

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County

Tanya A. Gee, Circuit Court Judge

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SC SUPREME COURT

DONNIE R. THIGPEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002280

APPENDIX

SUSAN B. HACKETT
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

JESSICA KINARD
Assistant Attorney General

P. O. Box 11549
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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THE FOLLOWING EXHIBIT IS ON FILE
WITH THIS COURT:
STATE'S EXHIBIT #135 (CD AUDIO)

1 one of whom had heard the original Miranda. Did he
2 stop you and say hey, we better tell Donnie that he
3 can stop at any time?

4 A No, sir.

5 Q Nobody did that?

6 A No, sir.

7 Q And your position was that he had been under the
8 influence earlier that morning, right?

9 A Yes, sir.

10 Q And that perhaps he was maybe even still legally
11 under the influence when he was with you?

12 A (There was no response.)

13 Q You don't know?

14 A I don't know.

15 Q Okay.

16 A I didn't do a test when we walked in there to
17 know exactly what his alcohol level was.

18 Q Okay. Did he appear that he had been under the
19 influence?

20 A Did he smell of some alcohol? Yes, he did.

21 Q Okay. Did he appear confused in any way?

22 A No, sir. He was able to again track the
23 questions, able to have a dialogue back and forth,
24 able to make arguments, present arguments, so no, sir,
25 he didn't seem confused.

1 Q Do you think he slurred his words in any way?

2 A It didn't sound at that time that he slurred his
3 words. You've listened to the tape.

4 Q I'm just asking you. Maybe it sounded different
5 in person. His eyes bloodshot?

6 A I can't --- I cannot recall definitively about
7 his eyes being bloodshot. It could have been from
8 some of the injury. I don't know, but I cannot tell
9 you right now that I recall his eyes being bloodshot.

10 Q Did he appear tired?

11 A Did we all appear tired, we spent a long day,
12 yes, sir.

13 Q Did he appear tired?

14 A I'm trying to think back. I can't say for
15 certain.

16 Q And he had been up since --- in your estimation
17 had been up late, late, late, right?

18 A I'm not sure what time the sergeant aroused him.
19 It was after ten o'clock when they got him up, so I
20 don't know.

21 Q And y'all estimate the accident to happen between
22 when and when?

23 A Possibly more around after the five o'clock-ish
24 hours.

25 Q Okay. And after then and then, between when and

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1 when?

2 A Between ---

3 Q Right, so are you saying that it happened in the
4 five o'clock-ish hours?

5 A I believe so.

6 Q You believe so?

7 A Yes, sir.

8 Q What makes you think that?

9 A The last transaction on his credit card was 5:01.

10 Q Whose credit card?

11 A Donnie Thigpen's.

12 Q Did you check Melvin Wright's credit card?

13 A (Indicating in the negative.)

14 Q Maybe he had one after that. Wouldn't that help
15 you pinpoint the time?

16 A What I do have is 5:01 and then from his
17 statement of playing with his dog it was getting
18 light. There was some conversation around about
19 six o'clock in the morning is when it starts to get
20 light, so ---

21 Q But the reality is, Trooper Coats, that the
22 last --- you have the last transaction on his credit
23 card at 5:01 and then you have a triathlon at 9:15 or
24 so. Between that time and that time, we don't know.
25 We know there was an accident, right?

- 1 A Uh-huh.
- 2 Q We know that Melvin Wright was in the car, right?
- 3 A Yes, sir.
- 4 Q We know it was Donnie Thigpen's car, right?
- 5 A Yes, sir.
- 6 Q And just because he used his credit card at
- 7 5:01 that makes you think it's closer to 5:01 than
- 8 9:15?
- 9 A Closer to --- after 5:01 is what I said.
- 10 Q I said, did you pinpoint it happening in the five
- 11 o'clock hours and you said, yes.
- 12 A I think I said after 5:01.
- 13 Q So what you're saying now is it that it could
- 14 have happened between 5:01 and 9:15. It could have
- 15 happened at 9:00 a.m. Is that possible, sir?
- 16 A It's possible, but not probable.
- 17 Q Could it have happened at 8:30 a.m., sir?
- 18 A What time does the sun come up, because that
- 19 tells you what time?
- 20 Q You tell me on that day.
- 21 A I believe there was a conversation where it was
- 22 said the sun comes up around six o'clock, so after
- 23 5:01, six o'clock.
- 24 Q We'll get to his statement. What I want to know
- 25 is how you're pinpointing the time of this accident?

1 A I didn't say I pinpointed it. I said after the
2 5:01 hour.

3 Q Because that is a lot more convenient for you,
4 right?

5 A It's not convenient for me. It's just that it is
6 what it is.

7 Q Okay. So the statement; you give him Miranda but
8 you don't tell him he can stop questioning, and you go
9 forward?

10 A I read him the Miranda card, and I did not tell
11 him specifically in a word that you can't --- you
12 don't have to go forward, no, sir.

13 Q Okay. And he may or may not be tired. I'll have
14 to ask him.

15 The reality is when you listen to his responses
16 to your questions, he tells you several times that he
17 wasn't driving, that he wasn't in the car, right?

18 A He said that, I don't remember. I don't recall,
19 I don't remember, I blacked out.

20 Q Okay. All right?

21 A And then at the end he said it was a mistake. It
22 shouldn't have been Melvin, should have been me, yes,
23 sir.

24 Q Just that statement alone doesn't say I'm
25 driving. Just that alone, it shouldn't have been

1 Melvin, it should have been me?

2 A That statement, no, it doesn't, no, sir, but the
3 other statements that are in the latter portion.

4 Q Yeah, that's not my question.

5 A I understand. I'm trying to answer your
6 question.

7 Q And listening to your --- the way you question
8 it, and we're all going to remember it a different way
9 probably, but listening to the way you questioned him,
10 you go from very friendly, I don't think your a bad
11 guy, Donnie, that kind of stuff to tell me the truth.
12 Is that an interrogation technique?

13 A Yes, sir.

14 Q How is that a technique?

15 A How is that a technique?

16 Q Uh-huh.

17 A Okay.

18 Q How does that elicit a confession?

19 A First you want to build rapport with Donnie,
20 okay, which we do, and then once you run into a
21 portion where the road block, if you will, speed bump
22 or whatever, get to the underlying surface of it, you
23 change your tactics of the interview and move into an
24 interrogation type of questioning.

25 Q Okay. So calculated, it's calculated?

1 A Not necessarily calculated. You've got --- I
2 mean, you've got to see what's going on with the
3 interview. Does it move from an interview to an
4 interrogation? So I mean, do you --- it's not driving
5 through for each, each one.

6 Q It's like cross-examination in a way?

7 A Yes, sir, like we're doing right now.

8 Q Okay. You hit something and you might move from
9 that in one direction or you may just think that's not
10 a way to go?

11 A Or allow someone else to ask a question.

12 Q Absolutely. And you understand the difference
13 between a leading question and an open-ended question,
14 right?

15 A Uh-huh.

16 Q Like the question I just asked you?

17 A Do I understand the difference between a leading
18 question and open ended question?

19 Q Yes. And that would be a leading question,
20 right?

21 A Leading.

22 Q There are a lot of leading questions in your
23 interview with Donnie; isn't that correct, sir?

24 A And there's also a lot of open ended questions,
25 too.

1 Q And there are some leading questions, are there
2 not?

3 A And open ended questions, yes, sir.

4 Q In fact, some might say that you suggest some
5 answers.

6 A Is that a question or a statement?

7 Q That is a question.

8 A Some might say.

9 Q And I mean, you understand that there are such
10 things as false confessions, right?

11 A Yes, sir.

12 Q In fact, you're not --- you don't appear to be
13 getting the answer that you want to have. You're not
14 getting the answer that you believe is the truth,
15 right?

16 A I don't believe I was getting the truth at the
17 time.

18 Q Okay. So you continued to question him; isn't
19 that right?

20 A (Nods in the affirmative.)

21 Q In fact, several times, you say, "Anything else?
22 Is there anything else", right? We can't see Donnie.
23 We just hear silence. What happens when you ask those
24 questions to him?

25 A Silence.

1 Q Until you ask another question, right?

2 A Yes, sir.

3 Q You felt that he was holding back, right?

4 A Yes, sir.

5 Q And that's why even though you're not getting the
6 answer you want, you continue the questioning, right?

7 A I continued the questioning because I don't
8 believe at that time he was giving the truth, yes,
9 sir.

10 Q Okay. And you don't tell him when he tells you
11 several times I blacked out, I don't remember. In
12 fact, at one point he says, "How could I forget this,
13 what you're telling me," right? Doesn't he say that?

14 A I don't know if it was in that context...

15 Q He says --- I think these are almost his exact
16 words, "I don't understand, man, how I can get out and
17 walk out?"

18 A Was it, "I don't understand how I got out, walked
19 away."?

20 Q Something like that?

21 A Something of that nature.

22 Q And in your opinion, he knew too many details,
23 right?

24 A I think it's a fact that he knew details, yes,
25 sir.

1 Q Okay. Well, okay, let me reword that. In your
2 opinion, the fact that he knew so many small details
3 made you think there was something else, that he
4 wasn't truly blacked out.

5 A What small details are you talking about?

6 Q The number of drinks.

7 A Okay.

8 Q The type of cigarettes, which probably if he
9 smoked, those were the ones he would get anyway. He
10 wouldn't switch around, right? The type of beer that
11 he had.

12 A Okay. Or the time of day it was when he kicked
13 the door in and played with the dog, the sun was
14 coming up.

15 Q Yeah. Or that.

16 A (Nods in the affirmative.)

17 Q And because of that, you felt he was holding
18 back. He knows too much. He remembers too much.
19 This is not a blackout. By --- what does blackout
20 mean, by the way?

21 A I don't know.

22 Q Do you think it could mean that you just forgot
23 what's going on?

24 A You're going to have to ask your client just like
25 I asked him what blackout means. I don't know.

1 Q What was his answer to that?

2 A He is still able to function. He blacks out.

3 It's just that it seemed that he conveniently forgets
4 what's going on or is able to forget what's going on
5 at a particular time. I don't know. You'd have to
6 ask him.

7 Q You've never heard that are expression before,
8 blackout?

9 A I have heard blackout, especially when something
10 happens to the power grid and New York City blacks
11 out. I have heard blackout before.

12 Q Have you ever heard blackout in the ---

13 A Specifically to what you're client is talking
14 about, what a blackout is, I don't know if there is a
15 medical definition or what, but he says, in his terms,
16 that he blacks out.

17 Q What's a general terminology for blackout to you
18 as far as alcohol, not as far as your power goes?

19 A As far as alcohol goes, passed out, yes,
20 blackout, I don't know. I don't know how you could
21 continue to function and not ---

22 Q Not remember?

23 A Yes.

24 Q Okay. Did you see the Hangover?

25 A Yes.

1 Q Okay. That depicts --- I would submit that
2 depicts a blackout.

3 A That's Hollywood and fictitious. I can't, you
4 know. I can't really ---

5 Q I haven't seen it, by the way.

6 A I think they have a Hangover 2, also, as a
7 sequel.

8 Q And during the course of the interview, you point
9 out his injuries?

10 A Okay.

11 Q Right?

12 A Yes, sir.

13 Q You make him pull up his shirt, and you point out
14 this abrasion on his arm?

15 A Okay.

16 Q Okay. At that point you asked him if he got
17 medical treatment, right?

18 A Okay.

19 Q And he says, "Well, I went to the hospital. They
20 took my blood and urine, but they did not do a
21 physical on me," right?

22 A He said the nurse checked him out, but they
23 didn't do a full physical.

24 Q As far as you know, there were no x-rays done on
25 him?

1 A No, sir.

2 Q Another thing, somebody is in an accident and the
3 force of an airbag --- I don't know if you were here.
4 I've heard that an airbag --- what's your estimation
5 of the force of an airbag coming out, have you ever
6 heard?

7 A I can't say with any specifics. Yes, I mean,
8 it's a nice size.

9 Q Okay.

10 A It's there to keep you in your seat.

11 Q If somebody says it's 150 to 200 miles an hour,
12 would that sound right to you?

13 A That is plausible, yes.

14 Q And you said you've seen marks on faces?

15 A Uh-huh.

16 Q Have you seen broken faces, maybe broken noses
17 from it, broken bones?

18 A I've seen some broken bones from it, as far as
19 placing children in the front seats with airbags,
20 especially if a vehicle is struck, where you actually
21 turn the airbag off, but no, I've not personally seen
22 anyone with a fracture or broken facial.

23 Q Even a slight fracture?

24 A I have not, no, sir.

25 Q Have you all ever done that, though?

1 A Done what?

2 Q Have you ever x-rayed somebody perhaps to see if
3 there was a slight fracture?

4 A I've never done x-rays, but I have had x-rays
5 done.

6 Q That's what I mean.

7 A Okay.

8 Q Do you have --- have you ever had a suspect
9 x-rayed to see?

10 A Huh-uh, I don't think that's normal protocol.

11 Q Okay. Do you remember this part of the
12 interview: You tell him and you tell him several
13 times it's time to help yourself out. You didn't help
14 out Melvin. It's time to help yourself out, and you
15 tell him, do you remember your dog attacking, and you
16 remember crawling into bed. Do you remember his
17 answer to that?

18 A (There was no response.)

19 Q Do you remember him saying, "Not really."?

20 A Read that again.

21 Q You remember your dog attacking you. You
22 remember crawling into bed.

23 A No, the question before that.

24 Q You didn't help your friend out. Now, it's time
25 that you can help yourself out.

1 A That was right after he had said, "I'll help
2 anybody out if I was in my right mind."

3 Q That was later on.

4 A Okay. Later on --- that sounds like it's about
5 that time.

6 Q That's later on. Do you remember him saying,
7 "Not really."?

8 A Uh-huh.

9 Q Do you remember him saying, "There wasn't an Ice
10 House in my car. There was Ice House at my house."?

11 A There was Ice House in his car.

12 Q Do you remember him telling you there wasn't Ice
13 House in his car. Do you remember that?

14 A I believe he said that he did not purchase Ice
15 House.

16 Q You looked at his credit card, did you see him
17 purchasing any Ice House?

18 A It doesn't show the purchase of Ice House.

19 Q You didn't look at Melvin Wright's, so you can't
20 tell if he purchased it, can you?

21 A No, sir.

22 Q Here is another part. After you told him how a
23 jury is going to feel with his story, you tell him,
24 "You need to come clean." You say that. Do you
25 remember saying that to him? Do you remember hearing

1 that?

2 A No, I don't believe I said that. I believe I
3 said, "You need to take responsibility." I believe I
4 also said that people understand, people make
5 mistakes.

6 Q And this is before his alleged confession?

7 A They don't understand people who deceive or use
8 deception or lie about it. I believe that's what I
9 was saying.

10 Q Okay. But at some point do you remember before
11 he makes this confession, you say to him one of your
12 many times, "You need to tell the truth." He says, "I
13 am." Then at some point just right after that when it
14 appears that you're not taking no for an answer, he
15 says --- that's when he starts giving y'all what you
16 want to hear. Do you remember that being sort of the
17 course of the way things go?

18 A I believe at that time is when he start taking
19 responsibility, yes, sir.

20 Q He says, "I was thrown around in the car, I
21 guess."

22 A He probably was thrown around in the car, yes,
23 sir.

24 Q Okay. And he says at that point, "I don't know
25 what else to tell you." Do you remember him saying

1 that?

2 A Is that after I asked him, "Is there anything
3 else you want to tell me?"

4 Q No. This is before you start telling him, before
5 you guys go and have a little meeting?

6 A Okay.

7 Q And this is when, I submit to you, he was saying
8 he wants to stop. Did you see that as him saying he
9 wants to stop?

10 A No, sir.

11 Q And at a point when he says, "I don't know what
12 else to tell you," you didn't think to tell him,
13 "Well, you know, you have the right to stop at any
14 time."?

15 A No, sir.

16 Q And then you guys go and have a little meeting.
17 What is that little meeting, Trooper Coats?

18 A The meeting was with First Sergeant Borowski and
19 Lance Corporal O'Donnell and walk in and ask them if
20 there anything I'm forgetting to ask him. What else
21 do I need to ask him. If there's anything they want
22 to ask him. Are we forgetting anything? Are we not
23 covering the questions that we need to cover?

24 Q Okay. Then you all come back in?

25 A Then we come back in. Then he is obviously able

1 to remember some other stuff.

2 Q No, no. Before that you say that's when you
3 point out the stuff in his beard.

4 A Is it then or is it after that?

5 Q It is then.

6 A Okay.

7 Q I mean, I may be remembering it wrong, and
8 they'll have the tape, but it's then.

9 A Okay.

10 Q Why don't you mention it before then? You've
11 been staring at him in the face, right?

12 A No, not necessarily.

13 Q Where are you sitting, across from Donnie?

14 A I'm sitting at the end of the table. I believe
15 O'Donnell is here, First Sergeant Borowski is here and
16 Donnie is in the middle of us.

17 Q So he's surrounded by officers?

18 A No, sir, not surrounded. He is on his side.
19 We're on this side. First Sergeant Borowski is on the
20 end. I believe he was taking a couple of phone calls
21 just on the troop business during the time of the
22 investigation also.

23 Q Okay. All right. Let me get this straight. I'm
24 Donnie.

25 A Uh-huh.

1 Q Who is to my right?

2 A Nobody.

3 Q Who is directly across from me?

4 A Possibly nobody.

5 Q Who is to my left?

6 A Triangle. Here's the table, you're Donnie. I'm
7 here, O'Donnell is here, and Borowski is at the end.

8 Q Okay. So I'm staring at O'Donnell?

9 A Probably staring at the wall if you're staring
10 straight ahead.

11 Q Okay.

12 A If he turns and looks, he'll see me. If he turns
13 this way, he'll see O'Donnell, and if he turns this
14 way, he'll see First Sergeant Borowski.

15 Q And there is a table longer than this between you
16 all?

17 A Yeah, maybe the size of ---

18 Q This?

19 A Maybe, the metal table.

20 Q But still a small table.

21 A Small table.

22 Q And at no point, until then, do you say, "Hey
23 dude, what about the glass in your beard?"

24 A I say that at that point in the audio.

25 Q But before that you never mention it, right?

1 A I didn't see anything.

2 Q Before you go outside with Borowski.

3 A I thought you said it was before then, before we
4 went out to ---

5 Q No, no, no. You say it immediately after coming
6 out of that little meeting.

7 A Okay.

8 Q Did they tell you to point that out to him?

9 A I cannot recall that, no, sir, and I don't know
10 if it was me that actually said anything about the
11 glass in his beard. I believe that might have
12 been ---

13 Q Yeah, but you remember it, right?

14 A I remember hearing it on the tape, yes.

15 Q Do you remember seeing it?

16 A Yes, after it was pointed out.

17 Q But you didn't collect it?

18 A I also remember seeing the marks on his arms.

19 Q Okay. And you knew there were pictures of that,
20 right?

21 A Yes, sir.

22 Q Did you assume that maybe your other officers had
23 taken pictures of the glass in his beard?

24 A That could be a possibility.

25 Q And that's why you ---

1 A I did not ---

2 Q --- as somebody who collects evidence decided not
3 to take the evidence in the dude's beard?

4 A Because it was on his clothing.

5 Q It was in his beard that you saw in his beard?

6 A But also on the clothing that he said he was
7 wearing.

8 Q Right. But there was still --- you're staring at
9 a guy with glass in his beard is what you're telling
10 me, sitting at a table of that length?

11 A I wouldn't say that I was staring at the guy. Was
12 the guy across from me? Yes, he was across from me.
13 Was it noted that he had glass in his beard, yes, we
14 noted that he had glass in his beard.

15 Q But you didn't collect it.

16 A I did not collect it, but I did collect his pants
17 and his shirt.

18 Q Yeah, because you collect evidence?

19 A Right.

20 Q That's not evidence, glass in a beard?

21 A (There was no response.)

22 Q And then as you start moving in and he starts
23 making a confession, an alleged confession in my
24 opinion, a confession in yours, right?

25 A I believe that's when he started taking

1 responsibility, yes, sir.

2 Q And he says, "I don't know what happened, maybe I
3 saw a deer. Maybe I was using the remote on my
4 radio."

5 A Uh-huh.

6 Q All these possibilities that he's throwing out at
7 this point, right?

8 A Uh-huh.

9 Q And he says, "I swerved probably," and what do
10 you tell him at that point?

11 A I said, "No, that's not the way it happened."

12 Q "No, you didn't swerve." You tell him that,
13 right?

14 A Uh-huh.

15 Q Because that's your opinion of what happened,
16 right?

17 A My opinion of what happened ---

18 Q Is that he just drove off the road?

19 A --- is what the evidence shows.

20 Q Yes, it's your opinion based on the evidence?

21 A That is what the evidence shows.

22 Q Okay. I'm not trying to fool you.

23 A No, I understand.

24 Q Okay.

25 A I want to make sure that I'm answering your

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1 questions correctly.

2 Q Because at some point, he says that he thinks he
3 jerked the wheel and you said, "You didn't jerk the
4 wheel."

5 A That's right.

6 (Pause.)

7 Q All right. I'm getting close to finishing.

8 A Do you mind if I get a cup of water right quick?

9 Q No. I'm sorry.

10 (Pause.)

11 A Thank you, sir.

12 Q Yes, sir.

13 Trooper Coats, as part of your investigation, you
14 also draw up my --- Donnie's phone records?

15 A Yes, sir.

16 Q And his credit card report, right.

17 A Yes, sir.

18 Q And I've already asked you this, but I'm going to
19 ask you again. You don't draw up anybody else's,
20 right?

21 A No, sir.

22 Q You've got one suspect?

23 A Yes, sir.

24 Q You've got your man?

25 A The evidence points to Donnie, yes, sir.

1 Q Okay. They talk about the First 48, right? Did
2 you ever watch that show?

3 A No.

4 Q The First 48 is supposedly --- to catch someone
5 within that first 48 minutes --- or 48 hours.

6 A Yes, sir.

7 Q In your case that's 48 minutes?

8 A I don't know how long it was.

9 Q But how important it is that you get somebody
10 right away, right?

11 A I'm not sure if I'm tracking your question.

12 Q Okay. What I'm just getting to is that in your
13 opinion, there is no other suspect when you're
14 questioning him, right?

15 A No, sir.

16 Q And you guys didn't --- did you look at some of
17 the phone calls that Donnie made or the phone calls
18 that came in to him?

19 A I believe that was just the ones after the wee
20 hour morning. There were several --- two incoming and
21 nothing outgoing until that afternoon.

22 Q And you checked into those, right? You checked
23 into who those people were?

24 A No, sir. I just know there wasn't a call made to
25 9-1-1 stating that I --- "Hey, my friend is here in

1 the car upside down. I don't think he is alive," no,
2 sir.

3 Q Were there calls that you checked on that might
4 have been --- were there any calls between 5:00 a.m.
5 and 9:15? Check your notes.

6 (Pause.)

7 A There was an outgoing call at 3:20 a.m., incoming
8 at 4:25, incoming at 4:58, and the next one was not
9 until 4:35 p.m., which was my cell phone number.

10 Q 4:35 p.m.?

11 A Yes, sir.

12 Q I see you have the same number.

13 What was the call at 4:58 a.m.? What was that
14 call?

15 A The call at 4:58 a.m. was one minute duration,
16 incoming call.

17 Q Did you check whose number that was?

18 A No, sir. There were no outgoing calls to 9-1-1.
19 He does not have a house phone at his house. He
20 didn't call for help.

21 Q Okay. I understand that, but I'm ---

22 A He said he wasn't in his right mind or he
23 probably would have been able to do that.

24 Q I'm still asking you about your investigation.

25 A Okay.

1 Q You didn't check into these numbers at 4:58 a.m.
2 or 4:25 a.m.?

3 A No, sir.

4 Q What if those were calls --- what if y'all
5 checked who those people were and they said, "Yeah,
6 Donnie called me then."?

7 A No, sir, those were incoming calls.

8 Q Okay, then, "Yeah, I called Donnie then. He told
9 me that he's driving Melvin." Wouldn't that be
10 something nice to have?

11 A We didn't check.

12 Q You didn't check?

13 A We checked to make sure there weren't any calls
14 to any law enforcement, EMS, to anyone who could help
15 him.

16 Q We got that. We got that. You made your point.
17 Did you check Melvin's phone to see if there were any
18 calls that he made?

19 A No, sir.

20 Q Credit card bill. Tell us about what are
21 the --- what you got from the night of 6/20?

22 A Track Side Tavern. Well, let's do it, I guess,
23 in chronological order. C.R. Station House in
24 Columbia, \$7 at 4:48 --- well, again, let me do it in
25 order.

1 Woods Fire Pizza, Columbia, 0101; Friends 0552;
2 C.R. Station House, 0441 and 0501 Track Side Tavern.

3 Q And Woods is Brixx, right?

4 A I think that's correct.

5 Q All right, sir. Parts of your phone records, did
6 you look into text messages?

7 A Nope.

8 Q You didn't look into text messages?

9 A They're not there. We asked for everything that
10 AT&T would supply. That's what they supplied.

11 Q You don't have a record of --- I think it just
12 says data transfer. You don't have that?

13 A Huh-uh.

14 Q Again, not to beat a dead horse. You've got to
15 be careful saying that in Camden.

16 A Especially this coming weekend.

17 Q Yes. Did you --- you don't have personal
18 knowledge of what happened, personal knowledge of the
19 car wreck? You just have the evidence that you
20 gathered, right?

21 A Was I in the back seat when it happened, no, sir.

22 Q I mean, it's kind of --- you don't have any
23 eyewitnesses except for Donnie, right?

24 A That's right; and Melvin.

25 Q Well, testifying, unfortunately?

1 A Yes, sir.

2 MR. POSTIC: Beg your indulgence on that.

3 (Pause.)

4 MR. POSTIC: No more questions. Thank you so
5 much.

6 THE COURT: Redirect?

7 REDIRECT EXAMINATION:

8 BY MR. PERRY:

9 Q Just a couple of quick points. There was some
10 issue made, Trooper Coats, about the damage to the
11 vehicle, to the passenger's side versus the driver's
12 side?

13 A Yes, sir.

14 Q Specifically as it relates to the cutting open of
15 the passenger side in order to extract Melvin?

16 A Yes, sir.

17 Q And that the vehicle had somehow been altered?

18 A Yes, sir.

19 Q Was the driver's side altered in any way? Was it
20 cut open for anybody to be extracted?

21 A No, sir.

22 Q So the way it looks in those photos would have
23 been very much, if not exactly, the way it looked when
24 the accident occurred or immediately following the
25 accident, correct?

1 A Yes, sir.

2 Q Okay. And there is clearly no doubt that the
3 passenger's side of the vehicle was damaged to the
4 point that it was not survivable, correct?

5 A Yes, sir, that's correct.

6 Q And that had nothing to do with the vehicle being
7 cut open, correct?

8 A Yes, sir, that's correct.

9 Q And there was a little bit of a to-do made about
10 false confessions. Do you believe that what Donnie
11 Thigpen eventually told you towards the culmination of
12 this interview, do you believe that to be a false
13 confession?

14 A No, sir.

15 Q What is it about the facts of this case, the
16 evidence uncovered by your investigation up to that
17 point, and any investigation that you conducted
18 subsequent to that point that causes you to state
19 today that you do not believe that was a false
20 confession?

21 A Because the evidence and finally, I guess ---

22 Q Specifically what evidence?

23 A The evidence, the airbag marks, okay. His
24 ability to recall specific details and then getting to
25 the point of confession, the DNA evidence from the

1 airbag, the DNA evidence from the headliner.

2 The injuries to his forehead and the injuries to
3 the inside of his arm, being his vehicle, being his
4 house less than a quarter mile away leads me to
5 believe that Donnie Thigpen was the driver of that
6 vehicle that night in which Melvin Wright was killed.

7 Q And there's been a lot made of the shards of
8 glass in the beard?

9 A Yes, sir.

10 Q Were these big jagged shards of glass hanging in
11 the hair of his face?

12 A No, sir.

13 Q Or were they little tiny crystals of glass like
14 we saw whenever we opened up the packet?

15 A The same size as in the packet that was displayed
16 to the jury.

17 Q There's been a lot made about tests that they
18 didn't do in this case. Contact the federal
19 government, NSA, anything like that --- did you see
20 whether or not they had any satellites that were
21 tasked over Elgin that morning to see whether or not
22 they have discerned Donnie Thigpen walking home after
23 this?

24 A It would be nice if we had access to that, but we
25 don't have access to that. That's out of our control.

1 Q Very well. Not to be funny, but why, did you not
2 test any of these other things?

3 A There was no need to. I mean, there was
4 no --- no need to. We had the DNA evidence from the
5 airbag. We had the evidence from the headliner. I
6 mean, there is no need for that.

7 Q Marks on the arm?

8 A Marks on the arm. There was no need.

9 MR. PERRY: No further questions.

10 MR. POSTIC: No recross. Thank you.

11 THE COURT: You may come down. Thank you very
12 much.

13 THE WITNESS: Do I leave this here?

14 MR. PERRY: Yes, leave it.

15 THE COURT: We'll take care of it.

16 All right. Ladies and gentlemen, let's take a
17 short break and I'll --- during the break, I'm going
18 to check with the attorneys about rest of the day's
19 schedule, so just go to your jury room, and don't
20 discuss the case among yourselves while you're in the
21 jury room. We'll see you in a few minutes.

22 (WHEREUPON, the jury left open court at
23 approximately 3:43 p.m.)

24 THE COURT: Approach the bench counsel, please.

25 (WHEREUPON, there was a bench conference.)

1 (WHEREUPON, State's Exhibit Numbers 138 through
2 143 were marked for identification only.)

3 (WHEREUPON, State's Exhibit Numbers 141 and 142
4 were admitted into evidence.)

5 (WHEREUPON, a short break was taken.)

6 THE COURT: State ready for the jury.

7 MR. MOAK: Yes, Your Honor. State's 141 and 142
8 are the chain of custody forms that I think have been
9 stipulated to, just for the court reporter's purposes,
10 and to make sure they get marked in.

11 THE COURT: On the record.

12 MR. POSTIC: Your Honor, on the record, as I
13 stated earlier, the solicitor's office, rather than
14 bringing in all these chain witnesses, I asked the
15 solicitor's office to indicate to me that these people
16 are still working at SLED in the Department of Public
17 Safety. They showed me proof of service on all these
18 folks that are just --- who have no other purpose than
19 just to establish the chain. In the interest of time,
20 I decided to stipulate to step up that.

21 THE COURT: All right.

22 Ready for the jury?

23 MR. MOAK: Yes, Your Honor.

24 THE COURT: Bring the jury.

25 (WHEREUPON, the jury came into open court at

1 approximately 4:06 p.m.)

2 THE COURT: All right. Solicitor, call your next
3 witness.

4 MR. MOAK: The state calls Verona Gibson.

5 VERONA GIBSON,

6 after being duly sworn, testified as follows:

7 THE WITNESS: My name is Verona Gibson.

8 DIRECT EXAMINATION:

9 BY MR. MOAK:

10 Q Ms. Gibson, where are you employed at?

11 A South Carolina Law Enforcement Division, commonly
12 referred to as SLED.

13 Q How long have you been working at SLED?

14 A Almost four years.

15 Q And what do you do at SLED?

16 A I am a forensic technician in the DNA evidence
17 processing department.

18 Q And what does that mean?

19 A We get in larger pieces of evidence and process
20 those for bodily fluids, ownership, touch DNA and
21 hairs and send those findings up to the DNA department
22 for analysis.

23 Q So when something gets submitted, do you check it
24 first to see if there is anything to actually test?

25 A If it is a larger item, yes, sir.

1 Q And you've been doing this four years?

2 A Approximately, yes, sir.

3 Q And what did you do before this job?

4 A I worked in retail.

5 Q Okay. But do you have any --- what's your
6 specific education, training or experience that
7 qualifies you for the job?

8 A I have an associate's degree from Greenville
9 Technical College in public safety and criminalists.
10 I went through extensive on the job training with
11 SLED, they make us prove that we can identify all the
12 bodily fluids that we are able to test for, can do
13 ownership and touch DNA before we are allowed to work
14 on our own, which took approximately six months.

15 Q So a six months training program?

16 A Yes.

17 Q You still work there, so I'm assuming you passed?

18 A Yes, sir, I did.

19 Q Do you have any regular in-service training?

20 A Not in-service training, but we are tested every
21 year to determine that we are still competent to do
22 our jobs.

23 Q And you've been doing this for the past four
24 years?

25 A Approximately, yes.

1 Q On an average week, how much stuff, how many
2 items do you normally have to process?

3 A On the average, I would say 20 to 30 items a
4 week.

5 Q So it's like 50 work weeks or so a year, so ---

6 A Yes, sir, that's a lot.

7 Q That's a lot. Have you ever had to testify
8 before?

9 A I have, yes, sir.

10 Q Have you been offered as an expert in the area of
11 forensics evidence processing?

12 A Yes, sir, I have.

13 Q Have you ever been accepted?

14 A Yes, sir.

15 MR. MOAK: Your Honor, at this time I would offer
16 Ms. Gibson as an expert in the field of forensic
17 evidence processing.

18 MR. POSTIC: No voir dire, no objection.

19 THE COURT: No voir dire, no objection.

20 BY MR. MOAK:

21 Q Specifically on the case we're talking about, and
22 I think it has a lab number of L097604, I believe?

23 A Yes, sir.

24 Q I think there were some other items that you were
25 asked to examine. I'm going to show you what's been

1 marked State's 110. It's a picture of, I guess, the
2 beginning of what --- one of the items you may have
3 examined.

4 I don't think I have a picture of the actual
5 cutting.

6 A It's possible. I have that it was a gray in
7 color piece of a headliner. This appears gray, but I
8 can't really tell what it is.

9 Q So you were asked to examine an item that was
10 marked as a gray piece of headliner?

11 A Yes, sir.

12 Q Okay. And that was --- what item number was
13 that?

14 A That was our item number 5.

15 Q Item number 5?

16 A Yes, sir.

17 Q Now, that item, what did you do with it?

18 A I originally examined it to see if there were any
19 stains that looked like it possibly could be blood.

20 Q Uh-huh.

21 A We would then do a chemical test and it tells if
22 there is a possibility that blood could be in the
23 stain.

24 Q Okay.

25 A We would cut that area and forward it to the DNA

1 department.

2 Q And that's what you did?

3 A Yes, sir, it is.

4 Q And that ultimately went to Catherine Leisy, is
5 that how you say it?

6 A Leisy.

7 Q And she is actually the one that actually did the
8 DNA test?

9 A She does a confirmatory test, yes, sir.

10 Q I'm going to show you what's being marked State's
11 138 and 139, see if you recognize these two pictures?

12 A Yes, sir, these are the photographs I took of our
13 item number 8.

14 Q And that's the airbag?

15 A Yes, sir.

16 MR. MOAK: Your Honor, at this time I'd moved 138
17 and 139 into evidence.

18 THE COURT: Any objection?

19 MR. POSTIC: No objection.

20 (WHEREUPON, State's Exhibit Numbers 138 and 139
21 were admitted into evidence.)

22 BY MR. MOAK:

23 Q Item 138 is that what you call the back of the
24 airbag?

25 A Yes, sir, that is what I labeled as the back of

1 the airbag.

2 Q Does it have a circle and an 8.1 mark by it?

3 A It does, yes, sir.

4 Q And that's your item, 8.1?

5 A Yes, sir.

6 Q And 8.1, is that an area that you identified
7 possible DNA off of?

8 A It was positive for the presumptive test of
9 blood, yes, sir.

10 Q And did you swab the whole airbag?

11 A The top part of the airbag avoiding any stain
12 areas that I did, yes, sir.

13 Q And that's 8.3?

14 A Yes, sir.

15 Q Is that marked on State's 139?

16 A Yes, sir, it is.

17 Q And 139, I think you marked that as the front of
18 the airbag?

19 A Yes, sir.

20 Q And the difference between the front and the back
21 is that the back was cut loose?

22 A It appeared to be cut from the steering column,
23 yes, sir.

24 Q And on the front, is there item 8.2 on there?

25 A Yes, sir.

1 Q Is that another area that was positive for
2 something?

3 A It was positive for the presumptive test for
4 blood, yes, sir.

5 Q The presumptive test, is that the same thing you
6 did on the headliner?

7 A Yes, sir, it is.

8 Q What do you do? Do you actually cut that out of
9 headliner, or how do you get that out of the headliner
10 --- I mean, the airbag?

11 A We take scissors and just cut a small area out
12 and then repackage that small area and forward that to
13 the DNA department.

14 Q And you sent that to Catherine Leisy, as well?

15 A Yes, sir.

16 Q Is that what you did in this evidence?

17 A Yes, sir.

18 MR. MOAK: No further questions of this witness.

19 THE COURT: Cross-examination?

20 CROSS-EXAMINATION:

21 BY MR. POSTIC:

22 Q Good afternoon, Ms. Gibson. Do you work in
23 Columbia?

24 A Yes, sir, I do.

25 Q On Broad River Road?

1 A Yes, sir.

2 Q Okay. And you've been there for four years; is
3 that correct?

4 A Approximately, yes, sir.

5 Q Okay. And how many technicians are there that do
6 the same sort of job that you do at SLED?

7 A Currently there are two.

8 Q Two. You and?

9 A Betty Butler.

10 Q Okay. And forgive me, you know, I'm not an
11 expert in DNA, but your job is just to collect
12 collection swabs of materials and that sort of thing;
13 is that right? In this case; is that what we're
14 testifying to?

15 A In this case, I took cuttings from the two items
16 that were submitted to me that tested positive for the
17 presumption test for blood and then a swab from the
18 airbag.

19 Q Was there a presumptive test done on that front?

20 A The swab, no, sir, that is for like a touch DNA
21 transfer.

22 Q Okay.

23 A Rather than an actual bodily fluid.

24 Q And what is touch DNA?

25 A Touch DNA is when you touch something or rub

1 against something, you can leave skin cells behind.

2 Q Okay. That's like in the movies when you see
3 them take a can or something like that; they follow
4 the suspect and they drop their soda can in a ---

5 A If they swab the outside of the soda can, yes,
6 sir.

7 Q They can get some --- because there's saliva,
8 too?

9 A Yes, sir.

10 Q But if they were just doing the side it would be
11 touch DNA?

12 A Yes, sir.

13 Q And in this case we have got --- I think we're
14 talking about four items; is that right, that were
15 actually submitted for testing?

16 A There were four sub items.

17 Q Four sub items?

18 A That's what we refer to them as.

19 Q Okay.

20 A They were not the parent item. They were
21 cuttings or swabs that I took off the parent item.
22 That's just a technicality with us, I guess.

23 Q Okay. Because if I look at --- and you have this
24 report in front of you?

25 A That appears to be a DNA report, not an ---

1 Q Okay.

2 A --- not an evidence processing report.

3 Q I apologize. That's correct. So the
4 four --- are we just talking about four items that you
5 dealt with then, the headliner and then three from the
6 airbag; is that correct?

7 A Right. One cutting from the headliner and then
8 three items off the airbag, two cuttings and a swab.

9 Q Okay. And there's one swab. Yeah, okay, sorry -
10 -- one with touch DNA and then three with blood; is
11 that correct?

12 A Two with blood, well, one from the headliner that
13 was possible blood, two from the airbag that were
14 possible blood and one from the airbag that was a
15 touch ownership swab, yes, sir.

16 Q Okay. And the blood ones you said you do a
17 presumptive test on those?

18 A Correct.

19 Q What is a presumptive test? How do you do that?

20 A It is a chemical test. We swab the area with a
21 wet, almost like a Q-tip. We drop two chemicals on
22 it. If there is a color change, there is a
23 possibility that that substance is blood.

24 Q Okay. On the Q-tip itself?

25 A Yes, sir, we don't touch the actual evidence

1 itself. We swab the evidence and test the swab.

2 Q Okay. So for instance if you had a spot like
3 this, you would take a Q-tip to that?

4 A Yes, sir.

5 Q And then drop two drops on it, and then if it
6 turns to a different color, it could potentially be
7 blood?

8 A Correct.

9 Q Okay. And you have no knowledge of what the case
10 is about?

11 A No, sir, just the incident reports we get in case
12 we need to determine what type of testing to do.

13 Q Okay. And so there was a match for blood, the
14 presumptive test. Forgive me if I'm getting it all
15 wrong. I was terrible in science.

16 There is a presumptive test for blood on the
17 headliner?

18 A Yes, sir.

19 Q Bingo. There is a presumptive test for blood on
20 the backside of the airbag?

21 A Yes, sir.

22 Q Bingo, two. There is a presumptive test for
23 blood on the front side of the airbag, right?

24 A (Nods in the affirmative.)

25 Q Bingo. And then there is a swab of the front?

1 A Yes, sir.

2 Q That is just --- is just touch, right?

3 A Right.

4 Q Okay. And even if the airbag itself, the picture
5 of the airbag --- can you tell which side is the front
6 and which side is the back?

7 A Yes, sir.

8 Q Do you have that in front of you?

9 A I do, yes, sir.

10 Q Mine are black and white. It's no big deal.

11 Let me ask. I'm going to ask her. Which one is
12 the front and which one is the back, if I could?

13 A The one that has 8.1 facing up is what we
14 consider the back.

15 Q Okay.

16 A You can't see 8.1 from the front view.

17 Q I see that. Okay. And did you circle on there
18 the blood; is that correct, the blood spots?

19 A The spots that I cut out, no, sir. The circles
20 are not still there. They go with the cutting.

21 Q Okay.

22 A But there is the 8.1, which is right beside where
23 I took the cutting.

24 Q Okay.

25 A And then the other circle that is right beside

1 that 8.1 is another area that was positive for the
2 presumptive test.

3 Q Oh, okay.

4 A So we do usually two spots or so around each
5 cutting that we take so that we leave one and we take
6 one.

7 Q Why didn't you do a touch on the backside?

8 A It's not usually a place that's greatly impacted
9 by the person stopped by the airbag.

10 Q Oh really? I thought it came up against your
11 arms?

12 A They are usually clothed.

13 Q Okay. Even in the hot South Carolina?

14 A Not always, not always, but our policy is to
15 always do the top and if it's asked for we can do the
16 back.

17 Q And it wasn't asked for in this case?

18 A No, sir.

19 Q Can I see yours? I don't have a color printer.

20 A Sure.

21 Q Can you determine the age of blood on a spot?

22 A Not that I'm aware of.

23 Q Is it possible to do that?

24 A Not that I'm aware of.

25 Q Okay. So there is no way of knowing whether a

1 blood spot is fresh or not unless it's wet?

2 A Not that I'm aware of.

3 Q So unless it's wet, you can't tell whether it's
4 fresh or not?

5 A Not that I'm aware of, no, sir.

6 Q Okay. Thanks so much for coming here from
7 Columbia.

8 MR. POSTIC: I have no more questions.

9 THE COURT: Redirect?

10 MR. MOAK: Briefly, Your Honor.

11 REDIRECT EXAMINATION:

12 BY MR. MOAK:

13 Q On these pictures, on 139 you swabbed for touch,
14 right?

15 A Yes, sir.

16 Q And on 138 where you didn't swab, you kind of
17 see --- on that same number it bled through?

18 A Yes, sir, it bled flu on the front.

19 Q So you can actually like orient that and kind of
20 orient the two pictures using the bleed through?

21 A Yes, sir.

22 Q And 8.1 is that kind of near the outside edge of
23 the airbag?

24 A Yes, sir, it's very close.

25 Q Okay, thank you.

Direct of Leisy by Moak

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1 MR.MOAK: No further questions, Your Honor.

2 THE COURT: Anything?

3 MR. POSTIC: (Indicating in the negative.)

4 THE COURT: All right. Ma'am. Thank you very
5 much. May this witness be excused?

6 MR. POSTIC: Absolutely.

7 THE COURT: You're free to go. Thank you very
8 much.

9 MR. MOAK: Next we'd call Catherine Leisy.

10 CATHERINE LEISY,
11 after being duly sworn, testified as follows:

12 THE WITNESS: Catherine Leisy, L-E-I-S-Y.

13 DIRECT EXAMINATION:

14 BY MR. MOAK:

15 Q Where are you employed, Ms. Leisy?

16 A I work for the South Carolina Law Enforcement
17 Division, also known as SLED.

18 Q What do you do there?

19 A I'm a forensic scientist assigned to the DNA and
20 serology department.

21 Q So you actually perform DNA analysis?

22 A Yes, I do.

23 Q What specific training, education, and experience
24 do you have to be an expert in this field?

25 A I have a bachelor of science degree in genetic

1 engineering from Cedar Crest College in Allentown,
2 Pennsylvania. I spent approximately four years as a
3 forensics DNA analyst at a private testing facility
4 at Cellmark in Germantown, Maryland, where we did the
5 same type of testing and analysis that I do at SLED.
6 I have received in-house training at SLED in any type
7 of test or analysis required to perform in the course
8 of my work, and I'm required to attend continuing
9 education, which consists of training or seminars
10 specific to the types of analysis that we do in DNA
11 testing.

12 Q And how long have you been with SLED?

13 A Just short of six years now.

14 Q And before that where did you work?

15 A Worked at Cellmark in Germantown, Maryland.

16 Q So how long have you been working in this field?

17 A For approximately ten years.

18 Q Okay. Now, approximately how many items have you
19 had to analyze for DNA in the past ten years?

20 A As far as individual items, I would say several
21 thousand.

22 Q And how many --- have you ever had to come to
23 court and testify to any of those results?

24 A Yes, I have.

25 Q How many times?

1 A I testified on approximately 40 occasions in
2 different jurisdictions throughout South Carolina,
3 California, Massachusetts, New Jersey, the District of
4 Columbia and the United States District Court.

5 Q Have you been offered as an expert in the field
6 of DNA analysis?

7 A Yes, I have.

8 Q Have you been accepted as an expert in that
9 field?

10 A I have.

11 MR. MOAK: Your Honor, at this time I'd offer
12 Ms. Leisy as an expert in the field of DNA analysis.

13 THE COURT: Any objection or voir dire?

14 MR. POSTIC: Neither, Your Honor, thank you.

15 THE COURT: You may proceed.

16 BY MR. MOAK:

17 Q Now, specifically on this case, were you --- I'm
18 going to show you what's marked State's 140.

19 A Yes, sir.

20 Q Is that a copy of the report that you prepared?

21 A It is.

22 MR. MOAK: Your Honor, at this time, Your Honor,
23 I'd move State's 140 into evidence, I believe without
24 objection.

25 MR. POSTIC: Without objection.

1 THE COURT: Admitted without objection.

2 (WHEREUPON, State's Exhibit Number 140 was
3 admitted into evidence.)

4 BY MR. MOAK:

5 Q Now, that's the report you did after you had done
6 your analysis, correct?

7 A Correct.

8 Q Now, can you tell us what you did to do the
9 analysis?

10 A I performed initial testing on several of the
11 items that I received to determine whether or not
12 there was possibly blood present on those items. I
13 then proceeded to develop DNA profiles from several of
14 the items of evidence to be used in comparison with
15 the DNA profile of a known individual to determine
16 whether or not that individual could have been a
17 contributor of the DNA on items found at the scene.

18 Q So you actually had, I think it was item 3, the
19 buccal swab?

20 A Correct, SLED item 3 is identified as a buccal
21 swab from Donnie Thigpen.

22 Q And that actually --- you have to have a standard
23 to test to match this, right?

24 A Correct, a profile developed from an item is used
25 as basically the benchmark of that individual to

1 compare to the evidence to determine if the profiles
2 match.

3 Q Now, did you find any other items that had
4 possible DNA evidence on them?

5 A I was able to develop DNA profiles that were
6 suitable for interpretation on three items of
7 evidence.

8 Q Can you tell us what the results were of that
9 comparison?

10 A The DNA profile that I developed from a cutting
11 that was taken from the headliner that was taken from
12 the Jeep and the DNA profile from the back of the
13 driver side airbag matches the DNA profile of Donnie
14 Thigpen and the probability of randomly selecting an
15 unrelated individual having a DNA profile matching
16 these items is approximately 1 in 13 quadrillion. I
17 also was able to develop a partial DNA profile from
18 the cutting from the front of the driver side airbag
19 that is from an unidentified male individual.

20 Q But did you exclude Donnie Thigpen from the
21 front?

22 A I did.

23 Q Now, the item numbers on the airbag. I think
24 it's 8.1 is the one that was matched to Donnie
25 Thigpen?

1 A That's correct.

2 Q And those numbers are the same that are on the
3 pictures of the airbag, right?

4 A It should be the number is an identifier. The
5 cutting would be taken from that location and then
6 passed on to me.

7 Q So your 8.1 is also run against 8.1.

8 A Correct, she is the one who generates that.

9 Q And your 8.2 is also run against her 8.2?

10 A Correct.

11 Q And the swab --- the headliner also matched
12 Donnie Thigpen?

13 A Yes, it did.

14 Q I think you said one in what, 14 quadrillion?

15 A One in 13 quadrillion.

16 Q How many people are on the planet right now?

17 A Current population is seven billion.

18 Q So you would have to multiple the population
19 several times to even ---

20 A It's really a measure of how likely you are if
21 you randomly selected an individual to find that they
22 had this exact profile. Essentially it means if you
23 randomly selected a person and generated a profile,
24 the probability that they would have this exact
25 profile is approximately 1 in 13 quadrillion.

1 Q I think the last page of your report, I think
2 it's the last page that has a chart that kind of
3 illustrates this?

4 A Yes.

5 Q If you'd explain that chart.

6 A The chart that's found on page four of the report
7 shows the DNA profiles themselves. It indicates what
8 items were tested. It indicates what are called short
9 tandem repeats or STR's. Those are the locations in
10 the DNA test and includes the DNA types that we find
11 at each of those locations, and we use these profiles
12 to compare the individual, in this case Mr. Thigpen,
13 to the profiles found in the evidence to determine if
14 those profiles match.

15 Q And if they don't match it's not him?

16 A Correct.

17 Q But item 8.1, and what's the number on the
18 headliner?

19 A That would be SLED item 5.1.

20 Q So 8.1 and 5.1 match Mr. Thigpen?

21 A Yes, they match his profile.

22 Q 8.2 was an unidentified male?

23 A Correct.

24 Q Can you explain what's called a partial profile?

25 A It just means that whether it was because I did

1 not obtain enough DNA from an item or the DNA was
2 degraded or broken down to an extent that I could not
3 develop a full DNA profile, it just means that some of
4 the locations I tested, I did not develop DNA types
5 with that profile.

6 Q What would cause a DNA profile to break down and
7 degrade?

8 A DNA will degrade over time, but it can also be
9 influenced by environmental factors, such as heat,
10 humidity, bacteria, enzymes, anything that comes in
11 contact with the DNA that could interrupt the
12 integrity or the continuous flow of the DNA.

13 Q And I'm assuming on 8.2 you got either an "x" or
14 a "y"?

15 A Yes, I did.

16 Q That's how you got the male and not female?

17 A Correct. In addition to the 15 STR locations, we
18 test the site for what's called amelogenin. It
19 basically gives us an "x" if we have female DNA or
20 "xy" if it's male. In this particular profile does
21 contain "xy".

22 Q But you don't have enough on the other spots to
23 match to any particular person?

24 A I don't have anyone else to compare to make a
25 match at this point. I only have Mr. Thigpen's

1 profile.

2 Q Okay. Oh, and when you test, I think you said
3 the first thing you look for is to find out if it was
4 actually blood, I think?

5 A Correct. I ran a presumptive or preliminary
6 screening test looking for the possible presence of
7 blood.

8 Q And 5.1, 8.1, were they all blood or what...

9 A My results did indicate a positive result
10 indicating the possible presence of blood for all
11 three of those items, yes.

12 Q Was there any way to tell for sure it was blood
13 and not touch on those items?

14 A That can't be determined. If you --- there's no
15 way to test for touch DNA, for the presence of it,
16 with the exception of developing the profile. I can't
17 say that the DNA profile was specifically isolated
18 from the blood, just that the cutting did contain
19 blood and I obtained this profile from the cuttings.

20 Q So the cuttings contained blood and that's
21 matched the profile you got from him?

22 A Correct.

23 Q And 8.1 was blood?

24 A It was positive for the presence of blood, yes.

25 Q And 5.1 was also blood?

1 A It was positive for that test, yes.

2 MR. MOAK: No further questions.

3 CROSS-EXAMINATION:

4 BY MR. POSTIC:

5 Q Ms. Leisy?

6 A Yes, sir.

7 Q Good afternoon.

8 A Good afternoon.

9 Q You work in Columbia, too?

10 A I do.

11 Q Do you all car pool?

12 A Yes, sir.

13 Q Good. I'm going to go real slow with you because
14 I'm not real good with science, okay. I want to make
15 sure I get this clear. I don't want to misstate
16 anything that you have said.

17 The first thing I want to do is make sure I have
18 the same report that you have in front of you and that
19 would be your report that says supplemental report?

20 A Yes, sir.

21 Q Okay. And it is four pages long?

22 A It is.

23 Q With the first page indicating the items that
24 were submitted.

25 A That's correct.

1 Q Okay. The second page showing the items
2 submitted and the results of the examination --- I
3 mean, it's going further on with more items submitted,
4 right?

5 A Yes, sir.

6 Q And then the items analyzed, correct?

7 A Correct.

8 Q The examinations that you did and then the
9 results?

10 A Correct.

11 Q Very short third page, and then a fourth page
12 that indicates a graph.

13 A Yes, sir.

14 Q Is that correct?

15 A Yes, sir.

16 Q And the only person who you attempted to match
17 any of this to is to Donnie Thigpen; is that correct?

18 A Yes, it is.

19 Q Okay. You were not given any other samples?

20 A I didn't receive any standards from anyone else,
21 no.

22 Q Okay. And the ones --- well, let's go through
23 first the items that --- for instance, there were some
24 items --- these are items that don't really have any
25 results. I'm just trying to figure out what that's

1 all about. 4.1, 4.2, 4.3, did you actually do a test
2 on those items?

3 A Yes, I did.

4 Q You did, and what were the results of those
5 tests?

6 A SLED item 4.1 was identified as swabs taken from
7 the small window of the rear door on the driver's side
8 of the vehicle. There was no human DNA obtained from
9 those swabs, just meaning when I ran my initial test
10 to see how much DNA I had, the test was negative
11 indicating there wasn't any DNA present.

12 SLED item 4.2 was a swab taken from the large
13 window of the rear door on the driver's side. I was
14 able to obtain some DNA from that item, but was not
15 able to develop a DNA profile.

16 Q Ms. Leisy, I hate to interrupt you. My report
17 says that it was from the rear passenger door, 4.2?

18 A It was indicated to me as the driver rear
19 passenger door.

20 Q Driver rear passenger door. I apologize. I'm so
21 sorry. Okay. Go ahead.

22 A I was able to obtain some DNA from that item, but
23 did not have enough or enough usable quality to
24 develop a DNA profile.

25 SLED item 4.3, which were swabs taken from the

1 driver's door handle and push button, I was able to
2 develop a very weak partial DNA profile, but it was
3 not enough that it would be suitable for comparison to
4 an individual.

5 Q On that page, which is in evidence, I'm sorry,
6 the chart that I'm looking at ---

7 A Yes, sir.

8 Q --- Donnie you have as 13, 14?

9 A At the first location, yes, sir.

10 Q Okay. Oh, I see. I see. And you have him on
11 the headliner, 13, 14, and you have him on the back as
12 13, 14, and then those are matches all the way across;
13 is that correct?

14 A That's correct, for those three headers.

15 Q Okay. And then the handle, it looks like the
16 driver door handle looks weak, but close to him, is
17 that correct?

18 A It is close, yes.

19 Q All right. Well, let me ask you this. In your
20 car, would you presume that you have Catherine Leisy's
21 DNA in it?

22 A I assume so.

23 Q And in my car Alex Postic's?

24 A Yes, sir.

25 Q Okay. Now, let's get to the matches that you

1 have. 5.1 is the headliner, which is this right here,
2 this right here, correct?

3 A I'm sorry but I didn't collect the sample.

4 Q I see. I see. Let me ask you. Can you tell if
5 that would be --- can blood be labeled as fresh or
6 not?

7 A You can sometimes have an idea, visually, based
8 on the darkness maybe how recent or old a sample is,
9 but it's not something I can pinpoint. I can't tell
10 you exactly when that sample was left.

11 Q Is there any way of testing that?

12 A There is nothing that we do to test that, no.

13 Q And in touch DNA, as well?

14 A Again, there is no way to tell exactly when a
15 sample may have been deposited, just whether or not
16 it's there when it's tested.

17 Q For blood or touch?

18 A Correct.

19 Q Okay. So it could have been left, I mean, maybe
20 not in this case, but in a home maybe a generation ago
21 even?

22 A Depending upon the environmental issues that DNA
23 is dealing with, it can be stable for several decades.

24 Q That's fascinating. Let's get to the blood DNA.

25 Okay? There is a match for blood --- let me go to the

1 airbag. There is a match for blood on the front of
2 the back, right?

3 A From the back of the airbag?

4 Q From the front of the back.

5 A There's a ---

6 Q I'm talking about 8.2?

7 A There is a partial profile developed from the
8 back, yes, sir.

9 Q Okay. And that did not match the Donnie Thigpen
10 profile that you had; is that correct?

11 A Yes, sir, that's correct.

12 Q Okay. So you would say that would match an
13 unknown human?

14 A It's just from an unidentified individual.

15 Q Okay. An unidentified individual, an unknown
16 human, front side of an airbag, and it's blood. It
17 passed the presumptive test for blood, you said?

18 A That there was blood on the cutting, yes.

19 Q Okay. I mean, you know what CODIS is, right?

20 A Yes, sir.

21 Q Do you want to explain to this jury what CODIS
22 is?

23 A CODIS stands for Combined DNA Index System. It's
24 an electronic database that's maintained by the FBI.
25 It consists of DNA profiles found at crime scenes or

1 items of evidence, as well as DNA profiles of known
2 convicted offenders.

3 Q Okay. Were you ever asked to place this sample
4 into CODIS?

5 A No, I was not.

6 Q And if you --- normally if, let's say there's a
7 DNA sample at a crime scene and they don't have a
8 suspect, let's say, and you put it into CODIS, could
9 it -- why would they do that?

10 A The purpose of CODIS is if you have unidentified
11 profiles found on items of evidence or a crime scene,
12 if you run the unknown evidence profile through the
13 database and you come up with a match, you may link
14 that crime to another crime or you may actually be
15 able to identify the contributor of that profile
16 because that profile exists in the database.

17 The issue with CODIS is that we do have to meet
18 certain guidelines and standards to determine what is
19 eligible, based on FBI guidelines, as to what we can
20 enter in.

21 Q Okay. So Ms. Leisy, nobody asked you to match
22 that unidentified sample into CODIS to see who it
23 belonged to, perhaps?

24 A The request was never made, no.

25 Q Okay. And then we have a match on the back side

1 of the airbag. Are you able to tell from that picture
2 of the airbag what side of the airbag it was, right
3 hand side, left hand side?

4 A I'm not really intimately familiar with the
5 picture. It was taken by Ms. Gibson and passed on to
6 me. I based my identification of where it was taken
7 from her notes.

8 Q And that one you did run against Donnie and it
9 matched Donnie?

10 A Yes, those profiles matched.

11 Q And again, that is blood, right, or it has the
12 characteristics of blood?

13 A Correct, it was positive for blood on the
14 cutting.

15 Q Okay. And again, that presumptive test is not
16 confirmatory, right? It's just that it has the
17 characteristics of blood; is that correct?

18 A Correct. It indicates the possibility.

19 Q Okay. And let's go to the touch DNA, okay.
20 That's a swab of --- do you have an exact marking of
21 that swab or is it of the entire front of the airbag?

22 A I don't have a marking of exactly where the item
23 was taken. I believe the paperwork indicated it was
24 taken from the front trying to avoid the areas of the
25 stain if possible.

1 Q Okay. And I see on --- you don't have that,
2 Ms. Leisy. That indicates where 8.3 would have come
3 from? It shows --- it just has arrows.

4 A You have to ask Ms. Gibson. I'm not familiar
5 exactly with her ---

6 Q I just missed my chance.

7 A --- arrows mean.

8 Q Okay. So it's a swab of the front side of the
9 airbag?

10 A That's what it indicated to me, yes, sir.

11 Q Okay. And that, I believe you say, "Insufficient
12 for reliable interpretation."

13 A Correct.

14 Q Okay. And now, Ms. Leisy, probably maybe I'm
15 reading this wrong, but if I looked at your identifier
16 table and I look at 8.3, which is the airbag front,
17 okay, would you say --- I mean, if this offends you as
18 a scientist, would you say it's a closer match to the
19 unknown person or to Mr. Thigpen? Can you say that?

20 A Comparing it to the unidentified individual, one
21 of the DNA types from that individual is consistent
22 with the DNA type I'm seeing at one location, and I
23 have the same instance at the other location, one of
24 the unidentified individual's DNA types is consistent
25 with the unidentified that I'm seeing on item 8.3.

1 Q So you're saying it's closer to the unidentified
2 human than to Donnie Thigpen?

3 A Just looking at the table, it is --- with levels
4 this low and a partial profile like this, I'm never
5 going to make a formal comparison to anyone with it.

6 Q And that --- yeah, I understand that. That's
7 very honest of you. Oh, can you --- I don't know if
8 you can tell this. I asked your colleague this
9 question. This --- can you the tell if this is a drop
10 or a smear?

11 A That's really outside my realm of expertise. I
12 don't do any type of blood spatter analysis.

13 Q Thank you for not answering.

14 MR. POSTIC: Beg the Court's indulgence.

15 (Pause.)

16 No more questions. Thank you so much.

17 THE WITNESS: Thank you.

18 THE COURT: Any questions?

19 REDIRECT EXAMINATION:

20 BY MR. MOAK:

21 Q Ms. Leisy, are you generally familiar with what
22 an airbag is?

23 A Yes, sir.

24 Q It's usually packed in a steering wheel or
25 another part to come out when you need them?

1 A Yes, sir.

2 Q Is it likely --- have you had to examine other
3 airbag swatches or anything in the past ten years?

4 A Yes, I have.

5 Q Would you expect to find blood on an airbag
6 before or after it's deployed?

7 A That depends on, you know, the circumstances of
8 the accident. There has to be some level of transfer,
9 either of bodily fluid or skin cells to that item, so
10 whether or not it's more likely after it's packed or
11 deployed. I would say it's more likely after it's
12 deployed, but you wouldn't be able to know for sure
13 unless you tested it before and after somehow.

14 Q You would have no reason to test it before it was
15 deployed, would you?

16 A No, sir.

17 Q And you said there had to be some kind of like
18 significant contact of touch or blood to do that?

19 A There would have to be some level of transfer.

20 Q Okay.

21 MR. MOAK: Begging the Court's indulgence. I'm
22 trying to pick a needle out of a haystack here.

23 BY MR. MOAK:

24 Q So you think it would be more likely that the
25 blood on the airbag would have been found on a

1 deployed airbag than an undeployed airbag?

2 A Unless during installation or manufacturing of
3 the airbag, if it had been deposited at that the
4 point. Otherwise I would say that it would be
5 difficult to make that transfer.

