ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
FEB 04 2015
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000883

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

CHRISTINA CATOE BIGELOW
Assistant Attorney General
SC Bar No. 73562

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville, South Carolina 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
FEB 04 2015
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000883

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

CHRISTINA CATOE BIGELOW
Assistant Attorney General
SC Bar No. 73562

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

305 East North Street, Suite 325
Greenville, South Carolina 29601
(864) 467-8282

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT 3

Issue I (Lack of Appellate Jurisdiction) 3

Issue II (DUI Video) 9

Issue III (Six-Month Suspension Evidence) 20

Issue IV (Jury Question Issue) 29

CONCLUSION 34

AUTHORITIES CITED

Cases

Alexander v. State, 778 So.2d 1017 (Fla. App. Ct. 2000) 32

Bank of New York v. Sumter County, 387 S.C. 147, 691 S.E.2d 473 (2010) 30

Burke v. AnMed Health, 393 S.C. 48, 710 S.E.2d 84 (Ct. App. 2011) 23

Canal Ins. Co. v. Caldwell, 338 S.C. 1, 24 S.E.2d 416 (Ct. App. 1999) 6

Davis v. United States, __ U.S., __, 131 S. Ct. 2419 (2011) 15

Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989) 5

Henning v. Kaye, 307 S.C. 436, 415 S.E.2d 794 (1992) 6

Hill v. South Carolina DHEC, 389 S.C. 1, 698 S.E.2d 612 (2010) 5, 9

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) 9, 10

In re Manigo, 398 S.C. 149, 728 S.E.2d 32 (2012) 10, 14

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 25

Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002) 5

Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010) 4-8

State v. Barnes, 407 S.C. 27, 753 S.E.2d 545 (2014) 8

State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012) 32

State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005) 23, 31

State v. Chandler, 267 S.C. 138, 226 S.E.2d 553 (1976) 17, 19

State v. Dicapua, 373 S.C. 452, 646 S.E.2d 150 (Ct. App. 2007) 23

State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) 24

State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2005) 24

State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985) 30

State v. Henderson, 347 S.C. 455, 556 S.E.2d 691, (Ct. App. 2001) 20, 24, 27, 28

State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) 30

State v. Hoyle, 397 S.C. 622, 725 S.E.2d 720 (Ct. App. 2012) 11

State v. Huntley, 349 S.C. 1, 562 S.E.2d 472 (2002) 18, 19

State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011) 10

State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) 24

State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) 30

State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004) 10

State v. Landon, 370 S.C. 103, 634 S.E.2d 660 (2006) 18

State v. Logan, 279 S.C. 345, 306 S.E.2d 622 (1983) 30

State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002) 9

State v. Pauling, 322 S.C. 95, 470 S.E.2d 106 (1996) 30

State v. Rocha, 335 P.3d 586 (2014) 26

State v. Sawyer, 409 S.C. 475, 763 S.E.2d 183 (2014) 13, 14, 18, 19

State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) 24

State v. Sheppard, 391 S.C. 415, 706 S.E.2d 16 (2011) 32

State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998) 5

State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008) 10

State v. Weaver, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004) 18

State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991) 30

Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 713 S.E.2d 278 (2011) 12, 19

United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978) 32

United States v. Leon, 468 U.S. 897 (1984) 15

White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) 9

Statutes

S.C. Code § 56-5-2950 .... 20, 25, 26, 27

S.C. Code § 56-5-2951 25

S.C. Code § 56-5-2953 .... 10, 11, 13, 14, 18

Rules

Rule 203, SCACR 6

Rule 220, SCACR 16

Rule 29, SCRCrimP 4

Rule 403, SCRE 22

STATEMENT OF ISSUES ON APPEAL

I. The appeal should be dismissed because this Court does not have appellate jurisdiction over the case.

II. The trial judge properly denied Appellant's motion to dismiss the case where the video taken at the incident site conclusively demonstrated that Appellant was fully advised of his Miranda rights; where dismissal of the case would be an absurd result not intended by the legislature; where the video was admissible under the totality of the circumstances exception; and where Appellant failed to allege or show any prejudice from the purported defect in the video.

III. The trial judge properly allowed the State to present evidence regarding the consequences of refusing to take a breath test where Appellant was fully advised of these consequences prior to refusing the test and the consequences were relevant to an assessment of Appellant's refusal.

IV. Appellant's issue regarding the judge's failure to answer the jury's question is not preserved for appellate review where defense counsel failed to contemporaneously object to the judge's procedure below and where defense counsel was in fact the one who suggested that the judge refrain from immediately answering the jury's question. In addition to not being preserved, Appellant's argument is wholly speculative and without merit.

STATEMENT OF THE CASE

Appellant was indicted in Greenville County in November 2012 for driving under the influence, second offense. On March 14, 2013, Appellant was tried before the Honorable D. Garrison Hill and a jury. The jury found Appellant guilty, and Judge Hill sentenced Appellant to ninety days and imposed a fine of $3,000.00, suspended to five days of active time on house arrest, a $2,100.00 fine, and probation for six months. He also ordered that Appellant attend MADD meetings and complete substance abuse counseling while on probation.

Appellant submitted a *pro se* letter to the trial judge on March 21, 2013, and another *pro se* letter to the solicitor on April 1, 2013. Appellant then retained a new attorney to represent him, who filed an "Amended Notice of Appeal" with the Court of Appeals on April 19, 2013, referencing Appellant's previous *pro se* filings. On June 21, 2013, this Court remanded the case to the circuit court "for the limited purpose of consideration of Appellant's motion for reconsideration." On March 17, 2014, a hearing on Appellant's post-trial motion was held, and the trial judge denied the motion in an oral ruling from the bench. On March 27, 2014, Appellant's counsel filed and served a new Notice of Appeal. On March 31, 2014, the trial judge filed an Order Denying Defendant's Motion for New Trial. (See Order filed 3/31/14).

On October 10, 2014, the State filed and served a motion to dismiss the appeal for lack of jurisdiction. Following the filing of a Return by Appellant and a Reply by the State, this Court denied the State's motion by Order dated November 13, 2014.

ARGUMENT

I. The appeal should be dismissed because this Court does not have appellate jurisdiction over the case.

By submitting this Brief, the State does not waive its argument that the Court lacks appellate jurisdiction over this case. The State made this argument by way of a Motion to Dismiss dated October 10, 2014. (R. p. 4-15). Following the filing of a Return by Appellant and a Reply by the State, this Court denied the State's Motion by Order dated November 13, 2014. (R. p. 16-23). Nevertheless, the State maintains its position that this appeal should be dismissed for lack of jurisdiction. The relevant facts are as follows.

