

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Charleston County  
Honorable J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002096

**RECEIVED**

MAY 08 2019

SC Court of Appeals

The State,

Appellant,

vs.

Hannah Kelly,

Respondent.

RECORD ON APPEAL

HANNAH KELLY

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**The video of traffic stop will be transported to the Court once an order has been issued.**

Form 9-438  
Rev. 08/2014

## UNIFORM TRAFFIC TICKET

STATE OF NORTH CAROLINA  
SUS

FIRST NAME <i>Henrikah</i>		MIDDLE NAME <i>MA</i>		LAST NAME <i>Kelly</i>	
STREET <i>112 Tr Plr Crown Ad</i>					
CITY <i>Meckle Corner</i>		STATE <i>SC</i>		ZIP CODE <i>29161</i>	
DL STATE <i>SC</i>	DRIVER'S LICENSE NO. <i>04108790</i>			CLASS <i>D</i>	CDL <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
RACE <i>B</i>	SEX <i>F</i>	BIRTH DATE <i>9/29/96</i>	HGT. <i>5'5"</i>	WGT. <i>137</i>	HAIR <i>Bl</i>
EYES <i>Bl</i>	VEH. LIC. NO. <i>1W4150</i>				
STATE <i>SC</i>	MAKE OF VEH. <i>Inc</i>	YEAR <i>14</i>	VEH. TYPE <input checked="" type="checkbox"/> AUTO	<input type="checkbox"/> BICYCLE	<input type="checkbox"/> COMB. <input type="checkbox"/> DONAL VEH.
VEHICLE OWNER FIRST NAME <i>MA</i>		MIDDLE NAME		LAST NAME	
OWNER STREET <i>311 City Plr</i>					
CITY <i>MA</i>		STATE		ZIP CODE	

**YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL COURT**

NAME OF TRIAL COURT <i>Sumner</i>		STREET <i>6185 Rivers Ave</i>			
DATE OF TRIAL <i>3/22/16</i>	TIME OF TRIAL <i>1000</i>	CITY <i>N. Charleston</i>	STATE <i>SC</i>	ZIP CODE <i>29405</i>	
VIOLATION SECTION NO. <i>50-5-2930</i>		VIOLATION - COURT APPEARANCE REQUIRED (YES/NO) <i>DUI 1st</i>			
DATE OF VIOLATION <i>2/19/16</i>	TIME OF VIOL <i>0057</i>	SC POINTS <i>0</i>	B.A. LEVEL <i>B 09</i>		
VIOLATION LOCATION <i>I-76 WB 211 AM</i>					COUNTY <i>Char.</i>
LAT		LONG		CITY	
NAME AND RANK OF ARRESTING OFFICER <i>TIP T.G. Mathwin</i>			SOCIA OFFICER NUMBER <i>9169-4167</i>		
BAIL DEPOSITED <i>TAT</i>	DATE OF ARREST <i>2/19/16</i>	BOND AMOUNT REQUESTED <i>TBA</i>			
DATE BAIL REC'D.	BY				

CASE BEFORE:  MAGISTRATE  MUN. COURT  CIRCUIT COURT  FAMILY COURT  FEDERAL COURT

NAME OF THE TRIAL COURT IF DIFFERENT FROM ABOVE:

TRIAL BY: TRIAL JUDGE <input checked="" type="checkbox"/> JURY <input type="checkbox"/>	DEFENDANT: DID NOT APPEAR <input type="checkbox"/> APPEARED <input checked="" type="checkbox"/>				
DISPOSITION DATE <i>3/11/16</i>	DISPOSITION: NOLLE PROSSED <input type="checkbox"/> GUILTY <input checked="" type="checkbox"/> PLED: NOLLO CONTENDERE <input type="checkbox"/> FORFEITED BOND <input type="checkbox"/> NOT GUILTY <input type="checkbox"/>				
CHARGE CONVICTED OF <i>DUI AC</i>	SAME AS ORIGINAL <input type="checkbox"/> SC POINTS				
JAIL	SUSPEND	FINE	AMT. COLLECTED	AMT. SUSPENDED	COMMITTED TO:
CERTIFIED CORRECT					DATE <i>3/11/16</i>
TRIAL COURT COPY					TICKET# <b>5102P 0209817</b>

CITY/COUNTY OF:

INCIDENT NO.:

AGENCY/ROOM:

6

STATE OF SOUTH CAROLINA

VS.

HANNAH KELLY

Case No. 5102P0209817

AUDIO TRANSCRIPTION

Judge JoAnna Summey

Charleston County North Area 3 Magistrate Court

1 JUDGE SUMMEY: Ladies and gentlemen, my name is  
2 JoAnna Summey, and I am the magistrate for this court, it's  
3 North Area 3, Charleston County Magistrate Court. The case  
4 in which you'll be choosing a jury is the State vs. Hannah  
5 Kelly, charged with having violated Section Code 56-5-2933 of  
6 the South Carolina Code of Laws with having committed the  
7 offense of DUAC under Ticket 5102P0209817.

8 Appearing on behalf of the prosecution is Todd  
9 Williams, the County attorney. Would you please introduce  
10 any witnesses that you have.

11 MR. WILLIAMS: Thank you, Judge. Good morning,  
12 ladies and gentlemen. My name is Todd Williams. I'm the  
13 assistant solicitor here in Charleston County, that means I'm  
14 the prosecutor for (unintelligible) Magistrate Court. Our  
15 witness today is Travis Methvin from the South Carolina  
16 Highway Patrol.

17 JUDGE SUMMEY: Appearing on behalf of the defense  
18 is Mr. Edward Phipps. Could you now introduce the defendant  
19 and any witnesses that you have or co-counseling.

20 MR. PHIPPS: Good morning (unintelligible). With  
21 me today is (unintelligible).

22 JUDGE SUMMEY: Thank you. At this time I would  
23 like to do a roll call of the jury pool. When Ms. Simpson  
24 calls your name, I need you to stand, state your name, your  
25 address, your age, your occupation, your marital status, and

1 the occupation of your spouse. I know that that is a lot.  
2 So if you forget something, I'll ask. I mean -- I know,  
3 okay. I just saw the eye rolls, that was pretty funny. All  
4 right. You ready?

5 MS. SIMPSON: Yeah.

6 JUDGE SUMMEY: Okay.

7 MS. SIMPSON: Jamie Brown.

8 MS. BROWN: Jamie Brown, 74 years old, retired,  
9 widow.

10 JUDGE SUMMEY: What's your address?

11 MS. BROWN: 76 (unintelligible).

12 JUDGE SUMMEY: Okay, thank you.

13 MS. BROWN: You're welcome.

14 UNIDENTIFIED MALE: Can you ask where she was  
15 retired from.

16 JUDGE SUMMEY: Where were you retired from, Ms.  
17 Brown?

18 MS. BROWN: Charleston County.

19 JUDGE SUMMEY: Charleston County, what -- which  
20 area?

21 MS. BROWN: Hospital.

22 JUDGE SUMMEY: Okay, thank you.

23 MS. SIMPSON: Eric Brown.

24 MR. BROWN: (Unintelligible) address is 47  
25 (unintelligible) warehouse worker at (unintelligible).

1 JUDGE SUMMEY: Thank you.

2 MS. SIMPSON: Timothy Bussey.

3 MR. BUSSEY: Timothy Bussey (unintelligible) 1236  
4 (unintelligible) Charleston (unintelligible) market  
5 enforcement officer (unintelligible).

6 JUDGE SUMMEY: Okay.

7 MS. SIMPSON: Shaii Smalls.

8 (Unintelligible.)

9 JUDGE SUMMEY: Oh, what's your marital status, sir?

10 MR. BROWN: Divorced.

11 JUDGE SUMMEY: Divorced. Go ahead, Ms. Smalls.

12 MS. SMALLS: (Unintelligible.)

13 JUDGE SUMMEY: Are you married? Single? Divorced?

14 MS. SMALLS: Single.

15 JUDGE SUMMEY: -Okay.

16 (Unintelligible.)

17 JUDGE SUMMEY: Stand up one more time and repeat  
18 it. They couldn't hear you.

19 (Unintelligible.)

20 JUDGE SUMMEY: Thank you.

21 MS. SIMPSON: Renate Espy.

22 MS. ESPY: Renate Espy (unintelligible) I'm married  
23 (unintelligible).

24 JUDGE SUMMEY: Okay. And what does spouse -- your  
25 husband or your spouse do?

1 MS. ESPY: He's unemployed.

2 JUDGE SUMMEY: Okay.

3 MS. ESPY: Self-employed.

4 JUDGE SUMMEY: Thank you.

5 MS. SIMPSON: Doris Middleton.

6 MS. MIDDLETON: Hi, I'm Doris Middleton. I'm 56, I  
7 live at 4946 Amberwood Lane, North Charleston, I work for  
8 MUSC, my husband is retired.

9 JUDGE SUMMEY: Okay, thank you.

10 MS. SIMPSON: Helen Murray.

11 MS. MURRAY: I'm Helen Murray, (unintelligible)  
12 years old, address is 1223 Sumner Avenue, I work at Ashley  
13 Hall as a (unintelligible).

14 JUDGE SUMMEY: What does he do?

15 MS. MURRAY: He works for the City of Charleston.

16 JUDGE SUMMEY: Okay. And what area?

17 MS. MURRAY: (Unintelligible.)

18 JUDGE SUMMEY: No, I mean what does he do?

19 MS. MURRAY: Landscaping.

20 JUDGE SUMMEY: Okay, thank you.

21 MS. SIMPSON: Deborah Gathers.

22 MS. GATHERS: I'm Deborah Gathers (unintelligible)  
23 my address is (unintelligible) downtown Charleston, I am  
24 single (unintelligible).

25 JUDGE SUMMEY: Okay, thank you.

1 hope y'all were able to get a good lunch. Please, as a  
2 reminder, to silence your cell phones and you can't use them,  
3 okay, while you're in here, okay? All right. Will each of  
4 you please raise your right hands. Do you solemnly swear or  
5 affirm that you will try the issues in this case of State vs.  
6 Hannah Kelly, and return a true verdict according to law and  
7 the evidence and testimony, so help you God? Thank you.

8 (Jurors sworn.)

9 JUDGE SUMMEY: The defendant is charged by the  
10 State of South Carolina under Ticket Number 5102P0209817 with  
11 having violated Section Code 56-5-2933 of the South Carolina  
12 Code of Laws with having committed the offense of DUAC.  
13 Okay.

14 Ladies and gentlemen of the jury, I'd like to  
15 briefly explain the procedure of trial for you which you will  
16 hear today. The State, which is the prosecution in this  
17 case, will make an opening statement. This party sees it as  
18 an attempt to help you understand what you will hear in this  
19 trial. After the prosecution has finished their statement,  
20 the defense may also make an opening statement. Neither  
21 opening is evidence, nor should you, the jury, draw a  
22 conclusion if the defense chooses to wait before it opens.

23 After the opening statements, the prosecution  
24 presents its case. They will offer witnesses and/or forms of  
25 evidence that they deem necessary to prove their case. Each

1 witness may be cross-examined by the defense. After the  
2 prosecution has presented its case, the defense may present  
3 their case in the same manner. At certain times during the  
4 trial, there may be an objection to evidence. The admission  
5 of evidence is governed by rules of law. When an objection  
6 is made, you must not draw any inference because of the  
7 objection to the question.

8           You must not consider any evidence that I  
9 instruct you to disregard. You must not infer that I favor  
10 either party because of any ruling that I make. The jury is  
11 concerned with the facts; the Court is concerned with the  
12 law. The Court is concerned with the facts only to see that  
13 they are properly and lawfully presented to the jury. The  
14 jury is concerned with the law only as the Court instructs it  
15 on the law at the close of trial. Thus, the responsibility  
16 of the jury and the responsibility of the Court are  
17 well-defined, and they do not overlap. This is one of the  
18 fundamental principles of our system of justice.

19           Throughout the trial you should remain alert and  
20 listen attentively. You should remember all the evidence as  
21 clearly as possible, but you should not form any definite or  
22 fixed opinions on the merits of the case until you have all  
23 the evidence, the argument of the parties, and the  
24 instructions on law by the Court. Until that time you should  
25 not discuss the case amongst yourself or with anyone.

1           In the event the Court takes any recess during  
2 which you are permitted to separate and go about your  
3 personal affairs, you will not discuss the case with anyone  
4 or permit anyone to say anything to you in your presence. If  
5 anyone attempts to say anything to you or in your presence  
6 about the case, tell him or her that you are the jury trying  
7 the case and ask him or her to stop. If they progress, leave  
8 them at once and report this matter to the Court immediately.

9           There may be times where I need to confer with  
10 both parties outside of your presence to assure that both  
11 parties receive a fair trial. During these times and at  
12 other appropriate times, I will allow you to refresh  
13 yourselves. During these breaks it is inappropriate to talk  
14 with anyone, even the other jurors, about this case. If  
15 anyone attempts to talk with you about the case, please  
16 report it to me immediately. Okay. Also, if you need to  
17 refresh yourselves, just raise your hand and let me know,  
18 okay? All right, thank you. Ready?

19           MR. WILLIAMS: May it please the Court?

20           JUDGE SUMMEY: Yes, sir.

21           MR. WILLIAMS: Good afternoon. Again, ladies and  
22 gentlemen, my name is Todd Williams. I'm the prosecutor, I'm  
23 the assistant solicitor, I handle DUIs and other  
24 traffic-related cases. Thank you for being here. I know you  
25 didn't volunteer to be here, that you're not here by your own

1 will. But we do appreciate you being here, we couldn't move  
2 forward without you.

3 As you heard Judge Summey say, Ms. Kelly over  
4 here, she was charged with driving with an unlawful alcohol  
5 concentration, DUAC. (Unintelligible) reasons of why we're  
6 here. Ms.) Kelly was stopped on February 19th of 2016, so  
7 just about a year ago, by Trooper Methvin. He conducted an  
8 investigation and arrested her for driving under the  
9 influence. You've heard of a DUI, drunk driving. DUI law in  
10 South Carolina, I'm going to read it to you:

11 "It is unlawful for a person to drive a motor  
12 vehicle within this state while under the influence of  
13 alcohol to the extent that the person's faculties to drive a  
14 motor vehicle are materially and appreciably impaired."

15 I count four things from that: It's unlawful to  
16 drive a motor vehicle, within this state, while under the  
17 influence of alcohol, to the extent that the person's  
18 faculties (unintelligible).

19 MR. PHIPPS: He's talking about (unintelligible).

20 JUDGE SUMMEY: Okay. You want to take them to the  
21 jury room.

22 (Unintelligible.)

23 JUDGE SUMMEY: Okay. Hi. Can y'all step in the  
24 room for me really quick. Thank you. Just wait over there  
25 so you can let him in.

1 (Unintelligible.)

2 JUDGE SUMMEY: Excuse me for one second. All  
3 right, back on record. Go ahead. Your objection, sir?

4 MR. PHIPPS: Your Honor, I object and I'm going to  
5 ask for a mistrial. This is highly prejudice  
6 (unintelligible) she was arrested.

7 JUDGE SUMMEY: Mr. Williams?

8 MR. WILLIAMS: Judge, the video will show why she  
9 was arrested for that (unintelligible) law.

10 JUDGE SUMMEY: Yes, sir?

11 MR. PHIPPS: Absolutely (unintelligible).

12 JUDGE SUMMEY: Okay.

13 MR. PHIPPS: I have to (unintelligible) no evidence  
14 has been (unintelligible) by the case otherwise.

15 JUDGE SUMMEY: Okay. Anything further? Okay. So  
16 you have the citation, obviously it says DUI on it; right?  
17 We're going to go forward with the trial. I think it's  
18 speculative at this point about the video. The issue,  
19 though, that I do want to bring up to you is that you know  
20 that the charging document goes back into the jury room to  
21 which it says DUI.

22 MR. PHIPPS: Right. Could I -- could I --

23 JUDGE SUMMEY: Yeah.

24 MR. PHIPPS: I don't mind (unintelligible).

25 JUDGE SUMMEY: Compare and contrast between the DUI

1 and the DUAC?

2 MR. PHIPPS: The law, yeah. That's  
3 (unintelligible).

4 JUDGE SUMMEY: Okay. Response?

5 MR. WILLIAMS: Your Honor, I believe  
6 (unintelligible).

7 JUDGE SUMMEY: Okay.

8 MR. WILLIAMS: She was charged with something.  
9 I've tried this case -- I've tried (unintelligible) before.

10 JUDGE SUMMEY: Yeah.

11 MR. WILLIAMS: If there's -- what the defense has  
12 done in the past about explaining to the jury, how we got  
13 (unintelligible) DUI to the DUAC here in front of them  
14 (unintelligible).

15 JUDGE SUMMEY: All right.

16 MR. WILLIAMS: He can tell them -- tell them that  
17 I'm wrong (unintelligible). I'm allowed to explain the  
18 charge (unintelligible).

19 MR. PHIPPS: (Unintelligible) he chose to try this  
20 as a DUAC, that's the State's prerogative to do. But it  
21 creates these issues (unintelligible). There's a prejudice  
22 here. All of a sudden it's like, "Oh, she got arrested for a  
23 DUI too?" (Unintelligible) It causes mass confusion  
24 (unintelligible) absolutely prejudice (unintelligible). How  
25 he explains how he got there, proving the State's burden,

1 they chose this (unintelligible). But they don't get to  
2 double-dip and talk about both. That's going to cause mass  
3 confusion. And that's why I ask for a mistrial.

4 JUDGE SUMMEY: We're going to go forward with  
5 trial, but be cautious when you're talking about the DUI.

6 MR. WILLIAMS: Your Honor, I just ask for a Court's  
7 explanation. Tell me what I can (unintelligible).

8 JUDGE SUMMEY: Well, Mr. Phipps has an issue, you  
9 know, the Court can see if you're going to -- and we have  
10 tried these cases before. We have tried them before.

11 MR. WILLIAMS: Never been an issue, Judge.

12 JUDGE SUMMEY: Yeah, defense has never -- yeah,  
13 brought it up before.

14 MR. WILLIAMS: I think cause it's a nonissue,  
15 Judge. He's trying to make an issue out of something that's  
16 not. It says (unintelligible) DUI in the charging documents.

17 JUDGE SUMMEY: So the Court does feel that  
18 mentioning the DUI is understandable, because in the video  
19 it's going to say DUI. And I brought the charging document  
20 because it states DUI. So you have to -- I mean, I get why  
21 you would want to explain where you got from DUI to DUAC. I  
22 think Mr. Phipps's issue is that you're explaining in  
23 comparison -- you're comparing the DUI charge with the DUAC  
24 charge and the differences.

25 MR. WILLIAMS: That's exactly right, Your Honor.

1 I'm going to say what a DUI is because everybody's heard of a  
2 DUI. I'm going to say, "This is what DUI is in South  
3 Carolina. This is what DUAC is, you might not have heard of  
4 it. That's what we're here to prove today." That's exactly  
5 (unintelligible).

6 MR. PHIPPS: (Unintelligible) charge  
7 (unintelligible).

8 MR. WILLIAMS: I don't get to charge them with  
9 anything, Your Honor. I'm not --

10 MR. PHIPPS: You're explaining DUI --

11 MR. WILLIAMS: I'm allowed to tell them  
12 (unintelligible).

13 MR. PHIPPS: You're allowed to tell them that she  
14 was arrested for DUI (unintelligible). That's fine if we go  
15 forward, but I want to preserve it for the record.

16 JUDGE SUMMEY: Yeah.

17 MR. PHIPPS: What record we have (unintelligible).

18 JUDGE SUMMEY: Okay.

19 MR. WILLIAMS: Your Honor, he's made his objection,  
20 it is preserved for the record. It is not prejudicial for me  
21 to say she was charged with this (unintelligible). He  
22 believes he had probable cause (unintelligible) these  
23 elements.