6 Q So the transfer --- the donor of that DNA would
7 have had to have been the one that installed it,
8 you're saying?

9 A At some point there would have to have some level
10 of contact for there to be a transfer of blood or body
11 cells.

12 Q Also, you were actually submitted another item
13 that's not listed on your report. Did you get a blood
14 vial, as well?

15 A I did receive a vial of blood from our toxicology
16 department that was labeled Donnie Thigpen.

17 Q So there is actually a vial in existence?

18 A The vial still does exist, yes.

19 MR. MOAK: Your Honor, I'm trying to find one
20 picture out of this whole stack and it's not there.
21 Okay, I've got it.

22 BY MR. MOAK:

23 Q I'm going to show you what's been marked as
24 State's 61. Is that an example --- do you see the
25 airbag right there?

1 A Yes, sir.

2 Q Is that an example of what you might call a
3 significant contact or transfer that could cause touch
4 DNA or blood DNA?

5 MR. POSTIC: Your Honor, I'm going to just pause
6 at this moment to see exactly what the solicitor just
7 handed up to the witness.

8 THE COURT: All right. Go ahead.

9 What number?

10 MR. MOAK: Sixty-one.

11 BY MR. MOAK:

12 Q Is that an example of skin to skin airbag contact
13 that would ---

14 MR. POSTIC: I would object. I don't think she
15 has personal knowledge of that and where that is
16 coming from. I don't think she can answer that
17 question.

18 MR. MOAK: Your Honor, there's been testimony of
19 the --- with the actual steering wheel is in evidence.
20 There's been testimony the airbag removed from the
21 steering wheel was actually what was tested. As a
22 matter of fact the pictures are items 138 and 139.
23 There's been testimony that's where the swabs were
24 taken from. There is testimony that is the airbag and
25 steering wheel that was tested.

1 THE COURT: What's the question?

2 MR. MOAK: I'm asking her if that picture shows a
3 significant --- let's just say skin to airbag contact
4 where you would expect some transfer of DNA, touch
5 DNA.

6 THE COURT: I overrule the objection.

7 BY MR. MOAK:

8 Q Is it?

9 A Based on the picture, it does appear that there
10 is direct contact between the airbag and this
11 individual. Really, any direct contact with the skin
12 will provide the opportunity for some level of
13 transfer. Whether or not it's enough to develop a
14 profile, I can't say, but I would expect some
15 transfer.

16 Q And also on State's 61, you see what appears to
17 be blood on that individual?

18 A There do appear to be red stains just by looking
19 at the picture. That's not enough for me to make that
20 determination.

21 Q And the front of the airbag, I think it's
22 described as the front. Does that appear to be what
23 this individual is touching?

24 A Again, I didn't take the cuttings or ---

25 Q Okay.

1 A --- assign the orientation of the airbag, so I
2 can't necessarily say what part of the airbag this
3 individual was in contact with.

4 Q So based on that picture, would you consider that
5 individual to be a possible contributor for 8.2 or
6 8.3?

7 A I would say it's possible. Again, there is
8 contact between that individual and the airbag.

9 Q But you never did his profile to test and tell
10 for sure?

11 A No, I don't have a profile from a known
12 contributor.

13 Q On 8.1, would the blood had to have been wet to
14 get on that airbag?

15 A That would have caused a greater amount of
16 transfer against a dry stain --- rubbing a material
17 against a dry stain. There may be some transfer. It
18 wouldn't necessarily cause the creation of a stain on
19 that new material. There would be some amount of
20 transfer.

21 Q But there would have to be enough to have it
22 presumptive for blood, correct?

23 A Right.

24 MR. MOAK: No further questions.

25 THE COURT: Recross?

1 MR. POSTIC: Thank you.

2 RECROSS EXAMINATION:

3 BY MR. POSTIC:

4 Q Let's say I took something about this size, okay.
5 It's made of airbag material, all right. And I put it
6 in Donnie Thigpen's car, pristine, and then I took
7 Donnie Thigpen's car and I rolled it off a cliff and
8 it bounced all over Donnie Thigpen's car. Could it be
9 assumed that there might be Donnie Thigpen --- some of
10 Donnie Thigpen's DNA on that item?

11 A I would say it would be possible, yes.

12 Q Okay. Because it's his car, right?

13 A Yes.

14 Q Okay. The solicitor shows you a picture of an
15 airbag underneath the victim in this case, okay, and
16 you can't --- can you tell us from that picture if
17 that is the victim's blood on that airbag?

18 A Based on looking at the picture, no, I cannot.

19 Q Okay. Let me ask you this. Does that
20 contaminate the scene?

21 A I wouldn't say contaminate. Contamination is
22 usually referred to as the introduction of DNA say
23 after the incident, after an item has been collected
24 and contaminated by my DNA or with something else.

25 This would just be the transfer of material at the

1 scene prior to collection.

2 Q Okay. And you were never given anybody else's
3 DNA profile other than Donnie Thigpen's, were you?

4 A No. I never received another standard besides
5 Mr. Thigpen's.

6 Q And it was never --- when it came back
7 unidentified, they never gave you another sample to
8 test, did they?

9 A No, sir.

10 MR. POSTIC: That's all I've got.

11 THE COURT: Thank you. You may come down. Thank
12 you very much.

13 May this witness be excused? Without objection.
14 You're free to go.

15 MR. MOAK: Your Honor, we have more one witness
16 we think we can get done.

17 MR. PERRY: We call B.C. Ridgeway, Your Honor.

18 BRIAN C. RIDGEWAY,
19 after being duly sworn, testified as follows:

20 THE WITNESS: My name is Brian C. Ridgeway.

21 DIRECT EXAMINATION:

22 BY MR. PERRY:

23 Q Trooper Ridgeway, where are you employed?

24 A I'm employed with the South Carolina Highway
25 Patrol, and I am a an investigator and a collision

1 reconstructionist.

2 Q You work with a particular troop?

3 A The M.A.I.T. Team.

4 Q How long have you been on the M.A.I.T. Team?

5 A Two-and-a-half years.

6 Q What's your educational background and what did
7 you do prior to being on the M.A.I.T. Team and prior
8 to being a trooper?

9 A I graduated Spring Valley High School and then
10 went in the Marine Corps.

11 Q How long were you in the Marine Corps?

12 A Two years.

13 Q And then when you came out of the Marine Corps.,
14 what did you do?

15 A I became a dispatcher for the Highway Patrol and
16 then joined the Highway Patrol.

17 Q How long have you been with the Highway Patrol?

18 A Thirteen years in January.

19 Q In your capacity as a member of the M.A.I.T.
20 Team, have you had occasion to do any work
21 with --- any work at all with the accident that took
22 place on June 20, 2009, over an Twenty-five Mile Creek
23 Road here in Kershaw County?

24 A Yes, sir, I completed the animation for it.

25 Q And what does that entail when you say you

1 completed the animation? How does that process work?

2 A I take the --- I'll take the data that was
3 collected from the scene and then in the same program
4 that we use to do the scene diagramming of it, I've
5 got a 3-D version of it. I can actually add motion
6 facts to the vehicles and adjust a few things based on
7 the evidence that was collected and anything that was
8 calculated, and it provides a 3-D wreck of what
9 happened.

10 Q Did you, in fact, collect any evidence in this
11 case?

12 A No, sir.

13 Q Do you know who did?

14 A Corporal O'Donnell, and I believe Corporal --- or
15 Sergeant Coats, now.

16 Q The evidence and information that you used to
17 create the animation in this case, did that come from
18 those two officers?

19 A Yes, sir.

20 Q In what format did you receive that?

21 A I received the --- it was actually originally
22 a --- it was an old C.A.D. program that it was
23 originally used on, and we had the DXF file for that
24 program from the points that they shot. I just had it
25 --- actually I'm not even going to say I converted it;

1 I just opened it in my program.

2 Q And your program actually takes that data and
3 puts it into a 3D format with motion, is that correct?

4 A I have to input those parameters for it before it
5 does any motion. Mine just had the ability to take
6 those same points that the other program had but they
7 also record elevation points, so my program can
8 actually read the elevation points and gives a 3D
9 rendering of it.

10 Q Trooper Ridgeway, I'm not much of a techie. I
11 don't really understand exactly how you do that. Is
12 there any particular training that you received in
13 learning how to operate that program and how to take
14 those data points and put them into that software and
15 generate these animations?

16 A Yes, sir, just on that part of it by itself, I
17 have received animation training and actually the
18 training on how to shoot the points at the scene and
19 then separate training on the animation part of it, so
20 they kind of work hand in hand.

21 Q Have you produced videos such as this one or
22 animations such as this one prior to this?

23 MR. POSTIC: Your Honor, I think we can speed
24 this up. I'm not going to object to the animation
25 coming in if you just want me to stipulate to it, it

1 will make this faster.

2 THE COURT: All right.

3 MR. PERRY: Thank you.

4 BY MR. PERRY:

5 Q Do you recognize what I'm handing up to you that
6 has been marked for identification purposes as State's
7 143.

8 A Yes, sir, that's the disk that I made for your
9 office for this case.

10 MR. PERRY: I offer it as State's 143.

11 THE COURT: Objection?

12 MR. POSTIC: Without objection.

13 THE COURT: Without objection.

14 (WHEREUPON, State's Exhibit 143 was admitted into
15 evidenced.)

16 BY MR. PERRY:

17 Q Trooper Ridgeway, we're going to play this over
18 here on the screen on the wall, if you can describe to
19 the jury what it depicts once Mr. Moak gets it up and
20 running.

21 MR. MOAK: Play the whole thing?

22 MR. PERRY: Yes, just play that copy.

23 (WHEREUPON, the video was played for the jury.)

24 BY MR. PERRY:

25 Q Based on the information that you were given,

1 that was gathered and given to you and you put in,
2 does that accurately depict and reflect how this
3 collision would have taken place?

4 A Yes, sir.

5 Q This is another view?

6 A Yes, sir, this is another camera angle.

7 Q So does all the evidence in this situation
8 suggest that the vehicle just pretty much drove
9 straight off the left side of the road?

10 A Yes, sir.

11 Q No swerving, no braking, no anything?

12 A. Nothing that I've been able to see from. As far
13 as the braking, I did have all the case photographs
14 that were taken by, I believe Sergeant Coats took
15 those photographs, and there is no --- I saw no
16 evidence of braking throughout that part of it through
17 the tire marks that go off the grass and straight into
18 the tree. They terminate at the tree and the vehicle
19 was found on the other side of it.

20 MR. PERRY: No further questions for this
21 witness, Your Honor.

22 THE WITNESS: Yes, sir.

23 CROSS-EXAMINATION:

24 BY MR. POSTIC:

25 Q No evidence of braking?

1 A None that I could see from the photographs.

2 Q Were you ---

3 A But I was not at the scene on the morning that it
4 occurred.

5 Q Right. Did they tell you what was the estimated
6 speed at the time of impact? Is that part of it when
7 you do the animation?

8 A Generally, I'll do the calculations if they
9 haven't already been done, but because of this kind of
10 collision, there is no way to do the calculations for
11 a speed for this vehicle.

12 Q So there is no estimated speed in this matter?

13 A No, sir.

14 Q Okay.

15 A Not as far as I'm aware of.

16 Q How about a ballpark?

17 A A ballpark? I couldn't --- I mean, you would
18 have to go on just the trooper's experience.

19 Q All right. So they don't tell you that?

20 A No, sir.

21 Q They don't tell you that. They just tell you
22 where the car ended up with the trees and that sort of
23 thing?

24 A Generally, what I'll do if I'm doing --- usually
25 the animations are for occasions that I actually work

1 myself. Of course, this one was prior to me joining
2 the M.A.I.T. team. I do animations for other
3 investigators, because I've got the training and I've
4 got the knowledge and I've done them several times.
5 Normally --- and that's what I did in this case, I
6 took the information that was in the case file for
7 this case, rendered the animation, and then I
8 consulted with Sergeant Coats, showed him the
9 animation and confirmed that that was what they, as
10 the primary investigators, also believed occurred.

11 Q Would it look --- would the animation look
12 different with a different estimated speed?

13 A Maybe faster or slower. I mean, it's
14 not --- generally it's not going to look much
15 different. All you're going to have is the ---

16 Q Car?

17 A --- the speed at which the vehicle gets to the
18 tree. Otherwise, it's not going to change much.

19 Q That works for me.

20 MR. POSTIC: I don't have any more questions.

21 THE COURT: Anything else?

22 MR. MOAK: No, sir.

23 THE COURT: All right. May this witness come
24 down?

25 THE WITNESS: Thank you.

1 THE COURT: You may be excused.

2 MR. POSTIC: No objection.

3 THE COURT: All right. Counsel, approach the
4 bench, please.

5 (WHEREUPON, there was a bench conference.)

6 THE COURT: All right. Ladies and gentlemen of
7 the jury, we're just trying to anticipate the
8 schedule, the number of witnesses that are left to go,
9 and I think I'm pretty safe in saying we can go ahead
10 and adjourn for the day.

11 I'll ask you to be back tomorrow morning at
12 nine o'clock. We had a little thing that had to be
13 done this morning. That's why I postponed it until
14 9:30. Tomorrow morning we need to up and running at
15 nine o'clock. I was going to say eight o'clock, but I
16 don't think y'all will go for that. Nine o'clock
17 tomorrow morning, at which time we'll continue with
18 the trial.

19 Again please don't discuss the case among
20 yourselves when you return to the jury room or with
21 anyone else over the evening hours. Please don't try
22 to do or attempt to do any research on this case.
23 You're hearing it all right here in front of you live.
24 That's the way it should be. Have a pleasant evening.
25 We'll see you at nine o'clock in the morning. Thank

1 you very much.

2 (WHEREUPON, the jury left open court at
3 approximately 5:08 p.m.)

4 THE COURT: Counsel, let me see you. We'll stand
5 at ease until nine o'clock.

6 (WHEREUPON, There was an overnight recess).

7 (WHEREUPON, State's Exhibit Number 144 was marked
8 for identification only.)

9 THE COURT: State ready to proceed?

10 MR. MOAK: Yes, sir.

11 THE COURT: Defense ready to proceed?

12 MR. POSTIC: Yes, sir.

13 THE COURT: All right. No housekeeping this
14 morning?

15 MR. POSTIC: No.

16 THE COURT: All right.

17 Ready Mr. Moak?

18 MR. MOAK: Yes, Your Honor.

19 THE COURT: Bring the jury, please.

20 (WHEREUPON, the jury came into open court at
21 approximately 9:02 a.m.)

22 THE COURT: Good morning, ladies and gentlemen.
23 We're ready to continue with the trial. Solicitor,
24 call your next witness.

25 MR. MOAK: The State calls Lance Corporal

1 O'Donnell.

2 JAMES R. O'DONNELL, JR.,

3 after being duly sworn, testified as follows:

4 THE WITNESS: James R. O'Donnell, Jr.

5 DIRECT EXAMINATION:

6 BY MR. MOAK:

7 Q Have you been promoted in the past two years.

8 You're a corporal now?

9 A Yes.

10 Q You were a lance corporal?

11 A Yes.

12 Q You are obviously with the Highway Patrol?

13 A Yes.

14 Q How long have you been with the Highway Patrol?

15 A Eighteen years.

16 Q What did you do before that?

17 A Electrician.

18 Q Now, what are you actually doing with the Highway
19 Patrol now?

20 A I am an accident reconstructionist, also a team
21 leader for the Chester office for the Foothills
22 M.A.I.T. Team.

23 Q So are you on the M.A.I.T. Team?

24 A That's correct.

25 Q Can you explain to the jury what the M.A.I.T.

1 Team is?

2 A M.A.I.T. Team, as it current stands, is basically
3 a 40-person unit that reconstructs accidents,
4 collisions, high profile incidents and basically other
5 media events that might occur that we can provide
6 assistance with.

7 Q And how do you get on the M.A.I.T. Team?

8 A Generally through work experience. Your
9 supervisors will pull out some of the traits that
10 they'll observe as being --- as having an aptitude
11 for reconstruction. They'll submit those up through
12 the chain of command. You'll take a kind of entrance
13 exam so to speak and if the position is available,
14 you'll apply for that position, go through an
15 employment board for that position, and if selected
16 then you will enter the program.

17 Q Every trooper is basically trained in the basics
18 of accident reconstruction?

19 A That's correct.

20 Q And basically you're saying the supervisor says,
21 "Okay, this guy is good at it, so we're going to
22 recommend him up."?

23 A Yes, that's how it works. There's usually only a
24 limited number of slots there, so some good people get
25 passed over.

1 Q Once you get a slot, what happens?

2 A You enter the field training program, which is
3 a --- it has a lot of areas. It's a 26 week program.
4 You have 26 quizzes that you take, and essentially at
5 the completion of quiz 13, you'll take a midterm,
6 which is a 50 question test, four hour exam. After
7 you complete that, then you'll move on to the second
8 phase which is the remainder of the 26 quizzes, so the
9 other 13. Then there is the final, which is a 100
10 question exam, four hours.

11 Q And that's just to be on the M.A.I.T. Team?

12 A Well, that's to reach your team, bring your level
13 up to the other team members on there.

14 Q You actually -- not only have you done that, you
15 are also fully accredited as a traffic accident
16 reconstructionist from the Accreditation for
17 Commission of Traffic Accident Reconstruction,
18 correct?

19 A Yes. I'm a member of ACTAR.

20 Q Okay. What does that mean?

21 A Basically, attorneys will take the bar exam, real
22 estate --- realtors take an exam; it's almost like an
23 accreditation to work in that particular field. In
24 accident reconstruction there's ACTAR, kind of like
25 the academic accreditation is kind of like how you

1 would describe it.

2 Q In the past, it's something like they like stage
3 something like an accident, have a practical skill so
4 they can see you do --- see you go through the
5 procedure on it?

6 A For the ACTAR exam, which is an eight hour test,
7 it's two phases, one is the first, which is 75
8 questions where it's basically just a theory portion
9 of the exam. You have --- actually that's four hours.
10 You take the second phase, which is the other four
11 hours which is the practical, and you're talking about
12 through things they will actually stage with
13 collisions and photographs, calculations, things will
14 occur. They did one in the I.T.P. conference that I
15 went to in 2008, with a crash. We were doing it with
16 cars last year in the summer, and set up a crash.

17 They'll gather all that data and submit that once
18 it's verified to ACTAR for them to use in their test,
19 because the test is not the same nationwide.

20 The one I did was a staged crash. There was a
21 two car collision, which actually occurred in the
22 parking lot of some college or something.

23 Q And you got certified?

24 A Correct.

25 Q You've also had training in mechanical

1 examinations?

2 A Through the M.A.I.T. Team, yes.

3 Q And what does that involve?

4 A Basically the mechanical aspect of the M.A.I.T.
5 Team, you almost have to have like a working knowledge
6 or a practical ability for that. I've been doing car
7 stuff, you know, with my dad since I was 12 so I kind
8 of already have an aptitude for that. The actual
9 M.A.I.T. portion is that it will identify certain
10 things in the vehicle, look for this, look for that if
11 you do your examinations that relate to the
12 reconstruction of the collision.

13 Q You've also had training in the SmartRoads
14 Computer Assisted Drawings?

15 A Yes.

16 Q And what is that?

17 A That's a name of a software that we use to
18 convert --- like I said, convert or take data from a
19 data collector which is our tracker, that's the
20 source. We use it for our forensic mapping. That
21 will allow us to import data on that data collector to
22 the SmartRoad software, to collect the points in those
23 lines that we eventually turn into a scaled diagram.

24 Q And you've also been trained in DNA collection?

25 A Yeah. There was a course at SLED and there were

1 like two online courses I took through the Department
2 of Justice.

3 Q And that includes what, the buccal swab?

4 A Correct.

5 Q Okay. And you've had all this training?

6 A Yes.

7 Q How many accidents have you investigated since
8 you've been a trooper?

9 A This --- I looked back prior to a deposition
10 anticipating this question in a deposition, but the
11 question was never.

12 Q Uh-huh.

13 A At that time, which I think was in the beginning
14 of 2008, was 4,400 and something.

15 Q Okay.

16 A And that did not include the incident reports
17 that we filed for certain single vehicle collisions,
18 so that number is low. So, 4,400 is --- you probably
19 could move that up to 46 or 4,700.

20 Q That was three or four years ago?

21 A No, that's through 18 years of law enforcement.

22 Q I thought you said that you had number in 2008?

23 A Yeah. I went back through and did the math.
24 4,400 something.

25 Q Okay.

1 A Then probably the ones we can't account for,
2 those are all in the incident reports, three, 350
3 since I've been on this.

4 Q There's been a lot of them?

5 A A lot.

6 Q How many times have you testified in court?

7 A A couple of times in civil. I've been certified
8 as an expert with Judge Burch and it was also Judge
9 McMahon out of Columbia.

10 Q So you've been offered as an expert in the field
11 of accident reconstruction before?

12 A Twice.

13 Q And accepted?

14 A Yes.

15 MR. MOAK: At this time I offer Trooper O'Donnell
16 as an expert in the field of accident reconstruction.

17 THE COURT: Any voir dire or objection?

18 MR. POSTIC: No, Your Honor, no voir dire or
19 objection.

20 THE COURT: All right. Thank you very much. You
21 may proceed.

22 BY MR. MOAK:

23 Q Now, going through how you reconstruct an
24 accident, can you tell us what this Sokkia Station is?

25 A It is a --- well, Sokkia set five is a total

1 station, which means it's an E.D.M. or Electronic
2 Distance Measurement device, along with a theodolite,
3 t-h-e-o-d-o-l-i-t-e, which means it can measure
4 angles. Basically without getting into the real
5 specifics of the working of it, the total station, the
6 E.D.M. side can control the amount of time that shoots
7 a signal out to the prism. If you control that time,
8 which it does, and then it has that known time, the
9 time it takes for the light to go out to your prism
10 and return, it can do the calculations. That's a part
11 that's based on time and distance.

12 On the transit site or the theodolite side will
13 measure --- it basically sets the horizontal plane,
14 360 degrees is measured, and the angles and then it
15 uses trigonometry to backdoor your distance, so that A
16 B C squared is ---

17 Q So, A squared and B squared and C squared ---

18 A Yeah, then takes the sign of the co-sign of the
19 other two and that gives your distance.

20 Q In other words you passed math?

21 A Electronically.

22 Q The basic technology of the Sokkia station is the
23 same thing basically that surveyors use?

24 A It is. There's several models, but now it's kind
25 of moved up to the total station package on the E.D.M.

1 site.

2 Q So one of ya'll is at the tripod and the other
3 one is, what, shooting points?

4 A Correct.

5 Q And Trooper Coats assisted you with this?

6 A He did. He ran the station. I was the architect
7 or the individual holding the pole.

8 Q And this records the data from the different
9 points?

10 A Yeah. It measures the distance between the total
11 station and the prism.

12 Q What's what you take back to your office or to
13 the programmer?

14 A It goes to the data collector, which is a hand
15 held device that sits next to the Sokkia station.
16 That stores the data, think of it as a thumb drive,
17 basically, that's attached by cables. You that back.
18 That's plugged into your desk top computer where you
19 can upload that data from the tracker to the program.

20 Q And you actually did a drawing based on that
21 data?

22 A I did.

23 Q I'm going to show you what's been marked as
24 State's 144. What is State's 144?

25 A This is going to be an exploded version of a

1 drawing that I did, a forensics mapping that I did for
2 a collision --- for this case.

3 MR. MOAK: May the witness leave the stand, Your
4 Honor?

5 THE COURT: Yes, sir.

6 MR. POSTIC: There's no objection, Your Honor.

7 MR. MOAK: I'd move State's 144 into evidence.

8 THE COURT: All right, sir. Without objection.

9 (WHEREUPON, State's Exhibit Number 144 was
10 admitted into evidence.)

11 BY MR. MOAK:

12 Q So basically, what you're saying is you set up,
13 you and Trooper Coats, and basically went down the
14 track, and you used shock points down the track of the
15 tires?

16 A Yeah, we set the total station up here basically,
17 in reference to our north point. It would recollect
18 by the arrow. We have set all our scenes up based on
19 the compass direction and then everything is oriented
20 upwards. We'll take our reference measurement of 30
21 feet.

22 THE COURT REPORTER: You need to speak up,
23 please. I'm having difficulty hearing you.

24 THE WITNESS: I'm sorry.

25 BY MR. MOAK:

1 Q Go ahead.

2 A We'll set the station up just about level with
3 the compass direction and coordinate the reference
4 point, which was 30 feet out in this case. It was
5 30 feet out to verify the E.D.M. side of the total
6 station was working, as well as the other side. It's
7 a done at the beginning of a forensics mapping, of any
8 forensic mapping, to make sure nothing has been
9 contaminated between the two, if everything is working
10 properly.

11 Corporal Coats, Sergeant Coats now, was running
12 the Sokkia station and I was the architect. Basically
13 each point, usually five to six feet apart, we'll
14 reference those. We'll start the scene down here,
15 take a couple of shots before, a couple of shots ---
16 you take the roadway first and then we'll come back
17 and shoot the evidence as same scene but separate from
18 the others. That way we can usually get more details
19 of evidence by more shots.

20 Q And we're getting ready to go through a bunch of
21 pictures. Do most of those pictures have paint
22 markings on there?

23 A Yeah, I'm not sure who put those down. There
24 were there prior to my arrival. I'm actually seeing
25 the photographs walking up in Sergeant Coat's

1 photograph sequence. They'll put down, follow those
2 marks, however, sometimes the paint doesn't match the
3 evidence, the paint at night, things like that. We
4 might get off track a bit. We don't follow those
5 exclusively to the point, but experience is probably
6 the best way. In this case, we follow it up to the
7 impact to the tree, shot the two trees, and then the
8 final resting points of the vehicle, and basically
9 that would be the tire points.

10 Q I'll go ahead and give you this. You'll need
11 this.

12 A Okay.

13 Q Now, after y'all were done at the scene, the
14 vehicle was transported by wrecker?

15 A That's correct.

16 Q And did you take some pictures or examine the
17 vehicle after it was hauled off?

18 A I did. There was an interview conducted at the
19 detention center in Kershaw. Just speaking with the
20 defendant, Mr. Thigpen, he alluded to some issues with
21 his vehicle. To confirm or deny those issues or
22 verify them, I did a mechanical examination of that
23 vehicle.

24 Q So the pictures taken during the examination were
25 taken by you?

1 A At that time wreck yard, yes.

2 MR. POSTIC: Your Honor, we'll stipulate that
3 there was no mechanical defect.

4 THE COURT: All right.

5 MR. POSTIC: Just.

6 THE COURT: No objection to the pictures?

7 BY MR. MOAK:

8 Q I just want you to identify State's 19 through 21
9 and State's 49.

10 A Picture 49 is going to be the left side into the
11 driver's door taken by me. Exhibit 19 is the right
12 front. Also, the right front is shown on Exhibit 20
13 and then Exhibit 21 shows the right fronts tire with
14 the lug nuts removed and there is tree bark embedded
15 into the a rim. In between the rim of the tire would
16 be the seats.

17 Q And these are pictures you took?

18 A Yes.

19 Q Your Honor, at this time I'd move 19 through 21
20 and State's 49 and evidence?

21 THE COURT: Without objection.

22 (WHEREUPON, State's Exhibit Numbers 19 through 21
23 and 49 were admitted into evidence.)

24 BY MR. MOAK:

25 Q And you just said before I showed you the

1 pictures that during the interview an issue about the
2 vehicle came up?

3 A Yes, sir I --- generally because that's what I do
4 also with the M.A.I.T. Team is mechanical examinations
5 since being assigned that unit in 2008.

6 I always ask that question. It's just kind of my
7 thing. Just in general I usually ask that question.

8 Q And you there at the jail during that interview?

9 A That's correct.

10 Q You actually asked questions and talked during
11 the interview?

12 A Yes, sir.

13 Q So you were there?

14 A Correct.

15 Q And also, near the conclusion of the interview,
16 were you the one that collected the buccal swab?

17 A I did.

18 Q Can you tell the jury how you do that or how you
19 did that?

20 A We --- prior to arriving at the jail, we knew
21 that we had collected samples from the interior of the
22 vehicle that contained blood. We also did some swabs
23 on the outside of the rear driver's side glass. It
24 appears somebody swiped their hand, possibly touched
25 it. We took basically touch DNA samples or evidence

1 from the scene. We need to have a standard to match
2 it up to. In this case we wanted to ask Mr. Thigpen
3 for his consent to take that sample. When we arrived
4 at the jail, I used a standard swab that was in our
5 kit and then envelope secured that inside the
6 classroom once the swab was collected.

7 Q The buccal swab kit is like a big Q-tip?

8 A It is. It's two Q-tips per package.

9 Q Basically you put it in his mouth and swish it
10 around a bit?

11 A Yeah. It's between the cheek and jaw, the teeth.

12 Q And then it's like an envelope that comes with
13 it?

14 A Yeah, we use small manila envelopes that are like
15 4 x 4, pretty small. We'll glove up and ask for
16 consent. I'll swab it and slide it back in and seal
17 the top. It's a glued seal so you don't have to lick
18 it or contaminate it, then seal it up, write the time
19 of collection.

20 Q And that eventually made it to SLED where it was
21 tested?

22 A Correct. That was placed --- because of Corporal
23 Coats at the time, Lance Corporal Coats at the time
24 was present, that evidence went from my hand to his
25 hand because he was present in the room at the time of

1 collection. He maintained chain of custody from that
2 location to the Midlands M.A.I.T. offices in Columbia.

3 Q Now, you actually were involved in producing this
4 statement here?

5 A I did the C.A.D. drawing or computer assisted
6 drawing, which you just saw exploded up, but other
7 than that, the actual report was completed by then
8 Lance Corporal Coats, Sergeant Coats.

9 Q So your did not write this?

10 A Did not write this.

11 Q Okay. Now, I think we went through a bunch of
12 pictures. You picked out the ones you needed to
13 describe what you did?

14 A Okay.

15 Q Have you got the pointer up there?

16 A Yes, sir.

17 Q The pictures that you identified, are those the
18 pictures?

19 A Yes, they are. They are photographs of the
20 scene, evidence found at the scene, and also the
21 defendant is present in some of these photographs, as
22 well, which he was not there when I was there.

23 Q Essentially State's 2 through 52 are the
24 pictures?

25 A Yeah, 52 and --- well, 48 is the beginning of the

1 end, but they should all be here in sequence.

2 Q Okay. You can sit down or stand there if you
3 want to explain to the jury ---

4 A Okay. These are the photographs that Sergeant
5 Coats took at the scene.

6 Q And you noted the actual evidence numbers at the
7 bottom of these pictures?

8 A This is just something --- that's just a far away
9 shot of a different angle of the southern direction
10 looking south on Twenty-five Mile Creek Road, I
11 believe. There is a bridge right there, which is
12 represented in our forensic match-up that you saw
13 earlier. In this shot you can see like a small S
14 curve on photograph four, which taking this vehicle,
15 he would have had to negotiate as you come through as
16 he approached the impact point of the tree.

17 The turn that's on the furthest point, the right
18 hand turn if you look back to the left, it appears
19 that either Mr. Thigpen, for whatever reason, applied
20 more steering input to his vehicle as he negotiated
21 the left-hand curve here to go straight down the road.
22 We usually refer to this type of collision as
23 straightening out the curve. The theory behind it is
24 the vehicle curves left in this case, but the vehicle
25 continues straight.

1 Myself and Sergeant Coats examined the north bound
2 shoulder, which would be where the patrol cars parked,
3 for evidence on that right hand shoulder and applying
4 the steering input to the left to come back to the
5 roadway.

6 We found no evidence of that, so based on that,
7 it appears that if he was to negotiate the roadway
8 properly on his side of the road northbound, apply
9 steering input, then for whatever reason went left of
10 the center. It made contact with the bridge, which is
11 going to be on your right, that curved portion there.

12 If you look on this photograph here, you've got
13 the furthest point of the guard rail with the warning
14 sign, and you can actually see the scuff marks where
15 the debris or edge of the bridge was actually rubbed.

16 Q Right there?

17 A Correct. It was actually rubbed off with contact
18 with his tire. The lower carriage bolts were knocked
19 loose and it appears to have rubber contact from the
20 tire on the left side.

21 Q And right there, is that what was --- I think
22 that's been described as evidence of a fresh impact?

23 A It is. It's consistent with his vehicle track
24 you'll see later in the photograph sequence, but that
25 would be a first contact point.

1 Q Okay.

2 A This would be his left front tire and that
3 explains the damage to his rims that you'll see later
4 in the photographs.

5 You can probably see that imprint, the forward of
6 the concrete curve, you can see some of the orange
7 paint that's in the center of that. These tracks are
8 created by the vehicle, which leads up to the point of
9 impact. Mr. Thigpen's vehicle struck a tree. These
10 marks are common when you run off onto the shoulder.
11 You see them a lot of times when you cut your own
12 grass, where your lawnmower has been and you overlap.
13 These are very similar to that.

14 There was also some impressions from rescue squad
15 vehicles that came to the scene as a result of the
16 collision. They were excluded from this path that we
17 saw in this photographic sequence. You'll see one of
18 those coming up.

19 Q And this path goes all the way down to the actual
20 Jeep, correct?

21 A Correct. You'll see an imprint from a rescue
22 squad vehicle coming in that doesn't match the angle,
23 so that's been excluded, but these are fresh marks
24 from the incident. I'm just going to walk you through
25 it. There's a slight slope. Near this location

1 there's high power tension lines. There's large
2 towers with cables on it. That's why you have this
3 open area here. Again, this is showing leading to the
4 tree. By this point Mr. Thigpen's vehicle is actually
5 entering some of the shrubbery and overgrowth in the
6 area, making contact with that live oak tree to the
7 left of center of the frame. It's going to be a
8 contact point where Mr. Thigpen's vehicle made contact
9 with the tree.

10 If you look down, that slice right there that
11 goes up and down appears to be the rim indentation
12 from the right front wheel of Mr. Thigpen's vehicle.
13 This is going to be the contact point from the center
14 front, right front. That's probably going to be the
15 bumper cover as it extends out past the frame of the
16 vehicle.

17 This long section of steel right here, the
18 vehicle is a '97 Jeep Cherokee, and I think it has a
19 ladder rack or roof rack. The right side is missing
20 because it's embedded in the tree. So when the
21 vehicle made contact with the tree, it lifted up,
22 embedded that steel in the tree and continued to
23 rotate around.

24 These are photographs 19 through, is it 24, that
25 we talked about earlier, that's going to be in my

1 opinion the contact point with the tree where it hit
2 the rim back and also imbedded the tree bark between
3 the bead of the tire and the rim itself.

4 This is a series of shots recovered, the standard
5 photographs from the M.A.I.T., of all four sides of
6 the vehicle, where possible. The glass is intact on
7 this photo here. I think later you'll see it's not
8 intact, but it's actually still in place.

9 That window is knocked out. The front wheel is
10 shattered, but it's in place. The safety glass is
11 still there.

12 This is going to be the driver's side or right
13 side. It appears that damage was possibly caused by
14 making contact with the curb and the carriage bolt
15 that we saw exposed. That tire is deflated, as well
16 as the right front was deflated.

17 This is going to be photographs of the front
18 earlier, going back out towards the scene. You see
19 how you can --- you've got one track there. There's
20 other tracks there. You have the beginning of the
21 rescue squad response coming in. Let me just back up
22 here. You can kind of see this impression. That was
23 ruled out as being related to this.

24 Then we usually walk this series back out to the
25 beginning of the incident. We can see where his

1 right --- the left side of the vehicle was tracking up
2 into a contact point on the bridge curve.

3 This photograph was taken by Sergeant Coats after
4 the victim had been removed from the vehicle. It had
5 been uprighted. The jaws of life was used to remove
6 the B pillar. You have three construction points in
7 your vehicle. This may have been covered already, but
8 you have the windshield, the two pieces of steel that
9 go up and that's the A pillar. The one at your
10 shoulders is the B pillar, and the one at the back,
11 the rear glass is at is the C pillar.

12 This A pillar received severe stress to it. On
13 contact with the tree, it goes upright, obviously.

14 You've got your bark embedded in the front wheel.
15 The impact was forceful, driven to the --- basically
16 the center front of that right front tire, deflated
17 the tire on impact, hit the rim, broke the lower
18 control arm, which allowed the upper control arm
19 location to come loose, then drive that whole assembly
20 into the rear of the fender well into what the fire
21 wall is. The fire wall is basically the steel barrier
22 between the engine compartment and the occupant
23 section of the vehicle.

24 It came --- the force of the fender wheel into
25 the fire wall actually compromised the occupant's

1 section on the passenger's side, pushing the glove
2 compartment door up against the lower seat cushion.
3 The stress, also because the fire wall was dislocated,
4 it allowed the A pillar to buckle. The B pillar
5 somewhat held its place and caused a stress point in
6 between, which would have come down into the right
7 front passenger opposite section, so you get the force
8 from coming up. At the same time you have the force
9 coming up to the top. It made it a not survivable
10 section.

11 These are the photographs I took at the wrecking
12 yard showing the same thing. You've got the B pillar
13 removed, A pillar is still there. You can actually
14 see the fracture point. The next shot you see the
15 glove compartment door was up against the seat cushion
16 and your legs would be occupying that area.

17 These are just more shots of the vehicle.

18 In that shot there, you can see how the left
19 front fender responded to the stress of the right
20 front, and actually folded in more towards where the
21 hood ornament would be at. This is where the driver's
22 side is basically intact. It's actually intact with
23 the exception of the driver side window.

24 That's a shot where I removed the steering wheel
25 that was actually on the headliner underneath the

1 victim in this case.

2 The glass is intact.

3 Q Okay. Now, obviously --- I think it was number
4 39 was the passenger's side where the roof was
5 impacted?

6 A I'm sorry, I was sitting down.

7 Q On State's 39, it is the picture from the
8 passenger's side?

9 A Correct.

10 Q I think State's 46 and 48 were taken from the
11 driver's side. Is there a significant difference
12 between the passenger's side versus the driver's side?

13 A The driver's side in State's 48 is showing
14 basically an unstressed side of the vehicle. You can
15 see where the roof was compromised, but the ladder
16 rack is still intact in this photograph.

17 You can also see the buckling to the left front
18 and the other number you said was which one?

19 Q Thirty-nine, I think.

20 A Thirty-nine. Okay. Yeah, that's the passenger's
21 side of the vehicle. That's also showing the jaws of
22 life cuts to the rear of the right passenger door.

23 Q So there is a marked difference between the
24 damage to the driver's side versus the passenger's
25 side?

1 A There is.

2 Q And where the roof and the A pillar caved in, is
3 that where the passenger would have been at?

4 A It is.

5 Q Is that kind of way you described it as a non-
6 survivable environment?

7 A Yes, sir. The other photographs --- it shows the
8 actual knee of the victim up against the A pillar,
9 because the glove compartment came in to the forward
10 part of the seat cushion causing him to come up. That
11 also would have reacted at the same time to the
12 stressors from the roof coming in.

13 Q Was there anything describing how the --- you
14 were there when the victim was still in the Jeep,
15 right?

16 A Yes.

17 Q Was there anything that grabbed the neck area or
18 something? Did you say something about that?

19 A He was severely injured. All his limbs were
20 intact. He did appear to have an injury to his right
21 knee from the A pillar stress that we talked about.
22 There is also some injuries to his forehead and the
23 right side of his face.

24 Q Okay. And that will be consistent with the glove
25 box getting shoved into him?

1 A That would force him to be propelled backwards
2 and kind of upwards. Also, you have to take into
3 account when this actual scenario takes place, the
4 impact takes place, inertia is carrying him forward in
5 the vehicle, so he is propelled even though all the
6 safety parts for the vehicle are in place or being
7 used.

8 The strength of the vehicle is designed by the
9 federal specs, and you have the airbag, you have the
10 seat belt, but he still has to follow the laws of
11 physics to be propelled like into the seat belt.

12 There is also a photograph, at final rest, he is
13 between the door window support and the A pillar
14 exposed to the outside, so he is being propelled
15 forward, making contact with his knee to the A pillar,
16 which appears that he probably broke his knee at that
17 location or damaged his knee severally, possibly got a
18 hold of the A pillar or the focal point between the A
19 and the B coming down.

20 Q And obviously, I guess the windshield shattered?

21 A It did. Usually that's a common occurrence when
22 an airbag deploys. It comes out at an excessive rate,
23 and it blows --- the steering wheel comes out. The
24 passenger's side usually comes up and also back and
25 covers the top half of the dash ---

1 Q Okay.

2 A --- as a separate precaution, but other than that
3 the stress of the overturned vehicle results in the
4 windshield being shattered.

5 Q And at least one --- did the driver's side window
6 shatter, too.

7 A Yeah, it's all one assembly. It's safety glass
8 so you bust one half of it, the rest of it's going to
9 go, too, but it's going to remain intact, together.

10 Q And you actually looked inside the Jeep, right,
11 when you were there?

12 A Yes, sir.

13 Q Did you see any glass in there?

14 A Yes, there was.

15 Q And was it --- was it like shards? How would you
16 describe it?

17 A Well, when safety glass goes, you have almost
18 like a fine mist of glass particles that come out into
19 the interior of the vehicle. In this case,
20 the --- even though the vehicle was traveling forward,
21 the force that was coming in from the tree strike
22 which is propelling the shards of glass into the
23 interior of the vehicle, as well. It's getting to
24 both sides. You also have the driver's side window
25 was broken, so the glass from that is also on inside

1 the vehicle.

2 Q And the issue with the mechanical question that
3 came up in the statement, was that like a transmission
4 issue he identified?

5 A He mentioned it was --- I don't have it
6 transcribed, but it was something to the effect of it
7 was hard to start when it was cold. He had a fuel
8 issue, fuel filter issue, and I think he mentioned
9 that and a shifting issue with the transmission.

10 Q Were either of those issues in your opinion
11 affected the handling ability of the Jeep?

12 A Obviously, if you lost the motor, if you have the
13 engine die, I mean, you're operating 45 miles an hour.
14 That's not a good thing. The key is still in place.
15 The steering wheel would not lock up. The
16 transmission shifting erratic would not help the
17 situation, pull over and deal with whatever you might
18 have.

19 In this case, he negotiated several things that
20 evening, negotiated an S curve, obviously
21 successfully. There was no evidence of braking at the
22 scene. Usually when you lock a wheel up, you're going
23 to have some early --- where it actually makes its own
24 like ditch in the grass and the grass would build up
25 in front of the tire of that locked wheel.

1 Q So the track of the tires would be deeper?

2 A Correct. It will start to dig and remove the
3 actual --- the top layer of grass or sod. You would
4 expose dirt through the vehicle track. That was not
5 present. We also recovered the brake pad from the
6 driver's section. I did not see an impression from
7 his shoe for heavy braking for an impending event.
8 Also, a lot of times if you lock your arms out for an
9 impact, in this case the defendant has some airbag
10 burns to his forearms which I have received and can
11 personally attest to.

12 Usually the impact forces for a collision will
13 result in a brake pedal stressing because you're
14 locked up. That was not evident in this case.

15 Q And you actually went to, I guess, the tow yard
16 where the vehicle was towed at?

17 A Correct.

18 Q And you examined the brakes?

19 A Correct.

20 Q How did you examine the brakes? Can you tell us
21 the process?

22 A We went down there. The first thing we do is go
23 and even though we take pictures of the vehicle at the
24 scene, we start from scratch and take pictures again.
25 It's just procedure. That way you don't miss

1 anything. We will do a 360-degree photograph of the
2 vehicle, just trying to get the interior. We
3 will --- I will usually remove, take out all four
4 corners of the vehicle, one at a time in this case.
5 If you have a wrecker available, you have the front
6 half, remove the wheels, inspect the pads, the rotors,
7 make sure their polished, grooved, the pads have
8 enough friction material on them to work.

9 Even if they don't have friction material still
10 it's steel on steel and will stop. You check the
11 master cylinder to make sure the fluid is still
12 present. Drum brakes, in this case, we'll pull the
13 drums off and inspect the primary and secondary shoes,
14 make sure the cylinder is not leaking.

15 In this case, both of those at one time had
16 leaked and built up brake dust/asbestos debris in
17 which that debris caused the wheel cylinders to reseal
18 and stop the vehicle.

19 I think Mr. Thigpen's vehicle was full of brake
20 fluid, so if he had an active leak, there would be
21 none to hardly any brake fluid in there.

22 Q There was fluid still in there?

23 A There was fluid still in there. Also, when you
24 have an active leak on the drum system, you will
25 actually have leak down inside where the brake backing

1 plate, where the primary and secondary shoes sit and
2 that will hold the drum, and actually form a puddle on
3 the bottom half of the rim or drum, so you can
4 actually see that it's an active leak.

5 Q So you checked to see whether or not the brakes
6 were working and they appeared to be working?

7 A Correct.

8 Q Did you also notice --- was the headlights turned
9 on?

10 A It was pulled out.

11 Q It was pulled out?

12 A The front half of the vehicle was severely
13 damaged due to the tree impact and subsequent roll
14 over.

15 Q Okay.

16 A So we were unable to determine from an actual
17 lamp exam due to the collision, but the switch was
18 pulled out.

19 Q So it looked like they were turn on?

20 A For all intents and purposes they appeared to
21 have been on, yes.

22 Q Now, yesterday --- did I ask you to check out an
23 available observatory website?

24 A I did.

25 Q Were you able to determine what the sunrise was

1 on June 20th, 2009?

2 A I believe it was 0511, which was not adjusted for
3 daylight savings time for June 20th, so you add an
4 hour, so it's 6:11 a.m.

5 Q So sunrise would be 6:11 and the headlights were
6 on in this Jeep?

7 A Correct.

8 Q And you were present when Mr. Thigpen told you,
9 told y'all that it was lightening up when he got home?

10 A I believe that's what he said.

11 Q Okay. Now, going back to --- if you'll look at
12 that picture there and thinking about State's 48, the
13 other side, in your experience in investigating
14 accidents, is it unusual to you that the passenger on
15 this side didn't survive whereas the driver did?

16 A Is it usual for ---

17 MR. POSTIC: I object to the speculation. He
18 doesn't have any personal knowledge of that kind of
19 thing.

20 THE COURT: Well, he's got his historical
21 knowledge to draw upon. I'll allow it.

22 MR. POSTIC: Thank you, Your Honor.

23 BY MR. MOAK:

24 A With a tree impact or an impact that right side
25 that was as severe as this, it would not be a

1 survivable compartment. However, when you decrease
2 the size of an occupant, you increase your chances of
3 surviving.

4 Q Uh-huh.

5 A Like I said, you have the use of the safety
6 equipment inside the vehicle, the structure, integrity
7 of it, the seat belt, airbag, someone with a smaller
8 stature they might have a shot.

9 Q And also, I think you were talking about the
10 airbag deployment earlier. You said from experience
11 that you've had an airbag deploy on you before?

12 A Yes, sir.

13 Q Did that leave any marks on you?

14 A Yes, I was --- that particular collision I was
15 working in Columbia and it was raining. Percival Road
16 was under construction. Basically I hit a tractor
17 trailer. In this case, the trailer was missing. It
18 was a bobtail. He put on the brakes and started to yaw
19 or slide up the roadway. I was responding to an
20 accident in the rain and he basically was sideways on
21 Percival Road. I jammed on the brakes and he slid
22 into my lane of travel.

23 I struck him between the second and third axels
24 and my airbag came out. My long sleeved uniform, the
25 sleeves got ripped off and I had abrasions on my arms.

1 The car filled up with baby powder, and you can't
2 breathe. It was not a pleasant sight.

3 Q So you had marks on your arms even though you had
4 long sleeves on?

5 A It ripped the sleeves off, popped the buttons.

6 Q And you saw Mr. Thigpen that afternoon at the
7 jail?

8 A I did.

9 Q Did you see the marks on his arm then?

10 A We, I think we --- yes, he had marks on his arm.
11 I can't remember which one it was. He had marks on
12 it.

13 Q Have you seen ---

14 A Eighty-five and 86, yes.

15 Q You have them up there?

16 A Yes.

17 Q You have a picture of his arm up there?

18 A Yes, sir, it appears to be a photograph in the
19 back with his handcuffs, which should be his right
20 arm. His whole back and exposes the interior of this
21 right forearm.

22 Q And does that appear to you, based on your
23 personal experience of having an airbag deploy on you
24 and other accidents, does that appear to be airbag
25 marks?

1 A It does.

2 Q And that's one arm?

3 A Yes, sir, that's all the shots that I observed
4 was that right arm.

5 Q So one and not the other?

6 A One hand was on the wheel.

7 Q So like that (indicating)?

8 A Correct.

9 Q Now, this may be too complicated, but were you
10 able to get a speed out of this wreck?

11 A We did not perform a speed calculation on this
12 collision. The speed limit was 45. We felt that the
13 damage that was received to the vehicle, without doing
14 a crush analysis, was consistent with the collision.

15 Q And Mr. Thigpen told you he was going the speed
16 limit, right?

17 A Right. We usually assume people are doing the
18 speed limit unless proven otherwise. If it's 45, we
19 go with 45.

20 Q And the defendant told you that and you saw no
21 reason to question that?

22 A Correct. It was consistent with the dynamics of
23 the collision.

24 MR. MOAK: No further questions.

25 THE COURT: Cross-examination?

1 MR. POSTIC: Thank you, Your Honor.

2 CROSS-EXAMINATION:

3 BY MR. POSTIC:

4 Q Corporal?

5 A Yes, sir.

6 Q How are you?

7 A Doing good.

8 Q Good morning. You're the one who removed the
9 airbag, right?

10 A Which one?

11 Q The air --- the driver's --- the steering wheel
12 airbag?

13 A Yes, sir.

14 Q And these are pictures that have been entered
15 into evidence, State's 138 and State's 139. There is
16 a blood spot that was given to SLED to test for DNA.
17 You're aware of that, aren't you?

18 A Yes, sir.

19 Q Can you tell me, what side --- would that be the
20 right or the left side of the airbag was the blood
21 spot on?

22 A These photographs I'm looking at, 138 and 139,
23 were taken --- actually, I don't know who took these
24 photographs. We did not --- I did not do any of the
25 swabbing of the steering wheel or airbag or anything

1 like that at the scene. With that picture orientation
2 maybe of the airbag still on the steering wheel ---
3 not knowing a reference of which is up and down, I
4 couldn't tell you if the picture is right side up or
5 what.

6 Q I got you.

7 A Or how the airbag ---

8 Q So you would be able to tell better if you saw it
9 on the actual steering wheel; is that what you're
10 saying?

11 A If the discharge holes are positioned, if I could
12 see those on the steering wheel itself.

13 Q Okay. So you can't tell if that blood spot is on
14 the right side or the left side or on the top or
15 bottom?

16 A Correct, because I don't know how the airbag is
17 positioned.

18 Q Ten o'clock?

19 A You would assume this is up, but without being
20 the one who actually cut it off the steering wheel ---
21 we collected it intact.

22 Q All right. I got you. I mean, you would
23 say --- it's come up that this was a violent impact or
24 a strong impact, correct?

25 A Yes, sir.

1 Q At forty-five miles per hour, let's say it's 45.

2 A Okay.

3 Q I mean, when you go on the highway, it doesn't
4 seem very fast, but it's pretty fast?

5 A Yes, sir.

6 Q Okay. Certainly if you hit a tree?

7 A Correct.

8 Q And certainly fast enough to take someone's life?

9 A Yes.

10 Q Okay. And I mean, in fact, there --- I'm sure
11 you've worked wrecks where there's been much less
12 damage and people and there have been fatalities?

13 A Yes, sir, a lot of times depending on what type
14 of --- it really kind of boils down to the injuries
15 you might receive, if there are internal injuries. It
16 boils Delta V versus the time rate change, and that's
17 how you ---

18 Q I don't know. What is that?

19 A Delta V is the change in velocity. If you go
20 from --- let me back up. The purpose of the safety
21 device, the seat belt and the airbag, is to slow your
22 Delta V or your velocity change over, from a short
23 amount of time to a long amount of time.

24 The airbag, when you impact, you discharge the
25 air out of it. It slows you down. When you make

1 contact in your seat belt, the seat belt will stretch
2 and actually has overlapping stitching for that
3 stitching to snap over time to slow you down so you
4 have a large Delta V over a short amount of time,
5 because there's --- I don't know if you went into the
6 three impact testimony?

7 Q Yes.

8 A You did?

9 Q To the what now?

10 A The three impacts that occur in a collision.

11 Q I don't ---

12 A I don't know if you all discussed that. Three
13 impacts occur in a collision; vehicle versus tree,
14 body versus vehicle, body versus body. In this case
15 we had --- well, we know of two. Third there was no
16 autopsy done, is my understanding, so we don't know
17 what injuries the victim would have received.

18 Basically the vehicle versus tree, we have that.
19 Body versus vehicle would have been his knee against
20 the A pillar when it received damage, and then his
21 internal organs, which would be the heart, lungs,
22 spleen, liver, all those get tore up pretty good.
23 Also, you have your brain inside his skull.

24 When you experience a large Delta V, about 30
25 miles an hour in a short amount of time, your brain

1 will compress against a part of your skull and you get
2 bleeding in the brain and that sort of thing.

3 If the Delta V is a short amount of time, you
4 will tear your heart, your spleen, you will rip your
5 aorta out, so you bleed out inside even if you have no
6 apparent injuries. The purpose of the airbag and the
7 seat belt is that you don't get that abrupt, you don't
8 get that big Delta change. You don't get as injured,
9 so, yes, it depends on the Delta V as to how hard you
10 get or how bad you get injured and then, you know, the
11 speed, usually thirty-ish or higher --- and I mean, in
12 this case, if the one vehicle dynamic impact is 45,
13 you have actually a 90 degree --- or 90 mile an hour
14 impact.

15 Q That's actually --- when you say that it makes me
16 think how my wife got me to stop speeding was to say,
17 "Your body is actually going 80 miles per hour, Alex."
18 It's not just the car, your body is, too. So anyway,
19 she still tells me to slow down.

20 Let me ask you about --- you did an
21 investigation, an examination, of the actual vehicle,
22 right?

23 A The mechanical examination was done at the tow
24 yard, and we also did what's called a general vehicle
25 exam, which is just to take some photographs of the

1 vehicle. We lifted up --- in this case, the hood was
2 already up. We could everything, the power steering
3 reservoir, the cap was missing, you have fluid there,
4 and ---

5 Q Well, I'm interested in the passenger
6 compartment. Obviously the victim is in his seat
7 belt, correct?

8 A Correct.

9 Q Is there any way to tell whether the driver,
10 whoever that person is, was seat belted or not?

11 A The --- there's a photograph. I'm not sure what
12 the number is that has the seat belt retracted up
13 against the B pillar, unless you pull it down across
14 your chest and you buckle it in. I do not recall
15 testing to see if the pretensioners fired on the
16 driver's side seat belt. Usually when the airbag come
17 out, the module that controls this airbag also
18 controls the pretensioners and basically hold it and
19 lock it into place where you can't use it again.

20 Q So nobody checked?

21 A I do not recall checking that, no.

22 Q But don't people get injuries from seat belts in
23 high impact accidents?

24 A They can.

25 Q And so that way sometimes you can tell that

1 somebody is the driver or somebody is the passenger
2 because of the way it's coming across?

3 A Correct. That's one thing you can use.

4 Q But nobody saw whether or not there was a seat
5 belt used in this case?

6 A He, relating to the defendant, I was at the scene
7 when he was at the scene. We did speak with him at
8 the classroom at the detention center. He had a shirt
9 on. We actually --- I actually asked him to lift his
10 shirt up where there could or could not have been seat
11 belt marks present, but we could not --- he had on his
12 chest, on his lower abdomen, some abrasions, but I did
13 not pull his shirt off or ask him to pull it off to
14 see those marks.

15 Q Okay. And how --- was that the first time you
16 were in contact with the defendant was in that --- in
17 the detention center?

18 A Yes.

19 Q And so you didn't know until then that he had
20 denied driving; is that correct?

21 A That's correct. That's the first interaction I
22 had with him.

23 Q Okay. And what was your purpose there? Was it
24 just to collect the buccal swab or just to sort of be
25 another presence there?

1 A To assist Lance Corporal Coats in the interview
2 to gain a working knowledge of the scenario involving
3 the collision to see if he may or may not add to the
4 investigation to determine any outside forces that may
5 have resulted in the collision or resulted in the
6 collision.

7 Q I see. So it would have helped in your
8 investigation what he might have told you; is that
9 correct?

10 A Correct. As far as we know it's a one vehicle
11 accident.

12 Q And, in fact, during that questioning, he thought
13 he had swerved or he made some comment that he swerved
14 and he was corrected, because your investigation that
15 you had already done indicated that there was no
16 swerve?

17 A I don't have the actual transcript of the
18 interview.

19 Q Okay. Well, then I'll ---

20 A You know, how that went down, the interaction
21 about the swerving or things of that nature isn't
22 committed to memory.

23 Q Did your --- can you turn that off, please?

24 Did you know at that point that there was no
25 swerve and no braking at the point when you were with

1 Coats and Borowski and Donnie?

2 A There was no evidence.

3 Q Did you know that at that point?

4 A I knew there was no evidence of braking at the
5 scene that I could see from the physical evidence.

6 Swerving, he --- the angle did not appear severe
7 at the collision site at the bridge impact. It's
8 almost like a glancing blow versus a double clip.

9 Q Got you.

10 A He hits the left front, then waits another second
11 and then the back or the left front -- left rear,
12 kicks in, so based on the angle of approach leaving
13 the roadway you go toward the tree. That doesn't
14 appear to be like a violent basis, but that was ---

15 Q Did you let Trooper Coats know this?

16 A He was there --- as it relates to what?

17 Q Oh, he was there when you did this?

18 A Correct.

19 Q Okay. So he knew?

20 A Correct.

21 Q And at the end of the interview, you do a buccal
22 swab?

23 A I think it's like halfway through. I don't think
24 it's at the end.

25 Q Okay.

1 A During that, we talked for a while, but then I
2 did the buccal swab.

3 Q As far as you know that's the only DNA that was
4 submitted to SLED?

5 A That was the only standard --- that's the only
6 standard that I was a part of being submitted. He
7 gave blood at the hospital or some other location and
8 that was considered a standard to be submitted.

9 Q Okay.

10 A I would have no knowledge of that.

11 Q Well, certainly there was his blood submitted to
12 SLED. There was the victim's blood submitted to SLED?

13 A Okay.

14 Q And then the buccal swab.

15 A Correct.

16 Q And then while you were going through your direct
17 testimony with Mr. Moak, you kept saying Mr. Thigpen
18 did this, Mr. Thigpen did that, but you don't have any
19 personal knowledge?

20 A Of witnessing the collision?

21 Q Yes.

22 A No.

23 Q Okay. That's kind of an obvious question, but I
24 have to ask. You --- when you examined scene, sir?

25 A Yes.

1 Q Did you see any footprints or anything in the
2 terrain around the accident?

3 A There were. I'm assuming that was from the
4 rescue squad responding. When I got out there, there
5 were four or five trucks present providing traffic
6 control from the surrounding area, so the scene was
7 somewhat compromised as it relates to ---

8 Q I got you.

9 A --- tread issues, things of that nature.

10 Q Was it kind of a muddy scene or was it --- I
11 mean, I can't really tell from what the ground looks
12 like?

13 A It was hot.

14 Q Uh-huh.

15 A And it's kind of that marshland, without the
16 water. The mosquitoes were huge.

17 Q Yeah.

18 A But it was dry --- it was a relatively dry
19 summer. For all intents and purposes, it was dry
20 terrain, leaves, swampy area.

21 Q Okay. Do you know if the vehicle was dusted for
22 any fingerprints?

23 A Not to my knowledge, no, we did not do that.

24 Q I mean, obviously the owner of the car and his
25 fingerprints are going to be in it, but it was never

1 dusted for prints from anyone else?

2 A No, sir.

3 Q Okay. The picture that I made Mr. Moak take
4 down, a lot of that damage is from the jaws of life
5 from the fire department? I mean, some of it at
6 least?

7 A Yeah, the --- basically the back half would be
8 the jaws of life. The door was still intact when we
9 got there. It was pulled off the latch assembly for
10 the B pillar, pushed forward. The actual rear door of
11 the driver's side was --- I'm sorry, the passenger's
12 side, was cut out to the rear latch on the right rear
13 and also the two hinges on the front. The B pillar
14 was actually missing on the inside. So the front half
15 tree, roof line, tree.

16 Q Okay. And certainly, I mean, we don't need to
17 talk about it anymore. The passenger did not live and
18 whoever drove did not die there at the scene,
19 certainly?

20 A Correct.

21 Q So we can move on from that. Let me ask you
22 about airbags in general.

23 A Okay.

24 Q When they come out --- how big is an airbag?
25 I've never seen one and I've been fortunate to never

1 have one hit me.

2 A They differ --- I don't know if it's a
3 standardized size.

4 Q What about the size for this car?

5 A Probably overlapping two inches, three inches
6 around the steering wheel.

7 Q Okay. So it overlapped the steering wheel?

8 A It comes out the past the steering radius, I'm
9 just guessing three inches maybe. You have your
10 expansion disk and I don't know if that's
11 standardized, but I don't have the number for it.

12 Q Okay. It comes out really hard, right?

13 A I've heard 150 miles an hour, but I'm sure that
14 could be an exaggeration.

15 Q I have heard that, too.

16 A This is the first generation airbag due to the
17 age, I think. The second ones are based on your
18 weight so it comes out fast. Mine was a first
19 generation.

20 Q Okay. So it covers and then it's full of, did
21 you say baby powder?

22 A It has some baby powder mixed in, some carbon and
23 stuff.

24 Q Okay.

25 A And nitrous gas is in there, too.

1 Q And there was the bag. There was one on the
2 passenger's side, as well, on this car?

3 A Correct.

4 Q Let me ask you something. You said something
5 about the wheel locking up. The steering wheel
6 locking up. Did I miss that or was it the brakes
7 locking up?

8 A There was no evidence of the brakes locking up.

9 Q Okay. And you're saying that the markings were
10 only on --- you saw the defendant's arms personally?

11 A Correct.

12 Q And you saw the picture that is going into
13 evidence, right?

14 A Yes. The --- whatever that number was.

15 Q In your opinion, that's an airbag burn?

16 A Correct.

17 Q Okay. And was there any marking on the left arm?

18 A I do not recall. From memory, I don't recall.

19 Q When there is an accident like this, does glass
20 come in or out? It just seems to me that the glass
21 would go out because everything is moving forward.

22 A You got the forward -- both. In this particular
23 scene it's both. You have the inertia chain that puts
24 the glass on the outside for Isaac's first law of
25 motion, inertia, and then as the vehicle rolls over it

Cross of O'Donnell by Postic

1 stows up. You have the other part of that sequence
2 where the glass comes in because that's coming back.
3 You reverse it on the graph.

4 Q I got you. What's up with the steering wheel
5 coming out?

6 A Impact with the occupant of the driver's side.

7 Q Okay. So ---

8 A A firm grip on one side versus the other. I
9 looked at it it's fractured through the middle. It's
10 like it's pot metal is the only way to describe it. I
11 don't think it's aluminum.