Relevant Facts

A Greenville County jury found Appellant guilty of driving under the influence on March 14, 2013. On that date, the trial judge sentenced Appellant to ninety days and imposed a fine of $3,000.00. This sentence was suspended upon service of five days of active time under Greenville County's "Home Incarceration Program," payment of a $2,100.00 fine, and probation for six months. The trial judge also ordered that Appellant attend MADD meetings and complete substance abuse counseling while on probation. On March 21, 2013 - eight days after trial - Appellant submitted a *pro se* letter to the judge asking for reconsideration of his conviction. This letter stated it was being copied to the "GS Court, Prosecutor, personal attorney." (R. p. 9-10). On April 1, 2013, Appellant submitted a second *pro se* letter to the solicitor referencing his prior letter and referring to it as a "request for appeal, review, or consideration for changing my trial results to a mistrial." (R. p. 11). Subsequently, Appellant retained a different attorney to represent him. On April 19, 2013 - thirty-six days after Appellant's conviction –

Appellant's new counsel filed and served an "Amended Notice of Appeal" referencing Appellant's previous *pro se* filings. On June 21, 2013, this Court remanded the case to the circuit court "for the limited purpose of consideration of Appellant's motion for reconsideration." On March 17, 2014, a hearing on Appellant's post-trial motion was held, and the trial judge denied the motion in an oral ruling from the bench. On March 27, 2014, Appellant's counsel filed and served a new Notice of Appeal. On March 31, 2014, the trial judge filed an Order Denying Defendant's Motion for New Trial. (R. p. 13-15).

Discussion

Rule 203 of South Carolina's Appellate Court Rules states, in pertinent part:

> After a plea or trial resulting in conviction or a proceeding resulting in revocation of probation, a notice of appeal shall be served on all respondents **within ten (10) days after the sentence is imposed**. In all other cases, a notice of appeal shall be served on all respondents within ten (10) days after receipt of written notice of entry of the order or judgment. When a **timely** post-trial motion is made under Rule 29(a), SCRCrimP, the time to appeal shall be stayed and shall begin to run from receipt of written notice of entry of an order granting or denying such motion (emphasis added).

Rule 29(a), SCRCrimP, provides, in pertinent part, that post-trial motions shall be made **within ten days** after the imposition of the sentence and that the time for appeal shall be stayed by a **timely** post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion.

In Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), the South Carolina Supreme Court stated as follows:

> Since there is no right to "hybrid representation" that is partially *pro se* and partially by counsel, substantive documents, with the exception of

> motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). Because petitioner was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. **The motion was essentially a nullity**. We therefore vacate the order ruling on the motion and dismiss petitioner's notice of appeal as moot. We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a party who is represented by counsel (emphasis added).

In Appellant's case, there was no proper, timely motion for reconsideration or notice of appeal within the ten days after the conviction. Appellant was admittedly represented by counsel at the time he submitted the March 21, 2013 letter to the trial judge. (See R. p. 12, lines 19-21; see p. 9-10). Under Miller, this document was an improper *pro se* filing that should not have been - and could not properly have been - accepted or ruled upon by the trial judge; it was a "nullity." Miller at 347, 697 S.E.2d at 527; see also Jones v. State, 348 S.C. 13, 14, 558 S.E.2d 517, 517 (2002) ("There is no constitutional right to hybrid representation either at trial or on appeal."); Foster v. State, 298 S.C. 306, 307, 379 S.E.2d 907, 907 (1989) (ordering the Clerk of Court to return a substantive *pro se* document filed while the petitioner was represented by counsel). Therefore, the March 21, 2013 letter could not operate as a notice of appeal or a motion for reconsideration that would stay the time period for the filing of the appeal.

Since no proper motion for reconsideration or notice of appeal was filed within ten days of Appellant's conviction, this Court has no jurisdiction over Appellant's case and must dismiss his appeal. See Hill v. South Carolina Dept. of Health and Environmental Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be

extended by this Court."); Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 24 S.E.2d 416, 418 (Ct. App. 1999) (in a civil case, pointing out that Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of jurisdiction "and results in dismissal of the appeal"); see also Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State."). Although this required dismissal will prevent Appellant from challenging his conviction in a direct appeal, Appellant's issues can be raised in a post-conviction relief application.[1]

In his response to the State's Motion to Dismiss, Appellant contended that the *pro se* documents[2] he submitted following trial did not constitute impermissible hybrid representation because Appellant "did not have an attorney **actively** representing him after the conclusion of the trial or during the time for filing post-trial motions or notice of appeal." (R. p. 16) (emphasis added). This argument misses the mark because it is undisputed that Appellant's trial counsel had not been relieved as counsel in the ten days following Appellant's trial. At least as far as the State is aware, there is no test regarding

---

[1] At the post-trial hearing on March 17, 2014, Appellant's new counsel explained that Appellant's trial counsel "left on a vacation and left the country without filing the motion [for reconsideration] or notice [of appeal]." (See R. p. 12, lines 21-22).

[2] In his Return, Appellant refers to these documents as a "motion for new trial" and "notice of appeal." However, the March 21, 2013 *pro se* letter - the only document submitted within ten days of the conviction - stated it was regarding a "Request to re-examine Case # GS2302124-01." (See R. p. 9-10). It stated several reasons that the judge should "reconsider the verdict" and "find this jury disqualified or accept their initial split decision for declaration of a mis-trial." (See R. p. 9-10). This filing could not in any way be construed as a notice of appeal, despite the fact that Appellant's subsequent *pro se* letter to the solicitor referred to it as a "request for appeal, review, or consideration for changing my trial results to a mistrial." (See R. p. 11). Note also that the March 21, 2013 *pro se* letter was not filed with the appellate court. In the State's view, the *pro se* filings of Appellant in this case illustrate the problems that arise when inexperienced litigants attempt to submit documents to the court. This is, at least in part, the reason for the Supreme Court's opinion in Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010).

an attorney's "level of activity" used in order to determine whether or not a defendant is entitled to submit *pro se* documents. Certainly, when a trial judge receives a *pro se* document from a criminal defendant, he should not be required to undertake an investigation into how "active" trial counsel has been; instead, he should only have to check the file to see whether or not the defendant is represented by counsel and whether or not counsel has been relieved by the court.[3] (See R. p. 217, lines 8-24, wherein the trial judge describes his confusion upon receiving the *pro se* letters from Appellant).