24 JUDGE SUMMEY: Okay.

25 MR. WILLIAMS: We're charging it (unintelligible).

1 JUDGE SUMMEY: I preserved it for the record. Just  
2 go forward and we'll see where we get.

3 MR. WILLIAMS: Thank you.

4 JUDGE SUMMEY: But also, you know, I do think that  
5 explaining what -- how we got from a DUI to a DUAC is  
6 important because on the ticket --

7 MR. PHIPPS: Your Honor (unintelligible).

8 JUDGE SUMMEY: Explain the law of DUI.

9 MR. PHIPPS: He's arguing both. He doesn't get to  
10 argue both laws. He doesn't get to do that. He doesn't get  
11 to talk about what the requirements are (unintelligible).  
12 He's chose not to pursue that. He's going to cause mass  
13 confusion, it's improper, (unintelligible).

14 MR. WILLIAMS: I'm allowed to say -- I get to say  
15 why we are here. Now, if I (unintelligible).

16 MR. PHIPPS: I don't know what to say, Your Honor.  
17 He says that if he (unintelligible).

18 JUDGE SUMMEY: Okay.

19 MR. PHIPPS: He can say she was arrested.

20 (Unintelligible.)

21 JUDGE SUMMEY: I do believe -- I do believe that  
22 you can say what she was charged with. I think that that --  
23 because if not, they're going to be like, "Why is that DUI  
24 and why is he saying DUI on that" -- I understand your  
25 thinking where that's concerned, the Court does.

1 Mr. Phipps's concern, I understand what he's saying is you're  
2 comparing two statutes and you chose to go with this one,  
3 okay?

4 MR. WILLIAMS: Exactly, Your Honor  
5 (unintelligible). There's nothing that says I can't. I  
6 mean, this is absurd. This is absurd, Your Honor, there is  
7 no case law that says this. (Unintelligible) charged with  
8 this, we're going forward with this because of these reasons.  
9 That's what I'm (unintelligible).

10 JUDGE SUMMEY: Okay.

11 MR. PHIPPS: There's nothing in the statute that  
12 says he gets to do it. (Unintelligible) he gets to say we've  
13 charged this and this is what the law is. He gets to make a  
14 choice (unintelligible). That's it. (Unintelligible) spot  
15 on (unintelligible) so all I want you to (unintelligible).  
16 He doesn't get to do that.

17 MR. WILLIAMS: Judge, there are not lesser included  
18 offenses, there are not lesser charges (unintelligible).

19 JUDGE SUMMEY: Right, yeah.

20 MR. WILLIAMS: It's not a lesser charge, it's a  
21 different charge (unintelligible).

22 JUDGE SUMMEY: I'm thinking. I get both sides,  
23 honestly. I understand your point and, Mr. Phipps, I  
24 understand where he's coming from, too. I know that there is  
25 not any case law to support that -- you're saying it's

1 procedure of trial.

2 MR. PHIPPS: (Unintelligible) really not choose  
3 (unintelligible).

4 JUDGE SUMMEY: That can't --

5 MR. WILLIAMS: Absolutely not, Your Honor.

6 JUDGE SUMMEY: Yeah. Because we're already -- I  
7 mean, we've already -- and I've already said the ticket  
8 number of the charge. Okay. So --

9 (Unintelligible.)

10 JUDGE SUMMEY: Right. If you -- okay. We can go  
11 forward with your argument; however, you can explain the DUI  
12 to the DUAC, don't compare the difference in the elements.  
13 And that's -- that's kind of like (unintelligible).

14 MR. WILLIAMS: There is nothing in the law that  
15 says I can't read other statutes (unintelligible).

16 JUDGE SUMMEY: You're going to explain 2933;  
17 correct?

18 MR. WILLIAMS: Yes, of course (unintelligible).

19 JUDGE SUMMEY: Why are you mentioning -- lovely.

20 MR. PHIPPS: Your Honor (unintelligible).

21 JUDGE SUMMEY: Yes. Yeah, we're going to go  
22 forward. Be cautious in your opening talking about the DUI.  
23 The DUI to the DUAC, yeah, that -- that gap there, I  
24 understand that has to be explained.

25 MR. WILLIAMS: That's what I was explaining, Your

1 Honor.

2 JUDGE SUMMEY: Okay. But when -- be cautious when  
3 you're explaining the law for the DUI, because the Court  
4 feels that Mr. Phipps has a point of the confusion. You do  
5 need to explain that she was stopped for the DUI, the Court  
6 understands that. I don't see any issue with that at all,  
7 "Methvin believes XYZ."

8 MR. WILLIAMS: Right, she met these elements.  
9 Exactly.

10 JUDGE SUMMEY: Just be cautious in comparing the  
11 two statutes is the point. Because when you're saying, "He  
12 believes she met XYZ," and then you're going to say what?  
13 She chose to go DUAC, the elements of DUAC are this?

14 MR. WILLIAMS: Your Honor, my summary: He stopped  
15 her, he conducted an investigation, he felt by reading the  
16 four elements, he thinks she met those. In South Carolina we  
17 don't conduct road breath tests before a person has been  
18 arrested. After her arrest she was breath tested in the  
19 jail. She provided a sample, good enough. In South Carolina  
20 we have this law called DUAC, here are the elements of it.  
21 That's what we're going to show you today.

22 MR. PHIPPS: Again, I (unintelligible). I don't  
23 believe -- I think it's improper to go into detail  
24 (unintelligible) she was arrested for DUI, we arrested her  
25 for DUI. And the law allows us (unintelligible). Why he's

1 trying to add (unintelligible) and that's what I'm trying to  
2 (unintelligible).

3 JUDGE SUMMEY: All right. I'm not granting a  
4 mistrial, we're going to go forward. However, Mr. Williams,  
5 you can mention the DUI, like I said before, how you got to  
6 the DUAC. Please stay away from the elements of the DUI,  
7 mention the elements of the DUAC. Okay, all right. Let's  
8 proceed.

9 MR. PHIPPS: Your Honor, may I?

10 JUDGE SUMMEY: Yes, sir.

11 MR. PHIPPS: Just for your (unintelligible).

12 JUDGE SUMMEY: Well, I would disagree that  
13 Mr. Williams is trying to try the case of DUI; however -- I  
14 mean, I don't believe that we're trying two things here. The  
15 Court does not believe that that was his intent. I do  
16 believe that, however, that the jury can get the two  
17 confused. I know that this has never been brought up when  
18 we've done this before, but it's been brought up this time.  
19 And I do believe that it can be confusing, that's why I've  
20 instructed Mr. Williams not to do the elements of DUI, just  
21 the elements of DUAC.

22 MR. PHIPPS: Well, and I (unintelligible).

23 JUDGE SUMMEY: Yeah, they're not going to. I just  
24 talked to Chief Judge Ellen Steinberg on that, and we're  
25 going to be doing a jury verdict form and not the charging

1 document. And I've told her that I would like this to be the  
2 practice of the Court for Charleston County here on out.  
3 We'll discuss that at our meeting, but -- yeah, so we're good  
4 on that. It is mentioned in the video, the DUI. So  
5 mentioning the DUI, that you've decided to go with DUAC, the  
6 Court has no issue with that. But again, please stay away  
7 from the elements of the DUI at this point. Okay. Bring  
8 them in, please. Unless we have anything else?

9 MR. WILLIAMS: Thank you.

10 JUDGE SUMMEY: Okay. Thank you so much. Okay.  
11 Mr. Williams?

12 MR. WILLIAMS: Thank you. Welcome back. As I told  
13 you, on February 19, 2016, Trooper Methvin, South Carolina  
14 Highway Patrol, charged Ms. Kelly with driving under the  
15 influence. After she was arrested on the roadside, Ms. Kelly  
16 was transported to the Charleston County Detention Center.  
17 Trooper Methvin administered a breath test. You might have  
18 heard of a breathalyzer before, that's a common word. In  
19 South Carolina -- a breathalyzer is actually a brand, like  
20 Coca-Cola or Pepsi. In South Carolina we use a machine  
21 called DataMaster DMT. DataMaster is like Apple and DMT is  
22 like an iPod, it's a version of DataMaster that we use.

23 He did this because he's required to. When  
24 someone's arrested in South Carolina for a DUI, they are  
25 given a breath test to determine their alcohol concentration.

1 The person does not have to submit to a breath test, the  
2 person can refuse a breath test or the person can give a  
3 sample. In South Carolina there's a another charge, not DUI,  
4 but a second charge. And again, you heard the judge say it's  
5 called a DUAC, driving with an unlawful alcohol  
6 concentration. It says: "It is unlawful for a person to  
7 drive a motor vehicle in this state while his blood alcohol  
8 concentration is .08 percent or more."

9 Okay. The elements of that is it is unlawful  
10 for a person to drive a motor vehicle, in this state, while  
11 his alcohol concentration is .08 percent or more. If you're  
12 not good with words and numbers, like I have trouble with,  
13 .08 percent -- so it is unlawful in South Carolina for  
14 someone to drive a motor vehicle -- y'all know what a motor  
15 vehicle is -- while his alcohol concentration is .08. That's  
16 why we're here today. The State intends to prove that  
17 Ms. Kelly was driving a motor vehicle in the state of South  
18 Carolina, in Charleston County, specifically, and her alcohol  
19 concentration, those elements (unintelligible) we're going to  
20 prove those to you today.

21 How do we show these things to you? We do this  
22 through the introduction of evidence. Evidence -- what I say  
23 is not evidence. The questions I ask the witness are not  
24 evidence. (Unintelligible) piece of evidence over another or  
25 not, it's up to you, beyond a reasonable doubt. You might

1 have heard that on TV. We don't have to just say it looks  
2 (unintelligible) driving a motor vehicle in this state while  
3 their alcohol concentration is .08 or greater.

4 Ms. Kelly has no burden of proof here,  
5 whatsoever; the State has the burden of proof. We have to  
6 show these things to you. Ladies and gentlemen, I'll tell  
7 you, this isn't a complex case. It's not a murder mystery,  
8 it's not a (unintelligible). It's a very simple case. But  
9 just because it's simple, doesn't mean it's not important.  
10 It's important both to Ms. Kelly and it's important to the  
11 State. We're alleging the State's laws were violated. All  
12 I'm asking of you today is your attention and your  
13 competency. We've got one witness, that's the  
14 (unintelligible). Beyond a reasonable doubt that Ms. Kelly  
15 was driving a motor vehicle (unintelligible).

16 MR. PHIPPS: Thank you, Your Honor. I appreciate  
17 you thinking (unintelligible) but, you know, a video so  
18 you'll get to see. And so the State has (unintelligible) we  
19 don't have to present anything (unintelligible). They have  
20 to prove guilty beyond a reasonable doubt. So let's talk  
21 about that guilty beyond (unintelligible) football field,  
22 push that ball all the way up to the 50-yard line  
23 (unintelligible). Specifically what that is  
24 (unintelligible). That's a big burden, proof beyond  
25 reasonable doubt (unintelligible). Because at the end of the

1 day (unintelligible) and you're going to get to make the  
2 determination (unintelligible).

3 MR. WILLIAMS: Thank you, Your Honor. The State  
4 will call Trooper Travis Methvin to the stand.

5 JUDGE SUMMEY: Raise your right hand. Do you swear  
6 or affirm that the testimony you're about to give will be the  
7 truth the whole truth and nothing butt truth, so help you  
8 God?

9 THE WITNESS: I do.

10 JUDGE SUMMEY: Thank you, sir.

11 TRAVIS METHVIN,  
12 of lawful age, produced, sworn, and examined on behalf of the  
13 State, deposes and says:

14 EXAMINATION

15 BY MR. WILLIAMS:

16 Q Thank you, Trooper. Could you please state your  
17 name for the jury.

18 A Travis Glenn Methvin.

19 Q Okay. Where are you employed?

20 A The South Carolina Department of Public Safety.

21 Q Okay. Are you a member of the highway patrol?

22 A I am.

23 Q Okay. Is the Department of Public Safety Division  
24 the one who manage or runs the highway patrol?

25 A It is.

1 Q Excuse me. You're often referred as a trooper?  
2 You have to say yes or no.

3 A Yes.

4 Q Thank you -- excuse me -- how long have you been  
5 employed with the highway patrol?

6 A Three years.

7 Q Okay. What did you do -- tell us about yourself,  
8 where are you from?

9 A I'm from Greenville, South Carolina. I was in the  
10 Marine Corps for four years, served as a corporal ammunition  
11 technician. I worked at a technology company for about two  
12 years before I became employed at the South Carolina Highway  
13 Patrol.

14 Q Okay. When you joined the highway patrol, did you  
15 receive any training?

16 A I did.

17 Q Okay. Tell us about it.

18 A The 12-week academy, the Criminal Justice Academy  
19 in Columbia, South Carolina, there's also an additional 9  
20 weeks for the trooper side, what they call "trooper school."  
21 We also were certified with field sobriety, traffic safety,  
22 legals, et cetera.

23 Q Okay. What do you learn in those -- it was 21  
24 weeks, total, training?

25 A Yes, sir.

1 Q What did you learn in that?

2 A We learned the legals of South Carolina state law,  
3 traffic stop safety, officer safety, of course. We are  
4 certified with the DataMaster machine, we're certified to  
5 operate it here in the state of South Carolina. We're also  
6 given standard field sobriety certification and DUI detection  
7 certifications through the state of South Carolina's Criminal  
8 Justice Academy.

9 Q Okay. Since you left the academy, since you've  
10 been a trooper, have you received any continuing education?

11 A I have.

12 Q Okay. What is that?

13 A I've recently completed the ARIDE certification. I  
14 got that beginning of -- or in -- beginning of December of  
15 2016.

16 Q And what is ARIDE, sir?

17 A ARIDE is advanced recognition of impaired drivers.  
18 Basically, it teaches you to pick up on clues of impairments  
19 with drugs, and just learning more tools and ways of  
20 detecting impairment.

21 Q Okay. As a trooper, what is the highway patrol's  
22 primary concern? What kind of law enforcement do they engage  
23 in?

24 A We are primarily a traffic enforcement agency. We  
25 focus on DUI detection, speeding, and other miscellaneous

1 traffic laws throughout the state.

2 Q Okay. What areas of Charleston County do you  
3 primarily control?

4 A I primarily patrol Interstate 26, that is my main  
5 area of focus in Charleston County.

6 Q So generally troopers are not in (unintelligible)?

7 A No.

8 Q Were you working on January 9th of -- February 19th  
9 of 2016?

10 A I was.

11 Q Okay. At that time do you recall what shift you  
12 were working?

13 A I was on night shift.

14 Q Okay. What is night shift?

15 A For us it's about a 6 p.m. to 6 a.m. shift.

16 Q Do you work nights? Days? How does that work?

17 A Every 28 days we rotate between night and day  
18 shift.

19 Q Okay. During that time do you recall if you had  
20 any contact with Hannah Kelly?

21 A I did stop her that evening, yes.

22 Q Okay. Can you identify her in court today?

23 A Yes, she's sitting right there.

24 Q Thank you. How did you first come in contact with  
25 Ms. Kelly?

1           A     I was on routine traffic patrol in Charleston  
2 County. I observed a black Lincoln that was weaving out of  
3 its lane. I then positioned my patrol vehicle behind the  
4 vehicle, I continued to observe it with my video camera  
5 activated. It continued to drift out of its lane multiple  
6 times. So I then initiated the traffic stop, approached the  
7 driver, and the --

8           Q     Hold on just a minute.

9           A     Okay.

10          Q     Sorry. So you stopped her for exiting her lane or  
11 failing to stay in her lane, you said?

12          A     Failure to maintain lane.

13          Q     Okay. Would you say she was all over the road or  
14 was she just out of her lane?

15          A     She continuously was not able to maintain a lane.

16          Q     Okay. You mentioned a video camera.

17          A     Yes.

18          Q     Okay. Was this your patrol car or personal  
19 vehicle?

20          A     This was a patrol vehicle.

21          Q     Okay. Issued by the highway patrol?

22          A     Yes, sir.

23          Q     Okay. Does it contain any video camera system?

24          A     It does.

25          Q     All right. Was this equipped by the state or is it

1 your personal (unintelligible)?

2 A It's equipped by the state of South Carolina.

3 Q Okay. Do you record traffic stops?

4 A Yes.

5 Q Okay. That happens on that camera system?

6 A Yes.

7 Q Okay. I'm going to hand you a DVD. Just tell me  
8 if you can identify that.

9 A It is mine.

10 Q Okay, thank you. Is this DVD an accurate capture  
11 of this traffic stop?

12 A It is.

13 MR. WILLIAMS: Your Honor (unintelligible).

14 JUDGE SUMMEY: I'll allow it.

15 MR. WILLIAMS: Your Honor, at this time I'd ask  
16 (unintelligible).

17 JUDGE SUMMEY: Yes.

18 Q (By Mr. Williams) Trooper, if you could come stand,  
19 I'm going to turn this TV around. You might not have your  
20 face to the jury, so I'm going to ask you to keep your voice  
21 up.

22 A Yes, sir.

23 Q All right. Trooper, tell us what you're seeing  
24 here on the screen.

25 A What you're seeing is I'm headed westbound on

1 Interstate 26 right before the 526. We're all familiar with  
2 that wonderful intersection in the area. It's nighttime, as  
3 you can see, I'm traveling westbound just (unintelligible)  
4 seated on the front windshield about -- a little bit below  
5 where your rearview mirror would be.

6 Q Is audio also recorded?

7 A It is. There is a 30-second playback. That video  
8 camera is actually always recording, so whenever I do  
9 activate it, it records 30 seconds visually, but not audibly.  
10 So when you first start watching the video, you're going to  
11 not hear anything. Then you'll start hearing, that's when I  
12 actually press record.

13 Q Where are the microphones that are recording?

14 A One is in the cabin and then one is on myself that  
15 you'll see here today.

16 Q Okay. So you have two audio sources recording?

17 A Yes. One inside the vehicle and then one on my  
18 person.

19 (Video plays.)

20 Q Okay. Trooper Methvin, did you initiate a traffic  
21 stop?

22 A I did.

23 Q Tell us what we just saw and why you

24 (unintelligible) to initiate a traffic stop.

25 A As I came past the 526 entrances and exits onto 26

1 Westbound, I observed this black Lincoln, as everyone could  
2 see, drifting over the white lines and failing to maintain  
3 their lane. So I decided to observe the vehicle, maybe it  
4 was just a one-time event. It wasn't. It was a continued  
5 pattern of (unintelligible). I reported it and then decided  
6 it was time to initiate a traffic stop to see what is causing  
7 this failing to maintain the lane. What you hear me saying  
8 is just our -- our little jargon of (unintelligible). I  
9 give the vehicle description, I give the location, and I also  
10 give the vehicle tag.

11 (Video plays.)

12 Q Trooper, was this in Charleston County?

13 A It was in Charleston County.

14 (Video plays.)

15 Q Okay. Trooper, tell me about your initial  
16 interaction with the driver and what you elected to do.

17 A All right. When I first made the approach to the  
18 vehicle, I could detect a strong odor of alcohol. I asked  
19 for license and registration, I cannot remember off the top  
20 of my head -- this has been almost a year ago -- exactly what  
21 information she gave me at that time. I did ask her if she  
22 had anything to drink, I believe she said yes, I'd have to  
23 check with my report that both the defense and the  
24 prosecution has. Given the strong odor of alcohol, given the  
25 weaving in and out of lanes, and the totality of the

1 circumstances, I decided it was a wise choice to continue my  
2 investigation as to why the car was weaving in the other  
3 lane. And that's when I asked her to step out of the  
4 vehicle.

