

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

No. 5252 (S.C. Ct. App. filed July 30, 2014)

RECEIVED

NOV 10 2014

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

DAISY LYNN MIMMS,

PETITIONER.

Appellate Case No. 2014-002198

APPENDIX

MARK WISE
BREEN R. STEVENS
Public Defender

First Circuit Public Defender Office
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Orangeburg, SC 29116
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Attorneys for Respondent

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Honorable Edgar Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DAISY LYNN MIMMS,

APPELLANT.

Appellate Case No. 2011-212931

RECORD ON APPEAL

MARK WISE
Public Defender

First Circuit Public Defender Office
P.O. Box 1112
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Attorney for Appellant

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*** Electronic Recording of Trial on File in Clerk of Court's Office ***

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	MAGISTRATE'S RETURN
	)	OF CRIMINAL APPEAL
	)	
STATE OF SOUTH CAROLINA	)	CASE NO. 2011-CP-38-00486
PLAINTIFF,	)	
	)	
-vs-	)	
	)	
DAISY LYNNE MIMMS	)	
DEFENDANT,	)	

The attached papers comprise the court record which is transmitted to the circuit court pursuant to S.C. Code Ann. 18-3-40.

1. Uniform Traffic Ticket
2. Pretrial motions and responses
3. Jury list and jury selection, record of strikes, cause and/or peremptory.
4. The trial transcript was recorded electronically and is available online via the County IT Dept. The transcript is not transmitted in this record.
5. Jury Verdict
6. Notice of Appeal

Respectfully submitted,

Merce D. Williamson
Magistrate

Orangeburg, South Carolina
May 11, 2011

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2011 MAY 11 P 2:03

[Handwritten signature]

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	MAGISTRATE'S RETURN
	)	OF CRIMINAL APPEAL
STATE OF SOUTH CAROLINA	)	CASE NO. 2011-CP-38-00486
PLAINTIFF,	)	
	)	
-vs-	)	
	)	
DAISY LYNNE MIMMS	)	
DEFENDANT,	)	

This matter is on appeal from the Magistrate Court of Orangeburg County, the Honorable Meree D. Williamson, and Presiding Judge.

The Defendant, Daisy Lynne Mimms, was charged with violating the S.C. Code Ann. 56-5-2930, which is commonly referred to as driving under the influence on October 23, 2010. A jury trial was requested by Attorney Mark Wise, on November 10, 2010. A pretrial conference was held on April 6, 2011. The jury list was prepared pursuant to S.C. Code Ann. 22-2-90, selection of jury list for scheduled terms of jury trials. The Defendant and the State were given an opportunity to exercise peremptory challenges on April 11, 2011. The trial by jury was held on April 11, 2011 at 2:00 p.m. The Notice of Appeal was filed on April 20, 2011. The proceedings were recorded electronically.

The State called the following witness:

1. Trooper Jamie Burris

A summary of his testimony is attached.

The Defense did not call any witnesses.

The State did not make any motions.

The Defense made the following motions

1. Pretrial motion to suppress the data master video

A summary of the Defendant's and the State's position on each motion and the Court's ruling is attached.

The State offered the following items into evidence:

1. Videotape at incident site

The Defense raised the following objections to the items offered into evidence.

2011 MAY 11 P 2:03
FILED FOR RECORD
WINIFRED B. CLARK
CLERK OF COURT
ORANGEBURG, SC

The Defense did not produce any items into evidence.

The Defense requested the following charge.

The Defense requested that the judge charge the jury on criminal intent.

Upon examination of the charge, the court ruled that the charge was neither supported by law nor sufficient evidence. Request to charge criminal intent was denied.

The Defendant was found guilty of violating S.C. Code Ann. 56-5-2930, commonly known as driving under the influence and the court imposed the following sentence:
30 days in jail suspended upon the payment of a fine of \$997.00.

Attached are the following items.

Attachment I	Uniform Traffic Ticket E396483
Attachment II	Pretrial motions and responses
Attachment III	Jury list, and jury selection including the record of strikes
Attachment IV	Jury Verdict
Attachment V	Notice of Appeal
Attachment VI	Summary of the witness' testimony
Attachment VII	List of motions, a summary of the parties' positions, and the court's ruling.

2011 MAY 11 P 2:03
FILED FOR RECORD
WILLIAM B. CLARK
CLERK OF COURT
ORANGEBURG, SC

Attachment I Uniform Traffic Ticket E396483

Form 438
Rev 12/06

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY
UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS **8557**

FIRST NAME **Daisy** MIDDLE NAME **Lyndee** LAST NAME **Mims**

VEHICLE NO. **SC 6105** STATE **SC** MAKE OF VEH **CAD** YEAR **20** COMLY VEH **NO** AUTO **NO** HPRER VEH **NO** COMB **NO** HAZ MT **NO** MOPED **NO** MTRCYCL **NO** OTHER **NO**

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL OFFICER

NAME OF TRIAL OFFICER **Traffic Court** STREET AND NO **1546 ELLIS AVE**

DATE OF TRIAL **11/10/10** TIME OF TRIAL **11 AM** CITY **Orangeburg** STATE **SC** ZIP CODE **29116**

VIOLATION - COURT APPEARANCE REQUIRED **YES** VIOLATION SECTION NO. **56-5-293.0**

OWNER OF VEHICLE **D.L. Mims** DATE OF ARREST **10/23/10**

ADDRESS OF OWNER **M.T. Pleasant SC** DATE OF VIOLATION **10/23/10**

BAIL DEPOSITED **\$0** NAME OF ARRESTING OFFICER **S. Y. Burns** RANK **1st**

FACE **W.F.** SEX **M** HT **5'6"** WT **170** EYES **BLU** COUNTY **Orangeburg** NUMBER **38**

DATE BAIL REC'D. BY **SC** BADGE **575** DISTRICT **7**

CASE BEFORE **MAJISTRATE** ☒ **MUN COURT** ☐ **CIRCUIT COURT** ☐ **FAMILY COURT** ☐ **FEDERAL COURT** ☐

NAME OF TRIAL OFFICER **IF DIFFERENT FROM ABOVE** TIME OF VIOLATION **2336** WEATHER **?**

DEFENDANT: DID NOT APPEAR ☐ APPEARED ☒ **UPB** HWY NO. **26**

NOLLE PROSSED ☐ DISPOSITION **GUilty** ☒ **PLED NOLO CONTENDERE** ☐

FORFEITED BOND ☐ MILES **16** N **1** E **1** S **1** W **1**

TRIAL BY: TRIAL OFFICER ☐ JURY ☒ CITY **Orangeburg** CODE **1**

VERDICT OF TRIAL IF ANY **GUilty** ☒ **NOT GUILTY** ☐ DATE OF TRIAL IF ANY **4/11/11** Lat **33 21 1300**

JAIL **30D** SUSPEND **997** FINE **997** AMT COLLECTED **997** AMT SUSPENDED **997** Long **6035.0500**

COMMITTED TO: Vehicle **Seized** Arrest as **Result of Collision** OFFENSE CODE **79** B.A. LEVEL **1**

CERTIFIED CORRECT **Theresa D. Williams** DATE **4/11/11** E **505200**

TRIAL OFFICER'S COPY

due 15 days within
Burns put BW in amt

CLERK OF COURT
EBURG, SC

2:11 MAY 11 P 2:03

Attachment I Uniform Traffic Ticket E396483

Form 438
Rev. 12/08

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY
UNIFORM TRAFFIC TICKET

STATE OF SOUTH CAROLINA VERSUS **8557**

FIRST NAME **Daisy** MIDDLE NAME **Lynne** LAST NAME **Mumms**

STREET AND NO. **[REDACTED]**

STATE LICENSE NO. **SC** DRIVER'S LICENSE NO. **[REDACTED]** CDL ☐ YES ☒ NO DRL LIC CLASS **D**

VEH. LIC. NO. **[REDACTED]** STATE **SC** MAKE OF VEH **CADILLAC** YEAR **2000** COAL VEH ☐ AUTO ☒ MOTOR VEH ☐ COMB. ☐ HAZ. MT. ☐ MOPED ☐ MTRCYCL ☐ OTHER ☐

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL OFFICER

NAME OF TRIAL OFFICER **Traffic Co. 7** STREET AND NO. **1746 Ellis Ave**

DATE OF TRIAL **11/10/10** TIME OF TRIAL **11 AM** CITY **Orangeburg** STATE **SC** ZIP CODE **29116**

VIOLATION - COURT APPEARANCE REQUIRED ☒ YES ☐ NO VIOLATION SECTION NO. **56.5-283.0**

OWNER OF VEHICLE **D. L. Mumms** DATE OF ARREST **10/23/10**

ADDRESS OF OWNER **Midway Pkasant SC** DATE OF VIOLATION **10/23/10**

RAIL DEPOSITED **5016** NAME OF ARRESTING OFFICER **J. H. Burris** RANK **1st**

DATE RAIL REC'D **10/20** BY **[REDACTED]** COUNTY **Orangeburg** NUMBER **38**

DESCRIPTION OF ACCUSED **[REDACTED]** HT **5'6"** WT **117** EYES **BLU** BADGE **575** DISTRICT **7**

CASE BEFORE ☒ MAGISTRATE ☐ MUN. COURT ☐ CIRCUIT COURT ☐ FAMILY COURT ☐ FEDERAL COURT ☐

NAME OF TRIAL OFFICER **[REDACTED]** TIME OF VIOLATION **2:33 PM** WEATHER **[REDACTED]**

DEFENDANT: DID NOT APPEAR ☐ APPEARED ☒

NOLLE PROSSED ☐ DISPOSITION **[REDACTED]** MILES **16.4** CITY **Orangeburg** CODE **1**

FORFEITED BOND ☐ PLED: NOLLO CONTENDERE ☐

TRIAL BY: TRIAL OFFICER ☐ JURY ☒

VERDICT OF TRIAL IF ANY ☒ GUILTY ☐ NOT GUILTY ☐ DATE OF TRIAL IF ANY **4/11/11**

JAIL **390** SUSPENDED **997** FINE **997** AMT COLLECTED **[REDACTED]** AMT SUSPENDED **[REDACTED]**

COMMITTED TO **[REDACTED]** Vehicle Searched **[REDACTED]** Arrest as Result of Collision **[REDACTED]**

CERTIFIED CORRECT **[Signature]** DATE **4/11/11** E 505200

TRIAL OFFICER'S COPY

due 15 days within

Burris put BW in amt

Attachment II Pretrial motions and responses

1. The Defense made the motion to suppress the data master evidence.

With no objection from the State, Judge Willie Robinson granted the motion to suppress the data master evidence.

Attachment III Jury list, and jury selection including the record of strikes

Orangeburg County Summary Court RANDOM STRIKE SHEET

JUDGE NAME :
TRIAL TYPE :
PANEL ID : E505200-E505202
COURTROOM CTRM

DESCRIPTION : Daisy L. Mimms

Sorted by: Random N
Trial

NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
1 Summers, Catherine L	82	B	F	()	()	()	J1
2 Antley, Randall D	7	W	M	()	X	()	J2
3 Adkins, Steve M	1	W	M	()	()	()	J3
4 Dash, Otis J	18	B	M	()	()	X	J4
5 Delk, Allyson D	20	W	F	()	()	()	J5
6 Sandifer, Jack G JR	73	W	M	()	X	()	J6
7 Williams, Sandy J	96	B	M	()	X	()	
8 Anderson, Mary A	4	B	F	()	()	X	
9 Reese, Michael P	66	W	M	()	X	()	
10 Felder, Lindy P	22	W	F	()	()	X	
11 Brown, Stacey L	10	B	F	()	()	()	J7
12 Knight, James Lee	46	B	M	()	X	()	
13 Hamilton, Latoyia S	31	B	F	X	()	()	
14 Jacobs, Jimmie E	39	W	M	X	()	()	
15 Proveaux, Chad R	62	W	M	()	()	()	J8
16 Perry, Brittany S	57	B	F	()	()	()	J9
17 Johnson, Harry	43	B	M	()	()	X	
18 Hughes, Chris G	36	W	M	()	()	()	
19 Walker, Julia F	86	B	F	()	X	()	
20 Disher, Patricia Ann	21	B	F	()	X	()	
21 Leysath, Louis L	48	B	M	()	()	()	
22 Yates, Jean E	99	W	F	()	()	()	
23 Weaver, Mary E	89	W	F	()	()	()	

FILED FOR RECORD
WINNIEFA B. CLARK
CLERK OF COURT
ORANGEBURG, SC
MAY 11 2023

**Orangeburg County Summary Court
RANDOM STRIKE SHEET**

JUDGE NAME :