Appellant also argued in his response that his case is distinguishable from Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010), because Miller involved a civil case (a post-conviction relief case) and because "unlike in Miller, Devore was not acting in parallel with an attorney actively engaged in his representation." (R. p. 18). However, the Miller decision was not limited to civil cases, nor was it limited to situations where both the attorney and the defendant file documents at similar times. To the contrary, the language of Miller is clear and unequivocal:

> Since there is no right to "hybrid representation" that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. **Because petitioner was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. The motion was essentially a nullity**. We therefore vacate the order ruling on the motion and dismiss petitioner's notice of appeal as moot. We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a party who is represented by counsel.

Miller, 388 S.C. at 347, 697 S.E.2d at 527 (citations omitted) (emphasis added).

---

[3] In this case, Appellant made no request for his counsel to be relieved following trial.

In his response to the State's Motion to Dismiss, Appellant further pointed to a defendant's right to act as his own lawyer and argued that "in the absence of counsel, Devore had an absolute right to represent himself and file a *pro se* motion for a new trial and notice of appeal." (R. p. 18). However, a criminal defendant is only allowed to act as his own lawyer after being properly warned about the dangers of self-representation. See, e.g., State v. Barnes, 407 S.C. 27, 36, 753 S.E.2d 545, 549 (2014) ("Under Faretta, the trial judge has the responsibility to make sure that the defendant is informed of the dangers and disadvantages of self-representation, and that he makes a knowing and intelligent waiver of his right to counsel.") (citation omitted). In this case, Appellant was never "in the absence of counsel." Instead, he was at all times represented by counsel; consequently, he was never warned of the dangers of self-representation.

Appellant asserts there was no hybrid representation in his case "as counsel had concluded his representation and left the country." (R. p. 18). However, in criminal cases, attorneys are not entitled to unilaterally "conclude" their representation of defendants even if they have plans to leave the country. Here, for the ten days following Appellant's conviction, jurisdiction over the case remained in the circuit court, and counsel had not been relieved by the court. Therefore, **only** counsel could properly file a motion for reconsideration or a notice of appeal.

It seems that in Appellant's view, because trial counsel was not "actively" representing Appellant, trial counsel did nothing wrong by leaving the country on vacation without filing a notice of appeal or motion for reconsideration on Appellant's behalf. And perhaps he did not; it may be that Appellant expressly instructed counsel not to file an appeal for one reason or another. However, to the extent counsel did, in fact, do

something "wrong," he should be held accountable, and the proper forum in which to do so is post-conviction relief. In the post-conviction relief forum, any questions relating to trial counsel's representation of Appellant could be addressed along with any direct appeal issues if it is shown that trial counsel's representation deprived Appellant of his right to a direct appeal. See White v. State, 263 S.C. 110, 113, 208 S.E.2d 35, 36 (1974). However, under the circumstances of Appellant's case at present, this Court does not have jurisdiction over Appellant's direct appeal and cannot properly address Appellant's direct appeal issues. See, e.g., Hill, 389 S.C. at 21, 698 S.E.2d at 623 ("The service of a notice of appeal is a jurisdictional requirement, and the time for service may not be extended by this Court."). Accordingly, the State respectfully requests that this Court dismiss the appeal in its entirety on the basis of lack of appellate jurisdiction.

II. The trial judge properly denied Appellant's motion to dismiss the case where the video taken at the incident site conclusively demonstrated that Appellant was fully advised of his Miranda rights; where dismissal of the case would be an absurd result not intended by the legislature; where the video was admissible under the totality of the circumstances exception; and where Appellant failed to allege or show any prejudice from the purported defect in the video.

The Incident Site Video Complied with the Statute

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). All rules of statutory construction are subservient to the rule that legislative intent must prevail if it can reasonably be discovered from the language employed in the statute, which must be construed in light of the statute's intended purpose. State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory

interpretation are not needed and the court has no right to impose another meaning." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Hodges, 341 S.C. at 85, 533 S.E.2d at 581 (citation omitted). Accordingly, the legislature's intent should be ascertained primarily from the plain language of the statute, and the court must apply clear and unambiguous terms of a statute according to their literal meaning. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004). Furthermore, "[a]lthough it is a well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant, courts must nevertheless interpret a penal statute that is clear and unambiguous according to its literal meaning." Jacobs, 393 S.C. at 587, 713 S.E.2d at 623. Nevertheless, courts will reject a statutory interpretation which would lead to a plainly absurd result which the legislature could not have intended or which would defeat the plain legislative intent. State v. Sweat, 379 S.C. 367, 377, 665 S.E.2d 645, 650 (Ct. App. 2008).

"Statutory interpretation is a question of law subject to *de novo* review." In re Manigo, 398 S.C. 149, 157, 728 S.E.2d 32, 35 (2012).

S.C. Code § 56-5-2953 states that a "[a] person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site videotaped." S.C. Code § 56-5-2953(A). The statute specifies the events at the incident site that must be recorded:

The video recording at the incident site must:

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

(ii) include any field sobriety tests administered; and

> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and **show the person being advised of his Miranda rights**.

S.C. Code § 56-5-2953(A)(1)(a)(i)-(iii) (emphasis added).

In the video recording of Appellant at the incident site, the officer properly started his video camera at the time he activated his blue lights. The video also properly included the field sobriety tests and the arrest of Appellant. The only part of the statute at issue in this case is the language requiring that the video recording at the incident site "show" the person being advised of his Miranda rights. Under Miranda, there are four warnings that must be given prior to questioning. Specifically, the suspect must be informed that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. State v. Hoyle, 397 S.C. 622, 627-28, 725 S.E.2d 720, 723 (Ct. App. 2012).

It is clear from the video, and it was stipulated below, that the officer began his recitation of the Miranda rights on camera. (See State's Exhibit # 1, Video, see R. p. 49, lines 1-24). In full view of the camera, the officer advised Appellant that he had the right to remain silent, that anything he said or did could be used against him in court, and that he had the right to an attorney before and during any questioning. (See Video at 23:06-23:12). Before the officer completes the fourth required prong of Miranda - that is, that if Appellant cannot afford an attorney, one will be appointed for him free of charge - he and Appellant walk off camera and the officer places Appellant in the backseat of the patrol

car. However, the fourth prong of Miranda can be heard clearly despite the fact that the two men are off camera. (See Video at 23:13-23:17).

At issue, then, is the meaning of the word "show" in the context of the statute. The legislature's purpose in enacting this statute was to create direct evidence of a DUI arrest. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). It is also clear that the legislature's intent was to require the State to document the steps taken at the incident site to ensure a fair procedure was used and that the intoxicated individual's rights were not violated. Considering these underlying purposes of the statute, the State submits that the most appropriate definition of "show" is to demonstrate, reveal, or make evident. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 1199 (1980) (under transitive verbs, definition 3: "To point out, demonstrate" and definition 4: "To manifest, reveal;" see also definition 1 under intransitive verbs: ""To be or become visible or evident"); WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 2nd COLLEGE EDITION 1319 (1976) (definition 5: "to reveal, manifest, or make evident (an emotion, condition, quality, etc.) by behavior or outward sign"). This definition of "show" best comports with the legislative intent while still giving effect to the plain language of the statute.