5 Q At this point did you know if the smell of  
6 alcoholic beverage was coming from Ms. Kelly or from the car,  
7 did you know?

8 A No, no. And that's another reason why we ask  
9 people out of the car sometimes. It's simply to get them out  
10 of the car to make sure it's not just the car that smells  
11 like alcohol, it's actually the person.

12 (Video plays.)

13 A The reason I ask for a female officer to pat down  
14 Ms. Kelly is because she is obviously a female. If there is  
15 a female officer there, it's a good choice to do a Terry  
16 frisk to make sure there's no -- it's not a search of a  
17 person, it's just to search the outside (unintelligible) to  
18 ensure there's no weapons.

19 (Video plays.)

20 Q Okay. You said you then offered a field sobriety  
21 test?

22 A Yes.

23 Q And what are those tests?

24 A A field sobriety test is a standard field sobriety  
25 test -- there are three that are in the standard field

1 sobriety tests. There are numerous others that you can be  
2 trained on (unintelligible) are the basic three that I'm --  
3 that we use. The first one is the HGN, the horizontal gaze  
4 nystagmus. What that test is the involuntary jerking of the  
5 eyes. The second test is the walk and turn, which is a  
6 divided attention test. Basically, driving is a divided  
7 attention, you have to check your mirrors, you have to check  
8 your speed, you have to check the car around you, you have to  
9 check the car behind you, you got to look for cars coming  
10 everywhere. Your detention is -- or your attention is  
11 divided. This test tests that divided attention. And then  
12 we do a one-legged stand, which also tests your divided  
13 attention and also just your basic balance as well.

14 (Video plays.)

15 Q Did you ask her if she had any mental conditions  
16 you should know about?

17 A That is the first question I asked. And the second  
18 question is I asked if she wears contacts or glasses.

19 Q And what was her answer?

20 A Neither.

21 (Video plays.)

22 Q Okay. Tell us about the HGN test. What did you  
23 see?

24 A The HDN test, first thing we do on HDN is we want  
25 to check your eyes for equal tracking and equal pupils. If

1 you have equal pupils, that means you're not on any kind of  
2 narcotics and your eyes are pretty much normal. We also  
3 equal track them to make sure that your eyes are -- can  
4 follow my pen. The second thing that we check for is called  
5 a lack of smooth pursuit. If someone is -- has alcohol in  
6 their system, you'll see a lack of smooth pursuit where your  
7 eyes will pretty much -- they struggle to follow. It's slow,  
8 it's just like if -- you know, if a car was coming up, your  
9 eyes need to track that smoothly. Under the influence your  
10 eyes may not be able to track that car or that person  
11 smoothly.

12           The second thing we track for is distinct and  
13 sustained nystagmus at max deviation. Basically, you take  
14 the stimulus, or the tip of my pen as I would call it, you  
15 take the stimulus and you put it at the very corner where the  
16 person can barely see out of the corner of their eyes.  
17 You'll see her eyes -- well, you will see the eye start to  
18 jerk. That is nystagmus. I saw that both -- I saw the lack  
19 of pursuit in both eyes, I also saw a distinct sustained.  
20 nystagmus in both eyes.

21           The next thing we check for is nystagmus prior  
22 to 45-degrees. Now, that one is basically you want to see --  
23 you start moving the pen slowly or the stimulus and you'll  
24 start -- you'll wait and see when it starts to jerk when the  
25 nystagmus starts. (Unintelligible) basically, shoulder

1 length is 45-degrees. Ms. Kelly had nystagmus prior to  
2 45 degrees in both eyes. The third and the final thing that  
3 I check for is called vertical gazed nystagmus. What that  
4 indicates is that person has more than their body is used to  
5 in their system at that time. I did not see any vertical  
6 gazed nystagmus.

7 Q What's going to cause nystagmus? Why are you doing  
8 this in relation to --

9 A The reason I asked for medical is that I want to  
10 cross out any brain injuries that could have caused  
11 nystagmus. So I know that when I see nystagmus, alcohol or  
12 (unintelligible) are in her system. If I can see the  
13 nystagmus, knowing that there's no medical conditions that I  
14 need to know about, I know that alcohol caused the nystagmus.

15 Q Okay. Could something like a head trauma or  
16 concussion also cause nystagmus?

17 A It could.

18 Q Okay. And you asked her at the beginning if she  
19 had it?

20 A I did. And she stated that she did not have any  
21 head injuries.

22 Q Okay. Now, we can't see her eyes, obviously, in  
23 this video, just can't do it. We're going to have to take  
24 your word for it?

25 A Yes.

1 Q Was this test alone the reason why you decided to  
2 arrest Ms. Kelly for a DUI?

3 A No, it was not.

4 Q At this point what did you do?

5 A We start the next test, which would be the walk and  
6 turn.

7 Q Okay.

8 (Video starts.)

9 Q Okay. Tell us how -- tell us what happened.

10 A All right. Every time -- whenever I gave the  
11 instructions you saw, "It's imperative that you stay in the  
12 starting position on the (unintelligible) side. Heel and  
13 toes -- your left foot on the line and your right foot heel  
14 to toe." As you can see, she got out of that starting  
15 position, started doing something with her hoodie. She  
16 started the test. And if you watch me, I put my arm -- if  
17 anybody noticed that my arm came out like this. Basically,  
18 what that's indicating is she did not touch heel to toe,  
19 okay? So each time my arm was extended, she was not touching  
20 heel to toe. She also turned improperly. I instructed her  
21 on how to turn, she did, like, an about-face. All right. So  
22 that is why you saw -- those were some more clues that I was  
23 starting to build totality of circumstances.

24 (Video starts.)

25 Q Okay. Tell us about that test.



1 A That would have been Ms. Kelly.

2 Q Okay. And how was that important?

3 A In the -- in the car, like I explained earlier, we  
4 have a microphone in the cabin of the vehicle.

5 Q Okay. At this point what are you going -- what are  
6 you about to do with the car?

7 A What we're about -- what I was doing, as you can  
8 see, was a search incident to arrest to make there was  
9 nothing obviously illegal, as well as inventory of the  
10 vehicle before we towed the vehicle as well.

11 Q Okay. After the vehicle was towed, where do you go  
12 from here?

13 A What we'll do is we'll transport her to the  
14 Charleston County Detention Center. Upon arrival there we'll  
15 take her to the DataMaster room.

16 Q Okay. And the DataMaster room is where you  
17 administer a breath test?

18 A It is.

19 MR. WILLIAMS: Your Honor, at this time I  
20 (unintelligible).

21 JUDGE SUMMEY: We're still on the record.

22 Q (By Mr. Williams) Now, Trooper Methvin, the thing  
23 you just saw has about eight minutes left on it. What  
24 happens in that period of time?

25 A We are being transported -- I was transporting

1 Ms. Kelly to the Charleston County Detention Center.

2 Q Okay. When you arrive at the detention center,  
3 what's the first thing you do?

4 A The first thing I do is that I put my weapons  
5 inside the trunk of my vehicle, per the jail's policy. And  
6 then I transport the prisoner into the DataMaster room.

7 Q Okay. Describe the DataMaster room, please.

8 A In Charleston County there's two DataMaster  
9 machines, there's a restroom, there's two video monitors that  
10 we are required to use by the State of South Carolina,  
11 there's chairs, copiers.

12 Q What does the DataMaster machine look like?

13 A It's a box with a screen on. It also has a jar  
14 next to it with a hose that you would use to provide a breath  
15 sample.

16 Q Okay. Prior to giving a sample (unintelligible)?

17 A Yes. I go through the SLED policies, which is --

18 Q You don't have to tell me.

19 A Okay.

20 Q Just, do you advise her of her rights?

21 A Yes, I do.

22 Q Is this a sheet that's prepared by SLED?

23 A It is.

24 Q Okay. Do you read it to her aloud?

25 A I do.

1 Q Do you give her a written copy?

2 A I do.

3 Q So she can read along with it?

4 A Yes.

5 Q Okay. Is she told that she does not have to take  
6 the test?

7 A Yes.

8 Q Trooper, when you gave Ms. Kelly this test,  
9 (unintelligible)?

10 A It was.

11 Q Okay.

12 A Yes.

13 Q With -- prior to the sample, is there a 20-minute  
14 observation period?

15 A There is.

16 Q Did you observe Ms. Kelly for 20 minutes?

17 A I did.

18 Q How close were you to her?

19 A Where me and the judge are, not far.

20 Q Did she put anything in her mouth at any period of  
21 time?

22 A No.

23 Q At the beginning of the 20-minute observation  
24 period, did you check to make sure there were no foreign  
25 objects in her mouth?

1 A I did.

2 Q Are you qualified to administer this test?

3 A I am.

4 Q Okay. You're certified to run a DataMaster test in  
5 South Carolina?

6 A Yes.

7 Q Who gives that certification?

8 A South Carolina Criminal Justice Academy.

9 Q Okay. And did you use the proper procedure, proper  
10 manner?

11 A Yes.

12 Q Okay. I'm going to hand you a document  
13 (unintelligible). Don't tell me what it is, but can you  
14 identify that document?

15 A Yes, I can.

16 MR. WILLIAMS: Your Honor, at this time I would  
17 move the DataMaster report of Ms. Kelly into evidence.

18 JUDGE SUMMEY: Okay.

19 (Unintelligible.)

20 JUDGE SUMMEY: Please step into the jury room.

21 Thank you. For the record, the jury (unintelligible). Go  
22 ahead.

23 (Unintelligible.)

24 JUDGE SUMMEY: Okay. Do you have a response?

25 MR. WILLIAMS: Your Honor, I have (unintelligible)

1 the operator, solid and/or liquid matter into the mouth. I  
2 don't think this calls into question (unintelligible).

3 JUDGE SUMMEY: Okay.

4 MR. PHIPPS: Your Honor, as we all know, he  
5 submitted that (unintelligible). Number three, the accused  
6 was not allowed anything in his mouth for 20 minutes. He let  
7 it happen (unintelligible) because (unintelligible).

8 MR. WILLIAMS: Policy (unintelligible) the failure  
9 to follow any of the policies, procedures, or regulations for  
10 the provisions of the section shall result in the exclusion  
11 of evidence of any test result. If the trial judge or  
12 hearing officer finds this failure materially affected  
13 accuracy or reliability of the test results or the fairness  
14 of the testing procedure, then the trial judge or hearing  
15 officer will specifically attest to the manner in which the  
16 failure materially affected the accuracy and reliability of  
17 the test result in fairness to the procedure.

18 Your Honor, if he said she put her fingers in  
19 her mouth one time, that was the testimony, I think the trial  
20 judge -- how that materially affected the accuracy or  
21 reliability of the test results.

22 JUDGE SUMMEY: Give me a moment to review this,  
23 please (unintelligible) you're still under oath. I've given  
24 this a lot of thought and consideration. And in taking both  
25 sides and looking at it, I'm going to let this go to the

1 jury. I'm going to let them, the jury, decide whether they  
2 believe that that impacted. I believe that the SLED  
3 regulation that you brought up and the statute, I'm going to  
4 allow it to go forward to determine the outcome of the trial.  
5 Sir, you're welcome to appeal, but I am going to let this go  
6 to the jury and let them make a determination.

7 MR. PHIPPS: Your Honor, may I use the restroom  
8 real quick (unintelligible)?

9 JUDGE SUMMEY: (Unintelligible) this is taking so  
10 long, but I do take this very seriously.

11 MR. PHIPPS: Thank you.

12 (Unintelligible.)

13 MR. WILLIAMS: Thank you, Judge. So based on the  
14 Court's ruling, prior to this I moved the DataMaster report  
15 (unintelligible).

16 JUDGE SUMMEY: Correct.

17 MR. WILLIAMS: Okay, thank you.

18 JUDGE SUMMEY: All right. Bring them back in.

19 (Unintelligible.)

20 MR. WILLIAMS: Thank you. Your Honor, before we  
21 broke, Trooper Methvin identified the document. I moved it  
22 into evidence, State's Exhibit 2.

23 JUDGE SUMMEY: Uh-huh.

24 MR. WILLIAMS: It's admitted?

25 JUDGE SUMMEY: Yes.

1 MR. WILLIAMS: Thank you.

2 BY MR. WILLIAMS:

3 Q Trooper Methvin, I'm going to hand you this  
4 document. (Unintelligible) can look at it at the same time  
5 (unintelligible).

6 A It's the subject biographical information.

7 Q Very top.

8 A Oh, yes, the South Carolina Law Enforcement  
9 Division breath alcohol analysis test report driving under  
10 the influence.

11 Q Okay. The first group, subject biographical  
12 information, who is this report run on?

13 A Hannah M. Kelly.

14 Q Okay. Second section, arrest information, what was  
15 the date of this arrest?

16 A February 19, 2016.

17 Q Okay. And who was the arresting officer?

18 A T.G. Methvin, me.

19 Q Thank you. What was the arrest time?

20 A 0057, so 12:57 a.m.

21 Q And length of time?

22 A The --

23 Q Just after midnight?

24 A Yes, just after midnight.

25 Q The operator information, who was the operator of

1 this test?

2 A Myself.

3 Q Okay. Occasionally, will a different officer  
4 operate the test than made the arrest?

5 A Yes.

6 Q Okay. But you did both of these in this case?

7 A Yes.

8 Q All right. Was this test run based on the arrest  
9 (unintelligible)?

10 A Yes.

11 Q Okay. It's got several questions. The breath  
12 test, was it in your report?

13 A Yes.

14 Q Was the subject's mouth checked and any foreign  
15 material removed?

16 A Yes.

17 Q Was the subject advised of applicable rights?

18 A Yes.

19 Q (Unintelligible) requested?

20 A Yes.

21 Q What type of sample was requested?

22 A A breath sample.

23 Q Okay. Was the subject observed for a minimum of 20  
24 minutes prior?

25 A Yes.

1 Q Okay. What is the purpose of the 20-minute waiting  
2 period?

3 A It is to -- actually, I would have to check the  
4 manual, the DataMaster manual, for that. But it's required  
5 by law.

6 Q Okay, thank you. Now, in the next section, the  
7 subject's breath alcohol test results, the test's date was  
8 when?

9 A February 19, 2016.

10 Q Okay. The observation start time was when?

11 A 1:29:25 a.m.

12 Q So this is approximately 32 minutes after her  
13 arrest --

14 A Yes.

15 Q -- is that correct?

16 A Yes.

17 Q Okay. Now, during that time, that was when her car  
18 was towed and you drove to the jail?

19 A Yes.

20 Q And you observed her for 20 minutes?

21 A Yes.

22 Q Now, the first thing is a blank test. What was  
23 that result?

24 A The test -- or the machine tests itself.

25 Q Okay. And what was the result of that test?

1 A .00.

2 Q So nothing?

3 A Yes.

4 Q Okay. Next it -- did the machine verify its  
5 internal standard?

6 A It did.

7 Q What was that temperature?

8 A 33.99 Celsius.

9 Q Is that within range?

10 A Yes.

11 Q (Unintelligible.)

12 A It was a 0.078.

13 Q Okay. So the machine is trying to run it at .08?

14 A Yes.

15 Q And what did it run?

16 A 0.078.

17 Q So is that slightly below?

18 A Yes.

19 Q Is that within an acceptable range?

20 A Yes.

21 Q If that had been -- if that test had been outside  
22 of the acceptable range, what would have happened?

23 A The machine would not have allowed me to get a  
24 sample from Ms. Kelly.

25 Q Is that how the machine is designed?

1 A Yes.

2 Q If it's not in proper working order, will it allow  
3 a driver to give a sample?

4 A No.

5 Q After it ran that .08 simulator verification and  
6 got a .078, did it run another blank test?

7 A It did.

8 Q What was that result?

9 A 0.00.

10 Q So at this point is it correct that the machine ran  
11 a 0, tested .08, got .078 (unintelligible) and then ran  
12 another 0 test?

13 A Yes.

14 Q At this point -- this is what we're leading up  
15 to -- the subject sample, what was the subject sample?

16 A It is a 0.09 percent.

17 Q Okay. What time was that?

18 A It was at 01:54:04.

19 Q Okay. So approximately how long was that after her  
20 arrest?

21 A Just under an hour.

22 Q After -- what was the -- what was the next thing  
23 that happened?

24 A It ran another internal test --

25 Q Okay. What was that?

1 A -- or a blank test, I'm sorry. It was a 0.0.

2 Q Okay. So to your knowledge, was the machine in  
3 proper working order?

4 A Yes.

5 Q Okay. Ms. Kelly's sample was what?

6 A A .09.

7 Q (Unintelligible.)

8 A That is greater than.

9 Q Okay, thank you. (Unintelligible) you observed  
10 Ms. Kelly on the roadside?

11 A Yes.

12 Q Okay. Why did you initially stop her?

13 A For failure to maintain lane.

14 Q Okay. Upon approaching the car, what did you  
15 notice (unintelligible)?

16 A A strong odor of alcohol, just very strong. I  
17 needed to separate and continue my investigation, separate  
18 her from the car.

19 Q And did you still observe that smell once she was  
20 outside of the car?

21 A Yes.

22 Q At that point did you give a field sobriety test?

23 A I did.

24 Q And you arrested her for DUI?

25 A (Unintelligible) yes, I did. I'm sorry.

1 Q Pursuant to state law (unintelligible)?

2 A Yes.

3 Q And what was her sample?

4 A A .09.

5 Q (Unintelligible.)

6 A Yes.

7 Q Okay.

8 MR. WILLIAMS: No more questions, Your Honor.

9 JUDGE SUMMEY: Mr. Phipps?

10 MR. PHIPPS: Thank you.

11 BY MR. PHIPPS:

12 Q (Unintelligible) Trooper?

13 A I've been employed with the South Carolina  
14 Department of Public Safety for three years.

15 Q And (unintelligible)?

16 A Could you specify a time frame? Up until right  
17 now.

18 Q For the time period that you were (unintelligible).

19 A I couldn't give you an exact number, sir.

20 Q And would you agree with me for just  
21 (unintelligible)?

22 A From the totality of circumstances, that is why I  
23 made my arrest.

24 Q And that opinion is subjective?

25 A Again, those were the totality of the

1. circumstances.

2. Q Okay. And (unintelligible)?

3. A Yes.

4. Q Do you recall what the weather was?

5. A It appeared to be clear, no rain.

6. Q Was it cold?

7. A I can't recall right now.

8. Q (Unintelligible.)

9. A I can't recall right now.

10. Q Your field sobriety (unintelligible)?

11. A Yes, sir.

12. Q And you talked about (unintelligible)?

13. A Yes, sir.

14. Q And you're pretty experienced in administering that  
15. test?

16. A There's always room to get better.

17. Q Okay. And how many queues are there?

18. A There are six clues total on horizontal gaze  
19. nystagmus.

20. Q (Unintelligible.)

21. A On the first set, in both eyes you're looking for a  
22. lack of smooth pursuit. On the second test -- or not the  
23. second test, but the second part of it, you're looking for  
24. distinct sustained nystagmus at max deviation in both eyes.  
25. And on the third area, you are looking for onset of nystagmus

1 prior to 45-degrees. And you would make two passes each  
2 time.

3 Q And then you (unintelligible)?

4 A Yes, sir.

5 Q And you stated in your testimony that she didn't  
6 walk heel to toe?

7 A Yes.

8 Q And (unintelligible)?

9 A On the video you can see my arm extending. I  
10 couldn't tell you steps one, nine, or ten, I could not tell  
11 you that right now. But you could see my arm extending,  
12 indicating a missed heel to toe.