TRIAL TYPE :

PANEL ID : E505200-E505202

DESCRIPTION : Daisy L. Mimms

Sorted by: Random

Trial

COURTROOM CTRM

NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
24 Mack, Shelia S	49	B	F	()	()	()	
25 Shuler, Jackie L	79	B	M	()	()	()	
26 Govan, Samuel Razel L	26	B	M	()	()	()	
27 Wright, Gladys H	98	B	F	()	()	()	
28 Butler, Howard	12	B	M	()	()	()	
29 Johnson, Carolyn M	42	B	F	()	()	()	
30 Davis, Howette S	19	B	F	()	()	()	
31 Chew, Jason A	16	W	M	()	()	()	
32 Johnson, Herbert C	44	B	M	()	()	()	
33 Butler, Larrie B JR	13	B	M	()	()	()	
34 Thornton, Shawn J	84	W	M	()	()	()	

Total Number of Jurors:

34

** END OF REPORT **

Roll call list for Jurors Present

Filtered by: Panel ID, Court Agency Code

Sorted by: Juror Name

SEQ#	SSN	NAME	JUR#	RACE	SEX	DOB	#XFER	DEFERRED	DTE	CMNT/PAY
1	6749	Adkins, Steve M	370	W	M		0			retired - carpenter - homemaker
4	4298	Anderson, Mary A	970	B	F		0			unemployed -
- (7)	4785	Antley, Randall D - LE	1113	W	M		0			F Serv. / Home mwr
- 10	3600	Brown, Stacey L	6582	B	F		0			* student @ DTech
- (12)	4533	Butler, Howard <i>(limited reading or writing)</i>	7572	B	M		0			unemployed
- (13)	1683	Butler, Larrie B JR	7603	B	M		0			a SC State; OSS
- (14)	8317	Capers, Sheron F	8244	B	F		0			Bank, self-emp
- 16	4878	Chew, Jason A	9113	W	M		0			dealt clerk
- (18)	6996	Dash, Otis J <i>Mag</i>	11919	B	M		0			family - HM
- 19	9998	Davis, Howette S	12318	B	F		0			SCSU / SC Vocder
- 20	4661	Delk, Allyson D	12966	W	F		0			acct man / RPH
- 21	8013	Disher, Patricia Ann	13294	B	F		0			Natural health
- (22)	4165	Felder, Lindy P	15414	W	F		0			farmer
- 26	4693	Govan, Samuel Razel L	19928	B	M		0			CC Party - un
- 31	6788	Hamilton, Latoyia S	21773	B	F		0			Shull gas str
- 36	1796	Hughes, Chris G	25144	W	M		0			SC DOT, unemp
- 39	7366	Jacobs, Jimmie E	26290	W	M		0			retired - used cars
- 42	1439	Johnson, Carolyn M	28189	B	F		0			SC Dts Board / SDO
- 43	3561	Johnson, Harry	28424	B	M		0			Koyo -
- (44)	4886	Johnson, Herbert C <i>school</i>	28444	B	M		0			retired, SCOS, value SD
- 46	2764	Knight, James Lee	31115	B	M		0			Mitico Lykster - schor
- 48	0601	Leysath, Louis L	32176	B	M		0			retired social W
- 49	6327	Mack, Shelia S	33293	B	F		0			retired teacher / M. op
- 57	8022	Perry, Brittany S	39791	B	F		0			* Student oc Tea
- 62	0514	Proveaux, Chad R	41051	W	M		0			driver / scalar
- (63)	9547	Rast, Stella L	41446	W	F		0			unemployed / chem
- (65)	9241	Reed, Vessie C	41808	W	F		0			SC Dts / TD
- (66)	3817	Reese, Michael P <i>Wife - Police</i>	41825	W	M		0			health / Hox
- 73	8763	Sandifer, Jack G JR	44569	W	M		0			USDA; self-emp
- 79	9179	Shuler, Jackie L	45905	B	M		0			chemical / SCSU
- 82	5060	Summers, Catherine L	49371	B	F		0			SCSU
- 84	0851	Thornton, Shawn J	50888	W	M		0			EMT part time PD. / HM
- (86)	8912	Walker, Julia F -	52307	B	F		0			HME -
- 89	7822	Weaver, Mary E	53559	W	F		0			RN; student
- 96	4686	Williams, Sandy J	55727	B	M		0			Correct Office / Lery MC
- 98	5566	Wright, Gladys H	56834	B	F		0			teacher / OCPD
- 99	0601	Yates, Jean E	57103	W	F		0			Micha B. / retired NA

Orangeburg County Summary Court

11-11

Jurors by Barcode Report

Sorted By Seq Nbr

UBOR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
1	Adkins, Steve M	W	M			
2	Allen, Lakeshia Q	B	F			
3	Alston, Monique Y	B	F			
4	Anderson, Mary A	B	F			37
5	Anderson, Melonie Ann	W	F			
6	Anderson, Rashad	B	M			
7	Antley, Randall D	W	M			5

234842

File: Rolcall.rpt

Orangeburg County Summary Court

4-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
8	Bradley, Alana M	W	F			
9	Brown, Cheryl K	B	F			
					Called 4/11/11 & came in 4/12/11	
10	Brown, Stacey L	B	F			25
11	Butler, Catherine A	B	F			
12	Butler, Howard	B	M			12 miles
13	Butler, Larrie B JR	B	M			2
14	Capers, Sheron F	B	F			25

Orangeburg County Summary Court

-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
15	Carson, Heather A	W	F			
16	Chew, Jason A	W	M			 20 
17	Clark, Evelyn R	B	F			
18	Dash, Otis J	B	M			 26 
19	Davis, Howette S	B	F			 15 
20	Delk, Allyson D	W	F			 30 
21	Disher, Patricia Ann	B	F			 13 

4-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
22	Felder, Lindy P	W	F			
23	Floyd, Efrim J	B	M			
24	Floyd, Joyce B	W	F			
25	Gibson, Kristyna P	W	F			
26	Govan, Samuel Razel L	B	M			
27	Gray, Princess P	B	F			
28	Green, Mary R	B	F			

Orangeburg County Summary Court

-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
29	Greene, Donald R	B	M	[REDACTED]	[REDACTED]	[Barcode]
30	Hamilton, Alicia R	B	F	[REDACTED]	[REDACTED]	[Barcode]
	Alice Lawson mother [REDACTED] (Disabled) called 3/28/11 (lost summons)					
31	Hamilton, Latoyia S	B	F	[REDACTED]	[REDACTED]	[Barcode] 3 [REDACTED]
32	Haynes, Sadie	B	F	[REDACTED]	[REDACTED]	[Barcode]
33	Hill, Timothy A	B	M	[REDACTED]	[REDACTED]	[Barcode]
34	Horrell, Donnie R	W	M	[REDACTED]	[REDACTED]	[Barcode]
35	Huggins, Tonia D	B	F	[REDACTED]	[REDACTED]	[Barcode]

Orangeburg County Summary Court

4-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
36	Hughes, Chris G	W	M			
37	Hughes, Mary H	W	F			
38	Jackson, Jannie F	B	F			
39	Jacobs, Jimmie E	W	M			
40	Jenkins, Rosa L	B	F			
41	Jennings, Esther R	W	F			
42	Johnson, Carolyn M	B	F			 

11

Orangeburg County Summary Court

4-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
43	Johnson, Harry	B	M			(3) [REDACTED]
44	Johnson, Herbert C	B	M			[REDACTED]
45	Kirby, Paula T	W	F			[REDACTED]
46	Knight, James Lee	B	M			[REDACTED]
47	Kuck, Steven L	W	M			[REDACTED]
48	Leysath, Louis L	B	M			0 [REDACTED]
49	Mack, Shelia S	B	F			7 [REDACTED]

4-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
50	Mcgee, Stephen T	B	M			
51	Mcpherson, Christina M	W	F			
52	Mcrae, Cecil K II	W	M			
53	Middleton, Evelyn	B	F			
54	Nelson, Colin	B	M			
55	Nix, Wendy H	W	F			
56	Patel, Ritanben K	A	F			

Orangeburg County Summary Court

1-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
57	Perry, Brittany S	B	F			1
58	Phelps, Rosa Mae	B	F			
59	Phoenix, Bernicesha J	B	F			
60	Pleasant, Josephine	B	F			15
61	Porterfield, Dalfred SR	B	M			
62	Proveaux, Chad R	W	M			15
63	Rast, Stella L Bozard	W	F			45

4-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
64	Reaume, Rachel L	W	F			
65	Reed, Vessie C	W	F			 35 
66	Reese, Michael P	W	M			
67	Rickenbacker, Miriam M	B	F			
68	Rivers, Linda J	B	F			
69	Robinson, Jackie	B	M			
70	Robinson, James A	W	M			

23

4-11-11

Orangeburg County Summary Court

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
71	Robinson, Katrina E	B	F			
72	Sago, William A	B	M			
73	Sandifer, Jack G JR	W	M			 15 
74	Schuler, Thomas	B	M			
75	Scott, Earnest D JR	B	M			
76	Sellers, Janie L	B	F			
77	Shifflett, Whitney R	W	F			

4-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
78	Shingler, Laquanda M	B	F			
79	Shuler, Jackie L	B	M			 25 
80	Shuler, Mamie L	B	F			
81	Sorrell-Gibson, Ashley	B	F			
82	Summers, Catherine L	B	F			 1 mile 
83	Terrell, Theresa Y	B	F			
84	Thornton, Shawn J	W	M			 3 

Orangeburg County Summary Court

I-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
85	Till, George Anne	W	F			
86	Walker, Julia F	B	F			 (w) 25 (H) 
87	Washington, Elnora	B	F			
88	Watson, Henry S	W	M			
89	Weaver, Mary E	W	F			 (1) 
90	Welfare, Benjamin SR	B	M			
91	Whetsell, Reggie M	W	M			

4-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
92	Whisenhunt, Charles S	W	M			
93	White, Janneka D	B	F			
94	Williams, Elizabeth D	B	F			
95	Williams, Johnny J	B	M			
96	Williams, Sandy J	B	M			
97	Willis, Erica M	B	F			
98	Wright, Gladys H	B	F			

Orangeburg County Summary Court

-11-11

Jurors by Barcode Report

Sorted By Seq Nbr

JUROR#	NAME	RACE	SEX	DOB	ADDRESS	Barcode
99	Yates, Jean E	W	F			
100	Young, Ivory L	B	F			

Total Number of Jurors: 100

Attachment IV Jury Verdict

State of South Carolina) In The Court of Central Traffic
County of Orangeburg) Ticket No.: E505200
Municipality of _____)
The State,)
Vs.) Jury Verdict
Daisy Lynne Mimms)
Defendant)
Attorney Mark Wise)

We the Jury find the Defendant:

☐ Not Guilty
☒ Guilty of Driving Under the Influence (DUI) / ~~Driving with Unlawful Alcohol Concentration~~
(DUAC)

4/11/11
Date

Laurie L. Leyland
Name of Foreperson

THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG)	
THE COUNTY)	Charge(s): DUI / Driving under the Influence, less
	than .10, 1st Offense
	Warrant/Indictment Nos.: E-505200
v.)	<u>NOTICE OF APPEAL</u>
DAISY LYNNE MIMMS,)	
<u>DEFENDANT.</u>)	

Defendant Daisy Lynne Mimms, by and through her attorney, is hereby appealing the conviction of the above-referenced warrant entered on April 11, 2011. As required by S.C. Statute 22-3-790, please file this notice, together with the record, a statement of all the proceedings in the case, and the testimony taken at the trial in the office of Clerk of Circuit Court within (10) days from today. Following this notice is a statement of the grounds for the appeal.

The defendant requests that the Court of Common Pleas grant oral argument, overturn the conviction, and remand the case for a new trial.

Respectfully Submitted:

April 20th, 2011

Mark Wise
Mark Wise
Assistant Public Defender

ATTEST.
Clerk of Court
ORANGEBURG, SC

FILED FOR RECORD
WINIFRED CLARK
CLERK OF COURT
ORANGEBURG, SC
2011 APR 20 P 4:25

STATEMENT OF GROUNDS FOR APPEAL**Procedural History:**

The defendant, Daisy Mimms ("Mimms"), was arrested on October 23, 2010 and charged with operating a motor vehicle while under the influence of alcohol or drugs.

The case was tried before a jury in the Magistrate's Court on April 11, 2011.

