

**ORIGINAL**

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Charleston County  
Honorable J.C. Nicholson, Jr., Circuit Court Judge  
Appellate Case Tracking No. 2017-002096

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SC Court of Appeals

The State,

Appellant,

vs.

Hannah Kelly,

Respondent.

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**FINAL BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

- I. The circuit court, sitting as an appellate court in this case, erred in reversing Respondent's conviction and sentence for DUAC incorrectly finding comments by the Solicitor in opening statements referencing DUI improper and prejudicially affected Respondent's substantial rights so as to deprive her of a fair trial warranting a mistrial. Further, the court erred in finding the comments in opening statement violated section 56-5-2933(I) of the South Carolina Code.

## STATEMENT OF THE CASE

On February 19, 2016, Respondent was arrested for DUI. She proceeded to trial before the Honorable JoAnna Summey, Magistrate for Charleston County North Area 3, on February 1, 2017. The State elected to proceed to trial on the charge of driving with an unlawful alcohol content under section 56-5-2933 of the South Carolina Code instead of driving under the influence under 56-5-2930 of the South Carolina Code.

At trial, Respondent objected and moved for a mistrial based on comments made by the solicitor in opening statements. The magistrate denied the mistrial, restricted the opening statement by the State, and proceeded with trial. The jury rendered a verdict finding Respondent guilty of driving with an unlawful alcohol concentration of .08 but less than .10. (Verdict Form; R.91). The magistrate sentenced her to forty-eight hours community service. (MagT.148; R.87).

Respondent filed a Notice of Appeal to the Court of Common Pleas on February 13, 2017. (Notice of Appeal to the Circuit Court; R.92). The Honorable J.C. Nicholson heard the appeal on August 31, 2017. By Order dated September 14, 2017 and filed September 21, 2017, he granted the appeal, reversed Respondent's conviction, and remanded the case for a new trial. (Order of Circuit Court; R.130-133).

The State received the written order on September 28, 2017, and served a Notice of Appeal to the Court of Appeals on October 9, 2017. This Brief of Appellant follows.

## ARGUMENT

- I. **The circuit court, sitting as an appellate court in this case, erred in reversing Respondent's conviction and sentence for DUAC incorrectly finding comments by the Solicitor in opening statements referencing DUI improper and prejudicially affected Respondent's substantial rights so as to deprive her of a fair trial warranting a mistrial. Further, the Court erred in finding the comments in opening statement violated section 56-5-2933(I) of the South Carolina Code.**

The circuit court, sitting as an appellate court, conducted a de novo review instead of applying the appropriate deference and standard of review as an appellate court reviewing the decision of the magistrate. Further, the circuit court committed an error of law in finding comments made by the solicitor in opening statement violated the requirements of section 56-5-2933(I) of the South Carolina Code. After making this error of law, the circuit court then erred in finding the magistrate erred in failing to grant a mistrial because the comments explaining Respondent's original arrest for driving under the influence (DUI) and subsequent charge of driving with an unlawful alcohol concentration (DUAC) prejudicially affected Respondent's substantial rights so as to deprive her of a fair trial. Additionally, the circuit court erred in considering as a ground for reversal whether a curative instruction was given because no curative instruction was requested. This Court should find the circuit court committed an error of law in the analysis of section 56-5-2933(I), the comments were entirely proper and not prejudicial, and reinstate Respondent's conviction and sentence for DUAC.

### **Factual Background**

On February 19, 2016, Trooper Methvin stopped Respondent in Charleston after he witnessed her weaving out of her lane. (MagT.69-70; 72-73; R.26-27). Upon approaching the vehicle, Trooper Methvin detected a strong odor of alcohol. (Mag.T.73; R.30). He conducted

field sobriety tests of Respondent. (Mag.74; R.31). After concluding the field sobriety tests, Trooper Methvin indicated Respondent was under arrest for DUI. (Mag.T.79; R.36). A video of the encounter was played for the jury, which included Trooper Methvin explaining he was arresting her for DUI. (Video). Further, Respondent is heard stating: "I should have stayed where I was at, I should have stopped drinking." (Video; Mag.T.79-80; R.36-37).

Respondent is offered and given a breath test to determine her breath alcohol content (BAC) level. Respondent's BAC level was recorded as .09. (State's Exhibit 2 (DataMaster Report); MagT. 105; R.48).