12 Q So it is hitting so it hard, the driver hitting
13 the steering wheel so hard that it dislodges it?

14 A It appears that way.

15 Q Breaks it?

16 A Actually snaps it in the vicinity of the flange
17 bolt, the flange nut, for the steering column.

18 Q Snaps the steering column? That's just ---

19 A Snaps the mounting plate for it.

20 Q Okay. Is that particular to that car or is that
21 something that can happen in any car?

22 A That's the first time I've seen it.

23 Q Do you know that bridge is being replaced now.

24 Do you have any knowledge of that?

25 A I have haven't been out there since 2009.

1 Q Is there anything in your mind, any sort of a
2 mechanical defect of that bridge when you saw it?

3 A Nothing comes to mind. I mean, the guard rails
4 are there, the curve, nothing unusual that stands out.

5 Q Okay. The headlights, would the impact of an
6 accident --- well, let me ask you, with a Jeep
7 Cherokee, how do you turn on the headlights?

8 A It's got a --- on one of the photographs it has a
9 pull switch.

10 Q Okay, a pull switch.

11 A First one is park, second is headlights. On that
12 particular vehicle it looks like it's out.

13 Q You have to pull it out?

14 A Pull it out.

15 Q So would an impact cause that maybe to come out
16 or not, could it?

17 A There was some stress to the interior of the
18 vehicle. The dash, it's possible that could have, you
19 know, it's a plastic housing around that that could
20 have caused it to pop out. I wasn't there. And the
21 photographs, if that stress did cause it to come out,
22 that stress was seated out to its original point for
23 adjusting the dim on it.

24 Q Okay. All right. That's all I've got. Thank
25 you?

1 THE COURT: Redirect?

2 REDIRECT EXAMINATION:

3 BY MR. MOAK:

4 Q Melvin Wright was not the driver, was he?

5 A I'm sorry?

6 Q The victim was not the driver?

7 A No, sir, the victim was found seat belted in on
8 the passenger's side.

9 Q Now, Mr. Postic asked you about -- I think the
10 way he worded the question, most of this damage was
11 done by EMS, was what he asked you?

12 A Was most of the damage caused by the jaws of
13 life, I think was the question.

14 Q Now, is that where most of the damage was, as
15 well?

16 A That's the impact location of the tree for the
17 right front.

18 Q The wreck caused most of the damage, didn't it?

19 A Correct.

20 Q As a matter of fact ---

21 A I'm sorry?

22 Q Basically what you're saying is the B pillar
23 goes --- it's like right there where it should have
24 been at?

25 A Correct, that was cut out by rescue, as well as

1 the rear door.

2 Q So they cut that out and just removed the two
3 doors, right?

4 A Right. They cut out the B pillar, removed the
5 door and then used the expansion arrests on the jaws
6 of life to push away the passenger front door.

7 Q Now, EMS didn't do that, did they? (indicating)

8 A The fracture point to the top of the roof line?

9 Q They didn't do that, did they?

10 A No, sir.

11 Q They didn't do that, did they?

12 A They pushed the door away from the --- that door
13 was basically locked in place. They pried it back
14 out. Most of the damage from the tree is on the right
15 front, right front wheel assembly into the wheel well
16 damage.

17 Q And they didn't do that, did they?

18 A No, they did not.

19 Q And the victim was sitting like right in here.
20 That's where the victim was at?

21 A Yes, sir.

22 Q So he was right there where all that damage took
23 place?

24 A Yes.

25 Q Now, I think Mr. Postic asked you about other DNA

1 being submitted. The DNA was submitted to figure out
2 if Donnie Thigpen was the driver, right?

3 A Yes.

4 Q Melvin Wright wasn't the driver, was he?

5 A No, sir.

6 Q Now, Mr. Postic asked you about what you knew
7 when you went to the jail. You had already went
8 through this whole scene. You had taken these
9 pictures and you had already done your examination at
10 the scene before you went to the jail, right?

11 A Correct.

12 Q And you went to the house with a search warrant
13 too, right?

14 A Yes, sir, it's like 3:45 we got there.

15 Q So you already kind of knew how the accident
16 happened. You already knew that was the track of the
17 vehicle, right?

18 A Yes, sir.

19 Q You already knew there was no evidence of
20 braking.

21 A Correct.

22 Q You already knew --- through the search warrant,
23 you already knew you had clothes that had glass
24 shards?

25 A Correct.

1 Q You already knew that the collision location was
2 fairly close to the home of the owner?

3 A Yes, sir, after arriving at that location, yes,
4 sir.

5 Q Look at this. If he had jerked the steering
6 wheel, would that track have been different?

7 A Yes, sir. The --- for all intents and purposes,
8 we're showing this vehicle being at 45 miles an hour.
9 If he had jerked the steering wheel, you would have
10 had a different angle of departure for this, not a
11 gradual angle. That would be based on where the jerk
12 occurred on the bridge, but there was no evidence that
13 occurred.

14 Q So when Donnie Thigpen told you he jerked the
15 wheel, you knew that wasn't true?

16 A It did not fit the evidence we had.

17 Q And he didn't tell you --- he didn't tell you
18 that there was a deer that ran out?

19 A I think we asked him if there was anything in the
20 roadway that would have caused him to take evasive
21 action to avoid or something like that.

22 Q And he said there wasn't anything?

23 A That was his response, yes.

24 Q I think you said he took his eyes off and looked
25 up and, you know, isn't that what he said?

1 A I don't have a transcript so I'm not exactly sure
2 what his actual wording was.

3 Q Okay. Mr. Postic asked you about the seat belt
4 marker, okay. Wouldn't these marks on State's 86,
5 isn't that evidence, in your opinion, of whether or
6 not he could have been the driver?

7 A Based on this photograph and talking with him, he
8 was the driver of the airbag deployment.

9 Q Yeah?

10 A He had his hands on the steering wheel at the
11 time it was deployed.

12 Q And that's what that mark shows?

13 A Correct.

14 Q Didn't Mr. Thigpen himself tell you he wasn't
15 wearing a seat belt?

16 A Again, that's on the interview. I don't have
17 the ---

18 Q It's on the audio?

19 A Yeah.

20 Q Okay. And the steering wheel, I think you said
21 it came loose because of the impact with the body?

22 A Yes.

23 Q With the driver?

24 A The second impact.

25 Q Well, isn't this what the driver would have

1 impacted with?

2 A If that sequence occurs or goes through the
3 collision event, the airbag will deploy. You don't
4 have time to remove your hands from the steering wheel
5 to anticipate an airbag deployment.

6 Q Okay.

7 A Or I guess you could if you knew it was coming.
8 In this case, the evidence shows his hands remained on
9 the steering wheel and that torque, he basically
10 provided a torque, in my humble opinion, to the
11 fracture to the steering wheel.

12 Q But if you don't have an airbag, the steering
13 wheel is going to hurt?

14 A Eventually you'll get to --- in this case, you'll
15 go forward, make contact with the airbag, that will
16 inflate the airbag, depending on that time to change
17 the Delta V, and you make contact with the vehicle.

18 Q One of the reasons for the airbag is so you don't
19 eat the steering wheel, essentially?

20 A Yes. And to slow your time rate of the Delta V,
21 so you don't receive the --- to slow your Delta V
22 timeframe and then to help out with your damage.

23 Q And I don't know if you remember this or not, but
24 when you were talking to Mr. Thigpen at the jail,
25 didn't he say his ribs hurt?

1 A I don't recall if he said that. We asked him to
2 lift his shirt up. He had some abrasions and red
3 marks. They hadn't started to change colors yet, but
4 he had some discoloration you could say in the lower
5 abdomen area.

6 Q But if it's on audio, he said it, right?

7 A Correct.

8 Q Now, again, this might be restating the obvious.
9 That's that bridge abutment that you have pictures of
10 that he hit? That's the edge of the bridge?

11 A Yes, sir.

12 Q Didn't he have to be left of center to hit that?

13 A He did.

14 Q And if he was on his lane, would he have hit that
15 tree?

16 A Not that --- if he was in his travel lane going
17 straight, he would not have made contact to the tree.

18 Q Right.

19 A No, sir, not without applying the steering wheel.

20 Q If he had stayed in his lane, he wouldn't have
21 hit anything, would he?

22 A Correct.

23 Q If he would have hit the brakes, would it have
24 slowed the Jeep down?

25 A Yes, sir.

1 MR. POSTIC: I'm going to object to any
2 speculation.

3 THE COURT: It's common knowledge. Overruled.

4 MR. POSTIC: Thank you.

5 BY MR. MOAK:

6 Q One of the things you said that y'all could have
7 done, but y'all --- the speed he gave was consistent
8 with what you thought it was, so ya'll didn't do like
9 a crush analysis?

10 A Correct.

11 Q Does the amount of force in the collision affect
12 how much the vehicle is crushed?

13 A Yes.

14 Q So if he's going ten miles per hour, it would be
15 a certain level of damage that you could see from
16 there and 45 would be another level, correct?

17 A Correct.

18 Q So if he would have hit the brakes, he would have
19 slowed down, right?

20 A Yes, sir.

21 Q And that would have decreased the force, your
22 Delta V when he hit that tree?

23 A Correct.

24 Q Because Delta V is like you're going 60 miles per
25 hour and you hit a brick wall. You're going from 60

1 miles per hour to zero like that, right? I mean,
2 that's what a Delta V is?

3 A Yes.

4 Q And the vehicle absorbs that. The body absorbs
5 that. That's what caused all the damage, right?

6 A For the injuries, yes, sir.

7 Q Now, if you go 60 miles per hour down a boat ramp
8 into water, you're not stopping just like that, are
9 you?

10 A No.

11 Q It's spread out?

12 A Correct.

13 Q So the Delta V isn't as much?

14 A Correct.

15 Q But he hit a tree, right?

16 A Yes.

17 Q That tree didn't move?

18 A No, sir.

19 Q That tree stopped it?

20 A Yes, sir.

21 Q So the Delta V was 45 miles per hour to zero,
22 just like that?

23 A Not being a barrier equivalent crash, you're
24 going to --- it's not going to be a straight up 45
25 rate of change. It's somewhat offset. You're

1 probably going to be in the 20 to 30s miles per hour
2 rate of change. He rotates around, comes to zero.

3 Q But he never hit the brakes to decrease the
4 force?

5 A No, sir, not that we could see.

6 Q That would have been the easiest thing to do,
7 wouldn't it?

8 A (Nods in the affirmative.) It's a common
9 reaction.

10 MR. MOAK: No further questions.

11 RECROSS-EXAMINATION:

12 BY MR. POSTIC:

13 Q Trooper O'Donnell?

14 A Yes, sir.

15 Q You said you knew that the clothes had glass
16 shards on them?

17 A I'm sorry?

18 Q Okay. You said you knew that the clothes that
19 were taken from Donnie's house had glass in them. Did
20 you know that?

21 A Yes, sir.

22 Q You did? I thought that was discovered at the
23 M.A.I.T. Team, the M.A.I.T. headquarters in Columbia?

24 A I participated in the search warrant of the
25 defendant's home and we located his pair of blue

1 shorts with a brown belt attached to that, and I
2 inspected those for inventory, and secured the glass
3 shards in the pockets.

4 Q Did you test that glass to see if it was ---

5 A No, sir.

6 Q No one tested it. Did anybody test his clothes
7 for airbag residue? You said it fills up with
8 something?

9 A No, sir.

10 MR. POSTIC: Okay. That's it. Thanks.

11 THE COURT: All right, sir. You may come down.
12 Thank you very much. May this witness be excused in
13 without objection?

14 MR. POSTIC: Without objection.

15 MR. MOAK: State calls Johnny Fellers.

16 JOHNNY FELLERS,
17 after being duly sworn, testified as follows:

18 THE WITNESS: Johnny Fellers.

19 THE COURT: All right. We're going to take a
20 short break at this time.

21 MR. POSTIC: Yes, sir.

22 THE COURT: Mr. Fellers, just stay where you are.

23 All right. Ladies and gentlemen of the jury,
24 please go to the jury room. Don't discuss the case
25 among yourselves while you're in the jury room. We'll

1 reconvene in about ten minutes.

2 (WHEREUPON, the jury left open court at
3 approximately 10:28 a.m.)

4 THE COURT: All right. Stand at ease.

5 (WHEREUPON, a short break was taken.)

6 THE COURT: Ready for the jury?

7 MR. MOAK: Yes, Your Honor.

8 MR. POSTIC: Yes, Your Honor.

9 THE COURT: Bring the jury.

10 MR. MOAK: Your Honor, before the jury comes back
11 out ---

12 THE COURT: Hold on. You said you are ready for
13 the jury?

14 MR. MOAK: We're having an issue with ---

15 MR. POSTIC: Do you want me to make sure?

16 THE COURT: Hold on. Hold on.

17 THE BAILIFF: Hold it a minute.

18 MR. MOAK: Sorry. Your Honor, I should have
19 mentioned this before I said I was ready. Heather
20 Dailey, who is actually one who ran the toxicology
21 test was supposed to be here at 10:00. Then she ---
22 she does not work at SLED. Then she was saying it
23 was going to be 11:15. Now, she is saying 11:30. The
24 only two witnesses we have left are her, other than
25 Mr. Fellers, are her and Robert Sears who actually did

1 the report. He actually was the supervisor who
2 reviewed it, did the report. We need her before we
3 put him up, so after we do Mr. Fellers, we may have to
4 take a break, Your Honor. I mean, we've been trying
5 to get her. This is the morning she said she was
6 completely available and we're just ---

7 THE COURT: Just wait a minute

8 Did you take them out of order?

9 MR. POSTIC: I don't know if you can. She's the
10 one who ran the toxicology report.

11 THE COURT: Well, I understand.

12 MR. POSTIC: I can't stipulate to that one.

13 MR. MOAK: I just want to make you aware, Your
14 Honor. I mean, we've done everything we can short
15 of ---

16 THE COURT: Where is she now?

17 MR. POSTIC: She lives in Irmo.

18 THE COURT: Do you know where she is now?

19 MR. MOAK: The last time we had to work with her,
20 she was waiting on a babysitter to show up at her
21 house.

22 THE COURT: Is she under subpoena?

23 MR. MOAK: Yes, the only thing we haven't done is
24 send an officer to pick her up.

25 THE COURT: She is still at her house in Irmo, as

1 far as you know?

2 MR. MOAK: As far as I know, yes.

3 INVESTIGATOR: She should be enroute. She said
4 11:15, so she should be enroute.

5 MR. MOAK: Every time we call to check on her,
6 she is at her house.

7 THE COURT: Well, let's find out where she is now
8 so we have some idea --- I mean, if she is still in
9 Irmo, she is an hour away. Call the sheriff to get
10 his helicopter.

11 MR. MOAK: I just want to make the court aware.
12 I think we can go forward with Mr. Fellers.

13 THE COURT: Just wait a minute. Find out where
14 she is.

15 INVESTIGATOR: She just crossed into Kershaw
16 County and should be here within the next fifteen or
17 so minutes.

18 (WHEREUPON, State's Exhibit Number 145 and 146
19 were marked for identification only.)

20 THE COURT: All right. Bring the jury, please.

21 (WHEREUPON, the jury came into open court at
22 approximately 11:17 a.m.)

23 THE COURT: All right. Ladies and gentlemen.
24 Thank you for your patience. I'm sorry about the
25 delay, but sometimes we need to accommodate some

1 witnesses. We're now ready to continue with the
2 trial. Solicitor?

3 MR. MOAK: Your Honor, I think we've called
4 Coroner Fellers already, and he has been sworn.

5 THE COURT: Yes, he has been sworn.

6 DIRECT EXAMINATION:

7 BY MR. MOAK:

8 Q Coroner Fellers, you are the coroner of Kershaw
9 County?

10 A Yes, sir.

11 Q How long have you been the coroner?

12 A Seventeen years.

13 Q Is it your responsibility to, I guess, to do a
14 death certificate or a coroner's report?

15 A Yes, sir.

16 Q Did you yourself go out to Twenty-five Mile Creek
17 Road on June 20, 2009?

18 A Yes, sir.

19 Q Did you actually see the body of the victim,
20 Melvin Wright?

21 A Yes, sir.

22 Q Did you make any observations about whether or
23 not he was alive or dead?

24 A Oh, he was dead at the time.

25 Q And did you actually do a coroner's report?

1 A Yes, sir.

2 Q I show you what's been marked as State's 145, and
3 see if you recognize this.

4 A Yes, sir, that's our coroner's report that we do.

5 Q Does that indicate that Mr. Wright died as a
6 result of a traffic fatality?

7 A Yes, sir.

8 MR. MOAK: Your Honor, at this time I'd move
9 State's 145 into evidence.

10 THE COURT: Any objection?

11 MR. POSTIC: No objection.

12 THE COURT: Without objection.

13 (WHEREUPON, State's Exhibit Number 145 was
14 admitted into evidence.)

15 BY MR. MOAK:

16 Q Now, you basically do the death pronouncement?

17 A Yes, sir.

18 Q Now, you aren't a doctor, are you?

19 A No, sir.

20 Q Do you have any medical training or anything?

21 A No medical training.

22 Q So you can't do an autopsy?

23 A No, sir.

24 Q And no autopsy was requested in this case?

25 A No, sir.

1 Q So basically, like how did you come to the
2 opinion or conclusion you had that report?

3 A With the appearance of the body that was in this
4 car, it was consistent with a closed head injury.

5 Q Does that report say something about a chest
6 injury or something?

7 A It says closed head injury.

8 Q A closed head injury?

9 A Yes, sir.

10 Q So you observed injuries to his head?

11 A I'm sorry, sir?

12 Q You observed injuries to his head?

13 A Yes, sir.

14 Q He wasn't breathing?

15 A No, sir.

16 Q He had no vital signs?

17 A No, sir.

18 Q So he was deceased?

19 A Yes, sir.

20 Q Was he still in the vehicle when you got there?

21 A Yes, sir, he was still belted into the vehicle.

22 Q Still belted into the passenger's seat?

23 A Yes, sir.

24 Q So he wasn't the driver, obviously?

25 A No, sir.

1 MR. MOAK: No further questions.

2 THE COURT: Cross-examination?

3 MR. POSTIC: Thank you, Your Honor.

4 CROSS-EXAMINATION:

5 BY MR. POSTIC:

6 Q Good morning.

7 A Good morning.

8 Q Fellers, is that the last name?

9 A Fellers.

10 Q Fellers, okay, that's what I got. How
11 long --- you've been 17 years as the coroner?

12 A Yes, sir.

13 Q Of this county. Is that an elected position?

14 A Yes, sir, I was elected 17 years ago.

15 Q And what generally are the duties of the coroner?

16 A To establish the cause and the manner of death.

17 Q Okay. And do you have a staff?

18 A Yes, sir.

19 Q Okay. Do you have medical examiners on your
20 staff?

21 A We do employ medical examiners.

22 Q So you contract with outside medical examiners?

23 A Yes, sir.

24 Q Okay. And you use them sometimes to determine
25 cause of death in a case?

1 A Yes, sir.

2 Q Did you have any contact with the defendant in
3 this case, Donnie Thigpen, do you know him at all?

4 A I don't think I had any contact with him. I
5 don't remember him.

6 Q And you have no specific or personal knowledge
7 about what happened in this car accident?

8 A No, sir.

9 Q Okay. And just by your observations, I mean, you
10 determined, of course, the victim was no longer
11 living; is that correct?

12 A Yes, sir.

13 Q And you just observed that he was in the car and
14 he had an injury and you made a determination at that
15 point that it was the car accident that caused his
16 death; is that correct?

17 A While we were on the scene, yes, sir.

18 Q Okay. I also have a report that was cc'd to you.
19 I just want to make sure that you got it. What is
20 that, sir?

21 A This is a toxicology report on Melvin Wright.

22 Q Okay. And it looks like it was submitted to
23 where?

24 A South Carolina Law Enforcement Division.

25 Q Okay. And what was the purpose of that, sir?

Redirect of Fellers by Moak
Direct of Dailey by Moak

1 A We do that on traffic fatalities to establish if
2 they had any alcohol or drugs in their system.

3 Q Okay. That might have caused the death even if
4 they were a passenger?

5 A A high concentration of alcohol or drugs could
6 cause death.

7 Q But it certainly did not in this case?

8 A No, sir.

9 MR. POSTIC: That's all I have. Thank you.

10 REDIRECT EXAMINATION:

11 BY MR. MOAK:

12 Q You ask for an autopsy if you have a question
13 about the cause of death?

14 A Yes, sir.

15 Q Did you have any question as to the cause of
16 death in this case?

17 A No, sir.

18 MR. MOAK: No further questions.

19 MR. POSTIC: Thank you.

20 THE COURT: All right, sir. You may come down.

21 MR. MOAK: The State calls Heather Dailey.

22 HEATHER DAILEY,

23 after being duly sworn, testified as follows:

24 THE WITNESS: Heather Dailey.

25 DIRECT EXAMINATION:

1 BY MR. MOAK:

2 Q Ms. Dailey, are you a stay-at-home mom now?

3 A Yes.

4 Q In June, in June of 2009, were you working at the
5 State Law Enforcement Division lab?

6 A I was.

7 Q And what were you doing?

8 A I was an analyst in the toxicology lab.

9 THE COURT: Ma'am, can you speak up a little bit.

10 THE WITNESS: I'll try. I was an analyst in the
11 toxicology lab.

12 BY MR. MOAK:

13 Q And what does that mean? I mean, what did you
14 do?

15 A A toxicologist is one who analyzes blood, urine
16 and other biological specimens for the presence or
17 absence of drugs, alcohol or other poisons and then
18 interprets them for the coroner and for courts of law.

19 Q Now do you have any --- what's your educational
20 background, your training background?

21 A I have a bachelors in biology from the University
22 of South Carolina with a cognate in chemistry plus all
23 the hands-on training we got at SLED before we could
24 actually work on cases.

25 Q So there is actually a SLED in-house training

1 program to qualify you for this job?

2 A Yes, sir.

3 Q Did you complete that program?

4 A I did.

5 Q How long did it take you to complete that
6 program?

7 A One year.

8 Q During that year, do you assist other --- are you
9 assisting other toxicologists and participating or
10 what are you doing?

11 A We learn from other toxicologists what we are
12 supposed do and we get hands-on training and we also
13 take examinations as to how to handle specimens and
14 what to look for, how to do it and how to it correctly
15 per protocol.

16 Q How long were you at SLED?

17 A I was with SLED just shy of four years.

18 Q And you were in the same area the entire time?

19 A I was always in toxicology, yes.

20 Q And when did you leave SLED?

21 A I left SLED in March of 2010.

22 Q Okay. So two years ago?

23 A (Nods in the affirmative.)

24 Q During the four years you were at SLED,
25 approximately how many cases have you examined in

1 toxicology?

2 A Examined?

3 Q Or analyzed.

4 A Probably about 2,000.

5 Q A lot?

6 A A lot, yes, sir.

7 Q Okay. You ran a lot of tests?

8 A Yes, sir.

9 Q Were you ever called to court during that time?

10 A Several times, yes, sir.

11 Q Were you ever offered as an expert?

12 A Every time.

13 Q In the field of toxicology?

14 A Toxicology, yes, sir.

15 Q That was in General Sessions?

16 A General Sessions, magistrate court.

17 Q Okay. About how many times have you testified
18 before?

19 A About 15.

20 Q Okay.

21 MR. MOAK: Your Honor, at this time I would offer
22 Ms. Dailey as an expert in the field of toxicology.

23 THE COURT: Voir dire? Objection?

24 MR. POSTIC: I have no voir dire, and I'm not
25 going to break her streak. No objection.

1 THE COURT: Thank you.

2 BY MR. MOAK:

3 Q Now, are you familiar with S.L.E.D. lab number
4 L097604?

5 A It was just handed to me about three minutes ago.

6 Q Well, I mean, you had it back in '09 at one
7 point, right?

8 A Yes, sir. I probably --- if I'm being called,
9 then I did handle it, yes, sir.

10 Q So you were working at SLED then?

11 A I was.

12 Q Do you know what you did in regards to this case
13 back in 2009?

14 A At that time I was an analyst. I opened a bag
15 and I was responsible for pipetting all our blood
16 alcohols.

17 Q What do you do with the blood alcohol?

18 A With the blood alcohol, I pipetted it out as a
19 certain sample, which is how we go about --- we
20 pipette or take out just a small sample, the same
21 amount for every single case that we get.

22 Q Okay.

23 A So I was just responsible for pipetting the
24 accurate amount of blood into the sample vials for
25 analysis for alcohol.

1 Q And how was the analysis performed?

2 A You --- we run blood alcohol analysis on the
3 Headspace Gas Chromatograph and then if you get a
4 positive result there, you confirm the positive on the
5 Headspace Mass Spectrometer.

6 Q And what do these two machines do?

7 A They analyze a substance for the presence of
8 alcohol.

9 Q And the machine does it?

10 A Yes, sir.

11 Q Do you know how the machine works?

12 A I used to.

13 Q Yes.

14 A It's been a long time since I've had to testify.

15 Q Sure. Okay. But the machine was working
16 properly?

17 A Yes, the machine was working properly. We set
18 aside certain protocols. Every sample has to be
19 surrounded by an accurate standard that we set at 0.08
20 with just --- so we have to --- every sample must be
21 surrounded by a certain number of 08's. They must be
22 accurate within plus or minus 0.05.

23 Q So the machine actually is testing a standard
24 that you know what the amount is?

25 A Yes.

1 Q So you try to --- if that's right, it kind of
2 tells you if the sample is right?

3 A Right, and we also test negative samples too to
4 make sure that there is no carry over from previous
5 samples.

6 Q That's kind of like the internal controls to make
7 sure you don't get a false reading?

8 A Yes.

9 Q Okay, now, after you performed this, were you
10 able to determine the level of alcohol that was in the
11 blood?

12 A It did give a level, yes, sir.

13 Q And what was that level?

14 A This reading --- the reading that we were given
15 was 0.218.

16 Q Okay. .218?

17 A Yes, sir.

18 Q And that is --- that's the .218 blood alcohol
19 percentage?

20 A Yes, sir.

21 Q And are you familiar --- why do you use the .08
22 as one of your standards?

23 A Yes, sir, it's just generally defined as the
24 legal limit.

25 Q That's the legal limit, so .218 is almost three

1 times that?

2 A Yes, sir.

3 Q Okay. Now, L097604 is the lab number for Donnie
4 Thigpen, correct?

5 A Correct.

6 Q So that was the blood, the vial that you drew the
7 blood out that was marked Donnie Thigpen.

8 Q And it came out of the best kit or the packaging
9 that was marked that it was collected from Donnie
10 Thigpen?

11 A Yes, sir.

12 Q Did it appear to have been tampered with or
13 anything when you got it?

14 A It did not.

15 Q So it appeared --- it was still sealed?

16 A Yes, sir.

17 Q And is it your opinion to a reasonable degree of
18 certainty in the field of toxicology that Donnie
19 Thigpen's blood alcohol was a .218?

20 A Sir, I cannot testify to any interpretation.
21 This was not my case. I did not sign off on it. I
22 was just here to run every alcohol.

23 Q But is it your opinion --- well, to your
24 knowledge, it came back as a .218?

25 A Yes, this is --- the lab number for this sample

1 came back as a 0.218.

2 Q You're the one that ran the test?

3 A I ran the test, but did not sign the case. It's
4 someone else's to interpret.

5 Q To further explain it, you ran it and then it
6 ended up going to Roberts Sears?

7 A Yes, sir.

8 Q And he is the one who reviewed your work?

9 A Yes, sir.

10 Q And he did the report?

11 A Yes, sir.

12 Q But the number that came out from your test is
13 .218?

14 A The number that printed out on our sheets from
15 the instrument was a 0.218.

16 Q No further questions?

17 THE COURT: Mr. Postic?

18 MR. POSTIC: Beg the Court's indulgence.

19 (Pause.)

20 CROSS-EXAMINATION:

21 BY MR. POSTIC:

22 Q Ms. Dailey, thank you for coming to Camden for
23 this case. Do you know when this test was run, ma'am?

24 A Let's see. The date on this --- our read out was
25 6/25/2009.

1 Q I don't see that on there.

2 MR. POSTIC: May I approach?

3 THE COURT: Yes.

4 MR. POSTIC: Thank you, Your Honor.

5 (Pause.)

6 BY MR. POSTIC:

7 Q Let me see which one you're looking at.

8 A I'm just looking at the date of that and the date
9 of report are two different things.

10 Q Okay. So that's not your report?

11 A No, sir. That's not our report.

12 Q All right. That's all I've got.

13 And I'm wondering as I'm looking at the report of
14 your colleague, Agent Sears --- do you go by agents if
15 you work in the lab? Did they call you Agent Dailey?

16 A Only those who carry badges and guns are agents.

17 Q Did you get to carry those?

18 A They stopped that just before I was hired.

19 Q Just a lab coat?

20 A Pretty much.

21 Q Well, I see Mr. Sear's report. I don't see your
22 name on it. How do I know that this is the report
23 that you did?

24 A I did not do a report. This was his case to sign
25 off on. I was just responsible for pipetting out an

1 accurate aliquant of sample and running the blood
2 alcohol instruments. After I removed the samples from
3 the instrument, I would make sure that everything was
4 correct, that all parameters were set, that our
5 standards were in that our negatives were negative and
6 then if we got a positive, then we would hand that
7 data over to the signing analyst for further testing
8 and reporting.

9 Q What do you mean by positive?

10 A If you get a positive result for alcohol, then
11 you have to confirm it and make sure the levels are
12 accurate and then you just confirm that the level you
13 found is the level you found and that what you
14 supposedly found was, in fact, that substance. That's
15 why we run both. We run an initial test and we also
16 run confirmatory tests just to be sure that the
17 results are accurate.

18 Q All right. Hang on one second.

19 (Pause.)

20 MR. POSTIC: Thank you for coming five minutes of
21 testimony, two hours of driving. Thank you.

22 REDIRECT EXAMINATION:

23 BY MR. MOAK:

24 Q That confirmatory testing that you're talking
25 about are the two machines?

1 A Sir?

2 Q The test you said?

3 A Uh-huh.

4 Q Okay. On your chain of custody, which is here
5 somewhere.

6 (Pause.)

7 I show you what's marked as State's 141. Is that
8 a SLED chain of custody?

9 A Okay.

10 Q Is that the same lab number?

11 A L097604, yes, sir.

12 Q Okay.

13 Specifically on page three of the chain of
14 custody, this section, as far as 5.1, on page three,
15 is that you?

16 A Yes, sir, that is me.

17 Q Does that show the chain of custody where you had
18 the sample in your custody to do the test?

19 A Yes, sir.

20 Q And that was June 25th?

21 A Yes, sir.

22 Q Of 2009?

23 A Yes, sir.

24 MR. MOAK: No further questions.

25 THE COURT: All right. You may come down, ma'am.

1 Thank you. You're free to go.

2 MR. MOAK: The State calls Robert Sears.

3 THE COURT: Are those reports that she has in
4 evidence, Mr. Moak? Any of those documents in
5 evidence?

6 MR. POSTIC: He didn't enter them.

7 ROBERT SEARS,

8 after being duly sworn, testified as follows:

9 THE WITNESS: My name is Robert Michael Sears.

10 DIRECT EXAMINATION:

11 BY MR. MOAK:

12 Q Is it Agent Sears, Mr. Sears, or what do I call
13 you?

14 A Mr. Sears is fine.

15 Q Okay. You work for the State Law Enforcement
16 Division?

17 A Yes, sir, I'm employed by the South Carolina Law
18 Enforcement Division, more commonly referred to as
19 SLED.

20 Q And you're in the lab?

21 A Yes, sir.

22 Q And what division are you in at the lab?

23 A I'm a forensic toxicologist with SLED.

24 Q And what is your education, training, and
25 experience that qualifies you to be a toxicologist?

1 A I have a bachelors degree in chemistry from
2 Francis Marion College. Upon receiving my degree, I
3 went to work for SLED, went back to school, received a
4 Master's degree in medicinal chemistry through the
5 pharmacy department at USC. In addition to formal
6 education, I've attended numerous schools and outside
7 training, both to learn how to utilize the equipment,
8 the instrumentation that we use, and to interpret
9 those findings that we develop in the laboratory. I
10 am board certified by the Forensic Toxicology
11 Certification Board and have been since 1995.

12 Q And how long have you been with SLED?

13 A I've been with SLED, April 2nd will be 24 years.

14 Q The whole time you've been a toxicologist?

15 A Yes, sir.

16 Q So I would imagine that you have testified in a
17 lots of cases?

18 A I've testified in excess of 100 times in this
19 state and also in the state of Georgia in their
20 General Sessions court.

21 MR. MOAK: Your Honor, I would submit him as an
22 expert in the field of toxicology.

23 THE COURT: Voir dire or objection?

24 MR. POSTIC: No voir dire, no objection.

25 BY MR. MOAK:

1 Q Mr. Sears, I want to direct your attention to
2 SLED lab number L097604. Do you have the paperwork on
3 that?

4 A Yes, sir.

5 Q Could you tell me what you received in this case;
6 what did you actually get in this case?

7 A In this particular case, a series of blood
8 samples and urine sample were submitted to the South
9 Carolina Law Enforcement Division for analysis.

10 Q How many vials of blood did you get?

11 A It's our common practice to photograph the
12 evidence as we receive it in the toxicology department
13 and based on the photograph that's part of the record,
14 I see six tubes of blood and one container of urine.

15 Q So you have six tubes of blood?

16 A Yes, sir.

17 Q Were they all --- can you tell us what the
18 difference in the cap color is?

19 A Different tubes have different things in them. A
20 red top tube has nothing in it. It's just a sterile
21 container. A gray top tube has sodium fluoride
22 potassium oxalate that are used as preservatives. It's
23 an anticoagulant and an antimicrobial, so that you
24 don't have to worry about any formation or break down
25 of components that are in that tube.

1 In this case, from the black and white
2 photograph, we can't tell what they were, but the two
3 tubes that are covered with the red and white stopper
4 seals appear to be the tubes that we provide in the
5 kits that we provide the officers and these would have
6 been grayed top tubes.

7 Q Okay.

8 A In addition, our notes do not indicate any
9 deviation from the gray top tube. When you look at
10 what was analyzed, if it's anything other than the
11 gray top tube, we will notate that on the analytical
12 run, on the instrument there.

13 Q And in the past, has SLED tried to like de-test
14 to see if there's a difference between different types
15 of tubes and storage conditions to see if it affects
16 the results?

17 A When Dr. Grey Amick was employed by our
18 laboratory, we did an in-house study looking at gray
19 top, purple top, red top tubes and assessing the
20 stability of alcohol or ethanol in those tubes. That
21 was published in a peer review journal, been at least
22 15 years ago, but yes, we have done that.

23 Q And so on a gray top tube, y'all actually tried
24 to see if you could affect the results by storage, how
25 you stored it, how long you stored it and it didn't

1 affect it?

2 A Yes, sir, tubes were stored in the refrigerator,
3 at room temple and at body temperature. We basically
4 found that tubes stored in the refrigerator or room
5 temple had no growth or no additional ethanol
6 generated in those gray top tubes.

7 Q And that's why you use the gray top tubes?

8 A Correct. That preservative, that anticoagulant,
9 plus the antimicrobial prevents any deleterious change
10 to that sample under reasonable storage conditions.

11 Q So the SLED procedures using that grey top tube
12 are designed to prevent any question of the validity
13 of the test?

14 A That's correct. That gray top tube is provided
15 to the officers and to coroners to try to make sure
16 that we have the best possible sample by the time it
17 gets to us.

18 Q And Heather Dailey just testified that she
19 actually ran the test on this case?

20 A That's correct.

21 Q And you have her results in front of you?

22 A I do.

23 Q And you actually --- you're the one that actually
24 did the report?

25 A Yes, sir, the policy in our laboratory is to, for

1 the last four or five years, to have on individual who
2 is a senior scientist review all quality control data
3 and generate the formal report so that when we go to
4 court we have somebody with a little more experience
5 to testify on the cause and effect of the things
6 involved in the case.

7 Q So even though she did the test, you're the one
8 that did the report?

9 A That's correct.

10 Q And you reviewed her data?

11 A Yes, I did.

12 Q Did you see anything in her notes or records to
13 indicate the test was done correctly or incorrectly?

14 A Everything that I saw would indicate the test was
15 done correctly. All the quality control was met. It
16 appears she followed SLED policy and protocol as it
17 was written.

18 Q Let me show you what's been marked State's 146.
19 Do you recognize that?

20 A Yes, I do.

21 Q Is that a copy of your report?

22 A Yes, sir, that is a copy of the report, and I
23 maintained the original in our case jacket.

24 Q Okay. And that report indicates the blood
25 alcohol level that was the result of your testing?

1 A Yes, it does.

2 Q And you signed the second page, I guess?

3 A Yes, sir, I did.

4 Q And that report was prepared on July, I think
5 1st?

6 A Yes, sir, that's the date on the report is
7 July 1st.

8 Q That's the date you wrote the report, right?

9 A That's the date it was actually generated in the
10 computer.

11 MR. MOAK: I'd offer State's 146 into evidence at
12 this time.

13 MR. POSTIC: No objection.

14 THE COURT: Without objection.

15 (WHEREUPON, State's Exhibit number 146 was
16 admitted into evidence.)

17 A It was finalized and reviewed. In addition to me
18 reviewing Heather's data, another analyst reviews my
19 case as well just to make sure that everything is
20 consistent with protocol, so that's the day it was
21 reviewed and the final form was generated.

22 Q But the test was actually conducted on June 25th,
23 2009, I think?

24 A The test was actually conducted on June 25th;
25 that is correct.

1 Q And what was the results of that test?

2 A The results of the blood alcohol were 0.218
3 percent or gram deciliter. That's a weight volume
4 measurement.

5 Q Now, how much would somebody have to drink to get
6 to that blood alcohol level?

7 A If we base this on a 150 pound male, the average
8 beer, if you drink a domestic beer, for example a 12
9 ounce Budweiser, you're going to reach a peak blood
10 alcohol of around .02. So if we just assume an
11 individual is drinking beer, in order to reach a .218,
12 you'd have to drink approximately 11 beers in one
13 hour.

14 You have to remember that your body is
15 eliminating the ethanol the entire time that you're
16 drinking, so you begin eliminating the ethanol as
17 you're consuming it. Ethanol is the alcohol found in
18 beer, wine or liquor, so for each hour that we drink,
19 say that these beers were consumed over five hours, we
20 have to replace what the body has eliminated, so
21 that's an additional approximately five more drinks to
22 cover that five hour period of time.

23 So again, if you were to drink over a one hour
24 period of time approximately 11 beers or mixed drinks,
25 if you were to drink over a longer period of time, it

1 would increase the number of alcoholic beverages you
2 would have to consume.

3 Q Okay. So, I'm going to give you a hypothetical.
4 If somebody is drinking between the hours of midnight
5 and five o'clock in the morning at one bar and they
6 said they had three to four beers, let's say four
7 beers, at another bar they said they had another four
8 beers and three liquor drinks, two Southern Comfort
9 Kamikazes, and a vodka Kamikaze, and at a third bar
10 they had three or four more beers, so 12 beers and
11 three liquor drinks over a five hour period, would
12 that get you to a --- to that level?

13 A I'm not familiar with those particular liquor
14 drinks in whether they only have a single liquor or
15 multiple liquors in them. Assuming there is only a
16 single liquor in each of those Kamikazes, you come up
17 with about 15 beverages that this individual drank. I
18 would say 11, 16, that's getting close.

19 I would say if it's over a five hour period of
20 time, it would take at least the 11 that we discussed
21 already plus five so around 16 drinks. That's if
22 you're measured immediately after --- well, about an
23 hour after that last drink, so again the body
24 continues to eliminate alcohol the longer we wait to
25 do the test.

1 Q And if the test is done seven hours after you
2 quit drinking, would you have had to drink a lot more
3 to still be at .22 about seven hours after you were
4 drinking?

5 A Yes, sir, because your body is eliminating that
6 alcohol at approximately one drink per hour, again, at
7 a rate of approximately one drink per hour, so if it
8 takes another five or six hours to do the test, you
9 would have to have consumed additional ethanol to
10 reach that peak so by the time that test is done,
11 you're still at that .22.

12 Q So he would have had to drink more than what is
13 laid out?

14 A That's correct.

15 Q More than 12 beers?

16 A Probably five more drinks in addition.

17 Q Okay.

18 A Five to seven more because you said seven hours.

19 Q Yeah.

20 A So approximately five to seven more beverages to
21 still be that the peak after the last drink.

22 Q Without getting a sample at the time of the
23 wreck, all you can really testify to is what the
24 toxicology was when it was collected?

25 A That's correct. I could back track and give you

1 an approximate value, but without laying some
2 foundation as to when the last drink was consumed, it
3 is a toss up.

4 Q Okay, but if the blood was drawn at 12:40 in the
5 afternoon, that would have been a full .218?

6 A That's correct. That's what --- we tested the
7 blood that was drawn at twelve or whatever time it was
8 and that would be consistent with that alcohol at that
9 time.

10 Q And also if the individual had not drank between
11 the wreck and the collection, that would mean he would
12 have to --- he got the alcohol in at some point,
13 correct?

14 A That's correct.

15 Q So he would have had to drink that before the
16 wreck?

17 A If he was under observation for the majority of
18 that time, or all of that time, yes, he would have had
19 to consume that prior to that wreck in order to still
20 be at that level.

21 Q Or how about if he said he hadn't drank anything
22 since the wreck?

23 A Again, we can make that assumption based on his
24 statement that there was no additional alcohol
25 consumed, so yes, he would have had to consume that

1 alcohol prior to the wreck.

2 Q And the standard that Heather Dailey said, one of
3 the standards from the machine is .08. I think that's
4 correct?

5 A Our quality control for that instrument, we run
6 a standard every 15 samples or even fewer if the run
7 doesn't have an even multiple of 45 --- even multiple
8 of 15. So we're running the .08s because that is our
9 legal per se level for alcohol in this state. We want
10 to make sure that the instrument is very accurate at
11 that level. We purchased certified reference
12 standards and we run those regularly. At the time
13 that this was run, all standards have to be within
14 5 percent, plus or minus five percent of that .08 and
15 all of Heather's standards were in that range. They
16 were all less than 5 percent.

17 Q Part of your training, also, don't you have some
18 training and experience on what the effects of that
19 alcohol percentage is on a person?

20 A Most certainly. Part of my responsibility at
21 SLED is to train new analysts in how to operate the
22 instrumentation and how to interpret their findings.
23 I've attended the Borkenstein school in Indiana where
24 we talk about the pharmacology of alcohol and how the
25 ethanol affects the individual, as well as

1 participating in drinking studies where I've been able
2 to observe individuals at various blood alcohol
3 concentrations.

4 So yes, I've been able to kind of put the level
5 of ethanol with classic side effects that you would
6 expect to see.

7 Q The side effects of alcohol, is that why .08 is
8 the legal limit?

9 A Research that's being done in the field of
10 alcohol toxicology has shown that everyone is
11 impaired, that is their opportunity or ability to
12 operate a motor vehicle is appreciably and materially
13 impaired at levels exceeding .05.

14 The State has decided that .08 is a reasonable
15 level to say this is important for driver safety, so
16 that's why we're going to use that .08.

17 Q And what would you expect to see on an average
18 person at this level, at .218?

19 A Alcohol acts as a central nervous system
20 depressant and it treats --- everybody is affected
21 similarly in that effect or in that vein, I guess. At
22 low levels of alcohol, say a .02, .03 people become
23 very bubbly and get gregarious. They're loud, they're
24 friendlier.

25 As that ethanol goes up and that level goes up to

1 .08, you begin to see slow reaction time, poor motor
2 coordination, lack of attention, their attention span
3 gets to be shorter. As the ethanol level goes up to
4 .15, you start to see sometimes short term memory
5 losses, our brain starts to process data in a
6 different way because it knows that its ability is
7 impacted by the presence of that central nervous
8 system depressant. At a .22, you can see people who
9 become violent. You can see people that actually have
10 slurred speech. Definitely in laboratory studies you
11 see poor or slowed reaction time and poor response to
12 stimuli. This is very obvious to those people doing
13 laboratory studies and standardized field sobriety
14 testing at a .2, and most of these signs are pretty
15 prominent.

16 Q Now, is there a --- does someone --- a person
17 experienced in drinking, like they drink regularly to
18 that level, does that affect what you observe in the
19 person's behavior?

20 A It can, because individuals actually learn from
21 their experience and so individuals who drink
22 regularly tend to realize that if they stand their
23 feet further apart, they're less likely to sway, so
24 the average observer doesn't notice the movement.
25 They tend to speak more slowly you don't notice the

1 slurred speech.

2 It does not, the experience does not, however
3 affect your ability to react to stimulus as far as
4 driving. Driving is a very complex task. One of the
5 things that alcohol does is it decreases your ability
6 to manage more than one task at a time. If you think
7 about driving, you're having to monitor your distance
8 from the vehicle to the side of the road, the distance
9 from your vehicle to vehicles in front of you, to
10 constantly monitor speed and adjust as necessary, so
11 it's a complex set of skills, although we all do it
12 every day and we very much think that it's routine
13 thing and not that difficult, but there are a lot of
14 things that you have to keep up with when you're
15 driving. Ethanol affects your ability to manage all
16 of these operations at one time.

17 Q So even though an alcoholic can kind of hide the
18 slurred speech, he can't hide the impairment?

19 A That's correct. There's actually a term for
20 that. It's called the melandy (phonetic) effect. That
21 is that individuals who begin to drink tend to look
22 more impaired on the way up than on the way down
23 because your body is learning how to mask that
24 impairment. That is a scientific finding that we've
25 seen with chronic drinkers, regular drinkers and non

1 drinkers, we see that in everybody.

2 Q So if you have a --- what's the deference between
3 a DataMaster test and a blood test? What's more
4 accurate?

5 A Well, a DataMaster test is an indirect
6 measurement of blood alcohol. We've set --- we've
7 tested many, many hundreds of thousands of people. We
8 know that the ratio for breath to blood is somewhere
9 between 1:1800 --- or 1800:1 up to about 2300:1.
10 We've stipulated in this state that the ratio is
11 2100:1. All our breath test instruments are set up so
12 that 2100 cc's of breath, or the alcohol found in 2100
13 cc's of breath is set to be equivalent to the alcohol
14 found in one milliliter of blood, so it's an indirect
15 measurement that in the vast majority of people under
16 estimates] your true blood alcohol concentration and
17 we can prove this again by taking simultaneous breath
18 and blood readings from people who have been given
19 known amounts of alcohol. So in most cases it's a
20 little bit lower than what the true alcohol is.

21 Q How about the urine? How is the urine tested?

22 A Urine --- there are a lot of potential issues
23 with a urine alcohol related to how often someone
24 urinates. When is the last time you urinated prior to
25 the test. How much water, how hydrated you are, how

1 much water you're drinking along with your alcohol.
2 It's not as good a correlation between urine and
3 blood.

4 Q Now, if you have a test that was done say an
5 hour-and-a-half after the blood draw and it was lower,
6 would that be what you're talking about, the downward
7 slope?

8 A That would be the individual is in the
9 elimination phase. They're on that curve where their
10 body is getting rid of that ethanol.

11 Q That means they're not still peaking?

12 A They're not still rising. They've already peaked
13 sometime prior.

14 MR. MOAK: No further questions of this witness.

15 THE COURT: Cross-examination?

16 MR. POSTIC: Thank you, Your Honor.

17 CROSS-EXAMINATION:

18 BY MR. POSTIC:

19 Q Mr. Sears.

20 A Yes, sir.

21 Q Thank you for coming today.

22 A You're welcome.

23 Q I know it's your job, but thank you for coming.

24 Let me ask you first about the storage?

25 A Uh-huh.

1 Q The gray tubes as opposed to the other tubes.

2 I'm probably going to repeat lot of things just

3 because I'm not a scientist, okay?

4 A Okay.

5 Q The gray tubes indicate a more --- those are the

6 ones that you use; is that correct?

7 A That's correct.

8 Q To do your test?

9 A Gray top tubes are what we provide to officers
10 and to coroners. They contain a preservative, in this
11 case sodium fluoride potassium oxalate.

12 Q Okay, and so those are --- what is that like, a
13 dust or ...

14 A That's a dry powder in the tube.

15 Q Okay, and that maintains the integrity of the
16 sample?

17 A It does two things. One it prevents the sample
18 from clotting so that we maintain a liquid sample that
19 we can utilize appropriately. The other thing is
20 there is an antimicrobial agent in the there that
21 prevents growth. If there were bacteria or generally
22 speaking if there were bacteria in the tube, it would
23 prohibit or inhibit their ability to thrive in that
24 tube.

25 Q So as long as the tube is --- and you said as

1 long as it's reasonably stored, then that's going to
2 give you an accurate sample?

3 A That's correct. The studies that have been
4 published store blood samples and everything from
5 frozen all the way up to heated, and as I said body
6 temperature, and with the gray top preservative ---
7 with the preservative found in a gray top tube, they
8 have been found to be very stable for months at a
9 time.

10 Q With all of these different --- even if it's
11 frozen or even if it's at body temperature?

12 A That's correct, with the gray top tubes.

13 Q For months at a time?

14 A Yes, sir.

15 Q Okay. And just before I get into the levels and
16 such, let me get to the urine test. Sounds to me, in
17 my kind of simple way of listening to you, the best
18 test is the blood, then the DataMaster, then the
19 urine, right?

20 A That would be correct.

21 Q Okay.

22 A Blood is the most accurate in determining what
23 level of alcohol or ethanol is in your blood stream at
24 the time of the test. Breath is next and then urine,
25 and because there is so much variability in

1 individuals, it's the least favorite.

2 Q Okay. So even take the urine test?

3 A Because in this state, as you know, we have a
4 policy or statute that allows us to look for drugs in
5 urine when alcohol levels are less than our inferred
6 limit for being under the influence.

7 Q Just to be clear, you have your report right
8 there that's been entered into evidence, right. There
9 is no indication of drugs in this case?

10 A That's correct. In this analysis, we also,
11 because of the fact that it was a driving under the
12 influence case, a blood sample was used for drug
13 testing after it was used for the ethanol analysis and
14 for the analytes that we looked for it was negative.
15 I can read the analytes, or they can read them as they
16 wish, but we have a set panel that we look for.

17 Q What is that panel?

18 A We look for amphetamines, benzodiazepines,
19 methamphetamine, oxycodone, cannabinoids, cocaine
20 metabolite and opiates, so these are some prescription
21 medications and some illicit drugs, as well.

22 Q Okay. So I'm seeing cocaine metabolites is what
23 we would call cocaine, right?

24 A Well, cocaine in the body is broken down pretty
25 quickly to benzoylecgonine.

1 Q Okay.

2 A The test actually looks for benzoylecgonine
3 as an indicator of cocaine abuse. If we go a step
4 further, we can generally find apparent cocaine if the
5 PE is positive, if the metabolites are there. So in
6 this case, the metabolite is a great indicator of
7 prior use.

8 Q I see, Okay. And then the cana-something is ---

9 A Cannabinoids are marijuana metabolites or T.H.C.
10 metabolites.

11 Q Okay.

12 A Marijuana has some 60 or 80 different compounds
13 in there that are loosely referred to as cannabinoids.

14 Q Okay, And, again, those were all negative?

15 A Yes, sir.

16 Q Just as a way of background Mr. Sears, you don't
17 know anything about this case whatsoever, right?

18 A All I know, the information that was provided to
19 me is that it was a wreck case and that's all I know
20 about it.

21 Q Okay. So now let me ask you about the ARC and
22 I'm --- this is where I'm going to be repeating
23 Mr. Moak and I'm just going to take some time here.
24 You're saying that when someone stops drinking, the
25 level can continue to go up; is that right?

1 A Yes, sir, there is a curve associated with
2 describing the amount of ethanol in your blood stream.
3 The --- and truthfully if you would like, I'll be glad
4 to draw this because we can talk about it better that
5 way. It's up the you.

6 Q Okay. That would be great.

7 (Pause.)

8 A So if we have two axis with the bottom being
9 time, the top being blood alcohol concentration, blood
10 alcohol is going to go up, not always at linear rate
11 because it depends on what you're drinking, how fast
12 you're drinking it, whether you're eating along with
13 it, whether you're being social at the same time, so
14 there may be gaps in what you drink.

15 So this can actually be somewhat jagged based on
16 how the frequency of the drinking is going on, how
17 quickly you're consuming your alcohol. At some point
18 after the last drink, you're going to continue to
19 absorb the ethanol from your stomach, from your
20 intestines, surely most of the alcohol absorption
21 happens in the upper intestines.

22 It takes between 30 and 90 minutes from that last
23 drink generally to reach your pee. If you spread it
24 out over a long period of time, it's going to happen
25 faster. If there's no food in your stomach it's going

1 to happen faster. If you're drinking mixed drinks
2 that have a concentration of around 12 percent, it's
3 going to be faster.

4 Any time you add carbonated beverages you absorb
5 the ethanol faster. Champagne is very quickly
6 absorbed in the stomach. The carbonation affects the
7 rate of absorption. Once you reach this peak, there
8 is an enzymatic process that allows your body to
9 eliminate the ethanol. This is a very linear curve.
10 It's generally from 0.11 to 0.022 gram per deciliter
11 per hour with an average of 0.015, and this is based
12 on ---

13 Q This is like terrible flash backs from college
14 right now, but that's okay.

15 A I've never been a professor, but I understand
16 what you're saying.

17 Q Okay.

18 A This is a very linear curve and it's based on
19 enzymes in your body, and it's linear down to about a
20 .02 in which point this curve really does start to
21 curve and flatten out, so this is a very linear
22 elimination rate. If we say that this is hours in
23 time, you can work your way backwards from the date or
24 the time that it was sampled back to some time in
25 history given that we assume or we know when the last

1 drink was and approximately how long it was from that
2 last drink to that next test or that point.

3 Q All right. Well, let me ask you this, Mr. Sears.
4 If you don't eat, how does that affect this slope?

5 A It doesn't affect the elimination rate at all.

6 Q Okay.

7 A It affects the absorption rate. Elimination rate
8 is based on alcohol dehydrogenase, which is an enzyme
9 in the body. Your body produces a fixed amount of it.
10 It's very rapidly saturated so that this rate is
11 continuous throughout your elimination all the way
12 down to the lower end of the blood alcohol range.

13 Q Okay.

14 A At this point, you actually have some additional
15 pathways that help increase that rate. That's why you
16 see the actual curvature down at the bottom of the
17 slope. Up until that point, alcohol dehydrogenase is
18 the primary route of alcohol metabolism and therefore
19 the elimination from the blood.

20 Q All right. So let's say --- well, let's use the
21 .218, okay?

22 A Okay.

23 Q Let's say that test was taken at 12:40 in the
24 afternoon?

25 A Okay.

1 Q And let's say someone had stopped drinking at
2 10:45 in the morning, okay?

3 A They stopped at 10:45?

4 Q Yeah, let's say that.

5 A Okay.

6 Q Would it still be going up at 12:40, two hours
7 later, or where would --- for an average 150-pound?

8 A No.

9 Q No?

10 A Assuming --- you have to assume there is no food
11 on the stomach ---

12 Q Okay.

13 A --- that this is not 200 proof grain alcohol.
14 This is a normal beverage, such as a Budweiser or
15 whatever. The higher the alcohol content, we can have
16 irritation in the stomach. So that can affect this
17 number a little bit, but no, if there is no food on
18 the stomach, and this person stopped drinking at
19 10:45, 30 to 60 minutes reliably later they peaked
20 out.

21 Q They peaked out --- so the peak is
22 about --- okay. I got you. All right. At a level
23 that's over .2 ---

24 A Yes, sir.

25 Q You've gone into what --- and part of your

1 studies, you explained slowed reaction time, much,
2 much slower reaction time, I would imagine, right?

3 A It depends on the alcohol level, obviously. It
4 aggravates it more as that level goes up.

5 Q Well, if we're talking about in the twos, okay.
6 The .2s, that's a pretty high level, right?

7 A Yes, sir, I think there is a perspective issue
8 here that we understand that normally you can see some
9 unconsciousness at about a .3.

10 Q Okay.

11 A A lot of people pass into a comma at a .3 to .4,
12 so this is a significant amount of alcohol and should
13 have some significant outward symptoms associated with
14 it.

15 Q Okay. What's the highest you've seen on a
16 driver. On a living driver, the highest I've seen was
17 around a .45.

18 Q Holy cow.

19 A And this would be somebody who is a chronic
20 drinker in order to reach that. The chemoreceptor
21 area in your brain tends to kick in, if you are a
22 casual drinker, at about .15, and our normal
23 physiological response is to try to vomit. Our body
24 wants to get rid of the ethanol in our stomach.

25 Q At .15?

1 A Yes, for somebody who is not a regular drinker.

2 Q All right. What's your understanding of the term
3 to blackout? What does that mean to you?

4 A Well, I guess that depends on the context that
5 it's discussed in. Individuals tend to forget things
6 they may have done. Does that mean that they
7 completely lost consciousness or did they block out
8 that part of their memory? I'm not certain. It would
9 depend on what you fill in the gaps around that.

10 Q Right. It may be part of that loss of short term
11 memory, right?

12 A It could very well be. As the concentration goes
13 up, that is a documented side effect that some people
14 experience, loss of short term memory associated with
15 higher ethanol levels.

16 Q And that could cause somebody to have trouble
17 with comprehension too, right?

18 A Oh, there is no doubt.

19 Q And the higher the level, the more loss of that?

20 A And the more likely they have a hard time
21 comprehending even what you speak to them, you know,
22 because you have to process what you are hearing and
23 put it in the context of the way you understand it.

24 Q I got you. If you observed people in that state,
25 can you tell whether or not they are at that the

1 level, just by observing?

2 A If you have had training.

3 Q You?

4 A Me?

5 Q Personally.

6 A Yeah, I would say at about a .15 to .2, those are
7 areas where you would start to notice a degradement in
8 their performance within a bar or a casual setting, I
9 would think at a .2 to a .3, you're going to see
10 significant impairment. Yeah, you would be able to
11 detect that. I would, because I've been through quite
12 a bit of training. Even without the field sobriety
13 test you notice that somebody is not quite right.

14 Q You could go to a bar and just sit there and say
15 that someone is a certain ---

16 A I don't know that you could put an exact number
17 on it, but I would never dream of saying, "You're a
18 .22," just by looking at you, but looking at someone
19 and saying, "That individual has had too much to
20 drink." I think it's more likely to be able to say
21 that.

22 Q Okay. Before I ask you my last set of questions,
23 give me a second.

24 (Pause.)

25 Just one more question, Mr. Sears, the pictures

1 of the tubes, if I could see that, sir?

2 A Sure. You just want the tubes?

3 Q Yeah. So there are six in there, right?

4 A That's correct. In that image there are six
5 blood vials and one urine. You'll see --- what they
6 do is take a picture and then they rotate the tubes so
7 you can see both sides of the labels, so you can
8 identify the name on the labels as well.

9 Q And y'all only used one of these to do your test?

10 A That's correct. We test a gray topped tube. If
11 they submit purple, red, green, and whatever, we're
12 going to take the gray top tube and test that tube.

13 Q Okay. And you don't know how many tubes of blood
14 were taken in this case, do you?

15 A No, sir, I wasn't at the hospital. All I can
16 tell you is that our policy is to photograph the tubes
17 when that sample is --- when that bag is opened so
18 that we have a record for court to say how the tube
19 was labeled and identify that tube.

20 Q Wonderful. Thank you so much.

21 MR. POSTIC: That's all I have.

22 THE COURT: Redirect?

23 REDIRECT EXAMINATION:

24 BY MR. MOAK:

25 Q You don't know how many tubes were taken in

1 total, but you know at least six, correct?

2 A That's correct. Six were submitted to our
3 laboratory for the purposes of this particular case.

4 MR. MOAK: No further questions.

5 THE COURT: Is that it? All right. Thank you
6 very much. You may come down.

7 THE COURT: May this witness be excused?

8 MR. POSTIC: Yes.

9 THE COURT: Without objection? Thank you very
10 much, sir. You're free to go.

11 Approach the bench counsel, counsel.

12 (WHEREUPON, there was a bench conference.)

13 THE COURT: All right. ladies and gentlemen, it's
14 about time for our lunch break. We're moving right
15 along. We may finish the evidence today. That's kind
16 of my anticipation. That will leave tomorrow for the
17 final summations and your deliberations. I'm going to
18 ask you to be back in the jury room at two o'clock.

19 There's a matter I need to take up with
20 another --- in another case at 1:30, so I'll ask you
21 to be back at two o'clock. Again, don't discuss the
22 case among yourselves when you return to the jury room
23 or with anyone else over the lunch hour. Have a
24 pleasant lunch. We'll see you at two o'clock. Thank
25 you very much.

1 (WHEREUPON, the jury left open court at
2 approximately it 12:18 p.m.)

3 THE COURT: Is it the State's intention to rest
4 at this time?

5 MR. MOAK: Yes, Your Honor. I just want to go
6 over, make sure we got everything moved into evidence.

7 THE COURT: You can do that. I'm not asking you
8 to rest on the record until you have completed that
9 survey of your evidence, but anticipating the fact
10 that the State will rest at two o'clock, I want to go
11 ahead at this time and, Mr. Postic, have you client
12 stand at this time. I want to make sure he
13 understands his rights as far as his defense.

14 Mr. Thigpen, will you raise your right hand.

15 DONNIE THIGPEN,
16 after being duly sworn, testified as follows:

17 THE COURT: Mr. Thigpen, at this time I'm going
18 to explain certain of your rights to you. If you do
19 not understand anything I say, please let me know. If
20 you want me to explain anything in more detail, please
21 let me know. Do you understand?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: We've now have reached the stage of
24 the trial where you may present your defense. You
25 have the right to claim the protections given to you

1 by the 5th amendment to the Constitution of the United
2 States. This amendment states in part, no person
3 shall be compelled in any criminal case to be a
4 witness against himself. This means that you cannot
5 be required to testify in this case.

6 You have a right to testify on your own behalf.
7 However, no one can make you testify. This is a
8 personal right, no one can waive this right except
9 you. If you decide to testify, you will be subject to
10 the same rules that govern other witnesses, and you
11 may be examined and cross-examined on any relevant
12 issue in this case.

13 In addition, if you have any convictions
14 involving dishonesty or a false statement or for
15 crimes punishable by more than one year and your civil
16 rights have not been restored, and this court
17 determines that the probative value of admitting this
18 evidence outweighs its prejudicial effect to you.

19 The solicitor will be able to attack --- will be
20 able to introduce your record to attack your
21 credibility if you decide to testify, and this
22 decision on your part must be freely, voluntarily, and
23 intelligently made and with knowledge of the
24 protections given to you by the 5th amendment to the
25 Constitution and the consequences of your decision to

1 testify.

2 If you decide not to testify, I will instruct the
3 jury that they cannot give the fact that you did not
4 testify any consideration whatsoever and that there is
5 to be absolutely no prejudice to you because you did
6 not testify.