At the trial the evidence revealed that Trooper James Burriss was on routine patrol and received information of a driver driving erratically. He subsequently saw Ms. Mimms vehicle which fit the description traveling on Interstate 26. He was behind Ms. Mimms vehicle and saw her right tires cross over the white lines on the roadway. He stopped Ms. Mimms. He offered Ms. Mimms the horizontal gaze nystagnus test. As a result thereof he placed her under arrest. Ms. Mimms refused the breathalyzer test.

On the video at the scene, Ms. Mimms indicated she had consumed one beer at a party earlier in the evening. The evidence also revealed that Ms. Mimms has cancer and was taking medication for her cancer.

At the conclusion of the state's case, counsel moved for a directed verdict as there was no evidence of impaired driving. The only evidence being that Ms. Mimms' tires traveled slightly over the white lines on the right side of the road. The motion was denied.

Ms. Mimms did not testify at trial.

Prior to the jury deliberating counsel requested the court give the jury the standard jury instruction on criminal intent. The court refused to do so. After the jury was instructed, counsel again requested the jury instruction. The request was denied.

Issue on Appeal:

1. Did the trial court err in refusing to charge the jury on criminal intent?

The issue at trial was whether Ms. Mimms' knowingly and intentionally engaged in any criminal conduct. Any impairment that she may have suffered was the result of the interaction between the beer she consumed and the cancer medication. She was not aware of the impact a beer and the cancer medication would have on her faculties. The jury should have been allowed to consider whether Ms. Mimms' engaged in conscious wrong doing.

2. Did the trial court err in denying the motion for a directed verdict as a result of the state's failure to prove impaired driving?

ATTEST: RUL. CL.
Wanda R. R. R.
CLERK OF COURT
ORANGE COUNTY COURT

The testimony was clear, both by way of oral testimony from Trooper Burriss and the video from the vehicle, that Ms. Mimms' vehicle only veered slightly, on one occasion, from the main lane of travel. Her vehicle did not leave the roadway nor did it cross over the yellow lines into the left lane.

This is insufficient to show impaired driving. This is a normal occurrence by drivers and does not indicate the driver's ability to operate a vehicle is impaired.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests the Court overturn the conviction and remand the case to Magistrate's Court for a new trial.

Respectfully Submitted:

April 20th, 2011

Mark Wise

Mark Wise
Assistant Public Defender

Attachment VI Summary of the witness' testimony

The State's only witness was Trooper Jamie Burris. After being sworn Burris stated that he was responding to a dispatch call to look out for a driver who was reported driving erratically. Trooper Burris saw a car fitting the description and upon coming off the ramp onto the interstate the vehicle ran off the roadway. The trooper proceeded with the traffic stop. The trooper stated he smelled a strong odor of alcohol and proceeded to have the defendant get out of the car. The roadside video was put into evidence and the horizontal gaze nystagmus test was performed. Burris stated that the defendant was unable to keep her balance and felt the roadside was unsafe to administer any further field sobriety tests. The trooper stated that by the defendant's mannerisms and appearance she appeared to be under the influence of alcohol. He also stated that the defendant did tell him she was also taking medication. The video tape included testimony by the defendant she had consumed alcohol and that she has cancer. Upon cross-examination the trooper explained in detail the three elements used in the HGN test to determine if the defendant was under the influence.

Attachment VII List of motions, a summary of the parties' positions, and the court's ruling.

Defense motions:

1. A motion was made for a directed verdict of not guilty as there was no evidence of impaired driving.

Defense position- The defense stated that Ms. Mimms only went off the road slightly.

State's position- The defendant ran off the roadway. This was sufficient evidence for the stop.

Court's ruling- The State had probable cause for the stop. The extent of *impairment* lies with the state to prove the person's faculties to drive a motor vehicle are materially and appreciably impaired. The impairment is proved with the presentation of additional evidence.

2. A motion was made for a directed verdict on the grounds that the State failed to prove criminal intent.

Defense's position- Ms. Mimms did not knowingly engage in criminal conduct.

State's position- There is no criminal intent in the statute charged.

Court's position- Criminal intent is not an element of SC Code Ann. 56-5-2930.
Motion denied.

HARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

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E X H I B I T S

NONE

1 DATE:

2 JANUARY 5, 2012

3 THE COURT: State of South Carolina versus Daisy Lynne
4 Mimms, Civil Action Number 2011-CP-38-486. Mr. Wise
5 appealed a Magistrate's Court decision of Judge Williamson,
6 and this is a -- this went to a jury trial?

7 MR. WISE: Yes, sir.

8 THE COURT: Okay. Did you represent her at the trial?

9 MR. WISE: I did, Your Honor.

10 THE COURT: Okay, alright, sir. Ms. Hutto, did you
11 represent the State?

12 MS. HUTTO: I did not. I believe this was, what, a
13 week before I think I started at the Solicitor's office, so
14 I did not, the trooper handled it himself.

15 THE COURT: Alright.

16 COURT REPORTER: What number is this, Judge?

17 THE COURT: Ms. Harry Dot, this was originally
18 scheduled, let's see, that was this morning, and we kept ...

19 MS. HUTTO: Ten a.m. this morning, Your Honor.

20 THE COURT: Yeah. Oh, yeah, Ms. Harry Dot, it was
21 Number Seven on my list for January Fifth, is that the
22 updated list number, Ms. Hutto?

23 MS. HUTTO: Actually, on Page Three, Number Four.

24 THE COURT: It may be Number Four on yours.

25 COURT REPORTER: Okay.

1 THE COURT: Have you got it?

2 COURT REPORTER: Yes, sir.

3 THE COURT: Okay. Alright, and it's 2011-CP-38-486,
4 appeal from a conviction on a DUI.

5 Mr. Wise.

6 MR. WISE: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 ARGUMENT BY MR. WISE:

9 Your Honor, if it please the Court, there are two
10 issues that I raised in this appeal. The first issue is
11 whether or not the Trial Court should have given an
12 instruction to the jury on criminal intent. And the second
13 issue was whether or not there was evidence that Ms. Mimms's
14 driving was materially and appreciably impaired.

15 Very briefly, at trial the evidence was that Trooper
16 Burris was behind Ms. Mimms and observed the right wheels of
17 her vehicle veer out of her lane of travel and then back
18 into her lane, but that occurred one time and then he pulled
19 her over. As part of the traffic stop the testimony
20 revealed that Ms. Mimms has cancer and at the time was
21 receiving chemotherapy, and that came out because on the day
22 this happened she didn't have any hair and Mr., and Trooper
23 Burris recognized what was going on and so there was a lot
24 of conversation about that. The testimony revealed that she
25 had consumed a beer earlier in the evening. There was no

1 testimony that she knew that having a beer while on
2 chemotherapy would affect her ability to drive. So, that
3 was the factual landscape before the case went to the jury.

4 As to the first issue I offered to Judge Anderson -- a
5 criminal intent instruction to Judge Williamson to be given
6 to the jury. The Court would not give that instruction,
7 ruling that in effect Fifty-six/Five/Twenty-nine/Thirty is a
8 strict liability statute. I submit that it's not, Your
9 Honor. I submit to the Court that the issue of criminal
10 intent is, the issue of mens rea is one of the most
11 important aspects of our criminal jurisprudence, and the
12 legislative intent to do away with it, to do away with the
13 mens rea requirement shouldn't be lightly inferred. And I
14 submit to the Court that when the issue of a lack of
15 criminal intent is raised by the evidence, as it was in this
16 case, that due process requires that the jury be instructed
17 on criminal intent and be allowed to consider whether or not
18 there is any mens rea. I submit to the Court that merely
19 because the statute is silent doesn't mean that a mens rea
20 requirement is eliminated, and that the Courts can impose a
21 mens rea requirement.

22 I call to the Court's attention two cases. The first
23 is a United States Supreme Court case, it's Morrisette
24 against the United States, and I have a copy for the Court.

25 THE COURT: Thank you. Thank you, sir.

1 MR. WISE: And in the Morrisette case the defendant,
2 it's a criminal case, a federal criminal case, the defendant
3 was charged with violating a criminal statute. The statute
4 as it was written did not have a mens rea or criminal intent
5 requirement. The Government argued, and the Lower Court
6 agreed that if there is no mens rea in the statute then
7 there is no mens rea requirement. The Supreme Court held
8 that a Court could impose a mens rea requirement where one
9 did not appear in the statute.

10 There is a state case, State against Ferguson, and I
11 have a copy of that, this is a State Supreme Court case.
12 The defendant in this case was charged with the distribution
13 of cocaine. The Trial Court ruled that there was no mens
14 rea requirement for the offense of distribution of cocaine,
15 and the Supreme Court determined that even though a mental
16 state was not included in the statute the Court could
17 determine the required mental state.

18 I submit to the Court, the reason the Courts, our
19 Supreme Court and the United States Supreme Court, have made
20 these determinations is because it is the Court's job to
21 insure the Constitutional protections to those that appear
22 before it. I submit that once we begin eliminating a mens
23 rea requirement, which I think is what the arguments have
24 been in this case, that what we're really doing is starting
25 on a slippery slope toward the erosion of the presumption of

1 innocence. And obviously, I would argue the Court should be
2 reluctant to do that.

3 The State's argument at the trial was, and the Court
4 agreed, that DUI is a traffic statute and therefore, like
5 most traffic statutes, it's a strict liability statute. At
6 the trial indeed the analogy was drawn to speeding, the
7 argument being if you are above the speed limit it doesn't
8 matter whether or not you know you are speeding. But DUI, I
9 submit, is different from speeding and traffic offenses,
10 especially where, as here, especially where the issue is one
11 of drug consumption versus pure consumption of alcohol.
12 Most speeding cases, Your Honor, the consequence is there
13 is a fine. A DUI case is much more significant, it can
14 carry a minimum sentence of a year in prison that can't be
15 suspended, it can carry a maximum sentence of five years,
16 and a felony DUI can carry a sentence of Twenty-five years.
17 So, this issue of mens rea requirement in DUI cases is not a
18 minor issue. The consequences of a DUI conviction are
19 significant. And I submit to the Court that we should not
20 eliminate the criminal justice bedrock of requiring an evil
21 mind accompany an evil act.

22 So, what we're asking the Court to do is order a new
23 trial and give the jury the opportunity to consider the
24 issue of any criminal intent of Ms. Mimms.

25 THE COURT: And Mr. Wise, let me ask you a question

1 about that. The reason -- let's see, I believe I saw in the
2 Return that the data master -- you got that suppressed, is
3 that correct?

4 MR. WISE: It was no -- I can't remember if I got it
5 suppressed or -- I know there was a refusal.

6 THE COURT: Well, it says, the defense made the motion,
7 I assume that would be you, - - -

8 MR. WISE: That would be me.

9 THE COURT: --- motion to suppress the data master
10 evidence with no objection from the State. Judge Robinson
11 granted the motion to suppress that. You must have made that
12 motion earlier before trial.

13 MR. WISE: Yes, yes, that's when I would have.

14 THE COURT: Okay. So, there was no evidence at trial
15 about blood alcohol or anything?

16 MR. WISE: No, no, there was not.

17 THE COURT: Okay. So, the only -- and I'm looking over
18 the Return, and I guess what I have here, this is the tape
19 of it?

20 MR. WISE: Probably, Your Honor.

21 THE COURT: Okay. I have this, the summary of Trooper
22 Burris's testimony, but then there were no -- Ms. Mimms did
23 not take the stand?

24 MR. WISE: She did not.

25 THE COURT: Okay. There was a video tape at the

1 incident site, was the video -- was the video shown?

2 MR. WISE: It was, Your Honor.

3 THE COURT: Okay. Okay. And could you hear the audio
4 on the video?

5 MR. WISE: Yes, you could.

6 THE COURT: Okay. Okay, so the trooper testified, --
7 you saw the video?

8 MR. WISE: Yes, Your Honor.

9 THE COURT: There was nothing about blood alcohol
10 level?

11 MR. WISE: No.

12 THE COURT: Okay. Okay. And your argument regarding
13 mens rea in this is not -- had she not been on drugs for
14 chemo, and she had drank, let's say she drank, instead of
15 one beer she drank -- because what you're talking about,
16 it's a combination of drinking the beer, having some
17 reaction on the drugs she was taking, I'm assuming that's
18 part, that's your defense?

19 MR. WISE: Exactly, sir.

20 THE COURT: Okay. Had she drank a six pack of beer
21 would you still be arguing the necessity of mens rea in a
22 DUI case?

23 MR. WISE: It would be, I would have a different
24 argument. And I don't know that I would because the, I
25 think when you look at -- and this is a little off track,

1 but when you look at the DUI statute, if you look at what
2 the mens rea requirement would be, I would say it would be a
3 purpose standard, which means that a person does something
4 that's likely to produce a result that will hold them
5 responsible for. So, when a person drinks six beers or some
6 number that, you know, we would fight about, then I think
7 it's different. But we know that a person can drink one
8 beer...

