

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Jun 12 2020**

**S.C. SUPREME COURT**

CERTIORARI TO LEXINGTON COUNTY  
Court of Common Pleas  
The Honorable Walton J. McLeod, IV, PCR Judge

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Appellate Case No. 2019–000831

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CHRISTOPHER MANNING,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**SUPPLEMENTAL APPENDIX**

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

CHRISTOPHER MANNING,

APPELLANT

---

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying appellant's motion to dismiss the case where the state violated S.C. Code Section 56-5-2953 because the arresting officer did not provide an affidavit certifying that it was physically impossible to provide a video recording as required by the statute because the person needed emergency medical treatment?
2. Did the trial court err in denying appellant's motion to suppress the blood test evidence pursuant to S.C. Code Section 56-5-2946 because there was not sufficient probable cause for an arrest which the statute requires before a blood sample can be drawn because the driver of the vehicle was not identified?
3. Did the trial court err in denying appellant's motion for a mistrial based on prejudice to appellant after the trial judge severed the felony DUI charge and the possession of a schedule three substance (hydrocodone) charge because the jury was told at the beginning of trial that appellant was being tried on both charges, and both indictments were read?
4. Did the trial court err in charging the jury on S.C. Code Section 56-5-2950 (b) which was a comment on the facts because the statute begins with: "A person who drives..." and the identification of the driver was the primary issue in the trial?

STATEMENT OF THE CASE

In November 2009, the Lexington County Grand Jury indicted Christopher D. Manning on the charge of Felony Driving Under the Influence/Death. On May 11 – 13, 2010, Manning proceeded to trial before the Honorable R. Knox McMahon and a jury. He was represented by Robert M. Masden, Esquire, and Bennett E. Casto, Esquire. The jury returned a verdict of guilty as indicted. Judge McMahon sentenced Manning to eighteen years imprisonment and a \$10,000 fine. Manning's attorney filed a notice of appeal.

## ARGUMENT

### I.

The trial court erred in denying appellant's motion to dismiss the case where the state violated S.C. Code Section 56-5-2953 because the arresting officer did not provide an affidavit certifying that it was physically impossible to provide a video recording as required by the statute because the person needed emergency medical treatment.

On July 31, 2009, Christopher Manning was working at a private club, Boondocks, as a cook. Tr. 201 – 203. Jacob Hill was working at the nearby restaurant, Fisherman's Wharf. On this day, Hill needed a ride home from work so he walked to Boondocks where he knew people because he had previously worked there. When he arrived there, he started drinking with some of his friends. Tr. 191, ll. 21 – 25; Tr. 192, ll. 1 – 25.

Manning's work shift was over by 11:00 that night, so he began mingling and hanging out with Hill and other friends drinking and socializing. This went on until around 4:00 in the morning. Tr. 204, ll. 9 – 25; Tr. 217, ll. 1 – 25.

Heather Fairchild, who was one of the bartenders that night, testified that Manning and Hill were drinking beer and shots together along with the other people. She said Manning consumed a "pretty good amount of alcohol." Tr. 206 – 208. But neither Hill nor Manning appeared to be visibly drunk. Tr. 218, ll. 1 – 25; Tr. 219, ll. 1 – 6. Manning and Hill and a young woman left the bar together, but Fairchild did not see them get in the car. However, she heard Manning say that he had his car, and he would drive. Tr. 209 – 212.

Nathan Prouse, an employee of the Lexington County Fire Service, received a call shortly before 5:00 A.M. of a vehicle accident on Highway 378 near the Saluda County line. He was the first responder to arrive at the scene. When he arrived, he saw two bodies in the

field. Tr. 103 – 107; Tr. 267 – 268. EMS arrived immediately after him, and announced that Hill was deceased. Prouse went to assist Manning who was severely injured. Tr. 270; Tr. 97 – 99.

As Prouse was talking to Manning, who appeared alert as he was speaking to Prouse and to EMS, he said that Manning kept saying: “I f---cked up!” Tr. 272, ll. 14 – 25; Tr. 273, ll. 1 – 5; Tr. 275, ll. 11 – 25; Tr. 276, ll. 1 – 25.

Three other emergency responders testified that they heard Manning say those same words: “I f---cked up!” They were: (1) Elizabeth Simmons who was an EMT, Tr. 88 – 89; Tr. 106; (2) Jerry Wise who was a volunteer with the Lexington County Fire service as an EMT, Tr. 121; ll. 20 – 25; Tr. 122, ll. 1 – 8; Tr. 127; (3) Victor Tomaino who was a volunteer fireman, Tr. 132, ll. 16 – 25; Tr. 133 – 135. Tomaino testified that he also heard Manning say that he shouldn’t have been driving. Tr. 135, ll. 1 – 9.

The forensic toxicologist, Jennifer Brown, testified that Manning’s blood alcohol level was .173. Tr. 552, ll. 1 – 25; Tr. 553, ll. 1 – 25. Hill’s blood alcohol level was .169. Tr. 560, ll. 9 – 25; Tr. 561, ll. 1 – 18.

Corporal James O’Donnell testified that he worked for the South Carolina Highway Patrol with the Multidisciplinary Accident Investigative Team (MAIT). He was qualified as an expert in the field of accident reconstruction. Tr. 563 – 564; Tr. 568. He testified that his opinion was that the vehicle was going 89 miles per hour at the time of the accident. The vehicle went into a curve but went off the shoulder of the road. The vehicle kept overturning, struck a tree, and went across a ditch where it stopped. The path was 535 feet. The accident was so violent that the engine was dislodged from the engine compartment. Tr. 581 – 585.

Hill was found lying about 50 feet from the vehicle, and Manning was found about 15 feet from the vehicle. Tr. 195, ll. 12 – 16. The state argued that Manning was the driver. Manning's defense was that Hill was the driver. Tr. 191, ll. 21 – 25; Tr. 192 – 200. Corporal O'Donnell testified there was no forensic evidence identifying the driver, and no witnesses. Tr. 614 – 615.

Defense counsel made a pretrial motion for dismissal of the case against Manning because the state violated S.C. Code Section 56-5-2953 by not providing either a video of the scene or an affidavit from the law enforcement officer indicating the reason there was no video. Counsel cited City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). The state argued that that there was no video because Manning had been transported to the hospital by the time the first responding trooper arrived. Tr. 145, ll. 1 – 25.

The judge denied defense counsel's motion. Defense counsel then argued that Section B of the statute provided that a sworn affidavit was necessary to indicate that a video recording was physically impossible because the person needed emergency medical treatment. The judge denied the motion again. Tr. 146, ll. 1 – 25; Tr. 147, ll. 1 – 3.

At the close of pretrial motions, the judge revisited this issue again before the jury was brought in. He discussed The City of Rock Hill v. Suchenski, id. and the statute. He found that the video was not required because there was no conduct to record. He said that Section B allowed the judge to consider the totality of the circumstances for the video not being produced, and he ruled that under the totality of the circumstances, 56-5-2953 did not apply to the factual situation in Manning's case. Tr. 178, ll. 22 – 25; Tr. 179 – 180.

Trooper Quest Hallman with the Highway Patrol testified that by the time he arrived at the scene of the accident, Manning had already been transported to the hospital as the ambulance passed Trooper Hallman as he was on his way to the scene. Tr. 313 – 317.

South Carolina Code Section 56-5-2953 (A) provides: “A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.” The statute identifies the requirements to be recorded:

(1) (a) The video recording at the incident site must:

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

(ii) include any field sobriety tests administered; and

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

(b) A refusal to take a field sobriety test does not constitute disobeying a police command.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2008).

In City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007), the Supreme Court ruled that dismissal of the charge of DUAC (arrest was for DUI), for the arresting officer’s failure to provide a complete videotape from the incident site was the appropriate remedy. In that case, the officer began the tape and taped two field sobriety tests but ran out of tape before the third field sobriety test was administered. The officer said it had never happened before and he did not know the tape had run out. The municipal court denied the motion to dismiss on the grounds of exigent circumstances.

On appeal, the circuit court reversed and dismissed the charge based on the violation of Section 56-5-2953(A). because a complete tape was not produced. The Supreme Court did not address the issue of exigent circumstances because the circuit court did not address it.

Section 56-5-2953(B) of the South Carolina Code (Supp. 2006) requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape. It reads:

(B) Nothing in this section may be construed as prohibiting the introduction of other evidence in the trial of a violation of Section 56-5-2930, 56-5- 2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. . . . Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2008).

In State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004), the Court of Appeals held that when a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning.

ARGUMENT

## II.

The trial court erred in denying appellant's motion to suppress the blood test evidence pursuant to S.C. Code Section 56-5-2946 because there was not sufficient probable cause for an arrest which the statute requires before a blood sample can be drawn because the driver of the vehicle was not identified.

Manning's attorney made a pretrial motion to suppress the blood test evidence taken from Manning pursuant to S.C. Code Section 56-5-2946 which provided that the "test must be administered at the direction of law enforcement who has probable cause to believe that the person violated or is under arrest for that section" or in Manning's case for felony DUI. Tr. 147, ll. 2 – 10.

Counsel argued that law enforcement did not have probable cause to support the arrest of Manning because the driver of the vehicle was unknown, and therefore the blood test could not be taken. Counsel argued that the blood test was taken around 7:00 A.M. and there were reports issued after that, around 8:00 A.M. stating that there was a driver issue because it was not known who was driving. He said that Trooper Breland issued the accident report at 8:00 A.M. stating the driver was unknown, and the coroner's report indicated they did not know who was driving. Also, the investigating officer completed the towing report showing there was a driver issue. Tr. 147 – 148.

William Zeigler was the deputy coroner who responded to the accident. Tr. 303, ll. 14 – 25; Tr. 304, ll. 1 – 25; Tr. 305, ll. 1 – 25. He testified that he was at the scene about an hour or two, and he was not able to identify the driver. He included in his report that the driver was not known. Tr. 308 – 312.

The judge held an *in camera hearing* where Trooper Quest Hallman testified as the investigating officer. Trooper Hallman received the call of the accident around 5:00 A.M. as he was on patrol. His normal procedure was to find out who the driver was. He looked at the evidence such as the seat and steering wheel position. Tr. 149 – 151.

He found a beer bottle among the debris in the field, and the vehicle had an odor of alcohol. Tr. 154, ll. 13 – Tr. 155, ll. 1 – 25. When he ran the tag on the vehicle, he found that it belonged to Manning's girlfriend, April Rabun. Heather Fairchild, the bartender at Boondocks, had told him Ms. Rabun was the girlfriend. Also, the address on Manning's license and the address on the vehicle registration were the same. Tr. 152 – 153.

Trooper Hallman sent Trooper Jeffrey B. Baker to the hospital to see Manning as Trooper Hallman was 35 miles away at the scene, and he needed to identify the driver. Tr. 151, ll. 12 – 25; Tr. 152, ll. 1 – 6. Trooper Hallman decided that Manning was the driver based on what Trooper Baker told him that he heard at the hospital, and that the vehicle belonged to Manning's girlfriend. Trooper Hallman's testimony was that Trooper Baker called him from the hospital and said Baker heard some statements when he went into the trauma area that Manning had said he was the driver, and that he and his buddy were riding to the lake. He could not remember exactly what Trooper Baker said. Tr. 152, ll. 1 – 25. He did not know who Trooper Baker heard these comments from. Tr. 154, ll. 1 – 6.

Trooper Hallman told Trooper Baker to get a blood sample since Trooper Baker heard these statements and if Trooper Baker felt that Manning was the driver. Tr. 154, ll. 7 – 12.

Trooper Hallman admitted on cross examination that the blood was drawn from Manning at 7:19 A.M. The implied consent was completed at 7:16 A.M. However, he did

not talk to the bartender, Heather Fairchild, until 9:30 A.M. There was nothing in all of the reports that Trooper Hallman collected as the case agent to give to the solicitor any statements Manning made to Trooper Baker. Tr. 156 – Tr. 157. The report from Trooper Breland of the MAIT was dated 8/1/09 at 6:40 and it said driver unknown. Tr. 158 – 159.

Trooper Hallman completed the towing report at 8:08 A.M. on August 1, 2009 which indicated there was still an issue as to who was driving the vehicle. Tr. 160 – 161. He admitted that he was not able to develop any physical evidence to show who was the driver or that indicated Manning as the driver prior to the blood being drawn other than what he said Trooper Baker told him. Tr. 161, ll. 20 – 25; Tr. 162, ll. 1 – 11.

Trooper Baker testified that he talked to Manning in the trauma unit at Richland Memorial Emergency Room. Manning smelled of alcohol, and was not very coherent. He was not sure that Manning understood the Miranda warnings because he was in and out of consciousness. When asked if Manning requested an attorney, Trooper Baker responded: “no, sir. He wasn’t very coherent.” Tr. 351 – 354; Tr. 357, ll. 10 – 25; Tr. 358, ll. 1 – 23; Tr. 380.

At the direction of Trooper Hallman, Trooper Baker arrested Manning and obtained a blood sample. Defense counsel objected based on his pretrial motion. Tr. 354 – 355.

During Trooper Baker’s testimony, defense counsel asked for a hearing on a matter of law as he wanted to clarify if Manning made any statements to Trooper Baker. The solicitor said that Trooper Baker was going to say that no statements were made to him. Tr. 358 – 359. Defense counsel argued that that created a different issue as Trooper Hallman had testified that Trooper Baker told Hallman of statements Baker had overheard. Tr. 360 – 363.

After testimony about the blood sample, defense counsel renewed his motion to suppress the blood test based on the lack of probable cause. He argued that Trooper Hallman said Trooper Baker told him he overheard statements in the trauma room that Manning was the driver of the vehicle. However, Trooper Baker denied making any statements. Tr. 416 – 417.

The solicitor said defense counsel misunderstood the testimony. The judge replayed Trooper Hallman's testimony, and recalled Trooper Baker to testify *in camera*. Tr. 418 – 425.

During this testimony, Trooper Baker testified that Manning did not make any statements to him and he did not remember any statements that the emergency first responders said that Manning made. He did not remember the specifics of his conversation with Trooper Hallman. Trooper Baker said he had no evidence that Manning was the driver other than what Trooper Hallman told him. Tr. 426 – 429.

Defense counsel renewed his objection to the blood test pursuant to 56-5-2946 based on the lack of probable cause to believe Manning was the driver, and therefore the blood sample should not have been drawn. Tr. 429 – 430. The state argued that probable cause was established through Trooper Hallman, and that Trooper Baker smelled alcohol on Manning. Tr. 431 – 433.

The judge ruled that there was sufficient probable cause to arrest Manning for the felony DUI based on the beer bottle at the scene, the statements from EMS that Manning was the driver, Trooper Baker smelling alcohol on Manning, and that the vehicle was registered to Manning's girlfriend. Tr. 433, ll. 12 – 25; Tr. 434 – 437.

S.C. Code Section 56-5-2946 provides:

Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests fo his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

The tests must be administered at the direction of a law enforcement officer who has probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

Probable cause to arrest without a warrant generally exists when facts and circumstances within an arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested. State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005). A police officer has probable cause to arrest without a warrant where he in good faith believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise. Id.

A trial court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Cuevas, *supra*.

There was not sufficient probable cause to arrest Manning because Trooper Hallman relied on statements that he said Trooper Baker allegedly heard in the trauma room that Manning was the driver. Trooper Baker testified that he never heard such statements. This information from Trooper Baker was the determining factor for probable cause for Trooper Hallman, but that evidence did not exist. Consequently, there was not sufficient evidence to establish that Manning was the driver. The information about the vehicle belonging to

Manning's girlfriend was not known until after the arrest, and Trooper Hallman relied on this for probable cause.

There was no physical evidence indicating Manning as the driver; no DNA, no fingerprints, and no witnesses. Tr. 614 – 615.

## ARGUMENT

### III.

The trial court erred in denying appellant's motion for a mistrial based on prejudice to appellant after the trial judge severed the felony DUI charge and the possession of a schedule three substance (hydrocodone) charge because the jury was told at the beginning of trial that appellant was being tried on both charges, and both indictments were read.

Manning was indicted on two charges; felony DUI and possession of a quantity of hydrocodone and acetaminophen, a schedule three controlled substance. These two indictments were read to the jury at the beginning of the trial. Tr. 1 – 10. Manning's attorney made a pretrial motion to sever the charges as the drug charge would be highly prejudicial under Rule 403, SCRE, to Manning. Tr. 73 – 75.

The trial judge did sever the two charges, after both indictments had been read to the jury, as the state explained that this drug did not show up in the drug analysis of either Manning or Hill. Tr. 174, ll. 16 – 25; Tr. 175, ll. 1 – 25; Tr. 176, ll. 1 -3. Defense counsel then asked for a mistrial because he argued that Manning was already prejudiced because both indictments were read to the jury so the jury has already heard of the drug charge. Counsel argued that whatever the judge told the jury about the drug charge would only cause them to speculate. Tr. 176, ll. 4 – 25; Tr. 177, ll. 1 – 5.

The judge said he refused to “be trapped into a mistrial.” He said that if Manning were prejudiced, it was a “self-inflicted wound.” Tr.177, ll. 6 – 25; Tr. 178, ll. 1 – 2.

Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Latimore, 390 S.C. 88, 700 S.E.2d 456 (Ct.

App. 2010); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); citing State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508 (1999). In order to receive a mistrial, a defendant must show error and resulting prejudice. It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial. State v. Culbreath, *supra*; State v. White, 371 S.C. 439, 443-44, 639 S.E.2d 160, 162 (Ct. App. 2006).

The power of the circuit court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the circuit court. State v. Latimore, *supra*, citing State v. Stanley, 365 S.C. 24, 615 S.E.2d 455, 460 (Ct. App. 2005).

Rule 403, SCRE, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Manning was prejudiced by the judge not granting a mistrial because the jury knew he had a drug charge. This was prejudicial because this charge had nothing to do with the felony DUI for which he did go to trial.

## ARGUMENT

### IV.

The trial court erred in charging the jury on S.C. Code Section 56-5-2950 (b) which was a comment on the facts because the statute begins with: "A person who drives..." and the identification of the driver was the primary issue in the trial.

When discussing the appropriate jury charges to give, the judge asked both attorneys what he should charge concerning Manning's rights under Miranda advised to him by Trooper Baker and the implied consent law, or if they wanted him to charge them at all. Defense counsel immediately said he did not want the judge to charge them at all. The state argued that in the interest of justice, the statute needed to be charged: 56-5-2950. Tr. 629.

Defense counsel objected because he argued it would be confusing to the jury and a comment on the facts because the statute starts with the words: "A person who drives. " The main issue in the case was who was driving. Tr. 630 – 631.

The judge said that since the identification of the person who actually committed this crime was an issue, he was going to charge the jury that they must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before they could convict him. Defense counsel said that he was "worried about that in context with the statute." Tr. 631, ll. 15 – 25.

The judge said he had a duty to charge the law. Tr. 632, ll. 1 – 12. The judge did charge the statute 56-5-2950 to the jury. Tr. 664.

S.C. Code Section 56-5-2950 (A) provides in part:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the

presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol or drugs or a combination of alcohol and drugs.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007).

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

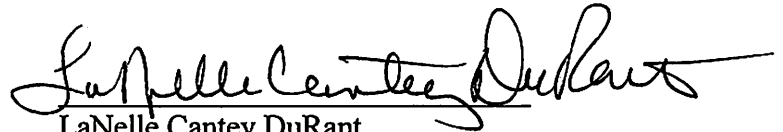
In State v. Roof, 298 S.C. 351, 380 S.E.2d 828 (1989), the appellant and his co-defendant were tried for the murder of a friend. Both defendants gave the same story. The trial judge instructed the jury that appellant's co-defendant could be found guilty of accessory after the fact, but the judge did not give that same instruction for appellant. The Supreme Court reversed appellant's case and remanded for a new trial because the Court wrote that the charge on accessory after the fact given for the co-defendant was a comment on the factual issue of witness credibility. The co-defendant testified but appellant did not. The Court cited Article V, Section 21 of the South Carolina Constitution which provides that "judges shall not charge juries in respect to matters of fact, but shall declare the law."