13 Q Sir, how many times did it happen?

14 A I couldn't give you an exact number.

15 Q (Unintelligible.)

16 A I did, but I did not count.

17 Q (Unintelligible.)

18 A No.

19 Q (Unintelligible.)

20 A It was (unintelligible) but --

21 MR. WILLIAMS: Asked and answered, Your Honor.

22 Q (By Mr. Phipps) Something about the start position?

23 A Yes.

24 Q And if I recall -- correct me if I'm wrong -- from  
25 your testimony, you stated that she had stepped off because

1 she was messing with her hoodie?

2 A Yes.

3 Q (Unintelligible) she was messing with her hoodie?

4 A No.

5 Q Okay. Do you know why she was -- did you ask her  
6 if there was (unintelligible)?

7 A I do not recall at this time.

8 Q Okay. And when you had her do (unintelligible)?

9 A Yes, yes.

10 Q And (unintelligible)?

11 A No, I do not.

12 Q Do you know what she does for a living?

13 A I believe she stated she was in the military.

14 Q Okay. And so you have no clue what she did that  
15 day?

16 A No, I do not.

17 Q Did you inquire if she had any leg issues or  
18 problems with her legs?

19 A Before -- like I testified before -- I asked if she  
20 had any medical conditions, and she stated no.

21 Q All right. Any other conditions that could cause  
22 you not to have balance of your legs and not able to do some  
23 of those tasks?

24 A When I asked if she had any medical conditions and  
25 she stated no, that is my requirement.

1 Q (Unintelligible.)

2 A I have asked her if she had any medical conditions,  
3 and she stated no.

4 Q That's not the question I (unintelligible).

5 A Okay.

6 Q The question is (unintelligible)?

7 A Could possibly.

8 Q Possibly. So if you ran five miles up north  
9 (unintelligible)?

10 A Could possibly.

11 Q Could possibly. And so all the (unintelligible)  
12 you determined that the totality of everything?

13 A Given the totality of the circumstances that I was  
14 given that night, yes.

15 Q And you took her to the station?

16 A The jail, yes.

17 Q (Unintelligible.)

18 A I don't remember anything that was discussed on the  
19 way to the jail.

20 Q You don't remember anything?

21 A No. I remember certain things, and then there's  
22 other things that I do not remember.

23 Q (Unintelligible.)

24 A Yes, we arrived at the jail.

25 Q It's (unintelligible)?

1 A Yes.

2 Q And (unintelligible)?

3 A I'm sorry?

4 MR. PHIPPS: May I approach?

5 JUDGE SUMMEY: Yes.

6 (Unintelligible.)

7 A Yes, this is it right here in my hand. Okay.

8 Q (By Mr. Phipps) And that is State's Exhibit --

9 MR. WILLIAMS: 2.

10 Q (By Mr. Phipps) 2, okay. So you have State's  
11 Exhibit 2 in your hand?

12 A Yes, sir.

13 Q And you go through this process and  
14 (unintelligible)?

15 A In the room, yes.

16 Q And this is a machine?

17 A Yes.

18 Q (Unintelligible.)

19 A SLED maintains it, yes.

20 Q (Unintelligible.)

21 A SLED maintains it, I am certified to operate it. I  
22 do not know what's inside.

23 Q So basically, you just know how to turn it on  
24 (unintelligible)?

25 A I'm certified to operate it through the state.

1 Q Okay. And was (unintelligible)?

2 A Yes. If it is outside an acceptable range, the  
3 DataMaster will not allow a sample to be taken.

4 Q Okay (unintelligible)?

5 A Again, I can operate it, but I cannot -- SLED is  
6 the one that maintains it. If the machine is not  
7 functioning, it will not allow me to take a breath sample  
8 from a driver.

9 Q But you testified earlier it was (unintelligible)?

10 A Yes.

11 Q (Unintelligible.)

12 A Because the machine allowed me to accept a breath  
13 sample.

14 Q So you don't know (unintelligible)?

15 A Well, if the machine does not allow me, from my  
16 training from the South Carolina Criminal Justice Academy,  
17 that if I cannot obtain a breath sample, that I need to  
18 restart the test or move on to a different machine.

19 Q Okay (unintelligible)?

20 A Not off the top of my head, no. I would have to  
21 refer to my manual.

22 Q You have to check the mouth?

23 A Yes.

24 Q Why?

25 A To make sure no foreign subjects -- or objects are

1 in their mouth.

2 Q (Unintelligible.)

3 A Yes.

4 Q What kind of (unintelligible)?

5 A A breath sample.

6 Q Okay. But aren't there different types of alcohol?

7 A There's ethanol.

8 Q (Unintelligible.)

9 A Yes.

10 Q Okay (unintelligible)?

11 A Yes.

12 Q And how can it enter the body?

13 A It can enter it in a couple different ways. But  
14 the common way is through drinking it.

15 Q Correct. So your body is like -- is like a sponge;  
16 is that correct?

17 A I'm not a doctor.

18 Q I'm not asking you that.

19 A Okay.

20 Q I'm not asking you if you're a doctor. I asked if  
21 you knew whether our bodies were like a sponge?

22 A I know the alcohol is absorbed a little bit in the  
23 stomach, but mostly through the colon.

24 Q It can be -- how many (unintelligible)? Is it  
25 immediately start (unintelligible)?

1 A I would have to refer to my manual.

2 Q The residual (unintelligible)?

3 A Briefly, I -- but not off the top of my head could  
4 I give you a good answer.

5 Q Okay. (Unintelligible) the mouth, the alcohol in  
6 the mouth --

7 A Yeah.

8 Q -- and sticks around? And the purpose of waiting  
9 20 minutes is why?

10 A It's required by law in the state of South Carolina  
11 that I observe someone for 20 minutes. The other reasoning  
12 behind that law, I would have to refer to that manual.

13 Q You don't know?

14 A Off the top of my head, other than required by law,  
15 no, I would have to check my manual.

16 Q And could it be to allow the alcohol that's  
17 (unintelligible)?

18 A As I've said before, I would have to check my  
19 manual --

20 Q Okay.

21 A -- to give you a good answer.

22 Q And (unintelligible)?

23 A Okay.

24 Q Well, I don't know (unintelligible)?

25 A It's not technically a sponge, no.

1 Q So absorbs? Let me ask you this, let me -- let me  
2 change this: Do you drink?

3 A Yes, I do.

4 Q Okay. Do you drink alcohol?

5 MR. WILLIAMS: Your Honor, I object.

6 (Unintelligible.)

7 Q (By Mr. Phipps) Are you familiar that when people  
8 drink that they often sweat alcohol out their pores?

9 A Yes.

10 Q Okay. So your body's porous like a sponge?

11 A Yes.

12 Q (Unintelligible.)

13 A I'm unaware of that. I'm not aware of where  
14 exactly it's derived from.

15 Q Okay. So wouldn't it be true (unintelligible)  
16 through your pores sweating, that same alcohol can come out  
17 through your tears?

18 MR. WILLIAMS: Your Honor, he's asked the question  
19 twice, and twice he's said he's not aware.

20 JUDGE SUMMEY: Yes or no?

21 A No, I'm not aware.

22 Q (By Mr. Phipps) Okay. And would the simulator test  
23 that -- it's verification was .078?

24 A Yes, sir.

25 Q And are you familiar (unintelligible) numbers when

1 you (unintelligible)?

2 A Do you mean by rounding up?

3 Q Or rounding down. Have you ever had numbers beyond  
4 (unintelligible)?

5 A Please clarify your question.

6 Q Absolutely. I apologize, I'll try to be clearer.

7 A No, you're fine.

8 Q You have a .90 --

9 A Yes, sir.

10 Q -- or .08 or .07. Have you ever had anything  
11 beyond that, numbers beyond 100?

12 A Not typically, no. I've never had that in my  
13 personal experience, no.

14 Q Because the machine truncates the numbers?

15 A I would have to refer to my manual and you'd have  
16 to refer to SLED on that.

17 Q So you don't know?

18 A No.

19 Q Okay. But yet the subject sample (unintelligible)?

20 A Yes.

21 Q Could that potentially be a .085 and truncated up?

22 A Again, I'm certified to operate it, but I'm not  
23 certified to maintain the machine.

24 Q You don't know?

25 A You'd have to ask SLED.

1 Q So you don't know?

2 A No, I do not.

3 Q (Unintelligible.)

4 A Yes.

5 Q And during that 20-minute period (unintelligible)?

6 A Any foreign objects, yes.

7 Q Any foreign?

8 A Yes, sir.

9 Q So what is foreign?

10 A Anything that is not -- like, outside the body.

11 Like water, smoking, eating.

12 Q (Unintelligible.)

13 A Just SLED.

14 Q (Unintelligible.)

15 A Yes, it's in the manual.

16 Q Interesting.

17 A It specifically states that. It's been what I'm

18 trained on.

19 Q (Unintelligible.)

20 A I'm not allowed to let them drink or smoke or eat

21 anything.

22 Q Are you trained to tell them (unintelligible)?

23 A I'm not restraining their hands at that point.

24 Q I understand that. But isn't it part of your

25 training (unintelligible) items put in their mouth?

1 A It is.

2 Q So as you're watching them, observing them, if you  
3 see them putting their hands up near their mouth, isn't it  
4 your responsibility to tell them, "Hey, stop putting your  
5 hands up near your mouth, you're not supposed to put any  
6 foreign items in your mouth"?

7 A Again, hands are not a foreign item.

8 Q How do you know (unintelligible)?

9 A I didn't see anything.

10 Q Okay. Would a penny be a foreign item? Would that  
11 be a problem?

12 A Yeah. I checked what is required of me in SLED. I  
13 did not see any pennies.

14 Q How about a finger? Is that a foreign item?

15 A I would not think so, no.

16 Q Okay. What if someone's crying and they've got  
17 pores running down into their mouth and they're wiping their  
18 face and then it's coming around their mouth, is that  
19 residual alcohol pouring from their eyes getting into their  
20 mouth?

21 A I assume it would be possible.

22 Q Possible (unintelligible)?

23 A I mean, highly unlikely.

24 Q (Unintelligible.)

25 A That would be -- to me, it would be different. But

1 I would assume, yes, that you could be possibly correct in  
2 that. But it is not foreign, yeah.

3 Q (Unintelligible) that wasn't the question.

4 A Okay.

5 Q It could alter the results; isn't that correct?

6 A I don't know.

7 Q You don't know?

8 A I answered you, yeah.

9 Q (Unintelligible.)

10 A Are you referring to when she provided a breath  
11 sample or whenever I left the jail?

12 Q (Unintelligible) and walked out the door.

13 A I can -- I would say within two hours. I couldn't  
14 give you an exact time of what time I left the jail that  
15 evening.

16 Q Okay. And somebody who drinks a lot and is  
17 intoxicated (unintelligible)?

18 A Some people do, some people don't. Everyone's  
19 different.

20 Q Did she?

21 A I do not recall.

22 Q You don't recall (unintelligible)?

23 A No, not during the 20-minute observation period she  
24 didn't. But I don't recall -- I don't recall. Sometimes I  
25 ask people when I get into the DataMaster room if they need

1 to use the restroom. But I do not recall exactly when  
2 Ms. Kelly used the restroom that evening.

3 Q She was in your observation for the 20-minutes time  
4 period. How many times did she wipe tears down her face,  
5 hold her hands on her face, and put in her mouth -- put her  
6 fingers in her mouth? How many times did that occur?

7 A I assume you counted. I can't -- I couldn't give  
8 you an exact number.

9 Q You don't know?

10 A Not the exact number, no, sir.

11 Q But it did occur?

12 A I'm sure it did. She was crying.

13 Q (Unintelligible.)

14 A You had stated earlier that it is a possibly and  
15 then you asked me and I was answering both questions at the  
16 same time and I said yes.

17 Q So she did put her fingers in her mouth at one  
18 time?

19 A As I testified earlier to that, yes.

20 Q And -- but you don't know how many times that  
21 occurred?

22 A No, not exactly.

23 Q If I played the video for you, could that refresh  
24 your recollection?

25 A The exact number?

1 Q (Unintelligible.)

2 A Yeah.

3 MR. PHIPPS: Your Honor, I would like to play the  
4 video for him. Do you have -- is that a Bluetooth? I think  
5 that might be the best way to do it.

6 (Unintelligible.)

7 MR. PHIPPS: You want to excuse the jury while  
8 we're trying to queue this all up?

9 JUDGE SUMMEY: Let's just try to use it before.  
10 Let me ask Latasha -- where's my note for that?

11 MR. PHIPPS: You want to excuse the jury while we  
12 try to figure it out?

13 (Unintelligible.)

14 JUDGE SUMMEY: Okay. So it does not work, the TV  
15 doesn't work?

16 MR. PHIPPS: Doesn't work, period.

17 JUDGE SUMMEY: I'm so sorry.

18 MR. PHIPPS: I may be able to hook up to my  
19 computer.

20 JUDGE SUMMEY: Maybe the disc will work this time.

21 MR. PHIPPS: Well, I don't think it's formatted.

22 JUDGE SUMMEY: Oh, that's right.

23 MR. PHIPPS: I have a bunch of (unintelligible)  
24 hookups in the back.

25 (Unintelligible.)

1 JUDGE SUMMEY: We're still on the record, by the  
2 way.

3 MR. PHIPPS: So I think it can hook up to the TV.

4 JUDGE SUMMEY: Okay. Using a (unintelligible)  
5 cord?

6 MR. PHIPPS: But I need two to one.

7 (Unintelligible) basically come out with two.

8 JUDGE SUMMEY: I'm sorry it's not formatted.

9 MR. PHIPPS: Do you have a (unintelligible)?

10 JUDGE SUMMEY: No.

11 MR. PHIPPS: And I thought I had stuff like that.

12 JUDGE SUMMEY: Well, I mean (unintelligible) we had  
13 an issue one other time with a formatted disc. We ended up  
14 having to play it on the computer. Do you remember that?

15 MR. PHIPPS: I don't have (unintelligible) my IT  
16 guy's getting yelled at. This is supposed to be resolved.  
17 Do you have a larger computer screen?

18 JUDGE SUMMEY: All we have are desktops.

19 MR. PHIPPS: I mean, we can set it up and play it  
20 for them.

21 JUDGE SUMMEY: I would have to -- I would have to  
22 unhook the desktop.

23 MR. PHIPPS: What I'm saying is I guess we can  
24 bring in the trooper over there and play it.

25 JUDGE SUMMEY: Yeah, I mean, Trooper Methvin can

1 move unless you have an issue with that. I have no issue  
2 with that. I mean, we've had to do this before with a laptop  
3 because it wasn't -- the DVD was not formatted to the proper  
4 file. (Unintelligible) and you're going to have to stands  
5 here, okay?

6 MR. WILLIAMS: Ed?

7 MR. PHIPPS: Yeah?

8 MR. WILLIAMS: Why don't we move the TV just to the  
9 floor and set it (unintelligible) right here?

10 (Unintelligible.)

11 JUDGE SUMMEY: We ready?

12 Q (By Mr. Phipps) Just to set a little foundation for  
13 the jury, explain what we're looking at.

14 A We are in the Charleston County Detention Center in  
15 the DataMaster room. That is me, that is Ms. Kelly, and down  
16 here is the DataMaster machine. And up here you can actually  
17 see the recording (unintelligible). And then this is a video  
18 recording (unintelligible).

19 Q I'm not going to stop it.

20 A Okay.

21 (Video plays.)

22 Q Where are her hands?

23 A They are (unintelligible) holding the paper right  
24 there near me. She has her hands folded.

25 Q Prior to that, were you watching?

- 1 A Yes, but I did not see (unintelligible)
- 2 Q (Unintelligible.)
- 3 A It sounds like she's sniffing.
- 4 Q (Unintelligible) your recollection?
- 5 A Yes, I watched the video.
- 6 Q Did you count how many times (unintelligible)?
- 7 A I did lose count, I'm sorry. It was numerous count
- 8 times --
- 9 Q Okay.
- 10 A -- before the breath test was administered.
- 11 Q Okay. Can you give me a number (unintelligible)?
- 12 A About there.
- 13 Q Okay. And then you even had her get up and throw
- 14 away an item?
- 15 A That was after the test, yes.
- 16 Q (Unintelligible.)
- 17 A Not to my recollection.
- 18 Q (Unintelligible.)
- 19 A Yes.
- 20 Q (Unintelligible.)
- 21 A From my knowledge, yes.
- 22 Q (Unintelligible.)
- 23 A Yes.
- 24 Q Okay. And in regards to the analysis of the report
- 25 (unintelligible) the blood ratio of alcohol to blood, do you

1 know?

2 A I'm not a medical professional.

3 Q Okay.

4 A I know BAC, but I'm not a medical professional. I  
5 could not give you a good answer on that.

6 Q Okay. And your -- your training?

7 A I would have to refer to the manuals. But again,  
8 I'm not --

9 Q Okay.

10 A -- a medical professional.

11 Q And when you had her take the test, I recall you  
12 saying you have to blow, like (unintelligible)?

13 A That's just something that I help people understand  
14 how to. So -- because if they fail to provide a valid breath  
15 sample, that does suspend their license, and I like to give  
16 people every bit of opportunity.

17 Q And so you tell her to breathe deep from the  
18 diaphragm?

19 A Yes.

20 Q Isn't it true that (unintelligible) breath that  
21 they ask for?

22 A It is a deep breath that you need.

23 Q You need?

24 A You need to be able to provide a breath sample.  
25 And if you fail to do so, it'll suspend your license.

1 Q So they teach you at the academy just to blow  
2 normal, but there's no necessity to have that deep, below  
3 diaphragm breath?

4 A I would have to check the manual.

5 Q Okay (unintelligible)?

6 A Again, I would have to check the manual.

7 Q Does the machine (unintelligible)?

8 A Again, I would have to check the manual on that.

9 Q Small versus large?

10 A I would have to check the manual on that.

11 Q (Unintelligible.)

12 A Yes.

13 ) (Unintelligible.)

14 JUDGE SUMMEY: Okay.

15 BY MR. WILLIAMS:

16 Q I'm going to try to be very brief (unintelligible)?

17 A I did.

18 Q So you were able to recall details  
19 (unintelligible)?

20 A Yes. The main details, yes.

21 Q The incident report doesn't include everything that  
22 happened?

23 A No, it does not.

24 Q Every word she said?

25 A No.

- 1 Q Okay. So you might remember some things?
- 2 A Yes.
- 3 Q You don't remember everything that happened here?
- 4 A Yes, that would be correct.
- 5 Q Does your report contain (unintelligible)?
- 6 A Yes, it does.
- 7 Q The -- Mr. Phipps asked you about the .09 versus  
8 the .078, the fact that one has three digits the other has  
9 two.
- 10 A Yes.
- 11 Q He asked you about truncating or rounding.
- 12 A Yes.
- 13 Q Okay (unintelligible)?
- 14 A I believe that was his point he was trying to make.
- 15 Q Is .085 still .08 or greater?
- 16 A If you truncate, yes, or if you round up, yes.
- 17 Q So even .08 rounded up to .09 is still .08 or  
18 greater?
- 19 A Yes.
- 20 Q Okay. He said -- when y'all were in the DataMaster  
21 room, was she handcuffed at the time?
- 22 A Once I brought her into the DataMaster room, I do  
23 remove handcuffs.
- 24 Q Okay. You don't have to if someone's fighting or  
25 combative?

1 A I do not have to, no. But she was not combative..

2 Q She was (unintelligible)?

3 A Yeah.

4 Q You were professional?

5 A Yes.

6 Q Y'all had a good relationship?

7 A The best that one can have in that situation.

8 Q In that situation, yeah.

9 A Yes.

10 Q But y'all weren't fighting each other?

11 A No.

12 Q So you had no reason to handcuff her?

13 A No.

14 Q If you handcuffed her, it would have been  
15 (unintelligible)?

16 A Yes.

17 Q But she didn't require that?

18 A No.

19 Q When you read her her advisement of

20 (unintelligible) and rights, did you read her the portion

21 where it said if you blow .08 or greater you can be charged  
22 with DUAC?