Any person viewing the video of the incident site in Appellant's case would have no question that Miranda rights were given to Appellant. The video makes it abundantly clear that Miranda rights were given to Appellant. Indeed, there has never been any question that Appellant was advised of his Miranda rights inasmuch as the tape is so clear in illustrating this point. (See R. p. 48-49). Because the video demonstrates - through a combination of video and audio - that all of the Miranda rights were given to Appellant,

the video "shows" Appellant being advised of his Miranda rights in compliance with S.C. Code § 56-5-2953(A)(1)(a)(iii).

Appellant relies on State v. Sawyer, 409 S.C. 475, 763 S.E.2d 183 (2014), in support of his position that the video recording here was deficient. However, Sawyer did not involve a video recording of the incident site but instead involved a video recording of the breath test site, which is governed by a different part of the statute. Id. at 477, 763 S.E.2d at 184. Also, Sawyer dealt with the old version of the statute prior to its amendment effective February of 2009. See id. at 480, 763 S.E.2d at 185. The old version of the "breath test" portion of the statute read as follows:

> (2) The videotaping at the breath site:
>
> (a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;
>
> (b) must include the reading of Miranda rights, the entire breath test procedure, the person being informed that he is being videotaped, and that he has the right to refuse the test;
>
> (c) must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test;
>
> (d) must also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to videotape this waiting period. However, if the arresting officer administers the breath test, the person's conduct during the twenty-minute pre-test waiting period must be videotaped.

In Sawyer, the video of the breath test site did not include audio. Id. at 477, 763 S.E.2d at 184. The Supreme Court held that, although a "silent video" would suffice for a recording of the defendant's conduct during the twenty-minute waiting period and the

actions of the breathalyzer operator conducting the test, a silent video could not meet the other statutory requirements; specifically, that the videotape "must include the reading of Miranda rights" and the person "being informed that he is being videotaped" and that "he has a right to refuse the test." Id. at 480, 763 S.E.2d at 185-86. In a footnote, the Supreme Court explained that a silent video could not meet the latter statutory requirements because "all that the video shows is the officer's lips moving." Id. at 480, 763 S.E.2d at 186 n4. Thus, without audio, the video did not, on its face, "include the reading of Miranda rights" as required by the breath test site portion of the old statute.

In Appellant's case, unlike in Sawyer, the statutory requirement at issue is that the *incident site* video must "show the person being advised of his Miranda rights." S.C. Code § 56-5-2953(A)(1)(a)(iii). Also unlike in Sawyer, there is not a "silent video;" instead there is both video and audio that, when taken together, conclusively establishes - that is, "shows" - that Appellant was advised of his Miranda rights. Accordingly, Sawyer is distinguishable and does not compel reversal in Appellant's case.

Dismissal Here Would be an Absurd Result

As a separate basis for upholding the trial judge's denial of Appellant's motion to dismiss, the State submits that dismissal of the case under the circumstances presented here would constitute an absurd result that could not have been intended by the legislature. See In re Manigo, 398 S.C. 149, 157, 728 S.E.2d 32, 36 (2012) (if applying the plain language of a statute would lead to an absurd result, courts will interpret the words in such a way to escape the absurdity). As mentioned above, one of the purposes of S.C. Code § 56-5-2953 was to require the State to document the steps taken at the incident site to ensure a fair procedure was used and that the intoxicated individual's

rights were not violated. The videotape in this case meets that legislative intent because it conclusively shows beyond doubt that Appellant was advised of all of his Miranda rights. It would be absolutely absurd to dismiss a DUI charge - or an even more serious charge such as a felony DUI - for such a trivial reason as the officer and Appellant walking off screen during the giving of the fourth Miranda right. Indeed, under Appellant's theory of the case, a court would be required to dismiss the case even if the last *word* of the fourth Miranda right was given off-camera. Such an interpretation goes too far. In fact, dismissal despite the fact that the video recording presented by the State clearly demonstrates that the person's constitutional rights were honored could breed disrespect for the judicial system and flouts the long-established philosophy that harsh sanctions, such as exclusion of evidence or dismissal, should be limited to blatant violations or serious misconduct. See, e.g., United States v. Leon, 468 U.S. 897, 907-908 (1984) ("The substantial social costs exacted by the exclusionary rule...have long been a source of concern. 'Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury.' An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system. Indiscriminate application of the exclusionary rule, therefore, may well 'generat[e] disrespect for the law and administration of justice.' Accordingly, '[a]s

with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.'"); Davis v. United States, __ U.S. __, 131 S. Ct. 2419, 2426 (2011) ("Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a 'last resort.'") (citations omitted).

In sum, the State submits that the legislature could not have intended the absurd result of dismissal under the circumstances presented in this case. Even assuming there was technical noncompliance with the statute, the video unquestionably demonstrates that Appellant was fully advised of his Miranda rights. Accordingly, this Court should uphold the trial court's denial of Appellant's motion to dismiss.

The Totality of the Circumstances Exception Applies

However, even if this Court were to reject the arguments set forth above, Appellant's conviction should still be affirmed under the "totality of the circumstances" exception. See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Subsection (B) of S.C. Code § 56-5-2953 states, in pertinent part, that "[n]othing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances." Appellant's argument that the video is deficient is essentially an argument that the State failed to produce a portion of the video. However, in this case, the officer's failure to produce that

portion of the video was reasonable under the totality of the circumstances. Appellant was stopped on a January night in Greenville, South Carolina. (R. p. 96, lines 11-18). As both Appellant and the officer testified at trial, it was around twenty-five degrees on the night Appellant was stopped. (R. p. 127, lines 20-22; p. 148, lines 7-12; see also p. 153, lines 18-19). In fact, according to Appellant, "the highest it could have been was twenty-five," and it was "one of the coldest nights of the year 2011 and 2012." (R. p. 148, lines 11-12). Also according to Appellant, he had been "shivering that whole time we were on that videotape." (R. p. 151, lines 11-14). Indeed, the cold affected Appellant so much that he was unable to perform one of the field sobriety tests. (R. p. 151, lines 11-15). Notably, the video reflects that Appellant was not wearing gloves, was wearing a fairly light jacket, and was wearing only a baseball cap on his head. (See Video at 7 minutes, 45 seconds).