The trial judge's charge on the statute 56-5-2950 was a comment on the factual issue as to who was the driver of the car, since it was appellant whose case was processed under the statute rather than the decedent's. The jury could readily derive from the judge's charge that appellant was the driver.

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for a new trial on Issues II, III, IV, and for a dismissal of the charges on Issue I.

Respectfully submitted,

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of March, 2011.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Lexington County  
R. Knox McMahon, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

CHRISTOPHER MANNING,

APPELLANT

---

**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

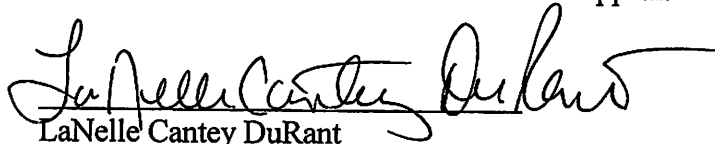
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Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) State's Exhibit 9 Implied Consent
- (3) State's Exhibit 10 Urine Collection
- (4) State's Exhibit 15 SLED's Lab Report Manning
- (5) Court's Exhibit 5 SLED Lab Report Hill
- (6) Trial Transcript Pages 1 – 10, 73 – 75, 88, 89, 97 – 99, 103 – 107, 121, 122, 127, 132 – 135, 145 – 162, 174 – 180, 191 – 204, 206 – 212, 217 – 219, 267 – 276, 303 – 305, 308 – 312, 351 – 363, 380, 416 – 437, 552, 553, 560 – 564, 568, 581 – 585, 614 – 615, 629 – 632, 635 – 693.

I certify that this designation contains no matter which is irrelevant to this appeal.

March 17th, 2011.



LaNelle Cantey DuRant

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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

CHRISTOPHER MANNING,

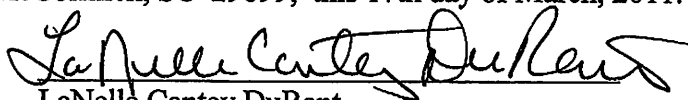
APPELLANT

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CERTIFICATE OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201; and upon Christopher Manning, #340790 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 17th day of March, 2011.

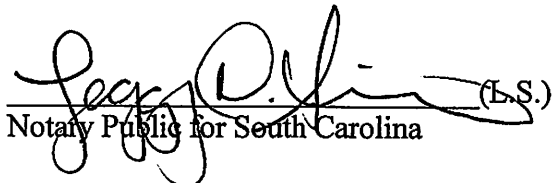


LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 17th day of March, 2011.



(L.S.)  
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal From Lexington County  
R. Knox McMahon, Circuit Court Judge

---

THE STATE,

Respondent,

vs.

CHRISTOPHER MANNING,

Appellant.

---

**INITIAL BRIEF OF RESPONDENT**

---

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## STATEMENT OF ISSUES ON APPEAL

### I.

The arresting officer was not required to provide an affidavit concerning the reason why Appellant's conduct at the scene of the accident was not videotaped where law enforcement did not arrive at the scene of the accident until after Appellant was transported to the emergency room.

### II.

Law enforcement had probable cause to believe Appellant committed felony DUI and therefore, the trial court did not err in denying the motion to suppress the blood test results.

### III.

The trial court did not err in denying Appellant's motion for mistrial and the issue is not preserved, especially since Appellant failed to timely raise his motion to sever and refused a curative instruction.

### IV.

The trial court's charge to the jury on implied consent was not a comment on the facts and the charge as a whole was not misleading and was free from error.

**STATEMENT OF THE CASE**

Appellant Manning was indicted by the Lexington County Grand Jury of Felony Driving Under the Influence resulting in Death. Manning was tried by jury on May 11-13, 2010 and convicted as charged. The Honorable R. Knox McMahon sentenced Appellant to eighteen years imprisonment.

## STATEMENT OF FACTS

Appellant Manning and his friend, Jake Hill, had drinks together after Manning finished his shift as a cook at a private bar. Manning and Jake left in Manning's SUV to go swimming. Manning crashed his SUV at a sharp curve, severely injuring himself and killing Jake.

Heather Fairchild was the first witness to testify before the jury. She was a bartender at Boondocks, a private club. She was tending bar on the night of July 31 into the morning hours of August 1, 2009. She started serving Manning around 10:30 or 11:00 p.m. that night after Manning finished his shift as a cook. Manning, Jake, and others drank together for several hours. They drank beer and shots of liquor. Fairchild testified that Manning drank a good amount of alcohol. Although she contended he was not stumbling, Fairchild testified that in her opinion, Manning was impaired that night. She testified she was familiar with the vehicle Manning drove to work and noticed it in the parking lot. Her shift ended at 4:45 a.m. Manning and Jake left shortly before then. Jake did not have a vehicle, he walked to the club that night. Manning said he had his car, and they made plans to drive to a boat ramp to go swimming. Tr. pp. 201-214.

Elizabeth Grayson Simmons from the Lexington County EMS arrived at the accident scene at 4:57 a.m. She noticed the strong smell of alcohol as she approached Manning. Manning's nose was split open and she saw a wound as big as a fist in his abdomen. She could see his intestines. A firefighter who also responded fetched a long-spine board to carry Manning from the field. Manning said "I f'ed up. I should have never done this. Look what I've done." Simmons could smell alcohol when he spoke. Tr. pp. 231-247, pp. 250-51

(direct quote: tr. p. 243, lines 18-19).

Firefighter Nathan Prouse testified that he was the first responder on the scene. The vehicle was in a field about 60 to 70 feet off the road and severely damaged. Two bodies lay in the field. EMS arrived almost simultaneously and went to Jake, quickly determining he was dead. Prouse approached Manning, who lay closer to the wreck. Prouse asked Manning if anyone else other than the victim was riding with Manning. Manning replied: "No, no, it was just me and my buddy who was riding with me. It was just me and my buddy." Tr. pp. 268-273 (direct quote: tr. p. 273, lines 17-19). Manning kept saying "I f-ed up" repeatedly. Tr. p. 275.

Another firefighter, Victor Tomaino, helped carry Manning on the spine board. He heard Manning repeatedly say "I f-ed up" and at one point, heard Manning say "I should not have been driving." Tr. p. 292. The Coroner's Office declared Jake dead, with the approximate time of death as 4:30 a.m. Tr. p. 308.

Lance Corporal Quest Hallman was the first officer on the scene of the crash, but Manning was already gone. It took Hallman about twenty-five to thirty minutes to respond to the scene, it was rainy and he was careful, but he did exceed the speed limit slightly. He arrived on the scene and could already see the reflectors of the crashed vehicle, but was directed to the vehicle by emergency personnel. Tr. pp. 315-317. Hallman explained as follows:

But . . . fire services said, hey, here's the car. They showed me the victim and said the other - the driver had been transported, which I pretty much assumed because I had passed the ambulance while I was en route to the scene.

Tr. p. 317, lines 17-21.

Jake's body was about fifty to seventy-five feet away from the wrecked vehicle. It appeared to Corporal Hallman that the vehicle left the road and flipped. The engine and transmission became unbolted from the vehicle and lay next to it. Tr. pp. 317-319. The odor of alcohol emanated from the vehicle. Hallman directed Trooper Baker to the hospital where Baker determined Manning to be the individual from the wreck. From Hallman's ensuing investigation, Hallman determined the address for Manning's driver's license and the registration for the vehicle were the same. The following testimony was elicited from Hallman in front of the jury:

Q: Okay. Now, you are still investigating this particular incident. Without going into any conversations that you had with some of these individuals, did you speak with anyone else that was still on the scene?

A: I did.

Q: Okay. During that course of – well, were you still investigating this incident to determine who was the driver?

A: Yes, sir.

Q: Okay. And after speaking with them and conducting your investigation, did you ultimately charge Mr. Christopher Manning –

A: I did.

Q: – with felony D.U.I.?

A: I did.

Tr. p. 337, line 11 - p. 338, line 1.

Manning was not in Corporal Hallman's presence at the time, so he directed Trooper

Baker, who was at the hospital, to have Manning's blood drawn. Tr. p. 338. Corporal Hallman explained why he directed Trooper Baker to do this as follows: "In my experience and my determination, I determined him as the driver of the vehicle. And with there being a death involved, a legal blood sample was drawn. . . ." Tr. p. 338, lines 16-21.

Manning's blood alcohol content was .173%. Tr. p. 553. As the forensic toxicologist testified, at this level of intoxication, an individual's reaction time would be slowed, there vision would be impaired, and their judgment adversely affected. Tr. pp. 553-554.

Corporal James O'Donnell of the South Carolina Highway Patrol testified as an expert in accident reconstruction. He determined that the vehicle veered off to the right of a left hand curve, traveled on the shoulder, struck a culvert, became airborne and flipped several times, ultimately traveling about 535 feet from where it left the road to the resting spot. The vehicle was going about 89 m.p.h. when it reached the curve. O'Donnell noted that the driver has more obstacles than a passenger would to keep from being ejected. He also testified that the steering wheel could have caused Manning's injuries in the abdomen. Tr. pp. 568-584; pp. 603-605.

Manning did not testify or call any witnesses in his defense.

## ARGUMENT

### I.

**The arresting officer was not required to provide an affidavit concerning the reason why Appellant's conduct at the scene of the accident was not videotaped where law enforcement did not arrive at the scene of the accident until after Appellant was transported to the emergency room.**

Appellant Manning argues that his felony DUI charge should have been dismissed because the arresting officer should have provided an affidavit concerning the failure to videotape Manning's conduct at the incident sight. Manning misconstrues the statute. Videotaping was not required because law enforcement did not arrive at the incident site until after Manning was transported to the hospital. Manning's argument fails because no part of the statute applies where a defendant leaves the incident site before law enforcement arrives.<sup>1</sup> Since Manning allowed himself to be taken to the hospital for treatment before law enforcement arrived, law enforcement was not required to execute an affidavit.

Under S.C. Code Ann. § 56-5-2953:

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the

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<sup>1</sup> In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers. D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 482 S.E.2d 558 (1997) *overruled on other grounds by* Evins v. Richland County Historic Preservation Comm., 341 S.C. 15, 532 S.E.2d 876 (2000).

breath test site video recorded.

(1)(a) The video recording at the incident site must:

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

In the instant case, since law enforcement arrived after Manning left the incident site, blue lights were activated, if at all, after Manning left. There was no conduct to videotape at the incident site. The statute does not apply in the instant case.

Further, Manning misconstrues the requirements to meet the exceptions found in § 56-5-2953(B), which are set out as follows:

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video equipment at the time of the arrest or probable cause determination, . . . was in an inoperable condition, . . . , in the alternative, submits a sworn affidavit that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of circumstances; .

...

The videotaping was not done at the incident site because Manning was not there. Under the plain language of the statute, the arresting officer is required to submit an affidavit when videotaping is not performed only if: (1) videotaping equipment is inoperable, (2) the person needed emergency medical treatment, or (3) exigent circumstances existed.

The problem was not that the equipment was inoperable, so that provision does not apply. Law enforcement was never in a position to determine, first hand, whether Manning needed emergency medical treatment or whether another exigent circumstance existed; therefore, the arresting officer is not required to submit an affidavit concerning a subject to which neither he nor other law enforcement officers have first hand knowledge. Manning is in a superior position to determine if emergency medical treatment was needed, because he was there. By the time law enforcement arrived, there was no conduct to record. Manning allowed himself to be taken from the scene by emergency personnel.

The facts of the case are more aligned with the next set of enumerated exceptions, where the blue lights are not activated due to road blocks, traffic accident investigations, and citizen arrests, and where video taping is required once practicable. Perhaps most closely related is the citizen arrest exception, since Manning was removed by individuals other than law enforcement. In the instant case, video recording never became practicable at the site, since Manning was not there, and therefore video taping never needed to begin.

However, the totality of circumstances exception certainly applies to the instant case. Under the totality of circumstances, a video tape was not required because law enforcement was not at the incident site before Manning allowed himself to be taken away, and the blue lights were not activated.

Manning's reliance on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) is misplaced. In that case, as Manning concedes, the Supreme Court did not review whether the totality of circumstances exception applied, as determined by the magistrate, because the reviewing circuit court did not address the issue in its order and the City failed to preserve the issue. In the instant case, the totality of circumstances issue applies and, further, the statute only applies when the defendant is found at the incident site, not when he has absconded or was already taken away by medical personnel. Accordingly, the trial court did not err.

## II.

**Law enforcement had probable cause to believe Applicant committed felony DUI and therefore, the trial court did not err in denying the motion to suppress the blood test results.**

Manning alleges that law enforcement did not have probable cause to believe Manning was the driver of the vehicle. However, evidence at trial shows otherwise. S.C. Code Ann. § 56-5-2946 provides, in relevant part, as follows:

Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

Corporal Hallman testified that when he arrived at the scene, a strong smell of alcohol emanated from what remained of the vehicle. At the hospital, Trooper Baker smelled the odor of alcohol on Manning. Tr. pp. 353-354. Jake was undoubtedly dead. Corporal Hallman spoke with the emergency personnel who heard Manning's comments implicating himself as the driver. Tr. pp. 337-338.<sup>2</sup> The DMV records tied the vehicle to Manning's residence.<sup>3</sup>

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<sup>2</sup> There was some confusion as to whether emergency personnel relayed this information to Baker or Hallman or both. See tr. p. 152, p. 154, p. 355, pp. 426-428. However, whether thru direct conversation with emergency personnel or relayed by Baker, it is apparent that Hallman became aware that emergency personnel heard statements indicating Manning was the driver when determining that Manning's blood should be taken.

<sup>3</sup> Manning claims in his brief that Hallman was not aware of the matching addresses at the time he requested Baker to get the blood test. However, Hallman testified he had this information at the time he determined probable cause. Tr. p.

This Court should apply a deferential standard, reversing only where the trial court's ruling is not supported by evidence found in the record. See State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (setting out the standard that should be applied for motions to suppress on Fourth Amendment grounds). The trial court's factual findings that relate to this analysis should be reviewed for clear error only. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000) (finding review of Fourth Amendment issue that was largely a question of fact should be reviewed like any other trial court's factual findings and should be reversed only if there is clear error).

"Probable cause to arrest without a warrant generally exists when facts and circumstances within an arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested." State v. Cuevas, 365 S.C. 198, 203, 616 S.E.2d 718, 721 (Ct. App. 2005) (citation omitted).

"Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officers disposal." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911 (1996). "Probable cause turns not on the individual's actual guilt or innocence, but on whether the facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of the crime." Jackson v. City of Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005). "The determination of probable cause is not an academic exercise in hindsight." Id., 366 S.C. at 667, 623 S.E.2d at 659.

"The term 'probable cause' does not import absolute certainty." State v. Arnold, 319

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163, lines 4-10, p. 165, lines 3-4.

S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1996). "Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities, not certainties." *Id.* "A finding of probable cause may be based upon less evidence than would be necessary to support a conviction." Lapp v. South Carolina Dept. of Motor Vehicles, 387 S.C. 500, 692 S.E.2d 565 (Ct. App. 2010).

"In other words, a police officer has probable cause to arrest without a warrant where he in good faith believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise." Cuevas, 335 S.C. at 204, 616 S.E.2d at 721 (Internal quotations and citations omitted).

Abundant information supported Corporal Hallman's determination of probable cause. Manning and the wreck smelled of alcohol, and the address for his driver's license and the registration were identical. That alone should be sufficient for probable cause. However, evidence supports that Corporal Hallman was informed that Manning indicated to emergency personnel that he was the driver, adding further evidence for Hallman to establish probable cause.

The information within Corporal Hallman's knowledge was sufficient to establish probable cause and the evidence in the record supports the trial court's ruling. Accordingly, the ruling should be affirmed.

## III.

**The trial court did not err in denying Appellant's motion for mistrial and the issue is not preserved, especially since Appellant failed to timely raise his motion to sever and refused a curative instruction.**

Manning committed two crimes that night. When he was arrested, he was in possession of a quantity of hydrocodone and acetaminophen, a schedule three controlled substance. Manning waited until after both indictments were read to the jury to move to sever the two charges. The trial court granted the severance. The trial court offered to give an instruction to the jury to disregard the severed charge. Seemingly as an afterthought, Manning moved for a mistrial. After the trial court denied the mistrial motion, Manning declined the instruction. Yet Manning claims reading both indictments prejudiced him. The issue should not be reviewed.

An issue is not preserved for review unless a contemporaneous objection is made to and ruled upon by the trial court. State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). A party cannot complain of court error created by his own conduct. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984). The Court of Appeals does not sit to relieve self-inflicted wounds. Rish v. Rish by and Through Barry, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988) (Bell, J., concurring).

Further, an issue is not preserved when the trial court's offer of a curative instruction is refused. State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996); see State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct. App. 1996) ("In rejecting the trial court's offer to strike the testimony or give a curative instruction, [the defendant] waived any

complaint he had to the challenged testimony”).

Manning waited for the indictments to be read before raising his challenge. Then he wanted a mistrial for the indictments being read to the jury. His objection to the reading of the indictments is too late, his alleged injury was self-inflicted. The trial court ruled as follows:

Well, I'm not going to get trapped into a mistrial. In that regard then, we're going to go forward. Now, you are not going to have it both ways. Either you want to go forward or you don't.

You didn't make that motion before the jury was qualified, and the Court is not going to be trapped like that. I'll be glad to give whatever instruction you want me to give them, but the case was called for trial in front of the Court. It was qualified.

There were no motions at the time, except one y'all brought up to me in chambers on the continuance. So if it prejudiced him, that's a self-inflicted wound. **That's not a wound inflicted by the State or by this Court.**

I'm not here to inflict any wounds on either the State nor the Defendant. I'll charge whatever you want in regard to that or I'll say nothing, but I don't see where it's – where the court could respond like that.

Tr. p. 177, lines 6-24 (emphasis added).

The trial court did not abuse its discretion. “A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons.” State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). “The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way.” State v. Dempsey, 340 S.C. 565, 570,

532 S.E.2d 306, 309 (Ct. App. 2000). "A mistrial should only be granted when 'absolutely necessary,' and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

In the instant case, Manning cannot show prejudice. If Manning thought he was going to be prejudiced by going forward on the felony DUI charge, he would have accepted the offer for an instruction. Instead, as evidenced by Manning declining the instruction, Manning must have thought it was more likely the jury would not focus on the severed charge and did not want to call further attention to the matter. Manning cannot show prejudice. Further, mistrial was not dictated by manifest necessity. The jury had ample evidence to convict Manning for felony DUI and there is no doubt that he was convicted on the evidence presented to the jury at trial, and not a pretrial event. See generally, State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior [crimes] is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes").

Accordingly, the trial court did not commit error.

## IV.

**The trial court's charge to the jury on implied consent was not a comment on the facts and the charge as a whole was not misleading and was free from error.**

The trial court charged the exact language of the implied consent statute, S.C. Code Ann. § 56-5-2950 and Manning complains it was error as a comment on the facts. Even viewed in isolation, the jury was certain to understand that it was not a comment on the facts and understood its duty to make its own factual determination that Manning was the driver. However, looking at the charge as a whole, the trial court clearly charged the jury with the duty to determine if they were convinced beyond a reasonable doubt that Manning was the driver from their own view of the evidence.

The trial court included on its charge on the elements of felony DUI the following: "Felony D.U.I. requires proof of three elements: Number one, **the actor drives a vehicle** while under the influence of alcohol and/or drugs; . . ." Tr. p. 652, lines 1-3 (emphasis added). The trial court further instructed the jury as follows:

In every case tried in this court before a jury, the jury becomes the sole and exclusive judge of the facts in a case. A trial judge cannot intimate, state, comment on or make any statement to a trial jury about the facts in the case.