7 It's left entirely up to you whether or not you
8 testify. You may talk with your attorney, your family
9 and friends or anyone else, but the final decision
10 will be left entirely up to you.

11 Do you understand what I've explained to you?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you have any questions about what
14 I've explained to you?

15 THE DEFENDANT: I do not.

16 THE COURT: Have you discussed with your lawyer
17 whether or not you should testify?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you wish to talk to your lawyer
20 any more about this decision at this time?

21 THE DEFENDANT: No, sir.

22 THE COURT: Do you wish to testify?

23 THE DEFENDANT: I do.

24 THE COURT: All right. Thank you very much.

25 All right. Let's stand at ease until

1 two o'clock.

2 MR. MOAK: Your Honor, one thing I would ask is
3 he had mentioned like four or five witnesses, can we
4 get their information so we can run rap sheets on
5 them?

6 MR. POSTIC: Yeah, we'll get them.

7 (WHEREUPON, a lunch break was taken.)

8 THE COURT: State ready to proceed?

9 MR. MOAK: Yes.

10 THE COURT: Defense ready to proceed?

11 MR. POSTIC: Yes, sir.

12 THE COURT: All right. You look quizzical.

13 MR. POSTIC: I don't understand. Have they
14 rested yet?

15 MR. MOAK: For the record I rest.

16 THE COURT: For the record, he rests. Any
17 motions?

18 MR. POSTIC: Yes, Your Honor, can.

19 THE COURT: All right. First, Your Honor, I have
20 a motion for a directed verdict of not guilty for the
21 defendant, especially in light of some of the
22 testimony that we've had since --- obviously since
23 we've been here and based on that there is no evidence
24 that points to the fact that the victim died as a
25 result of the car accident.

1 We have a layperson coroner, who came in here who
2 was not qualified as an expert and who made an
3 assumption based on the fact that the body of the
4 victim was in a car accident and indicated that there
5 was --- that he certainly --- he determined that he
6 was not alive. However, he could not give, in
7 my opinion --- I think even in the light most
8 favorable to the state, a competent opinion as to the
9 way the defendant --- the way the victim died.

10 I think that's it on directed verdict, Your
11 Honor.

12 THE COURT: What's the State's position?

13 MR. MOAK: Your Honor, I believe we've got
14 State's 61 in evidence was a picture of Mr. Wright
15 strapped in the passenger's seat of the vehicle,
16 deceased, the body is bleeding from injuries that I
17 don't think it takes an expert to look at that picture
18 and figure out the injuries were consistent with the
19 cause of death.

20 Mr. Feller's, the coroner, testified that he
21 found a closed head injury because of the head injury
22 to the body, and that would be consistent with the
23 pictures. Like State's 39, which shows --- yes, 39
24 shows it fairly clearly where the roof is caved in,
25 where his head would have been at and it clearly shows

1 that, you know, I think common sense tells you what's
2 in evidence is clear and what caused the death.

3 MR. POSTIC: And, Your Honor, I mean, we would
4 just say there's more than common sense that's needed.
5 There's no --- I mean, it's not out of this --- or an
6 absurdity to say that someone may be dead in the car.
7 No witness has come here giving an official time or
8 cause of death. No witness has come here and given us
9 a time of death and no witness has said absolutely
10 this caused his death.

11 MR. MOAK: And I believe the coroner, you know,
12 he's been the coroner for seventeen years. He has
13 done a lot of death notices. He's done a lot of
14 causes of death. He testified he had no question that
15 he had no question in his mind whatsoever what the
16 cause of death was and it's in evidence, the coroner's
17 report, that it's from this traffic accident. That's
18 what the testimony is.

19 MR. POSTIC: He is not a medical examiner. He
20 has a staff. He can contract medical examiners.
21 There is a fatal accident. He didn't do it.

22 THE COURT: All right. I understand that, and I
23 think probably the coroners are called upon to make
24 that determination on a somewhat regular basis. Not
25 every death involves an autopsy to pinpoint the cause

1 of death. I think it's within his --- I mean, it's
2 within his field of knowledge and experience to be
3 able to offer that opinion based on what he saw at the
4 time and place.

5 It might be a neater case had there been an
6 autopsy and an inquest or at least an autopsy, but I
7 think the coroner is qualified to give that opinion,
8 and so I feel that the evidence goes well beyond mere
9 conjecture or suspicion and that there is some
10 evidence, either direct or circumstantial or a
11 combination of both, which reasonably tends to prove
12 the guilt of the defendant and the cause of death or
13 from which the cause of death and the guilt of the
14 defendant may be logically and reasonable deduced if
15 that evidence is taken in the light most favorable to
16 the state, so I must respectfully deny your motion for
17 a directed verdict.

18 Anything further?

19 MR. POSTIC: Yes, Your Honor. I'd like to renew
20 my motions at this point, Your Honor. Specifically,
21 Your Honor, I do want to renew my motion pretrial to
22 suppress the statement made by the defendant.

23 Especially given the testimony of the final
24 State's witness, who indicated that someone with a
25 blood alcohol that the defendant had at the time that

1 he was given the first Miranda that his cognitive
2 skills were diminished greatly, that his comprehension
3 and his short term memory were compromised
4 significantly to the point that someone may not even
5 be understanding what someone is saying to them, and
6 if the basis of the later confession is the Miranda
7 that the defendant was given at 11:30 in the morning,
8 the two Mirandas that he was given that early in the
9 morning, then I would say that his statement to the
10 officers at 5:00 p.m. or 6:00 p.m. would be
11 unconstitutional.

12 THE COURT: Why?

13 MR. POSTIC: Because he did not get the full
14 protections of the 5th amendment. I call it Miranda,
15 but it's really the 5th and 6th amendment. I don't
16 want to call them Miranda because Miranda actually
17 leaves out that you have the right to stop at any
18 time.

19 THE COURT: Well, that's --- that was what I was
20 going to query you about, is it fatally defective,
21 constitutionally defective, in the event that last
22 warning is omitted or deleted.

23 MR. POSTIC: That's the position of the
24 defendant.

25 THE COURT: Do you have something you can show

1 me?

2 MR. POSTIC: At the time, State v. Kennedy. At
3 the time that he was given the full Miranda, and I
4 rely on the New Mexico case that I handed up earlier,
5 he was incapacitated through intoxication to
6 completely understand what he was doing.

7 THE COURT: Do you want to hand that up?

8 MR. POSTIC: Your Honor?

9 THE COURT: The case you just cited.

10 MR. POSTIC: I didn't hand it up with my --- I'm
11 sorry, Your Honor. It goes with my original pretrial
12 brief.

13 THE COURT: Brief?

14 MR. POSTIC: Motion.

15 MR. MOAK: Your Honor, this is essentially the
16 same argument we had on Monday.

17 THE COURT: Well, it may be, but he's entitled to
18 make it now, too.

19 MR. MOAK: Yeah.

20 MR. POSTIC: It's Brown, do you still have that?

21 THE COURT: Oh, I've got this.

22 MR. MOAK: Your Honor, I don't think anything has
23 changed, Your Honor.

24 THE COURT: I have that. I've that he had. You
25 said State v. Kenny, didn't you?

1 MR. POSTIC: Kennedy.

2 THE COURT: Kennedy, okay.

3 MR. POSTIC: Kennedy, which is the State case
4 that I gave ---

5 THE COURT: Kennedy, all right. Yes, I
6 understand. I don't think Kennedy says that.

7 MR. POSTIC: It's my --- of course, I left that
8 notebook, but I --- Kennedy stated that
9 Miranda --- that the proper rights were the five
10 prongs.

11 THE COURT: Okay. I'm with you now.

12 MR. POSTIC: Even then he has a .19 later on in
13 the day, and that also, according to Mr. Sears, is a
14 level of intoxication that compromises comprehension,
15 compromises short term memory, as well.

16 THE COURT: What's the State's position?

17 MR. MOAK: The same position we had before, Your
18 Honor.

19 THE COURT: Well, before we didn't have the
20 testimony of the last witness.

21 MR. MOAK: I think both of us talked about the
22 level of intoxication. We knew what the levels were.

23 THE COURT: It wasn't in front of this jury at
24 that time.

25 MR. MOAK: Yeah, but anyway, State v. Kennedy has

1 a paragraph in there where our court cites Miranda and
2 just says this is what the U.S. Supreme Court said in
3 Miranda on the five prongs. Well, at no point does
4 that case adopt, say the South Carolina Constitution
5 adopts any other standard other than what the US
6 Supreme Court adopted.

7 For the Powell --- Powell v. Florida is the one I
8 handed up. It clearly states --- that's a 2010 US
9 Supreme Court case says there's only four prongs.

10 THE COURT: Well, it says Miranda prescribed the
11 four prongs.

12 MR. MOAK: Yeah, yeah. That's what the US
13 Supreme Court says.

14 THE COURT: Right.

15 MR. MOAK: A Miranda is a US Supreme Court
16 federal protection. The South Carolina Supreme Court
17 or Court of Appeals never adopted a greater more
18 stringent standard under the South Carolina
19 Constitution, which they have done in several cases
20 where there's plenty of cases where they say that the
21 South Carolina Constitution provides greater
22 protection than the US constitution. That's not what
23 they said in State v. Kennedy. In Kennedy it's just a
24 paragraph in there that this is like Miranda, and it
25 cites Miranda super.

1 Well, the current state and federal --- the US
2 Supreme Court on Miranda is four prongs. So our
3 position is the last Miranda, talking about Trooper
4 Coats, is in compliance with Powell, is in compliance
5 with the current US Supreme Court position on what
6 Miranda is, so our position is the final Miranda was
7 effective.

8 If you read the New Mexico case that Postic
9 handed up, I believe it said the guy was too drunk to
10 be released and there was some question about whether
11 he could stand up. At no point did -- we've got the
12 videos. I think you've heard the audios and seen the
13 videos. At no point during this is it alleged that
14 Mr. Thigpen was so far --- was so drunk he could not
15 stand, he could not function. You heard the hour and
16 13 minute audio in its entirety yesterday, and you
17 also heard the section on Monday, and he clearly
18 understands what's going on.

19 He's actually presenting a somewhat logical
20 defense that he blacked out. He is responding to
21 questions logically. His speech doesn't appear to be
22 slurred, but he is actually responding to questions.
23 He's clearly able to think and --- unless he is now
24 claiming to have blacked out on that, too.

25 I mean, I think it's clear, and you've heard the

1 whole --- the whole confession. I mean, he knew what
2 was going on. He responded to the questions. I don't
3 think there is any question at 5:20 that day whether
4 or not he knew what was going on even though, I would
5 guess, if you extrapolate out his toxicology was
6 probably still like a .10 or somewhere in that range
7 based upon what Mr. Sears testified to this morning.
8 But, you know, he clearly was not so intoxicated that
9 he could not assert his rights. I think standard has
10 to be so overborne like where he couldn't even
11 understand what's going on.

12 At no point during this day as far as law
13 enforcement contact with him, and we also played on
14 Monday part of the video with McKenzie, which was
15 approximately seven hours before the Coats audio. We
16 also played the DataMaster, which was three or four
17 hours before Coats.

18 He's --- while I wouldn't agree with his defense
19 that he raises in those videos, he actually is raising
20 a defense. He understands what he's being charged
21 with. He understands that, you know, he understands
22 that there's a procedure, and he chooses to speak.

23 I don't believe that, based on the evidence, the
24 statements that we have audios and videos of, I don't
25 think it shows that he was so intoxicated that he just

1 could not comprehend that one, he had rights, two, he
2 was in a situation where those rights come into play
3 and three, he could assert them. He chose never to
4 assert them. At no point did he ask for an attorney.

5 In fact, during --- actually, even better than
6 that, during the actual audio, and this is part of the
7 stuff that we had to redact out based on defense
8 motion, he actually tells the troopers, they asked him
9 do you have an attorney. He talks about Neal Lourie
10 and says that he's going to have to pay him, so he
11 even knows --- he even gives the name of a lawyer, but
12 does not say he wants to speak with a lawyer.

13 THE COURT: Well, that's not ---

14 MR. MOAK: I mean, he is clearly --- he is
15 clearly talking about his rights.

16 THE COURT: Well, in Kennedy, the court --- it
17 says a suspects in custody may not be subjected to
18 interrogation unless he has informed --- has been
19 informed that, and lists his right to remain silent,
20 anything can be used against him in a court of law;
21 his right to an attorney; if he cannot afford an
22 attorney, one will be appointed for him prior to any
23 questioning if he so desires; and he has the right to
24 terminate the interrogation at any time and not to
25 answer any further questions.

1 Now, if I move over to the US Supreme Court in
2 the Florida case, the Powell case, the court says to
3 give force to the Constitution's protection against
4 compelled self-incrimination, the court established in
5 Miranda certain procedural safeguards that required
6 police to advise criminal suspects of their rights
7 under the 5th and 14th amendment before commencing
8 custodial interrogation.

9 Intent on giving concrete constitutional
10 guidelines for law enforcement agencies and courts to
11 follow, Miranda prescribed the following four, now
12 familiar, warnings. The suspect must be warned prior
13 to any question that he has the right to remain
14 silent, that anything he says can be used against him
15 in a court of law, that he has the right to the
16 presence of an attorney, and if he cannot afford an
17 attorney one will be appointed for him prior to any
18 questioning if he so desires.

19 Miranda's third warning, the only one at issue
20 here that addresses our particular concern, that the
21 circumstances surrounding in-custody interrogation can
22 operate very quickly to overbear the will of one
23 merely made aware of his privilege to remain silent by
24 his interrogators. Responsive to that concern, we
25 stated as an absolute prerequisite to interrogation

1 that an individual held for questioning must be
2 clearly informed that he has the right to consult with
3 a lawyer and have the lawyer with him during the
4 interrogation, and then they go on to say the four
5 warnings that Miranda requires are invariable, but
6 this court has not dictated the words in which the
7 essential information must be complied.

8 So, Mr. Postic, there may be a disconnect between
9 Kennedy and the Powell case, but ultimately, as you
10 know, I have admitted it into evidence and it's up to
11 the jury to decide whether or not they accept and find
12 that he was properly advised and that his will was not
13 overborne and the confession was not coerced, so I'm
14 not sure what you're asking me to do other than to
15 tell the jury that they are to disregard that.
16 Ultimately that's their decision; it's not my
17 decision. I must respectfully deny your motion.

18 MR. POSTIC: Thank you, Your Honor. I think the
19 only other motion that I need to renew at this time,
20 Your Honor, would be my motion about the photograph,
21 the one photograph that includes the victim in the car
22 and that has also been published to the jury, so I'm
23 renewing my motion.

24 THE COURT: Okay.

25 MR. POSTIC: Because I think this is the time to

1 do it. That is overly prejudicial under the new case
2 of State v. Collins and that the prejudicial value
3 outweighs any probative value. Whatever is shown in
4 that picture could easily have been testified to by
5 the troopers of the M.A.I.T. Team.

6 THE COURT: Do you have that Birch case?

7 MR. POSTIC: No, Your Honor. I'm sorry.

8 THE COURT: All right.

9 MR. PERRY: Your Honor, I can have it for you in
10 just a moment.

11 THE COURT: Well, if my memory serves me, that
12 showing in that case is much more egregious than this.
13 Just for the record, I reviewed 20 or 30 photos that
14 the State wished to offer and limited it --- the
15 presentation to only one where the victim was shown
16 the photograph, and I think that the way the --- what
17 the picture depicted, the jury could --- from that,
18 the jury could pretty well determine the cause of
19 death based on just the configuration of the vehicle
20 and the fact that he still was wearing the seat belt
21 and the crush on the passenger side, which everybody
22 has testified led to his death.

23 I'm not going to take it out. I don't think ---
24 bloody pictures go to juries all the time, as long as
25 they're not just overly prejudicial. Everything is

1 prejudicial, but I think it had probative value and
2 that's why I allowed it, but I only allowed one
3 because I don't intend to overwhelm the jury with
4 those photos, so I must respectfully deny your motion.

5 If you can find that case ---

6 MR. PERRY: Your Honor, I do have it here. From
7 the State's position, Your Honor, the photographs in
8 that particular case were ---

9 THE COURT: That was a Chesterfield County case?

10 MR. PERRY: Yes, sir, it is. The State offered
11 ten photos, Your Honor, of the child's body. The
12 photos were taken by a forensic pathologist in a
13 clinical setting prior to the autopsy being performed.
14 The photos offered no probative value with respect to,
15 you know, the situation at hand that the charges were
16 about. Moreover, this was a situation where, it was a
17 dog mauling case.

18 THE COURT: Right.

19 MR. PERRY: And, you know, it didn't so much
20 reflect on the owner of the dogs. It's what the dogs
21 did to the body.

22 THE COURT: To the child's body.

23 MR. PERRY: Again, the fact that the photos were
24 taken in a clinical environment where they did not
25 offer any type of evidence that was probative to the

1 ultimate question in the case, the State's position
2 with respect to this particular photo that, Your
3 Honor, allowed is --- it shows very clearly what the
4 condition of the inside of that vehicle was, what
5 a --- what any person exiting that vehicle should have
6 been aware of when they left and being that the State
7 has the burden of proof in leaving the scene with
8 death that the person either knew or reasonably should
9 have known that he was leaving someone who was either
10 dead or in great danger of dying, I think the
11 probative value clearly outweighs any prejudicial
12 effect of the photo. I mean, all the evidence we have
13 offered is prejudicial. Otherwise we wouldn't have
14 offered it.

15 THE COURT: Well, I mean, I understand that.

16 MR. PERRY: In addition, the fact that they're
17 arguing that the coroner didn't actually say that he
18 killed the guy, State's 61 is the best evidence we got
19 for that element.

20 MR. POSTIC: Just one matter. Can we approach
21 before we bring in the jury?

22 (WHEREUPON, there was a bench conference.)

23 THE COURT: All right. Is the State ready for
24 the jury?

25 MR. MOAK: Yes, Your Honor.

1 THE COURT: You'll announce?

2 MR. POSTIC: I'm ready.

3 THE COURT: All right. Bring the jury.

4 (WHEREUPON, the jury came into open court at
5 approximately 2:28 p.m.)

6 THE COURT: All right. Ladies and gentlemen. I
7 hope you had a pleasant lunch. Mr. Moak?

8 MR. MOAK: Your Honor, the State rests.

9 THE COURT: All right. Ladies and gentlemen,
10 that's all the evidence that the State is going to
11 present in this case. Now, as I told you on opening
12 day, the defendant has an opportunity to present a
13 defense if he wishes to do so. He is not required to
14 do so and under no circumstances is he compelled in
15 any way to do so.

16 The burden stays with the State to prove guilt
17 beyond a reasonable doubt.

18 However, at this time, Mr. Postic, does the
19 defendant wish to offer a defense?

20 MR. POSTIC: Yes, Your Honor. Thank you.

21 THE COURT: All right. You may proceed.

22 MR. POSTIC: Your Honor. My first witness is
23 Sharla Rene Overton.

24 SHARLA OVERTON,

25 After being duly sworn, testified as follows:

1 THE WITNESS: My name is Sharla Rene Overton,
2 spelled O-V-E-R-T-O-N.

3 DIRECT EXAMINATION:

4 BY MR. POSTIC:

5 Q Ms. Overton, thank you for coming today. I'm
6 going to be stand back here just to make sure the jury
7 can hear you when you talk, okay?

8 A Okay.

9 Q All right. Do you testify often in court,
10 Sharla?

11 A No, I've been to others.

12 Q Are you a little nervous?

13 A Not really.

14 Q Okay, good.

15 A Just being in front of everybody makes me kind of
16 nervous, but not really.

17 Q Sharla, I'm going to ask you a few background
18 questions before we get what we brought you here for.
19 Where are you from?

20 A Greenville, South Carolina, originally.

21 Q Okay. And what brings you --- I'm sorry. Where
22 do you live, now?

23 A I have a temporary residence in Goose Creek,
24 South Carolina.

25 Q And what is your job?

1 A I am a homemaker. My husband is active duty
2 Navy.

3 Q And how long have you been down in Goose Creek?

4 A I think we signed for our house December 19th,
5 approximately through there.

6 Q Okay. Do you have a family?

7 A Yes, I do.

8 Q How many kids?

9 A I have a total of seven children.

10 Q Okay. All yours?

11 A All biologically mine, yes, sir.

12 Q What's the oldest, what's the youngest?

13 A Twenty-two, 21.

14 Q Okay.

15 A There is a birthday coming soon.

16 Q Okay.

17 A And my youngest is nine.

18 Q Okay. Fair enough. And you came up from Goose
19 Creek today, right?

20 A Yes.

21 Q You're not under subpoena. I called you, right?

22 A Right.

23 Q Okay. Will you please tell us, do you have any
24 connection with Mr. Thigpen, with Donnie?

25 A I know him. I actually was introduced to him by

1 Betty Babinski and her brother Vincent.

2 Q Okay.

3 A And I've known them for a while.

4 Q Do you know what Betty's relationship is with
5 Donnie?

6 A Not at this time. I think they were dating.

7 Q Okay.

8 A But I don't know.

9 Q Okay.

10 A Since I've moved, I haven't really...

11 Q That's understandable. All right. Let's go back
12 to 2009, okay?

13 A Okay.

14 Q That was almost three years ago, talking about in
15 June. Are you familiar with a bar called Track Side?

16 A Yes, sir.

17 Q Or a club --- is it a club or a bar?

18 A It's a trailer bar.

19 Q A trailer bar. Okay. Meaning what?

20 A It's like a double wide or like a modular home
21 put together.

22 Q Okay. Where is it?

23 A It is right down from Champions on Two Notch Road
24 before you hit Clemson road.

25 Q Okay. Were you there in the early morning of

1 June 20th?

2 A Yes.

3 Q And what were you doing there?

4 A I had been there --- I had worked earlier, my
5 husband and I had gone out.

6 Q Okay.

7 A It was my husband's turn to drink.

8 Q What does that mean?

9 A We don't intentionally go out --- we don't drive
10 after drinking.

11 Q Okay.

12 A Excessively, stuff like that.

13 Q Okay. So you mean, if it's your husband's turn
14 to drink, that means you were not drinking
15 excessively?

16 A Right. I think in four hours I had like two
17 beers.

18 Q Okay. All right. Tell me on that night, did you
19 observe Donnie Thigpen?

20 A Yes, my husband and him played darts earlier that
21 evening and I had witnessed him coming in from a
22 fight.

23 Q Donnie?

24 A Yes.

25 Q Okay. Did you see the fight itself?

1 A I did not physically see the fight. I asked him
2 who had beat him up, and he said he got into a fight
3 with B.J.

4 Q Okay. What did he look like?

5 A Well, he had a beard covering the right side of
6 his face and was talking about how his face hurt, how
7 his head hurt.

8 Q Did he appear cut up or anything like that?

9 A I wasn't really paying that close of attention.
10 My husband just about had enough for the evening. We
11 were winding down.

12 Q What time do you think this was?

13 A It may have been two o'clock. I mean, it may
14 have been later. Track Side has a clock, but it's not
15 very visible.

16 Q Okay. The sun was still down. I mean ---

17 A It wasn't daylight.

18 Q Okay. How late does Track Side stay open?

19 A That depends on the business. I have seen
20 it --- I've been there and seen the sun came up.

21 Q Okay.

22 A But that was a long time ago.

23 Q Okay. Those days are over?

24 A Oh, yes.

25 Q For both you and your husband?

Direct of Overton by Postic

1 A Yes, my husband has quit drinking.

2 Q Okay. Did you have occasion later that night to
3 observe Donnie?

4 A I actually --- when I got my husband off the
5 bathroom floor, the women's bathroom floor, I had
6 taken him out to the car and we were parked side by
7 side at the front of the bar.

8 Q Side-by-side with who?

9 A The car that Melvin was trying to get into. The
10 doors were open and people were trying to shuffle
11 around and I heard ---

12 Q Melvin being Melvin Wright?

13 A Yes. I had gotten pizza from him earlier in the
14 evening. He gave it to my husband to try to help
15 sober him up.

16 Q Did you know Melvin, as well?

17 A I had known him from Brixx pizza. I seen him in
18 there once or twice, and I had seen him in Track Side.

19 Q Where did you work at the time?

20 A I worked at the Outback Steak House. I was
21 trading Melvin a six ounce steak for the pizza he had
22 given me.

23 Q He got the better deal?

24 A No, sir, when I went back the next day to give
25 him the steak is when I found out that he had passed

1 away.

2 Q I'm sorry. Okay. Tell me what happened or who
3 you saw in the parking lot. You got in a car --- both
4 cars were facing towards the bar then?

5 A Yes, sir.

6 Q Okay.

7 A There were three people messing with the car, and
8 so I ---

9 Q Messing with which car? I'm sorry to stop you.

10 A I was trying to put my husband in my van.

11 Q Okay.

12 A I was putting him in the passenger's seat and I
13 reached over to put the seat belt on him. I turned
14 and I will saw Melvin, and I said, "Hey, don't forget
15 to be here morning. I'll bring your steak and a
16 loaded baked potato."

17 Q Okay.

18 A I heard like a seat, like you're adjusting a seat
19 or like the popping noise the seat makes.

20 Q Okay.

21 A But I was more concerned with my husband at that
22 point, but there was one person on this side of the
23 car and two on the other.

24 Q Did you know which person was on which side and
25 who was ---

1 Did you recognize --- did you definitely
2 recognize Melvin?

3 A I did recognize Melvin and spoke with him and I
4 saw Donnie.

5 Q And he was there, too?

6 A Very, yeah ---

7 Q What else that?

8 A Yeah, there was someone else. It was almost as
9 if they were helping him get in the car.

10 Q Who, Donnie?

11 A Yeah.

12 Q Okay.

13 A But physically who got in the driver's seat, I
14 don't know.

15 Q Okay. That's fine. Did you see that car drive
16 off?

17 A Yes, and there was another car that followed
18 them. They went out separate driveways, but both
19 headed toward the same way, toward CNR. There is a
20 gas station down the street that we would always stop
21 by and get beer on the way home.

22 Q Did you --- hold on a second. When you saw him
23 drive off, did the you know what was driving, who was
24 in the passenger's seat?

25 A No, sir, I was --- I had stepped in to make sure

1 that we had paid our tab.

2 MR. POSTIC: Beg the court's indulgence one
3 moment.

4 (Pause.)

5 BY MR. POSTIC:

6 Q I just want to confirm, we're talking about
7 Donnie's blue Jeep?

8 A I believe so, yes, sir.

9 Q Okay.

10 A I...

11 Q Did you know it to be Donnie's car?

12 A No. I just saw a car.

13 Q Was there a big Gamecock on the back of it?

14 A I didn't pay that much attention.

15 Q All right. That's fine. Please answer any
16 questions from the State.

17 CROSS-EXAMINATION:

18 BY MR. MOAK:

19 Q You don't know who that third guy is?

20 A No.

21 Q Okay. You didn't recognize him from the bar at
22 all?

23 A I don't --- I don't know. I don't remember. I
24 guess that would be the better way to say it.

25 Q Okay.

1 A It's been three years. I tried to talk to
2 someone three years ago and no one wanted to talk to
3 me.

4 Q I have a couple of questions that I'm curious
5 about.

6 A Okay.

7 Q At what point did you find out that you were
8 going to be a witness in this case?

9 A They told me --- was it, I want to say last
10 Tuesday or Wednesday, I was dropping my children off
11 at their biological father's house in Quail Run, and I
12 ran into Carmen Babinski. She asked me if the lawyer
13 had called me and I said no. She said that a lawyer
14 should be calling and to make sure I checked my
15 messages.

16 Q Okay. So you weren't involved in this case until
17 last week?

18 A It might have been a day or two more. I keep
19 very busy during the day time. My husband just came
20 home from a stateside deployment, so we've been
21 spending a lot of time together.

22 Q And you know Melvin died that night, right?

23 A I wasn't aware until the following day.

24 Q Okay. And did you know that Donnie had been
25 arrested?

1 A I was not aware until I was informed later on
2 that evening.

3 Q Last week or the 20th of June?

4 A No, like when I walked in with the Outback steak
5 at the bar to give to them, they told me that Melvin
6 had died.

7 Q Okay.

8 A Or that he had passed away and that Donnie had
9 been arrested.

10 Q Okay. Who did you tell this story to about
11 seeing a third guy?

12 A I actually posted it on WLTX web page.

13 Q Okay.

14 A And I believe I also told Betty Babinski, but I
15 can't remember.

16 Q Did you call the Highway Patrol?

17 A Excuse me?

18 Q Did you call the troopers with the Highway Patrol
19 or law enforcement?

20 A No, because shortly after that I found out
21 that --- at least I heard that there wasn't going to
22 be anything that there was nothing going on with it.

23 Q Okay.

24 A So my husband and I just went on planning our
25 wedding.

- 1 Q Okay.
- 2 A And getting his commissioning and stuff done and
3 moving on with our life.
- 4 Q I'm just curious, because it's been three years
5 and all of the sudden you pop up last week with a
6 story.
- 7 A I --- my story is just as ---
- 8 Q Okay.
- 9 A --- I don't know the answers to the questions
10 that I don't know.
- 11 Q Okay.
- 12 A Or I don't remember.
- 13 Q And you remember --- I tried to talk to you
14 before?
- 15 A And I apologize. I didn't know who you were.
16 You didn't introduce yourself.
- 17 Q Okay. You wouldn't talk to me, would you?
- 18 A I didn't know who you were.
- 19 Q Okay.
- 20 A You came up. You identified me and asked me what
21 I was here for and what did I know.
- 22 Q And you wouldn't tell me?
- 23 A I've been ---
- 24 MR. POSTIC: Asked and answered, Your Honor.
- 25 MR. MOAK: Okay.

1 Q You say this was two o'clock at Track Side?

2 A I said a rough estimation.

3 Q Okay. Why would you estimate it two o'clock?

4 A Because usually around two o'clock at Track Side
5 things start to change, the people start to change. A
6 different type of group rolls in. That's a rough
7 estimation. It may have been later. My husband had
8 thrown up in the women's bathroom and I had to have
9 help getting him up off the bathroom floor.

10 Q Okay.

11 A So my concept of time may have be a little off.

12 Q Is two o'clock when the other bars shut down?

13 A When the other bars --- yes, around two or so the
14 other bars shut down.

15 Q Is Track Side like a members only club or
16 something?

17 A Yes.

18 Q They're pretty much open all the time?

19 A I don't know if they're open all the time.

20 Q Okay.

21 A I think that they close out or shut down between
22 five and seven. I know that I've accidentally left my
23 credit card there and have it closed up after taking
24 my husband home and they shut down my card around
25 five, 5:15. It may have been when they slowed down.

1 I don't know.

2 Q Were you there that morning or night when they
3 shut down on the 20th?

4 A Not that I'm aware of.

5 Q You mentioned CNR. Where is that in relation to
6 Track Side?

7 A It is next door, but it's like there is a parking
8 lot.

9 Q Uh-huh?

10 A And then there's a couple of buildings. I don't
11 know what they have in them.

12 Q Okay.

13 A And then there is the rest of the building.

14 Q It's another bar?

15 A Yes.

16 Q Is it run by the same people?

17 A I don't think so.

18 Q Okay. But it has like --- it shuts down around
19 two?

20 A I don't know.

21 Q Okay.

22 A I know I've been in there later than two.

23 Q Okay.

24 A But I don't know if --- it's kind of like if they
25 are not busy, they shut down.

1 Q Okay.

2 A But it's also a member's only.

3 Q It's kind of like right there, almost next door
4 to Track Side. That same general area?

5 A Same general area, yes.

6 Q Okay.

7 MR. MOAK: No further questions.

8 THE COURT: Redirect?

9 MR. POSTIC: Just one thing.

10 REDIRECT EXAMINATION:

11 BY MR. POSTIC:

12 Q You stated in cross-examination that you had
13 posted on the WLTX message board?

14 A Uh-huh.

15 Q And when was that? Back at the time this
16 happened?

17 A Yeah, it was --- they had actually posted and I
18 wanted to find out exactly what was going on because I
19 knew that him and Betty had been dating.

20 Q Okay.

21 A I didn't know what the status of that was or
22 anything, and I posted something about, what about the
23 third person in the vehicle.

24 Q Okay. Did you see a third person in the vehicle,
25 or around the vehicle?

1 A There were three people there.

2 Q Okay.

3 A And when I turned around, there were three people
4 gone.

5 Q Okay.

6 A And I'm --- the distance it would have taken to
7 run to CNR, I probably would have caught them.

8 Q Probably?

9 A You know, like I said, I don't know, but...

10 MR. POSTIC: That's all I've got. Thank you.

11 THE COURT: Anything further?

12 RE CROSS-EXAMINATION:

13 BY MR. MOAK:

14 Q You think you saw them at two o'clock because the
15 crowd was changing?

16 A I say about two o'clock because it's usually
17 when my husband and I end up going home.

18 Q And you weren't there when Track Side shut down
19 at five?

20 A I don't think so, no.

21 MR. MOAK: No further questions?

22 THE COURT: All right. You may come down, ma'am.
23 Thank you very much for coming.

24 MR. POSTIC: Thank you, Your Honor.

25 THE COURT: May this witness be excused?

1 MR. POSTIC: Thank you, Your Honor.

2 THE COURT: Without objection.

3 MR. POSTIC: My second witness, Your Honor, is
4 Tina Moore.

5 TINA MOORE,

6 after being duly sworn, testified as follows:

7 THE WITNESS: My name is Tina Marie Moore.

8 DIRECT EXAMINATION:

9 BY MR. POSTIC:

10 Q Tina, I'm going to stand over here. I'm going to
11 say this to every witness. I apologize to the rest of
12 the people here. I'm going to stand over here, just
13 to make sure the jury can hear you when I ask these
14 questions, all right?

15 A (Nods in the affirmative.)

16 Q Okay. Tina, and I'm going to ask you some
17 background questions to kind of put you at ease, okay.
18 Where are you from, Tina?

19 A I'm from Lugoff.

20 Q Okay. From this area all your life?

21 A Since I was ten.

22 Q Okay. Where did you go to school?

23 A Lugoff Elgin High School.

24 Q When did you graduate?

25 A Ninety-four.

1 Q What sort of work do you do?

2 A I have a housecleaning business. I clean houses.

3 Q Anything else?

4 A I'm also a life guard during the summer, Camden
5 Country Club.

6 Q And do you have a family?

7 A Yes, I do. I've got two boys.

8 Q How old?

9 A One is almost 12 and the other is 21 months.

10 Q Okay. Very nice. Tina, are you familiar with an
11 establishment called Track Side?

12 A Yes.

13 Q Okay. What kind of place is it?

14 A It's a bar.

15 Q And have you ever gone there?

16 A Yes.

17 Q Do you still go there?

18 A Not --- not so much anymore.

19 Q Okay. All right. Were you --- did you go
20 there --- well, first of all, let me ask you this. Do
21 you know who Donnie Thigpen is?

22 A Yes.

23 Q Okay. How do you know him?

24 A I know him through my boyfriend, Leon. They went
25 to school together.

1 Q Okay. And I contacted you --- my investigator
2 and I contacted you about coming here; is that
3 correct?

4 A Correct.

5 Q Okay. And that was only just in the past couple
6 of days; is that correct?

7 A Yes, sir.

8 Q And you've never been contacted by anybody from
9 law enforcement or from the solicitor's office?

10 A No, sir.

11 Q Okay. And you've not attempted to contact
12 anybody?

13 A No, sir.

14 Q Okay. Tina, tell me what you remember about
15 this --- and this --- do you remember this night?

16 A Yes.

17 Q June 20th, 2009?

18 A Yes, sir.

19 Q It's very --- did you know Melvin Wright, as
20 well?

21 A I did not know him. Just saw him that night.

22 Q Okay. Can you tell me what happened that night?
23 What do you remember? Well, let me ask you --- I'm
24 sure a lot of things happened, but do you remember
25 seeing Donnie at Track Side?

1 A Yes.

2 Q What do you remember --- what is memorable to you
3 about seeing him at Track Side that night?

4 A He was intoxicated. He did get into an
5 altercation with another guy there at the bar. That's
6 when we were trying to persuade him to leave. He was
7 very adamant that he wanted to drive his vehicle. We
8 persuaded him no. We got him into the passenger's
9 seat and that's when Melvin offered to drive him home,
10 and me and my boyfriend were following behind to make
11 sure that they got home okay. We did make a stop at
12 the store. They pulled over at the store so we pulled
13 in behind them.

14 I remember Melvin got out, went in to the gas
15 station, purchased Ice House, I believe it was an 18
16 pack and came back to the car and my boyfriend Leon
17 went in the store and purchased Bud Light. He came
18 back to the car. From there we followed behind. Me
19 and Leon wanted to go by his house to check on his
20 animals and his father so we parted and from then ---

21 Q When you parted, how far were you from Donnie's
22 house?

23 A Maybe five --- maybe eight minutes at the most.

24 Q Okay.

25 A They lived very close together.

1 Q What time would you say this was?

2 A It was at least --- it was daylight. The sun was
3 just starting to come up, so it was maybe early
4 morning, maybe 5:30, 6:00.

5 Q All right. And then what happened?

6 A From there me and Leon, we stayed at his house
7 probably around 30, 45 minutes and then we headed to
8 Donnie's house. We arrived there. There was no
9 vehicle in the yard, so we went to the door. The door
10 was locked. We knocked on the door. There was no
11 answer. We did hear the dog inside barking, but we
12 got no answer, and so we got back in the car and we
13 left.

14 Q Okay. And that's --- well, let me ask you this.
15 When you say he was adamant that he wanted to drive,
16 did he actually get in the front, the driver's side
17 seat?

18 A Yes, he got into his driver's seat and we
19 persuaded him out and got him into the passenger's
20 side.

21 Q Was it a hard thing to persuade him or ---

22 A It was --- it took us a couple of minutes, but he
23 was okay with it. At the very last he was like okay.

24 Q All right.

25 MR. POSTIC: Thank you very much.

1 THE COURT: Go ahead. Cross-examination?

2 CROSS-EXAMINATION:

3 BY MR. MOAK:

4 Q What time did you say you went back to check on
5 Donnie?

6 A I'm saying between five and seven because it was
7 early morning.

8 Q And you're saying that when y'all left the gas
9 station, who was driving?

10 A Melvin.

11 Q Did his Jeep stop at any time after that that
12 y'all saw?

13 A No, no. They kept going forward.

14 Q I show you what's marked State's 61.

15 A Okay.

16 Q That's who you say was driving the car?

17 A Yes, that's what --- yes, I cannot see his face,
18 but yes, that was the red shirt, I am sure.

19 Q And you say he was driving?

20 A Yes, sir.

21 Q And the only other person in the car was Donnie
22 Thigpen?

23 A No, it was just him and Donnie in the car.

24 Q There weren't but two people in there?

25 A Right, correct.

1 Q Okay. Where does Leon live?

2 A Leon lives actually on Archer Avenue.

3 Q Okay.

4 A It's right there in Pontiac. It's off of Robin
5 Hood.

6 Q How did y'all get --- when you went to check on
7 Donnie, how did you get to --- what route did you
8 take?

9 A I don't remember. We went down Robin Hood and
10 came in to the right.

11 Q Okay.

12 A And whenever we exited, we left a different way.

13 We didn't go the same way. We left a different way
14 just to make sure to see if they were down the road or
15 what have you, and we didn't see anything.

16 Q To see if they were down the road?

17 A See if they went the other direction or, you
18 know, left. We were just --- because we came the one
19 way and we didn't see him, so we went the other
20 direction to leave just to see, but we didn't see
21 anything.

22 Q So you're saying that around 5:30 that's when
23 y'all parted ways?

24 A Yes.

25 Q You went to check on some animals and then came

1 right back over there?

2 A It was about 35 minutes.

3 Q Okay.

4 A Thirty-five minutes later.

5 Q And this has been marked as State's 93. This is
6 like an aerial map?

7 A Yes.

8 Q That's Kelly Mill Road and Twenty-five Mile
9 Creek. Doesn't that turn into like Mickle Lane in
10 Richland County. Is that the same road?

11 A I believe so.

12 Q There's like Charlie Road there and that's been
13 marked as his address?

14 A Yes.

15 Q Did y'all come this way or that way? Which way
16 did you come?

17 A We came in --- let's see. This is his house
18 facing towards the road. We came in that direction.

19 Q This way?

20 A No, this way. Yeah, we came in towards his house
21 on the left.

22 Q Okay.

23 A Whenever we left his home, we went to the right.

24 Q Okay.

25 A To just see if, you know,...

1 Q So right coming out, so you went that way
2 leaving?

3 A Yes, yes, sir.

4 Q So you came in this way and left that way?

5 A Yes, sir.

6 Q Okay. And you said you were looking, something
7 about wanting to see if they were down the road or
8 something?

9 A Yes, you know, just to see if anything had
10 happened, if the car had broken down, if they had
11 gotten a flat tire, anything of that nature.

12 Q Y'all didn't notice anything?

13 A No, sir.

14 Q Okay.

15 MR. MOAK: No further questions.

16 MR. POSTIC: No, redirect, Your Honor.

17 THE COURT: I'm sorry?

18 MR. POSTIC: No redirect.

19 THE COURT: All right. You may come down, ma'am.
20 Thank you very much. You're free to go.

21 Without objection.

22 MR. POSTIC: Your Honor, my next witness is
23 William Lehman.

24 WILLIAM LEHMAN,
25 after being duly sworn, testified as follows:

1 THE WITNESS: My name is William Lehman.

2 DIRECT EXAMINATION:

3 BY MR. POSTIC:

4 Q William, do you have a name that people call you?

5 A B.J.

6 Q Does your middle name start with a J?

7 A It does.

8 Q Okay. James?

9 A John.

10 Q John. William, real quickly, you were contacted
11 a while ago by my investigator about this case; isn't
12 that correct?

13 A Yes.

14 Q And you talked to me maybe once or twice and that
15 would be for the first time today since that, correct?

16 A Yes.

17 Q Do you know a place called Track Side?

18 A I do.

19 Q Okay. Were you there --- do you remember the
20 night of June 20th, 2009?

21 A I do.

22 Q Do you remember Donnie Thigpen being there?

23 A I do.

24 Q How do you know Donnie?

25 A We've had a few disagreements over the last

1 probably three or four years.

2 Q Okay. Anything serious or just kind of ...

3 A Nothing real serious. We had a fight that night,
4 but usually it was just when he was drunk, he would be
5 very mouthy to me.

6 Q Okay. And tell me --- you guys ended up having a
7 fight?

8 A We did.

9 Q Where was the fight?

10 A It was on the porch.

11 Q Okay.

12 A At Track Side.

13 Q And if there was a winner and a loser of the
14 fight, who was the winner?

15 A Well, I mean, he didn't really land any punches.

16 Q Okay.

17 A He kept trying to get at me. I did hit him. I'm
18 left handed. I hit him with my left hand so that
19 would have been his right eye that I hit him in. I
20 did cut him with a punch.

21 Q Okay. You remember that clearly?

22 A I do remember that clearly, yes, sir.

23 Q Okay. And you said you connected him with the
24 eye?

25 A Yeah.

1 Q It was on the porch?

2 A It was on the porch that that happened.

3 Q And then what happened next?

4 A He fell down when I hit him. Like he was coming
5 at me and had balled his fist up and so I hit him. He
6 fell down then, and then I turned around because a
7 good friend of his, Leon, was around the corner behind
8 me using the bathroom. I thought maybe Leon might
9 come ---

10 Q Right.

11 A --- and try to attack me. Then Leon came up onto
12 the porch and tried to collect Donnie, because I mean,
13 he was being belligerent.

14 Q Right.

15 A Like I said, he had been very verbally abusive
16 and he had balled up his fist and come in my
17 direction. He was continuing that even after he got
18 knocked down. He had to be drug away two or three
19 times. I had walked past him --- like I was on this
20 side of the porch and Donnie was here, and I hit him
21 and he fell down over there on the porch and I walked
22 past him down --- there is a wheelchair ramp. I
23 walked to the end of it and Donnie then, you know,
24 once he got up on his feet, came running down there.
25 We had a little scuffle right there in the gravel.

1 Q Okay.

2 A But, you know, like there wasn't any punches
3 really thrown at that point, but it was like he was
4 trying to hit me and couldn't. And then after that
5 like Melvin drug him off.

6 Q Melvin Wright?

7 A Yes.

8 Q Did you know Melvin?

9 A I do. I once had an altercation with Melvin and
10 his brother Gary.

11 Q Okay.

12 A But it was a minor one.

13 Q And how did the fight end?

14 A Basically he just got drug off. You know, four
15 or five times he would break free and try to come
16 back. Either Melvin or Leon would grab him and try to
17 drag him away. He just didn't want to give up, and I
18 eventually just walked to the other bar that's there.

19 Q Okay. B.J., I'm sure that the solicitor's office
20 is going to ask you this. Do you have any criminal
21 convictions?

22 A Yes.

23 Q Okay.

24 A I have a drug charge when I was 19 years old.

25 Q Okay. What year was that?

1 A It was --- must have been probably 1993 was when
2 the offense occurred, '93, and I went to prison for
3 two-and-a-half years.

4 Q Anyway, thank you have much for coming. Please
5 answer any questions from the solicitor's office.

6 CROSS-EXAMINATION:

7 BY MR. MOAK:

8 Q So you actually got into a fight with Melvin a
9 couple of days or week or so before this night?

10 A No. The fight with Melvin had been months, if
11 not a year earlier. You know, it was all squashed and
12 we were friendly. It was actually just a
13 misunderstanding. Two other people had gotten into a
14 fight and then either Gary or Melvin got involved with
15 that, and I stayed out of it.

16 Then another friend of mine joined it and then
17 the other brother got into it. When the third brother
18 got involved, then I got involved in an attempt to
19 kind of break it up.

20 Q Is Gary in the courtroom?

21 (Pause.)

22 A I can't see behind you.

23 (Pause.)

24 Yes.

25 Q Where is he at?

1 A He's sitting there in the blue shirt.

2 Q Okay. It took you a while to pick him out,
3 didn't it?

4 A Somehow I just didn't see him. I don't know if
5 an officer was sitting in front. I just missed him.

6 Q Now, something --- I want to see if I heard this,
7 right. You're saying Melvin was driving?

8 A I never said that.

9 Q Was Melvin with Donnie that night that you got in
10 a fight there?

11 A I don't believe they came there together, no.

12 Q Okay.

13 A They may have, I don't know, but when the fight
14 was over, Melvin was dragging him away. I remember
15 seeing them over by Donnie's Jeep.

16 Q Okay. So you don't know how they left?

17 A I don't know how they left.

18 Q You went over to CNR?

19 A I walked over to CNR. I mean, I seen the truck
20 leaving, but it was northbound on U.S. 1.

21 Q So you never saw who was --- who drove Donnie's
22 Jeep?

23 A I don't know who drove Donnie's Jeep from Track
24 Side.

25 Q Do you know who was in Donnie's Jeep from Track

1 Side?

2 A I can't swear to that, no.

3 Q Okay.

4 A I cannot swear to that.

5 Q Okay. That's what I was asking. I thought I
6 misheard. I thought you said you saw Melvin driving?

7 A No, sir, I did not say that.

8 Q Okay. No further questions?

9 MR. POSTIC: No redirect, Your Honor.

10 THE COURT: All right, sir. You may come down.
11 Thank you very much for coming. May this witness be
12 excused? Without objection. You're free to go.

13 Thank you very much.

14 MR. POSTIC: Thank you. Beg the Court's
15 indulgence.

16 (Pause.)

17 MR. POSTIC: I'm going to call Trooper Kelly.

18 THE COURT: You're still under oath.

19 WILLIAM BRENT KELLY,
20 having previously been sworn, testified as follows:

21 DIRECT EXAMINATION:

22 BY MR. POSTIC:

23 Q Trooper Kelly, you were not on my witness list.
24 I'm going to show you an e-mail that appears to be
25 sent by you to Trooper Coats.

1 A Okay.

2 Q Tell me if you recognize that.

3 MR. MOAK: Can I see what he handed up?

4 THE COURT: He hadn't offered it yet.

5 MR. POSTIC: It's part of --- I'm sorry. It's
6 part of your discovery to me.

7 MR. MOAK: I just want to see what the piece of
8 paper is.

9 MR. POSTIC: Your Honor, may Mr. Moak approach?

10 THE COURT: Let the officer look at it first.

11 MR. POSTIC: Yes, Your Honor.

12 THE WITNESS: Yes, sir.

13 MR. POSTIC: Okay. Let me show to it Mr. Moak.

14 (Pause.)

15 BY MR. POSTIC:

16 Q Do you remember sending that e-mail, Trooper
17 Kelly?

18 A I mean, I don't remember, but I guess I did. It
19 says it was sent on Thursday, June 25th, 2009.

20 Q So five days after the accident?

21 A Yes, sir.

22 Q It appears to me from looking at that paperwork
23 that you had done some research into the phone records
24 of the victim, Melvin Wright; is that correct?

25 A Just what Mr. Wright's family had given me.

1 Q Okay. Does it indicate that there were a couple
2 of phone calls made by Mr. Wright?

3 A Yes, sir.

4 Q What time were those calls made?

5 A There was one made at 3:50.

6 Q Okay, A.M. or P.M.?

7 A A.M. There was an incoming call at 3:52.

8 Q Okay.

9 A There was another call made at 4:22.

10 Q And were you able to determine who these phone
11 calls were to and from?

12 A Based on what the family told me the names were
13 in his cell phone.

14 Q Okay. Did you follow-up on those calls?

15 A Yes, sir.

16 Q Did you actually go see these people?

17 A No, sir. I called these numbers.

18 Q Okay. Did they give you any insight into what
19 happened that night?

20 A The only one that I spoke to or was able to get
21 an answer on these numbers was the name Rich.

22 Q Okay.

23 A That was the only answer that I got when I tried
24 that number.

25 Q And I can't ask you anything that would elicit

1 hearsay, so I just want to...

2 You just called them, spoke to one of them, but
3 you did not actually go see them?

4 A Right.

5 Q Is that correct?

6 A Correct.

7 Q Did you go to the bars, to these two bars?

8 A Yes, sir.

9 Q You did?

10 A Yes, sir.

11 Q And did you speak to anybody who might have been
12 witnesses?

13 A I spoke to bartenders and people in the bar who
14 was willing to talk to me.

15 Q Okay. They don't get much law enforcement there,
16 I guess?

17 A No, sir.

18 Q And were you able to find out anything
19 interesting?

20 A No, sir, nobody could tell me anything and
21 nobody --- the ones --- a lot of them really didn't
22 want to cooperate and talk to me.

23 Q Okay.

24 MR. POSTIC: I'm not introducing this. I'm just
25 going to take it back.

1 That's all I have. Thank you, Trooper Kelly.

2 THE COURT: Cross-examination?

3 CROSS-EXAMINATION:

4 BY MR. MOAK:

5 Q You went to Track Side and CNR trying to figure
6 out what happened that night?

7 A Yes, sir, once we cleared up from the scene that
8 day, left the residence, and everything was secured
9 up, I went to Brixx ---

10 Q Uh-huh.

11 A --- first to Melvin's work place.

12 Q Uh-huh.

13 A I talked to his boss there.

14 Q Uh-huh.

15 A And what we were doing at that time was basically
16 trying to get a timeframe of when he left work that
17 night. After I left Brixx, I went to Track Side.
18 After Track Side I went next door to CNR. Is that the
19 name of it?

20 Q And did you end up getting like a copy of
21 Melvin's work hours or ...

22 A Yes, sir. The owner or the boss man of Brixx or
23 the manager of Brixx at that time gave me a copy of
24 his time sheet where he clocked out that night.

25 Q That guy's name was Troy Jenkins, the manager?

1 A If that's what's in my notes, yes, sir.

2 Q Okay. And then he's the one that told you to go
3 to Track Side, right, the manager?

4 A I can't -- I can't recall without reviewing the
5 notes if he actually told me to go to Track Side.

6 Q But you went to Track Side and CNR and didn't get
7 a whole lot of cooperation?

8 A No, sir.

9 Q But you tried?

10 A I tried, yes, sir.

11 MR. MOAK: No further questions.

12 REDIRECT EXAMINATION:

13 BY MR. POSTIC:

14 Q Trooper, when you called these people whose names
15 and numbers were in the phone of Melvin Wright, did
16 they --- well, the one that you spoke to denied even
17 knowing Melvin Wright; is that correct?

18 A Correct.

19 Q That's it?

20 A He actually called me back. He didn't answer
21 when I called him. He called the number back.

22 Q Correct. And he told you that he did know him?

23 A Right.

24 Q But he knew the bars, right?

25 A Yes, sir.

1 MR. POSTIC: Okay. That's it.

2 THE COURT: You may come down, sir. Thank you
3 very much.

4 Next witness?

5 MR. POSTIC: The next witness is Caywood, David
6 Caywood, C-A-Y-W-O-O-D.

7 DAVID CAYWOOD,

8 after being duly sworn, testified as follows:

9 THE WITNESS: My name is David Michael Caywood.

10 DIRECT EXAMINATION:

11 BY MR. POSTIC:

12 Q David, thanks for coming.

13 A Who am I talking to?

14 Q I'm right here.

15 A Oh, hey, how are you doing?

16 Q I've never met you before today, have I, sir?

17 A No, sir, you haven't.

18 Q And I didn't subpoena you. My office and my
19 investigator contacted you about coming; is that
20 correct?

21 A That's correct.

22 Q And I'm going to talk to you from back here so
23 the whole jury --- so I can make sure that the jury
24 can hear you, okay?

25 A Okay.

1 Q David, where are you from?

2 A I'm originally from Blythewood, South Carolina.

3 Q And how do you know Donnie?

4 A We have been friends since we were about 12 years
5 old. I've known him since then. We've been good
6 friends, best man in his wedding. I know him pretty
7 well.

8 Q David, do you have any personal knowledge
9 whatsoever about this evening in question, any
10 personal first hand knowledge?

11 A The one --- no, sir. I wasn't there, just
12 hearsay.

13 Q Okay. Well, I'm not going to ask you about
14 hearsay.

15 A Okay.

16 Q And you also --- you weren't at any of these
17 bars, were you?

18 A No, sir.

19 Q Okay. And the reason I'm asking you is just to
20 ask you if Donnie ever had a practice of lending out
21 his car?

22 A He did it all the time. On numerous occasions, I
23 drove it. He would get drunk and sometimes he would
24 get way too drunk and he often passed his keys to
25 someone else, whether it be me, my brother. He was

1 pretty good about having someone else drive. There
2 was, you know, a few instances where he would say he
3 wasn't that drunk and would want to drive himself, but
4 he was pretty good about passing his keys off.

5 Q Back in 2009, would you say Donnie --- is it
6 pretty fair to say he had a little bit of a drinking
7 problem?

8 A Yes, sir.

9 Q That would be actually kind of minimizing it a
10 little bit, wouldn't it?

11 A Yes, sir.

12 Q Have you remained his friend through this time?

13 A Yes, sir, a very close friend.

14 Q Has he changed?

15 A Not at all.

16 Q I mean, does he still ---

17 A Oh, has he changed? I thought you meant our
18 relationship.

19 Q Yes.

20 A Yes, from what I understand, it's been 380 some
21 days since he has had a drop of alcohol in his system
22 period. He is a totally different person whenever
23 he's sober and a really good guy.

24 MR. MOAK: Your Honor, I'm kind of wondering what
25 the relevance of that is to this trial.

1 THE COURT: I'll allow it. Go ahead.

2 BY MR. POSTIC:

3 Q I'm not going to ask any more questions about
4 that. I'll leave you to him?

5 THE WITNESS: Okay.

6 MR. POSTIC: Please answer any of his questions.

7 THE WITNESS: Will do.

8 CROSS-EXAMINATION:

9 BY MR. MOAK:

10 Q Do you have a conviction of using like an altered
11 or false driver's license?

12 A I believe, whenever I was 17 years old in Myrtle
13 Beach, South Carolina, I was afraid that I was going
14 to get in trouble, and I may have. But that was ---

15 Q You sure it wasn't Richland County?

16 A About 11 years ago.

17 Q Are you sure that wasn't Richland County?

18 A Yes, sir, I'm sure.

19 Q Yeah. Was anybody with you when you got arrested
20 for that?

21 A Yes, sir.

22 Q Who was that?

23 A There was a group of us. You're talking about in
24 Myrtle Beach, because I ---

25 Q I'm talking about the Richland County conviction

1 for use of another's driver's license or ID card.

2 MR. POSTIC: Your Honor, may I approach before
3 potential irrelevant evidence comes in?

4 THE COURT: Approach the bench.

5 (WHEREUPON, there was a bench conference.)

6 THE COURT: All right. Ladies and gentlemen, let
7 me straighten this out with the lawyers. Just --- I
8 thought it was a simple matter, but anyway, just go to
9 your jury room for a minute. I'll call you in just a
10 minute. Don't discuss the case among yourselves while
11 you're in the jury room.

12 (WHEREUPON, the jurors left the courtroom.)

13 THE COURT: All right. Mr. Moak, go ahead.

14 MR. MOAK: Your Honor, I think the use of a false
15 ID card is a problem of dishonesty.

16 THE COURT: All right. Is it within ten years?

17 MR. MOAK: Actually it looks like it actually is
18 February of 2002, so it would have been within ten
19 years last month, when we called the case originally.

20 MR. POSTIC: Well, shoot.

21 MR. MOAK: I just noticed that.

22 THE COURT: Well, the rule says ten years doesn't
23 it?

24 MR. MOAK: Yeah.

25 THE COURT: Evidence of conviction under this

1 rule is not admissible if the period of more than ten
2 years has elapsed since the date of the conviction or
3 of the release of the witness from confinement imposed
4 for the conviction, whichever is the later date.

5 MR. MOAK: It just says fine or jail time. I
6 don't know if he did any jail time. I don't know when
7 he was released or when he paid the fine.

8 THE COURT: What's the ---

9 MR. POSTIC: What's my position?

10 THE COURT: Yeah.

11 MR. POSTIC: I think it doesn't come in. He has
12 the record in front of him. He knows the rule, and I
13 think there needs to be a curative instruction to the
14 jury that he can't impeach this witness on that
15 charge.

16 MR. MOAK: I'm fine with that.

17 THE COURT: What?

18 MR. MOAK: I'm fine with that.

19 MR. POSTIC: Good.

20 THE COURT: Well, by the same token, the rule
21 applies to the defendant if the defendant testifies.

22 MR. MOAK: I'm not mentioning it.

23 MR. POSTIC: The defendant has a conviction of
24 the same date.

25 MR. MOAK: I think the co-defendant.

Cross of Caywood by Moak

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1 THE COURT: All right. They're both more than
2 ten years. Right.

3 MR. MOAK: So I have agree. That covers that.
4 The other issue is ---

5 THE COURT: Wait a minute. I'll give a curative
6 instruction, all right?

7 MR. POSTIC: Yes, Your Honor.

8 MR. MOAK: The other issue is he just testified
9 that he knows the defendant hadn't had a drink in like
10 over 380 days. They're telling me that the defense
11 current rap sheet, the newest one they think, shows
12 that is he has a public disorderly conduct, public
13 drunk type case within that time frame.

14 THE COURT: Well, let's find that.

15 MR. PERRY: Trooper Coats went to get that right
16 now. He just went to our office.

17 MR. POSTIC: And I believe it's just disorderly
18 conduct. It's not drunkenness.

19 THE COURT: I don't know.

20 MR. POSTIC: I'm pretty sure. I might have known
21 about it.

22 THE COURT: It's a conviction?

23 MR. POSTIC: I think it's a conviction.

24 THE COURT: Or just an arrest?

25 MR. POSTIC: It's not a resisting arrest. It's

1 disorderly ---

2 THE COURT: I said, is it an arrest?

3 MR. POSTIC: It's an arrest and a conviction.

4 THE COURT: And a conviction.

5 MR. POSTIC: I think so, on Donnie.

6 THE COURT: Hang loose.

7 THE WITNESS: Yes, sir.

8 MR. MOAK: It wouldn't even come up but for the
9 fact that the guy said he hasn't had ---

10 THE COURT: I understand.

11 Is she running the sheet right now?

12 MR. MOAK: I thought Trooper Coats was.

13 THE WITNESS: Actually, I believe I had said I
14 was under the impression. I believe that it's been
15 380 days since his last drink.

16 THE COURT: Well, she wrote it down.

17 THE WITNESS: I mean, I haven't been with him
18 every minute, every second of that time, but...

19 (WHEREUPON, a short break was taken.)

20 (Pause.)

21 THE COURT: Now, bring the jury.

22 MR. POSTIC: Your Honor, I'm sorry, can we hold
23 off for a minute? My client needs to use the restroom
24 and he is the next witness.

25 THE COURT: Hold on. We've been at ease.

1 MR. POSTIC: I apologize, Your Honor, I just
2 turned to him and said, "Are you ready? You're going
3 to be next." He has to use the bathroom. I
4 apologize.

5 THE COURT: Okay. Just, please ---
6 Are we --- are you through with this witness?

7 MR. POSTIC: I'm through with him.

8 MR. MOAK: I'm not.

9 THE COURT: All right. Now, are we ready to
10 proceed?

11 MR. MOAK: Yes, thank you.

12 THE COURT: Defense ready to proceed?

13 MR. POSTIC: Yes, Your Honor.

14 THE COURT: Please bring the jury.

15 (WHEREUPON, the jury came into open court at
16 approximately 3:35 p.m.)

17 THE COURT: All right. Solicitor, you may
18 continue.

19 BY MR. MOAK:

20 Q How many days did you say it's been since he had
21 alcohol?

22 A I believe around 380.

23 Q 308?

24 A Eighty, 8-0, yes, sir.

25 Q Okay. Are you in A. A. together or something?

1 A No, sir, like I said, we've been friends since we
2 were about 12 years old.

3 Q So how do you know it's 380 days?

4 A Just from talking to him and him saying it's been
5 this long, it's been this long, so it's around about a
6 total of about 380 days.

7 Q So that's from him?

8 A Yes, sir.

9 Q Okay. So you're not with him 24 hours a day?

10 A No, sir.

11 Q Okay. You're saying he's a different person now?

12 A Not necessarily a different person. He is a
13 different person whenever he drinks and whenever he is
14 sober.

15 Q And you've been around him when he drinks?

16 A Yes, sir.

17 Q So if he made a statement that I, Donnie Thigpen,
18 have known to blackout when I drink, would you agree
19 that statement?

20 A I would say yes to that.

21 Q Yes. So you're one of the ones that know him to
22 drink and blackout?

23 A What's that?

24 Q You're one of the people who knows him to drink
25 until he blacks out?

1 A I know he has drank until he blacked out, yes.

2 Q You've been around him when he did that?

3 A I have, yes, sir.

4 Q How does he act whenever he does that?

5 A Like a drunk person that has blacked out. I
6 don't know how else to describe it.

7 Q Did he ever drive when he was doing that?

8 A No, not around me.

9 Q But does he remember what happens when he blacks
10 out?

11 A I mean, I guess, seeing as it's blackout. I
12 don't imagine that he does. I mean, it's called
13 blackout drunk. I guess you forget everything.