After attempting to conduct sobriety tests outside in front of the patrol vehicle's camera for more than twenty-two minutes, the officer ultimately decided he had probable cause to arrest Appellant. (See Video). He then handcuffed Appellant, started advising him of his Miranda rights, and simultaneously began walking Appellant to the patrol car. (See Video). It was entirely reasonable - and the safest and most prudent course of action - for the officer to walk Appellant directly to the patrol car without delay in order to get Appellant out of the twenty-five degree weather.[4] In other words, it was reasonable for the officer to be more concerned with getting Appellant out of the cold weather than with whether or not the fourth Miranda prong was fully in view of the camera. Furthermore, under the totality of the circumstances, the video as a whole unquestionably demonstrates

---

[4] As the solicitor pointed out, the cameras on officers' vehicles "don't have a 360-degree view." (R. p. 42, lines 18-19).

that Appellant was fully advised of his Miranda rights. For these reasons, the totality of the circumstances exception applies and this Court should uphold the trial court's denial of Appellant's motion to dismiss.

Appellant Failed to Allege or Show Any Prejudice

Even assuming the video did not strictly comply with S.C. Code § 56-5-2953, and assuming this Court rejects the other arguments above, the State submits that a defendant should be required to show prejudice from an officer's noncompliance with the statute.[5] It has long been the rule in this state that where a statute does not explicitly set forth a remedy for noncompliance, it is appropriate to employ a prejudice analysis. See e.g., State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("exclusion of evidence should be limited to violations of constitutional rights and not to statutory violations, at least where the appellant cannot demonstrate prejudice at trial resulting from the failure to follow statutory procedure."); State v. Huntley, 349 S.C. 1, 5-6, 562 S.E.2d 472, 474 (2002) (a prejudice analysis was appropriate where breathalyzer operator failed to comply with a statute regarding the simulator test solution where the statute did not specify a remedy; the defendant was not prejudiced where there was no question the breathalyzer machine was operating properly and its results were reliable); State v. Landon, 370 S.C. 103, 108-109, 634 S.E.2d 660, 663 (2006) (although the law enforcement agency failed to comply with a statute requiring detailed records be kept regarding breath testing devices, a prejudice analysis was appropriate where the statute did not specify a remedy); see also State v. Weaver, 361 S.C. 73, 80, 602 S.E.2d 786, 789

[5] To the extent necessary, the State will move to argue against the precedent of Sawyer and the other cases holding that a prejudice analysis is not appropriate in cases involving noncompliance with S.C. Code § 56-5-2953.

(Ct. App. 2004) (failure to comply with § 17-13-140 does not void a warrant where a defendant fails to demonstrate prejudice).

The fact that S.C. Code § 56-5-2953 mentions dismissal as a *possible* remedy for noncompliance should not change the fact that a defendant must show prejudice. In the dissent in State v. Sawyer, Chief Justice Toal stated as follows:

> Contrary to the majority's assertion, the General Assembly did not specify a remedy in section 56–5–2953 for failure to comply with the statutory requirements. Subsection (B) merely provides that noncompliance with the statute "is not alone a ground for dismissal" *if* the video recording qualifies under an exception in subsection (B). S.C.Code Ann. § 56–5–2953 (B); *see also Suchenski,* 374 S.C. at 16, 646 S.E.2d at 881 (finding that failure to produce a video recording in compliance with 56–5–2953 *may* be a ground for dismissal if no exceptions apply). Regardless, in my opinion, a statute's failure to specify a remedy for noncompliance does not preclude a prejudice analysis, as the majority implies. *C.f. State v. Landon,* 370 S.C. 103, 108–09, 634 S.E.2d 660, 663 (2006) (finding a prejudice analysis appropriate for an alleged violation of a recordkeeping statute which does not specify a remedy for noncompliance).
>
> In my view, Respondent was not prejudiced by the video recording's lack of audio. Aside from its lack of audio, the video recording complies with the statutory requirements of 56–5–2953 by including the reading of Respondent's *Miranda* warnings, the officer informing Respondent of the video recording and his right to refuse the breath test, and the breath test procedure itself. This Court has stated that "the purpose of section 56–5–2953 ... is to create direct evidence of a DUI arrest." *Town of Mt. Pleasant v. Roberts,* 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011). Despite the malfunctioning of the audio, the video recording nevertheless creates evidence of Respondent's breath test. Significantly, Respondent has challenged neither the validity of the *Miranda* warnings he was given nor any other aspect of the breath test procedure. Respondent has not asserted that bad faith or a bad motive existed on the part of any actor involved in the video recording audio failure.
>
> Therefore, I would hold that Respondent was not prejudiced by the omission of audio in the video recording and, consequently, the circuit court erred in suppressing the evidence. Absent a violation of Respondent's constitutional rights—which are not in dispute here—the circuit court should not have excluded the video recording or the evidence surrounding Respondent's breath test without a showing that (1) the video did not comply with section 56–5–2953 *and* (2) Respondent was

> prejudiced as a result of the video's non-compliance. *See Huntley,* 349 S.C. at 6, 562 S.E.2d at 474; *Chandler* 267 S.C. at 143, 226 S.E.2d at 555.

Sawyer, 409 S.C. at 484-85, 763 S.E.2d at 187-88 (Toal, C.J., dissenting, Kittredge, J., concurring in the dissent). The State wholeheartedly agrees with the reasoning in Chief Justice Toal's dissent.

In this case, as discussed above, it is abundantly clear from the video that Appellant was fully advised of his Miranda rights. Indeed, Appellant has never contended otherwise and has never asserted that his constitutional rights were violated or that he suffered prejudice from the fact that the fourth Miranda warning was given while the officer and Appellant were out of the camera's view. Accordingly, dismissal of the case was not warranted.

III. The trial judge properly allowed the State to present evidence regarding the consequences of refusing to take a breath test where Appellant was fully advised of these consequences prior to refusing the test and the consequences were relevant to an assessment of Appellant's refusal.

Relevant Facts

Prior to trial, defense counsel requested that language regarding the six-month driver's license suspension that is a consequence of a person's refusal to take a breath test be redacted on both the written advisement of rights form and the Datamaster videotape. (R. p. 52-53). He argued that the six-month suspension, which was an administrative action by the highway department, was irrelevant to the case. (R. p. 53, lines 3-11). Defense counsel agreed with the solicitor that, under S.C. Code § 56-5-2950(B)(1), Appellant's refusal to take the breath test itself could be used against him at trial, but disagreed that the six-month suspension - a consequence of refusal - was admissible. (R. p. 53-54). The solicitor pointed out that, although she would have to redact the portions

regarding the suspect's right to have independent tests conducted pursuant to State v. Henderson, 347 S.C. 455, 556 S.E.2d 691, (Ct. App. 2001) - because the statute specifically states that a person's failure to request additional tests is not admissible against the person - the rest of the statute is admissible. (R. p. 55, lines 2-22). The solicitor also argued that the evidence was "relevant to the implied consent rights that [the officer] is required to read" and stated she did not see how the six-month suspension language was prejudicial to Appellant. (R. p. 55, line 22 – p. 56, line 13). Defense counsel again reiterated his argument that the evidence was not relevant. (R. p. 56, lines 9-11). Specifically, he stated "[t]hat would be my point on that just for consistency's sake." (R. p. 56, lines 10-11).