At trial, the State proceeded on a charge of DUAC pursuant to section 56-5-2933 instead of DUI under 56-5-2930. The magistrate announced the case as proceeding under section 56-5-2933 based on a charge of DUAC. (MagT.2; R.3). After swearing in the jury, the magistrate again explains Respondent is charged with DUAC pursuant to section 56-5-2933. (MagT.50; R.7). Further, she explained to the jury neither opening statement by the parties were considered evidence. (MagT.50; R.7).

During opening statement, the solicitor introduced himself and explained the case to the jury. He told the jury:

As you heard Judge Summey says, Ms. Kelly over here, she was charged with driving with an unlawful alcohol concentration, DUAC. . . . Ms. Kelly was stopped on February 19<sup>th</sup> of 2016, so just about a year ago, by Trooper Methvin. He conducted an investigation and arrested her for driving under the influence. You've heard of 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, with this state, while under the influence of alcohol, to the extent that the person's faculties . . . .

(MagT.53; R.10). At this point, Respondent objected and asked for a mistrial. (MagT.53-54; R.10-11). The magistrate then heard argument regarding the objection and mistrial motion in which Respondent asserted he was prejudiced by the references to DUI and the references confused the jury. (MagT.55; R.12). The State asserted it needed to explain to the jury the fact Respondent was originally arrested for DUI but that she was being prosecuted for DUAC. (MagT.58; 61; R.16; 18). The magistrate indicated she understood the need to explain to the jury how the charges went from DUI to DUAC, but cautioned the State that there was no need to go into the elements of DUI or compare DUI to DUAC. (MagT.62; R.19). Respondent then seemed to argue the State was attempting to try Respondent for both DUI and DUAC and the magistrate expressly disagreed and explained again to the State not to go into the elements of DUI, just the elements of DUAC. (MagT.62; R.19). The magistrate court denied the motion for a mistrial, and by restricting the State's opening sustained the objection raised by Respondent. Respondent, however, never asked for a curative instruction of any kind, nor did he move to strike the discussion of the elements of DUI from the opening statement. (MagT.62-63; R.19-20).

When opening argument resumed, the State explained Respondent was arrested for DUI. He explained she was given a breath test. (MagT.63; R.20). He then told the jury: "In South Carolina there's a another charge, not DUI, but a second charge. And again, you hear the judge say it's called a DUAC, driving with an unlawful alcohol concentration." He then provided the elements for DUAC as allowed by the magistrate. (MagT.64; R.21).

After presentation of the State's case and closing argument, the trial court charged the jury. She explained:

Now I'm going to read you the charge: "Section 56-5-2933, driving with unlawful alcohol 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."

(MagT.146-147; R.85-86). The trial court presented the jury with a verdict form which never referenced DUI, but had options related solely to the charge of DUAC. The form provided:

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.

(Verdict Form; R.91). The jury found Respondent guilty of DUAC at least eight one-hundredths (.08) of one percent but less than ten one-hundredths (.10) of one percent, and the magistrate sentenced her to forty-eight hours of community service. (Verdict Form; MagT.148; R.91; 87).

**Section 56-5-2933(I)**

Initially, the circuit court committed an error of law in finding a violation of section 56-5-2933(I) because Respondent was not prosecuted for both DUI and DUAC, she was only prosecuted for DUAC. The solicitor's explanation in opening statements did not result in a violation of section 56-5-2933(I), especially in light of the fact the magistrate clearly only submitted the charge of DUAC to the jury for consideration. (Verdict Form; R.91).

Section 56-5-2933 provides: "It is unlawful for a person to drive a motor vehicle within this State while his alcohol concentration is eight one-hundredths of one percent or more." S.C. Code Ann. § 56-5-2933(A) (Supp. 2016). The statute also provides:

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.**

S.C. Code Ann. § 56-5-2933(I) (Supp. 2016)(emphasis added).

The circuit court found this statute was violated by the State referencing DUI and DUAC in opening statements. (Order of Circuit Court p.2; R.131). The statute is only violated if a person is **prosecuted** for both DUI and DUAC. In this case, the magistrate's jury charge, the verdict form, and ultimately the verdict of the jury clearly indicate Respondent was only prosecuted for DUAC and not DUI. Nothing in the section precludes the State from referencing DUI in its opening statement; it solely prevents double prosecution for DUI and DUAC. As a result, the circuit court committed an error of law in finding a violation of section 56-5-2933(I).

### **Mistrial**

Further, the circuit court, in part because of its erroneous analysis of section 56-5-2933(I), incorrectly determined the magistrate erred in denying the motion for a mistrial. The circuit court, sitting as the appellate court, failed to give the magistrate the proper deference, failed to indicate the magistrate committed an abuse of discretion in her decision to deny the motion for a mistrial, and made its own conclusions as if it were sitting as the trial court and not the appellate court.

A trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). The appellate court favors the exercise of **wide discretion** of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999) (emphasis added).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "A mistrial should only be granted in **cases of manifest necessity and with the greatest caution** for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (emphasis added) (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)).

"Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

In the instant case, the magistrate as the trial court specifically found a mistrial was not warranted. This decision was due deference by the circuit court, which was not given. The circuit court viewed the evidence in light of how he would have concluded a motion for a mistrial and not in light of whether an abuse of discretion was committed by the magistrate.

The magistrate specifically found referring to the elements of DUI could be confusing and instructed the State not to mention them and only mention DUAC. The magistrate also specifically explained she understood the need to explain to the jury that the case began as a DUI and is ultimately being prosecuted as a DUAC. (MagT.62-63; R.19-20). The magistrate denied the motion for a mistrial indicating the trial could proceed. The circuit court, sitting as an appellate court, erred in ignoring the findings of the trial court and based on its own view of the facts finding a mistrial should have been granted. (Order of Circuit Court p.2-3; R.131-132).

A review of the facts of the case indicates there was no prejudice sufficient to warrant the extreme measure of a mistrial. "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). When making this determination, the Court must "review the alleged impropriety of argument in the context of the entire record." State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Further, this Court "will defer to the discretion of the trial judge, whose ruling will not ordinarily be disturbed." State v. South, 285 S.C. 529, 536, 331 S.E.2d 775, 779 (1985).

The allegedly improper comments<sup>1</sup> consisted of a single reference to the elements of DUI during opening statement immediately after the trial court told the jury the opening statements

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<sup>1</sup> The State also submits there was nothing improper about the solicitor's opening statement. He was explaining to the jury why it would hear Respondent was originally arrested for DUI but was going to trial for DUAC. In doing so, he merely sought to explain the differences in the charges to the jury. The solicitor as well as the trial court made it abundantly clear to the jury that the only charge being considered by them was DUAC.

were not evidence. Further, throughout trial, the State presented evidence supporting DUAC. The magistrate as trial judge specifically charged the jury solely on DUAC and never mentioned DUI. Additionally, the verdict form made it abundantly clear the jury was only considering DUAC and not DUI. As a result, the single mention of the elements of DUI in the opening statement as a means of explaining to the jury why Respondent was being tried for DUAC after being arrested for DUI certainly is not so prejudicial as to warrant a mistrial. Additionally, any possible prejudice could have been easily cured by a curative instruction had one been requested but Respondent never requested a curative instruction. It is hard to fathom how the statements were so prejudicial that a mistrial was warranted when they were not so prejudicial as to even warrant the request of a curative instruction.

In addition, the circuit court places significance on this lack of a curative instruction from the magistrate. (Order of Circuit Court p.3; R.132). It was error for the circuit court to consider the lack of a curative instruction as Respondent never requested one. The issue was not preserved for consideration by the circuit court as it sat as an appellate court. See e.g., State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) (finding an issue not preserved when the trial court sustained appellant's objection, but appellant did not contemporaneously move to strike the testimony or request a curative instruction). Any reliance on the lack of a curative instruction for purpose of reversing the denial of the mistrial is an error of law and should be reversed by this Court.

Accordingly, this Court should find the circuit court committed errors of law in finding a violation of section 56-5-2933(I) and in considering the lack of a curative instruction when none was requested by Respondent during the magistrate court hearing. Further, the circuit court clearly utilized an incorrect standard for reviewing the denial of Respondent's motion for a

mistrial and should have given deference to the ruling of the trial court in this case. Failure to properly consider the rulings as an appellate court justifies this Court reversing the decision of the circuit court and reinstating Respondent's conviction and sentence from the magistrate court.

CONCLUSION


For all the foregoing reasons, it is respectfully submitted that the decision of the circuit court finding a violation of section 56-5-2933 and that the magistrate erred in failing to grant a mistrial should be reversed and the conviction and sentence from the magistrate court reinstated.

Respectfully submitted,

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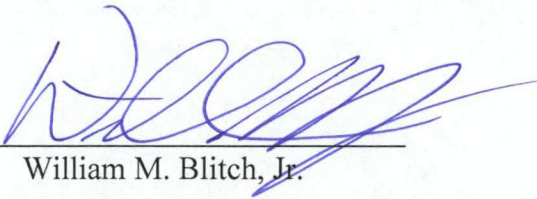
**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies the Final Brief of Appellant complies with Rule 211(b),  
SCACR.

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