23 A I did.

24 Q Is that what we're doing here today?

25 A Yes.

1 Q And finally, I'm just going to hand you Section  
2 56-5-2950. And I'm just going to ask you to read this  
3 underlined portion right here to refresh your recollection.

4 A Okay.

5 MR. PHIPPS: I object (unintelligible).

6 Q (By Mr. Williams) If you could review that  
7 underlined sentence.

8 A From here?

9 Q The underlined sentence.

10 A Okay. Before the --

11 Q Not read, if you could review it.

12 A Okay.

13 Q Okay. Does that refresh your recollection?

14 A Yes, it does.

15 Q Okay. Mr. Phipps asked you a question regarding  
16 the range. Is that within range?

17 A Yes, it is.

18 Q What is the accepted range?

19 A 7 -- or .076 to .8 or .084.

20 Q So it's .04 above or below point .08?

21 A Yes.

22 Q So this was in range?

23 A Yes, it was.

24 Q Thank you.

25 MR. WILLIAMS: No other questions, Your Honor.

1 JUDGE SUMMEY: Right.

2 MR. WILLIAMS: All I'm saying (unintelligible).

3 JUDGE SUMMEY: It's the reply that -- to the Court  
4 that's different. And I'm going to check with court  
5 administration.

6 (Unintelligible.)

7 JUDGE SUMMEY: Right. I'm going to check with  
8 court administration, I'll be right back. We're still on the  
9 record. On record. Yes, I got one on January 10, okay. The  
10 court -- this is from court administration:

11 "The court held that henceforth in criminal  
12 trials the party with the right to second closing arguments  
13 requests the party with the right to open and close will be  
14 required to open in full on the law and the facts and be  
15 limited in reply to addressing the other party's argument and  
16 not permitted to raise new matters."

17 And then it -- so this is the Court's  
18 understanding on this, is that because you put in evidence  
19 during a motion, the jury saw the evidence. So therefore,  
20 you put in evidence. So the order is going to be you do full  
21 closing, Mr. Williams, does a full closing, and then you get  
22 to respond or rebut anything. That's the proper order.

23 MR. WILLIAMS: Judge, I think it's -- I've been  
24 told that if he goes in full then I get to reply with what he  
25 said.

1 JUDGE SUMMEY: Not per court administration.

2 MR. WILLIAMS: Judge (unintelligible).

3 MR. PHIPPS: Your Honor (unintelligible).

4 JUDGE SUMMEY: Absolutely. Go ahead.

5 MR. PHIPPS: So (unintelligible).

6 MR. WILLIAMS: Judge, the Court addressed that  
7 actually and I'm trying to find (unintelligible) it said it's  
8 in trials (unintelligible).

9 JUDGE SUMMEY: It does say that. Yeah, it does say  
10 that, Mr. Phipps. So the party with the right to be first  
11 and last closing argument must open in full on the law and  
12 the facts and in reply may respond in full to the other  
13 party's argument but not raise a new matter.

14 MR. WILLIAMS: Yeah, I agree with that. I'm  
15 entitled to go last because he introduced evidence. I have  
16 to open. It used to be he would go (unintelligible) he would  
17 close and I would close. Now I have to open in full  
18 (unintelligible) he closes in full, I may reply only to what  
19 he said. (Unintelligible) I have to give my entire closing  
20 argument, he closes, then I get to reply.

21 JUDGE SUMMEY: It says: "We preserve the common  
22 law rule that the defendant has the right to open and close  
23 if he presents no evidence." So you were right. Your scene  
24 is evidence because they watched the video. And it does say  
25 opinions -- that trials after this opinion. I received this

1 on January 10th, okay. Anything further on this issue? Are  
2 you prepared to go forward with closing arguments? Mandy,  
3 please bring in the jury. Go ahead and bring in the jury.

4 MS. SIMPSON: Okay.

5 (Unintelligible.)

6 JUDGE SUMMEY: Hold on. I'm sorry, I was reading.  
7 What are you talking about?

8 MR. WILLIAMS: He just said does he go first. And  
9 I said, no, I go first --

10 JUDGE SUMMEY: No, he goes first in full.

11 MR. WILLIAMS: Yes, ma'am.

12 JUDGE SUMMEY: Because of the evidence. Or else,  
13 yes, you would have.

14 MR. PHIPPS: Otherwise, I would have gone.

15 JUDGE SUMMEY: Yeah, if the VA video -- you did  
16 present that as Defense 1.

17 MR. PHIPPS: And then he would have gone  
18 (unintelligible).

19 JUDGE SUMMEY: No. If that video, if the jury had  
20 not watched that video, you would have gone first in full, he  
21 would have gone second, and you would have replied. Had a  
22 limited reply. But because evidence was presented, it  
23 switched.

24 MR. PHIPPS: All right, I gotcha.

25 JUDGE SUMMEY: Sorry for the confusion. Bring them

1 in.

2 MR. WILLIAMS: May it please the court? Ladies and  
3 gentlemen, that's it. Now you're going to hear from me and  
4 you're going to hear from Mr. Phipps in our closing  
5 arguments. I know this has seemed like a long day drawn out,  
6 but it's very important that you're here. We couldn't have  
7 done this without you. As I've told you before, this is very  
8 important. It's important to Ms. Kelly that she have her day  
9 in court, and it's important to the State that we  
10 (unintelligible) because we allege that Ms. Kelly violated  
11 the state's laws.

12 You saw the video, you saw a second video, you  
13 heard testimony from the trooper. What we had to prove to  
14 you today, I'm going to read it to you again: "It is  
15 unlawful for a person to drive a motor vehicle within this  
16 state while his alcohol concentration" -- that's the crime  
17 she's alleged to have committed and I believe we've proven  
18 that she did do that beyond a reasonable doubt. You heard  
19 that she was driving. Trooper Methvin said that she was  
20 driving a black Lincoln, she got out of her car, y'all saw  
21 that. You heard him say this was in Charleston County, this  
22 was in the state of South Carolina.

23 Her alcohol concentration was .08 percent. Her  
24 test per the DataMaster report and this document states,  
25 Exhibit No. 2 -- you get to take back to the jury room with

1 you and look at it up close. Her result was .09. Now, there  
2 was a question from Mr. Phipps about rounding. We round up  
3 on .085 to .09. I don't think that was the case. Even if it  
4 is the case, I submit to you that .085 is still .08 or  
5 greater. You heard when Trooper Methvin placed her under  
6 arrest and said, "You're under arrest for a DUI." In South  
7 Carolina at this point in the juncture, Trooper Methvin has  
8 not administered a breath test. So he has no way to know  
9 what her alcohol concentration is.

10 He took her to the jail, administered a breath  
11 test, advised her -- of which you saw on the tablet -- if you  
12 blow a .08 or greater you get prosecuted for a DUAC. That's  
13 what we're doing. If there's questions about the 20-minute  
14 waiting period, I think you saw it yourself. You get to  
15 judge that evidence for yourself. As I told you in the  
16 beginning, this has taken a long time, but it is a simple  
17 case, I believe. I believe we've proven this to you beyond a  
18 reasonable doubt. She was driving in South Carolina, her  
19 alcohol concentration was .08 or greater. I believe you  
20 should find her guilty. Thank you.

21 MR. PHIPPS: May it please the Court?

22 JUDGE SUMMEY: Yes, sir.

23 MR. PHIPPS: Thank you. (Unintelligible) legal  
24 questions. I'll try to be brief. I tried to be brief  
25 before. You finally saw me (unintelligible). Sit there and

1 be quiet and you can't hold that against her.  
2 (unintelligible). It is -- he tries to make it very simple  
3 and say, you know, we've got a number and that's it, we've  
4 got to convict her. That's not true. The law allows us to  
5 present to you information, which I did prove the truth,  
6 actually, believe it or not. I heard (unintelligible).  
7 There was testimony of doubt from him (unintelligible).

8           So the law allows me to present any evidence  
9 that corroborates or questions the ability to breath test  
10 (unintelligible). Okay. So what does that mean in layman's  
11 terms? What that says is (unintelligible). Well, guess  
12 what, it's not (unintelligible) field sobriety. But if you  
13 watch her, she seems fine, she was fine, she was walking heel  
14 to toe. And he said she's doing something like this, but you  
15 can't see. She looks fine. She doesn't step off  
16 (unintelligible) arms aren't raised. There's all kinds of  
17 indicators that they can testify to. Numerous of them. None  
18 of them.

19           You saw a little bit before when she did the  
20 one-legged stand when she started, but once she got going  
21 (unintelligible) or anything that could cause that  
22 (unintelligible). Talking about she stepped off when they  
23 put her in the initial ready stance to determine that she  
24 messed with her hoodie. (Unintelligible) she fell out of  
25 balance because she was cold. You can see the smoke, it's

1 cold out there. Think about that. They don't want to talk  
2 about that. Think about what they're not talking about. It  
3 was cold out there that night, and she (unintelligible). My  
4 opinion, and hopefully you'll agree with me, it was okay.

5 Think about the other part to this. They  
6 stopped the video (unintelligible). Y'all didn't see the  
7 video. I could have played it for you, have you go through  
8 (unintelligible). What was on there that they didn't want  
9 you to see? Why didn't they play the whole thing?  
10 (Unintelligible) I apologize, but I wanted you to see  
11 (unintelligible) hide anything. They specifically -- the  
12 State did not show that because they didn't want you to see  
13 the close-up. They didn't want you to see her crying and not  
14 being intoxicated. There's nothing on those videos that  
15 shows her intoxicated.

16 Let's talk about the driving (unintelligible).  
17 When asked why, he didn't know. He didn't ask. He didn't  
18 ask (unintelligible). I don't know about y'all, but I text  
19 all of the time. I shouldn't, it's horribly dangerous, but  
20 we all know that that's (unintelligible). About .08 of a  
21 percent or (unintelligible). They didn't want you people,  
22 you good people, to convict her on (unintelligible) of a  
23 percent after she (unintelligible) to present to you that  
24 what do you see in her and the video doesn't equate to the  
25 number. And I hope that you will.

1                   But let's talk about that number, let's think  
2 about that. He testified the procedures, such as why you  
3 don't let anybody put anything in their mouth  
4 (unintelligible). He's only been doing it for three years,  
5 and he's done so many DUIs -- so many DUIs he can't even  
6 count, but he doesn't know that the reason for that is  
7 because of residual alcohol. So we talked about pores.  
8 Okay. Sweat, pores come out. Here she is crying, Trooper  
9 knows she's not supposed to put anything in her face or her  
10 mouth. You watched the video, you'll see she did it over 25  
11 times. He admitted to it, she put her fingers in her mouth.  
12 Residual alcohol is in her mouth (unintelligible).

13                   He even said it. He testified -- when I asked  
14 him, he said -- I said, "Couldn't tears -- couldn't tears  
15 change that and alter the number?" He said, "Possibly. I'm  
16 not sure, I'd have to read the manual," all this stuff. But  
17 that by itself creates what? (Unintelligible) we all saw it  
18 (unintelligible) admits that it potentially, based upon  
19 talking about the pores and we're a sponge, potentially it  
20 can alter that. Alter that. But also, what went on? The  
21 machine went off, the machine didn't even collaborate to .08.  
22 Now, they say, you know, there's this range, they don't even  
23 know what it is. They don't know what the range is. But  
24 it's good enough for (unintelligible) let's put this girl in  
25 jail.

1 I don't think it's okay. I'm going to ask for  
2 you to find her not guilty (unintelligible). Think about why  
3 they won't play that tape for you (unintelligible) their case  
4 (unintelligible) and had a big number, they would have showed  
5 you that in a heartbeat. But the reason they didn't show it  
6 to you was because she was crying (unintelligible). Think  
7 about that. .10 -- I'm sorry, I apologize (unintelligible).  
8 Not guilty today. I appreciate your time. All the way in  
9 the red zone (unintelligible). Y'all saw it. That, by  
10 itself, is (unintelligible). Just ignored everything else  
11 and thought about that one issue alone.

12 (Unintelligible.)

13 MR. WILLIAMS: Thank you, Your Honor. Last you're  
14 going to hear from me, I'm entitled to respond to what he  
15 just said. Several things here, ladies and gentlemen.  
16 Mr. Phipps is a sharp lawyer. I don't question that. What  
17 he wants you to do is to take a simple situation, he wants to  
18 hide the law. He wants to say, "Look at this, look at this  
19 over here." She blew .09 (unintelligible) that's the law.  
20 That's what we have to prove to you. This question regarding  
21 the range, I heard the trooper say, "Before the breath test  
22 is administered, .08 percent simulator of the test must be  
23 performed, and the result must reflect a reading between  
24 .076 percent and .084 percent." The machine did that. It  
25 was .078 percent.

1           Mr. Phipps tells you that she wasn't stumbling.  
2       I never said she was stumbling, we never said she was  
3       plastered or hammered (unintelligible) whatever else you want  
4       to say. That's not what she's charged with doing. That's  
5       not why we're here. We're here because her alcohol  
6       concentration of .08 (unintelligible). The reason this law  
7       exists is because we don't want defendants to come and say,  
8       "She handled her alcohol well, she's fine." You can't say  
9       that. People handle alcohol differently. Some people can  
10      have a glass of wine and be fine. Some people can have a  
11      glass of wine and not be able to drive a car, probably  
12      shouldn't.

13                 That's why we have this law. It cuts out, "How  
14      does she look?" She was fine on the line there, her foot was  
15      fine, she could have been texting. We cut all that out.  
16      It's .08 percent or greater. Here it is .09. It's a simple  
17      case, and he's trying to make it complex and confusing.  
18      Please don't be confused by this. He said she wasn't  
19      intoxicated. Nothing I have to do today, nothing the State  
20      has to prove to you is intoxication. Again, ladies and  
21      gentlemen, the statute says it is unlawful for a person to  
22      drive a motor vehicle in this state while his alcohol  
23      concentration is .08 percent or more. Period, that's it.

24                 We didn't show you the DataMaster video  
25      (unintelligible). I see eyes glazed over (unintelligible).

1 You have this video -- the roadside video, we stopped it  
2 again. He drives her to the jail in the middle of the night.  
3 You have this video, you may watch the entire thing. It's  
4 about 45 minutes, you can watch it start to finish. Take  
5 this video. If you have questions, please watch it. It is  
6 in evidence, you are entitled to watch the whole thing. I  
7 try not to bore you. I'm going to stop the video when I've  
8 shown you what you need to see. By all means, watch that  
9 video, watch the DataMaster video in their entirety.

10 The case is in y'all's hands now. Take your  
11 time. We've taken our time in presenting our cases, take  
12 your time and decide. Don't rush to judgment if you have a  
13 question of what you didn't see. I'm not going to try to  
14 keep you here needlessly. I think this is a simple case.  
15 .08 percent or greater driving, that's it. .09 percent.  
16 Mr. Phipps makes a lot of reference to .01 percent, .01, is  
17 why we want you to convict. Well, yes, ma'am. Actually,  
18 it's 2 percent. If .08 and we're wrong by .01, and I don't  
19 think we are, .08 and she's still guilty. Because it has to  
20 be greater than .08, it's .08 and greater.

21 Ladies and gentlemen, I really think this is a  
22 simple case, and I ask that in your deliberations you don't  
23 get confused. Watch the videos if need to. You've got  
24 everything here (unintelligible). It's .09 when she was  
25 driving. Thank you.

1           JUDGE SUMMEY: Thanks. Ladies and gentlemen, you  
2 have listened to the proceedings and the evidence in this  
3 case. It is now my legal duty to instruct you as to the law  
4 which applies to the facts. The laws of the state of South  
5 Carolina do not permit a magistrate or a trial judge to  
6 comment on the facts. You, as judge, are the sole and  
7 exclusive judges of the facts; however, it is my duty to give  
8 you the law and you must accept and apply the law as I give  
9 it to you and be guided in your deliberations and your  
10 considerations upon the evidence.

11           Not only are you the sole and exclusive judges  
12 of the facts, but also you, as a jury, are the sole and  
13 exclusive judges of the effect and value of the evidence in  
14 the case, as well as the credibility of all of the witnesses  
15 who have testified. It is for you to determine which witness  
16 or witnesses are recalling and truthfully relating what  
17 transpired at the time of the alleged commission of the  
18 violation as described in this citation. To weigh the  
19 evidence, you must consider the credibility of the witnesses.  
20 You will apply the test of truthfulness, which you are  
21 accustomed to applying in your daily lives.

22           You may consider the manner of testifying, the  
23 appearance of the witnesses upon the witness stand, the  
24 reasonableness of the testimony, the opportunity the witness  
25 had to see or hear, accuracy of memory, intelligence,

1 interest, and bias, if any, together with all the facts and  
2 circumstances surrounding the testimony of any witness. It  
3 is your province to determine what testimony is worthy of  
4 belief and what testimony is not worthy of belief according  
5 to the weight you assign to the testimony of each witness.

6           Presumption of innocence: The law does not  
7 require any defendant to prove his or her innocence of a  
8 crime. On the contrary, the law requires the State to  
9 establish a defendant's guilt by legal evidence beyond a  
10 reasonable doubt. The law presumes the defendant to be  
11 innocent of the charge made against him in the arrest  
12 citation until his guilt has been proven beyond a reasonable  
13 doubt. The burden of overcoming the presumption of innocence  
14 is placed upon the State and rests upon the State throughout  
15 the trial until the State has satisfied you by evidence of  
16 the defendant's guilt beyond a reasonable doubt.

17           What is reasonable doubt? A reasonable doubt is  
18 the kind of doubt that will cause a reasonable person to  
19 hesitate to act. The failure of any defendant to testify in  
20 his or her own behalf does not create any presumption against  
21 him or her. I charge you that you must not permit this fact  
22 to weigh in the slightest against the defendant, nor should  
23 this fact enter into any discussion or deliberation of the  
24 jury in any manner.

25           Now I'm going to read you the charge: "Section

1 56-5-2933, driving with unlawful alcohol concentration. It  
2 is unlawful for a person to drive a motor vehicle within this  
3 state while the alcohol concentration is .08 percent or more.  
4 A person who violates the provisions of this section is  
5 guilty of the offense of DUAC, or driving with unlawful  
6 alcohol concentration."

7 Your verdict in this case will be one of two  
8 forms. If from the evidence and the law you find that the  
9 defendant is not guilty, you will check "not guilty" on the  
10 form and the foreman will sign his or her name and date. If,  
11 on the other hand, you find the defendant is guilty based  
12 upon the evidence and the law which you have heard, you will  
13 check "guilty" on the form and the foreperson will sign his  
14 or her name and date. Your verdict must be unanimous. It  
15 must be guilty or not guilty.

16 Members of the jury, you may return and  
17 deliberate your verdict. The jury panel may pick its own  
18 foreperson. Mr. or Mrs. Foreperson, please advise the Court  
19 when you're ready to report your verdict, please knock on the  
20 door. Also, Ms. Alternate, you are not allowed to go back  
21 during the jury deliberations, okay? You may come have a  
22 seat and wait or you may exit, okay? Does anybody have any  
23 issue with that?

24 (Unintelligible.)

25 JUDGE SUMMEY: Well, y'all may go deliberate.

1 Mandy, you're going to have to give that to them and hand it  
2 to me, please. Ladies and gentlemen, have you reached a  
3 verdict?