Appellant's counsel then told the judge he would agree to stipulate for the record that Appellant was "properly given and offered the SLED test" or that "[t]he test was offered pursuant to SLED regulations." (R. p. 56, line 23 – p. 57, line 2). Counsel also pointed out that Appellant's suspension had actually been rescinded and stated he saw no reason to "get into that" because it "takes us away from what we're here about." (R. p. 57, lines 3-5). He added that the evidence would inject "this administrative stuff into [the case]." He stated that if the solicitor "gets into it, then I have to be allowed to get into it." (R. p. 57, lines 23-25). In response, the solicitor stated she would not tell the jury Appellant's license was actually suspended, but "that's the choice [Appellant] faced under the statute." (R. p. 58, lines 10-12). She stated that she believed she "should be able to under the statute that the statute says that he has the right to refuse, but it can be used against him and his license will be suspended for six months. I guess I can go on and say he can challenge the suspension. But that was the choice that he faced that night.

And I think that the jury needs to understand the choice that he faced." (R. p. 59, line 21 – p. 60, line 2).

The judge then asked defense counsel to explain why Appellant's full awareness of the risks and consequences of refusing the test was not probative regarding his decision. (R. p. 60, lines 3-7). Defense counsel responded, "[b]ecause it's a separate – a totally separate proceeding" that is "not a part of the criminal case." (R. p. 60, lines 8-10; see also lines 17-25).

The judge subsequently asked about what the State was requesting as far as jury charges and the right to refuse the test. (R. p. 61, lines 24-25; see also p. 58, lines 5-18). The solicitor passed up the statute with only the "right to independent testing" language redacted. (R. p. 62, lines 1-3).

After fully hearing from both sides, the trial judge first noted that he was "keenly interested" in "not wanted to get bogged down in collateral matters." (R. p. 62, lines 11-13). However, he ruled that "evidence of what [the defendant] risked under the law and possible consequences from the refusal are relevant." (R. p. 62, lines 14-16). He also ruled that the evidence was admissible under Rule 403, SCRE, because he did not find that the probative value of the evidence was substantially outweighed by the concerns of Rule 403. (R. p. 62, lines 16-22). The judge stated that defense counsel would be permitted to respond by eliciting evidence concerning what ultimately occurred regarding the suspension. (R. p. 63, lines 2-4).

Later in trial, the defense objected to the implied consent form containing the language about the six-month suspension and objected to the Datamaster video which

also contained that language.[6] (R. p. 119-25). Significantly, however, although defense counsel was given the opportunity to review the jury charge in advance (R. p. 140, lines 2-12; p. 142, lines 6-25), he failed to object to the fact that the judge's instructions to the jury included a reading of the implied consent statute containing the six-month suspension language. (R. p. 142, lines 6-25; p. 185-86; p. 188, lines 20-24). In fact, after the jury charge was completed, and the judge asked whether there were any objections, defense counsel specifically told the court there were no objections from the defense. (R. p. 188, lines 18-24).

Issue Preservation

Initially, the issue raised on appeal is not preserved for review because Appellant expressly waived any complaint he had below. As mentioned above, in the jury charge, the judge provided the jury with information regarding the fact that a six-month driver's license suspension is a consequence of refusal to take the breath test. (R. p. 185-86). Appellant had no objection to this jury instruction and in fact expressly told the judge after the jury charge ended that he had no objection. (R. p. 188, lines 20-24). Accordingly, Appellant waived any objection to the jury being given information about the six-month suspension. See State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) ("Dicapua's sole objection to the videotape came in the form of a motion in limine to suppress the videotape because of its lack of audio. Once the State moved to enter the videotape into evidence and publish it to the jury, however, Dicapua's counsel specifically stated he had 'no objection.' We find this amounted to a waiver of any issue Dicapua had with the videotape."); Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d

[6] Defense counsel did not object to the officer's testimony about the six-month suspension. (R. p. 120, lines 21-25).

84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review."); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced.").

Further, even if defense counsel's failure to object to the language regarding the six-month suspension in the jury charge did not operate as a waiver of his previous objection, the fact that the jury was provided with information regarding the six-month suspension in the jury charge rendered the evidence regarding the six-month suspension at trial merely cumulative. Therefore, any error with respect to admission of the unredacted implied consent form and unredacted Datamaster video was entirely harmless. See, e.g., State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

The issue is also not preserved for appellate review because the argument made on appeal is different than the argument raised to the trial judge. Before the trial judge, defense counsel argued **only** that the language regarding the six-month suspension was not relevant. (See R. p. 21-32). On appeal, Appellant relies on State v. Henderson, 347 S.C. 455, 556 S.E.2d 691 (Ct. App. 2001), arguing that the statute itself does not provide that the administrative penalty for refusal of the test is admissible, and further argues that allowing evidence of the six-month suspension "places the defendant in a position of having to offer evidence to allow the jury to quantify the effect of a potential suspension" and that "[p]lacing a defendant in the position of having to introduce evidence to justify the exercise of a statutory right is simply untenable." (Brief of Appellant, p. 5-6). The

new arguments made on appeal - which do not even mention relevance - are not preserved for review and should not be addressed by this Court. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."); State v. Freiburger, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (finding an issue not properly preserved for appeal where one ground is raised below and another ground is raised on appeal); State v. Johnson, 363 S.C. 53, 58–59, 609 S.E.2d 520, 523 (2005) (holding to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court with the objection addressed to the trial court in a sufficiently specific manner that brings attention to the exact error, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal); see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) ("Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments."). Therefore, Appellant's issue regarding admission of evidence of the six-month suspension should be dismissed on error preservation grounds.

Discussion of the Merits

Assuming the issue on appeal is somehow preserved for review, the trial judge did not err in admitting evidence regarding the six-month driver's license suspension which is a consequence of a person's refusal to take a breath test. S.C. Code § 56-5-2950, the implied consent statute, provides, in relevant part, as follows:

(B) No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

(1) the person does not have to take the test or give the samples, but that the person's privilege to drive must be suspended or denied for at least six months with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, *and that the person's refusal may be used against the person in court*[.]

