16 from the evidence presented to you in combination with the law
17 that I will charge to you, the state has proved that the
18 defendant is guilty of the crime or crimes charged beyond a
19 reasonable doubt. The defendant has nothing to show to you.
20 The defendant has nothing to prove to you. All of that falls
21 upon the shoulders of the state to prove their case to you
22 beyond a reasonable doubt.

23 I tell juries all the time, the defendant doesn't even
24 have to show up for trial, because they've got nothing to show
25 to you. They got nothing to prove to you. It's all upon the

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

130

1 State of South Carolina to present the evidence and present
2 the evidence for your consideration that you combine with the
3 law that the Court gives to you.

4 Now, in your job as judges of the facts, part of that
5 will be to judge the credibility and believability of the
6 witnesses that come before you and testify under oath, and if
7 you're thinking, well, how am I judging somebody's credibility
8 and believability; you do it every single day of your life.
9 When somebody tells you something, in your mind, you're
10 judging whether or not you believe them. You use your good
11 common sense. You use your good judgment that you use in
12 conducting your own affairs. That's what we're asking you to
13 do; use your good common sense. Listen to the facts and
14 evidence and then that which you find, you apply that to the
15 law.

16 How the case will proceed. We'll have opening statements
17 by the attorneys. Then we'll go into the evidentiary portion
18 of trial. Witnesses will come before you and testify under
19 oath. There might be some documents that are introduced, or
20 videos or some type of non-testimonial evidence that will be
21 given to you. After the evidentiary portion, we've got the
22 closing arguments of the attorneys, then the charge on the
23 law. All that you're gonna apply to the facts and evidence
24 you've heard in this case, and then I give the case to you,
25 submit the case to you for your deliberations and unanimous

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

131

1 decision.

2 Now, opening statements, closing arguments, important
3 parts of the case. Opening statements are the initial
4 comments of the lawyers about what they think is going to
5 happen during the evidentiary portion of the trial. Closing
6 arguments are their arguments on the evidence already
7 presented to you. But as you can tell from that, neither one
8 of those are evidence. Opening statements, closing arguments,
9 not evidence. You base your decision solely and completely on
10 the evidentiary portion of the trial from witnesses you've
11 heard under oath and from other evidence that the Court has
12 allowed to be admitted in this particular matter.

13 We've asked you and the parties have asked you to listen
14 carefully to the facts and evidence, and I will remind you
15 about this, about the notetaking when I tell you about that.
16 Some people are better notetakers than others. Okay? Just
17 because somebody writes something down on a piece of paper,
18 does not give it more weight or sway with the jury than
19 somebody else's memory of what someone said. You put that all
20 together at the end.

21 But again, you've taken an oath to listen carefully to
22 the facts and evidence in this case, to follow the law that
23 the Court will give to you at the end. You put the two
24 together and reach a unanimous verdict on the two charges
25 against the defendant. So, each one of those is a separate

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY HARTE

132

1 charge, basically a separate case; you'll make two separate
2 decisions on the felony driving under the influence with death
3 and felony driving under the influence with great bodily
4 injury. Two cases, you will decide and solve both of those
5 with your unanimous verdict.

6 So, with that, Solicitor?

7 MS. HARTE: Good morning.

8 JURY: Good morning.

9 OPENING BY HARTE:

10 MS. HARTE: Decisions. This case is all about decisions.
11 We wake up every day as human beings and we all make
12 decisions. Some of those are good decisions; some of those
13 are bad decisions. Some of those decisions have huge
14 consequences and sometimes they don't. However, no matter
15 what decisions we make each day, we are responsible for them
16 and the consequences they bring about, especially when those
17 decisions are driven by alcohol. But, this case today just
18 isn't about making decisions in general. It's particularly
19 about making bad decisions; and not just one bad decision, but
20 a chain of bad decisions. A chain of bad decisions all driven
21 by alcohol caused by the defendant, Claybon Atwater, that led
22 to the great bodily injury to Mr. David Schnell and the death
23 of Ms. Donna Schnell.

24 Today you're going to hear about April 6th, 2019, and the
25 bad decisions that the defendant made that day. The selfish

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY HARTE

133

1 decisions, all driven by alcohol. The defendant woke up on
2 April 6th, 2019; he went to the beach with his family, and he
3 began drinking -- drinking. However, when he left the beach
4 that day is when that horrible chain of bad decisions all
5 began. The first of many bad decisions the defendant made
6 that day was when he decided to make the conscious bad
7 decision to get into the vehicle and drive to the Circle K gas
8 station, although he had been drinking alcohol. And how do we
9 know that the defendant had been drinking alcohol before
10 getting in the car driving to the Circle K gas station,
11 because of the defendant's own words. Listen for testimony
12 about what the defendant told law enforcement he was doing
13 prior to the collision, especially referring to his
14 consumption of alcohol. Listen for testimony about what the
15 defendant told an insurance agent that he had been doing prior
16 to the collision. It's very important. Listen -- listen to
17 those statements.

18 And why did the defendant make yet a bad decision again
19 to drive to that Circle K gas station after drinking on the
20 beach; all because of alcohol. He wanted a beer. And how
21 does the state know this again? Because throughout this
22 trial, you're gonna see surveillance video from that Circle K
23 gas station. When you watch that video, watch what the
24 defendant purchases in that gas station. You're gonna hear
25 testimony from that store clerk that was working in that store

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY HARTE

134

1 on April 6th, 2019. Listen closely to her testimony about
2 what the defendant purchased. The only thing the defendant
3 purchased.

4 The defendant then made yet another bad decision fueled
5 by his intoxication when he got behind the wheel leaving the
6 gas station with his son and wife in the car. The defendant
7 then decided to dart across three lanes of traffic, hitting
8 and killing Ms. Donna Schnell and causing great bodily injury
9 to another victim, Mr. Don -- Mr. David Schnell. Then the
10 defendant made yet another bad decision after that collision
11 to keep driving and switch seats with his wife. Why did the
12 defendant make this bad decision to switch seats with his
13 wife? Alcohol; he was intoxicated and knew he had no business
14 being behind the wheel.

15 Ladies and gentlemen, all of the defendant's decisions on
16 April 6th, 2019 were driven by alcohol. This was not just one
17 bad decision he made on that day that had dire consequences,
18 but a chain of them. A chain of bad decisions, all because
19 the defendant was under the influence of alcohol. And
20 throughout this trial, I want you to listen to several
21 eyewitness' testimony regarding the defendant's darting out
22 into traffic, and how there was nowhere for the victims'
23 vehicle to go. Pay close attention to the statements made by
24 the defendant himself admitting to drinking and that he did
25 not see the victims' car when he pulled out into traffic. The

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY HARTE

135

1 defendant did not see the victims' motorcycle because he was
2 intoxicated, he did not look, and he failed to yield the right
3 of way. And because of that, Ms. Donna Schnell is now dead,
4 and Mr. David Schnell suffered great bodily injury.

5 Listen closely to the testimony regarding the defendant's
6 blood alcohol concentration. That's very important on this
7 case. Listen very closely to that testimony.

8 Now, I told you today's case was about decisions, and we
9 have discussed the defendant's decisions made on April 6th,
10 2019. Specifically, the bad decisions -- but I want to switch
11 gears now and talk about the decision that you have to make if
12 you're selected to be on this jury, and after hearing all of
13 the evidence presented to you, I submit to you that you will
14 find this defendant guilty.

15 My name is Rachel Harte and, along with my co-counsel,
16 Mr. George DeBusk, we are representing the State of South
17 Carolina. And, as you heard Judge John say, we have the
18 burden of proving beyond a reasonable doubt that the defendant
19 is guilty of driving under the influence, death, and driving
20 under the influence, great bodily injury, and we plan to do
21 just that.

22 So, I want to touch on the law a little bit and tell you
23 what we have to prove beyond a reasonable doubt and go through
24 each element with you, since I told you we have to prove that.
25 So, the State of South Carolina felony driving under the

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY HARTE

136

1 influence death result means we have to prove that the
2 defendant was driving the motor vehicle while under the
3 influence of alcohol or drugs, meaning that while he was
4 driving his facilities were impaired by either alcohol or
5 drugs. Here the alcohol that he drank. Three, acting in a
6 way forbidden by law and driving a motor vehicle or neglecting
7 his duties imposed on him by laws of this state while driving
8 a motor vehicle, and that illegal act or negligent act
9 approximately resulted in the death of another.

10 Here the state anticipates proving beyond a reasonable
11 doubt that the defendant's driving under the influence and
12 failure to yield the right of way, which is forbidden by state
13 law, was the proximate cause of the death of Ms. Donna
14 Schnell, and you're going to hear medical testimony regarding
15 those injuries in the wreck.

16 Now, I also told you that we have to prove felony driving
17 under the influence great bodily injury results. That is
18 going to be the same elements I just went over with you except
19 instead of the state proving beyond a reasonable doubt that
20 death occurred, we must show that great bodily injury occurred
21 to David Schnell. Great bodily injury means injury which
22 creates a substantial risk of death or causes serious
23 permanent disfigurement or protracted loss or impairment of
24 any bodily member or organ. Here the state proves -- intends
25 to show beyond a reasonable doubt that the defendant's driving

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY HARTE

137

1 under the influence of alcohol and failure to yield the right
2 of way lead to the great bodily injury of David Schnell.
3 Listen for testimony from Mr. Schnell throughout this week and
4 from an emergency room nurse regarding those great bodily
5 injuries.

6 Also, throughout this trial, I want you to pay close
7 attention, as I mentioned before, to the defendant's blood
8 alcohol concentration level. I want you to remember this
9 throughout the trial; this is an important factor. In the
10 State of South Carolina, if a person has blood alcohol
11 concentration level of 0.08 or above, you may infer from that
12 they were impaired. This is very important. Once again,
13 listen to the testimony about what the defendant's blood
14 alcohol concentration level was on April 6th, 2019.

15 Now, I know I've mentioned as the state, we have the
16 burden of proof and I want to discuss briefly with you that --
17 what that is, beyond a reasonable doubt. This defendant has
18 decided to have a trial and that's his constitutional right to
19 do so. I like to explain reasonable doubt as proof that
20 leaves you firmly convinced. There's no mathematical equation
21 here. Okay? And the Judge will also go over the law general
22 standards with you when he gives you your instructions as to
23 the law, and if I say anything different up here from what
24 Judge John tells you, you defer to him, because he is the
25 Judge and is to instruct you on the law.

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY TRUSLOW

138

1 After hearing all of the evidence presented to you
2 throughout this week, Mr. DeBusk will come back before you in
3 closing arguments, and he's gonna go over in great detail how,
4 throughout the course of this week, we've proved beyond a
5 reasonable doubt each and every element, and the state will
6 tell you why this case leads to one verdict and one decision
7 you all must make, and that is Claybon Atwater, the defendant,
8 is guilty of one count of felony driving under the influence
9 of alcohol, death results, and one count of felony driving
10 under the influence, great bodily injury results.

11 THE COURT: All right. Mr. Truslow?

12 MR. TRUSLOW: Yes, sir, if it please the Court?

13 THE COURT: Yes, sir.

14 OPENING BY TRUSLOW:

15 MR. TRUSLOW: Ladies and gentlemen, I'm gonna tell you --
16 I'm gonna say something that might seem a little bold, and I'm
17 gonna give you two reasons, not to listen to much more of what
18 they have to say, and what's wrong with this type of
19 situation. Okay?

20 She said that he darted out in traffic, and him switching
21 seats because he was drinking. Okay? Right from the get-go,
22 here we go. All right? He didn't dart out in front of
23 traffic, and I have no problem telling you that, because I
24 know what the evidence is, and it's all spin. It's spin. He
25 waited for traffic to slow down. And, in fact, with three

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY TRUSLOW

139

1 lanes of traffic, you know, failure to yield, the victim was
2 in the third lane; why didn't the cars in the first two lanes
3 hit him? They slowed for him. He had to get on 17 South, so
4 he gets across, and then over here in third lane, the bike
5 comes flying by. I'll tell you one thing that's never gonna
6 happen ever, people are not gonna stop getting in accidents,
7 because it happens, and it's tragic. People are not gonna
8 stop dying. My heart goes out to this family. It does,
9 because I know what that's like, but it happens, and it
10 happens every day in this country and in this county. But
11 whether or not my client is drinking caused the death, it's
12 two different things. It's two different things. And the
13 reason we're in trial today is because we don't believe that
14 his drinking alcohol and driving was the proximate cause of
15 the death, and we believe that accident would've happened
16 regardless, regardless. And I'll tell you, these days, the
17 way the pendulum is swung, if you get a car wreck, and you've
18 been drinking, you're in for it. I'm telling you.

19 But you know, you took an oath today to go by the law,
20 and I told my client, you better pray to God that we have some
21 human beings on the jury who would take the time to follow the
22 law and the facts, because that's all we have in this state
23 and in this country. It's not the best system, but it's the
24 best that there is, because we get 12 people, who have no
25 knowledge of this matter and nobody is pleased on your side to

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY TRUSLOW

140

1 come in and listen to the facts, and they make the decision
2 based on the law. And, if you do that, Claybon is gonna go
3 home with his family today, if you do that. Because his
4 drinking, and he was drinking, and he told them that he was
5 drinking, was not the reason this collision occurred. It
6 would have occurred regardless. It would've occurred if had
7 never had a drop of alcohol in his life. So, that's the
8 pickle that we find ourselves in.

9 You know, I want to tell you just briefly in a couple of
10 minutes that I found. I've done this job for 28 years, and
11 when I hear legal principals such as innocent until proven
12 guilty, it's hard for me to buy into it. It just is, because
13 I'm tasked with bringing you up to speed in what goes on in
14 here in a very short period of time, I get to talk to you
15 twice. You probably have preconceived or may have
16 preconceived notions of how things go, but I promise you, you
17 come into jury duty and you don't do this for a living, it's
18 very hard, because the rule says you're innocent until proven
19 guilty, not to think that the person sitting in that chair is
20 guilty of something, because what would we be doing here; why
21 would they spend all this money; why would all these people be
22 here, and it happens. I'm telling you it happens every week,
23 every week. And the only thing that puts you in that chair
24 over there is an accusation, and that's it, and none of us are
25 free from that.

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY TRUSLOW

141

1 And the only thing that you can do besides pack your
2 things and leave is go off and plead guilty. Then it is to
3 have a trial; that's all we can do, which leads to just how
4 important jury duty is, particularly in a criminal case,
5 because you are like the backstop. And when the Judge says
6 you're the finders of fact, that's what he means, and what it
7 means is the buck stops with you. We don't have anybody else
8 to appeal to. You decide whether he's guilty or innocent, not
9 the Judge. The Judge tells you the law, and he rules on
10 matters of law during this trial. But, in terms of whether or
11 what happened in this case equals guilt of a felony DUI with
12 death or great bodily injury is on you, and I don't envy your
13 position. I used to think my job was hard, and somewhere
14 along the line I learned that the jury's job is really the
15 hardest, because I wouldn't want to have to make these
16 decisions; they're tough. You have people on both sides, you
17 know, and I never used to open that understanding up to the
18 other side. I was tunnel-visioned into doing my job but, you
19 know, I can see that now. This gentleman was hurt bad, and he
20 lost, if I'm not mistaken, his wife, and I have every reason
21 to believe she was a fine person. But this trial today is to
22 determine one thing, whether my client is guilty of her death
23 and his injuries.

24 One thing I want to tell you in addition, is that DUI,
25 driving under the influence, is never a good idea. I'm not in

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY TRUSLOW

142

1 favor of it, but driving under the influence, plus a collision
2 where somebody is killed or hurt, does not equal felony DUI,
3 the crime. Driving under the influence that leads to a
4 collision, which you are the proximate cause of that collision
5 and it happened because you're drinking, is going to be DUI
6 and that's an enormous distinction. Like I said before, it
7 may be hard to distinguish and to follow, but I can only ask
8 you to do the work to figure it out and see if whether there
9 is an understanding of the law when you get it and discuss it,
10 because it means everything in the world to us.

11 You know, I still get nervous in these trials, but I had
12 an old lawyer tell me one time, if you weren't, then you don't
13 care about what you're doing, and I care. And I'm sure you
14 guys, anything that -- you know, unless you've had jury duty,
15 but you don't do it often, would come here, trepidatious, and
16 nervous about what's happening, and that you could get on a
17 criminal trial, but I would submit to you that my client is
18 nervous, because he's done all he can do in this country, and
19 he has come to trial, and he's putting it in your hands. I'm
20 not gonna ask you to pay attention to this and pay attention
21 to that; I believe that you will. I can tell that you're
22 paying attention there, and that's all I ask, is that you come
23 into this with an open mind. One of the best definitions I
24 ever heard of listening was allowing another person the
25 opportunity, the real opportunity, to change your mind, and

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY TRUSLOW

143

1 you know, I like that, because it says a lot. I mean, a
2 definition like that of listening, it's really just really
3 open to take a hard look at something. And I say that
4 because, innocent until proven guilty. I'm drawing a blank on
5 the other ones now, but I don't know that they exist. We're
6 all humans and I would not feel bad if you have a gut feeling
7 if somebody is guilty of a charge. I mean, we see it all the
8 time. We see trials on T.V. and people form an opinion, and
9 they saw one day of a ten-day trial. People on social --
10 you're gonna have testimony here today, it's normal to --
11 that's what we are, but it's the best system that we have. My
12 job is to point out along the way issues that support what I'm
13 trying to do say to you, and so I will do that.

14 And real briefly, let me back up and tell you I'm Kirk
15 Truslow and I represent Claybon Atwater. Claybon is a real
16 person. I've got to know him over the last two-and-a-half
17 years. He has a family; a wife and three kids. He and his
18 family were on vacation. He brought his family down here to
19 North Myrtle Beach, and his mom and extended family, a bunch
20 of people, and they were staying at a place in North Myrtle
21 Beach. He did drink earlier that day prior to going to the
22 beach, and then he -- his son and his wife wanted to go to the
23 store, the convenience store. His wife wasn't feeling well
24 and didn't want to drive; Claybon drove. Got to the store,
25 and he bought a beer. Guess what, he didn't open it. It

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY TRUSLOW

144

1 wasn't open and he started drinking it in the car; it was
2 closed and trying to get across traffic and waited until he
3 thought he could get across.

4 I think when you pay attention to this case, you will see
5 that you very well may have been in this collision. How many
6 do we have constantly on the roadways and deaths where no one
7 caused the problem, and that's the issue.

8 The other issue, I said at the beginning about darting
9 out, the second reason we said, and this is just two of many
10 to come probably, is switching seats. What the evidence is
11 gonna show you -- and this isn't great for me -- but he did
12 not switch seats. He did not switch seats because he was
13 drinking, and I'm not even gonna be able to tell you, but I'm
14 just pointing that out, because you will see that -- he had a
15 revoked license in North Carolina. Like I said, you know, --
16 but I'm telling you, if you want to get to the right verdict
17 in this case, those are things you've got to pay attention to.
18 He even says it, you know, and then he finally admits he was
19 driving; I'm in trouble, I have a revoked license. He wasn't
20 thinking about the alcohol issue and it wasn't an issue until
21 they make it an issue, and if you look and watch the evidence,
22 you'll see there wasn't much there to do that night. He was
23 concerned and worried and now as he says in the car, I'm gonna
24 be charged with murder. So, yeah, he was vocal -- and vocal,
25 I'll say that, but I just ask you to look through that for

State v. Atwater - 2019-GS-26-02899, 02900
OPENING BY TRUSLOW

145

1 evidence that there his alcohol consumption that morning
2 caused this accident, because if it did not and he's
3 convicted, that's not right, and it that has grave
4 consequences. And I believe -- you know, I would give a
5 different type of opening statement if I didn't believe it. I
6 believe that you will see that. Now, I'm hinging it on that,
7 I'm just gonna lay it out for you.

8 The other thing, the last thing I'm gonna tell you, is
9 the myth that this is a competition between me and the state.
10 I assure you, I am not trying to be win; that's not what this
11 is about. I give you my word that I'll be straight with you
12 the entire trial, pointing out what I think is important, and
13 when I come back to talk to you in closing arguments, I'll ask
14 you for a not guilty verdict, because the state didn't prove
15 beyond a reasonable doubt and leave you firmly convinced that
16 this accident would not have occurred outside of alcohol. No
17 tricks or games with me. I'm not gonna use words like darted
18 out when it didn't happen like that. And, I'm gonna keep that
19 credibility with you and ask that you do the right thing based
20 on how you find the facts at the end and apply it to the law.
21 And, as much as I hate to say it, if it's a conviction, it's a
22 conviction if you believe in your heart you went by the law
23 and that was your verdict then guess what, I have just as much
24 respect for you. Don't get me wrong, I'm not telling you how
25 to vote; I'm telling you how I think the ruling would be.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

146

1 So, again, I'm Kirk Truslow. This probably is not how you
2 wanted to spend a few days of your life but here you are.
3 And, you know, I got up today and I was having a bad hair day,
4 but I realize I've had a bad hair day for 53 years. That's
5 what happens when you have three cowlicks. Anyway, again,
6 just, you know, help us in this trial, to come to the right
7 verdict, the true verdict, based on the law and reasonable
8 doubt in felony DUI with death. Thank you.

9 BY THE COURT:

10 THE COURT: All right, Solicitor, your first witness.

11 MS. HARTE: Your Honor, the state would like to call
12 David Schnell to the stand.

13 THE COURT: All right. Please come forward.

14 THE CLERK: Please raise your right hand and place your
15 left hand on the bible.

16 DAVID SCHNELL, HAVING BEEN DULY SWORN

17 TESTIFIES AS FOLLOWS:

18 THE CLERK: Please be seated. State your full name and
19 spell it for the record, please.

20 THE COURT: All right. Before you get started,
21 Solicitor, we're gonna hand out the notepads and the pens.
22 So, when the clerk's representative gives you the notepad and
23 a pen or you get the notepad and a pen, you can put your name
24 on the top of the first page. Write your name on the top of
25 the first page.

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

147

1 All right, sir, scoot up a little bit closer to the
2 microphone and state your full name for the record.

3 MR. SCHNELL: David Schnell.

4 THE COURT: Spell your last name, please.

5 MR. SCHNELL: S-C-H-N-E-L-L.

6 THE COURT: Go ahead, Solicitor.

7 DIRECT EXAMINATION OF DAVID SCHNELL BY MS. HARTE:

8 Q: Mr. Schnell, what is your occupation?

9 A: What is my occupation?

10 Q: Yes, sir.

11 A: I was a builder and I owned bars for 35 years.

12 Q: Okay. Are you currently employed?

13 A: No -- yes, I am. I'm employed now as a part-time
14 security guard at a campground in Myrtle Beach.

15 Q: Okay. And where do you currently live?

16 A: I live at [REDACTED] Affinity Drive in Myrtle Beach, South
17 Carolina.

18 Q: Okay. And, Mr. Schnell, what was your wife's name?

19 A: Donna Marie Schnell.

20 Q: Okay. And what was your wife's occupation?

21 A: My wife was an RN at Grand Strand Hospital.

22 Q: And how long were you and Donna married?

23 A: Me and Donna were married for three years.

24 Q: Okay. And did you and Donna share any hobbies?

25 A: Excuse me?

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

148

1 Q: Did you and Donna share any hobbies that y'all like to do
2 together?

3 A: We enjoyed camping in our RV, and we enjoyed riding
4 motorcycles.

5 Q: Okay. And I want to direct your attention to April 6th,
6 2019. Can you please tell the jury about that day and what
7 you and your wife were doing that day?

8 A: Well, I got up early in the morning and went to work.
9 Donna got up and went to a course at the hospital, like
10 another college course, and we were meeting up later on that
11 afternoon to go to a Jeep show that was being done in Myrtle
12 Beach, you know showing Jeeps and mud bog, and stuff like
13 that. And, when I got home from work, Donna was super excited
14 and I was like what's going on and she was like -- we had
15 known a month before that we were going to be grandparents,
16 and we weren't allowed to tell our family. So, Donna was
17 super excited because she was on the phone with her family
18 telling them that -- either her mother or sister her daughter
19 -- that they were -- we were gonna be grandparents and Devin
20 was -- Devin is her son -- was gonna have the first baby.

21 Q: Okay. So, y'all were having a good day on April 6th,
22 2019 ---

23 A: We were having a good day.

24 Q: --- starting off?

25 A: Yep.

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

149

- 1 Q: Okay. And where were you -- where did you say you and
2 your wife were driving to on April 6th, 2019?
- 3 A: We were going out towards the North Myrtle Beach area.
- 4 Q: Okay. And were y'all going out that direction for a
5 reason?
- 6 A: We were gonna go out and have something to eat and drink
7 before we went to the show, and we went to a place I thought
8 that my wife would like.
- 9 Q: Okay.
- 10 A: And it turned out being wrong, and she just didn't enjoy
11 the atmosphere, and she said can we go somewhere else, so we
12 jumped back on the bike and headed up the highway.
- 13 Q: Okay. And do you remember which road you were driving
14 on?
- 15 A: We were on 17 North Business.
- 16 Q: Okay. And what type of vehicle were you and your wife
17 traveling in?
- 18 A: We were on a 2010 Yamaha street trike.
- 19 Q: Okay. And what color was that vehicle?
- 20 A: Blue.
- 21 Q: Okay. And before the incident, was there any damage to
22 your vehicle?
- 23 A: No damage, the bike was immaculate.
- 24 Q: Okay. Your Honor, may I approach the witness?
- 25 A: Yes, ma'am.

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

150

1 Q: Mr. Schnell, I'm showing you what's been marked as
2 State's Exhibit Number 3. Could you please identify that?

3 A: That's my bike, I guess after the accident.

4 Q: Okay. And is that a true and accurate depiction of your
5 motorcycle after the collision?

6 A: I guess so, because I never really realized -- I never
7 really saw it.

8 Q: Okay.

9 MS. HARTE: Your Honor, at this time, the state moves to
10 enter State's Exhibit 3 and publish it to the jury.

11 THE COURT: Any objection?

12 MR. TRUSLOW: No, sir.

13 THE COURT: All right. It's into evidence without
14 objection.

15 STATE'S EXHIBIT NUMBER 3

16 ADMITTED INTO EVIDENCE

17 BY MS. HARTE:

18 Q: I also want to hand you what's been marked as State's
19 Exhibit 4. Could you also please tell the Court what you're
20 looking at?

21 A: Looking at a disaster; that's what I'm looking at. I'm
22 looking at something that someone bought for me. I didn't buy
23 this; my wife bought this bike, and I didn't know it, for me,
24 when I moved here. I was sick, and I thought when we moved
25 here, we didn't have any more money because we owned three

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

151

1 houses and we'd just purchased us a house to move here because
2 I was sick, and I was retired, and she bought this bike for
3 me, so I could have a bike that I could ride, because I
4 couldn't ride a two-wheeler anymore, so she bought this.

5 Q: Yes, sir. And I know this is hard for you, but is that a
6 true and accurate depiction of how your bike or motorcycle
7 looked after the car accident?

8 A: To be honest with you, I never saw my bike.

9 Q: Is that your motorcycle?

10 A: That's my motorcycle, though. That's my motorcycle.

11 Q: Okay.

12 MS. HARTE: Your Honor, the state moves to enter State's
13 Exhibit 4 into evidence.

14 MR. TRUSLOW: No objection.

15 THE COURT: All right. It's in evidence without
16 objection.

17 STATE'S EXHIBIT NUMBER 4

18 ADMITTED INTO EVIDENCE

19 MS. HARTE: Judge, I'm gonna just wait and publish all
20 these photos at the same time.

21 THE COURT: That's fine.

22 MS. HARTE: Okay.

23 BY MS. HARTE:

24 Q: Mr. Schnell, I also want to show you what's been marked
25 as State's Exhibit Number 5. Could you please identify what

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

152

1 you're looking at again to the jury?

2 A: That's my motorcycle.

3 Q: Okay. And is that a fair and accurate depiction of your
4 motorcycle, sir?

5 A: It's not fair, but it's my motorcycle.

6 Q: Yes, sir.

7 MS. HARTE: Your Honor, at this time, the state moves to
8 enter State's Exhibit 5 into evidence?

9 THE COURT: Any objection?

10 MR. TRUSLOW: No objection.

11 THE COURT: In evidence without objection.

12 STATE'S EXHIBIT NUMBER 5

13 ADMITTED INTO EVIDENCE

14 BY MS. HARTE:

15 Q: And I want to show you one more photo. May I -- I want
16 to show you what's been marked as State's Exhibit Number 6,
17 Mr. Schnell. Could you please identify that for the jury?

18 A: It's my motorcycle, and that's my sneaker laying
19 alongside of the bike.

20 MS. HARTE: Your Honor, at this time, the state moves to
21 enter State's Exhibit Number 6 to the jury?

22 MR. TRUSLOW: No objection.

23 THE COURT: In evidence without objection.

24 PLAINTIFF'S EXHIBIT NUMBER 6

25 ADMITTED INTO EVIDENCE

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

153

1 MS. HARTE: I mean, into evidence, Your Honor, I
2 apologize. And, may I publish State's Exhibit 4 through 6 to
3 the jury?

4 THE COURT: I'm sorry, 3, 4, 5, and 6?

5 MS. HARTE: Yes, sir, I've already published 3. I
6 apologize.

7 THE COURT: All right. You may do so.

8 BY MS. HARTE:

9 Q: Okay, Mr. Schnell, who was driving your vehicle that day?

10 A: Driving my vehicle?

11 Q: Yes, sir.

12 A: I was.

13 Q: Okay. And do you remember what lane you were traveling
14 in on the highway?

15 A: Excuse me?

16 Q: Do you remember which lane you were traveling in?

17 A: Yeah, I was in the third lane.

18 Q: Okay. I would like to show you what's been marked as
19 State's Exhibit 2.

20 MS. HARTE: Your Honor, may I approach the witness?

21 THE COURT: Yes, ma'am.

22 BY MS. HARTE:

23 Q: Mr. Schnell, I'm showing you what's been marked as
24 State's Exhibit 2. Could you please tell me what you're
25 looking at?

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

154

1 A: I'm looking at an aerial view of Business 17. This is
2 the Circle K.

3 Q: Okay.

4 A: And this is the third lane that I was in.

5 Q: Okay. Do you recognize this exhibit?

6 A: Yes, I do.

7 Q: Okay. And is it a fair and accurate depiction of the
8 intersection where the collision occurred?

9 A: Yes, ma'am.

10 Q: Okay.

11 MS. HARTE: At this time, Your Honor, the state moves to
12 enter State's Exhibit 2 into evidence.

13 THE COURT: Any objection?

14 MR. TRUSLOW: No objection.

15 THE COURT: All right. It's into evidence without
16 objection.

17 STATE'S EXHIBIT NUMBER 2

18 ADMITTED INTO EVIDENCE

19 MS. HARTE: And, Your Honor, may I have the witness to
20 step down to indicate where he was driving to the jury?

21 THE COURT: Yes, sir, if you're able to.

22 BY MS. HARTE:

23 Q: Mr. Schnell, can you please show the jury on the map
24 where your car was?

25 A: We were coming up here, right about here I saw the car,

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

155

1 and ---

2 Q: Just tell me right now where your car was located?

3 A: Right here.

4 Q: Okay. Right here?

5 A: My bike was located right here.

6 Q: I'm sorry. I didn't mean to say car. And, can you
7 please point out where the car that hit you and your wife came
8 from?

9 A: From this area.

10 Q: Okay. And what do you know to be right there that you
11 just pointed out? Yes, sir, that building.

12 A: That's a Circle K.

13 Q: Okay. All right. I think that's good enough.

14 MS. HARTE: Your Honor, may I publish State's Exhibit 2
15 to the jury?

16 THE COURT: Any objection?

17 MR. TRUSLOW: No objection.

18 THE COURT: All right. You may do so.

19 BY MS. HARTE:

20 Q: Mr. Schnell, did you see who was driving the car that
21 wrecked into you and your wife?

22 A: Yes, I did.

23 Q: Do you see him in the courtroom today?

24 A: Yes, I do.

25 Q: Can you please point him out to the jury?

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

156

1 A: Mr. Atwater.

2 Q: Okay.

3 MS. HARTE: Let the record reflect that the witness is
4 pointing to the defense table, Your Honor, at the defendant,
5 Claybon Atwater.

6 BY MS. HARTE:

7 Q: Mr. Schnell, what, if anything, did you do when the
8 collision occurred?

9 A: We were coming down the road, and out of the corner of my
10 eye I saw a car come out, and I said, what are you doing, and
11 I tried to turn, I hit the brakes, I hit downshift, and I
12 tried to turn the bike into the next lane to get away. And
13 right before we hit, I looked him right in the face, and we
14 hit, and that was it.

15 Q: Okay. And do you remember anything immediately after the
16 collision?

17 A: I'm not sure how long I was out, but when I came to, the
18 lady was sitting in the driver's seat, and she -- they started
19 pulling away, and I was screaming they're getting away,
20 they're getting away, and somebody came over and put their
21 hand on my chest and said, no, they're not going to go
22 anywhere; don't worry about it. Then his wife got out of the
23 car and walked by me and I said what were you guys doing, and
24 she said it was just a small little accident, sir.

25 Q: Okay. And Mr. Schnell, can you please tell me about the

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

157

1 injuries that you sustained after the collision?

2 A: Okay. I had a compound fracture of my right leg, my foot
3 was snapped off facing right. They had to put a rod from my
4 knee down to my ankle. I had a fractured collarbone, I had a
5 dislocated shoulder, I had twelve broken ribs and a broken
6 jaw.

7 Q: Okay. And Mr. Schnell, did Donna survive this accident
8 or this collision?

9 A: Nope.

10 Q: Do you still have any lingering issues or injury because
11 of this collision?

12 A: I -- I can't -- I don't have very good balance on my feet
13 anymore, and I don't think I've slept in two-and-a-half years.

14 Q: And just in general, can you please describe to the jury
15 the impact that this collision has had on your life?

16 A: Well, first of all, I lost a very important person in my
17 life. I mean, we, you know, newlyweds and we were just
18 getting our life going. We were so excited about having a
19 grandchild; it would be our first grandchild. And -- I just
20 wanted to just learn more about Donna, just wanted to learn --
21 she was very special and interesting. Otherwise, I'm
22 financially destroyed from this. I'm in the process of losing
23 my home, which I'm working as hard as I can to keep it, and
24 I'm being strapped with financial bills from the accident,
25 medical bills, that even though you have insurance, and I had

State v. Atwater - 2019-GS-26-02899, 02900
DAVID SCHNELL - DIRECT BY HARTE

158

1 insurance and I paid dearly for the insurance after my wife's
2 accident. I have well over \$200,000 worth of bills that I'm
3 being -- liens against me. So, forget losing my wife; I'm
4 gonna lose what my wife -- you've got to remember, I wasn't
5 working when we moved here. I was retired for a year because
6 I was sick, and my wife was taking care of me. My wife was
7 footing the bill for three homes, and every bill that came in,
8 because I was just sitting there, and she brought me down here
9 so I could just relax and have a little peace, and it's all
10 gone. It's all gone. I'll never be able to -- I can't work.
11 I can't bartend, which was one of my favorite things I like to
12 do, being a bar owner and a bartender and spending time with
13 people, and I sure as hell can't get on a roof, because of my
14 leg and that's how I made my living.

15 Q: Thank you.

16 A: I've become healthier with the sick part that I came here
17 for, but I can't go back and do what I did to make a living
18 again.

19 MS. HARTE: I beg the Court's indulgence.

20 THE COURT: Yes, ma'am.

21 MS. HARTE: Your Honor, I have no further questions for
22 Mr. Schnell at this time.

23 Mr. Schnell, please answer any questions that Mr. Truslow
24 has for you.

25 THE COURT: Cross-examination?

State v. Atwater - 2019-GS-26-02899, 02900
JENNIFER MCCLUNG - DIRECT BY HARTE

159

1 MR. TRUSLOW: No questions.

2 THE COURT: All right, sir, you may step down.

3 Your next witness, please?

4 MS. HARTE: Next, Your Honor, the state calls Jennifer
5 McClung to the stand.

6 THE COURT: All right.

7 THE CLERK: Please raise your right hand and place your
8 left on the Bible.

9 JENNIFER MCCLUNG, HAVING BEEN DULY
10 SWORN TESTIFIES AS FOLLOWS:

11 THE CLERK: Please be seated. State your full name and
12 spell it for the record, please.

13 MS. MCCLUNG: It's Jennifer McClung, J-E-N-N-I-F-E-R, M-
14 C-C-L-U-N-G.

15 THE COURT: And, ma'am, could you move the microphone a
16 little closer or you to the microphone, one of the two. All
17 right. Thank you.

18 MS. MCCLUNG: Thank you.

19 DIRECT EXAMINATION OF JENNIFER MCCLUNG BY MS. HARTE:

20 Q: Ms. McClung, where -- where are you currently employed?

21 A: Strand Resort.

22 Q: Okay. And where you employed in April of 2019?

23 A: Circle K in North Myrtle Beach.

24 Q: Okay. And is that in Horry County?

25 A: Yes.

State v. Atwater - 2019-GS-26-02899, 02900
JENNIFER MCCLUNG - DIRECT BY HARTE

160

1 Q: Okay. And how long did you work for that Circle K gas
2 station?

3 A: About six months/nine months.

4 Q: Okay. And what was your position there?

5 A: I was a cashier.

6 Q: Okay. And did you have any other duties while working at
7 the store other than running the cash register?

8 A: Cleaning, stocking, maintaining the parking lot.

9 Q: Okay. Were you working on April 6th of 2019?

10 A: Yes.

11 Q: Okay. Can you tell me if you remember an incident
12 occurring that day?

13 A: Yes, there was a car wreck out in front of the store.

14 Q: Okay. And did you have the ability to view that car
15 collision?

16 A: I didn't see it happen, but I heard it.

17 Q: Okay. And how close did the incident happen in proximity
18 to the Circle K, would you say?

19 A: Right up front.

20 Q: Okay. And do you have access -- when you were working
21 for the Circle K gas station, did you have access to the store
22 surveillance system?

23 A: I did.

24 Q: Okay. And are those videos from the Circle K store
25 surveillance system, are they kept in the normal course of

State v. Atwater - 2019-GS-26-02899, 02900
JENNIFER MCCLUNG - DIRECT BY HARTE

161

1 business?

2 A: Yes.

3 Q: Okay. And did you show law enforcement the video
4 surveillance from the Circle K on April 6th, 2019?

5 A: Yes.

6 Q: Did you download a copy of that video surveillance for
7 law enforcement?

8 A: Yes.

9 Q: Okay. I want to show you what's been marked as State's
10 Exhibit 32. Do you recognize this?

11 A: Yes.

12 Q: And when did you view this CD?

13 A: Friday afternoon with you.

14 Q: Okay. And ---

15 THE COURT: Could you speak up just a little bit, please,
16 ma'am?

17 A: Friday afternoon.

18 BY MS. HARTE:

19 Q: Okay. And is this your signature on it, Ms. McClung?

20 A: Yes, it is.

21 Q: Okay. And what is on that recording?

22 A: The surveillance of the store and the parking lot.

23 Q: Okay. Is it -- is it the full copy of the store
24 surveillance system?

25 A: It's -- yes, it is. It's clips of multiple put together.

State v. Atwater - 2019-GS-26-02899, 02900
JENNIFER MCCLUNG - DIRECT BY HARTE

162

1 Q: Okay. And did you -- how did you recognize it as a
2 recording from the Circle K surveillance system on April 6th,
3 2019?

4 A: It's timestamped and on the video.

5 Q: Okay. And was the recording a true and accurate
6 depiction of State's Exhibit 32 ---

7 A: Yes.

8 Q: --- the surveillance video?

9 MS. HARTE: At this time, Your Honor, the state moves to
10 enter State's Exhibit 32 into evidence.

11 THE COURT: Any objection?

12 MR. TRUSLOW: No objection.

13 THE COURT: In evidence without objection. You may
14 proceed.

15 STATE'S EXHIBIT NUMBER 32

16 ADMITTED INTO EVIDENCE

17 BY MS. HARTE:

18 Q: All right. Ms. McClung, have you been shown what has
19 been marked ---

20 MR. DEBUSK: Your Honor, would you like us to back up so
21 the Court can see them?

22 THE COURT: No, that's fine. Just right there.
23 That's good right there.

24 BY MS. HARTE:

25 Q: Ms. McClung, have you been shown what's been marked as

State v. Atwater - 2019-GS-26-02899, 02900
JENNIFER MCCLUNG - DIRECT BY HARTE

163

1 State's Exhibit Number 33 this CD?

2 A: Yes.

3 Q: Okay. And when did you view that recording?

4 A: Friday afternoon.

5 Q: Okay. And is that your signature on it?

6 A: Yes. Yes.

7 Q: And what was on that recording or CD?

8 A: The complete compilation of all the cameras put together.

9 Q: Okay. And how did you recognize it again as a recording
10 from the Circle K surveillance system on April 6th, 2019?

11 A: Because it's time stamped and on the camera also.

12 Q: Okay. And is this edited recording a true and accurate
13 depiction of the State's Exhibit 32, the full surveillance
14 store system?

15 A: Yes.

16 Q: Okay.

17 MS. HARTE: At this time, Your Honor, the state moves to
18 enter State's Exhibit 33 into evidence?

19 MR. TRUSLOW: No objection.

20 MS. HARTE: And I would want to publish this to the jury
21 at this time.

22 THE COURT: All right. It's into evidence without
23 objection and you may publish it.

24 STATE'S EXHIBIT NUMBER 33

25 ADMITTED INTO EVIDENCE

State v. Atwater - 2019-GS-26-02899, 02900
JENNIFER MCCLUNG - DIRECT BY HARTE

164

1 (REPORTER'S NOTE: State's 33 published to the jury. No
2 audio.)

3 BY MS. HARTE:

4 Q: Okay. Ms. McClung, that video that was just played,
5 State's Exhibit 33, were you the clerk at the cash register?

6 A: Yes.

7 Q: And does that video show a customer purchasing something
8 at the cash register?

9 A: Yes.

10 Q: Okay. Is that customer in the blue-and-white striped
11 shirt?

12 A: Yes.

13 Q: On the original player does it show a receipt of what the
14 customer purchased?

15 A: Yes.

16 MS. HARTE: Your Honor, may I approach the witness?

17 THE COURT: Yes, ma'am.

18 BY MS. HARTE:

19 Q: I'm showing you what's been marked as State's Exhibit 7.
20 Could you please tell the jury what you're looking at?

21 A: It's a picture of the registers and on the side it's like
22 a printed -- it pops up printed receipt of what the guests or
23 customers are buying when you're ringing them up.

24 Q: Right. Can you please tell me what that receipt says
25 that this customer, the defendant, was buying?

State v. Atwater - 2019-GS-26-02899, 02900
JENNIFER MCCLUNG - DIRECT BY HARTE

165

1 A: He bought a 22 ounce of Corona.

2 MS. HARTE: At this time, Your Honor, the state moves to
3 enter State's Exhibit 7 into evidence and publish it to the
4 jury.

5 THE COURT: Any objection?

6 MR. TRUSLOW: No objection.

7 THE COURT: All right. It's in evidence without
8 objection.

9 STATE'S EXHIBIT NUMBER 7

10 ADMITTED INTO EVIDENCE

11 BY MS. HARTE:

12 Q: Ms. McClung, I have no further questions for you at this
13 time. Please answer any questions that the defense may have.

14 THE COURT: Cross-examination?

15 MR. TRUSLOW: No cross, Your Honor.

16 THE COURT: All right. You may step down, ma'am.

17 MS. HARTE: Your Honor, may she be excused?

18 THE COURT: Any objection?

19 MR. TRUSLOW: No objection.

20 THE COURT: All right, ma'am, you're released from your
21 subpoena and may go back to your regular duties. Thank you.

22 MS. MCCLUNG: Thank you.

23 THE COURT: All right. Your next witness, please.

24 MR. DEBUSK: Yes, Your Honor. The state calls Marcus Lee
25 of South Carolina Highway Patrol.

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

166

1 THE COURT: All right.

2 All right, sir, come forward.

3 THE CLERK: Please raise your right and place your left
4 hand on the Bible.

5 WILLIAM MARCUS LEE, HAVING BEEN DULY
6 SWORN TESTIFIES AS FOLLOWS:

7 THE CLERK: Please be seated. State your full name for
8 the record and spell it, please.

9 MR. LEE: My name is William Marcus Lee.

10 DIRECT EXAMINATION OF WILLIAM MARCUS LEE BY MR. DEBUSK:

11 Q: Trooper Lee, what's your rank?

12 A: Corporal

13 Q: Corporal Lee, what -- who is your employer?

14 A: South Carolina Highway Patrol.

15 Q: What is -- how long have you been with the South Carolina
16 Highway Patrol?

17 A: I joined the Highway Patrol in 2008.

18 Q: Okay. What are your duties at this time?

19 A: I'm currently assigned to the Pee Dee MAIT, it's the
20 Multidisciplinary Action Investigation Team.

21 Q: What do y'all do?

22 A: We do general collision reconstruction of complex cases.

23 Q: Who asks you to do collision reconstruction; for what
24 purpose would you do this?

25 A: We generally handle felony DUI cases, hit-and-run cases,

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

167

1 both of which involve great bodily injury or death. We'll
2 also handle cases sometimes for -- where speed is a question
3 or just general documentation for scenes for like murders and
4 stuff. We help out with that as well.
5 Q: So, in general, criminal cases?
6 A: Yes.
7 Q: And law enforcement calls you out to help on the scenes?
8 A: Yes.
9 Q: You said you'd been with the Highway Patrol since 2008.
10 How long have you been with law enforcement?
11 A: That was my first law enforcement position.
12 Q: And how long have you been assigned to MAIT?
13 A: I joined MAIT in May of 2015.
14 Q: And I think you said it, but I was going a little fast,
15 what does MAIT stand for, it's M-A-I-T, right?
16 A: Yes, sir; it's the Multidisciplinary Accident
17 Investigation Team.
18 Q: Okay. Now, in order to your duties, do you have some
19 specialized training?
20 A: Yes, sir.
21 Q: Would you describe that to the jury?
22 A: When I joined highway patrol, at that time, every trooper
23 about six months after they were on, went through At-Scene
24 Collision Investigation, which is one of the courses offered
25 through South Carolina Criminal Justice Academy as a series of

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

168

1 courses relating to collision reconstruction. After joining
2 MAIT, I went ahead and took Technical Collision Investigation,
3 which focuses primarily on time and distance studies; and the
4 next one was Collision Reconstruction, also had Pedestrian and
5 Bicycle Reconstruction, as well as motorcycle, as far as
6 advanced training goes.

7 Q: And who provided those trainings?

8 A: All those -- all those five classes were through the
9 South Carolina Criminal Justice Academy.

10 Q: Have you taken other specialized courses through the
11 course of your employment with MAIT?

12 A: Yes, and those were either at conferences or in-house
13 training, where we hired an instructor to come in and teach.

14 Q: In total, how many hours of instruction do you think
15 you've had in the area of accident reconstruction?

16 A: It's probably north of 4' or 500 hours as far as
17 collision reconstruction or accident investigation courses.

18 Q: And in the -- in terms of actual working actual cases,
19 how many cases have you done?

20 A: Since joining MAIT?

21 Q: Yes, sir.

22 A: Probably close to 650, 700, might be more.

23 Q: Okay. Have you testified in court before?

24 A: Yes, I have.

25 Q: Have you been qualified as an expert before?

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

169

1 A: No, I have not.

2 Q: But you do have all the training you've described?

3 A: Yes, sir.

4 MR. DEBUSK: Your Honor, we would move to qualify
5 Corporal Lee as an expert in accident reconstruction.

6 THE COURT: All right. Do you wish to voir dire the
7 witness or challenge his qualifications?

8 MR. TRUSLOW: No, Your Honor.

9 THE COURT: All right. He is qualified to give his
10 opinion in the field of accident reconstruction.

11 You may proceed.

12 BY MR. DEBUSK:

13 Q: Did you work on the investigation of an incident that
14 happened on April 6th, 2019 in North Myrtle Beach?

15 A: I did.

16 Q: What was your role?

17 A: I assisted with scene documentation. Myself and a couple
18 other co-workers came out and photographed the scene. We
19 examined the motorcycle involved as well as the vehicle that
20 was involved and I believe that was a Mercury Grand Marquis.
21 And we also did a forensic mapping of the scene.

22 Q: What is forensic mapping?

23 A: Forensic mapping is a still diagram. We tend to do it as
24 four different diagrams. The first one we'll do a diagram
25 just of the roadway itself. The next diagram in the CAD file

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

170

1 we make is usually the area of impact. The third one is
2 evidence of final rest showing the tire marks and gouges
3 associated with the collision and also where the vehicles came
4 to final rest or any bodies that were also ejected from the
5 vehicles. And, the fourth one is sequence of events, where
6 it's kind of -- it's all those combined, so that you can kind
7 of see the movement throughout the diagram of what went where.

8 Q: Now, was this an actual scale map like a surveyor makes?

9 A: Yes, we use the total station to take those measurements.

10 Q: And in addition to making those measurements with the --
11 with the, I guess it's a mapping station, total station?

12 A: Yes, sir.

13 Q: You also -- you and the other MAIT team members involved
14 take photographs?

15 A: Yes, sir.

16 Q: And observe the scene?

17 A: Yes, sir.

18 MR. DEBUSK: Court's indulgence a moment, Your Honor.

19 THE COURT: Yes, sir.

20 BY MR. DEBUSK:

21 Q: I want to show you what have been marked as State's
22 Exhibits 3 through 6, 8 through 11, and 15 and 16 and ask if
23 you recognize these?

24 A: I do.

25 Q: What are they?

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

171

1 A: These are photographs from the day of the collision at
2 the scene.

3 Q: Are they fair and accurate representations of the state
4 of the scene, when you saw it?

5 A: Yes, sir.

6 Q: Let me draw your attention in particular to State's
7 Number 16. Do you see orange marks on the roadway near the
8 vehicle?

9 A: Yes, sir; I do.

10 Q: Could you tell the jury what those marks are?

11 A: It's standard procedure that the tire marks, gouges, and
12 tire points, where the vehicle was actually stopped at is
13 marked with paint. That way we can also go back later. Those
14 tire marks tend to be short-lived evidence. They fade pretty
15 quickly, especially if it's a hot day, but the orange paint
16 would be there to signify tire marks.

17 Q: Was this marking the scene for later reference?

18 A: Yes, sir.

19 Q: Thank you.

20 MR. DEBUSK: Your Honor, 3 through 6 are already in
21 evidence. The state would offer at this 8 through 11 and 15
22 and 16 into evidence.

23 THE COURT: Any objection?

24 MR. TRUSLOW: I just need to see them, Your Honor.

25 THE COURT: Sure.

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

172

1 MR. TRUSLOW: Your Honor, may we approach?

2 THE COURT: Certainly.

3 (REPORTER'S NOTE: Bench conference is held off the record in
4 the presence of but outside the hearing of the jury.)

5 THE COURT: As far as 8 through 11 and 15 through 16, the
6 Court's going to allow those in evidence.

7 STATE'S EXHIBIT NUMBER 8 THROUGH 11, 15, AND 16

8 ADMITTED INTO EVIDENCE

9 BY MR. DEBUSK:

10 Q: Let me also show you State's 13 and ask if you recognize
11 that one?

12 A: Yes, sir; I do.

13 Q: What is that?

14 A: This is a photograph from the scene showing the trike
15 that was involved in this collision, and it appears as though
16 there is a deceased victim on scene.

17 Q: Does that show the distance between where the bike came
18 to rest and where the victim came to rest?

19 A: Yes, sir.

20 Q: Okay.

21 MR. DEBUSK: Your Honor, at this time, the state moves
22 State's 13 into evidence.

23 THE COURT: Objection?

24 MR. TRUSLOW: No objection.

25 THE COURT: All right. It's into evidence without

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

173

1 objection. As to 8 through 11 and 15 through 16, I neglected
2 to ask, any objection to those?

3 MR. TRUSLOW: No, sir. So, they're all into evidence
4 without objection. You may proceed.

5 STATE'S EXHIBIT NUMBER 13

6 ADMITTED INTO EVIDENCE

7 MR. DEBUSK: We've got to get these all in before we
8 start talking about them in detail.

9 BY MR. DEBUSK:

10 Q: Let me show you State's 20, 21 -- 18, 19, 20, and 21 and
11 ask if you recognize these.

12 A: This is the CAD I created.

13 Q: What is a CAD?

14 A: A computer assisted diagram.

15 Q: Okay. And is that the scale map that you referred to
16 being produced?

17 A: Yes, sir.

18 Q: Based on the actual survey of the scene?

19 A: Yes, sir.

20 Q: Does it show the skid marks produced by the vehicles?

21 A: It would. They're documented on here on 18 and 19.

22 Q: Okay. And does it show the location of the vehicles at
23 the time you surveyed them?

24 A: Let's see. 18 and 19 would include that.

25 Q: And does one of them show your reconstruction of what

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

174

1 happened after the ---

2 A: Yes.

3 Q: --- in the course of the collision; which one is that?

4 A: 19 would show the sequence of events.

5 Q: Okay. Thank you.

6 MR. DEBUSK: Your Honor, at this time, the state offers
7 18, 19, 20, and 21 into evidence?

8 THE COURT: Any objection?

9 MR. TRUSLOW: No, sir. No, sir.

10 THE COURT: All right. So, 18, 19, 20, and 21 are into
11 evidence without objection. You may proceed.

12 STATE'S EXHIBITS NUMBER 18 THROUGH 21

13 ADMITTED INTO EVIDENCE

14 BY MR. DEBUSK:

15 Q: Okay. How many vehicles were involved in this incident?

16 A: Two.

17 Q: What were they?

18 A: One was, I believe it was a Yamaha that had been
19 converted into a trike, and the other was a Mercury Grand
20 Marquis.

21 Q: Let me show you on State's Exhibits 3, 4, 5, and 6?

22 A: Is that the Yamaha you referred to?

23 A: Yes, sir.

24 Q: Okay. And that's -- and what was the second vehicle?

25 A: A Mercury Grand Marquis.

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

175

1 Q: I'm showing you 8, 9, 10, and 11, is that the other
2 vehicle involved in this collision?

3 A: Yes, sir.

4 Q: Now, on State's Exhibit 18, there are red marks in the
5 roadway on your map; what are those red marks?

6 A: Those red marks would be significant of tire marks that's
7 attributed to this collision. We tend to mark our tire marks
8 red, just to make them easy to see on the diagram, and we do
9 blue for gouges, because if we just a more natural color it
10 blends in too much with the asphalt and it's hard to say.

11 Q: Just for visibility?

12 A: Yes, sir.

13 Q: Now, let me show you State's 15 and 16 and ask you are
14 those skid marks represented in those two photos?

15 A: The tire marks associated with the trike are easily seen
16 in 15. The predominant tire mark in 16, I don't believe it
17 actually went to this collision, but in the background you can
18 see the same skid marks that are in this one.

19 Q: But they're -- the skid marks that are in those photos
20 are shown on your map?

21 A: Yes.

22 Q: And that's an actual scale drawing of the skid marks?

23 A: Yes.

24 Q: Okay. Given the skid marks and where they're located,
25 what do they indicate in this?

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

176

1 A: The trike was traveling by way of the compass in kind of
2 a northeast direction, which I believe it would be north on
3 17. It would've been in Lane Number 1 closest to the median.
4 Q: Lane Number 1 is the lane closest to the median?
5 A: Right.
6 Q: What would Lane Number 2 be?
7 A: Lane Number 2 would be the center lane.
8 Q: And Lane Number 3 would be?
9 A: The lane closest to the curb towards the Circle K gas
10 station.
11 Q: That's sort of standard numerics for accident
12 reconstruction?
13 A: Yes, sir.
14 Q: So, when you say Lane 1, you're referring to the one
15 closest to the median?
16 A: Yes, sir.
17 Q: Okay. Please continue with the skid marks?
18 A: All right. So, the tire marks of -- for the trike
19 indicated a northerly travel or northbound on 17, which in
20 this direction, it's actually kind of an eastward direction
21 based on the compass, but the rider took evasive action and
22 applied the brakes, and there is a definite change of
23 direction for the tire mark leading for the front tire of the
24 bike and that would be right around the area of impact, which
25 leads up to the impact. There is a tiny yellow mark on the --

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

177

1 tiny tire mark on the yellow line from the front left of the
2 Mercury.

3 Q: Referring to State's Exhibit 18, you talked about some
4 change of direction, I would ask if you would step up and show
5 the jury the point you're indicating?

6 A: So, the top red line would be for the side tire, for the
7 left side tire of the trike, and the bottom one goes and it
8 changes and angles up for the front tire. The top one, that's
9 the shorter one would be for the side tire on the left side,
10 the bottom one that turns and goes up -- with the same tire.
11 And as the trike is sliding forward, it essentially tries to
12 keep going forward unless it's redirected by another force,
13 that was be on impact.

14 Q: So, if I may, you're referring to where the angle changes
15 right there as being the point of impact?

16 A: There and back there.

17 Q: Based on your reconstruction of the skid marks?

18 A: Yes, sir.

19 Q: Okay. Now, please resume your seat.

20 What do the skid marks themselves indicate; what was
21 happening with the trike when those skid marks were made?

22 A: The operator was applying the brakes.

23 Q: Would the brakes have been locked to make those skid
24 marks?

25 A: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

178

1 Q: Okay. And before the impact, was there any indication of
2 evasive action by the driver of the trike?

3 A: I would consider the emergency braking enough to lay down
4 tire marks as evasive.

5 Q: Did he turn or change directions to ---

6 A: Considering he's traveling towards the median, yes, I
7 would say he is trying to evade the car.

8 Q: So, leaving his lane of travel possibly is a means of
9 evasion?

10 A: Yes, sir.

11 Q: Okay. What is EGR data?

12 A: EDR?

13 Q: EGR. Let me ask you, airbag modules?

14 A: The event data recorder, yes, sir.

15 Q: Yes, sir, what is EVR, I guess it would be?

16 A: Airbag control modules and power train control modules in
17 this case, being a Ford Crown Vic or Mercury Grand Marquis,
18 they're equipped with a power train control module, and they
19 record collision data of speeds, sometimes Delta-V, which is
20 the sudden change of velocity.

21 Q: Were you able to recover any such data for this case?

22 A: No, sir; there was no event recorded.

23 Q: What would -- what would make an event record?

24 A: Typically, an airbag deployment will lock an event.

25 Sometimes we'll have a non-deployment event, but the power

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

179

1 train control module records on a loop and it's a very short
2 loop, so it's easily overridden.

3 Q: So, if the airbags deployed, it would've -- it recorded
4 an event?

5 A: Yes, and that would have been locked in.

6 Q: And if the car ran over 25 seconds after the event, it
7 would have been overwritten?

8 A: The power train control module, yes.

9 Q: Okay. So, there was no, basically no airbag module data
10 for this?

11 A: Right.

12 Q: Was the Yamaha equipped with an airbag or anything of
13 that similar nature?

14 A: We didn't have a way of getting any digital information
15 from the trike.

16 Q: Does it have a recorder?

17 A: No.

18 Q: Okay. So, you were not able to get digital data as to
19 speeds and what not?

20 A: No.

21 Q: Based on your reconstruction, was excessive speed a
22 factor for either one of these vehicles?

23 A: No.

24 Q: Okay. What was the speed limit in this area, do you
25 know?

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - DIRECT BY DEBUSK

180

1 A: I want to say it's 40 or 45.

2 Q: Okay. Now, based on this collision, given the Yamaha
3 proceeding in lane, I believe you said 1, and the vehicle
4 coming from an entrance -- where did the blue vehicle come
5 from?