4 MS. FOREPERSON: Yes, we have.

5 JUDGE SUMMEY: I need it. Do y'all have it? You  
6 can just hand it to me over the bench.

7 MS. FOREPERSON: Okay.

8 JUDGE SUMMEY: Ms. Foreperson, is this the verdict?  
9 Say it out loud.

10 MS. FOREPERSON: Yes, ma'am.

11 JUDGE SUMMEY: Thank you. Ms. Kelly, you have been  
12 found guilty of the charge of DUAC. Mr. Williams, do you  
13 wish to make a recommendation?

14 MR. WILLIAMS: Your Honor, I (unintelligible). I  
15 think the charge carry a 48-hour minimum.

16 (Unintelligible.)

17 JUDGE SUMMEY: All right. Ms. Kelly, you will be  
18 getting 48 hours of community service. The Charleston County  
19 Community Service has a coordinator, they'll be in contact  
20 with you. They will sign you up for that, okay?

21 MS. KELLY: Yes, ma'am.

22 JUDGE SUMMEY: All right. Thank you very much. I  
23 wish you the very best.

24 (End of audio recording.)

25

CERTIFICATE OF TRANSCRIPTIONIST

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I, Sarah M. Elvington, do hereby certify that the foregoing tape transcription was produced to the best of my ability and may include inaudible sections.

I further certify that I am neither counsel for, related to, nor employed by any parties to the action, and further, that I am not a relative or employee of any counsel or attorney employed by the parties thereto, nor financially or otherwise interested in the outcome of this action.

Witness my hand, I have hereunto affixed my official seal this 29th day of May, 2017.

\_\_\_\_\_  
Court Reporter

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**SOUTH CAROLINA LAW ENFORCEMENT DIVISION**  
**BREATH ALCOHOL ANALYSIS TEST REPORT**  
**DRIVING UNDER THE INFLUENCE**



**SUBJECT BIOGRAPHICAL INFORMATION**

SUBJECT NAME: HANNAH M KELLY  
 RACE: BLACK  
 SEX: F  
 DOB: [REDACTED]

DL NUMBER: [REDACTED]  
 DRIVER'S LICENSE: SC  
 SUBJECT ADDRESS: 112 TRIPLE CROWN RD  
 MONCK'S CORNER SC 29461

**ARREST INFORMATION**

OFFICER NAME: T G METHVIN  
 TICKET NUMBER: 5102P0209817  
 ARREST DATE: 02/19/2016

AGENCY ORI: SCSHP0600  
 COUNTY OF ARREST: 10 - CHARLESTON  
 ARREST TIME: 00:57

**OPERATOR INFORMATION**

TEST OPERATOR: T G METHVIN  
 CERTIFICATION #: DMT009700  
 SOLUTION LOT #: 15801

BREATH TEST VIDEO RECORDED? YES  
 SUBJECT'S MOUTH CHECKED AND  
 ANY FOREIGN MATERIAL REMOVED? YES  
 SUBJECT ADVISED OF APPLICABLE RIGHTS? YES

AGENCY ORI: SCSHP0600  
 EXPIRATION DATE: 04/27/2017  
 BOTTLE: 1306

SUBJECT INFORMED OF VIDEO RECORDING? YES  
 SUBJECT INFORMED OF TYPE SAMPLE REQUESTED? YES  
 SUBJECT OBSERVED FOR A MINIMUM OF (20)  
 TWENTY MINUTES? YES

**SUBJECT'S BREATH ALCOHOL TEST RESULTS**

DATAMASTER DMT SERIAL # 109207

TEST DATE		02/19/2016
OBSERVATION START TIME:		01:29:25
BLANK TEST	0.00	01:52:25
INTERNAL STANDARD	VERIFIED	01:52:31
0.08% SIMULATOR TEMPERATURE	33.99°C	01:52:57
0.08% SIMULATOR VERIFICATION	0.078	01:52:57
BLANK TEST	0.00	01:53:50
SUBJECT SAMPLE	0.09	01:54:02
BLANK TEST	0.00	01:54:59
INTERNAL STANDARD	VERIFIED	01:55:06

*Hannah Kelly*  
 Subject's Signature

2-19-16 0158  
 (Received Copy) Date/Time

*[Signature]*  
 Arresting Officer's Signature

*[Signature]*  
 Test Operator's Signature

VISIT [WWW.SLED.SC.GOV](http://WWW.SLED.SC.GOV) AND CLICK ON IMPLIED CONSENT. THEN CLICK ON BREATH SITE VIDEO RECORDINGS. ENTER THE REQUESTED INFORMATION FROM THE BOX BELOW TO ACCESS THE VIDEO RECORDING OF THIS BREATH TEST:

SUBJECT ID: 005187F235      DATE/TIME: 02/19/2016 01:51:26  
 SUBJECT PASSWORD: E864B      DMT SERIAL NUMBER: 109207

\*\*\*IMPORTANT NOTICE\*\*\*  
 INFORMATION FROM THIS REPORT WILL BE USED TO ACCESS THE BREATH TEST VIDEO. ANYONE WITH THIS INFORMATION WILL HAVE ACCESS TO THE VIDEO. PROTECT THIS REPORT AS YOU WOULD ANY IMPORTANT DOCUMENT. SLED ASSUMES NO RESPONSIBILITY FOR UNAUTHORIZED ACCESS.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY/CITY OF CHARLESTON )  
 )  
 STATE OF SOUTH CAROLINA )  
 )  
 VS )  
 )  
Hannah Kelly )  
 DEFENDANT )

5102P0209817  
 CASE NUMBER

IN THE SUMMARY COURT

JURY VERDICT

We the Jury find the Defendant:

Not Guilty

Guilty of DUAC at least eight one-hundredths (.08) of one percent but less than ten one-hundredths (.10) of one percent.

Guilty of DUAC at least ten one-hundredths (.10) of one percent but less than sixteen one-hundredths (.16) of one percent.

Guilty of DUAC sixteen one hundredths (.16) of one percent or more.

2/1/2017  
 Date

*Shari Lewis*  
 Name of Foreperson

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS  
) NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON

) Case No. 2015-000604

) Former Ticket No.: 5102P020981

HANNAH KELLY

) 2017-CP-10-725

Appellant,

) NOTICE OF APPEAL

Vs.

STATE OF SOUTH CAROLINA

Respondent.

To: TOD WILLIAMS, ESQUIRE, SOLICITOR FOR THE NINTH JUDICIAL CIRCUIT,  
AND TO THE RESPONDENT ABOVE NAMED:

HANNAH KELLY, by and through her Attorney, Edward L. Phipps, hereby appeals her conviction in Charleston County North Area III Magistrate in front of the Honorable Joanna Summey-Fuller on February 1, 2017. The appeal is made on the following grounds:

1. The Magistrate erred in presenting the jury with an incorrect charging document where the State opted to prosecute a DUAC in lieu of a DUI.
2. The Magistrate erred allowing the State to begin to prosecute for both DUAC and DUI. After the Honorable Court denied a mistrial with instructions for the State to cease referring to DUI laws, the Honorable Court failed to instruct the jury to disregard the incorrect information presented by the State.
3. The Magistrate erred in admitting into evidence the results of a breathalyzer test after the State could not establish a proper foundation for the test results. The State admitted and allowed the Appellant to put something in her mouth during the twenty (20) minutes prior to the breathalyzer test.
4. This Appeal is based on the legal doctrines as states in State v. Parker, 271 S.C. 159 (1978) and SC Code of Laws 56-5-2933 and any other issues that will be determined upon review of the record.

PHIPPS LAW FIRM, L.L.C.

By: \_\_\_\_\_  
Edward L. Phipps  
Attorney at Law  
155 King Street, 2nd Floor  
Charleston, SC 29401  
(843) 216-9797  
Attorney for the Defendant

Charleston, SC  
February 10, 2017

FILED  
FEB 13 PM 12:01  
CLERK OF COURT

STATE OF SOUTH CAROLINA )  
 COUNTY OF CHARLESTON )  
 STATE OF SOUTH CAROLINA, )  
 )  
 APPELLANT(S), )  
 )  
 -versus- )  
 )  
 HANNAH KELLY )  
 )  
 RESPONDENT(S) )

IN THE MAGISTRATES COURT

2017-CP-10-725

MAGISTRATES RETURN

**FILED**  
 2017 MAR 17 AM 9:03  
 JULIE J. ARMSTRONG  
 CLERK OF COURT

COMES NOW, JoAnna E. Summey, Magistrate in and for Charleston County, South Carolina, and offers this as her Return to the Notice of Appeal filed by the above-named Appellant, Hannah Kelly, appealing the guilty verdict on citation No.5102P0209817. The Jury found the Defendant guilty DUAC. The court gave 48 hours of Community Service in lieu of fine or jail time.

RESPONSE TO APPEAL

1. The Magistrate erred in presenting the jury with an incorrect charging document were the State opted to prosecute DUAC in lieu of DUI.

RESPONSE: The jury was presented with A Jury Verdict Form after the State and Defense Rest to take into the Jury Room to deliberate and give their Verdict. Please see attached Jury Verdict Form.

2. The Magistrate erred allowing the State to begin to prosecute for both DUAC and DUI.

RESPONSE: The Court denied the motion for a mistrial, The Court found that the Prosecution was allowed to mention the difference between DUI and

DUAC due to the original charge being DUI; Prosecution was explaining to the Jury the reason for pursuing the charge of DUAC when the original charge was DUI as allowed under SC 56-5-2933

(I) A person charged for a violation of Section 56-5-2930 may be prosecuted pursuant to this section if the original testing of the person's breath or collection of other bodily fluids was performed within two hours of the time of arrest and reasonable suspicion existed to justify the traffic stop. A person may not be prosecuted for both a violation of Section 56-5-2930 and a violation of this section for the same incident.

3. The Magistrate erred in admitting into evidence the results of a breathalyzer test after the State could not establish proper foundation for the test results. The State admitted and allowed the Appellant to put something in her mouth during the twenty minutes prior to the breathalyzer test.

RESPONSE: The Court found that proper foundation had been established for the breathalyzer test to be admitted. After review of the BA video, the Court ruled that fingers, tears, and placing her hand to her mouth once did not violate the 20 minute waiting period requirements.

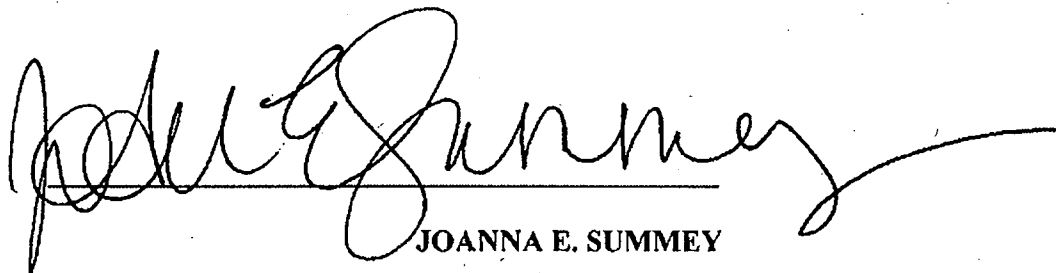
State v. Parker (1978) requires that in order for the breathalyzer to be entered in there are 4 elements that must be met. The Court found that the Prosecution 1. Presented the BA machine was in proper working order before the test was administered; 2. Presented the correct solution was in the machine; 3. Presented the Officer did check to see if any foreign objects were in the defendants mouth and the Defendants tears, hold the hands to the mouth, and one time placing

fingers in her mouth did not violate this element; 4. Presented the Defendant's test was performed by a qualified officer.

**DOCUMENTS**

1. Appeal
2. Defendants Appeal
3. Jury Verdict Form

**RESPECTFULLY SUBMITTED**

A handwritten signature in black ink, appearing to read 'Joanna E. Summey', is written over a horizontal line. The signature is fluid and cursive.

**JOANNA E. SUMMEY**

**MAGISTRATE CHARLESTON COUNTY**

**DATE: March 15, 2017**

**Charleston County, South Carolina**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

HANNAH KELLY

Plaintiff

vs.

STATE OF SOUTH CAROLINA

Defendant

THE COURT OF COMMON PLEAS

DOCKET NO. 2017-CP-10-0725

TRANSCRIPT OF RECORD

August 31, 2017

Charleston, South Carolina

B E F O R E:

THE HONORABLE J. C. NICHOLSON, JUDGE

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

EDWARD PHIPPS, ESQ.  
Attorney for the Appellant

T.D. WILLIAMS, IV, ESQ.  
Attorney for the State

JOYCE C. RUEGER, CVR-M  
Circuit Court Reporter

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## INDEX TO EXHIBITS

No exhibits were introduced

PROCEEDINGS

1  
2 THE COURT: Hannah Kelly v the State of South  
3 Carolina?

4 [Whereupon, the court reviews documents]

5 THE COURT: Who is here representing who?

6 MR. PHIPPS: Good morning, Your Honor, Edward  
7 Phipps representing Hannah Kelly.

8 THE COURT: Okay.

9 MR. WILLIAMS: Todd Williams from the Solicitor's  
10 Office here on behalf of the State, Your Honor.

11 THE COURT: All right Mr. Phipps, I'll be glad to  
12 hear you.

13 MR. PHIPPS: Your Honor, may it please the court?  
14 On February 19th of 2016 around 1 a.m. Ms. Kelly was  
15 arrested for driving under the influence. She submitted  
16 to a breath test. And the officer administering the test  
17 started his 20 minute mandatory period. I think you may  
18 have the memorandum we filed so I can ---.

19 THE COURT: --- I don't have the memorandum. I've  
20 read the Magistrate's return.

21 MR. PHIPPS: Okay. That's fine. I'll give you a  
22 little bit more detail and just summarize it. So he  
23 started his breathalyzer test at 1:20 and it ended at  
24 1:50. So it is a 20 minute observation period. She was  
25 ultimately charged. She blew a point zero nine. As the

1 prosecution went on through his case and we tried to  
2 resolve it Mr. Williams sent me a notice, which was  
3 proper, that he was going to go forward as a DUAC,  
4 driving with unlawful alcohol content and not a DUI ---

5 THE COURT: --- I'm sorry, go forward with what?

6 MR. PHIPPS: He was going forward with trial under  
7 the charge of driving with unlawful alcohol content,  
8 DUAC, which he is allowed to do. He gave us proper  
9 notice so he switched it from a DUI to a DUAC. During  
10 the trial in the beginning in the opening Mr. Williams  
11 started his case talking about DUI. And went into what I  
12 felt was a little bit more than he should have.

13 He started explaining the law, what the elements  
14 are, what the difference is between the two. 56-5-2933  
15 states that I don't have to defend her for both the DUI  
16 and the DUAC which could cause mass confusion just as if  
17 someone was charged with murder and they come and  
18 prosecute it for reckless homicide it would be improper  
19 for them to go ahead and talk about the elements of  
20 murder and murder itself.

21 So at that point I objected. The judge heard the  
22 arguments and took it under consideration for about 30 to  
23 40 minutes and came back and ruled that she agreed.  
24 There was some confusion and they said we've tried this  
25 this way for the last seven times. And my response was

1 just because that's the way you've been doing don't make  
2 it right. And she agreed and said that he should no  
3 longer do that and that she is going to deny the mistrial  
4 and the case went forward. But she did not correct what  
5 had occurred in front of the jury. And typically judges  
6 have absolute discretion when it comes to a mistrial and  
7 it's usually not appealable. But it is if they don't  
8 cure it.

9 And it was a mistake in law and she agreed to it and  
10 ruled in my favor on that but didn't cure it. So that's  
11 the first issue that is brought before you today. Do you  
12 want me to wait on the second and do you want him to  
13 respond to it or do you want me to go on?

14 THE COURT: Go ahead with the rest of it.

15 MR. PHIPPS: Okay, Your Honor. In regards to the  
16 case it proceeded forward. And at the point where Mr.  
17 Williams tried to enter the Datamaster results into  
18 evidence I objected under foundation that he had not  
19 established the proper foundation. And he couldn't  
20 because under State v Parker she through the 20 minute  
21 time period had stuck her fingers in her mouth several  
22 different times. And the officer -- may I approach, Your  
23 Honor?

24 THE COURT: Yes, sir.

25 [Whereupon, Mr. Phipps provides documents to the

1 court].

2 MR. PHIPPS: So I have snapshots of the time period.  
3 And you can see during the time period and I think those  
4 pictures are about every two minutes she is putting her  
5 hands in her face. Now as a police officer they are  
6 trained even in the South Carolina Law Enforcement  
7 Division's alcohol analysis test report for driving under  
8 the influence as they are putting in the information they  
9 are required to check her mouth and remove any foreign  
10 items.

11 THE COURT: Did the police officer testify that he  
12 did check her mouth or not?

13 MR. PHIPPS: He did. He testified that he checked  
14 her mouth and he also testified that she put her fingers  
15 in her mouth.

16 THE COURT: Okay. Did he check her mouth after  
17 she put her fingers in her mouth?

18 MR. PHIPPS: He did not.

19 THE COURT: Okay.

20 MR. PHIPPS: So she's crying during this whole time  
21 wiping her mouth putting her fingers in her mouth. They  
22 are required to check her mouth and then once she's done  
23 they are required to make sure that she doesn't put  
24 anything in her mouth. State v Parker says that; she  
25 can't put anything. He kept saying that well, her

1 fingers aren't foreign items referring back to checking  
2 for foreign items. That's not what State v Parker says.  
3 State v Parker says anything and then he admits because  
4 you could see through the pictures it's not just once;  
5 it's the whole duration. So if we were talking about if  
6 she blew a point two eight or two five, something high,  
7 this might not be as big an issue.

8 But the fact is a) he didn't follow procedures and  
9 talking about scintilla as I was sitting in the audience  
10 there is a scintilla here in the number. And the fact is  
11 he also testified that alcohol can get into her tears,  
12 tear ducts and wiping her face and crying possibly could  
13 alter it but not probably is what he said.

14 But the fact is the law says you can't put anything  
15 in your mouth; that's State v Parker. And even in her  
16 return she is incorrect in quoting the law. She talks  
17 about a foreign item, that you have to have a foreign  
18 item removed, but is says anything. And so we have the  
19 videotape. He's admitted to it. She reviewed it. And  
20 on several occasions I believe in cross when we went  
21 through it again and I objected to the entrance of it at  
22 that point and asked for a) to be excluded and b)  
23 dismissed. The -- if you could hold on, Your Honor.

24 [Whereupon, Mr. Phipps reviews documents]

25 MR. PHIPPS: She did this almost about 15 times.

1 THE COURT: I'm sorry?

2 MR. PHIPPS: Putting her fingers in her face and in  
3 her mouth. The officer testified that Hannah put her  
4 fingers in her mouth but he did not know how many times  
5 exactly. And when I crossed him regarding it, and there  
6 is a transcript that is available, after reviewing the  
7 video I asked the officer again and his response was that  
8 he lost count and that he was sorry.

9 And as a police officer he knows what he is supposed  
10 to do is if somebody is doing that and putting stuff in  
11 their mouth he has to tell them ma'am, you can't put  
12 anything in your mouth. Keep your hands away from your  
13 mouth. And if you continue to do it I'm going to have to  
14 charge you or take it as a refusal. He is controlling  
15 that. She doesn't know what she's doing.

16 She doesn't know whether it is wrong or right or  
17 whether it affected the outcome of the B-A. He does. He  
18 knows the rules and he sat there and let her for 20  
19 minutes put her fingers in her mouth. So we've asked for  
20 it to be a mistrial, excluded, and at this point for it  
21 to be dismissed. Thank you, Your Honor.