14 Q About how many times have you been around him
15 when he's drank that much?

16 A A handful.

17 Q Like a hand full of fingers?

18 A Uh, yes, sir.

19 Q And what timeframe are we talking about?

20 A Since we were old enough to drink until he quit.

21 Q Which was last year?

22 A Right.

23 Q Okay. What does he do when he blacks out? Can
24 he function?

25 A No, no. I mean, he's blackout drunk. He just,

1 you know, he gets loud and sometimes he passes out,
2 goes to sleep.

3 Q Uh-huh.

4 A Sometimes he would just get loud and rambunctious
5 and we'd have to calm him down.

6 Q Can he talk?

7 A No. He can mumble.

8 Q He can mumble?

9 A Yes, sir.

10 Q So he doesn't really function very well when he
11 is blacked out?

12 A No, sir.

13 Q Do you think he can drive a car when he blacks
14 out?

15 A Definitely not.

16 Q Do you think it's a good idea for him to be
17 driving a car when he blacks out?

18 A I don't think it's good idea for anyone to drive
19 when they're drinking.

20 Q Is this something like ya'll are out drinking and
21 he ends up blacking out? Does this happen over a
22 period of time or is it just like that, like he flips
23 out ---

24 A Well, it happens over a period of time. I
25 imagine since you're out and you're having fun, too,

1 you're not totally focused on him, that it seems like
2 it could be like that, but it happens over a period of
3 time.

4 Q It's not something that just comes over him?

5 A No, sir.

6 Q Did you ever pay attention how much he drinks to
7 get to that point?

8 A Not counting beer for beer, no, sir.

9 Q In 2009 --- are you familiar with that year?

10 A Yes, sir.

11 Q Do you know when this wreck happened?

12 A Yes, sir.

13 Q Okay. Was he drinking pretty heavily that year?

14 A I couldn't --- I wouldn't know about heavily.

15 What is heavily to you?

16 Q Was he drinking regularly?

17 A I mean, if you're saying does he go home and have
18 a beer after work, I couldn't say, but whenever we
19 were together, we would usually go get something to
20 eat and have a drink, yes, sir.

21 Q Okay. How often did you get together?

22 A Maybe once a week, once every two weeks maybe.

23 Q Okay.

24 MR. MOAK: No further questions.

25 MR. POSTIC: I have no redirect, Your Honor.

1 THE COURT: All right, sir. Thank you very much.
2 You may come down, sir.

3 THE WITNESS: Thank you.

4 THE COURT: You're free to go.

5 THE WITNESS: May I sit in the audience out
6 there?

7 THE COURT: Oh, absolutely. It's a public
8 courtroom. You're welcome to stay.

9 MR. POSTIC: Thank you, Your Honor.

10 Next witness.

11 MR. POSTIC: Your Honor, the next witness is the
12 defendant, Donnie Thigpen.

13 DONNIE THIGPEN,
14 after being duly sworn, testified as follows:

15 THE WITNESS: My name is Donnie Roland Thigpen,
16 Jr.

17 DIRECT EXAMINATION:

18 BY MR. POSTIC:

19 Q Okay, Donnie. Donnie, I'm going to ask
20 you --- well, you've heard me --- I'm going to ask you
21 some background questions to kind of put you at ease
22 about testifying. I understand you're probably pretty
23 nervous?

24 A Yes.

25 Q Okay. Where are you from, Donnie?

1 A I was born --- well, my family lived on Lake
2 Wateree, South Carolina when I was born.

3 Q Okay.

4 A Then we moved to Columbia ---

5 Q Okay.

6 A --- when I was probably five, I believe.

7 Q All right. And where did you live in Columbia?

8 A It was in a subdivision called North Crossing off
9 of Clemson road.

10 Q And where did you go to school?

11 A I went to North Springs elementary, Summit Middle
12 and Spring Valley High School.

13 Q And when did you leave Spring Valley?

14 A I didn't graduate. I think I left in 2000 or
15 2001. I was supposed to graduate in 2002.

16 Q Why did you quit school?

17 A At the time, things were kind of rough for me,
18 and I --- frankly, I just wanted to work and make
19 money as opposed to finishing school, because I knew
20 that I could get my GED.

21 Q Did you end up getting your GED?

22 A I did.

23 Q And are your parents still alive?

24 A Yes, sir.

25 Q Okay. What are their names?

1 A Donnie, Sr. and Tammy.

2 Q Okay. Are they still together?

3 A No, they're not.

4 Q When did they get --- how old were you when they
5 split up?

6 A I believe that I was about 12 years old.

7 Q Okay. Are you an only child?

8 A Yes.

9 Q Do you have any step brothers or sisters?

10 A I have a stepbrother and a stepsister.

11 Q Okay. From your dad or your mom?

12 A From my --- well, they're not --- they're not his
13 children.

14 Q I see?

15 A They are the children of my stepmother.

16 Q Okay. And when you left Spring Valley, where did
17 you end up going to school? Not school, I'm sorry,
18 where were you working?

19 A At the time I was working at Texas Roadhouse on
20 Two Notch Road.

21 Q Okay. What were you doing there?

22 A I was a cook.

23 Q And what other kind of work did you do?

24 A After that, I believe that's when I --- I moved
25 to Elgin with what is now my ex-wife. I started doing

1 vinyl siding for an individual in Elgin. I did that
2 for about I'd say two years, maybe, two-and-a-half
3 years.

4 From there I went to work at Lorick Office
5 Products downtown. I was a delivery driver in the
6 furniture department. I mainly just delivered office
7 furniture, chairs, things of that nature.

8 I currently, now work at BOSE Corporation.

9 Q That's B-O-S-E?

10 A B-O-S-E, yes, sir.

11 Q What is BOSE corporation?

12 A You're probably familiar with the wave radio,
13 maybe the Lifestyle Surround System, Three-two-one
14 Surround, and military headsets, but basically I build
15 --- I run the machines that build the circuit boards
16 for the wave radio, the wave music system.

17 Q How long have you had that job?

18 A It will be five years in November.

19 Q Okay. And where do you --- do you still live on
20 Twenty-five Mile Creek Road?

21 A No, sir, I don't.

22 Q Okay. When did you move?

23 A December of last year.

24 Q And what --- where do you live now?

25 A I live in a subdivision called Millbank off of

1 Hard Scrabble Road in Columbia.

2 Q Okay.

3 A Northeast side of Columbia.

4 Q Okay. Who do you live with?

5 A I live with my fiancée Betty and her two
6 children.

7 Q Does Betty work?

8 A Yes, she does.

9 Q What does she do?

10 A She is a nurse technician at Palmetto Health
11 Richland.

12 Q And how old are her children?

13 A Justine is seven and Jonathan is five.

14 Q How long have you and Betty been together?

15 A I believe it will be four years in November.

16 Q So November 2008?

17 A Yes.

18 Q How did you meet her?

19 A Well, we actually --- I told you that I lived in
20 North Crossing when I was younger.

21 Q Right.

22 A She lived across the street from my family, her
23 family did. She was two years younger than me so we
24 didn't really hang out much. I hung out with her
25 older brother some.

1 We parted ways un. My family got divorced. We
2 moved and they moved, and we ran into each other in
3 '08, 2008, and ever since then we've been together.

4 Q At the time of this incident, where were you
5 living?

6 A Twenty-five Mile Creek Road.

7 Q Okay. And what kind of home was that?

8 A It was a mobile home.

9 Q And was it a --- is it in the country or was it
10 in the city? How would you describe your
11 neighborhood?

12 A It was in the country.

13 Q Okay.

14 A I probably had five neighbors.

15 Q Okay.

16 A The closest one was probably two football fields
17 away.

18 Q Okay. Did you have a --- was your driveway dirt
19 or gravel? What was your driveway?

20 A It was a mixture of gravel, dirt and grass.

21 Q And back --- there's been some talk about a dog.
22 Did you have a dog back then?

23 A Yes, I did.

24 Q Do you still have the same dog?

25 A I do.

1 Q What kind of dog is this?

2 A He is a pit bull.

3 Q How big is he?

4 A He's about 105 pounds. He's pretty large.

5 Q All right. I live in the city, and the concept
6 of pit bulls frightens me. I mean, tell me, are they
7 gentle dogs, mean dogs?

8 A Mine is gentle. I mean, I have two small
9 children around him. Jonathan has been around him
10 since he was one, Justine since she was four. I mean,
11 I can't get the ball out of his mouth.

12 Q Okay.

13 A He'll give it to them.

14 Q All right.

15 A So I mean, he's pretty gentle with them, you
16 know.

17 Q Okay. All right. Let me get to Melvin, okay.
18 How did you know Melvin?

19 A I knew Melvin when --- I met Melvin first when we
20 were probably --- I know I was in middle school. I
21 would go to his neighborhood and hang out with friends
22 that we knew mutually and I knew him from high school
23 a little bit, you know, and then once we got out of
24 high school, we kind of --- we started hanging out
25 more.

1 I mean, we wouldn't hang out every day or
2 anything like that, but mainly, you know, we would go
3 shoot pool together pretty much. I mean, he
4 would --- he would come home to my house on occasion,
5 you know.

6 Q Would you say he was a good friend?

7 A He was a very good friend.

8 Q A good guy?

9 A Great guy.

10 Q All right. Donnie, let's talk about this time in
11 your life in 2009. You've seen yourself, now along
12 with the rest of us, and you've heard yourself. Tell
13 me how that feels to see yourself like that.

14 A I don't think I understand what you're asking me.

15 Q You've seen the video of yourself a couple of
16 times now. You've heard yourself in the interrogation
17 room. You've seen pictures of yourself. You've heard
18 about your blood alcohol. What does that --- how do
19 you feel when you hear about Donnie Thigpen
20 two-and-a-half years ago?

21 A It saddens me, really. It really brings tears to
22 my eyes. I mean, Melvin was a good friend of mine,
23 you know.

24 Q I understand.

25 A I wouldn't --- I wouldn't walk away from anyone

1 in that situation. In this situation, that all of us
2 knows about ---

3 Q Well, let me move on because you're talking about
4 something different, and I appreciate that. I'll ask
5 you about that later on.

6 What I mean is, I was asking you about your
7 problem with alcohol?

8 A That's what you're asking me about?

9 Q Yeah. I'm just saying when you see the way you
10 acted on that video screen, when you see the pictures
11 of yourself then, that's what I mean. Are you that
12 same person?

13 A Today no, absolutely not by any means. I haven't
14 drank in a long time. It's been over 400 days, I
15 believe. Today would have made 411. That's pretty
16 big to me because ---

17 Q Are you doing AA or anything?

18 A No, I wasn't. I haven't, you know.

19 Q Okay. Was there anything going on in your life,
20 or do you think you just had a disease, alcohol?

21 A I believe I just had the disease itself,
22 alcoholism.

23 Q Do you feel a lot better now, at this time?

24 A Yes.

25 Q Do you contest that you were really drunk that

1 night?

2 A Yes, I do.

3 Q I mean, you --- now, do you contest or do you
4 confirm? Do you agree that you were drunk?

5 A I agree that I was drunk.

6 Q Okay. And let's go through that night, okay.
7 Were you working that night?

8 A I was..

9 Q What were your hours?

10 A 3:30 to 11:30. 3:30 P.M. to 11:30 P.M.

11 Q How far was your work from your home?

12 A It's approximately 12, 12 to 15 minutes.

13 Q And did you go home after work?

14 A I did.

15 Q Did you --- what did you do then?

16 A Let the dog out, fed him, grabbed some movies I
17 had rented a couple days before, took the movies back.
18 I stopped by the store, and then I headed to Brixx.

19 Q And when you went to Brixx, did you go by
20 yourself?

21 A Yes, sir, I did.

22 Q Did you have dinner there?

23 A No. I don't believe I ate anything while I was
24 there.

25 Q Okay. Did you have something to drink?

1 A I did.

2 Q Okay.

3 Q And how many drinks would you say you had?

4 A Probably three beers, approximately three beers.

5 Q What kind of beer did you drink?

6 A I can't remember. I mean, I drank Budweiser. I
7 can't remember what I had that night, though.

8 Q Okay. Was Melvin with you at Brixx that night?

9 A Was he working? Yes.

10 Q Did you see him while you were there?

11 A I did.

12 Q Did you guys make arrangements to meet later on?

13 A We did. I just told him to call me. I was
14 getting ready to leave. I told him to call me, you
15 know, if he wanted to hang out, you know, shoot pool.
16 He mentioned he wanted to shoot pool. I remember him,
17 you know, making the, you know, the ---

18 Q The universal signal?

19 A Yeah, the universal signal, so I just told him to
20 call me.

21 Q Okay. And where did you go from Brixx?

22 A From Brixx I went to another bar.

23 Q Okay.

24 A It's called Friends, off of Decker Boulevard, I
25 believe. I mean, it is on Decker Boulevard.

1 Q Is it --- was this --- what day of the week was
2 this? Do you remember by any chance?

3 A No. I can't remember.

4 Q That's okay. You can always say that you don't
5 know. It was a long time ago.

6 A I want to say it was Monday, maybe.

7 Q If you don't know, you don't know.

8 A I can't remember, no.

9 Q All right. Did you have any --- did you meet
10 anybody at Friends?

11 A Did I meet anyone at Friends?

12 Q Yes.

13 A Yes. I met two friends of mine, Leon and his
14 girlfriend at the time.

15 Q He is who was here earlier?

16 A Yes.

17 Q And did you have any more to drink there?

18 A I did, probably another three or four beers.

19 Q Okay.

20 A And I believe I had a couple shots.

21 Q Wow.

22 A Also.

23 Q Okay. And you drove, right?

24 A I drove.

25 Q Okay. Because you left there to go where?

1 A To Track Side.

2 Q Okay. Donnie, is that the last time you drove
3 that night?

4 A Yes, it was.

5 Q Before I start getting into the rest there, how
6 do you feel about the fact that you drove after? That
7 sounds like --- already like, I don't know, eight
8 beers, eight or nine drinks?

9 A I shouldn't have been driving.

10 Q If you had been stopped, do you think you would
11 have maybe gotten a DUI then?

12 A Most --- most likely, yes.

13 Q So why did you go to Track Side?

14 A Melvin ended up calling me and, you know, wanted
15 to hang out, so...

16 Q So when you got to Track Side, was he already
17 there?

18 A He was.

19 Q What kind of car did you have?

20 A I had a Jeep Cherokee.

21 Q And when you were at Track Side, something
22 happened while you were there?

23 A Yes. I got into a fight.

24 Q Okay. And you were here when this guy B.J. had a
25 fight with you?

1 A Yes.

2 Q Or when --- I'm sorry. It wasn't here, but you
3 were here when he testified to it.

4 A Yes, yes, I was.

5 Q And you heard him say that he had gotten into
6 some, you know, scuffles or sort of verbal arguments
7 with you before in the past. Is that true?

8 A Yeah.

9 Q Were you ---

10 A Nothing major. I mean, B.J., he can be kind of a
11 cocky kind of guy sometimes, too.

12 Q Okay.

13 A You know.

14 Q I don't know, but okay.

15 A I mean, I haven't seen B.J. in a long time. I
16 don't go to the bar anymore, so...

17 Q Okay.

18 A I don't know how he is now, but I know how he was
19 then.

20 Q And you know how you were then, too.

21 A I know how I was then, also.

22 Q You weren't too great of a guy then, were you?

23 A No, I wasn't.

24 Q Not when you were drinking?

25 A No.

1 Q What happened then with him? I mean, what kind
2 of --- how bad was the altercation?

3 A I mean, we --- we didn't go at it for an extended
4 period of time or anything. You know, he hit me. I
5 fell down into the --- down the railway there and into
6 the gravel. I mean, I had tried to go back at him,
7 but I was being held back, you know, and I'm stumbling
8 around. Everybody was --- I mean, Melvin was
9 stumbling around. Leon was stumbling around. I
10 understand they were just trying to keep the peace.

11 Q Hard to talk about right now, isn't it?

12 A Yeah.

13 Q Kind of embarrassing?

14 A It is, yes.

15 Q Donnie, at that point, had you made any plans or
16 anything? What was the story then?

17 A Had I made any plans?

18 Q To go out further or to stay at Track Side?

19 A No, I don't remember if I actually made plans,
20 no.

21 Q Do you have any clue about what time it was when
22 you ended up leaving?

23 A It was late. I'd say between five and six in the
24 morning.

25 Q And a lot has been made about what you can

1 remember and what you can't remember.

2 You've heard yourself and you've seen this
3 interview. You've heard this interview. Do you
4 remember more now than you remember then?

5 A Yeah. I mean, I remember more of what happened
6 that night, yes.

7 Q And why is that?

8 A Because quite frankly for the last almost three
9 years it's all I've been thinking about.

10 Q Okay. Donnie, do you remember leaving Track
11 Side?

12 A Yeah.

13 Q Did you drive when you left?

14 A No, I did not.

15 Q Did you want to drive?

16 A I wanted to. I mean, I actually tried to. I got
17 in the driver's side of the Jeep, but my friends told
18 me, "No, that's not a good idea. You need to get
19 out."

20 Q Do you recognize that as a pretty good decision
21 on their part now?

22 A Yes, I do.

23 Q Do you remember who you were with when you left
24 Track Side?

25 A I was with Melvin.

1 Q Was there anyone else in the car?

2 A Not that I can recall, no.

3 Q Do you remember where y'all went?

4 A We went to the gas station in Pontiac. I believe
5 it's the Citgo.

6 Q Did you get out of car there?

7 A No, I didn't. Melvin went in.

8 Q Are you sure?

9 A Yes.

10 Q Where was Leon and Tina? Did you have any idea?

11 A They were following us.

12 Q Oh, did you even know that Sharla was there?

13 A I remember seeing Sharla briefly.

14 Q Did you talk to her?

15 A I don't know Sharla too well.

16 Q Okay. Where did y'all go from the store, do you
17 know?

18 A To my house.

19 Q And what happened then?

20 A Melvin actually wanted to borrow the car, my car.

21 Q Had you let him borrow the car before?

22 A Yeah. Sure, if he needed to.

23 Q Okay. And so that was it? You got out and he
24 left?

25 A Yeah.

1 Q Is that the last time you saw your friend?

2 A Yes, it was.

3 Q How did you get in the house?

4 A I had to force my way in the front door because
5 obviously my keys were in the Jeep that Melvin took,
6 so...

7 Q And when you forced your way in the house, did
8 you break your door?

9 A I didn't break it completely, no.

10 Q Did you have a deadbolt?

11 A No. At that time, I didn't have a deadbolt, no.

12 Q No. How did you lock your front door?

13 A I just had a lock on the bottom.

14 Q Like the little thing you put on the door, like
15 that, that thing?

16 A Yeah.

17 Q And you had 105 pound dog, too?

18 A Yeah.

19 Q So ---

20 A He wasn't too happy when I was kicking the door.

21 Q Do you remember that?

22 A Yeah.

23 Q Okay. Tell me about that. What did you do when
24 you got home? Do you remember what happened when you
25 got home with your dog that day?

1 A You know, he --- if he hasn't gone to the
2 restroom in a while, he is kind of irate. I don't
3 think I let him out before I left, so he was jumping
4 on me, you know, needing to go out. I was pushing him
5 around, you know, kind of wrestling with him.

6 Q Okay. And even if you had --- I think you might
7 have just said that you did let him out that night?

8 A Yes.

9 Q Is that possible?

10 A I mean, I could have.

11 Q It's still a couple of hours?

12 A I mean, it was from 11:30 to between 5 and 6 in
13 the morning. He was ready to go.

14 Q Okay. And did you have a habit of kind of
15 wrestling with him?

16 A Yeah, on occasion I will.

17 Q Okay.

18 A More so when I've been drinking because I'm a
19 little bit less reactive, I guess, you would say to
20 him jumping on me, you know. If he were to scratch me
21 or what have you.

22 Q You would have poor motor skills?

23 A If I was drinking?

24 Q Yeah.

25 A Yes.

1 Q And slowed reaction time?

2 A Probably, yes.

3 Q And then what did you do?

4 A I went to sleep.

5 Q Went to sleep or passed out?

6 A I went to sleep.

7 Q Okay. Do you remember anybody knocking on your
8 door?

9 A Yeah.

10 Q I'm not talking about the police. Do you
11 remember anybody else knocking on your door?

12 A No, I don't.

13 Q You don't remember your dog getting all crazy?

14 A No.

15 Q In the middle of the night or earlier in the
16 morning?

17 A I mean, after drinking like I was that night, if
18 the dog was barking, I probably wouldn't care that
19 much, so no.

20 Q All right. Donnie I've asked just about every
21 witness who sat there the same question: do you have
22 any personal knowledge of what happened at this
23 incident --- at this spot right here five houses down
24 from your house with your car?

25 A Absolutely none.

1 Q You're certain of that?

2 A I'm positive of that.

3 Q All right. Okay, well, before we start getting
4 into --- you know, I better stay linear. What's the
5 next thing you remember?

6 A I remember two officers knocking on my door.

7 Q Okay. Had you already been awake by then?

8 A I was awake for a short while, yes.

9 Q Okay. Do you remember the names of those
10 officers by any chance?

11 A I think it was Trooper Borowski and I don't know
12 the other guy. He --- I think he's the chief in
13 Mayesville now.

14 Q Okay, and he testified here?

15 A Yes.

16 Q Okay. Did you --- at that point, Donnie, do you
17 remember if you were still under the influence or had
18 you sobered up?

19 A No, I was still very intoxicated.

20 Q And would you remember talking to them at all?

21 A Very vaguely.

22 Q Were you --- I mean, what was your reaction to
23 what they told you?

24 A They told me that there was a wreck.

25 Q Right.

1 A And somebody had died, and I was shocked because
2 they told me it was my car.

3 Q And did you --- at that point in time, how were
4 you dressed?

5 A At that point when they got there, I believe I
6 had just gotten out of the shower, so I had a towel
7 around my waist.

8 Q Okay. Were you --- do you remember having a
9 bunch of glass on you?

10 A No, I don't.

11 Q Where did you sleep that night?

12 A In my bed.

13 Q I don't think they took your sheets. Did you
14 sleep in your clothes, do you remember, on the night
15 before?

16 A I might have.

17 Q Okay. Do you remember the --- when you
18 finally --- when you finally got a chance to go back
19 home after you had been arrested. Did you have a
20 chance to check out your sheets? Did you see a bunch
21 of glass in there?

22 A No, I didn't.

23 Q How about grass or organic material?

24 A In my bed, no.

25 Q Maybe on your floor?

1 A I mean, there could have been. I lived in --- I
2 used to live in the country.

3 Q Okay.

4 A The dog is in and out. I'm in and out. I cut
5 the grass. I didn't take my shoes off at the door,
6 it's very possible, you know, there was grass on the
7 carpet.

8 Q Do you keep a tidy house back then?

9 A Back then?

10 Q Yes.

11 A No, not really, no.

12 Q Okay. So did you have a chance to get dressed
13 after that?

14 A Yes, I put a shirt and shorts on.

15 Q Okay. And what did they do at that point, do you
16 remember?

17 A I believe we went on the front porch.

18 Q Okay.

19 A And they were questioning me.

20 Q At any time --- I mean, it's all on tape. At any
21 time did you say, "Yeah, I was driving, I remember
22 that."?

23 A No.

24 Q At that time, did you remember much of the night
25 before?

1 A I remember as much as possible.

2 Q Okay. You don't remember flipping your car?

3 A No.

4 Q Crawling out of a window, a broken window?

5 A No.

6 Q Walking home in the early morning?

7 A No.

8 Q Did you have --- did you even think it might be
9 Melvin when you heard that?

10 A I had no idea who was in the car. I mean, Melvin
11 had taken the car, but we were both pretty
12 intoxicated, so... I mean, anybody could have been in
13 the car.

14 Q Do you remember the initial --- when the initial
15 officers came to you, do you remember them reading
16 you --- what's called Miranda rights?

17 A I don't.

18 Q You just remember them questioning you?

19 A Yes.

20 Q And then did they arrest you there at your house?

21 A I mean, they put me in handcuffs, I believe.

22 Q Okay. And did they take you to the scene of the
23 accident at that point?

24 A Eventually, yes. They took me down to where the
25 Jeep had flipped over.

1 Q And did they take you to the hospital after that?

2 A Yes.

3 Q Did you even see --- did you end up seeing the
4 Jeep when you were there?

5 A Yeah. I think I saw it, yes.

6 Q Did you even know where it was?

7 A No. I had no idea.

8 Q Did you --- at that point, did they take you to
9 the hospital? Do you remember that they took six or
10 seven or however many vials of blood out of you,
11 right?

12 A I don't remember how much they took. I remember
13 them taking blood and a urine sample.

14 Q Okay. And after that, do you remember where they
15 took you?

16 A To the jail.

17 Q Okay. And at some point before you get --- go in
18 the room with Trooper Coats, did they allow you to
19 make some phone calls?

20 A No. I don't believe so.

21 Q Okay. You don't remember that?

22 A No.

23 Q Okay. How about food? Did you get any food?

24 A No.

25 Q Did you ask for any, though?

1 A No. I didn't ask for any food, I don't believe.

2 Q And what is your mood at this point; what are you
3 feeling?

4 A I'm scared.

5 Q Okay.

6 A I mean, they tell me that, you know, there was
7 wreck. My Jeep was involved, somebody died in the
8 Jeep. They couldn't tell me who it was or they
9 wouldn't tell me who it was. I mean, I was confused.

10 Q Okay. Now, really, you know, this is the big
11 question. You go in a room. You got three officers
12 dressed out. Are they armed? Do you remember?

13 A I don't remember if they were armed.

14 Q Are they in uniform?

15 A I think they might have had --- one officer was
16 in uniform. Two guys here I think had regular golf
17 shirts on, maybe.

18 Q Okay. And ---

19 A I mean, they could have been in uniform, I can't
20 really remember.

21 Q Okay. Do you remember them at that point giving
22 you your rights?

23 A Not really, no.

24 Q Do you think you might have been still a little
25 drunk or hung over or something then?

1 A I was still pretty drunk.

2 Q Okay. Because the big thing is, Donnie, you've
3 told them several times by now that you weren't
4 involved, right, and you're sitting here under oath
5 and you're telling all of us that you weren't
6 involved, okay, and when you're in that room, you tell
7 them, "Yep, I was there."

8 Or did you tell them that? What was your
9 understanding of that?

10 A I don't think that was my exact words, no.

11 Q Okay. What happened then?

12 A In that room?

13 Q Yeah.

14 A I felt threatened. I was drunk, confused,
15 scared. I mean, these guys --- I mean, there's three
16 of them. I'm being accused of this heinous act, this
17 crime and, you know, they just told me that it was a
18 good friend of mine, and they're telling me I was the
19 one that was driving that car.

20 Q And they told you that as if it were an absolute
21 fact?

22 A As if I was the one driving that car.

23 Q Did you kind of believe that you were then?

24 A I didn't --- I didn't know what to believe.

25 Q Did you have any memory of being in the car like

1 that?

2 A No, absolutely not.

3 Q Anything?

4 A I would have are remembered something like that.

5 Q Okay. Did you ---

6 A I mean.

7 Q Did you feel like you could leave?

8 A Like I could leave?

9 Q Yeah.

10 A Absolutely not.

11 Q Did you feel like you could stop their

12 questioning?

13 A By telling them what they wanted to hear. I felt
14 like I could stop.

15 Q You had already told them what you knew or didn't
16 know, right?

17 A Yeah. I mean, I'm sure nobody in this room has
18 ever been in that kind of situation. It's kind of
19 hard to explain the ---

20 Q Well, go ahead and tell us.

21 A The fear, the confusion, I mean, you just were
22 told that you are basically accused of killing one of
23 your very good friends. I mean, and you have no idea
24 about any of it. You know, you were with him earlier
25 the night before.

1 I mean, it's really hard to explain the turmoil
2 that was going on in my head at that time.

3 Q All right. I'm going to move on. Let me just
4 ask you about a few little small issues that came up
5 during the trial. Well, let me ask you about this one
6 right here. These are pictures of your shower.

7 Let me --- what kind of place did you live in?

8 A It was a mobile home.

9 Q Okay. Double wide, single wide?

10 A It was a small double wide.

11 Q Okay. How many bathrooms?

12 A There were two.

13 Q Do you recognize that spot? Do you know anything
14 about that?

15 A No.

16 Q Do you know that --- can you tell the difference
17 between that bathroom and the other bathroom?

18 A Absolutely. This --- you can take a --- you can
19 sit down and take a regular bath in this one. In mine
20 it's just a stand up shower and I had the garden tub
21 off to the side.

22 Q Would you take a bath there?

23 A No. That's where I washed my dog.

24 Q Okay.

25 A Nobody used that. I had roommate before and he

1 used it, but mainly I just used that to wash my dog.

2 Q Okay. Did you use it that morning?

3 A No, I don't see why I would have.

4 Q Do you know if that's blood? Do you have any
5 idea?

6 A I don't know what that is. It doesn't look like
7 blood to me.

8 Q Wow.

9 A It looks more like old shampoo dried up.

10 Q Red shampoo?

11 A I don't know.

12 Q All right. Donnie. Let me ask about your car,
13 your old car. How long had you had that car?

14 A Six years maybe.

15 Q Did you keep that car in pretty good condition?

16 A I tried. I cleaned it out probably once every
17 two or three weeks, but I mean, I was throwing golf
18 clubs in and out, fishing equipment in and out,
19 anything I needed to carry, you know, lawn mowers.

20 Q Okay.

21 A That was my car.

22 Q Tell me about the roof, the headliner.

23 A The headliner?

24 Q Yeah.

25 A Well, it was --- it hung down. I mean, it

1 touched my head when I drove.

2 Q Did you normally wear your seat belt, Donnie, do
3 you know?

4 A Yeah, now. I mean, I tried to practice wearing
5 my seat belt back then, too. I mean...

6 Q Oh, did you drink any more beer when you got
7 home?

8 A I don't think so. I mean, it's possible I had
9 some beer at the house, I'm sure, so it's possible ---

10 Q You're not sure?

11 A I mean, I'm not sure.

12 Q Donnie. This door, when you forced it in, is
13 this a metal door?

14 A It is.

15 Q And were you able to close it back up when you
16 were done --- when you had gone inside?

17 A Yeah.

18 Q Would it still lock?

19 A Yeah.

20 Q Did I already ask you that?

21 A No, you haven't.

22 Q Oh, any idea where this comes from?

23 A It could have come from the fight, obviously.

24 Q We're just speculating. I don't want you to
25 invent something you don't know.

1 A I have no idea where that came from.

2 Q Airbag?

3 A Absolutely not.

4 MR. POSTIC: One moment, Your Honor.

5 (Pause.)

6 BY MR. POSTIC:

7 Q My second set of eyes reminded me of something.

8 This last picture I showed you and I said, "What's
9 this. Do you remember this?" And this is a picture
10 of your arm, but you don't remember it, do you?

11 A No.

12 Q Okay. And this is a picture of your arm; is that
13 correct?

14 A Yeah, it's in evidence, it has to be a picture of
15 my arm.

16 Q All right. I'm going to ask you one more time
17 before cross-examination, is this the truth?

18 A This is the truth.

19 Q Okay. Is the dozens of time that you told
20 officers that you weren't involved, was that the
21 truth?

22 A Yes, that was truth.

23 Q And the one time that you told these guys, was
24 that the truth when you told them that you were in the
25 car?

1 A Absolutely not.

2 Q Okay.

3 A I didn't know what else to do to make this stop.

4 Q I understand.

5 A That's the only thing I could think of to do.

6 Q Is it --- before I hand you over, is there
7 anything I've forgotten to ask you or anything you'd
8 like to add?

9 A (There was no response.)

10 Q That's fine.

11 MR. POSTIC: Please answer any questions from the
12 solicitor's office.

13 CROSS-EXAMINATION:

14 BY MR. MOAK:

15 Q We can agree that your Jeep was wrecked, right?

16 A Yes.

17 Q And you agree that Melvin died in the passenger's
18 seat of your Jeep?

19 A Yes.

20 Q Do you agree that your Jeep crashed not too far
21 from your house?

22 A Yes.

23 Q Do you agree that's kind of the route the Jeep
24 took to hit that tree?

25 A That's what you guys are saying, so...

1 Q Do you dispute that?

2 A Do I dispute that's the route?

3 Q Yeah.

4 A No, sir. I mean, if that's what you guys are
5 saying. I mean, you have experts so...that's what
6 they do every day.

7 Q So you don't really have a problem with Trooper
8 O'Donnell's accident reconstruction of how the wreck
9 happened?

10 A I don't see why I would have a problem with it,
11 no, sir.

12 Q You don't have a --- you don't disagree with the
13 animation we showed the jury --- the Trooper Ridgeway,
14 his computer animation. Do you dispute that?

15 A Do I dispute it?

16 Q Yeah.

17 A I mean, I have no knowledge of this accident,
18 sir. So, I mean, anything that you guys are saying
19 is --- is merely what you have come up with.

20 Q You're not saying that's not how it happened,
21 though? Or are you saying that's not how it happened?

22 A I wouldn't know how it happened, sir.

23 Q Okay. And do you remember telling the troopers
24 that you got off of work at BOSE at 11:30 the night
25 before?

1 A I'm sure I did. That was my routine, so I'm sure
2 I told them that.

3 Q Do you remember telling the troopers that you
4 were wearing the yellow shirt with the stripes on it,
5 the plaid looking stripes?

6 A I mean, after listening to the audiotape that's
7 what I told them.

8 Q I'm showing you what's marked State's
9 Exhibit 129. Is that your shirt in there?

10 A It looks like it.

11 Q And that's the shirt you were wearing that night,
12 right?

13 A I believe so.

14 Q And you saw the shorts and the shoes and all
15 that. That's all your stuff, right?

16 A Could I see it again? It's been a long time.

17 Q Okay.

18 A I mean, it looks like my clothes, yes.

19 Q But you're saying there were no glass shards or
20 anything?

21 A I'm saying that there wasn't glass in them?

22 Q Right. You're saying there is no glass?

23 A I mean, you guys came and picked up the clothes
24 so, I mean, I don't know if there was glass in it or
25 not.

Cross of Thigpen by Moak

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1 Q Okay. So you don't know if there was glass or
2 not?

3 A No.

4 Q So you're not saying there is no glass?

5 A No, I'm not. I mean, I have no knowledge of why
6 there would be glass in them other than maybe rolling
7 around in the gravel parking lot, but that was at a
8 bar.

9 Q But do you remember telling the troopers you got
10 off of work at BOSE at 11:30. You told them what
11 clothes you were wearing. You told them that you
12 picked up some movies you had to take back, and you
13 told him you went by, I guess, the gas station in
14 Pontiac to get cigarettes. Do you remember telling
15 them that?

16 A Vaguely. I mean, I know what's on the audio.

17 Q Okay. Did you listen to the audio?

18 A Yes.

19 Q Was that your voice?

20 A Yes, it was.

21 Q That was you telling them, right?

22 A That was the intoxicated Donnie Thigpen, yes.

23 Q So that was Donnie Thigpen?

24 A It was.

25 Q And Donnie Thigpen was right?

1 A Was right?

2 Q Yeah, you did get off of work at BOSE at
3 11:30 that night. You did pick some movies up and
4 take them back. You went to the gas station and got
5 cigarettes, you did that, right?

6 A Yes, sir.

7 Q You were wearing those clothes, right?

8 A Yes, sir.

9 Q Okay. Now, you told the troopers and that was
10 your --- or how about this. Your voice on that audio
11 told the troopers that you went to Brixx and met
12 Melvin, right?

13 A Yes.

14 Q And that's what you just testified to?

15 A Yes.

16 Q So that's correct, too, right?

17 A Yep.

18 Q You told the troopers you drank three or four
19 beers at Brixx, right?

20 A Yes.

21 Q You told the troopers you went from Brixx to
22 Friends and they thought it was a friend's house, but
23 your corrected them, right? You told them where it
24 was at?

25 A I did.

1 Q You told them on Decker Boulevard?

2 A Yes.

3 Q They said it was near the Comedy House, right?

4 A Yes.

5 Q And you told the troopers and this is, I think
6 the second or third time you went through this, that
7 not only do you have three or four beers at Friends, I
8 think you even said they were Yuenglings?

9 A It's possible. I drank Yuengling on occasion
10 back then.

11 Q And you --- I think you told them that at Friends
12 you had a vodka --- one vodka Kamikaze and two
13 Southern Comfort Kamikazes; isn't that what you told
14 them?

15 A It is.

16 Q That's what you drank, right? Did you drink
17 that?

18 A I might have. I remember taking two shots. I
19 don't remember exactly what they were.

20 Q And you told the troopers that you left Friends
21 and went to Track Side with Melvin, right?

22 A Yes. And you told the troopers you drank three
23 or four more beers there.

24 A Yes.

25 Q Is that true?

1 A Yes.

2 Q So up to this point, everything you told the
3 troopers is actually what happened, right?

4 A Yes, it is.

5 Q But you told the troopers on June 20th between
6 five and six o'clock when you were asked at the jail,
7 you told them repeatedly that you blacked out and
8 didn't remember anything after that?

9 A I said that has to be what happened because I
10 don't remember this wreck.

11 Q No. I mean, isn't it true you told them you
12 didn't remember because you blacked out?

13 A Yes.

14 Q And you told the troopers that when you black
15 out, it never comes back, and the memory never
16 returns?

17 A That's what's on the audio, yes.

18 Q That's what you told them?

19 A Yes.

20 Q That's not true, is it?

21 A No, it's not true.

22 Q I mean, you're telling --

23 A I mean, I can remember bits and pieces of when I
24 used to drink heavily and, you know, I would remember
25 bits and pieces of the night before.

1 Q And then you actually told the troopers you
2 remember coming home and your dog --- you even used
3 the same phrase, your dog was irate. Do you remember
4 that?

5 A Yes.

6 Q Except on June 20th you said your dog was irate
7 because you were kicking the door in. Do you remember
8 saying that?

9 A No. I mean, I remember saying the dog was
10 barking and, you know --- because somebody was forcing
11 their way in the house.

12 Q You remember that though, right?

13 A Yeah.

14 Q But now you're saying the dog is irate because he
15 had to use the bathroom?

16 A I mean, that's probably why he was.

17 Q Okay. And you told the troopers the afternoon of
18 the 20 that when you got home, you remembered the sun
19 was coming up. It was light out when you got home.
20 Do you remember telling them that?

21 A That's what I told him.

22 Q And that's kind of consistent with what you're
23 saying now. You said you were there about 5:30 to
24 6:00, something like that?

25 A Yeah.

1 Q So that's true, too, right?

2 A The time, yes, that's true.

3 Q Okay. But you couldn't tell the troopers
4 anything about what happened between you leaving Track
5 Side and you getting home because you blacked out.
6 That's what you kept saying. Isn't that true that's
7 what you kept saying?

8 A I think I did tell him I went by the store.

9 Q Not the second time.

10 A Not the second time? What do you mean?

11 Q Well, okay. Your other witnesses have testified
12 that you and Melvin --- and you testified, too, that
13 you and Melvin stopped and Melvin got some more beer.

14 A I don't know what Melvin purchased, no.

15 Q Okay. Did you go back to the gas station on the
16 way back from Track Side?

17 A We went by the gas station, yes, sir.

18 Q But you didn't tell the troopers that on
19 June 20th?

20 A I don't think I did.

21 Q Do you remember the troopers asking you who
22 bought the Ice House?

23 A No, I don't remember.

24 Q You don't remember telling the troopers you have
25 Ice House at your house in your refrigerator, but none

1 in the Jeep?

2 A Yes, I do actually, yes.

3 Q Okay. But on the 20th you didn't have any
4 details between Track Side and coming home because you
5 blacked out. I mean, you heard the audio. I mean,
6 how many times do you say you blacked out on the
7 audio?

8 A A lot.

9 Q Well, that's not true, is it?

10 A I mean, no.

11 Q So ---

12 A I mean, I couldn't remember the whole night, you
13 know, at the time.

14 Q So when you were telling the troopers that you
15 blacked out, that you didn't know how you got home,
16 you were lying?

17 A No, I wasn't lying, no.

18 Q You just said you weren't blacked out. Were you
19 or were you not blacked out?

20 A I mean, I had lot to drink. I just got in a
21 fight. You know, I remember bits and pieces of when I
22 was dropped off.

23 Q Do you even tell the troopers about the fight?

24 A I don't believe I did.

25 Q Do you remember telling the troopers you had to

1 hear about the fight from --- whoever Betty Babinski
2 is? That's who you found out about the fight from,
3 right?

4 A That's what's on the audio.

5 Q You told the troopers that you had to be told
6 that you got in this fight and now you say you
7 remember it?

8 A It's what's on the audio.

9 Q So were your telling the truth on the audio or
10 are you telling the truth now?

11 A I'm telling the truth now.

12 Q Okay. So on the audio you're lying?

13 A The only parts of the audio that I was lying was
14 when I so-called confessed to this.

15 Q Now, were your lying when you said, "Why did it
16 have to be Melvin? Why couldn't it have been me?"
17 Were you've lying about that?

18 A Was I lying about that?

19 Q Yeah.

20 A No.

21 Q So that was true?

22 A Yes. I mean, after I was told that it was my
23 friend, you know, that had been killed in the car, I
24 mean, if it was anybody in the car, I would rather,
25 you know, if --- I would rather it be me if I was

1 being accused of it, I would rather it be me than
2 them.

3 Q And we know you're lying when you're on the audio
4 saying you take full responsibility, right?

5 A Yes. I mean, I wasn't --- I'm not responsible
6 for what happened.

7 Q So we know you were lying to the troopers when
8 you said to tell the family, tell our office that you
9 take full responsibility? So you're lying?

10 A I wouldn't have knowingly taken full
11 responsibility for something that I hadn't done.

12 Q Were you lying to troopers when you told them
13 there wasn't a pulse?

14 A I told them there wasn't a pulse?

15 Q It's on the audio.

16 A I don't remember that.

17 Q Were you lying to the troopers when you said that
18 you jerked the wheel?

19 A I didn't know what to tell them, sir. Like I
20 said, I was scared out of my mind. I had no idea
21 of --- and they were, they were telling me that I was
22 in this car.

23 Q You listened to the audio, didn't you?

24 A Yes, sir.

25 Q Do you remember in the audio, Trooper Coats

1 repeatedly told you that he would even believe a deer
2 came out or another --- or maybe you swerved to avoid
3 another car?

4 A He said that.

5 Q That's what --- he was actually telling you a
6 story?

7 A He made up a lot of suggestions.

8 Q And you didn't go with that: You said "No, that
9 would be a lie." That's what you told them, right?

10 A That's what's on the audio, yes, sir.

11 Q So the audio has him telling you, hey, that is a
12 good story. Why don't you say this; I might believe
13 it. And you're saying that it's a lie. That's what
14 is on the audio. That's what's on there, right?

15 A That's what's on there.

16 Q And you're now have saying that your couldn't
17 tell the troopers what they didn't want to hear?

18 A I don't understand.

19 Q You're telling us now that you told the troopers
20 what you said because they wanted to hear it?

21 A Yes.

22 Q Is that essentially what you're saying?

23 A Yes, sir.

24 Q But what the troopers told you they wanted to
25 hear, you wouldn't say it because you said it would be

1 a lie. That's what the audio shows, isn't it?

2 A Yes.

3 Q Now, do you remember talking to Trooper McKenzie?

4 Do you remember going to the DataMaster room, the
5 video we showed?

6 A Yes.

7 Q Do you remember telling Trooper McKenzie, "Why am
8 I in here because someone took my car for a joyride?"

9 Do you remember telling him that?

10 A That's what's on the tape.

11 Q And that was you, wasn't it?

12 A That was me on the tape, yes, sir.

13 Q Do you remember telling Trooper Borowski and
14 Deputy Slaten the last time you saw your car was
15 three o'clock that morning? Do you remember telling
16 him that?

17 A No, I don't remember that.

18 Q So you never said that?

19 A I'm not saying I never said that. If it's on the
20 audio ...

21 Q Do you want me to play it?

22 A No, you don't have to play it. I mean, if it's
23 on the audio, it's on the audio.

24 Q Do you remember Trooper Borowski asking you if
25 you gave the keys to someone and your response was it

1 was three o'clock? Do you remember telling him that?

2 A No, I don't actually.

3 (Pause.)

4 MR. POSTIC: Can we approach, Judge? I just
5 don't --- he just says he doesn't remember. He is not
6 being impeached.

7 MR. MOAK: He said ---

8 MR. POSTIC: He said he doesn't remember saying
9 it. It's in evidence. I mean, this is just ---

10 THE COURT: I think it's impeachment. It's
11 cross-examination. I'm going to allow it.

12 MR. POSTIC: Thank you, Judge.

13 (WHEREUPON, a portion of the CD was replayed.)

14 BY MR. MOAK:

15 Q So the trooper asked you about giving the keys to
16 somebody and the response was that it was like
17 three o'clock? That's what you told him, right?

18 A Sir, I couldn't hear it clearly, no.

19 (WHEREUPON, a portion of the CD was replayed.)

20 BY MR. MOAK:

21 Q You heard Borowski ask you who you gave the keys
22 to and you said it was like three o'clock and then
23 Borowski asked you about an injury. Is that what was
24 just on there?

25 A Again, I couldn't hear very well, sir.

1 Q Okay.

2 A I mean, I heard something about three o'clock.

3 Q That was your voice, right?

4 A I mean, they are in my yard, so it has got to be
5 me.

6 Q Now, Borowski --- and I can play it over and over
7 again until you hear it, but Borowski asked you who
8 you gave the keys to and your response was
9 three o'clock?

10 A He asked me who I gave the keys to and I said
11 three o'clock.

12 Q Yes, that's what I said. You told Trooper
13 McKenzie somebody took your car for a joyride and that
14 was on the DataMaster. Do you remember that?

15 A Yeah.

16 Q Okay. At what time did you tell the troopers
17 that you had given your keys to Melvin Wright?

18 A I didn't tell them that, I don't believe.

19 Q He don't ---

20 A I believe I told them I was dropped off by a
21 friend, but I don't know.

22 Q Well, I think Trooper Borowski testified that you
23 said you were dropped off by a friend and then later
24 when he asked you for a name, you said it was a
25 stranger, but you never give troopers the name of who

1 you gave your keys to?

2 A I don't think I did, no.

3 Q And that's kind of important information, isn't
4 it?

5 A It's important, yes.

6 Q The day the wreck happened, you're not telling
7 the troopers. You're saying you blacked out. That's
8 what happened, right?

9 A I mean, this -- I've only seen this video one
10 time and to take anything that I say in this video to
11 be truthful is absurd, to tell you the truth. I mean,
12 when do I get the blood test? I get the blood test at
13 what, one o'clock?

14 Q Uh-huh.

15 A Twelve o'clock, something like that, and it's
16 .218. What do you think it is there? I'm not trying
17 to be rude or anything. I mean, I'm just trying to
18 state a fact.

19 Q Yeah, but you're also telling the troopers you
20 couldn't remember because you blacked out. Do you
21 remember you told the troopers that you remember
22 everything lead up to Track Side. You told the
23 troopers you remember everything that happened after
24 you got home, but everything in the middle, you were
25 saying you blacked out about. That's --- isn't that a

1 good summary of what you're saying?

2 A That's what I said on these audiotapes.

3 Q Okay.

4 A The whole entire time I am drunk. I don't
5 understand how you can take, you know, anything I said
6 in these tapes to heart.

7 Q On the audio, Trooper Coats --- y'all had the
8 conversation, you know what your deal is. You know
9 what you're faced with, and instead of telling what
10 you said today, you told him, "I take full
11 responsibility. I could have done more if I hadn't
12 have been half drunk. I didn't call 9-1-1. I should
13 have called 9-1-1." This is what you told Trooper
14 Coats the afternoon of June 20th, okay. Are you
15 disagreeing that you told Trooper Coats that you
16 should have called 9-1-1?

17 A I'm not disagreeing. It's on audio. Everyone in
18 this courtroom knows that that was me on the audio.

19 Q Okay. How else am I going to look at this? On
20 the audio, you were telling the troopers that the only
21 reason you know you got into an altercation with B.J.,
22 who was here earlier, is because you were told you got
23 into an altercation with him?

24 A I don't remember being told that I got in an
25 altercation with B.J.

1 Q Do you remember telling the troopers that Betty
2 told you that?

3 A I remember what's on the audiotape. That's what
4 I'm going by.

5 Q So what you're really saying is when you're
6 talking to the troopers, you blacked out the night
7 before and now three years after the fact, you can
8 remember what you blacked out about, but now you're
9 blacking out about what you told the troopers. You
10 don't remember that?

11 A If I --- correct me if I'm wrong, I tell you how
12 many drink I had at each place. I tell you, you know,
13 where I went. I mean, I don't tell you I was in the
14 wreck because I wasn't in the wreck.

15 Q You didn't tell the troopers, "Why did Melvin had
16 to be in my car when I wrecked?"

17 A That's what was on the audio.

18 Q And you told them that?

19 A Yes.

20 Q The troopers who were trying to get you to say it
21 was a deer or another car that caused the wreck, I
22 mean, they told you a story, and you wouldn't ---

23 A They also told me that I was driving the vehicle.

24 Q Yeah.

25 A Multiple times, all day long, and I believe --- I

1 mean, I had no shoes on. In this video I have no
2 shoes on. You know, I can't remember who it was, but
3 I was going back and forth. It might have been the
4 coroner because I remember on the video something
5 saying, "Hey, how are you doing, Coroner," or
6 something like that, and he flat out calls me a liar
7 right there.

8 Q You are a liar.

9 A I'm not a liar.

10 Q You lied to the troopers, that's what you just
11 testified that you lied to the troopers.

12 A I'm not tying today.

13 Q You testified your lied to the troopers on
14 June 20th? You are a liar.

15 A The only part that I was lying about on that day
16 was that I was in the vehicle.

17 Q You are a liar.

18 MR. POSTIC: Asked and answered, Your Honor.

19 THE COURT: Sustained.

20 MR. POSTIC: Thank you.

21 BY MR. MOAK:

22 Q And you're saying that Melvin Wright is the one
23 driving that Jeep.

24 A I'm not saying that he's the one that was driving
25 the Jeep. Melvin dropped me off at my house. I don't

1 know what happened after that.

2 Q So you're saying this guy was driving the Jeep
3 that night? That's what you're saying?

4 MR. POSTIC: He knows who Melvin Wright is.
5 There is no need for him to be showing him the
6 picture.

7 THE COURT: It's cross, I'm going to allow it.

8 BY MR. MOAK:

9 Q You're saying this guy was driving the Jeep that
10 night?

11 A Melvin left my house driving the JEEP.

12 Q Did Melvin have a driver's license?

13 A I believe he had just gotten it back.

14 Q When you went out drinking with Melvin, did his
15 parents like him to come back drunk at their home?

16 A I'm not sure.

17 Q He didn't have a practice of instead of going
18 home he would sleep it off with whoever he was hanging
19 out with?

20 A He did sleep it off a lot at my house.

21 Q Isn't that what y'all were doing? Isn't that why
22 you were going home to your house?

23 A I needed to go home because I had just gotten
24 into a fight, and I had way too much to drink, and I
25 needed to lie down.

1 Q Isn't that why Melvin was with you going to your
2 house?

3 MR. POSTIC: Asked and answered, Your Honor.

4 THE COURT: Overruled.

5 MR. POSTIC: Thank you.

6 BY MR. MOAK:

7 Q Isn't that why Melvin was with you in your Jeep
8 going to your house?

9 A Melvin was going to stay with me that morning. I
10 mean, so to speak, to sleep it off. He said he needed
11 to go somewhere, and he asked if he could borrow the
12 Jeep, so I let him borrow the Jeep.

13 Q How did you know Melvin was wearing a seat belt?

14 A The officer in the audiotape, I believe it was
15 one of the officers, said pretty certainly you --- I
16 think it was you left the scene, you weren't wearing a
17 seat belt. Your buddy was wearing a seat belt.

18 Q Are you sure that wasn't after you told him you
19 weren't wearing a seat belt?

20 A I just remember in the audio what the officers
21 were saying, you know.

22 Q Now here is another question. Are you telling
23 the truth about everywhere you went that night?

24 A Am I telling the truth?

25 Q Now, yes, are you telling the truth about

1 everywhere you went that night?

2 A Yes, I am.

3 Q I show you what's been marked as State's 137, did
4 you go over that with your lawyer?

5 A I don't remember seeing this before.

6 Q Is that your bank records?

7 A When I get records from my bank, they don't look
8 like this. I was looking for my account number. My
9 account number is there. It must be my account
10 records.

11 Q And you're telling us that you went to Brixx,
12 then to Friends, then to Track Side, then to the gas
13 station and then home, right?

14 A Right.

15 Q Then how come you have a charge for \$7 at CNR
16 Station House at 4:41 that morning?

17 A I couldn't tell you.

18 Q And how much was your tab at Track Side?

19 A \$14.

20 Q So at 4:41 at CNR, you ran a tab for \$7 and the
21 one for Track Side was \$5.01, I think?

22 A That's correct.

23 Q In 20 minutes you spent \$14 on something at Track
24 Side, in 20 minutes.

25 A That's the way it appears.

1 Q So you're still not telling us the truth about
2 everywhere you went that night?

3 A I don't remember going to CNR.

4 Q Now that sober Donnie can't remember the
5 blackout, he still blacked all that, right?

6 A Sir, it's been three years, you know. I mean, it
7 obviously was a quick transaction. I mean, maybe if I
8 was there longer and had made a bigger purchase maybe
9 I could remember going there. I mean, I just don't
10 remember going to CNR.

11 Q How long does it take you to go from that gas
12 station to Pontiac to your house?

13 A About ten minutes roughly.

14 Q Ten minutes?

15 A Yeah.

16 Q So if you left --- did you leave Track Side when
17 you --- like immediately when you cleared your bar tab
18 out?

19 A I don't remember.

20 Q You don't remember if you hung out any longer
21 than that or did you leave immediately?

22 A No, I don't remember.

23 Q Did you go anywhere between the gas station and
24 your house?

25 A No.

1 Q Who was drunker, you or Melvin?

2 MR. POSTIC: Calls for speculation, Your Honor,
3 he's not an expert.

4 THE COURT: He can answer --- overruled.

5 Q Who?

6 A I wasn't in a state to determine how drunk
7 someone was.

8 Q Where was Melvin going to?

9 A Where was he going?

10 Q Yeah?

11 A I don't know.

12 Q And why would you have to force your door open?

13 A I didn't have my keys, Melvin had my car keys.

14 Q You know, I might be stupid, but why did you have
15 to do that to your door if Melvin dropped you off at
16 your house and your keys were right there when he
17 dropped you off? Why?

18 A We were pretty intoxicated. I wasn't thinking
19 about, oh, I need my keys.

20 Q I mean, you're in your yard with your keys and
21 you had your phone with you, too, didn't you?

22 A I don't remember if I had my phone or not.

23 Q Why didn't you call Melvin to come back with your
24 keys, let you in the house?

25 A I wanted to sleep, sir.

1 MR. MOAK: No further questions.

2 MR. POSTIC: No more questions, Your Honor.

3 That's our defense.

4 THE COURT: All right. You may come down. Thank
5 you very much.

6 THE WITNESS: Could I just speak really ---

7 THE COURT: No, sir. Answer the question. The
8 attorneys said there were no more questions.

9 The defense rests?

10 MR. POSTIC: Yes, Your Honor.

11 THE COURT: Any reply? Reply or rebuttal?

12 MR. PERRY: No, sir, Your Honor.

13 THE COURT: All right. Thank you very much.

14 That's it, ladies and gentlemen. That concludes
15 the evidence in this case.

16 Now, the remaining portion of the trial will
17 consist of the final summations of counsel and my
18 instructions to you on the law of South Carolina as it
19 applies to this case. After that the case will be
20 turned over to you for deliberation. Obviously it's
21 after five o'clock now. We're not going to start that
22 process until nine o'clock in the morning. So I'll
23 ask you to be in the jury room at nine o'clock in the
24 morning at which time we will continue and conclude
25 this trial.

1 Again, please don't discuss the case among
2 yourselves when you return to the jury room or with
3 anyone else over the evening hours. Have a pleasant
4 evening and we'll see you tomorrow.

5 (WHEREUPON, the jury left open court at
6 approximately 5:12 p.m.)

7 THE COURT: Be seated, counselor.

8 MR. POSTIC: Yes, sir.

9 THE COURT: Any motions?

10 MR. POSTIC: No, Your Honor.

11 THE COURT: All right.

12 MR. POSTIC: Unless we're having a charge
13 conference. Are we?

14 THE COURT: Well, I'm going to do that next.

15 MR. POSTIC: Of course, Your Honor, I do want to
16 renew all my previous objections. I don't need to
17 list them off --- and my motions, Your Honor.

18 THE COURT: All right.

19 MR. POSTIC: Except for the ones you granted.

20 THE COURT: All right. Any requested charges on
21 behalf of the State?

22 MR. MOAK: None from the State, Your Honor.

23 THE COURT: Standard, other than what I've
24 already provided?

25 MR. PERRY: Yes, Your Honor.

1 THE COURT: And Mr. Postic.

2 MR. POSTIC: Your Honor, I do have an issue with
3 the involuntary intoxication. I don't quite
4 understand why that's in here. We didn't raise it as
5 a defense in this case at all, so I frankly ---

6 THE COURT: All right. I told you that was a
7 draft set.

8 MR. POSTIC: Yes, Your Honor.

9 THE COURT: And how about that?

10 MR. MOAK: Well, I mean ---

11 THE COURT: He hadn't raised it as a defense so
12 why should it be instructed to the jury.

13 MR. MOAK: Well, I mean, one of the charges of
14 leaving the scene of an accident involving death, it
15 doesn't necessarily involve alcohol, and his testimony
16 is clearly he got drunk on his own volition, so I
17 mean, I don't think he gets to claim, I was drunk and
18 didn't know what to do. I got scared and left the
19 scene, which is a possible inference the jury might
20 have in mind.

21 MR. POSTIC: That's not our case, Your Honor. We
22 didn't present an expert that said that he was so
23 drunk that he would have forgotten what he had done or
24 anything like that. We never stated that.

25 MR. MOAK: I know you didn't, but that's what

1 this issue is a part of.

2 MR. POSTIC: I think you can argue that.

3 THE COURT: That's what he testified to.

4 MR. POSTIC: I think it's just burdensome and
5 overly confusing to the jury. It's like charging
6 self-defense when your defense is that you weren't
7 there.

8 THE COURT: I'll think about it. What else? All
9 right. Well, let me tell you --- let me put something
10 to you. We've been doing a little research. As a
11 matter of fact, we've gone back and read Miranda V
12 Arizona.

13 The Miranda Supreme Court case says to protect
14 the privilege and unless other fully effective means
15 are adopted to notify a person of his right of silence
16 and to assure that the exercise of the right will be
17 scrupulously honored, the following measures are
18 required. He must be warned prior to any questioning
19 that he has the right to remain silent, that anything
20 he says can be used against him in a court of law,
21 that he has the right to the presence of an attorney
22 and that if he cannot afford an attorney, one will be
23 appointed for him prior to any questioning if he so
24 desires, four prongs, Miranda v. Arizona.

25 Now, I know what Kennedy says, but I'm also aware

1 of what the Powell case says. I can't find anywhere
2 that South Carolina has established a right to the 5th
3 prong, that it is a right guaranteed under the
4 constitution. That you have a right to walk out when
5 you're ready to walk out. I just don't see it. As a
6 consequence, the proposed language in the proposed
7 charge, I'm going to delete that 5th prong. The 5th
8 prong is what I sent to you as a draft, but I can't
9 find any basis for it other than --- if you can show
10 me something different.

11 MR. POSTIC: Well, I got it from this book.

12 THE COURT: Anderson?

13 MR. POSTIC: Yes.

14 THE COURT: But you can't just cite Miranda v.
15 Arizona and say this is it.

16 MR. POSTIC: My understanding of Powell, Your
17 Honor, is Powell is citing Miranda so as it is citing
18 Miranda, it is going to cite those four.

19 THE COURT: And I just read Miranda.

20 MR. POSTIC: Yes, sir, Your Honor. And I stated
21 in my argument that I was fully aware that Miranda was
22 only four. Kennedy is post Miranda and Kennedy is our
23 State law, and if our State law gives more rights to a
24 defendant, to an accused, then I think that's the law.

25 THE COURT: But it doesn't say that. It says ---

1 Kennedy says and your author of that book says, that
2 this is Miranda and it's not.

3 MR. POSTIC: It is what Miranda --- I mean, this
4 is an argument, Judge. The Miranda has become more
5 than just that case that I don't think that
6 anybody -- you know, that a layperson --- I don't even
7 remember the actual facts of Miranda itself. I know
8 it must have happened in Arizona.

9 THE COURT: It did.

10 MR. POSTIC: But I don't know the actual facts.
11 It's become more than that case. It's become --- it's
12 the recitation of an individual's rights when
13 questioned by the police.

14 THE COURT: Well, I'm ---

15 MR. POSTIC: And our law, I don't see anywhere in
16 our law that says Kennedy is wrong. I can't find it.

17 THE COURT: Kennedy doesn't hold what you say it
18 holds.

19 MR. POSTIC: Kennedy says --- I don't have it. I
20 don't have my folder on that, but I --- Kennedy says
21 when an accused is in custody, he must be told, for
22 his statement to come in, he must be told those five
23 prongs.

24 THE COURT: Well.

25 MR. POSTIC: I'll be happy to bring it tomorrow,

1 Your Honor. When I argued this a month ago, I had the
2 advisement of rights form from the University of South
3 Carolina police and the Clemson police and they argued
4 the five prongs.

5 THE COURT: You argued it here?

6 MR. POSTIC: I'm sorry?

7 THE COURT: You argued it here?

8 MR. POSTIC: I argued it when this case was
9 called first.

10 THE COURT: Oh.

11 MR. POSTIC: And, you know, it's just kind of a
12 cute way of describing how, while our State may be
13 divided between those two, they still agree on the
14 five prongs, and I ---

15 THE COURT: Along what?

16 MR. POSTIC: Clemson and Carolina. It was a cute
17 argument.

18 THE COURT: Well, I mean, if you can use them,
19 why can't you use Highway Patrol's card or the
20 sheriff's card and just take a vote and see who has
21 the most.

22 MR. POSTIC: Well, because the rights of the
23 accused are above everything else.

24 THE COURT: I don't disagree with you.

25 MR. POSTIC: Well, this is, as I have said, it's

1 an unsophisticated person, you know, who ---

2 THE COURT: But if law enforcement should state
3 the 5th prong they ought to know that.

4 MR. POSTIC: Yes, they should.

5 THE COURT: If they should.

6 MR. POSTIC: They should know it and they should
7 do it. I think it destroys the voluntariness of the
8 statement. Now, I understand Your Honor's ruling, and
9 I'm not asking you to change that, and they didn't
10 object to my charge, but you know...

11 THE COURT: What else? Did you get that?

12 MR. MOAK: Your Honor, if I may, Florida v.
13 Powell actually covers this issue, as well. As a
14 matter of fact, the first issue that they ruled on in
15 Florida v. Powell is whether or not Miranda was based
16 on state or federal.