6 A: The Mercury Grand Marquis entered the roadway from a gas
7 station.

8 Q: Okay. With the Marquis coming from the gas station and
9 the bike traveling in Lane 1, who had the right of way?

10 A: The trike would have had the right of way.

11 Q: Would failing to yield right of way be a legal
12 infraction?

13 A: That's not a -- failure to yield right of way is a motor
14 vehicle violation, yes, sir.

15 Q: Yes, thank you. And it was the Yamaha trike that had the
16 right of way?

17 A: Yes, sir.

18 MR. DEBUSK: Your Honor, I would move to publish the
19 items just brought into evidence to the jury.

20 THE COURT: All right, sir; you may do so.

21 BY MR. DEBUSK:

22 Q: And again the -- there is one of the diagrams approved by
23 MAIT that shows the reconstruction of the collision; is that
24 correct?

25 A: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - CROSS BY TRUSLOW

181

1 Q: It shows the car coming out from the gas station, the
2 point of collision and then where the vehicles came to rest,
3 correct?

4 A: Yes, sir.

5 Q: Thank you. Please answer any questions the defense may
6 have.

7 THE COURT: All right. Cross-examination?

8 MR. TRUSLOW: Yes, sir, briefly.

9 CROSS-EXAMINATION OF WILLIAM MARCUS LEE BY MR. TRUSLOW:

10 Q: So, officer, no mistake about it, you are with law
11 enforcement, right?

12 A: Yes, sir.

13 Q: And the MAIT Team is not separate from the highway
14 patrol?

15 A: No, sir; we're a ---

16 Q: It's adjunct; I mean, it's part of it?

17 A: Yes, sir.

18 Q: Okay. In your -- the diagram where you have the lanes,
19 the three lanes here, and the three lanes south and
20 northbound?

21 A: Yes, sir.

22 Q: Those diagrams where you have a symbol representing the
23 bike and then the car when they're coming together?

24 A: Yes, sir.

25 Q: The Lane 2 and 3, that go back towards the curb, towards

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - CROSS BY TRUSLOW

182

1 where my client came from?

2 A: Yes, sir.

3 Q: Why are there no other vehicles represented on your
4 diagram?

5 A: I don't have anything to suggest where they would be at.

6 Q: Okay. So, you're not aware of the other vehicles in the
7 roadway at the time?

8 A: We normally only include the vehicles involved in the
9 collision.

10 Q: Okay. That's what I was asking you. So, you wouldn't
11 necessarily go looking to see where other vehicles were in the
12 other lanes at the time; you would focus on the two vehicles
13 in the accident?

14 A: Yes, sir.

15 Q: Okay. And if you can just take a look at this for me,
16 this is part of the report. Am I looking at where you
17 calculate speed at that point?

18 A: These first couple of pages are from a program that we
19 subscribe to as -- as -- as MAIT, known as Expert Auto Stats.
20 It allows for the size and weight and that kind of stuff, just
21 general information about the vehicles.

22 Q: Right.

23 A: The next page is from our case notes that we put together
24 about each case, and this is the calculation section. It says
25 N/A for calculations, because we didn't do any calculation on

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - CROSS BY TRUSLOW

183

1 this case as far as speed calculations goes.

2 Q: So, at the end of that, you're not talking about speed on
3 there in those calculations? I mean, did you calculate the
4 speed?

5 A: No, sir; we didn't do any speed calculations on this.

6 Q: All right. When you were doing your report, did you have
7 access to this document? It's actually in your report, so I
8 assume you did.

9 A: Yes, sir. We normally request it and put it in the ---

10 Q: To look at the accident report and a few other documents,
11 correct?

12 A: Yes, sir.

13 Q: What is the speed that is reflected on there for Unit
14 Number 1, the -- the trike motorcycle?

15 A: At this point right here, it's blank with a question
16 mark.

17 Q: Oh, I gave you the wrong one. Let me see that for one
18 second.

19 MR. TRUSLOW: Court's indulgence, Your Honor?

20 THE COURT: Yes, sir.

21 BY MR. TRUSLOW:

22 Q: All right. I will save that question for another witness
23 who did the accident report. So, the MAIT Team -- in doing
24 all your work, there was no calculations done of speed,
25 correct?

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - REDIRECT BY DEBUSK

184

1 A: Yes, sir.

2 Q: And the speed of the -- the trike motorcycle going north
3 or my client's speed pulling out?

4 A: No, sir.

5 Q: All right. And you have Unit 1, the trike, was in Lane 1
6 prior to the collision, correct?

7 A: Yes, sir.

8 Q: Which is the far outside north lane from the curb?

9 A: It's the lane closest to the median.

10 Q: Closest to the median, and then you have 2 and 3, three
11 lanes?

12 A: Yes, sir.

13 Q: All right. Do you have a way to determine how long Unit
14 Number 1, the trike motorcycle, was in Lane 1 prior to the
15 collision?

16 A: No, sir.

17 Q: Okay. So, it could have switched into Lane 1 at any
18 time, as far as you know?

19 A: Sure.

20 MR. TRUSLOW: That's all, Your Honor. That's all I have.

21 THE COURT: Any redirect?

22 MR. DEBUSK: Briefly, Your Honor.

23 REDIRECT EXAMINATION OF WILLIAM MARCUS LEE BY MR. DEBUSK:

24 Q: Why did you not calculate speeds in this?

25 A: In this collision, we were asked to come in and assist

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - REDIRECT BY DEBUSK

185

1 with scene documentation.

2 Q: So, you were there to map?

3 A: Yes, sir.

4 Q: But you also did a reconstruction in the case?

5 A: Yes, sir. We did attempt to image the EDR data from the
6 Mercury Grand Marquis, but it showed no event recorded.

7 Q: Okay. Did you look at other things like did you look at
8 the headlights, light bulbs in the vehicles?

9 A: Yes, sir.

10 Q: What did you find in those?

11 A: The -- I examined two lamps from the headlight.

12 MR. TRUSLOW: Your Honor, I would object. He's going
13 past the scope of redirect.

14 THE COURT: Just a second. Okay?

15 MR. DEBUSK: I'll withdraw the question, Your Honor.

16 THE COURT: All right.

17 BY MR. DEBUSK:

18 Q: But you did determine, based on your reconstruction, that
19 there was no excess speed in this case?

20 A: No, sir.

21 Q: There was no excess speed?

22 A: No excess speed.

23 Q: Thank you.

24 THE COURT: Anything on that question?

25 MR. TRUSLOW: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
WILLIAM MARCUS LEE - RECROSS BY TRUSLOW

186

1 RECROSS-EXAMINATION OF WILLIAM MARCUS LEE BY MR. TRUSLOW:

2 Q: How did you determine there's no excess speed if you
3 didn't calculate the speed?

4 A: It's just kind of through experience. I mean, as far as
5 the passenger on the motorcycle went from the bike relatively
6 close by way of collisions. It doesn't appear to be anything
7 fast.

8 Q: Thank you.

9 THE COURT: Do you wish the witness to be excused?

10 MR. DEBUSK: Yes, Your Honor.

11 THE COURT: Any objection?

12 MR. TRUSLOW: No, sir.

13 THE COURT: All right, sir, you're released from your
14 subpoena; you may go back to regular duties. Thank you.

15 Y'all come up and talk to me for one second, please.

16 (REPORTER'S NOTE: Bench conference is held off the record in
17 the presence of but outside the hearing of the jury.)

18 THE COURT: All right. Next witness please?

19 MS. HARTE: The state calls Mr. Ted Kerley to the stand.

20 THE BAILIFF: Your Honor, I think the jurors need a
21 break.

22 THE COURT: All right. This is gonna be the last witness
23 and it's a short witness. So, can we wait or not. I mean if
24 we can't, then we'll take a break. Mr. Foreman?

25 MR. FOREMAN: Yes, sir, Your Honor.

State v. Atwater - 2019-GS-26-02899, 02900
TED DILLARD KERLEY - DIRECT BY HARTE

187

1 THE COURT: All right. Very good.

2 THE CLERK: Please raise your right and place your left
3 on the Bible.

4 TED DILLARD KERLEY, HAVING BEEN DULY
5 SWORN TESTIFIES AS FOLLOWS:

6 THE CLERK: Please be seated. State your full name for
7 the record and spell it, please.

8 MR. KERLEY: Ted Dillard Kerley; that's K-E-R-L-E-Y.

9 THE COURT: Can you scoot a little closer to the
10 microphone, please, sir?

11 MR. KERLEY: Okay.

12 THE COURT: Thank you.

13 MR. KERLEY: Is that better?

14 THE COURT: Yes, sir.

15 DIRECT EXAMINATION OF TED DILLARD KERLEY BY MS. HARTE:

16 Q: Mr. Kerley, what is your current occupation?

17 A: I'm retired.

18 Q: Okay. What did you previously do?

19 A: I worked for General Electric for 34 years.

20 Q: Okay. And where do you currently live?

21 A: I live in Florida part time and North Carolina part time.

22 Q: Okay. And do you vacation in the Myrtle Beach area
23 often?

24 A: We've lived in Myrtle Beach for about a year-and-a-half.

25 Q: Okay. And I want to direct your attention to April 6th,

State v. Atwater - 2019-GS-26-02899, 02900
TED DILLARD KERLEY - DIRECT BY HARTE

188

- 1 2019. Were you in the North Myrtle Beach area that day?
- 2 A: Yes, ma'am.
- 3 Q: Okay. And do you recall seeing an incident by the Circle
- 4 K on 45th Avenue South and Highway 17?
- 5 A: Yes, ma'am.
- 6 Q: Okay. And which direction were you traveling?
- 7 A: I believe it was north, I think.
- 8 Q: Okay.
- 9 A: I'm not sure, I think it was north.
- 10 Q: I'll show you a map in a minute and you can point that
- 11 out.
- 12 A: Okay.
- 13 Q: Who was in the car with you, Mr. Kerley?
- 14 A: My wife.
- 15 Q: Okay. And where was your wife located in your car?
- 16 A: Right beside me in a truck.
- 17 Q: Okay. So, obviously you were the driver?
- 18 A: Uh-huh, (affirmative response).
- 19 Q: Okay. And do you remember what lane you were driving in?
- 20 A: In the third lane next to the median.
- 21 Q: Okay. And do you recall what vehicle was in front of
- 22 you?
- 23 A: Yes, ma'am. It was a trike, what brand name I couldn't
- 24 tell you, but it was a trike.
- 25 Q: Okay.

State v. Atwater - 2019-GS-26-02899, 02900
TED DILLARD KERLEY - DIRECT BY HARTE

189

1 MS. HARTE: Your Honor, State's Exhibit 1, excuse me 2,
2 has already been entered into evidence. May this witness step
3 down so I can have him identify to the jury where he was
4 located?

5 THE COURT: Yes, ma'am. You'll go right in front of the
6 jury box there. Remember to keep your voice up a little bit,
7 okay? Thank you, sir.

8 BY MS. HARTE:

9 Q: Okay. Mr. Kerley, can you please tell the jury what
10 you're looking at?

11 A: It looks like the northbound of 17.

12 Q: Okay. And is this a fair and accurate depiction of the
13 area where the incident occurred and where you were driving
14 that afternoon?

15 A: Yes.

16 Q: Okay. And can you please point on this map, Mr. Kerley,
17 where you were driving that afternoon?

18 A: I was in this lane next to the median, and I stopped
19 probably right about there.

20 Q: Okay. And can you please show the jury, in relation to
21 your car on the map, where the victims' vehicle, the
22 motorcycle was located on this map?

23 A: Right here.

24 Q: Okay. And can you please show the jury on the map where
25 you witnessed the defendant's vehicle pulling out of or the

State v. Atwater - 2019-GS-26-02899, 02900
TED DILLARD KERLEY - DIRECT BY HARTE

190

1 blue Mercury?

2 A: I think it was right here pulling out. As I approached,
3 I saw these two lanes stopped and I saw the vehicle inching
4 out and then all of sudden it darted out.

5 Q: Okay. We'll take a seat, and we'll get to some more
6 questions.

7 Do you recall how fast you were driving that afternoon,
8 Mr. Kerley?

9 A: Probably less than 45.

10 Q: Okay. And were you traveling the same speed as the other
11 vehicles around you?

12 A: The trike in front of me, we were constant. So, we were
13 probably at the same speed.

14 Q: Okay. And was the victims' vehicle, the trike
15 motorcycle, was it traveling steadily in the lane in front of
16 you; did you see that car switch or the trike switch lanes at
17 all?

18 A: No, we had followed it several -- for several blocks.

19 Q: Okay. So, it was consistently in the lane in front of
20 you?

21 A: Yes.

22 Q: Okay. Did you see the collision occur?

23 A: Yes.

24 Q: Okay. And how -- and we just showed on the map how far
25 you were in relation to the collision, can you give an

State v. Atwater - 2019-GS-26-02899, 02900
TED DILLARD KERLEY - DIRECT BY HARTE

191

1 estimate of how far you think you were?

2 A: Probably about 30 -- probably about 30 yards, 25 to 30
3 yards.

4 Q: Okay. And you mentioned it briefly, and I want to ask
5 you again, because I want you to tell the jury exactly what
6 you observed because -- did you observe this collision?

7 A: Yes, ma'am.

8 Q: Okay. And can you please describe to the jury what you
9 saw from the beginning to the end?

10 A: Yes, ma'am. We were coming up 17, and we had passed
11 through a light and two lanes to the right of me were stopped.

12 Q: And let me pause you right there. When you say the two
13 lanes to the right of you, would that be the middle lane and
14 the lane closest to the gas station?

15 A: Yes, ma'am.

16 Q: Okay. Continue, I'm sorry.

17 A: And as we approached, saw the car inching out, and then I
18 told my wife, he's coming out, he's coming out. I blew my
19 horn and about the time I blew my horn, he darted out.

20 Q: And when you say dart out, what do you mean by that?

21 A: He pulled out fast.

22 Q: Okay. And did you see who was actually driving that
23 vehicle at the time?

24 A: No, ma'am. I was more concerned about the trike. I was
25 watching it. And, the car pulled on out. The trike had

State v. Atwater - 2019-GS-26-02899, 02900
TED DILLARD KERLEY - CROSS BY TRUSLOW

192

1 nowhere to go, the median was right beside of him; he had
2 nowhere to go. Then once he got past the median, he hit the
3 car in the front fender, driver's side fender. She went over
4 him, over the windshield, and then he went over the windshield
5 then.

6 Q: Yes, sir.

7 A: And ---

8 MS. HARTE: I beg the Court's indulgence.

9 BY MS. HARTE:

10 Q: And did you stay on the scene after the accident?

11 A: Yes, ma'am.

12 Q: And did you give a statement to law enforcement?

13 A: Yes, ma'am.

14 Q: And one last question, did you see any other cars wave
15 the defendant out into traffic?

16 A: Well, the cars were stopped, and I figured they were
17 letting him out, which is a very dangerous thing to do, but
18 they were letting him out.

19 Q: Okay. I have no further questions at this time. Please
20 answer any questions the defense attorney has.

21 THE COURT: Cross-examination?

22 CROSS-EXAMINATION OF TED DILLARD KERLEY BY MR. TRUSLOW:

23 Q: Sir, how would you consider traffic that day if you're
24 talking medium, heavy, that type of thing, on 17?

25 A: A usual day, moderate probably.

State v. Atwater - 2019-GS-26-02899, 02900
TED DILLARD KERLEY - CROSS BY TRUSLOW

193

- 1 Q: Was there -- okay, moderate. Were there cars in all
2 three lanes where you were?
- 3 A: In my lane, there was no car in front of the trike that I
4 could remember.
- 5 Q: Right.
- 6 A: And as far as behind me, there might've been a car behind
7 me, but there was cars to the right of me.
- 8 Q: Now, this is what I'm trying to get at here. So, when
9 you talk about the cars, and when I say Lane 1, I'm talking
10 about the one you're in and then working back to the curb,
11 Lane 2 and Lane 3. The vehicles in Lanes 2 and 3 were
12 stopped, correct?
- 13 A: Correct.
- 14 Q: And you would characterize it -- it's a fair assumption
15 to say they were stopped to let him in or cross over to
16 southbound 17, right; I mean that's a fair depiction?
- 17 A: Correct, correct.
- 18 Q: Did you see any of those people waving him through by
19 chance?
- 20 A: No, no.
- 21 Q: Okay. And again, you were more focused on the trike,
22 right?
- 23 A: Yes, sir.
- 24 Q: Okay. And then when the collision occurred, did you hit
25 the trike?

State v. Atwater - 2019-GS-26-02899, 02900
TED DILLARD KERLEY - REDIRECT BY HARTE

194

1 A: No, sir; I stopped.

2 Q: Okay. Did you -- you stopped prior to where that
3 collision occurred?

4 A: Yes.

5 Q: Okay. Did you leave skid marks do you think?

6 A: No.

7 Q: Okay. Thank you.

8 THE COURT: Any redirect?

9 MS. HARTE: Just briefly.

10 REDIRECT EXAMINATION OF TED DILLARD KERLEY BY MS. HARTE:

11 Q: When the collision occurred, did the trike have anywhere
12 to go?

13 A: No.

14 Q: Okay.

15 A: He was -- the trike was trying to get out of the way is
16 what it looked like to me. He was trying to go left, and he
17 had nowhere to go.

18 Q: Okay.

19 MS. HARTE: No further questions, Your Honor.

20 THE COURT: Anything on that question?

21 MR. TRUSLOW: No, sir, Judge.

22 THE COURT: All right. Do you wish the witness to be
23 excused?

24 MS. HARTE: Yes, sir, Your Honor.

25 THE COURT: All right, sir, you're released from your

State v. Atwater - 2019-GS-26-02899, 02900
TED DILLARD KERLEY - REDIRECT BY HARTE

195

1 subpoena, you may go back to your regular duties. Thank you.

2 MR. KERLEY: Thank you.

3 BY THE COURT:

4 THE COURT: All right, ladies and gentlemen, we're going
5 to break for lunch at this point in time. Come back at 5 to
6 2:00. Come back at 5 to 2:00 and we'll come into the
7 courtroom at that time. Thank you very much.

8 Remember, don't talk about the case, don't allow anybody
9 to talk to you about it. Put your pads and pens in your seat.

10 Thank you.

11 (REPORTER'S NOTE: Jury exits courtroom @12:22 p.m. The
12 following takes place outside the presence of the jury.)

13 THE COURT: All right. Anything from the state at this
14 point in time?

15 MR. DEBUSK: No, Your Honor.

16 THE COURT: From the defense?

17 MR. TRUSLOW: No, sir, Your Honor.

18 THE COURT: Did you communicate with the bonding
19 company?

20 MR. TRUSLOW: I did. I was gonna tell you that, Your
21 Honor. I did, and she texted me back. She just wants him to
22 call her once a day.

23 THE COURT: All right. So, very good. So, based on
24 that, Mr. Atwater, you remain out on bond under those terms
25 and conditions. With that, you understand that your presence

State v. Atwater - 2019-GS-26-02899, 02900
TED DILLARD KERLEY - REDIRECT BY HARTE

196

1 is -- well, it's up to you if you come back, but if you don't
2 come back, the trial will proceed in your absence. Do you
3 understand that?

4 MR. ATWATER: Okay. If I'm absent that means ---

5 THE COURT: How about stand up. All right. So, let's be
6 clear about this. You're out on bond. You're under the terms
7 and conditions of bond. If you don't come back when court
8 resumes, a bench warrant will be issued for your arrest.

9 MR. ATWATER: All right. Yes, sir.

10 THE COURT: But if you don't come back, that's not gonna
11 stop the trial. The trial will continue on to its conclusion
12 whether you're here or not; do you understand that?

13 MR. ATWATER: Yes, I'll be back.

14 THE COURT: All right. Very good. Thank you very much.

15 MR. TRUSLOW: Thank you, Judge.

16 **RECESS @ 12:24 P.M.**

17 *****OFF THE RECORD*****

18 **ON THE RECORD @ 1:56 P.M.**

19 THE COURT: Is the state ready for the jury to come in?

20 MS. HARTE: Yes, sir, Your Honor.

21 THE COURT: All right. And, Mr. Truslow?

22 MR. TRUSLOW: You told Mr. Atwater at 1:50 we were going
23 forward with or without him, and ---

24 THE COURT: It's past it, so ---

25 MR. TRUSLOW: I see that.

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - DIRECT BY DEBUSK

197

1 THE COURT: All right. So, let's ask the jury to come on
2 in. Thank you, sir.

3 (REPORTER'S NOTE: Jury enters courtroom @ 1:59 p.m.)

4 (REPORTER'S NOTE: Defendant enters courtroom @ 2:00 p.m.)

5 THE COURT: All right, Solicitor, your next witness,
6 please.

7 MR. DEBUSK: Thank you, Your Honor. The state calls
8 Tasha Ann Grainger.

9 THE COURT: Please come around, ma'am. Just come right
10 up front to where you see the clerk. Thank you.

11 THE CLERK: Please raise your right hand and place your
12 left on the Bible.

13 TASHA ANN GRAINGER, HAVING BEEN DULY
14 SWORN TESTIFIES AS FOLLOWS:

15 THE CLERK: Please have seat. State your full name and
16 spell it for the Court, please.

17 MS. GRAINGER: My name is Tasha Ann Grainger; T-A-S-H-A;
18 Ann is A-N-N; Grainger is G-R-A-I-N-G-E-R.

19 DIRECT EXAMINATION OF TASHA ANN GRAINGER BY MR. DEBUSK:

20 Q: Ms. Grainger, where do you live?

21 A: Whiteville.

22 Q: Is that in North Carolina?

23 A: Yes.

24 Q: Are you feeling well today?

25 A: No.

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - DIRECT BY DEBUSK

198

1 Q: Do you have an injury of some sort?

2 A: I broke my back a few weeks ago and it's bothering me
3 today.

4 Q: I appreciate you coming in under the circumstances. What
5 do you do for a living?

6 A: I help my boyfriend paint. We paint businesses and
7 homes.

8 Q: Okay. Where were you on April 6th of 2019?

9 A: I was in North Myrtle Beach. I had stopped at the Circle
10 K.

11 Q: Why did you stop -- what were you doing in North Myrtle
12 Beach at that time?

13 A: I was picking up my then boyfriend, ex-boyfriend now,
14 from work from the House of Blues.

15 Q: And why did you stop at the Circle K?

16 A: We had my daughters with us, and they were wanting some
17 drinks, so we stopped and grabbed some drinks and chips and
18 stuff.

19 Q: Did you get out and go in the store?

20 A: No.

21 Q: Did your boyfriend get out and go in the store?

22 A: Yes.

23 Q: Okay. Where did you park?

24 A: I was parked in the parking lot, depending on which way
25 you come in, I was out -- on the outside of like the store.

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - DIRECT BY DEBUSK

199

- 1 Q: Uh-huh, (affirmative response).
- 2 A: It's here and then there was a couple of parking spots in
3 between each driveway, and I was parked in one of those
4 parking spots.
- 5 Q: Is that by the road, by Highway 17?
- 6 A: By the highway, yes.
- 7 Q: I have here what's been marked as State's Exhibit Number
8 2. If you could show on the Circle K approximately where you
9 were parked?
- 10 A: I was parked right here.
- 11 Q: Okay. Right there by the road?
- 12 A: Uh-huh, (affirmative response).
- 13 Q: Now who was in the car with you?
- 14 A: My daughters.
- 15 Q: And how many?
- 16 A: Two.
- 17 Q: Okay. Did you see anything unusual that day?
- 18 A: No, not until I seen a car come in the parking lot and it
19 got my attention because it was coming really fast.
- 20 Q: Okay. Where did it go?
- 21 A: It come in behind me in the first driveway, and it come
22 around the store.
- 23 Q: Do you remember what color the car was?
- 24 A: I think it was blue.
- 25 Q: Okay. Let me show you what's been marked as State's

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - DIRECT BY DEBUSK

200

1 Exhibit 8 and ask you if that looks familiar?

2 A: Uh-huh, (affirmative response); that's it.

3 Q: What -- is that a car?

4 A: Yes.

5 Q: That's State's Exhibit 8 for the record. After it pulled

6 around the -- and again, why did it come to your attention

7 going around the gas station?

8 A: It come in pretty fast behind me.

9 Q: Uh-huh, (affirmative response). And what -- what did it

10 do after it went around?

11 A: I didn't see for a minute until it come to go out of the

12 driveway to actually leave Circle K, and it stopped in front

13 of me, but it was like a brief stop and then it went straight

14 on into traffic.

15 Q: At that time, did you feel like it was the proper time to

16 go out in traffic?

17 A: No.

18 Q: Why?

19 A: Because it was gonna cause an accident.

20 Q: Did you say anything to the people -- I guess it was just

21 your daughters; did you say anything to your daughters in the

22 car?

23 A: Yes.

24 Q: What did you say?

25 A: I said, Lord, have mercy, they're speeding; they're gonna

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - DIRECT BY DEBUSK

201

1 cause an accident, and it was -- one of my daughters even made
2 the comment, yes, Momma, they're going to fast in the parking
3 lot.

4 Q: Uh-huh, (affirmative response). And was the person
5 driving the car male or female?

6 A: Male.

7 Q: Okay. What happened when they pulled into traffic?

8 A: They hit a motorcycle.

9 Q: What happened when they hit the motorcycle?

10 A: There was two people on the motorcycle and the lady went
11 flying in the air.

12 Q: Uh-huh, (affirmative response). Did you see where she
13 landed?

14 A: On the highway.

15 Q: What happened to that lady; do you know?

16 A: She's dead.

17 Q: Uh-huh, (affirmative response). What did you do after
18 the collision?

19 A: I got out, and I seen the male that was on the
20 motorcycle, he was like upset trying to crawl to the lady and
21 paramedics were trying to get him to calm down. So, I went
22 over there, and I was talking to him trying to calm him down,
23 and just get him to stay still and not to move.

24 Q: After the -- after that, did you stay around and give a
25 statement to the police?

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - CROSS BY TRUSLOW

202

1 A: Uh-huh, (affirmative response).

2 Q: Okay. Did you see where the car that hit the motorcycle
3 went after -- after they hit the motorcycle?

4 A: After it hit the motorcycle, I didn't really pay it no
5 attention. I was just watching the woman and the man on the
6 motorcycle. But as I looked around, I seen that the car was
7 parked or had been parked over like to the left of the
8 accident.

9 Q: I show you State's Exhibit 18, does that show where the
10 car parked after the accident?

11 A: Yeah.

12 Q: Thank you. Please answer any questions the defense might
13 have.

14 THE COURT: Cross-examination?

15 MR. TRUSLOW: Yes, sir.

16 CROSS-EXAMINATION OF TASHA ANN GRAINGER BY MR. TRUSLOW:

17 Q: Ms. Grainger, do you who this gentleman is right here?

18 A: Do I know him?

19 Q: Yeah.

20 A: Not personally.

21 Q: Do you know who he is?

22 A: Yeah.

23 Q: Okay. Have you met with him prior to your testimony
24 today?

25 A: No, sir.

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - CROSS BY TRUSLOW

203

- 1 Q: Okay. So, you haven't talked with him today?
- 2 A: Yes, I've spoke to him; yes.
- 3 Q: That's what I'm asking you. Where did that take place;
- 4 where did you talk with him?
- 5 A: Over the phone.
- 6 Q: Okay. When was that?
- 7 A: One day last week.
- 8 Q: Okay. Did you discuss your testimony and what you would
- 9 provide here in this trial?
- 10 A: What do you mean, like discuss?
- 11 Q: Did you discuss with him what you would say today as a
- 12 witness?
- 13 A: No. He asked me what happened, and I explained to him
- 14 what happened.
- 15 Q: You gave a written statement, right?
- 16 A: Yes, sir.
- 17 Q: Okay. We all have a copy of that. So, he just wanted to
- 18 know what you were gonna say; is that right?
- 19 A: Yes.
- 20 Q: Okay. Do you recall if your written statement indicates
- 21 that you made any statements about, oh, my Lord, when this --
- 22 when he was speeding around the parking lot?
- 23 A: No, I didn't.
- 24 Q: Do you remember if you wrote that in your statement?
- 25 A: No.

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - CROSS BY TRUSLOW

204

- 1 Q: Did you write it?
- 2 A: No.
- 3 Q: Okay. Did you put anything about your daughter saying,
4 my goodness or whatever, that guy is going too fast, faster
5 than he should or whatever she said?
- 6 A: No.
- 7 Q: Did you record that and tell law enforcement that day?
- 8 A: No.
- 9 Q: So, anything not in your statement today, is just from
10 your memory from a couple years ago, correct?
- 11 A: Uh-huh, (affirmative response).
- 12 Q: All right. What -- what color vehicle were you operating
13 that day?
- 14 A: Was I operating?
- 15 Q: Uh-huh, (affirmative response).
- 16 A: Silver.
- 17 Q: Silver and what kind of car?
- 18 A: A Kia Soul.
- 19 Q: Okay. So, if we have video of the station, the
20 convenience store there, your vehicle would appear on there
21 somewhere ---
- 22 A: Uh-huh, (affirmative response).
- 23 Q: --- in the front?
- 24 A: Uh-huh, (affirmative response).
- 25 Q: Okay. You were parked in a parking space or at a gas

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - CROSS BY TRUSLOW

205

1 pump?
2 A: In a parking space.
3 Q: Okay. In the front of the store?
4 A: Yes.
5 Q: Okay. Facing the store?
6 A: No.
7 Q: You backed in?
8 A: No, it -- the parking spot goes parallel with the road.
9 Q: Okay. Well, isn't that on the side of the building? I
10 mean, you're telling me there's -- in the front of the store
11 there are parallel parking spaces?
12 A: In the front of the store ---
13 Q: Uh-huh, (affirmative response).
14 A: --- there is a parking spot here and a parking spot here,
15 yes.
16 Q: Okay. So, were you facing north or south?
17 A: I was facing north.
18 Q: All right. Did you go into the store?
19 A: No.
20 Q: Did anybody from your vehicle go into the store?
21 A: Yes.
22 Q: And who was that?
23 A: My ex-boyfriend.
24 Q: All right. And you remained in the vehicle?
25 A: Yes.

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - CROSS BY TRUSLOW

206

1 Q: Did my client's car come behind you before or after he
2 went in the store?
3 A: After who went into the store?
4 Q: Your ex-boyfriend?
5 A: After.
6 Q: Okay. And when you saw the car the next time, I think
7 you said it flew around and came around you or flew around
8 you?
9 A: Uh-huh, (affirmative response).
10 Q: Was he still in the store, your ex-boyfriend?
11 A: Yes.
12 Q: Okay. Was your ex-boyfriend in the store when the
13 accident occurred?
14 A: Yes.
15 Q: All right. Did you see my client go in the store?
16 A: No.
17 Q: Did you see my client walk out of the store?
18 A: No.
19 Q: Do you know if he went in the store?
20 A: No.
21 Q: All right. So, when he is approaching or facing Highway
22 17, before he pulls out, did you see him inching forward?
23 A: No.
24 Q: Okay. Did you see the vehicles traveling north in Lanes
25 2 and 3 stopped?

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - CROSS BY TRUSLOW

207

- 1 A: No.
- 2 Q: Okay. So, it's your testimony that Lanes 2 and 3 never
3 stopped?
- 4 A: Correct.
- 5 Q: Okay. Do you know -- do you happen to know an individual
6 named Mr. Kesley [sic]?
- 7 A: Who?
- 8 Q: Mr. Kesley [sic]?
- 9 A: No.
- 10 Q: Who was on the scene that day; did you talk to any other
11 witnesses on the scene that day?
- 12 A: No.
- 13 Q: Okay. Did you see the vehicle that was traveling behind
14 the motorcycle that collided into my client's car?
- 15 A: No.
- 16 Q: So, when my client went into Highway 17 to effect this
17 turn, do you remember which lane the motorcycle was traveling
18 in?
- 19 A: I do not know, but there was a truck, I mean, beside me
20 in the first lane.
- 21 Q: Beside you?
- 22 A: Now, you're parked, right?
- 23 A: I was parked, and when I looked, a truck was coming by.
- 24 Q: Okay. On Highway 17 on the highway?
- 25 A: Uh-huh, (affirmative response) on the highway.

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - CROSS BY TRUSLOW

208

- 1 Q: Going the same direction as the motorcycle?
- 2 A: Yes.
- 3 Q: So, did my client pull in front of that truck?
- 4 A: When he pulled, the truck hit their brakes.
- 5 Q: So, you did see a vehicle stopped in those lanes?
- 6 A: Yes.
- 7 Q: Was there any other vehicle stopped in the lanes?
- 8 A: Not that I recall.
- 9 Q: But at least now, there was at least one, a truck?
- 10 A: Yeah.
- 11 Q: What kind of truck, I mean, a pickup truck or ---
- 12 A: Yeah; it was a big pickup truck.
- 13 Q: A big pickup truck, big wheels?
- 14 A: Yeah. Well, it weren't no S-10.
- 15 Q: All right.
- 16 A: It was like a -- I don't want to say like a specific
- 17 truck, because I don't recall.
- 18 Q: Was it jacked up kind of?
- 19 A: Yeah; it was a big truck.
- 20 Q: That's what I was asking you.
- 21 MR. TRUSLOW: I think that's all the questions I have,
- 22 Judge.
- 23 THE COURT: Redirect?
- 24 REDIRECT EXAMINATION OF TASHA ANN GRAINGER BY MR. DEBUSK:
- 25 Q: Why did the vehicle beside you have to stop?

State v. Atwater - 2019-GS-26-02899, 02900
TASHA ANN GRAINGER - REDIRECT BY DEBUSK

209

1 A: The blue car was pulling out.

2 Q: So, he stopped because of the blue car pulling out?

3 A: Uh-huh, (affirmative response).

4 Q: Okay. And you gave a statement to police that day didn't
5 you?

6 A: Yes.

7 Q: And you said that the -- the blue Mercury with a male
8 driving and a female passenger flew around the parking lot?

9 A: Uh-huh, (affirmative response).

10 Q: Were you able to write everything that you saw on that
11 statement?

12 A: No.

13 Q: Just a short page, right?

14 A: Uh-huh, (affirmative response).

15 Q: There are things that you saw that you didn't get to put
16 on that statement, correct?

17 A: Correct.

18 Q: Okay. Thank you.

19 THE COURT: Anything on those questions?

20 MR. TRUSLOW: No, sir.

21 THE COURT: All right. Do you wish the witness to be
22 excused?

23 MR. DEBUSK: Yes, please, Your Honor.

24 THE COURT: Any objections?

25 MR. TRUSLOW: No, sir.

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - DIRECT BY HARTE

210

1 THE COURT: All right, Ms. Grainger, you are released
2 from your subpoena and may go back. Thank you.

3 A: Thank you.

4 THE COURT: All right, Solicitor, your next witness
5 please.

6 MS. HARTE: Your Honor, at this time, the state would
7 like to call Mr. Darren Maxwell.

8 THE COURT: All right. All right, Mr. Maxwell, come all
9 the way around that way and then come up front. Come right up
10 here next to the clerk.

11 THE CLERK: Please place your right hand and place your
12 left hand on the Bible?

13 DARREN MAXWELL, HAVING BEEN DULY
14 SWORN TESTIFIES AS FOLLOWS:

15 THE CLERK: Please have a seat. State your full name and
16 spell it for the Court, please.

17 MR. MAXWELL: Darren Maxwell; D-A-R-R-E-N, and the last
18 name is Maxwell, M-A-X-W-E-L-L.

19 THE COURT: Very good. Stay in front of the microphone.
20 Okay?

21 MR. MAXWELL: All right.

22 THE COURT: Thank you, sir. All right, Solicitor.

23 DIRECT EXAMINATION OF DARREN MAXWELL BY MS. HARTE:

24 Q: Mr. Maxwell, what is your occupation?

25 A: I'm a data analyst.

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - DIRECT BY HARTE

211

1 Q: Okay. And where do you live?

2 A: Charlotte, North Carolina.

3 Q: Okay. And do you vacation in Myrtle Beach often?

4 A: Yes.

5 Q: Okay. And I want to direct your attention to April 6th,
6 2019. Were you in the North Myrtle Beach area?

7 A: Yeah.

8 Q: Okay. And do you recall seeing an incident occur by the
9 Circle K gas station on 45th Avenue South and Highway 17?

10 A: Yes.

11 Q: Okay. And what direction were you traveling in?

12 A: North.

13 Q: Okay. Who was driving the car you were in?

14 A: Me.

15 Q: Okay. Was there anyone in the car with you?

16 A: My wife and three children.

17 Q: Okay. And where was your wife located in the car?

18 A: The passenger side; the passenger seat.

19 Q: And was there a car traveling in front of you?

20 A: Yeah, there was; yes.

21 MS. HARTE: Your Honor, may I approach the witness with
22 State's Exhibit 1 that's already been entered into evidence?

23 THE COURT: Yes, ma'am.

24 BY MS. HARTE:

25 Q: Mr. Maxwell, do you just mind stepping down so we can

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - DIRECT BY HARTE

212

1 point out to the jury?

2 COURT REPORTER: It's 2.

3 THE COURT: It's 2.

4 MS. HARTE: Excuse me 2, I apologize, Your Honor.

5 THE COURT: Not a problem.

6 BY MS. HARTE:

7 Q: You can step down. This is a map of the collision scene.
8 Is this a fair and accurate depiction of the area where the
9 collision occurred?

10 A: Like right here, yeah.

11 Q: Okay. And can you please show the jury on the map where
12 your vehicle was?

13 A: Assuming this was the gas station, I was like right here.

14 THE COURT: Could you speak -- if you're not behind the
15 microphone because I need you to speak up just a little bit.

16 A: Assuming this is the gas station, I was about right here
17 somewheres.

18 BY MS. HARTE:

19 Q: Okay. That is the Circle K gas station?

20 A: Right.

21 Q: And can you please show the jury on the map where you saw
22 the blue car prior to the collision?

23 A: Like right in the exist; maybe this one; I think it was
24 that one.

25 Q: Okay. And -- and just for clarification purposes, which

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - DIRECT BY HARTE

213

1 lane were you in; were you in this lane closest to the gas
2 station, the middle lane or the one closest to the median?

3 A: Closest to the gas station.

4 Q: Okay. If you could take a seat for me.

5 A: Okay.

6 Q: Okay. And Mr. Maxwell, do you recall how fast you were
7 driving?

8 A: I think traffic consistently was rolling and maybe 20 or
9 30 miles an hour, if I can think.

10 Q: Yeah. Okay. Were you traveling the same speed as the
11 other vehicles traveling around you?

12 A: Correct, I was.

13 Q: And in relation to the gas station, you said you were
14 traveling in the lane closest to it, right?

15 A: Yes, I was.

16 Q: All right. And did you actually see the blue car pull
17 out of the gas station?

18 A: I did.

19 Q: Okay. And did you see who was driving the car that
20 pulled out from the gas station?

21 A: Well, no, I didn't see it initially, no.

22 Q: Okay. Can you describe to the jury how the car pulled
23 out of the gas station, the blue car?

24 A: I guess the gas station has a little incline. It's a
25 little incline to get out of the gas station. So, they were

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - DIRECT BY HARTE

214

1 kind of tilted up towards the -- towards the street, assuming
2 to make a right turn, but I think they just kind of gunned it
3 assuming they were gonna go across two lanes of north traffic
4 to get to the south, and that's what happened, they kind of
5 gunned it to kind of shoot the gap.

6 Q: Okay. And was there room for the blue car to pull out in
7 traffic from what you observed?

8 A: No.

9 Q: Okay. And did you actually see the collision occur?

10 A: Yeah, I did. Yes, I'm sorry, yes, I did.

11 Q: Okay. And can you please describe what you witnessed as
12 far as this collision?

13 A: Just coming up the street, initially the motorcycle with
14 the lady and the guy was in front of us. About the time we
15 got close to the gas station, I think one car had gotten in
16 between us, and out of your peripheral when you're driving
17 close to the street, you can -- you kind of take aware of cars
18 that are pulling out, just in case they've got to swerve or
19 whatever, so as we got closer, I'm assuming that they thought
20 that when they didn't see the bike, that that was a break in
21 the traffic, so at the time ---

22 MR. TRUSLOW: Objection, Your Honor, to what my client
23 assumed; he's speculating.

24 THE COURT: Well, just testify as to what you saw and
25 what you believed.

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - CROSS BY TRUSLOW

215

1 A: Yeah. Well, what I saw was the guy -- the car tried to
2 shoot through two lanes of northern traffic to get to the
3 southbound traffic.

4 Q: Okay. Thank you. I don't have any questions at this
5 time or any more questions. Please answer any questions that
6 the defense attorney has..

7 THE COURT: All right. Cross-examination?

8 MR. TRUSLOW: Yes, sir.

9 CROSS-EXAMINATION OF DARREN MAXWELL BY MR. TRUSLOW:

10 Q: Can you clear up for me what you made -- the comment you
11 made or the testimony about a righthand turn; what you meant
12 by that?

13 A: What do I mean by a righthand turn?

14 Q: Let me ask you this? No, let me ask you this. When you
15 said that somebody was making a righthand turn, who were you
16 talking about?

17 A: I don't remember exactly what I said about a righthand
18 turn. I was just -- I meant that it would have made more
19 sense to make a righthand turn and make a U-turn if you wanted
20 to go south. That's what I was trying to say if that's what
21 you were referring to.

22 Q: All right. As opposed to make a lefthand turn and go
23 south; you would have turned to go north and turned around
24 somewhere up there and come back is what you're saying?

25 A: Correct. There was too much traffic to go across that

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - CROSS BY TRUSLOW

216

1 middle lane.

2 Q: That was my next question. So, if you had to describe
3 the traffic out there that evening or that afternoon it was,
4 4:00 p.m. say, was it heavy or medium or light?

5 A: I would consider it heavy.

6 Q: Heavy traffic?

7 A: Correct.

8 Q: All right. And your testimony is one car was in front of
9 you, only one car between you and my client's turn?

10 A: From what I remember, yes, there was one car between us,
11 the bike and me.

12 Q: Okay. Well, where was the bike?

13 A: Initially coming up the highway they were right in front
14 of us, but about time we got to the gas station, they were not
15 directly in front of us; there was one car between -- one or
16 two cars between us and the ---

17 Q: So, at some point, that motorcycle, trike bike, dipped
18 into the left lane, the outside lane, correct?

19 A: I didn't see them dip into the -- I mean, I wasn't
20 watching them, but ---

21 Q: At some point they were in front of you?

22 A: At some point they were in front of me, yes.

23 Q: At some point they weren't?

24 A: They were still in front of me, but there was a car
25 separating us, correct.

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - CROSS BY TRUSLOW

217

- 1 Q: And you don't know how that happened?
- 2 A: I wasn't watching to see. I was just driving, so, I
- 3 don't know what happened.
- 4 Q: And you were in what lane?
- 5 A: The right, the furthest ---
- 6 Q: The closest to the curb?
- 7 A: Correct.
- 8 Q: Which means you're testifying that the motorcycle would
- 9 have been in that lane as well?
- 10 A: From what I remember, yeah.
- 11 Q: So, you remember the motorcycle in Lane 3, correct?
- 12 A: From what I remember, yes.
- 13 Q: Thank you. Thank you. And just for clarity sake, your
- 14 statement that you gave to law enforcement that day, can you
- 15 identify that; is that your statement? Please don't tell me I
- 16 got the wrong one out.
- 17 A: That's right.
- 18 Q: Okay. That's your statement?
- 19 A: Yes.
- 20 Q: And that's about two sentences?
- 21 A: Yes.
- 22 Q: Have you had an opportunity to speak with either the
- 23 prosecutors or anybody from their office, investigators, about
- 24 this case prior to today?
- 25 A: No, not really, no.

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - CROSS BY TRUSLOW

218

1 Q: So, did you just show up here and wait for your name to
2 be called?

3 A: No, I mean the prosecutor called me, but I don't think we
4 went into the details of the case if that's what you're asking
5 me.

6 Q: What did y'all talk about?

7 A: We talked about what I saw and would I be willing to come
8 down ---

9 Q: It was details of the case, right?

10 A: Oh, I didn't -- I didn't understand what you meant by
11 details. I'm sorry.

12 Q: So, let's sum up. To the best of your knowledge, after
13 all this time, the motorcycle in the collision was in Lane 3,
14 the closest to the curb, and not Lane 1, out next to the
15 median?

16 A: From what I remember when we were driving up the street,
17 when they were in front of me, I was in Lane 3, and they were.
18 At the time of the accident, we were separated by a car or
19 two. So, I couldn't tell you whether they were in the second
20 or the third, but I know that initially when they were in
21 front of me, they were in the third. I don't want to tell you
22 something that's not true.

23 Q: So, they could've been in the second or the third?

24 A: They could've been. I just know they were ---

25 Q: And now there could have been two cars between you?

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - CROSS BY TRUSLOW

219

1 A: It was two years ago.
2 Q: I understand.
3 A: I just know they were in front of me; then they wasn't.
4 Q: I understand, and all I'm trying to do is to get the best
5 of your memory ---
6 A: Yes, sir.
7 Q: --- and I appreciate you being honest.
8 A: Yes, sir.
9 Q: So, maybe it wasn't just one car in front of you in
10 between the collision time. It could've been two?
11 A: It could've been.
12 Q: You could've been further back?
13 A: I was close enough to see it.
14 Q: Sure. Is there any possibility it could've been more
15 than two? I mean ---
16 A: No, I -- if it was anything it was two, but I don't think
17 it was three or four car length, no.
18 Q: How certain are you right now that it was two or less?
19 A: One hundred percent certain it was two or less.
20 Q: You testified the first time it was one, right? How
21 certain were you then?
22 A: Of how many cars it was ---
23 Q: In front of you?
24 A: I'm -- well, whether it's one or two; it's one or two. I
25 don't know.

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - REDIRECT BY HARTE

220

1 Q: All right. You're sticking with one or two?

2 A: I'm sticking with one or two.

3 Q: All right. Thank you. No more questions.

4 THE COURT: Redirect?

5 MS. HARTE: Just briefly.

6 REDIRECT EXAMINATION OF DARREN MAXWELL BY MS. HARTE:

7 Q: Mr. Maxwell, when you were driving, were you focused on
8 the motorcycle?

9 A: Focused?

10 Q: When you were driving, what were you focused on?

11 A: Driving, I guess; I don't know.

12 Q: Exactly. And when you -- when you say you were driving
13 down the traffic and the motorcycle was in your lane at some
14 point, do you mean right before the collision?

15 A: Literally, they were right in front of us, because I
16 remember the lady being on the back of the bike. You know, I
17 don't -- at the time, I didn't think I would have to remember
18 that, but yeah, I remember them being directly in front of us,
19 and when the accident happened, they weren't; there was a
20 space between us.

21 Q: And when you say space between you, do you mean lanes of
22 traffic?

23 A: A car. A car, like as far as not directly in front of
24 me, like I can run into them; there's something that's
25 separating us, and there was a car.

State v. Atwater - 2019-GS-26-02899, 02900
DARREN MAXWELL - REDIRECT BY HARTE

221

1 Q: There was a vehicle in front of you?

2 A: There was a vehicle separating us, correct.

3 Q: Okay. But you did see the blue car pull out of the gas
4 station, correct?

5 A: I did, correct.

6 Q: And how would you describe that blue car pulling out of
7 the gas station?

8 A: Abruptly.

9 Q: Thank you.

10 THE COURT: Anything on that question?

11 MR. TRUSLOW: No, sir.

12 THE COURT: All right, sir. Do you wish the witness to
13 be excused?

14 MS. HARTE: Yes, sir, Your Honor.

15 THE COURT: Any objection?

16 MR. TRUSLOW: No objection.

17 THE COURT: All right, sir, you're released from your
18 subpoena; you may go back to regular activities. Thank you.

19 All right, Solicitor?

20 MR. DEBUSK: The state calls Yolanda Padilla.

21 THE COURT: All right. Ma'am, just come all the way
22 around up front, please.

23 THE CLERK: Raise your right hand and place your left
24 hand on the Bible, please.

25 YOLANDA PADILLA, HAVING BEEN

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - DIRECT BY DEBUSK

222

1 DULY SWORN TESTIFIES AS FOLLOWS:

2 THE CLERK: Please be seated. State your full name and
3 spell it for the record, please.

4 MS. PADILLA: Yolanda Padilla; Y-O-L-A-N-D-A, P-A-D-I-L-
5 L-A.

6 THE COURT: Move a little bit closer to the microphone.
7 All right, great. Go ahead.

8 DIRECT EXAMINATION OF YOLANDA PADILLA BY MR. DEBUSK:

9 Q: Ms. Padilla, where do you live?

10 A: I live in Wilmington, North Carolina.

11 Q: Okay. What do you do; what's your occupation?

12 A: I'm a customer service agent in -- in Raleigh.

13 Q: Now, how about back in April 6th of 2019, were you in
14 North Myrtle Beach that day?

15 A: I was.

16 Q: What were you doing there?

17 A: I just went to the beach for a weekend with my family.

18 Q: Were you driving on 17 that afternoon, on Highway 17;
19 were you driving on Highway 17 that afternoon?

20 A: Yes.

21 Q: Who was with you?

22 A: My mom.

23 Q: Where is your mom today?

24 A: She passed about a month ago.

25 Q: Okay. And where were y'all going?

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - DIRECT BY DEBUSK

223

- 1 A: Just to the grocery store.
- 2 Q: Which -- what direction were you traveling on Highway 17?
- 3 A: I'm honestly, I don't know which way. I couldn't -- I'm
- 4 not familiar with the area very ---
- 5 Q: Okay. Did you find yourself in the area of the Circle K
- 6 gas station at 45th Avenue South?
- 7 A: Yes.
- 8 Q: What happened there?
- 9 A: We were in the far right lane. I was just kind of
- 10 talking to my mom, and I remember her kind of mentioning, you
- 11 know, watch this car. So, I slowed down and saw the car there
- 12 pulling out of the gas station, and I remember slowing down
- 13 and like of kind of thinking, oh, this car is gonna pull out;
- 14 so, let me just slow down, and then they just like pulled out
- 15 and then they hit the -- or the -- I think the motorcycle hit
- 16 the car, but I'm not sure.
- 17 Q: Okay. So, when you looked up, you saw the blue car?
- 18 A: Yes.
- 19 Q: And why did you slow down?
- 20 A: Well, you know, like I said, my mom was like watch this
- 21 car, and then it kind of looked like they were gonna pull out,
- 22 and I didn't want to hit them. So, I slowed down.
- 23 Q: Did you stop or wave them out in any way?
- 24 A: No.
- 25 Q: Did you -- did you attempt to let them across traffic?

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - DIRECT BY DEBUSK

224

1 A: No, I just, I didn't want to hit them.

2 Q: Why did you slow down?

3 A: I was afraid he would pull out in front of me, and I was
4 hesitant to go, I thought he was going to pull out.

5 Q: So, you were -- you slowed down because you feared
6 hitting him?

7 A: Yes.

8 Q: Because you feared he was going to pull out ---

9 MR. TRUSLOW: Objection, he's leading the witness all
10 over the place.

11 THE COURT: All right. Rephrase your question.

12 MR. DEBUSK: Yes, Your Honor.

13 BY MR. DEBUSK:

14 Q: Did you fear he was gonna pull out?

15 A: Yes.

16 Q: Okay. Did he pull out?

17 A: Yes.

18 Q: What happened?

19 A: Well, I remember him pulling out, and then I heard like
20 something hit something and then I looked to my left, and the
21 motorcycle or they hit each other.

22 Q: Did you actually see the collision with the motorcycle?

23 A: I remember hearing it. I -- I kind of glanced that way
24 as soon as I heard it, and then I saw that they had hit.

25 Q: Now, if you hadn't slowed down, what would have happened?

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - DIRECT BY DEBUSK

225

1 MR. TRUSLOW: Objection, speculation.

2 THE COURT: She's driving. I'm gonna allow her to
3 testify.

4 BY MR. DEBUSK:

5 Q: If you hadn't slowed down, what would have happened?

6 A: I might've hit the car.

7 Q: Okay. Is it fair to say you slowed down to avoid hitting
8 the car?

9 A: Yes.

10 Q: And again, did you wave him out or do anything to
11 communicate with him?

12 MR. TRUSLOW: Objection, asked and answered.

13 THE COURT: I'm gonna allow it. Go ahead and ask the
14 question.

15 BY MR. DEBUSK:

16 Q: Did you wave him out or do anything to indicate that he
17 could go in front of you?

18 A: No.

19 Q: Okay. Before you looked over after hearing the accident,
20 had you seen the motorcycle?

21 A: No.

22 Q: Okay. Do you know what happened to the people on the
23 motorcycle?

24 A: I remember -- so, we stopped. My mom got out of the car,
25 then I pulled off to the side, and I remember ---

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - CROSS BY TRUSLOW

226

1 Q: Did your mom have some sort of skills that would've
2 helped in that situation?

3 A: Oh, she was a CNA for a very long time.

4 Q: So, a certified nursing assistant?

5 A: Yesh.

6 Q: Okay. And so she went to aid the wounded?

7 A: Yeah.

8 Q: And what did you see?

9 A: I -- I called 911 from the side, and then after I got off
10 the phone, I kind of ran out, and I saw them working on the
11 woman. I saw the man sitting like kind of on the ground and
12 that's kind of what I saw.

13 Q: Did you -- did you stay around to give a statement to the
14 police?

15 A: I did.

16 Q: Okay. Thank you. Please answer any questions defense
17 has.

18 THE COURT: Cross-examination?

19 CROSS-EXAMINATION OF YOLANDA PADILLA BY MR. TRUSLOW:

20 Q: Ms. Padilla, you're Yolanda Padilla?

21 A: Correct.

22 Q: Okay. You said -- you testified you slowed down to avoid
23 an accident?

24 A: Yes.

25 Q: Did you know if you left skid marks?

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - CROSS BY TRUSLOW

227

1 A: I -- I don't know.

2 Q: Did you slam the brakes on?

3 A: Not that I remember. I remember slowing down, but I
4 don't remember slamming on brakes.

5 Q: Did you slow down because there was a car in front of you
6 slowing down?

7 A: No, I saw the car, and that's when I -- I saw the car and
8 then -- I guess.

9 Q: Do you know if you were going north or south?

10 A: Honestly, I'm not sure. I'm not very familiar with the
11 area.

12 Q: I want to ask you if you can identify this document?

13 A: I think this is my statement.

14 Q: All right. Can you just read that statement?

15 A: We were driving ---

16 THE COURT: Not out loud.

17 A: Oh.

18 THE COURT: You can read it and you can ask her
19 questions.

20 BY MR. TRUSLOW:

21 Q: So, how many sentences are on this written statement?

22 A: Two.

23 Q: Does your written statement say anything about -- well,
24 it doesn't say anything other than this, correct? Let's say
25 -- well, this doesn't say which direction you're going either,

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - CROSS BY TRUSLOW

228

1 does it? So, you did not see the accident?

2 A: I didn't see them hit, no. I heard it, and then I kind
3 of glanced and saw that they had hit.

4 Q: Where were you when the accident -- when you heard the
5 accident; were you past the accident, or were you -- did you
6 see -- did you see the accident -- you looked back at the
7 accident to see it happen?

8 A: It was to my left as I remember.

9 Q: Okay. Do you remember any particular reason you didn't
10 look over there when he pulled out?

11 A: No, I just kept driving.

12 Q: All right. After you slowed to avoid hitting?

13 A: Correct.

14 Q: All right. And you were in the most inside lane nearest
15 to the curb and the store?

16 A: Yes.

17 Q: Okay. Are you -- have you had any meetings with anyone
18 to refresh your memory of your testimony?

19 A: I have not. I had a phone call and then I just -- we --
20 I just said what I saw and that's it.

21 Q: Well, did you say more than you said in this statement?

22 A: I mean, not -- I just -- what I said today.

23 Q: Were any questions asked of you after you said what you
24 saw?

25 A: Not really.

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - CROSS BY TRUSLOW

229

- 1 Q: Quick phone call?
- 2 A: Yes.
- 3 Q: How long?
- 4 A: Maybe five minutes.
- 5 Q: Okay. And then when you arrived today, you're from North
- 6 Carolina?
- 7 A: I am.
- 8 Q: Okay. When did you get in town for this trial?
- 9 A: Yesterday, maybe like 4:00.
- 10 Q: Okay. And you've had no contact with any authorities,
- 11 and the solicitor's office, prosecutors, law enforcement?
- 12 A: Correct.
- 13 Q: Okay. How did you know what time to be here?
- 14 A: They let me know -- I think I spoke to them on Friday,
- 15 and they let me know. They like emailed the reservation and
- 16 ---
- 17 Q: All right. Was that the phone call you had with them
- 18 about what you saw?
- 19 A: No, that was just with the -- I think her name was Tara.
- 20 Q: Like the coordinator or somebody?
- 21 A: Right.
- 22 Q: All right. Did you -- do you know any of the other
- 23 witnesses in this case by chance who were witnesses that were
- 24 driving other vehicles?
- 25 A: No.

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - REDIRECT BY DEBUSK

230

1 Q: Nobody? Have you met any of them since then?

2 A: I mean, we were just in the room together, but that's it.

3 Q: Okay. Did you discuss the case at all in there?

4 A: No.

5 Q: Didn't even come up?

6 A: No.

7 Q: Okay. Did you perhaps remember that any of those folks,

8 like where they were in relation to you during the accident,

9 like if somebody was behind you or to the left of you?

10 A: No, I didn't say anything to any of that.

11 Q: Okay. Do you remember an incline going into the roadway

12 from the parking lot of the Circle K?

13 A: I don't.

14 Q: Okay. Well, I think that's all I have for you. Thank

15 you.

16 THE COURT: Redirect?

17 REDIRECT EXAMINATION OF YOLANDA PADILLA BY MR. DEBUSK:

18 Q: When the blue car pulled out, was there any car between

19 you and the blue car?

20 MR. TRUSLOW: Objection, asked and answered, it's not

21 new.

22 THE COURT: I believe it's in reply. I'm gonna allow it.

23 A: No.

24 BY MR. DEBUSK:

25 Q: So, you were the next car facing them?

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - REDIRECT BY DEBUSK

231

1 A: Yes.

2 Q: And you -- you testified you slowed down to avoid hitting
3 it, and I think you also testified ---

4 MR. TRUSLOW: Objection, he's testifying. He's leading.

5 THE COURT: Don't. Just ask the question, Solicitor.

6 MR. DEBUSK: Okay.

7 BY MR. DEBUSK:

8 Q: Did you testify that your mother called your attention to
9 the blue car?

10 A: Yes.

11 Q: Okay. Was your attention on the blue car?

12 A: Yes.

13 Q: Mr. Truslow asked you about the statement you gave. Did
14 you in fact see this? Did you in that statement say which --
15 which direction you and your mother were traveling that day?