9 THE COURT: Well, let me ask you a question, how did,--
10 was there any evidence of how much she drank in the record?

11 MR. WISE: The only evidence was the conversation
12 between her and the trooper that she had one beer.

13 THE COURT: At the time of her arrest it was on the
14 video?

15 MR. WISE: Right, exactly so. She had one beer, she
16 was undergoing chemotherapy, and that's what this case was
17 about.

18 THE COURT: Okay. Alright, okay, I'm sorry. Go ahead.

19 MR. WISE: Thank you, Your Honor. That's as to the
20 first issue. As to the second issue, I would argue to the
21 Court that there was no evidence of any impaired driving.
22 The only evidence of impaired driving was the fact that Ms.
23 Mimms's vehicle veered over the right line of the roadway
24 and that this occurred only once, that she did not leave the
25 paved portion of the roadway, and she never veered over the

1 left yellow line. So, it was over the white line once, back
2 on, and then Trooper Burris pulled her over. His position
3 at the trial was, once you cross the white line, that's it,
4 that's all I need. Our position is that veering over the
5 while line one time is, I'd submit to the Court as a matter
6 of law not impaired driving. Even the traffic statutes
7 don't make it a crime to go over those white lines one time.
8 There is really ...

9 THE COURT: What do the traffic, what do they say?

10 MR. WISE: I have this.

11 THE COURT: Well, give me that. Good, thank you, sir.

12 MR. WISE: This is the relevant statute, and if you
13 just jump down to Clause A, "A vehicle shall be driven as
14 nearly as practicable entirely within a single lane, and
15 should not be moved from the lane until the driver has first
16 ascertained that such movement can be made with safety."
17 So, it uses the language, as nearly as practicable within
18 the lane. So, I'd submit to the Court, even the statute
19 doesn't say it's an offense to leave your lane, because I
20 think if the legislature wanted you to stay within your lane
21 and made going out of your lane one time punishable it would
22 say so. So, and it kind of makes sense when you think about
23 it, Your Honor, because drivers unfortunately routinely veer
24 over those white lines.

25 THE COURT: But hopefully it's because there's a pot

1 hole or something on the side of the road, or things like
2 that.

3 MR. WISE: Exactly. Well, ...

4 THE COURT: But you could do it for any reason is what
5 you're saying. You get at least one drive over, like you
6 used to be able to get a one bite in a dog case, you get one
7 drive over the dotted line, you've got to get at least two?

8 MR. WISE: I practiced in jurisdictions where they say
9 you have to cross those lines three times.

10 THE COURT: Oh, really?

11 MR. WISE: If you don't cross them three times then ...

12 THE COURT: So, you've got to get three strikes.
13 Where was that?

14 MR. WISE: In Virginia.

15 THE COURT: In Virginia?

16 MR. WISE: Uh-huh. Because here's what happens, ...

17 THE COURT: Well, let me ask you a question, does the
18 Virginia statute read that way?

19 MR. WISE: I don't know.

20 THE COURT: Okay.

21 MR. WISE: I don't know.

22 THE COURT: I was just kind of curious.

23 MR. WISE: But, you know, what happens is, and we see
24 it all the time, we, you know, the Court's probably been on
25 the road, the phone rings, something's happening in the car,

1 and you go over those lines. And I submit to the Court,
2 that's why they have those little rumble strips on those
3 lines.

4 THE COURT: To remind you?

5 MR. WISE: Exactly. Okay, move back over, because
6 that's going to happen. But I don't think that going over
7 that line one time means that -- I don't think going over
8 that line one time is a violation of the traffic offense,
9 and certainly, I don't think going over it one time means
10 your ability to operate is materially and appreciably
11 impaired.

12 THE COURT: Well, how about, would it matter as to how
13 you went over that line?

14 MR. WISE: Oh, indeed. I would submit to the Court if
15 she went over the line and, you know, ended up off the paved
16 roadway or, you know, any number of things.

17 THE COURT: Whether it's one time or not?

18 MR. WISE: It could be a problem.

19 THE COURT: Okay.

20 MR. WISE: But I think, you know, she veered over, she
21 veered back, and that was his testimony.

22 THE COURT: Okay. Alright.

23 MR. WISE: So, as I've indicated, I think we don't -- I
24 submit that we don't charge somebody with a driving offense
25 mainly because they drift off the road. And since that's

1 the only driving we have here, I submit to the Court that my
2 motion for direct verdict should have been granted. And at
3 this point that's what I'm asking the Court to so hold.

4 THE COURT: Okay. And Mr. Wise, did you ask Judge
5 Williamson to charge the statute, Subsection A?

6 MR. WISE: No, I did not.

7 THE COURT: Okay. Alright. What else?

8 MR. WISE: That's it.

9 THE COURT: Okay. Alright, Ms. Hutto.

10 MS. HUTTO: May it please the Court, Your Honor.

11 ARGUMENT BY MS. WISE:

12 I am going to address Mr. Wise's second issue first, -

13 - -

14 THE COURT: Okay.

15 MS. HUTTO: --- because I think that's what I can do
16 more concisely. The issue of Ms. Mimms veering over the
17 white line, it's not did she violate a traffic statute. It's
18 not did she seem to be materially and appreciably impaired
19 by veering over once. The question in the bad driving is
20 probable cause for the stop, and veering over the white line
21 is probable cause for a stop. Certainly, there's no
22 evidence in the record that there was a reason for her to
23 veer from the roadway. There's no indication there was an
24 animal, a pot hole or anything, all it is is that she
25 veered. That by itself is reason enough for the trooper to

1 have stopped her, which he did in this case.

2 Materially and appreciably impaired goes to then what
3 the trooper observes and what is on the video when Ms.
4 Mimms's mental state is observed. I find it interesting
5 that Mr. Wise uses the expression, slippery slope in
6 discussing this issue, since the real slippery slope, if we
7 get into a discussion of mens rea and intent in Fifty-
8 six/Five Twenty-nine/Thirty is, you're going to have a lot
9 of defendants then claiming, well, I didn't really intend to
10 get drunk, I just had a, you know, a six pack or a Twelve
11 pack, or one of those suitcases. The statute is pretty
12 clear, and it says that, "A person who is materially and
13 appreciably impaired, and if that impairment is the result
14 of alcohol or drugs, or drugs and alcohol," it doesn't say
15 that they have to be on legal drugs, it doesn't say what
16 drugs, it says materially and appreciably impaired because
17 of drugs, alcohol, or both. And in this case where it's a
18 drug that she was prescribed, we certainly know that there
19 are lots of good prescription drugs out there that when you
20 take you can't drive. We know there are lots of prescription
21 drugs out there that when you take you can't then turn
22 around and drink on top of them. The jury looked at the
23 video, they looked at the driving, they determined the
24 facts. They were the fact finders, and their fact finding
25 should be upheld on this. It is not, it is simply not an

1 intent statute. It is, for lack of a better term, strict
2 liability. If you are impaired, and the jury found she was
3 impaired, and that impairment is the result of drugs and
4 alcohol, or drugs or alcohol, then you are guilty of DUI.

5 There is simply no indication that intent is necessary,
6 and I would submit to you that quite frankly saying that
7 intent should be necessary is going to throw up a whole new
8 line of defense that I don't think we want to start in this
9 State. The two cases that Mr. Wise provides to you from
10 the Supreme Court deal with vastly different crimes. One
11 is -- and this is reading them at a glance while I sit
12 here, deals with government property and basically the
13 guy not realizing what he had is really a quite different
14 and somewhat complicated crime. And then, you have
15 distribution of cocaine. Arguably, yes, you've got to
16 know that in order to do it. Here, once you drink and you
17 are impaired then you are guilty of DUI. If you take
18 drugs and you are impaired you're guilty of DUI. You don't
19 need the intent. The danger of inserting intent is just
20 that, it's very dangerous, and therefore, I would ask that
21 you deny the appeal in this case and let the conviction
22 stand.

23 THE COURT: Okay, thank you, ma'am.

24 And Mr. Wise, anything else?

25 MR. WISE: Very briefly, Your Honor.

1 THE COURT: Yes, sir.

2 ARGUMENT IN REPLY BY MR. WISE:

3 As to the veering, I think the State's position is that
4 is probable cause for the stop, I'd submit to the Court that
5 an action that is not unlawful can't be probable cause. And
6 I've discussed why I say that the veering off the road
7 wouldn't be enough for probable cause because it is lawful.

8 THE COURT: But that's usually up to the officer to
9 determine, right?

10 MR. WISE: Well, no, Your Honor, I think a Court can
11 take a look at the facts in the case and make a ...

12 THE COURT: No, I understand that I should review it,
13 just like whenever there is any kind of probable cause, I
14 can review it and see whether I believe there's probable
15 cause.

16 MR. WISE: Right.

17 THE COURT: Supposedly, the officer making the arrest
18 makes the determination about whether there's probable cause
19 in that situation or not.

20 MR. WISE: That's correct, that's correct.

21 THE COURT: Okay. Yeah, okay. And can I ask you
22 another question, Mr. Wise? Was there a field sobriety
23 test?

24 MR. WISE: No -- well, I believe there were, I believe
25 there were.

1 THE COURT: Okay.

2 MR. WISE: Yeah.

3 THE COURT: Thank you, sir. Now go ahead.

4 MR. WISE: The second issue that was raised was the
5 potential for defendants to say they didn't intend to get
6 drunk, and I understand that. And we kind of touched on
7 that a little bit. I'd submit to the Court that in certain
8 circumstances the Court is going to make a determination.
9 Even when you say you didn't intend to get drunk the facts
10 of the case are not going to allow you to get the criminal
11 intent statute. As the Court posed to me, you have five
12 drinks -- if I represent somebody who's had five drinks,
13 maybe even three drinks I'm probably not going to ask for
14 the criminal intent statute, because I think at that point
15 looking at the kind of mens rea that exists, I think that's
16 a reasonable issue. But when you have a situation where a
17 person is engaged in activity which really would be lawful,
18 having a beer is okay, chemotherapy is okay, the combination
19 is an issue. Now, certainly I recognize the jury could have
20 said, you know what, you're on chemotherapy, you had a beer,
21 you should have known better, but ...

22 THE COURT: And they could have said, but it's not DUI.
23 The jury after listening to all that could have said, good
24 enough excuse for me.

25 MR. WISE: But they didn't, they didn't even have the

1 opportunity to think about whether or not she had to have
2 known that this was going to be the issue. And that's the
3 only thing I was arguing, just let them consider it. If they
4 reject it, they reject it, and that's fine.

5 The issue of whether or not it would be a problem with
6 prescription drugs, we know that there are prescription
7 drugs that you can take and drive. So, I submit to the
8 Court, yes, that there are some times when you could take
9 prescription drugs that this would be an issue. If you know
10 that this is going to affect you this way, yes, that's an
11 appropriate issue for the Court to charge criminal intent.
12 And I'm not arguing to the Court it's going to be in every
13 case, but the facts of this case warrant, and I think due
14 process requires under the facts of this case that they at
15 least be allowed to consider that.

16 And as to the last issue, the cases that I passed up,
17 the only point of those cases is to make the Court aware
18 that the United States Supreme Court and the State Supreme
19 Court has said, you know what, even if the statute doesn't
20 have a mens rea requirement, we can put one in. The Courts
21 are empowered to do that. The fact that the legislature
22 doesn't include one isn't the end of the issue as to mens
23 rea in criminal statutes.

24 THE COURT: Thank you, sir.

25 MR. WISE: Thank you.

1 THE COURT: Alright, what I'll do is, I will read over
2 these and I will contact y'all about my decision. Okay?
3 Thank y'all very much.

4 MS. HUTTO: Thank you, Your Honor.

5 MR. WISE: Thank you, Your Honor.

6 (END OF TRANSCRIPT)

CERTIFICATE

I, the undersigned, Mrs. Harry A. Walker, of Rowesville, South Carolina, Official Court Reporter for the First Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the captioned cause, relative to appeal, in the Court of General Sessions for Orangeburg County, South Carolina, on the Fifth day of January, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

DATE: February 2, 2013

Harry A. Walker
(MRS.) HARRY A. WALKER

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)
)
 STATE OF SOUTH CAROLINA)
)
 Plaintiff,)
)
 vs.)
)
 DAISY LYNNE MIMMS)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FIRST JUDICIAL CIRCUIT
 2011-CP-38-00486

RECEIVED

SEP 11 2012

ORDER DENYING APPEAL

THIS MATTER came before me on January 5, 2012 pursuant to a Notice of Appeal filed by the Defendant.