22 THE COURT: Okay. Mr. Williams?

23 MR. WILLIAMS: Thank you, Your Honor. May I  
24 approach and hand you a memorandum here?

25 THE COURT: Yes, sir.

1 [Whereupon, Mr. Williams provides documents to the  
2 court]

3 THE COURT: Thank you, sir. I'll be glad to hear  
4 you, Mr. Williams.

5 MR. WILLIAMS: Thank you, Your Honor. I'll address  
6 the second issue that appellate raises first if it  
7 pleases the court regarding the touching of the mouth.

8 THE COURT: All right.

9 MR. WILLIAMS: In page three of my memorandum I  
10 note several cases. The admission of evidence is within  
11 the trial judge's discretion and will not be disturbed on  
12 appeal as an abuse of discretion. In criminal cases the  
13 appellate court system is to review errors of law only.  
14 On review we are limited to determining whether the trial  
15 judge used discretion. The appellate court does not  
16 reevaluate the facts based on its own view of the  
17 preponderance of the evidence but simply determines  
18 whether the trial judge's ruling is supported by any  
19 evidence. Furthermore, because the appellate court lacks  
20 the opportunity for direct observation of the witnesses  
21 it should afford great deference to trial court findings  
22 where matters of creditability are involved.

23 Your Honor, I believe the second issue regarding the  
24 touching of the mouth and introduction of the breath  
25 alcohol test report comes to a foundation was laid, I

1 moved it into evidence and the court admitted it over  
2 objections. So I think the admission of evidence is  
3 within the trial judge's purview and it shouldn't be  
4 disturbed and ---

5 THE COURT: --- well, the statute very clearly says  
6 you've got to observe her 20 minutes and nothing goes in  
7 the mouth for 20 minutes. That's a different thing that  
8 what you're quoting to me. Do you think putting the  
9 fingers in the mouth is sufficient to violate the 20  
10 minutes?

11 MR. WILLIAMS: Judge, the trial court judge  
12 determined it was not.

13 THE COURT: Pardon?

14 MR. WILLIAMS: The trial court judge determined it  
15 was not.

16 THE COURT: I know but that's not a factual issue;  
17 that's a legal issue.

18 MR. WILLIAMS: Judge, the trial court judge heard  
19 -- this was obviously Mr. Phipps questioned the arresting  
20 officer on this is great, great detail. The trial judge  
21 heard this and saw this. I think the defendant's  
22 contention is that crying introduced alcohol into the  
23 mouth, which I think the trial judge found not probable  
24 or not likely and determined that a foundation pursuant  
25 to Parker a proper foundation was laid.

1 THE COURT: Okay.

2 MR. WILLIAMS: So I think this is just an admission  
3 of evidence argument and think proper foundation was laid  
4 ---

5 THE COURT: --- talk to me about the DUAH [sic] in  
6 lieu of the DUI.

7 MR. WILLIAMS: Your Honor, the DUI law in South  
8 Carolina 29-30 subsection (i) says that a person charged  
9 with violation of this section may be prosecuted pursuant  
10 to subsection 2933 the DUIC law if the original testing  
11 was done within two hours. So the statute gives the  
12 ability for the State to prosecute somebody arrested for  
13 DUI for DUAC at trial. I noted in my memorandum ---

14 THE COURT: --- I understand that. He doesn't  
15 question that. He questions about the fact that the  
16 Magistrate erred in presenting the jury with an incorrect  
17 charging document, which the State opted to prosecute a  
18 DUAC in lieu of a DUI. That's what he says was an error.

19 MR. WILLIAMS: Yes, Your Honor. I don't believe  
20 that happened. I know that ---

21 THE COURT: --- I don't know.

22 MR. WILLIAMS: I understand, Your Honor, and ---

23 THE COURT: --- I haven't seen a transcript. Did  
24 the judge tell the jury that?

25 MR. WILLIAMS: No, sir. The judge said -- in the

1 judge's opening remarks to the jury panel the Magistrate  
2 stated and quote according to the transcript: [Reading]  
3 The case in which we will be choosing a jury is the State  
4 v Hannah Kelly charged with having violated section code  
5 56-5-2933 of the South Carolina Codes of Law with having  
6 committing the offense of DUAC.

7 And the Magistrate in the charge to the jury at the  
8 end of the trial: [Reading] Now I'm going to read you  
9 the charge. Section 56-5-2933 driving with unlawful  
10 alcohol concentration, it is unlawful for a person to  
11 drive a motor vehicle within this State while an alcohol  
12 concentration is .08 percent or more. A person who  
13 violates the provision of this section is guilty of the  
14 offense of DUAC or driving with unlawful alcohol  
15 concentration.

16 The jury verdict form also indicated DUAC. There is  
17 no mention of DUI. The appellate was not tried for DUI,  
18 Your Honor. There was mention, the State made mention in  
19 opening she was arrested for DUI. She gave a breath  
20 sample and she is being prosecuted for DUAC. But there  
21 was no confusion to the jury clearly they found her  
22 guilty that she was being tried for DUI not a DUAC.

23 THE COURT: So you told the jury in opening  
24 statements that she was arrested for DUI but she was  
25 being prosecuted for DUAC?

1 MR. WILLIAMS: That's correct.

2 THE COURT: Was there an objection to that?

3 MR. WILLIAMS: I don't think there was an objection  
4 to that. I think the objection came later going through  
5 the elements. I think the appellate at this point also  
6 makes a contention that there were no curative  
7 instructions given. No curative instruction was  
8 requested by the defendant of the court.

9 THE COURT: What did the judge say needed to be  
10 cured?

11 MR. WILLIAMS: She said, Your Honor: [Reading]  
12 Appellate objected to DUI. Magistrate will quote the DUI  
13 to the DUAC yes, that gap there I understand that has to  
14 be explained. The Magistrate further went on to state:  
15 [Reading] I will disagree that Mr. Williams is trying to  
16 try the case of DUI, however I mean I don't believe that  
17 we are trying two things here. The court does not  
18 believe that was his intent.

19 THE COURT: Okay. Anything else?

20 MR. WILLIAMS: No sir, Your Honor.

21 THE COURT: Okay. Mr. Phipps, do you have any  
22 reply?

23 MR. PHIPPS: I do, Your Honor. May it please the  
24 court? It wasn't just as simple as connecting dots of  
25 she was arrested and now we are prosecuting a DUAC. He

1 went into pretty good depth. He started off by saying  
2 quote: I handle DUI's and other traffic related cases.  
3 Then he briefly mentions DUAC and starts telling the jury  
4 that the officer, speaking of the Trooper, he conducted  
5 an investigation and arrested her for driving under the  
6 influence. You've heard of DUI, drunk driving, DUI laws  
7 in South Carolina. I'm going to read to you it is  
8 unlawful for a person to drive a motor vehicle within the  
9 State while under the influence of alcohol. To the  
10 extent that a person's faculties driving a motor vehicle  
11 are impaired ---

12 THE COURT REPORTER: --- can you read that a little  
13 slower please.

14 MR. PHIPPS: Sure. Sorry. Where did you lose me?

15 THE COURT REPORTER: Just right where you are.

16 MR. PHIPPS: Okay. Driving a motor vehicle or  
17 materially and personally impaired. I count four things  
18 from that. It is unlawful to drive a motor vehicle  
19 within the State while under the influence of alcohol to  
20 the extent of a person's faculties. By that point I  
21 objected.

22 THE COURT: And who was -- was this argument in  
23 opening statement or was this the judge talking to the  
24 jury?

25 MR. PHIPPS: That was his opening statement going

1 into DUI's basically.

2 THE COURT: Okay.

3 MR. PHIPPS: And it's just highly prejudicial and  
4 impartial. And the law is very clear. And I have  
5 defended for both. There should have been no mention of  
6 a DUI. I don't know why they think that's okay and they  
7 can go ahead and do it. It's highly, highly prejudicial.

8 And so for that reason I asked for a mistrial. That  
9 was what I asked to be cured. And she came back and when  
10 she responded that what he quoted from the transcript but  
11 she also stated which he did not refer to is she denied  
12 the request for a mistrial but sustained the objection  
13 and said to the State quote: Please stay away from the  
14 elements of DUI at this point.

15 But all that was argued in front of the jury about  
16 the DUI and it was never cured. In regards to the  
17 putting the fingers in the mouth.

18 THE COURT: I'm not impressed with that argument,  
19 okay, the putting your fingers in your mouth, okay. I  
20 mean you've got to put your fingers in your mouth to put  
21 something in there I understand. But just sucking on  
22 your thumb I'm not sure that violates the 20 minutes,  
23 okay; or whatever she was doing with her fingers.

24 Mr. Williams, why are you talking about DUI when  
25 you're prosecuting something DUAC? That's like coming in

1 this court and you've got somebody charged with  
2 manslaughter and you start talking about criminal sexual  
3 conduct. I mean other than trying to prejudice the jury  
4 why would you do something like that.

5 MR. WILLIAMS: To explain to the jury, Your Honor,  
6 why they are going to hear the arresting officer's ---

7 THE COURT: --- but she's not charged with DUI.

8 MR. WILLIAMS: Your Honor, she was arrested for  
9 DUI.

10 THE COURT: So what? You're trying her for a  
11 different charge. What do you think gives you the right  
12 to talk to a jury about DUI when you're trying it for  
13 DUIAC [sic]?

14 MR. WILLIAMS: Your Honor, when the Trooper ---

15 THE COURT: --- excuse me, DUAC; I put the I in.  
16 I'm sorry.

17 MR. WILLIAMS: Yes sir, I understood. The officer  
18 says on the video that was played to the jury you're  
19 under arrest for DUI. There is extensive discussion on  
20 the video and in the breath test room that the jury sees  
21 of DUI. The point of discussing DUI and DUAC is to say  
22 to the jury, they don't know these things, she is  
23 arrested for DUI. She is not given a breath test until  
24 after that arrest.

25 THE COURT: My attitude about it and I don't know

1 how they do it in Magistrate's court. In Circuit Court  
2 it doesn't matter what she was arrested for; it was what  
3 they indicted for and what you're trying them for. And I  
4 assume in Magistrate's court it's what you're trying them  
5 for; not what they were arrested for.

6 MR. WILLIAMS: Your Honor, I think the jury needs  
7 to understand that the breath test is not taken until  
8 after the arrest for DUI. That's when it was charged  
9 with DUAC.

10 THE COURT: I'm going to grant the appeal and  
11 remand it back for a trial with instruction that the  
12 prosecutor is not to mention DUI or go into DUI when he  
13 is trying DUAC, okay.

14 MR. PHIPPS: Thank you, Your Honor.

15 MR. WILLIAMS: Thank you, Judge.

16 THE COURT: You want to send me a proposed order?

17 MR. PHIPPS: I'll send you a proposed order.

18 THE COURT: You can put in there that the finger  
19 issue on that issue is denied.

20 MR. PHIPPS: Yes, Your Honor. Thank you.

21 \*\*\*\*\*END OF TRANSCRIPT OF RECORD\*\*\*\*\*  
22  
23  
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25

C E R T I F I C A T E

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I, the undersigned, Joyce C. Rueger, Official Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston County, South Carolina on the August 31, 2017.

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

October 22, 2017



Joyce C. Rueger, CVR-M  
Court Reporter

Certified Transcript provided to T.D. Williams IV, Esq.,  
Assistant Solicitor

Certification reference # 102217 (Original)

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 STATE OF SOUTH CAROLINA, )  
 Respondent, )  
 )  
 vs. )  
 )  
 )  
 HANNAH KELLY, )  
 Appellant. )

IN THE COURT OF COMMON PLEAS

CASE NO. 2017-CP-10-725

Memorandum of Law

FILED  
 2017 AUG 30 PM 4:18  
 JULIE J. ARMSTRONGS  
 CLERK OF COURT

NOW COMES, HANNAH KELLY, by and through her Attorney, Edward L. Phipps, for her Memorandum of Law to appeal her conviction in Charleston County North Area III Magistrate in front of the Honorable Joanna Summey-Fuller on February 1, 2017.

**STATEMENT OF FACTS**

On February 19, 2016 around 1:00 a.m. Hannah Kelly was arrested for driving under the influence. Hannah submitted to a breath test. The officer administering the breath test began the twenty (20) minute mandatory observation period at approximately 1:30 a.m. and ended this observation period around 1:50 a.m. During this observation period Appellant wiped her crying eyes with her hands and placed her hands into and near her mouth more than 20 times. The results of the breath test read nine one-hundredths of one percent (0.09).<sup>1</sup>

Hannah was prosecuted for Driving with an Unlawful Alcohol Concentration (DUAC). However, the prosecutor began his opening argument by introducing himself and then informing the jury, "I handle DUIs and other traffic related cases."<sup>2</sup> The State then briefly mentioned that

<sup>1</sup> Exhibit A  
<sup>2</sup> Trial Tr. 52:23-24; Feb. 1, 2017.

Hannah was charged with DUAC. The State then unlawfully introduced DUI facts and law by telling the jury:

He conducted an investigation and arrested her for driving under the influence. You've heard of a DUI, drunk driving. DUI law in South Carolina, I'm going to read it to you: It is unlawful for a person to drive a motor vehicle within this state while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired.

I count four things from that: It's unlawful to drive a motor vehicle, within this state, while under the influence of alcohol, to the extent that the person's faculties.<sup>3</sup>

It was at this moment that Defense counsel promptly objected and requested a mistrial under § 56-5-2933(I).<sup>4</sup> At the conclusion of arguments on this matter, Magistrate Summey denied the request for a mistrial but sustained the objection, and advised the State, "please stay away from the elements of the DUI at this point."<sup>5</sup>

Trial resumed without any instruction to the jury to disregard the State's improper prosecution for DUI. Under direct examination of the officer the State moved to admit the breath test into evidence and Defense counsel objected for lack of foundation.<sup>6</sup> The video recording of the breath test procedure was reviewed. Defense counsel questioned the officer regarding the breath test procedure, specifically the element of not allowing the accused to put anything into her mouth as required under *State v. Parker*.<sup>7</sup> After watching the video the officer testified that Hannah placed her hands near her face and had put her fingers in her mouth.<sup>8</sup> Judge Summey listened to the recording and put on the record that the officer in fact testified to Hannah putting her fingers in her mouth.<sup>9</sup> Defense counsels Motion to exclude the breath test and dismiss the

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<sup>3</sup> Trial Tr. 53:7-18.

<sup>4</sup> Trial Tr. 54:4-5.

<sup>5</sup> Trial Tr. 63:6-7.

<sup>6</sup> Trial Tr. 83:16-19.

<sup>7</sup> Trial Tr. 86.

<sup>8</sup> Trial Tr. 94:15, 95:4.

<sup>9</sup> Trial Tr. 97:4-8.

case under *Parker* was rejected.<sup>10</sup>

Magistrate Summey allowed the breath test results into evidence. On cross examination, the officer testified, "I assume it would be possible" for someone crying and wiping their face to get residual alcohol into their mouth.<sup>11</sup> When asked if Hannah put her fingers in her mouth the officer stated, "As I testified earlier to that, yes."<sup>12</sup> Appellant was found guilty of DUAC.

### STATEMENT OF ISSUES ON APPEAL

- I. The Magistrate erred by failing to grant a mistrial or more importantly give the jury curative instructions when the state engaged in prosecutorial misconduct during opening argument.
  - A. The State's remarks during opening argument were improper when the State began prosecuting Hannah for both driving under the influence and driving with an unlawful alcohol concentration.
  - B. The State's remarks during opening argument prejudicially affected Hannah's substantial rights so as to deprive her of a fair trial.
  
- II. The Magistrate erred by allowing into evidence the results of a breathalyzer test after the State could not establish a proper foundation for the test results in violation of *State v. Parker* when the State failed to prevent Hannah from putting anything into her mouth during the twenty minute mandatory observation period.

### STANDARD OF REVIEW

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<sup>10</sup> Trial Tr. 99:5-6

<sup>11</sup> Trial Tr. 118:21.

<sup>12</sup> Trial Tr. 120:19.

In a criminal appeal from the magistrate's court, the circuit court does not review the matter de novo; rather, the court reviews the case for preserved errors raised by appropriate exception.<sup>13</sup> The appeal must be heard by the circuit court upon the grounds of exceptions made and the record on appeal, without the examination of witnesses.<sup>14</sup> The circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial."<sup>15</sup> The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law.<sup>16</sup>

### ARGUMENT

**I. The Magistrate erred by failing to grant a mistrial or more importantly give the jury curative instructions when the state engaged in prosecutorial misconduct during opening argument.**

A claim of Prosecutorial misconduct is reviewed to determine whether the conduct complained of so infected the trial with unfairness as to make the resulting conviction a denial of due process.<sup>17</sup> To prevail under this standard, one must show that "the State's remarks or conduct were improper and, second ... that such remarks or conduct prejudicially affected his substantial rights" so as to deprive him of a fair trial.<sup>18</sup>

**A. The State's remarks during opening argument were improper when the State began prosecuting Hannah for both driving under the influence and driving with an unlawful alcohol concentration.**

"It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a

<sup>13</sup> Town of Mt. Pleasant v. Robert, 393 S.C. 332, 341 (2011); S.C. Code Ann. § 14-25-105 (Supp. 2010).

<sup>14</sup> S.C. Code Ann. § 18-3-70 (Supp.2010).

<sup>15</sup> Id.

<sup>16</sup> City of Rock Hill v. Suchenski, 374 S.C. 12, 15 (2007).

<sup>17</sup> U.S. v. Blackwood, 149 Fed.Appx. 163 (4<sup>th</sup> Cir. 2005).

<sup>18</sup> Id.

motor vehicle are materially and appreciably impaired.”<sup>19</sup> It is unlawful in our State for a person to be prosecuted for both a driving with an unlawful alcohol concentration (DUAC) and driving while under the influence of alcohol or drugs (DUI) for the same incident.<sup>20</sup>

The State began opening arguments by prosecuting Hannah for DUI, specifically, by discussing the elements of DUI. Additionally, the prosecutor made statements such as, “I handle DUI’s and other traffic related offenses”, and “You’ve heard of DUI, drunk driving.”<sup>21</sup> In total, the State mentioned DUI to the jury five separate times, whereas the prosecutor only mentioned DUAC once. The one time he addressed DUAC the prosecutor stated, “she was charged with driving with an unlawful alcohol concentration, DUAC”.<sup>22</sup> It was immediately after the prosecution began discussing the elements of DUI that Defense counsel promptly objected to the prosecution’s improper and inflammatory argument and preserved this claim for appeal.<sup>23</sup>

The prosecutions statements are confusing and misleading to a jury because Hannah was not charged with DUI. The prosecution’s purpose of discussing DUI at length with the jury was to invoke in the minds of the jury that Hannah is someone linked to DUI. Hannah was charged with a DUAC and as § 56-5-1933(I) states, a person cannot be prosecuted for both DUI and DUAC. Hannah was given a traffic ticket for DUI, and if the State only mentioned that fact this issue would not exist. However, the State crossed the line by making improper statements

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<sup>19</sup> S.C. Code Ann. § 56-5-2930(A).

<sup>20</sup> S.C. Code Ann. § 56-5-2933(I).

<sup>21</sup> Trial Tr. 52:23; 53:7-18.

<sup>22</sup> Trial Tr. 53:4-5.

<sup>23</sup> Trial Tr. 54:4-5.

about DUI, reading the DUI statute, and discussing the DUI elements during opening argument. The Magistrate also agreed the State's remarks were improper when it instructed the State to "stay away from the elements of DUI".<sup>24</sup>

**B. The State's remarks during opening argument prejudicially affected Hannah's substantial rights so as to deprive her of a fair trial.**

The rule that it is always the duty of the prosecuting attorney to treat Hannah in a fair and impartial manner applies to his argument to the jury.<sup>25</sup> Whether prejudice exists is established by: (1) the degree to which the State's remarks had a tendency to mislead the jury; (2) whether the remarks were isolated or extensive; (3) the strength of competent proof introduced to establish a defendant's guilt; (4) whether the State's remarks were invited by the improper conduct of Defense counsel; and (5) whether curative instructions were given.<sup>26</sup>

*i. The degree to which the State's remarks had a tendency to mislead the jury.*

The State began opening arguments by discussing DUI on five different occasions. The State read the DUI statute and began discussing DUI elements while mentioning DUAC only once before Defense counsel had to object. The purpose of these remarks could only have been to mislead the jury into thinking that Hannah was on trial for DUI.