Since you the jury are the sole judge of the facts, you are not to infer from what I have said during the progress of this trial, in ruling upon the admissibility of evidence or otherwise, or anything that I now say during the course of this instruction to you that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case.

That is a matter solely for you the jury to determine. As jurors it is your duty to determine the effect, the value, the weight, and the truth of the evidence presented during this trial.

Tr. p. 655, line 24 - p. 656, line 15.

The trial court again charged the elements of felony DUI as follows:

... The State must first prove beyond a reasonable doubt that the Defendant drove a vehicle in this State while under the influence of alcohol and/or drugs.

An issue in this case is the identification of the Defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you may convict the Defendant.

The State must further prove beyond a reasonable doubt that the Defendant drove a vehicle while under the influence of alcohol and/or drugs. . . .

Tr. p. 661, lines 9-23.

In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987).

Article V, §21 of the South Carolina Constitution states: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." South Carolina law dictates a trial judge should refrain from any comment which tends to indicate to the jury his opinion

on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused. State v. Jackson, 297 S.C. 523, 377 S.E.2d 570, 572 (1989); State v. Smith, 288 S.C. 329, 342 S.E.2d 600, 601 (1986). However, jury instructions must be considered in their entirety and, if in their entirety they are free from error, then any potentially misleading portions do not constitute reversible error. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869, 874 (1994); Jackson, 377 S.E.2d at 572.

“A charge that states the legal conclusions that would result from the establishment of certain facts is not necessarily an improper charge, nor a mandate to the jury to assume the truth of the facts as stated.” State v. Dickey, 380 S.C. 384, 402, 669 S.E.2d 917, 927 (Ct. App. 2008). “The test is how a reasonable juror would have understood the charge.” Id.

In the instant case, the trial court charged the exact language of the statute and did not intimate his belief as to whether Manning was in fact the driver. His instructions as a whole clearly require the jury to make their own decision on whether evidence proved beyond a reasonable doubt that Manning was the driver. The instructions in their entirety were not misleading and were free from error. Accordingly, the trial court did not err.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 30, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal From Lexington County  
R. Knox McMahon, Circuit Court Judge  
\_\_\_\_\_

THE STATE,

Respondent,

vs.

CHRISTOPHER MANNING,

Appellant.  
\_\_\_\_\_

**DESIGNATION OF MATTER  
TO BE INCLUDED IN THE RECORD ON APPEAL**  
\_\_\_\_\_

Respondent proposes the following to be included in the Record on Appeal in addition to matter designated by Appellant:

Tr. pp. 83-187; pp. 201-219; pp. 223-259; pp. 265-321; pp. 328-358; pp. 368-414; pp. 416-438; pp. 443-472; pp. 477-498; pp. 544-585; pp. 587-616; pp. 627-632.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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SALLEY W. ELLIOTT  
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ATTORNEYS FOR RESPONDENT

June 30, 2011

## STATE OF SOUTH CAROLINA

## IN THE COURT OF APPEALS

---

Appeal From Lexington County  
R. Knox McMahon, Circuit Court Judge

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THE STATE,

Respondent,

vs.

CHRISTOPHER MANNING,

Appellant.

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**PROOF OF SERVICE**

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I, Norma Bigbee, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

I further certify that all parties required by Rule to be served have been served.

This 30th day of June, 2011

  
NORMA BIGBEE  
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

CHRISTOPHER MANNING,

APPELLANT

---

FINAL BRIEF OF APPELLANT

---

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying appellant's motion to dismiss the case where the state violated S.C. Code Section 56-5-2953 because the arresting officer did not provide an affidavit certifying that it was physically impossible to provide a video recording as required by the statute because the person needed emergency medical treatment?
2. Did the trial court err in denying appellant's motion to suppress the blood test evidence pursuant to S.C. Code Section 56-5-2946 because there was not sufficient probable cause for an arrest which the statute requires before a blood sample can be drawn because the driver of the vehicle was not identified?
3. Did the trial court err in denying appellant's motion for a mistrial based on prejudice to appellant after the trial judge severed the felony DUI charge and the possession of a schedule three substance (hydrocodone) charge because the jury was told at the beginning of trial that appellant was being tried on both charges, and both indictments were read?
4. Did the trial court err in charging the jury on S.C. Code Section 56-5-2950 (b) which was a comment on the facts because the statute begins with: "A person who drives..." and the identification of the driver was the primary issue in the trial?

STATEMENT OF THE CASE

In November 2009, the Lexington County Grand Jury indicted Christopher D. Manning on the charge of Felony Driving Under the Influence/Death. On May 11 – 13, 2010, Manning proceeded to trial before the Honorable R. Knox McMahon and a jury. He was represented by Robert M. Masden and Bennett E. Casto. The jury returned a verdict of guilty as indicted. Judge McMahon sentenced Manning to eighteen years imprisonment and a \$10,000 fine. Manning's attorney filed a notice of appeal.

## ARGUMENT

### I.

The trial court erred in denying appellant's motion to dismiss the case where the state violated S.C. Code Section 56-5-2953 because the arresting officer did not provide an affidavit certifying that it was physically impossible to provide a video recording as required by the statute because the person needed emergency medical treatment.

On July 31, 2009, Christopher Manning was working at a private club, Boondocks, as a cook. R. 129 – 131. Jacob Hill was working at the nearby restaurant, Fisherman's Wharf. On this day, Hill needed a ride home from work so he walked to Boondocks where he knew people because he had previously worked there. When he arrived there, he started drinking with some of his friends. R. 119, ll. 21 – 25; R. 120, ll. 1 – 25.

Manning's work shift was over by 11:00 that night, so he began mingling and hanging out with Hill and other friends drinking and socializing. This went on until around 4:00 in the morning. R. 132, ll. 9 – 25; R. 145, ll. 1 – 25.

Heather Fairchild, who was one of the bartenders that night, testified that Manning and Hill were drinking beer and shots together along with the other people. She said Manning consumed a "pretty good amount of alcohol." R. 134 – 136. But neither Hill nor Manning appeared to be visibly drunk. R. 146, ll. 1 – 25; R. 147, ll. 1 – 6. Manning and Hill and a young woman left the bar together, but Fairchild did not see them get in the car. However, she heard Manning say that he had his car, and he would drive. R. 137 – 140.

Nathan Prouse, an employee of the Lexington County Fire Service, received a call shortly before 5:00 A.M. of a vehicle accident on Highway 378 near the Saluda County line. He was the first responder to arrive at the scene. When he arrived, he saw two bodies in the

field. R. 34 – 38; R. 187 – 188. EMS arrived immediately after him, and announced that Hill was deceased. Prouse went to assist Manning who was severely injured. R. 190; R. 28 – 30.

As Prouse was talking to Manning, who appeared alert as he was speaking to Prouse and to EMS, he said that Manning kept saying: “I f---cked up!” R. 192, ll. 14 – 25; R. 193, ll. 1 – 5; R. 195, ll. 11 – 25; R. 196, ll. 1 – 25.

Three other emergency responders testified that they heard Manning say those same words: “I f---cked up!” They were: (1) Elizabeth Simmons who was an EMT, R. 19 – 20; R. 37; (2) Jerry Wise who was a volunteer with the Lexington County Fire service as an EMT, R. 52; ll. 20 – 25; R. 53, ll. 1 – 8; R. 58; (3) Victor Tomaino who was a volunteer fireman, R. 63, ll. 16 – 25; R. 64 – 66. Tomaino testified that he also heard Manning say that he shouldn’t have been driving. R. 66, ll. 1 – 9.

The forensic toxicologist, Jennifer Brown, testified that Manning’s blood alcohol level was .173. R. 408, ll. 1 – 25; R. 409, ll. 1 – 25. Hill’s blood alcohol level was .169. R. 416, ll. 9 – 25; R. 417, ll. 1 – 18.

Corporal James O’Donnell testified that he worked for the South Carolina Highway Patrol with the Multidisciplinary Accident Investigative Team (MAIT). He was qualified as an expert in the field of accident reconstruction. R. 419 – 420; R. 568. He testified that his opinion was that the vehicle was going 89 miles per hour at the time of the accident. The vehicle went into a curve but went off the shoulder of the road. The vehicle kept overturning, struck a tree, and went across a ditch where it stopped. The path was 535 feet. The accident was so violent that the engine was dislodged from the engine compartment. R. 437 – 441.

Hill was found lying about 50 feet from the vehicle, and Manning was found about 15 feet from the vehicle. R. 123, ll. 12 – 16. The state argued that Manning was the driver. Manning’s defense was that Hill was the driver. R. 119, ll. 21 – 25; R. 120 – 128. Corporal O’Donnell testified there was no forensic evidence identifying the driver, and no witnesses. R. 469 – 470.

Defense counsel made a pretrial motion for dismissal of the case against Manning because the state violated S.C. Code Section 56-5-2953 by not providing either a video of the scene or an affidavit from the law enforcement officer indicating the reason there was no video. Counsel cited City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). The state argued that that there was no video because Manning had been transported to the hospital by the time the first responding trooper arrived. R. 76, ll. 1 – 25.

The judge denied defense counsel’s motion. Defense counsel then argued that Section B of the statute provided that a sworn affidavit was necessary to indicate that a video recording was physically impossible because the person needed emergency medical treatment. The judge denied the motion again. R. 77, ll. 1 – 25; R. 78, ll. 1 – 3.

At the close of pretrial motions, the judge revisited this issue again before the jury was brought in. He discussed The City of Rock Hill v. Suchenski, id. and the statute. He found that the video was not required because there was no conduct to record. He said that Section B allowed the judge to consider the totality of the circumstances for the video not being produced, and he ruled that under the totality of the circumstances, 56-5-2953 did not apply to the factual situation in Manning’s case. R. 109, ll. 22 – 25; R. 110 – 111.

Trooper Quest Hallman with the Highway Patrol testified that by the time he arrived at the scene of the accident, Manning had already been transported to the hospital as the ambulance passed Trooper Hallman as he was on his way to the scene. R. 233 – 237.

South Carolina Code Section 56-5-2953 (A) provides: “A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.” The statute identifies the requirements to be recorded:

- (1) (a) The video recording at the incident site must:
  - (i) not begin later than the activation of the officer’s blue lights;
  - (ii) include any field sobriety tests administered; and
  - (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.
- (b) A refusal to take a field sobriety test does not constitute disobeying a police command.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2008).

In City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007), the Supreme Court ruled that dismissal of the charge of DUAC (arrest was for DUI), for the arresting officer’s failure to provide a complete videotape from the incident site was the appropriate remedy. In that case, the officer began the tape and taped two field sobriety tests but ran out of tape before the third field sobriety test was administered. The officer said it had never happened before and he did not know the tape had run out. The municipal court denied the motion to dismiss on the grounds of exigent circumstances.

On appeal, the circuit court reversed and dismissed the charge based on the violation of Section 56-5-2953(A).because a complete tape was not produced. The Supreme Court did not address the issue of exigent circumstances because the circuit court did not address it.

Section 56-5-2953(B) of the South Carolina Code (Supp. 2006) requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape. It reads:

(B) Nothing in this section may be construed as prohibiting the introduction of other evidence in the trial of a violation of Section 56-5-2930, 56-5- 2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. . . . Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2008).

In State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004), the Court of Appeals held that when a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning.

The statute is clear that the failure of the arresting officer to produce the video recording would not result in dismissal of the charge **IF** the officer submits a sworn affidavit certifying why the recording was not provided. In Manning's case, no affidavit was produced even when the specific reason for emergency medical treatment is stated in the statute. Therefore, according to the ruling in City of Rock Hill v. Suchenski, *supra*, the charge should have been dismissed because the Supreme Court said that 59-5-2953 provides for a dismissal of the charges when the statute was inexcusably violated.

The Supreme Court found in the Suchenski, *supra*, case, that under Section 56-5-2953, a violation of the statute with no mention of prejudice, may result in dismissal of the charges.

Manning's charge should have been dismissed by the trial judge.

## ARGUMENT

### II.

The trial court erred in denying appellant's motion to suppress the blood test evidence pursuant to S.C. Code Section 56-5-2946 because there was not sufficient probable cause for an arrest which the statute requires before a blood sample can be drawn because the driver of the vehicle was not identified.

Manning's attorney made a pretrial motion to suppress the blood test evidence taken from Manning pursuant to S.C. Code Section 56-5-2946 which provided that the "test must be administered at the direction of law enforcement who has probable cause to believe that the person violated or is under arrest for that section" or in Manning's case for felony DUI. R. 78, ll. 2 – 10.

Counsel argued that law enforcement did not have probable cause to support the arrest of Manning because the driver of the vehicle was unknown, and therefore the blood test could not be taken. Counsel argued that the blood test was taken around 7:00 A.M. and there were reports issued after that, around 8:00 A.M. stating that there was a driver issue because it was not known who was driving. He said that Trooper Breland issued the accident report at 8:00 A.M. stating the driver was unknown, and the coroner's report indicated they did not know who was driving. Also, the investigating officer completed the towing report showing there was a driver issue. R. 78 – 79.

William Zeigler was the deputy coroner who responded to the accident. R. 223, ll. 14 – 25; R. 224, ll. 1 – 25; R. 225, ll. 1 – 25. He testified that he was at the scene about an hour or two, and he was not able to identify the driver. He included in his report that the driver was not known. R. 228 – 232.

The judge held an *in camera hearing* where Trooper Quest Hallman testified as the investigating officer. Trooper Hallman received the call of the accident around 5:00 A.M. as he was on patrol. His normal procedure was to find out who the driver was. He looked at the evidence such as the seat and steering wheel position. R. 80 – 82.

He found a beer bottle among the debris in the field, and the vehicle had an odor of alcohol. R. 85, ll. 13 – R. 86, ll. 1 – 25. When he ran the tag on the vehicle, he found that it belonged to Manning's girlfriend, April Rabun. Heather Fairchild, the bartender at Boondocks, had told him Ms. Rabun was the girlfriend. Also, the address on Manning's license and the address on the vehicle registration were the same. R. 83 – 84.

Trooper Hallman sent Trooper Jeffrey B. Baker to the hospital to see Manning as Trooper Hallman was 35 miles away at the scene, and he needed to identify the driver. R. 82, ll. 12 – 25; R. 83, ll. 1 – 6. Trooper Hallman decided that Manning was the driver based on what Trooper Baker told him that he heard at the hospital, and that the vehicle belonged to Manning's girlfriend. Trooper Hallman's testimony was that Trooper Baker called him from the hospital and said Baker heard some statements when he went into the trauma area that Manning had said he was the driver, and that he and his buddy were riding to the lake. He could not remember exactly what Trooper Baker said. R. 83, ll. 1 – 25. He did not know who Trooper Baker heard these comments from. R. 85, ll. 1 – 6.

Trooper Hallman told Trooper Baker to get a blood sample since Trooper Baker heard these statements and if Trooper Baker felt that Manning was the driver. R. 85, ll. 7 – 12.

Trooper Hallman admitted on cross examination that the blood was drawn from Manning at 7:19 A.M. The implied consent was completed at 7:16 A.M. However, he did

not talk to the bartender, Heather Fairchild, until 9:30 A.M. There was nothing in all of the reports that Trooper Hallman collected as the case agent to give to the solicitor any statements Manning made to Trooper Baker. R. 87 – R. 88. The report from Trooper Breland of the MAIT was dated 8/1/09 at 6:40 and it said driver unknown. R. 89 – 90.

Trooper Hallman completed the towing report at 8:08 A.M. on August 1, 2009 which indicated there was still an issue as to who was driving the vehicle. R. 91 – 92. He admitted that he was not able to develop any physical evidence to show who was the driver or that indicated Manning as the driver prior to the blood being drawn other than what he said Trooper Baker told him. R. 92, ll. 20 – 25; R. 93, ll. 1 – 11.

Trooper Baker testified that he talked to Manning in the trauma unit at Richland Memorial Emergency Room. Manning smelled of alcohol, and was not very coherent. He was not sure that Manning understood the Miranda warnings because he was in and out of consciousness. When asked if Manning requested an attorney, Trooper Baker responded: “no, sir. He wasn’t very coherent.” R. 265 – 268; R. 271, ll. 10 – 25; R. 272, ll. 1 – 23; R. 290.

At the direction of Trooper Hallman, Trooper Baker arrested Manning and obtained a blood sample. Defense counsel objected based on his pretrial motion. R. 268 – 269.

During Trooper Baker’s testimony, defense counsel asked for a hearing on a matter of law as he wanted to clarify if Manning made any statements to Trooper Baker. The solicitor said that Trooper Baker was going to say that no statements were made to him. R. 272 – 273. Defense counsel argued that that created a different issue as Trooper Hallman had testified that Trooper Baker told Hallman of statements Baker had overheard. R. 274 – 277.

After testimony about the blood sample, defense counsel renewed his motion to suppress the blood test based on the lack of probable cause. He argued that Trooper Hallman said Trooper Baker told him he overheard statements in the trauma room that Manning was the driver of the vehicle. However, Trooper Baker denied making any statements. R. 325 – 326.

The solicitor said defense counsel misunderstood the testimony. The judge replayed Trooper Hallman's testimony, and recalled Trooper Baker to testify *in camera*. R. 327 – 334.

During this testimony, Trooper Baker testified that Manning did not make any statements to him and he did not remember any statements that the emergency first responders said that Manning made. He did not remember the specifics of his conversation with Trooper Hallman. Trooper Baker said he had no evidence that Manning was the driver other than what Trooper Hallman told him. R. 335 – 338.

Defense counsel renewed his objection to the blood test pursuant to 56-5-2946 based on the lack of probable cause to believe Manning was the driver, and therefore the blood sample should not have been drawn. R. 338 – 339. The state argued that probable cause was established through Trooper Hallman, and that Trooper Baker smelled alcohol on Manning. R. 340 – 342.

The judge ruled that there was sufficient probable cause to arrest Manning for the felony DUI based on the beer bottle at the scene, the statements from EMS that Manning was the driver, Trooper Baker smelling alcohol on Manning, and that the vehicle was registered to Manning's girlfriend. R. 342, ll. 12 – 25; R. 343 – 346.

S.C. Code Section 56-5-2946 provides:

Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests for his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

The tests must be administered at the direction of a law enforcement officer who has probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

Probable cause to arrest without a warrant generally exists when facts and circumstances within an arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested. State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005). A police officer has probable cause to arrest without a warrant where he in good faith believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise. Id.

A trial court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Cuevas, supra.

There was not sufficient probable cause to arrest Manning because Trooper Hallman relied on statements that he said Trooper Baker allegedly heard in the trauma room that Manning was the driver. Trooper Baker testified that he never heard such statements. This information from Trooper Baker was the determining factor for probable cause for Trooper Hallman, but that evidence did not exist. Consequently, there was not sufficient evidence to establish that Manning was the driver. The information about the vehicle belonging to

Manning's girlfriend was not known until after the arrest, and Trooper Hallman relied on this for probable cause.

There was no physical evidence indicating Manning as the driver; no DNA, no fingerprints, and no witnesses. R. 469 – 470.

## ARGUMENT

### III.

The trial court erred in denying appellant's motion for a mistrial based on prejudice to appellant after the trial judge severed the felony DUI charge and the possession of a schedule three substance (hydrocodone) charge because the jury was told at the beginning of trial that appellant was being tried on both charges, and both indictments were read.

Manning was indicted on two charges; felony DUI and possession of a quantity of hydrocodone and acetaminophen, a schedule three controlled substance. These two indictments were read to the jury at the beginning of the trial. R. 1 – 10. Manning's attorney made a pretrial motion to sever the charges as the drug charge would be highly prejudicial under Rule 403, SCRE, to Manning. R. 11 – 13.

The trial judge did sever the two charges, after both indictments had been read to the jury, as the state explained that this drug did not show up in the drug analysis of either Manning or Hill. R. 105, ll. 16 – 25; R. 106, ll. 1 – 25; R. 107, ll. 1 -3. Defense counsel then asked for a mistrial because he argued that Manning was already prejudiced because both indictments were read to the jury so the jury has already heard of the drug charge. Counsel argued that whatever the judge told the jury about the drug charge would only cause them to speculate. R. 107, ll. 4 – 25; R. 108, ll. 1 – 5.