16 A: In there it says that we were northbound.

17 Q: So, you were traveling northbound?

18 A: Yeah, I didn't remember that, but I guess I was.

19 Q: But at the time, in your statement, you were traveling
20 northbound?

21 A: Yes.

22 Q: You don't remember today because it's been two years?

23 A: Right.

24 Q: Okay. And again, you didn't see the motorcycle hit the
25 car, correct?

State v. Atwater - 2019-GS-26-02899, 02900
YOLANDA PADILLA - RECROSS BY TRUSLOW

232

1 A: No.

2 Q: What -- your attention was on the road before ---

3 MR. TRUSLOW: Objection, third time.

4 THE COURT: All right. Just ask a question, Solicitor?

5 BY MR. DEBUSK:

6 Q: Was your attention on the road ahead of you?

7 A: Yes.

8 Q: Thank you. No further questions.

9 THE COURT: Anything on those questions?

10 MR. TRUSLOW: Yes, sir.

11 RECROSS-EXAMINATION OF YOLANDA PADILLA BY MR. TRUSLOW:

12 Q: Was the traffic heavy, medium, or light that day?

13 A: I would say it was pretty heavy. It seemed kind of
14 heavy.

15 Q: How fast were you going?

16 A: I don't remember.

17 Q: Huh?

18 A: I don't recall.

19 Q: Okay. Well, then I'm assuming you wouldn't know how fast
20 you were going when you slowed then as well?

21 A: Right.

22 Q: All right.

23 MR. TRUSLOW: That's all I have, Your Honor.

24 THE COURT: Do you wish the witness to be excused?

25 MR. DEBUSK: Yes, Your Honor.

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

233

1 THE COURT: Any objection?

2 MR. TRUSLOW: No, sir.

3 THE COURT: All right, ma'am, you are released from your
4 subpoena and may go back to your regular activities. Thank
5 you.

6 MS. PADILLA: Thank you.

7 THE COURT: All right. Next witness, please?

8 MR. DEBUSK: Your Honor, the state calls Demi Steward-
9 Risso.

10 THE COURT: Just come around all the around up front
11 right up here, ma'am. Thank you.

12 THE CLERK: Please raise your right hand and place your
13 left on the Bible.

14 DEMI STEWARD-RISSO, HAVING BEEN DULY
15 SWORN TESTIFIES AS FOLLOWS:

16 THE CLERK: Please be seated. State your full name and
17 spell it for the record, please.

18 MS. STEWARD-RISSO: My name is Demi Steward-Risso. Demi,
19 D-E-M, as in Mary, I; last name Steward, S-T-E-W-A-R-D;
20 hyphen, Risso, R-I-S-S-O.

21 DIRECT EXAMINATION OF DEMI STEWARD-RISSO BY MR. DEBUSK:

22 Q: Ms. Steward-Risso, who is your employer?

23 A: National General Insurance.

24 Q: Okay. Where do you work, what region?

25 A: I work in the mid-Atlantic. We are based out of Winston

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

234

- 1 Salem, North Carolina.
- 2 Q: Okay. What are your duties with the insurance company?
- 3 A: Currently I'm a claims adjuster as well as claims
4 adjuster manager. I manage nine claims adjusters currently.
- 5 Q: How about back in April of 2019, what were your duties
6 then?
- 7 A: In April of 2019, I was a bodily injury adjuster for
8 National General Insurance.
- 9 Q: As part of your duties as a adjuster for bodily injuries,
10 did you conduct interviews with people?
- 11 A: Yes.
- 12 Q: Did you conduct an interview with the defendant, Claybon
13 Atwater, on April 9th of 2019?
- 14 A: I did.
- 15 Q: Okay. What was the purpose of that?
- 16 A: The purpose of that interview was to discuss the events
17 of the accident that happened a few days prior and to
18 determine liability for the estimate.
- 19 Q: Let me show you what's been marked as State's Exhibit 35
20 and ask if you recognize that?
- 21 A: I do recognize this.
- 22 Q: What is that?
- 23 A: This is a transcript of a statement that I took with
24 Claybon Atwater.
- 25 Q: Okay.

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

235

1 MR. DEBUSK: Your Honor, for the record, that's State's
2 Exhibit 35 marked for identification.

3 BY MR. DEBUSK:

4 Q: I'm going to show you State's Exhibit 34 and ask if you
5 recognize that.

6 A: I do recognize this.

7 Q: What is that?

8 A: This is an excerpt of the recorded statement that I took
9 with Claybon Atwater.

10 Q: Is it a fair and accurate representation of what was in
11 the main transcript?

12 A: It is, yes.

13 Q: Okay. What -- what question did you ask that defendant
14 in the excerpt?

15 A: In -- in this excerpt ---

16 MR. TRUSLOW: Objection, Your Honor. I don't recall this
17 in the *Jackson v. Denno* hearing. This is a completely new
18 matter.

19 THE COURT: Mr. Foreman, ladies and gentlemen of the
20 jury, go to your jury room, please. Thank you. Leave the
21 pads and pens. Don't discuss the case, don't allow anybody to
22 talk to you about it. Leave your pads and pens in your seat.

23 (REPORTER'S NOTE: Jury exits courtroom @ 2:40 p.m. The
24 following takes place outside the presence of the jury.)

25 THE COURT: Let me ask you a couple of questions, Mr.

State v. Atwater - 2019-GS-26-02899, 02900

236

DEMI STEWARD-RISSO - IN CAMERA EXAMINATION BY TRUSLOW

1 Truslow. First, were you aware of this statement before
2 today?

3 MR. TRUSLOW: I was.

4 THE COURT: All right. So, you didn't -- it was
5 transmitted to you in discovery?

6 MR. TRUSLOW: Sure, yes, sir.

7 THE COURT: All right. Are you claiming that the
8 insurance agent is an agent of the police?

9 MR. TRUSLOW: Well, I would have to ask her some
10 questions.

11 THE COURT: All right.

12 IN CAMERA EXAMINATION OF DEMI STEWARD-RISSO BY MR. TRUSLOW:

13 Q: Ms. Steward-Risso?

14 A: Yes.

15 Q: In regards to this case, did you have any connection or
16 contact or communication with law enforcement prior to the
17 actual interview with Mr. Atwater?

18 A: I did not.

19 Q: Okay. And subsequent to?

20 A: No.

21 Q: And was there just the one interview?

22 A: Yes.

23 Q: Okay. And was this a telephone interview or an in-person
24 interview?

25 A: Telephone.

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - EXAMINATION BY THE COURT

237

1 Q: And how did you identify who you were having the
2 interview with?

3 A: At the beginning of each statement, I ask the person I'm
4 interviewing to state their first and last name, and then in
5 the interview itself, I ask date of birth, as well as like in
6 North Carolina an ID number. So, both of those were used to
7 identify the person to whom I was speaking.

8 Q: I don't have anything else for her.

9 EXAMINATION BY THE COURT:

10 THE COURT: All right. So, let me -- let me just be
11 clear. You weren't asked by the law enforcement any type of
12 law enforcement to conduct this interview?

13 A: No.

14 THE COURT: You were doing this is a regular course of
15 your insurance company duties?

16 A: Correct.

17 THE COURT: Thank you very much. Any argument about the
18 statement, Mr. Truslow?

19 MR. TRUSLOW: No, sir, I believe the argument about the
20 identity would be a question of fact for cross-examination,
21 not a legal issue, no, sir.

22 THE COURT: All right. Very good. See if the jury is
23 ready; they may take the opportunity to use the facilities, so
24 we'll wait for them to be ready.

25 They need to take a break, or they ready to come.

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

238

1 DEPUTY: They're finishing up.

2 THE COURT: I'm sorry, I didn't hear you.

3 DEPUTY: They're finishing up; yes, sir.

4 THE COURT: All right. Very good. Just whenever they're
5 ready to come in, just bring them in.

6 (REPORTER'S NOTE: Jury enters courtroom @ 2:45 p.m.)

7 THE COURT: All right, Solicitor, you may continue.

8 MR. DEBUSK: Thank you.

9 CONTINUED DIRECT EXAMINATION OF DEMI STEWARD-RISSO BY MR.

10 DEBUSK:

11 Q: Ms. Steward-Risso, at the time and date of this
12 interview, were you in any means an agent of law enforcement?

13 A: No.

14 Q: Were you doing this solely for the purpose of the
15 insurance company?

16 A: Yes.

17 Q: Okay. How did you conduct the interview, by what means?

18 A: Over the telephone.

19 Q: How did you identify the witness as the person you were
20 speaking to?

21 A: When the -- when I first conduct an interview, I ask the
22 person to whom I'm speaking to identify themselves by first
23 and last name; I ask them to spell their first and last name;
24 and ask them their address. Later on I get into asking them
25 to confirm their date of birth, as well as a driver's license

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

239

1 number or an ID number.

2 Q: Okay. So, you do take efforts to confirm you are talking
3 to the witness?

4 A: Correct; Uh-huh, (affirmative response).

5 Q: Now, did I leave that with you? Now, State's Exhibit 34
6 ---

7 MR. DEBUSK: Your Honor, we would move State's 34 into
8 evidence?

9 THE COURT: Any objection?

10 MR. TRUSLOW: I'm sorry, what is 34?

11 MR. DEBUSK: It's the excerpt from the full transcript.

12 MR. TRUSLOW: Hearsay.

13 THE COURT: I'm gonna allow it.

14 MR. DEBUSK: A statement of party opponent, Your Honor.

15 MR. TRUSLOW: I would just like to know which exception
16 he's going on?

17 MR. DEBUSK: Statement of party opponent.

18 THE COURT: I'm gonna allow it.

19 MR. TRUSLOW: May I put something on the record, Your
20 Honor? I don't believe it meets ---

21 THE COURT: All right. I'll have to send the jury out.

22 MR. TRUSLOW: All right.

23 THE COURT: Mr. Foreman, ladies and gentlemen of the
24 jury, go to your jury room, please. Leave your pads and pens.
25 Thank you. Always leave your pads and pens.

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

240

1 (REPORTER'S NOTE: Jury exits courtroom @ 2:46 p.m. The
2 following takes place outside the presence of the jury.)

3 THE COURT: All right. Go ahead, sir?

4 MR. TRUSLOW: Yes, sir. Your Honor, I'm reading *State v.*
5 *Gardner* -- *Garner*, which is 403 S.E.2d 631, 1999. A case
6 which says that previously where the declarant testified at
7 trial and was subject to cross-examination, a general rule was
8 prior statements made by a declarant or witness were
9 admissible regardless of the hearsay nature of the statements.
10 However, now it's subject to four exceptions and I -- and I'm
11 looking here, it says the exceptions are, the statement is not
12 hearsay if declarant testifies at the trial or hearing subject
13 to cross-examination, or it's inconsistent with the testimony,
14 or consistent with the declarant's testimony, but offered to
15 rebut an express or implied charge of recent fabrication, or
16 one of identification of person made after perceiving the
17 person, an issue by party opponent is d(2) under Rule 801 and
18 -- one second. All right. Well, and so the exception is
19 admission by a party opponent, is that what he's saying?

20 THE COURT: He's saying -- as I understand the state is
21 relying on 801(d)(2)?

22 MR. TRUSLOW: Yes, sir.

23 THE COURT: And I'm assuming they could be relying on
24 803(6).

25 MR. TRUSLOW: Right. What my position, Your Honor, would

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

241

1 be that the written statement he was wanting to put in
2 evidence is hearsay, not her saying what he said if she was in
3 the conversation and made a statement, but a statement that's
4 reduced to writing standing on its own, much like a drug
5 report was held to be hearsay many years ago and not put into
6 evidence, a written drug report. They would have to testify
7 as to the result. And so, he wants to put the statement into
8 evidence in writing on paper to the jury, and that document is
9 hearsay.

10 THE COURT: What's your argument, Solicitor?

11 MR. DEBUSK: Your Honor, the statement itself is not
12 hearsay because it falls outside of the definition of hearsay
13 under Rule 801(d)(2). Further the writing itself is an
14 exception to hearsay where the availability of the declarant
15 is immaterial under 803(6), records of regularly conducted
16 activity. In this case, the -- the witness is a adjuster,
17 that regularly conducts interviews. The records are kept of
18 those interviews and this is the record -- any prior
19 statement.

20 THE COURT: All right. If you're going to -- also
21 803(6), you probably need to examine the witness more about
22 their recordkeeping activity and that sort of thing. All
23 right?

24 MR. DEBUSK: Yes, Your Honor.

25 THE COURT: All right. So, assuming that to be the case,

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

242

1 I am gonna allow it under 801(d)(2) and 803(6).

2 Thank you very much.

3 MR. DEBUSK: Your Honor, if I may, also Rule 803(5), I
4 would argue that, because that implies the ---

5 THE COURT: All right. Very good, 803(5). Thank you.

6 MR. DEBUSK: Thank you, Your Honor.

7 THE COURT: Ask the jury to come back in.

8 Hold on one second. Before I do that, anything else you
9 need to take up right now?

10 MR. TRUSLOW: No, sir.

11 THE COURT: All right. Very good. All right. Bring
12 them back in. Thank you.

13 THE COURT: Solicitor, you have 803(5) in front of you?

14 MR. DEBUSK: Yes, Your Honor.

15 THE COURT: Look at the last sentence?

16 MR. DEBUSK: Understood, Your Honor.

17 THE COURT: All right. Very good.

18 MR. TRUSLOW: Judge, he needs to go to the restroom. He
19 can come back in while we're going; he knows that.

20 THE COURT: That's fine. You can go ahead and go, the
21 jury is coming in. That's fine, but he can go.

22 MR. DEBUSK: Your Honor, it is offered now as part of the
23 statement.

24 (REPORTER'S NOTE: Jury enters courtroom @ 2:52 p.m.)

25 THE COURT: Before we get started, ladies and gentlemen,

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

243

1 it's commonplace to have to send you to your jury room because
2 I told you at the very beginning, I'm not gonna make any
3 comments in front of you about what I believe the facts of
4 this case are, and discussing matters with the attorneys, I
5 may be expressing certain opinions or statements to them that
6 you should not hear. All right? That's why I had to send you
7 out. All right? Thank you very much.

8 You may continue, Solicitor.

9 MR. DEBUSK: Thank you.

10 BY MR. DEBUSK:

11 Q: Ms. Steward-Risso, when these interviews were done in the
12 course of your business, are they recorded?

13 A: They are, yes.

14 Q: And are they transcribed as part of the record keeping of
15 your company?

16 A: They are, yes.

17 Q: Okay. And, also, what's the reason that they record
18 these statements?

19 A: So, you can have them for referral purposes.

20 Q: So, you don't have to rely on your memory?

21 A: Correct.

22 MR. DEBUSK: Your Honor, we would offer ---

23 THE COURT: So, you now have offered 34 into evidence?

24 MR. DEBUSK: Yes, we'd offer 34 into evidence, Your
25 Honor.

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

244

1 MR. TRUSLOW: Yeah, I mean over the previous objection,
2 but I think the entire statement should go in, in the rule of
3 completeness.

4 THE COURT: You want ---

5 MR. TRUSLOW: The entire interview.

6 THE COURT: All right. So, I'm gonna allow 34 in
7 evidence over the objection of the defense, but I am requiring
8 that State's 35, the full and complete statement also go in at
9 this time.

10 MR. DEBUSK: May we approach?

11 THE COURT: Yes, sir.

12 (REPORTER'S NOTE: Bench conference is held off the record in
13 the presence of but outside the hearing of the jury.)

14 THE COURT: So, at the request of the defense, I'm
15 allowing in State's 35 and, as discussed at the bench, there
16 will be one redaction. Thank you very much.

17 MR. DEBUSK: Thank you, Your Honor.

18 STATE'S EXHIBITS NUMBER 34 AND 35

19 ADMITTED INTO EVIDENCE

20 MR. DEBUSK: From state's, Your Honor, may we pull
21 State's 34 and have the witness read from it?

22 THE COURT: Yes, sir.

23 BY MR. DEBUSK:

24 Q: Would you please read for the jury what that excerpt
25 says?

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - DIRECT BY DEBUSK

245

1 A: Okay.

2 Q: Who's asking the questions?

3 A: I'm the one asking the questions.

4 Q: Okay.

5 A: So, the first question was, What had you been drinking
6 that day? The response was, I drunk a couple of beers
7 earlier. I asked, What else? He said that was it. I asked,
8 There was a mention of a strawberry daiquiri; did you drink a
9 strawberry daiquiri? He says, Oh, yeah, on the beach, yes, I
10 had -- I had a little taste of one, but I ain't drunk a whole
11 daiquiri. I didn't drink the whole daiquiri. I had a couple
12 of beers while I was on the beach. I said, Around what time
13 did you drink these beers and the strawberry daiquiri? He
14 said, This happened at 4:00, referring to the accident. I had
15 drunk them about 12:00 P.M., 11:00 A.M., or 12:00 P.M. I
16 drunk one, drunk some 11:00 or 12:00. I know that it was in
17 the afternoon that I got in the car wreck, it was 4-something.
18 And then I asked what kind of liquor was in the strawberry
19 daiquiri, and that's the end of the excerpt.

20 Q: Okay. Thank you. I'm sorry.

21 A: Sorry. I'm sorry. So, I had asked what kind of liquor
22 was in the strawberry daiquiri. The response was, I don't
23 really know, I just took a couple of sips of it. I don't know
24 what all was in there. It was a smoothie daiquiri. I took a
25 couple of sips of it. I didn't drink much of that. And then

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - CROSS BY TRUSLOW

246

1 he says white rum.

2 Q: Please answer any questions the defense may have.

3 THE COURT: Cross-examination?

4 MR. TRUSLOW: Yes, Your Honor.

5 CROSS-EXAMINATION OF DEMI STEWARD-RISSO BY MR. TRUSLOW:

6 Q: Can you go back to what you just read? Okay. Did you
7 read this entire thing here?

8 A: I believe so, yes.

9 Q: Okay. And the entire interview, obviously this is an
10 excerpt from it, correct?

11 A: Correct.

12 Q: The rest of the interview is written as well?

13 A: Correct.

14 Q: Okay. And we'll put that into evidence later probably,
15 but that's all the questions I have for you.

16 A: Okay.

17 Q: Thank you, ma'am.

18 THE COURT: Any redirect?

19 MR. DEBUSK: No, Your Honor.

20 THE COURT: All right. Do you wish the witness to be
21 excused?

22 MR. DEBUSK: Yes, we do.

23 MR. TRUSLOW: No objection.

24 THE COURT: All right, ma'am, you are released from your
25 subpoena and may go back to your regular insurance duties.

State v. Atwater - 2019-GS-26-02899, 02900
DEMI STEWARD-RISSO - CROSS BY TRUSLOW

247

1 Thank you.

2 THE COURT: Counsel, y'all come up and talk to me for one
3 second, please.

4 (REPORTER'S NOTE: Bench conference is held off the record in
5 the presence of but outside the hearing of the jury.)

6 THE COURT: All right, ladies and gentlemen, y'all got a
7 break because I sent you out. They obviously didn't. They
8 were responding to my questions. So, with that, we'll just
9 take a short break and give them an opportunity to take a
10 break and we'll come back in in just a few minutes. All
11 right? Thank you very much.

12 Remember, pads and pens in the chair.

13 (REPORTER'S NOTE: Jury exits courtroom @ 2:59 p.m.)

14 THE COURT: All right. Take a short break about five
15 minutes or so and we'll come back. Thank you.

16 **RECESS @ 3:00 P.M.**

17 *****OFF THE RECORD*****

18 **ON THE RECORD @ 3:15 P.M.**

19 THE COURT: All right. Is the state ready for the jury
20 to come in?

21 MR. DEBUSK: Yes, Your Honor.

22 THE COURT: And defense?

23 MR. TRUSLOW: Yes, sir.

24 THE COURT: Ask the jury to come in, please.

25 (REPORTER'S NOTE: Jury enters courtroom @ 3:16 p.m.)

State v. Atwater - 2019-GS-26-02899, 02900
ADAM CZERWINSKI - DIRECT BY DEBUSK

248

1 THE COURT: All right, Solicitor, your next witness,
2 please.

3 MR. DEBUSK: The state calls Adam Czerwinski.

4 THE CLERK: Please raise your right hand and place your
5 left on the Bible.

6 ADAM CZERWINSKI, HAVING BEEN
7 DULY SWORN TESTIFIES AS FOLLOWS:

8 THE CLERK: Please be seated. State your full name for
9 the record and spell it, please.

10 MR. CZERWINSKI: Adam Czerwinski, C-Z-E-R-W-I-N-S-K-I.

11 THE COURT: Go ahead.

12 DIRECT EXAMINATION OF ADAM CZERWINSKI BY MR. DEBUSK:

13 Q: Mr. Czerwinski, who is your employer?

14 A: Grand Strand Medical Center.

15 Q: Okay. How long have you worked for Grand Strand?

16 A: Going on nine years.

17 Q: Okay. At this time, what do you do?

18 A: I'm the director of the surgical trauma ICU.

19 Q: What does the director do?

20 A: I oversee the unit operations of a 16-bed ICU that cares
21 for surgical and trauma patients.

22 Q: How about in April of 2019, what were your duties then?

23 A: I was a trauma nurse lead at the facility.

24 Q: What does a trauma nurse lead do?

25 A: They are the primary responders to trauma activations

State v. Atwater - 2019-GS-26-02899, 02900
ADAM CZERWINSKI - DIRECT BY DEBUSK

249

1 that present to our facility.

2 Q: Would that be people that come in with injuries from
3 accidents?

4 A: Correct.

5 Q: What's your training and background?

6 A: I'm a state licensed registered nurse, as well as
7 nationally certified in trauma, emergency care, and critical
8 care.

9 Q: As part of your duties as a trauma nurse, would you have
10 access to the medical records and help create medical records
11 for patients?

12 A: I would and do.

13 Q: Okay. Let me take you back to April 6th of 2019. Do you
14 recall a patient named David Schnell coming through your ER?

15 A: I do.

16 Q: What was his situation?

17 A: From a pre-hospital report I received that he and his
18 wife were in a motorcycle accident, and he had a -- most
19 notably from an EMS standpoint, had an open fracture of the
20 right lower extremities.

21 Q: Explain to the jury what an open fracture is?

22 A: It is a laceration overlaying a bone that is fractured,
23 where you can visually see that deformity.

24 Q: I'm sorry, but basically a fracture means broken, right?

25 A: Correct.

State v. Atwater - 2019-GS-26-02899, 02900
ADAM CZERWINSKI - DIRECT BY DEBUSK

250

1 Q: Now, there are two bones in the lower leg, are they not?

2 MR. TRUSLOW: Your Honor, I'm going to object for the
3 record. I don't know that he was qualified yet as an expert
4 for this testimony as a trauma nurse.

5 MR. DEBUSK: He's trained as a nurse, and it's a basic
6 question.

7 THE COURT: I appreciate that, so, just go through some,
8 his experiences and his training as a nurse to allow him to
9 identify body parts.

10 MR. DEBUSK: Yes, Your Honor.

11 BY MR. DEBUSK:

12 Q: What is your background and education for nursing?

13 A: Four years of nursing education, as well as advanced
14 anatomy and physiology.

15 Q: Is that a course that's ---

16 A: Yes, that's part of the nursing curriculum.

17 Q: Yes, sir. As part of your regular training and your
18 advanced anatomy and physiology, did you learn the bones and
19 organs of the body?

20 A: Correct.

21 Q: Can you tell this jury how many bones are in the lower
22 leg of a human being?

23 A: Well, one in the thigh region; two in the lower region.

24 Q: I'm speaking from the knee to the ankle?

25 A: Two.

State v. Atwater - 2019-GS-26-02899, 02900
ADAM CZERWINSKI - DIRECT BY DEBUSK

251

- 1 Q: Okay. So, it's a double bone basically?
- 2 A: Correct.
- 3 Q: On Mr. Schnell, one or two bones; were both of those
- 4 bones broken or just one?
- 5 A: Both of them were broken, yes.
- 6 Q: Was there any other injury to the lower leg?
- 7 A: Yeah, it was, I believe a dislocation of the ankle.
- 8 Q: What other injuries did Mr. Schnell suffer?
- 9 A: Outside of the leg?
- 10 Q: Outside of the leg?
- 11 A: Left maxillary fracture, which is above the upper jaw.
- 12 Q: The upper jaw?
- 13 A: Correct.
- 14 Q: Okay.
- 15 A: He had left fifth through ninth rib fractures.
- 16 Q: The ribs?
- 17 A: The ribs, yeah, responsible for expansion of and
- 18 inspiration of your lungs, and then right fifth through eighth
- 19 rib fractures, and then numerous abrasions over his body.
- 20 Q: Were there any injuries to the shoulder area?
- 21 A: Sorry, yes; right clavicle.
- 22 Q: What's a clavicle?
- 23 A: It supports the shoulder and connects to the sternum.
- 24 Q: If that's what's normally called a collarbone?
- 25 A: Yes, a collarbone.

State v. Atwater - 2019-GS-26-02899, 02900
ADAM CZERWINSKI - DIRECT BY DEBUSK

252

1 Q: Okay. What kind of treatment -- in the emergency
2 department where you were, what kind of treatment did Mr.
3 Schnell require?

4 A: So, when a trauma patient presents, we do a advanced
5 trauma survey looking at the things that are most likely to
6 cause harm to a patient and prevent them from deteriorating or
7 getting worse. From a radiographic standpoint, we did a
8 number of images of his chest, pelvis, and right lower
9 extremity. And then also did CT images, computed tomography
10 to look at the internal -- possible internal injuries, and
11 then from a treatment standpoint, we did a -- attempted a
12 reduction of that right lower extremity.

13 Q: What does that mean?

14 A: We tried to put it back in place.

15 Q: Okay. Was that done in surgery?

16 A: No, that was first attempted in the emergency room.

17 Q: With both -- both the bones broken, would further
18 treatment be required for that?

19 A: Correct.

20 Q: The kind injury they would normally put in an implant?

21 A: Yes.

22 Q: Is the healing time for that generally longer?

23 A: Depending on the patient and injury, yes.

24 Q: When Mr. Schnell was treated in the emergency room, where
25 was he sent to next?

State v. Atwater - 2019-GS-26-02899, 02900
ADAM CZERWINSKI - DIRECT BY DEBUSK

253

1 A: PACU which is a staging area for the OR, Post Anesthesia
2 Care Unit, and then he was taken to the operating room with
3 our orthopedic traumatologist.

4 Q: And he was admitted to the hospital after the surgery?

5 A: Yes.

6 Q: Do you know when he left the hospital?

7 A: I believe it was the 19th, which is 13 or 14 days.

8 Q: So, two weeks in the hospital?

9 A: Yes.

10 Q: Please answer any questions the defense may have?

11 MR. TRUSLOW: No questions, Your Honor.

12 THE COURT: All right. Do you wish the witness to be
13 excused?

14 MR. DEBUSK: We do, Your Honor.

15 MR. TRUSLOW: No objection.

16 THE COURT: All right, sir, you're released from your
17 subpoena and may go back to your regular duties. Thank you.

18 MR. CZERWINSKI: Thank you, Your Honor.

19 THE COURT: All right, solicitor, who is your next
20 witness?

21 MR. DEBUSK: Officer Steve Ostin of North Myrtle Beach.

22 THE COURT: All right, sir, just come all the way around
23 and come up front next to the clerk's representative.

24 THE CLERK: Please raise your right and place your left
25 on the Bible.

THE CLERK: Please be seated and state your full name for the record and spell it, please.

MR. OSTIN: My name is Steven Mark Ostin; S-T-E-V-E-N, M-A-R-K, O-S-T-I-N.

THE COURT: Go ahead, Solicitor.

DIRECT EXAMINATION OF STEVEN MARK OSTIN BY MR. DEBUSK:

Q: Officer Ostin, I see a stripe on your sleeve there;
what's your rank?

A: PFC, Patrolman First Class, sir.

Q: What are your duties at this time?

A: I'm a patrol officer.

Q: How about in April of 2019, what were your rank and duties back then?

A: I was a patrol officer as well.

Q: Okay. How long have you been with North Myrtle Beach Police Department?

A: Approximately four-and-a-half years.

Q: Okay. As a patrol officer, what were your duties back in April of 2019?

A: Respond to most calls for service. I used to the first on scene and basic investigation of the calls.

Q: About April 6th, 2019, did you respond to the area of the Circle K on Highway 17 and 45th South?

State v. Atwater - 2019-GS-26-02899, 02900
STEVEN MARK OSTIN - DIRECT BY DEBUSK

255

1 A: Yes, sir.

2 Q: What county is that in?

3 A: Horry County.

4 Q: Okay. Let me show you what's been marked as State's

5 Exhibit 2 and ask if you recognize that.

6 A: Yes, sir.

7 Q: Is that the area?

8 A: Yes, sir.

9 Q: What was the nature of the call you responded to?

10 A: Motor vehicle collision.

11 Q: Okay. Do you recall what time you arrived?

12 A: Late in the afternoon, roughly before 5 o'clock, I

13 believe, sir.

14 Q: Let me ask you this, do you know Officer Shick?

15 A: Yes, sir.

16 Q: Is Officer Shick in the courtroom here today?

17 A: Yes, sir.

18 Q: Is he sitting on the front row?

19 A: Yes, sir.

20 Q: How long had you been there when Officer Shick arrived?

21 A: Less than five minutes.

22 Q: Okay. When you arrived, what did you find?

23 A: I saw a motor vehicle collision with a motorcycle that

24 had been damaged and two people on the ground.

25 Q: What did you do?

State v. Atwater - 2019-GS-26-02899, 02900
STEVEN MARK OSTIN - DIRECT BY DEBUSK

256

1 A: I initially assessed the two victims and then met with
2 the other vehicle that was involved and spoke with the
3 occupants.

4 Q: Now, the two victims, was anybody aiding them when you
5 arrived?

6 A: Yes, sir. Ms. Schnell was getting CPR, and then her
7 husband was being aided on the ground as well.

8 Q: Now, were these EMS people that were aiding them or were
9 these bystanders?

10 A: Bystanders at that time.

11 Q: Okay. And were you able to determine when you arrived
12 how many vehicles had been involved in the accident?

13 A: Two vehicles; a motorcycle and a separate vehicle that
14 caused the collision.

15 Q: Okay. What did you do after you checked on the -- the
16 victims on the ground?

17 A: I met with the driver and the occupants of the other
18 vehicle that was involved.

19 Q: Did someone identify themselves as the driver?

20 A: Yes, sir.

21 Q: Who was that?

22 A: Yarisbeth Espada.

23 Q: Okay. What did you do when you talked to her?

24 A: I spoke with her, asked her the version of events and
25 made sure that her and the other occupants were not injured as

State v. Atwater - 2019-GS-26-02899, 02900
STEVEN MARK OSTIN - DIRECT BY DEBUSK

257

1 well.

2 Q: Did you get identification?

3 A: Yes, sir.

4 Q: What happened next?

5 A: Officer Shick arrived on the scene, and I believe he took

6 over the investigation from there.

7 Q: Did you pass on to him the information you had received?

8 A: Yes, sir.

9 Q: Were there witnesses at the scene as well?

10 A: Yes, sir.

11 Q: Did you talk to the witnesses?

12 A: Yes, sir.

13 Q: Okay. Did you pass that information on to Officer Shick?

14 A: Yes, sir.

15 Q: What did you do for the rest of the time you were on the

16 scene?

17 A: Stood by. I think I took some witness statements and

18 then I helped secure the scene from traffic.

19 Q: Okay. Was there a lot of traffic at that time of day?

20 A: Yes, sir.

21 Q: Was this on a busy thoroughfare, Highway 17?

22 A: Yes, sir.

23 Q: Is it in fact, is that the main thoroughfare through

24 North Myrtle Beach?

25 A: Yes, sir; it is.

State v. Atwater - 2019-GS-26-02899, 02900
STEVEN MARK OSTIN - DIRECT BY DEBUSK

258

1 Q: Okay. So, you helped direct the traffic around the --
2 where were the injured individuals?

3 A: Still partly laying in the roadway.

4 Q: Where in the roadway?

5 A: In the northbound lanes of Highway 17.

6 Q: Do you recall that -- please answer any question defense
7 might have.

8 MR. TRUSLOW: No cross, Your Honor.

9 THE COURT: All right. Very good. All right, do you
10 wish the witness to be excused?

11 MR. DEBUSK: Yes, Your Honor.

12 MR. TRUSLOW: No objection.

13 THE COURT: All right, sir, you're released from your
14 subpoena and may go back to your regular duties. Thank you,
15 sir.

16 All right. Next witness, please?

17 MR. DEBUSK: Your Honor, the state calls Officer
18 Christopher Shick.

19 THE COURT: All right, sir, please come around to be
20 sworn.

21 THE CLERK: Please raise your right hand and place your
22 left on the Bible.

23 CHRISTOPHER SHICK, HAVING BEEN DULY
24 SWORN TESTIFIES AS FOLLOWS:

25 THE CLERK: Please be seated. State your full name for

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

259

1 the record and spell it, please.

2 MR. SHICK: My name is Lance Corporal Christopher Shick,
3 spelled S-H-I-C-K.

4 DIRECT EXAMINATION OF CHRISTOPHER SHICK BY MR. DEBUSK:

5 Q: Officer Shick, who is your employer?

6 A: I work for the City of North Myrtle Beach Department of
7 Public Safety.

8 Q: What are your duties?

9 A: I'm a police officer for the agency, assigned to traffic
10 investigation or travel detail.

11 Q: All right. I notice you're wearing a pair of well-shined
12 boots; do you -- what kind of vehicle do use?

13 A: I ride a motorcycle, sir.

14 Q: Okay. How about in April of 2019?

15 A: I was operating in the same capacity as I do today.

16 Q: How long have you been with the North Myrtle Beach PD?

17 A: Seventeen years this month, sir.

18 Q: Okay. Were you on duty on April 6th, 2019?

19 A: I was.

20 Q: Did you respond to Highway 17 and 45th South?

21 A: I did, for motor vehicle accident involving a motorcycle.

22 Q: Do you recall what time you arrived?

23 A: I do. I arrived on scene at approximately, 1646, which
24 is 4:46 p.m.

25 Q: What time was the dispatch of the call?

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

260

1 A: I was dispatched to the call at 16:40, which is 4:40 p.m.

2 Q: Okay. What was your role when you arrived on the scene?

3 A: As a traffic investigator for the department, generally I
4 take over the investigations for crashes. So, when I arrived
5 on scene, my assigned duties for this call was to investigate
6 the crash and complete the crash report.

7 Q: Now, when you arrived on the scene, what did you do?

8 A: When I first arrived on the scene, I parked my motorcycle
9 in the median, the open median, we call it Lane 0, and with my
10 emergency lights on and donned my traffic vest, because I was
11 going to be working the roadway. Immediately when I was
12 scene, either a fire or EMS personnel advised me that there
13 was ---

14 Q: Don't tell me what they told you, but did you consult
15 with the fire personnel?

16 A: I did; yes, sir.

17 Q: Did you consult with some civilian witnesses as well?

18 A: I did. There were numerous witnesses in the roadway and
19 in the area; yes, sir.

20 Q: Did you consult with Officer Steve Ostin?

21 A: I did; yes, sir.

22 Q: Okay. based on -- on what you heard from them, what did
23 you do?

24 A: Based on what I was told, I began to investigate which
25 vehicles were involved in the crash and to determine who was

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

261

1 operating those vehicles and occupying those vehicles.

2 Q: Okay. What -- what did you determine?

3 A: My initial investigation, I was presented with
4 information from Steve Ostin on scene about which vehicles
5 were involved. There was a motorcycle that was damaged and
6 crashed with two patients laying on the roadway. Mr. Schnell
7 was identified as the driver of that, and Ms. Schnell was
8 identified as the passenger that was on the motorcycle.

9 Q: When you arrived, were people trying to aid them?

10 A: They were. They were both receiving medical care when I
11 got on the scene.

12 Q: To your knowledge, how did Mr. Schnell leave the scene?

13 A: He was transported via ambulance.

14 Q: Okay. Would he have gone to Grand Strand Regional
15 Medical Center?

16 A: Yes, sir, that is correct.

17 Q: And what happened to Ms. Schnell, Ms. Donna Schnell?

18 A: Ms. Schnell was pronounced deceased on the scene.

19 Q: After you checked on the motorcycle occupants, what did
20 you do next?

21 A: At that point, I went over and made contact with the
22 second vehicle that was involved in the crash and the
23 occupants in that.

24 Q: What was the second vehicle, what kind?

25 A: It was blue Mercury; I believe it was a Grand Marquis.

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

262

1 Q: I noticed you looked down when you answered that; what
2 are you looking at?

3 A: I have my collision report in front of me for reference.

4 Q: So, you refreshed yourself from your report?

5 A: Yes, sir; that's correct.

6 Q: Okay. The blue Mercury, did you speak to the person who
7 presented themselves as the driver?

8 A: I did.

9 Q: Based on that interview, did you speak to anyone else?

10 A: I did. I also spoke to the passenger, front passenger.

11 Q: Who was that?

12 A: The front passenger was the defendant, Mr. Atwater.

13 Q: Why did you speak to him?

14 A: The result of the investigation was leading me in the
15 direction that Mr. Atwater was the driver of the Mercury at
16 the time of the crash.

17 Q: What did you do when you spoke with Mr. Atwater?

18 A: I conducted an interview with Mr. Atwater. When I first
19 made contact with him, he was seated in the front passenger
20 seat of the Mercury, and in the midst of our conversation,
21 another female that was involved in that vehicle, Ms. Espada
22 was standing in the area. She stated she wasn't feeling well
23 and sat down in the driver's seat. So, at that point, I asked
24 Mr. Atwater to exit the vehicle and moved him to the rear, so
25 I could conduct my interview with him in private away from

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

263

1 other interruptions, and at the back of the car, we continued
2 our interview about the incident that took place. During that
3 interview, he was giving me information that he was not the
4 driver and that somebody else was. I had belief at that
5 point, based upon statements from witnesses ---
6 Q: Don't tell us what the witnesses said.
7 A: I won't. I had believed at that point that he was the
8 driver, and he was giving me false information. Based upon
9 that, I Mirandized him.
10 Q: What -- what does Mirandized mean? I know when I watch
11 T.V., I can ---
12 A: I issued him his Miranda warnings, which is a set of
13 warnings about his rights before any questioning. He stated
14 that he understood those.
15 Q: Everyone has heard this a hundred times, what are those?
16 A: You have the right to -- generally, so when I operate on
17 the road, I carry a Miranda card inside of my shirt pocket,
18 and I read that Miranda warnings directly off of my card, so I
19 read them the same every time. I'm in my dress uniform today,
20 and I don't have a Miranda card in my dress uniform because
21 it's in my duty uniform.
22 Q: How does it start?
23 A: It starts off you have the right to remain silent.
24 Anything you say can and will be used against you in a court
25 of law.

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

264

1 Q: Just like on T.V.?

2 A: Yes, just like on T.V.

3 Q: Let me ask you, do you wear a body-worn camera while you
4 were on patrol back in 2019?

5 A: Yes, sir; I do.

6 Q: At this time, when you arrived at the scene, was your
7 camera working?

8 A: It was.

9 Q: Or was it on?

10 A: When I arrived on scene, I activated it as I was putting
11 on my traffic vest, yes, sir.

12 Q: Okay. Was it activated during the time you talked to Mr.
13 Atwater?

14 A: Yes, sir; it was.

15 Q: After you Mirandized him, what happened?

16 A: After I Mirandized him, during out interview, he and the
17 passenger or the female that was seated in the driver's seat,
18 started to have side conversation while I was trying to
19 conduct my interview with him, where I was unable -- or I felt
20 I was unable to continue that interview because of their side
21 conversation. At that point, he was placed in investigative
22 detention.

23 Q: What does that mean?

24 A: I stood him up and placed him in handcuffs, placed him in
25 what we call investigative detention to prevent his movements,

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

265

1 and I removed him from that -- from that particular position
2 behind the car and escorted him to a patrol car where I could
3 continue the interview away from distractions.

4 Q: Did the story he was telling you part of the reason that
5 he was placed in investigative detention?

6 A: Yes, sir; correct.

7 Q: Okay. How -- let me ask you to step back a moment. Are
8 you trained in accident investigation?

9 A: Yes, sir; I am.

10 Q: What -- what is your background in accident
11 investigation?

12 A: I've been assigned to our traffic unit since December of
13 2010. In that time period, I've attended the South Carolina
14 Criminal Justice Academy. I have over 350 hours of accident
15 investigation including at scene, technical reconstruction,
16 and collision reconstruction; those are all courses the
17 academy teaches to recreate crash scenes. I also have
18 motorcycle collision investigation training, and pedestrian
19 collision investigation training.

20 Q: At the time you placed Mr. Atwater in investigative
21 detention, based on your experience and your training, was the
22 vehicle at the location of the crash -- the Mercury, was the
23 Mercury at the location of the collision.

24 A: It was not in the location of the impact of the crash,
25 no, sir.

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

266

1 Q: Okay. Was that also part of the reason you placed him in
2 investigative detention?

3 A: It was; yes, sir.

4 Q: Okay. After you placed him investigative detention, what
5 did you do?

6 A: At that point, I moved him to the patrol car, where I
7 could have ---

8 Q: Whose patrol car?

9 A: I believe it was Officer Ostin's.

10 Q: Patrol car?

11 A: It was the closest patrol car to where I was conducting
12 this interview. Obviously, I don't -- I'm on a motorcycle, so
13 I don't have a cage or a patrol car to seat him in. So, I
14 placed him in Officer Ostin's car, and at the time, my
15 recollection was I as unable to complete Miranda behind his
16 car, or I did not complete that process. So, in an interest
17 of making sure I was issuing him his rights, I re-Mirandized
18 him off of my card, and explained his Miranda rights, which he
19 waived and stated he understood.

20 Q: I have to ask you a difficult question, but at that time,
21 did you have a sense of smell?

22 A: I did not.

23 Q: Is there a reason?

24 A: There is; yes, sir.

25 Q: Is it a medical condition?

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

267

1 A: It is.

2 Q: So, you can't smell anything at all?

3 A: I cannot.

4 Q: So, you can't tell us a smell of alcohol, cigarettes, or
5 anything?

6 A: I would have no idea, sir. In July of 2018 I had to have
7 cancer surgery, which gave me the neat scar I have across the
8 top of my head, and as a result of that, they removed the
9 gland that allows me to smell, so I have no sense of smell.

10 Q: When you continued questioning him at the back of the
11 car, did the story change?

12 A: It did; yes, sir.

13 Q: What did he tell you that time?

14 A: In the backseat of the car, at that point, post-Miranda,
15 he admitted to being the driver of the incident -- at the time
16 of the incident he was driving the car at the time of the
17 crash. And when I asked him why he drove, he gave me a reason
18 why he was driving.

19 Q: Okay. Once again, your body camera was on at this time?

20 A: It was; yes, sir.

21 Q: Where is the body-worn camera now?

22 A: I have it on my uniform shirt about where my tie is there
23 between the two shirt pockets.

24 Q: Let me show you what's been marked as State's Exhibit 28
25 and ask if you recognize that?

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

268

1 A: Yes, sir, it's my body worn camera CD that I viewed and
2 initialed with my initials.

3 Q: Is that the CD that you reviewed and signed a fair and
4 accurate copy of the recording of your body-worn camera?

5 A: Yes, sir;, it is.

6 Q: Does it contain the interview we just spoke about?

7 A: It does.

8 Q: At this time, the state would move State's 28 into
9 evidence and ask to publish it to the jury?

10 THE COURT: Any objection?

11 MR. TRUSLOW: No, sir.

12 THE COURT: All right, sir. It's into evidence without
13 objection.

14 STATE'S EXHIBIT NUMBER 28

15 ADMITTED INTO EVIDENCE

16 MR. TRUSLOW: Well, Your Honor, I should say pursuant to
17 pretrial motions and rulings.

18 THE COURT: All right. Then the Court will admit it over
19 the objection of the defense consistent with the pre-trial
20 ruling. Thank you very much.

21 MR. DEBUSK: Your Honor, as previously because of the
22 difficulty with the portable player, we've copied the contents
23 of this disc for the publication.

24 THE COURT: Is that marked with the court reporter?

25 MR. DEBUSK: Yes, Your Honor, State's Exhibit 28.

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

269

1 THE COURT: All right. Very good.

2 (REPORTER'S NOTE: State's 28 published for the Court. Audio
3 not transcribed herein.)

4 BY MR. DEBUSK:

5 Q: Officer Shick, what is the yellow band across the screen?

6 A: Yellow is my traffic vest. It zips up in the front, so
7 because of the new things with bodycams, I can only zip it up
8 part of the way, so as I move sometimes, it covers the camera.

9 Q: Thank you.

10 A: Yes, sir.

11 (REPORTER'S NOTE: Continuing publishing State's 28 to the
12 jury. Audio not transcribed herein.)

13 BY MR. DEBUSK:

14 Q: Officer Shick, at end of that statement, did the
15 defendant tell you that his license was suspended?

16 A: He did.

17 Q: Now, was he ultimately placed under arrest at the scene?

18 A: He was; yes, sir.

19 Q: For what charge?

20 A: For driving under suspension and DUI.

21 Q: Now, did you confirm his suspension?

22 A: I did. So, when I first made contact with Mr. Atwater at
23 the passenger seat of the suspect vehicle, I asked for his
24 identification. He provided me with a North Carolina
25 Identification Card, not a driver's license. That was my

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

270

1 first indication that he may not have a valid license. After
2 this video portion here ended, at that point, I did confirm
3 through NCIC, utilizing my dispatch, the status of his
4 driver's license and the status of North Carolina, and they
5 advised he was suspended.

6 Q: What's NCIC?

7 A: The National Criminal Information Center. It's a
8 national computer system that police use to check statuses,
9 tags, driver's license, wants and warrants on folks and
10 property.

11 Q: We've already discussed the fact that you couldn't smell
12 at that point. Did there come a time when you suspected
13 alcohol use?

14 A: No. My purpose in the case at the time was I was trying
15 to determine who the driver of the car was.

16 Q: But at the time, based on the totality of the
17 investigation of other officers, did you come to ---

18 A: Yes.

19 Q: Okay. Were what's called field sobriety tests performed
20 at the scene?

21 A: Field sobriety tests were not performed at the scene.

22 Q: Why not?

23 A: For a culmination of reasons that were determined between
24 myself and the acting supervisor, Officer Hale, who was on the
25 scene. Mainly because Mr. Atwater was already in handcuffs

State v. Atwater - 2019-GS-26-02899, 02900
CHRISTOPHER SHICK - DIRECT BY DEBUSK

271

1 and secured in the back of a patrol car. We were on a busy
2 highway, Highway 17. It was on ---

3 Q: Were you in fact in the middle of a busy highway?

4 A: Matter of fact, we were in the dead middle; we were in
5 the median or Lane 0. There was a lot of traffic, a lot of
6 emergency personnel around. It was a Saturday afternoon; it
7 was moderate to heavy traffic at the time of the incident, and
8 like I say, he was already in handcuffs.

9 Q: Okay. Now, during the course of this, you told me you
10 were trained in accident investigation. During the course of
11 this, did you request assistance from what's called the MAIT
12 from highway patrol?

13 A: Yes, sir; I did. Generally, when we have a felony DUI or
14 a felony hit-and-run case, MAIT is experts in that field, and
15 they come to assist us with our investigations. They have
16 more resources, equipment, to utilize for that investigation.

17 Q: Thank you. Please answer any questions the defense may
18 have.

19 A: Yes, sir.

20 THE COURT: Cross-examination?

21 MR. TRUSLOW: No, Your Honor.

22 THE COURT: All right. You may step down, sir.

23 MR. SHICK: Thank you, Your Honor.

24 THE COURT: All right. Who is next, Solicitor?

25 MR. DEBUSK: Your Honor, may we approach?

State v. Atwater - 2019-GS-26-02899, 02900
ERIC EASON - DIRECT BY HARTE

272

1 THE COURT: Sure.

2 (REPORTER'S NOTE: Bench conference is held off the record in
3 the presence of but outside the hearing of the jury.)

4 THE COURT: All right, Solicitor, call your witness.

5 MS. HARTE: Your Honor, at this time the state calls Dr.
6 Eric Eason to the stand.

7 THE COURT: Please come all the way around up front,
8 please, sir.

9 THE CLERK: Raise your right hand and place your left
10 hand on the Bible.

11 ERIC EASON, HAVING BEEN DULY SWORN

12 TESTIFIES AS FOLLOWS:

13 THE CLERK: Please be seated. State your full name for
14 the record and spell it, please.

15 DR. EASON: First name, Eric, E-R-I-C; last name Eason,
16 E-A-S-O-N.

17 THE COURT: Go ahead, Solicitor.

18 DIRECT EXAMINATION OF ERIC EASON BY MS. HARTE:

19 Q: Dr. Eason, are you a duly licensed physician and surgeon?

20 A: Yes.

21 Q: In which states?

22 A: South Carolina and Illinois.

23 Q: Okay. And how long have you been licensed to practice in
24 your profession?

25 A: In South Carolina, I received my license in 1998. And

State v. Atwater - 2019-GS-26-02899, 02900
ERIC EASON - DIRECT BY HARTE

273

1 then in Illinois, it would have been 2013.

2 Q: Okay. And are you presently engaged in the practice of
3 your profession and currently working?

4 A: Yes.

5 Q: Okay. And where are you currently working?

6 A: I currently work for myself. I was working in Chicago as
7 a medical examiner, and then when COVID hit, I moved back down
8 to Charleston, my hometown, and formed my own business and I
9 do consult work in forensic pathology now.

10 Q: Okay. And where did you receive your medical training?

11 A: I received my medical degree from the Medical University
12 of South Carolina in Charleston and that was in 1998. I then
13 -- you want me to go through my training ---

14 Q: Sure.

15 A: --- or keep going? All right. I then spent a year in
16 Columbia, South Carolina at the University of South Carolina.
17 I completed an internship in family medicine. During that
18 year I decided to switch specialties, so I moved back to
19 Charleston. And then from 1999 to 2003, I completed my
20 pathology residency at MUSC. During those four years, I
21 decided to sub-specialize in forensic pathology. So, in 2003,
22 I moved to Atlanta, and that next year completed my forensic
23 pathology fellowship at the Fulton County Medical Examiner's
24 Office through Emory University. And then when that was
25 finished in June of 2004, the next day I started work at the

State v. Atwater - 2019-GS-26-02899, 02900
ERIC EASON - DIRECT BY HARTE

274

1 Georgia Bureau of Investigation.

2 Q: Okay. And does your work include the performance of
3 autopsies?

4 A: Yes.

5 Q: Okay. And how many autopsies would you say you've
6 performed over the course of your career?

7 A: At least 3,000.

8 Q: Okay. And do you specialize in any particular branch or
9 field of medicine?

10 A: Forensic pathology.

11 Q: Okay. And would you tell us what pathology involves?

12 A: Yes. So, pathology is specialty of medicine. We are
13 doctors, medical doctors -- we go to medical school -- that
14 are more behind the scenes type doctors. We don't actually
15 see patients, but what we do is we study the disease process
16 via analyzing tissue and bodily fluids from patients, and then
17 we'll report back to the clinician. A sub-specialty of
18 pathology is forensic pathology and that's where we examine
19 someone who has died unexpectedly or suddenly or the death is
20 suspicious, and the goal of that is to determine the cause of
21 death and the manner of death.

22 Q: Okay. And are you a member of any specialized medical or
23 scientific groups or associations?

24 A: Yes. College of American Pathologists, they're a
25 national group containing pathologists like myself; and then

State v. Atwater - 2019-GS-26-02899, 02900
ERIC EASON - DIRECT BY HARTE

275

1 the American Academy of Forensic Sciences that focuses more on
2 the scientific aspects of forensic sciences. So, it's going
3 to include individuals who examine fingerprints and do DNA
4 testing, but there's also a branch that includes forensic
5 pathologists like myself.

6 Q: And can you tell us what the American Board of Pathology
7 is?

8 A: That is a certification board. Every doctor that
9 graduates med school will go through a residency, and then
10 they have to take a board exam through the American Board of
11 Pediatrics, or Gynecology or something like that. And it's
12 essentially, you finish your residency, you take a test; and
13 then if you pass the test, you become board certified; and
14 then you have to take the test like every ten years to become
15 recertified.

16 Q: Okay. And have you been qualified in a court of law as
17 an expert in pathology?

18 A: Yes.

19 MS. HARTE: Your Honor, at this time, the state moves to
20 enter Dr. Eason as an expert in forensic pathology.

21 THE COURT: Do you wish to voir dire the witness or
22 challenge his qualifications?

23 MR. TRUSLOW: No, Your Honor.

24 THE COURT: All right. Very good.

25 MR. TRUSLOW: No objection.

State v. Atwater - 2019-GS-26-02899, 02900
ERIC EASON - DIRECT BY HARTE

276

1 THE COURT: All right. He is qualified to give his
2 opinion in the field of forensic pathology.

3 You may proceed.

4 MS. HARTE: Thank you, Judge.

5 BY MS HARTE:

6 Q: Dr. Eason, have you had the opportunity to review the
7 records of the anatomical pathology autopsy of Ms. Donna Marie
8 Schnell?

9 A: Yes.

10 Q: Okay. You didn't perform that autopsy, correct?

11 A: Correct.

12 Q: Okay. Who did perform that autopsy?

13 A: I have that Dr. Edward L. Proctor performed the autopsy
14 back in 2019.

15 Q: Okay. And could you please tell the Court why Dr.
16 Proctor isn't here today to testify?

17 A: I'm testifying as a surrogate because what I've been told
18 is that Dr. Proctor apparently is on medical leave, apparently
19 caught COVID back in February and has been unable to testify
20 since then. So, I'm testifying as a surrogate on his behalf.

21 Q: Okay. And have you ever been in this position before,
22 testifying on an autopsy and its findings, one in which you
23 didn't perform yourself?

24 A: Several times. In residency at MUSC, I testified in
25 several cases. That's how I got my first experience

State v. Atwater - 2019-GS-26-02899, 02900
ERIC EASON - DIRECT BY HARTE

277

1 testifying in the courtroom in Georgia. I did it a couple of
2 times for a doctor who may have been on vacation. And this is
3 probably my fourth time, I think up here in Conway. I've been
4 doing this for Dr. Proctor for a couple of months now.

5 Q: Okay. And where and when was Ms. Schnell's autopsy
6 performed?

7 A: I have a complete autopsy was performed of the decedent
8 at Grand Strand Regional Medical Center autopsy facility on
9 April 8th, 2019.

10 Q: Okay. And what external injuries were apparent on Ms.
11 Donna Schnell's body?

12 A: I have here that there was a bruise or a contusion on the
13 right eye area. I have there was blood -- bloody discharge
14 from the nose, and then I recall on the photographs seeing
15 some lacerations on the ---

16 Q: Can you explain to the jury what that word means, please?

17 A: Right. So, we're talking about blunt force trauma and
18 there's really three main types of injuries that can occur on
19 the outside of the body due to blunt force trauma. Blunt
20 force trauma is when a solid object hits the body or the body
21 hits a solid object, or some combination of that. So, you end
22 up with bruises or contusions and that's -- we've all had
23 those before. That's where something hits the body and blood
24 will start to dissipate out to the skin. That scratch or
25 scrape from skinning your knee or something like that, and

State v. Atwater - 2019-GS-26-02899, 02900
ERIC EASON - DIRECT BY HARTE

278

1 then the third one is a laceration, which is actually a tear
2 of the skin. So, something solid hits the body and tears the
3 skin open. It looks like a stab wound, but it's not, it's
4 actually a tear or laceration.

5 Q: Okay. And what about internally, what injuries were
6 apparent internally on Ms. Schnell's body?

7 A: I have that the main internal injuries were to the head.
8 I have multiple fractures of the calvarium, it's just the
9 fancy name for the skull. And then there was a very large
10 fracture of the base of the skull. And then the pictures show
11 a bleeding on the brain -- it would be called a subarachnoid
12 hemorrhage, is the fancy name for it -- but it was severe
13 brain damage, severe skull damage as well.

14 Q: Okay. And were these injuries to the head external and
15 internal and/or both?

16 A: Just internal.

17 Q: Okay. And what would be the consequences of a such an
18 injury?

19 A: Those are lethal; especially the base of the skull
20 fracture, that is a lethal injury.

21 Q: Okay. And then, of course, reviewing this autopsy or in
22 the course of performing autopsies, do you check the victim
23 for presence of potentially intoxicating substance, like drug
24 or alcohol?

25 A: Yes. In motor vehicle crash cases, that's typically the

State v. Atwater - 2019-GS-26-02899, 02900
ERIC EASON - DIRECT BY HARTE

279

1 standard to draw tox to see if the individual who died was on
2 any drugs or alcohol or anything like that. And so, we will
3 run tox on that and I can go through the results.

4 Q: All right.

5 A: So, I have the ethanol was at 94 or .09 would be the, I
6 think, the legal way to describe it. .08 is legally
7 intoxicated in South Carolina to my knowledge. I moved back
8 here about a year ago, so I can't remember. And then I have
9 caffeine was present, and then I also have this chemical known
10 as Trazadone, which is an anti-depressant and also a -- it
11 will help you go to sleep.

12 Q: That's what I wanted to ask you about. Is -- what is
13 Trazadone and why is it generally prescribed to someone?

14 A: So, you have -- it's an atypical antidepressant
15 prescribed for major depression. It's also prescribed as a
16 sleeping pill, too.

17 Q: Okay.

18 A: For people who are depressed.

19 Q: And was the amount of Trazadone found in Ms. Schnell's
20 system considered within therapeutic use?

21 A: I have the result was .24 micrograms per milliliter, and
22 I have that the normal dose ranges from .8 to .3, and I have
23 3.1 as well. It appears to be in the therapeutic range.

24 Q: Okay. Would it appear to be maybe underneath the
25 therapeutic range?

State v. Atwater - 2019-GS-26-02899, 02900
ERIC EASON - DIRECT BY HARTE

280

1 A: You could say that, yeah.

2 Q: Okay. And based on that particular autopsy, within the
3 bounds of reasonable medical certainty, Dr. Eason, what is
4 your medical expert opinion for concerning the cause of death
5 of Ms. Donna Schnell?

6 A: Can I explain what cause of death is versus manner?

7 Q: Absolutely.

8 A: Sure. So, cause of death is what actually took the
9 individual's life. And so in this case, I have cause of
10 death, extensive head trauma sustained in motorcycle crash.

11 The manner of death is a little bit different; it's the
12 circumstances under which the death occurred. And most states
13 have five manners of death; natural, death due to old age or
14 disease; homicide in which the death is due to the actions of
15 another individual or individuals; accident, which the death
16 was preventable and usually due to drugs or some type of
17 trauma; suicide, which the individual takes their own life;
18 and then undetermined is where we can't sort it out, usually
19 between homicide versus accident or something like that. And
20 so, in this case, I have the manner of death as an accident.

21 Q: Okay. But -- one last question. There -- going back to
22 the head injury ---

23 A: Yes.

24 Q: --- that Ms. Schnell had, you -- you said -- what were
25 the consequences of such an injury?

State v. Atwater - 2019-GS-26-02899, 02900
ERIC EASON - CROSS BY TRUSLOW

281

1 A: They're lethal; they would cause death.

2 Q: Okay. And from reading your report, what was the cause
3 of that head injury?

4 A: Oh, the motorcycle crash.

5 Q: Okay. Dr. Eason, I don't have any questions for you.
6 Please answer -- any more questions at this time, please
7 answer any the defense attorney may have?

8 THE COURT: Cross-examination?

9 MR. TRUSLOW: Just -- just two quick follow-ups.

10 CROSS-EXAMINATION OF ERIC EASON BY MR. TRUSLOW:

11 Q: Alcohol content, .09 you said?

12 A: Correct.

13 Q: And then Trazadone is within therapeutic range, correct?

14 A: Correct.

15 Q: And what is the therapeutic use of that drug?

16 A: It is anti-depressant, and, also used as a sleeping pill.

17 Q: All right. No further questions.

18 THE COURT: Any redirect?

19 MS. HARTE: No further questions, Your Honor.

20 THE COURT: Do you wish the witness to be excused?

21 MS. HARTE: Yes, sir, Your Honor.

22 THE COURT: Any objection? Mr. Truslow, any objection to
23 the witness being excused?

24 MR. TRUSLOW: Oh, no, sir.

25 THE COURT: Very good. All right, doctor, you are

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

282

1 released from your subpoena and may go back to your regular
2 duties. Thank you.