*ii. Whether the remarks were isolated or extensive.*

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<sup>24</sup> Trial Tr. 63:6-7.

<sup>25</sup> *State v. McGill*, 191 S.C. 1 (1939).

<sup>26</sup> *Blackwood*, at 186.

In total, the State mentioned DUI to the jury five separate times, read the DUI statute, and began discussing the elements of DUI before Defense counsel objected.

- iii. *The strength of competent proof introduced to establish Hannah's guilt.*

The State must prove that a person was driving a motor vehicle in this state while her alcohol concentration is eight one-hundredths of one percent (0.08) or more.<sup>27</sup> The only evidence the prosecution put forth was the results of an unreliable breath test that read nine one-hundredths of one percent (0.09) and was admitted without proper foundation pursuant to *Parker*.

- iv. *Whether the States remarks were invited by the improper conduct of Defense counsel.*

The remarks were not invited by conduct of Defense counsel. The State made the improper remarks during opening argument before Defense counsel addressed the jury.

- v. *Whether curative instructions were given.*

In the case of U.S. v. Smith the court found that even if the State's remarks were improper, "the remarks were not extensive, the evidence against Smith was strong, and whatever prejudicial effect the comments may have had was cured by the district court's instruction to the jury."<sup>28</sup>

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<sup>27</sup> 56-5-2933(A).

<sup>28</sup> U.S. v. Smith, 39 Fed.Appx. 816 (4<sup>th</sup> Cir. 2002).

## 121

An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission. A mistrial should not be ordered in every case where incompetent evidence is received and later stricken out.<sup>29</sup>

In the present case, the prejudicial effect of the State's improper remarks was not cured by an instruction to the jury. The judge instructed the State to refrain from making further improper remarks, but did not instruct the jury to disregard those remarks and strike them from the record. These improper remarks remained a part of the record and jeopardized the integrity of the trial process and violated Hannah's substantial right to a fair trial.

**II. The Magistrate erred by allowing into evidence the results of a breathalyzer test after the State could not establish a proper foundation for the test results in violation of *State v. Parker* when the State failed to prevent Hannah from putting anything into her mouth during the twenty minute mandatory observation period.**

"The requirement for laying a foundation for the introduction of the results of chemical tests is universally recognized."<sup>30</sup> Parker established law in this state that prior to admitting breath test results into evidence, the State is required to prove "(1) that the machine was in proper working order at the time of the test; and (2) that the correct chemicals had been used; (3) *that the accused was not allowed to put anything in his mouth for 20 minutes prior to the test*, and (4) that the test was administered by a qualified person in the proper manner."<sup>31</sup> (Emphasis added). "The Parker precautions are intended to ensure that the results of the breathalyzer test if given are accurate and

<sup>29</sup> State v. Dawkins, 297 S.C. 386, 392 (1989).

<sup>30</sup> State v. Parker, 271 S.C. 160, 162 (1978).

<sup>31</sup> Id. at 163.

reliable as evidence at trial”.<sup>32</sup> The rule in Parker arose out of its analysis of establishing a foundation for admitting into evidence the results of a breathalyzer test under our states implied consent statute § 56-5-2950, 1976 Code.<sup>33</sup> The statute allows the trial judge to exclude from evidence the results of any breath test where failure to follow the policies, procedures, and regulations of that statute materially affected the accuracy or reliability of the test results.<sup>34</sup> “One showing that must be made is that the accused was not allowed ‘prior to the test’ to put anything in his mouth for 20 minutes, the observation period adopted by SLED pursuant to its authority under the implied consent law.”<sup>35</sup>

In the present case, the officer did not prevent Hannah from putting *anything* into her mouth during the twenty minute mandatory observation period. After the operator informed Hannah that the twenty minute mandatory observation period had begun, video evidence shows her crying into her hands and wiping her hands onto and into her mouth multiple times.<sup>36</sup> When asked whether Hannah put her fingers into her mouth the officer testified, “As I testified earlier to that, yes.”<sup>37</sup> The officer also testified, “I assume it would be possible” for someone crying and wiping their face to get residual alcohol into their mouth.<sup>38</sup>

“The purpose of the observation period is to allow for the deprivation of mouth alcohol.”<sup>39</sup> The law provides that the accused must not be allowed to put *anything* into her mouth for 20 minutes prior to the breath test.<sup>40</sup> SLED’s own policy states that “the operator will monitor the subject to ensure no external liquids and/or solids are ingested

<sup>32</sup> State v. Jansen, 305 S.C. 320 (1991).

<sup>33</sup> Id. 162.

<sup>34</sup> S.C. Code Ann. § 56-5-1950(J) (1976).

<sup>35</sup> Ex Parte Home, 303 S.C. 31 (1990), (citing State v. Parker)

<sup>36</sup> Exhibit B at 5:55; Exhibit C (Displays 15 photographs of Hannah placing hands onto face after observation period begins)

<sup>37</sup> Trial Tr. 120:19.

<sup>38</sup> Trial Tr. 118:21.

<sup>39</sup> South Carolina Law Enforcement Division, “Implied Consent Operations Manual” ver. 1.120113 pag. 17 (2014).

<sup>40</sup> Parker at 163.

before providing a breath sample.”<sup>41</sup> This crucial requirement in the law to secure the accuracy of the breath test was not complied with. This failure by the officer is especially damaging when the threshold for DUAC guilt is eight one-hundredths of one percent (0.08), and Hannah’s breath test result read nine one-hundredths of one percent (0.09).<sup>42</sup> Failure to follow established procedure during breath testing jeopardized the accuracy of the breath test results, and the Magistrate should have excluded that evidence from trial.

Magistrate Summey’s Return was improper when it stated that by Hannah “placing her hand to her mouth *once* did not violate the 20 minute waiting period requirements”.<sup>43</sup> However, Hannah did not place her hands to her face just once but did so over fifteen (15) times.<sup>44</sup> The officer testified that Hannah put her fingers into her mouth but he did not know how many times “exactly”.<sup>45</sup> After reviewing the video, the officer testified “I did lose count, I’m sorry. It was numerous times.”<sup>46</sup> Magistrate Summey also reviewed the video evidence and should have known that Hannah did not place her hands to her mouth just once. Therefore, to rule that proper foundation was established after Hannah was allowed to put her hands up to and into her mouth numerous times was incorrect.

Further, Magistrate Summey misquoted Parker in the Magistrates Return by stating, “State v. Parker (1978) requires that in order for the breathalyzer to be entered in there are 4 elements that must be met.”<sup>47</sup>

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<sup>41</sup> “Implied Consent Operations Manual” at 17.

<sup>42</sup> S.C. Code Ann. § 56-5-2933(A).

<sup>43</sup> Magistrates Return at 2, State v. Kelly, 2017-CP-10-75.

<sup>44</sup> Jansen at 320.

<sup>45</sup> Trial Tr. 120:22.

<sup>46</sup> Trial Tr. 124:7-8.

<sup>47</sup> Magistrates Return at 2.

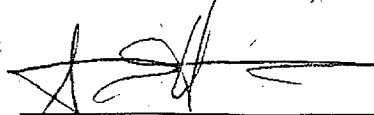
"The Court found that the Prosecution 1. Presented the BA Machine was in proper working order before the test was administered; 2. Presented the correct solution was in the machine; 3. Presented *the Officer did check to see if any foreign objects were in the defendants mouth* and the Defendants tears, hold the hands to the mouth, and one time placing fingers in her mouth did not violate this element; 4. Presented the Defendant's test was performed by a qualified officer."<sup>48</sup> (Emphasis added).

The third element of Parker reads "(3) that the accused was not allowed to put **anything** in his mouth for 20 minutes prior to the test..."<sup>49</sup> (Emphasis added). The rule is clear that the accused not be allowed to put anything in her mouth, not just foreign objects.

### CONCLUSION

As the Magistrate Court made substantial legal errors that ought to be reviewed by the Court of Appeals, this court should grant Appellant's Motion for Leave to Appeal to the Court of Appeals.

RESPECTFULLY SUBMITTED,  
PHIPPS LAW FIRM, LLC



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843-216-9797  
*Attorney for Appellant*

Charleston, South Carolina  
August 30, 2017

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<sup>48</sup> Id. at 2-3.

<sup>49</sup> Parker at 163.

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON )

The State of South Carolina, ) 2017-CP-10-725  
Respondent, )  
 )  
v. ) **State's Memorandum in Opposition**  
 )  
Hannah Kelly, )  
Appellant. )

The State of South Carolina, by and through the undersigned, hereby opposes this appeal and requests that the Appellant's conviction be affirmed based upon the following:

**ISSUES ON APPEAL**

- I. The Magistrate did not err in allowing the prosecution of Appellant for Driving with an Unlawful Alcohol Concentration, as no prosecutorial misconduct exists.

In her Memorandum of Law, Appellant Hannah Kelly alleges prosecutorial misconduct based upon the State's reference to driving under the influence during opening statement. However, Appellant did not allege prosecutorial misconduct in her Notice of Appeal. Section 18-3-30 of the South Carolina Code of Laws requires that the notice of appeal "stat[e] the grounds upon which the appeal is founded." Accordingly, any claims of prosecutorial misconduct have been waived and are not preserved for review.

Prosecutorial misconduct cannot exist when a specific prosecution is explicitly authorized by law. Appellant was arrested and charged with Driving Under the Influence (DUI) in violation of S.C. Code of Laws § 56-5-2930 (Supp. 2016). Subsection 56-5-2930(I) provides that "A person charged for a violation of this section [DUI] may be prosecuted pursuant to Section 56-5-2933

[DUAC] if the original testing of the person's breath or collection of other bodily fluids was performed within two hours of the time of arrest and reasonable suspicion existed to justify the traffic stop." Section 56-5-2933 contains the offense of Driving with an Unlawful Alcohol Concentration (DUAC). The State elected to try Appellant for DUAC, after giving Appellant the required written notice, as allowed by law. Appellant was not tried for DUI.

In its opening statement, the State explained to the jury that Appellant was originally charged with DUI but was being tried for DUAC, based upon Appellant's alcohol concentration. Following Appellant's objection to the State's mention of DUI, the Magistrate ruled "The DUI to the DUAC, yeah, that – that gap there, I understand that has to be explained." (Trial Transcript at 60:23-24.)

The Magistrate ruled that "I would disagree that Mr. Williams is trying to try the case of DUI; however – I mean, I don't believe that we're trying two things here. The Court does not believe that that was his intent." (Trial Transcript at 62:12-15.)

At no point was Appellant tried or otherwise placed in jeopardy for the crime of Driving Under the Influence. In the her opening remarks to the jury panel, the Magistrate stated "The case in which you'll be choosing a jury is the State vs. Hannah Kelly, charged with having violated Section Code 56-5-2933 of the South Carolina Code of Laws with having committed the offense of DUAC." (Trial Transcript at 2:3-7.)

When charging the jury, the Magistrate concluded by saying

Now I'm going to read you the charge: "Section 56-5-2933, driving with an unlawful concentration. It is unlawful for a person to drive a motor vehicle within this state while the alcohol concentration is .08 percent or more. A person who violates the provisions of this section is guilty of the offense of DUAC, or driving with unlawful alcohol concentration. (Trial Transcript at 146:25-147:6.)

Furthermore, when completing the verdict form, the foreperson selected "Guilty of DUAC at least eight one-hundredths (.08) of one percent but less than ten one-hundredths (.10) of one percent."

(Jury Verdict.)

Appellant also contends that the Magistrate erred in failing to give a curative instruction to the jury. This argument is not preserved for appeal, as Appellant did not request any curative instruction at the time during trial, nor did the Magistrate decline to give a curative instruction. "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. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003)

No prosecutorial misconduct exists when the State distinguishes for the jury the offenses of DUI and DUAC, and Appellant's conviction should be affirmed.

II. The Magistrate did not err by admitting the Breath Alcohol Analysis Test Report into evidence.

Prior to admitting the report, the Magistrate heard extensive testimony from the arresting officer regarding the foundational issues required by the *Parker* court. (271 S.C. 159, 163, 245 S.E.2d 904, 906 (1978)). Upon hearing that testimony, the Magistrate determined a proper foundation had been established and admitted the Breath Alcohol Analysis Test Report into evidence over Appellant's objection. (Trial Transcript at 99:24-25.)

"The admission of evidence is within the trial judge's discretion and will not be disturbed on appeal absent abuse of that discretion." State v. Slocumb, 336 S.C. 619, 626-27, 521 S.E.2d 507, 511 (Ct. App. 1999). "In criminal cases, the appellate court sits to review errors of law only. . . . On review, we are limited to determining whether the trial judge abused his discretion. . . . [The

appellate court] does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (internal citations omitted).

At trial, the Magistrate viewed the video and heard testimony from the arresting officer. "Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved." Dorchester Cty. Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996).

Appellant has not demonstrated an abuse of discretion by the Magistrate in admitting the Breath Alcohol Analysis Test Report into evidence, nor has Appellant even alleged such an abuse, which is required for an appellate court to overturn the trial court's admission of evidence. Furthermore, the trial court sits in a superior position to determine the facts and credibility of witnesses.

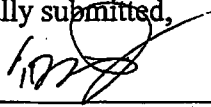
The Magistrate did not err by admitting the Breath Alcohol Analysis Test Report into evidence, and this appeal should be dismissed.

#### CONCLUSION

The Court should dismiss this appeal and affirm Appellant's conviction. No prosecutorial misconduct exists when the State distinguishes to the jury the charges of Driving Under the Influence and Driving with an Unlawful Alcohol Concentration during its opening statement at a trial for DUAC. Additionally, the Magistrate did not err in admitting Appellant's Breath Alcohol Analysis Test Report into evidence after first determining that a proper foundation had been laid in accordance with law. The admission of evidence is within the trial judge's discretion and will not be disturbed on appeal absent abuse of that discretion.

Finally, Appellant requests that the Court "should grant Appellant's Motion for Leave to Appeal to the Court of Appeals" for the very first time in the conclusion to Appellant's Memorandum of Law. As there has been no prior mention of such, the State objects as improper and asks that no such leave be granted.

Respectfully submitted,



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T. D. Williams IV  
Assistant Solicitor  
101 Meeting Street, Suite 400  
Charleston, South Carolina 29401-2249

August 31, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	
	)	CASE NO. 2017-CP-10-725
STATE OF SOUTH CAROLINA,	)	
Respondent,	)	
	)	
vs.	)	
	)	
	)	<b>ORDER</b>
	)	
HANNAH KELLY,	)	
Appellant.	)	

FILED  
 2017 SEP 21 AM 9:38  
 JULIE J. HARRIS  
 CLERK OF COURT

THIS MATTER came before the Court on August 31, 2017 for a hearing upon Appellant's Motion to Appeal a conviction in Charleston County North Area III Magistrate in front of the Honorable Joanna Summey-Fuller on February 1, 2017. Appellant was represented by Edward L. Phipps. The Respondent was represented by Tod Williams. The Court having reviewed this matter and the record as a whole, the submittals of counsel, and upon hearing arguments of counsel and being fully informed, it is Ordered that this case be remanded for a new trial on the following findings of fact and conclusions of law:

**FINDINGS OF FACT:**

1. Appellant was arrested and charged with driving under the influence (DUI), but Respondent chose to prosecute her with driving with an unlawful alcohol concentration ("DUAC") instead and tried her in Magistrate's Court before the Honorable Joanna Summey-Fuller on February 1, 2017.
2. During opening arguments, Respondent improperly went into extensive discussion and analysis about DUI to the Jury in violation of S.C. Code Ann. § 56-5-2933(I).

3. Appellant objected to the Respondent's improper statements in regards to DUI, the Magistrate sustained the objection but did not grant a mistrial or provide a curative instruction to the jury to disregard the improper statements.
4. Appellant was found guilty of DUAC.
5. Appellant filed Notice of Appeal on February 13, 2017.
6. Magistrate Summey-Fuller filed the Magistrates Return on March 17, 2017.
7. The criminal appeal from Magistrate's Court was heard by this Court of Common Pleas on August 31, 2017.

#### CONCLUSIONS OF LAW

I.

- gen
- A. S.C. Code Ann. § 56-5-2933(1) provides that it is unlawful in our State for a person to be prosecuted for both a driving with an unlawful alcohol concentration (DUAC) and driving while under the influence of alcohol or drugs (DUI) for the same incident. Based on the record herein, I find that Respondent's extensive discussion and analysis of DUI during opening argument while Appellant is charged with DUAC is improper and a violation of 56-5-2933(1).
  - B. This claim was reviewed to determine whether the conduct complained of so infected the trial with unfairness as to make the resulting conviction a denial of due process. U.S. v. Blackwood, 149 Fed.Appx. 163 (4<sup>th</sup> Cir. 2005). To prevail under this standard, one must show that "the State's remarks or conduct were improper and, second ... that such remarks or conduct prejudicially affected his substantial rights" so as to deprive him of a fair trial. Id. Based on the evidence submitted before this court, and the arguments of counsel, I find and conclude that

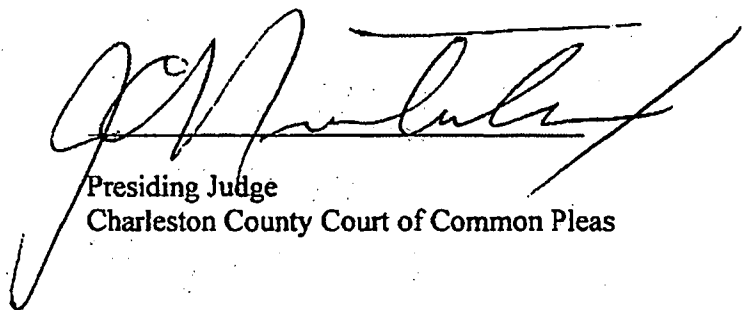
Respondent's remarks during opening argument were improper. I find that such remarks and conduct, coupled with the absence of curative instructions to the jury, prejudicially affected Appellant's substantial rights so as to deprive her of a fair trial.

II. Prior to admitting breath test results, Appellant objected and now appealed the results of the breathalyzer test based on violation of State v. Parker, 271 S.C. 160, 162 (1978). Based on the evidence submitted before this court, and the arguments of counsel, I find and conclude that the Magistrate did not err in allowing into evidence the results of the breathalyzer test.

**IT IS THEREFORE ORDERED AS FOLLOWS:**

It is therefore **ORDERED** that Appellant's Motion on Appeal is **GRANTED** in part and **DENIED** in part, and this case shall be remanded to North Area III Magistrate for a new trial consistent with this order and will be scheduled at a time determined by the Magistrate court.

It is further **ORDERED** that the verdict, judgment, and any administrative (DMV) suspensions entered against the Appellant in the Magistrate Court is set aside and vacated.



Presiding Judge  
Charleston County Court of Common Pleas

Date: \_\_\_\_\_

9/14/17

Charleston, South Carolina

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County  
Honorable J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002096

The State,

Appellant,

vs.

Hannah Kelly,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Supplemental Record on Appeal complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


ALAN WILSON  
Attorney General

WILLIAM M. BLITCH, JR.  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 15608

RECEIVED

MAY 08 2019

SC Court of Appeals

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ATTORNEYS FOR APPELLANT

May 8, 2019