The judge said he refused to “be trapped into a mistrial.” He said that if Manning were prejudiced, it was a “self-inflicted wound.” R. 108, ll. 6 – 25; R. 109, ll. 1 – 2.

Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Latimore, 390 S.C. 88, 700 S.E.2d 456 (Ct.

App. 2010); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); citing State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508 (1999). In order to receive a mistrial, a defendant must show error and resulting prejudice. It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial. State v. Culbreath, *supra*; State v. White, 371 S.C. 439, 443-44, 639 S.E.2d 160, 162 (Ct. App. 2006).

The power of the circuit court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the circuit court. State v. Latimore, *supra*, citing State v. Stanley, 365 S.C. 24, 615 S.E.2d 455, 460 (Ct. App. 2005).

Rule 403, SCRE, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Manning was prejudiced by the judge not granting a mistrial because the jury knew he had a drug charge. This was prejudicial because this charge had nothing to do with the felony DUI for which he did go to trial.

## ARGUMENT

### IV.

The trial court erred in charging the jury on S.C. Code Section 56-5-2950 (b) which was a comment on the facts because the statute begins with: "A person who drives..." and the identification of the driver was the primary issue in the trial.

When discussing the appropriate jury charges to give, the judge asked both attorneys what he should charge concerning Manning's rights under Miranda advised to him by Trooper Baker and the implied consent law, or if they wanted him to charge them at all. Defense counsel immediately said he did not want the judge to charge them at all. The state argued that in the interest of justice, the statute needed to be charged: 56-5-2950. R. 474.

Defense counsel objected because he argued it would be confusing to the jury and a comment on the facts because the statute starts with the words: "A person who drives. " The main issue in the case was who was driving. R. 475 – 476.

The judge said that since the identification of the person who actually committed this crime was an issue, he was going to charge the jury that they must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before they could convict him. Defense counsel said that he was "worried about that in context with the statute." R. 476, ll. 15 – 25.

The judge said he had a duty to charge the law. R. 477, ll. 1 – 12. The judge did charge the statute 56-5-2950 to the jury. R. 507.

S.C. Code Section 56-5-2950 (A) provides in part:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the

presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol or drugs or a combination of alcohol and drugs.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007).

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

In State v. Roof, 298 S.C. 351, 380 S.E.2d 828 (1989), the appellant and his co-defendant were tried for the murder of a friend. Both defendants gave the same story. The trial judge instructed the jury that appellant's co-defendant could be found guilty of accessory after the fact, but the judge did not give that same instruction for appellant. The Supreme Court reversed appellant's case and remanded for a new trial because the Court wrote that the charge on accessory after the fact given for the co-defendant was a comment on the factual issue of witness credibility. The co-defendant testified but appellant did not. The Court cited Article V, Section 21 of the South Carolina Constitution which provides that "judges shall not charge juries in respect to matters of fact, but shall declare the law."

The trial judge's charge on the statute 56-5-2950 was a comment on the factual issue as to who was the driver of the car, since it was appellant whose case was processed under the statute rather than the decedent's. The jury could readily derive from the judge's charge that appellant was the driver.

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for a new trial on Issues II, III, IV, and for a dismissal of the charges on Issue I.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Carney DuRant".

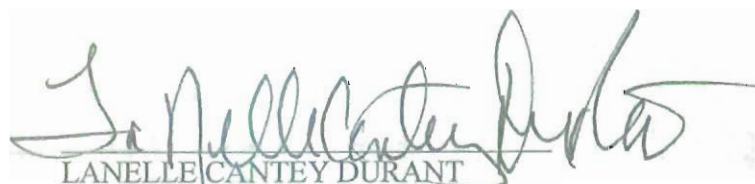
LaNelle Carney DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of August, 2011.

## CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

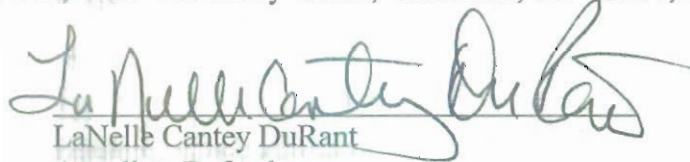
V.

CHRISTOPHER MANNING,

APPELLANT

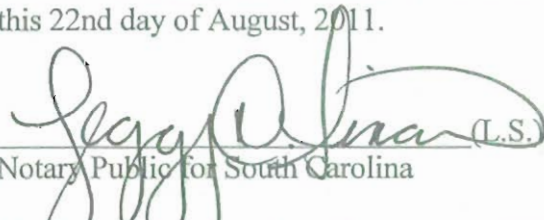
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon David Spencer, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 22nd day of August, 2011.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 22nd day of August, 2011.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal From Lexington County  
R. Knox McMahon, Circuit Court Judge

---

THE STATE,

Respondent,

vs.

CHRISTOPHER MANNING,

Appellant.

---

**FINAL BRIEF OF RESPONDENT**

---

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## STATEMENT OF ISSUES ON APPEAL

### I.

The arresting officer was not required to provide an affidavit concerning the reason why Appellant's conduct at the scene of the accident was not videotaped where law enforcement did not arrive at the scene of the accident until after Appellant was transported to the emergency room.

### II.

Law enforcement had probable cause to believe Appellant committed felony DUI and therefore, the trial court did not err in denying the motion to suppress the blood test results.

### III.

The trial court did not err in denying Appellant's motion for mistrial and the issue is not preserved, especially since Appellant failed to timely raise his motion to sever and refused a curative instruction.

### IV.

The trial court's charge to the jury on implied consent was not a comment on the facts and the charge as a whole was not misleading and was free from error.

**STATEMENT OF THE CASE**

Appellant Manning was indicted by the Lexington County Grand Jury of Felony Driving Under the Influence resulting in Death. Manning was tried by jury on May 11-13, 2010 and convicted as charged. The Honorable R. Knox McMahon sentenced Appellant to eighteen years imprisonment.

## STATEMENT OF FACTS

Appellant Manning and his friend, Jake Hill, had drinks together after Manning finished his shift as a cook at a private bar. Manning and Jake left in Manning's SUV to go swimming. Manning crashed his SUV at a sharp curve, severely injuring himself and killing Jake.

Heather Fairchild was the first witness to testify before the jury. She was a bartender at Boondocks, a private club. She was tending bar on the night of July 31 into the morning hours of August 1, 2009. She started serving Manning around 10:30 or 11:00 p.m. that night after Manning finished his shift as a cook. Manning, Jake, and others drank together for several hours. They drank beer and shots of liquor. Fairchild testified that Manning drank a good amount of alcohol. Although she contended he was not stumbling, Fairchild testified that in her opinion, Manning was impaired that night. She testified she was familiar with the vehicle Manning drove to work and noticed it in the parking lot. Her shift ended at 4:45 a.m. Manning and Jake left shortly before then. Jake did not have a vehicle, he walked to the club that night. Manning said he had his car, and they made plans to drive to a boat ramp to go swimming. ROA. pp. 129-142.

Elizabeth Grayson Simmons from the Lexington County EMS arrived at the accident scene at 4:57 a.m. She noticed the strong smell of alcohol as she approached Manning. Manning's nose was split open and she saw a wound as big as a fist in his abdomen. She could see his intestines. A firefighter who also responded fetched a long-spine board to carry Manning from the field. Manning said "I f'ed up. I should have never done this. Look what I've done." Simmons could smell alcohol when he spoke. ROA. pp. 156-172, pp. 175-176

(direct quote: ROA. p. 168, lines 18-19).

Firefighter Nathan Prouse testified that he was the first responder on the scene. The vehicle was in a field about 60 to 70 feet off the road and severely damaged. Two bodies lay in the field. EMS arrived almost simultaneously and went to Jake, quickly determining he was dead. Prouse approached Manning, who lay closer to the wreck. Prouse asked Manning if anyone else other than the victim was riding with Manning. Manning replied: "No, no, it was just me and my buddy who was riding with me. It was just me and my buddy." ROA. pp. 188-193 (direct quote: tr. p. 193, lines 17-19). Manning kept saying "I f-ed up" repeatedly. ROA. p. 195.

Another firefighter, Victor Tomaino, helped carry Manning on the spine board. He heard Manning repeatedly say "I f-ed up" and at one point, heard Manning say "I should not have been driving." ROA. p. 212. The Coroner's Office declared Jake dead, with the approximate time of death as 4:30 a.m. ROA. p. 228.

Lance Corporal Quest Hallman was the first officer on the scene of the crash, but Manning was already gone. It took Hallman about twenty-five to thirty minutes to respond to the scene, it was rainy and he was careful, but he did exceed the speed limit slightly. He arrived on the scene and could already see the reflectors of the crashed vehicle, but was directed to the vehicle by emergency personnel. ROA. pp. 235-237. Hallman explained as follows:

But . . . fire services said, hey, here's the car. They showed me the victim and said the other – the driver had been transported, which I pretty much assumed because I had passed the ambulance while I was en route to the scene.

ROA. p. 237, lines 17-21.

Jake's body was about fifty to seventy-five feet away from the wrecked vehicle. It appeared to Corporal Hallman that the vehicle left the road and flipped. The engine and transmission became unbolted from the vehicle and lay next to it. ROA. pp. 237-239. The odor of alcohol emanated from the vehicle. Hallman directed Trooper Baker to the hospital where Baker determined Manning to be the individual from the wreck. From Hallman's ensuing investigation, Hallman determined the address for Manning's driver's license and the registration for the vehicle were the same. The following testimony was elicited from Hallman in front of the jury:

Q: Okay. Now, you are still investigating this particular incident. Without going into any conversations that you had with some of these individuals, did you speak with anyone else that was still on the scene?

A: I did.

Q: Okay. During that course of – well, were you still investigating this incident to determine who was the driver?

A: Yes, sir.

Q: Okay. And after speaking with them and conducting your investigation, did you ultimately charge Mr. Christopher Manning –

A: I did.

Q: – with felony D.U.I.?

A: I did.

ROA. p. 251, line 11 - p. 252, line 1.

Manning was not in Corporal Hallman's presence at the time, so he directed Trooper

Baker, who was at the hospital, to have Manning's blood drawn. ROA. p. 252. Corporal Hallman explained why he directed Trooper Baker to do this as follows: "In my experience and my determination, I determined him as the driver of the vehicle. And with there being a death involved, a legal blood sample was drawn. . . ." ROA. p. 252, lines 16-21.

Manning's blood alcohol content was .173%. ROA. p. 409. As the forensic toxicologist testified, at this level of intoxication, an individual's reaction time would be slowed, their vision would be impaired, and their judgment adversely affected. ROA. pp. 409-410.

Corporal James O'Donnell of the South Carolina Highway Patrol testified as an expert in accident reconstruction. He determined that the vehicle veered off to the right of a left hand curve, traveled on the shoulder, struck a culvert, became airborne and flipped several times, ultimately traveling about 535 feet from where it left the road to the resting spot. The vehicle was going about 89 m.p.h. when it reached the curve. O'Donnell noted that the driver has more obstacles than a passenger would to keep from being ejected. He also testified that the steering wheel could have caused Manning's injuries in the abdomen. ROA. pp. 424-440; pp. 458-460.

Manning did not testify or call any witnesses in his defense.

## ARGUMENT

### I.

**The arresting officer was not required to provide an affidavit concerning the reason why Appellant's conduct at the scene of the accident was not videotaped where law enforcement did not arrive at the scene of the accident until after Appellant was transported to the emergency room.**

Appellant Manning argues that his felony DUI charge should have been dismissed because the arresting officer should have provided an affidavit concerning the failure to videotape Manning's conduct at the incident site. Manning misconstrues the statute. Videotaping was not required because law enforcement did not arrive at the incident site until after Manning was transported to the hospital. Manning's argument fails because no part of the statute applies where a defendant leaves the incident site before law enforcement arrives.<sup>1</sup> Since Manning allowed himself to be taken to the hospital for treatment before law enforcement arrived, law enforcement was not required to execute an affidavit.

Under S.C. Code Ann. § 56-5-2953:

(A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the

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<sup>1</sup> In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers. D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 482 S.E.2d 558 (1997) *overruled on other grounds by* Evins v. Richland County Historic Preservation Comm., 341 S.C. 15, 532 S.E.2d 876 (2000).

breath test site video recorded.

(1)(a) The video recording at the incident site must:

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

In the instant case, since law enforcement arrived after Manning left the incident site, blue lights were activated, if at all, after Manning left. There was no conduct <sup>post activation of</sup> to videotape <sup>blue lights</sup> at the incident site. The statute does not apply in the instant case.

Further, Manning misconstrues the requirements to meet the exceptions found in § 56-5-2953(B), which are set out as follows:

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video equipment at the time of the arrest or probable cause determination, . . . was in an inoperable condition, . . . , in the alternative, submits a sworn affidavit that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of circumstances; .

...

The videotaping was not done at the incident site because Manning was not there. Under the plain language of the statute, the arresting officer is required to submit an affidavit when videotaping is not performed only if: (1) videotaping equipment is inoperable, (2) the person needed emergency medical treatment, or (3) exigent circumstances existed.

The problem was not that the equipment was inoperable, so that provision does not apply. Law enforcement was never in a position to determine, first hand, whether Manning needed emergency medical treatment or whether another exigent circumstance existed; therefore, the arresting officer is not required to submit an affidavit concerning a subject to which neither he nor other law enforcement officers have first hand knowledge. Manning is in a superior position to determine if emergency medical treatment was needed, because he was there. By the time law enforcement arrived, there was no conduct to record. Manning allowed himself to be taken from the scene by emergency personnel.

The facts of the case are more aligned with the next set of enumerated exceptions, where the blue lights are not activated due to road blocks, traffic accident investigations, and citizen arrests, and where video taping is required once practicable. Perhaps most closely related is the citizen arrest exception, since Manning was removed by individuals other than law enforcement. In the instant case, video recording never became practicable at the site, since Manning was not there, and therefore video taping never needed to begin.

However, the totality of circumstances exception certainly applies to the instant case. Under the totality of circumstances, a video tape was not required because law enforcement was not at the incident site before Manning allowed himself to be taken away, and the blue lights were not activated.

Manning's reliance on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) is misplaced. In that case, as Manning concedes, the Supreme Court did not review whether the totality of circumstances exception applied, as determined by the magistrate, because the reviewing circuit court did not address the issue in its order and the City failed to preserve the issue. In the instant case, the totality of circumstances issue applies and, further, the statute only applies when the defendant is found at the incident site, not when he has absconded or was already taken away by medical personnel. Accordingly, the trial court did not err.

## II.

**Law enforcement had probable cause to believe Applicant committed felony DUI and therefore, the trial court did not err in denying the motion to suppress the blood test results.**

Manning alleges that law enforcement did not have probable cause to believe Manning was the driver of the vehicle. However, evidence at trial shows otherwise. S.C.

Code Ann. § 56-5-2946 provides, in relevant part, as follows:

Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

Corporal Hallman testified that when he arrived at the scene, a strong smell of alcohol emanated from what remained of the vehicle. At the hospital, Trooper Baker smelled the odor of alcohol on Manning. ROA. pp. 267-268. Jake was undoubtedly dead. Corporal Hallman spoke with the emergency personnel who heard Manning's comments implicating himself as the driver. ROA. pp. 251-252.<sup>2</sup> The DMV records tied the vehicle to Manning's residence.<sup>3</sup>

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<sup>2</sup> There was some confusion as to whether emergency personnel relayed this information to Baker or Hallman or both. See ROA. p. 83, p. 85, p. 269, pp. 335-337. However, whether thru direct conversation with emergency personnel or relayed by Baker, it is apparent that Hallman became aware that emergency personnel heard statements indicating Manning was the driver when determining that Manning's blood should be taken.

<sup>3</sup> Manning claims in his brief that Hallman was not aware of the matching addresses at the time he requested Baker to get the blood test. However, Hallman testified he had this information at the time he determined probable cause. ROA.

This Court should apply a deferential standard, reversing only where the trial court's ruling is not supported by evidence found in the record. See State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (setting out the standard that should be applied for motions to suppress on Fourth Amendment grounds). The trial court's factual findings that relate to this analysis should be reviewed for clear error only. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000) (finding review of Fourth Amendment issue that was largely a question of fact should be reviewed like any other trial court's factual findings and should be reversed only if there is clear error).

"Probable cause to arrest without a warrant generally exists when facts and circumstances within an arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested." State v. Cuevas, 365 S.C. 198, 203, 616 S.E.2d 718, 721 (Ct. App. 2005) (citation omitted).

"Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officers disposal." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911 (1996). "Probable cause turns not on the individual's actual guilt or innocence, but on whether the facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of the crime." Jackson v. City of Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005). "The determination of probable cause is not an academic exercise in hindsight." Id., 366 S.C. at 667, 623 S.E.2d at 659.

"The term 'probable cause' does not import absolute certainty." State v. Arnold, 319

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p. 94, lines 4-10, p. 96, lines 3-4.

S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1996). “Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities, not certainties.” Id. “A finding of probable cause may be based upon less evidence than would be necessary to support a conviction.” Lapp v. South Carolina Dept. of Motor Vehicles, 387 S.C. 500, 692 S.E.2d 565 (Ct. App. 2010).

“In other words, a police officer has probable cause to arrest without a warrant where he in good faith believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise.” Cuevas, 335 S.C. at 204, 616 S.E.2d at 721 (Internal quotations and citations omitted).

Abundant information supported Corporal Hallman’s determination of probable cause. Manning and the wreck smelled of alcohol, and the address for his driver’s license and the registration were identical. That alone should be sufficient for probable cause. However, evidence supports that Corporal Hallman was informed that Manning indicated to emergency personnel that he was the driver, adding further evidence for Hallman to establish probable cause.

The information within Corporal Hallman’s knowledge was sufficient to establish probable cause and the evidence in the record supports the trial court’s ruling. Accordingly, the ruling should be affirmed.

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determined

## III.

**The trial court did not err in denying Appellant's motion for mistrial and the issue is not preserved, especially since Appellant failed to timely raise his motion to sever and refused a curative instruction.**

Manning committed two crimes that night. When he was arrested, he was in possession of a quantity of hydrocodone and acetaminophen, a schedule three controlled substance. Manning waited until after both indictments were read to the jury to move to sever the two charges. The trial court granted the severance. The trial court offered to give an instruction to the jury to disregard the severed charge. Seemingly as an afterthought, Manning moved for a mistrial. After the trial court denied the mistrial motion, Manning declined the instruction. Yet Manning claims reading both indictments prejudiced him. The issue should not be reviewed.

An issue is not preserved for review unless a contemporaneous objection is made to and ruled upon by the trial court. State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). A party cannot complain of court error created by his own conduct. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984). The Court of Appeals does not sit to relieve self-inflicted wounds. Rish v. Rish by and Through Barry, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988) (Bell, J., concurring).

Further, an issue is not preserved when the trial court's offer of a curative instruction is refused. State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996); see State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct. App. 1996) ("In rejecting the trial court's offer to strike the testimony or give a curative instruction, [the defendant] waived any

complaint he had to the challenged testimony”).

Manning waited for the indictments to be read before raising his challenge. Then he wanted a mistrial for the indictments being read to the jury. His objection to the reading of the indictments is too late, his alleged injury was self-inflicted. The trial court ruled as follows:

Well, I’m not going to get trapped into a mistrial. In that regard then, we’re going to go forward. Now, you are not going to have it both ways. Either you want to go forward or you don’t.

You didn’t make that motion before the jury was qualified, and the Court is not going to be trapped like that. I’ll be glad to give whatever instruction you want me to give them, but the case was called for trial in front of the Court. It was qualified.