3 Y'all come up for just a second.

4 (REPORTER'S NOTE: Bench conference is held off the record in
5 the presence of but outside the hearing of the jury.)

6 BY THE COURT:

7 THE COURT: All right, ladies and gentlemen, the next
8 witness to be called by the state, it could be -- it
9 definitely would be a longer witness than you've had so far,
10 and we would go beyond, most likely, the time that I try to
11 stop, to inconvenience you as little as possible, is 5
12 o'clock. So, what we're gonna do is stop at this point in
13 time.

14 Now, I'll remind you of a couple of things. You're not
15 researchers, you're not investigators, you can't look up
16 anything, you can't talk to anybody about this case. I told
17 you don't talk about it yourselves. Okay? Don't talk about
18 the case with anyone, because intentionally or
19 unintentionally, they'll give you their opinion. They don't
20 have one. You shouldn't have an opinion about this case
21 because you haven't heard all of the evidence. Further, you
22 don't know the law that you have to apply to that evidence in
23 this particular matter. So, follow those instructions. Don't
24 talk to anybody; don't allow anybody to talk to you about it.
25 Please remember that, you know, if you happen to see some

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

283

1 other juror tonight for whatever reason, you know, y'all can
2 be friendly, but obviously, you can't talk about the case.
3 All right. So, with that, I'm going to excuse you. The
4 bailiff will tell you we're gonna come into the courtroom at
5 9:30. The bailiff will tell you when to be here, so we can
6 accommodate that. The clerk's office will have something else
7 for you tomorrow morning in the -- in the jury room for you
8 before you come in at 9:30. So, with that, I'll see you back
9 tomorrow morning at 9:30. Pads and pens in your seats.

10 Thank you very much.

11 (REPORTER'S NOTE: Jury exits courtroom @ 4:16 p.m. The
12 following takes place outside the presence of the jury.)

13 THE COURT: All right. From the state, anything at this
14 point in time?

15 MR. DEBUSK: Yes, Your Honor.

16 THE COURT: Yes, sir.

17 MR. DEBUSK: Earlier today when we were doing motions,
18 you ordered redactions on the jail dashcam from Officer Floyd
19 and the BAC video with Officer Hoard. We have made those. My
20 proposition is to give these numbers and to convert the
21 original State's 30 and ---

22 THE COURT: Make sure it's the right one.

23 MR. DEBUSK: I'm looking for it, Your Honor. I'm looking
24 for the BAC room video.

25 I apologize, Your Honor.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

284

1 THE COURT: All right.

2 MR. DEBUSK: I've replaced one of the exhibits.

3 THE COURT: All right. Well, let's make sure.

4 MR. DEBUSK: I apologize, Your Honor.

5 THE COURT: That's all right. Make sure we ---

6 MR. DEBUSK: Your Honor, State's 31 is the BAC video in
7 its original form.

8 THE COURT: Okay.

9 MR. DEBUSK: State's 30 is Floyd's dashcam in its
10 original form. I'm adding the redacted versions of the BAC
11 video, which I would ask Madam Court Reporter to mark.

12 COURT REPORTER: State's 36.

13 MR. DEBUSK: State's 36 ---

14 THE COURT: Okay.

15 MR. DEBUSK: --- to substitute for State's 30.

16 THE COURT: All right.

17 MR. DEBUSK: I'm sorry, no, substitute for State's 31.

18 THE COURT: 31. All right.

19 MR. DEBUSK: 36 for 31, and I think it will be 37 for 30.

20 THE COURT: All right. So, I'll let you finish.

21 All right. So, what we'll do is we'll leave those two
22 with the court reporter just for -- mark those then not to go
23 to the jury. All right. And we'll use the others to go to --
24 to the jury, but we'll keep all of them for the record.

25 MR. DEBUSK: Yes, Your Honor.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

285

1 MR. TRUSLOW: Yes, sir.

2 THE COURT: Okay. All right. Anything from the defense,
3 Mr. Truslow?

4 MR. TRUSLOW: No, sir.

5 THE COURT: All right.

6 MR. TRUSLOW: No, sir.

7 THE COURT: So, counsel, in the morning, if you do have
8 any requests to charge or anything of that nature that you
9 want me to consider to include in what I will come up with on
10 my own, I'll be glad to receive that in the morning.

11 All right?

12 MR. TRUSLOW: Certainly.

13 THE COURT: Thank you very much.

14 Mr. Atwater, stand up for just one second. Please
15 remember, as I told you at lunch, you're out on bond, the same
16 terms and conditions, if you don't come back, a bench warrant
17 is issued for your arrest, the trial continues in your
18 absence; you understand all of that?

19 MR. ATWATER: Yes, sir.

20 THE COURT: All right. Very good. See y'all back
21 tomorrow morning at 9:30.

22 Thank you.

23 **END OF DAY 2**

24 **RECESS @ 4:16 P.M.**

25 *****OFF THE RECORD*****

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

286

1 NOVEMBER 3, 2021 - DAY 3 OF 4

2 ON THE RECORD @ 9:35

3 THE COURT: So, in the State v. Claybon Lewis Atwater,
4 Jr., is the state ready to proceed?

5 MR. DEBUSK: Yes, Your Honor.

6 MR. TRUSLOW: Yes, sir. He's right here.

7 THE COURT: All right, sir.

8 All right. Ask the jury to come in, please, ma'am.

9 Thank you.

10 (REPORTER'S NOTE: Jury enters courtroom @ 9:37 a.m.)

11 THE COURT: All right, Solicitor, your next witness,
12 please.

13 MR. DEBUSK: Thank you, Your Honor. The state calls
14 Officer Bryan Floyd.

15 THE COURT: Please come around to be sworn, sir.

16 THE CLERK: Please raise your right hand and place your
17 left on the Bible.

18 BRYAN FLOYD, HAVING BEEN DULY SWORN

19 TESTIFIES AS FOLLOWS:

20 THE CLERK: Please be seated. State your full name and
21 spell it for the Court, please.

22 MR. FLOYD: My name is Bryan Floyd; B-R-Y-A-N, F-L-O-Y-D.

23 DIRECT EXAMINATION OF BRYAN FLOYD BY MR. DEBUSK:

24 Q: Officer Floyd, who is your employer?

25 A: City of North Myrtle Beach Department of Public Safety.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

287

- 1 Q: How long you been with them?
- 2 A: For about seven-and-a-half years at this point.
- 3 Q: Okay. What are your duties today?
- 4 A: Today I work for B shift, swing rotation -- B swing, so I
- 5 work about the mid-shift, on patrol.
- 6 Q: You're a patrol officer?
- 7 A: Yes, sir.
- 8 Q: Back in April of 2019, what were your duties then?
- 9 A: Same duties.
- 10 Q: Same duties. Were you on duty on April 6th of 2019?
- 11 A: Yes, sir; I was.
- 12 Q: Did you respond to Highway 17 and 46th Avenue South?
- 13 A: Yes, sir; I did.
- 14 Q: What was the nature of that call?
- 15 A: It was a traffic collision involving a motorcycle and a
- 16 vehicle.
- 17 Q: What was your role on the scene?
- 18 A: I showed up on the scene to initially assist any of the
- 19 officers on scene with anything they needed help with. When I
- 20 arrived on the scene, I was advised of the potential of
- 21 transporting one of the suspects to the jail.
- 22 Q: Who was that suspect?
- 23 A: The defendant.
- 24 Q: Okay. What did you do when you were told to do that?
- 25 A: I went and spoke with him. He was sitting in the

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

288

1 backseat of Officer Ostin's vehicle. He was slouched down, so
2 I went over and talked to him for a few minutes to kind of get
3 an idea of what happened that day.

4 Q: What did you observe when you talked to him?

5 A: When I went over and talked to him, he was kind of
6 slouched down, laid down, with his eyes kind of half closed.
7 He appeared to kind of be like half asleep. I smelled a heavy
8 odor of alcohol coming from the vehicle where he was sitting
9 at the time, and he had very slurred speech.

10 Q: What did you do, in response to that?

11 A: I read him Miranda rights to try to get some -- or ask
12 him questions about some things I had observed to try to make
13 sure that I could give the officers on scene proper
14 information.

15 Q: Now, when you did this, when you Mirandized him, did you
16 have your body camera on?

17 A: Yes, sir; I did.

18 Q: Did it record?

19 A: Yes, sir; it did.

20 Q: Did it record audio?

21 A: It recorded audio probably, but video, the visual portion
22 of it, does look skewed. It actually had -- I can't talk
23 right now. It looked rainbow colored. The video did not
24 record properly in that fashion.

25 Q: So, but you did read him the Miranda warnings?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

289

- 1 A: Yes, sir; I did.
- 2 Q: But why did you feel that necessary?
- 3 A: Because he was detained at that moment, he was in
4 handcuffs in the back of a patrol car, and I was going to be
5 asking him questions about a crime.
- 6 Q: Okay. And when you started asking questions, what was
7 the purpose you were asking those questions?
- 8 A: I wanted to investigate a potential DUI situation.
9 Because of the odor of alcohol and the things that I observed,
10 I believed that he was under the influence.
- 11 Q: Okay. What did you ask him about?
- 12 A: I asked him if he had been drinking, where he had come
13 from, if -- he had told me that he had been drinking earlier
14 in the day. I asked him what he had to drink, which he had
15 told me a 24-ounce, I believe Nat -- Natty Light maybe, I
16 would need to review my notes to actually be fully sure. He
17 also told me had several shots earlier in the day and that he
18 was coming from the beach.
- 19 Q: And that is on your body-worn camera?
- 20 A: Yes, sir; it is.
- 21 Q: Let me show you what's been marked as State's Exhibit 1
22 and ask if you recognize this?
- 23 A: Yes, sir; I do.
- 24 Q: How do you recognize it?
- 25 A: I reviewed the video, and then I initialed it after I

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

290

1 reviewed it.

2 Q: When you reviewed it, is that a fair and accurate copy of
3 your body-worn camera?

4 A: Yes, sir; it is.

5 Q: Before I publish, I want to ask you a few more things.
6 After you did that initial interview, what did you do?

7 A: I went and spoke with the lead investigator, which is
8 Lance Corporal Shick. I advised him that the, I believed that
9 he was under the influence, and requested further information
10 of what he wanted me to do at that point.

11 Q: And what did you -- what did you do in response?

12 A: We ended up having a discussion about if we were gonna do
13 field sobriety tests. Due to the safety reasons of things,
14 between me, him, and the on-scene supervisor, we decided not
15 to do field sobriety tests.

16 Q: What was the safety issues that you were presented with?

17 A: On the scene, we were in the middle of Highway 17 in the
18 middle of the day, and there was cars on both sides, we were
19 trying to work with medical personnel who were trying to give
20 aide to the victims. We had several witnesses trying to
21 approach us and give us information about the collision. And
22 then again, we had vehicles on both sides in the middle of
23 Highway 17.

24 Q: By vehicles, you mean emergency vehicles?

25 A: We also had emergency vehicles on scene and officers

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

291

1 directing traffic, as well as normal flow of traffic coming
2 down Highway 17.

3 Q: It's pretty heavy that time of day?

4 A: Yes, sir; it is.

5 Q: Okay. So, what did you -- you yourself do after you had
6 that consultation?

7 A: After that, we went back or went back to the vehicle. I
8 retrieved the defendant and then transported -- excuse me --
9 escorted him up to my patrol vehicle, placed him in the back
10 of my patrol vehicle, and then transported him to the jail.

11 Q: Okay. Is that vehicle that you were using, does it have
12 a video system and audio system as well?

13 A: Yes, sir; it does.

14 Q: Does it record what's being said in the vehicle?

15 A: Yes, sir; it does.

16 Q: I'm showing you what's been marked as State's Exhibit 37
17 and ask if you recognize that?

18 A: Yes, sir.

19 Q: What is that?

20 A: That's a video recording from the -- from my patrol
21 vehicle from being escorted from the scene to the jail.

22 Q: Okay. What was the purpose of taking him to jail?

23 A: We were going to -- one, he was being placed under
24 arrest. We were taking him to jail to complete further field
25 sobriety tests, give him an opportunity to give a breath

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

292

1 sample, and then for him to be booked in.

2 MR. DEBUSK: Okay. Your Honor, at this time the state
3 would move State's 1 and 37 into evidence?

4 THE COURT: I'm sorry, State's?

5 MR. DEBUSK: 1 and 37.

6 THE COURT: Any objection?

7 MR. TRUSLOW: Subject to the prior rulings of the Court.

8 THE COURT: All right. So, State's 1 and 37 are in
9 evidence over the objection of the defense.

10 You may proceed.

11 STATE'S EXHIBIT NUMBER 1 AND NUMBER 37

12 ADMITTED INTO EVIDENCE

13 MR. DEBUSK: Your Honor, may we publish these to the
14 jury?

15 THE COURT: You may do so.

16 (REPORTER'S NOTE: State's 1 published to the jury. Audio not
17 transcribed herein.)

18 BY MR. DEBUSK:

19 Q: Officer Floyd, is that the point in which you went and
20 consulted with the other officer?

21 A: Yes, sir.

22 Q: And then you returned, you spoke to him again?

23 A: Yes, sir.

24 (REPORTER'S NOTE: Continue publishing State's 1 to the jury.
25 Audio not transcribed herein.)

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

293

1 BY MR. DEBUSK:

2 Q: Officer Floyd, after this, you transported him to the
3 jail?

4 A: Yes, sir; I did.

5 Q: While he was in the back of your vehicle, did he make any
6 admissions?

7 A: Yes, sir. He admitted to me that he had been drinking,
8 that he had alcohol within his system, and that he was driving
9 the vehicle.

10 MR. DEBUSK: Go ahead and play the next one.

11 (REPORTER'S NOTE: State's 37 published to the jury. Audio
12 not transcribed herein.)

13 BY MR. DEBUSK:

14 Q: Now, when you arrived at the jail, what did you do with
15 the defendant?

16 A: Once we were at the jail, he's brought into the jail,
17 there was a discussion about search warrants and about
18 DataMaster. To conserve time, I went and worked on a search
19 warrant for blood and Officer Jake Hoard brought Mr. Atwater
20 into the DataMaster to retrieve a blood sample.

21 Q: Is it normal to have a different officer do the breath?

22 A: Not normally, but due to the factors of time, we wanted
23 to try to make sure we had a search warrant within the
24 timeframe that we needed, so I went ahead and worked on that
25 because I knew facts of this case.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

294

1 Q: What court did you go to to get the search warrant?

2 A: The City of North Myrtle Beach Municipal Court.

3 Q: After you obtained the search warrant, what did you do?

4 A: I transported Mr. Atwater to the North Strand ER, where
5 we used the SLED blood kit to retrieve his blood using medical
6 personnel, and then he was transported back to the North
7 Myrtle Beach jail.

8 Q: How far is it from the jail to that emergency room?

9 A: Less than a mile.

10 Q: Okay. When you arrived at the ER, did you advise the
11 defendant of his implied consent rights?

12 A: Yes, sir; I did.

13 Q: Now, let's make this clear, this was after you had done
14 the breathalyzer?

15 A: Yes, correct, yes, sir; he had already been -- done that.

16 Q: Officer -- who was the officer, you said Officer Hoard?

17 A: Officer Hoard was the one that administered the
18 DataMaster and then I went with him.

19 Q: And this was after the DataMaster?

20 A: Yes, sir.

21 Q: Just to keep things in order. When you inform someone of
22 their implied consent rights, to use a form?

23 A: Yes, sir. We use a form that is provided to us by SLED.

24 Q: I'm showing you what's been marked as State's 26 and ask
25 if you recognize that?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

295

1 A: Yes, sir.

2 Q: What is that?

3 A: This is the advisement of implied consents rights.

4 Q: Okay. Did you advise him -- did you read those to him?

5 A: Yes, sir; I did.

6 Q: Was your bodycam on?

7 A: Yes, sir; it was.

8 MR. DEBUSK: Your Honor, we'd would move State's 26 into
9 evidence?

10 THE COURT: Any objection?

11 MR. TRUSLOW: No, sir.

12 THE COURT: In evidence without objection.

13 STATE'S EXHIBIT NUMBER 26

14 ADMITTED INTO EVIDENCE

15 BY MR. DEBUSK:

16 Q: And I think we've already authenticated the video of that
17 reading device; did we not?

18 A: No.

19 Q: Not yet?

20 THE COURT: No.

21 MR. DEBUSK: Check your hand, Solicitor, check your hand.

22 BY MR. DEBUSK:

23 Q: I show you what's been marked as State's 29 and ask if
24 you recognize this?

25 A: Yes, sir; I do.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

296

1 Q: What is that?

2 A: That's a video of my body camera once at the hospital.

3 Q: Okay. How do you recognize it?

4 A: I initialed it after I reviewed the video.

5 Q: Is it a fair and accurate representation of you reading
6 the implied consent to him?

7 A: Yes.

8 MR. DEBUSK: Your Honor, may we publish -- we would move
9 State's 29 into evidence at this time.

10 THE COURT: Any objection?

11 MR. TRUSLOW: No, sir.

12 THE COURT: In evidence without objection. You may
13 publish it.

14 STATE'S EXHIBIT NUMBER 29

15 ADMITTED INTO EVIDENCE

16 (REPORTER'S NOTE: State's 29 published to the jury. Audio
17 not transcribed herein.)

18 BY MR. DEBUSK:

19 Q: Officer Floyd, did you really need the search warrant you
20 obtained from the North Myrtle Beach Police of ---

21 A: Yes, sir.

22 Q: What did that search warrant allow you to do?

23 A: It allowed me to have medical personnel draw his blood.

24 Q: Who did you find to draw the blood?

25 A: One of the nurses at the North Strand ER.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

297

1 Q: Was the blood drawn in your presence?

2 A: Yes, sir; it was.

3 Q: What containers was the blood put into?

4 A: They were put into the SLED specimen kit that they have;
5 they provided it for us. They have special vials to fill, and
6 also, I had security tape that are put over the vials and for
7 the box to make sure they are properly contained inside.

8 Q: Now, is a form created when the blood is drawn?

9 A: Yes, sir.

10 STATE'S EXHIBIT NUMBER 27

11 MARKED FOR IDENTIFICATION

12 Q: Let me show you what's been marked as State's 27?

13 A: Yes, sir.

14 Q: What is that?

15 A: This is the form that we fill out with the nurse, and it
16 gives all the information on the defendant, as well as the
17 information for the nurse drawing the blood, and it gives us
18 specific instructions on how to do everything.

19 Q: Does it tell you what time the blood was drawn?

20 A: Yes, sir; it does. The time of the blood draw was 19:28.

21 Q: Would that be 6:28 in civilian time?

22 A: 7:28.

23 Q: 7:28, thank you, 7:28. Whose signature is at the bottom?

24 A: The bottom is Shannon Coker.

25 Q: Is that the individual that drew the blood for you?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

298

1 A: Yes, sir.

2 Q: And again, it was drawn in your presence?

3 A: Yes, sir.

4 Q: And it was put into a kit provided by you?

5 A: It was actually -- the kit is provided by SLED. Each
6 department is given these kits by SLED for these kind of
7 incidents.

8 Q: So, you got it from SLED and you provided it to the
9 nurse?

10 A: Yes, sir.

11 Q: Okay.

12 MR. DEBUSK: Your Honor, we would move State's 27 into
13 evidence?

14 THE COURT: Any objection?

15 MR. TRUSLOW: Yes, sir. I believe the form is hearsay,
16 and usually happens is testimony.

17 MR. DEBUSK: Oh, but we have -- we have her as a ---

18 THE COURT: All right.

19 MR. DEBUSK: --- further witness. We'll just complete
20 the foundation with ---

21 THE COURT: All right. Very good.

22 STATE'S EXHIBIT NUMBER 23

23 MARKED FOR IDENTIFICATION

24 BY MR. DEBUSK:

25 Q: Let me show you what's been marked as State's 23 and ask

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

299

- 1 if you recognize that?
- 2 A: Yes, I do.
- 3 Q: What is that?
- 4 A: These are the vials that are -- have my name on them as
- 5 well as the defendant's name on them with the evidence tape
- 6 put over them -- evidence seals put over them after they were
- 7 drawn by the nurse.
- 8 Q: Does that picture show those evidence seals as you placed
- 9 them and signed them?
- 10 A: Yes, sir.
- 11 Q: Are they intact?
- 12 A: Yes, sir.
- 13 Q: I'm gonna show you what's been marked as State's Exhibit
- 14 22 and ask if you recognize that?
- 15 A: Yes, sir; I do.
- 16 Q: What is that?
- 17 A: This is what the specimen box looks like, and it has the
- 18 seals on it, the evidence seals for shipping.
- 19 Q: Is there a signature on that seal?
- 20 A: Yes, sir; there is, my signature.
- 21 Q: Okay. Is that box in the condition that you sealed it?
- 22 A: Yes, sir; it is.
- 23 Q: That would've been sealed at the ER?
- 24 A: Yes, sir.
- 25 Q: Okay.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

300

1 MR. DEBUSK: Your Honor, we move state's 22 into evidence
2 at this time?

3 MR. TRUSLOW: No objection.

4 THE COURT: All right. Just 22?

5 MR. DEBUSK: At this time, Your Honor. We'll have
6 further foundation on ---

7 THE COURT: All right. State's 22 is in evidence without
8 objection.

9 STATE'S EXHIBIT NUMBER 22

10 ADMITTED INTO EVIDENCE

11 BY MR. DEBUSK:

12 Q: Now, once you have the blood, you put in the box, and you
13 seal the box, what do you do with the box?

14 A: Once we have all that taken care of, I transported the
15 defendant back to the North Myrtle Beach Jail, and then I took
16 the evidence, the box, and brought it to our evidence locker
17 where we have a refrigerated system where I secured it.

18 Q: Okay. How did you secure it?

19 A: The refrigerator has different compartments built into it
20 and it has a little key. Once we lock the box, we actually
21 have a slot on that individual box to where it is inside the
22 box with the evidence, and the only person who has access to
23 it is the evidence custodian.

24 Q: Okay. So, you secured and stored it in that
25 refrigerator?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

301

1 A:

2 Yes, sir.

3 Q: Okay. Please answer any questions the defense might
4 have.

5 THE COURT: Cross-examination?

6 MR. TRUSLOW: Yes, sir.

7 CROSS-EXAMINATION OF BRYAN FLOYD BY MR. TRUSLOW:

8 Q: Pardon me. I use this podium. I won't be long.

9 Officer, when you got on the scene, what did you first do?

10 A: When I first arrived on scene, I was advised by another
11 officer that I might be transporting somebody or putting
12 somebody in my patrol vehicle.

13 Q: Uh-huh, (affirmative response).

14 A: I believe the first thing I did was I went and asked if
15 they needed help with anything on the scene.

16 Q: Okay. And -- I'm sorry. What were you told about that;
17 what were you told to do?

18 A: I do not recall.

19 MR. DEBUSK: Object to hearsay, Your Honor.

20 BY MR. TRUSLOW:

21 Q: What did you do after that?

22 A: After speaking with Lance Corporal Shick, I went and
23 spoke with the defendant.

24 Q: And is that -- when you went to do that the first time,
25 what we see on the video?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

302

1 A: Yes, sir.

2 Q: Okay. What was the purpose of that?

3 A: It was to try to get a little bit more further
4 information. I know that Officer Shick is investigating the
5 crime, but he's having a lot of things to do, but just get try
6 to get some -- an idea of what took place that day.

7 Q: So, at that point, there was no discussion of a DUI
8 situation?

9 A: At that point, no, sir.

10 Q: So, any evidence of suspecting him of DUI occurred from
11 that visit to him forward?

12 A: Yes, sir.

13 Q: All right. Now, when you say that you had a strong odor
14 of alcohol you smelled, correct?

15 A: Yes, sir.

16 Q: Do you recall if you put in your report that it was a
17 strong odor of alcohol or just an odor?

18 A: I do not recall, sir. I just remember having a smell of
19 alcohol coming from the vehicle he was placed in.

20 Q: Okay. Do you agree with me -- have you learned in any of
21 your classes that you cannot tell the quantity of alcohol
22 consumed by the odor, only that an alcohol beverage was
23 consumed?

24 A: I don't understand what you're asking, sir.

25 Q: Can you tell how many alcoholic beverages a person has

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

303

1 had by the odor of alcohol?

2 A: Not simply by the odor of alcohol; no, sir.

3 Q: Okay. So, the odor of alcohol alone is not any deciding
4 factor?

5 A: No, sir. It's just one of the factors we use to indicate
6 that somebody has been drinking.

7 Q: Okay. When did you first realize there was an odor of
8 alcohol on that video?

9 A: As soon as I opened up the door, you could smell it
10 coming from the vehicle.

11 Q: Okay. Did you make any comment about that or ask about
12 it?

13 A: To him, sir?

14 Q: Yes?

15 A: No, sir. As soon as I realized that there was a
16 potential that he was under the influence, I read him his
17 Miranda rights.

18 Q: Okay. You didn't ask about the odor at that point?

19 A: Not until after I Mirandized him.

20 Q: Okay. So, when he was -- let me ask you this, why did --
21 why did you -- when you were telling him two times about you
22 going to sleep, and lean up, and that type of thing, right?

23 A: Yes, sir.

24 Q: Was he leaned over because of his handcuffs and his leg;
25 did he mention about the handcuff pain?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

304

1 A: I do not -- from the video, I do not recall him
2 mentioning that he was having handcuff pain; he was just kind
3 of slouched over.
4 Q: Would you agree with me that it's kind of self-serving to
5 characterize it as sleeping in this type of investigation when
6 we can't see him?
7 A: I was just referring to it as his demeanor, how he was
8 sitting over and slouched over in like a sleeping type
9 position or a potential falling asleep with his eyes closed.
10 Q: Did he respond to your questions?
11 A: After I had to talk to him a few times to try to get his
12 attention, yes, sir, he would respond to me.
13 Q: Did you get the information from him that you needed?
14 A: Yes, sir, whenever I was talking to him; yes, sir, I did.
15 Q: Were you the one that he gave his phone number to; do you
16 recall or not?
17 A: I do not recall, sir.
18 Q: Would you characterize him as coherent?
19 A: As far as in what manner, sir?
20 Q: In discussing with you or answering -- giving you the
21 information you asked for, responding?
22 A: Was he able to respond to my questions? Yes, sir.
23 Q: Okay. Was he confused by your questions?
24 A: He did not appear to be confused by my questions; no,
25 sir.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

305

1 Q: Now, on the video when you said about a couple of shots,
2 do you remember the first time it came up and he said no?

3 A: I believe he was referring to at that point the -- the
4 way I questioned it, that he thought I was referring to at the
5 beach or when, and I rephrased my question. I said I
6 understand that you had a couple of shots.

7 Q: Right, he said no; do you remember that? Do you remember
8 him saying no after you brought up a couple of shots?

9 A: I do not recall, sir.

10 Q: Okay. Well, do you remember thereafter saying, you just
11 told me that, referring to a couple of shots?

12 A: Yes, sir, because he indicates no and then he does
13 indicate to me, yes, he did have a couple of shots at one
14 point.

15 Q: So, your testimony is on the video that he doesn't deny
16 the couple of shots?

17 A: Correct; yes, sir.

18 Q: Did he express not wanting to walk to your car and walk
19 by and/or see the body of the victim?

20 A: Yes, sir. He expressed to me that he doesn't want to see
21 the body of the victim, which is laying in the roadway behind
22 the patrol vehicle he is in.

23 Q: So, would you say that he was alert to time and place,
24 and his surroundings?

25 A: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

306

1 Q: When you told him -- would you characterize him as, I
2 don't want to say sobbing throughout this, but something in
3 that nature with the, oh, Jesus, that type thing; did you hear
4 that?

5 A: Yes, sir; I did hear that.

6 Q: All right. Do you think that that was out of character,
7 or would that be an appropriate response to being in this type
8 of trouble, when you realize you are?

9 A: I think that's an appropriate response for anybody who is
10 involved in a collision where someone is killed.

11 Q: That's not my question; can you answer the question.

12 THE COURT: Yes, sir, he answered the question.

13 MR. TRUSLOW: No, sir, I asked -- I'll ask it again.

14 THE COURT: You can ask another question, but he did
15 respond to your question.

16 BY MR. TRUSLOW:

17 Q: Well, let me ask a different question. Would his
18 conduct, as I just described to you, would that be consistent
19 with somebody realizing that they are in serious criminal
20 trouble potentially?

21 A: Potentially, yes, sir.

22 Q: Okay. Appropriate? Appropriate response?

23 A: Sir, I can't respond to how he felt at the time.

24 Q: What was your answer to that question then?

25 A: That that is an appropriate response to someone that

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

307

1 knows they're in trouble; yes, sir.

2 Q: Okay. Thank you. Now, if -- do you recall loosening his
3 handcuffs?

4 A: I adjusted one of the handcuffs; yes, sir.

5 Q: Okay. Now, if that handcuff was not tight, would you
6 have loosened it?

7 A: It wasn't that it was tight, sir, I just wanted to allow
8 his hand to have a little more movement, because cuffs are not
9 -- do not have a way to move the same way as other objects
10 because they're made of metal. So, I wanted to make sure that
11 it was prying into his hand.

12 Q: Okay.

13 A: His hand, if I remember correctly, was twisted, so it
14 allowed it to have a little bit more free movement in there,
15 so it doesn't pinch or cause any damage to the wrist.

16 Q: All right. Did you hear him on the video in your car on
17 the way to the police department state that everybody stopped?

18 A: He makes a comment about people stopped; yes, sir.

19 Q: Okay. Had you heard that from him prior to then; was he
20 consistent about that?

21 A: Not that I recall.

22 Q: Do you know in your investigation, whether that was his
23 position with other officers at any time in the early
24 investigation?

25 A: At that time, sir, I was more dealing with him in dealing

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

308

1 with the DUI situation, than dealing with the collision.

2 Q: Okay. Regarding the -- once you brought him to the jail
3 you turned him over for a breath test, correct?

4 A: Yes, sir.

5 Q: And then you went to get a search warrant for blood?

6 A: Yes, sir.

7 Q: Who did you get a search warrant from?

8 A: From the City Judge, the Municipal Judge.

9 Q: All right. And do you remember what time you did that?

10 A: I don't recall exactly what time I got him to the jail,
11 but it was within five minutes of getting him to the jail, I
12 went and started typing the warrant.

13 Q: Okay. I mean, what would you approximate then the time
14 of completing that typing and actually having a judge sign the
15 warrant?

16 A: If I had the search warrant -- I want to say it was
17 around 6:30.

18 Q: All right.

19 A: That's an approximate ---

20 Q: I mean, do you recall any significant event happening
21 between doing the warrant and going and getting it signed?

22 A: No, sir.

23 Q: In other words, to process it?

24 A: No, sir. It was from one thing to another. I just went
25 and worked on it.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

309

- 1 Q: All right. Now, one last question. So, I want to ask
2 you, this document, I think you looked at this perhaps on
3 direct examination. Are you familiar with one of those
4 documents?
- 5 A: No, sir; I did not look at this document. This was a
6 document that was done within the DataMaster.
- 7 Q: Okay. Do you know what that is?
- 8 A: Yes, sir; I do know what this is.
- 9 Q: Okay. And who in a case of DUI would prepare that
10 document?
- 11 A: The person operating the DataMaster would prepare this.
- 12 Q: And do you know who that was in this case?
- 13 A: Officer Jake Hoard.
- 14 Q: Okay. That document prints out and is generated by the
15 computer?
- 16 A: Yes, sir.
- 17 Q: Okay. Is that document changed or altered by
18 handwriting?
- 19 A: Yes, sir; there is. The arresting officer up here has
20 Jake Hoard on it, and then I corrected it and put I'm the
21 arresting officer for this case.
- 22 Q: So, that's your writing on it?
- 23 A: Yes, sir.
- 24 Q: Did you also change the time?
- 25 A: Yes, sir. He didn't have the appropriate time on there,

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - REDIRECT BY DEBUSK

310

1 so I made sure the appropriate time for arrest was on there.

2 Q: So, I mean, to some degree, you were involved in this
3 testing as well?

4 A: Yes, sir. I had this direct discussion with him before
5 that. There was a discussion between me, him, and Sergeant
6 Cary (spelled phonetically) Rose at the time, while we were at
7 the jail, about getting a breath sample, and then about
8 getting a search warrant, and it was determined due to the
9 fact that I knew the circumstances of the case that I would do
10 the search warrant, and he would do the breath sample.

11 Q: Okay.

12 MR. TRUSLOW: That's all the questions I have, Judge.

13 THE COURT: Thank you.

14 Redirect?

15 MR. DEBUSK: Yes, thank you, Your Honor.

16 REDIRECT EXAMINATION OF BRYAN FLOYD BY MR. DEBUSK:

17 Q: Now, we have established that you can't quantify alcohol
18 with your nose, but did you in fact smell alcohol on the
19 defendant?

20 A: Yes, sir; I did.

21 Q: What else made you think that you had a potential DUI?

22 A: Due to the fact that he had the slurred speech; due to
23 the fact he indicated to me post-Miranda that he had been
24 drinking; the overall slouch and demeanor of him with his eyes
25 being closed is normally an indicator of somebody who is

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - RECROSS BY TRUSLOW

311

1 potentially under the influence.

2 Q: Did you have try multiple times to get his attention for
3 the Miranda and other things?

4 A: Yes, sir.

5 Q: Okay. How about on the way to jail, what was his
6 demeanor then?

7 A: He continued to slouch over in the back seat; again
8 continued to have his eyes closed; you know, his slurred
9 speech continued as well.

10 Q: And why would -- when you talked about the two shots and
11 you asked him if he had two shots at the beach, he said no,
12 but he did not say that they were earlier?

13 A: They were -- yes, sir, that's what he referred to. He
14 said, no, I didn't have them at the beach; they were earlier
15 in the day.

16 Q: Thank you.

17 THE COURT: Anything on those questions?

18 MR. TRUSLOW: Just two points, Your Honor.

19 RECROSS-EXAMINATION OF BRYAN FLOYD BY MR. TRUSLOW:

20 Q: So, before you're done testifying, throughout this case
21 that the evidence we have of the -- the on-scene evidence, is
22 it your testimony that my client had slurred speech?

23 A: Yes, sir.

24 Q: Okay. Let me ask you this, the terms, is this -- slurred
25 speech, odor of alcohol, unsteady gait, have you ever heard

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - RECROSS BY TRUSLOW

312

1 those terms before?

2 A: No, sir.

3 Q: You've never heard that?

4 A: No, sir.

5 Q: You just said slurred speech, didn't you?

6 A: I've heard slurred speech and ---

7 Q: You've never heard unsteady gait?

8 A: Not unsteady gait; no, sir, I have not.

9 Q: Do you want to know what it means?

10 A: Yes, sir; I would like to know what it means.

11 Q: I said, do you know what it means?

12 A: No, sir; I do not.

13 Q: What about this, have you heard the term unsteady on

14 their feet?

15 A: Yes, sir.

16 Q: Okay. Gait and walking are the same thing.

17 A: Yes, sir.

18 Q: Okay. So, have you ever brought a DUI case where you

19 didn't use at least two of those three terms in your report;

20 odor of alcohol, slurred speech, unsteady on your feet?

21 A: No, sir. Those normally go with our DUI cases; those are

22 normal indicators for an officer to find probable cause.

23 Q: Okay. So, your testimony in summing up was he had the

24 odor of alcohol. But you agree with me that the odor has

25 nothing to do with determining quantity of alcohol consumed,

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - RECROSS BY TRUSLOW

313

1 correct?

2 A: No, sir. It's just an indicator that there is alcohol
3 within the presence of him.

4 Q: And then slurred speech you say is on there?

5 A: Yes, sir.

6 Q: And then he said he'd been drinking?

7 A: Yes, sir.

8 Q: And is it illegal to drink alcohol and drive?

9 A: Is it illegal to drink alcohol and drive?

10 Q: Yes?

11 A: No, sir. It's not illegal to drink alcohol and drive
12 unless you meet certain criterias and have a blood alcohol
13 level of .08 or higher.

14 Q: Let me ask you this, do you believe people should have a
15 drink and drive in this state?

16 A: I do not believe so; no, sir.

17 MR. DEBUSK: Objection, Your Honor, that's speculative, a
18 personal opinion.

19 BY MR. TRUSLOW:

20 Q: Do you arrest people ---

21 THE COURT: Stop for a second.

22 MR. TRUSLOW: Yes, sir.

23 THE COURT: The question asked for a personal opinion,
24 and it can be taken as such by the jury. Thank you very much.

25 BY MR. TRUSLOW:

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - RECROSS BY TRUSLOW

314

1 Q: Have you ever arrested an individual for drinking and
2 driving only?

3 A: Yes, sir.

4 Q: That's all the questions I have.

5 THE COURT: All right. You may step down, sir.

6 Do you expect to recall this witness?

7 MR. DEBUSK: Your Honor, no, I would ask that he be
8 excused?

9 THE COURT: You may stay in the courtroom. You're
10 released from your subpoena.

11 MR. DEBUSK: Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. DEBUSK: The state calls Shannon Kocher.

14 THE COURT: All right, ma'am, come all the way around up
15 front, please.

16 MR. DEBUSK: Your Honor, the bailiff has a question.

17 BAILIFF: We have a couple of jurors that need a short
18 break.

19 THE COURT: All right. So, Ms. Kocher, have a seat,
20 please, ma'am. Have a seat.

21 All right. We'll take a short break, and we will come
22 back in about five or ten minutes. Thank you. Remember,
23 leave your pads and pens. Thank you. Don't talk about the
24 case.

25 (REPORTER'S NOTE: Jury exits courtroom @ 10:30 a.m.)

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - RECROSS BY TRUSLOW

315

1 THE COURT: Before we take a break, anything from the
2 state?

3 MR. DEBUSK: No, Your Honor.

4 THE COURT: From the defense?

5 MR. TRUSLOW: No, Your Honor.

6 THE COURT: All right. So, we will take a short break
7 then. Thank you.

8 **RECESS @ 10:31 A.M.**

9 *****OFF THE RECORD*****

10 **ON THE RECORD @ 10:38 A.M.**

11 THE COURT: Okay. All right. The state ready for the
12 jury?

13 MR. DEBUSK: Yes, Your Honor.

14 THE COURT: Defense?

15 MR. TRUSLOW: Yes, sir.

16 THE COURT: Ask the jury to come in, please.

17 (REPORTER'S NOTE: Jury enters courtroom @ 10:40 a.m.)

18 THE COURT: All right, Solicitor, your next witness,
19 please.

20 MR. DEBUSK: Your Honor, the state calls Shannon Kocher.

21 THE COURT: Please come around to be sworn, ma'am.

22 THE CLERK: Please raise your right hand and place your
23 left hand on the Bible.

24 SHANNON MARIE KOCHER, HAVING BEEN

25 DULY SWORN TESTIFIES AS FOLLOWS:

State v. Atwater - 2019-GS-26-02899, 02900
SHANNON MARIE KOCHER - DIRECT BY DEBUSK

316

1 THE CLERK: Please be seated. State your full name for
2 the record and spell it for the Court.

3 MS. KOCHER: Shannon Marie Kocher; S-H-A-N-N-O-N, M-A-R-
4 I-E, K-O-C-H-E-R.

5 DIRECT EXAMINATION OF SHANNON MARIE KOCHER BY MR. DEBUSK:

6 Q: Ms. Kocher, what's your occupation?

7 A: I'm a medical lab technician.

8 Q: Okay.

9 THE COURT: Can you scoot a little bit closer to the
10 microphone or speak up, please, ma'am?

11 BY MR. DEBUSK:

12 Q: Who is your employer?

13 A: North Strand ER.

14 Q: Where is that located?

15 A: North Strand, Myrtle Beach.

16 Q: In the City of North Myrtle Beach?

17 A: Yes.

18 Q: Okay. How about in April in 2019, was your employment
19 the same?

20 A: Yes.

21 Q: Okay. What are your duties at the North Myrtle Beach ER?

22 A: I operate the lab.

23 Q: Do you normally take blood from patients?

24 A: Normally, no, just the BALs, blood alcohol levels.

25 Q: Okay. But you are trained to do that?

State v. Atwater - 2019-GS-26-02899, 02900
SHANNON MARIE KOCHER - DIRECT BY DEBUSK

317

1 A: Yes.

2 Q: Okay. Do you encounter the defendant, Claybon Atwater,
3 on April 6th, 2019?

4 A: Yes.

5 Q: What was the -- what were the circumstances?

6 A: They brought him in for a DUI to have his blood alcohol
7 drawn.

8 Q: What did you?

9 A: I drew his blood.

10 Q: What did you put the -- what containers did you put the
11 blood in?

12 A: Oh. They have their own kits they bring, and we use
13 their kits.

14 Q: Do the tubes have seals on them?

15 A: Yes, they do.

16 Q: Do you sign the seals?

17 A: Yes.

18 Q: Let me show you what's been marked as State's Exhibit 23
19 and ask if you recognize those?

20 A: Yes.

21 Q: Is your signature on that?

22 A: Yes.

23 Q: Is that from the day that you took the blood from Mr.
24 Atwater?

25 A: Yes.

State v. Atwater - 2019-GS-26-02899, 02900
SHANNON MARIE KOCHER - DIRECT BY DEBUSK

318

1 MR. DEBUSK: Your Honor, the state would offer State's 23
2 into evidence?

3 THE COURT: Any objection?

4 MR. TRUSLOW: No, sir; no objection.

5 THE COURT: So, State's 23 is in evidence without
6 objection. You may proceed.

7 STATE'S EXHIBIT NUMBER 23

8 ADMITTED INTO EVIDENCE

9 BY MR. DEBUSK:

10 Q: Now, you draw the blood and you put it in the tubes. Who
11 gave you the tubes?

12 A: The police officer.

13 Q: Okay. And after they were sealed and you signed off on
14 them, what did you do with them?

15 A: They were given back to the police officer.

16 Q: In the course of drawing blood, is there a form
17 associated with that, a written form?

18 A: Yeah; well, I sign a form.

19 Q: I show you what's been marked as State's 27 and ask if
20 you recognize that?

21 A: Yes.

22 Q: Okay. What is that?

23 A: What was that?

24 Q: What is that?

25 A: It's the form that you fill out to say that you followed

State v. Atwater - 2019-GS-26-02899, 02900
SHANNON MARIE KOCHER - DIRECT BY DEBUSK

319

1 procedure and drew the blood.

2 Q: Do you have a copy of it in front of you?

3 A: Yes.

4 Q: Is that your signature on the bottom?

5 A: Yes.

6 Q: Okay. So, when you ---

7 MR. DEBUSK: Your Honor, we would move State's 27 into
8 evidence at this time. We completed the foundation.

9 MR. TRUSLOW: No objection.

10 THE COURT: All right. It's in evidence without
11 objection.

12 STATE'S EXHIBIT NUMBER 27

13 ADMITTED INTO EVIDENCE

14 BY MR. DEBUSK:

15 Q: Now, from the time you took the blood from Mr. Atwater
16 till when you gave it to the officer, did you alter it or
17 change it in any way?

18 A: No.

19 Q: Who actually put the seals on the tubes?

20 A: Either I did or he did.

21 Q: Okay. But they were done in your presence?

22 A: He handed them to me and usually ---

23 Q: It was done in your presence?

24 A: --- yes.

25 Q: Okay. Thank you. Please answer any questions the

State v. Atwater - 2019-GS-26-02899, 02900
SHANNON MARIE KOCHER - CROSS BY TRUSLOW

320

1 defense might have?

2 THE COURT: Cross-examination?

3 CROSS-EXAMINATION OF SHANNON MARIE KOCHER BY MR. TRUSLOW:

4 Q: Just briefly. Do you recall what shift you were working
5 back then?

6 A: Yeah, I work night shift.

7 Q: Okay. What hours would that have been?

8 A: It would've been 7:00 p.m.

9 Q: To 7:00 a.m.?

10 A: Yes.

11 Q: Okay. And you may be -- you might not be the right
12 witness for this, but let ask you, in your profession, were
13 you taught or learned anything about rising alcohol level?

14 A: No.

15 Q: Okay. Well, thank you, ma'am. No questions. Nothing
16 further questions.

17 THE COURT: Any redirect?

18 MR. DEBUSK: No, Your Honor. We would ask that the
19 witness be excused.

20 THE COURT: Any objection?

21 MR. TRUSLOW: No objection.

22 THE COURT: All right, ma'am, you're released from your
23 subpoena and may go back to your regular duties. Thank you.

24 Next witness, please?

25 MS. HARTE: Your Honor, at this time, the state calls

State v. Atwater - 2019-GS-26-02899, 02900
CHRIS SENGLE - DIRECT BY HARTE

321

1 Chris Sengle.

2 THE COURT: All right.

3 THE CLERK: Please raise your right hand and place your
4 left on the Bible.

5 CHRIS SENGLE, HAVING BEEN DULY
6 SWORN TESTIFIES AS FOLLOWS:

7 THE CLERK: Please be seated. State your full name for
8 the record and spell it, please.

9 MS. SENGLE: Chris Sengle; C-H-R-I-S, S-E-N-G-L-E.

10 THE COURT: Go ahead.

11 DIRECT EXAMINATION OF CHRIS SENGLE BY MS. HARTE:

12 Q: Ms. Sengle, who is your employer?

13 A: North Myrtle Beach Police Department.

14 Q: And how long have you been employed with them?

15 A: A little over 14 years.

16 Q: Okay. And what are your duties with North Myrtle Beach
17 PD?

18 A: I'm the evidence custodian.

19 Q: Okay. And how about in April of 2019, what were your
20 duties then?

21 A: Evidence custodian.

22 Q: Okay. And how is evidence handled in your department?

23 A: Once the officers bring it in from the street, they're
24 dropped into pass-through lockers, and I pull it from the
25 other side. They put it in from the hallway, and I pull it

State v. Atwater - 2019-GS-26-02899, 02900
CHRIS SENGLE - DIRECT BY HARTE

322

1 from the evidence room. And we also have refrigerators that
2 are pass-through as well.

3 Q: Okay. And how many people are employed in your
4 department?

5 A: There's one.

6 Q: Okay. Is that you?

7 A: Yes, ma'am.

8 Q: Okay. And I know you just said where the evidence is
9 stored.

10 A: Uh-huh, (affirmative response).

11 Q: And who has access to that evidence?

12 A: I do and my supervisor.

13 Q: Okay. I am showing you what's been marked as State's
14 Exhibit 22 and already entered into evidence. Do you
15 recognize that?

16 A: Yes, ma'am.

17 Q: Okay. Could you please tell the jury what you're looking
18 at?

19 A: It is a biological specimen kit. It holds either urine
20 or a blood sample that the officers do at the hospital.

21 Q: Okay. And have you ever handled what's -- have you ever
22 handled what's in this picture in the course of your duties?

23 A: Yes, ma'am.

24 Q: Okay. When?

25 A: Anytime there is a person that has been taken to the

State v. Atwater - 2019-GS-26-02899, 02900
CHRIS SENGLE - DIRECT BY HARTE

323

1 hospital where a urine sample or a blood sample has been
2 collected.

3 Q: Okay. Can you tell me whose name is on that sample?

4 A: The officer's name is Bryan Floyd.

5 Q: Okay. And can you tell me ---

6 A: I'm sorry.

7 Q: Can you tell me who that is a sample from?

8 A: From the picture, I don't see the name, but it would be
9 from the defendant, Claybon Atwater.

10 Q: Okay. And do you have any documents with you regarding
11 the chain of this blood kit?

12 A: Yes, ma'am. I have our property and evidence sheet that
13 the officer fills out when they drop the evidence.

14 Q: And why do y'all create these forms?

15 A: For us to always reference back to as far as who had
16 handled the evidence, where we got it from, where it was
17 stored.

18 Q: Okay. I want to bring you back to the blood kit that you
19 handled from the defendant. How did that item come into your
20 possession?

21 A: It was dropped by Officer Floyd into one of our
22 refrigerators, and when I came into work the next business
23 day, I pulled it from the refrigerator.

24 Q: Okay. And when you obtained the item, how long was it
25 packaged?

State v. Atwater - 2019-GS-26-02899, 02900
CHRIS SENGLE - DIRECT BY HARTE

324

1 A: It was, roughly, close to two weeks.

2 Q: Okay. And were the seals intact?

3 A: Yes, ma'am.

4 Q: Okay. And would you have done it if the blood kit --
5 would you have stored it if the blood kit was not intact or
6 sealed?

7 A: No. I would've rejected it.

8 Q: And while it was in your custody and control, did you
9 alter or change it in any way?

10 A: No, ma'am.

11 Q: Okay. And when and where did you leave the item, excuse
12 me, when and where does the item leave your custody and
13 control?

14 A: When I delivered it to SLED.

15 Q: Okay. And when you submitted the kit at SLED, were the
16 seals intact then?

17 A: Yes, ma'am.

18 Q: Okay. I have no questions for you at this time. Please
19 answer any the defense attorney may have.

20 MR. TRUSLOW: No cross-examination, Your Honor.

21 THE COURT: All right. Do you wish the witness to be
22 excused?

23 MS. HARTE: Yes, sir, Your Honor.

24 MR. TRUSLOW: No objection.

25 THE COURT: All right, ma'am, you're released from your

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

325

1 subpoena and may go back to regular duties. Thank you.

2 All right. Who is the next witness, please?

3 MS. HARTE: Next, Your Honor, the state calls Jake Hoard.

4 THE COURT: All right.

5 THE CLERK: Please raise your right hand and place your
6 left on the Bible.

7 JAKE HOARD, HAVING BEEN DULY SWORN
8 TESTIFIES AS FOLLOWS:

9 THE CLERK: Please be seated. State your full name for
10 the record and spell it, please.

11 MR. HOARD: Yes, ma'am. Yes, ma'am. I'm Officer Jake
12 Hoard, H-O-A-R-D. Formally with the North Myrtle Beach
13 Department of Public Safety; now I work for City with the
14 Farmington Department of Public Safety.

15 DIRECT EXAMINATION OF JAKE HOARD BY MS. HARTE:

16 Q: Okay. And Mr. Hoard, I can tell your voice is a little
17 bit raspy. Can you please tell the jury kind of what's going
18 on with you medically?

19 A: I will try and project as best I can. I have a paralyzed
20 right vocal cord. So, what you are hearing is my left one
21 working overtime. I'll do the best I can.

22 Q: Okay. And you already said your name for the record, and
23 where were you working in April of 2019, Mr. Hoard?

24 A: I was a patrolman first class with the North Beach
25 Department of Public Safety.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

326

1 Q: Okay. And what is your educational background?

2 A: I have an associate's degree in criminal justice, a
3 bachelor's degree in criminal justice and a master's degree in
4 law enforcement administration.

5 Q: Okay. And while employed at North Myrtle Beach PD, what
6 was your position?

7 A: I was a patrolman and basically -- just a basic
8 patrolman.

9 Q: Okay. And how long did you serve in that capacity?

10 A: Six years.

11 Q: Okay. And can you please describe your responsibilities
12 while you were at the North Myrtle Beach Police Department?

13 A: Yes, ma'am. I was a bicycle patrol officer. When I
14 left, I was a DUI FST instructor; I was a DataMaster operator;
15 I was a FST practitioner; I did obviously basic patrol. I
16 have a bunch of certifications, but the ones that pertain to
17 DUI enforcement and to this case are ---

18 Q: We'll get to that question in just a second.

19 A: Okay. I'm sorry.

20 Q: I was about to ask you that. Are you certified as a
21 breath alcohol testing specialist and a DataMaster operator?

22 A: Yes, ma'am.

23 Q: Okay. And who certified you as a alcohol breath testing
24 specialist and DataMaster operator?

25 A: The South Carolina Criminal Justice Academy.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

327

1 Q: Okay. And what kind of training have you had in
2 preparation for being certified as a breath testing
3 specialist?

4 A: So, the initial class is an eight-hour class taught by
5 South Carolina Justice Academy before you are certified to go
6 out and be a law enforcement officer, and then you have to do
7 an annual recertification and re practical exam with FSTs and
8 take an online test.

9 Q: Okay. And what other certifications do you hold?

10 A: So, a Class I officer, a DataMaster operator, an FST
11 practitioner. I also took a separate SLED class based solely
12 off the DataMaster, that talked about that, just got a little
13 more in depth. I was also -- I've been awarded a bronze,
14 silver, and gold DUI Hero Enforcement Award from the South
15 Carolina Law Enforcement Officers Association. I'm a DUI FST
16 instructor, and I'm one of only two officers in North Myrtle
17 Beach, unless it's changed in the year since I've left, to win
18 a gold DUI Hero Award.

19 Q: Okay. And have you ever been qualified to testify in
20 court as an expert witness?

21 A: I have not.

22 Q: Okay. Have you ever testified in court regarding DUI
23 cases?

24 A: It was a failure to stop DUI and it was General Sessions,
25 yes, ma'am, a couple of years ago.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

328

1 Q: Okay.

2 MS. HARTE: Your Honor, at this time the state would move
3 to qualify Mr. Hoard as an expert in breath alcohol testing?

4 THE COURT: Do you wish to voir dire the witness or
5 challenge his qualifications?

6 MR. TRUSLOW: No, sir, I would only ask for clarification
7 on the classification expert, the breath alcohol testing; is
8 that what you said?

9 MS. HARTE: And I would also ask that he be certified as
10 an expert on the DataMaster as well?

11 MR. TRUSLOW: Well, not -- I think that's what he's an
12 expert in, not just breath alcohol. Breath alcohol, breath
13 testing machine.

14 THE COURT: So, there's no objection to the state's
15 offer?

16 MR. TRUSLOW: To what?

17 THE COURT: There's no objection then to the state's
18 offer?

19 MR. TRUSLOW: Yes, sir. She asked for him to be an
20 expert in both of those areas, and I said I believe he's an
21 expert in breath alcohol testing and the DataMaster machine,
22 not breath alcohol as a general subject.

23 THE COURT: Okay.

24 MS. HARTE: Your Honor, if you'd like me to rephrase?

25 THE COURT: Yes, ma'am, please.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

329

1 MS. HARTE: Your Honor, at this time, I would like to
2 move Mr. Hoard as a expert in alcohol breath test -- as an
3 alcohol breath testing specialist and a DataMaster operator?

4 MR. TRUSLOW: Yes, sir. No objection.

5 THE COURT: All right. So, he's qualified to give his
6 opinion in that field then. Thank you very much.

7 MS. HARTE: Thank you, Your Honor.

8 BY MS. HARTE:

9 Q: Mr. or Trooper Hoard, were you employed with North Myrtle
10 Beach on April 6th, 2019?

11 A: Yes, ma'am.

12 Q: Okay. And what were your duties on that particular day?

13 A: On that particular day, I came in and I was asked to
14 assist Officer Floyd with conducting breath testing of the
15 defendant as well as standard field sobriety tests for the
16 defendant in this case.

17 Q: Okay. And where did this occur, in what county?

18 A: In Horry County, ma'am.

19 Q: Okay. And did you read the defendant his Miranda
20 warnings when he entered the blood alcohol room?

21 A: Yes, ma'am.

22 Q: Okay. And what is the standard procedure for offering
23 the breath test?

24 A: So, first things first, you start the video. The video
25 recording process in the DataMaster room is not controlled in

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

330

1 any way affected by us, the department or the officer, it's
2 all controlled by South Carolina Law Enforcement Division.
3 The first thing, you turn on the video. Second, you escort
4 the defendant into the room. Then there is a partition just
5 for safety. The defendant waits on one-half of the partition;
6 you wait on the other half. Then you input data into the
7 DataMaster. There's an assortment of data that has to go in
8 such as the defendant's information, his driver's license,
9 your operator number, the arresting officer's information.
10 Then there's a 20, I'm sorry, then you check the defendant's
11 mouth. You have to make sure there are no obstruction,
12 there's nothing in the mouth that could cause a skewed result.
13 Once that check is completed, you then begin a 20-minute
14 observational period. During that 20-minute observational
15 period, nothing goes into the defendant's mouth; nothing comes
16 out, for the same reason, nothing can affect the results.
17 After the 20-minute observational period, the machine runs
18 through some tests. So, another thing about the machine ---
19 Q: Officer, we're going to back you up just a little bit ---
20 A: Sorry.
21 Q: --- because I want to stay in order with the jury. Did
22 you -- is there any sort of form or advisement that you read
23 to the defendant ---
24 A: Yes, ma'am.
25 Q: --- when he entered into the alcohol room?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

331

- 1 A: Yes, ma'am. So, during that 20 minute observational
2 period, you read the defendant what's called the advisement of
3 the implied consent form, and you ask the defendant to sign
4 that form.
- 5 Q: Okay. And did you follow the proper procedure to advise
6 this defendant of his implied consent rights?
- 7 A: Yes, ma'am.
- 8 Q: And did you do that by using the form?
- 9 A: Yes, ma'am; I read it verbatim.
- 10 Q: Okay. And to the best of your knowledge from memory, do
11 you remember if the defendant signed the advisement of implied
12 consent and rights form?
- 13 A: I do believe the defendant did sign the form; yes, ma'am.
- 14 Q: Okay. And when a defendant signs this form, in general,
15 what does it mean?
- 16 A: It just means that he has understood the form. I also
17 gave -- I gave the defendant in this case, and I typically
18 give the defendant, a chance to ask questions if they don't
19 understand part of the form, and the defendant didn't have any
20 questions.
- 21 Q: Okay. I want to show you what's been marked as State's
22 Exhibit 25?
- 23 A: Yes, ma'am.
- 24 Q: Could you please tell the jury what you're looking at?
- 25 A: Yes, ma'am. Ladies and gentlemen of the jury, this is a

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

332

1 copy of the implied consent form that I read to the defendant
2 in the DataMaster room, as well as his signature saying that
3 he did understand the form, I did read it to him verbatim, and
4 he was also provided a copy. His copy doesn't have a
5 signature on it.

6 Q: Okay. And does that copy have your signature on it?

7 A: Yes, ma'am.

8 Q: Okay. And what is the date by your signature?

9 A: April 6th of 2019.

10 Q: Okay. And is that a fair and accurate depiction of the
11 advisement of implied consent rights signed by the defendant
12 on April 6th, 2019?

13 A: Yes, ma'am; it's a copy.

14 Q: Okay.

15 MS. HARTE: And, Your Honor, at this time, the state
16 moves to enter exhibit or State's Exhibit 25 into evidence?

17 THE COURT: Any objection?

18 MR. TRUSLOW: No objection.

19 THE COURT: All right. It's in evidence without
20 objection.

21 STATE'S EXHIBIT NUMBER 25

22 ADMITTED INTO EVIDENCE

23 BY MS. HARTE:

24 Q: Okay. So, after you went over the defendant's implied
25 consent rights, did you do any field sobriety tests?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

333

1 A: Yes, ma'am; I did.

2 Q: Okay. And what are field sobriety tests?

3 A: The field sobriety tests I conducted are NHTSA, National
4 Highway Traffic Safety Administration field sobriety tests
5 that when they're performed properly, with proper
6 instructions, can give an accurate indication of the
7 impairment of the subject. In reference to the State of South
8 Carolina, it shows that the subject at the time was materially
9 and appreciably impaired.

10 Q: And which ones, if any, did you administer on this
11 defendant?

12 A: Yes, ma'am. I did the walk-and-turn and the one-leg-
13 stand test, and I'm just going to refer to my notes.

14 Q: Okay. Well, we're gonna go one by one, so we can go
15 through. We're gonna start with the walk and turn; did you do
16 that with him first?

17 A: Yes, ma'am, that was the first test that the defendant
18 attempted to perform.

19 Q: Okay. And can you please explain to the jury what the
20 walk-and-turn is, and -- can you please explain what that is?