IT APPEARING that there are no legal or factual grounds that would constitute error in the Magistrate's decision.

NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGED, AND DECREED that the Defendant's Appeal be dismissed with prejudice.

AND IT IS SO ORDERED.



Edgar Warren Dickson
 PRESIDING JUDGE
 FIRST JUDICIAL CIRCUIT

Orangeburg, South Carolina

September 6, 2012

ATTEST: TRUE COPY

Wingia B. Clark
 CLERK OF COURT
 ORANGEBURG COUNTY, SC

FILED FOR RECORD
 WINNIE B. CLARK
 CLERK OF COURT
 ORANGEBURG, SC
 2012 SEP -7 PM 6:58

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that his Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November ¹⁴~~16~~th, 2013

Mark Wise

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Assistant Public Defender

First Circuit Public Defender's Office
Orangeburg Office
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(803) 536-5682

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Orangeburg County
Edgar Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAISY LYNNE MIMMS,

APPELLANT.

Appellate Case No. 2012-212931

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court erred in ruling that there is no criminal intent required for the crime of driving under the influence.**

- II. The trial court erred in ruling that the mere veering off of a roadway on one occasion is sufficient to show impaired driving.**

STATEMENT OF THE CASE

This appeal arises out of Daisy Mimms' conviction for driving under the influence in violation of S.C Code § 56-5-2930. On April 11, 2011, Ms. Mimms was tried in the Magistrate's Court of Orangeburg County with the Honorable Meree D. Williamson presiding.

At the conclusion of the State's case, counsel moved for a directed verdict arguing the evidence was insufficient to show Ms. Mimms' driving was "materially and appreciably impaired." Counsel also moved for a directed verdict, asserting there was no evidence Ms. Mimms possessed criminal intent. The motions were denied. R. 31.

At the conclusion of the evidence, counsel renewed the motions. The motions were again denied. Counsel requested the court instruct the jury on criminal intent. The court refused, ruling that driving under the influence is a strict liability crime. R.* Electronic Recording of Trial.

Ms. Mimms was found guilty. The court imposed a sentence of thirty days incarceration, suspended upon the payment of a fine of \$997.00. R. p. 4.

The motions were renewed after the verdict.

A Notice of Appeal was filed on April 21, 2011 R. p. 27.

The appeal to the circuit court was heard by the Honorable Edgar W. Dickson on January 5, 2012. R. p. 32. The undersigned again represented the Appellant, and Assistant Solicitor Anne Hutto represented the State. *Id.* Judge Dickson issued an Order dated September 6, 2012, finding that there was no legal or factual grounds constituting error on the part of the magistrate and dismissing the appeal with prejudice. R. p. 53. Appellant filed and served notice of appeal dated September 14, 2012.

STATEMENT OF THE FACTS

On the night of October 23, 2010, Trooper James H. Burriss of the South Carolina Highway Patrol was notified of a driver driving erratically on Interstate 26 R. p. 31. The Trooper testified he saw a car that fit the description and travelled behind the car. He saw the vehicle veer outside of the lane of travel, crossing the white line on the right side of the roadway but not leaving the paved portion of the roadway, and then return to the travel lanes R.* Electronic Recording of Trial. This occurred once whereupon he initiated his blue lights and stopped the vehicle R.* Electronic Recording of Trial. The Trooper testified he smelled the odor of alcohol R. p. 30.

At the scene, Ms. Mimms was given the horizontal gaze nystagmus test R. p. 30. Trooper Burriss testified Ms. Mimms was unable to keep her balance and that he felt the roadside was unsafe to administer any further field sobriety tests. R. p. 30.

The Trooper testified that Ms. Mimms stated she was being treated for cancer and was taking chemotherapy as a result thereof R.* Electronic Recording of Trial. Trooper Burriss' testified he believed Ms. Mimms might be suffering from cancer as he observed that she did not have any hair. R.* Electronic Recording of Trial. The Trooper testified Ms. Mimms stated that she had consumed one alcoholic drink earlier R.* Electronic Recording of Trial. There was no evidence that Ms. Mimms knew that consuming a beer while undergoing chemotherapy would impact her ability to drive R.* Electronic Recording of Trial.

Ms. Mimms was arrested. She refused to take a breathalyzer test.

Ms. Mimms did not testify at the trial.

After deliberations, the jury returned a verdict of guilty.

ARGUMENT

I. The trial court erred in ruling that there is no criminal intent required for the crime of driving under the influence.

The law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The trial court in the instant matter declined to instruct the jury on the issue of criminal intent believing driving under the influence is a strict liability crime. This was error. When the lack of criminal intent is raised by the evidence, as it was in this case, due process requires the jury be instructed on criminal intent.

Driving under the influence is not a strict liability crime. Strict liability crimes, with few exceptions, are regulatory in nature and do not involve substantial terms of incarceration. At the trial, the crime of driving under the influence of alcohol was analogized to speeding. However, driving under the influence carries significant penalties including a potential prison sentence of up to five years for a fourth offense. Therefore, driving under the influence is not a crime with insignificant consequences and due process requires criminal intent.

A legislative intent to do away with a mens rea requirement should not be lightly inferred and courts have imposed a mens rea requirement when one was not written into the statute. The crime of kidnapping is such a situation.

In Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240 (1952), the defendant was charged with violating a criminal statute. At the trial and in the lower appellate courts, it was asserted that if no mens rea appeared in the statute that there was no criminal intent required. The Supreme Court found that although there was no mens rea element in the statute, a court could impose such a requirement. The court stated, "We hold that mere omission ... of any

mention of intent will not be construed as eliminating that element from the crimes denounced.”

Id. at 263 (Emphasis added.). The court explained its rationale with the following language:

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.

Id. at 251.

In State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990), the defendant was charged with distribution of cocaine. The trial court ruled there was no mens rea requirement for the offense of distribution of cocaine. Our Supreme Court determined that even though a mental state was not included in the statute, the court could determine the required mental state. The court imposed a criminal intent requirement although one was not written into the statute.

The issue in this case was whether Ms. Mimms knew her chemotherapy treatment and the consumption of one beer would impact her ability to drive. As there was no evidence that she was aware of any potential negative impact on her ability to drive, the issue of criminal intent was an appropriate one for submission to the jury. The trial court was empowered to instruct the jury on criminal intent and due process required it do so.

II. The trial court erred in ruling that the mere veering off of a roadway on one occasion is sufficient to show impaired driving.

Driving under the influence is therefore established by proof that defendant's ability to drive was materially and appreciably impaired. State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998)

The testimony was unequivocal that Ms. Mimms only left the main lane of travel on one occasion when she traveled over the white line on the right side of the roadway. She never left the paved portion of the roadway and never veered over the yellow line on the left side of her lane. Her driving was not enough to meet the requirement of "materially and appreciably impaired" driving. South Carolina law only requires a driver maintain a lane in travel as much as practicable.

The relevant statute is S.C Code § 56-5-1900(a) which provides, "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety." (Emphasis added.) The statute does not penalize the act of leaving a lane of travel on one occasion.

As the only driving witnessed was the one occurrence of leaving her lane of travel, appellant submits her driving was not impaired and her motion for directed verdict should have been granted.

CONCLUSION

The trial court erred in ruling there is no criminal intent required for the crime of driving under the influence. The issue of whether the appellant possessed criminal intent was presented in testimony at the trial. The jury should have been instructed on criminal intent. Additionally, driving under the influence is a criminal statute with the potential for significant periods of incarceration. Due process requires that before an individual can be convicted and punished for a violation of such a statute, a jury should be required to find the individual possessed criminal intent.

The trial court erred in ruling that veering off of a roadway is sufficient to show impaired driving. Driving that is materially and appreciably impaired is a requirement for a conviction for driving under the influence. Leaving a lane of travel on one occasion and then returning to the travel lane is simply insufficient to show driving that is materially and appreciably impaired.

Accordingly, Appellant respectfully requests reversal of her conviction and remand of her case for a new trial.

Respectfully Submitted,

Mark Wise

Mark Wise
Assistant Public Defender
ATTORNEY FOR APPELLANT

This 4th day of December 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAISY LYNN MIMMS,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esq., attorney for Respondent, by depositing a copy of same in the United States Mail, postage prepaid, on this 4th day of December, 2013, addressed to Salley W. Elliott, Esq., Office of the Attorney General, Post Office Box 11549, Columbia, SC 29211, and upon Daisy Lynn Mimms, Appellant, by depositing a copy of same in the United States Mail, postage prepaid, on this 4th day of December, 2013, addressed to Daisy Lynn Mimms, 1150 Rosemead Road, Mount Pleasant, SC 29464.

Mark Wise

Mark Wise
Assistant Public Defender
ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2012-212931

THE STATE,

Respondent,

vs.

DAISY LYNNE MILMS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

- I. DID THE CIRCUIT COURT CORRECTLY AFFIRM THE MAGISTRATE'S REFUSAL TO CHARGE CRIMINAL INTENT BECAUSE S.C. CODE ANN. § 56-5-2930 IS A STRICT LIABILITY STATUTE?
- II. DID THE CIRCUIT COURT CORRECTLY AFFIRM THE DENIAL OF THE MOTION FOR DIRECTED VERDICT BECAUSE THE STATE PRESENTED SUFFICIENT EVIDENCE OF APPELLANT'S GUILT, INCLUDING TROOPER BURRIS' TESTIMONY APPELLANT DROVE ERRATICALLY, THAT HER CAR SMELLED STRONGLY OF ALCOHOL, THAT APPELLANT COULD NOT MAINTAIN HER BALANCE, THAT SHE FAILED A FIELD SOBRIETY TEST, AND APPELLANT'S APPEARANCE AND MANNERISMS WERE CONSISTENT WITH IMPAIRMENT?

STATEMENT OF THE CASE

The State charged Appellant Daisy Lynn Mimms with driving while under the influence ("DUI"), first offense, pursuant to S.C. Code Ann. § 56-5-2930 (2006). (R. p.4[Uniform Traffic Ticket]). On April 11, 2011, Appellant was tried in the Magistrate's Court of Orangeburg County before the Honorable Meree D. Williamson. (R. p.2 [Magistrate's Return, p. 2]). Appellant was represented at trial by Assistant Public Defender Mark Wise. The jury found Appellant guilty of DUI, and the Judge Williamson sentenced her to a 30 day sentence suspended upon payment of a fine of \$997.00. (R. p.3; R. p.26[Magistrate's Return, p. 3 and Attachment IV - Jury Verdict Form). A Notice of Appeal was filed on April 21, 2011. (R. p.27 [Attachment V of Magistrate's Return]). The appeal to the circuit court was heard by the Honorable Edgar W. Dickson on January 5, 2012. (R. p.32) Mr. Wise again represented Appellant, and Assistant Solicitor Anne Hutto represented the State. Id. Judge Dickson issued an Order dated September 6, 2012, finding that there were no legal or factual grounds constituting error on the part of the magistrate and dismissing the appeal with prejudice. (R. p.53 [Circuit Court Order dated September 6, 2012]). Appellant filed and served notice of appeal dated September 14, 2012. Appellant filed and served her brief and this brief of Respondent follows.

STATEMENT OF FACTS

The trial summary of the facts in the Magistrate's Return is as follows:

The State's only witness was Trooper Jamie Burris. After being sworn Burris stated that he was responding to a dispatch call to look out for a driver who was reported driving erratically. Trooper Burris saw a car fitting the description and upon coming off the ramp onto the interstate the vehicle ran off the roadway. The trooper proceeded with the traffic stop. The trooper stated he smelled a strong odor of alcohol and proceeded to have the defendant get out of the car. The roadside video was put into evidence and the horizontal gaze nystagmus test was performed. Burris stated that the defendant was unable to keep her balance and felt the roadside was unsafe to administer any further field sobriety tests. The trooper stated that by the defendant's mannerisms and appearance she appeared to be under the influence of alcohol. He also stated that the defendant did tell him she was also taking medication. The video tape included testimony by the defendant that she had consumed alcohol and that she has cancer. Upon cross-examination the trooper explained in detail the three elements used in the HGN test to determine if the defendant was under the influence. (R. p.30 [Magistrate's Return, p. 9]).