17 THE COURT: I have that.

18 MR. MOAK: I have it right there.

19 MR. POSTIC: Well, I mean, where does the 5th
20 prong come from.

21 THE COURT: Good question, good question.

22 MR. PERRY: It appears that it comes from Judge
23 Anderson.

24 THE COURT: I'm not --- I'm looking for your
25 charge. Oh, I've got it.

1 What's the State's position with regard to the
2 proposed charge submitted by the defendant?

3 MR. MOAK: Your Honor, I've been saying since
4 Monday that there's only four prongs of Miranda, and I
5 think that's what should be charged, but you're the
6 Judge. You're the judge of the law.

7 THE COURT: Well, I understand that. I want to
8 do the right thing. I don't want this case to come
9 back.

10 MR. MOAK: In Florida v. Powell it clearly states
11 that unless the State decision is based upon state
12 law, it clearly states it's based upon state law, then
13 the Supreme Court has jurisdiction over it, and
14 that's --- this is actually almost the same argument
15 that was in Florida v. Powell. Florida v. Powell,
16 what happened was a defendant was not given a 5th
17 prong.

18 The Florida court agreed with the defendant, the
19 State appealed, and the US Supreme Court said because
20 the Florida Supreme Court's decision does not indicate
21 clearly and expressly that it is alternatively based
22 on a bona fide separate, adequate, and independent
23 grounds, we have jurisdiction to decide this case.
24 That's the first thing they ruled before they got to
25 whether or not there was four prongs or five prongs.

1 The next issue they decided was that it was four
2 prongs. That's what we have here.

3 In State v. Kennedy if you read it, the holding
4 is not --- the paragraph about Miranda is not the
5 holding. They were just citing that Miranda --- it's
6 like a --- it's a paragraph about Miranda warnings and
7 it just has a list, the Miranda warning, and it just
8 has a paragraph of the Miranda warning that it cites
9 and that's not the holding of the case.

10 There is nothing in State v. Kennedy that alleges
11 that the 5th prong is based on a greater protection
12 given by the South Carolina Constitution or by South
13 Carolina law. Since it doesn't show that, say that, I
14 think clearly this is same situation that Florida v.
15 Powell covered. I mean, this is the same exact case.

16 THE COURT: How about the defendant's second
17 request concerning the confession, taking the totality
18 of the surrounding circumstances you must consider
19 whether the defendant's will was overborne by the
20 circumstances? Do you have that?

21 MR. MOAK: I think it does, I mean it has to take
22 the totality of the circumstances ---

23 THE COURT: You don't object to that one?

24 MR. MOAK: I don't object to that one, Your
25 Honor.

1 THE COURT: Anything further?

2 MR. PERRY: Yes, Your Honor, just briefly back to
3 the charge that Your Honor was proposing to give with
4 respect to voluntary intoxication. I understand the
5 defense takes the position that their defense is "we
6 weren't there." But in order for the State to prove
7 leaving the scene, one of the elements that we must
8 prove is that he was there, so if the jury can find
9 that he was there, as we must prove, then the issue of
10 voluntary intoxication does come to bear, so we would
11 suggest, we would request that you charge the
12 involuntary intoxication charge because it does --- it
13 fits exactly with the State's theory of the case and
14 moreover, it fits with what the State is required to
15 prove under the law.

16 MR. POSTIC: Not an element of leaving the scene,
17 Your Honor. He is not required to --- if he is
18 required --- if I expressed it as a defense, but it's
19 not an element of leaving the scene.

20 MR. PERRY: Your Honor, we're required to prove
21 that he was there in order to prove he left the scene.

22 And if voluntary intoxication is the charge, and
23 the jury could find he was there, but because he was
24 drunk, he couldn't knowingly leave the scene.

25 MR. POSTIC: That's speculative. That's not ---

1 MR. MOAK: The defendant's own statement is that
2 he was panicked and if he wasn't drunk, he would have
3 done more. He would have possibly called 9-1-1, would
4 have assisted the victim. That's what he said in his
5 statement.

6 THE COURT: I think it's applicable.

7 MR. POSTIC: Then I want mere presence, Your
8 Honor. Thank you.

9 THE COURT: Any problem with that? Mere
10 presence?

11 MR. PERRY: No, sir.

12 MR. MOAK: We're fine.

13 THE COURT: Well, I think mere presence --- I'll
14 give the Grippon, circumstantial evidence charge,
15 which I think is --- I think Edwards has been
16 aggregated by Cherry.

17 MR. POSTIC: It's ---

18 THE COURT: By State v. Cherry.

19 MR. POSTIC: Yes, Your Honor.

20 THE COURT: And State v. Battle.

21 All right. I'll let you know in the morning.
22 I'm going to do some more research in the meantime.
23 If I can find anything in South Carolina that says
24 that the 5th prong is mandatory or is constitutionally
25 required or is by case law that we have adopted the

1 5th prong of what Anderson says in Kennedy, but it's a
2 parenthetical in Kennedy. It's not the holding in
3 Kennedy. It's a parenthetical comment on what
4 Anderson believes Miranda to say. I've gone back and
5 read Miranda. It doesn't say that.

6 MR. POSTIC: I'll look it up too, Your Honor.
7 For some reason I want to say the 5th prong comes from
8 the Supreme Court.

9 THE COURT: That's fine. If it does, that's
10 fine. I have no --- I'm going to charge the law as I
11 understand it.

12 MR. PERRY: Yes, Your Honor.

13 THE COURT: And if it's there, it's there. If
14 it's not...

15 All right. Let's stand at ease until
16 nine o'clock in the morning.

17 (WHEREUPON, there was an overnight recess).

18 THE COURT: All right. For the record, how does
19 the State wish to proceed in terms of final arguments?

20 MR. MOAK: Your Honor, we're going to open on the
21 law and close on the facts.

22 THE COURT: All right, that's just for my --- I'm
23 not going to hold you to it, but to estimate what it
24 would require on the final.

25 MR. MOAK: On the law, it shouldn't take me more

1 than ten or fifteen minutes. The facts, I only have
2 four pages of notes.

3 THE COURT: All right. Mr. Postic, do you
4 understand that procedure?

5 MR. POSTIC: I understand that, Your Honor.
6 However, I think that I can ask the court in its
7 discretion to require the State to make one closing
8 rather than two.

9 I think my --- the position of the defendant is
10 it is --- this is an appearance of unfairness that the
11 State is allowed two closings while I'm allowed one
12 for the defendant.

13 The deck is already pretty well stacked. I would
14 like to do that. I just feel that it --- it reduces
15 the importance. I mean, in law school, the professors
16 talked about privacy and recency all the time, and
17 they get both.

18 THE COURT: Well, as you know, there is a reason
19 for that. Our courts have recognized that reason,
20 that the State has the burden of proof beyond a
21 reasonable doubt. That's why the State has the last
22 argument. I'll explain that to the jury, but other
23 than that, I'm just respectfully denying your motion.

24 All right. Counsel, I have provided both of you
25 with --- earlier, I had sent you a proposed set of

1 jury charges. I now have modified them somewhat based
2 on our discussions of yesterday and have given you my
3 final version.

4 I'll ask you at this point if there are any
5 objections that you wish to place on the record. Any
6 from the State?

7 MR. PERRY: None from the State, Your Honor.

8 THE COURT: From the defense?

9 MR. POSTIC: Your Honor, did you include the
10 language on the intoxication?

11 THE COURT: Yes.

12 MR. POSTIC: Your Honor, I'm just going to renew
13 my objection to that. We did not raise that as a
14 defense. There is -- in fact, my client clearly said
15 that he was drunk. He never said that he was in the
16 car. There's not a defense to this thing in the
17 least. It's never been brought up by the defense.

18 I just think it's improper to have it in this
19 case.

20 THE COURT: Okay. Well, if you'll recall when I
21 said yesterday that I planned to give it, you said in
22 that case you would request a mere presence charge,
23 which I have also included, not that that satisfies
24 your concern, but it satisfies my concern to some
25 extent.

1 MR. POSTIC: Thank you, Your Honor. What page is
2 the mere presence in? I'm sorry.

3 MR. PERRY: Eighteen.

4 MR. POSTIC: I have --- this must be an error. I
5 have failure of the defendant to testify on my page
6 18.

7 THE COURT: That should have been deleted. You
8 must have --- you've got the set I gave you yesterday.

9 MR. POSTIC: Oh, yikes.

10 THE COURT: Throw that away. Just throw that
11 away.

12 MR. POSTIC: Well, I'm going to recycle it. My
13 kids would get on me.

14 Thank you, Your Honor.

15 THE COURT: All right. Recycle it then.

16 Is the state ready for the jury?

17 MR. MOAK: Yes, Your Honor.

18 THE COURT: Defense ready for the jury?

19 MR. POSTIC: Yes, Your Honor.

20 THE COURT: Bring the jury, please.

21 (WHEREUPON, the jury came into open court at
22 approximately 9:34 a.m.)

23 THE COURT: Good morning, ladies and gentlemen.

24 THE JURORS: Good morning.

25 THE COURT: We're now ready to conclude the

1 trial. Let me just explain the procedure. The State
2 will argue first and they will explain to you their
3 interpretation of the law. Then the defendant's
4 counsel will respond to that and make his final
5 argument.

6 The State then has the right to come back and
7 make another final argument or a final argument. The
8 reason for this is the State is given two
9 opportunities to talk to you because the State has the
10 burden.

11 As I said at the beginning of this trial, the
12 State has the burden of proving all the elements of
13 these alleged crimes to you beyond a reasonable doubt.

14 Because they have the heavier burden --- the
15 heavy burden --- the burden, whether you classify it
16 as heavy or not, of proving the case beyond a
17 reasonable doubt, that's the reason the law gives them
18 the opportunity to have the final argument to you.

19 All right. With that explanation in mind,
20 Mr. Moak, you may begin.

21 CLOSING STATEMENT:

22 MR. MOAK: Good morning.

23 THE JURORS: Good morning.

24 MR. MOAK: You've been here since Monday

25 listening to us talk. In a short time, this will be

1 over and ya'll will have the case, and then we'll get
2 to hear y'all speak because the word verdict comes
3 from the Latin word veredicto, which means true
4 saying. The whole purpose of this is to get a true
5 saying from the jury.

6 Now, what this case is about, obviously, is the
7 defendant has been charged with felony DUI death.
8 That's one of the charges, okay.

9 This crime makes it illegal for somebody to drive
10 a vehicle --- so you have to be the driver, while
11 under the influence of intoxicating liquors and/or
12 narcotic drugs, barbiturates, alcohol or drugs. You
13 have to be a driver under the influence, and that act
14 is forbidden by law. That means this isn't like a
15 traffic violation, like speeding, driving on the wrong
16 side of the road, you rear end somebody --- those are
17 obviously acts committed by law or alleged to be
18 imposed by law.

19 Here the act we're alleging is that he drove on
20 the wrong side of the road. Obviously you have to be
21 on the left side of the road to go on that direction
22 to hit that bridge abutment and to leave the road in
23 that manner, okay. That's the act alleged here.

24 And that act of neglect proximately caused the
25 death of an individual. Again, he drove off that side

1 of the road, off the left side of that road, hits the
2 bridge, hits a tree and Melvin Wright dies.

3 When the defendant testified yesterday, he
4 indicated that he has no dispute whether or not Melvin
5 died in the wreck. He didn't dispute Melvin died in
6 his Jeep and his Jeep was involved in the wreck. He
7 doesn't dispute that's the way the wreck happened,
8 okay.

9 So pretty much from here, the defendant himself
10 testified he's not there. The defendant further
11 testified and he himself said he was drunk. You heard
12 that his blood alcohol was a .218. You heard his
13 witnesses, even the ones that he brought up, that he's
14 drunk, trying a fight a guy named B.J. Clearly, he
15 would have been under the influence.

16 The only issue in regard to this charge is the
17 first element. The defendant is trying to argue that
18 he was not the driver. Everything else from the
19 defendant's own mouth that he testified to is pretty
20 much in.

21 Now, there's another charge, which I don't have a
22 board for, leaving the scene of the accident causing a
23 death.

24 The elements of this crime are the defendant was
25 driving a vehicle, the same element as felony DUI.

1 The vehicle was involved in an accident, his Jeep.
2 The accident caused the death of another person,
3 another issue the defendant himself is not disputing.
4 The defendant did not stop or failed to return and
5 remain at the scene.

6 So basically like you're driving a vehicle, that
7 vehicle gets in a wreck, somebody dies. You don't
8 stay at the scene.

9 And the fifth one, the defendant failed to give
10 his or her name, address, vehicle registration number
11 and failed to show driver's license.

12 Obviously if you don't stay at the scene, you
13 can't do that. Number six, the defendant failed to
14 give reasonable assistance to the injured person.
15 That would include, Melvin is hurt, call 9-1-1, call
16 for an ambulance, do anything to try to make this
17 wreck --- after it happened, to try not to have the
18 tragic result it had, okay.

19 Again, there is no dispute that Melvin died in
20 that Jeep, the Jeep that belongs to Donnie Thigpen,
21 the Jeep that ran off that road, the Jeep that ran
22 into that tree. The Jeep that no brakes were applied
23 to. That's what he got killed in.

24 The only dispute as far as I can tell from the
25 defendant's testimony yesterday is he's saying he was

1 not driving, okay.

2 So that's the main issue that y'all are called to
3 decide. Now, how do we prove --- what standard holds?
4 Okay. Let me hold this up.

5 Y'all might be thinking hey, you know, I'm just
6 an ordinary guy, go to work, have a family. You know,
7 I'm not trained in the law. I don't know anything
8 about all of this stuff, you know, why are they asking
9 me to decide this?

10 Well, the thing is, everybody going through life,
11 like for example, if you've got kids, you hear a crash
12 in the other room, you come in, a lamp or something is
13 knocked over, the brother and sister are like he did
14 it, he did it. He did it, she did it. You ask who
15 did what. You know, you make a credibility
16 determination, which child is telling the truth, you
17 know, to try to figure out, investigate this thing.

18 That's a normal thing that people do. Another
19 thing, like you buy a used car. Talk to a used car
20 salesman. You know, is this guy telling the truth.
21 Does he have a reason to lie to me because he wants to
22 sell the truck? You know, those are things that
23 normal every day people would have to do in their
24 lives.

25 The issue is the standard of proof in criminal

1 cases is beyond a reasonable doubt. Oh, I have the
2 board. Now, I've got a slide for this. Okay. I have
3 this, actually it's on two slides, but it says the
4 same thing as this. Proof beyond a reasonable doubt
5 is proof that leaves you firmly convinced of the
6 defendant's guilt. There are very few things in this
7 world that we know with absolute certainty. In
8 criminal cases the law does not require proof that
9 overcomes every possible doubt. The law does not
10 require that.

11 The law does not require it. It's basically the
12 consideration of the evidence. If you are firmly
13 convinced that the defendant is guilty of the crime
14 charged, you must find him guilty. If on the other
15 hand you think there is a real possibility he is not
16 guilty, you must give him the benefit of the doubt and
17 find him not guilty.

18 Now, the reason I'm showing you that, the way
19 it's worded and the reason I read that to you is
20 because once I get done talking and then Mr. Postic is
21 going to have a chance to talk to you. Then I'll have
22 another chance to talk to you again. Once we're done,
23 the judge is going to charge you on the law.

24 This is what he's going to tell you. He's going
25 to give you much more instruction on what this means,

1 and this is what you're going to get.

2 I've seen many trials where the jury sends back a
3 note saying hey, can you tell us what reasonable doubt
4 is. Every time that happens, all that happens is you
5 come back out and this gets read to you one more time.
6 That's all that will happen.

7 There is a reason for that. The Judge is the
8 judge of the law. He decides what the law of this
9 case is. You know, he's got Supreme Court opinions,
10 all that stuff, statutes. He determines what applies
11 to this case, and he tells you this is the law that
12 applies to this case.

13 Right now, all I'm doing is explaining a little
14 bit about what the law is trying to give you a little
15 bit more than what he's going to tell you, and the
16 issue is that he's the judge of the law, but there is
17 another judge in the courtroom.

18 There's 12 of them. You are actually judges
19 right now. You're the judges of the facts. You as
20 jurors, your job is to weigh the evidence and decide
21 what you think really happened, that doesn't make
22 sense. That makes sense, that type of thing because
23 ultimately what beyond a reasonable doubt means is up
24 to you. It's up to you. It's what you, in your mind,
25 decides what beyond a reasonable doubt is.

1 That's why we bring 12 jurors from the community
2 to come in and decide this. If I was able to say hey,
3 with absolute certainty that this case is beyond a
4 reasonable doubt, then we wouldn't be here.

5 If the judge was able to decide with absolute
6 certainty that this case was beyond a reasonable
7 doubt, we wouldn't be here. If the defendant was able
8 to say with absolute certainty that this case does not
9 have beyond a reasonable doubt, we wouldn't need you.
10 That is the whole purpose of the jury, because their
11 case --- they're going to have their position and
12 we're going to have our position. That's what the
13 judges do is to decide between the two sides and with
14 the evidence where it's at. It's up to you. So when
15 you ask yourselves what beyond a reasonable doubt
16 means, that's up to you.

17 Now, what is a reasonable doubt? You know,
18 reasonable comes from the word reason. It's a doubt
19 with a reason you can attach to it. So if you can't
20 even like verbalize what your doubt is, it's probably
21 not reasonable. It's a reason that you can tell your
22 fellow jurors, okay.

23 Again, if you can't even like say, you know, this
24 is why I think there is a doubt, then it's probably
25 not reasonable. Again, the whole purpose is, it comes

1 from a lack of a true saying. That's what a trial is,
2 a search for the truth, not a search for a doubt.

3 The purpose of the trial is to look at the
4 evidence, say okay, what does this evidence tell us
5 happened, and, you know, is this the truth.

6 One of the things the judge charged you with
7 before we started this case, I think he mentioned a
8 juror that went out to a wreck scene to see if they
9 thought that's what happened. That's an example of
10 not being in a search for the truth. That actually
11 might be a search for doubt because that person is
12 actually going out on their own looking for other,
13 like what if this happened, what if that happened.

14 This case has been investigated by the Highway
15 Patrol. You heard their investigation. You heard
16 their take on the investigation. Everything that's in
17 evidence is all in here really for you to consider.

18 Okay. A trial is a search for the truth, not a
19 search for doubt.

20 Now, how --- I'm doing this kind of in backwards
21 order. Now, how have we proved our case? You've
22 heard from a lot of witnesses. You've heard from
23 Trooper Southern, who is a Richland County deputy.
24 You've heard from Trooper Borowski. You've heard from
25 Trooper McKenzie. You heard from Russell Ferguson

1 from EMS. You've heard from Trooper Coats. You've
2 heard from Trooper O'Donnell. You've heard from
3 Trooper Ridgeway. You've heard from Carolyn Kirkland
4 the nurse. You've heard from Catherine Leisy, who did
5 the DNA. You heard from Verona Gibson, who swabbed
6 the airbag and figured out what the evidence there
7 was. You've heard from Heather Dailey. You've heard
8 from Robert Sears. That's the witnesses we called.

9 Each one of those witnesses are kind of like the
10 used car salesman I told you about. You know, when
11 you're talking to them, you know, does this make
12 sense, okay.

13 Now, we'll submit that on number five, does the
14 witness have a reason to be biased or prejudiced. I
15 think it was clear that Monty Coats, that Trooper
16 O'Donnell, Borowski, Kelly, McKenzie, the first time
17 they met Donnie Thigpen was this day.

18 They met him, Borowski met him probably somewhere
19 around 10:00 the morning of June 20th. Trooper
20 McKenzie, you know, he is there somewhere around 11:00
21 when he met him. It might be Trooper Kelly --- I'm
22 not sure if Trooper Kelly ever met him, and then
23 Trooper McKenzie stays with him from 11:30 to roughly
24 2:05 when he's booked in, and then later on around
25 5:00, 5:30, Coats and O'Donnell, Borowski meet with

1 Donnie Thigpen, okay.

2 No matter what happened in this case, whether or
3 not they concluded Donnie Thigpen did this or not, you
4 know, they went home. They went to their families.
5 The next day they went to work.

6 This case did not make or break their jobs. You
7 know, they don't gain anything by lying about this.
8 They do have a lot to lose if they lie. Number five,
9 do they have a reason to be biased or prejudiced.
10 There is no allegation that these troopers have
11 anything against Donnie Thigpen.

12 You know, they went out there, don't know anybody
13 involved in this wreck, and the first thing they said,
14 you've heard Borowski, he got there, he saw the marks,
15 saw the glass specks. Those glass specks, it's kind
16 of interesting. They didn't come out in the pictures.
17 There was a lot of cross-examination about whether
18 this was really glass. They have this thing that was
19 folded, kind of showed y'all. I think it's fairly
20 clear that there's glass shards, specks. That was
21 there. That was off of his clothes, okay.

22 The demeanor of the witness on the stand.
23 Trooper Coats, Trooper O'Donnell, Trooper Borowski.
24 You know, were they professional? You know, could you
25 believe what they said? Was the witness forthright in

1 his testimony? Trooper Coats, there were a bunch of
2 questions he was asked by Mr. Postic about, you know,
3 would this have helped, and he said that well, you
4 know, it might have.

5 It might have if the guy hadn't confessed to it,
6 if we wouldn't have had the DNA, if we wouldn't have
7 known he did it. You know. Was the testimony of the
8 witness consistent?

9 Okay. And on the consistency, the troopers, you
10 know, their story pretty much has been the same since
11 this happened. You know, nothing has changed about
12 them, but on --- talking about consistency, okay, the
13 day of --- this is going for consistency, okay, the
14 day that Trooper Coats, Trooper O'Donnell, and Trooper
15 Borowski talked to Mr. Thigpen, he remembered that he
16 got off work around 11:30 approximately. He came
17 home, didn't change his clothes. He actually said he
18 wore a smock at work, and it sounded like he took the
19 smock off, might have had these clothes under it, but
20 he described those clothes.

21 He took those videos back, went to Circle K, got
22 cigarettes, went to Brixx, met Melvin, had three beers
23 with a dude named Mike. Decided to meet Melvin back
24 at Track Side later. He went to Friends, another bar
25 and drank three or four beers. And that afternoon, he

1 remembers he was drinking Yuengling, okay. Played
2 pool. He had one vodka Kamikaze and two Southern
3 Comfort Kamikazes. Then he had three or four ---
4 okay, he went to Track Side, had three or four more
5 beers. He remembered paying his bar tab with his
6 debit card, okay. That's what he remembered before
7 the wreck when they talked to him the afternoon of
8 June 20th.

9 Now, when they talked to him, he admitted that he
10 got home, it was getting light out because the sun was
11 coming up. You remember that. He remembered kicking
12 the door in because he didn't have his keys. You
13 remember the dog --- he said the dog was irate and he
14 had to wrestle with the dog to calm him down, but he
15 said on June 20th the dog was irate because he was
16 kicking the door, then he went to sleep and showered.

17 Okay. Now, as to what happened during the time
18 of the wreck, okay, and this is to Trooper Borowski
19 and Deputy Slaten, a friend drove me home. It was a
20 friend of a friend, and then they asked him again
21 after McKenzie got there, you know, it was what I was
22 kind of trying to play yesterday. They asked him, you
23 know, "Who did you give the keys to." He said, "Oh,
24 it's three o'clock." They went over to another issue,
25 like the injury or something.

1 So then later on when he goes to the DataMaster,
2 he tells Trooper McKenzie, "Why am I in jail just
3 because somebody took my car for a joyride?" Okay.
4 Then they get him in the room with Borowski,
5 O'Donnell, and Coats, and it's, "I don't remember, I
6 don't think I was driving. Somebody else had to have
7 been driving. I drank too much and blacked out. I'm
8 known to black out and not remember and it never comes
9 back. My memory never comes back." Towards about
10 three fourths of the way through, they ask him, "Hey,
11 does your chest hurt?" He said, "Well, my ribs hurt a
12 little bit." I reckon so if he hit that airbag and
13 steering wheel.

14 Then he ultimately says, and I think the question
15 was, "What do you tell Melvin's family about did you
16 do everything you could," and then he starts saying,
17 "I was not in my right mind. I could have done more
18 if I wasn't half drunk. I should have done more.
19 Tell them it was an honest mistake. I didn't mean to
20 hurt him. It should have been me."

21 He actually said, "Why wasn't it me, not Melvin.
22 I'm sorry, I didn't mean to hurt him. Why did he have
23 to be in my car when I had the wreck? I was driving,
24 probably going the speed limit."

25 That actually was met --- the troopers agreed he

1 probably was going --- the speed limit was 45 and I
2 think they probably agree with that but, you know...

3 "I swerved, looked up and was in a ditch. I just
4 panicked and I ran. If I was sober, there probably
5 would have been a lot I could have done."

6 Then if you listen on the tape, well, he claimed
7 the troopers told him he wasn't wearing a seat belt.
8 If you listen to the audio, it's clearly Donnie
9 Thigpen who says, "I wasn't wearing a seat belt,
10 Melvin was." You hear Trooper Coats, agree. I don't
11 think he wore one. Trooper Coats agreed, but up to
12 that point, I don't think you hear anything about them
13 talking about whether we know you didn't have a seat
14 belt. I mean, that came from Donnie Thigpen.

15 He says, "I take full responsibility. Tell the
16 family I take full responsibility. Tell the
17 solicitor's office, I take full responsibility," okay.

18 Now, even in this, what he said on the 20th, you
19 have inconsistencies. He had a friend who drove home.
20 Then when asked who the friend was, he said then that
21 somebody took his car for a joyride. Almost like
22 somebody stole his car. Then he switches to, "I don't
23 know. I don't remember driving. It's more like I
24 could have been could have been driving, but I don't
25 remember it. I don't remember that wreck. Therefore,

1 that's why I think something else was driving. Then
2 he finally just breaks down and admits, "Yeah, I was
3 driving."

4 Now, you heard him yesterday and yesterday
5 interestingly enough, he says that it is ridiculous to
6 believe anything he said on that statement, okay.

7 Even though --- and everything in the statement
8 he told the troopers on the 20th was a lie ---

9 MR. POSTIC: Judge. I'm sorry, Ron. Judge, I
10 hate to interrupt closing, however, this is --- he's
11 supposed to be giving a statement on the law. He is
12 getting into the facts. I mean, there's a clear
13 dividing line.

14 THE COURT: Confine your opening to the law that
15 you wish the jury to know about.

16 MR. MOAK: Okay. He then switches to ---

17 THE COURT: I grant, sir, Mr. Moak. I'm going to
18 grant his motion to require you to stick to the
19 statutes and the law and not argue the facts at this
20 time.

21 MR. MOAK: Okay.

22 THE COURT: You've got plenty of opportunity to
23 argue the facts in the case.

24 MR. MOAK: I just have an example of
25 inconsistencies that ---

1 MR. POSTIC: See, he's arguing now.

2 MR. MOAK: Now, was the testimony of the witness
3 corroborated? Okay.

4 Now, the troopers, talking about corroboration,
5 all that dealt with Thigpen talked about glass and
6 there wasn't a picture. We know that's corroborated.

7 There was some questions for Trooper McKenzie ---

8 MR. POSTIC: Judge, I'm sorry. I'm sorry to keep
9 interrupting. These are facts. It's not the law.

10 MR. MOAK: I'm putting examples of corroboration.

11 THE COURT: Well, you'll have plenty of
12 opportunity to do that in your final argument. This
13 portion of your presentation to the jury is supposed
14 to be limited to what the law is, what your
15 interpretation of the law is, and then you can match
16 it up with the law in your final argument. You don't
17 get the same argument twice, please.

18 MR. POSTIC: Thank you.

19 MR. MOAK: Thank you.

20 Now, other than Mr. Thigpen admitting to being
21 the driver on the 20th, most of the evidence we have
22 on whether or not he was the driver calls for
23 circumstantial evidence, okay. And this is something
24 else that you're going to do, okay.

25 There are two types of evidence which are

1 generally presented during trial, direct evidence and
2 circumstantial evidence. Direct evidence is the
3 testimony of a person who asserts or claims to have
4 actual knowledge of the facts, such as an eyewitness.

5 The only eyewitness we have to this is Donnie
6 Thigpen. Circumstantial evidence is proof of a chain
7 of facts and circumstances indicating the existence of
8 a fact.

9 The law makes absolutely no distinction between
10 the weight or value to be given to either direct or
11 circumstantial evidence. Nor is a greater degree of
12 certainty required of circumstantial evidence than of
13 direct evidence.

14 You should weigh all the evidence in the case.
15 After weighing all the evidence, if you are convinced
16 of the guilt of the defendant beyond a reasonable
17 doubt, you must find the defendant guilty.

18 If, on the other hand, you are convinced the
19 defendant is guilty --- you are not convinced the
20 defendant is guilty beyond a reasonable doubt, you
21 must find him not guilty.

22 You can tell it's kind of hard to read that.
23 That's why it's on the board.

24 Now, what is circumstantial evidence? Okay.
25 Like you have, similar to the child with the lamp.

1 The child has brown crumbs on his face. You just saw
2 the cookie jar, it was full just a couple minutes
3 before, the cookie jar lid is off, cookies are
4 missing, the child asks mom for milk, but nobody saw
5 the child take the cookies, okay. You have to look at
6 each one of these things and say what does that ---
7 does that go one way or the other, okay? What's the
8 inference, okay? Is there the inference that the
9 child took cookie from the cookie jar? Or that the
10 dog took cookies from the jar. Another is the
11 invisible person took the cookies from the jar or they
12 evaporated. You have to look at all these and which
13 one is a reasonable inference and which ones are not,
14 okay.

15 You know cookies don't evaporate, there's no such
16 thing as an invisible person, so there is only one
17 reasonable inference, okay.

18 You look at that, you know, you heard the
19 troopers testify to why they arrested Donnie Thigpen.
20 That was even before they had the DNA and the
21 toxicology. All that did was back up the observations
22 that the troopers made that day and look at the
23 possible inferences, what's reasonable, what's
24 unreasonable, okay.

25 That's the last of the power points. Let me

1 switch that off.

2 Now, something else that you're going to hear
3 is --- okay --- is you're going to hear some issue
4 about whether or not the statement of Donnie Thigpen
5 was freely and voluntarily made, okay.

6 What the judge is going to tell you, I'm just
7 going to read it, a statement, okay --- right here, I
8 had them mixed up, I think.

9 The statement is alleged to have been made by the
10 defendant and admitted into evidence in this case.
11 You know, while the court has determined the statement
12 is admissible, you're going to be instructed on the
13 decision of whether or not it's voluntary is up to
14 you, the jury.

15 If the defendant did make the statement you must
16 determine whether or not the statement is made by the
17 defendant voluntarily of his own free will. This
18 means the statement was not caused by pressure, force,
19 fear, threats, coercion, intimidation or promise of
20 leniency or reward of any kind.

21 In determining whether or not the statement is
22 voluntary, you should consider both the
23 characteristics of the statement and the details of
24 the question.

25 Some of the factors you must consider are one,

1 the age of the defendant; two, the defendant's
2 education or lack of education; three, the defendant's
3 mental ability or capacity; four, the defendant's IQ
4 or intelligence; five, the defendant's background or
5 environment; six, the place and length of detention;
6 seven, the nature of the questioning; and eight, the
7 advice or lack thereof to the defendant of his or her
8 constitutional rights, including but not limited to
9 the right to remain silent, which would include the
10 right to stop the questioning at any time.

11 Any statement could be used against him or her in
12 a court of law. The right to have a lawyer present
13 and if he or she could not afford a lawyer, one will
14 be appointed to represent him without any cost. You
15 must carefully consider all the surrounding
16 circumstances before you waive any right to an
17 statement, okay.

18 What that means and what you've probably seen on
19 TV, is that when a defendant is in custody and the
20 police want to question him, you have to Mirandize
21 him, okay.

22 Miranda doesn't require you to read off a card or
23 say it word for word. I think the actual US Supreme
24 Court, what they say it's not a talismanic
25 requirement. That means you don't have to use the

1 exact word. You just have to tell them those rights.
2 You can paraphrase, as long as you can tell them these
3 rights, okay.

4 So a situation where, you know, for example a
5 hypothetical, a trooper interviews somebody and reads
6 off his Miranda card issued for him by his agency and
7 reads those four prongs, you have the right to remain
8 silent, the right to have the help of a lawyer, you
9 know, anything you say can and will be used against
10 you in a court of law.

11 You know, those four prongs, read these. You can
12 either read those or you can just explain them, okay,
13 but if he reads them off, I think it might not be much
14 of a question whether or not he was Mirandized or not.

15 Then the issue is you have to think, okay, does
16 this guy know what he's doing, okay.

17 You can listen to the audio. Listen to the
18 response, listen to, you know, did the guy answer the
19 question asked? Did he respond appropriately? Did
20 he --- is he crazy, like if I say hey, you know, where
21 were you the day the aliens got you. You know, that
22 might be someone who has diminished capacity.

23 In this case, I won't argue the facts, but we
24 have, you know, we have seen the DataMaster. You've
25 seen that of Trooper McKenzie, and then you can hear

1 the audio where Trooper Coats then talked to him. You
2 can tell there is a difference, almost like two
3 different people there, okay, and you have to look at
4 this in the totality of the circumstances. Don't
5 think I can argue he wasn't quite still drunk at
6 five o'clock that day, but even he said he was, but
7 the question is whether or not he knew what he was
8 doing. He knew what his rights were. He knew to
9 exercise them and, you know, there's a lot of
10 questions you can ask yourself, like if you listen to
11 the audio, okay, does he know what he's in jail for,
12 okay?

13 He knows why he's there, you know. Does he think
14 he is there for child support, they're asking him
15 about killing somebody, you know, does he know what
16 he's in there for? Does he comprehend what he's in
17 there for? Does he know what's going on?

18 Is he asking do you want to talk to them? Does
19 he say, yeah. Does he ever ask, hey, you know, I
20 don't feel comfortable. I want to talk to a lawyer.
21 That would stop it, but you're not going to hear that.

22 Does he ever say, hey, I don't want to talk to
23 you anymore. Leave me alone. He never did that. Do
24 they ask him like, hey, where were you? Is he able to
25 give details or any like a logical ---

1 MR. POSTIC: Judge, these are facts again.

2 MR. MOAK: You know ---

3 MR. POSTIC: I'm sorry, I glazed over. He's been
4 doing it for a while.

5 THE COURT: Continue, go ahead.

6 MR. MOAK: I mean, these are things you can
7 consider, the totality of the circumstances. Listen
8 to his voice. Does he sound drunk? I think that's
9 what the allegation is going to be.

10 Does he give a logical story? And listen to the
11 emotion towards the end when he's saying, "Why
12 couldn't it have been me? Melvin didn't deserve
13 this." Listen to that.

14 Is that false, or is that true? That's the data,
15 okay. You're going to have to decide whether or not
16 that statement was freely and voluntarily made, and
17 you need listen to what his answers are. Listen to
18 the details and again, I mean, if he is so intoxicated
19 that he doesn't comprehend what's going on, what he's
20 in the jail for, what he's being questioned about,
21 what he's facing, would he remember those details?

22 Some of those details, you know, you heard him
23 yesterday, there is a --- we'll go into that --- the
24 last closing, there is actually --- in some areas
25 there's better details on the afternoon of June 20th

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1 that he gives that he is remembering them, you know.

2 He remembered that day. He doesn't remember now,
3 you know. Was he so intoxicated that he could not
4 have freely and voluntarily given that statement, so
5 y'all can listen to him, and you can listen to the
6 emotion when he finally breaks down and gets it off
7 his chest. This is what I did. I'm sorry, you know.

8 You contrast that story two-and-a-half years
9 later after he's had time to think about it. At this
10 time I'm going turn it over to Mr. Postic. I'll ask
11 you to give him your attention, and I'll speak with
12 you again in a few minutes.

13 THE COURT: Mr. Postic.

14 MR. POSTIC: Thank you, Your Honor.

15 CLOSING STATEMENT:

16 MR. POSTIC: Good morning. My argument is going
17 to get out of order.

18 Before I start, what I do now is, I don't have
19 this fancy technology, but I put it on a poster board.
20 I put it down here and just read off of it, so it
21 basically looks like I don't need notes. I can't fool
22 you.

23 Thank you so much for your service. That's the
24 very first thing that we need to tell you, both of us,
25 and my client, as well. You've given a week of your

1 busy days to be here for this case. It is
2 unbelievably important, and this job that you're doing
3 right now is the greatest job you can really do as a
4 citizen who is not in law enforcement, not in the
5 military, and I told you at the very beginning of
6 this, you know, this was a long time ago for all of
7 us, how much I hated the opening statement because he
8 didn't really know anything about the case. I was
9 telling y'all stuff that was not in evidence.

10 They were telling you a story that seemed cut and
11 dried. You hadn't heard the evidence yet, but now, I
12 like this part because now we know what we're talking
13 about, okay. We spent a week, y'all spent, you know,
14 six, seven hours a day here sitting here, you're not
15 allowed to talk. You're not allowed to interact with
16 us, and, you know, now we finally get to talk. I
17 mean, you are going to talk, and we're going to listen
18 because you guys are going to tell us the facts,
19 basically.

20 It when I start here, I want to tell you in no
21 way are we minimizing the dangers of driving under the
22 influence, in no way are we minimizing the deaths that
23 happen every day by driving under the influence, and
24 in no way do we not sympathize with this family, no
25 way. This is a tragedy all around, absolute tragedy

1 that no parents should have to bury their child, but
2 you can't be inflamed by those sorts of things when
3 you're coming to a verdict.

4 I mean, a verdict is a search for the truth, and
5 I --- that's what he told you at the beginning, that's
6 what Mr. Moak told you, and that's what I'm going to
7 tell you. When I sat over here, I said the exact same
8 things. I said that it's not a search for doubt,
9 because I always felt that's what defense attorneys
10 do, just trying to muddy up the waters, but we want
11 truth.

12 In a case like this, these people deserve the
13 truth. We all deserve the truth, but if we can't get
14 to the truth, it's not going to help anything to
15 convict this young man and to take away his liberty.
16 That helps nothing. In a case like this, no stone
17 should be left unturned, none. In this case, there
18 were plenty of stones left unturned.

19 The Highway Patrol, and listen, I'm going to
20 attack them, okay, obviously, but I have nothing but
21 respect for these guys. It's a tough job. You never
22 know what you're going to come across, but to convict
23 this young man, we need more. We have to have more.
24 Yes, the solicitor is going to say I'm making a lot of
25 hay out of a lot of stuff.

1 Well, listen, this young man's liberty is at
2 stake. Things that could have helped y'all in
3 deliberations, the airbag DNA. I mean, I'm going to
4 start with the biggest one, an unidentified human DNA
5 on the front of an airbag, okay. Does that
6 make --- does that appeal to you? Who is that? Does
7 that not seem like that would be the driver?

8 An airbag hitting someone in the face, in the
9 body and there's DNA on it and it's not Donnie
10 Thigpen's DNA, and even they swabbed the front, okay.
11 I don't know if y'all remember this. There was a lot
12 of science people up there. They swabbed the front of
13 the airbag. That was unmatched, but I asked them ---
14 that lab tech was so cool. I said does that DNA come
15 closer to the unidentified human than it does to
16 Donnie Thigpen? Yes, it does.

17 Okay. Look at the resources that they have,
18 y'all. They have CODIS. I talked to them about
19 CODIS. That's a database of DNA samples. Did they
20 run that unidentified DNA sample, a sample that
21 can --- to a trillionth of a percentage person who it
22 is, one in, you know, the mistake, the likelihood of
23 mistake is that small and they don't do that? Does
24 that appeal to you? Can a young man be convicted
25 without knowing that?

1 If they come to you and they say --- if they show
2 you the picture --- I'm not going to waste time. If
3 they show you the picture of the victim of Melvin on
4 top of the that airbag and say that it's his, I would
5 be offend. That is an insult. They have had three
6 years. They have had his blood. They have Melvin's
7 blood. They could test for the DNA.

8 I would be absolutely insulted. They can make a
9 movie, a PIXAR movie of a wreck, and they can't match
10 an unidentified human in a car? That is reasonable
11 doubt right there. I should sit down right now. They
12 had Melvin's phone. They had phone calls that he made
13 and phone calls that were made to him in the middle of
14 the night, early morning. Nobody even mentioned it
15 until I brought Trooper Kelly back up. I showed him
16 an internal e-mail that they had, three calls that he
17 tracked down within five days of this accident. These
18 are names and numbers of people in his phone. They've
19 got his name and the number, and they are just
20 satisfied with, "I don't know him. I don't know who
21 that is." Give me a break.

22 You know why they did that? Because they had
23 their man. They were done. They put a bow on this
24 thing. They weren't curious? They weren't suspicious
25 in any way? One of them says he even goes to that

1 bar. Could this be the stranger? Could this be the
2 unidentified driver? Give me a break. They want to
3 convict this kid.

4 There are no eyewitnesses, y'all, none. I'm
5 going to argue about his statement later on. He is
6 not an eyewitness. None. None here. None that came
7 here.

8 There are neighbors. I mean, it's the country.
9 You know, I talk about how I'm from the city. I'm
10 from a neighborhood, you know, it's different, but
11 there are people who live there. You look at that
12 video. There are people walking. They look like
13 civilians. Did they think of going to those people?
14 Did they think of that? Does that appeal to you that
15 they want to convict this young man and they don't
16 have that?

17 That doesn't make a lick of sense. They closed
18 up their case. They tried to slam that square peg in
19 a round hole so badly.

20 And the glass in the beard, y'all, come on. Some
21 of them said they saw it. Some of them said they
22 didn't. How -- it incenses me that they would come up
23 here and they would all try to say this, that there's
24 glass in his beard, and they don't have a picture of
25 it. Their resources are outrageous. They are there

1 on the scene.

2 They have got, you know, they can recreate
3 something that happened, an animation. They can't
4 comb his damn --- oops, sorry. They can't comb his
5 beard? He's rubbing his hair because he has glass in
6 it? Give me a break. It is nowhere, nowhere do they
7 collect that.

8 And then the glass that they have, okay, that
9 they say came from these clothes. Y'all look at it.
10 I mean, y'all know. Y'all have seen a window broken
11 out of a car in a parking lot. It might have happened
12 to y'all, okay. That's not that kind of glass.

13 And think of the resources --- couldn't they just
14 bring somebody down, somebody from Jeep or something.
15 Hey, yeah, that matches. This is from a Jeep. This
16 is the kind of glass we use. Wouldn't that help,
17 y'all?

18 What are they trying to make y'all do? Just
19 because the dude lives right next to the accident?
20 Just because it's his car? Give us more, man, you're
21 trying to take away a young man's liberty. It's huge.

22 Okay. The blood on his shoes. The blood on his
23 clothes, okay. All right, maybe it's his blood from
24 his fight. Maybe it's his blood from fighting his
25 doggie, but maybe it's Melvin's blood. Please test

1 it. Please test it. You've got his DNA. You've got
2 Melvin's DNA. Please.

3 The clothes are wet. I mean, listen, the dude,
4 the guy had a bad night. He was not the best kind of
5 kid at that time. There is no doubt about it, okay.
6 He is not proud of it.

7 I'm sure his family didn't like hearing about it,
8 .22, I mean that's ridiculous. His clothes are just
9 balled up on the floor. They take them. You know, do
10 they test it? Do they say it's beer. You know, they
11 don't test it. They just take it. Put it in a bag.
12 And do you know why they put it in that bag? So they
13 can test it later on, but they don't test it. I mean,
14 if we're going to use that, that would be --- man, if
15 y'all had that...

16 Okay. The blood, the DNA match on the airbag,
17 okay. How hard would it be to say before you cut it
18 off, what side it was on? They know which
19 way --- man, this thing is heavy. They know which way
20 this wheel was when it was either turned it or not.

21 That has glass in it. This is why they wear
22 gloves.

23 What side did that blood come on? Does it match
24 this arm, and I'm going to talk about that in a
25 minute, okay. Is it on that side?

1 Melvin's credit card, you know, we don't know
2 when this accident happened, we really don't. They
3 like to say it's five o'clock because what's when
4 Donnie said he was home, so they just --- that's it.
5 That's all. They made that jump there, but frankly,
6 they don't know if it happened between five and nine.
7 They have no idea.

8 The Ice House bottle. There's Ice House in the
9 car. It's a full Ice House. These don't sound like
10 the sort of guys who leave Ice House undrunk. I
11 imagine it's been bought recently. Let's find out
12 where it was bought, when it was bought. Let's get an
13 idea of when this accident happened. No, we got our
14 guy. We don't need that.

15 Examining of the car, they've got it --- the
16 truck, whatever it is, the S.U.V. They've got the
17 truck, and they make sure, yeah, it's got no brake
18 fluid. I mean, it has got fine brake fluid. It's not
19 a mechanical defect. The reason they do that is to
20 show there was bad driving and that's the only reason
21 the wreck could have happened, okay, but there's so
22 much more that could have done with that car.

23 Tell us if the seat belt was used or not. You
24 know, just tell us. They know how to do it.
25 O'Donnell said he knew how to do it, how to figure it

1 out. He didn't do it. Tell us if the car seat had
2 been moved back or front. Where is the position of
3 the car seat? Would it fit somebody that size. Would
4 it fit somebody this size?

5 Do that for us, please. There's some shoe
6 floating around the car, right on the driver's side,
7 some shoe. Whose shoe is this? We don't know.
8 Forget it. Just leave it in the car.

9 I mean, does this appeal to you? They are trying
10 to take his liberty away. Fingerprints, fingerprint
11 the car, you know. Maybe there's another person in
12 there. Maybe there's another person to talk to, okay.

13 Maybe there's another person whose fingerprint
14 also matches the unidentified human's DNA. It's not
15 my job to find out who that person is. It's their
16 job. It doesn't take than long. You'll see that DNA
17 sample was submitted in like October and it was
18 returned in November. You've got the report. It
19 doesn't take that long. It probably takes a lot less
20 time than it does to make a PIXAR Toy Story IV. I
21 like that. Sorry.

22 The paint chip in the ear, okay, how --- I mean,
23 this one it just boggles the mind, okay. This is
24 their --- okay. The paint chip would have been good,
25 I guess, if it's paint chip from the car. If we're

1 able to match it to the car. Yeah, that would be good
2 stuff to have. I don't understand the whole way this
3 went about, okay? We see a paint chip on you, man,
4 and I'm going to go get my Q-Tip out of my car. I'm
5 at the scene of the accident and then all of a sudden
6 the defendant, Donnie, rides up with Tom Borowski, and
7 it's just gone. That point chip is gone.

8 I submit to just throw that out. All right.
9 Let's move on to things that the prosecutor thinks are
10 important, but I submit to you they cannot prove
11 beyond a reasonable doubt.

12 We'll get into reasonable doubt. Reasonable
13 doubt is just, you know, what it is, is do you feel
14 good about your decision, you know. If when you go to
15 bed tonight after this long week and you put your head
16 on your pillow and you can just fall asleep and you're
17 not thinking about Donnie Thigpen if you decide to
18 convict him, then I guess it's beyond a reasonable
19 doubt, but if you're still thinking about him, then
20 there's a doubt, that's a reasonable doubt.

21 I mean, people say it all the time. It's better
22 for ten guilty people go free than for one innocent
23 person to get convicted, all right. Lose their
24 liberty, lose their freedom, and that's why we have
25 y'all.

1 All right. Let me get on with this. Airbag
2 burn. I had these prepared. How many pieces of the
3 evidence, did they have, Ms. Ambroziak?

4 THE COURT REPORTER: 146.

5 MR. POSTIC: Okay, 146 pieces of evidence, a
6 movie, videos, pictures, but no DNA test on
7 unidentified DNA. Give me a break.

8 If y'all --- I mean, before this case, if y'all
9 saw this on somebody, you've probably seen something
10 like this on your kid or your neighbor's kid. It
11 looks like a rug burn is what one of them said. It's
12 an abrasion, y'all, but to them, because they have
13 their guy, that's an airbag.

14 It doesn't make a lick of sense. Do you know
15 what else would have been nice? Okay. Bring us some
16 more pictures of airbag burns. Bring it in. You've
17 got experts. They've all been qualified experts.
18 They can bring it in. They can show y'all. They can,
19 you know, show us pictures instead of cookie jars,
20 show us pictures of other airbag burns. Let's compare
21 that.

22 That's why I asked them over and over again about
23 it. And then the other thing is this, does it make
24 any sense that it would just be on one arm? Of
25 course, one of them said it was on both arms. They

1 didn't take a picture of that.

2 Does that make any sense? Does it make any sense
3 to just drive off like this into the trees or would
4 you be like this? Does that appeal to you?

5 This was certainly a violent and destructive
6 wreck. A young man lost his life. You would expect a
7 little more, and then the airbag is 150 miles per hour
8 to 200 miles per hour coming at you.

9 You would expect a little more damage than what
10 they're showing you. Airbag residue, too. They all
11 testified it stinks, it smells terrible, and it's just
12 like baby powder or something like that. Okay, is it
13 on the clothes of the defendant? Can you test for
14 that? No, you know, we've got our guy.

15 The part that I hate is when Coats in his
16 interview of Donnie says, "What do you think a jury is
17 going to do with you, son?" I mean, he is taking your
18 job away from you. I hated that.

19 Look at the other injuries on Donnie, nicks and
20 scratches. Some of them are -- I mean, the dude was
21 living a --- you know, I mean, he has changed, but it
22 was a rough life, bar fights, fighting a dog, locking
23 himself out of his house, some of these are scabbed
24 up. He lives in the woods. He does yard work.

25 Does that make any sense that he's walking out of

1 that accident with this? A cut on the eye, some nicks
2 and scratches? Crawling out of this? This?

3 Does that make a lick of sense? Certainly, it
4 causes me to pause. Also, the officers know, Trooper
5 McKenzie knows when he takes him to the hospital what
6 kind of wreck this was. Hey, let's do a physical on
7 him. Maybe he has some bruised ribs. Maybe he has a
8 tiny break in his arm or something, anything to show
9 that he was in this wreck.

10 Now, certainly, and they kept making on and on
11 about comparing the two sides of the car, okay. Well,
12 we're not saying that the driver didn't survive and
13 the passenger died. We all know that. That's not
14 some brilliant observation on their part. It's clear,
15 but would that driver just look like that? Try to
16 reconcile that. That makes no sense.

17 Okay. What else do they think is important?
18 Muddy shoes, okay. You know, do you know what this
19 looks like to me? A tennis shoe, are you wearing a
20 tennis shoe, have you ever worn a tennis shoe in the
21 yard? Does it look like this? I mean, big deal.

22 How many pieces of evidence again?

23 THE COURT REPORTER: 146 for the State.

24 MR. POSTIC: 146, trying to overwhelm y'all.

25 They're the ones trying to muddy things up. Speaking

1 of mud, there's not really that much mud on those
2 shoes.

3 What kind of terrain was it, y'all? It was a
4 swamp. It was a creek. It's a Twenty-five Mile
5 Creek. The glass shards y'all, again, I've already
6 talked about tempered glass and the difference.

7 I am incredulous that Trooper Coats would say, "I
8 don't know the difference between glass in a car and
9 glass that comes from a picture frame or from a
10 bottle."

11 I mean, this guy has got all kinds of experience.
12 He works M.A.I.T. All right. This blood spot, y'all.
13 You know, at the beginning, the solicitor liked to
14 point out, it was like remember the cut on the eye,
15 like that's some big thing. Okay, he did have a cut
16 on his eye, sure. But is that what made this?

17 You heard the DNA expert say that there is no way
18 to know the age of blood, okay. No way to know. We
19 don't know when that was there. It's his car, plus we
20 don't even know if that's blood. They just said it
21 passed the presumptive test for blood. That doesn't
22 mean that it's blood.

23 They also said --- I was paying attention.
24 Science, I was getting some science. They also said
25 that the DNA is not from the --- does not mean that

1 just because this fabric that was submitted, that that
2 DNA came back positive for Donnie Thigpen. It doesn't
3 mean they're talking about that spot that might be
4 blood. They're talking about the fabric, the fabric
5 that he touches with his head because he's got a
6 droopy liner.

7 The other thing, and I was just kind of looking
8 at this with like what the officers called organic
9 material. I call it leaves and weeds, but there's a
10 piece on top of that blood, no blood on that piece, no
11 blood whatsoever. Fresh blood? Wouldn't that get
12 some blood on that? Look at that. I mean, it's just
13 little things, you know.

14 This morning, I went to go get a cup of coffee
15 down the street, and in the bathroom, they had a
16 little sign, you know, a little cutesy saying
17 something like life is a long journey, don't sweat the
18 small stuff. Well, I want you to sweat the small
19 stuff, okay, because this guy's liberty is at stake,
20 and they're saying all these small little things lead
21 to him, okay. So every small piece of evidence is
22 important, and if you have a reasonable doubt about
23 any of these pieces of evidence, I think you got to
24 cut it. I mean, I think you've got to acquit him.
25 That means not guilty in case you don't know. I'm

1 sure you know.

2 All right. Blood spot. Let's see. If Donnie
3 is freshly bleeding, wouldn't there be more blood than
4 just this? Think about it. I thought about wetting a
5 paper towel and just kind of showing y'all. It seems
6 like it would be more than that.

7 Oh, the DNA on the back of the airbag. Okay. I
8 already kind of discussed how they could have told you
9 on what side --- what's this? On what side that was.
10 Okay. Wouldn't it help if you knew if that was on the
11 same side as that alleged airbag burn. No. They just
12 cut it out, turn it in.

13 The other thing is, on Verona Gibson, they make a
14 big deal out of that that there's blood on the back of
15 the airbag and it comes from this, okay.

16 First of all, there's no bleeding, he wasn't
17 bleeding. Second of all, I asked Verona Gibson, their
18 technician, "Why didn't you swab the whole back of the
19 airbag?" "Well, because that rarely gives you a sample
20 of the driver." You know, she said that and they're
21 trying to say that that's him.

22 The DNA on the front of the airbag seems like
23 that would be more likely that that's the driver, and
24 there is nothing on the front that matches Donnie.
25 They can't have it both ways. Their DNA is a

1 fantastic tool for uncovering crimes. It doesn't make
2 any sense.

3 Plus, you know, I asked her, "Do you think there
4 might be DNA in my car that matches me?" "Yeah, there
5 probably is," okay.

6 There's blood DNA on the front of the airbag and
7 it doesn't match Donnie, and he's got a cut on his
8 eye. No doubt about it. He got it from some guy
9 named B.J. at a really fancy bar.

10 Oh, they love to tell you that it's just an easy
11 walk down from that wreck to Donnie's house, just a
12 nice little Sunday stroll, right?

13 Yeah, it's an easy stroll. I've done it. My
14 investigator and I did. The cops didn't do it. They
15 drove it, but it's not that easy a stroll, okay. Not
16 if you've come out of a fatal car accident and you've
17 crawled out of a car in a swamp where there's snakes.
18 Does that make any sense?

19 All right. Let's get to the big one. I mean,
20 here is the thing that I'm sure that they are not
21 going to just glance over. Donnie Thigpen said he was
22 driving. He said it. "Why are we even here." I'm
23 sure you think that, "Why are we even here?"

24 Before we get to that statement that he makes to
25 Officer Coats, let's look at his day, all right.

1 Let's look at his other statements, the spontaneous
2 statements when the police officer is at my front door
3 and I'm drunk, okay. That's another thing. Talk
4 about diminished capacity. Somebody asks you who took
5 your car and you say "3:00 a.m."

6 That's diminished capacity. Do you really think
7 he understood what was going on at that point? He's
8 confused. When they drive him to the scene, he looks
9 the wrong way. What wreck? He doesn't know. This is
10 the guy who allegedly just crawled out of this car.
11 It makes no sense.

12 Just about every time later on when he
13 finally --- when people tell him that there's a dead
14 person, he says --- can you just tell me who was in
15 the car? Can you just tell me about it? Does that
16 sound like somebody who knows? Listen to him again.
17 These are spontaneous statements.

18 If you have any doubt, listen to them again.

19 The Judge is going to instruct you that you can
20 discard this confession if you find that it wasn't
21 voluntary, if you think it was forced or coerced or if
22 you think he has promised leniency to get it, then you
23 can disregard it.

24 It's not just --- I mean, we wouldn't need you if
25 it was an absolute that he said it so he must have

1 done it.

2 Was he in fear for his life or was he --- not for
3 his life, probably, but was he fearful? Was he
4 scared? Yeah. Okay. He's out of his comfort zone,
5 y'all, kind of like y'all are, okay, except for if you
6 take off your shoes, it's because you want to be
7 comfortable. It's not because they take you out of
8 your house without your shoes.

9 All he wants is to get back in his bed and to his
10 dog which has been taken by animal control. Look at
11 these cops, sorry, these officers of the law. They're
12 fine guys. I'm in no way saying that their lying. I
13 told you at the beginning that they could be telling
14 the truth and he could be innocent, but there is a
15 reason they are all here.

16 They are an imposing figure. They are big men
17 with guns in uniform. The prosecutor is even big. I
18 shouldn't say that, but you don't think somebody would
19 feel coerced? Put yourself in his shoes. He is
20 140 --- 150 pounds soaking wet. He has had a really
21 bad night.

22 I mean, sure, it's his own fault, and they put
23 him in there with these officers, and there are
24 officers on the porch telling him what happened, where
25 is your car? He is like, you know, has a blurry

1 vision of what's going on.

2 I mean, their witness, Professor Sears as I want
3 to call him because he used the chalk board, he said
4 to you that when you drink too much, when you drink to
5 a level that your blood alcohol is a .2 and above, I
6 mean, everything goes bad, motor skills, recognition
7 skills, your comprehension, your short-term memory.
8 In fact, you may not even understand what somebody is
9 saying to you as they say it.

10 Was there any promise of leniency or reward? In
11 a way, "Now is the time to help yourself, Donnie."
12 What does a kid think that means, an unsophisticated
13 kid who has been taken, and sure, it's not a six-hour
14 interrogation, sure it's not, but he has been with
15 these guys since ten in the morning.

16 He doesn't know what's going on. The last thing
17 he remembers, I don't know if he remembered it then,
18 but I think it's --- this is my theory, the last thing
19 he thinks, "I loaned my car to Melvin. Now, there is
20 a problem with my car, I hope ---," I think he is
21 thinking about Melvin. He is thinking Melvin might be
22 in trouble.

23 It's a theory. It makes sense. If there is a
24 reasonable explanation other than the one they're
25 giving you, that's reasonable doubt.

1 What can you consider when you're determining
2 whether this statement was voluntary or not? I'm
3 going to spend some time on the statement, sorry.

4 You can consider his age. He is a kid. You can
5 consider his education, 11th grade, quit school.
6 Consider his background and environment. Lives out in
7 the woods, has a job, doesn't know anything about this
8 sort of stuff. Look at the setting of the statement,
9 okay.

10 I brought that up several times. He's in a
11 little room in the jail. Three big men with guns.
12 They probably don't let them have guns in the prison,
13 in the jail. That is intimidating. Whether he was
14 aware of his constitutional rights, okay. I made a
15 big deal about this because I'm a lawyer and, you
16 know, the constitution is a big deal for me and for
17 our kind, especially those that defend the accused.

18 He was told at the beginning that he could stop
19 at any time. This is important, I think, okay.

20 But at the beginning, remember, he is drunk as a
21 lord, okay. Whatever that means.

22 I mean, he is a .25. Is he really? I asked him,
23 "Do you remember that?" "No, no." You know, then
24 later on he is given a different set of rights at the
25 jail.

1 At this point, he doesn't know if he's ever
2 getting out. He is told at that point --- he is not
3 told at that point, I should say, that he can stop the
4 questioning. In fact, he has now told them so many
5 times that he doesn't know what happened to that car.

6 He has told them over and over again, and when he
7 tells them, "I don't think I was driving," --- this is
8 how he starts, "I don't think I was driving. If
9 someone is in trouble, I'm going to help them." This
10 man, his interrogator, "No, no."

11 You don't think he would be scared, and for a
12 while there, he keeps saying, "I didn't do this. This
13 is crazy, man."

14 Look at the little things in that statement.
15 There is Ice House all over the car. Well, I have Ice
16 House at home, okay.

17 I submit to you that that corroborates Melvin is
18 the one who bought the Ice House. That's obviously
19 the beer that he likes. At least that night.

20 He might have brought some back, and he might
21 have gone back out. Is that that crazy? I mean,
22 these are people who stay up all night drinking.

23 There was no end in sight for Donnie --- Melvin.
24 He says --- even when he first starts to tell them
25 what they want to hear. He said, "I guess I jerked

1 the wheel." I guess. "No, no, you didn't jerk the
2 wheel. You drove right off the road."

3 I submit to you that he does not tell them
4 anything that they haven't already told him. "You
5 crawled out, you left your friend." "Yeah, I crawled
6 out. I left my friend."

7 "He was seat belted, and you just walked out."
8 "That's right. I didn't have my seat belt on. He
9 did." He's been told over and over again.

10 "You left your friend in his seat belt in your
11 car," and they're going to try to tell you that that's
12 some new information that they just got from Donnie
13 Thigpen? Nope.

14 And he finally just gives them the most generic
15 statement there is. "Yeah, I was driving. I crawled
16 out. He was still in there. I should have called
17 9-1-1. I didn't call 9-1-1." They told him over and
18 over again, "Well, you didn't call 9-1-1, did you?"

19 He didn't tell them anything that he has not been
20 told by them. There is --- I mean, that is the
21 epitome of suggestibility.

22 Compare that statement to the other ones, the
23 spontaneous ones, the one that you watched. I mean,
24 why are we even here otherwise?

25 If you have a reasonable doubt as to whether his

1 statement was given freely and voluntarily of his own
2 free will, if you have a reasonable doubt about that,
3 you can throw it out. You don't have to consider it.

4 Using all the factors I said, it doesn't have to
5 be all of them, part of them, some of them. That's a
6 hard thing for me to ask y'all to do, but that's what
7 we're asking.

8 "You need to come clean. The jury is not going
9 to believe you. They'll convict you like that." I
10 hope you don't. I hope you show them. "I am coming
11 clean. I am." That's what he says, "I am." "No."
12 "I jerked the wheel." "No."

13 Just remember the day that brought him to that
14 room in the jail. He's drunk, probably hung over,
15 barely slept, a blurry memory of the night before,
16 kind of beaten up from a fight, asking him about his
17 car, arrested, taken to the scene, shown where his car
18 was, shoeless, clueless as to what's going on with his
19 dog, his family, wants to call people.

20 He doesn't eat the entire day, doesn't eat, goes
21 to the hospital, gets seven or whatever, how many
22 vials of blood taken out of him, forced, surrounded by
23 officers at the Highway Patrol, Kershaw County, the
24 coroner, told of serious allegations, very serious
25 allegations, and they want you to believe that he is

1 not afraid, and he is given a free --- yeah, of
2 course, they did. That's what they want you to
3 believe? That doesn't appeal to you, does it?

4 This is what they want you to believe. He wrecks
5 his car with such force into two trees, so bad that
6 his friend, his great dear friend dies. That kind of
7 wreck --- I mean, again, it doesn't matter that one
8 compartment was compromised to survivability and the
9 other one didn't. Holy cow, flipped upside down into
10 the woods, and he crawled out, walked home at a .2
11 whatever drunk. That's what they want you to believe,
12 that that's what happened.