There were no motions at the time, except one y’all brought up to me in chambers on the continuance. So if it prejudiced him, that’s a self-inflicted wound. **That’s not a wound inflicted by the State or by this Court.**

I’m not here to inflict any wounds on either the State nor the Defendant. I’ll charge whatever you want in regard to that or I’ll say nothing, but I don’t see where it’s – where the court could respond like that.

ROA. p. 108, lines 6-24 (emphasis added).

The trial court did not abuse its discretion. “A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons.” State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). “The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way.” State v. Dempsey, 340 S.C. 565, 570,

532 S.E.2d 306, 309 (Ct. App. 2000). “A mistrial should only be granted when ‘absolutely necessary,’ and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.” State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted). “The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice.” State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

In the instant case, Manning cannot show prejudice. If Manning thought he was going to be prejudiced by going forward on the felony DUI charge, he would have accepted the offer for an instruction. Instead, as evidenced by Manning declining the instruction, Manning must have thought it was more likely the jury would not focus on the severed charge and did not want to call further attention to the matter. Manning cannot show prejudice. Further, mistrial was not dictated by manifest necessity. The jury had ample evidence to convict Manning for felony DUI and there is no doubt that he was convicted on the evidence presented to the jury at trial, and not a pretrial event. See generally, State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) (“[A] vague reference to a defendant’s prior [crimes] is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes”).

Accordingly, the trial court did not commit error.

## IV.

**The trial court's charge to the jury on implied consent was not a comment on the facts and the charge as a whole was not misleading and was free from error.**

The trial court charged the exact language of the implied consent statute, S.C. Code Ann. § 56-5-2950 and Manning complains it was error as a comment on the facts. Even viewed in isolation, the jury was certain to understand that it was not a comment on the facts and understood its duty to make its own factual determination that Manning was the driver. However, looking at the charge as a whole, the trial court clearly charged the jury with the duty to determine if they were convinced beyond a reasonable doubt that Manning was the driver from their own view of the evidence.

The trial court included on its charge on the elements of felony DUI the following: "Felony D.U.I. requires proof of three elements: Number one, **the actor drives a vehicle** while under the influence of alcohol and/or drugs; . . ." ROA. p. 495, lines 1-3 (emphasis added). The trial court further instructed the jury as follows:

In every case tried in this court before a jury, the jury becomes the sole and exclusive judge of the facts in a case. A trial judge cannot intimate, state, comment on or make any statement to a trial jury about the facts in the case.

Since you the jury are the sole judge of the facts, you are not to infer from what I have said during the progress of this trial, in ruling upon the admissibility of evidence or otherwise, or anything that I now say during the course of this instruction to you that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case.

That is a matter solely for you the jury to determine. As jurors it is your duty to determine the effect, the value, the weight, and the truth of the evidence presented during this trial.

ROA. p. 498, line 24 - p. 499, line 15.

The trial court again charged the elements of felony DUI as follows:

... The State must first prove beyond a reasonable doubt that the Defendant drove a vehicle in this State while under the influence of alcohol and/or drugs.

An issue in this case is the identification of the Defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you may convict the Defendant.

The State must further prove beyond a reasonable doubt that the Defendant drove a vehicle while under the influence of alcohol and/or drugs. . . .

ROA. p. 504, lines 9-23.

In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987).

Article V, §21 of the South Carolina Constitution states: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." South Carolina law dictates a trial judge should refrain from any comment which tends to indicate to the jury his opinion

on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused. State v. Jackson, 297 S.C. 523, 377 S.E.2d 570, 572 (1989); State v. Smith, 288 S.C. 329, 342 S.E.2d 600, 601 (1986). However, jury instructions must be considered in their entirety and, if in their entirety they are free from error, then any potentially misleading portions do not constitute reversible error. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869, 874 (1994); Jackson, 377 S.E.2d at 572.

“A charge that states the legal conclusions that would result from the establishment of certain facts is not necessarily an improper charge, nor a mandate to the jury to assume the truth of the facts as stated.” State v. Dickey, 380 S.C. 384, 402, 669 S.E.2d 917, 927 (Ct. App. 2008). “The test is how a reasonable juror would have understood the charge.” Id.

In the instant case, the trial court charged the exact language of the statute and did not intimate his belief as to whether Manning was in fact the driver. His instructions as a whole clearly require the jury to make their own decision on whether evidence proved beyond a reasonable doubt that Manning was the driver. The instructions in their entirety were not misleading and were free from error. Accordingly, the trial court did not err.

**CONCLUSION**

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 17, 2011

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal From Lexington County  
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

\_\_\_\_\_  
vs.

CHRISTOPHER MANNING

Appellant.  
\_\_\_\_\_

**CERTIFICATE OF COUNSEL**  
\_\_\_\_\_

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

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## STATE OF SOUTH CAROLINA

## IN THE COURT OF APPEALS

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Appeal From Lexington County  
R. Knox McMahon, Circuit Court Judge

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THE STATE,

Respondent,

vs.

CHRISTOPHER MANNING,

Appellant.

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**PROOF OF SERVICE**

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I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
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I further certify that all parties required by Rule to be served have been served.

This 17th day of August, 2011

  
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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

CHRISTOPHER MANNING,

APPELLANT

APPELLATE CASE NO. 2010-161686

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Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

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Opinion No. 5017

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PETITION FOR REHEARING

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The Court of Appeals affirmed the above named appellant's conviction and sentence on August 1, 2012. Appellant filed a petition for rehearing on August 16, 2012. On October 10, 2012, the Court of Appeals withdrew the first opinion, substituted and refiled a second opinion still affirming appellant's conviction and sentence. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Manning argued four issues on appeal: (1) the trial court erred by denying Manning's motion to dismiss the case because the state violated S.C. Code Section 56-5-2953 (Supp. 2011) by

failing to provide an affidavit of the arresting officer certifying that it was physically impossible to provide a video recording as required by statute when Manning needed emergency medical treatment; (2) the trial court erred in denying appellant's motion to suppress the blood test evidence pursuant to S.C. Code Section 56-5-2946 because there was not sufficient probable cause for an arrest because the driver of the vehicle was not identified; (3) the trial court erred in denying Manning's motion for a mistrial based on prejudice to appellant after the trial judge severed the felony DUI charge and the possession of a schedule three substance (hydrocodone) charge after the jury was told at the beginning of trial that appellant was being tried on both charges; (4) the trial court erred in charging the jury on S.C. Code Section 56-5-2950 (b) which was a comment on the facts because the statute begins with: "A person who drives..." and the identification of the driver was the primary issue in the trial.

The Court of Appeals affirmed the trial court on all four issues. On Issue One, the Court held that the circuit court properly concluded the video recording was not required due to the totality of the circumstances because Manning and Corporal Hallman were never at the incident scene at the same time. On Issue Two, the Court held that both Corporal Hallman and Trooper Baker had probable cause to arrest Manning because Trooper Baker called Corporal Hallman from the hospital and said Manning was the driver; and Trooper Baker had probable cause because a highway patrolman told him Manning was the driver and he smelled alcohol on Manning at the hospital so there was no clear error. On Issue Three, the Court held that Manning waived any objection to the circuit court's denial of his motion for a mistrial when he refused a curative instruction offered by the court, but still ruled on the merits that the circuit court did not abuse its discretion in denying Manning's motion for a mistrial. On Issue Four, the Court held that viewing the jury instruction as a whole, the circuit court did not abuse its discretion in charging the jury on Section 56-5-2950(A)

because it was unlikely that a reasonable juror would have singled out the phrase “ a person who drives” and interpret it as the circuit court’s opinion on the facts of the case.

**ISSUE ONE:** On July 31, 2009, Christopher Manning was working at a private club, Boondocks, as a cook. R. 129 – 131. Jacob Hill was working at the nearby restaurant, Fisherman’s Wharf. On this day, Hill needed a ride home from work so he walked to Boondocks where he knew people because he had previously worked there. When he arrived there, he started drinking with some of his friends. R. 119, ll. 21 – 25; R. 120, ll. 1 – 25.

Manning’s work shift was over by 11:00 that night, so he began mingling and hanging out with Hill and other friends drinking and socializing. This went on until around 4:00 in the morning when they left. R. 132, ll. 9 – 25; R. 145, ll. 1 – 25.

Nathan Prouse, an employee of the Lexington County Fire Service, received a call shortly before 5:00 A.M. of a vehicle accident on Highway 378 near the Saluda County line. He was the first responder to arrive at the scene. When he arrived, he saw two bodies in the field. R. 34 – 38; R. 187 – 188. EMS arrived immediately after him, and announced that Hill was deceased. Prouse went to assist Manning who was severely injured. R.190; R. 28 – 30.

As Prouse was talking to Manning, who appeared alert as he was speaking to Prouse and to EMS, he said that Manning kept saying: “I f---cked up!” R.192, ll. 14 – 25; R.193, ll. 1 – 5; R. 195, ll. 11 – 25; R.196, ll. 1 – 25.

Three other emergency responders testified that they heard Manning say those same words: “I f---cked up!” They were: (1) Elizabeth Simmons who was an EMT, R. 19 – 20; R. 37; (2) Jerry Wise who was a volunteer with the Lexington County Fire service as an EMT, R. 52; ll. 20 – 25; R. 53, ll. 1 – 8; R. 58; (3) Victor Tomaino who was a volunteer fireman, R. 63, ll. 16 – 25; R. 64 –

66. Tomaino testified that he also heard Manning say that he shouldn't have been driving. R. 66, ll. 1 – 9.

The forensic toxicologist, Jennifer Brown, testified that Manning's blood alcohol level was .173. R. 408, ll. 1 – 25; R. 409, ll. 1 – 25. Hill's blood alcohol level was .169. R. 416, ll. 9 – 25; R. 417, ll. 1 – 18.

Corporal James O'Donnell testified that he worked for the South Carolina Highway Patrol with the Multidisciplinary Accident Investigative Team (MAIT). He was qualified as an expert in the field of accident reconstruction. R. 419 – 420; R. 568. He testified that his opinion was that the vehicle was going 89 miles per hour at the time of the accident. The vehicle went into a curve but went off the shoulder of the road. The vehicle kept overturning, struck a tree, and went across a ditch where it stopped. The path was 535 feet. The accident was so violent that the engine was dislodged from the engine compartment. R. 437 – 441.

Hill was found lying about 50 feet from the vehicle, and Manning was found about 15 feet from the vehicle. R. 123, ll. 12 – 16. The state argued that Manning was the driver. Manning's defense was that Hill was the driver. R. 119, ll. 21 – 25; R. 120 – 128. Corporal O'Donnell testified there was no forensic evidence identifying the driver, and no witnesses. R. 469 – 470.

Defense counsel made a pretrial motion for dismissal of the case against Manning because the state violated S.C. Code Section 56-5-2953 by not providing either a video of the scene or an affidavit from the law enforcement officer indicating the reason there was no video. Counsel cited City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). The state argued that there was no video because Manning had been transported to the hospital by the time the first responding trooper arrived. R. 76, ll. 1 – 25.

The judge denied defense counsel's motion. Defense counsel then argued that Section B of the statute provided that a sworn affidavit was necessary to indicate that a video recording was physically impossible because the person needed emergency medical treatment. The judge denied the motion again. R. 77, ll. 1 – 25; R. 78, ll. 1 – 3.

At the close of pretrial motions, the judge revisited this issue again before the jury was brought in. He discussed The City of Rock Hill v. Suchenski, id. and the statute. He found that the video was not required because there was no conduct to record. He said that Section B allowed the judge to consider the totality of the circumstances for the video not being produced, and he ruled that under the totality of the circumstances, 56-5-2953 did not apply to the factual situation in Manning's case. R. 109, ll. 22 – 25; R. 110 – 111.

Trooper Quest Hallman with the Highway Patrol testified that by the time he arrived at the scene of the accident, Manning had already been transported to the hospital as the ambulance passed Trooper Hallman as he was on his way to the scene. R. 233 – 237.

South Carolina Code Section 56-5-2953 (A) provides: "A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded." The statute identifies the requirements to be recorded:

- (1) (a) The video recording at the incident site must:
  - (i) not begin later than the activation of the officer's blue lights;
  - (ii) include any field sobriety tests administered; and
  - (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and show the person being advised of his Miranda rights.
- (b) A refusal to take a field sobriety test does not constitute disobeying a police command.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2008).

In City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007), the Supreme Court ruled that dismissal of the charge of DUAC<sup>1</sup> (arrest was for DUI), for the arresting officer's failure to provide a complete videotape from the incident site was the appropriate remedy. In that case, the officer began the tape and taped two field sobriety tests but ran out of tape before the third field sobriety test was administered. The officer said it had never happened before and he did not know the tape had run out. The municipal court denied the motion to dismiss on the grounds of exigent circumstances. On appeal, the circuit court reversed and dismissed the charge based on the violation of Section 56-5-2953(A) because a complete tape was not produced. The Supreme Court did not address the issue of exigent circumstances because the circuit court did not address it.

Section 56-5-2953(B) of the South Carolina Code (Supp. 2006) requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape. It reads:

(B) Nothing in this section may be construed as prohibiting the introduction of other evidence in the trial of a violation of Section 56-5-2930, 56-5- 2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. . . . Nothing in this section prohibits the court from

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<sup>1</sup> Driving With an Unlawful Alcohol Concentration

considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2008).

In State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004), the Court of Appeals held that when a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning.

The statute is clear that the failure of the arresting officer to produce the video recording would not result in dismissal of the charge **IF** the officer submits a sworn affidavit certifying why the recording was not provided. In Manning's case, no affidavit was produced although a reason for not producing the affidavit existed because emergency medical treatment, which is stated in the statute as a reason, was necessary in Manning's case. Therefore, according to the ruling in City of Rock Hill v. Suchenski, *supra*, the charge should have been dismissed because the Supreme Court said that 56-5-2953 provides for a dismissal of the charges when the statute was inexcusably violated.

The Supreme Court found in Suchenski, *supra*, that under Section 56-5-2953, a violation of the statute with no mention of prejudice, may result in dismissal of the charges.

The Court of Appeals held that the circuit court properly concluded the video recording was not required due to the totality of the circumstances because Manning and Corporal Hallman were never at the incident scene at the same time. The Court misapprehended the issue. The Court addressed only the requirement for a video whereas Manning was asserting that an affidavit was required as provided in the statute to indicate why a video was not provided. The Court did not

address the issue of an affidavit not being provided when it was required by statute just as much as a video.

Manning's charge should have been dismissed by the trial judge.

**ISSUE TWO:** Manning's attorney made a pretrial motion to suppress the blood test evidence taken from Manning pursuant to S.C. Code Section 56-5-2946 which provided that the "test must be administered at the direction of law enforcement who has probable cause to believe that the person violated or is under arrest for that section" or in Manning's case for felony DUI. R. 78, ll. 2 – 10.

Counsel argued that law enforcement did not have probable cause to support the arrest of Manning because the driver of the vehicle was unknown, and therefore the blood test could not be taken. Counsel argued that the blood test was taken around 7:00 A.M. and there were reports issued after that, around 8:00 A.M. stating that there was an "identity issue" because it was not known who was driving. He said that Trooper Breland issued the accident report at 8:00 A.M. stating the driver was unknown, and the coroner's report indicated they did not know who was driving. Also, the investigating officer completed the towing report showing there was a driver identity issue. R. 78 – 79.

William Zeigler was the deputy coroner who responded to the accident. R. 223, ll. 14 – 25; R. 224, ll. 1 – 25; R. 225, ll. 1 – 25. He testified that he was at the scene about an hour or two, and he was not able to identify the driver. He included in his report that the driver was not known. R. 228 – 232.

The judge held an *in camera* hearing where Trooper Quest Hallman testified as the investigating officer. Trooper Hallman received the call of the accident around 5:00 A.M. as he was

on patrol. His normal procedure was to find out who the driver was. He looked at the evidence such as the seat and steering wheel position. R. 80 – 82.

He found a beer bottle among the debris in the field, and the vehicle had an odor of alcohol. R. 85, ll. 13 – R. 86, ll. 1 – 25. When he ran the tag on the vehicle, he found that it belonged to Manning's girlfriend, April Rabun. Heather Fairchild, the bartender at Boondocks, had told him Ms. Rabun was the girlfriend. Also, the address on Manning's license and the address on the vehicle registration were the same. R. 83 – 84.

Trooper Hallman sent Trooper Jeffrey B. Baker to the hospital to see Manning as Trooper Hallman was 35 miles away at the scene, and he needed to identify the driver. R. 82, ll. 12 – 25; R. 83, ll. 1 – 6. Trooper Hallman decided that Manning was the driver based on what Trooper Baker told him that he heard at the hospital, and the fact that the vehicle belonged to Manning's girlfriend. Trooper Hallman's testimony was that Trooper Baker called him from the hospital and said Baker heard some statements when he went into the trauma area that Manning had said he was the driver, and that he and his buddy were riding to the lake. He could not remember exactly what Trooper Baker said. R. 83, ll. 1 – 25. He did not know who Trooper Baker heard these comments from. R. 85, ll. 1 – 6. Trooper Hallman told Trooper Baker to get a blood sample since Trooper Baker heard these statements and if Trooper Baker felt that Manning was the driver. R. 85, ll. 7 – 12.

Trooper Hallman admitted on cross examination that the blood was drawn from Manning at 7:19 A.M. The implied consent was completed at 7:16 A.M. However, he did not talk to the bartender, Heather Fairchild, until 9:30 A.M. There was nothing in all of the reports that Trooper Hallman collected as the case agent to give to the solicitor any statements Manning made to Trooper Baker. R. 87 – R. 88. The report from Trooper Breland of the MAIT was dated 8/1/09 at 6:40 A.M. and it said driver unknown. R. 89 – 90.

Trooper Hallman completed the towing report at 8:08 A.M. on August 1, 2009 which further indicated there was still an issue as to who was driving the vehicle. R. 91 – 92. He admitted that he was not able to develop any physical evidence to show who was the driver or that indicated Manning as the driver prior to the blood being drawn other than what he said Trooper Baker told him. R. 92, ll. 20 – 25; R. 93, ll. 1 – 11.

Trooper Baker testified that he talked to Manning in the trauma unit at Richland Memorial Emergency Room. Manning smelled of alcohol, and was not very coherent. He was not sure if Manning understood the Miranda warnings because he was in and out of consciousness. When asked if Manning requested an attorney, Trooper Baker responded: “no, sir. He wasn’t very coherent.” R. 265 – 268; R. 271, ll. 10 – 25; R. 272, ll. 1 – 23; R. 290.

At the direction of Trooper Hallman, Trooper Baker arrested Manning and obtained a blood sample. Defense counsel objected based on his pretrial motion. R. 268 – 269.

During Trooper Baker’s testimony, defense counsel asked for a hearing on a matter of law as he wanted to clarify if Manning made any statements to Trooper Baker. The solicitor said that Trooper Baker was going to say that no statements were made to him. R. 272 – 273. Defense counsel argued that that created a different issue because Trooper Hallman had testified that Trooper Baker told Hallman of statements Baker had overheard. R. 274 – 277.

After testimony about the blood sample, defense counsel renewed his motion to suppress the blood test based on the lack of probable cause. He argued that Trooper Hallman said Trooper Baker told him he overheard statements in the trauma room that Manning was the driver of the vehicle. However, Trooper Baker denied making any statements. R. 325 – 326.

The solicitor said defense counsel misunderstood the testimony. The judge replayed Trooper Hallman’s testimony, and recalled Trooper Baker to testify *in camera*. R. 327 – 334.

During this testimony, Trooper Baker testified that Manning did not make any statements to him and he did not remember any statements that the emergency first responders said that Manning made. He did not remember the specifics of his conversation with Trooper Hallman. Trooper Baker said he had no evidence that Manning was the driver other than what Trooper Hallman told him. R. 335 – 338.

Defense counsel renewed his objection to the blood test pursuant to 56-5-2946 based on the lack of probable cause to believe Manning was the driver, and therefore the blood sample should not have been drawn. R. 338 – 339. The state argued that probable cause was established through Trooper Hallman, and that Trooper Baker smelled alcohol on Manning. R. 340 – 342.