21 A: Yes, ma'am.

22 Q: If you need to stand up and demonstrate?

23 A: Could I?

24 THE COURT: Yes, sir.

25 MS. HARTE: Your Honor, could we allow the witness to

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

334

1 stand down and demonstrate for the jury?

2 THE COURT: Yes, sir, but you're gonna have to -- you'll
3 probably have to do it right in front of this microphone,
4 because of your voice situation.

5 A: So, for the walk-and-turn, the first thing is you put the
6 defendant in what's called the instructional position. The
7 instructional position is they put one foot on the ground,
8 they take their other foot and put it heel to toe in front of
9 the front foot like so, they keep their arms down by their
10 side, and then they stay in that position until you tell them
11 to move, and they stay in that position while you give the
12 instructions.

13 Q: Okay. You can take a seat for us. Okay. And when
14 performing the walk-and-turn tests, what are -- what are you
15 looking for; what are the indicators?

16 A: There's eight validated clues in the test. I'm just
17 gonna to refer to my notes.

18 Q: Okay. Failure to maintain balance. The failure to
19 maintain balance is when they're in that instructional
20 position. They can't -- they can't hold it, they are moving
21 their feet. Basically, they can't stand still while you give
22 the instructions.

23 Starts too soon, and what that is, is when you say if
24 you'll please stay in that position until I tell you to move.
25 People under the influence, they have short attention spans,

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

335

1 divided attention. They'll forget that you told them not to
2 move. So, as you're giving instructions, he'll just start
3 performing the test before you tell them to begin. That's a
4 valid indicator.

5 Steps off line, so you're asking them to walk in a
6 straight line, and they start curving one way or the other and
7 have to overcorrect. That's a validated indicator.

8 Tell them to touch heel to toe by leaving more than a
9 half inch gap. That's -- again, that's a validated indicator.

10 Uses arms for balance by raising more than six inches off
11 the body. That's a validated indicator. What that is, is
12 they're getting ready to fall over, so they'll reach out to
13 steady themselves. That's a validated indicator.

14 Stops while walking. That occurs -- there's four things
15 that you tell them right before they begin the test, and
16 that's to count each step out loud, look down at your feet,
17 keep your arms down by your side, and you don't stop the test
18 until after you have successfully completed it. And what will
19 happen oftentimes when they do their nine steps forward, they
20 kind of forget the instructions, because they were too focused
21 on doing those nine steps and because of the intoxication,
22 they forget -- divide attention, and they'll say -- or nine
23 steps back and he'll stop. That's a validated indicator.

24 The incorrect number of steps. I've had some people that
25 just keep going and going and going because they forget it was

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

336

1 nine steps there and nine steps back, and you've got to stop
2 them because they're at 30 steps and they're about to go into
3 the road.

4 And then improper turn, that one, I've kind of got to
5 demonstrate.

6 Q: You can step down to do that.

7 A: So, in giving the instructions, this is the proper way to
8 ---

9 Q: Make sure that you're close to the mic.

10 A: Sorry. So, the proper way to perform the test, you take
11 nine steps forward, when you get to nine, you leave your lead
12 foot planted, you then turn around by making a series of
13 several smaller steps around your lead foot like that, and
14 then you will turn and take nine steps ---

15 MR. TRUSLOW: Your Honor, I've got to pose an objection.
16 I think that if he's going to demonstrate a test, that he
17 should do the test, not just a portion of it, if he's going to
18 physically demonstrate it.

19 THE COURT: All right. Take your seat back. Thank you.

20 BY MS. HARTE:

21 Q: Was that the last of the indicators?

22 A: That was the final indicator.

23 Q: Now, I want to move on to, could you please describe the
24 defendant's performance on this particular test?

25 A: Yes, ma'am. So, the defendant gave two validated -- so,

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

337

1 two of those indicators validate the test that the defendant
2 is under the influence. The two that the defendant had was
3 failure to maintain balance during instructions and starting
4 too soon. I don't want to get ahead, but it's in the video,
5 so you'll see the defendant not being able to hold that
6 instructional position. You will also see the defendant
7 starting the test before being told to begin to do so. Then
8 the defendant stopped, and he was reluctant about completing
9 the test. And I asked him, you know, just do the best you
10 can. He said he had a leg pain issue. He didn't want to
11 complete the test, so he never even got to take his nine steps
12 forward and nine steps back, but we already validated
13 indicators at that point that he was under the influence.

14 Q: Okay. And I want to move on to the next test that you
15 stated you did, the one-leg stand. Could you please just
16 explain to the jury what the one-leg stand is?

17 A: Yes, ma'am. So, the one-leg stand, you have the
18 defendant stand with their feet together and their arms by
19 their side, and they just stand there and don't move while you
20 give the instructions. The instructions are when I tell you
21 to begin, you will lift one foot, whichever your choice, and
22 the defendant gets to choose which foot he lifts,
23 approximately six inches off the ground, take the toe of your
24 lifted foot and point it parallel to the ground, look at your
25 toe and count in the following manner; 1001, 1002, 1003, 1004.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

338

1 You tell them to keep counting until I tell you to stop and
2 when I tell you to stop, you'll go back to that position. You
3 do that for 30 seconds, but if it's not 30 seconds, because
4 people can count different and you use a stopwatch so you get
5 an accurate 30 seconds.

6 Q: All right. And when performing this type of test, are
7 you looking for the same indicators that you mentioned, or
8 different indicators?

9 A: No, ma'am. There's four separate indicators just for
10 this test.

11 Q: Okay. Could you please explain to the jury what you're
12 looking at in regards to this test as indicators?

13 A: So, for the one-leg stand, there is four indicators.
14 Puts foot down; uses arms to balance, but more than six inches
15 from the body; sways, which is going like that, you'll see
16 that in the foot; or hops, which is where they're starting to
17 lose balance and they have to move that foot that's planted on
18 the ground to stop from falling over.

19 Q: Okay. And could you please describe the defendant's
20 performance on this test?

21 A: Yes. So, two of those indicators validate the test that
22 the defendant is impaired. In this case, the defendant -- I
23 observed three indicators. He used his arms to balance. The
24 reason was to stop from falling over. He swayed, which is the
25 going back and forth. And then, he also hopped by again,

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

339

1 moving that back foot so they don't fall over.

2 Q: Okay. And is there another field sobriety test that you
3 didn't perform?

4 A: Yes, ma'am; a horizontal gaze nystagmus. We did not
5 perform that test.

6 Q: Okay. And why didn't you perform that test?

7 A: So, in the DataMaster room, for safety and security, I
8 have to be on one side of a petition with a lock and key; the
9 defendant is on the other. With the horizontal gaze
10 nystagmus, you have to be in close proximity to the defendant
11 because, one, you have to see how their eyes are reacting to
12 the stimulus; and two, you have to be close because the
13 stimulus has to be held up close to their eyes. It's not
14 possible in that DataMaster room for those security reasons.

15 Q: Okay. And, is there any recording or record of these
16 field sobriety tests?

17 A: Yes, ma'am. The entire battery is video and audio
18 recorded.

19 Q: Okay. And have you been shown a copy of what's been
20 marked as State's Exhibit 36? And I'll approach if ---

21 A: That's my signature; yes, ma'am.

22 Q: Okay. And is that your signature on the disc?

23 A: Yes, ma'am.

24 Q: And could you please tell the jury what's on this disc?

25 A: So, that video is gonna record me starting the video, the

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

340

1 defendant coming in, and it will record my entire interaction
2 in this case with the defendant: Field sobriety testing; the
3 advisement of implied consent; questions that he was asked
4 post-Miranda, where he makes admissions; the 20-minute
5 observational period; his mouth getting checked for
6 obstructions; the breath test running through its test to make
7 sure it's functioning properly; him supplying voluntarily a
8 breath test; me telling him the breath test results; him being
9 shown a copy of the results; and then him being escorted back
10 into the jail area.

11 Q: And when you reviewed this recording, was it a true and
12 accurate representation of the recording that you did on April
13 6th, 2019?

14 A: Yes, ma'am.

15 Q: Of the field sobriety test?

16 A: Yes, ma'am. Like I said, we have no control of the
17 video. It's handled by SLED. We just activate it and make
18 sure it's working.

19 Q: Okay. So, this tape has not been tampered or altered in
20 any way?

21 A: The only addition was a muted portion in your pretrial
22 motion, but it's not been altered in any way; yes, ma'am.

23 Q: Okay. And after the field sobriety tests, what did you
24 do next?

25 A: I talked to the defendant because we still had time left.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

341

1 I just made conversation with him. I did ask him basic
2 questions to make sure he was in the right state of mind, he
3 wasn't injured, things like that. There's actually a book in
4 our room and that's basically a script and you just follow the
5 instructions. So, I asked him those questions. His answers
6 were recorded. Then I explained on how to provide a breath
7 sample if he chose to do so. I explained to him how to do so,
8 and he provided a breath sample.

9 Q: So, did you administer a breathalyzer test?

10 A: Yes, ma'am.

11 Q: And how do you administer a breathalyzer test?

12 A: So, these are straws that are sealed. You put on medical
13 gloves, you -- once the machine is ready, you unseal the
14 straw, you put one end of the straw into the tube, you give
15 the tube to the defendant, the defendant comes up and just
16 blows into the tube a nice easy elongated breath like they're
17 blowing up a balloon, and the machine does the rest. Like I
18 say, we have no control over that.

19 Q: Okay. And could you please explain to the jury what the
20 DataMaster is?

21 A: So, the DataMaster is a machine that measures a sample of
22 your breath to determine the alcohol concentration.

23 Q: Okay. And what training, if any, have you had in regard
24 to the DataMaster?

25 A: So, like I said, every officer that graduates from the

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

342

1 South Carolina Criminal Justice Academy graduates as a
2 certified operator. They take the 80-hour class and as part
3 of that 80-hour class. You also have to do your annual
4 refreshers to keep certified in that machine.

5 Q: All right. And how many times would you say you've
6 administered the DataMaster?

7 A: At this point in my career, it's -- it's gonna be 200 or
8 upwards of 200, a significant amount.

9 Q: Okay. And you are certified as a DataMaster operator,
10 correct?

11 A: So, now that I'm in the State of Michigan, it's the same
12 machine, but different verbiage. But I was certified at this
13 time for South Carolina's machine, and I'm getting certified
14 in Michigan's machine.

15 Q: We're specifically talking about South Carolina?

16 A: Yes; I was certified.

17 Q: Okay. And how long were you certified in South Carolina
18 as a DataMaster operator?

19 A: Since I became an officer, so at this point, five or six
20 years.

21 Q: Okay. And once again, who certified you as a DataMaster
22 operator?

23 A: The South Carolina Criminal Justice Academy.

24 Q: Okay. And were you certified to operate the DataMaster
25 on April 6th, 2019?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

343

1 A: Yes, ma'am.

2 Q: Okay. And what is the standard procedure for offering
3 the breath test? Do you read the defendant anything?

4 A: Yes, ma'am. So, you first read the implied consent so
5 they understand what their options are, you know they
6 understand they can refuse; they understand what they're being
7 arrested for; they understand that, if they refuse, there are
8 administrative consequences. You have them sign that form,
9 then you check them out, assuming there's no obstructions.
10 There's the minute observational period, and then after that
11 twenty 20-minute observational period. And then after that
12 20-minute observational period, the machine starts running
13 through its test, and then the defendant has the opportunity
14 to give a sample if they choose to do.

15 Q: Okay. And did the defendant submit to the breathalyzer
16 test?

17 A: Yes, ma'am.

18 Q: Okay. And what were the results of that test?

19 A: .11 percent blood alcohol concentration.

20 Q: And was the DataMaster working properly during the
21 defendant's test?

22 A: Yes, ma'am. So, the DataMaster runs through a series of
23 checks before the defendant even has the option, and it does
24 another purge and check afterwards. We have no control over
25 that. As a matter of fact, the DataMaster, if it detects any

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

344

1 error, it will not even let the defendant provide a sample.
2 The way the system is set up, it is always to benefit the
3 defendant.
4 Q: Okay. And is there any written report of the DataMaster
5 test and its results that you can show the jury?
6 A: Yes, ma'am. It prints off the test results.
7 Q: Okay. I want to show you what's been marked as State's
8 Exhibit 24. Could you please tell the jury what you're
9 looking at?
10 A: Yes. This is a copy of the defendant's test results from
11 the breath sample that he provided through the DataMaster.
12 Q: Does it have your signature on it?
13 A: Yes, ma'am; it does.
14 Q: Okay. Did you create that report?
15 A: Yeah. Well, it's created by the machine, but yes, ma'am,
16 since I input the data.
17 Q: Okay. And what time was the breath sample taken?
18 A: The breath sample was taken at 18:51 hours and 31
19 seconds, 6:51 p.m. and 31 seconds.
20 Q: Okay. And is that a fair and accurate depiction of the
21 breath alcohol analysis test report created on April 6th,
22 2019?
23 A: Yes, ma'am.
24 Q: Has it been altered or tampered in any way?
25 A: No, ma'am.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

345

1 Q: Okay.

2 MS. HARTE: Your Honor, at this time, the state moves to
3 enter State's Exhibit 24 into evidence?

4 THE COURT: Any objection?

5 MR. TRUSLOW: No, sir.

6 THE COURT: It's in evidence without objection.

7 STATE'S EXHIBIT NUMBER 24

8 ADMITTED INTO EVIDENCE

9 A: Thank you, ma'am.

10 BY MS. HARTE:

11 Q: And is there also a recording of the DataMaster test?

12 A: Yes, ma'am.

13 Q: Okay. And I previously showed you this, and I'm gonna
14 show it to you again. Have you had an opportunity to review
15 what's been marked as State's Exhibit 36?

16 A: Yes, ma'am.

17 Q: And is that your signature on it?

18 A: Yes, ma'am.

19 Q: Okay. And could you tell the Court again just briefly
20 what's on this disc?

21 A: So, again, that's gonna cover the entire process
22 including the checking of the mouth; the 20-minute
23 observational period; the defendant being advised of his
24 implied consent; the defendant providing a sample; the machine
25 doing the final purge, final check; and then the results

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

346

1 printing off; me telling the defendant his results; and that
2 form that she entered into evidence being printed and shown to
3 the defendant as well; and the defendant is asked to sign the
4 form.

5 Q: Okay. And was the recording that you watched a true and
6 accurate representation of what occurred on April 6th, 2019?

7 A: Yes, ma'am.

8 Q: Okay. And has this disc been tampered or altered in any
9 way?

10 A: No, ma'am.

11 MS. HARTE: Your Honor, at this time, the state moves to
12 enter State's Exhibit 36 into evidence and would like to
13 publish this to the jury.

14 THE COURT: Any objection?

15 MR. TRUSLOW: Just subject to the Court's prior rulings
16 on this.

17 THE COURT: All right. All right. So, over the
18 objection of the defense, the state can -- and State's 36 is
19 into evidence.

20 STATE'S EXHIBIT NUMBER 36

21 ADMITTED INTO EVIDENCE

22 THE COURT: You may publish to the jury.

23 (REPORTER'S NOTE: State's 36 published to the jury. Audio
24 not transcribed herein.)

25 BY MS. HARTE:

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

347

1 Q: Mr. Hoard, what was the defendant's results again on the
2 blood?

3 A: .11 percent.

4 Q: Okay. And what is the presumptive level of intoxication
5 in South Carolina?

6 MR. TRUSLOW: Objection, Your Honor. It's a question of
7 law and it's also not phrased correctly.

8 THE COURT: Ladies and gentlemen, go to your jury room,
9 please.

10 (REPORTER'S NOTE: Jury exits courtroom @ 11:50 a.m. The
11 following takes place outside the presence of the jury.)

12 THE COURT: All right, Mr. Truslow, what way do you think
13 it should be phrased?

14 MR. TRUSLOW: Well, my first position is that he should
15 not testify as to the law in this case. The judge should give
16 the law to the jury. He's giving what the result was, now
17 he's testifying what the legal principles of a presumption are
18 and the second part of it would be it's an inference, and the
19 jury may infer. This is tantamount, I think, to instructing
20 the jury on the law.

21 THE COURT: What say you, Solicitor?

22 MS. HARTE: Judge, I could rephrase the question. He's
23 been certified as an expert and he's a police officer. I
24 think he can testify to what the level of intoxication is in
25 South Carolina and I can rephrase it.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

348

1 MR. TRUSLOW: And it's not a level of intoxication,
2 either.

3 MS. HARTE: I'll rephrase it. What is the -- what is the
4 blood alcohol content level where -- in South Carolina that
5 ---

6 THE COURT: I think we'll -- we'll leave it to the Court
7 to explain that to the jury when we go over the law regarding
8 driving under the influence, felony driving under the
9 influence and inferences regarding the test.

10 MS. HARTE: Okay, Judge.

11 THE COURT: Do you have further questions of this
12 witness?

13 MS. HARTE: I do.

14 THE COURT: Okay. Who would be the next witness from the
15 state, just so ---

16 MR. DEBUSK: Your Honor, we have three witnesses left.
17 Two of them are -- they are all from SLED or formerly from
18 SLED.

19 THE COURT: All right.

20 MR. DEBUSK: The first one will be very short, and the
21 second one longer than the short one and the third one kind of
22 long.

23 THE COURT: All right. Very good. All right. Check
24 with the jury and see when they're ready to come back in.
25 Okay? Thank you, ma'am.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

349

1 BAILIFF: They're ready, Judge.

2 THE COURT: All right. Bring them in. Thank you.

3 (REPORTER'S NOTE: Jury enters courtroom @ 11:55 a.m.)

4 THE COURT: All right, Solicitor, you may continue.

5 BY MS. HARTE:

6 Q: Mr. Hoard, did you ask the defendant if he had been
7 drinking any alcohol ---

8 A: Yes, ma'am.

9 Q: --- during the video that we just watched?

10 A: Yes, ma'am.

11 Q: And how did the defendant answer that question?

12 A: He responded he had been drinking earlier in the day, and
13 then when pressed for just a little more detail, he responded
14 he had consumed a 24-ounce Icehouse beer and a 16-ounce
15 Natural Light beer.

16 Q: I have no further questions for you at this time. Please
17 answer any questions the defense attorney has for you.

18 THE COURT: Cross-examination?

19 MR. TRUSLOW: Yes, sir.

20 CROSS-EXAMINATION OF JAKE HOARD BY MR. TRUSLOW:

21 Q: Officer, are you familiar with the association or, I
22 guess, government agency NHTSA?

23 A: Yes, sir.

24 Q: Do you know what that is?

25 A: Yes, the National Highway Traffic Safety Administration.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

350

1 Q: All right. And then in your education and training with
2 field sobriety tests, do field sobriety tests kind of
3 originate from NHTSA?

4 A: Yes. They did the validation study and decided what
5 tests would be performed and validated those tests and what
6 the validated -- so, yes, sir.

7 Q: So, you're familiar with that validation studies and that
8 type thing?

9 A: Yes, sir. I'd have to refer to the research, but I'm
10 familiar with the studies; yes, sir.

11 Q: Are you -- are you aware that the reliability of these
12 tests change dramatically when not given all three tests?

13 A: Yes, sir.

14 Q: Okay. In fact, the test reliability becomes 64 percent
15 for one and 68 percent for the one-leg stand; 64 percent
16 accuracy reliability for the walk-and-turn without the HGN?

17 A: So, the exact percentages, I don't have memorized. I
18 could refer ---

19 Q: Does that sound about right?

20 A: Again, I don't -- I don't want to give an answer that --
21 I'd have to refer to them, to those studies, sir.

22 Q: Okay. He did not -- he was not given the HGN testing,
23 correct?

24 A: He was not, correct.

25 Q: Which is checking the eyes?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

351

1 A: Yes, sir.

2 Q: Okay. And he wasn't because you were on the other side
3 of the glass there pretty much?

4 A: So, there's a -- there's a petition, and I can't give HGN
5 while staying on the safety side with the petition; it's just
6 not possible.

7 Q: Although you did check his mouth for foreign objects when
8 he approached you right?

9 A: Yes, sir.

10 Q: And that's something you had to look into his mouth?

11 A: Yes, sir.

12 Q: Okay. And his eyes are right above his mouth, correct?

13 A: Yes, sir.

14 Q: All right. And you had nothing to do with the call of
15 giving him field sobriety tests at the incident site where he
16 could receive all three?

17 A: No, sir. My participation of the case was ---

18 Q: Okay.

19 A: --- what we saw on the video.

20 Q: This is gonna be brief. Is there any -- was there any
21 information you asked him to provide you that he did not
22 provide in that room?

23 A: You mean in terms of questions I asked that he didn't
24 answer?

25 Q: Any information you requested from him that he did not

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

352

1 give you?

2 A: Not to my knowledge, sir; no.

3 Q: Okay. Was there anything you asked him to do that he did

4 not do apart from the first test?

5 A: The walk-and-turn that he didn't want to perform; that's

6 the only thing I had asked him to perform that he felt he

7 could not do.

8 Q: When you asked him to stand on the X, was he standing on

9 the X?

10 A: No, he was wandering. There were several times he had to

11 be reminded to stand on the X. So, I would say that due to

12 the amount of times he kept wandering off and I had to tell

13 him to stand back on the X.

14 Q: Your testimony is that the video depicts him wandering

15 around the room?

16 A: So, when I say stand on the X, you're supposed to just

17 stand on the X. There were several times I just had to remind

18 to stand on the X.

19 Q: Could you see the video just now?

20 A: Yes, sir.

21 Q: You didn't see him standing on the X the entire time?

22 A: No. He was not on the X the entire time; no, sir.

23 Q: Okay. All right. Well, let me get back to something.

24 The field sobriety tests, I guess they're designed to test

25 divided attention, correct?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

353

1 A: Divided ---

2 Q: Something along those lines?

3 A: That is one of the accomplishments of standardized field
4 sobriety tests, yes.

5 Q: So, they would have to concentrate on two different
6 things at the same time?

7 A: For the divided attention portion, yes, sir.

8 Q: Okay. Now, would you consider facing a major serious
9 felony, with that be an additional factor to have your
10 attention on in addition to the two, however many others?

11 A: No, sir; because what you're asking is for them to
12 perform a simple task. The felony being in the back of your
13 mind like this happened, I did this, I wouldn't think that
14 that would constitute your inability to follow basic simple
15 instructions.

16 Q: You don't think any of his attention would be on the
17 predicament in which he's in or under arrest?

18 MS. HARTE: Objection, Your Honor, speculation.

19 THE COURT: It's calling for speculation ---

20 MR. TRUSLOW: I'm asking him if he ---

21 THE COURT: Sir?

22 MR. TRUSLOW: Yes, sir.

23 THE COURT: Okay. I'll give you an opportunity to speak.
24 When I'm speaking you do not speak; do you understand me?

25 MR. TRUSLOW: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

354

1 THE COURT: Thank you. You cannot ask for his opinion.
2 You can rephrase your question. Thank you.

3 BY MR. TRUSLOW:

4 Q: Do you believe that he had his attention focused on being
5 under arrest at all?

6 A: Part of his attention was probably on the fact, because
7 he wanted to know what his bond was; yes, sir.

8 Q: So, would that further divide his attention?

9 A: No, sir, not from -- not from completing the tasks at
10 hand, because he has -- he's following my instructions and
11 listening to what I'm telling him.

12 Q: With the one-leg test stand ---

13 A: The one-leg stand.

14 Q: With that test, what are the factors his attention is
15 divided on with the test, multiple factors?

16 A: So, it's counting each step out loud, looking down at
17 your feet, holding that foot up and staying steady, ---

18 Q: Right.

19 A: --- and then waiting for the officer to say stop and
20 going back to that position.

21 Q: So about ---

22 A: During the test, before it's the instructions and making
23 sure you comprehend how to perform.

24 Q: Okay. So, during the test there's about five factors
25 you're focused on?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

355

1 A: Well, there's four validated ---

2 Q: Four. Okay.

3 A: What you asked was, you know -- basically, what you asked
4 what does the defendant have to do to successfully perform.

5 Q: Okay. I'm simply asking that if he is concerned about
6 being under arrest for this felony offense, is that not
7 something further that would take his attention and add an
8 additional factor?

9 MS. HARTE: Objection, Your Honor, speculation.

10 MR. TRUSLOW: All right. That's fine.

11 BY MR. TRUSLOW:

12 Q: So, would you agree with me that when you're
13 investigating a subject for driving under the influence, you
14 are concerned whether his normal faculties are impaired?

15 A: Yes, sir; materially and appreciably impaired.

16 Q: Thank you. Do you think performing a field sobriety test
17 is a normal function for people?

18 A: Not normal as in everyday; however, the average people
19 that is not under the influence can perform these tests
20 successfully, yes.

21 Q: Okay. How many -- do you know whether people often do
22 field sobriety tests on their spare time; do you have any way
23 to know that?

24 A: Not -- no, I really don't. I would gander to say most
25 people don't practice these unless you're a serial DUI person

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

356

1 that's ---

2 Q: Would you be surprised that my client, that was the first
3 time, or you've had -- do you think you've ever had anybody in
4 there that it was their first time doing the field sobriety
5 tests in their life?

6 A: Yes, I have. Based off of what ---

7 Q: Okay. So, that's not something that ---

8 MS. HARTE: Objection ---

9 THE COURT: Mr. Truslow, he's trying to answer question.
10 Please let him answer your question.

11 Go ahead.

12 A: So, in answer to that question, I have had people say
13 that's the first time -- I've ran people through roadside that
14 I thought were impaired that went through the tests, didn't
15 give out indicators, and said, you know, that's the first time
16 I've had to do that, and they weren't impaired, and I let them
17 drive off.

18 BY MR. TRUSLOW:

19 Q: Okay. Fair enough.

20 A: But I don't -- I didn't verify that.

21 Q: So, the last really question on that issue, is it your
22 position that the field sobriety test is accurate in testing
23 an individual's normal faculties and abilities; is it an
24 accurate test of that?

25 A: We -- can you repeat the question. I just want to make

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

357

1 sure ---

2 Q: Yes, sir. Is it your position that the field sobriety
3 test tests accurately an individual's normal faculties and
4 abilities?

5 A: Contrast of that field sobriety tests accurately depict
6 the subject's intoxication due to the validated indicators.
7 The field sobriety tests ---

8 Q: At least to a degree of 64 percent and 68 percent?

9 A: Those are your numbers. I would have to have the studies
10 ---

11 Q: Would you like to see the study, would that help?

12 THE COURT: Mr. Truslow ---

13 MR. TRUSLOW: He said he would need it.

14 THE COURT: --- I appreciate it, and you understand he's
15 trying to answer your question.

16 MR. TRUSLOW: I do, Your Honor.

17 THE COURT: Please let him finish ---

18 MR. TRUSLOW: I understand and I'm sorry.

19 THE COURT: --- before you jump in and ask another
20 question.

21 MR. TRUSLOW: Yes, sir.

22 THE COURT: Okay.

23 MR. TRUSLOW: Yes, sir.

24 THE COURT: Go ahead.

25 BY MR. TRUSLOW:

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

358

1 Q: Would you like to see the numbers?

2 A: For the studies? Yeah. Yeah. If the only way you'll
3 accept my answer to that question is for me to make sure my
4 answer is accurate ---

5 Q: Yes.

6 A: --- because I'm not gonna give an answer that could be
7 wrong.

8 Q: I understand. Do you -- so, do you disagree with my
9 numbers is what I'm asking, I guess?

10 MS. HARTE: Your Honor, this question has been asked and
11 answered.

12 THE COURT: I'm gonna allow it one more time. Go ahead.

13 BY MR. TRUSLOW:

14 Q: Do you disagree with that?

15 A: So, I don't know ---

16 Q: Okay. Well, you're an expert ---

17 A: --- if that's accurate.

18 Q: --- I'm sorry. I'm sorry. It won't happen again. I'm
19 sorry, please continue, I apologize.

20 A: You don't have to apologize, sir. If I had the numbers
21 in front of me, I could say that you're -- that it was
22 accurate or not. I don't and I don't want to say something
23 that is not true.

24 Q: All right. Fair enough.

25 A: That I don't know to be true.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

359

1 Q: Fair enough. All right. So, is it your testimony today
2 that he passed or failed the one-leg stand test?

3 A: So, they are not pass or fail tests. They are more of
4 the indicators that he observed; however, he had validated
5 indicators on both tests.

6 Q: Okay.

7 A: So, in that case, he did not successfully perform either
8 test, and both tests were indicators that validated tests
9 showing that he was impaired; yes, sir.

10 Q: Okay. Well, let me ask you a couple of very simple
11 questions.

12 A: Yes, sir.

13 Q: When he took the one-leg stand test, did he stay on the
14 X?

15 A: Yes, sir.

16 Q: Okay. When he took the one-leg stand test, did he hold
17 his foot up until you told him to stop?

18 A: Yes, sir.

19 Q: Okay. And then did he put his foot down when you told
20 him to?

21 A: Yes, sir, when I said stop.

22 Q: All right. Thank you. Regarding the first one, the
23 walk-and-turn test, is it your testimony he indicated clues of
24 impairment or that he did not really take the test, was unable
25 to?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

360

1 A: So, it would be the same thing as if someone performed
2 half the test, said I don't want to do this anymore, for
3 whatever reason.

4 Q: Sure.

5 A: He had validated indicators during that test during the
6 time, and then before he performed, he did not want him to do
7 it; and, obviously, I'm not gonna force him to perform the
8 test.

9 Q: Sure. Okay. Are they instructed they had a right to
10 refuse to do the tests?

11 A: No; that's not part of the instructions. You just simply
12 say -- you don't even have to ask, you can say can we do these
13 tests or can we not do these tests, and he voluntarily did the
14 tests.

15 Q: Is an individual mandated to perform a field sobriety
16 test?

17 A: No, sir; they can refuse.

18 Q: Okay. So, he has the right to refuse to do it or not do
19 the test?

20 A: Yes, sir.

21 Q: Okay. Was there any evidence that you saw in the video
22 that he was in any type of physical pain?

23 A: No, sir.

24 Q: None?

25 A: No, sir.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

361

1 Q: Okay.

2 A: If you want me to elaborate ---

3 Q: No; I just wanted you to answer that.

4 A: Okay.

5 Q: Was there any evidence in the video tape that he was

6 tired?

7 A: Yes, sir. Well, he told me he was tired.

8 Q: Okay. Evidence that he told you that?

9 A: Yes, sir.

10 Q: And going back, because I am curious now, there's -- you

11 didn't see any evidence that he was in any physical pain?

12 A: No, sir.

13 Q: Okay.

14 A: I had evidence that he was checked out by medics.

15 Q: Do you know that for a fact?

16 A: Yes, sir, because when he -- that room was just outside

17 that room is the jail, and I recall the jailers have to ask

18 questions and -- because he was involved in a wreck, and I

19 remember Officer Floyd answering -- I forget the jailer -- if

20 he had been checked out on scene. On top of that, I asked him

21 if he had any injuries was under a doctor's care and he said

22 no.

23 Q: Okay. Okay. Apart from that, one last time, apart from

24 you saying he was checked out, okay? Evidence being something

25 you see or hear ---

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

362

- 1 A: Yes, sir.
- 2 Q: --- I'm simply asking was there that -- any evidence on
3 that video tape that he was in pain?
- 4 A: That he was?
- 5 Q: In pain?
- 6 A: In pain?
- 7 Q: Any evidence whatsoever?
- 8 A: No, sir. No, sir.
- 9 Q: Whether you believe it or not, you didn't see any that
10 would suggest it?
- 11 A: No, sir. He walked into the room on his own, he was
12 following -- he even, in that video, he's up and down. You
13 know, he was upset, but in terms of being in physical pain,
14 no, sir.
- 15 Q: Would you agree that he followed your instructions in
16 terms of where to stand, when to come up to you, and when to
17 go back, those instructions for the most part?
- 18 A: For the most part, yes, sir.
- 19 Q: Okay. And again, did he provide, readily, a number when
20 you asked for it towards the end of the video, a phone number
21 or social security number, it was one of the two?
- 22 A: No. What it was is I was explaining to him, he wanted to
23 use his phone ---
- 24 Q: Yes.
- 25 A: --- so people can get him out of jail and no issue with

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

363

1 that. What it was is the concern was he didn't know where his
2 phone was.

3 Q: Sure.

4 A: And I said, you can use our phone, but the problem is,
5 you know, even -- I have a smart phone, because of that nobody
6 has phone numbers memorized, and I think he had gone off on a
7 phone number that was important to him.

8 Q: Okay. All right. When he was on the X and not standing,
9 but he went down on his feet like this?

10 A: Yes, sir.

11 Q: Okay? Did you see him do that a number of times and for
12 a period of time?

13 A: I did at least once, sir.

14 Q: All right. At least once?

15 A: Yes, sir.

16 Q: All right.

17 A: And he sat down as well.

18 Q: At the end, right?

19 A: Yes, sir.

20 Q: And then you told him to get up?

21 A: Yes, sir.

22 Q: What did he do?

23 A: He got up.

24 Q: Okay. So, when he was down on the ground like that, on
25 his feet, did he lose balance at any point in time?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

364

- 1 A: He didn't fall over; no, sir.
- 2 Q: Okay. The conversations that you had with him on that
3 video, is that indicative of what you generally experience
4 with people in that room?
- 5 A: So, with the exception of I had asked him about my water
6 heater because I was -- I was concerned about my water heater
7 and he's been a plumber since he was 18. The alternative is,
8 you just sit there in silence for 20 minutes and it's
9 miserable for the officer and it's miserable for the
10 defendant. If you have a defendant that doesn't want to
11 converse ---
- 12 Q: I wasn't criticizing for that at all. I mean, I was just
13 saying it was ---
- 14 A: I thought that was what you were asking; I'm sorry.
- 15 Q: --- that and some of the other conversations with -- you
16 had with him, were they reasonable give and take or was there
17 any difficulty understanding you or him in the exchange?
- 18 A: No, sir. I mean, he answered my questions.
- 19 Q: Sure.
- 20 A: And if I needed him to repeat something, he repeated it.
- 21 Q: You wouldn't ordinarily, would you, ask an impaired
22 person for plumbing advice, would you?
- 23 A: No. Well, it depends on if he's fall-down drunk, the
24 answer is absolutely not. If he is, you know, intoxicated,
25 but ---

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

365

- 1 Q: Which is tantamount, would you agree, to relying on his
2 ability to form an opinion and give you a coherent and overt
3 answer?
- 4 A: It's more or less just making conversation as opposed to
5 actually going to him for repair advice; it's more or less
6 just making conversation.
- 7 Q: Okay. Why didn't you tell me that the first time, I
8 mean, honestly?
- 9 A: I misunderstood the question because you stopped.
- 10 Q: Okay. Was there anything he told you that you didn't
11 understand?
- 12 A: That I didn't understand?
- 13 Q: Yeah?
- 14 A: No, sir.
- 15 Q: Were you asking him questions, right?
- 16 A: Yes, sir.
- 17 Q: Isn't that being coherent? I mean, you know what
18 coherent -- understanding what's going on?
- 19 A: Being aware; yes, sir.
- 20 Q: Yes. Did he appear to be aware of ---
- 21 A: Yes.
- 22 Q: --- time and place, and was he coherent in his
23 conversation with you, understandable?
- 24 A: For the most part, yes, sir.
- 25 Q: Okay. Did he delay in responding to you when asked

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

366

1 something; was there any long delays?

2 A: No significant delays. There was a couple of times I had
3 to ask another question because, you know, he was upset.

4 Q: All right. He was upset, wasn't he?

5 A: Yes, sir; I believe so.

6 Q: I mean, that's fair, right?

7 A: I believe so.

8 Q: And the drinking, the last question, he made clear he had
9 said the two beers earlier that day, six to seven hours prior?

10 A: So, I had asked him since he woke up, and that was the
11 two beers and then he had a significant amount the night
12 before, and he said that he felt he had sobered up from the
13 night drinking, which was ---

14 Q: Right. And did you take it to mean that any evidence or
15 talk of shots was the previous day or night?

16 A: It was before he had woken up.

17 Q: Yes, sir. Okay.

18 MR. TRUSLOW: One second, Court's indulgence and I may be
19 done.

20 THE COURT: Yes, sir.

21 BY MR. TRUSLOW:

22 Q: One last question. So, with the -- when you got the test
23 result back, right, you signed that document, correct?

24 A: Yes, sir.

25 Q: And then you had him come up?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - REDIRECT BY HARTE

367

1 A: And he signs it.

2 Q: And he came up, correct, to the desk?

3 A: Yes, sir.

4 Q: Then he gets it, and he signs it?

5 A: Yes, sir.

6 Q: Did he do that?

7 A: Yes, sir.

8 Q: Okay. And prior to when you're giving him the rights

9 before the tests, he's provided that in writing, right?

10 A: Yes, sir.

11 Q: And he held his hands with no problem on the X, correct;

12 he didn't drop the paper?

13 A: No, he didn't -- he did not drop the paper.

14 Q: And he gave it back to you when you asked for it?

15 A: Yes, sir.

16 MR. TRUSLOW: I don't have any further questions, Judge.

17 BY MR. TRUSLOW:

18 Q: Thank you, sir.

19 A: Thank you.

20 THE COURT: Redirect?

21 MS. HARTE: Just briefly, Your Honor.

22 REDIRECT EXAMINATION OF JAKE HOARD BY MS. HARTE:

23 Q: Mr. Hoard, did the -- when you asked the defendant what

24 date it was, how many answers did he give you?

25 A: Three answers, I believe, my -- he gave the 4th, 5th, and

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - REDIRECT BY HARTE

368

1 6th.

2 Q: Okay. And, also, when you asked the defendant what month
3 it was, was there some hesitation?

4 A: Yes, he had to remember and put it together.

5 Q: Okay. And on that video, did you have to tell the
6 defendant to stand up several times?

7 A: Yes, ma'am.

8 MS. HARTE: I have no further questions, Your Honor.

9 THE COURT: Anything on those questions?

10 MR. TRUSLOW: No, sir.

11 THE COURT: All right, sir.

12 You may step down, sir.

13 MS. HARTE: Your Honor, the state would like to excuse
14 this witness.

15 MR. TRUSLOW: No objection

16 THE COURT: Any objection. All right. So, you are
17 released from your subpoena, sir, and may go back to your
18 regular duties. Thank you.

19 MR. HOARD: Thank you, Your Honor.

20 THE COURT: Counsel, y'all come up and talk to me for a
21 second, please.

22 (REPORTER'S NOTE: Bench conference is held off the record in
23 the presence of but outside the hearing of the jury.)

24 THE COURT: All right. Your next witness, Solicitor?

25 MR. DEBUSK: Yes, Your Honor. The state calls Sarah

State v. Atwater - 2019-GS-26-02899, 02900
SARAH PRESTON - DIRECT BY DEBUSK

369

1 Preston.

2 THE COURT: Come around all the way around up front,
3 please, ma'am. Thank you.

4 THE CLERK: Please raise your right hand and place your
5 left on the Bible.

6 SARAH PRESTON, HAVING BEEN DULY
7 SWORN TESTIFIES AS FOLLOWS:

8 THE CLERK: Please be seated. State your full name for
9 the record and spell it, please.

10 MS. PRESTON: My name is Sarah Preston.

11 DIRECT EXAMINATION OF SARAH PRESTON BY MR. DEBUSK:

12 Q: Ms. Preston, where are you currently employed?

13 A: Currently, I work at the North Carolina State Crime Lab.

14 Q: And where did you come from this morning?

15 A: Raleigh, North Carolina.

16 Q: Thank you for making the trip. Now, how about back in
17 May of 2019, who was your employer back then?

18 A: I work for the South Carolina Law Enforcement Division,
19 commonly referred to as SLED.

20 Q: What is South Carolina Law Enforcement?

21 A: The South Carolina Law Enforcement?

22 Q: Division, yes, what is SLED; what did your division do?

23 A: Oh, I worked in the forensics lab. I was in the
24 toxicology department.

25 Q: Okay. What was your job; what were your duties when you

State v. Atwater - 2019-GS-26-02899, 02900
SARAH PRESTON - DIRECT BY DEBUSK

370

1 were in the toxicology department?

2 A: I was a forensic toxicologist, and I -- my duties were to
3 perform blood alcohol analysis, as well as preliminary drug
4 screens on biological specimens, mostly blood and urine, for
5 the presence or absence of drugs, poisons, and alcohol, and
6 then draft reports and interpret those findings to the Court
7 and things like that. In addition to that, I also inventoried
8 evidence as it came into the laboratory, performed lab duties,
9 and just maintained the flow of work throughout the toxicology
10 department.

11 Q: Let me show you what's been marked as State's 22 and 23
12 and ask if you recognize these?

13 A: Yes.

14 Q: What do you look at to confirm that you handled this
15 item?

16 A: There is a unique laboratory identification number in
17 each of those photos.

18 Q: Okay. Is that a number assigned by SLED?

19 A: Yes. So, as each case comes into the laboratory, it is
20 assigned a unique identification number.

21 Q: Is that used to keep track of it?

22 A: Yes.

23 Q: Do you keep a list of the people that are involved in
24 handling the evidence?

25 A: Yes. There is a chain of custody that keeps track of

State v. Atwater - 2019-GS-26-02899, 02900
SARAH PRESTON - DIRECT BY DEBUSK

371

1 where the evidence goes and who has it in their custody at any
2 given time.

3 Q: Since I'm going to ask you about this, I better mark it.
4 I'm going to show you what's been marked for identification
5 purposes only as State's Exhibit 38 and ask if you recognize
6 this?

7 STATE'S EXHIBIT NUMBER 38

8 MARKED FOR IDENTIFICATION

9 A: Yes.

10 Q: What is it?

11 A: This is the chain of custody for this case.

12 Q: Now, does -- does it indicate who turned the item into
13 SLED?

14 A: Yes, it does.

15 Q: What's that person's name?

16 A: Submitted by Chris Sengle of the North Myrtle Beach
17 Department of Public Safety into the evidence submission
18 lockers.

19 Q: Okay. After Ms. Sengle turned it in, who else handled it
20 before it got to you?

21 A: Before me?

22 Q: Yeah?

23 A: Charlotte Pitts and Jackie Davis.

24 Q: What would they have done?

25 A: So, Charlotte Pitts would have taken this evidence into

State v. Atwater - 2019-GS-26-02899, 02900
SARAH PRESTON - DIRECT BY DEBUSK

372

1 her custody. She'll be the one to assign it that unique
2 laboratory identification number and affix that number to the
3 evidence, and enter all the information into our laboratory
4 information management system or LIMS, and that's how we keep
5 track of everything. Once she was done adding that
6 identification number to the evidence, she transferred it into
7 the toxicology evidence intake storage, which is refrigerated
8 secured storage within the evidence control department, and
9 there it would wait until the next day when I would go down to
10 get the evidence. At that point, Jackie Davis takes the
11 evidence from that refrigerator into her custody and then she
12 hand-delivers it to me and then that's how it gets into my
13 custody.

14 Q: Now, when Ms. Pitts and Ms. Davis handles this, it was a
15 blood collection kit; is that correct?

16 A: That is correct.

17 Q: Which is indicated in State's Exhibit 30, I'm sorry ---

18 A: 22.

19 Q: 22. So, they would have handled it in a sealed
20 condition; is that correct?

21 A: That is correct.

22 Q: And the evidence box has tamper indicative seals; is that
23 correct?

24 A: That is correct.

25 Q: Okay. And if those seals had of been broken, what would

State v. Atwater - 2019-GS-26-02899, 02900
SARAH PRESTON - DIRECT BY DEBUSK

373

1 have been done?

2 A: If the evidence kit would have come in unsealed, there
3 would've been notes made in our department as well, and then
4 Charlotte, who would have been the one adding the
5 identification number, would've created another seal with her
6 date and initials and made that note so that everyone was
7 aware that it came in unsealed, but by the time it got to me,
8 it would have been sealed.

9 Q: Was there any indication that there was any problems with
10 the seal of this kit?

11 A: No, when I received the evidence kit, it was sealed with
12 the original signature.

13 Q: With the original officer's signature on it; is that
14 correct?

15 A: I can't read the signature, but yes, it does have a
16 signature.

17 Q: It's been authenticated?

18 A: Yes.

19 Q: So, you received it in a sealed condition. What did you
20 do?

21 A: Okay. So, yes, once I received that evidence from Jackie
22 Davis, I would take it upstairs. Our evidence control unit is
23 in the first floor, I was on fourth floor. So, I would take
24 it upstairs. And at that point, I would open up the evidence
25 to inventory it and make it easier to store. And so, at that

State v. Atwater - 2019-GS-26-02899, 02900
SARAH PRESTON - DIRECT BY DEBUSK

374

1 point, I take the box, and then I take pictures of all of the
2 seals so that you can see that it was not tampered with prior
3 to me receiving it. So, that would be this top photo up here
4 is the evidence kit that I received from downstairs in the
5 evidence control department. At that point, I would cut open
6 the box and then inside of that kit is the interior box, which
7 also has a seal on it. I took another photo of that. Once I
8 open that box, I would take a photo of the blood tubes that
9 were found inside, which are also sealed. At this point, I
10 would write my initials and that unique identification number
11 on each of these two blood tubes, and then I don't open the
12 tubes at this time. I place them into a heat-sealed pouch, so
13 essentially just a plastic bag, heat seal it, and then date
14 and initial the seal on that bag.

15 Q: And then what do you do with the heat-sealed bag?

16 A: Right. So, then after everything is in that heat-sealed
17 bag, I would change the custody into the custody of our
18 toxicology evidence refrigerator, which is a secured
19 refrigerator that only toxicology personnel in the chain of
20 command have access to.

21 Q: Okay. While those tubes were in your possession, did you
22 alter or change them in any way?

23 A: No. The only thing that I would've done was write my
24 initials and the unique identification number on it. I would
25 not open them in any way.

State v. Atwater - 2019-GS-26-02899, 02900
SARAH PRESTON - DIRECT BY DEBUSK

375

1 Q: Did you break the seal on the tubes?

2 A: No.

3 Q: As part of your duties, you did break the seal on the
4 box?

5 A: I broke the seal on the outside boxes, like I said, just
6 for storage purposes. It's easier to go ahead and get rid of
7 those outside boxes. We do have the photos to show that they
8 were sealed. We put it in that heat-sealed pouch, because we
9 think about it, a bunch of boxes in a fridge is gonna take up
10 way more space than a bunch of like Ziploc bags. So, that's
11 why we change the packaging.

12 MR. DEBUSK: 58 for identification only, and then I think
13 23 and 22 are into evidence, Your Honor.

14 COURT REPORTER: It's 38.

15 THE COURT: 38.

16 MR. DEBUSK: I'm sorry, 38. That was 38 for
17 identification only.

18 THE COURT: All right. Very good.

19 BY MR. DEBUSK:

20 Q: Thank you. Please answer any questions defense might
21 have.

22 THE COURT: Cross-examination?

23 MR. TRUSLOW: Yes, sir. One second, Judge.

24 No questions, Your Honor.

25 THE COURT: All right. Do you wish the witness to be

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

376

1 excused?

2 MR. DEBUSK: I do indeed, Your Honor.

3 MR. TRUSLOW: No objection.

4 THE COURT: All right, ma'am, you're released from your
5 subpoena and may go back to your regular duties. Thank
6 you.

7 BY THE COURT:

8 THE COURT: All right, ladies and gentlemen, we're going
9 to break for lunch at this point in time. I'll have you come
10 back at 2 o'clock. We'll hear the remaining witnesses from
11 the state and then we'll proceed from that point on.

12 So, remember, don't talk about the case; don't allow
13 anybody to talk to you about it. Leave your pads and pens and
14 I'll see you back at 2 o'clock. Thank you very much.

15 (REPORTER'S NOTE: Jury exits courtroom @ 12:26 p.m. The
16 following takes place outside the presence of the jury.)

17 THE COURT: All right. Before we break for lunch,
18 anything from the state?

19 MR. DEBUSK: Your Honor, I would just ask, I don't know,
20 are we anticipating argument and charge today if there's no
21 defense case?

22 THE COURT: I don't know where we are in the case. I
23 know you have a couple of witnesses left. I obviously don't
24 know where the defense is at this point in time, and I have to
25 question the defendant to see if he wants to testify and

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

377

1 explain his rights. So, I don't know. I don't want to go
2 beyond 5 o'clock for sure. I don't want to give the jury the
3 case such that they are close to that point in time. I would
4 rather that be done in the morning. So, we'll just have to
5 see how things go this afternoon. When you get done with your
6 presentation of the case this afternoon, we'll see what time
7 it is, where it is, we'll see at that point in time where the
8 defense may be as far as presentation of any evidence or if
9 the defendant wishes to testify; we'll see all that this
10 afternoon. Okay?

11 MR. DEBUSK: Nothing further from the state.

12 MR. TRUSLOW: Yes, sir. Nothing further.

13 THE COURT: Thank y'all. All right. Very good.

14 So, Mr. Atwater, just usual instructions. You understand
15 that, you know, you're released on the terms and conditions of
16 bond. If you don't come back, bench warrant, the case
17 proceeds in your absence; you understand that?

18 MR. ATWATER: Yes, sir.

19 THE COURT: Thank you very much. All right. See y'all
20 back at 2 o'clock.

21 Thank you.

22 **RECESS @ 12:29 P.M.**

23 *****OFF THE RECORD*****

24 **ON THE RECORD @ 2:02 P.M.**

25 THE COURT: Can you invite Mr. Truslow in, please?

State v. Atwater - 2019-GS-26-02899, 02900
JESSICA KAPP - DIRECT BY DEBUSK

378

1 All right. The state ready for the jury to come in?

2 MR. DEBUSK: Yes, Your Honor.

3 THE COURT: Mr. Truslow?

4 MR. TRUSLOW: Yes, sir.

5 THE COURT: All right. Very good. Ask the jury to come
6 in please.

7 (REPORTER'S NOTE: Jury enters courtroom @ 2:04 p.m.)

8 THE COURT: All right, Solicitor, your next witness
9 please.

10 MR. DEBUSK: Thank you, Your Honor. The state calls
11 Jessica Kapp.

12 THE COURT: Please come around up front to be sworn,
13 ma'am.

14 THE CLERK: Please raise your right hand and place your
15 left on the Bible.

16 JESSICA KAPP, HAVING BEEN DULY SWORN
17 TESTIFIES AS FOLLOWS:

18 THE CLERK: Please be seated. State your full name and
19 spell it for the Court?

20 MS. KAPP: My name is Jessica Kapp, spelled J-E-S-S-I-C-
21 A, K-A-P-P.

22 DIRECT EXAMINATION OF JESSICA KAPP BY MR. DEBUSK:

23 Q: Good afternoon, Ms. Kapp. Where are you currently
24 employed?

25 A: I am currently employed a 380-bed hospital here in Myrtle

State v. Atwater - 2019-GS-26-02899, 02900
JESSICA KAPP - DIRECT BY DEBUSK

379

1 Beach.

2 Q: Okay. How about May of 2019, where were you employed

3 then?

4 A: I was employed at SLED.

5 Q: That's South Carolina Law Enforcement Division?

6 A: Yes, sir.

7 Q: What section were you in?

8 A: I worked for the toxicology department.

9 Q: Okay. What was your job -- what were your duties when

10 you were with SLED?

11 A: I inventoried evidence, I did blood alcohol testing, and

12 I did preliminary drug screens.

13 Q: Okay. What would -- what kind of training did you have

14 to do that job?

15 A: I received in-house training to do blood alcohol testing

16 and preliminary drug screens, and in-house training to do the

17 evidence inventory, and I also have a Bachelor of Science from

18 College of Charleston in biochemistry.

19 Q: Okay. How long were you engaged in the job of alcohol

20 testing?

21 A: About three years, from 2016 to 2019.

22 Q: Are you doing similar things now, or are you doing

23 something different?

24 A: I do something completely different now.

25 Q: Okay. I'm gonna show you what's been marked as State's

State v. Atwater - 2019-GS-26-02899, 02900
JESSICA KAPP - DIRECT BY DEBUSK

380

- 1 Exhibit 23 and ask if you recognize that?
- 2 A: I do.
- 3 Q: How do you recognize it?
- 4 A: The blood that was tested in this case.
- 5 Q: What -- what -- what allows you to uniquely identify it?
- 6 A: The case number and this photo.
- 7 Q: That's the number that starts with L19?
- 8 A: Yes.
- 9 Q: Did that evidence come into your possession at some point
- 10 during your employment?
- 11 A: It did.
- 12 Q: For what purpose?
- 13 A: To do the alcohol testing.
- 14 Q: What did you do?
- 15 A: Well, would you like for me to describe the process from
- 16 start to finish?
- 17 Q: Yes, please.
- 18 A: Okay. I retrieve the evidence from the evidence
- 19 refrigerator. Then I would line up all the bags that I was
- 20 going to test, and I would only open each bag at a time so
- 21 there would only be one at a time, and then I would cut the
- 22 sample, and I would run it, and then I would get my result.
- 23 Q: To run it, what would that entail?
- 24 A: Oh, I would load it onto the GC/MS-FID and that will -- a
- 25 sample of the blood from the evidence bag into a vial and then

State v. Atwater - 2019-GS-26-02899, 02900
JESSICA KAPP - DIRECT BY DEBUSK

381

1 place it on the instrument to run.

2 Q: Okay. Did you keep careful track of each sample?

3 A: Yes, I did.

4 Q: And correlate the results separately?

5 A: Yes.

6 Q: Okay. Did you follow all policies and procedures of SLED

7 when you did that?

8 A: Yes; I did.

9 Q: Are -- are there any standards, any quality control in

10 the process?

11 A: There are.

12 Q: How many times did you run this blood?

13 A: I ran it three times. It is standard procedure for us

14 to run it twice, and it was run three times because in one of

15 the runs, one of the standards was out, but that -- that was

16 excluded and it was repeated again.

17 Q: And again, that's standard procedure?

18 A: That is standard procedure, yes.

19 Q: Okay. But in two of the runs the standards were not out

20 of range?

21 A: Yes; they were perfectly fine.

22 Q: Okay. Is there another test that's done as well with the

23 -- with the blood to confirm the presence of alcohol?

24 A: Yes, we run it on the mass spec as well to confirm what

25 we're looking at is in fact alcohol.

State v. Atwater - 2019-GS-26-02899, 02900
JESSICA KAPP - DIRECT BY DEBUSK

382

- 1 Q: And you ran that test as well?
- 2 A: Yes.
- 3 Q: When you have the blood out to run these tests, did you
- 4 alter or change the -- the blood in the tube in any way?
- 5 A: No.
- 6 Q: Just to do your test -- the sample you used to do your
- 7 test, you -- you followed SLED policies and procedures?
- 8 A: Yes. The whole time I was following policy.
- 9 Q: And what would you do with the results of the test?
- 10 A: I would turn them over to the toxicologist to review and
- 11 the quality control person to review.
- 12 Q: Okay. After you completed your work, what did you do
- 13 with the samples?
- 14 A: I returned them to the locked evidence refrigerator after
- 15 I was finished testing.
- 16 Q: Okay. And just once again, at all times, you followed
- 17 the standard policy and procedures of SLED?
- 18 A: I did.
- 19 Q: Kept careful track of the results from each sample?
- 20 A: I sure did; yes.
- 21 Q: And you handed those up to the toxicologist?
- 22 A: Yes.
- 23 Q: Thank you. Please answer any questions the defendant
- 24 has.
- 25 MR. TRUSLOW: No cross, Your Honor.

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

383

1 THE COURT: All right. Very good. All right. Do you
2 wish this witness to be excused?

3 MR. DEBUSK: Please, Your Honor.

4 MR. TRUSLOW: No objection.

5 THE COURT: All right, ma'am, you're released from your
6 subpoena and may go back to your regular duties. Thank you.

7 All right. Who is your next witness?

8 MR. DEBUSK: Dustin Smith, Your Honor.

9 THE COURT: All right.

10 THE CLERK: Please raise your right hand and place your
11 left on the Bible.

12 DUSTIN SMITH, HAVING BEEN DULY SWORN

13 TESTIFIES AS FOLLOWS:

14 THE CLERK: Please be seated. State your full name and
15 spell it for record.

16 MR. SMITH: My name is Lieutenant Dustin Smith; D-u-s-t-
17 i-n, S-m-i-t-h.

18 DIRECT EXAMINATION OF DUSTIN SMITH BY MR. DEBUSK:

19 Q: Lieutenant Smith, who is your employer?

20 A: I work for the South Carolina Law Enforcement Division,
21 commonly known as SLED.

22 Q: What division do you work in?

23 A: I am the supervisor of the toxicology department.

24 Q: Okay. What does that entail?

25 A: So, in toxicology, we do analysis on bodily fluids,

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

384

1 primarily blood, urine, ocular, tissues, or to look for the
2 presence or absence of alcohol, drugs, or poisons, and then we
3 make interpretations of those findings in courts or to
4 coroners or to the police agencies.

5 Q: How long have you been the director of that division?

6 A: I've been supervisor of toxicology since 2006.

7 Q: And how long have you been doing toxicology with SLED?

8 A: This my -- 23 years.

9 Q: Now, could you explain to the jury what your
10 qualifications and your training are for doing toxicology?

11 A: Sure. I have a Bachelor's of Science in biology with an
12 emphasis on marine biology and a minor in chemistry. I have
13 extensive both internal and external training all in the
14 testing and interpretation of alcohol and drugs. I have
15 attended the Robert Borkenstein courses on alcohol and public
16 safety, and driving under the influence of drugs. I'm an
17 active member of the society of forensic toxicologists. I sat
18 on a panel --, on the 2017 panel sponsored by the National
19 Safety Council for setting the standardization for minimum
20 testing for DUI casework and traffic fatalities. I sit on a
21 technical working group sponsored by the National Institute of
22 Justice, and I am a board-certified forensic toxicologist as a
23 fellow of the American Board of Forensic Toxicology.

24 Q: Now, in 23 years of toxicology, do you have any estimate
25 of how many cases you've worked on?

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

385

1 A: Thousands if not tens of thousands.

2 Q: And have you ever testified as an expert in court before?

3 A: Yes, I have.

4 Q: About how many times?

5 A: Over a hundred times.

6 MR. DEBUSK: Your Honor, we would proffer Lieutenant
7 Smith as an expert in the area of toxicology.

8 MR. TRUSLOW: Without objection.

9 THE COURT: Qualified to give his opinion in the field of
10 toxicology. You may proceed.

11 BY MR. DEBUSK:

12 Q: Were you involved in the analysis of -- well, let me
13 start with this. Let me show you State's Exhibit 23 and ask
14 if you have a way of recognizing that?

15 A: I do recognize these; yes.

16 Q: How do you recognize them?

17 A: These are the blood tubes that were submitted in this
18 particular case.

19 Q: And what allows you to recognize them?

20 A: Well, there are two things. The first thing is that the
21 labels on the blood tubes are indicated on my toxicology
22 report as Clayton Atwater, Jr., and that is what is listed on
23 the labels on these tubes of blood. And there is also when a
24 case is submitted to our laboratory, it's given a unique
25 laboratory identification number, and that number appears in

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

386

1 this photograph.

2 Q: Before we get specifically to this case involving Mr.
3 Atwater, let me also show you State's 22 and ask if you
4 recognize that.

5 A: Yes, I do.

6 Q: What is it?

7 A: This is the sealed urine blood collection kit that was
8 submitted in this case.

9 Q: Now, who creates these kits?

10 A: So, SLED purchases the kits. We purchase a pre-made kit
11 that includes two grey top tubes of blood and urine container,
12 and these are for the collection of various samples of either
13 DUI or postmortem cases. These -- these kits are passed out
14 to various law enforcement agencies and hospitals. And when
15 an officer makes a case and they need to collect samples,
16 there are instructions in this kit as to how to collect the
17 samples, and then how to properly package and seal this
18 evidence in order to submit it to our laboratory.