S.C. Code § 56-5-2950(B)(1) (emphasis added); see also S.C. Code § 56-5-2951. Significantly, subsection (G) of S.C. Code § 56-5-2950 provides that "[t]he provisions of this section must not be construed as limiting the introduction of any other evidence bearing upon the question of whether or not the person was under the influence of alcohol, drugs, or a combination of alcohol or drugs." S.C. Code § 56-5-2950(G).

Thus, subsection (B) of the implied consent statute expressly permits a person's refusal to take a breath test or provide biological samples to be used against the person in court. Significantly, the person cannot even be offered any tests unless the person is first advised, verbally and in writing, that there are certain consequences for refusing a test. Subsection (G) makes it clear that "any other evidence" relevant to the question of whether or not the person was under the influence is admissible.

A person's refusal to take a breath test or provide samples is not - standing alone - particularly probative of guilt. However, when there are consequences flowing from a refusal - and the person is fully advised of these consequences - the refusal becomes highly probative on the issue of guilt. Obviously, on one hand, a person with nothing to hide would be inclined to take the test and clear themselves of wrongdoing, particularly where he or she knows there are significant consequences for refusing the test. On the

other hand, an impaired person would be inclined to refuse to the test, and the fact that a person refuses the test despite the consequences bolsters the inference of impairment.

Here, the consequences of refusing a breath test are that "the person's privilege to drive must be suspended or denied for at least six months" and that "the person's refusal may be used against the person in court." S.C. Code § 56-5-2950(B)(1). Appellant was fully advised of these consequences before he was offered the test and before he refused the test. (R. p. 119-25). As the solicitor argued below, it is only fair that the jury have a full picture of the choice Appellant faced that night and of what he chose to give up by refusing to submit to the test. The consequences of refusal are obviously relevant and probative on the issue of impairment - and thus guilt - and the jury was entitled to know about them. See State v. Rocha, 335 P.3d 586, 591 (2014) (in case where defendant argued that his "suspension advisory form" - which contained information about the consequences of refusal to take a breath test including suspension of his driver's license - was not relevant, the Idaho Supreme Court of held that the suspension advisory form was in fact relevant because "the form stated the adverse consequences faced by [the defendant] for failing to perform evidentiary testing," and thus "it strengthened the inference that he was unwilling to submit to a test because he believed the test results would show an alcohol concentration above the legal limit").

Appellant's reliance on State v. Henderson is misplaced. Henderson dealt with admission of evidence regarding a person's right to have an independent test to determine his blood-alcohol level. State v. Henderson, 347 S.C. 455, 556 S.E.2d 691 (Ct. App. 2001). Critically, the implied consent statute specifically provides that a person's failure to request additional blood or urine tests is **not** admissible against the person in court. Id.

at 458, 556 S.E.2d at 693; see also S.C. Code § 56-5-2950(D). Although the State was required to lay a foundation for the Datamaster test results, the defense offered to stipulate that the proper procedures were followed and that he was advised of his statutory rights. Id. at 458, 556 S.E.2d at 692. Therefore, this Court held, "there was no plausible reason why [the language about the right to an independent test] should have been read to the jury," particularly where the magistrate judge had ruled that the language would be redacted from the report itself. Id.

In Appellant's case, the issue is not regarding the language about the right to independent testing, since the State properly redacted that language. (R. p. 55, lines 13-17). Instead, the issue is regarding language about consequences stemming from the refusal to take a breath test. As discussed above, the statute expressly provides that a person's refusal may be used against them, and the evidence regarding the consequences of refusal is clearly relevant to a jury's assessment of the significance of a person's refusal. The Henderson case is factually and legally distinguishable and does not support Appellant's position.[7] For the reasons discussed above, the trial judge did not err in allowing evidence regarding the six-month driver's license suspension.

[7] Regarding Appellant's unpreserved argument that allowing evidence of the six-month suspension "places the defendant in a position of having to offer evidence to allow the jury to quantify the effect of a potential suspension," this contention is wholly without merit. Appellant's argument confuses admissibility of legitimately probative evidence with a jury issue regarding the weight of such evidence. As with any other evidence of guilt, if a particular defendant believes he is an exception to the rule - in other words, that the State's legitimately probative evidence is less probative when applied to him - he may present such a theory through cross-examination, closing argument, and, if he so chooses, through his own testimony or the testimony of defense witnesses.

IV. Appellant's issue regarding the judge's failure to answer the jury's question is not preserved for appellate review where defense counsel failed to contemporaneously object to the judge's procedure below and where defense counsel was in fact the one who suggested that the judge refrain from immediately answering the jury's question. In addition to not being preserved, Appellant's argument is wholly speculative and without merit.

Relevant Facts

After deliberating for approximately one-hour and forty-five minutes, the jurors sent out a note asking the following question: "What happens if one juror has a different verdict than the others?" (R. p. 188-94; p. 194, lines 9-10). After advising the attorneys about this note, the judge stated he was considering giving the jurors the option of stopping deliberations for the evening and returning in the morning because he thought they were getting tired in light of other jury questions that had come up. (R. p. 194, lines 9-15). Defense counsel apparently agreed and ultimately stated "[t]hat's fine with me." (R. p. 194-95; p. 195, line 7). The judge then presented this option to the foreman of the jury and asked that he confer with the other jurors and then let the court know their decision. (R. p. 195-96). The jury subsequently decided to stay and continue deliberations. (R. p. 196, lines 14-15). After the foreman indicated that the jurors wished to watch one of the videos again, the jury was provided with a computer on which to watch the video. (R. p. 196-98).

Thereafter, the judge reminded the attorneys that there was an outstanding jury question regarding what happens if one juror has a different verdict than the others. (R. p. 198, lines 19-22). The judge then stated, "I don't know what y'all want to do with that. Do you want to wait and see what they do?" (R. p. 198, line 21-22). Defense counsel responded: "Why don't we give them 15 or 20 minutes. Do you want to do that?

I mean, this may solve it." (R. p. 198, lines 24-25). The judge agreed and stated, "[a]ll right." (R. p. 199, lines 1-2). Approximately 15 or 20 minutes later, the jury reached its guilty verdict. (R. p. 199, lines 5-23). During the subsequent sentencing hearing, defense counsel raised no issue with the judge's failure to answer the jury's question. (R. p. 199-206). In fact, the issue was not raised until a post-trial hearing, at which time a different attorney represented Appellant. (R. p. 209-20). The judge denied Appellant's motion for new trial on this ground by order filed March 31, 2014. (See R. p. 1-3).