The judge ruled that there was sufficient probable cause to arrest Manning for the felony DUI based on the beer bottle at the scene, the statements from EMS that Manning was the driver, Trooper Baker smelling alcohol on Manning, and that the vehicle was registered to Manning's girlfriend. R. 342, ll. 12 – 25; R. 343 – 346.

S.C. Code Section 56-5-2946 provides:

Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

The tests must be administered at the direction of a law enforcement officer who has probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

Probable cause to arrest without a warrant generally exists when facts and circumstances within an arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested. State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005). A police officer has probable cause to arrest without a warrant where

he in good faith believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise.

Id.

A trial court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant.

State v. Cuevas, supra.

There was not sufficient probable cause to arrest Manning because Trooper Hallman relied on statements that he said Trooper Baker allegedly heard in the trauma room that Manning was the driver. Trooper Baker testified that he never heard such statements. This purported information from Trooper Baker was the determining factor for probable cause for Trooper Hallman, but that evidence did not exist. Consequently, there was not sufficient evidence to establish that Manning was the driver. The information about the vehicle belonging to Manning's girlfriend was not known until after the arrest, and Trooper Hallman relied on this for probable cause.

There was no physical evidence indicating Manning as the driver; no DNA, no fingerprints, and no witnesses. R. 469 – 470.

The Court of Appeals held that both Corporal Hallman and Trooper Baker had probable cause to arrest Manning because Trooper Baker called Corporal Hallman from the hospital and said Manning was the driver; and Trooper Baker had probable cause because a highway patrolman told him Manning was the driver and he smelled alcohol on Manning at the hospital so there was no clear error. The Court misapprehended the issue. The Court failed to address the issue that the evidence showed that the two officers' stories contradicted each other, and the trial court made no credibility findings.

**ISSUE THREE:** Manning was indicted on two charges; felony DUI and possession of a quantity of hydrocodone and acetaminophen, a schedule three controlled substance. These two indictments were read to the jury at the beginning of the trial. R. 1 – 10. Manning’s attorney made a pretrial motion to sever the charges as the drug charge would be highly prejudicial under Rule 403, SCRE, to Manning. R. 11 – 13.

The trial judge did not sever the two charges until after both indictments had been read to the jury, as the state explained that this drug did not show up in the drug analysis of either Manning or Hill. The state did not explain how a grand jury indictment was obtained without any evidence. R. 105, ll. 16 – 25; R. 106, ll. 1 – 25; R. 107, ll. 1 -3. Defense counsel then asked for a mistrial because he argued that Manning was already prejudiced because both indictments were read to the jury so the jury has already heard of the drug charge. Counsel argued that whatever the judge told the jury about the drug charge would only cause them to speculate. R. 107, ll. 4 – 25; R. 108, ll. 1 – 5.

The judge said he refused to “be trapped into a mistrial.” He said that if Manning were prejudiced, it was a “self-inflicted wound” even though the drug analysis showed no evidence. R. 108, ll. 6 – 25; R. 109, ll. 1 – 2.

Whether to grant or deny a mistrial motion is a matter within the trial court’s sound discretion, and the court’s decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Latimore, 390 S.C. 88, 700 S.E.2d 456 (Ct. App. 2010); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); citing State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508 (1999). In order to receive a mistrial, a defendant must show error and resulting prejudice. It is only in cases of abuse of discretion which result in prejudice that this court will

intervene and grant a new trial. State v. Culbreath, *supra*; State v. White, 371 S.C. 439, 443-44, 639 S.E.2d 160, 162 (Ct. App. 2006).

The power of the circuit court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the circuit court. State v. Latimore, *supra*, citing State v. Stanley, 365 S.C. 24, 615 S.E.2d 455, 460 (Ct. App. 2005).

Rule 403, SCRE, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Manning was prejudiced by the judge not granting a mistrial because the jury knew he had a drug charge. This was prejudicial because this charge had nothing to do with the felony DUI for which he did go to trial.

The Court of Appeals held that Manning waived any objection to the circuit court's denial of his motion for a mistrial when he refused a curative instruction offered by the court. At the same time, the Court ruled on the merits that the circuit court did not abuse its discretion in denying Manning's motion for a mistrial. The Court wrote that the single reference to the schedule three drug charge contained in the indictments read at the beginning of the trial did not constitute sufficient prejudice to justify a mistrial.

The Court misapprehended the issue. In State v. Wilson, 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010), the Court of Appeals ruled that because the defendant objected to the admission of testimony regarding a prior incident of CDV in this CDVHAN case, and when his objection was overruled, he moved for a mistrial, he was not required to make another motion for mistrial or under any obligation to accept a curative instruction.

The prejudicial effect on the jury could not be determined. The Court wrote that there was no evidence that the jury considered the severed drug charge in reaching its verdict. This was impossible to determine without talking to the individual jurors. Therefore, a mistrial should have been granted.

**ISSUE FOUR:** When discussing the appropriate jury charges to give, the judge asked both attorneys what he should charge concerning Manning's rights under Miranda advised to him by Trooper Baker and the implied consent law, or if they wanted him to charge them at all. Defense counsel immediately said he did not want the judge to charge them at all. The state argued that in the interest of justice, the statute needed to be charged: 56-5-2950. R. 474.

Defense counsel objected because he argued it would be confusing to the jury and a comment on the facts because the statute starts with the words: "A person who drives...." The main issue in the case was who was driving. R. 475 – 476.

The judge said that since the identification of the person who actually committed this crime was an issue, he was going to charge the jury that they must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before they could convict him. Defense counsel said that he was "worried about that in context with the statute." R. 476, ll. 15 – 25.

The judge said he had a duty to charge the law. R. 477, ll. 1 – 12. The judge did charge the statute 56-5-2950 to the jury. R. 507.

S.C. Code Section 56-5-2950 (A) provides in part:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol or drugs or a combination of alcohol and drugs.

Appellant was administered the tests. R. 87-88.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007).

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

In State v. Roof, 298 S.C. 351, 380 S.E.2d 828 (1989), the appellant and his co-defendant were tried for the murder of a friend. Both defendants gave the same story. The trial judge instructed the jury that appellant's co-defendant could be found guilty of accessory after the fact, but the judge did not give that same instruction for appellant. The Supreme Court reversed appellant's case and remanded for a new trial because the Court wrote that the charge on accessory after the fact given for the co-defendant was a comment on the factual issue of witness credibility. The co-defendant testified but appellant did not. The Court cited Article V, Section 21 of the South Carolina Constitution which provides that "judges shall not charge juries in respect to matters of fact, but shall declare the law."

In State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006), the Supreme Court held that the trial judge did not err in charging the jury that the victim's testimony in this CSC case need not be corroborated by other testimony or evidence. In his dissent, Justice Pleicones wrote that a jury

charge is correct if it contains the correct definition of the law when read as a whole citing Shepard v. State, 357 S.C. 646, 665, 594 S. E.2d 462 (2004). He continued to write that some principles of law, however, are not to be charged to a jury citing State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) which held that although evidence of a defendant's flight is admissible as circumstantial evidence of guilt, it is improper for the trial judge to instruct the jury on the law of flight, because such an instruction "oftentimes has the potential for creating more problems than solution," as it places undue emphasis upon that part of circumstantial evidence.

The Court of Appeals held that viewing the jury instruction as a whole, the circuit court did not abuse its discretion in charging the jury on Section 56-5-2950(A) because it was unlikely that a reasonable juror would have singled out the phrase "a person who drives" and interpret it as the circuit court's opinion on the facts of the case. The Court misapprehended the issue. The whole issue in this case was who was the driver. The judge's erroneous charge went to the heart of the issue that the jury had to decide. In State v. Thorne, 237 S.C. 248, 116 S.E.2d 854 (1960), the Supreme Court ruled the trial court may not, even unintentionally, intimate to the jury any opinion as to the facts, and if he does so, either intentionally or unintentionally, a new trial must be granted.

The trial judge's charge on the statute 56-5-2950 was a comment on the factual issue as to who was the driver of the car, since it was appellant whose case was processed under the statute rather than the decedent's. The jury could readily derive from the judge's charge that the judge believed appellant was the driver.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its rulings.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above the printed name and title.

LaNelle Cantey DuRant  
Appellate Defender

This 24th day of October, 2012.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Lexington County  
R. Knox McMahon, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

CHRISTOPHER MANNING,

APPELLANT

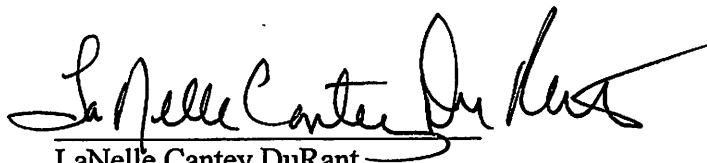
APPELLATE CASE NO. 2010-161686

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of October, 2012.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 24th day  
of October, 2012.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022.

# The South Carolina Court of Appeals

## The State, Respondent

**V.**

**Christopher Manning, Appellant.**

Appellate Case No. 2010-161686

## ORDER DENYING PETITION FOR REHEARING AND SUBSTITUTING OPINION

After careful consideration of the Petition for Panel Rehearing, the Court has decided to issue a substituted opinion. It is, therefore, ordered that the Petition for Panel Rehearing be denied and the earlier opinion, Op. No. 5017, be withdrawn and substituted with the attached opinion.

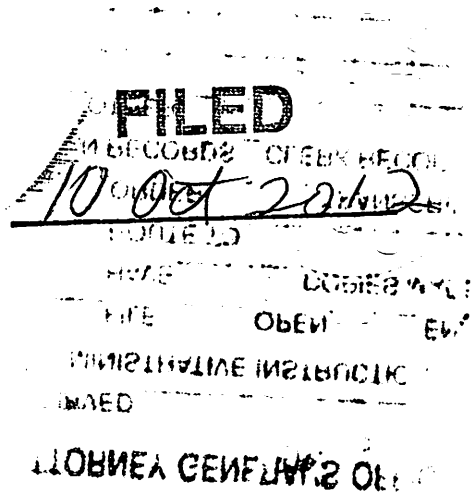
 H. Bruce Ingram J. Williams

 Paul C. Thomas J. Thomas

 James E. Lockemy J. Lockemy

## Columbia, South Carolina

cc:  
LaNelle Cantey DuRant  
..  
David A. Spencer



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

The State, Respondent,

v.

Christopher Manning, Appellant.

Appellate Case No. 2010-161686

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Appeal From Lexington County  
R. Knox McMahon, Circuit Court Judge

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Published Opinion No. 5017  
Heard May 8, 2012 – Filed August 1, 2012  
Withdrawn, Substituted and Refiled October 10, 2012

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**AFFIRMED**

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Appellate Defender LaNelle C. DuRant, of Columbia, for  
Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney  
General John W. McIntosh, Assistant Deputy Attorney  
General David A. Spencer, all of Columbia; and Solicitor  
Donald Myers, of Lexington, for Respondent.

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**WILLIAMS, J.:** In this appeal, Christopher Manning (Manning) asserts the circuit court erred by (1) denying Manning's motion to dismiss the case because the State violated section 56-5-2953 of the South Carolina Code (Supp. 2011) by failing to provide an affidavit of the arresting officer certifying that it was physically impossible to provide a video recording as required by the statute when Manning needed emergency medical treatment; (2) denying Manning's motion to suppress

the blood test evidence pursuant to section 56-5-2946 of the South Carolina Code (1991) because there was not sufficient probable cause for an arrest; (3) denying Manning's motion for a mistrial based on prejudice suffered by Manning after the circuit court severed the felony DUI charge and the possession of a schedule three substance charge after the jury was aware Manning was being tried on both charges; and (4) charging the jury on section 56-5-2950(b) of the South Carolina Code (Supp. 2011). We affirm.

## **FACTS**

On July 31, 2009, Manning was working at Boondocks, a private club. Jacob Hill (Hill) was working at a nearby restaurant, Fisherman's Wharf. Hill needed a ride home from work, so he walked to Boondocks where he knew people because he had previously worked there. When he arrived at Boondocks, Hill started drinking with friends.

After Manning's shift at Boondocks was over at 11:00 pm, he began drinking with Hill and his friends until around 4:00 am. Heather Fairchild (Fairchild), one of the bartenders at Boondocks that night, testified that although Manning and Hill consumed a "pretty good amount of alcohol" by drinking beer and taking shots together, neither appeared to be visibly drunk. When Boondocks closed, Fairchild testified she heard Manning and Hill talk about going swimming in Lake Murray and also heard Manning say he had his car and he was going to drive.

Manning and Hill were subsequently in a single car accident, severely injuring Manning and killing Hill. Manning was arrested for felony DUI and possession of a quantity of hydrocodone and acetaminophen, both schedule three substances. During the two-day jury trial, the State argued Manning was the driver. Manning's defense at trial was that Hill was the driver of the vehicle.

Nathan Prouse (Prouse), an employee of the Lexington County Fire Service, testified he received a call shortly before 5:00 am about a vehicle accident on Highway 378. He was the first responder on the scene. When Prouse arrived, he saw two bodies lying on the ground in a field. EMS arrived immediately after Prouse and pronounced Hill deceased. Prouse went to assist Manning, who was severely injured. Prouse testified Manning appeared alert and told Prouse, "I f-ed up!" Other emergency responders testified they heard Manning say those same words. Elizabeth Grayson Simmons (Simmons), of Lexington County EMS, testified the first thing she noticed was a strong smell of alcohol as she approached Manning. Simmons testified Manning's nose was split, and he had a wound as big

as a fist in his abdomen exposing his intestines. Simmons testified she heard Manning state, "I f-ed up. I should have never done this. Look what I've done." Firefighter Victor Tomaino (Tomaino), who assisted in Manning's care, testified he heard Manning repeatedly say "I f-ed up" and "I should not have been driving."

Corporal Quest Hallman (Corporal Hallman) was the first police officer to arrive at the scene, but Manning had already been transported to the hospital. Corporal Hallman conducted an investigation of the scene to determine the identity of the driver. Corporal Hallman ultimately concluded that Manning was the driver and directed Trooper Jeffrey B. Baker (Trooper Baker) to retrieve a blood sample from Manning at the hospital. In explaining his request for the blood sample, Corporal Hallman testified, "In my experience and my determination, I determined [Manning] was the driver of the vehicle. And with there being a death involved, a legal blood sample was drawn."

Forensic toxicologist, Jennifer Brown (Brown), testified that Manning's blood alcohol level was .173, and Hill's blood alcohol level was .169 at the time of the accident. Brown also testified this level of intoxication would slow an individual's reaction time, impair his or her vision, and adversely affect his or her judgment.

Corporal James O'Donnell (O'Donnell) testified he worked for the South Carolina Highway Department Patrol with the Multidisciplinary Accident Investigation Team (MAIT). The State qualified O'Donnell as an expert in the field of accident reconstruction. O'Donnell further testified that in his opinion, the vehicle was going 89 miles per hour at the time of the accident. He opined that the vehicle went into a curve, went off the shoulder of the road, overturned multiple times, struck a tree, and flew across a ditch where it landed. O'Donnell estimated the vehicle travelled a total of 535 feet during the accident. O'Donnell noted the accident was so violent that the engine was dislodged from the engine compartment. Hill was found lying approximately fifty feet from the vehicle, and Manning was found approximately fifteen feet from the vehicle. O'Donnell testified there was no forensic evidence identifying the driver, and no witnesses. O'Donnell did note, however, that a driver has more obstacles than a passenger would to keep from being ejected, and that the steering wheel in this case could have caused Manning's abdominal injuries.

Prior to trial, the circuit court severed the felony DUI charge and the schedule three drug charge, and the jury found Manning guilty of felony DUI. The circuit court sentenced Manning to eighteen years' imprisonment and a \$10,000 fine. Manning appeals.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.*

## LAW/ANALYSIS

### I. Section 56-5-2953

Manning argues the circuit court erred in denying his motion to dismiss because the arresting officer did not provide an affidavit in compliance with section 56-5-2953. We disagree.

Section 56-5-2953(A) provides that a person who operates a vehicle while under the influence of alcohol "*must* have his conduct at the incident site and the breath test site video recorded." (emphasis added).

Subsection B of 56-5-2953 outlines four exceptions that excuse noncompliance with subsection A's mandatory video recording requirement. Failure to comply with the video recording requirement is excused: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances. § 56-5-2953(B); *see also Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 346, 713 S.E.2d 278, 285 (2011) (explaining a previous version of subsection B that is nearly identical to the current version).

Manning relies on *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007), to argue the circuit court erred in failing to dismiss Manning's charges. In *Suchenski*, our supreme court affirmed the dismissal of the defendant's charges for driving with an unlawful alcohol concentration due to the failure of the arresting officer to record a third field sobriety test because he unintentionally ran out of videotape. 374 S.C. at 14-16, 646 S.E.2d at 879-80. However, in that case, our supreme court found the lower court only considered subsection A of 56-5-2953, and not the exceptions to the videotaping requirement in subsection B of 56-5-2953. *Id.* at 15-16, 646 S.E.2d at 880. Therefore, the *Suchenski* court found any

issue dealing with the exceptions outlined in subsection B of 56-5-2953 was not preserved for review. *Id.*

Here, the circuit court found there was no conduct to record under subsection A of section 56-5-2953 because the police arrived after Manning left the scene to seek medical treatment. The circuit court held subsection A of 56-5-2953 was inapplicable because Corporal Hallman and Manning were never simultaneously present at the incident site; therefore, there was nothing to record. Moreover, the circuit court held that even if Corporal Hallman had a duty to record or sign a sworn affidavit certifying that it was physically impossible to produce the video recording because Manning needed emergency medical treatment, section 56-5-2953 allows a circuit court to look at the totality of the circumstances and make a determination of whether the charges should be dismissed.

We find section 56-5-2953 was implicated by the facts of this case. Although the officers did not arrive to the incident site before Manning was sent to the hospital, the first sentence of subsection A plainly states that "[a] person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site . . . video recorded." § 56-5-2053(A). The important question here is whether the State satisfied an exception to the video recording requirement outlined in subsection B. § 56-5-2053(B).

We also find the circuit court properly refused to dismiss Manning's charges under subsection B. In this case, it was physically impossible for Corporal Hallman to produce a video recording of Manning at the incident scene because Manning had been transported from the scene for medical treatment prior to Corporal Hallman's arrival. Because the State did not submit an affidavit signed by the arresting officer and stating Manning was transported for medical treatment, Manning's charges should have been dismissed unless another exception under subsection B applied. *See* § 56-5-2953(B) ("Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal . . . if the arresting officer . . . submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment . . .").

Despite the failure to provide an affidavit under subsection B, the video recording was not required because Corporal Hallman was conducting an investigation of a traffic accident and Manning was arrested at the hospital. *See* § 56-5-2953(B) ("In circumstances including, but not limited to, . . . traffic accident investigations . . . , where an arrest has been made and the video recording equipment has not been

activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal.”).

Moreover, even if the traffic accident investigation exception was inapplicable, the circuit court properly concluded the video recording was not required due to the totality of the circumstances because Manning and Corporal Hallman were never at the incident scene at the same time. *See* § 56-5-2953(B) (“Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of the circumstances . . .”).

Accordingly, we find the circuit court properly held section 56-5-2953 did not require the dismissal of Manning's charges.

## **II. Section 56-5-2946**

Manning also argues the circuit court erred in denying his motion to suppress the blood test evidence pursuant to section 56-5-2946 because there was not sufficient probable cause for an arrest. We disagree.

Section 56-5-2946 provides, in pertinent part:

Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated [the law by driving under the influence] or is under arrest for [driving under the influence]. The tests must be administered at the direction of a law enforcement officer who has probable cause to believe that the person violated or is under arrest for a violation of § 56-5-2945 [offense of felony driving under the influence].