19 Q: Is there anything in the tubes when they're put in the
20 kits or when the kits are distributed?

21 A: The only thing that is in the tubes, they are grey topped
22 tubes, and we prefer grey topped tubes. Those include both
23 potassium oxalate and sodium chloride. One of those,
24 potassium oxalate is anticoagulant that keeps the blood from
25 clotting. Sodium chloride is a preservative, and it keeps the

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

387

1 blood from growing bacteria or anything.

2 Q: And those preservatives and anticoagulant are taken into
3 account in the subsequent analysis?

4 A: Well, they come in all of the tubes; yes.

5 Q: Okay. And again, those have instructions for proper
6 collection?

7 A: Yes, they do.

8 Q: And for sealing?

9 A: That's correct.

10 Q: Okay. What is the purpose of the seals on the tubes in
11 the kit?

12 A: Just to ensure that the kit has not been tampered with in
13 transport.

14 Q: And that would indicate if there had been an attempt?

15 A: If they had -- if the seals had been broken or appeared
16 it had been tampered with, we would have made a notation of
17 that.

18 Q: Were there any such notations in this case?

19 A: There were none.

20 Q: Now, let me ask you, how is alcohol quantified in blood?

21 A: I'm not sure that I understand your question. Are you
22 asking for instrumentation?

23 Q: Yes. What's the process for quantifying alcohol in
24 blood? What instrumentation, what process and procedure do
25 you use?

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

388

1 A: Sure. Well, we use instrumentation known as a gas
2 chromatography with a flame ionization detector, headspace gas
3 chromatography. This is the gold standard that's used
4 throughout forensic toxicology labs across the country.

5 Q: Okay. And how about is there a separate test to confirm
6 the presence of alcohol?

7 A: Yes. So, we use headspace gas chromatography with flame
8 ionization detection in order to identify and quantify the
9 amount of ethanol or other volatiles that are present in the
10 sample. We use a more specific instrument known as a
11 headspace gas chromatograph mass spectrometer in order to
12 identify specifically which substance is present in the
13 sample.

14 Q: And when you say ethanol, is that the alcohol we normally
15 think of in beer and wine?

16 A: That's correct. Ethanol is just drinking alcohol.

17 Q: Now, in this procedure, when you do this, is there a
18 quality control aspect to it?

19 A: Sure. Everything that we do, every batch, every type of
20 analysis that we do is accompanied by very stringent quality
21 control requirements. When we complete each analysis, we
22 create a quality control packet, and that quality control
23 packet -- all of the quality control has to fall within
24 acceptable parameters for us to accept the data from that run.

25 Q: Would you tell the jury what a standard is and what it's

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

389

1 purpose is?

2 A: Sure. So, we run standards -- in regards to our head
3 space gas chromatograph flame ionization detector, which is
4 for the identification and quantification of the ethanol and
5 blood, we run standards so that we can ensure that the
6 instrument is working properly. We run standards of known
7 concentration and those standards have to fall within five
8 percent of the expected concentration for them to be accepted
9 as successful.

10 Q: Now, how many times were samples run in this particular
11 case?

12 A: In this particular case, for the identification and
13 quantification, they were run three times, on three separate
14 occasions.

15 Q: Why was it run three times?

16 A: So, the way that we perform our blood alcohol analysis,
17 is we go into the tube initially, we run that sample. If that
18 sample is negative, we're done, we're complete, we assume --
19 we consider that case to be negative. If that case is
20 positive, it has a positive amount of alcohol in it, we go
21 back in it on another day in what we call a replicate
22 analysis, and then we go back in and we do the same process
23 all over again. In this particular instance, when we went
24 back to perform our replicate analysis, when we went back in
25 it the second time, and we had a quality control parameter

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

390

1 fall out of line, and so we did not accept the data in that
2 particular run. So, in this particular case, it had to be run
3 a third time, so that we had the data that was acceptable.

4 Q: And that's just a quality control to make sure you get
5 things right?

6 A: That's exactly right, yes.

7 Q: Okay. Does the out-of-range run with the out-of-range
8 standard does that have any effect on the other two runs?

9 A: It has no effect on the other two runs.

10 Q: They're independently -- independent replicates,
11 basically?

12 A: And again, we do those in replicate, so we go into the
13 pouch, we take one sample out and we run it. We put it away,
14 we go back into it most of the time on the subsequent day, we
15 go back into that pouch all over again, we do it all over
16 again. And then in this particular case, the second one had
17 quality control parameter that was out of range. We put it
18 away, we go back into it on a subsequent time. So, there are
19 three completely isolated and separate incidents.

20 Q: And each run has separate standards and separate samples,
21 right?

22 A: That's correct. Each run we re-aliquot out standards, we
23 re-aliquot out samples, and then each run has its own set of
24 quality control that's associated with it.

25 Q: Who did the actual measurement runs in this case?

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

391

- 1 A: Jessica Kapp.
- 2 Q: Okay. And what happened to the results that she got from
3 the -- the analysis?
- 4 A: So, the results that she got were entered into our
5 laboratory information management system once the quality
6 control had been approved. And then an analyst or
7 toxicologist then moves with the case from that point.
- 8 Q: Did you ultimately receive the results in this case?
- 9 A: I did.
- 10 Q: Okay. What do you do when you get the results?
- 11 A: So, once -- once all the analyses are performed and the
12 toxicologist compiles all of the data into a report, the
13 toxicologist gives me the case along with all of the data. I
14 review the report first to make sure there are no
15 typographical errors, sort of an administrative review, and
16 then I also go through all of the data and I make sure all of
17 the data is appropriate and make sure that everything that is
18 listed in the report is -- is properly supported by the data
19 that's in the case file.
- 20 Q: Okay. And did you do that in this case?
- 21 A: I did do that in this case.
- 22 Q: And what were the results of the blood alcohol analysis?
- 23 A: In this particular case the result was 0.105 percent or
24 grams per deciliter.
- 25 Q: I'm showing you what's been marked as State's Exhibit 39

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

392

1 and ask if you recognize that.

2 A: Yes, I do; this is page 1 of our toxicology report.

3 Q: Does that show the -- fairly and accurately depict the
4 results of the blood alcohol analysis in this case?

5 A: Yes, sir, it does.

6 MR. DEBUSK: Your Honor, we're gonna offer this into
7 evidence.

8 MR. TRUSLOW: There's no objection.

9 THE COURT: All right. So, State's 39 is into evidence
10 without objection.

11 STATE'S EXHIBIT NUMBER 39

12 ADMITTED INTO EVIDENCE

13 BY MR. DEBUSK:

14 Q: Now, what does .105 blood alcohol mean?

15 A: In regards to the effects on a human body?

16 Q: Well, in general terms, what is the blood alcohol
17 content?

18 A: So, blood alcohol content is simply a measurement of the
19 alcohol concentration in the blood. It's what percentage of
20 your blood volume contains alcohol or ethanol.

21 Q: Now, alcohol or ethanol generally gets in a person by
22 drinking beverages, correct?

23 A: Primarily, that is the way you get alcohol into your
24 system is by ingesting a beverage.

25 Q: Once the alcoholic beverage is ingested, the alcohol is

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

393

1 absorbed, what happens to the alcohol in the body?

2 A: So, anytime you ingest any alcohol or drugs, the body
3 immediately recognizes that as being a foreign substance and
4 it wants to get rid of it. It wants to go back to
5 homeostasis. And so your body, through a process called
6 metabolism, begins to change that, and in this case, change
7 alcohol into a form that it can more easily get rid of, so
8 that it can eliminate it from your body.

9 Q: Do you have a standard rate at which the alcohol leaves
10 the body?

11 A: So, ethanol is unique amongst most drugs in that it is
12 eliminated at a constant rate from the body. It's eliminated
13 at a -- what's an accepted average of a 0.015 percent per
14 hour. So, you would remove approximately 0.015 percent per
15 hour. I like to use a range because I think it covers more
16 individuals. I typically use a range of 0.01 to a 0.02
17 percent per hour, though it can certainly be higher than that.
18 Alcoholics or more experienced drinkers can develop the
19 ability to metabolize and eliminate alcohol at a faster rate
20 than the average population.

21 Q: So, that average rate that you quoted to us, 0.015 is
22 sort of a conservative rate?

23 A: That's true; that's correct, yes.

24 Q: Okay. Are there any assumptions behind that elimination
25 rate as to how long ago the alcohol is drunk?

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

394

- 1 A: In order to back it -- in order to calculate a past
2 alcohol concentration?
- 3 Q: Yes, in order to ---
- 4 A: So, yes, in order to calculate a past blood alcohol
5 concentration, you do something that's called retrograde
6 extrapolation. And there is one primary function that you
7 must make in order to do that, and that is you have to assume
8 that at the point in time that you're trying to go back in
9 time to, that they were in elimination, which means that they
10 had already reached their peak blood alcohol concentration.
11 Typically, it takes between 30 minutes and an hour between --
12 between 30 minutes to an hour after your last drink for you to
13 reach peak blood alcohol concentration, and once you do, then
14 you'll be in a steady constant decline from that point
15 forward.
- 16 Q: And would a person who had not drunk for several hours
17 before an incident be in that declining phase?
- 18 A: Yes, most definitely.
- 19 Q: Now, given an incident time of 4:40 in the afternoon and
20 a collection time of 7:28 in the afternoon, what would that --
21 can you extrapolate back to what the blood alcohol would've
22 been at the time of the incident?
- 23 A: Yes. Again, assuming that they were in elimination at
24 the time of the incident, that's approximately three hours.
25 So, using the range that I stated previously, it would be

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

395

1 approximate -- the blood alcohol concentration three hours
2 prior to the incident would have been approximately 0.03 to
3 0.06 percent higher than it was at the time of the testing.

4 Q: What would that make the .105 three hours before the
5 testing -- the collection of the sample?

6 A: So, if we apply it to this case, we have a 0.105, so that
7 means that three hours prior, the blood alcohol concentration
8 would have been between 0.135 and 0.165 percent.

9 Q: So, that's .135 to .165, correct?

10 A: That's correct. And like I said before, there's
11 certainly the possibility that it could be higher than that,
12 because if the individual were an experienced drinker.

13 Q: Let me ask you a little bit about the effects of alcohol.
14 Does a person have to be falling-down drunk to be impaired?

15 A: Absolutely not. So, alcohol is a central nervous system
16 depressant, and by that, I mean it basically depresses the
17 activity of the brain. The American Medical Association has
18 put out research and guidance where it indicates that at a
19 0.05 percent, a person begins to be impaired to operate a
20 motor vehicle. And so, absolutely not, you do not need to be
21 -- it doesn't even need to be apparent that you are
22 intoxicated for you to be impaired or your abilities to be
23 impaired to operate a motor vehicle.

24 Q: What would the effects of the level of alcohol you saw in
25 this case be on a person?

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

396

1 A: Some of the primary effects that you would expect ---

2 MR. TRUSLOW: Your Honor, objection to the form of the
3 question. I think he needs to define -- he's asking him the
4 effects of alcohol, and if he could be more clear and ask what
5 number he's talking about, if he's going to get into symptoms
6 of that number.

7 BY MR. DEBUSK:

8 Q: Let's start with .105, what would the effects of an
9 alcohol level of .105 be in a person?

10 A: Okay. So, the effects that I think are most important in
11 regards to a driving under the influence case that would
12 correlate with a 0.105 would be diminished reaction time,
13 difficulty with multi-tasking, drowsiness, and then -- and
14 then one that I think is actually very important is a decrease
15 in inhibitions. Meaning that you might do things that you
16 might not normally do or say things that you might not
17 normally say. And when you do or say these things, if your
18 reaction time is inhibited or your ability to multi-task is
19 inhibited, then you don't have the ability to correct from
20 mistakes you might make by -- you know, by doing things or
21 saying things that you might not normally do or say.

22 Q: And by drowsiness, you mean they would appear sleepy?

23 A: That's correct.

24 Q: Okay. Would that answer change any if the level was .135
25 to .165?

State v. Atwater - 2019-GS-26-02899, 02900
DUSTIN SMITH - DIRECT BY DEBUSK

397

1 A: It wouldn't change; it would be the same answer, but
2 certainly it would be more exaggerated.

3 Q: Would that be true of the difference between say .08 and
4 .015?

5 A: That's correct, yes, same effects at 0.08; that's right.

6 Q: I'm sorry; I interrupted your answer. Please ---

7 A: Okay. Sorry, yes. The same effect -- you expect the
8 same effects at a 0.08 that you would at a 0.105. Again, the
9 higher the blood alcohol content, the more exaggerated that
10 those effects are going to be.

11 Q: Now, what is the difference between a breathalyzer result
12 and the result you get from toxicology?

13 A: So, breathalyzer result uses a very different technology
14 than we use in a forensic toxicology lab. It uses, a UV-Vis
15 spectrophotometer, and the results are based on an average
16 breath-to-blood alcohol ratio, and those instruments are meant
17 to ever -- very slightly underestimate the blood alcohol
18 concentration at the time that the sample is given. So, a
19 breath alcohol is meant to underestimate slightly the -- the
20 concentration at the time that the sample is given. Our
21 samples are forensically defensible and are -- and we do not
22 underestimate. We report precisely what was in the sample at
23 the time that the sample was tested.

24 Q: Now, would a blood alcohol level by breathalyzer taken at
25 .11 and then a blood sample 35 minutes -- taken 35 minutes

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

398

1 later at .105 be consistent?

2 A: Yes. I think it would be very consistent, because again
3 even if we just use the average elimination rate of a 0.015,
4 30 minutes later -- I mean, 30 minutes, if we split that in
5 half -- 0.015 percent per hour, if we split that in half, it
6 would be approximately a 0.0075. If we add that to our
7 calculation it would be a 0.112. So, it's almost exactly what
8 they got.

9 Q: Please answer any questions the defense might have.

10 A: Sure.

11 THE COURT: Cross-examination?

12 MR. TRUSLOW: None, Your Honor.

13 THE COURT: All right. Do you wish the witness to be
14 excused?

15 MR. DEBUSK: Yes, Your Honor.

16 MR. TRUSLOW: No objection.

17 THE COURT: All right, sir, you are released from your
18 subpoena, and you may go back to your regular duties. Thank
19 you.

20 All right, Solicitor, the next witness for the state?

21 MR. DEBUSK: Your Honor, at this time the state rests.

22 THE COURT: All right. Very good.

23 Any matters for the Court, Mr. Truslow?

24 MR. TRUSLOW: Yes, sir.

25 BY THE COURT:

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

399

1 THE COURT: All right. Very good. All right, ladies and
2 gentlemen, the state has finished its presentation of evidence
3 to you in this case. That's obviously not the end of the
4 matter. There are, at this stage of every criminal trial
5 proceeding, there are matters of law that I have to take up
6 outside of your presence with the attorneys, and to rule on
7 certain matters. So, keep in mind, we're keeping you, you
8 know, waiting, but it may take a little bit of time to get
9 this accomplished. So, we will endeavor to move along as
10 quickly as possible, but I need for y'all to go to your jury
11 room. And we'll, again, move along as quickly as we can
12 properly hearing everything that needs to be heard.

13 So, remember don't talk about the case; don't allow
14 anybody to talk to you about it. You can talk about the great
15 job the Atlanta Braves did in winning the World Series, or how
16 bad the Clemson Tigers and South Carolina Gamecocks are
17 playing football or whatever you want to do, but not about
18 this case. All right? Leave your pads and pens in the seat.

19 Thank you.

20 (REPORTER'S NOTE: Jury exits courtroom @ 2:34 p.m. The
21 following takes place outside the presence of the jury.)

22 THE COURT: All right, Mr. Truslow, I'll be glad to hear
23 from you, sir.

24 MOTIONS:

25 MR. TRUSLOW: Your Honor, the defense makes a motion for

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

400

1 a directed verdict on the count of felony DUI with death, as
2 well as the count of felony DUI with great bodily injury
3 occurring. It can be a little difficult when there's a
4 statutory inference to argue that motion; that is evidence.
5 So, I would argue on the element of proximate cause. When it
6 comes to that, Your Honor, it's really simply four witnesses
7 who would be relevant, who can answer or speak to that
8 evidence, and those would be the fact witnesses we had and
9 perhaps the MAIT witness.

10 In regards to that, Your Honor saw that testimony and I
11 think that probably what would appear to be more credible --
12 most credible would be Mr. Kesley [sic.], the first fact
13 witness to testify. He testified that the first two lanes
14 were stopped, as if to allow Mr. Atwater out and cross over.

15 The next fact witness, after some confusion with her,
16 wound up telling me that in fact there were trucks stopped
17 there, and she said it was a -- like what I would call a
18 monster truck, a big jacked-up truck. And then you have the
19 testimony of my client that was entered via the breath alcohol
20 test room, wherein he once again sets forth his position into
21 evidence, and that is he was stopped -- traffic stopped in
22 those lanes at which point he was being waved through, and he
23 went to make the turn. It's kind of hard to imagine a failure
24 to yield where we have this evidence, and in particular where
25 he -- he allegedly fails to yield, however he's not struck by

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

401

1 the first two lanes of a three-lane northbound highway, where
2 all the evidence and people have testified it was heavy
3 traffic. I'm not sure how that's feasible but based upon that
4 and the lack of evidence otherwise, we believe that it would
5 be improper to go forward on the issue of proximate cause,
6 thereby felony DUI. That's our argument.

7 THE COURT: All right. From the state?

8 MR. DEBUSK: Your Honor, the witness, Padilla, said that
9 she did not wave the defendant out, that she had to slow down
10 to avoid hitting him. He pulled out in front of her without
11 cause. In this case, the victim clearly saw the defendant
12 pulling out, because he was able to lock his brakes and -- and
13 try to steer away from him. The defendant claims he never saw
14 a thing until the motorcycle hit him. That's failing to
15 lookout to see what he had to yield the right of way to, and
16 that is failure to yield a right of way, and that is a -- a
17 breach of duty imposed by law, and that is clearly the
18 motorcycle accident that caused the injury in this case. So,
19 there is -- there is cause to put forth to the jury in this
20 case, Your Honor.

21 THE COURT: All right. So, looking at the motion for
22 directed verdict, the Court's concerned with the existence or
23 non-existence of evidence, not with its credibility, or
24 believability, or weight. A defendant would be entitled to a
25 directed verdict when the state fails to produce evidence of

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

402

1 the offense charged.

2 In this matter, the Court must view the evidence and all
3 reasonable inferences therefrom in the light most favorable to
4 the non-moving party, that's the state. And if any direct
5 evidence or any substantial circumstantial evidence reasonably
6 tends to prove the guilt of the accused, the Court should
7 submit the case to the jury.

8 Now, in this particular matter, the defendant having been
9 charged with felony driving under the influence death
10 resulting and great bodily injury, the state has to first
11 prove that the defendant drove the vehicle while under the
12 influence of alcohol and/or drugs to the extent that the
13 defendant's faculties were appreciably impaired. The state
14 has to prove beyond a reasonable doubt the defendant was
15 sufficiently under the influence to impair his ability to
16 drive with reasonable care with due regard for others and
17 himself. There is an inference from the results of tests, the
18 amount of alcohol in the defendant's blood at the time of the
19 alleged violation as shown by chemical analysis of the
20 defendant's breath or other bodily fluids may be considered in
21 deciding whether the defendant was under the influence. If
22 the alcohol concentration was eight one-hundredths of one
23 percent or more, it may be inferred that the defendant was
24 under the influence. Obviously, that's just an evidentiary
25 fact the jury considers, but it is an inference. In this

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

403

1 case, both the breath test and the blood test showed that the
2 alcohol concentration was above eight one-hundredths of one
3 percent or more.

4 Also, there has to be -- the state has to prove that the
5 act or neglect of the defendant proximately caused great
6 bodily injury or death, and proximate cause basically being
7 the wreck cause, the immediate cause.

8 So, in this particular matter, there are a couple of
9 statutes that apply regarding this. The driver of a vehicle
10 about to enter or cross a roadway from any place other than
11 another roadway shall yield the right of way to all vehicles
12 approaching on the roadway to be entered or crossed. The
13 driver of the vehicle emerging from an alley, building,
14 private road, or driveway within a business or residential
15 district shall stop the vehicle immediately prior to driving
16 onto the sidewalk, or in the event there is no sidewalk area,
17 shall stop at the point nearest to the street to be entered
18 where the driver has a view of approaching traffic.

19 So, regarding this, look at the testimony that was
20 presented in this matter as to those issues. Obviously, you
21 had the testimony of the victim, David Schnell, as to his
22 observations as to the defendant's actions. You had the
23 testimony of Corporal Marcus Lee of South Carolina Highway
24 Patrol MAIT team, indicating that the -- as he described the
25 trike or the motorcycle driven by the victim with a passenger

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

404

1 had the right of way, and his motor vehicle violation to
2 failure to yield the right of way. We had the testimony of
3 Mr. -- let me get the name right -- Mr. Kerley, Ted Kerley,
4 who indicated that the defendant, he saw him inching out and
5 said that he darted out, pulled out fast. He said the trike
6 had nowhere to go; he said that more than once. We had the
7 testimony of Tasha Ann Grainger talking about the vehicle
8 driven by the defendant was in the parking lot going a little
9 fast, that there was speeding involved, and that she so
10 indicated to that to the police. Another witness, Darren
11 Maxwell, indicated that the defendant gunned the car, as he
12 indicated, to shoot the gap, and he said there was no room to
13 pull out. The car tried to shoot across lanes to get across
14 and there was too much traffic to go across. Yolanda Padilla
15 said that she saw the defendant's vehicle, watched the car,
16 she was slowing down because he was pulling out. She didn't
17 want to hit him; that's why she slowed down. She saw the
18 defendant pull out and she heard the accident. If she hadn't
19 slowed down, she might have hit him. She did not wave him out
20 or in any way indicate for the defendant to come out. There
21 is also the testimony of Ms. Rizzo from the insurance company
22 indicating the defendant indicating that he was drinking or
23 had been drinking prior to the time of the accident. And then
24 obviously you have the testimony of the officers about the
25 prior drinking of the defendant and the results of the tests.

State v. Atwater - 2019-GS-26-02899, 02900
CLAYBON ATWATER, JR. - BY THE COURT

405

1 All that to say there's more than sufficient evidence if that
2 evidence is so believed by the jury. Again, that's their job
3 to judge the credibility and believability. My job is to
4 decide whether the evidence exists. The evidence does exist,
5 there being more than sufficient evidence to convict the
6 defendant of both crimes beyond a reasonable doubt. The Court
7 respectfully declines to grant a motion for a directed verdict
8 on this matter.

9 Further motions by the defense?

10 MR. TRUSLOW: No, sir.

11 THE COURT: All right. Mr. Truslow, is there an
12 intention of the defense to present witnesses in this case?

13 MR. TRUSLOW: No, sir.

14 THE COURT: All right. Is your client prepared at this
15 time for me to talk to him about his right to testify?

16 MR. TRUSLOW: He is, Your Honor.

17 THE COURT: All right. Very good.

18 If you could stand up, please sir.

19 Place him under oath.

20 THE CLERK: Please stand and raise your right hand.

21 CLAYBON ATWATER, JR. HAVING BEEN DULY
22 SWORN TESTIFIES AS FOLLOWS:

23 THE COURT: All right, Mr. Atwater, at this time, I'm
24 going to explain to you certain of your constitutional rights.
25 If at any point in time I say something that you don't

State v. Atwater - 2019-GS-26-02899, 02900
CLAYBON ATWATER, JR. - BY THE COURT

406

1 understand or you've got a question about, you want to ask a
2 question, you need to indicate that to me. Okay? You can't
3 just stand there. You can raise your hand, you can say
4 something, you can tell your attorney, but you got to let me
5 know you've got a question, or you want to ask something. Are
6 we in agreement there?

7 MR. ATWATER: Yes, sir.

8 THE COURT: All right. Very good.

9 Now, we've reached the stage of the trial where you can
10 present your defense. You have the right to claim the
11 protection given to you by the Fifth Amendment of the
12 Constitution of the United States of America, which states in
13 part that no person shall compelled or forced in any criminal
14 case to be a witness against themselves. Meaning, nobody can
15 make you testify. You can testify if you want to, but nobody
16 can make you do so; do you understand that?

17 MR. ATWATER: Yes, sir.

18 THE COURT: Now, if you decided to testify, you'd be
19 subject to all the same rules you've seen these other
20 witnesses come in. They get asked questions by one side and
21 cross-examined by the other. So, you'd be asked questions by
22 your attorney; you'd be cross examined and asked questions by
23 the state. You understand that?

24 MR. ATWATER: Yes, sir.

25 THE COURT: All right. Is there any issue about prior

State v. Atwater - 2019-GS-26-02899, 02900
CLAYBON ATWATER, JR. - BY THE COURT

407

1 convictions?

2 MR. DEBUSK: Your Honor, the only prior conviction he has
3 is a 2002 felony possession of cocaine. There are also four
4 DUI convictions, but they're not carried over the years, so
5 they could not be used to impeach, and pending charges which
6 are not impeachable.

7 THE COURT: All right. Very good. All right. Now, your
8 decision to testify is your decision. It has to be done
9 freely and voluntarily, knowing what we've talked about here
10 today. You understand that?

11 MR. ATWATER: Yes, sir.

12 THE COURT: Now, you can certainly get advice from -- I
13 expect you to get advice from your attorney about this, you
14 can speak to a family member if you wanted to, but ultimately,
15 you understand, it's your decision; you understand that?

16 MR. ATWATER: Yes, sir.

17 THE COURT: All right. Now, if you decided not to
18 testify, I'm gonna be having it as part of my instructions to
19 the jury that they can't give that fact any consideration
20 whatsoever. I'll be telling them they can't talk about it, it
21 can't come up in the jury room, they can't use it mentally in
22 making this decision, because you have the constitutional
23 right not to testify. So, that's what I will be instructing
24 them. Do you understand that?

25 MR. ATWATER: Yes, sir.

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

408

1 THE COURT: Now, before -- first, do you understand what
2 we've talked about?

3 MR. ATWATER: Yes, sir.

4 THE COURT: All right, sir. So, before I ask you what
5 you want to do, do you want to ask your attorney any question
6 or anyone any questions?

7 MR. ATWATER: (Confers with counsel.) No testify.

8 THE COURT: All right, sir. Well, okay, but you had an
9 opportunity to speak to your attorney, correct?

10 MR. ATWATER: Yes, sir.

11 THE COURT: All right, sir. So, do you want to testify
12 in this case?

13 MR. ATWATER: No.

14 THE COURT: All right, sir. Thank you very much. You
15 can have a seat. Thank you.

16 MR. TRUSLOW: Thank you.

17 THE COURT: All right. Before -- we'll take a short
18 break anyway, but before we bring the jury back in, the state
19 having rested, the Court's denied your motion for directed
20 verdict, you've indicated there is no testimony to be
21 presented by the defense, and the defendant has also indicated
22 that. Do you want to, Mr. Truslow, at this point in time,
23 renew the motions for directed verdict that you just made?

24 MOTIONS:

25 MR. TRUSLOW: Yes, sir. At this time, the defense renews

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

409

1 its motion for directed verdict, as well as prior motions
2 throughout the case.

3 THE COURT: All right, sir. Very good.

4 All right. Regarding the renewed motions for directed
5 verdict, the Court's going to reaffirm and reiterate what I
6 just said a couple of minutes ago regarding the initial motion
7 for directed verdict. I do find that there is more than
8 sufficient evidence, if that evidence is so believed by the
9 jury, to convict the defendant of the crimes for which he has
10 been charged beyond a reasonable doubt. I find there's more
11 than sufficient evidence that has been presented in that
12 particular matter. Again, credibility and believability is up
13 to the jury, but I respectfully decline to grant the renewed
14 motion for directed verdict.

15 CHARGE CONFERENCE:

16 THE COURT: All right. Before we -- all right. So,
17 before we take a short break, let's talk about the charge in
18 this matter. How about the verdict form, is there any request
19 of the defense regarding a verdict form, other than it being
20 not guilty or guilty of the felony driving under the influence
21 death resulting, or not guilty or guilty of felony driving
22 under the influence great bodily injury. Is there any other
23 requests?

24 MR. TRUSLOW: Well, not in regards to those offenses, but
25 we're gonna request a charge on failure to stop or failure to

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

410

1 yield right of way, which is a lesser included offense.

2 THE COURT: I'm sorry. A verdict form?

3 MR. TRUSLOW: No, a charge. I thought we were talking
4 about the charges. The verdict form is fine that way.

5 THE COURT: Okay. So, you're not asking for any kind of
6 lesser included offense of any kind?

7 MR. TRUSLOW: We're asking for a lesser included offense
8 of failure to yield right of way, which is a lesser included
9 offense of felony DUI.

10 THE COURT: What's the state's position?

11 MR. DEBUSK: I don't think it is a lesser included
12 offense, Your Honor. I think a simple DUI, it might, but I
13 don't think the ---

14 MR. TRUSLOW: Well, I was getting to that.

15 MR. DEBUSK: --- elements -- may I?

16 MR. TRUSLOW: Sure.

17 MR. DEBUSK: I don't the elements of failure to yield
18 right of way are included in the felony DUI, just the general
19 requirement of a breach of duty or ---

20 THE COURT: The defendant has not been charged with the
21 crime as I enumerated under those code sections, a vehicle
22 entering a roadway from a place other than another roadway;
23 that's not what he's been charged with. So, those crimes, if
24 you want to call it failing to yield the right of way under
25 those circumstances to have it to be a lesser included

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

411

1 offense, all the elements of the lesser included offense have
2 to be part of the more serious offense, and clearly that's not
3 the case for felony driving under the influence and failing to
4 yield the right of way. They are completely different
5 elements and, therefore, it cannot be charged as a lesser
6 included offense and cannot be charged separately because he's
7 never been charged with that crime.

8 MR. TRUSLOW: All right.

9 THE COURT: Anything else?

10 MR. TRUSLOW: I would like to just put on the record my
11 reasoning for that real quick was the second element of felony
12 DUI, the actor does an act forbidden by law or neglects the
13 duty imposed by law, I would argue is covered -- covers
14 failure to yield right of way.

15 THE COURT: No, sir.

16 MR. TRUSLOW: And outside of the -- I understand ---

17 THE COURT: That's under the issue of proximate cause.
18 Okay? The direct cause, but it's not a crime, and it's not
19 been so charged as a crime. All right? So, any other
20 requests regarding ---

21 MR. TRUSLOW: Driving under the influence, Your Honor.

22 THE COURT: All right, Solicitor, what about the lesser
23 included offense of driving under the influence for both of
24 the charges?

25 MR. DEBUSK: Well, Your Honor, in this case there are at

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

412

1 least three, and I think four prior convictions for DUI on the
2 defendant's records. One from 2020 and 2017 and one more I've
3 not been able to get paperwork on which would make a fourth,
4 which carries one to five years. I don't know you'd handle
5 the fact that it's fourth offense other than just the
6 sentencing issue.

7 THE COURT: I believe that would be a sentencing issue.

8 MR. TRUSLOW: He could've -- he could've been indicted
9 for a DUI third or more, he was not, and so we're simply
10 asking for a charge on the offense of driving under the
11 influence. There is no driving under the influence
12 subsequent.

13 THE COURT: Well, driving under the influence, but if the
14 jury so ---

15 MR. TRUSLOW: Sentencing issue.

16 THE COURT: --- if the jury so convicts him, then that's
17 a matter for sentencing. The Court would take into
18 consideration he's been convicted of other crimes making it a
19 third or fourth or whatever it might be and sentence him
20 appropriately at that time. It would not be appropriate to --
21 it's not been part of the case; it would not go to the jury in
22 that particular matter. All right? So, the Court will put
23 the lesser included offense of driving under the influence on
24 both of the charges. Anything else?

25 MR. TRUSLOW: No, Your Honor.

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

413

1 THE COURT: All right. So, let's talk about the charge.
2 All right. So, I'll talk to the jury about the things we
3 always talk to them about in every criminal case. As far as
4 the issues of credibility and believability, their job in that
5 regard. The fact that I did allow them to take notes, as I
6 told them before, some people are better than others, and
7 we're going to rely on their collective wisdom and memory.
8 I'll talk to them about direct and circumstantial evidence.
9 And in regards to circumstantial evidence, I will add to the
10 extent the state relies on circumstantial evidence, the
11 circumstances must be consistent with each other and when
12 taken together point conclusively to the guilt of the accused
13 beyond a reasonable doubt. Expert witnesses, talk to them
14 about because of some experience, training, education, work in
15 a particular field, we may allow them to give their opinion,
16 but that doesn't give them any greater weight than any other
17 witnesses; they judge them all the same and judge their
18 credibility and believability the same.

19 Now, there's a statement of the defendant, I'll tell the
20 jury that though I allowed it to be in evidence, they make the
21 ultimate decision as to whether or not the, first, if the
22 defendant made the statement, if he did make the statement,
23 they determine whether the statement was made by the defendant
24 voluntarily of his own free will, not caused by pressure,
25 force, fear, threats, coercion, et cetera. They can consider

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

414

1 the age of the defendant, defendant's education or lack
2 thereof, the defendant's mental ability or capacity,
3 background and environment, place and length of detention,
4 nature of questioning, and advice or lack thereof to the
5 defendant of -- and I read them all -- but the Miranda. And
6 the state has the burden of proof beyond a reasonable doubt
7 that the alleged statement was voluntary.

8 The presumption of innocence, we'll talk to them about
9 that. Reasonable doubt, the kind of doubt that would cause a
10 reasonable person to hesitate to act.

11 Then regarding felony driving under the influence, I'll
12 talk to them that they're making two separate decisions. They
13 have to make that decision twice. Regarding the law of felony
14 driving under the influence, first for death resulting, then
15 for great bodily injury. And again, some of the things I just
16 talked about in the directed verdict motion. The state has to
17 prove the defendant drove the vehicle while under the
18 influence of alcohol to the extent that the defendant's
19 faculties were appreciably impaired, that the defendant was
20 sufficiently under the influence to impair his ability to
21 drive. Talk to them about the inference that we -- that I
22 talked about earlier, that would be part of it. The state has
23 to prove that, while driving, the defendant did an act
24 forbidden by law or neglected a duty of a driver. And those
25 again are the driver of a vehicle about to enter or cross a

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

415

1 roadway from any place other than another roadway shall yield
2 the right of way to all vehicles approaching on the roadway to
3 be entered or crossed. Driving a vehicle emerging from an
4 alley, building, private road or driveway within a business or
5 residential district shall stop the vehicle immediately prior
6 to driving onto the sidewalk or, in the event that there is no
7 sidewalk area, shall stop at the point nearest the street to
8 be entered where the driver has a view of approaching traffic.

9 Then talk to them about proximate cause, direct cause,
10 the cause about which the either the death of the victim or
11 the great bodily injury would not have resulted.

12 And then driving under the influence, charge them about
13 that, that is basically the same that the defendant was
14 driving a motor vehicle in the state while under the influence
15 of alcohol to the extent that the defendant's faculties were
16 materially or appreciably impaired, and the state has to prove
17 beyond a reasonable doubt the defendant was sufficiently under
18 the influence to impair his ability to drive. It was an
19 inference again about the eight one-hundredths of one percent
20 or more.

21 And then the charge about a greater or lesser offense
22 that if they have a doubt as to whether or not the defendant
23 was guilty of the greater or the lesser offense, if that has
24 been so proved to them by the state beyond a reasonable doubt,
25 they must give the defendant the benefit of the doubt and find

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

416

1 him not -- find him guilty of the lesser included offense,
2 assuming of course the state has proved that to them beyond a
3 reasonable doubt.

4 So, that's the Court's intention.

5 Anything else from the state?

6 MR. DEBUSK: No, Your Honor.

7 THE COURT: From the defense?

8 MR. TRUSLOW: No, Your Honor. Do we need to give you a
9 request to charge the jury this moment; is this the time now;
10 are we going forward now?

11 THE COURT: It's past time. We should've had it first
12 thing this morning. So, I just told you what I'm charging the
13 jury ---

14 MR. TRUSLOW: Yes, sir.

15 THE COURT: --- and we're gonna call them in in a minute
16 and we're going to get started. So, if you've got something
17 for me, it's past time to give it to me, but if you've got
18 something right now, tell me.

19 MR. TRUSLOW: All right. Section 56-5-2320.

20 THE COURT: All right. Hold on a second. 56-5-2320?

21 MR. TRUSLOW: Yes, sir.

22 THE COURT: All right. Hold on a second. 56-5-2320,
23 labeled vehicle turning left. The driver of a vehicle
24 intending to turn left within an intersection or into an
25 alley, private road, or driveway shall yield the right of way

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

417

1 to any vehicle approaching from the opposite direction, which
2 is within the intersection or so close thereto as to
3 constitute an immediate hazard. Those aren't the facts of
4 this case, are they, Mr. Truslow?

5 MR. TRUSLOW: Well, there was testimony that this was an
6 intersection for certain.

7 THE COURT: From who?

8 MR. TRUSLOW: I would have to get the transcript, but I
9 definitely heard that, at least to the effect that there was
10 an intersection.

11 THE COURT: I didn't hear that at all ever from anybody.
12 They -- all the evidence is that your guy is at ---

13 MR. TRUSLOW: The convenience store.

14 THE COURT: --- convenience store.

15 MR. TRUSLOW: Uh-huh, (affirmative response).

16 THE COURT: And exiting the convenience store and going
17 across traffic. There is nobody said that they were at an
18 intersection.

19 MR. TRUSLOW: I thought Mr. -- I keep saying Kesley, but
20 I thought he said or pointed out that he was at an
21 intersection at the store.

22 THE COURT: All right. Well, let's go back. Everybody
23 get your notes as to what he said.

24 Solicitor, you do the same.

25 All right. So, as I got it -- is it Mr. Kerley, Ted

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

418

1 Kerley, K-E-R-L-E-Y; is that right?

2 MR. TRUSLOW: Yes, sir.

3 THE COURT: All right. Very good. All right. So, my
4 notes indicate that he was there on April 6, 2019 in North
5 Myrtle Beach. The accident happened at Circle K and Highway
6 17 North. He was driving next to the median. The trike in
7 front of me. He agreed with the scene as set forth in State's
8 Exhibit Number 2. Defendant's vehicle came from the side.
9 Said his speed was less than 45. He saw the collision, two
10 lanes to the right stopped. The car was inching out, he's
11 coming out, he darted out, he pulled out fast, the trike had
12 nowhere to go.

13 MR. TRUSLOW: Okay. That's where it is. That's what
14 I've got. You don't have to go any further, Your Honor. I've
15 got two lanes to the right were stopped.

16 THE COURT: Correct. That doesn't mean it's at an
17 intersection.

18 MR. TRUSLOW: Okay. That's what I thought I heard him
19 say, but you said two lanes -- to lanes stopped.

20 THE COURT: Two lanes to the right were stopped.

21 MR. TRUSLOW: --- were stopped.

22 THE COURT: Okay.

23 MR. TRUSLOW: I thought he said at the intersection. It
24 didn't say that?

25 THE COURT: Well, I don't -- well, I don't remember that

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

419

1 at all. Solicitor, what's your argument?

2 MS. HARTE: Judge, I don't remember Mr. Kerley testifying
3 to there being an intersection at all. I think maybe he's
4 confusing that there was a median in the middle of that
5 highway, but he never mentioned an intersection, Your Honor.

6 THE COURT: Do you have any notes or any indication ---

7 MR. TRUSLOW: No.

8 THE COURT: Wait a minute ---

9 MR. TRUSLOW: Oh, I'm sorry.

10 THE COURT: --- any indication of any witness indicating
11 that they were at an intersection?

12 MR. TRUSLOW: No, sir.

13 MS. HARTE: No, sir, Your Honor.

14 THE COURT: All right. So, okay. So, that's why I'm not
15 -- I don't believe that 56-5-2320 is appropriate, because it
16 clearly says the driver of the vehicle intending to turn left
17 within an intersection or on, I'm sorry, into an alley,
18 private road, or driveway. So, none of that is the facts of
19 this case. He was coming from, not into, he was coming from
20 an alley, private road, driveway, premises. That's why I went
21 with the code section that -- that I quoted to you, those
22 being 56-5-2350, the vehicle entering a roadway, and 56-5-
23 2745, the driver of a vehicle emerging from an alley,
24 building, private road, or driveway. That's why I had those
25 two code sections because those, in the Court's mind, that's

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

420

1 the facts of the case.

2 MR. TRUSLOW: Okay.

3 THE COURT: So, that's why I was using those.

4 Any other requests?

5 MR. TRUSLOW: Yes, sir, just two more.

6 THE COURT: Okay.

7 MR. TRUSLOW: I wanted some charge that you have on state
8 of mind for a crime of failure to yield right of way, whether
9 it's criminal intent or criminal negligence or some -- some
10 mens rea of that offense, a general criminal intent charge or
11 if it doesn't rise to criminal intent then ---

12 THE COURT: You're asking for a general criminal intent
13 charge?

14 MR. TRUSLOW: Yes, sir.

15 THE COURT: There's no charge that has to do with felony
16 DUI that's about intent. There is no such thing.

17 MR. TRUSLOW: Well, I'm talking more that failure to
18 yield right of way is not a strict liability crime; it's
19 either -- it's not just negligence. It's a criminal offense
20 is what I'm saying; it's not a civil case standard here. That
21 failure to yield right of way is a crime under our laws.

22 THE COURT: Well, the state has to prove beyond a
23 reasonable doubt that the defendant did one of those two
24 things that I talked about. Did one of those two -- violated
25 one of those two statutes. That's part of the charge on

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

421

1 felony driving under the influence. But what you're asking
2 for is a general charge on intent; is that correct?

3 MR. TRUSLOW: Yes, sir, on the mens rea of -- of -- of
4 the criminal offense.

5 THE COURT: All right. Hold on one second. All right.
6 General intent charge is in order to establish criminal
7 liability, the criminal intent must be proven beyond a
8 reasonable doubt. So, criminal intent is always a matter that
9 must be determined by the jury from the circumstances
10 surrounding the situation. There's no way to prove intent to
11 a mathematical certainty. There's no way medical science can
12 look into a person's brain and determine what the person had
13 in mind. You take into consideration the acts of the parties
14 and all the facts and circumstances of the case. Criminal
15 intent is a mental state, conscious wrongdoing. It's up to
16 you to determine what the defendant intended to do based upon
17 the circumstances shown to have existed. And it has to be,
18 again, proved by the state beyond a reasonable doubt. Is that
19 what you're asking?

20 MR. TRUSLOW: Yes, sir. Yes, sir.

21 THE COURT: All right. Any objection by the state?

22 MR. DEBUSK: Yes, we would object to that charge.

23 Failure to yield right of way is a traffic, and it's a civil
24 fine not a criminal offense. It's a duty imposed by the law,
25 which is to yield the right of way, and it's enforced by a

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

422

1 traffic fine, not by a criminal penalty; it's a civil fine.
2 Mens rea doesn't apply to that. It confuses the jury because
3 of the felony DUI charge itself.

4 THE COURT: All right, sir. I would respectfully decline
5 to agree with you. I will charge that.

6 What else, Mr. Truslow?

7 MR. TRUSLOW: Your Honor, the last one I'd ask for is 56-
8 5-2950, which is the implied consent.

9 THE COURT: Hold on a second?

10 MR. TRUSLOW: Yes, sir.

11 THE COURT: All right. So, 56-5-what?

12 MR. TRUSLOW: 2950. I'm sure you already charged the
13 inference, obviously, but it's paragraph 11(A) that I would be
14 interested in.

15 THE COURT: Hold on a second. And what part?

16 MR. TRUSLOW: Well, if I had to pick a part, paragraph
17 ---

18 THE COURT: No, I'm just asking you what do you want me
19 to charge?

20 MR. TRUSLOW: Section A to B, the first section that
21 deals with implied consent, taking breath tests, taking urine
22 or blood tests. It specifically says that breath testing
23 sample must be taken and collected within two hours of arrest.
24 The blood must be taken within three hours of the arrest.

25 THE COURT: All right. And I'm sorry. Have you made an

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

423

1 argument that they didn't comply with the statute?

2 MR. TRUSLOW: I will make one. That's in evidence, the
3 time of arrest, and I asked him who changed the time of arrest
4 on the sheet that was printed by the computer. He said he
5 changed the time with his own handwriting. And then the times
6 in -- the evidence that we have the times are different in
7 certain documents, breath test and blood test. And then we
8 have evidence of, on the scene, when the accident occurred in
9 the video, and they can determine when he was arrested as
10 opposed to time written on a document.

11 THE COURT: All right. Well, I understand that, but
12 from, and I understand your arguments, but from the evidence
13 is clear he wasn't arrested for driving under the influence
14 until he got the police station.

15 MR. TRUSLOW: Well, I don't know that he was ever
16 arrested for it, honestly, if he wasn't arrested then. But
17 because the officer said you're under arrest for driving under
18 the -- pardon me, driving under suspension. That's part of my
19 argument.

20 THE COURT: They told him at the police station that he
21 was under arrest for driving under the influence.

22 MR. TRUSLOW: Well, yes, when he was reading off the
23 sheet for the test, correct, but if he meant -- if he was --
24 in his mind, he was arrested for driving under the influence
25 there that backs the time up quite a bit, for the two hours

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

424

1 and three hours. I mean, they're talking about he smells like
2 alcohol, he wants him to take the breath test, so we'll take
3 him down to the station. He tells him I'm arresting you for
4 driving under the influence and stops himself and changes it
5 to driving under suspension.

6 THE COURT: All right. I understand that. The breath
7 sample has to be taken within two hours of arrest. So, he was
8 arrested at the police station, certainly they had the breath
9 test within two hours. The officer testified that they got
10 the search warrant while he was doing the breath test and
11 immediately took him to the North Strand ER. Again, the
12 evidence will show within three hours of the arrest, having
13 been arrested at the police station for the driving under the
14 influence.

15 MR. TRUSLOW: Yes, sir.

16 THE COURT: All right.

17 MR. TRUSLOW: They're ---

18 THE COURT: All right. So, the whole thing says, a
19 person who drives a motor vehicle in this state is considered
20 to have given consent to chemical test of a person's breath,
21 blood, or urine for the purpose of determining the presence of
22 alcohol, drugs, or the combination of alcohol and drugs, if
23 arrested for an offense arising out of the facts alleged to
24 have been committed while the person was driving a motor
25 vehicle while under the influence of alcohol, drugs, or a

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

425

1 combination of alcohol and drugs. A breath test must be
2 administered at the direction of the law enforcement officer
3 has arrested the person for driving a motor vehicle in this
4 state while under the influence of alcohol, drugs or a
5 combination of alcohol and drugs. At the direction of the
6 arresting officer, the person first must be offered a breath
7 test to determine the person's alcohol concentration. If the
8 person is physically unable to provide an acceptable breath
9 sample because the person has an injured mouth, is unconscious
10 or dead, or for any reason considered acceptable by licensed
11 medical personnel, the arresting officer may request a blood
12 sample to be taken. If the officer has reasonable suspicion
13 that the person is under the influence of drugs other than
14 alcohol or is under the influence of any combination of
15 alcohol and drugs, the officer may order a urine sample to be
16 taken for testing. A breath sample taken for testing must be
17 collected within two hours of the arrest. Any additional
18 tests to collect other samples must be taken within three
19 hours of the arrest. The breath test must be administered by
20 a person trained and certified by the South Carolina Criminal
21 Justice Academy pursuant to SLED policies. Before the breath
22 test is administered an eight one-hundredths of one percent
23 simulator test must be performed and the result must reflect a
24 reading between 0.076 percent and 0.084 percent. Blood and
25 urine samples must be obtained by physicians licensed by the

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

426

1 State Board of Medical Examiners, registered nurses licensed
2 by the State Board of Nursing, or other medical personnel
3 trained to obtain samples in a licensed medical facility.
4 Blood and urine samples must be obtained and handled in
5 accordance with the procedures approved by SLED. That's what
6 you want me to read?

7 MR. TRUSLOW: Yes, sir.

8 THE COURT: What do you say, Solicitor?

9 MR. DEBUSK: Your Honor, I feel that would be confusing
10 for the jury. There's very technical language in there about
11 how the breathalyzer is to function. Alluded the charge --
12 the breath test was taken two hours of arrest and the blood
13 sample within three would suffice.

14 MR. TRUSLOW: Really, Judge, it's the same statute that
15 you're charging them on below on the inference. So, it's just
16 asking that more of the statute be read.

17 THE COURT: Well, I'm not charging subsection (B) as it's
18 written. I am charging about an inference, but I'm not
19 reading subsection (B) to them. Are you asking me to do that
20 too?

21 MR. TRUSLOW: No, sir. (A).

22 THE COURT: Okay. So, going back to the inference just
23 so that we're clear. Inferences from result of test. The
24 amount of alcohol in the defendant's blood at the time of the
25 alleged violation as shown by chemical analysis of the

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

427

1 defendant's breath or other bodily fluids may be considered by
2 you in deciding whether the defendant was under the influence.
3 If the alcohol concentration was eight one-hundredths of one
4 percent or more, it may be inferred that the defendant was
5 under the influence. This inference is simply an evidentiary
6 fact to be considered by the jury along with the other
7 evidence in the case, and you may give it the weight you
8 decide it should receive. That's what I'm telling them about
9 inference. You want me to tell them anything else?

10 MR. TRUSLOW: No, sir.

11 THE COURT: Okay. All right. All right. Anything else
12 from the defense?

13 MR. TRUSLOW: The last one, Your Honor, is if you would
14 charge the jury that search warrant is required to take his
15 blood in this state and this country under *Missouri v.*
16 *McNeely*.

17 THE COURT: So, you want me to tell them in this case the
18 search warrant was properly issued to take the defendant's
19 blood?

20 MR. TRUSLOW: No. I want you to tell them it's required
21 to take his blood, to get a search warrant. I don't believe
22 there's evidence that the search warrant was executed prior to
23 taking the blood. There was never an answer given to me of
24 when the search warrant was signed in terms of these times
25 that we're talking about.

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

428

1 THE COURT: All right, Solicitor, you want to reopen the
2 case to address that issue?

3 MR. DEBUSK: If necessary, Your Honor, I guess I'll have
4 to.

5 THE COURT: All right. So, granted.

6 MR. TRUSLOW: I object to that.

7 MR. DEBUSK: Your Honor, I need ---

8 THE COURT: I can -- the Court can ---

9 MR. TRUSLOW: Yes, sir.

10 THE COURT: --- reopen the case according to case law, at
11 any point in time including after the jury has deliberated,
12 before they have reached a decision. The Court has that
13 authority to reopen the case at any point in time ---

14 MR. TRUSLOW: Yes, sir.

15 THE COURT: --- until the jury reaches a decision. So -
16 --

17 MR. DEBUSK: Your Honor, Officer Floyd is the officer
18 we'd have to call and he's not present at the time. He was
19 relieved from the subpoena and -- I can have him here in the
20 morning.

21 THE COURT: And you'll need -- you'll need a copy of the
22 search warrant and all the accompanying documents.

23 MR. DEBUSK: Yes, Your Honor.

24 THE COURT: All right. So, we'll take a short break.
25 You tell me how long that it will take to accomplish that.

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE CONFERENCE

429

1 Okay?

2 MR. TRUSLOW: Yes, sir.

3 THE COURT: Thank you very much.

4 MR. TRUSLOW: Thank you.

5 THE COURT: Again, Mr. Atwater, you understand the terms
6 and conditions. You're on the bond until the jury goes out to
7 deliberate. At that point in time, you're delivered into the
8 custody and control of the sheriff's office. So, you stay on
9 the terms of the bond. If you don't come back, the trial
10 continues. You understand that?

11 MR. ATWATER: Uh-huh, (affirmative response).

12 THE COURT: Was that a yes?

13 MR. ATWATER: Yes, sir.

14 THE COURT: All right. Very good. Thank you.

15 MR. DEBUSK: Your Honor, I have a copy of the search
16 warrant and Officer Floyd here in an hour.

17 THE COURT: In an hour?

18 MR. DEBUSK: Yes, sir.

19 THE COURT: All right. It's 3:30. That makes it 4:30.

20 Let me think about it a second. We may send the jury home and
21 do that tomorrow, first thing tomorrow and arguments and
22 charge.

23 All right. Y'all take a break. Thank you.

24 **RECESS @ 3:26 P.M.**

25

*****OFF THE RECORD*****

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

430

1 ON THE RECORD @ 3:33 P.M.

2 THE COURT: Thank you very much.

3 All right, Solicitor, you said it would take an hour
4 probably for the officer to come back?

5 MR. DEBUSK: I'm thinking, Your Honor, about 45 minutes
6 and that was five minutes or ten minutes ago.

7 THE COURT: Okay. It's 3:30. You know, it's gonna be
8 4:30 most likely before we get started. There's no sense in
9 doing that. We'll send the jury home. We'll resume in the
10 morning.

11 Let's see if I can find it right now. I need to look for
12 it, but -- I'll probably have to look for it. I'll put it all
13 the record tomorrow about the reopening the case, but I'll put
14 that on the record again tomorrow. And what we'll do is we
15 will -- the fact of the matter is, where the case actually
16 stands on the record in front of the jury is the state just
17 rested its case. There's been nothing presented to the jury
18 that the defendant or the defense does not wish to proceed
19 with the presentation of evidence. So, all the jury has in
20 front of them is the state just rested its case, and that is
21 the stage of the proceedings. Therefore, clearly there's no
22 prejudice to the defendant to allow the state to reopen if
23 they so choose to do so or request to do so, which they have.
24 The Court finds that it is proper that all the factual matters
25 necessary for the jury to make a proper determination should

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

431

1 be presented to them and I'm gonna allow it. So, with that,
2 we will come back tomorrow morning at 9:30.

3 Thank you very much.

4 MR. DEBUSK: Thank you, your Honor. Your Honor, let me
5 clarify. Are you in fact gonna charge the 56-5-2950 paragraph
6 (A)?

7 THE COURT: I am. As I read it. As I read it out,
8 that's what I'm going to read.

9 Thank you.

10 MR. TRUSLOW: Thank you.

11 THE COURT: Counsel, I need to either call the jury in
12 and excuse them.

13 MR. DEBUSK: Oh, yes, Your Honor; I'm sorry.

14 THE COURT: All right.

15 MR. DEBUSK: I apologize.

16 THE COURT: Just one second and I'm going to have you
17 bring the jury in. All right. Ask -- go out there and ask
18 them to bring the jury in.

19 (REPORTER'S NOTE: Jury enters courtroom @ 3:38 p.m.)

20 THE COURT: All right, ladies and gentlemen, you heard
21 the state rest. They have requested to reopen the case to add
22 an additional matter to their presentation, and I am going to
23 grant that. With that, it will be some time before that
24 witness can travel back. I don't want to inconvenience you,
25 so we'll start again tomorrow morning 9:30. At that point

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

432

1 time, we'll finish the evidentiary portion. We'll then go
2 into the closing arguments, the charge on the law, and I will
3 submit the case to you for your deliberations and unanimous
4 decision.

5 Please remember, when you go home, don't talk about the
6 case, don't allow anybody to talk to you about it. You're not
7 researchers, investigators; you can't look up anything. You
8 understand y'all shouldn't be talking about this. You'll
9 decide the case on all the facts and evidence along with the
10 law at the time that I give it to you tomorrow.

11 So, with that, I'll see you back tomorrow morning 9:30.
12 Leave your pads and pens.

13 Thank you very much.

14 (REPORTER'S NOTE: Jury exits courtroom @ 3:40 p.m. The
15 following takes place outside the presence of the jury.)

16 THE COURT: All right. Anything before we break for the
17 evening?

18 MR. DEBUSK: Your Honor, in the morning I request that we
19 also be allowed to recall Officer Hoard to testify that a
20 standard of .08, that's eight one-hundredths of one percent
21 simulator test was performed and that the result between .076
22 and .084 since that is in the statute that's going to be read
23 to the jury.

24 THE COURT: Mr. Truslow?

25 MR. TRUSLOW: Actually, I don't object to it. I believe

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

433

1 it's on the report that's printed out that was properly in
2 between that.

3 THE COURT: All right. Very good. Thank you very much.
4 All right. Anything else, Mr. Truslow?

5 MR. TRUSLOW: No, sir.

6 THE COURT: All right. See y'all in the morning.

7 MR. TRUSLOW: Yes, sir.

8 MR. DEBUSK: Thank you, Your Honor.

9 THE COURT: Thank you.

10 **END OF DAY 3**

11 **RECESS @ 3:42 P.M.**

12 *****OFF THE RECORD*****

13 **NOVEMBER 4, 2021 - DAY 4 OF 4**

14 **ON THE RECORD @ 9:39 A.M.**

15 (REPORTER'S NOTE: The following takes place outside the
16 presence of the jury.)

17 **BY THE COURT:**

18 THE COURT: I told you yesterday we were going to put
19 something on the record regarding the reopening, requesting
20 the state to reopen the case.

21 MS. HARTE: Your Honor, just briefly, if I may address
22 that. The state just respectfully requests if Your Honor is
23 inclined to do so, will you instruct the jury of the state
24 requesting to reopen that. We would just respectfully ask
25 that you mention that the reason why the state is requesting

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

434

1 to do that is because of a ruling on the matter of law
2 yesterday.

3 THE COURT: I'm not -- that's matters out of their
4 purview. I'll just tell them that the state asked to reopen
5 the case and I'm granting that request.

6 MS. HARTE: Okay. Thank you, Your Honor.

7 THE COURT: All right. Thank you. But going back to
8 that, I mentioned that the court does have the authority to do
9 so. The case law even indicates at the point in time when the
10 jury is deliberating before they've reached a final verdict.
11 Obviously, we're not even close to that. The state has just
12 rested their case. I cite the case of *State v. Humphery*, 274
13 S.E.2d 918, 1981; *Myat v. Tuomey Regional Medical Center*, 832
14 S.E.2d 306, 2019 case; *State v. Wren*, 470 S.E.2d 111, Court of
15 Appeals, 1996; *Brenco v. S.C. Department of Transportation*,
16 659 S.E.2d 167, 2008.

17 All right. So, with that, is the state ready for the
18 jury to come back in?

19 MS. HARTE: No, sir, Your Honor. We have a quick issue
20 to take up on the ruling yesterday addressing the jury charge.
21 Your Honor ---

22 THE COURT: We're not there. You haven't rested your
23 case yet.

24 MS. HARTE: Okay. I'm sorry, Your Honor.

25 THE COURT: Thank you.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

435

1 MR. DEBUSK: It pertains to whether evidence we'll put
2 up, Your Honor.

3 THE COURT: All right. Let me hear that then.

4 MS. HARTE: Okay. Your Honor, as you know yesterday,
5 there was a ruling that the jury charge would be included on
6 -- include the portion 56-5-2950(A), Your Honor, which
7 includes the three-hour and two-hour time requirement, Your
8 Honor.

9 THE COURT: Yes, ma'am.

10 MS. HARTE: We just want the state to -- or the Court to
11 be aware that there is a Supreme Court ruling, Your Honor, and
12 that if that portion is going to be included, that we have
13 concerns about the defense attorney making an improper
14 argument and misapplying the law. I will give you that cite,
15 Your Honor, but that case states that there is burden for
16 prejudice that the defendant must show. The blood sample or
17 the blood draw is not taken within that three or two-hour time
18 period. We're concerned that Mr. Truslow will get up and
19 argue that the investigative detention was the time of arrest;
20 and therefore, we didn't satisfy the statute because the
21 statute says must, and as a result of that the case should be
22 dismissed.