Notably, the audio transcript of Trooper Burris' testimony at trial reveals that Appellant did not successfully complete the horizontal gaze nystagmus test and, that based upon his lengthy experience and training as well as Appellant's appearance and mannerisms and the totality of the circumstances, Appellant was driving her vehicle while impaired. Trooper Burris stated that he saw Appellant drive her vehicle off the roadway as he responded to the dispatch call about an erratic driving. ([Magistrate Audio Transcript transported and filed separately]). He also narrated for the jury when the video recording from his patrol car was presented at trial "You just saw her going off the roadway right there?" ([Magistrate Audio Transcript transported and filed separately]). After pulling Appellant over, Trooper Burris said "You was weaving all over the roadway!" [Magistrate Audio Transcript transported and filed separately]). He also testified about the enhanced or synergy effect that can arise when alcohol is consumed in combination with medication. Appellant presented no evidence at trial. ([Magistrate Audio Transcript transported and filed separately]).

ARGUMENTS

I.

The Circuit Court correctly affirmed the Magistrate's refusal to charge criminal intent because S.C. Code Ann. § 56-5-2930 is a strict liability statute

Appellant claims the magistrate erred by refusing her request to charge the jury on criminal intent and in finding that S.C. Code Ann. § 56-5-2930 provides for strict liability. On appeal to the circuit court, Appellant argued that in instances where a defendant consumed only one beer in addition to taking medication, the State should be required to establish and the court must charge the jury that the defendant knew that the combination of alcohol and drugs would impact her ability to drive before she could be convicted. Relying on Morrisette v. United States, 342 U.S. 246 (1952) and State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990), Appellant argued on appeal to the circuit court that mere silence of the statute as to *mens rea* does not mean the requirement is eliminated and that the magistrate judge erred in refusing to provide the requested jury charge even though S.C. Code Ann. § 56-5-2930 does not specifically provide for it. The State submits that the magistrate judge correctly refused the requested jury charge and the circuit court properly affirmed the conviction and dismissed the appeal. S.C. Code Ann. § 56-5-2930 provides for strict liability.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). An appellate court will not reverse a trial court's ruling absent a prejudicial abuse of discretion. State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585, 585-586 (Ct. App. 2001). An abuse of discretion occurs when the trial court's decision lacks evidentiary support or is controlled by an error of law. State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002).

"Criminal liability is normally based upon the concurrence of two factors, 'an evil meaning mind [and] an evil doing hand; although this court has recognized that the legislature may declare an act criminal regardless of the mental state of the actor.'" State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994), citing State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990); State v. Manor, 179 S.C. 45, 183 S.E. 582 (1936). Our legislature can make a particular crime a strict liability offense. Id.; see e.g. State v. Kirkland, 282 S.C. 14, 317 S.E.2d 444 (1984).

"[S]trict liability offenses or absolute liability offenses depend on no mental element, but consist only of forbidden acts or omissions. Strict liability allows for criminal liability absent the element of mens rea found in the definition of most crimes. To prove a violation of a strict liability statute, the state need only prove the accused engaged in a voluntary act or an omission . . ." 21 Am. Jur. 2d Criminal Law section 132. A per se violation or strict liability crime is one which imposes a criminal sanction for an unlawful act without requiring a showing of criminal intent. State v. Harrison, 846 P. 2d 1082 (New Mexico 1993). In effect, the legislature forbids the act and makes its commission criminal without regard to intent of the defendant. Id. The rationale for strict liability statutes is that the public interest in the area governed by the statute is so compelling or the harm caused so great that the public interest outweighs the interests of the individual charged. Id.; State v. Rios, 980 P. 2d 1068 (N.M.1999).

Whether an offense is one of strict liability is a question of legislative intent. State v. Jefferies, 316 S.C. at 13. In Jefferies, our supreme court indicated that when the statute does not expressly state whether a *mens rea* is required, the court looks to the common law and development of the statute to determine whether the legislature intended the crime to require a *mens rea*. See also Morrisette v. United States, 342 U.S. 246 (1952).

The primary and cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). “Whenever possible, legislative intent should be found in the plain language of the statute itself. Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008).

S.C. Code Ann. § 56-5-2930 states “It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person’s faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that a person’s faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances A person who violates the provisions of this section is guilty of the offense of driving under the influence”

The State submits that nothing in the plain language suggests anything but strict liability. Also, a review of the legislative enactments pertaining to this statute suggested anything but strict liability. See S.C. Code Ann. § 46-343 (1952); S.C. Code Ann. § 46-343 (Supp. 1960); S.C. Code Ann. § 46-343 (1962); S.C. Code Ann. § 56-5-2930 (Supp. 1987); S.C. Code Ann. § 56-5-2930 (Supp. 1998); S.C. Code Ann. § 56-5-2930 (Supp. 2000); S.C. Code Ann. § 56-5-2930 (Supp. 2008). Further, no case law in South Carolina suggests § 56-5-2930 is anything but a strict liability statute. See State v. Long, 186 S.C. 439, 195 S.E.2d 624 (1938) and State v. Mouzon, 231 S.C. 655, 9 S.E.2d 672 (1957), in which our courts concluded that driving under the influence is *malum prohibitum* and *malum in se*. The intent for *malum prohibitum* is simply the intent to do the act which results in a violation of the law. Crossley v. State, 582 S.E.2d 204

(Ga.App. 2003). Unlike with the crime of kidnapping where the common law and development of the kidnapping statute reveals the legislative intent that the *mens rea* of "knowledge" is required, the rationale, purpose and development of the law respecting DUI differs. See State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994).

The statute in question clearly provides that the only proof necessary is evidence that a defendant was driving a vehicle under the influence of alcohol and/or drugs or other substances and that the defendant's faculties were materially and appreciably impaired. Our courts have repeatedly recognized that the corpus delicti of driving under the influence is established by proof that a person is driving a vehicle while materially and appreciably impaired and the impairment is caused by the use of alcohol, drugs, or other substances or a combination thereof. State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001) and S.C. Code Ann. section 56-5-2930; see also State v. Knuckles, 354 S.C. 626, 583 S.E.2d 51 (2003); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001); State v. McCombs, 335 S.C. 123, 515 S.E.2d 547 (Ct. App. 1999); State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (1996); State v. Sheppard, 248 S.C. 464, 150 S.E.2d 916 (1966).

The State also submits that our legislature recognized the public interest in deterring intoxicated individuals from driving motor vehicles while materially and appreciably impaired to protect the drivers, the innocent individuals who are injured and killed by these drivers and the families and loved ones of innocent victims and enacted the statute without requiring proof of intent to secure a conviction for violating the statute. See State v. Harrison, 846 P.2d 1082 (N.M. 1993); City of Wichita v. Hull, 724 P.2d 699 (Kan. 1986). Our supreme court recognized this legislative intent and public policy in State v. Long, 186 S.C. 439, 195 S.E.2d 624, 627 (1938), when it concluded:

"the purpose of the statute is to prevent accidents and preserve person from injury, and the reason for it is that an intoxicated person has so befuddled and obscured his faculties of perception, judgment, and recognition of obligation toward his fellows as to be a menace in guiding the instrumentality so speedy and high-powered as a modern automobile. Such a man is barred from the highway because he has committed the wrong of getting drunk and thereby has rendered himself unsafe to propel and guide a vehicle capable of the speed of an express train and requiring its operation to be in possession of his faculties."

See also Dixon v. Weir Fuel Co., 251 S.C. 74, 160 S.E.2d 194 (1968) ("One violates the traffic statute if he partakes of alcohol to the extent that he cannot drive a motor vehicle with reasonable care, or if he cannot drive as a prudent driver would operate a vehicle."). Other jurisdictions have construed driving under the influence statutes as strict liability offenses for these reasons. State v. Zaragoza, 209 P.2d 629 (Az. 2009); State v. Young, 795 P. 2d 285 (Haw.App. 1990); People v. Thorson, 496 N.E.2d 304 (Ill. 1986); Burns v. State, 556 N.E.2d 955 (Ind.Ct.App. 1990); City of Wichita v. Hull, 724 P.2d 699 (Kan. 1986); State v. McDole, 734 P.2d 683 (1987); City of Defiance v. Kretz, 573 N.E.2d 2 (Ohio 1991); State v. Miller, 788 P.2d 974 (Or. 1990); State v. Polk, 927 A.2d 514 (N.H. 2007); State v. Sims, 236 P.3d (N.M. 2010); State v. Bernhardt, 584 A.2d 854 (N.J. 1991); State v. Glass, 620 N.W.2d 146 N.D. 2000); State v. Kain, 24 S.W.3d 816 (Tenn. 2000); State v. Carter, 810 S.W.2d 197 (Tex.Crim.App. 1001); State v. Caibaiosai, 363 N.W.2d 574 (Wis. 1985); see also Begay v. United States, 553 U.S. 137 (2008) (stating that statutes that forbid driving under the influence are strict liability crimes).

The charge requested by Appellant would defeat the public policy, obstruct the purpose of the statute, and lead to an absurd result that would allow a defendant to argue that his intentional consumption of alcohol or other substances impaired his ability to

know he was impaired or to form conscious intent to drive drunk. State v. Williams, 698 P.2d 732 (Az. 1985); see Morrisette v. United States, 342 U.S. 246 (1952). The requested charge is also inconsistent with the longstanding precedent that voluntary intoxication does not relieve an individual from criminal responsibility. State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993); State v. Hartfield, 300 S.C. 469, 388 S.E.2d 802 (1990); see also State v. Gurule, 252 P.2d 823 (N.M. 2011).

The State also notes that the right to operate a motor vehicle on a public highway in South Carolina is not a property right but is merely a privilege subject to reasonable regulation under the police power in the interest of the public safety and welfare. Chisolm v. S.C. Dept. Motor Vehicles, 402 S.C. 593, 741 S.E.2d 42 (Ct. App. 2013). South Carolina has a substantial interest in protecting its citizens from the injury, death and harm caused by individuals who drive vehicles while materially and appreciably impaired by alcohol, drugs, other substance or combination thereof. The statute as enacted promotes the health, safety and welfare of the citizens of South Carolina and was clearly intended as a strict liability offense to accomplish these goals.

Moreover, a reading of the statute as a whole reflects further legislative intent that the offense is one of strict liability. Subparts I and J of the statute which set forth certain factors a defendant may challenge or introduce when charged and tried for the offense does not include the factor which formed the basis for the requested charge. See City of Camden, 326 S.C. 556, 486 S.E.2d 492 (1997)(stating that in construing a statute, the court looks to it language as a whole in light of its manifest purpose and stating that driving while intoxicated is a traffic offense).

Lastly, if this Court determines intent is required, the wording of the statute makes the **act of driving** a motor vehicle within the State after consuming alcohol, drugs or other substances the gravamen of the offense. State v. Townsend, 321 S.C. 55, 467 S.E.2d 138 (1996). Therefore any charge respecting intent would be limited to Appellant's the intent to drive after imbibing some amount of these substances. Any error in failing to give this charge is harmless because there is no question in this case Appellant consumed alcohol and was on medication and made a conscious decision to drive the vehicle. State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (1998).

The Magistrate Judge correctly ascertained and effectuated the intent of the legislature, as required. Pittman, 373 S.C. at 561, 647 S.E.2d at 161. Because § 56-5-2930 is a strict liability statute in which intent is not required, the Magistrate Judge correctly denied the request to charge. Appellant's conviction must be affirmed. City of Orangeburg v. Carter, 303 S.C. 290, 400 S.E.2d 140 (1991) (stating the trial judge properly charged the jury that "DUI is established by proof the defendant's ability to drive was materially and appreciably impaired.").

II.

The Circuit Court correctly affirmed the denial of the motion for directed verdict because the State presented sufficient evidence of Appellant's guilt, including Trooper Burris' testimony Appellant drove erratically, that her car smelled strongly of alcohol, that Appellant could not maintain her balance that she failed a field sobriety test, and Appellant's appearance and mannerisms were consistent with impairment.

Appellant claims that the Magistrate's Court failed to grant her motion for directed verdict because one swerve in and out of a lane is insufficient to show impaired driving. (Appellant's Brief 3-4.) Appellant ignores all of the other evidence and testimony that Appellant was impaired while driving, and therefore the magistrate judge correctly denied the motion for directed verdict.

A. Insufficient Record

It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence. E.g. Ex Parte Morris, 367 S.C. 56, 624 S.E.2d 649 (2006); McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (appellate courts repeatedly have held "that statements of fact appearing only in arguments of counsel will not be considered"); S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct.App.2003) ("[a]rguments made by counsel are not evidence"). The burden is on appellant to provide a sufficient record for review. E.g. State v. Mitchell, 330 S.C. 189, 194, 498 S.E.2d 642, 644 (1998).