13 Does that make any sense? Try to reconcile his
14 appearance. The video, he is pacing around. Does
15 that look like somebody who came out of a car that
16 flipped that killed someone? Yikes. That's some
17 force. Forty-five miles per hour is fast. Does he
18 have injuries consistent with a violent and fatal
19 wreck, or does he have injuries consistent with what
20 he told you, a fight at the bar.

21 My goodness, the witnesses I had to bring in
22 here. I mean, they get people with all kinds of
23 experience, good officers, great training, testified
24 numerous times. I got to go to Track Side Bar to find
25 my witnesses.

1 "It was my husband's turn to drink, so he got
2 snockered and passed out in the lady's bathroom," but
3 I mean, those are the witnesses. They could have gone
4 and talked to those people, too, by the way, and that
5 guy B.J., got in a fight with him.

6 That's intoxication. Like, if I saw him in the
7 same place I was walking into, I'd go somewhere else.
8 He picked a fight with him, knocked down in the
9 gravel.

10 And his dog, okay. Yeah, they like to laugh
11 about that, okay, sure you got into to a fight with
12 your dog. Yeah, he had 105-pound pit bull dog, a dog
13 that in their statement, their own statement took
14 animal control several minutes to secure, okay.
15 That's not a Labradoodle, okay. That's a big dog.

16 Oh, the other thing is, does it make any sense
17 that he wouldn't take his house keys? Does it make
18 any sense that he would get out of his car without his
19 house keys or does it make more sense that a stranger
20 that some unknown person that some unidentified DNA
21 person was driving? Does that make any sense?

22 If that's reasonable to y'all, then that's a
23 reasonable doubt. We have no idea when this wreck
24 happened. We don't know if he got dropped off at
25 home, what time that happened. He doesn't really

1 know. Some might have been --- it's pretty hazy.

2 It's three years ago.

3 Donnie is at home. He's got no keys. He's been
4 dropped off, he is too drunk to even bother calling
5 Melvin. Probably can't even call on the phone, much
6 less drive, and he knows he can break into his house.
7 He knows it. You know, he has one of those locks. He
8 probably could use a credit card. He doesn't need a
9 burglar alarm. He has a 105-pound pit bull.

10 He passes out. He just passes straight out,
11 doesn't hear Tina and Leon coming by the house. That
12 was something I had to ask all these officers was
13 whether he could lock this door again. They couldn't
14 really answer, but you'll have the picture. You'll be
15 able to see. It's not --- the integrity of closing
16 the door has not been compromised.

17 Think about a stranger in the car. It was not my
18 car, it was not my friend. I don't need these keys.
19 I might be pretty messed up, but I'm going to go away.

20 Think about his, Donnie's minor injuries, and
21 think about that wreck. The hard part about this job,
22 this part of the case for me is that he gets to go
23 again, all right. He gets to go first, and he gets to
24 go again.

25 I just have to anticipate what he's going to say.

1 He's a smart guy. I've known him a long time, and so
2 I need to sort of anticipate. That's what I'm trying
3 to do through my closing, throughout my closing, but I
4 know that he's going to bring up a lot of this stuff.

5 Donnie is a liar, he's going to say, okay. Well,
6 yeah, he is a liar. He lied to the cops back on June
7 20, 2009. That's when he lied. I submit to you, that
8 may be the only lie that you hear in this courtroom
9 this week. I mean, they did their --- they did what
10 they had to do, but they just stopped too early,
11 y'all.

12 No stone should be left unturned in this case. I
13 still --- I can't --- I got to say it one more time.
14 Unidentified human DNA. If they try to say that is
15 Donnie's, I might explode. I mean, they had his DNA.
16 They had it. They could have tested it. It's not our
17 job to do that.

18 I can't let that go. I cannot let it go. That
19 is reasonable doubt. There is an unidentified person
20 on that airbag. The front of the airbag, the part of
21 the bag that would hit the driver. That --- and it's
22 blood, and it's touch --- it doesn't make a lick of
23 sense.

24 Every time he brings up an argument in this case,
25 think to yourself does that prove this case beyond a

1 reasonable doubt? Okay. Is it circumstances, all
2 right. There's no eyewitness. There's no direct
3 evidence.

4 He is going to say Donnie is direct evidence.
5 I've told you why that isn't. That statement is bunk.
6 Again, reasonable doubt. You've got to be firmly
7 convinced in what y'all do, firmly convinced. If
8 you've got any sort of doubt that would cause a
9 reasonable person, cause you to hesitate to act, that
10 is a reasonable doubt.

11 Judge Cooper is going to charge you on reasonable
12 doubt. He'll charge you on firmly convinced and on
13 hesitate to act, but here is what reasonable doubt is,
14 okay. It's the thing of putting your head on the
15 pillow, okay, that I told you earlier, and it's six
16 months from now, y'all.

17 If you're still thinking, you know, was Donnie
18 driving? Who was that unidentified person? Why
19 couldn't they give us that unidentified person? Why
20 didn't we call those numbers that we had in Melvin's
21 phone? Why didn't they give us that? Why didn't they
22 show us airbag burns? Why didn't they do that? If
23 you're still thinking that six months from now, if you
24 can anticipate that you'll be thinking of that, then
25 you have a reasonable doubt right, now.

1 Circumstantial evidence, I told y'all from the
2 beginning that circumstantial evidence is the hardest
3 case there is because you've got nobody coming up here
4 and saying this is what happened, okay.

5 The only person they're going to say did it is
6 Donnie Thigpen and he doesn't know what happened. The
7 reason he knows details and doesn't know about the
8 wreck is because he wasn't in the wreck.

9 You've got to exercise great, great caution,
10 because as I told you, everybody can be telling the
11 truth. An innocent person could lose their freedom.

12 Okay. I'm coming close. It's going to be time
13 for y'all to speak soon, okay. You have two more
14 coming up. You have the solicitor and you have the
15 judge's charge, and then it's your turn to speak. You
16 listened to us a lot. Lawyers like to talk.

17 Y'all are the judges of the facts. It's hard to
18 judge someone. Nobody likes to judge someone, but
19 that's your job. It's not a fair fight without y'all.
20 It really isn't. They made up their mind real quick,
21 48 minutes, probably, the first 48.

22 They didn't go into --- they just closed up their
23 case. In fact, when he sent an e-mail five days
24 later, "oh, whatever, we got our guy. Don't worry
25 about contacting these people that were in the phone,"

1 you know, go see those people.

2 Don't just take their word for it. I don't know
3 them. Okay. Sure. How about --- "well, I'm sorry,
4 your name is on here in his contacts. Can we come
5 talk to you?" Is that not making you think? Are you
6 not suspicious?

7 This is the best system in the world, y'all.
8 There is no doubt about it. Y'all are just normal
9 people. You don't know anything about this case, and
10 you come in here and make a decision, okay. Use your
11 collective common sense. You guys are from all over
12 this county, okay.

13 Some of y'all may know something that other
14 people don't. That's the whole point of the
15 collective common sense. The solicitor wants a
16 verdict that speaks the truth, okay. He says that
17 verdict is guilty. Okay. I'm sure he's going to come
18 up here and say that. I've yet to hear a solicitor
19 come up and say that. Well, maybe none. Okay. He is
20 going to come up and say speak a verdict that speaks
21 the truth. It's guilty, okay. I can't really do that
22 because the truth is not here with what they have
23 given you. There is no truth. Unfortunately for
24 these people. You cannot convict this kid on this
25 kind of evidence. Things are not always as they seem.

1 When the solicitor made his opening and he recited the
2 facts, it looked like an open and shut case.

3 Car found, guy lives next door, he's cut up, some
4 kind of airbag thing on his arm, giving some
5 cockamamie story, drunk as heck, blood alcohol through
6 the roof, DNA on the airbag, DNA on the little blood
7 spot. Remember the cut on the eye.

8 It looks straightforward. Oh, yeah, and then he
9 was cut, too. That looks straightforward. It's not
10 straightforward, y'all. That is a complicated case.
11 It's one issue, but it's complicated.

12 Unfortunately, they just didn't give you all they
13 had or they could have had. Any doubt that you have
14 has to be ruled in his favor. The tie goes to the
15 runner if you're a baseball fan.

16 The Highway Patrol had their guy. They had their
17 guy. Let's wrap it up, put it in a box, put a bow on
18 it. It's done. Let's move to the next case. Well,
19 I'm asking y'all to put a bow on this verdict that
20 says not guilty for this young man.

21 Thank you.

22 THE COURT: All right. Ladies and gentlemen,
23 let's take a short break. I anticipate the closing
24 argument of counsel to be about as lengthy as you've
25 already seen so far, and then there will be my charge

1 on the law, so it probably will be a good time to take
2 a morning break. Just relax for a few minutes. We'll
3 call you in about ten minutes. Don't discuss the case
4 among yourselves while you're in the jury room.

5 (WHEREUPON, the jury left open court at
6 approximately 11:23 a.m.)

7 THE COURT: Please be seated until the jury least
8 the room, folks. Remain seated until the jury
9 leaves the room, please.

10 All right. Stand at ease for ten minutes.

11 (WHEREUPON, a short break was taken.)

12 THE COURT: State ready for the jury?

13 MR. MOAK: Yes, Your Honor.

14 THE COURT: Defense ready?

15 MR. POSTIC: Yes, Your Honor.

16 THE COURT: Bring the jury.

17 THE BAILIFF: All right.

18 (WHEREUPON, the jury came into open court at
19 approximately 11:38 a.m.)

20 THE COURT: All right. Mr. Moak, you may
21 continue.

22 CLOSING STATEMENT:

23 MR. MOAK: Listening to Mr. Postic, you think
24 poor, poor Donnie. It's all about Donnie. What are
25 they doing to Donnie? Why are they doing this to

1 Donnie?

2 This case is about right here. That's where
3 Melvin would be sitting at. That's what this case is
4 about. Melvin is not here.

5 Melvin was such a good friend to Donnie and
6 Donnie was such a good friend of his that Melvin ---
7 Donnie decided to leave him hanging, literally. You
8 saw that picture. Melvin died with his seat belt on
9 in the passenger's seat of Donnie's Jeep headed to
10 Donnie's house so that he and Donnie could sleep it
11 off.

12 Donnie himself said yesterday that they were
13 going to his house to sleep it off, but Donnie is such
14 a good friend, he left the scene, and now it almost
15 sounds like he's blaming Melvin's death on Melvin.
16 Blame it on the dead guy.

17 Now, a couple of things I just can't help but
18 point out. All this issue they argue about the glass
19 shards. I saw Mr. Postic just in closing pick up the
20 steering wheel. He put it down --- almost looked like
21 he got cut or something. He said that I guess that's
22 why they wear gloves. He is saying that there's no
23 glass shards there, there's no glass shards in his
24 Jeep. He is saying there's no glass shards on
25 Donnie's clothes. There are no glass shards on

1 Donnie's beard? I mean, I hate to say it, but I think
2 Mr. Postic just showed y'all that there were glass
3 shards.

4 (Pause.)

5 I mean, y'all saw that. You can look at it
6 again. Take it back to the jury room. You can look
7 at it there, too. You see that stuff in there. This
8 is just like it. If y'all want to see it.

9 MR. POSTIC: Judge, this stuff is in evidence.

10 THE COURT: He's got a right to ---

11 MR. POSTIC: I feel like he's improperly
12 addressing the jury.

13 THE COURT: I think you held up some of the
14 evidence for the jury to see.

15 MR. MOAK: Y'all saw that.

16 MR. POSTIC: Thank you, Your Honor.

17 MR. MOAK: And then y'all saw Mr. Postic ---
18 y'all saw Mr. Postic pull his finger back as if he had
19 been cut on a steering wheel, but he wants to argue
20 there's no glass.

21 In his opening statement, one of the things that
22 Mr. Postic mentioned was just because Donnie Thigpen
23 has two indictments does not make him guilty, okay.

24 What makes him guilty is that --- and this is
25 what makes the most sense, is that the morning when

1 the Jeep is found, when the troopers go to ask him,
2 "What do you know about what happened to your Jeep,"
3 Mr. Postic asked you, "Does this look like somebody
4 who has been in such a wreck?"

5 Well, the trooper that comes out there is Tom
6 Borowski, 24 years experience with the Highway Patrol,
7 seen multiple fatalities, multiple driver fatalities,
8 the first thing he noted when he got there, and he
9 testified to this, he saw the burn marks, which every
10 trooper testified that they had seen burn marks from
11 an airbag, they've seen those. They've seen them
12 multiple times. Some of the troopers had them
13 themselves, and that's an airbag mark. An airbag mark
14 obviously has to have an airbag explode to give an
15 airbag mark. They have that.

16 They saw the glass shards. They saw Mr. Thigpen
17 heavily intoxicated. Mr. Thigpen couldn't tell them
18 where his Jeep was at, had no explanation of how he
19 got home or that he would stick with or where he was
20 at the night before, so immediately that's what's
21 called probable cause. That's why I asked Trooper
22 McKenzie if he thought he had probable cause, okay.

23 They take him to the hospital. They get the
24 blood drawn. Mr. Postic is asking a bunch of
25 questions about like the paint chip, why one trooper

1 went to his car to get a Q-Tip and Borowski tired to
2 hurry up and bring the guy to the trooper, and then
3 when they get to the hospital, why they didn't do like
4 a full medical exam.

5 If you'll recall, when Trooper McKenzie testified
6 and we played that DataMaster tape, Trooper McKenzie
7 testified he only had two hours from the time of
8 arrest to get a DataMaster result into evidence, okay.

9 That DataMaster started at like 1:40, which is
10 two hours and ten minutes after arrest. They're
11 trying to get what they got done in time to get him to
12 the jail, to get that DataMaster blown so they can get
13 that result in front of you.

14 Thankfully, they got blood drawn in that
15 timeframe, but unfortunately, they didn't get the
16 DataMaster done in time.

17 I'm sorry Trooper McKenzie did not drive fast
18 enough. I'm sorry he did not drive fast enough for
19 you to hear what the DataMaster reading was, okay.
20 I'm sorry. They know they've got a time limit.
21 They're trying to get their job done in accordance
22 with the laws of South Carolina. They don't have time
23 to sit there and have x-rays done on Mr. Thigpen and
24 all this while they're at the hospital.

25 What they're worried about is getting the

1 evidence of this case in a manner that can be
2 presented in court. They don't want it thrown out.
3 They want it in front of you. Thankfully they got
4 that, and y'all heard that Mr. Thigpen was a .218 at
5 approximately 12:30 on June 20th. Okay. I'm glad he
6 got that. Now, and that adds to probable cause, okay.

7 Now, going on to probable cause and reasonable
8 doubt, Trooper Coats, Trooper O'Donnell, and Trooper
9 Borowski went to the jail and interviewed Mr. Thigpen.

10 You may want to listen to it again. You're going
11 to have the audio. You can listen to it all you want
12 to. You're going to hear Trooper Coats reading his
13 Miranda. You're going to hear Trooper Coats ask
14 Donnie Thigpen, "Do you want to talk to me?" He is
15 going to say, "Yes," and you're going to hear Donnie
16 Thigpen trying to say, "I don't remember what happened
17 last night. I blacked out. I don't remember coming
18 home," and listen to what all else he says, okay.

19 He is under the influence. But, if he is under
20 the influence and can't follow what's going on,
21 doesn't know anything, it's awfully strange that he's
22 remembering all these details. He tells the trooper,
23 "I got off work at BOSE around 11:30, I came home, I
24 changed clothes, took my movies back, went and got my
25 cigarettes, went to Brixx, drank three or four beers,

1 went to Friends, three or four more beers." They were
2 Yuengling; he remembered the brand. Vodka Kamikaze,
3 Southern Comfort Kamikazes, two of those, then went to
4 Track Side, three or four more beers. Then all of the
5 sudden, he doesn't remember a thing until he gets home
6 around daylight, had to push the door in, kick the
7 door in because he didn't have any keys. Dog got
8 irate and had to deal with the dog thinking he was
9 breaking in, takes a shower and fell asleep. He
10 remembers that, but in the middle, the ride home from
11 Track Side, the wreck, all that, "I don't remember, I
12 blacked out."

13 It defies logic that you can remember everything
14 up to the trip home and remember getting home and
15 after the trip home and don't remember what's in
16 middle during the trip home.

17 That's why Trooper Coats and, I think,
18 O'Donnell's voice was on there too, asking simple
19 questions, keeps asking him, both, "This doesn't make
20 sense. Nobody is going to believe you can remember
21 all this stuff, but the actual trip home you can't
22 remember a thing."

23 He tells him that he was holding something back.
24 They keep asking him and asking him. He finally
25 admits, "I was driving," tells them, "I take full

1 responsibility," and he didn't have a lot of details,
2 and I submit to you, sometimes I think the truth is in
3 the middle where we like to say he does remember, but
4 he is just lying about it.

5 If he was a .22 at 12:40 he probably was a lot
6 higher then. He may have like Sears said that he may
7 have some short term memory loss. He may not have all
8 the details. He may not have all the details, you
9 know.

10 I think that's the reasonable explanation. He
11 may not want to remember --- to admit that he
12 remembers, but that's what he left on the side of the
13 road, or actually in the woods off the side of the
14 road, on Twenty-five Mile Creek Road. He may want
15 to --- it may actually not be healthy for him to
16 remember that.

17 But listen to his emotions on that audio when he
18 says, "I take full responsibility." It's almost like
19 relief, like he got it off his chest, like he felt
20 better.

21 Is that false? Does that sound false to you?

22 Now, when he testified yesterday, it's almost
23 like he's saying that was drunk night. I'm sober
24 night. Sober Donnie can remember what drunk Donnie
25 blacked out about. Okay. That's almost what he's

1 saying. But the interesting thing is that sober
2 Donnie is saying that everything that drunk Donnie
3 told the troopers on June 20th is a lie, but the funny
4 thing is, everything on that thing right there, those
5 are the same things that sober Donnie is saying that
6 drunk Donnie did that night.

7 The only difference is sober Donnie doesn't
8 remember that he drank Yuengling and doesn't remember
9 what kind of liquor drinks he had. Drunk Donnie
10 remembered the kinds of drink and even the brand.

11 So can the sober Donnie, two-and-a-half years
12 later, really remember better than drunk Donnie or is
13 sober Donnie trying to come up with an explanation to
14 try to get himself out of the trouble that drunk
15 Donnie got him into. What makes more sense, okay?

16 What makes more sense?

17 It makes sense that Donnie, whether it's sober or
18 drunk, they're the same person, and is the driver,
19 okay. State's 110, okay. We got a blood on the
20 headliner, okay.

21 The troopers thought or think that that stain
22 comes from the cut above his right eye that they think
23 could have come from the airbag.

24 They put up a guy named B.J. who says I punched
25 him. I cut him. He was bleeding. They put up

1 witnesses who said Donnie was adamant he was wanting
2 to drive and he got in the driver's seat and they had
3 to move him out. It's almost like --- and Donnie said
4 the headliner sagged so low it hit him. It's kind of
5 like just throwing that out there as an alternative
6 explanation of how Donnie's DNA could be on that blood
7 stain on the headliner and him not be the driver, but
8 think about this.

9 Under that story, the friends got Donnie out of
10 the truck, pushed him or talked him into the getting
11 in the passenger's side. Under that story, Donnie
12 rode in that Jeep in the passenger's side with that
13 cut from Track Side to the gas station where he waited
14 for Melvin to buy an 18-pack of Ice House and then
15 from there back to his house without leaving a blood
16 stain on the passenger's side. That's the only blood
17 stain they found on the headliner. It was above the
18 driver's seat. It wasn't on the passenger's seat. If
19 their theory that it came from the cut of being
20 punched and Donnie had moved from driver side to the
21 passenger side, it would be on both sides.

22 So the fact that it's on the driver's seat, above
23 the driver's seat, shows --- tends to show that Donnie
24 is the driver, okay.

25 The airbag, y'all have seen the pictures of the

1 airbag, okay. The front of the airbag, if you look at
2 the DNA report, there is a profile, and there's some
3 of those on the chart. You'll need to look at it. It
4 doesn't have everything filled in.

5 The swabs for unidentified male are on the front,
6 okay. 8.1 right there is blood, and you see that
7 little 8.3 with an arrow where they swabbed
8 everything. Okay, that's the front.

9 Look at State's 61 and look where Melvin's arm is
10 at on that airbag and Melvin is bleeding, okay. On
11 8.2, on the back, is blood DNA from Donnie Thigpen,
12 okay. Blood DNA from Donnie Thigpen to a chance of
13 one in 13 quadrillion, okay. And there's no real
14 chance it's Donnie's blood?

15 They testified the only way they would expect him
16 to be able to get his blood on that airbag before it
17 deployed was is if he had been like part of the
18 manufacturing, if he had been bleeding, the one that
19 packed it and had bled on it.

20 There is no way for him to get his blood on that
21 airbag unless he was in that Jeep when the airbag went
22 out. Okay, you want to see hey, he might have been
23 there and wasn't the driver, his own witnesses, Tina
24 Moore, the only two people in that Jeep are Donnie
25 Thigpen and Melvin Wright.

1 Ask yourself, was Melvin driving? Looking at
2 that picture where Melvin's arms are on there, is
3 there any question whether Melvin was the driver?
4 Melvin was not the driver. There is no question. The
5 question is who is the driver, and when the DNA
6 results came back, they matched strangely enough,
7 coincidentally enough, they matched the man who
8 admitted to being the driver. It's almost like a
9 little jackpot. It matched the guy who said he did
10 it, okay. Unfortunately for sober Donnie, sober
11 Donnie and drunk Donnie have the same DNA.

12 Now, the glass, I've already talked about that.
13 The burn marks, you know, the troopers have seen many
14 of those and they said was the airbag. It's all
15 strange he has the mark for an airbag and he has DNA
16 on the airbag.

17 Now, Mr. Postic says something about it doesn't
18 make sense about not being on both hands. Well, I
19 hate to point this out, and y'all can watch the
20 animation. Mr. Postic, when he did that thing, that's
21 somebody who like braced for an impact. That's
22 somebody who is trying to avoid impact. There was no
23 braking, nobody hit the brakes in this vehicle, nobody
24 tried to slow that Jeep down. Nobody swerved the Jeep
25 back. That Jeep basically drifted over, hit the edge

1 of the bridge abutment, and went straight into this
2 tree.

3 There was no, "Hey I'm going in the woods. I
4 better get back on the road." There was no, "Hey this
5 ain't good. I'm need to hit the brakes." That's
6 where I think the --- we will submit there probably is
7 some truth that Donnie may have blacked out, because
8 how else is somebody who is conscious going to like
9 drift over, hit a bridge, start pushing up weeds and
10 vines driving in a tree without hitting the brakes,
11 without trying to get back on the road and doing no
12 defensive maneuvers. That doesn't make sense. That
13 he either passed out, blacked out, or had something
14 happen, that makes sense.

15 So they got the guy who owns the Jeep within
16 walking distance of where the Jeep was found with burn
17 marks, with this injury above the eye, they got the
18 blood stain above the driver's side seat. They got
19 the glass shards, you know. Yeah. That's a pretty
20 good guess that's Donnie Thigpen.

21 And another interesting thing is, I don't think
22 we got picture of it --- this is kind of cool, too.
23 On this DNA, there's item 4.3. You can look at item
24 4.3 on the driver's door handle area, okay.
25 O'Donnell, when I asked about DNA evidence collection,

1 said they did a swab with the door area near the
2 handle where it looked like somebody had climbed out,
3 that his hands had slid down the door. Now, look at
4 that. On the first location that comes a 13, 14.
5 Donnie Thigpen is a 13, 14.

6 On the second, third, fourth, the fifth location,
7 which is the next one they got a result on, is a 15.
8 Donnie Thigpen has got a 15 and 17.

9 The next location they got on the door is a 13,
10 2. Donnie is a 13, 2, 16 and then there's an X
11 chromosome, which could be male or female, but all the
12 numbers that they got are consistent with Donnie
13 Thigpen the same way that the touch DNA from 8.3 would
14 be consistent with the 8. --- with the 8.2 from the
15 front of the airbag.

16 And that would be the area where it looked like
17 somebody had put out their hand and slid down the side
18 of the door. That's Donnie Thigpen, too. So we got
19 the burn marks. We got the glass. We got the cut on
20 the head. We got the blood stain above where he sat.
21 We have the blood on the airbag and now we've got
22 partial DNA that kind of matches him on the door where
23 he was climbing out, okay.

24 Remember, he is the one that said he did it,
25 okay. Mr. Postic says we need more. I mean, we have

1 him saying he did it, we got the DNA, you know, why
2 would we check the guy that we know is not the driver
3 to try prove he is the driver. There is no reason to
4 do that. That's what makes the most sense.

5 Now, the various stories we heard. One of them
6 is, and I find this real interesting, yesterday he
7 said that everything he told the troopers on June 20th
8 was the lie. I think he even said it is ridiculous
9 for us to rely on anything he even said that day.
10 Well, this is what he's still saying, okay. So if
11 this was a lie on June 20th, it was lie yesterday,
12 okay.

13 As a matter of fact, we know he's leaving stuff
14 out because his bank records show that he was at CNR,
15 which is another bar and drank there, too. That's
16 something that neither sober nor drunk Donnie, they
17 both forgot about. Okay. What his records show is
18 that at 1:01 in the morning, he ran his card for
19 \$9 --- came back as Wood Fired Pizza, Columbia, South
20 Carolina. I think that's Brixx, the pizza place. At
21 2:52 he runs his card at the Friend's Club, that was
22 \$36 bucks, okay, then at 4:41 at the CNR Station House
23 \$7, and then Track Side at 5:01 for \$14. Okay. He
24 left out one of the bars.

25 There is a little thing called discovery, where

1 we have to give all our evidence over to the defense
2 so they can look at it, so they can go through it, so
3 they can try to identify their defense. You know, he
4 had access to that. He knew that was out there. He
5 still chose not to tell you that he went to CNR bar. I
6 don't know what happened there that he --- maybe he
7 blacked out of that, I don't know, but he was still
8 lying yesterday when he took the stand.

9 Now, another thing that's interesting is
10 Mr. Postic, something about the troopers not trying to
11 follow up on the cell phones. Well, that e-mail talks
12 about Trooper Kelly right here. He called a number
13 from the cell phone, nobody ran it, nobody would call
14 him back. The one guy that did said he hung out at
15 Track Side, but didn't know who Melvin Wright was,
16 okay.

17 Trooper Kelly also testified that the afternoon
18 of the 20th after he left the wreck, he went to Brixx,
19 talked to the manager and then went on to Track Side
20 and was asking does anybody know what happened last
21 night. They wanted to know what went on that night.

22 You heard how they described it. They didn't
23 want to talk to him. Nobody knew anything. Nobody
24 cooperated. Well, it's awfully strange --- and they
25 testified, they didn't even find out this was going on

1 and they were involved last week, Sharla Overton, Tina
2 Moore, B.J., they said they were notified last week
3 that they needed to come to court. These are the same
4 people, the crowd in Track Side, these are the
5 regulars at Track Side. These are the ones that drink
6 at Track Side. These are the people that would not
7 cooperate with law enforcement.

8 As a matter of fact, Sharla Overton and her story
9 about, "I was going to give him a steak because he
10 gave my husband some pizza to try to sober him up."
11 You heard what she said about the wreck. She comes to
12 Track Side with the steak and the bartender says, "Oh,
13 Melvin's dead and Donnie is in jail," and then the
14 troopers came over. She knew they were asking --- she
15 knew the troopers had been to the bar questioning,
16 looking for witnesses, and knew on June 20th and then
17 this just pops up last week and yesterday, okay. Tina
18 Moore didn't find out until last week. We found out
19 also about B.J.

20 I'm going to submit on behalf of the State a lot
21 of this, this thing about --- this thing about Donnie
22 getting punched and all that, I would submit that it
23 sounds to me like this story wasn't made up until last
24 week. This ain't what was said in the audio. You
25 heard about B.J. in the audio.

1 Oh, and in his opening Mr. Postic was arguing
2 that you would find the confession involuntary because
3 it was --- it was given after six hours of
4 investigation --- after six hours of interrogation,
5 that they had him in a room, swept him out after six
6 hours. You now know that ain't true. Okay. After he
7 was booked in on the DataMaster, he is making phone
8 calls. On that audio, you heard him tell the
9 troopers, "I called my grandmother and my girlfriend,
10 Betty. Betty tells me I got into an altercation or
11 argument with B.J." There is nothing said about a
12 fight. They're looking at the cut above his eye.
13 Nothing is said about a fight, okay.

14 We would submit that this story, you know, this
15 new version was what sober Donnie came up with last
16 week to cover-up what drunk Donnie did, okay.

17 Now, the story that Melvin took the Jeep. Donnie
18 Thigpen admitted that they were going home to sleep it
19 off, okay. His own witness, Tina Moore says they
20 followed them to the gas station and Melvin got an
21 18-pack of beer, okay. Mr. Postic, in his closing
22 argument, was trying to say that --- it sounded like
23 he was trying to argue that Melvin went to the house,
24 dropped Donnie off at the house and then went and got
25 beer, but their own witnesses what they testified to,

1 if you believe it, is that Melvin bought the beer with
2 Donnie on the way back with the first trip.

3 Okay, now, questions you might want to ask, okay.
4 If he is going home with Donnie at 5:30 to sleep off
5 his drink, does it make sense he is going to change
6 his mind once he gets to the house to go to sleep.
7 They talk about Donnie wanting to go to sleep so bad.
8 Donnie testified that he wasn't in a position to say
9 who was drunker, but he testified that Melvin was
10 pretty drunk, okay. If Donnie wants to go to sleep so
11 bad, why doesn't Melvin? Why does it make sense for
12 Melvin to change his mind and nobody knows where he
13 was going, to drop Donnie off and then go to some
14 undisclosed location, okay.

15 Who would be up at 5:30 who wasn't already at the
16 bar? Okay. The people they were hanging out with,
17 according to them, Tina Moore and Leon are coming to
18 the house anyway to check on them. Who else is he
19 going to see at 5:30. If Melvin goes and finds
20 somebody else, who is he going to wake up and get to
21 drive him around at 5:30 in the morning? Also, it's
22 awfully strange that the Jeep is heading to Donnie's
23 house, is going the same way that Donnie admits they
24 were going that way. Okay. Does that make sense?

25 When Donnie was first asked, and he probably was

1 pretty drunk at his house, he was saying that a friend
2 dropped me off and that when asked who the friend was,
3 he then switches to it was a stranger and then denies
4 knowing who was in the Jeep. Then I think even
5 Mr. Postic was pointing out that even on the roadside
6 when they took him to where the accident was, he made
7 a point of looking away from where the accident was
8 and saying, "I don't see a wreck."

9 I submit that's probably the best evidence when
10 you take that wrecked car, know who did it to the
11 scene, and he just looks the other way and says, "I
12 don't see the wreck." He knows which direction that
13 wreck was at. He knew which direction. He knew where
14 that wreck was. He didn't want to look that the
15 wreck.

16 Does it make sense that Melvin dropped Donnie
17 off? Okay. The door. If Melvin drops Donnie off,
18 why don't they let Donnie in the house before he
19 leaves?

20 Does that make sense? Why are you going to push
21 the door in that you may end up having to buy a new
22 lock, get your door fixed, pay money when all you have
23 to do is get the keys, if the keys are there with you.
24 What makes more sense is the keys aren't with him
25 because he knows they're in the ignition back in the

1 Jeep which he just wrecked. That makes more sense.

2 Tina, she testified her and Leon followed them to
3 the gas station, were following them back and there
4 was a spot where they broke off to check on some
5 animals or something, they came back, knocked on the
6 door, didn't see a Jeep, nobody answered the door.
7 She didn't say anything about --- the door was locked
8 and there was nothing wrong with the door. Well, we
9 got the pictures. Y'all can look at them. I mean,
10 that door was there. It looked like it was pushed in.
11 You have the foot marks on the bottom. You have the
12 push marks on the top. The dirt looks just like this
13 on the hand. I mean, y'all saw that. That's the same
14 color dirt. That's even the same hand where he would
15 have been pushing at. Okay. She doesn't say anything
16 about the door. What she does say is that they left
17 the opposite of where they came in because they want
18 to check to make sure nothing happened with the Jeep.

19 Okay. If Melvin is sober that he is driving, why
20 is she worried that the Jeep broke down, wrecked, flat
21 tire, whatever. It makes more sense that the reason
22 she wants to check it is because drunk Donnie is the
23 one behind the wheel of the car. That's what makes
24 more sense.

25 And again, like the Caywood guy, okay. Was it

1 David Caywood who was Donnie's friends since they were
2 12? You know, he came up here to back his friend up,
3 to tell you how changed he is and all this and that,
4 but it's interesting that he said that everything that
5 he has about Donnie, the source of all his testimony
6 about sober Donnie not being drunk Donnie no more is
7 from sober Donnie.

8 Caywood must not have gotten the memo about the
9 black out story change, because Caywood testified that
10 he had been around drunk Donnie when he blacked out
11 and drunk Donnie remembered everything. Then after he
12 testified, sober Donnie came up and changed it, I
13 remember, no that's not true. I do remember. I
14 didn't blackout, okay. It must be that his buddy
15 Caywood must not have gotten the memo on that one.

16 What he tells the troopers at the scene --- or at
17 the house, the last time he saw his Jeep was at
18 three o'clock, well, he is saying that he drove with
19 friends to Track Side. Well, he paid the tab at
20 Friends at like 2:52, so at three o'clock, which
21 is --- oh, that's when he was originally trying to
22 start black out. 3:00 o'clock, he is probably driving
23 the Jeep. He pays the tab. He goes between friends
24 and Track Side. He is driving the Jeep drunk enough
25 that he claims he was blacked out.

1 Now, as drunk as he was, Sears testified that you
2 would expect some memory loss. He doesn't have a lot
3 of details when he finally comes out and says it, but
4 those troopers kept asking him. They knew something
5 was there. They didn't know if it was, "I did it, I'm
6 sorry. I didn't mean to do it." They didn't know if
7 it was --- for all they knew, it could have been this
8 new story about getting punched and all that. They
9 didn't know. They knew he was hiding something.
10 They're asking --- what did they tell him? "Hey, if
11 it was a deer that jumped out and caused the wreck, we
12 would believe that. Tell us something," and what's
13 Donnie say? "That would be a lie."

14 Donnie knows, in the condition he's in at
15 five o'clock that day, he knows truth versus lie.
16 Mr. Postic keeps calling him a kid that dropped out of
17 the school. Well, this kid over here, poor Donnie, he
18 will be 28 next months. He dropped out at 11th grade
19 but he testified that the reason he dropped out is
20 because knew he could pass the GED and he decided to
21 get a job and work. Okay, and what does he do now?
22 He makes circuit boards, okay. This ain't no Special
23 Ed kid that has problems following you. This is a guy
24 that is highly intelligent, okay.

25 You listen to his voice. Listen to the

1 conversation back and forth. He knows what's going
2 on. They're accusing the troopers --- this man right
3 here, Monty Coats, they're saying this man right here
4 told him what to say, everything he said Coats told
5 him what to say.

6 Now, the seat belt, the only thing they've got
7 showing he's got the seat belt was him. Once he says
8 that, they agreed with him. That's the good part of
9 that. They had to ask him, "Hey, were you wearing a
10 seat belt?" He said, "I wasn't wearing a seat belt."
11 Check that off, you know. That's one of the few
12 details he had from the wreck, but he did say, "Tell
13 the family I take full responsibility. It was an
14 honest mistake." At one point, he would start saying,
15 "I took my eyes off the road and I swerved."

16 They said, "No, you didn't swerve," and that's
17 because they knew how this thing happened. He doesn't
18 swerve. You know. It might be that he nodded off and
19 woke up and hit the bridge, you know.

20 It doesn't really make sense that somebody would
21 be conscious during this wreck because a conscious
22 person would have done something to try to avoid it.
23 The fact that there is no avoidance makes more sense
24 that he may have had a blackout issue, okay.

25 Some of the things he gave them during the

1 statement, he told them he paid the bar tab with his
2 debit card. That's the bank they got that. You know,
3 he is telling him things that are true, things that
4 are corroborated.

5 Now, does it make more sense that Donnie was
6 driving? We would submit, yeah. We would submit
7 beyond a reasonable doubt he is the driver. He's got
8 his blood on the driver airbag and to this point,
9 there's been no allegation of a third person, okay.

10 That airbag was on it because Melvin Wright laid
11 on it and his blood got on there. There is no real
12 explanation for how his blood is on that airbag if he
13 is not in the vehicle in the driver's seat when it
14 goes off. There is no explanation. We have the DNA
15 off the headliner above the driver's seat, and we've
16 got his head with the mark.

17 Granted, they have an alternative explanation as
18 to how that cut got there, but their explanation would
19 involve there being another blood stain, which doesn't
20 exist, so we would submit the DNA shows he is the
21 driver. He says he is the driver. Common sense tells
22 you that --- we're at trial, okay.

23 Does anybody really --- did anybody really expect
24 him to get up there during trial and say yeah, I did
25 it, okay.

1 He knows what we told the trooper. If he was
2 saying yeah I did it, we are wouldn't be in trial. It
3 would have been a plea probably.

4 When he took the stand, he is going to trial, he
5 has got to tell something, and this is the best he
6 could come up with. That's the best he can come up
7 with is four drinking buddies that he found last week,
8 a story about a mark over the head that would have
9 another --- you have to have a blood stain that's not
10 there to back that story up. That's what he came up
11 with.

12 So yesterday, you know, he said he's not a liar,
13 but he's saying he lied to the troopers the entire
14 time on June 20th and --- listen to the audio, listen
15 to his emotions. Listen to him when he says, "Melvin
16 didn't deserve this. Why couldn't it have been me."
17 Listen to him when he says, "How come Melvin had to be
18 in my car the one time I had a wreck."

19 You know, "Tell them I didn't do --- I didn't do
20 everything I could. I could have done more if I
21 hadn't been half drunk. I should have called 9-1-1.
22 I wish I did." Listen to that. Listen to the
23 emotion. Listen to how he said it. False confession?
24 No, that's the guilt coming out. That's the day of
25 and he knows what he did. He knows the troopers ain't

1 buying his story, and he finally just comes clean.
2 You can hear the emotion of him coming clean in there.

3 Now, two-and-a-half years later, sober Donnie has
4 come up with a story, and that's all it is, is a
5 story. it's not truth. It's not backed up by the
6 evidence. It's not backed up by the airbags. Not
7 backed up by the DNA, not backed up by the bank
8 records. Not backed up by the glass shards, not
9 backed up by anything other than his drinking buddies
10 that he found last week. Now, when you go back to the
11 jury room, you're going to look at all this evidence.
12 You're going to have all these pictures.

13 I think they said there's 146 pieces of the
14 evidence? That sounds like a lot and there are a lot
15 of pictures, but there's a pretty good chunk of
16 pictures that didn't come in. So, I don't think it
17 really is 146, but y'all will look at the scene
18 pictures, his pictures, the house pictures from the
19 search warrant, you're going to look at clothes,
20 listen to the audio.

21 Once y'all do that, once you go back there and
22 honestly look at it and think about what really
23 happened, you're going to find that Donnie Thigpen did
24 on June 20, 2009, commit the crime of felony DUI death
25 and leaving the scene of accident, death.

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1 He was the driver. He was under the influence.
2 He drove the Jeep. He hit that tree. He killed
3 Melvin, and then he ran. In his own words, "I
4 panicked and I ran." That's what you're going to
5 find, and you're going to render a true saying, a
6 verdict of guilty on both charges. Thank you.

7 THE COURT: Thank you, Mr. Moak.

8 JURY CHARGE:

9 THE COURT: Well, ladies and gentlemen, you've
10 heard all the testimony. You've heard the arguments
11 of both the State and the defendant, and you will take
12 to the jury room with you all the evidence that's been
13 introduced in this case.

14 Now, from time to time I've had juries send out a
15 message to me asking that I send them a copy of what
16 I'm about to go over with you. I generally am not
17 able to do that. Some states it is done, but it's
18 generally not done in South Carolina, so I ask you to
19 pay close attention as I explain the law to you as it
20 applies to this case.

21 There are a few things I want to remind you of
22 that I told you on Monday and Tuesday in my opening
23 remarks. Under our constitution and code of laws,
24 only the jury can make findings of fact in this case.
25 I am not permitted to indicate to you how I might feel

1 about the facts. If I have said or done anything
2 during the course of the trial to indicate to you that
3 I have an opinion about the facts in this case, please
4 disregard that. You must independently weigh the
5 evidence presented at the trial and render verdict
6 based on that evidence.

7 The same constitution and laws which designate
8 and make you the finders of fact also make me the
9 instructor of the law. If you have some idea of what
10 the law is or the law ought to be and it does not
11 agree with what I now tell you the law is, you are
12 obligated under the oath that you have taken to
13 abandon any preconception on your part and accept and
14 apply the law as I now state it to you.

15 Now, the indictments in this case, and you will
16 have the indictments with you in the jury room, allege
17 two offenses against the defendant. First, felony
18 driving under the influence involving death and
19 leaving the scene of an accident involving death.

20 Each charge is a separate and distinct offense.
21 You must decide each indictment for the defendant
22 separately on the evidence and the law applicable to
23 it uninfluenced by your decision as to the other
24 indictment.

25 The defendant may be separately convicted or

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1 acquitted on both or either of the offenses charged.
2 You'll be asked to write a verdict, a separate verdict
3 of guilty or not guilty for each indictment and for
4 each defendant --- I'm sorry, for each indictment, not
5 for --- there is only one defendant.

6 I remind you the fact that the defendant was
7 arrested, charged and indicted in this case is not
8 evidence in this case. It cannot be considered by you
9 as evidence of guilt in this case, nor does it create
10 any presumption or inference of guilt.

11 The indictments are simply the formal legal
12 documents, which contain the charges made against the
13 defendant. They are the formal documents by which the
14 case is brought into court.

15 Now, the defendant has pled not guilty to each of
16 these indictments. That plea puts the burden on the
17 State to prove the defendant guilty.

18 As I told you before a person charged with
19 committing a criminal offense in South Carolina is
20 never required to prove himself or herself innocent,
21 and I charge you again, and this is an important rule
22 of law, that a defendant in a criminal trial, no
23 matter what the seriousness of the crime or charge may
24 be will always be presumed to be innocent of the crime
25 for which the indictment was issued unless guilt has

1 been proven by evidence satisfying you of that guilt
2 beyond a reasonable doubt.

3 This presumption of innocence does not end when
4 you begin your deliberations, but it accompanies the
5 defendant throughout the trial until you reach a
6 verdict of guilt based on evidence satisfying you of
7 this guilt beyond a reasonable doubt.

8 In other words, a presumption of innocence is not
9 a mere legal theory. It's not just a legal phrase.
10 It is a substantial right to which every defendant is
11 entitled unless you the jury are satisfied from the
12 evidence of the defendant's guilt beyond a reasonable
13 doubt.

14 Well, what is a reasonable doubt in the law? A
15 reasonable doubt is a kind of doubt that would cause a
16 reasonable person to hesitate to do something. In
17 other words, a reasonable doubt is the kind of doubt
18 that would cause a reasonable person to hesitate to
19 act.

20 The State has the burden of proving the defendant
21 guilty beyond a reasonable doubt. Some of you may
22 have served as jurors in civil cases where you're told
23 that it's only necessary that's a fact to be proved is
24 more likely true than not true, such as by the greater
25 weight or preponderance of the evidence.

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1 In criminal cases, however, the State's proof
2 must be more powerful than that. It must be beyond a
3 reasonable doubt.

4 To think the defendant is probably guilty or
5 circumstances are suspicious is not enough. Proof
6 beyond a reasonable doubt is proof that leaves you
7 firmly convinced of the defendant's guilt.

8 Now, there are very few things in this world that
9 we know with absolute certainty. In criminal cases
10 the law does not require proof that overcomes every
11 possible doubt. If based on your consideration of the
12 evidence you are firmly convinced that the defendant
13 is guilty of the crime charged, you must find the
14 defendant guilty. If on the other hand, you think
15 there is a real possibility that the defendant is not
16 guilty, you must give the defendant the benefit of the
17 doubt and find him not guilty.

18 Now, there are two types of evidence which are
19 generally presented during a trial. Direct evidence
20 and what we call circumstantial evidence. Direct
21 evidence is the testimony of a person who claims to
22 have actual knowledge of a fact, such as an
23 eyewitness. It is evidence which immediately
24 establishes the main fact to be proved, but
25 circumstantial evidence and there is a considerable

1 amount of circumstantial evidence in this case, is
2 proof of a chain of facts and circumstances indicating
3 the existence of some fact.

4 It is evidence which immediately establishes
5 collateral facts from which the main fact may be
6 inferred.

7 Circumstantial evidence is based on inference and
8 not on personal knowledge or observation, but the law
9 makes absolutely no distinction between the weight or
10 value to be given to either direct or circumstantial
11 evidence, nor is a greater degree of certainty
12 required of circumstantial evidence than of direct
13 evidence.

14 You should weigh all the evidence in the case and
15 after weighing all the evidence, if you're not
16 convinced of the guilt of the defendant beyond a
17 reasonable doubt, you must find the defendant not
18 guilty.

19 Now, necessarily, you must determine the
20 credibility of witnesses who testified in this case.
21 Credibility simply means believability. It becomes
22 your duty as jurors to analyze and evaluate the
23 evidence and determine which evidence convinces you of
24 its truth.

25 In determining the believability of witnesses who

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1 testified in this case, you may believe one witness
2 several witnesses or several witnesses over one
3 witness.

4 You may believe part of the testimony of a
5 witness and reject the remaining part of the testimony
6 of the same witness. You may believe the testimony of
7 a witness in its entirety or reject the testimony of
8 any witness in its entirety. You may consider whether
9 any witness has exhibited to you any interest or bias,
10 prejudice or other motive in this case, and you may
11 also consider the appearance and manner of the witness
12 while on the witness stand.

13 Now, you know there has been a statement that has
14 been alleged to have been made by the defendant in
15 this case, and it has been admitted into evidence in
16 this case.

17 While the court, that is me, I have determined
18 that the statement was admissible, I instruct you that
19 you make the ultimate decision of whether or not the
20 defendant made the statement.

21 If the defendant did make the statement, you must
22 determine whether the statement was made by the
23 defendant voluntarily and of his own free will.

24 This means that the statement was not caused by
25 pressure or force or fear or threats or coercion or

1 intimidation or by hope or a promise of leniency or a
2 reward of any kind.

3 In determining that the statement was voluntary,
4 you should consider the characteristics of the
5 defendant and the details of the questioning.

6 Some of the factors you may consider are the age
7 of the defendant, the defendant's education or lack of
8 education, the defendant's mental ability or capacity,
9 the defendant's IQ or intelligence, the defendant's
10 background and environment, the place and length of
11 the detention, the nature of the questioning and the
12 advice or lack thereof to the defendant of his
13 constitutional rights, including but not limited to
14 the right to remain silent, which means the defendant
15 has the right to terminate the interrogation at any
16 time, that any statement could be used against him in
17 a court of law, the right to have a lawyer present,
18 that if he could not afford a lawyer, a lawyer would
19 be appointed to represent him without any cost.

20 You must consider all the surrounding
21 circumstances before you give any weight to the
22 alleged statement.

23 The State has the burden of proving beyond a
24 reasonable doubt that the alleged statement was
25 voluntary. If you determine it was, you may give the

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1 statement any further consideration that you deem
2 proper. You must decide what weight, if any, should
3 be given to the alleged statement.

4 If you determine the alleged statement was not
5 free and voluntary statement of the defendant, you
6 should not consider the statement at all.

7 Now, we had some expert witnesses who testified
8 in this case. Rules of Evidence, those are the rules
9 that govern our trial procedures, ordinarily do not
10 permit a witness to testify about their opinions or
11 conclusions. An exception to this rule exists for
12 witnesses we call expert witnesses, a witness who by
13 his education and experience has become expert in some
14 art or science or profession or calling may state an
15 opinion to you as to relevant and material matters in
16 which the witness claims to be an expert and may also
17 state the reasons for that opinion.

18 You should consider any expert opinion received
19 in this case like any other evidence. Give it the
20 weight you think it deserves. If you decide the
21 opinion of an expert witness is not based on
22 sufficient education or experience or if you conclude
23 that the reasons given in support of the opinion are
24 not sound or that the opinion is outweighed by other
25 evidence, you may disregard the opinion entirely.

1 An expert witness's testimony in other words, is
2 to be given no greater weight than that of any other
3 witness simply because the witness is an expert.
4 Further, you are not required to accept an expert's
5 opinion even though it's not contradicted.

6 As you know, the defendant is charged with felony
7 driving under the influence involving death. The
8 State must first prove beyond a reasonable doubt that
9 the defendant drove a vehicle while under the
10 influence of alcohol or drugs. Driving a motor
11 vehicle means that the vehicle was in motion. This
12 may be proved by direct or circumstantial evidence.

13 The movement of a vehicle might occur without any
14 affirmative act by a driver or by any person. If a
15 vehicle is moved by some power beyond the control of
16 the defendant or by accident, that would not be
17 driving.

18 The State must prove beyond a reasonable doubt
19 that the defendant was sufficiently under the
20 influence to impair his ability to drive with
21 reasonable care, with due regard for others and
22 himself or as a reasonably prudent person would drive.

23 It's not necessary to show that the defendant was
24 in a helpless condition, passed out or even
25 intoxicated. On the other hand, the fact that the

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1 defendant at some time prior to this incident drank an
2 alcoholic beverage or took a drug does not prove that
3 the defendant was driving under the influence.

4 Next, the State must prove that while driving,
5 the defendant did an act forbidden by law or neglected
6 a duty imposed by law, and finally the State must
7 prove beyond a reasonable doubt that the act or
8 neglect of the defendant proximately caused great
9 bodily injury or death to another person.

10 The amount of alcohol in the defendant's blood at
11 the time of the alleged violation as shown by chemical
12 analysis of the defendant's blood or other bodily
13 fluids may be considered by you in deciding whether
14 the defendant was under the influence.

15 If the alcohol concentration was eight one
16 hundreds of one percent or more, it may be inferred
17 that the defendant was under the influence --- was
18 under the influence.

19 This inference is simply an evidentiary fact to
20 be considered by you along with the other evidence in
21 the case, and you may give it the weight you decide it
22 should receive.

23 The defendant is also charged with leaving the
24 scene of an accident causing personal injury or death
25 to another person. The State must prove beyond a

1 reasonable doubt that the defendant was driving a
2 vehicle, the vehicle was involved in an accident, the
3 accident caused death another person, the defendant
4 did not stop or failed to return and remain at the
5 scene, and five, that the defendant failed to give his
6 name, address, and vehicle registration number, and if
7 asked, failed to show his driver's license, and the
8 defendant failed to give reasonable assistance to the
9 injured person.

10 Reasonable assistance includes taking the person
11 to the doctor or hospital or making arrangements to
12 have the person taken, if it is apparent that
13 treatment is needed or if the injured person asked for
14 treatment. The State must also prove beyond a
15 reasonable doubt that the defendant knew or should
16 have known that the accident happened. This may be
17 shown by evidence of circumstances and conditions
18 which would cause an ordinary reasonable person to
19 believe that the vehicle had been involved in an
20 accident resulting in personal injury or death to
21 another person.

22 If you find, after reviewing all the evidence,
23 that the State has proved that the defendant was only
24 present at the scene of the crime and that they have
25 not proved beyond a reasonable doubt any other

1 participation in the crime, then you must find the
2 defendant not guilty.

3 The law is that proof of presence at the scene of
4 a crime alone is not sufficient to find someone
5 guilty.

6 When voluntary intoxication has not produced a
7 permanent injury, it is not a defense to a crime. A
8 person who voluntarily becomes intoxicated is just as
9 responsible for the acts committed while intoxicated
10 as when the person was not intoxicated.

11 Now, ladies and gentlemen, in just a minute, you
12 are going to retire to the jury room to begin your
13 deliberations. I want to remind you during those
14 deliberations that you must not communicate with
15 anyone or provide any information to anyone by any
16 means about this case. You're not going to be able to
17 use any reference material including the internet,
18 obviously, a dictionary or encyclopedia or any other
19 material for research purposes. If you learn that a
20 juror has violated this instruction, you're directed
21 to report it to the court immediately.

22 Now once again, nothing that I may have said or
23 done during the course of this trial or during the
24 course of these instructions has in any way been
25 intended to express or suggest a view of the case or

1 an opinion of the facts, the weight of the evidence or
2 the credibility of the witnesses.

3 If any of my actions or words have seemed to so
4 indicate, please disregard such and form your own
5 opinion on these matters. I am required to declare
6 the law, as I've done through these instructions to
7 help guide you to a just and lawful verdict. Whether
8 some of the these instructions will apply will depend
9 on what you find to be the facts.

10 The fact that I've instructed on various subjects
11 in this case must not be taken by you as indicating an
12 opinion of this court as to what you should find to be
13 the facts to be or what your verdict should be.

14 Now, there are two possible verdicts for each
15 charge that you may find in this case. Obviously
16 guilty or not guilty, and there is no significance to
17 the order in which I state these possible verdicts.

18 All 12 of you must agree on a verdict on each
19 indictment. Your verdict cannot be based on sympathy
20 or passion or prejudice or emotion or any other
21 consideration that's not in evidence in this case.

22 Mr. Foreperson, when the jury agrees on a
23 verdict, I'm going to send to you, as I say, the
24 indictments to the jury room and in the bottom
25 left-hand corner of the face of the indictment is a

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1 place for your verdict.

2 If you will write either --- on each indictment
3 your verdict, not guilty or guilty, sign your name and
4 date it, knock on the jury room door and we will
5 receive your verdict.

6 I believe Madam Clerk has ordered --- she is
7 shaking her head yes, lunch for you: It may be --- is
8 it here in.

9 THE CLERK: It's on his its way.

10 THE COURT: Just relax for a few minutes before
11 you start your deliberations. I will say during your
12 deliberations, you can go ahead and eat your lunch.
13 You can stop and eat your lunch and begin your
14 deliberations afterwards.

15 Now, you're going --- the bailiffs are going to
16 bring to the jury room all of this evidence. We'll
17 even send in some surgical gloves for you if you feel
18 you need to use them.

19 Now, I'm not sure --- I will check with the
20 lawyers when you retire to the jury room about the CDs
21 and how you're going to play them if you wish to do
22 so. It's up to you. Whether you want to play these
23 CDs or not, all we need to know is we'll move the
24 equipment in to the jury room for you if you wish to
25 play any of the --- how many CDs are there?

1 MR. PERRY: I think three or four, Your Honor.

2 THE COURT: Three or four. Okay. Well, let us
3 know. Mr. Foreman, let us know if the jury wants to
4 hear those or watch those. That will be fine, but in
5 the mean time, I'm going to ask you not to start your
6 deliberations until the bailiffs bring the evidence to
7 you. Once you have the evidence and the verdict --- I
8 mean, the indictments for your verdict then you may
9 begin your deliberations.

10 All right. Ladies and gentlemen. I'm turning it
11 over to you. Thank you very much.

12 (WHEREUPON, the jury left open court at
13 approximately 12:50 p.m.)

14 THE COURT: Any exceptions to the charge from the
15 State?

16 MR. MOAK: No, Your Honor.

17 THE COURT: From the defense?

18 MR. POSTIC: No, sir.

19 THE COURT: All right. Fine. All right, counsel
20 if you will get with the court reporter and make sure
21 all the evidence is available and ready to go to the
22 jury.

23 MR. MOAK: Your Honor, a couple of the CDs, the
24 DataMaster and the one where Trooper Kelly videoed
25 that has some stuff you excluded.

1 THE COURT: Well, let's hope they don't ask for
2 it. We may have to send my clerk in to play it.

3 MR. POSTIC: Okay, or we could play it out here.

4 THE COURT: Or play it out here. All right.

5 Stand at ease until we hear from the jury.

6 MR. POSTIC: Thank you, Your Honor. Wait a
7 minute hold on a moment counsel, let me see you a
8 minute. That's all right. Go ahead and be excused.

9 (WHEREUPON, there was a bench conference.)

10 (WHEREUPON, the jury began their deliberations at
11 1:03 p.m.)

12 THE COURT: Come to order, please, I need to
13 dismiss the alternates. Craig.

14 THE DEPUTY: Yes, sir.

15 THE COURT: Come to order, please.

16 THE DEPUTY: Yes, sir.

17 THE COURT: I need to dismiss the alternates.

18 Who is 31? Are you 31?

19 ALTERNATE JUROR: Yes, sir.

20 THE COURT: And 75? That was a long week, wasn't
21 it?

22 ALTERNATE JUROR: Yes, sir, it was.

23 THE COURT: Well, obviously I can't let you sit
24 in the jury room during the deliberations because you
25 were chosen as alternates.

1 I will tell you, many times, many times we have a
2 problem during the week with a juror who gets sick or
3 a car won't start or any number of things that happen.
4 We just have to have alternates, so I really do
5 appreciate your being willing to serve. It's been an
6 interesting week, hasn't it?

7 ALTERNATE JUROR: Yes, sir, it has.

8 THE COURT: I hope you kind of learned some
9 lessons this week.

10 ALTERNATE JUROR: Yes, sir.

11 THE COURT: Now, we're going to make sure you get
12 some lunch, and I'm not sure, is it here yet or it's
13 on the way?

14 THE BAILIFF: I think they may be getting it out
15 now.

16 THE COURT: You're certainly free to --- I think
17 you can eat it, take it with you. I think it's just a
18 pizza. You can do whatever you want to do. Let me
19 say one thing, if anybody wants to talk to you about
20 this case, you can talk to them if you want to, but
21 you don't have to. If you feel like you just want to
22 remain silent, that's fine. If anybody bothers you
23 about it, just let me know or let the bailiffs know.
24 I'll take care of it.

25 Another thing, you can stay and wait to see what

1 the jury does. You can sit in the audience just like
2 everybody else. You don't have to. You're going to
3 be free to go, but I do want to thank you for your
4 service this week. It's been a long and --- I say
5 interesting, but it's been a long week.

6 Usually trials don't last this trial, but it did.
7 Just a lot of facts to be brought in front of the
8 jury. So I want to thank you on behalf of these
9 lawyers, too, and they know that without jurors that
10 are willing to come and sit, we can't get anything
11 done. We can't get --- the cases just will not get
12 resolved because this is our system. This is the way
13 it works. I hope you had a pleasant week, learned a
14 little bit. I'm going to thank you for your service.
15 You're going to get a big check in the mail from the
16 Clerk of Court, but it's not going to make a car
17 payment, so thank you very much for your service.
18 You're now dismissed.

19 Now, they'll take you and show you if they've got
20 some lunch for you.

21 (WHEREUPON, the alternates left the courtroom.)

22 THE COURT: All right. Stand at ease until we
23 hear from the jury.

24 (WHEREUPON, a break was taken.)

25 THE COURT: All right. I've been informed that

1 the jury has reached a verdict. I want to just --- I
2 probably don't need to say it, but I do need to say
3 it. Cases like this are fairly sensitive and I know
4 your emotions are probably on edge, both sides.

5 I want to caution you about any outbursts when
6 the jury --- whichever side they decide for, I caution
7 you against any outbursts. This is still a court of
8 law.

9 This is still the business of the court, and we
10 will conduct business in a respectful way, so anybody
11 that just feels they need to show their emotions, I
12 ask you to please step outside, or I will have to have
13 law enforcement remove you from the courtroom.

14 All right. Counsel, the bailiffs inform the
15 court that the jury has reached a verdict. Are you
16 ready to receive the verdict?

17 MR. PERRY: We are, Your Honor.

18 THE COURT: Defense ready?

19 MR. POSTIC: Yes, Your Honor.

20 THE COURT: Bring the jury.

21 THE BAILIFF: All right.

22 (WHEREUPON, the jury returned to open court with
23 the verdict at 2:58 p.m.)

24 VERDICT:

25 THE COURT: Mr. Foreman, has the jury reached a

Verdict

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1 verdict?

2 THE FOREMAN: Yes, Your Honor, we have.

3 THE COURT: Will you please hand it to the
4 bailiff.

5 All right. Madam clerk, if you will publish the
6 verdict, please.

7 THE CLERK: Thank you, Your Honor. This is the
8 State of South Carolina, County of Kershaw, the State
9 vs. Donnie Roland Thigpen, indictment number
10 2009-GS-28-1171 for leaving the scene of the accident.
11 We the jury unanimously find the defendant guilty.

12 On indictment 2009-GS-28-1164 for felony DUI, we
13 the jury unanimously find the defendant guilty. It is
14 signed by the foreperson, juror number 178.

15 Mr. Foreman and ladies and gentlemen of the jury,
16 if these are your verdicts, please signify by raising
17 your right hand.

18 THE COURT: Any desire to poll the jury?

19 MR. POSTIC: Please, Your Honor.

20 THE COURT: Madam clerk, poll the jury?

21 THE CLERK: Thank you, Your Honor.

22 THE CLERK: Juror number 187, was this your
23 verdict?

24 JUROR: Yes.

25 THE CLERK: Is it still your verdict?

1 JUROR: Yes.

2 THE CLERK: Thank you. Juror number 57, was this
3 your verdict?

4 JUROR: Yes.

5 THE CLERK: Is it still your verdict?

6 JUROR: Yes.

7 THE CLERK: Thank you. Juror number 20, was this
8 your verdict?

9 JUROR: Yes.

10 THE CLERK: Is it still your verdict?

11 JUROR: Yes.

12 THE CLERK: Thank you. Number 34, was this your
13 verdict?

14 JUROR: Yes.

15 THE CLERK: Is it still your verdict?

16 JUROR: Yes.

17 THE CLERK: Thank you. Number 78, was this your
18 verdict?

19 JUROR: Yes.

20 THE CLERK: Is it still your verdict?

21 JUROR: Yes, ma'am.

22 THE CLERK: Thank you. Number 67, was this your
23 verdict?

24 JUROR: Yes, ma'am.

25 THE CLERK: Is it still your verdict?

Verdict

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1 JUROR: Yes, ma'am.

2 THE CLERK: Thank you. Number 97, was this your
3 verdict?

4 JUROR: Yes.

5 THE CLERK: Is it still your verdict?

6 JUROR: Yes.

7 THE CLERK: Thank you. Number 180, was this your
8 verdict?

9 JUROR: Yes.

10 THE CLERK: Is it still your verdict?

11 JUROR: Yes.

12 THE CLERK: Thank you. Number 113, was this your
13 verdict?

14 JUROR: Yes.

15 THE CLERK: Is it still your verdict?

16 JUROR: Yes.

17 THE CLERK: Thank you. Number 178, was this your
18 verdict?

19 JUROR: Yes, ma'am.

20 THE CLERK: Is it still your verdict?

21 JUROR: Yes, ma'am.

22 THE CLERK: Thank you. Number 55, was this your
23 verdict?

24 JUROR: Yes.

25 THE CLERK: Is it still your verdict?

1 JUROR: Yes, ma'am.

2 THE CLERK: Thank you. Number 37, was this your
3 verdict?

4 JUROR: Yes.

5 THE CLERK: Is it still your verdict?

6 JUROR: Yes.

7 THE CLERK: The jury has been polled, Your Honor.

8 THE COURT: All right. Thank you very much.

9 All right. Ladies and gentlemen of the jury, I
10 want to thank you very much for your service this

11 week. It's been a long week, and it's been a
12 difficult case. I've noticed you've been attentive,
13 and you've honored my requests throughout the week.