23 THE COURT: Is that your motion, Mr. Truslow?

24 MR. TRUSLOW: Is that my motion, Your Honor?

25 THE COURT: Yeah, are you asking the Court to dismiss it

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

436

1 because of the failure to meet the time limits?

2 MR. TRUSLOW: No, sir.

3 THE COURT: So, you haven't asked the Court for that
4 relief?

5 MR. TRUSLOW: No, sir. I mean, it wouldn't -- I'm not
6 making it a legal issue, it's just a factual issue, and that's
7 the law on those facts. I'm not making a motion about it; no,
8 sir. You're already ruled on the arrest ---

9 MS. HARTE: Well, Judge, we would just ask that the
10 portion of (A), if it's included in the charge, that it also
11 include *Hamrick v. State*, because it is -- it is a new part of
12 the law.

13 THE COURT: How about give me the case cite that you're
14 talking about?

15 MS. HARTE: Yes, sir, Your Honor.

16 THE COURT: So, we're not talking in something I haven't
17 read.

18 MS. HARTE: Yes, sir, Your Honor. It's -- would you like
19 the southeastern?

20 THE COURT: Southeast cite.

21 MS. HARTE: Yes, sir. That is 828 S.E.2d edition ---

22 THE COURT: Whoa. I can't type that fast.

23 MS. HARTE: I'm sorry. Okay. 828 S.E.2d 596, Your Honor.

24 THE COURT: Okay. Just stop. Thank you.

25 All right. Give me the page number.

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

437

1 MS. HARTE: We are on page 8.

2 THE COURT: No, the page number for the cite, 828 S.E.2d,
3 what's the page?

4 MS. HARTE: I'm sorry. 604.

5 THE COURT: 604. All right. So, that's the page you're
6 on, but the actual cite is 828 S.E.2d 596?

7 MS. HARTE: Yes, sir, Your Honor.

8 THE COURT: Okay. All right.

9 MR. TRUSLOW: What -- what's the number of the page?

10 MS. HARTE: And specifically, the portion of the three-
11 hour statutory requirement, Your Honor.

12 THE COURT: So, what is it you want me to do?

13 MS. HARTE: Well, Your Honor, if we're going to include
14 the portion of the statute (A) for the jury to consider, that
15 portion says must be collected within three hours of arrest
16 for the breath sample taken; and for the blood sample taken,
17 it says within a three-hour time period and it's a must, Your
18 Honor. And therefore, that's not a true and accurate
19 depiction of the law, because this case law is saying that
20 there is a burden for prejudice if that sample is taken
21 without that three-hour time -- outside of that three-hour or
22 two-hour timeframe.

23 THE COURT: Let's go to this case. What evidence is
24 there that either the three-hour or the two-hour time limit
25 was violated? He was arrested at North Myrtle Beach Public

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

438

1 Safety Department -- okay -- for the crime.

2 MS. HARTE: We agree, Your Honor, and that is our
3 argument.

4 THE COURT: Well, that's what the facts are. Whether or
5 not you agree, that's what happened. Okay? So, where is it
6 that the two or three-hour was violated from the documents
7 that are in the case?

8 MS. HARTE: Well, Your Honor, we would then just move to
9 preclude the defense attorney from arguing through
10 nullification. We suspect that is his argument, because
11 that's why the search warrant time is coming back up, Your
12 Honor. And that's why we did have that pretrial hearing, and
13 we did rule that that was investigative detention, but the
14 state feels that the defense attorney is going to argue that
15 he was under arrest when they saw him in the back of that
16 police car on that video, Your Honor.

17 THE COURT: I don't know what Mr. Truslow is going to
18 argue, and if you have an objection to his argument, you can
19 interrupt his argument and ask for a court's ruling at that
20 time. Okay? But you're asking me to speculate as to what
21 he's going to say. I don't know.

22 MS. HARTE: Well, Your Honor, ---

23 THE COURT: The facts of the case, the facts of this case
24 are clear. He was arrested for the felony DUI charges at the
25 North Myrtle Beach Public Safety Department. Okay? Now, the

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

439

1 two hours and the three hours started then. I haven't seen
2 anything in this case, and it hadn't been brought to my
3 attention that either of the two-hour or the three-hour time
4 limits were violated from the time he arrived at the Public
5 Safety Department and was arrested at that point in time. So,
6 I don't see the issue. Okay? Sorry.

7 MS. HARTE: Thank you, Your Honor.

8 THE COURT: All right. So, but if you feel there is some
9 improper argument by defense counsel, you interrupt that
10 argument and you make the motion, I'll send the jury out and
11 we'll hear the arguments and decide the matter at that time.
12 Okay?

13 MS. HARTE: Thank you, Judge.

14 THE COURT: All right.

15 Defense ready for the jury to come in?

16 MR. TRUSLOW: Yes, Your Honor.

17 THE COURT: Ask the jury to come in, please.

18 MR. DEBUSK: Your Honor?

19 THE COURT: Yes, sir.

20 MR. DEBUSK: One -- we've made a copy of the search
21 warrant, state's exhibit. We did redact the very last few
22 words, we said because the defendant was a flight risk.

23 THE COURT: All right.

24 MR. DEBUSK: That's on your prior ruling.

25 THE COURT: All right. So, Mr. Truslow, you're aware of

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

440

1 that?

2 MR. TRUSLOW: No, sir.

3 THE COURT: All right. Show it to defense counsel?

4 MR. DEBUSK: On the affidavit, the last line, the last
5 few words were because of the defendant was a flight risk and
6 we've redacted that.

7 MR. TRUSLOW: Okay.

8 MR. DEBUSK: Based on the prior ruling of the Court.

9 THE COURT: Do you disagree with that?

10 MR. TRUSLOW: No, sir.

11 THE COURT: All right. Very good.

12 MR. DEBUSK: Thank you, Your Honor, just for the record.

13 MR. TRUSLOW: Thank you.

14 THE COURT: Yes, sir, thank you. Bring the jury in,
15 please.

16 (REPORTER'S NOTE: Jury enters courtroom @ 9:50 a.m.)

17 THE COURT: All right, ladies and gentlemen, at the
18 request of the state, I'm gonna allow them to reopen to bring
19 a matter to -- or call a witness.

20 Go ahead, Solicitor.

21 MR. DEBUSK: Thank you, Your Honor. The state calls
22 Bryan Floyd.

23 THE COURT: Please come around to be sworn.

24 THE CLERK: Please raise your right hand and place your
25 left hand on the Bible.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

441

1 BRYAN FLOYD, HAVING BEEN DULY SWORN

2 TESTIFIES AS FOLLOWS:

3 THE CLERK: Please be seated. Please state your full
4 name and spell it for the Court.

5 MR. FLOYD: Bryan Floyd; it's B-R-Y-A-N, F-L-O-Y-D.

6 THE COURT: Go ahead, sir.

7 DIRECT EXAMINATION OF BRYAN FLOYD BY MR. DEBUSK:

8 Q: Officer Floyd, I understand your previous testimony was
9 that you transported the defendant to the Myrtle Beach Jail --
10 North Myrtle Beach Jail?

11 A: The North Myrtle Beach Jail; yes, sir.

12 Q: When you arrived, what did you do with him?

13 A: Once we arrived, I turned him over to the jailers. There
14 was a discussion between myself and the ---

15 Q: Well, at that point, did he go to the breath room?

16 A: Yes, sir; that's what I was gonna say. He went to ---

17 Q: What did you do?

18 A: During the time that he was in the DataMaster room, I
19 went and obtained a search warrant.

20 Q: Where did you go?

21 A: To the North Myrtle Beach Municipal Court.

22 Q: Who prepared the search warrant?

23 A: I prepared the search warrant.

24 Q: Who was the affiant?

25 A: I was.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

442

- 1 Q: Okay. Who signed the search warrant?
- 2 A: I believe it's Tracy Scola, which is one of our associate
3 judges at the North Myrtle Beach Municipal Court.
- 4 Q: And was this done while the defendant was still in the
5 breath room?
- 6 A: Yes, sir.
- 7 Q: Let me show you what's marked as State's Exhibit 40 and
8 ask if you recognize that?
- 9 A: Yes, sir; I do.
- 10 Q: What is that?
- 11 A: This is a copy of the search warrant that I obtained.
- 12 Q: Okay. And is it signed by the judge?
- 13 A: Yes, sir; it is.
- 14 Q: And that was obtained on the same day as the incident?
- 15 A: Yes, sir.
- 16 Q: Again, while the defendant was in the breathalyzer room?
- 17 A: Yes, sir.
- 18 Q: Now, once the defendant was released from the
19 breathalyzer room, what did you do?
- 20 A: At that point, I transported him to the North Strand ER,
21 where I read him a copy of the warrant and provided him a copy
22 of it.
- 23 Q: Is that part of the execution of the warrant?
- 24 A: Yes, sir.
- 25 Q: Did you read him the entire warrant?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

443

1 A: Yes, sir.

2 Q: Was that captured on your body camera?

3 A: Yes, sir; it was.

4 Q: Is -- let me show you what's marked as State's 41 and ask
5 if you recognize that?

6 A: Yes, sir; I do.

7 Q: What is that?

8 A: This is a copy of my body worn camera and footage
9 reviewed and then signed or initialed on top.

10 Q: Does that show you reading the search warrant to the
11 defendant?

12 A: Yes, sir.

13 MR. DEBUSK: Your Honor, we would move State's 41 into
14 evidence at this time.

15 THE COURT: Any objection?

16 MR. TRUSLOW: No, sir.

17 THE COURT: It's into evidence without objection.

18 STATE'S EXHIBIT NUMBER 41

19 ADMITTED INTO EVIDENCE

20 BY MR. DEBUSK:

21 Q: Now, the search warrant, once you read it to him, did you
22 provide him a copy?

23 A: Once we got back to the jail, I provided him a copy; yes,
24 sir.

25 Q: And so, he had a copy of the search warrant?

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

444

1 A: Yes, sir.

2 Q: Are you required to do anything to let the Court know the
3 search warrant has been served?

4 A: Yes, sir. We have to fill out a return form on the back
5 which tells the judge, the issuing judge, what we obtained
6 pursuant to their warrant.

7 Q: Now, when you -- did you execute such a return?

8 A: Yes, sir; I did on the same day.

9 Q: And did you get it back to the same Municipal Court?

10 A: Yes, sir.

11 Q: Was it signed back by the same judge?

12 A: It doesn't have a copy of the signature on here at the
13 bottom, but it would've been signed by the same judge, yes.

14 Q: Okay. And you returned it that same day?

15 A: Yes, sir.

16 Q: Okay.

17 MR. DEBUSK: Your Honor, we would move state's 40 into
18 evidence.

19 THE COURT: Any objection?

20 MR. TRUSLOW: May I look at that one?

21 THE COURT: Yes, sir.

22 MR. TRUSLOW: No, sir; no objection.

23 THE COURT: All right. It's in evidence without
24 objection.

25 STATE'S EXHIBIT NUMBER 40

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

445

1 ADMITTED INTO EVIDENCE

2 BY MR. DEBUSK:

3 Q: So, you turned it into the Court where you have to?

4 A: Yes, sir.

5 Q: And then after that, the Court would sign it at their
6 leisure?

7 A: Yes, sir.

8 Q: Now, let me ask you another question, were you initially
9 at the scene where the collision occurred?

10 A: Yes, sir; I was.

11 Q: Now, is there a point when you first became aware of the
12 smell of alcohol on the defendant?

13 A: Yes, sir; there was.

14 Q: Were you the first officer to detect that smell of
15 alcohol?

16 A: Yes, sir; I was.

17 Q: Was Officer Shick physically able to detect that smell?

18 A: No, sir; he was not.

19 Q: What time did you first physically smell alcohol on the
20 defendant?

21 MR. TRUSLOW: Your Honor, I'm gonna object, because it's
22 just -- you reopened the case for them and they're going into
23 territory that they've already done in their first case.
24 This is going back to the scene and smelling alcohol. I
25 thought this was just for the search warrant issue.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - DIRECT BY DEBUSK

446

1 MR. DEBUSK: It's directly related to the ruling of law,
2 Your Honor.

3 THE COURT: Y'all come up here and talk to me for a
4 second.

5 (REPORTER'S NOTE: Bench conference is held off the record in
6 the presence of but outside the hearing of the jury.)

7 THE COURT: All right, Solicitor.

8 MR. DEBUSK: Thank you.

9 BY MR. DEBUSK:

10 Q: Now, what was the time when you first detected the smell
11 of alcohol on the defendant?

12 A: 17:14.

13 Q: What is that in civilian time?

14 A: 5:14.

15 Q: 5:14. And ---

16 THE COURT: I'm sorry, did you say 5:14 or 5:30?

17 A: 5:14.

18 BY MR. DEBUSK:

19 Q: That would be your first detected smell of alcohol?

20 A: Yes, sir.

21 Q: When was the time you actually placed him under arrest?

22 A: Approximately 15 minutes later or 10 minutes later.

23 Q: Okay. And again, no one had smelled alcohol on him
24 before 5:14?

25 A: No, sir.

State v. Atwater - 2019-GS-26-02899, 02900
BRYAN FLOYD - CROSS BY TRUSLOW

447

1 Q: Thank you. Please answer any questions the defense has.

2 THE COURT: Cross-examination?

3 CROSS-EXAMINATION OF BRYAN FLOYD BY MR. TRUSLOW:

4 Q: Just a couple of questions, Officer Floyd. Was it Judge
5 Skola who signed the search warrant?

6 A: Yes, sir; it was.

7 Q: Do you recall where you were when that was signed?

8 A: We were at the Department of Public Safety Municipal
9 Court.

10 Q: Okay. And Ms. Skola signed it there at the police
11 department?

12 A: Yes, sir.

13 Q: Thank you. Nothing else.

14 THE COURT: All right. You may step down, sir. Anything
15 else?

16 MR. DEBUSK: Yes, Your Honor, we have one other witness.

17 THE COURT: All right. Step down.

18 Go ahead.

19 MS. HARTE: Your Honor, at this time the state calls Jake
20 Hoard.

21 THE COURT: All right.

22 THE CLERK: Please raise your right hand and place your
23 left hand on the Bible.

24 JAKE HOARD, HAVING BEEN DULY SWORN

25 TESTIFIES AS FOLLOWS:

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - DIRECT BY HARTE

448

1 THE CLERK: Please be seated. Please state your name and
2 spell it for the Court.

3 MR. HOARD: Yes, ma'am. Jake, J-A-K-E; last name Hoard,
4 H-O-A-R-D.

5 THE COURT: Go ahead, Solicitor.

6 DIRECT EXAMINATION OF JAKE HOARD BY MS. HARTE:

7 Q: And Officer Hoard, just so we remind the jury, did you
8 perform the breathalyzer test on the defendant in this case?

9 A: I did.

10 Q: Okay. Were you -- before the breath sample was taken,
11 was a standard of .08 ran?

12 A: Yes, ma'am.

13 Q: Okay. And did the results come back between .076 and .08
14 when you ran that test?

15 A: Yes, ma'am.

16 Q: Okay. And is that reflected on the breath analysis
17 sample report?

18 A: Yes, ma'am; it is.

19 Q: Okay. I want to approach you and show you what's been
20 marked as State's Exhibit 24 and already admitted into
21 evidence. Can you tell the jury what you're looking at?

22 A: Yes. This the blood alcohol test for the defendant in
23 this case from the breathalyzer sample of the DataMaster
24 machine.

25 Q: Okay. And can you point out on that form where it

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

449

1 reflects what time that standard that we just talked about was
2 ran?

3 A: Yes, ma'am. So, where it says .08 percent simulator
4 verification of .078, that's the machine running its standard
5 to make sure that it's within operating range.

6 Q: Okay. And what time does it say that standard was ran?

7 A: It is at 18:50 and 6 seconds. So, 6:50 and 6 seconds.

8 Q: Okay. And does that form also reflect the time that the
9 defendant's breath sample was taken?

10 A: Yes, ma'am; it does.

11 Q: Okay. And what time was the defendant's breath sample
12 taken?

13 A: At 18:51 and 31 seconds or 6:51 P.M. and 31 seconds.

14 Q: Okay. And what were the results of the defendant's
15 breath sample?

16 A: The defendant's sample was .11 percent.

17 Q: Okay. Thank you, Officer Hoard. I'm gonna grab that
18 exhibit. I don't have any more questions for you. Please
19 answer any the defense attorney may have?

20 A: Yes, ma'am.

21 THE COURT: Cross-examination?

22 MR. TRUSLOW: Yes, sir.

23 CROSS-EXAMINATION OF JAKE HOARD BY MR. TRUSLOW:

24 Q: Officer Floyd, regarding that DataMaster machine ---

25 A: Officer Hoard.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

450

- 1 Q: I'm sorry. Officer Hoard, regarding the DataMaster
2 machine, how old is that machine?
- 3 A: I do not know how old.
- 4 Q: I want to ask you to identify this document?
- 5 A: This is South Carolina Law Enforcement calibration
6 records for the machine.
- 7 Q: So, if you go -- do you see the serial number for the
8 machine up top somewhere?
- 9 A: Yes, sir; but I don't have a comparison record.
- 10 Q: All right. Well, let me get you the BA report.
- 11 A: Thank you, sir.
- 12 Q: Yeah.
- 13 A: Okay. Thank you, sir.
- 14 Q: All right. So, that DataMaster machine, what's the first
15 date of the entry you see there, just to get an idea of how
16 old it is?
- 17 A: January 29th of 2009 is the first entry on the
18 calibration record.
- 19 Q: All right. So, it's at least 12 years old, correct?
- 20 A: Yes, sir.
- 21 Q: All right. Have you experienced a lot of problems with
22 that machine?
- 23 A: No, sir, because it's maintained by SLED and the machine
24 won't function if there's any errors like that.
- 25 Q: Well, who reports problems to SLED with the machine?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

451

1 A: Two -- sometimes we will do a report to SLED, but then
2 sometimes SLED will get notified by the machine if it's
3 connected, and they'll know when there's an error that occurs
4 because they can pull up the records from the machine.

5 Q: Okay. Well, I'll give you an example real quick. Well,
6 I tell you what, let me start here. It's not gonna take long.
7 So, I would like you to see ---

8 MS. HARTE: Your Honor, I want to object. These records
9 were not provided to the state. I've never seen these before;
10 I don't know what Mr. Truslow ---

11 THE COURT: All right. Mr. Foreman, ladies and gentlemen
12 of the jury, go to your jury room, please.

13 (REPORTER'S NOTE: Jury exits courtroom @ 10:01 a.m. The
14 following takes place outside the presence of the jury.)

15 THE COURT: All right. What records are you asking the
16 witness to look at, Mr. Truslow?

17 MR. TRUSLOW: All right, Your Honor. I'm asking him to
18 look at SLED's records of this particular BA machine, which
19 are accessed via the State's website and SLED's website.
20 There was a recent case, Your Honor, one the cases cited
21 earlier in our arguments where the defense was never given the
22 video for the breath alcohol room test, and the defense's
23 motion was denied for the relief because that video is
24 accessed through the SLED's website. That's where they
25 maintain all the implied consent stuff. These records for the

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

452

1 machine, and in fact that case discusses SLED's records. And
2 they said that not giving the records was not a violation by
3 the state either, because it's accessed by the public there.
4 And what's accessed are the records which also are maintained
5 as certified records for the record, and that's how it reads,
6 but I can show you the stamp and what it is here.

7 THE COURT: Well, see if he can identify them or
8 recognize them. If he doesn't know what the documents are,
9 then you can't question him.

10 MS. HARTE: Your Honor ---

11 MR. TRUSLOW: Well, but if -- if he's -- he's the expert
12 ---

13 THE COURT: I understand that, but if he doesn't know
14 what the records are ---

15 MR. TRUSLOW: Okay.

16 THE COURT: --- and he's not familiar with them, then he
17 can't possibly answer questions about them.

18 MR. TRUSLOW: All right. One second, Your Honor, I just
19 want to find the main one.

20 THE COURT: See if he can identify them or knows what
21 they are.

22 MR. TRUSLOW: Let me see. I'm looking for one particular
23 one, Your Honor.

24 BY MR. TRUSLOW:

25 Q: Would you recognize what this document is as an expert on

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

453

1 the machine?

2 A: Knowing what it is by looking at the title, ---

3 Q: Uh-huh, (affirmative response).

4 A: --- yes. But in terms of dealing with the records of the
5 DataMaster on a regular basis ---

6 Q: Right.

7 A: --- I'm not sure that I'm the appropriate entity, because
8 like I said, these are all maintained by SLED, and they can
9 explain what these different ---

10 Q: Let me ask you this, is it a record for the machine that
11 you use as an expert?

12 A: So, the serial number ---

13 Q: Yes.

14 A: --- does match the machine that I used in this case.

15 Q: Okay. Do you have any reason to believe that these
16 records maintained by SLED, this is a certified copy, would
17 not be accurate and reliable?

18 A: So, this one is a certified copy?

19 Q: Yes, sir.

20 A: So, I do believe that this -- however -- no, it doesn't
21 appear to be a certified copy.

22 MR. TRUSLOW: So, I've just got one question about the
23 documents, that's all.

24 THE COURT: All right. Well ask him.

25 MR. TRUSLOW: Well, I mean, in the trial still.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

454

1 THE COURT: I know. Go ahead and ask him while the jury
2 is out.

3 BY MR. TRUSLOW:

4 Q: Can you -- can you look at that document and tell me what
5 -- what -- what that is a record of?

6 MS. HARTE: Your Honor, I'm going to object. This is
7 outside the scope of my direct, and also Jake Hoard doesn't
8 work for SLED. He's never worked for SLED. He's not a SLED
9 agent. He says he has never seen this document before. He
10 can say that it matches the identification number of the
11 DataMaster, but he doesn't know what information is on that
12 piece of paper.

13 MR. TRUSLOW: Well, that's why I'm asking him about the
14 information on it.

15 THE COURT: Let's see what the witness says. If he
16 thinks he knows what the information is, then ---

17 BY MR. TRUSLOW:

18 Q: Can you tell what that is a record of?

19 A: It's like I said before, looking at the title, it's the
20 calibration records.

21 Q: Okay.

22 A: The issue is, is you have these cells like B1, B2, B3,
23 B4, XQE27. Only SLED would know what those codes are, because
24 I wouldn't have access to those.

25 Q: I'm not asking you about the codes. That is a record of

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

455

1 when the machine was calibrated, correct?

2 A: These are the calibration records for the ---

3 Q: Yes.

4 A: --- DataMaster.

5 Q: So, if you look at that document ---

6 THE COURT: We talked about this yesterday. You
7 constantly interrupt before he finishes his answers.

8 MR. TRUSLOW: I have a problem with that in life, too,
9 and I apologize. It won't happen again.

10 THE COURT: I'm telling you, don't do it anymore.

11 MR. TRUSLOW: Yes, sir.

12 THE COURT: Okay?

13 MR. TRUSLOW: Yes, sir.

14 THE COURT: Thank you.

15 BY MR. TRUSLOW:

16 Q: So, can you look at that document as an expert and tell
17 when your machine at North Myrtle Beach when you were there,
18 when it was calibrated last; are you able to determine that
19 from that document?

20 A: So -- yes, because the date and time of the calibrations
21 as well as the ORI for North Myrtle Beach are on the document.

22 Q: Thank you.

23 A: On the right side of that is where you would -- you would
24 have to get someone from SLED.

25 Q: All right. Well, I'm not going to ask you about the

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

456

1 right side of it. Was that machine calibrated in 2009?

2 A: 2000?

3 Q: 9?

4 A: Yeah, you talking about the first time it was calibrated?

5 Q: Yes.

6 A: Yes, in January 20, 2009, it was calibrated it looks like
7 twice.

8 Q: Okay. Was it calibrated in 2010?

9 A: Yes, sir; it was.

10 Q: And was it in 2012?

11 A: Yes, sir; it was.

12 Q: Was it in 2014?

13 A: Yes, sir; it was.

14 Q: And when is the next year it was calibrated?

15 A: 2020.

16 Q: So, six years after is the next one?

17 A: Yes, sir.

18 Q: And my client's test was on April 6th of 2019?

19 A: Yes, sir.

20 Q: Thank you. That's all the questions I have.

21 THE COURT: Thank you. All right. Now, solicitor, now
22 you have the answers.

23 MS. HARTE: I would just argue that that was outside of
24 the scope of my direct examination. I've never seen this
25 document before. I would just argue that he's not from SLED.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

457

1 He was not qualified as an expert in SLED. We are talking
2 just about the DataMaster test in regards to the ruling of law
3 yesterday and statute that's gonna be read as a jury
4 instruction.

5 THE COURT: All right. I appreciate that, but I'm gonna
6 allow the questions to be asked. If you want some time to
7 look at the document and prepare for your redirect, I'll be
8 glad for you to do so.

9 MS. HARTE: And, Your Honor, just for the record, where
10 was this printed out from; I'm not sure if it's authentic?

11 THE COURT: Okay. What I heard from the witness was it's
12 got -- it's -- the documents were certified.

13 MS. HARTE: No, sir, that was the other one.

14 MR. HOARD: Can I show you, Your Honor.

15 THE COURT: Yeah, let me -- let me have those documents.
16 All right. I mean obvious questions by you are he has no idea
17 if these are the full and complete records. He's not the
18 person that is listed on the sheet, but he's able to correlate
19 his machine number with this machine number, and that this
20 document says this, but he has no idea if those are full and
21 complete records regarding calibration. If other calibrations
22 were done, he has no idea about any of that, because he's not
23 from SLED, but obvious questions. All right. But I'm gonna
24 allow Mr. Truslow to ask the questions that he asked, but you
25 know, this witness has no idea if those are full and complete

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

458

1 documents.

2 MR. TRUSLOW: Well, in response to that, Your Honor, I am
3 prepared with the jury to have him access that very record
4 himself.

5 THE COURT: He can't do that. You can do that if you
6 want to present that.

7 MR. TRUSLOW: All right, sir.

8 THE COURT: Okay? Through somebody from SLED.

9 MR. TRUSLOW: Your Honor, I don't need SLED. I can go to
10 SLED's website and they've said in the case law that that is
11 where you get access.

12 THE COURT: I understand that, but you don't have anybody
13 from SLED to say those are all full and complete records for
14 this -- for this machine.

15 MR. TRUSLOW: They say it on the website here, on their
16 website, they say it's a true and accurate copy.

17 THE COURT: Copy of that record?

18 MR. TRUSLOW: Yes.

19 THE COURT: Okay. True and accurate copy of the record,
20 sure. It does not mean that's all the records. It does not
21 mean that's all the records from that machine.

22 MR. TRUSLOW: There could be records somewhere else by
23 some other website?

24 THE COURT: That SLED has, that's correct, and you need
25 somebody from SLED to say those are the only records. Okay?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

459

1 MR. TRUSLOW: Yes, sir.

2 THE COURT: Now, but whether, you know, that that's a
3 true and complete copy of what that document says; there's no
4 question about that. Okay? Are those all the records? I
5 have no idea. There's nobody here to say that. Okay?

6 Ask the jury to come in, please.

7 (REPORTER'S NOTE: Mr. Truslow and Ms. Harte confer.)

8 THE COURT: Hold them out there, please. All right. So,
9 you're going to need some time to go through all that? All
10 right. Very good.

11 Send the jury back and tell them it will be about 15
12 minutes or so. Okay? Thank you very much. We'll be at ease.

13 You can step down. We'll be at ease for about 15 or 20
14 minutes. Just send the jury back to the jury room. Okay?
15 All right. Thank y'all.

16 **RECESS @ 10:12 A.M.**

17 *****OFF THE RECORD*****

18 **ON THE RECORD @ 10:29 A.M.**

19 THE COURT: All right. Is the state ready for the jury
20 to come in?

21 MS. HARTE: Yes, sir, Your Honor.

22 THE COURT: And defense?

23 MR. TRUSLOW: Yes, sir.

24 THE COURT: Ask the jury to come in, please, and the
25 witness, you want to come back and ---

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

460

1 (REPORTER'S NOTE: Jury enters courtroom @ 10:29 A.M.)

2 THE COURT: All right, Mr. Truslow.

3 MR. TRUSLOW: Yes, sir.

4 BY MR. TRUSLOW:

5 Q: Officer Hoard?

6 A: Yes, sir.

7 Q: I was asking you about records from -- records on the
8 machine that you used in your test, correct, the DataMaster
9 machine? And what I've done is I have gone to the SLED
10 website ---

11 THE COURT: Sir?

12 MR. TRUSLOW: Yes, sir?

13 THE COURT: Those aren't the documents you showed the
14 state.

15 MR. TRUSLOW: I showed them; I gave them the computer,
16 Your Honor. I gave it to them and put it right in front of
17 them.

18 Did I?

19 MS. HARTE: Your Honor, we did not look at the SLED
20 website; we looked at the documents.

21 MR. TRUSLOW: I put it ---

22 THE COURT: I appreciate that, and the matters you
23 presented to me were the documents.

24 BY MR. TRUSLOW:

25 Q: I have printouts and I'm going to ask if you can identify

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

461

1 that?

2 A: Yes, sir. By looking at the title of the document, it's
3 the South Carolina Law Enforcement Division calibration
4 records.

5 Q: Okay. Now, is that record, does that indicate the serial
6 number for the DataMaster machine that you used?

7 A: I have to compare it again to ---

8 Q: Oh, I'm sorry.

9 A: --- the document I used.

10 Q: Here's the BA report, which is Exhibit 24; is that the
11 same machine?

12 A: Sir yes, sir. The serial numbers on this document and
13 the DataMaster that I used match.

14 Q: In regard to the calibration of that machine, do you know
15 what calibration means?

16 A: It's when a SLED tech comes in and runs the machine
17 through tests essentially.

18 Q: Okay. All right. Was that machine calibrated in 2009,
19 or I'm sorry, let's move up. Was it calibrated in 2010?

20 A: It does appear so; yes, sir.

21 Q: And were there two calibrations done?

22 A: Yes, sir.

23 Q: Was it calibrated in 2012?

24 A: Yes, sir.

25 Q: Okay. And were there two calibrations done?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

462

- 1 A: Yes, sir.
- 2 Q: And what about 2014?
- 3 A: Yes, sir.
- 4 Q: And were there two calibrations done on the machine?
- 5 A: Not on this document.
- 6 Q: In 2014; no?
- 7 A: I only see one.
- 8 Q: Okay. After 2014, what is the next date that the machine
- 9 is calibrated?
- 10 A: March 24th of 2020.
- 11 Q: 2020. And my client's breath test on that machine, was
- 12 April 6th of 2019?
- 13 A: Yes, sir.
- 14 Q: Which is roughly four years and nine months after the
- 15 last calibration, roughly?
- 16 A: Roughly, sir.
- 17 Q: Okay. All right. And I would like to see if you can
- 18 recognize that document?
- 19 A: So, again from looking at the title, this is the South
- 20 Carolina Law Enforcement's status records.
- 21 Q: Okay. Now, with regard to that record, is that the
- 22 record for the same machine that was used for our test in this
- 23 case?
- 24 A: The serial numbers match; yes, sir.
- 25 Q: All right. So, if you will look at October 19th of 2018

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

463

1 up to April 6th of 2019, that's roughly the first six months
2 prior to the test in this case.

3 A: Bear with me one moment, sir.

4 Q: Yes, sir.

5 A: That's October?

6 Q: October 19th of 2018.

7 A: Okay.

8 Q: All right. So, October 19th of 2018 up to the date of
9 our arrest, April 4th -- April 6th of 2019, during that six
10 months, how many reported errors were there?

11 A: So, you want me to count from October of 2018?

12 Q: Yes, sir.

13 A: To the date of this ---

14 MS. HARTE: Objection, Your Honor, he doesn't know what
15 an error is, and he doesn't work for SLED.

16 THE COURT: All right. So, let me see the document,
17 please. Thank you.

18 I'm gonna allow him to answer the question from the
19 document. Obviously, the officer does not work for the State
20 Law Enforcement Division and cannot interpret those.

21 MR. TRUSLOW: Yes, sir.

22 BY MR. TRUSLOW:

23 Q: How many listed just general errors are there?

24 A: So, you mean I got to ---

25 Q: The six months prior to April 6th, 2019, and take your

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - CROSS BY TRUSLOW

464

1 time?

2 A: So, we're going from -- what was the first date?

3 Q: October 19th, 2018?

4 A: All right. So, that's one error.

5 Q: Uh-huh, (affirmative response).

6 A: And when was the defendant's ---

7 Q: April 6th of 2019?

8 A: It looks like the next error after that is on the 10th.

9 Q: After the arrest, correct?

10 A: Correct.

11 Q: So, the preceding six months, you would agree there was

12 one error, correct?

13 A: There was only one error, correct.

14 Q: Okay. The subsequent six months, how many errors, six

15 months after his test?

16 A: That would be April, May, June, July, August ---

17 Q: April to ---

18 A: --- and to October?

19 Q: Yes.

20 A: It looks like 11.

21 Q: Eleven errors. And last question -- that's all I have

22 for this officer, Your Honor, no further questions.

23 THE COURT: Redirect?

24 MS. HARTE: Yes, sir, Your Honor.

25 REDIRECT EXAMINATION OF JAKE HOARD BY MS. HARTE:

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - REDIRECT BY HARTE

465

1 Q: Officer Hoard, do you work for SLED?

2 A: No, ma'am; I do not.

3 Q: Okay. And the document that was just last shown to you,
4 do you know what those error codes mean?

5 A: So, some of them, yes. The error codes are not
6 necessarily -- so like the October 2019th one, I remember
7 that, that's a suck-back error.

8 Q: Okay.

9 A: That's not an error in the machine. What that means is
10 that, instead of blowing, the defendant sucked in and the
11 DataMaster will automatically shut off and give an error.

12 Q: Okay.

13 A: Some of those error codes I cannot interpret, because I
14 don't work for SLED, but some of them I do know.

15 Q: Okay. And do you know if the documents that were handed
16 to you by the defense attorney, do you know if those are the
17 full and complete records of all the inspections that have
18 been done by SLED on that machine?

19 A: No, ma'am, because again, I don't work for SLED.

20 Q: Okay. And did you say that the machines can be monitored
21 remotely?

22 A: Yeah. They are monitored remotely; yes, ma'am.

23 Q: Okay. And do you know if -- if and when SLED inspects
24 issues that they discover remotely?

25 A: No, ma'am. The only time I know that they do is if we

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - REDIRECT BY HARTE

466

1 submit an error report to them. Like I said, sometimes the
2 DataMaster will automatically submit a report to SLED.

3 Q: Okay. And do you know if SLED regularly inspects the
4 machine for calibration or only when errors occur?

5 A: It's a combination of the two.

6 Q: Okay. But you wouldn't know when, because you don't work
7 for SLED?

8 A: Yes, ma'am, correct.

9 Q: Okay. And I want to show you ---

10 MS. HARTE: (To Mr. Truslow) Do you have your exhibits?

11 MR. TRUSLOW: Yes.

12 MS. HARTE: I want to the BA records that you showed him.

13 BY MS. HARTE:

14 Q: Okay. This right here are the BA records. I'm going to
15 show you what's been marked as State's Exhibit 42. Could you
16 please tell the jury what you're looking at?

17 A: Yes, ma'am. This is the inspection records for the
18 DataMaster, serial number 10577, which again matches the same
19 serial number in this case that the defendant provided a
20 breath sample into.

21 Q: Okay. And can you tell me when it says that that machine
22 was last inspected, according to page 46 that I just handed
23 you, State's Exhibit?

24 A: Thank you, ma'am.

25 Q: Oh, excuse me, page 43?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - REDIRECT BY HARTE

467

1 A: According to page 43, the instrument was last inspected
2 by SLED, Donald B. Baker, on March 13th of 2019.

3 Q: Okay. And at what time was that?

4 A: It was at about 12:50 and 39 seconds P.M.

5 Q: Okay. And would you agree with me that that was three
6 weeks before April 6th, 2019?

7 A: Yes, ma'am, approximately.

8 Q: Okay. And would you agree with me that that was -- that
9 April 6th, 2019 is when you gave the defendant his
10 breathalyzer test on that machine?

11 A: Yes, ma'am.

12 Q: Okay. I'm going to grab those back from you.

13 MS. HARTE: Your Honor, at this time, the state moves to
14 enter State's Exhibit 42 into evidence?

15 THE COURT: Any objection?

16 MR. TRUSLOW: No objection at all, Your Honor.

17 THE COURT: All right. State's 42 is in evidence without
18 objection.

19 MR. TRUSLOW: You going to mark it?

20 MS. HARTE: I'm not entering the entire thing, just page
21 46.

22 MR. TRUSLOW: I thought she was entering the full -- I
23 would like to enter the full record, Your Honor.

24 MS. HARTE: Judge, this is my direct examination, I
25 entered in page 46.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - REDIRECT BY HARTE

468

1 THE COURT: All right. So, hold on a second.

2 MS. HARTE: I mean, my cross.

3 THE COURT: All right. Hold on. Hold on one second.

4 You come and talk to me.

5 (REPORTER'S NOTE: Bench conference is held off the record in
6 the presence of but outside the hearing of the jury.)

7 BY MS. HARTE:

8 Q: Okay. Mr. Hoard, I also ---

9 THE COURT: So, just let's be clear before we get into --
10 so, State's 42 is a one-page document, correct?

11 MS. HARTE: Yes, sir.

12 MR. TRUSLOW: Yes, Your Honor.

13 THE COURT: It's in evidence without objection. Thank
14 you.

15 STATE'S EXHIBIT NUMBER 42

16 ADMITTED INTO EVIDENCE

17 BY MS. HARTE:

18 Q: Okay. I also want to -- I'm sorry, this is the complete
19 record of what you showed him. So, I'll take this.

20 I also want to approach you with the records of the blood
21 alcohol status reports that the defense attorney showed you.

22 Do you recognize those?

23 A: Yes, ma'am.

24 Q: Sorry. I specifically want to point their attention to
25 page 4?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - REDIRECT BY HARTE

469

1 A: Yes, ma'am.

2 Q: And would you -- could you please take some time to look
3 over page 4?

4 A: Yes, ma'am.

5 Q: Okay. And isn't it true, according to that report, that
6 there were no errors between March 13th, 2019 and the time the
7 defendant's blood sample was taken by you?

8 A: That is correct, ma'am; there are no errors between --
9 yes, ma'am, that's correct.

10 Q: Okay. I'm gonna grab that back from you.

11 MS. HARTE: Your Honor, at this -- well ---

12 BY MS. HARTE:

13 Q: All right. Did you run a standard test on the
14 breathalyzer machine on April 6th, 2019 to insure it was
15 working properly?

16 A: Yes, ma'am. The machine automatically runs through a
17 standard test. The machine runs through to make sure it's
18 functioning properly. The machine will not let me collect a
19 sample, nor the defendant provide a sample unless it passes
20 those checks.

21 Q: Okay. And from the documents that you viewed that the
22 defense attorney showed you, that large stack, and I can give
23 that to you again, did it appear from that that the machine
24 was inspected every other month?

25 A: I'd have to look.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - REDIRECT BY HARTE

470

1 Q: I'll approach you with that. And this is the inspections
2 of the machine, but just the onsite inspections?
3 A: Yes, ma'am.
4 Q: If you will just flip through that for me?
5 A: So, if you could ask the question again?
6 Q: Yes. So, would you agree with me, after reviewing those
7 documents, that it appears that the machine, the specific one
8 we're talking about, that the defendant's breath sample was
9 taken from was inspected every other month?
10 A: So, yes, ma'am, with the exception of in 2009.
11 Q: Okay.
12 A: It looks like SLED had to do an extra inspection to come
13 out for repairs, essentially.
14 Q: Okay. And once again, is that just the reports for
15 onsite inspections?
16 A: Yes, ma'am; it is.
17 Q: And do you work for SLED?
18 A: No, ma'am; I do not.
19 Q: So, do you know if that's all the inspections that have
20 been done by SLED?
21 A: No, ma'am. I have no way of knowing if this is a
22 complete record.
23 Q: Thank you.
24 MS. HARTE: I have no further questions for this witness,
25 Your Honor.

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - RECROSS BY TRUSLOW

471

1 THE COURT: Anything on those questions just asked?

2 MR. TRUSLOW: Two brief follow-up questions, Your Honor.

3 THE COURT: Yes, sir.

4 RECROSS-EXAMINATION OF JAKE HOARD BY MR. TRUSLOW:

5 Q: So, there were -- there were no errors in the period
6 prior to the arrest that she asked you about, correct?

7 A: She asked me about a timeframe ---

8 Q: Yes.

9 A: --- and there were no errors in that timeframe.

10 Q: The timeframe I asked you about right after -- six months
11 after his test, there were 11 errors, correct?

12 A: If I recall correctly, yes, sir.

13 Q: Okay. And when Donald Baker inspected the machine on
14 March 13th of 2019, weeks before his test, he didn't calibrate
15 it, did he?

16 A: I have no ---

17 Q: I mean based on the record I gave you?

18 A: So, again, that's a SLED question. If the calibration is
19 part of an inspection, I don't have the answer for that
20 because I don't work for SLED.

21 Q: Okay. According to the calibration records for SLED that
22 I gave you, was it calibrated then?

23 A: So, again, the issue is I don't know if those are the
24 complete records. I don't know if SLED said we're doing
25 calibrations and inspections; I don't know the answer to that

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - RECROSS BY TRUSLOW

472

1 question.

2 Q: Well, how could you answer her questions?

3 A: Because she wasn't asking me to speculate as if I was an
4 employee of SLED and knew their policies and procedures for
5 DataMaster inspections.

6 Q: She asked you if it was inspected every other month,
7 didn't she?

8 A: Week, according to that document, we know it was
9 inspected on the average every other month with a couple of
10 exceptions.

11 Q: Right.

12 A: Where they had to come for an extra inspection because of
13 -- it looks like repairs, but SLED would have to verify it.

14 Q: But you answered that question, right?

15 A: Yes, sir.

16 Q: According to my document that I gave you, it wasn't
17 calibrated, was it, simple?

18 A: Sir, again, you're asking me to assume that this is the
19 complete calibration records on the machine, which again, I do
20 not work for SLED, and I can't say that these are the full and
21 complete records.

22 Q: Well, do you want to take back your answer on whether it
23 was inspected every other month, because you're relying on the
24 document?

25 A: No, because she showed me documents that showed that SLED

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - RECROSS BY TRUSLOW

473

1 inspected on an average every other month.

2 Q: I showed you documents.

3 A: She also told me that those aren't the complete records
4 and had me answer that question on the SLED inspection. I
5 have no way of knowing if those are the complete records for
6 the SLED inspections.

7 Q: She told you they weren't the complete records?

8 A: No, she asked me.

9 Q: Right.

10 A: And I told her that I couldn't know because I didn't work
11 for SLED.

12 Q: Well, we'll wrap this up quickly. She asked you if it
13 was inspected every other month, correct?

14 A: On the average, yes, sir.

15 Q: And you said yes, based upon looking at the record?

16 A: Correct.

17 Q: I asked you if it's calibrated the four years and nine
18 months before his test based on the record, and you won't
19 answer that?

20 A: So, again, you're asking me to assume that the document
21 that you've handed me that I just saw today ---

22 Q: Yes.

23 A: --- that there are no other records of calibrations and
24 you're also asking me to infer that when SLED does an onsite
25 inspection, they don't automatically do a calibration, and I

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - RECROSS BY TRUSLOW

474

1 do not have the answer to that question, because I don't work
2 for SLED.

3 Q: Okay. Fair enough. How did you get the answer about the
4 inspections?

5 MS. HARTE: Your Honor, this question has been asked and
6 answered.

7 THE COURT: I'm gonna to allow you to ask it one last
8 time, Mr. Truslow.

9 BY MR. TRUSLOW:

10 Q: How did you answer her about the inspections being done?

11 A: Because she showed me a document of the inspections.

12 Q: Okay. Well, can I show you the document of the
13 calibrations right here?

14 A: Yes, sir; I do have that document.

15 Q: When was it calibrated last before our breath test?

16 A: So, per the records here?

17 Q: Yes.

18 A: It was calibrated before the defendant's test. The last
19 time it was calibrated before the defendant's test was
20 September 17th of 2014.

21 Q: 2014.

22 A: Assuming again, and I cannot assume that these are the
23 full records.

24 Q: Do you assume the inspection records are the full
25 records?

State v. Atwater - 2019-GS-26-02899, 02900
JAKE HOARD - RECROSS BY TRUSLOW

475

1 A: So, the inspection records, she's not asking me to
2 interpret; she's just asking me to read the date off of the
3 inspection.

4 Q: And the date it was calibrated, despite the fact that it
5 was calibrated every year prior to it, the last time it was
6 calibrated was four years and nine months before his test,
7 according to that record?

8 A: Yeah. I think you asked two questions. The first
9 question was every year twice, and that's not accurate because
10 one of these years it was only done once. Again, I don't know
11 what SLED's policy and procedure is.

12 To the second question, according to this record, which I
13 can't say is the full record again, because I don't work for
14 SLED, the last time it was calibrated, according to this piece
15 of paper was, correct, it was in 2014.

16 Q: Thank you.

17 THE COURT: All right, sir. You may step down. Thank
18 you.

19 MR. HOARD: Thank you, Your Honor.

20 THE COURT: If you have any exhibits, hand those to the
21 court reporter.

22 MR. HOARD: Yes, sir.

23 THE COURT: All right. Further witnesses by the state?

24 MR. DEBUSK: No, Your Honor, the state rests.

25 THE COURT: Very good. All right.

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

476

1 BY THE COURT:

2 THE COURT: All right, ladies and gentlemen, I have
3 allowed the state to reopen, and they have now rested, and I
4 have to examine the matter outside your presence. It won't
5 take nearly as long as it did the last time, because we've
6 gone over a lot of things in the interim. So, but I do have
7 to do that outside your presence. As soon as that's done, I'm
8 gonna call you in and we'll start the closing arguments in
9 this matter. All right?

10 Thank you very much.

11 (REPORTER'S NOTE: Jury exits courtroom @ 10:50 a.m. The
12 following takes place outside the presence of the jury.)

13 THE COURT: All right, Mr. Truslow, do you want to renew
14 your motions for directed verdict?

15 MOTIONS:

16 MR. TRUSLOW: Yes, Your Honor. The defense would renew
17 the motion for directed verdict and base it on the argument I
18 made last time, and renew our motions made throughout this
19 case, pretrial, and during the trial.

20 THE COURT: All right, sir. I'm going to reaffirm the
21 prior rulings of the Court regarding the directed verdict
22 motion, relying upon the ruling that the Court made previously
23 at the end of the original state's case or presentation of
24 evidence. I respectfully decline to grant your motion for a
25 directed verdict, and again, renew the Court's rulings

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

477

1 regarding the pretrial motions made by the defense.

2 MR. TRUSLOW: Thank you, sir.

3 THE COURT: All right. Any further matters before we
4 take a short break and then start the closing arguments?

5 MR. TRUSLOW: Nothing from the defense, Your Honor.

6 THE COURT: All right, sir. So, when we come back, and
7 the jury comes in, I'll ask you, Mr. Truslow, if there are --
8 the status of the defense, and you can tell me that the
9 defense rests, and then we'll go straight into the closing
10 arguments.

11 MR. TRUSLOW: Yes, sir.

12 THE COURT: Now, as kind of sort of indicated, in a
13 previous conversation, the defense has not entered any
14 evidence in this case. So, in that regard then, the state
15 must make its full and complete argument to the jury followed
16 by the last argument or complete argument by the defense.
17 We'll see what time it is, and we'll see if I go straight into
18 the charge or we take a break, it just depends on how long
19 y'all are and what time it is, and if lunch came in the
20 interim. All right. So, let's take a short break, ten
21 minutes, and then we'll come in. All right. Thank you.

22 MS. HARTE: Thank you, Judge.

23 **RECESS @ 10:54 A.M.**

24 *****OFF THE RECORD*****

25 **ON THE RECORD @ 11:06 A.M.**

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

478

1 BY THE COURT:

2 THE COURT: Thank you very much. You may be seated.

3 Thank you.

4 All right. Is the state ready for the jury to come in?

5 MR. DEBUSK: Yes, Your Honor.

6 THE COURT: Defense?

7 MR. TRUSLOW: Yes, sir.

8 THE COURT: All right. Ask the jury to come in, please.

9 (REPORTER'S NOTE: Jury enters courtroom @ 11:07 a.m.)

10 THE COURT: All right. Mr. Truslow, the position of the
11 defense?

12 MR. TRUSLOW: Your Honor?

13 THE COURT: The defense rests at this time?

14 MR. TRUSLOW: Yes, sir. The defense rests, Your Honor.

15 THE COURT: All right. Very good.

16 All right, ladies and gentlemen, we have now finished the
17 evidentiary portion of the trial. We're gonna go into the
18 closing arguments. As I told you at the very beginning,
19 opening statements, closing arguments -- closing arguments are
20 important. They are each side's summation or comments that
21 they have regarding the evidence you have already received.
22 These arguments are not evidence and cannot be considered by
23 you as evidence in the case. It's their opinion about the
24 evidence and what they are asking you to do as a result of
25 your examination of the facts and your unanimous verdict in

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

479

1 this particular matter.

2 So, with that, the state?

3 MR. DEBUSK: Thank you, Your Honor.

4 CLOSING BY DEBUSK:

5 MR. DEBUSK: Ladies and gentlemen, when David Schnell got
6 on his Yamaha trike motorcycle on August 6th, of 2019, obeying
7 the law, Mr. Kerley was in the truck behind him, said he was
8 driving the same speed as him under 45 miles per hour, staying
9 in his lane, driving northward on Highway 17. What's more he
10 was alert. He was watching out. We know this because when
11 doom came to him in the form of a big, blue Mercury Marquis,
12 he was able to downshift, lock the brakes, turn the bike as
13 much as he could given there was a median there, and try to
14 avoid it. He tried, but he was not able to. He was obeying
15 the law. He was doing right.

16 Now, on April 6th, 2019, when the defendant got in his
17 blue, big Lincoln, he was thinking about the law; he was
18 thinking about alcohol. He said his son and wife wanted to go
19 to the store. Well, at the store, he didn't buy any chips for
20 his son; he didn't buy any candy for him; he didn't buy any
21 ginger ale to settle his wife's stomach. In fact, they didn't
22 even get out of the car. He's the only one that got out of
23 the car. And what did he buy? He bought a big bottle of
24 beer. That's what was on his mind, his alcohol. That's why
25 -- the purpose of that trip. And he had already had some

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

480

1 alcohol; he was drunk at that point. Now, he himself told you
2 that he was drinking. He said at one point he had two beers,
3 a couple of shots. At some point he said some kind of
4 daiquiri to be -- a 24-ounce beer, all kinds of different
5 beer. Well, he may not be the best witness, because if you
6 know one thing for sure, he's willing to lie to stay out of
7 trouble. When the police arrived after he had pulled out in
8 from of Mr. Schnell causing the death of Donna Schnell and the
9 serious injuries of David Schnell, he lied about who was
10 driving the car. He said his wife was driving the car. The
11 officer finally got him to admit that, in fact, he was driving
12 the car, but he was willing to lie. He was willing to lie to
13 avoid the problem. And whether he was driving under the
14 influence or driving under suspension, he was willing to lie
15 to stay out of trouble. So, maybe he's not the best witness
16 of how much alcohol he was drinking. He probably was lying to
17 minimize that.

18 He said when he was in the back of -- for instance in the
19 back of the Myrtle Beach police car -- North Myrtle Beach
20 police car, he said I've been drinking since yesterday. And
21 when they said they'd give him a test, he said, well, I've
22 probably got some alcohol in me. He knew. He knew he had
23 alcohol and he had been drinking. Those are in evidence, and
24 you can listen to them, all the different statements. But,
25 the best proof is probably the measurement of his blood

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

481

1 alcohol content. There are two of them. From the BAC
2 machine, that's the BAC machine that had been inspected just
3 three weeks before by SLED found to be -- found to pass the
4 test, everything was routine. It came back .11. I think
5 Officer Shick told you that the dispatch was about 4:40 and
6 that test was taken at about 6:50, so that was just after the
7 accident.

8 The other measurement was the blood sample taken at the
9 hospital at the emergency room by a nurse, Ms. Kocher. It was
10 taken to SLED and tested there and found to be .105. If you
11 recall, Lieutenant Dustin Smith, the expert from SLED, he came
12 and told you that that was consistent, because once some time
13 had passed and alcohol leaves the body after time. So, .11
14 and then 40 minutes later .105 are consistent. But it also
15 told us something else very important, is that alcohol leaves
16 the body with the time, it dissipates. And in this case, he
17 took a conservative rate, that is a low, low-ball rate of what
18 would have dissipated and he extrapolated back to what the
19 blood alcohol would have been at the time of the collision,
20 and he told you it was .135 to .165. And you'll hear when the
21 Judge instructs you on the law that there is a limit of .08,
22 which is much less than those numbers, above which you can
23 infer he was intoxicated. And that's with the assumption he
24 hadn't been drinking the last 30 minutes to an hour. Of
25 course, he said he hadn't drank since before he was on the

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

482

1 beach. He told the insurance adjuster noon, that's four hours
2 -- four-and-a-half hours before. And I would argue to you
3 that was the very reason that they were at that Circle K to
4 begin with was he was looking for more alcohol to keep that
5 buzz going. He was buying beer.

6 Now, on April 6th, 2019, when Donna Schnell got on the
7 back of the motorcycle with David Schnell, she probably knew
8 she had too much to drink to drive herself, and what did she
9 do? She didn't drive. She followed the law. She was a
10 passenger. She left her husband quite capable and quite alert
11 to do the driving for her. Her answer to having alcohol in
12 her system was not drive. The defendant, he had an answer
13 right next to him, too. He didn't have to call Uber, he
14 didn't have to call Lyft, he didn't have to call a taxi cab;
15 he could have done exactly what he after the accident, he
16 could have switched with his wife. If they had switched
17 before they left that gas station, this wouldn't have
18 happened. Knowing he had alcohol in his system, remember
19 that, he was going to find some, go find some, he said in the
20 back of that car seat. Knowing he had alcohol in his system,
21 he decided to drive, and he had an alternative sitting right
22 next to him.

23 In short, the death of Donna Schnell and the injuries of
24 David Schnell were a result of the choices made by Claybon
25 Atwater, what he chose to do. His choice to drive to go to

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

483

1 the store, when he knew he had been drinking; his choice to
2 drive instead of letting his wife drive; his choice to rush
3 out into traffic instead of waiting until it's clear.

4 But your analysis will be a little more technical than
5 that. You have to look at the law, and the Judge is gonna
6 tell you about the law, and always defer to him in matters of
7 law, what he tells you is right. But, I have to talk about
8 the law too, because it's my burden of proof, and I need you
9 to know exactly what it is I need to prove and argue those
10 points. Criminal offenses are -- they're made up of elements;
11 different things you have to prove to get to the guilt phase.
12 And, here are the elements of driving under the influence --
13 driving under the influence with death or great bodily injury
14 are: One, driving a motor vehicle. Two, doing so while under
15 the influence of alcohol, drugs, or a combination of the two.
16 Three, doing an act forbidden by law or neglecting a duty
17 imposed by law. And, then the fourth element is the act or
18 neglect proximately causing the death in the case of death or
19 great bodily injury, the other charge. Here you've got one of
20 each; one felony DUI with death and one felony DUI great
21 bodily injury.

22 Now, after initially lying about it, the defendant
23 ultimately admitted he had been driving under the influence a
24 motor vehicle. But that's the first time he admits he was
25 driving. That leaves us three issues. First, was the

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

484

1 defendant under the influence of alcohol. Again, you heard
2 about the two alcohol tests; .11 on the breathalyzer and .105
3 on the blood sent to SLED for analysis. And again, remember
4 extrapolating back, given a conservative estimate, that's a
5 low estimate of how fast the alcohol leaves the body. .135 to
6 .165 blood alcohol at the time of the collision. And the
7 Judge is going to instruct you about certain inferences; I
8 alluded to it before, but I'm gonna give it to you in a little
9 more detail now. But inferences is something you are allowed
10 to conclude from a certain piece of evidence. Listen
11 carefully to instructions on that point, and what I you to
12 particularly look out for is if the alcohol concentration was
13 at the time eight one-hundredths of one percent or more, it
14 may be inferred that the person is under the influence of
15 alcohol. Eight one-hundredths is .08. And again, .11 and
16 .105 are already greater than .08. Extrapolating back, .135
17 to .165 is covering that range twice the legal the limit.
18 That's a -- you can assume just from the level of intoxication
19 if you choose to that he was intoxicated.

20 Now, a couple of points about the breath alcohol
21 standards. First is about the search warrant. Blood was
22 taken via a search warrant; it's in evidence. Officer Floyd
23 told you while the defendant was in the blood alcohol -- the
24 breathalyzer room, he went right next door to the Municipal
25 Court and got that search warrant. We have a copy of it; it's

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

485

1 signed. Using that search warrant he took him to the
2 emergency room and got the medical professionals, licensed
3 medical professional, there at the -- the ER to draw that
4 blood. He read the entire search warrant. I didn't publish
5 it to you, but it's in evidence. It's on one of these discs,
6 State's Exhibit 41. And he then finished his duty by filling
7 out what's called a return, saying -- and gave it back to the
8 Court. Officer Floyd followed the law of a search warrant to
9 get that blood. And then we went through the stages of who --
10 who had custody of that blood. If you recall, Nurse Kocher
11 took the blood and she gave to Officer Floyd; Officer Floyd
12 locked it away in a refrigerator where it was retrieved by
13 Sengle, Officer Sengle, who took it to SLED; and the people at
14 SLED didn't unseal it until they took these pictures, which
15 are also in evidence; and then they tested the blood, .105.

16 Next the breathalyzer test, it was given within two hours
17 of arrest. You remember the officer told you when he arrested
18 him it was, I think, 5:46 or something like that. It's
19 actually on the video. He says your under arrest for driving
20 under suspension, but he's already in handcuffs. The earliest
21 he could have had any idea that there was alcohol involved was
22 when Officer Floyd first smelled it, and that was at -- he
23 testified 5:14. The blood alcohol test was taken at 6:50.
24 So, that's well within two hours. So, it was taken within two
25 hours of arrest.

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

486

1 But this case isn't about technicalities. There are a
2 lot of technicalities in the law, and they followed them.
3 They got the search warrant, they got the blood samples within
4 two hours, and even having an idea it could've been DUI. They
5 got the SLED samples in three hours of the accident, which
6 happened at 3:40 and the blood sample was taken at, I think,
7 at 6:50 or 6:32 or something like that. It's in the records
8 you have where the nurse signed for it. The technicalities --
9 your analysis is more on the facts. Was this a felony DUI?
10 You know who was driving. The next question is, was he
11 intoxicated. Again, .135 to .165. But, that's a permissive
12 inference; you can if you want to, just do it on that. Is
13 there more evidence of intoxication? Yes. Look at the
14 defendant in the back of Office Ostin's patrol car, when
15 Officer Floyd goes up there and talks to him. He's laying
16 down, he's falling asleep, he has to practically wake him up.
17 What did the expert from SLED, Lieutenant Dustin Smith say?
18 He said one of the effects of alcohol is drowsiness, falling
19 asleep. There's evidence of intoxication right there. And
20 remember, this was right after he was in this fatal car
21 accident.

22 Now, adrenaline has different effects on different
23 people. With me, I get very wired. If you had come in here
24 before the trial, you would see me pacing up and down just
25 trying to burn off energy, just from the adrenaline getting

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

487

1 ready to talk to you people. But, he would have had the
2 mother of all adrenaline dumps when this happened. You know
3 he had to, yet he was falling asleep in the back of the car.
4 When he was in the breathalyzer room and in the car going to
5 it, he was all weepy, telling the officer at one point he
6 said, why didn't I just stay home. I'll also argue that's
7 also an indication of impairment. Listen to his speech as
8 he's talking to the officers. Was he glib? Was he fast
9 talking? Was his speech a little bit slurred? It's on the
10 record, you can decide for yourself. I'd argue his speech was
11 slurred.