Appellant claims that "[Trooper Burris] saw the vehicle veer outside of the lane of travel, crossing the white line on the right side of the roadway but not leaving the paved portion of the roadway, and then return to the travel lanes [Circuit Court Transcript 4, lines 16-18]." (Brief of Appellant 1.) Appellant then argues that "The testimony was unequivocal that [Appellant] only left the main lane of travel on one occasion when she traveled over the white line on the right

side of the roadway. She never left the paved portion of the roadway and never veered over the yellow line on the left side of her lane.” (Brief of Appellant 3.)

The Magistrate’s Return does not contain this detailed information. (See R. p. 30 [Magistrate’s Return, p 9]). Instead, Appellant cites counsel’s oral argument to the circuit court on appeal, where defense counsel stated “[a]t trial the evidence was that Trooper Burris was behind [Appellant] and observed the right wheels of her vehicle veer out of her lane of travel and then back into her lane, but that occurred one time and then he pulled her over.” (R. p.35 Circuit Ct. Transcript 4, lines 16-18.) While other statements by Trooper Burris exist, none of them prove Appellant’s claim that she only went over a white line once. See (Magistrate Audio Transcript) (Burris states that as he was coming up behind, she ran off the roadway); (Magistrate Audio Transcript) (Narration during video, “You just saw her going off the roadway right there?”); (Magistrate Audio Transcript) (“You was weavin’ all over the roadway!”).

The only evidence Appellant presents is the statement of her attorney of what happened in the video. Since a single statement by an attorney does not create a sufficient factual record for review, and the burden is on Appellant to provide a sufficient record for review, this Court should dismiss the issue. Mitchell, 330 S.C. at 194, 498 S.E.2d at 644. Moreover, the swerve the trooper observed provided the basis for the traffic stop which led to other evidence that was presented as to Appellant’s impairment. See State v. Parker, 271 S.C. 159, 237 S.E.2d 584 (1978)(officer’s personal observation that defendant failed to maintain his lane was sufficient to justify the traffic stop and arrest); State v. Vinson, 400 S.C. 347, 734 S.E.2d 182 (Ct. App. 2012) (stating that trooper was justified in stopping defendant for perceived violation of statute requiring driver to remain within their lane when defendant’s front tire crossed one time into the area between the double yellow lines that separated opposing lanes).

B. Directed Verdict

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a trial court's denial of a defendant's motion for a directed verdict, an appellate court must view the evidence in a light most favorable to the State. State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). An appellate court must find a case is properly submitted to the jury if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused. Weston, 367 S.C. at 292-93, 625 S.E.2d at 648.

Here, the State presented sufficient evidence that, viewed in the light most favorable to the State, shows Appellant drove a vehicle while impaired within the meaning of S.C. Code Ann. section 56-5-2930. First, Trooper Burris testified that when responding to a dispatch about a person driving erratically on I-26, he observed Appellant's vehicle which matched the description of the vehicle in the dispatch call. As Trooper Burris followed the vehicle, he observed Appellant drive the vehicle off of the roadway. (R p.30 [Magistrate's Return – Attachment VI]; Audiotape of trial). Trooper Burris initiated a traffic stop and, upon approaching the passenger window of Appellant's vehicle, smelled a strong odor of alcohol from the window of the car. Id. Third, Trooper Burris testified that Appellant was unable to keep her balance while performing the sobriety tests. Id. Fourth, Trooper Burris was so concerned with Appellant's performance that he believed it was unsafe to administer any further field sobriety tests. Id. Fifth, Appellant did not successfully complete the horizontal gaze nystagmus test. (Magistrate Audio Transcript transported and filed separately). Sixth, Trooper Burris concluded

that, based upon his training, experience, Appellant's mannerisms and appearance, and the totality of the circumstances, Appellant was operating her vehicle while under the influence and impaired. Id. Trooper Burris specifically testified at trial that crossing the line of the roadway is not the only proof that Appellant was driving under the influence. Id. The video tape of the incident site also contained Appellant's admission of consuming alcohol and medication. Id.

Appellant only contests the nature of one item of evidence: the erratic driving. (Brief of Appellant 3-4.) However, that one factor cannot be viewed in isolation. The review for directed verdict includes all of the evidence presented and taken in the light most favorable to the State. Because the record before this Court contains sufficient evidence tending to prove that Appellant was impaired while driving within the meaning of the statute, the judge properly denied the motion for directed verdict. See State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001); State v. Parker, 271 S.C. 159, 245 S.E.2d 904 (1978); State v. Douglas, 245 S.C. 83, 138 S.E.2d 845 (1964); State v. Breech, 308 S.C. 356, 417 S.E.2d 873 (1992). This Court should affirm.

CONCLUSION

For the reasons stated above, this Court should affirm the conviction.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

December 4, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Meree D. Williamson, Magistrate Court Judge
Appellate Case No. 2012-212931

THE STATE,

Respondent,

vs.

DAISY LYNNE MIMMS,

Appellant.

CERTIFICATE OF COUNSEL

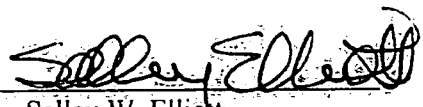
The Undersigned certifies that this Final Brief of Respondent complies with Rule 211(b),
SCACR.

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ATTORNEYS FOR RESPONDENT

December 4, 2013

FILED
FEB 4 2014

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Daisy Lynne Mimms, Appellant.

Appellate Case No. 2012-212931

Appeal From Orangeburg County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5252
Heard June 4, 2014 – Filed July 30, 2014

AFFIRMED

Assistant Public Defender Mark Wise, of Orangeburg,
for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Salley W. Elliott,
both of Columbia, for Respondent.

CURETON, A.J.: Daisy Mimms appeals a circuit court order dismissing an appeal of her conviction in magistrate court for driving under the influence of alcohol or drugs (DUI). Mimms contends the circuit court erred in finding the magistrate court did not err in concluding: (1) there is no criminal intent required for the crime of DUI; and (2) veering off a roadway on one occasion was sufficient to show impaired driving. We affirm.

FACTS

On October 23, 2010, Trooper Jamie Burris, while responding to a dispatch call of a driver driving erratically, conducted a traffic stop of Mimms because her car fit the description from dispatch and he observed her drive off the roadway. Burris "smelled an odor of alcohol" as he walked toward Mimms' car; therefore, he asked her to get out of the car. During the stop, Burris told Mimms, "You [were] weaving all over the roadway." Burris administered three parts of the Horizontal-Gaze Nystagmus (HGN) test to determine if Mimms was under the influence. Mimms was unable to keep her balance while performing the test and she did not successfully complete any portion of the HGN test. Based on Mimms' performance on the HGN test, Burris "did not feel comfortable" requiring Mimms to complete additional field sobriety tests. Additionally, based on her appearance and mannerisms, Burris determined Mimms was "clearly" under the influence of alcohol. Mimms admitted she consumed alcohol earlier that evening. Mimms also told Burris she had cancer and was undergoing chemotherapy treatment. Burris explained to Mimms the mixture of alcohol with her medication could have had a "synergy effect," impacting her level of intoxication.

Subsequently, the State charged Mimms with DUI, and she proceeded to a jury trial in magistrate court. After the State rested, Mimms moved for a directed verdict, arguing there was insufficient evidence of impaired driving because the evidence only showed she "ran off the road slightly." Further, Mimms maintained there was no evidence showing she weaved back and forth, drove into a ditch, or crossed the dotted line. As a second ground for a directed verdict, Mimms argued the State failed to prove an intentional act of violating the law. Mimms asserted the State was required to prove criminal intent and it failed to present such evidence. Mimms contended the evidence did not indicate she knew or had any reason to know she should not have drunk a beer or there would be a "synergy effect" when she consumed the medication and alcohol. According to Mimms, there was no evidence she knew combining beer with her medication would impact her ability to drive. The magistrate denied the motion, finding there was sufficient evidence of impaired driving and the DUI statute does not require the State to prove criminal intent. Mimms presented no defense.

Prior to instructing the jury, the magistrate reviewed the parties' proposed jury charges and determined she "[would] not instruct on criminal intent."¹ The jury convicted Mimms of DUI and the magistrate sentenced her to thirty days' imprisonment, suspended upon payment of a \$997.00 fine. Mimms appealed to the circuit court, which dismissed her appeal with prejudice. This appeal followed.

¹ The actual charge to the jury is not included in the record.

STANDARD OF REVIEW

Section 18-7-170 of the South Carolina Code (2014) articulates the standard of review to be applied by the circuit court in an appeal of a magistrate's judgment:

Upon hearing the appeal the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

"In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception. In reviewing criminal cases, this court may review errors of law only." *State v. Henderson*, 347 S.C. 455, 457, 556 S.E.2d 691, 692 (Ct. App. 2001) (internal citations omitted). "When there is any evidence, however slight, tending to prove the issues involved, [the appellate court] may not question a magistrate court's findings of fact that were approved by a circuit court on appeal." *Allendale Cnty. Sheriff's Office v. Two Chess Challenge II*, 361 S.C. 581, 585, 606 S.E.2d 471, 473 (2004). This court will presume that an affirmance by a circuit court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law. *See Bowers v. Thomas*, 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007). However, "[q]uestions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

LAW/ANALYSIS

I. CRIMINAL INTENT

Mimms argues the magistrate erred in failing to charge the jury on criminal intent as an element of DUI. Although our DUI statute does not provide for any mental state, Mimms essentially argues a culpable mental state—intent—must be read into the statute. Otherwise, according to Mimms, her right to due process of law would be violated. We disagree.

Section 56-5-2930(A) of the South Carolina Code (Supp. 2013) provides:

It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired. A person who violates the provisions of this section is guilty of the offense of driving under the influence

In a trial for DUI, the state has to prove: (1) the defendant's ability to drive was materially and appreciably impaired; and (2) this impairment was caused by the use of drugs or alcohol. *State v. Salisbury*, 343 S.C. 520, 524, 541 S.E.2d 247, 248-49 (2001).

In offenses at common law, and under statutes which do not disclose a contrary legislative purpose, to constitute a crime, the act must be accompanied by a criminal intent, or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent.

State v. Ferguson, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990) (quoting *State v. Am. Agric. Chem. Co.*, 118 S.C. 333, 337, 110 S.E. 800, 802 (1922)). "Of course, the legislature, if it so chooses, may make an act or omission a crime regardless of fault." *Id.* at 271-72, 395 S.E.2d at 183; *see also State v. Manos*, 179 S.C. 45, 49-50, 183 S.E. 582, 584 (1936) ("The legislature, however, may forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the doer, and if such legislative intention appears the courts must give it effect, although the intent of the doer may have been innocent. This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the state, where the word 'knowingly' or other apt words are not employed to indicate that knowledge is an essential element of

the crime charged. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt." (quotation marks and citation omitted)). "These crimes are referred to commonly as 'strict liability' offenses. Whether an offense is a strict liability offense, and if not, what kind of criminal intent is required to satisfactorily show a commission of that offense, are questions of legislative intent." *Ferguson*, 302 S.C. at 272, 395 S.E.2d at 183. "Therefore, whether knowledge and intent are necessary elements of a statutory crime must be determined from the language of the statute, construed in the light of its purpose and design." *Guinyard v. State*, 260 S.C. 220, 227, 195 S.E.2d 392, 395 (1973).

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (quoting *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). "[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant." *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). The statutory language must be construed in light of the intended purpose of the statute. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quotation marks and citation omitted). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Roberts*, 393 S.C. at 342, 713 S.E.2d at 283. Appellate courts will not construe a statute in a way which leads to an absurd result or renders it meaningless. See *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.").

"[D]riving of an automobile upon the public highway by a person while intoxicated is not only *malum prohibitum*, but *malum in se*." *State v. Long*, 186 S.C. 439, 446-47, 195 S.E. 624, 627 (1938).

'It is true the statute forbids it and provides a penalty, but this in no way determines whether it is only *malum prohibitum*. The purpose of the statute is to prevent accidents and preserve persons from injury, and the

reason for it is that an intoxicated person has so befuddled and deranged and obscured his faculties of perception, judgment, and recognition of obligation toward his fellows as to be a menace in guiding an instrumentality so speedy and high-powered as a modern automobile. Such a man is barred from the highway because he has committed the wrong of getting drunk and thereby has rendered himself unfit and unsafe to propel and guide a vehicle capable of the speed of an express train and requiring its operator to be in possession of his faculties.'

Id. (quoting *People v. Townsend*, 183 N.W. 177, 179 (Mich. 1921)). *Malum in se* is defined as a "crime or an act that is inherently immoral." *Black's Law Dictionary* 971 (7th ed. 1999). *Malum prohibitum* is defined as an "act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." *Id.* "A corrupt purpose, a wicked intent to do evil, is indispensable to a conviction of a crime which is morally wrong. But no evil intent is essential to an offense which is a mere *malum prohibitum*." *State v. Moore*, 128 S.C. 192, 199, 122 S.E. 672, 674-75 (1924) (Cothran, J., concurring) (quotation marks and citation omitted).