Probable cause to arrest without a warrant exists when the "circumstances within the arresting officer's knowledge are sufficient for a reasonable person to believe a crime has been committed by the person to be arrested." *State v. Cuevas*, 365 S.C. 198, 203, 616 S.E.2d 718, 721 (Ct. App. 2005). "In determining whether probable cause exists, 'all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received.'" *Id.* at 204, 616 S.E.2d at 721 (citing *State v. Roper*, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979)). "Probable cause turns not on the individual's actual guilt

or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime."

*Jackson v. City of Abbeville*, 366 S.C. 662, 658, 623 S.E.2d 656, 666 (Ct. App. 2005).

This court reviews the circuit court's probable cause determination under a "clear error" standard. *Baccus*, 367 S.C. at 48-49, 625 S.E.2d at 220. The finding that an arrest was made based upon probable cause is conclusive on appeal where supported by evidence. *State v. Jones*, 268 S.C. 227, 233, 233 S.E.2d 287, 289 (1977).

Here, the circuit court found that both Corporal Hallman and Trooper Baker had probable cause to arrest Manning for felony DUI. We agree.

Under our standard of review, we find a reasonable person with Corporal Hallman's knowledge would have probable cause to arrest Manning for felony DUI. The accident occurred at 5 am and was so violent that the car drifted off the road over 500 feet. Corporal Hallman testified he smelled alcohol in and around the vehicle, and saw a beer bottle in the accident debris. Corporal Hallman also testified he knew the address on the vehicle's registration matched Manning's Department of Motor Vehicle (DMV) record. Most importantly, Corporal Hallman testified he believed Manning to be the driver because Trooper Baker called him and told him Manning stated he was the driver. We find further support for a finding of probable cause based on Corporal Hallman's testimony he arrested Manning for felony DUI after speaking with fire service personnel and EMS at the scene, who were present with Manning shortly after the accident.

Second, if Trooper Baker was deemed to be the arresting officer, we find there is evidence to support Trooper Baker had probable cause to arrest Manning for felony DUI based on a statement made to him by a Highway Patrol officer indicating Manning was the driver, his observations at the hospital that Manning smelled of alcohol, and his observations that Manning sustained trauma consistent with having been in an accident. Accordingly, because the circuit court's finding that Corporal Hallman and Trooper Baker both had probable cause to arrest Manning is supported by the evidence in the record, we find no clear error. *See State v. Barrs*, 257 S.C. 193, 198, 184 S.E.2d 708, 710 (1971) (holding because there was evidence to support the circuit court's finding that officer had probable cause to make an arrest, it is conclusive on appeal).

### **III. Severance of charges**

Manning argued the circuit court erred in denying his motion for a mistrial after the circuit court severed the felony DUI charge and the possession of a schedule three substance charge because the potential jurors were told at the beginning of the trial that Manning was being tried for both charges, and both indictments were read.

In this case, Manning was indicted for two charges: felony DUI and possession of a quantity of hydrocodone and acetaminophen, both schedule three substances. At the beginning of jury selection, the circuit court read both indictments to the prospective jurors. After jury selection was complete and the jury was qualified, Manning moved to sever the charges, arguing because he had no hydrocodone or acetaminophen in his system at the time of the accident, it would be highly prejudicial under Rule 403 of the South Carolina Rules of Evidence for the jury to consider his possession of those substances in determining whether he was guilty of felony DUI. Manning asserted, "the natural assumption of the jury will be that [the possession of the schedule three substances] is something that deals with the felony DUI."

During the pre-trial hearing, after the State confirmed the schedule three substances did not appear in Manning's blood stream, the circuit court severed the charges. Manning moved for a mistrial, arguing the jurors would still speculate about the severed drug charge because they heard both indictments read at the beginning of jury selection. The circuit court denied Manning's motion stating:

You didn't make that motion before the jury was qualified, and the Court is not going to be trapped [into a mistrial] like that. I'll be glad to give whatever instruction you want me to give [to the jury], but the case was called for trial in front of the Court. It was qualified. There were no motions at that time, except the one y'all brought to me in chambers on the continuance. So if it prejudices [Manning], that's a self-inflicted wound. That's not a wound inflicted by the State or this Court.

Manning declined the circuit court's offer to give an instruction to the jury to disregard the severed drug charge.

We find Manning waived this issue on appeal by failing to timely object to presenting both indictments to the prospective jurors. Manning did not

contemporaneously object to reading both indictments to prospective jurors and did not move to sever the charges until after the jury selection process was complete and the jury was qualified. *See Scott v. Porter*, 340 S.C. 158, 167, 530 S.E.2d 389, 393 (Ct. App. 2000) ("[I]n order to be timely, an objection usually must be made at the earliest possible opportunity."); *cf. State v. Lynn*, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (holding that the failure to contemporaneously object to prejudicial testimony "cannot be later bootstrapped by a motion for a mistrial"). Moreover, on the merits, we find the circuit court did not abuse its discretion in denying Manning's motion for a mistrial.

The decision to grant or deny a mistrial is within the sound discretion of the circuit court. *State v. Stanley*, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005). The circuit court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *Id.*; *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Granting a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way." *State v. Moore*, 377 S.C. 299, 311-13, 659 S.E.2d 256, 263 (Ct. App. 2008). A mistrial should only be granted when "absolutely necessary," and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. *Stanley*, 365 S.C. at 34, 615 S.E.2d at 460.

We find the single reference to the schedule three drug charge contained in the indictments read at the beginning of trial does not constitute sufficient prejudice to justify a mistrial. *See State v. Thompson*, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior [crimes] is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."). Ample evidence in the record supports Manning's conviction for felony DUI, and there is no evidence the jury considered the severed drug charge in reaching its verdict. Therefore, we affirm the circuit court's decision to deny Manning's motion for a mistrial.

#### **IV. Section 56-5-2950(b)**

Manning argues the circuit court erred in charging the jury on section 56-5-2950(A) because the statute begins with "a person who drives" which is a statement on the facts and the identification of the driver was the primary issue at trial. We disagree.

Generally, the circuit court is required to charge only the current and correct law of South Carolina. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004); *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). The law to be charged to the jury is determined by the evidence presented at trial. *Brown*, 362 S.C. at 261-62, 607 S.E.2d at 95. "Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). An appellate court will not reverse a circuit court's decision regarding jury instructions absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Section 56-5-2950(A) provides, in pertinent part:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs, or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol or drugs or a combination of alcohol and drugs.

Here, the circuit court charged the jury, in pertinent part:

Felony DUI requires proof of three elements: Number one, the actor drives a vehicle under the influence of alcohol and/or drugs; number two, the actor does an act forbidden by law or neglected a duty imposed by law; and number three, the act or negligence, the act of neglect, proximately cause the death to another person . . . . In every case before a jury, the jury becomes the sole and exclusive judge of the facts in a case. A [circuit] judge cannot intimate, state, comment on or make any statement to a jury about the facts in the case. Since you the jury are the sole judge of the facts, you are not to infer from what I have said during the progress of this trial . . . or anything that I say now during the course of this instruction to you that I have any opinion about the facts in the case. . . . An issue in this case is the identification of the Defendant as the person who

committed the crime charged. The State has the burden of proving the identity beyond a reasonable doubt. You the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you convict the Defendant.

The circuit court subsequently charged the jury with section 56-5-2950(A), reading the statute in its entirety.

Viewing the jury instruction as a whole, we find the circuit court did not abuse its discretion in charging the jury on section 56-5-2950(A). Prior to charging the jury on section 56-5-2950(A), the circuit court made clear it was not making any statements related to the facts, but rather the jury in its absolute discretion must decide beyond a reasonable doubt if Manning was the driver of the vehicle. It is unlikely that a reasonable juror would have singled out the phrase "a person who drives" and interpreted it as the circuit court's opinion on the facts of the case. *See State v. Jackson*, 297 S.C. 523, 527, 377 S.E.2d 570, 572 (1989) ("[T]he test is what a reasonable juror would have understood the charge as meaning."). We therefore affirm the circuit court's jury charge on section 56-5-2950(A). *See id.* at 526, 377 S.E.2d at 572 ("Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error.").

## **CONCLUSION**

Accordingly, the circuit court's decision is

**AFFIRMED.**

**THOMAS and LOCKEMY, JJ., concur.**

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County

R. Knox McMahon, Circuit Court Judge

**RECEIVED**

JAN 30 2013

Opinion No. 5017 (S.C. Ct. App. filed 10/10/12) **S.C. Supreme Court**

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09-GS-32-02855

THE STATE,

RESPONDENT,

V.

CHRISTOPHER MANNING,

PETITIONER

APPELLATE CASE NO. 2012-213685

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PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 10, 2012.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court in denying appellant's motion to dismiss the case where the state violated S.C. Code Section 56-5-2953 because the arresting officer did not provide an affidavit certifying that it was physically impossible to provide a video recording as required by the statute because the person needed emergency medical treatment?
2. Whether the Court of Appeals erred in affirming the trial court in denying appellant's motion to suppress the blood test evidence pursuant to S.C. Code Section 56-5-2946 because there was not sufficient probable cause for an arrest which the statute requires before a blood sample can be drawn because the driver of the vehicle was not identified?
3. Whether the Court of Appeals erred in affirming the trial court in denying appellant's motion for a mistrial based on prejudice to appellant after the trial judge severed the felony DUI charge and the possession of a schedule three substance (hydrocodone) charge because the jury was told at the beginning of trial that appellant was being tried on both charges, and both indictments were read?
4. Whether the Court of Appeals erred in affirming the trial court in charging the jury on S.C. Code Section 56-5-2950 (b) which was a comment on the facts because the statute begins with: "A person who drives..." and the identification of the driver was the primary issue in the trial?

## STATEMENT OF THE CASE

### **Procedural History**

In November 2009, the Lexington County Grand Jury indicted Christopher D. Manning on the charge of Felony Driving Under the Influence/Death. On May 11 – 13, 2010, Manning proceeded to trial before the Honorable R. Knox McMahon and a jury. He was represented by Robert M. Masden and Bennett E. Casto. The state was represented by Derrick Mobley, T. Angela Garrick, and Alton H. Eargle, Jr. The jury returned a verdict of guilty as indicted. Judge McMahon sentenced Manning to eighteen years imprisonment and a \$10,000 fine. Manning's attorney filed a notice of appeal. The office of Appellate Defense perfected the appeal. The Court of Appeals affirmed Manning's conviction and sentence on August 16, 2012. App. 1-11. On October 10, 2012, the Court of Appeals withdrew the first opinion, substituted and refiled a second opinion still affirming appellant's conviction and sentence. State v. Manning, Op. No. 5017 (Ct. App. filed October 10, 2012). App. 35 – 46. Appellant filed a petition for rehearing on August 16, 2012, and a second petition for rehearing on October 24, 2012. App. 12 – 27; App. 47 – 64. On November 30, 2012, the Court of Appeals denied the petition for rehearing. App.66. This petition for a writ of certiorari to the Court of Appeals follows.

### **Relevant Facts**

On July 31, 2009, Christopher Manning was working at a private club, Boondocks, as a cook. R. 129 – 131. Jacob Hill was working at the nearby restaurant, Fisherman's Wharf. On this day, Hill needed a ride home from work so he walked to Boondocks where he knew people because

he had previously worked there. When he arrived there, he started drinking with some of his friends.

R. 119, ll. 21 – 25; R. 120, ll. 1 – 25.

Manning's work shift was over by 11:00 that night, so he began mingling and hanging out with Hill and other friends drinking and socializing. This went on until around 4:00 in the morning.

R. 132, ll. 9 – 25; R. 145, ll. 1 – 25.

Heather Fairchild, who was one of the bartenders that night, testified that Manning and Hill were drinking beer and shots together along with the other people. She said Manning consumed a "pretty good amount of alcohol." R. 134 – 136. But neither Hill nor Manning appeared to be visibly drunk. R. 146, ll. 1 – 25; R. 147, ll. 1 – 6. Manning and Hill and a young woman left the bar together, but Fairchild did not see them get in the car. However, she heard Manning say that he had his car, and he would drive. R. 137 – 140.

Nathan Prouse, an employee of the Lexington County Fire Service, received a call shortly before 5:00 A.M. of a vehicle accident on Highway 378 near the Saluda County line. He was the first responder to arrive at the scene. When he arrived, he saw two bodies in the field. R. 34 – 38; R. 187 – 188. EMS arrived immediately after him, and announced that Hill was deceased. Prouse went to assist Manning who was severely injured. R. 190; R. 28 – 30.

As Prouse was talking to Manning, who appeared alert as he was speaking to Prouse and to EMS, he said that Manning kept saying: "I f---cked up!" R. 192, ll. 14 – 25; R. 193, ll. 1 – 5; R. 195, ll. 11 – 25; R. 196, ll. 1 – 25.

Three other emergency responders testified that they heard Manning say those same words: "I f---cked up!" They were: (1) Elizabeth Simmons who was an EMT, R. 19 – 20; R. 37; (2) Jerry Wise who was a volunteer with the Lexington County Fire service as an EMT, R. 52; ll. 20 – 25; R. 53, ll. 1 – 8; R. 58; (3) Victor Tomaino who was a volunteer fireman, R. 63, ll. 16 – 25; R. 64 –

66. Tomaino testified that he also heard Manning say that he shouldn't have been driving. R. 66, ll. 1 – 9.

The forensic toxicologist, Jennifer Brown, testified that Manning's blood alcohol level was .173. R. 408, ll. 1 – 25; R. 409, ll. 1 – 25. Hill's blood alcohol level was .169. R. 416, ll. 9 – 25; R. 417, ll. 1 – 18.

Corporal James O'Donnell testified that he worked for the South Carolina Highway Patrol with the Multidisciplinary Accident Investigative Team (MAIT). He was qualified as an expert in the field of accident reconstruction. R. 419 – 420; R. 568. He testified that his opinion was that the vehicle was going 89 miles per hour at the time of the accident. The vehicle went into a curve but went off the shoulder of the road. The vehicle kept overturning, struck a tree, and went across a ditch where it stopped. The path was 535 feet. The accident was so violent that the engine was dislodged from the engine compartment. R. 437 – 441.

Hill was found lying about 50 feet from the vehicle, and Manning was found about 15 feet from the vehicle. R. 123, ll. 12 – 16. The state argued that Manning was the driver. Manning's defense was that Hill was the driver. R. 119, ll. 21 – 25; R. 120 – 128. Corporal O'Donnell testified there was no forensic evidence identifying the driver, and no witnesses. R. 469 – 470.

## ARGUMENT

### I

The Court of Appeals erred in affirming the trial court in denying appellant's motion to dismiss the case where the state violated S.C. Code Section 56-5-2953 because the arresting officer did not provide an affidavit certifying that it was physically impossible to provide a video recording as required by the statute because the person needed emergency medical treatment.

Defense counsel made a pretrial motion for dismissal of the case against Manning because the state violated S.C. Code Section 56-5-2953 by not providing either a video of the scene or an affidavit from the law enforcement officer indicating the reason there was no video. Counsel cited City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). The state argued that that there was no video because Manning had been transported to the hospital by the time the first responding trooper arrived. R. 76, ll. 1 – 25.

The judge denied defense counsel's motion. Defense counsel then argued that Section B of the statute provided that a sworn affidavit was necessary to indicate that a video recording was physically impossible because the person needed emergency medical treatment. The judge denied the motion again. R. 77, ll. 1 – 25; R. 78, ll. 1 – 3.

At the close of pretrial motions, the judge revisited this issue again before the jury was brought in. He discussed The City of Rock Hill v. Suchenski, id. and the statute. He found that the video was not required because there was no conduct to record. He said that Section B allowed the judge to consider the totality of the circumstances for the video not being produced, and he ruled that under the totality of the circumstances, 56-5-2953 did not apply to the factual situation in Manning's case. R. 109, ll. 22 – 25; R. 110 – 111.

Trooper Quest Hallman with the Highway Patrol testified that by the time he arrived at the scene of the accident, Manning had already been transported to the hospital as the ambulance passed Trooper Hallman as he was on his way to the scene. R. 233 – 237.

South Carolina Code Section 56-5-2953 (A) provides: “A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.” The statute identifies the requirements to be recorded:

(1) (a) The video recording at the incident site must:

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

(ii) include any field sobriety tests administered; and

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

(b) A refusal to take a field sobriety test does not constitute disobeying a police command.

S.C. Code Ann. § 56-5-2953(A) (Supp. 2008).

In City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E. 2d 879 (2007), the Supreme Court ruled that dismissal of the charge of DUAC (arrest was for DUI), for the arresting officer’s failure to provide a complete videotape from the incident site was the appropriate remedy. In that case, the officer began the tape and taped two field sobriety tests but ran out of tape before the third field sobriety test was administered. The officer said it had never happened before and he did not know the tape had run out. The municipal court denied the motion to dismiss on the grounds of exigent circumstances. On appeal, the circuit court reversed and dismissed the charge based on the violation of Section 56-5-2953(A) because a complete tape was not produced. The

Supreme Court did not address the issue of exigent circumstances because the circuit court did not address it.

Section 56-5-2953(B) of the South Carolina Code (Supp. 2006) requires the officer to produce the videotape or submit an affidavit explaining the failure to produce the videotape. It reads:

(B) Nothing in this section may be construed as prohibiting the introduction of other evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. . . . Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the video recording.

S.C. Code Ann. § 56-5-2953(B) (Supp. 2008).

In State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004), the Court of Appeals held that when a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning.

The statute is clear that the failure of the arresting officer to produce the video recording would not result in dismissal of the charge **IF** the officer submits a sworn affidavit certifying why

the recording was not provided. In Manning's case, no affidavit was produced even when the specific reason for emergency medical treatment is stated in the statute. Therefore, according to the ruling in City of Rock Hill v. Suchenski, *supra*, the charge should have been dismissed because the Supreme Court said that 59-5-2953 provides for a dismissal of the charges when the statute was inexcusably violated.

The Supreme Court found in the Suchenski, *supra*, case, that under Section 56-5-2953, a violation of the statute with no mention of prejudice, may result in dismissal of the charges.

Manning's charge should have been dismissed by the trial judge.

The Court of Appeals held that the circuit court properly concluded the video recording was not required due to the totality of the circumstances because Manning and Corporal Hallman were never at the incident scene at the same time. App. 42 – 41.

The Court misapprehended the issue. The Court addressed only the requirement for a video whereas Manning was asserting that an affidavit was required as provided in the statute to indicate why a video was not provided. The Court did not address the issue of an affidavit not being provided when it was required by statute just as much as a video. The Court of Appeals basically eliminated the need for an affidavit which was not in line with the law.

Manning's charge should have been dismissed by the trial judge.

ARGUMENTII

The Court of Appeals erred in affirming the trial court in denying appellant's motion to suppress the blood test evidence pursuant to S.C. Code Section 56-5-2946 because there was not sufficient probable cause for an arrest which the statute requires before a blood sample can be drawn because the driver of the vehicle was not identified.

Manning's attorney made a pretrial motion to suppress the blood test evidence taken from Manning pursuant to S.C. Code Section 56-5-2946 which provided that the "test must be administered at the direction of law enforcement who has probable cause to believe that the person violated or is under arrest for that section" or in Manning's case for felony DUI. R. 78, ll. 2 – 10.

Counsel argued that law enforcement did not have probable cause to support the arrest of Manning because the driver of the vehicle was unknown, and therefore the blood test could not be taken. Counsel argued that the blood test was taken around 7:00 A.M. and there were reports issued after that, around 8:00 A.M. stating that there was a driver issue with the driver's identity because it was not known who was driving. He said that Trooper Breland issued the accident report at 8:00 A.M. stating the driver was unknown, and the coroner's report indicated they did not know who was driving. Also, the investigating officer completed the towing report showing there was a driver issue. R. 78 – 79.

William Zeigler was the deputy coroner who responded to the accident. R. 223, ll. 14 – 25; R. 224, ll. 1 – 25; R. 225, ll. 1 – 25. He testified that he was at the scene about an hour or two, and he was not able to identify the driver. He included in his report that the driver was not known. R. 228 – 232.