12 Then we have the field sobriety tests that were conducted
13 inside the breathalyzer room. They have to do the walk and
14 turn where they have to put their feet in front of each other
15 and go, I think, nine steps. He couldn't even complete it.
16 He said -- he couldn't keep his balance, if you want him when
17 he stepped, he started too soon. He already showed some of
18 the indications that we expect to see of intoxication in that
19 test. But he said he couldn't complete it because his leg
20 hurt. And they said the next 20 minutes squatted down, I
21 can't even do it because I'd never be able to get back up. I
22 mean he was squatted down more than a major league baseball
23 catcher squats during a game. That's not what you do if your
24 leg hurts. That's not an indication of a hurt leg. I think
25 it's the next thing he said after my leg hurts is probably

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

488

1 more to the point. My head is spinning. Why is your head
2 spinning? Is your head spinning because your legs hurt? No,
3 your head spins because you're drunk. Again, indications of
4 intoxication.

5 The next test was the one-legged stand. I guess it
6 doesn't matter which leg you raise, and look at different
7 things. You're supposed to keep your arms down by your side.
8 He -- the officer, who was an expert in field sobriety tests,
9 said he showed three out of four indications of intoxication
10 when he did that test.

11 Another one, poor judgment. Going out into traffic
12 without looking to see what's coming, that's poor judgment.
13 That in itself is an indication of intoxication. Not seeing a
14 motorcycle that would've been easily visible -- I'll get to
15 that in a minute when I talk about the other witnesses. Not
16 seeing a motorcycle and pulling out anyway and not even
17 looking, that's an impairment of judgment. And, remember
18 David Schnell he was aware and he did look and he saw this man
19 coming, so did all the other witnesses. He thought the cars
20 were letting him out. Well, Ms. Padilla testified, and she
21 told you she was going down the street, and she slowed down
22 because he was coming out. She didn't motion him out; she was
23 trying not to hit him. She was driving defensively.
24 Misinterpreting that as clearance to shoot all the way across
25 the road is an impairment of judgment again, an impairment.

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

489

1 He told the officer if you're gonna do a test, I've
2 probably got so me alcohol in me. He knew; he knew he was
3 impaired. He smelled of alcohol. As soon as the officer
4 opened the door, he suspected alcohol because he smelled it,
5 and he claims he hadn't been drinking for four hours. He had
6 to have a lot of alcohol in him to be that easy to smell. He
7 said he's been drinking since yesterday, and he went in the
8 store to get even more alcohol.

9 I would argue the inference of the law is correct in this
10 case. The inference that says that breath alcohol -- blood
11 alcohol over .08 does indicate intoxication. In this case,
12 .135 to .165, this is intoxication. Remember again, as
13 Lieutenant Dustin Smith said it's not falling-down drunk.
14 Impairment starts long before the falling-down drunk. Your
15 judgment is impaired long before -- I don't know if any of
16 y'all are old enough to remember, a guy named Foster Brooks.
17 He run the circuit back in the 70s. He was a -- his schtick
18 was he was always acting like he was drunk, like he was always
19 falling-down drunk. You don't have to be acting like Foster
20 Brooks to be drunk to be impaired.

21 Our next issue after impairment is doing an act forbidden
22 by law and neglecting your duty to impose the law. In this
23 case, the duty we're talking about is to yield the right of
24 way. The Judge is gonna instruct you on the law and he's
25 going to read you the statutes on -- on failure to yield and

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

490

1 yielding the right of way. You heard the testimony of
2 Corporal Lee, the MAIT Team highway patrol -- I believe he was
3 the second or third witness, the ones who made these wonderful
4 maps that show where the skid marks are. They show how the
5 victim tried to avoid this accident. Corporal Lee said that
6 the defendant had the right of way, by law the defendant had
7 the right of way because he was proceeding in his lane on a
8 clear roadway. He also said that failure to yield the right
9 of way is a violation of state law. It is a traffic
10 violation. And again, the Judge will charge you on that, on
11 what failure to yield is. And in this case, you have to
12 consciously choose to go out there and fail to yield the right
13 of way. That's a conscious choice. In this case there's more
14 to it. I'd argue that yielding the right of way is really a
15 two-part thing. One, is you see a vehicle that has the right
16 of way and you have to yield to it. The other half of it is
17 you have an affirmative duty imposed by law to look for
18 vehicles that have the right of way and yield to them. You
19 have to look out there and see. To shoot across the road
20 without ever looking across three lanes of traffic in heavy to
21 moderate heavy traffic day is not fulfilling your duty of
22 looking out for vehicles. I'll give you a little example.
23 Fortunately, I live here in Conway, so I don't have to deal
24 Highway 501 much, but sometimes I have to drive to the beach.
25 I get on 501, and before you get to that big intersection at

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

491

1 Carolina Forest, it's always backed up, and there's always
2 some poor driver that's in the turn lane wanting to go across
3 at one of the dealerships and it's steady cars. And sometimes
4 somebody will stop and let them across. If you stop to let
5 them across, sometimes they won't go. When you look up, you
6 see it's because there's traffic in the other lanes going.
7 That traffic is still going and he knows he has to yield to
8 those cars because they have the right of way. They haven't
9 decided to be polite and stop. Sometimes they turn into the
10 one lane that you actually have control over, and that's the
11 only thing you really can allow them to do is let them out
12 into your lane. And sometimes, you stop and the car next to
13 you stops, all the traffic stops, and then that car can go
14 across, and then you can accelerate and catch up with the cars
15 ahead of you and you've done a good deed for the day. The
16 point is, those people always look out for the car coming in
17 the other lane. That is yielding the right of way. And here
18 the defendant failed at both. He neither yielded the right of
19 way -- clearly, he pulled right out into traffic where Mr.
20 Schnell was driving, and Mr. Schnell had no way to avoid
21 hitting him, but he also didn't even look. How do we know he
22 didn't look? He said so. He came out of nowhere. Bang, he
23 hit me, came from nowhere. He came from nowhere because he
24 never looked. Mr. Schnell could have been perfectly visible
25 because Mr. Schnell saw him, and Mr. Schnell could see him if

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

492

1 the defendant could see Mr. Schnell. Mr. Schnell reacted to
2 it. He locked his brakes and downshifted, he steered away
3 from it. Was Mr. Schnell the only one that saw him? There
4 were other witnesses here. Mr. Kerley behind Mr. Schnell in
5 traffic, he says he saw the defendant at the entrance inching
6 out. That's before he even left. Mr. Kerley down the road
7 could already see him coming out. Mr. Maxwell, who was behind
8 Ms. Padilla, he saw him and said he was coming up there
9 inching out. He could see him. And, of course, Ms. Padilla
10 saw him because she had to slow down to avoid hitting him. If
11 all those people could see the defendant, all the defendant
12 had to do was look and he would have seen Mr. Schnell, proving
13 he never looked. He didn't bother looking to look. He just
14 saw a vehicle slowing down and said I'm going. Heck with it;
15 I'm going. If he had even looked, he would've seen Mr.
16 Schnell. And, if he would've stayed there and waited for a
17 better opportunity, he probably would've stopped and got hit
18 by Ms. Padilla. Mr. Schnell reacted, again, he did what he
19 had to do. He saw him and tried to avoid him. The defendant,
20 he never slowed down, he just pulled right out of there. He
21 didn't -- didn't look. Again, breached that duty to look out
22 and breached that duty to yield the right of way to the cars
23 in traffic.

24 It was never, never Mr. Schnell's duty to look out for
25 the defendant. He had the right of way; he was in his lane.

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

493

1 You can't shift the blame to Mr. Schnell. Mr. Schnell was
2 doing what he should've been doing. It was defendant's duty
3 to look out for Mr. Schnell and avoid him. It was never Ms.
4 Padilla's duty to look out for the defendant. Fortunately for
5 Ms. Padilla, her mother did. She said her mother said look
6 out for this guy, he's coming out. That's what saved her from
7 being the one that hit him. So, that she was -- she was saved
8 by her sharp-eyed mother.

9 Mr. Schnell, who was two lanes away with his wife, he
10 didn't realize the defendant was actually coming out, and when
11 he did come out it was too late. The defendant not looking
12 popped right out there and Mr. Schnell had nowhere to go, just
13 like Mr. Kerley said, nowhere to go.

14 That act of charging out into traffic without looking is
15 a violation that caused this -- the death and serious bodily
16 injury to the Schnells. That action, that breach of duty --
17 and it was influenced by intoxication, because a person with
18 good judgment, they're not gonna do that.

19 Remember the testimony of all the eyewitnesses here, I'm
20 talking about all of them, since we're talking about them --
21 in every case there are differences among what people see and
22 what they remember. When you worry is when several witnesses
23 get up there and tell the exact same story, then you know they
24 got together and talked about it. Everybody is telling a
25 little bit different story, but the same basic thing, you know

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

494

1 they also saw it from different angles. Look at the common
2 themes. Mr. Schnell; Ms. Grainger, who was parked right by
3 the road at the gas station; Mr. Maxwell, who was behind the
4 Padillas; Yolanda Padilla; they all saw the same thing. They
5 saw the defendant, didn't think he would go out there because
6 it wasn't safe. Ms. Grainger said, he's gonna cause an
7 accident. Ms. Padilla, with her sharp-eyed mother beside her,
8 fortunately, heard her warning and slowed down to avoid him,
9 because she knew he was coming. One lady was able to predict
10 it. They all saw the same thing, basically. They all saw the
11 blue Mercury. They all didn't think he could make it if he
12 came out. And, they all saw him inching out to the exit.

13 Let's look at them individually. Ms. Padilla, she was in
14 the next car up to where the defendant pulled out. She told
15 you she was coming along, and her mother says, look out, he's
16 coming out; look out for that car, but she slowed down. If
17 she hadn't slowed down, she would have run right into him. He
18 wasn't looking for Ms. Padilla. Again, her sharp-eyed mother
19 saved them that day. Like Mr. Schnell, Ms. Padilla took
20 action and fortunately she saw him soon enough to avoid
21 hitting him. When the defendant shot out quick enough to get
22 out of her way or it would've been her in this accident. She
23 told you she did mean to wave him out and let him out. She
24 said, no, I did not. I only slowed down because he was -- I
25 was gonna hit him if I didn't. Maybe his impaired mind made

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

495

1 him think that by slowing down she was letting him out. She
2 didn't, but maybe he thought that. But she couldn't let him
3 out to anything except maybe her lane. Her lane if he had
4 turned right and went along her lane, that's the only lane she
5 controlled. He still had the duty to look in those other two
6 lanes to see that motorcycle in the position where all those
7 other cars saw him. So, that motorcycle wasn't easily
8 visible. So, the defendant never looked. If he had looked,
9 he would have seen it. He would've seen what everybody else
10 saw. Instead, he said he came out of nowhere. He came out of
11 nowhere because he didn't look.

12 And Ms. Padilla told you she never let him out. He
13 neglected his duty to yield and his duty to keep a lookout.
14 And you might say well, it's a he- said, she-said between him
15 and Ms. Padilla, but that's really not obvious. She has
16 nothing to gain or lose by -- she's just telling the truth.
17 She had the demeanor of truthfulness when she was on the
18 stand. The defendant who was already a proven liar, who has
19 shown that he will tell a lie directly to the police's face to
20 avoid being held responsible for his actions. And again, even
21 if she had let him out, she controlled nothing but her own
22 lane. What happened to the Schnells happened because the
23 defendant failed to even look. That's why it happened. He
24 failed to yield them the right of way, because he
25 intentionally charged out into traffic. That's an intentional

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

496

1 act. It may have been affected by intoxication, but that's no
2 defense. It was an intentional act to pull into traffic
3 without looking.

4 Tasha Grainger told you the same thing. When he pulled
5 out, she said that guy is gonna cause an accident, she told
6 her daughter. That guy is gonna cause an accident. Remember
7 he came to her attention because he was going through the gas
8 station so fast. We have the video station video, and you can
9 see him see him going between the pumps. You think if a child
10 had of walked out between those pumps, do you think he would
11 have had time to stop going that fast.

12 Mr. Maxwell, he told you the same thing. He looked at
13 that guy and said, he's got no room to get that big car out
14 through traffic. I can't believe he's gonna go, but he did.
15 And remember, just as the defendant had opportunity of letting
16 his wife drive instead of him. Mr. Maxwell pointed out to you
17 there's another alternative; the defendant could've turned
18 right and gone down the road and then made a U-turn safely
19 instead of charging out across traffic. But in his impaired
20 mind, he didn't see that alternative, he just charged out
21 without looking.

22 Now, the final element is doing an act forbidden by law,
23 if that act forbidden by law neglected the duty imposed by law
24 proximately causes the injury -- in this case, injuries to
25 David Schnell, great bodily injury, and the death of Ms.

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

497

1 Schnell. Had the defendant not chosen to drive out through
2 there without looking, to charge out across that road blindly,
3 this wouldn't have happened. And it was the collision of the
4 trike motorcycle with this big Mercury that caused the
5 injuries. Ms. Schnell was thrown from the bike. It's not
6 pleasant to look at, but Number 13, she's covered by a sheet.
7 You can see how far she is from the bike. You can even see
8 what -- these are in evidence and you'll have plenty of chance
9 to look at them. Look like there's a helmet there. The
10 helmet wasn't enough to save her. She landed on her head and
11 got massive head injuries as a result of this collision. And
12 Dr. Eason told you -- Dr. Eason is the pathologist that told
13 you about the injuries, the head injuries that caused her
14 death. Mr. Schnell himself told you about the injuries he
15 suffered with a broken leg, both of the bones broken; ankle
16 injured, they had to put a rod through there. He was in
17 recovery for months and still is handicapped by those leg
18 injuries; and multiple, multiple broken ribs, I don't remember
19 how many on both sides; the broken clavicle. They found out
20 later he had a dislocated shoulder, a broken jaw. You
21 remember Czerwinski, the emergency room nurse, talked about
22 the jaw, and both, both bones in the leg were broken. He told
23 you that two bones in the lower leg, they were both broken and
24 it was a compound fracture, that is sticking out of the skin;
25 broken bone sticking out of the skin. By any definition, that

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY DEBUSK

498

1 is a great bodily injury; and by legal definition that's great
2 bodily injury. He lost the use of the leg for many, many
3 months and it's still compromised to this day. That is great
4 bodily injury.

5 Clearly, the failure to yield or failure to lookout, even
6 look and see what was coming was reason that the great bodily
7 injury and the death happened. That's it. There you have it;
8 drinking, driving, impairment, a conscious choice to drive out
9 into traffic without looking to see if anything is coming when
10 every other witness saw the defendant and if you're visible to
11 all those people, Mr. Schnell would've been visible to him,
12 and the death and great bodily injury that occurred because of
13 that choice. That choice was to charge out I traffic without
14 looking. Most of all it's impairment. It's the alcohol he
15 was drinking. His blood alcohol level three hours later was
16 .105; at the time of the incident, it was probably .135 to
17 .165 close to twice that legal limit of .08. That's the
18 reason. That's the reason his judgment was impaired, the
19 reason he went out into that lane, that's the reason he
20 charged out into traffic and didn't yield the right of way,
21 because he was impaired. As he drove to that store to get
22 another beer to keep that buzz going, and he was ready to
23 drink it. He was in a hurry to get home and pop the top off
24 that beer. He didn't take the time to look to see what was
25 coming. The bike, the motorcycle came from nowhere, but it

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

499

1 saw him -- he just charge out there and caused this death and
2 destroyed the life of David Schnell and cost him grievous
3 injury to him. No injury more grievous than the loss of his
4 wife; that can't be replaced. And the kind of impairment that
5 causes these terrible choices that the defendant made, like I
6 said, he wasn't falling-down drunk; it's impairment, the kind
7 of intoxication that comes from being under the influence of
8 alcohol that causes you to make poor decisions and make poor
9 judgments. And that's why Donna Schnell died. That's why
10 David Schnell's life is ruined. And so it just said that
11 sometimes impairment starts before you can ever -- as you sit
12 there looking at it. In this case, you say plenty of
13 evidence. A man who should've been pumped full of adrenaline
14 falling asleep in the back of the car. The blood alcohol
15 test, the behavior inside the alcohol room. That's why the
16 only just verdict in this case is guilty of felony DUI with
17 great bodily injury and guilty of felony DUI with death.

18 Thank you.

19 THE COURT: Mr. Truslow?

20 MR. TRUSLOW: Please the Court?

21 THE COURT: Yes, sir.

22 CLOSING BY TRUSLOW:

23 MR. TRUSLOW: I think one quick important observation
24 that just came to me as one of the last things that the
25 prosecutor said that's important is that he couldn't wait to

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

500

1 get back home where he could drink some beer. So, now he's
2 the kind of guy that's not gonna drink or drive with open
3 container all of a sudden. You know, these cases are not
4 easy, but you've got -- if you want to get it right, look
5 through -- see the trees through the forest, and see the
6 things that really matter. It's important and that's my job
7 to point them out.

8 And first I want to tell you what this case is not. It
9 is not the civil case where liability is determined in an
10 accident case. It's not a case where Mr. Schnell is suing my
11 client for wrongful death or injuries. It is a criminal case
12 alleging a crime in criminal court, and the state is the
13 party, not Mr. Schnell. It's between the State of South
14 Carolina, all of us, and Claybon, and that situation is much
15 different than a civil trial. It's not trying to determine
16 who caused an accident. It's trying to determine whether an
17 individual committed a crime beyond a reasonable doubt that
18 you pay the price for. Two different things. This case --
19 let me give you some examples and then we'll get into some
20 other things of what not to look at.

21 The fact that he didn't buy his son some chips or Coca
22 Cola. The stuff about that case -- and I'll point some of it
23 out -- but that stuff is not what this is about. That's
24 silliness; and this is not silly. This is as serious as it
25 gets.

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

501

1 Also, you can't, in a case like this, let things go
2 unchecked. For instance, how many times it was referenced
3 just now that he chose not to look. I think that's a huge
4 assumption to make without evidence that he didn't look,
5 because that's two fundamentally very different things. I
6 mean, if you look at it like that, he never stopped at Highway
7 17, and he just rolled on through. If he wasn't gonna look,
8 why would he stop? When I look at the case and look at the
9 facts, and I try to remember everything, but I won't -- and
10 that's another thing. I've been in cases before where what
11 the jury wound up talking about, even deciding the case on,
12 was something that I never even brought up, nor the
13 prosecutor, which is kind of funny, but it happens, you know.
14 If I say something that is not in evidence or is inaccurate, I
15 ask you to go with what you all remember exactly. I'm telling
16 you the best I can remember. But when I look at the evidence,
17 I think that of the fact witnesses -- and what I mean by that,
18 was the four, I think, witnesses that testified they were out
19 there -- when you judge credibility -- and the Judge was
20 telling you earlier in the trial when we first spoke to you
21 that how do you do that, and he said you just judge a person
22 the same way you would if you were dealing with them on any
23 other subject. You size people up every day in life whether
24 you, you know, realize it or not, and I can't help but think
25 that Mr. Kerley of those witnesses was the most credible. I

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

502

1 mean, I don't know if it's the way he came across or what, but
2 to me, he seemed confident in what he was saying. And he was
3 very clear in the fact -- in fact, he said this to the
4 prosecutor before I even got to question him, on his own in
5 direct examination he said that those two lanes were stopped
6 as if to let him out. That is not shooting across the
7 highway. In my opening I mentioned don't use the word darting
8 out, and then ironically Mr. Kerley used the word dart, and
9 that's okay, because in proper context what happened was he
10 darted out after he inched forward and the traffic stopped.
11 And then that's I guess what you do when you dart out; there's
12 no other way to do it. We all do it. Okay? But it doesn't
13 mean that he didn't look at all. And I tell you one thing it
14 does do, it gives him credibility to some degree, because he
15 made three or four statements throughout this case via the
16 videotape when it happened, and that did not change. You
17 know, if you listen to the evidence again, if you have to, he
18 said the cars stopped to let me in. He may have said one of
19 them waved me through or whatever, but he said that. He never
20 wavered from that, even when he said it when he wasn't being
21 asked and he was just talking, and that's important if you
22 want to get to what happened here. Mr. Kerley confirms that.
23 If you look at that, he clearly confirms that. He says those
24 two lanes were stopped. The next fact witnesses, the lady,
25 Ms. Grainger, she changed things up a little bit. And then

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

503

1 she wasn't in Lane 3, she was in Lane 2. Then she said there
2 was a truck here. Then she said it was not an S10, it was a
3 big truck, jacked-up truck, like I said, which would impede
4 your view. And bear in mind that Mr. Atwater, Claybon is not
5 from here. He was on vacation with his entire family. Okay?
6 He doesn't travel Highway 17 in North Myrtle Beach every day.

7 Now, if that's not an excuse, and it may not be, it's not
8 an excuse for who caused the accident. All right? It's not.
9 If we were in here in a civil case, it's not an excuse. Well,
10 that's not what we're here for. We're here because he's
11 accused of taking Ms. Schnell's life. That's what this is.
12 And in a case like this -- and you'll hear the law in a little
13 bit from the Judge -- it's totally, totally different
14 situation. Totally different, because it is a crime; it's not
15 -- it's not civil liability in an accident. And the Judge
16 will read it to you something about criminal intent. A lot of
17 times in these cases, we like to talk about through the trial
18 for some reason, but in this case, it becomes important
19 because it draws a line between civil cases and criminal
20 cases.

21 In looking at the traffic, if you believe he stopped and
22 if you believe the first two lanes of traffic stopped, and you
23 believe there's a big truck in front of him, and if you
24 believe maybe somebody did wave him through to go ahead -- in
25 fact, that's the only reason with all that traffic that he

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

504

1 would stop would be to let him in. So, it's not preposterous
2 to think somebody waved him through. He's not from here. He
3 goes across, there's no criminal intent involved in that, and
4 that is what's put you in a different court. But in this
5 case, they chose to charge him with this criminal offense, a
6 big one, and that's where my point of contention is. Before
7 you take somebody out, it's got to be a crime, you know. I'm
8 not making light of what happened here at all. I'm simply
9 telling you that it's not a criminal offense what happened
10 here.

11 I don't believe he was impaired by alcohol, but that's
12 me. That's your decision. But if you found he was, you have
13 the opportunity to find him guilty of DUI. Felony DUI is a
14 much, much different animal. It requires not just that he
15 committed failure to yield. We all can be guilty of that, but
16 that he was DUI, he failed to yield, which also requires
17 criminal intent once again, and it was a direct and proximate
18 result of Ms. Schnell's death and Mr. Schnell's bodily injury.
19 I never try to act in this trial as if he had not consumed
20 alcohol. I can't do that; it would be a lie. But, when you
21 get to the issue of impairment, what you get to is whether or
22 not somebody's normal faculties are materially and appreciably
23 impaired where they cannot safely operate an automobile or
24 their normal functions, and that is a very important issue in
25 this case. I'm not conceding DUI by any means, but the

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

505

1 important point there is their normal faculties.

2 In this case you have law enforcement, and I can tell
3 you, I don't know if anybody has noticed it, but the pendulum
4 has swung. It is not illegal to drink and drive in this
5 state. Maybe it will be, maybe it should be, but it's not.
6 It's not, and that may be tough for some people to swallow.
7 Officer Floyd had a problem with that. I respect his position
8 on that. Okay? But I'm telling you the law is being enforced
9 as if it were per se, and if alcohol comes up at all, and even
10 in a normal DUI case, you're asked out of the car; you're not
11 getting back in the car, whether you're impaired or not. Keep
12 that in mind, and that's true. Officer Floyd doesn't believe
13 -- believes you should be able to drink anything and drive.
14 Again, I respect his position, but it's not the law. When you
15 look at somebody's normal faculties and capabilities in a DUI
16 case, you can't hinge it on BA number, because we -- all
17 people are affected differently by alcohol. You can't hinge
18 it on a failure of a sobriety test, because they're not
19 science. I don't care what anybody thinks, they're not.
20 They're just not. The little bit stuff they have on it, I
21 brought out in evidence will tell you that unless you do three
22 standardized tests together, they're close to meaningless;
23 they have a failing grade. Sixty-eight percent ---

24 MR. DEBUSK: Objection, Your Honor, facts not in
25 evidence. Those are questions, not testimony.

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

506

1 THE COURT: Please stick to the facts of the case. Thank
2 you.

3 MR. TRUSLOW: Let's talk about the normal faculties that
4 you have. When I think of a way to test somebody's normal
5 faculties, I would think to ask them for normal information or
6 to do something normal, not to do something abnormal, and I
7 submit to you the field sobriety tests are abnormal in that we
8 don't ever do them. Who does that? I submit to you that if
9 you get stopped with DUI and you're doing field sobriety
10 tests, it is likely the first time you've done it. But, I'll
11 tell you one thing, you probably haven't taken classes on it;
12 you probably haven't practiced it; and it's probably in your
13 repertoire of things that you do. But yet, it's gonna be used
14 as evidence that your normal faculties are impaired.

15 Having said that, I would ask you to look at those tests,
16 because I would submit to you that he did not flunk the walk-
17 and-turn test. He didn't take the test. He said he couldn't
18 do it; he didn't do it. The one-leg stand, I mean, I don't
19 know if I'm somewhere else, but I don't see what he did wrong.
20 As difficult as the test can be, he held his foot up until the
21 officer said stop, and he counted along 1/1,000, 2/1,000,
22 3/1000. His speech was not slurred; that's how he talks. He
23 sounded clear to me. He counted clear. He counted; he didn't
24 mess up his counting. He kept his foot up. And when he put
25 his foot down, the officer said good job.

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

507

1 The law in this state the Judge will give you, again, is
2 DUI, breaking a traffic violation, and being the direct and
3 proximate cause of the death and injury in this case. That is
4 not here, in my opinion. If you follow the law as given to
5 you, criminal intent separates crime and criminal trials from
6 civil liability and responsibility for an act that leads to
7 damages, monetary, or physical, or death. We have wrongful
8 death cases every day in this courtroom -- not every day in
9 this courtroom, but throughout the country. This is not that,
10 and I'm not insulting your intelligence. I know you've got it
11 and I've said it four times, but I just -- it's important,
12 because I, you know, I see it.

13 Moving on to the decision-making process. As the Judge
14 told you, what we talk about in this case is not evidence, the
15 prosecutor and I, it's what we see as important, what we
16 pointed out. Each of you, and generally -- I've never had
17 jury duty, but I understand you collaborate and talk about
18 what you heard, what this person heard, and you work through
19 it, and you apply the facts as you find them to the law as is
20 given to you by the Court. Everybody should have a say. And
21 I want to ask you when you're deliberating, when you discuss
22 reasonable doubt, it's a tough thing to get in a way, but in a
23 way then it's not. It's been defined as doubt that leaves you
24 firmly convinced that the person is guilty of each and every
25 element, and each and every element of the crime must be found

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

508

1 beyond a reasonable doubt. I submit to you that you're
2 reasonable people, and if you have a doubt; you have a
3 reasonable doubt. I'll also submit to you that your position
4 is as valid as anybody's not to be deterred, but to be heard
5 and to vote your conscience based on what you've heard and
6 what the law is.

7 I would ask you not to pay particular attention to the
8 numbers, because as I said, it's different for everybody, and
9 you don't have to, because you've got the video and audio you
10 can look at it for yourself. And then when you hear about
11 reverse extrapolation and all these things, and when you're
12 judging where something is coming from, if people have been
13 biased, have a reason or interest in the case, to take that
14 into account. Meaning that reverse extrapolation and the
15 gentleman who spoke about that is a law enforcement officer.
16 He was a Lieutenant with the South Carolina Law Enforcement
17 Division, and you must factor that in. You must. It's not a
18 professor in college that's talking about science; he's a
19 police officer.

20 In closing, I want to say this. First, I believe that
21 the two most important pieces of evidence in this case, Mr.
22 Kerley substantiating my client saying what happened. What he
23 said happened is not a person who did not look and was just
24 blazingly just shooting across the highway. He was doing they
25 type thing we do every day. And maybe the most important

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

509

1 evidence is the videotape at the Circle K, because you have a
2 glimpse of Claybon minutes, if not seconds, before this
3 accident. So, when on the video you can't see him walk from
4 one patrol car to the other, but what you can see, I submit,
5 he has no problem with it. You see him minutes, shortly
6 minutes before the accident parking the car; walking in the
7 store; walking up one aisle, around to the beverages, select a
8 beer, no hesitation, he doesn't drop it; he comes all the way
9 back; stands in line behind two people; takes his wallet out;
10 pays the appropriate amount of money; receives his change;
11 takes his package; walks out; he gets in the car; drives
12 around. He wasn't going fast coming in or leaving. What
13 better evidence did you have of whether his normal faculties
14 are impaired? What better evidence? You know, you'll have
15 sometimes when people say how did you convict that person; you
16 know, it's so hard. Would he have to have a video of the
17 crime of them robbing a bank or something. You have video of
18 his faculties, physical and mental, the minute before this
19 collision occurred. He was not rolling around in the back of
20 a police car moaning minutes before. He said his leg hurt
21 later. I can't go through everything that happened, but you
22 know, you can and you can see any piece of evidence again that
23 you want to. But when he realized that, as he sat in the car,
24 I'm gonna be charged with murder. When he realized that and
25 pay attention to the fact that he was handcuffed and put in

State v. Atwater - 2019-GS-26-02899, 02900
CLOSING BY TRUSLOW

510

1 the back of a patrol car early, early on, and then it started
2 to dawn on him, and I'm gonna tell you there are some people
3 that will have an effect on you. It will have an effect on
4 your field sobriety tests. It will have an effect on your
5 ability to not moan or cry or yell for Jesus. He wasn't doing
6 that in the store at the Circle K. By the way, he gave a
7 phone number; he was able to name the store he was at to the
8 officer; he responded to questions with no delay; he had
9 interaction. And, as far as your normal faculties, he was
10 alert and coherent and he was -- to time and space and where
11 he was at and what's going on, he was fluent, and he knew. He
12 was not impaired by alcohol. If you find he was, you can find
13 him guilty of DUI. But then the next step, he didn't even
14 look; it's not believable. And the direct cause of a death
15 with criminal intent when there's a big truck in front of him,
16 and he possibly was being waved through, but we know the cars
17 are stopped.

18 So, ladies and gentlemen, the last thing I'll say is that
19 everywhere around this country right now, there are other
20 trials like this going on, and they're not easy, but whether
21 we -- we talk about the importance of a jury, whether we have
22 a system or we don't is defined about what juries do every day
23 like this. And if it's not strong, and there's not a backstop
24 to distinguish between civil and criminal and beyond a
25 reasonable doubt, then how hard it should be to convict

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

511

1 somebody of a serious crime? Then, it's not there and you
2 can't rely on a jury in Kansas City to keep it strong for
3 South Carolina. It either is or isn't. It probably wouldn't
4 be easy to convict somebody, it wouldn't be easy necessarily
5 to vote not guilty, but it's between the state and my client,
6 not Mr. Schnell. If you deliver a verdict that is consistent
7 with the law, nobody can argue with you, including me. So, I
8 just ask you to find him not guilty of felony DUI, because
9 it's just not there.

10 Thank you.

11 BY THE COURT:

12 THE COURT: All right. Mr. Foreman, ladies and gentlemen
13 of the jury, go to your jury room. We'll take a short break
14 for about five minutes. It's important that you listen to the
15 Court as far as the law. So, go to your jury room. Leave your
16 pads and pens. Don't talk about the case.

17 Thank you.

18 (REPORTER'S NOTE: Jury exits courtroom @ 12:07 p.m.)

19 THE COURT: All right. We'll take a short break for
20 about five minutes.

21 Thank you.

22 RECESS @ 12:07 P.M.

23 *****OFF THE RECORD*****

24 ON THE RECORD @ 12:13 P.M.

25 THE COURT: All right. Is the state ---

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

512

1 MR. DEBUSK: Your Honor, we have a ---

2 THE COURT: --- yes?

3 MR. DEBUSK: We have a request for the jury computer.
4 We're working on that and we're having it brought up.

5 THE COURT: Okay. All right. Good deal. Well, we'll
6 need that, you know, obviously ---

7 MR. DEBUSK: Yes, sir.

8 THE COURT: --- to go in with the evidence. All right.
9 Is the state ready for the jury to come in?

10 MR. DEBUSK: Yes, Your Honor.

11 THE COURT: And defense, Mr. Truslow?

12 MR. TRUSLOW: Yes, sir; we're ready.

13 THE COURT: Ask the jury to come in. Thank you.

14 (REPORTER'S NOTE: Jury enters courtroom @ 12:14 p.m.)

15 CHARGE TO JURY:

16 THE COURT: All right, ladies and gentlemen, it's now my
17 duty and responsibility to give you the law that you will
18 apply to the facts and evidence you have heard in this case.
19 I told you at the very beginning, I would not make any
20 comments and would not indicate to you in any way what I
21 thought the facts of this case are, and in that same vein, if
22 you came into this courtroom with any preconceived ideas of
23 what the law is, what it ought to be, what it should be,
24 you'll disregard them. You'll take the law as I now give it
25 to you and apply it to the facts and evidence you've heard in

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

513

1 this case.

2 I told you at the very beginning that one of your jobs,
3 duties, and responsibilities was to judge the credibility and
4 that is the believability of the witnesses that have come
5 before you and testified under oath. Now, in doing that, you
6 can believe one witness against several, several against one,
7 you can believe a portion of what a witness says and disregard
8 the remaining portion of it. If you've got a good sound
9 reason for doing so, you can disregard in its entirety the
10 testimony of a particular witness. You look at whether or not
11 that witness has exhibited to you any kind of interest,
12 motive, bias, prejudice that they may have in giving you the
13 testimony they gave you, and obviously you consider the
14 opportunity for knowledge. How did they come about that
15 information that they gave you from the witness stand. I told
16 you, it's an exercise of good common sense, listening to the
17 facts and evidence in this particular matter, and then
18 applying the law that I am giving to you now. You don't have
19 any friends to reward, you don't have any enemies to punish,
20 and your verdict can't be the result of any kind of passion or
21 prejudice or sympathy. It has to be an examination of the
22 facts and evidence you've heard in this case and applying the
23 law that I give you.

24 I did allow you to take notes. I'll remind you, as I
25 told you earlier, some people are better notetakers than

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

514

1 others. Just because somebody wrote something down on a piece
2 of paper, does not make it any more believable than the
3 collective wisdom and collective memory of the jury in this
4 particular case.

5 Two types of evidence that are presented in virtually
6 every single case; direct and circumstantial evidence. Direct
7 evidence, that's the testimony of a person who claims or
8 asserts to have actual knowledge of the fact. This is what I
9 saw, this is what I heard, this is what took place in my
10 presence. Circumstantial evidence is a chain of facts
11 indicating the existence of a fact. Now, the law doesn't make
12 a distinction between the two, but to the extent that the
13 state relies on any circumstantial evidence, the circumstances
14 must be consistent with each other and, when taken together,
15 point conclusively to the guilt of the accused beyond a
16 reasonable doubt. The state always has the burden of proof of
17 proving the defendant guilty beyond a reasonable doubt, and
18 that burden rests on the state whether it relies on direct
19 evidence, circumstantial evidence, or some combination of the
20 two.

21 I qualified a couple of witnesses to give their opinion.
22 Sometimes they're called expert witnesses. What they are in
23 actuality, they are qualified to give an opinion, because
24 normally we don't allow people to give their opinion. They
25 have to tell you this is what I saw, this is what I heard,

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

515

1 this is what took place in my presence. But some witnesses,
2 by reason of their education, training experience, in a field
3 of study, would allow them to give you their opinion, but that
4 doesn't give them any special status. You judge all the
5 witnesses the same; you judge all their credibility and
6 believability by the same standard.

7 In order to establish criminal liability, criminal intent
8 has to be proved to you by the state beyond a reasonable
9 doubt. Now, that's a matter that must be determined by you,
10 the jury, from all the circumstances surrounding the
11 situation. There's no way to prove it to you by some
12 mathematical formula or mathematical certainty, and there's no
13 way that medical science can look into somebody's brain and
14 tell you what they were thinking or what they were doing.
15 You take into consideration their acts, the acts of the
16 parties, and all the facts and circumstances of the case.
17 Criminal intent is a mental state, a conscious wrongdoing.
18 It's up to you determine what the defendant intended to do
19 based on the circumstances shown to have existed that's been
20 proved to you by the state beyond a reasonable doubt.

21 The defendant in this case did not testify. That is not
22 a fact for you to consider in your deliberations. You may not
23 talk about it. You may not use it mentally in making your
24 decision. Every person accused of a criminal offense, has the
25 constitutional right to remain silent. The assertion of that

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

516

1 right cannot be used against him. Therefore, it can't be used
2 in your deliberations. I told you the burden of proof is on
3 the State of South Carolina. The defendant is never required
4 to prove anything to you. Remember at the very beginning I
5 told you, the defendants don't even have to show up because
6 the state always has on everything the burden of proof to
7 prove the defendant guilty beyond a reasonable doubt.

8 Now, in this case there were certain statements of the
9 defendant that were audio and video recorded that's been
10 presented by the state. While I allowed that evidence to be
11 presented to you, you are the final determining factor
12 regarding those statements. First, you have to determine did
13 the defendant actually make those statements. If you do, then
14 you determine whether or not the statement was made by the
15 defendant voluntarily and of his own free will. Was it caused
16 by any kind of pressure, force, fear, threats, coercion, hope
17 of leniency? In determining whether or not it was voluntary,
18 you consider the characteristics of the defendant and the
19 details of the situation. You could look at the age of the
20 defendant; his education or lack thereof; the defendant's
21 mental ability or capacity; the place and length of detention;
22 the nature of the question; and of course, the advice or lack
23 thereof to the defendant of their constitutional rights,
24 including, but not limited to, the right to remain silent.
25 Any statement can be used that you make against you in a court

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

517

1 of law. You have the right to have a lawyer present during
2 questioning. If you cannot afford one, one will be appointed
3 to represent you, and you can stop making a statement at any
4 time you choose. The state has the burden of proving beyond a
5 reasonable doubt that the alleged statement was the
6 defendant's statement and was made voluntarily, freely, and
7 his decision to make that statement. So, if you find that,
8 you give it whatever weight you want. Obviously, if you find
9 it wasn't a voluntary statement, you disregard it and don't
10 use it at all.

11 The indictments against the defendant that I told you and
12 talked about at the very beginning, and I told you that when
13 the defendant was charged with the crimes, the burden of proof
14 immediately came upon the State of South Carolina to prove the
15 defendant guilty beyond a reasonable doubt. This is the
16 presumption of innocence. This is an important rule of law
17 that everyone charged in a criminal offense will always be
18 presumed innocent of the crime for which the indictment was
19 drawn or issued against them unless the state can prove that
20 person guilty beyond a reasonable doubt. Now, that
21 presumption of innocence didn't end when the indictments were
22 served on the defendant; it didn't end at the beginning of the
23 trial; it hasn't ended now. It only ends when you
24 collectively determine from the facts presented to you that
25 the state proved the defendant guilty of the crime or crimes

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

518

1 charged beyond a reasonable doubt. This isn't just some legal
2 theory or legal phrase. It is a substantial right to which
3 every defendant is entitled unless you are satisfied from the
4 evidence of the guilt of the defendant beyond a reasonable
5 doubt.

6 So, what is reasonable doubt; the kind of doubt that
7 would cause an ordinary, reasonable person to hesitate to act.
8 Proof beyond a reasonable doubt is proof that leaves you
9 firmly convinced of the defendant's guilt. Now, there are
10 very few things we can know with absolute certainty. The law
11 doesn't require the State of South Carolina to give you that
12 kind of proof. What is required is, based upon your
13 consideration of the evidence, you are firmly convinced the
14 defendant is guilty of the crime or crimes charged, you have
15 to find him guilty. On the other hand, based upon the
16 evidence presented, your examination of it, you are not firmly
17 convinced that the defendant is guilty of the crime or crimes
18 charged, you must give the defendant the benefit of the doubt
19 and find him not guilty.

20 Any person who drives a motor vehicle in the State of
21 South Carolina is considered to have given their consent to
22 chemical tests of the person's breath, blood, or urine for the
23 purpose of determining the presence of alcohol, drugs, or the
24 combination of alcohol and drugs, if arrested for an offense
25 arising out of acts alleged to have been committed while a

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

519

1 person was driving a motor vehicle under the influence of
2 alcohol, drugs, or a combination. A breath test must be
3 administered at the direction of a law enforcement officer
4 that's arrested the person while driving a motor vehicle while
5 under the influence. At the direction of the arresting
6 officer, the person must first be offered a breath test to
7 determine the person's alcohol concentration. If they're
8 physically unable to do it because they're injured in some
9 way, unconscious, or deceased, then the arresting officer can
10 request a blood sample to be taken or ask the court -- officer
11 to authorize it. If the officer has a reasonable suspicion
12 that a person is under the influence of drugs, then they can
13 order a urine sample. A breath sample taken for testing must
14 be collected within two hours of the arrest for the offense
15 for which the person is charged. Any additional tests to
16 collect other samples have to be collected within three hours
17 of the arrest. Now, the breath test has to be administered by
18 a person certified by the South Carolina Criminal Justice
19 Academy pursuant to SLED policies. Before a breath test is
20 administered an eight one-hundredths, that's .08 of one
21 percent simulator test must be performed, and the result has
22 to be between .076 and .084. Blood and urine samples have to
23 be obtained by a physician licensed by the State Board of
24 Medical Examiners or a registered nurse licensed by the State
25 Board of Nursing or other medical personnel trained to obtain

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

520

1 the samples in a licensed medical facility, and those samples
2 must be obtained and handled in accordance with the procedures
3 approved by the State Law Enforcement Division.

4 What's the defendant charged with? Felony driving under
5 the influence death resulting or great bodily injury. The
6 state must first prove beyond a reasonable doubt that the
7 defendant drove a vehicle while under the influence of alcohol
8 and/or drugs to the extent that the defendant's faculties were
9 appreciably impaired. Driving a motor vehicle means the
10 vehicle was in motion, and that can be proved, as I talked
11 about, by direct or circumstantial evidence. The state must
12 prove beyond a reasonable doubt that the defendant was
13 sufficiently under the influence to impair his ability to
14 drive with reasonable care, with due regard for himself and
15 others, or as a reasonably prudent person would drive. It is
16 not necessary to show that the defendant was in a helpless
17 condition or passed out or grossly intoxicated. On the other
18 hand, the fact that the defendant at some time prior to the
19 accident drank an alcohol beverage does not prove the
20 defendant was driving under the influence.

21 There is an inference that you may consider. Inferences
22 from the results of tests. The amount of alcohol in the
23 defendant's blood at the time of the alleged violation, as
24 shown by a chemical analysis of the defendant's breath or
25 chemical analysis of other bodily fluids, may be considered by

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

521

1 you in deciding whether the defendant was under the influence.
2 If the alcohol concentration was eight one hundredths of one
3 percent, that's .08, .08, it may be inferred that the
4 defendant was under the influence. Now, this inference that
5 the person was under the influence is simply an evidentiary
6 fact to be considered by you, the jury, along with all the
7 other evidence in the case, and you give it the weight you
8 decide it should receive.

9 Next, the state has to prove to you beyond a reasonable
10 doubt that the defendant while driving did an act forbidden by
11 law or neglected a duty imposed by law. Anyone driving upon
12 the highway, byways, roads of the State of South Carolina,
13 there are certain obligations that are imposed on everybody
14 who drives, and they are statutory obligations, and you must
15 do these things when you drive. The driver of a vehicle about
16 to enter or cross a roadway from any place other than another
17 roadway shall yield the right of way to all vehicles
18 approaching on the roadway to be entered or crossed. The
19 driver of a vehicle emerging from an alley, building, private
20 road, or driveway within a business or residential district
21 shall stop the vehicle immediately prior to driving onto a
22 sidewalk, or in the event there is no sidewalk, shall stop at
23 the point nearest the street to be entered where the driver
24 has a view of approaching traffic.

25 Finally, the state has to prove beyond a reasonable doubt

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

522

1 that the act or neglect of the defendant proximately caused
2 great bodily injury or death to another person. So, what's
3 proximate cause? Proximate cause is the direct cause, the
4 efficient cause, the cause about which the death or the great
5 bodily injury would not have resulted. So, there has to be
6 this chain of circumstances in that matter regarding the
7 injury inflicted by the defendant until the time of the
8 defendant's death. But the proximate cause does not mean that
9 it occurred immediately prior to the death. Obviously, the
10 deceased or death is self-explanatory. Great bodily injury as
11 defined is -- means a bodily injury which creates substantial
12 risk of death, or which causes serious injury or permanent
13 disfigurement or protracted loss or impairment of the function
14 of a bodily member or organ. That's great bodily injury.

15 Now, you understand that the defendant has been charged
16 with two felony driving under the influence charges. You
17 gonna have to decide both of them, and I'll talk about that a
18 little bit more when I talk about the verdict form. But, if
19 you find the state has failed to prove to you beyond a
20 reasonable doubt that the defendant is guilty of either one of
21 them or both of them, then you must consider the lesser
22 included offense that's included in each of those charges,
23 that's driving under the influence. The state, again, has to
24 prove the defendant was driving a motor vehicle in this state
25 while under the influence of alcohol or drugs to the extent

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

523

1 that the defendant's faculties to drive were materially and
2 appreciably impaired. The state also has to prove beyond a
3 reasonable doubt that the defendant was sufficiently under the
4 influence to impair his ability to drive with reasonable care
5 with due regard for himself and others or fails as a
6 reasonably prudent person would have driven. Not necessary,
7 again, to show the defendant was in helpless condition, passed
8 out, grossly intoxicated, but the fact that the defendant, at
9 some time prior to the incident, drank an alcohol beverage or
10 took a drug does not prove the defendant was driving under the
11 influence. Again, you have that inference from the results of
12 blood tests or breath test, chemical analysis of a person's
13 breath or the chemical analysis of a person's bodily fluid.
14 And again, if the alcohol concentration was eight one-
15 hundredths of one percent, that's .08, it may be inferred,
16 that the defendant was under the influence of drugs or
17 alcohol. And again, the inference is an evidentiary fact you
18 consider with all the other evidence, and you give it the
19 weight you decide it should have.

20 Greater or lesser offense. If you have a reasonable
21 doubt as to whether the defendant is guilty of a greater or a
22 lesser offense, you must resolve that doubt in favor of the
23 defendant, if you find the state has proved that to you by the
24 greater weight -- I'm sorry -- by the -- beyond a reasonable
25 doubt. The state always has the burden on everything to prove

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

524

1 the defendant guilty beyond a reasonable doubt.

2 So, two charges against the defendant: Felony driving
3 under the influence death resulting; felony driving under the
4 influence with great bodily injury.

5 Verdict forms, fairly straightforward. You have the
6 caption of the case, State of South Carolina versus Claybon
7 Lewis Atwater, Jr. Felony driving under the influence death
8 resulting (victim's name, Donna Schnell). On the charge of
9 felony driving under the influence death resulting, the death
10 of Donna Schnell, we, the jury, by unanimous consent, find the
11 defendant -- there's two choices, put one before the other,
12 I've got to put one before the other; don't assign anything to
13 that -- not guilty or guilty.

14 On that decision, unanimous decision of the jury, Mr.
15 Foreman, if the jury finds the defendant not guilty of that
16 crime, you must proceed to the lesser included offense of
17 driving under the influence. We, the jury, on the charge of
18 driving under the influence, by unanimous consent, find the
19 defendant, Claybon Lewis Atwater, Jr., again, not guilty or
20 guilty.

21 If you found the defendant guilty regarding the felony
22 driving under the influence death resulting, you proceed
23 directly to the other charge of felony driving under the
24 influence great bodily injury (the victim, David Schnell).
25 So, on the charge of felony driving under the influence great

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

525

1 bodily injury, for injuring David Schnell, we, the jury, by
2 unanimous consent, find the defendant, Claybon Lewis Atwater,
3 Jr., two choices, not guilty or guilty. Again, Mr. Foreman,
4 if the jury finds him not guilty of that offense, you must go
5 on to the driving under the influence. Again, on the charge
6 of driving under the influence, we, the jury, by unanimous
7 consent, find the defendant, Claybon Lewis Atwater, Jr., not
8 guilty or guilty.

9 Mr. Foreman, when your jury deliberates and makes its --
10 and you, of course -- unanimous decision in this matter, you
11 will reflect those decisions by checking the appropriate block
12 on the verdict form, signing your name, put the correct date
13 on the verdict form. Those forms will go into the jury room
14 with you along with the evidence.

15 Now, I said unanimous several times. It means exactly
16 what you think it means, 12/0, not 11/1, 10/2, any combination
17 thereof. Whatever verdict you place on the verdict form, Mr.
18 Foreman, you are telling the Court that every single member of
19 the jury agrees that is their verdict, 12/0. So, when called
20 upon after the reading of the verdict by the clerk's
21 representative, the clerk will inquire of you to affirm that
22 is your verdict by the raising of your right hand, and so by
23 so indicating you're telling the Court that every single
24 member of the jury will be able to do so.

25 I'm gonna ask that you go back to the jury room. The two

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

526

1 alternates, ladies, I need for you to stay with us. Mr.
2 Foreman, I'm gonna ask that you take your jury to the jury
3 room. Do not, do not begin your deliberations until the
4 bailiff brings into your room the verdict form and the
5 exhibits. At that point in time, you may begin your
6 deliberations.

7 The clerk's office is providing lunch for you. It will
8 be brought into you in the jury room. Y'all do whatever you
9 want to. If you want to stop and enjoy lunch and then go on
10 with your deliberations; however you want to do that, y'all
11 are in control of that. All right?

12 So, take your jury to the jury room. Don't begin your
13 deliberations until you get all of the exhibits and the
14 verdict form. Thank you very much.

15 And the two alternates, ladies, please stay with us.

16 Thank you.

17 MR. TRUSLOW: Judge?

18 THE COURT: If you have a question, you're required to
19 write it out and so it can be part of the record. Okay?
20 Thank you very much. I'm sorry.

21 (REPORTER'S NOTE: Jury exits courtroom @ 12:42 p.m. The
22 following takes place outside the presence of the jury.)

23 THE COURT: All right. As to the two alternates in this
24 matter. Is there any reason from the state that the Court
25 should not excuse the alternates from their duties and

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

527

1 responsibilities at this time?

2 MR. DEBUSK: No, Your Honor.

3 THE COURT: From the defense?

4 MR. TRUSLOW: No, Your Honor.

5 THE COURT: All right. I want to tell you that I
6 appreciate your service in this case. I can't tell you
7 honestly how many times during this year in a jury trial I've
8 had to substitute in an alternate for one of the regular
9 members of the jury. People can get sick, something happens,
10 something happens at home, and we got to substitute the juror,
11 but obviously it didn't happen in this particular case. They
12 all seemed ready, willing, and able to prepare and go forward
13 with their duties. So, I'm gonna be able to excuse you from
14 your jury service in this case. You've got a three-year
15 exemption from coming back to Circuit Court jury duty.
16 Obviously, if you get a note from the City Judge or Magistrate
17 or Federal Judge asking you to go see them, you have to, but
18 you just don't have to come back to see us for three years for
19 Circuit Court jury duty.

20 At this point, you are both excused. Thank you very
21 much.

22 (REPORTER'S NOTE: Alternates excused and exit courtroom @
23 12:42 p.m.)

24 THE COURT: All right. Exceptions, deletions, additions
25 to the charge from the state?

State v. Atwater - 2019-GS-26-02899, 02900
CHARGE TO JURY

528

1 MR. DEBUSK: No, Your Honor.

2 THE COURT: Deletions, exceptions to the charge from the
3 defense?

4 MR. TRUSLOW: No, Your Honor.

5 THE COURT: All right. Please come forward and make sure
6 with Ms. Kay we've got all the proper exhibits going into the
7 jury, and we have the laptop that's disabled and all it can do
8 it play the videos. So, that will go into the jury room also.

9 While you're doing that, counsel, I want to tell all
10 three of you, I appreciate the effort and the way that y'all
11 have tried this case. All three of you have done exactly what
12 the Court would expect of you in representing the interest of
13 your respective parties, and I commend all three of you for
14 that. Thank you very much.

15 MS. HARTE: Thank you, Judge.

16 MR. DEBUSK: Thank you, Your Honor.

17 THE COURT: All right. Just make sure we got all the
18 proper exhibits and then the bailiff will take them in.

19 Thank you.

20 (REPORTER'S NOTE: Counsel reviews and stipulates to exhibits
21 and verdict form.)

22 THE COURT: And so, at this point in time, the jury
23 having, and I'm sorry, Ms. Kay, I need to put one more thing
24 on the record. I'm sorry. At this point in time, the jury
25 having going into deliberation, the defendant is delivered

State v. Atwater - 2019-GS-26-02899, 02900
BY THE COURT

529

1 into the custody and control of the Horry County Sheriff's
2 Office. Thank you very much.

3 MR. DEBUSK: Thank you, Your Honor.

4 (REPORTER'S NOTE: Deliberations commence 12:47 p.m.)

5 **RECESS @ 12:47 P.M.**

6 *****OFF THE RECORD*****

7 **ON THE RECORD @ 2:45 P.M.**

8 BY THE COURT:

9 THE COURT: You may be seated. Thank you.

10 MR. TRUSLOW: Yes, sir.

11 THE COURT: All right. It's my understanding that the
12 jury has reached a verdict in this matter. Is the state ready
13 to receive it?

14 MR. DEBUSK: Yes, Your Honor.

15 THE COURT: And the defense, Mr. Truslow?

16 MR. TRUSLOW: Yes, sir, ready.

17 THE COURT: Let me speak to the persons assembled in the
18 courtroom and interested in this matter. I do not know what
19 the jury's verdict is. We will all receive it at the same
20 time. We asked this jury to do a difficult thing, that is
21 decide this matter based on the presentation they had. The
22 verdict of the jury will be received with respect and silence.
23 I will not tolerate any kind of showing of emotion, outbursts
24 of any kind regarding the jury's verdict. If you do that, you
25 will be detained by one of the law enforcement officers

State v. Atwater - 2019-GS-26-02899, 02900

530

VERDICT OF THE JURY

1 present. After this proceeding is over with, I will conduct a
2 contempt of court hearing whereby I can send you to the
3 Department of Corrections for a period of one year for
4 violation of this order. If you do not believe you can follow
5 these instructions, please leave the courtroom now.

6 All assembled are bound by the Court's order.

7 Ask the jury to come in.

8 (REPORTER'S NOTE: Jury enters courtroom @ 2:47 p.m.)

9 VERDICT OF THE JURY:

10 THE COURT: Mr. Foreman, has the jury reached a verdict
11 in this matter?

12 FOREMAN: Yes, sir; we have.

13 THE COURT: Very good. Could you hand the verdict form
14 to the clerk's representative, please?

15 You may publish the verdict.

16 THE CLERK: Indictment number 2019-GS-26-02900, the State
17 of South Carolina, County of Horry versus Claybon Lewis
18 Atwater, Jr.. On the charge of felony driving under the
19 influence death resulting for the death of Donna Schnell, we,
20 the jury, by unanimous consent, find the defendant, Claybon
21 Atwater, guilty.

22 Indictment Number 2019-GS-26-02899, the State of South
23 Carolina, County of Horry, versus Claybon Lewis Atwater, Jr.,
24 on the charge of felony driving under the influence death
25 results for the death of Donna Schnell, we, they jury, by

State v. Atwater - 2019-GS-26-02899, 02900
VERDICT OF THE JURY

531

1 unanimous consent, find the defendant, Claybon Atwater,
2 guilty.

3 Indictment Number 2019-GS-26-02899, the State of
4 Carolina, County of Horry, versus Claybon Lewis Atwater, Jr.,
5 on the charge of felony driving under the influence, great
6 bodily injury, for on injuring David Schnell, we, the jury, by
7 unanimous consent, find the defendant, Claybon Atwater,
8 guilty. Signed by foreperson Daniel Boorn, dated November the
9 4th, 2021.

10 Ladies and gentlemen of the jury is this your verdict, so
11 signify by raising your right hands.

12 THE CLERK: All jurors having affirmed their verdict by
13 the raising of their right hand, does the state wish the jury
14 polled?

15 MR. DEBUSK: No, Your Honor.

16 THE COURT: Does the defense wish the jury polled?

17 MR. TRUSLOW: No, sir.

18 THE COURT: Mr. Foreman, ladies and gentlemen of the
19 jury, I want to thank you for your service in this case. You
20 did exactly what the Court asked you to do, to well and truly
21 deliberate, look at the facts and evidence in this case and
22 render a unanimous verdict based upon the evidence and the law
23 as charged to you. You've earned an exemption of coming back
24 to Circuit Court jury duty for the next three years. If you
25 do happen to get summoned in that period of time, just tell

State v. Atwater - 2019-GS-26-02899, 02900
MOTIONS

532

1 the Clerk of Court when you're served, and you will be
2 excused.

3 Again, my thanks. Thank you for your service. You are
4 now excused. Thank you very much.

5 (REPORTER'S NOTE: Jury exits courtroom @ 2:50 p.m.)

6 THE COURT: Mr. Truslow, the motions from the defense?
7 MOTIONS:

8 MR. TRUSLOW: I renew our motion for directed verdict at
9 this point as well as renew and remake our previous motions
10 throughout the trial.

11 THE COURT: All right. Thank you very much.

12 BY THE COURT:

13 THE COURT: The Court previously having denied the
14 motions for a directed verdict and reaffirming the Court's
15 rulings in the matter previously. The motion before the Court
16 for a new trial. I find that the evidence at the directed
17 verdict stage was more than sufficient to submit the question
18 of guilt to the jury. I now find that there was more than
19 sufficient competent evidence to sustain the jury's verdict in
20 their decision to find the defendant guilty of the crime of
21 felony driving under the influence death resulting and great
22 bodily injury beyond a reasonable doubt, and I respectfully
23 decline to grant the motion for a new trial.

24 Is the state ready to proceed with sentencing?

25 MR. DEBUSK: Your Honor, may I approach?

State v. Atwater - 2019-GS-26-02899, 02900
SENTENCING

533

1 THE COURT: Yes, sir.

2 MR. DEBUSK: The sentencing forms, Your Honor.

3 THE COURT: Thank you, sir. Yes, sir?

4 SENTENCING:

5 MR. DEBUSK: Thank you, Your Honor. The impact of this
6 case has been mostly on the family of Donna Schnell. And her
7 husband, surviving husband, also a victim in this case, David
8 Schnell wishes to speak as well as her daughter, Shannon
9 Espel.

10 Your Honor, I would like to speak just briefly on the
11 prior convictions. According to the driving record that I
12 have, the defendant has convictions for driving while impaired
13 from 2005 in Orange County, North Carolina; 2017 in Alamance
14 County, North Carolina; a second count in 2017 also, I
15 believe, in Alamance County; and most disturbingly, this is
16 three weeks before this happened the defendant was arrested
17 for DUI in North Carolina, and he was out on bond for that in
18 Alamance County. That became a conviction on February 12th,
19 2020. That's just three days before -- three weeks before
20 this -- this incident occurred he had been arrested for DUI.
21 He also has a prior conviction for possession of cocaine --
22 Court's indulgence for one moment -- from 2002. He has
23 several other pending charges in North Carolina for which he
24 is currently out on bond, but those are my convictions, Your
25 Honor. Those are just pending charges.