A simple purpose to do the act forbidden in violation of the statute is the only criminal intent requisite to a conviction of a statutory offense which is not *malum in se*. It follows that the only criminal requisite to a conviction of an offense created by statute, which is not *malum in se*, is the purpose to do the act in violation of the statute.

Id. at 199-200, 122 S.E. at 675 (quotation marks and citations omitted).

[S]tatutes that forbid [DUI], such as the statute before us,² typically do not insist on purposeful, violent, and

² "New Mexico's DUI statute makes it a crime (and a felony after three earlier convictions) to 'drive a vehicle within [the] state' if the driver 'is under the influence of intoxicating liquor' (or has an alcohol concentration of .08 or more in his blood or breath within three hours of having driven the vehicle resulting from 'alcohol consumed before or while driving the vehicle')." *Begay v. United States*,

aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all. The Government argues that 'the knowing nature of the conduct that produces intoxication combined with the inherent recklessness of the ensuing conduct more than suffices' to create an element of intent. And we agree with the Government that a drunk driver may very well drink on purpose. But this Court has said that, unlike the example crimes, the conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate.

Begay v. United States, 553 U.S. 137, 145 (2008) (citation omitted).

The DUI statute is devoid of any language regarding knowledge or intent. *See* S.C. Code Ann. § 56-5-2930(A). The statute is primarily a safety statute which seeks to punish an individual's drunken actions, not his or her intent. *See Long*, 186 S.C. at 446, 195 S.E. at 627 ("The purpose of the statute is to prevent accidents and preserve persons from injury . . ."); *see also Case v. Com.*, 753 S.E.2d 860, 866 (Va. Ct. App. 2014) ("Thus[,] the concern is what could happen with an intoxicated individual behind the wheel, regardless of whether he intended to be there, turn on the car, or move the vehicle."); Therefore, we hold the legislature intended DUI to be a strict liability offense. *See Guinyard*, 260 S.C. at 227, 195 S.E.2d at 395 ("[W]hether knowledge and intent are necessary elements of a statutory crime must be determined from the language of the statute, *construed in the light of its purpose and design*." (emphasis added)); *see also Case*, 753 S.E.2d at 866 ("Bearing these concerns . . . in mind, we conclude that there is no *mens rea* requirement in [the DUI statute]. As long as the Commonwealth proves beyond a reasonable doubt that an intoxicated individual 'operated' his vehicle, regardless of intent, he is guilty of [DUI].").

We note our supreme court has incorporated a mental state into criminal statutes lacking any requirement of intent, knowledge, recklessness, or negligence. In *Ferguson*, 302 S.C. at 272-73, 395 S.E.2d at 184, our supreme court stated, "A reading of the entire statutory scheme convinces us that the legislature intended to

553 U.S. 137, 141 (2008) (alteration in original) (quoting N.M. Stat. Ann §§ 66-8-102(A), (C)).

place a mental state requirement in the offense contained in [the statute prohibiting manufacturing, distributing or dispensing a controlled substance]." (footnote omitted). Similarly, in *State v. Jefferies*, 316 S.C. 13, 19, 446 S.E.2d 427, 430-31 (1994), our supreme court stated, "We find that the *mens rea* of 'knowledge' is required under [the kidnapping statute]." (footnote omitted). However, in *Ferguson* and *Jefferies* the courts examined the relevant statute for a clear legislative purpose for imposing strict liability, which the courts did not find. See also S.C. Code Ann. § 56-5-2920 (2006) (including the *mens rea* of recklessness, stating "[a]ny person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving"); cf. *State v. Kirkland*, 282 S.C. 14, 16, 317 S.E.2d 444, 444 (1984) ("It is apparent that this section, in prohibiting sexual intercourse with any persons confined to a mental institution, imposes strict liability for its violation, as neither lack of consent, intent, nor knowledge were made elements of the offense." (internal quotation marks and citation omitted)); *State v. Jenkins*, 278 S.C. 219, 222, 294 S.E.2d 44, 45-46 (1982) ("By failing to include 'knowingly' or other apt words to indicate criminal intent or motive, we think the legislature intended that one who simply, without knowledge or intent that his act is criminal, fails to provide proper care and attention for a child or helpless person of whom he has legal custody, so that the life, health, and comfort of that child or helpless person is endangered or is likely to be endangered, violates . . . the Code.").

We find that under our DUI statute, there is a clear legislative purpose for imposing strict liability and public policy favors strict liability. Moreover, the majority of jurisdictions, in cases involving the same or similar argument, hold DUI and related offenses are intended to impose liability without requiring a specific finding that the defendant possessed a culpable state of mind.³ Importantly, Mimms' interpretation would lead to an unreasonable and absurd result. As the State correctly points out, under Mimms' reasoning, any person

³ See generally *State v. Parker*, 666 P.2d 1083, 1084 (Ariz. Ct. App. 1983); *People v. Senn*, 824 P.2d 822, 824 (Colo. 1992); *Bodoh v. D.C. Bureau of Motor Vehicle Servs.*, 377 A.2d 1135, 1137 (D.C. 1977); *Albaugh v. State*, 721 N.E.2d 1233, 1236 (Ind. 1999); *City of Wichita v. Hull*, 724 P.2d 699, 702 (Kan. Ct. App. 1986); *State v. McDole*, 734 P.2d 683, 686 (Mont. 1987); *State v. Glass*, 620 N.W.2d 146, 151 (N.D. 2000); *State v. Goding*, 489 A.2d 579, 580-81 (N.H. 1985); *State v. Fogarty*, 607 A.2d 624, 628 (N.J. 1992); *State v. Johnson*, 15 P.3d 1233, 1240 (N.M. 2000); *State v. Pistole*, 476 N.E.2d 365, 366 (Ohio 1984); *State v. Miller*, 788 P.2d 974, 977 (Or. 1990); *State v. Turner*, 953 S.W.2d 213, 215 (Tenn. Crim. App. 1996); *Farmer v. State*, 411 S.W.3d 901, 905 (Tex. Crim. App. 2013).

convicted under this statute could argue he or she did not "intend" to become intoxicated such that his or her faculties to drive a motor vehicle were materially and appreciably impaired.⁴ Furthermore, after ingesting the highly potent medication required for her illness, Mimms voluntarily decided to consume alcohol and drive a vehicle. See *City of Milwaukee v. Johnston*, 124 N.W.2d 690, 693 (Wis. 1963) ("If one afflicted with [an illness] has a low tolerance to intoxicants or is more susceptible to be influenced by the consumption of intoxicants, it behooves such a person to imbibe less quantitatively to keep within his capacity than his friends who may enjoy greater consumption within their capacity because of their natural or acquired tolerance. A person is chargeable not with knowledge of an objective quantitative standard of drinking but with the knowledge of his own limitations and capacity, and if he chooses to consume intoxicants and to operate a motor vehicle he does so at his own risk."). Accordingly, we hold the circuit court did not err in dismissing Mimms' appeal for the magistrate court's failure to charge criminal intent as an element of the DUI statute. Our ruling does not apply to situations wherein a drug is involuntarily or unknowingly ingested while consuming alcohol.

II. IMPAIRED DRIVING

Mimms argues the magistrate erred in failing to grant her motion for a directed verdict because the State only produced evidence she veered off the roadway on one occasion. Consequently, according to Mimms, the circuit court erred in

⁴ Mimms' counsel seems to have conceded to the slippery slope that could result should this court determine the DUI statute requires the State to prove criminal intent. While presenting arguments to the circuit court, Mimms' counsel stated:

I'd submit to the [c]ourt that in certain circumstances the [c]ourt is going to make a determination. Even when you say you didn't intend to get drunk[,] the facts of the case are not going to allow you to get the criminal intent statute. . . . [I]f I represent somebody who's had five drinks, maybe even three drinks[,] I'm probably not going to ask for the criminal intent statute, because I think at that point looking at the kind of *mens rea* that exists, I think that's a reasonable issue.

(italics added).

determining the magistrate did not err in finding "the mere veering off of a roadway on one occasion is sufficient to show impaired driving." We disagree.

"On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling." *State v. Gaster*, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." *State v. McKnight*, 352 S.C. 635, 642, 576 S.E.2d 168, 171 (2003). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." *State v. Horton*, 359 S.C. 555, 563, 598 S.E.2d 279, 283 (Ct. App. 2004).

Mimms correctly asserts the pertinent statute "does not penalize the act of leaving a lane of travel on one occasion" and that fact alone does not render her driving impaired. However, during oral argument before this court, Mimms conceded Trooper Burris had probable cause to initiate the stop. In fact, Mimms never argued to the magistrate court or circuit court Trooper Burris did not have probable cause to make the stop. The State produced a great deal of evidence of impaired driving uncovered after the initial stop. Specifically, the State submitted evidence: (1) Mimms' car matched the description of a car driving erratically; (2) while responding to the dispatch, Burris observed Mimms run off the roadway; (3) during the stop, Burris told Mimms "You [were] weaving all over the roadway"; (4) Burris "smelled an odor of alcohol" as he walked toward Mimms' car and inside her vehicle; (5) Mimms did not successfully complete the HGN test; (6) during the HGN test, Mimms was unable to keep her balance; (7) based on Mimms' performance on the HGN test, Burris "did not feel comfortable" requiring Mimms to complete additional field sobriety tests; and (8) Mimms' appearance and mannerisms indicated she was under the influence of alcohol. Therefore, viewing the evidence in the light most favorable to the State, the evidence supports the magistrate's submission of this case to the jury.

CONCLUSION

Accordingly, the circuit court's dismissal of the appeal is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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AUG 14 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DAISY LYNNE MIMMS,

APPELLANT

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

Opinion No. 5252

PETITION FOR REHEARING

Pursuant to Rule 221(a), counsel for Daisy Lynne Mimms respectfully petitions this Court for rehearing. Counsel respectfully submits that the Court misapprehended the issue Petitioner attempted to present to the Court.

The Petitioner, charged with driving under the influence, believes the jury should have been allowed to consider her lack of criminal intent as she was unaware her chemotherapy treatment and her consumption of an alcoholic beverage would impact her ability to drive.

The relevant statute prohibits a person from driving a motor vehicle if her faculties are materially and appreciably impaired by the combination of drugs or substances and alcohol. The statute is devoid of any language regarding a mens rea requirement. However, courts are permitted to impose a mens rea requirement when one was not written into the statute. Morissette v. United States, 342 U.S. 246 (1952), State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990).

The Petitioner urges the Court to hold that in a driving under the influence case involving alleged impairment as a result of the consumption of drugs, if evidence is presented that the defendant was unaware of the effects of such drugs, the jury should be allowed to consider whether the defendant possessed criminal intent. Other jurisdictions, to the extent they have found similar statutes to be strict liability, have limited the application to charges based upon alcoholic content in a person's blood. Cf. State v. Young, 795 P.2d 285 (Haw. App. 1990), People v. Thorson, 496 N.E.2d 304 (Ill. 1986), State v. Bernhardt, 584 A.2d. 854 (N.J. 1991), State v. Glass, 620 N.W.2d 146 (N.D. 2000), City of Defiance v. Kretz, 573 N.E.2d 2 (Ohio 1991), and State v. Miller, 788 P.2d 974 (Or. 1990).

The Petitioner urges the Court to distinguish between matters in which an individual is charged with driving under the influence as a result of the consumption of alcohol and drugs as opposed to being charged as a result of the consumption of alcohol alone. Petitioner submits the Court is free to impose strict liability in the latter cases and allow a defendant to raise the issue of criminal intent in the former. This is a distinction trial courts will have no difficulty in making.

As there was no evidence at the trial that the Petitioner was aware of the effect her treatment would have on her and or that she was aware of any limitations, the jury should have

been allowed to make a determination as to her actions having before it the issue of criminal intent.

Accordingly, Petitioner Daisy Lynn Mimms respectfully requests this Court to grant her Petition for Rehearing.

Respectfully submitted,

Mark Wise

Mark Wise

This 14th day of August, 2014

The South Carolina Court of Appeals

The State, Respondent,

v.

Daisy Lynne Mimms, Appellant.

Appellate Case No. 2012-212931

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff J.
Paul B. Thomas J.
Joseph W. Curator A.J.

Columbia, South Carolina

cc: Mark Wise, Esquire
Salley W. Elliott, Esquire
Alan McCrory Wilson, Esquire

FILED

9/17/14