Issue Preservation

As Appellant's counsel appears to have conceded at the post-trial hearing,[8] the issue being raised on appeal is not preserved for appellate review. (R. p. 211, lines 17-18; p. 216, line 21 – p. 217, line 3; see also p. 214, lines 1-19; p. 219, lines 10-20). Not only did defense counsel fail to contemporaneously object at the appropriate time, he in fact suggested that the trial judge give the jurors "15 or 20 minutes" rather than immediately answer the jury's question. Defense counsel also had no complaints about the trial judge's procedure for allowing the jurors to determine whether or not they wished to return in the morning, and he never requested that the jurors be instructed, polled, or given an Allen charge. Appellant cannot now complain on appeal where he failed to timely and properly object below and where his own conduct helped induce the alleged error. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (to preserve an issue for appellate review, the objection must be timely made, which usually requires it

[8] Specifically, Appellant's counsel agreed that no contemporaneous objection was raised by trial counsel. (R. p. 211, lines 15-19). Appellant's counsel also stated that "[p]reservation of error becomes critical for the direct appeal, but not for the motion for a new trial." (R. p. 216, lines 23-25). The judge noted at the post-trial hearing that Appellant's trial counsel did not want him to give the jury an Allen charge and that defense counsel specifically agreed with the court's procedure regarding the jury question. (R. p. 219, lines 10-20).

be made at the earliest possible opportunity); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); State v. King, 334 S.C. 504, 509-510, 514 S.E.2d 578, 581 (1999) (where defendant failed to object to issue arising during the jury charge until after the verdict in his post-trial motion for a new trial, he waived appellate review of the issue); Bank of New York v. Sumter County, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010) ("It is axiomatic that an issue cannot be raised for the first time in a post-trial motion."); State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal."); State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal."); State v. Hale, 284 S.C. 348, 355, 326 S.E.2d 418, 423 (Ct. App. 1985) ("Hale concedes that no exception was taken to the 'Allen' charge in the trial court. Having denied the trial judge an opportunity to cure any alleged error by failing to object to the charge, Hale cannot properly raise the issue for the first time on appeal."); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."). Therefore, Appellant's issue regarding the jury question must be dismissed on error preservation grounds.

Discussion

Even if the issue had been properly preserved for review, Appellant's argument is wholly speculative and without merit. Appellant asserts that, because the jury asked a

question about what would happen if one of the jurors had a different verdict than the others, there must have been a minority juror and this minority juror was unduly influenced. Appellant's argument thus assumes that the jury was deadlocked eleven to one; however, such an assumption is without basis in actual fact. The jury never informed the court it was deadlocked. As the trial judge pointed out, the jury may have simply been asking a hypothetical question. (R. p. 1, footnote 1). Again, because defense counsel acquiesced in the trial judge's procedure below and actually encouraged the judge **not** to immediately answer the jury's question, this issue was not explored at the trial level and consequently cannot be explored on appeal. There are simply no facts in the record to support the notion that there was in fact a minority juror or that he or she was unduly influenced by the court's procedure.

Furthermore, the trial judge did not abuse his broad discretion by delaying the answering of the jury question until after the jury watched the video - as per defense counsel's request. He also did not abuse his discretion by allowing the foreman to inquire of the other jurors regarding whether or not they wished to stop deliberating for the evening. See e.g., State v. Sheppard, 391 S.C. 415, 420, 706 S.E.2d 16, 19 (2011) ("The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion.") (citation omitted); see also United States v. Barnes, 586 F.2d 1052, 1060 (5th Cir. 1978) (in case where the trial judge failed to answer a jury question before a verdict was reached due to a lengthy objection from defense counsel, the court stated, "[h]aving delayed the answering of the question in order to serve the interests of his client, counsel cannot now complain that he was prejudiced by the delay.").

In any event, even if the judge had abused his discretion somehow, Appellant cannot possibly show prejudice under the circumstances presented here. See State v. Black, 400 S.C. 10, 16-17, 732 S.E.2d 880, 884 (2012) ("To warrant reversal, an error must result in prejudice to the appealing party."); see also Alexander v. State, 778 So.2d 1017, 1021 (Fla. App. Ct. 2000) ("Not only is this issue not preserved by a contemporaneous objection at trial, we cannot conclude that the failure to answer the jury question constituted harmful error when the jury was appropriately instructed on the law in question, including the standard jury instruction that appellant himself suggests would have answered the jury question."). As the trial judge pointed out at the post-trial hearing and in his post-trial order, he had already instructed the jurors that Appellant could only be convicted "if all twelve of you agree the State has proven each and every element of the case beyond a reasonable doubt" and that "each of you have a vote," that "your vote is exactly that, it's your vote and no one else's," and that a juror should not "surrender to an honestly and conscientiously held belief simply to get this case over with or to reach a unanimous verdict." (R. p. 2-3; p. 183, lines 8-11; p. 187, lines 8-15; p. 218, line 21 – p. 219, line 1). Notably, in closing argument, defense counsel also urged the jurors to stand firm if they developed a belief that Appellant was innocent. (R. p. 173, lines 7-11 & lines 17-18). In sum, besides being totally unpreserved, Appellant's argument is premised upon a faulty assumption that the jury was deadlocked. Appellant cannot show an abuse of discretion or prejudice under these circumstances because his argument is speculative. Appellant's conviction should be affirmed.

CONCLUSION

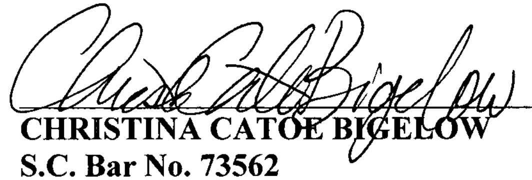
For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA CATOE BIGELOW
Assistant Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit



CHRISTINA CATOE BIGELOW
S.C. Bar No. 73562

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

February 4, 2015

RECEIVED
FEB 04 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000883

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

CHRISTINA CATOE BIGELOW

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

February 4, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
FEB 04 2015
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000883

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

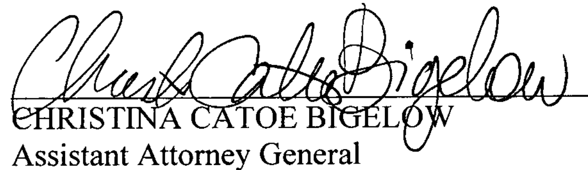
v.

JOHNIE ALLEN DEVORE, JR.,

APPELLANT.

PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **J. Falkner Wilkes**, 114 Whitsett Street, Greenville, South Carolina, 29601, this **4th** day of **February, 2015.**



CHRISTINA CATOE BIGELOW
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737