14 You've been prompt. Some jurors aren't always
15 prompt, but you've been prompt. For that I want to
16 thank you. I want to thank you on behalf of myself.
17 I want to thank you on behalf of these attorneys and
18 really on behalf of the people of Kershaw County,
19 because your service is so important to this system of
20 justice that we have.

21 I tell jurors all the time, this system can do
22 without me. It can do without these attorneys, but it
23 can't do without you. You're such an important part
24 of the judicial system of this county, this state, and
25 this nation that your role in this system was written

1 into the Constitution of the United States some 250
2 years ago. This is a system that's tried and true in
3 this country, many other countries in the world don't
4 have a system like ours where citizens come and judge
5 their fellow citizens and make these difficult
6 decisions. These decisions are difficult. They must
7 be made. For that I thank you.

8 Now, the remaining portion of the trial, the
9 remaining portion of these proceedings will consist of
10 the sentencing of the defendant.

11 We don't have the luxury of --- like they do on
12 Law and Order of waiting and coming back and doing
13 sentencing at a later date. We have to do it and move
14 on because we have so many cases that need to be
15 tried. We'll be trying cases next week and the week
16 after either here or in Columbia, so it's imperative
17 that we keep the system moving.

18 You're welcome to stay for that procedure if you
19 wish to do so. It's going to take a few minutes to
20 get the paperwork done. I'm going to ask you to
21 return to the jury room for just a few minutes.

22 If you wish to come back in, you can either
23 come --- do you want them in here or in the audience?
24 Would it be better if they come in here?

25 THE BAILIFF: Yes.

1 THE COURT: You can come back to the jury box if
2 you wish to do so. On the other hand, you can be
3 excused. You're free to go. Ms. McDonald tells me
4 that she has --- how about their work statements?

5 THE CLERK: Work statements can be picked up in
6 my office.

7 THE COURT: Work statements can be picked up in
8 the clerk's office, and your check is in the mail.
9 Thank you again for your service. If you'd like to
10 step back in the jury room for just a minute,
11 Ms. McDonald is probably going to have a few words to
12 talk to you about. I do thank you for your service.
13 Good luck to all of you.

14 (WHEREUPON, the jury left open court at
15 approximately 3:06 p.m.)

16 THE COURT: All right. Stand at ease for about
17 ten minutes.

18 (WHEREUPON, a short break was taken.)

19 THE COURT: Any motions?

20 MR. POSTIC: Your Honor, I just --- I request ten
21 days to file any post-trial motions.

22 I do want to renew my motions that I raised
23 during the trial. Obviously the statement ---
24 allowing the statement to be entered, allowing the
25 picture of the victim, and it's overly prejudicial,

1 denying directed verdict, even though there was no
2 medical examiner to give us the cause of death in this
3 matter, and otherwise for post-trial motions, ten
4 days.

5 THE COURT: That's fine, be glad to.

6 Solicitor.

7 MR. PERRY: Yes, Your Honor.

8 THE COURT: You may proceed.

9 MR. PERRY: Yes, sir.

10 THE COURT: All right. Solicitor.

11 MR. PERRY: Yes, sir, may it please the Court.

12 Your Honor, you've been here the entire time. You've
13 heard all the testimony. The day that this happened,
14 Your Honor, the defendant told Trooper Coats and
15 others that he took full responsibility for his
16 actions.

17 He also told them that there would have been a
18 whole lot more that he could have done if he had been
19 sober. He could have called 9-1-1, a great many
20 things that he could have done or might have done that
21 night that might have made a difference and not
22 resulted in the death of Melvin Wright, but the words
23 that keep coming back to me, Your Honor, is he wanted
24 Trooper Coats to tell Melvin's family and to tell the
25 solicitor's office that he accepted full

1 responsibility.

2 Your Honor, yesterday afternoon, Donnie Thigpen
3 sat right there on that stand under oath in front of
4 Your Honor and said that that was a lie, that what he
5 told them that day was a lie, that he did not accept
6 full responsibility.

7 Your Honor, at this time, the State would ask you
8 to hold Donnie Thigpen fully responsible for what he
9 did, fully responsible for choosing to consume so much
10 alcohol that hours later he was almost three times the
11 legal limit, choosing to drive his vehicle after he
12 had had --- that he could recall, beyond the number of
13 drinks that he says it normally takes for him to black
14 out.

15 He knew that he had that tendency. He had
16 proclivity to drink so much alcohol to the point that
17 he would black out and couldn't remember what he had
18 done, yet he chose to continue drinking that night,
19 and he choose to get behind the wheel of his
20 automobile, not merely by himself, which would have in
21 and of itself been bad enough, but with an innocent
22 passenger strapped into the right-hand seat of that
23 vehicle and drive his vehicle home, run it off the
24 road and into a tree and kill Melvin Wright.

25 Melvin's family --- we have talked a lot about

1 liberty, about the defendant's liberty, Your Honor,
2 that that's in jeopardy here. Well, I venture to say
3 that Melvin Wright, Jr. would gladly trade places.
4 His family will never get to spend another birthday
5 with him, another Christmas with him. His son is
6 going to grow up without his father, Your Honor. We
7 just ask that you hold Donnie Thigpen responsible for
8 what he did.

9 Your Honor, by way of record, again it's --- it
10 speaks to, you know, I don't know what kind of person
11 he has become since then, but at least up to this
12 point, he admitted in court that he wasn't a very good
13 person. He was the kind of person who would drink so
14 much that he would black out, get in bar fights, and
15 obviously drive intoxicated.

16 You know, back in 2002, Your Honor, he was
17 starting right off, starting early, a minor purchasing
18 alcohol, using a fictitious license to purchase
19 alcohol, possession of marijuana. In 2002, he picked
20 up his first driving under the influence, Your Honor.

21 Now, the rap sheet doesn't show how that was
22 resolved. We've been told he told troopers that day
23 that Neal Lourie had been his attorney and they had
24 put it off and put it off and put it off and finally
25 it pled as a reckless.

1 Now, I don't show that disposition on this rap
2 sheet, Your Honor, so either there is still a pending
3 DUI first from 2002 or it was pled down to something,
4 but it doesn't show dismissed, not convicted, on here.

5 After that, Your Honor, in 2003, we have public
6 disorderly conduct. Again, as recently as
7 February 2011, public disorderly conduct, yet
8 Mr. Thigpen who sat on the stand yesterday, told us
9 that he's a changed man. He's no longer the man who
10 killed Melvin Wright by drinking too much alcohol and
11 driving his car that night.

12 Your Honor, if you would, I have his mother,
13 father and brother here. I know at some point at
14 least one of them would like to be heard.

15 THE COURT: I'll be good hear from you.

16 MR. PERRY: Your Honor, this is Melvin Wright,
17 Sr.

18 THE FATHER: Your Honor, I would like to thank
19 you, the court, the jury. I think it was an
20 outstanding job done here today, and I'm going to have
21 to get my words out. It's a hard time for me. It's
22 been a long time coming, and I know that they talk
23 about they've been through a lot.

24 We go through a lot, have been through a lot, a
25 lot of changes in our life, things and plans that we

1 had made, things that his son had planned,
2 opportunities. It's all been taken away.

3 I feel for Donnie and his family. I didn't know
4 his past, but also, I loved my son with all my heart.
5 I could probably say I love him more than anybody, you
6 know, but I know that I miss him so much.

7 I had something wrote out here, but I think you
8 can understand the pain.

9 I'm sorry it come to this, but something needs to
10 be done about people running --- the possibility of
11 families being run over because people are not held
12 accountable for drinking and driving. It has to be
13 stopped somewhere. I appreciate your time, Your
14 Honor, and your decisions. Thank you.

15 THE COURT: Thank you, sir.

16 Anything further?

17 MR. PERRY: Your Honor, I couldn't come up
18 with --- I'm sorry.

19 THE MOTHER: My name is Candida Wright. I'm
20 Melvin's mother.

21 The day that I heard my son was killed, it's a
22 thing that you never want to hear. It changes
23 everybody's life. I know that Donnie, like he said he
24 didn't mean to set out to do that, but we all have to
25 have a responsibility to take for ourselves, for our

1 things that we do in life because if it would have
2 been my son that did that to anybody, there would have
3 been --- I couldn't deal with it, and your family is
4 having a hard time, too. You did not just destroy my
5 family. You destroyed your family, too.

6 As a Christian, in my heart, I forgive you for
7 what you did. You don't have to ask me for it. I
8 already did it. I still would love to have my son
9 here.

10 THE BROTHER: My name is Gary Wright. I'm the
11 brother. I just want to say God have mercy on your
12 soul. Thank you.

13 MR. PERRY: Your Honor, I would just point out
14 one more thing before we close and hand it over to the
15 court and the defense, and that is, in addition to not
16 accepting responsibility, not coming in here before
17 the court pleading guilty, asking the family for
18 forgiveness, asking the court for forgiveness and
19 leniency as he said he wanted to do that day when he
20 was talking with the officers, instead he came up with
21 all these different stories about how it happened to
22 the point of blaming it on Melvin himself, Melvin was
23 somehow driving that vehicle, blame it on the dead
24 guy.

25 Your Honor, the State would just ask that the

1 sentence be severe, that he be held fully accountable
2 for not just drinking and driving and the death
3 resulting, but from crawling outside of that vehicle
4 clearly knowing that his friend was either dead or in
5 danger of dying and going home and crawling in the bed
6 without so much as making a phone call, Judge. We
7 just ask that the sentence reflect the severity of
8 what happened here.

9 THE COURT: All right. Thank you.

10 Mr. Postic.

11 MR. POSTIC: Thank you, Judge. Before I start, I
12 want to say that Donnie --- I talked to Donnie,
13 explained to him not to comment on the facts in this
14 matter, but I think he does want to say something to
15 the court at some point.

16 I've known this family now for three years, and,
17 you know, the issue with these kind of cases, and the
18 jury has spoken, so I'm not going to try to diffuse
19 the charges, is --- I mean, he has got no
20 maliciousness. He's not an angry person. He's a
21 sweet kid.

22 He's very, very close to his family. They're
23 extremely supportive and loving of him. They, you
24 know, these things unfortunately, you know, happened,
25 and it's --- the hardest thing is that if he was

1 driving and he was pulled over 100 meters before this
2 accident, he would be in magistrate court. You know,
3 it's just very, very unfortunate that this would
4 happen.

5 I would tell you this, Your Honor, just in the
6 way of I don't know, mitigation or because it does
7 touch on the facts, I've spent much time with him, and
8 he has never told me that he was driving, and if it
9 was going to be a plea, it was going to have to be an
10 Alford plea because he didn't know anything.

11 I don't know if that's, you know, because of the
12 accident or because of drinking, I don't know. I just
13 ask Your Honor to take into account his age. Take
14 into account his lack of maliciousness and the fact he
15 does have a record, the fact that he has a sickness, I
16 mean, it was a sickness, obviously, to drink that much
17 and, I mean, no matter what, to have a blood alcohol
18 that high.

19 In prison, you know, he understands of course,
20 that he's going. It's going to be a difficult place
21 for him. I just ask that you consider those things.

22 I don't know if anybody in his family wants to
23 say anything.

24 Do you mind, Your Honor?

25 THE COURT: No. I'll be glad to hear from them.

1 MR. POSTIC: Thank you. This is his mother. Her
2 name is Tammy Thigpen.

3 THE COURT: Yes, ma'am.

4 THE MOTHER: I'm Tammy Thigpen. Donnie has
5 changed his life. He did have a time, rough time
6 there for a long time, but he has changed. He
7 accepted Jesus Christ over a year ago, and we come
8 from a Christian family, and I have prayed many times
9 for the Wright family and can't imagine what his
10 mother is going through, but I do now.

11 My son may be alive, but he's not going to be
12 when he goes to prison, not to me. I'll never believe
13 my son was there. I don't know if I'm supposed to say
14 that, but people make choices to get in vehicles with
15 people who have been drinking, and I just --- I just
16 never will believe it, but he is a changed man, and I
17 pray that you will have mercy on my son.

18 THE COURT: Thank you, ma'am.

19 MR. POSTIC: This is Esther Thigpen, his
20 grandmother.

21 THE COURT: Yes, ma'am.

22 THE GRANDMOTHER: My name Esther Thigpen. I'm
23 Donnie's grandmother. Donnie is very close to me.

24 THE COURT: Move that microphone around just a
25 little bit.

1 THE GRANDMOTHER: Donnie is my grandson. He is
2 very close to me. He's been close to me since the day
3 he was born. He's had some really rough times, but
4 Donnie has changed. He is a different man now. He is
5 a wonderful man. He's close to me, very, very close.

6 I ask that you have mercy on him. He's the only
7 person I have now, and with him being taken away from
8 me, I don't know what to do, but, Your Honor, I ask
9 for mercy, please mercy. Thank you.

10 UNIDENTIFIED MAN: I'm probably not going to be
11 able to keep it together very well.

12 THE COURT: I need your name, sir.

13 THE FATHER: Oh, I'm Donnie's dad, Donnie, Sr.

14 We didn't get to spend a lot of time together
15 when he was young. (Pause.) Shoot. Me and his
16 mother --- me and his mother split up when he was only
17 like 12. We missed a lot of time together.

18 I just --- I just --- I just hope you will have
19 mercy, please. That's all.

20 THE GRANDFATHER: Your Honor, I'm his grandson
21 --- I mean, granddaddy.

22 Donnie's mother is my daughter, and I've known
23 this young this young man all his life, and just like
24 his daddy said, he's had a rough time. You know, him
25 and his mother split up, and his mother raised him.

1 She done the best she could. She has to work. She
2 works out of town a lot, and she did the best she
3 could with him and Donnie has changed. He has really
4 changed in the last three or four years. I know that
5 for a fact because I've known him.

6 Also, he's took up with a young lady who's living
7 with him. She has got two kids. He's helping her
8 raise them two kids, you know. He has quit all this
9 stuff what he used to do. I know that for a fact
10 because I gave my heart to God not too long ago.

11 I've been --- I was out there, too, you know what
12 I mean, but I know he has changed. He's a changed
13 man. We love him. We don't want him to go away from
14 us.

15 Please have mercy on him and, you know, what you
16 decide, we just have to live with it. I want to let
17 you know, all you folks, that he is my grandson, and I
18 love him. Please have mercy on him.

19 UNIDENTIFIED WOMAN: My name is Betty Babinski.
20 I also want him back. I ask for your mercy of the
21 court, Melvin's family and everybody involved, we do
22 have two kids together and Donnie takes care of then.
23 He does a good job. They would rather go with Donnie
24 sometimes than with their own dad because they love
25 him and they're asking me when he's going to come

1 home, and I don't know what to tell them. I'm going
2 to have to tell them the truth, I know that, but it's
3 kind of hard because they're so close with him.

4 He is a changed man, Your Honor. He used to
5 drink, and he was bad at it, but he hadn't touched a
6 drink, he has not, I swear to you and before
7 everybody. He doesn't go to the bars. He doesn't do
8 any of that anymore. He goes to work and he comes
9 home. That's all he does. He doesn't go out anymore.

10 He just --- he's a good man. I beg you, please
11 don't take him away from me. I can't handle that and
12 my kids can't either. I know I'm rambling on. I just
13 ask you to take into consideration that he ---
14 whatever sentence he gets, it's going to affect
15 everybody around him.

16 Thank you, Your Honor.

17 I love you, Donnie.

18 THE DEFENDANT: I love you, too.

19 May I speak, Your Honor?

20 THE COURT: Yes, sir.

21 THE DEFENDANT: I want to apologize to the whole
22 Wright family from the very bottom of my heart.

23 I can't begin to imagine what kind of pain this
24 has caused you. I loved Melvin just like all of you
25 loved him. We didn't have a family bond like you had

1 with him, but I loved Melvin and I miss him. Please
2 have mercy on me. I'm sorry. I ask that you, Your
3 Honor, have mercy on me, also.

4 MR. POSTIC: Judge, I mean, you've heard, this is
5 an extremely emotional event on both sides. Good
6 people on both sides. It's a tragedy. There is no
7 doubt about it.

8 I do ask you, I understand the State's position.
9 I understand. I just don't know if at this point the
10 punishment that he receives --- I mean, I just --- I
11 understand deterrent is a big thing in your mind and
12 punishment, as well.

13 But for someone like this, any sentence is a life
14 of punishment for him, so I ask you to be lenient,
15 Your Honor.

16 MR. PERRY: Your Honor, I know it's a little bit
17 out of the norm, and the State already having said
18 some things, the defense having said some things, but
19 I feel that I would not be living up to my obligation
20 if I didn't point out the fact that nobody was there
21 to ask for mercy for Melvin on the morning of June 20,
22 2009, and I'd ask the court to show the defendant the
23 same measure of mercy that he showed Melvin Wright,
24 Jr. when he crawled out of his car and went home and
25 crawled into bed instead of doing anything he could to

1 help his friend after he drove his car into a tree and
2 killed him.

3 SENTENCING:

4 THE COURT: All right. Well, I'm going to
5 say --- and these attorneys know this, these are the
6 hardest cases that we have to deal with because
7 sometimes good people do bad things, and there are
8 consequences for those actions.

9 This is --- the taking of a human life is the
10 most serious crime that we have in our jurisprudence.
11 Whether it be intentional or as this, a different
12 charge, but nevertheless a life has been lost.

13 That's why the penalty is so severe. I'm sure
14 all of you know that this case --- this conviction, I
15 have to abide by the jury's verdict.

16 It carries a mandatory fine of not less than
17 \$10,100 and no more than \$25,100, and the mandatory
18 imprisonment of not less than one year, nor more than
19 25 years when death results.

20 Now, that's a pretty wide range of potential
21 punishments, but I sat this week, and I heard all the
22 evidence.

23 I believe the defendant didn't intend for this to
24 happen, but the fact that he put himself in a position
25 to allow this to happen is --- there's some intent

1 there.

2 It's a tragedy for both families. This is a no-
3 parole offense. I'm sure you've advised your client
4 of that. I had a young man two weeks ago driving a
5 boat in Richland County on Lake Murray, a similar set
6 of facts, two people killed, boating under the
7 influence.

8 I don't know how to --- I almost feel like the
9 courts have very little control over what goes on out
10 there on the street. I know these officers try hard.
11 I mean, they really try hard so this doesn't happen.
12 I believe that, but despite their best efforts and our
13 efforts, these kind of things continue to happen.

14 How old is your client?

15 THE DEFENDANT: I'm 27, sir.

16 THE COURT: I don't think a 25-year sentence is
17 appropriate. I don't think a one-year sentence is
18 appropriate either.

19 I respect your client's remorse. I believe he is
20 remorseful. Did he spend any time in jail before he
21 was released on bond?

22 MR. POSTIC: I think he got out pretty quickly,
23 maybe one or two nights in jail? Maybe just one
24 night.

25 THE DEFENDANT: I think it was two.

1 MR. POSTIC: Two nights. He was released on
2 June 22nd, booked on June 22nd --- on June 20th, I'm
3 sorry.

4 (Pause.)

5 THE COURT: All right. Mr. Thigpen, on both
6 charges the sentence of this court is for you to be
7 committed to the State Department of Corrections for a
8 period of ten years and pay a fine of \$10,100. Good
9 luck to you, sir. Both sentences to run concurrent.

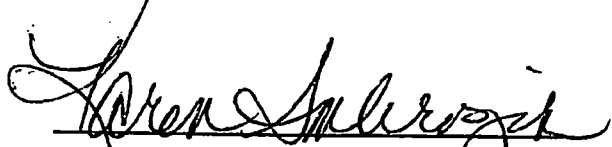
10 MR. MOAK: Thank you, Your Honor.

11 MR. POSTIC: Thank you, Your Honor.

12 THE COURT: Court is adjourned.
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1 CERTIFICATE OF REPORTER:
23 STATE OF SOUTH CAROLINA)
4)
5 COUNTY OF KERSHAW)
6

7 I, Karen Ambroziak, Official Court Reporter for
8 the 5th Judicial Circuit of the State of South
9 Carolina, do hereby certify that the foregoing is a
10 true, accurate and complete Transcript of Record of the
11 proceedings had and evidence introduced in the trial of
12 the captioned case, relative to appeal, in the General
13 Sessions Court for Kershaw County, South Carolina, on
14 the 19th - 23rd days of March, 2012.

15 April 11, 2013
1617 
1819 Karen Ambroziak, Court Reporter
2021 My Commission Expires: 04/01/14
22
23
24
25

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM KERSHAW COUNTY

Court of General Sessions

The Honorable Thomas G. Cooper, Jr.

Case No.: 2009-GS-28-1164, 1171
 Appellate Case No.: 2012-212391

State of South Carolina,

Respondent,

vs.

Donnie Thigpen, Jr.

Appellant.

FINAL BRIEF OF APPELLANT

TOMMY A. THOMAS
 Bar No.: 005536
 Post Office Box 88
 Imo, SC 29063
 (803) 732-5507

ATTORNEY FOR
 APPELLANT

CHRISTINA CATOE
 ATTORNEY FOR RESPONDENT
 P.O. Box 11549
 Columbia, SC 29211-1549

RECEIVED

MAR 31 2014

SC Court of Appeals

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State v. Von Dohlen, 322 S.C. 243, 471 S.E. 2d 695.

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State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005)

Statutes: S.C. Code Ann. §56-5-2946

S.C. Code Ann. §56-5-2950

STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE CIRCUIT COURT IMPROPERLY ALLOWED THE INTRODUCTION OF EVIDENCE AND TESTIMONY OF THE DATAMASTER PROCESS AND VIDEO AFTER FINDING THAT THE TEST WAS GIVEN BEYOND THE STATUTORY TWO (2) HOUR LIMITATION.**
- II. WHETHER THE CIRCUIT COURT IMPROPERLY DENIED DEFENSE COUNSEL'S MOTION TO SUPPRESS THE STATEMENT MADE BY THE APPELLANT.**

STATEMENT OF THE CASE

On June 20, 2009, the Appellant was charged with the offenses of Felony DUI - Death (Indictment No.: 2009-GS-28-1164), Leaving the Scene - Death (Indictment No.: 2009-GS-28-1171 and Failure to Render Aid - Death, (Ticket No.:D881819 - Dismissed Not Indicted).

A jury was empanelled and the Appellant was tried by Jury on March 19-23, 2012 before the Honorable Thomas G. Cooper, Jr. The Appellant was represented by Alex Postic and Derek Chiarenza, Attorneys at Law. The State was represented by Brett Perry and Ron Moak, Deputy Solicitors.

The Appellant was found guilty of Leaving the Scene of an accident Death and Felony DUI - Death. He was sentenced to ten (10) years on each count to run concurrent. He was also Ordered to pay a fine in the amount of \$10,000.00.

The Appellant filed a timely Notice of Appeal. This initial brief follows:

STATEMENT OF FACTS

On the early morning of June 20, 2009, a 1997 blue Jeep Cherokee was found in the brush off of Twenty-Five Mile Creek Road in Kershaw County. The vehicle was registered to the Appellant, Donnie Thigpen, Jr. The investigation of the Midlands M.A.I.T. team of the South Carolina Highway Patrol found that the vehicle had crossed the center line of the roadway and ran off the left side of the road hitting a tree. The vehicle came to rest upside down. The passenger side of the vehicle was severely damaged. The passenger of the vehicle was found deceased still buckled in his seat belt. The driver of the Jeep was not found at the scene.

Upon determining the registered owner of the vehicle the police went to the Appellant's house located approximately a quarter of a mile from the scene of the accident. Testimony was given by the arresting officers that upon arrival at the Appellant's home they spoke with the Appellant. He appeared to be intoxicated. The officers observed fine glass shards in his beard and hair. He also had a cut above his eye and appeared to have bruises on his body. Based upon their observations, he was placed under arrest and was read his Miranda rights at that time.

He was initially taken to the scene of the accident. In an attempt to remove what the officer thought was a blue paint chip lodged in his ear. After an unsuccessful attempt to gather the chip he was taken to the hospital for a blood draw and urine sample. The Blood was collected at 12:40 p.m. (ROA. p. 336, lines 11-12) From there he was taken to the Kershaw County Detention Center.

Upon arrival at the Detention Center the Appellant was take to the DataMaster Room and a video recording was begun of this proceeding (ROA. p. 336, line 13-17). This video was admitted into evidence with objection. (ROA. p. 337, lines 1-9) Testimony was presented by the DataMaster operator. The office was asked if the test was performed within two hours of the

arrest at 11:29 the morning of June 20, 2009. The officer testified that it was over the two hour period. The time of the DataMaster test was 1:42 p.m. The blood draw was within two (2) hours of the arrest. (ROA. p. 339, lines 14-23)

Later that afternoon, at approximately 5:20 p.m. the Appellant was questioned by law enforcement officers. The Appellant was again given his Miranda rights. This interview was audio recorded and during this process Law enforcement asserts that the Appellant admitted to driving the car. This audio recording was played for the jury. (ROA 434, lines 1-13)

Members of the M.A.I.T. and other Law enforcement officers testified regarding reconstruction of the accident and that certain blood and DNA evidence was collected. DNA evidence was compared to a sample taken from the Applicant. A DNA profile was suitable for interpretation on three items of evidence. A cutting from the fabric headlines of the Jeep, back of the driver side air bag and from the front of the driver's side air bag. (ROA p. 551, lines 10-19)

The sample from the headliner and from the back of the driver side air bag matched the Appellant. The sample from the front of the airbag was from an unidentified male. (ROA p. 551, lines 20-25)

Testimony was presented by Defense witnesses that the Appellant was not driving the vehicle on the night in question. That his bruises and cuts came from a fight at a local bar and that the Appellant had a habit of lending out his car or giving the keys to someone else if he had too much to drink.

The Appellant testified at the trial (ROA p. 764). The Appellant stated that he wanted to drive his vehicle from the bar, Trackside, but was prevented from doing so. That the Victim

drove him to his house and wanted to borrow his car. With Appellants permission the victim left with his car. The Appellant testified that he had no personal knowledge of what happened at the incident.

After closing arguments, the Judge charged the Jury in part regarding the statement made by the Appellant and the inference of under the influence by the use of chemical analysis of Appellant's blood

No exception was taken to the charge. The Jury began their deliberations at 1:03 p.m. A verdict was returned at 2:58 p.m.

ARGUMENT

I. WHETHER THE CIRCUIT COURT IMPROPERLY ALLOWED THE INTRODUCTION OF EVIDENCE AND TESTIMONY OF THE DATAMASTER PROCESS AND VIDEO AFTER FINDING THAT THE TEST WAS GIVEN BEYOND THE STATUTORY TWO (2) HOUR LIMITATION.

The Appellant was arrested at 11:29 a.m. Blood was drawn at 12:40 p.m. (ROA p. 336, lines 11-12) and a breath sample was taken at 1:42 p.m. (ROA p. 339, lines 17-19) The DataMaster reading was .19. (ROA p. 78, lines 16-17)

Pre-trial objection was made by Defense Counsel to Suppress the DataMaster reading. (ROA p. 72, lines 15-19) The Basis of the Motion was that §56-5-2946 South Carolina code of Laws, as amended, states that the sample must be taken within two hours of the arrest. In this case the sample was taken two hours and thirty six minutes after arrest. (ROA p. 73, lines 4-10) Counsel argued that the reading should be suppressed pursuant to §56-5-2950 and §56-5-2946 (ROA p. 73).

The State responded that pursuant to §56-5-2946 and §56-5-2950 when the Appellant was charged with Felony DUI, he had no option but to submit to the blood draw (ROA p. 80, lines 16-22). The State conceded that the DataMaster test was outside of the two hour window as prescribed by law.

However, the State argued that even if the DataMaster result is not admitted for the purpose of the issue of under the influence, that they were entitled to use it as part of the toxicologist hypothesis that the Appellant's blood alcohol was in the process of being eliminated and that the DataMaster video itself was admissible even if the results were suppressed (ROA p. 78, lines 15-16).

The Court relies upon the cases of State v. Long, 363 S.C. 360, 363, 610 S.E.2d 809, 811 (2005) and State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005) in its analysis of Defense Counsel's objection. The Court concludes:

"Now, although the court in Long and Cuevas doesn't say specifically that it incorporates the two hour requirement and the three hour requirement, it does say that the technical provisions of 2950 are applicable to 2946, so by the language of Long, Section 56-5-2950 prescribes the technical testing requirements, and incorporates and says that law enforcement must follow the guidelines of 2950 (A), which is the two hour --- amount other things, among other things, is the two hour requirement."

"So I think because this breath test was taken in excess of the two hour requirement that the breath test reading, DataMaster reading, would not be admissible." (ROA p. 154, lines 3-16)

The Court grants the Motion to Suppress the evidence of the DataMaster reading. (ROA. p. 155, lines 20-23). The Court further finds that if the State is going to use the DataMaster video, then the State is going to have to either redact it or stop it prior to evidence of the Appellant's blood level. In regards to the testimony of the toxicologist testimony, the court rules

that the State can say that a test was given and can say that the level was less than the blood alcohol but cannot use the suppressed amount. (ROA p. 156, lines 20-23)

Upon arrival at the Kershaw County Detention Center, the Appellant was taken into the DataMaster Room. (ROA. p. 336, line 17) Counsel again made objection to DataMaster evidence being introduced and it was admitted over objection. (ROA. p. 337, lines 1-3) The video was played to the Jury. (ROA p. 337, lines 18-19)

The complete process of giving a breath test was explained to the Jury as well as the conduct and appearance of the Appellant. (ROA pp. 339-342). Additional testimony was given about his statement that someone took his car on a joy ride and that he was running his fingers through his hair. The Officer makes reference to a blue paint chip noticed in his ear and alluding to the glass shards found in his hair earlier. (ROA pp. 340-341)

Generally the admission or exclusion of evidence in general is within the sound discretion of the Trial Court Fields v. Regional Medical Center of Orangeburg, 363 SC 19, 609 SE2d 506 (2005). In this case the Court found that the results of the DataMaster should be excluded. But allowed testimony and evidence associated with the excluded test to be admitted. Including the video of the Appellant in the DataMaster Room. Given the testimony of the officers and DataMaster reading the Appellant was obviously intoxicated. That error allowed the State to back door the evidence they were prohibited from introducing given the Court's ruling.

In this case, the Judge's decision to allow the testimony and evidence (video) of the DataMaster process was clearly an error and produced prejudice to Appellant. This error would require a reversal of the Appellant's conviction.

**II. WHETHER THE CIRCUIT COURT IMPROPERLY DENIED
DEFENSE COUNSEL'S MOTION TO SUPPRESS THE
STATEMENT MADE BY THE APPELLANT.**

The Appellant made an incriminating statement after arrest in the afternoon of June 20, 2009. Defense counsel made a pre-trial Motion to Suppress the Appellant's oral statement. (ROA p. 85, lines 23-25)

The Appellant was arrested at his home and at that point is read his Miranda rights. He denied involvement in the accident. However, based upon his appearance, he is placed under arrest. He is allowed to make a phone call and is taken to the hospital to give a blood sample at 12:40 p.m. His blood alcohol registers .21. He is then transported to the Kershaw County Detention Center where he is given a breath test at 1:42 p.m. (ROA 339, lines 16-18) with a DataMaster reading of .19. He is booked into the Detention Center. Later that afternoon he gives a statement that is audio recorded. In this statement he implicates himself in the incident. (ROA. p. 87, lines 1-14) Although he was questioned about the incident in the DataMaster room. (ROA p. 87, lines 19-22) this is the only incriminating statement that he gives.

Just before the afternoon interrogation he is re-mirandized. At 6:00 p.m. the Appellant makes a statement confessing to driving and to leaving the scene. (ROA p. 88, lines 18-22)

At the initial arrest and reading of the Appellant's rights he had a blood alcohol level of almost .23. Defense counsel argued that the Appellant would be too intoxicated to understand his rights at that point, (ROA p. 89, line 4-9) the point of his initial arrest. Counsel further argues that the Appellant would have still been intoxicated at the time of the 4:20 p.m. interrogation to voluntarily give his statement to law enforcement. In

argument at trial, the State even opines that the Appellants blood alcohol level at the time of questioning could have been .10. (ROA p. 706, line 1-7)

A Jackson v. Denno hearing was held to determine the voluntariness of the confession. Testimony was given that upon arriving at the home of the Appellant and speaking with him, that he physically appeared intoxicated. (ROA. p. 94, lines 10-18)

That he was read his Miranda rights prior to being placed under arrest. (ROA p. 96, lines 19-21) At that point testimony was presented that the Appellant did not ask for an attorney and denied that he had any involvement in the incident. (ROA pp. 97-98) This was 11:29 a.m. (ROA p. 104, lines 6-10)

The Appellant was read his Miranda Rights for the second time before the interview the afternoon of the incident. This was between the hours of 5:20 p.m. and 6:40 p.m. (ROA p. 128, lines 22-25, p. 129, lines 1-10) Testimony was given by Officer Coats that:

"(He) ultimately admitted he was driving.

That he stated "I checked. He didn't have a pulse." And that "he took responsibility for what he had done that night". (ROA p. 114, lines 1-10)

The Court rules that:

"Once Miranda rights are validly and voluntarily waived, the waiver continues until such time as the individual being questioned revokes the waiver or circumstances are such that his will is overborne and his capacity for self-determination is critically impaired.

So it's ---the Miranda rights that are given continue throughout the interrogation. I don't think --- I mean, I think that's pretty well established law. You don't have to give them over and over again during the course of an interrogation..." (ROA p. 136, lines 21-25, p. 137, lines 1-6)

The question presented is whether the Appellant's statement was made voluntarily even in the afternoon given his level of intoxication.

The objection to the introduction to the statement was made again during officer Borowski's testimony (ROA p. 322, lines 7-8) and During the testimony of Officer Coates (ROA. p. 429, line 19-22). The recording of the Appellant's interview was played for the Jury (ROA p. 434, lines 1-16).

The Appellant testified that during the afternoon interrogation that he didn't remember being read his rights (ROA p. 789, lines 21-23) That he "felt threatened. I was drunk, confused, scared." (ROA p. 790, lines 1-19) The Appellant stated he was told that he was driving the car and had killed his friend (ROA p. 790, lines 17-22) and that ultimately he had no memory of being in the vehicle. (ROA p. 790, lines 23-25 p. 791, lines 2-4-791)

Testimony of the State's witness, Robert Sears, forensic toxicologist, indicated that:

"Research that's being done in the field of alcohol toxicology has shown that everyone is impaired, that is their opportunity or ability to operate a motor vehicle is appreciably and materially impaired at levels exceeding .05." (ROA p. 676, lines 9-13)

If the Appellant's ability to drive was impaired at a blood alcohol level of .05, then surely his ability to make a voluntary statement would have been impaired with a blood alcohol level of around .10.

The process for determining whether a statement is voluntary, and thus admissible, is bifurcated: it involves determinations by both the Judge and the Jury. First, the trial Judge must conduct an evidentiary hearing, outside the presence of the Jury, where the State must show the confession was voluntarily made by a preponderance of the evidence.

Under Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, a defendant is entitled to a "reliable determination as to the voluntariness of his confession by a tribunal other than the Jury charged with deciding his guilt or innocence.

The State bears the burden of showing the confession was voluntary. Von Dohlen, 322 S.C. 243, 471 S.E. 2d 695.

During the Jackson v. Denno hearing, the trial Judge must examine the totality of the circumstances surrounding the confession and determine whether the State has carried its burden of showing the confession was voluntarily made.

Once the trial Judge determines that the confession is admissible, it is up to the Jury to ultimately determine whether the confession was voluntarily made.

In the Court's charge to the Jury, the Judge addresses the issue of the statement. He charges that he has determined that the statement was admissible but instructs the Jury that they must make the ultimate decision of whether or not the Appellant made the statement (ROA p. 927, line 13-23).

The voluntariness of a confession is determined from an examination of the totality of the circumstances. Von Dohlen. The totality of the circumstances in this case show that he was intoxicated at the time of the statement. The statement was not voluntarily given, nor were his rights voluntarily waived.

That the Court abused its discretion in allowing the introduction of the statement.

That the Appellant's conviction should be reversed.

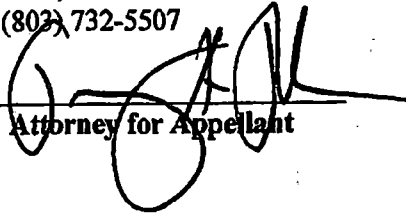
CONCLUSION

For the above stated reasons, Appellant respectfully requests that this Court reverse his convictions.

Respectfully submitted,

TOMMY A. THOMAS
Bar No.: 005536
Post Office Box 88
Irmo, SC 29063
(803) 732-5507

By:



Attorney for Appellant

7588 Woodrow Street
Irmo, South Carolina 29063

March 28 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2012-212391

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DONNIE THIGPEN, JR.,

APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General
SC Bar No. 73562

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Appellant's issue regarding the Datamaster-related evidence is not preserved for appellate review where Appellant challenged only the admission of the Datamaster test result below; where defense counsel stated he was not objecting to the admission of the Datamaster video; and where Appellant did not object to any other Datamaster-related evidence. In any event, the trial judge did not err by allowing the Datamaster video and evidence relating to the Datamaster test because the Datamaster test result was in fact admissible, and, regardless, S.C. Code § 56-5-2950 (J) clearly contemplates exclusion of only the test result. Finally, even assuming error, such error could not have prejudiced Appellant where Appellant's blood test result of .218 was properly allowed into evidence and where Appellant admitted throughout the trial, including during his own testimony, that he was intoxicated on the night of the incident.
- II. Appellant's issue regarding the voluntariness of his confession is not preserved for appellate review where Appellant made a different argument for suppression below. In any event, the trial judge properly admitted Appellant's confession, which was made around 6:00 pm, where the evidence reflected that, although Appellant had become intoxicated the night before, he had stopped drinking in the early morning hours, and where the officers' testimony and the audio recording of Appellant's statement indicated that Appellant had sobered up significantly and that he understood his rights and gave his statement freely and voluntarily.

STATEMENT OF THE CASE

Appellant was indicted in Kershaw County for felony driving under the influence, death resulting, and leaving the scene of an accident. On March 19-23, 2012, Appellant proceeded to trial before the Honorable G. Thomas Cooper, Jr., and a jury. The jury found Appellant guilty of both charges, and Judge Cooper sentenced Appellant to ten years for each charge with the sentences to run concurrently. A timely notice of appeal was served and filed.

ARGUMENT

Background Facts

On June 19, 2009, Appellant got off work around 11:30 pm. (R. p. 764-73). After coming home to feed his dog, he headed out for a night of partying. (R. p. 764-78). He first went to Brixx, a pizza place where his friend Melvin worked. (R. p. 774). At Brixx, Appellant had three beers. (R. p. 774). After telling Melvin to give him a call if he wanted to shoot pool later that night, Appellant left and drove to another bar called Friends. (R. p. 774-75). There he met up with two acquaintances, Tina and Leon. (R. p. 775-77). Appellant had three or four more beers at Friends, and also had at least two liquor shots. (R. p. 775). After hanging out for a while, Appellant and his associates went to a private bar called Track Side. (R. p. 775-78). At Track Side, Appellant had several more drinks. (R. p. 776-80; p. 801-802). At some point while there, Appellant got into a fight with a man named B.J. (R. p. 739-44; p. 775-78). Shortly thereafter, Appellant and Melvin left the bar. (R. p. 778-80). After stopping by a gas station so that Melvin could pick up Icehouse beer, Appellant and Melvin headed to Appellant's house so that they could both sleep off the alcohol. (R. p. 780; p. 816-17). They never made it.

Appellant's Jeep was found in the woods the next morning between a quarter mile and a half mile from Appellant's home. (R. p. 202; p. 209-212; p. 396). The Jeep had veered off the left side of the road, struck a bridge, and crashed into a tree. (R. p. 267-71; p. 576; p. 599). Melvin was still seat-belted-in to the front passenger seat. (R. p. 218; p. 283). He had died in the crash. (R. p. 648-52). The collision had basically crushed the passenger compartment, but the driver compartment was pretty much intact. (R. p. 439; p. 529; p. 601-608). The keys to the Jeep were still in the ignition. (R. p. 217).

Appellant was nowhere to be found on the collision scene, although subsequent forensic tests revealed that Appellant's DNA was on the driver's side headliner and on the driver's side airbag. (R. p. 224; p. 284; p. 549-55).

After learning that the vehicle belonged to Appellant, officers drove the short distance to his home to investigate. (R. p. 212-13). Upon arrival, officers noticed that Appellant's front door appeared to have been kicked in. (R. p. 215). After officers knocked on the door for a while and were just about to leave, Appellant opened the door. (R. p. 213; p. 284). He was wearing a towel and appeared to have just taken a shower. (R. p. 212-14). Officers immediately recognized the smell of alcohol on Appellant, and observed that his speech was slightly slurred and that he appeared to be intoxicated. (R. p. 214; p. 289). Officers also noticed that Appellant had various injuries consistent with having been in a car accident, had tiny shards of glass in his hair and beard, and also had airbag marks on one of his arms. (R. p. 214; p. 261-64; p. 287-88; p. 294; p. 330; p. 340; p. 426; p. 450-51). Tiny shards of glass were found in the clothing he was wearing the night before.¹ (R. p. 371; p. 420-23).

Before speaking with Appellant, Officer Slaten read him his Miranda rights. (R. p. 214). Appellant agreed to speak with the officers but denied having any involvement with the collision of his Jeep. (R. p. 215-17; p. 235; p. 292-94). Appellant stated that he had not been driving that morning and had left his keys with a friend. (R. p. 216). He explained that he had to break into his house early that morning because he didn't have his keys. (R. p. 216). When asked the friend's name with whom he left his keys, Appellant claimed he had in fact given his keys to a stranger. (R. p. 216-17).

¹ The Jeep's windshield shattered as a result of the collision, and glass was strewn all over the vehicle. (R. p. 421, lines 2-8).

Believing they had probable cause to believe Appellant had committed felony driving under the influence, officers arrested Appellant. (R. p. 293-94; p. 355). Appellant was Mirandized again in the patrol car. (R. p. 330-32). Trooper McKenzie then took Appellant to the hospital, where his blood was collected at 12:40 pm. (R. p. 332-35). The subsequent test of the blood revealed that Appellant had a blood alcohol concentration of .218. (R. p. 671). Appellant was then taken to the Datamaster room at the Kershaw County Detention Center. (R. p. 336). During the twenty-minute waiting period, Appellant had some discussions with the officers and continued to deny involvement in the collision. (R. p. 336-41). The breath test, which was completed at 2:05 pm, indicated that Appellant's blood alcohol level was .19. (R. p. 78, lines 16-17; p. 106-107).

Later that afternoon, after Appellant had sobered up a great deal, Appellant was interviewed in a classroom at the police station. (R. p. 112-16; p. 127-31; p. 320, lines 7-13; p. 434-35). The interview was audiotaped. (R. p. 434). Sergeant Coats read Appellant his Miranda rights again before speaking with him. (R. p. 434-35). Initially, Appellant continued to deny his involvement in the collision. (R. p. 437). However, he eventually confessed that he had been the driver of the Jeep at the time of the crash. (See State's Exhibit 135, Audio Recording; see R. p. 321-22; p. 448-49). Appellant told officers that after the wreck, he checked Melvin for a pulse and could not find one, then got scared and went home. (R. p. 114; p. 322). Appellant also stated that he took full responsibility for what happened and told officers that he wished he had died instead of Melvin. (R. p. 114; p. 806-807).

At trial, Appellant claimed that his confession was given under pressure and was false. (See R. p. 790-92). Appellant admitted at trial that he was intoxicated on the night in question, but denied that he had been in the Jeep at the time of the collision. (See R. p. 771-87). Appellant claimed that Melvin was driving his Jeep after they left Track Side bar and that once they reached Appellant's house, Melvin said he needed to borrow the car. (R. p. 780). According to Appellant's trial testimony, that was the last time Appellant saw Melvin. (R. p. 780-81). Appellant indicated he had no idea who was driving his car at the time of the collision and did not know how Melvin came to be seat-belted in the passenger seat. (See R. p. 786-87). He also indicated that his injuries must have come from his fight at the bar or from wrestling with his large dog. (R. p. 776-77; p. 781-83; p. 794-95). However, he was unable to explain the glass shards in his clothes or the airbag mark on his arm. (R. p. 795-99). The jury ultimately rejected Appellant's trial story and convicted him of felony driving under the influence and leaving the scene of an accident. (R. p. 941).

- I. Appellant's issue regarding the Datamaster-related evidence is not preserved for appellate review where Appellant challenged only the admission of the Datamaster test result below; where defense counsel stated he was not objecting to the admission of the Datamaster video; and where Appellant did not object to any other Datamaster-related evidence. In any event, the trial judge did not err by allowing the Datamaster video and evidence relating to the Datamaster test because the Datamaster test result was in fact admissible, and, regardless, S.C. Code § 56-5-2950 (J) clearly contemplates exclusion of only the test result. Finally, even assuming error, such error could not have prejudiced Appellant where Appellant's blood test result of .218 was properly allowed into evidence and where Appellant admitted throughout the trial, including during his own testimony, that he was intoxicated on the night of the incident.

Relevant Facts

Appellant was arrested at 11:29 am on June 20, 2009. (R. p. 334, lines 21-25). Appellant's blood was collected at 12:40 pm that day. (R. p. 335, lines 1-7). The subsequent blood test indicated that Appellant's blood alcohol concentration was .218. (R. p. 671). Officers commenced the twenty-minute waiting period for a Datamaster breath test at 1:42 pm, and the test was completed at 2:05 pm. (R. p. 106-107; p. 338-39). The Datamaster test result revealed a blood alcohol concentration of .19. (R. p. 78, lines 16-17).

Prior to commencement of trial, defense counsel made a motion to suppress the Datamaster breath test results because the test was completed more than two hours after Appellant's arrest in violation of S.C. Code § 56-5-2950. (R. p. 72, line 17 – p. 73, line 10). However, defense counsel's motion to suppress was limited to the test results; in fact, he specifically stated he was objecting only to the Datamaster "reading," and was not objecting to the Datamaster video. (See R. p. 72-83; see p. 81, lines 10-12; see also p. 134, lines 20-22). The trial judge later issued a ruling granting defense counsel's motion to suppress the test result, but he agreed the State could use the video as long as it was

redacted or stopped before the test result was revealed. (R. p. 154-56). The trial judge also stated that the State would be permitted to ask the toxicology expert a hypothetical question including facts that a Datamaster test is given to a person and the resulting blood alcohol level is less than the person's blood alcohol level indicated by a blood test. (R. p. 156, lines 18-24). Defense counsel had no objections. (R. p. 156-57). When the State introduced the Datamaster video into evidence, defense counsel indicated that he did not object as long as the video was in redacted form. (R. p. 336, line 23 – p. 337, line 9). Counsel also did not object to any of the subsequent testimony regarding the Datamaster process and did not object to the hypothetical question posed to the toxicology expert. (R. p. 337-42; p. 375-76; p. 679-80).

Issue Preservation

Appellant now argues that the trial judge improperly allowed the introduction of evidence and testimony regarding the Datamaster process after finding that the Datamaster test was given to Appellant outside of the two-hour time frame prescribed by S.C. Code § 56-5-2950. However, as illustrated by the facts set forth above, this issue is not preserved for appellate review because below, Appellant challenged only the admission of the Datamaster test result and did not challenge the admission of the related evidence. Indeed, defense counsel specifically stated he was not objecting to the Datamaster video, and he never objected to any other Datamaster-related evidence. Accordingly, the issue raised on appeal is not preserved for review. See, e.g., State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000), *cert. denied*, 530 U.S. 1209 (2000) (holding that an issue is not preserved for appellate consideration where the appellant conceded the issue at trial); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760,

767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (a party cannot argue one ground for an objection at trial and an alternative ground on appeal); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (a losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred; imposing preservation requirements on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments; when appellant's contentions are not presented to or passed upon by the trial judge, such contentions will not be considered on appeal). Based upon the foregoing, the issue should be dismissed on error preservation grounds.

Discussion

Assuming the issue was properly preserved, the trial judge did not err by allowing the Datamaster video and other related evidence into evidence. S.C. Code Ann. § 56-5-2950 (A) states, in pertinent part, as follows: "A breath sample taken for testing must be collected within two hours of the arrest." Section (J) of that statute states, in pertinent part, that "[t]he failure to follow any of [the SLED] policies, procedures, and regulations, or the provisions of this section, shall result in the exclusion from evidence of any test results, if the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure and the court trial judge or hearing officer rules specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure." S.C. Code § 56-5-2950 (J).

Initially, it is the State's position that the Datamaster test – commenced only thirteen minutes after the two hour time period elapsed – was in fact admissible because there is nothing to indicate that the failure to follow the two-hour rule “materially affected the accuracy or reliability of the test results or the fairness of the testing procedure.”² S.C. Code § 56-5-2950 (J).

Regardless, the statute is clear that only the “test results” are to be excluded if the judge finds a violation of section (A) of the statute. S.C. Code § 56-5-2950 (J). See, e.g., State v. Frey, 362 S.C. 511, 516, 608 S.E.2d 874, 877 (Ct. App. 2005) (“With any question regarding statutory construction and application, the court must always look first to the legislative intent as determined from the plain language of the statute.”) (citations omitted); State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2000) (the text of a statute provides the best evidence of the legislative intent or will; if a statute’s language is “plain, unambiguous, and conveys a clear meaning,” statutory construction rules are not needed and a court has no right to impose a different meaning) (citations omitted). The language of the statute indicates that the legislature’s primary concern was that a Datamaster test administered too long after the arrest could, under certain circumstances, compromise the accuracy and reliability of the test results. See S.C. Code 56-5-2950 (A) & (J); cf. State v. Frey, 362 S.C. 511, 518, 608 S.E.2d 874, 878 (Ct. App. 2005) (pointing out that the statutory mandate requiring that a blood sample be obtained by a trained medical professional is “inextricably connected to the accuracy and reliability of the

² The solicitor started to make this argument below; however, inasmuch as the State also had Appellant’s blood test result, he did not press the issue. (R. p. 83, lines 10-14; see also p. 72-83; p. 153-57). The judge did not ultimately make a ruling in this regard as he was required to do before ruling the test result inadmissible. (See R. p. 153-57). See S.C. Code § 56-5-2950 (J) (the failure to follow the provisions of the statute “shall result in the exclusion from evidence of any test results, *if* the trial judge or hearing officer finds that this failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure *and* the court trial judge or hearing officer *rules specifically* as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure”).

blood test results"). However, this concern is not implicated by admission of other evidence relating to the Datamaster testing, such as the video of the test, which may contain highly relevant evidence including statements made by the suspect. Significantly, Appellant cites no authority in support of his position that the statute requires exclusion of something more than just the test result. In the State's view, if the legislature had intended that the Datamaster video and any other related evidence also be excluded, it would have said so plainly in the statute. Accordingly, we submit the trial judge committed no error by permitting the introduction of the Datamaster video and related testimony.

Lack of Prejudice to Appellant

Even assuming the trial judge committed error, the error could not have prejudiced Appellant under the circumstances of this case. First, Appellant's blood was taken at 12:40 pm on the same day as the Datamaster test, and the test result of .218 was properly admitted - without objection - at trial. (See R. p. 80, lines 10-11; p. 335, lines 1-7; p. 658-59; p. 670-71). Second, Appellant admitted from the beginning of trial that he was under the influence of alcohol and had a "high blood alcohol" on the night in question. (R. p. 199, lines 18-24). During the defense case, Appellant testified that he got "drunk" that night after drinking nine drinks at two bars plus several more drinks at another bar. (R. p. 773-76; p. 818-19). Appellant's other witnesses corroborated that he was intoxicated that night. (See R. p. 717-21; p. 731-34; p. 739-42; p. 760-63). Indeed, Appellant's defense was not that he was unimpaired that night; instead, his defense was that he was not driving the vehicle at the time of the collision. (See R. p. 199-200; p. 779-81; p. 888-93).

Appellant contends in his brief that he was prejudiced by the allegedly erroneous admission of the Datamaster testimony because it revealed he was "obviously intoxicated." (Brief of Appellant, p. 9). However, because there was there was absolutely overwhelming evidence - from both the State and the defense - that Appellant was intoxicated that night, Appellant could not possibly have suffered prejudice from the admission of the challenged evidence. (See R. p. 80, lines 10-11; p. 199, lines 18-24; p. 214; p. 289; p. 322; p. 329-33; p. 335, lines 1-7; p. 451; p. 658-59; p. 670-71; p. 717-21; p. 731-34; p. 739-42; p. 760-63; 773-76; p. 818-19). See State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (reversal is not required unless appellant is prejudiced by the error); State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result); State v. Johnson, 298 S.C. 496, 498-99, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence."). Therefore, Appellant's convictions should be affirmed.

- II. Appellant's issue regarding the voluntariness of his confession is not preserved for appellate review where Appellant made a different argument for suppression below. In any event, the trial judge properly admitted Appellant's confession, which was made around 6:00 pm, where the evidence reflected that, although Appellant had become intoxicated the night before, he had stopped drinking in the early morning hours, and where the officers' testimony and the audio recording of Appellant's statement indicated that Appellant had sobered up significantly and that he understood his rights and gave his statement freely and voluntarily.

Relevant Facts

Prior to trial, defense counsel requested a Jackson v. Denno hearing, arguing that the statement Appellant gave during the 5:20 pm interview was involuntary because the Miranda rights that Appellant was given immediately prior to that interview were

incomplete in that they failed to include a statement advising Appellant that he could stop the questioning at any time. (See R. p. 85, line 23 – p. 91, line 8). Counsel contended that this omission violated State v. Kennedy, 325 S.C. 295, 479 S.E.2d 838 (Ct. App. 1996), *aff'd as modified*, 333 S.C. 426, 510 S.E.2d 714 (1998).³ Defense counsel asserted that, at the time the first Miranda warnings were given around 11:30 am, Appellant was too intoxicated to understand his rights; however, he acknowledged that “there are a lot of cases that say that the defendant must be almost knocked out to give an involuntary statement.” (R. p. 89, lines 1-20). Therefore, he argued, the initial Miranda warnings could not control, and the subsequent, allegedly deficient Miranda warnings given before the 5:20 pm interview, were not sufficient to inform Appellant that he could stop the questioning at any time. (R. p. 88-90). Defense counsel acknowledged that there were no promises or threats made to Appellant. (R. p. 90, lines 12-17).

The following facts were developed through the State’s witnesses at the pre-trial Jackson v. Denno hearing. Officers arrived at Appellant’s house between 11:00 am and 12:00 pm on June 20, 2009, to investigate the collision. (R. p. 93-95; p. 104). Appellant had the odor of alcoholic beverage about his person and appeared to be intoxicated. (R. p. 94, lines 12-18). Officer Slaten read Appellant his Miranda rights on the porch before speaking with him. (R. p. 94-95). Appellant said he understood his rights, did not appear confused, and the police did not threaten or coerce him. (R. p. 95-97; p. 130). Appellant agreed to talk to police and he denied any involvement in the collision. (R. p. 98; p. 130).

³ Notably, the South Carolina Supreme Court rejected such an argument in State v. Cannon, 260 S.C. 537, 543, 197 S.E.2d 678, 680 (1973), and the South Carolina Court of Appeals more recently rejected such an argument in State v. Hoyle, 397 S.C. 622, 725 S.E.2d 720 (Ct. App. 2012).

After determining that there was probable cause to arrest Appellant for felony DUI, Trooper McKenzie took Appellant into custody and placed him in his patrol car. (R. p. 102). The trooper Mirandized Appellant again in the patrol car. (R. p. 102-103). Trooper McKenzie stated that Appellant appeared to be under the influence when he spoke to him. (R. p. 105, lines 2-6). Appellant continued to deny any involvement in the collision. (R. p. 105, lines 10-14).

Sergeant Coats, a member of the M.A.I.T. team, was called out to investigate the collision that day. (R. p. 109). After visiting the scene, he went to the jail to interview Appellant. (R. p. 110). Sergeant Coats issued Appellant his Miranda warnings before beginning the interview. (R. p. 110-11). The entire interview, which began at 5:20 pm and lasted approximately one hour and twenty minutes, was audio recorded. (R. p. 110-11; p. 113). Sergeant Borowski, who was also present at the interview, testified that, although he had observed Appellant in an intoxicated state before noon that day, Appellant had "sobered up a lot" by the time of the 5:20 pm interview. (R. p. 127-28; p. 131, lines 7-8). He testified that Appellant had a "pretty good improvement" to his condition by that time. (R. p. 131, lines 5-7). Sergeant Borowski also testified that Appellant understood what was going on at the time of the interview. (R. p. 127-29). Sergeant Coats agreed, stating that Appellant was not threatened and that he had no reason to believe Appellant was not acting of his own free will and accord. (R. p. 114-15). Sergeant Coats also testified that Appellant could track the conversation they were having, was cognizant of what was going on, and understood everything that was said to him. (R. p. 116). Appellant provided rational answers to questions, made arguments on his own behalf, and made corrections if incorrect information was relayed to him. (R. p.

112; p. 116; p. 130). During the interview, Appellant provided an itinerary of his activities the night before the collision and ultimately admitted that he had been driving the car at the time of the collision. (R. p. 114). He stated that he checked for the victim's pulse after the collision and found none. (R. p. 114, lines 9-10). Appellant also stated that he "took full responsibility" for the collision. (R. p. 128, lines 19-21).

Following the pre-trial testimony of the four law enforcement officers, defense counsel stated he had no witnesses to present for the defense. (R. p. 133, lines 7-9). Counsel then reiterated his argument pursuant to State v. Kennedy. (See R. p. 133-35). As a part of this argument, he acknowledged that Appellant, at the time of the 5:20 pm interview, was "understanding, his composition steadily improved, pretty good improvement from the beginning to the confinement when he is giving his statement and when he is at the detention center." (R. p. 133, lines 13-16). Counsel argued that, since Appellant was "most cognizant of his rights" by the time of the 5:20 interview, he should have been given a complete Miranda warning. (R. p. 133, lines 17-22; p. 138-39). Defense counsel further acknowledged that the 5:20 interview was "clearly a different scenario" than the one earlier that day, and that it is clear that there is a "marked difference in the way [Appellant] speaks and the way he answers those officers" at the 5:20 interview. (R. p. 134, lines 8-11; p. 135, lines 6-11). Counsel also stated that Appellant's "blood alcohol has gone down" and that his "ability to comprehend has gone up." (R. p. 134, lines 14-15). Counsel also asserted that Appellant was promised leniency and help and told that he was facing up to fifty years in prison. (R. p. 135, lines 12-24).

The trial judge ultimately denied Appellant's motion to suppress, finding that the Miranda warnings given to Appellant before the 5:20 pm interview were appropriate. (See R. p. 136-46). Significantly, the trial judge pointed out that he had listened to the tape of Appellant's interview and did not find that Appellant's will was overborne or that his capacity for self-determination was critically impaired. (R. p. 137, lines 7-12). Subsequently, during trial, evidence regarding Appellant's confession, including the audiotape of the interview, was admitted over defense counsel's objection. (See R. p. 321-22; p. 428-30; p. 433-34). Following his motion for directed verdict, defense counsel "renewed" his motion to suppress the confession. (See R. p. 700-709). After some discussion, the trial judge again denied the motion, pointing out that the confession was already in evidence and before the jury. (R. p. 709, lines 8-17). The trial judge later revisited the issue during the jury charge conference and reaffirmed his prior ruling with respect to State v. Kennedy. (See R. p. 824-30).

Issue Preservation

Appellant argues on appeal that his confession in the 5:20 pm interview was not voluntary because the totality of the circumstances shows he was intoxicated at the time of the statement. (See Brief of Appellant, p. 11-13). This argument is not preserved for appellate review. Below, Appellant made an argument regarding State v. Kennedy and the insufficiency of the Miranda rights preceding the 5:20 pm interview. (See R. p. 85-91; p. 133-46). Appellant never argued that Appellant was too intoxicated to give a voluntary confession in the 5:20 pm interview. In fact, defense counsel effectively conceded that Appellant was sober enough to give a voluntary statement by that point. (See R. p. 89, lines 1-20; p. 133-34). Accordingly, the issue raised on appeal is not

properly before this Court. See State v. Russell, 345 S.C. 128, 133-34, 546 S.E.2d 202, 205 (Ct. App. 2001) (appellant's argument that his statements were not trustworthy or reliable because he was highly intoxicated at the time they were made was not preserved for appellate review because appellant raised a different argument below and the issue on appeal was not raised to the trial judge); State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (a party cannot argue one ground for an objection at trial and an alternative ground on appeal); State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000), *cert. denied*, 530 U.S. 1209 (2000) (holding that an issue is not preserved for appellate consideration where the appellant conceded the issue at trial); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Therefore, this issue should be dismissed on error preservation grounds.

Discussion

A defendant's statement must be made voluntarily because if a defendant's "will is overborne and his capacity for self-determination critically impaired," use of the resulting involuntary statement offends due process. State v. Kennedy, 325 S.C. 295, 305, 479 S.E.2d 838, 843 (Ct. App. 2002). "The test for determining the admissibility of a statement taken in compliance with Miranda is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances." State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) (citation omitted). Before admitting an alleged statement of a defendant, the trial court must examine the totality of the circumstances and determine whether the State has proven by a preponderance of the evidence that the statement was given voluntarily. State v. Miller, 375 S.C. 370, 383, 652 S.E.2d 444,

450 (2007) (citations omitted). "When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not reevaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 378-79, 652 S.E.2d at 448 (citation omitted). The conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law. *State v. Kennedy*, 325 S.C. at 305, 479 S.E.2d at 843.

Appellant argues on appeal that his confession was not voluntary because he was intoxicated at the time he gave the statement. (See Brief of Appellant, p. 11-13). Even assuming the issue was preserved, the trial judge did not err in admitting Appellant's confession because there was evidence supporting that Appellant's statement was not rendered involuntary due to intoxication. As defense counsel appeared to recognize below (see R. p. 89, lines 1-20), "[t]he fact that one is intoxicated at the time a confession is made does not necessarily render him incapable of comprehending the meaning and effect of his words." *State v. Saxon*, 261 S.C. 523, 529, 201 S.E.2d 114, 117 (1973). "Therefore, proof that an accused was intoxicated at the time he made a confession does not render the statement inadmissible as a matter of law, unless the accused's intoxication was such that he did not realize what he was saying." *Id.* In that vein, "[p]roof of intoxication, short of rendering the accused unconscious of what he is saying, 'goes to the weight and credibility to be accorded to the confession, but does not require that the confession be excluded from evidence.'" *Id.* (citations omitted).

In this case, as discussed above, there was evidence presented supporting that Appellant's confession was given freely and voluntarily and with a full understanding of