The judge held an *in camera hearing* where Trooper Quest Hallman testified as the investigating officer. Trooper Hallman received the call of the accident around 5:00 A.M. as he was on patrol. His normal procedure was to find out who the driver was. He looked at the evidence such as the seat and steering wheel position. R. 80 – 82.

He found a beer bottle among the debris in the field, and the vehicle had an odor of alcohol. R. 85, ll. 13 – R. 86, ll. 1 – 25. When he ran the tag on the vehicle, he found that it belonged to Manning's girlfriend, April Rabun. Heather Fairchild, the bartender at Boondocks, had told him Ms. Rabun was the girlfriend. Also, the address on Manning's license and the address on the vehicle registration were the same. R. 83 – 84.

Trooper Hallman sent Trooper Jeffrey B. Baker to the hospital to see Manning as Trooper Hallman was 35 miles away at the scene, and he needed to identify the driver. R. 82, ll. 12 – 25; R. 83, ll. 1 – 6. Trooper Hallman decided that Manning was the driver based on what Trooper Baker told him that he heard at the hospital, and that the vehicle belonged to Manning's girlfriend. Trooper Hallman's testimony was that Trooper Baker called him from the hospital and said Baker heard some statements when he went into the trauma area that Manning had said he was the driver, and that he and his buddy were riding to the lake. He could not remember exactly what Trooper Baker said. R. 83, ll. 1 – 25.

He did not know who Trooper Baker heard these comments from. R. 85, ll. 1 – 6.

Trooper Hallman told Trooper Baker to get a blood sample since Trooper Baker heard these statements and if Trooper Baker felt that Manning was the driver. R. 85, ll. 7 – 12.

Trooper Hallman admitted on cross examination that the blood was drawn from Manning at 7:19 A.M. The implied consent was completed at 7:16 A.M. However, he did not talk to the bartender, Heather Fairchild, until 9:30 A.M. There was nothing in all of the reports that Trooper

Hallman collected as the case agent to give to the solicitor any statements Manning made to Trooper Baker. R. 87 – R. 88. The report from Trooper Breland of the MAIT was dated 8/1/09 at 6:40 and it said driver unknown. R. 89 – 90.

Trooper Hallman completed the towing report at 8:08 A.M. on August 1, 2009 which indicated there was still an issue as to who was driving the vehicle. R. 91 – 92. He admitted that he was not able to develop any physical evidence to show who was the driver or that indicated Manning as the driver prior to the blood being drawn other than what he said Trooper Baker told him. R. 92, ll. 20 – 25; R. 93, ll. 1 – 11.

Trooper Baker testified that he talked to Manning in the trauma unit at Richland Memorial Emergency Room. Manning smelled of alcohol, and was not very coherent. He was not sure that Manning understood the Miranda warnings because he was in and out of consciousness. When asked if Manning requested an attorney, Trooper Baker responded: “no, sir. He wasn’t very coherent.” R. 265 – 268; R. 271, ll. 10 – 25; R. 272, ll. 1 – 23; R. 290.

At the direction of Trooper Hallman, Trooper Baker arrested Manning and obtained a blood sample. Defense counsel objected based on his pretrial motion. R. 268 – 269.

During Trooper Baker’s testimony, defense counsel asked for a hearing on a matter of law as he wanted to clarify if Manning made any statements to Trooper Baker. The solicitor said that Trooper Baker was going to say that no statements were made to him. R. 272 – 273. Defense counsel argued that that created a different issue in direct conflict as Trooper Hallman had testified that Trooper Baker told Hallman of statements Baker had overheard. R. 274 – 277.

After testimony about the blood sample, defense counsel renewed his motion to suppress the blood test based on the lack of probable cause. He argued that Trooper Hallman said Trooper Baker

told him he overheard statements in the trauma room that Manning was the driver of the vehicle. However, Trooper Baker denied making any statements. R. 325 – 326.

The solicitor said defense counsel misunderstood the testimony. The judge replayed Trooper Hallman's testimony, and recalled Trooper Baker to testify *in camera*. R. 327 – 334.

During this testimony, Trooper Baker testified that Manning did not make any statements to him and he did not remember any statements that the emergency first responders said that Manning made. He did not remember the specifics of his conversation with Trooper Hallman. Trooper Baker said he had no evidence that Manning was the driver other than what Trooper Hallman told him. R. 335 – 338.

Defense counsel renewed his objection to the blood test pursuant to 56-5-2946 based on the lack of probable cause to believe Manning was the driver, and therefore the blood sample should not have been drawn. R. 338 – 339. The state argued that probable cause was established through Trooper Hallman, and that Trooper Baker smelled alcohol on Manning. R. 340 – 342.

The judge ruled that there was sufficient probable cause to arrest Manning for the felony DUI based on the beer bottle at the scene, the statements from EMS that Manning was the driver, Trooper Baker smelling alcohol on Manning, and that the vehicle was registered to Manning's girlfriend. R. 342, ll. 12 – 25; R. 343 – 346.

S.C. Code Section 56-5-2946 provides:

Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

The tests must be administered at the direction of a law enforcement officer who has probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

Probable cause to arrest without a warrant generally exists when facts and circumstances within an arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested. State v. Cuevas, 365 S.C. 198, 616 S.E.2d 718 (Ct. App. 2005). A police officer has probable cause to arrest without a warrant where he in good faith believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise. Id.

A trial court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant. State v. Cuevas, *supra*.

There was not sufficient probable cause to arrest Manning because Trooper Hallman relied on statements that he said Trooper Baker allegedly heard in the trauma room that Manning was the driver. Trooper Baker testified that he never heard such statements. This information from Trooper Baker was the determining factor for probable cause for Trooper Hallman, but that evidence did not exist. Consequently, there was not sufficient evidence to establish that Manning was the driver. The information about the vehicle belonging to Manning's girlfriend was not known until after the arrest, and Trooper Hallman relied on this for probable cause.

There was no physical evidence indicating Manning as the driver; no DNA, no fingerprints, and no witnesses. R. 469 – 470.

The Court of Appeals held that both Corporal Hallman and Trooper Baker had probable cause to arrest Manning because Trooper Baker called Corporal Hallman from the hospital and said Manning was the driver; and Trooper Baker had probable cause because a highway patrolman told

ARGUMENTIII

The Court of Appeals erred in affirming the trial court in denying appellant's motion for a mistrial based on prejudice to appellant after the trial judge severed the felony DUI charge and the possession of a schedule three substance (hydrocodone) charge because the jury was told at the beginning of trial that appellant was being tried on both charges, and both indictments were read.

Manning was indicted on two charges; felony DUI and possession of a quantity of hydrocodone and acetaminophen, a schedule three controlled substance. These two indictments were read to the jury at the beginning of the trial. R. 1 – 10. Manning's attorney made a pretrial motion to sever the charges as the drug charge would be highly prejudicial under Rule 403, SCRE, to Manning. R. 11 – 13.

The trial judge did sever the two charges, after both indictments had been read to the jury, as the state explained that this drug did not show up in the drug analysis of either Manning or Hill. R. 105, ll. 16 – 25; R. 106, ll. 1 – 25; R. 107, ll. 1 -3. Defense counsel then asked for a mistrial because he argued that Manning was already prejudiced because both indictments were read to the jury so the jury has already heard of the drug charge. Counsel argued that whatever the judge told the jury about the drug charge would only cause them to speculate. R. 107, ll. 4 – 25; R. 108, ll. 1 – 5.

The judge said he refused to “be trapped into a mistrial.” He said that if Manning were prejudiced, it was a “self-inflicted wound.” R. 108, ll. 6 – 25; R. 109, ll. 1 – 2.

Whether to grant or deny a mistrial motion is a matter within the trial court's sound discretion, and the court's decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. State v. Latimore, 390 S.C. 88, 700 S.E.2d 456 (Ct. App. 2010); State

v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); citing State v. Council, 335 S.C. 1, 12-13, 515 S.E.2d 508 (1999). In order to receive a mistrial, a defendant must show error and resulting prejudice. It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial. State v. Culbreath, *supra*; State v. White, 371 S.C. 439, 443-44, 639 S.E.2d 160, 162 (Ct. App. 2006).

The power of the circuit court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the circuit court. State v. Latimore, *supra*, citing State v. Stanley, 365 S.C. 24, 615 S.E.2d 455, 460 (Ct. App. 2005).

Rule 403, SCRE, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Manning was prejudiced by the judge not granting a mistrial because the jury knew he had a drug charge. This was prejudicial because this charge had nothing to do with the felony DUI for which he did go to trial.

The Court of Appeals held that Manning waived any objection to the circuit court's denial of his motion for a mistrial when he refused a curative instruction offered by the court, but still ruled on the merits that the circuit court did not abuse its discretion in denying Manning's motion for a mistrial. App. 44

The Court misapprehended the issue. In State v. Wilson, 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010), the Court of Appeals ruled that because the defendant objected to the admission of testimony regarding a prior incident of CDV in this CDVHAN case, and when his objection was

overruled, he moved for a mistrial, he was not required to make another motion for mistrial or under any obligation to accept a curative instruction.

The Court wrote that there was no evidence that the jury considered the severed drug charge in reaching its verdict. This was impossible to determine without talking to the individual jurors. Therefore, a mistrial should have been granted.

ARGUMENTIV

The Court of Appeals erred in affirming the trial court in charging the jury on S.C. Code Section 56-5-2950 (b) which was a comment on the facts because the statute begins with: “A person who drives...” and the identification of the driver was the primary issue in the trial.

When discussing the appropriate jury charges to give, the judge asked both attorneys what he should charge concerning Manning’s rights under Miranda advised to him by Trooper Baker and the implied consent law, or if they wanted him to charge them at all. Defense counsel immediately said he did not want the judge to charge them at all. The state argued that in the interest of justice, the statute needed to be charged: 56-5-2950. R. 474.

Defense counsel objected because he argued it would be confusing to the jury and a comment on the facts because the statute starts with the words: “A person who drives.” The main issue in the case was who was driving. R. 475 – 476.

The judge said that since the identification of the person who actually committed this crime was an issue, he was going to charge the jury that they must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before they could convict him. Defense counsel said that he was “worried about that in context with the statute.” R. 476, ll. 15 – 25.

The judge said he had a duty to charge the law. R. 477, ll. 1 – 12. The judge did charge the statute 56-5-2950 to the jury. R. 507.

S.C. Code Section 56-5-2950 (A) provides in part:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was

driving a motor vehicle while under the influence of alcohol or drugs or a combination of alcohol and drugs.

The law to be charged must be determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391 (2001); State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). A trial court's decision regarding jury charges will not be reversed, where the charges as a whole properly charged the law to be applied. State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007).

A jury charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006). Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994).

In State v. Roof, 298 S.C. 351, 380 S.E.2d 828 (1989), the appellant and his co-defendant were tried for the murder of a friend. Both defendants gave the same story. The trial judge instructed the jury that appellant's co-defendant could be found guilty of accessory after the fact, but the judge did not give that same instruction for appellant. The Supreme Court reversed appellant's case and remanded for a new trial because the Court wrote that the charge on accessory after the fact given for the co-defendant was a comment on the factual issue of witness credibility. The co-defendant testified but appellant did not. The Court cited Article V, Section 21 of the South Carolina Constitution which provides that "judges shall not charge juries in respect to matters of fact, but shall declare the law."

The trial judge's charge on the statute 56-5-2950 was a comment on the factual issue as to who was the driver of the car, since it was appellant whose case was processed under the statute

rather than the decedent's. The jury could readily derive from the judge's charge that appellant was the driver.

The Court of Appeals held that viewing the jury instruction as a whole, the circuit court did not abuse its discretion in charging the jury on Section 56-5-2950(A) because it was unlikely that a reasonable juror would have singled out the phrase "a person who drives" and interpret it as the circuit court's opinion on the facts of the case. App. 46.

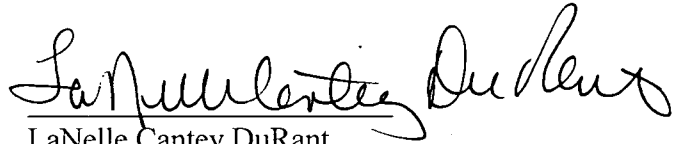
The Court misapprehended the issue. The whole issue in this case was who was the driver. The judge's erroneous charge went to the heart of the issue that the jury had to decide. In State v. Thorne, 237 S.C. 248, 116 S.E.2d 854 (1960), the Supreme Court ruled the trial court may not, even unintentionally, intimate to the jury any opinion as to the facts, and if he does so, either intentionally or unintentionally, a new trial must be granted.

The trial judge's charge on the statute 56-5-2950 was a comment on the factual issue as to who was the driver of the car, since it was appellant whose case was processed under the statute rather than the decedent's. The jury could readily derive from the judge's charge that the judge believed appellant was the driver.

CONCLUSION

Based on the above, certiorari should be granted, the conviction and sentence reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant".

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER.

This 30th day of January, 2013

him Manning was the driver and he smelled alcohol on Manning at the hospital so there was no clear error. App. 42.

The Court misapprehended the issue. The Court failed to address the issue that the evidence showed that the two officers' stories contradicted each other, and the trial court made no credibility findings.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lexington County  
R. Knox McMahon, Circuit Court Judge

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Opinion No. 5017 (S.C. Ct. App. filed 10/10/2012)  
09-GS-32-02855

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THE STATE,

RESPONDENT,

V.

CHRISTOPHER MANNING,

PETITIONER

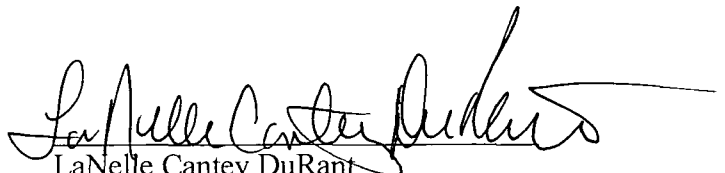
APPELLATE CASE NO. 2012-213685

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CERTIFICATE OF SERVICE

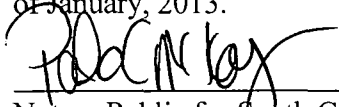
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I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on David Spencer, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, this 30th day of January, 2013.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day  
of January, 2013.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Lexington County  
R. Knox McMahon, Circuit Court Judge

---

**RECEIVED**

MAY 30 2013

THE STATE,

Respondent, **S.C. Supreme Court**

vs.

CHRISTOPHER MANNING,

Petitioner.

Appellate Case # 2012-213685

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**RETURN TO PETITION  
FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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**STATEMENT OF ISSUES ON APPEAL****I.**

The arresting officer was not required to provide an affidavit concerning the reason why Petitioner's conduct at the scene of the accident was not videotaped where law enforcement did not arrive at the scene of the accident until after Petitioner was transported to the emergency room.

**II.**

Law enforcement had probable cause to believe Petitioner committed felony DUI and therefore, the trial court did not err in denying the motion to suppress the blood test results.

**III.**

The trial court did not err in denying Petitioner's motion for mistrial and the issue is not preserved, especially since Petitioner failed to timely raise his motion to sever and refused a curative instruction.

**IV.**

The trial court's charge to the jury on implied consent was not a comment on the facts and the charge as a whole was not misleading and was free from error.

**STATEMENT OF THE CASE**

Petitioner Manning was indicted by the Lexington County Grand Jury of Felony Driving Under the Influence resulting in Death. Manning was tried by jury on May 11-13, 2010 and convicted as charged. The Honorable R. Knox McMahon sentenced Petitioner to eighteen years imprisonment.

Manning appealed his conviction and sentence to the Court of Appeals. The Court of Appeals affirmed the conviction and sentence in an opinion filed August 1, 2012. Manning petitioned for rehearing. The petition was denied, but the original opinion was withdrawn and substituted with a new opinion on October 10, 2012. State v. Manning, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012).

### STATEMENT OF FACTS

Petitioner Manning and his friend, Jake Hill, had drinks together after Manning finished his shift as a cook at a private bar. Manning and Jake left in Manning's SUV to go swimming. Manning crashed his SUV at a sharp curve, severely injuring himself and killing Jake.

Heather Fairchild was the first witness to testify before the jury. She was a bartender at Boondocks, a private club. She was tending bar on the night of July 31 into the morning hours of August 1, 2009. She started serving Manning around 10:30 or 11:00 p.m. that night after Manning finished his shift as a cook. Manning, Jake, and others drank together for several hours. They drank beer and shots of liquor. Fairchild testified that Manning drank a good amount of alcohol. Although she contended he was not stumbling, Fairchild testified that in her opinion, Manning was impaired that night. She testified she was familiar with the vehicle Manning drove to work and noticed it in the parking lot. Her shift ended at 4:45 a.m. Manning and Jake left shortly before then. Jake did not have a vehicle, he walked to the club that night. Manning said he had his car, and they made plans to drive to a boat ramp to go swimming. ROA. pp. 129-142.

Elizabeth Grayson Simmons from the Lexington County EMS arrived at the accident scene at 4:57 a.m. She noticed the strong smell of alcohol as she approached Manning. Manning's nose was split open and she saw a wound as big as a fist in his abdomen. She could see his intestines. A firefighter who also responded fetched a long-spine board to carry Manning from the field. Manning said "I f'ed up. I should have never done this. Look what I've done." Simmons could smell alcohol when he spoke. ROA. pp. 156-172, pp. 175-176 (direct quote: ROA. p. 168, lines 18-19).

Firefighter Nathan Prouse testified that he was the first responder on the scene. The vehicle was in a field about 60 to 70 feet off the road and severely damaged. Two bodies lay in the field. EMS arrived almost simultaneously and went to Jake, quickly determining he was dead. Prouse approached Manning, who lay closer to the wreck. Prouse asked Manning if anyone else other than the victim was riding with Manning. Manning replied: "No, no, it was just me and my buddy who was riding with me. It was just me and my buddy." ROA. pp. 188-193 (direct quote: tr. p. 193, lines 17-19). Manning kept saying "I f-ed up" repeatedly. ROA. p. 195.

Another firefighter, Victor Tomaino, helped carry Manning on the spine board. He heard Manning repeatedly say "I f-ed up" and at one point, heard Manning say "I should not have been driving." ROA. p. 212. The Coroner's Office declared Jake dead, with the approximate time of death as 4:30 a.m. ROA. p. 228.

Lance Corporal Quest Hallman was the first officer on the scene of the crash, but Manning was already gone. It took Hallman about twenty-five to thirty minutes to respond to the scene, it was rainy and he was careful, but he did exceed the speed limit slightly. He arrived on the scene and could already see the reflectors of the crashed vehicle, but was directed to the vehicle by emergency personnel. ROA. pp. 235-237. Hallman explained as follows:

But . . . fire services said, hey, here's the car. They showed me the victim and said the other – the driver had been transported, which I pretty much assumed because I had passed the ambulance while I was en route to the scene.

ROA. p. 237, lines 17-21.

Jake's body was about fifty to seventy-five feet away from the wrecked vehicle. It

appeared to Corporal Hallman that the vehicle left the road and flipped. The engine and transmission became unbolted from the vehicle and lay next to it. ROA. pp. 237-239. The odor of alcohol emanated from the vehicle. Hallman directed Trooper Baker to the hospital where Baker determined Manning to be the individual from the wreck. From Hallman's ensuing investigation, Hallman determined the address for Manning's driver's license and the registration for the vehicle were the same. The following testimony was elicited from Hallman in front of the jury:

Q: Okay. Now, you are still investigating this particular incident. Without going into any conversations that you had with some of these individuals, did you speak with anyone else that was still on the scene?

A: I did.

Q: Okay. During that course of – well, were you still investigating this incident to determine who was the driver?

A: Yes, sir.

Q: Okay. And after speaking with them and conducting your investigation, did you ultimately charge Mr. Christopher Manning –

A: I did.

Q: – with felony D.U.I.?

A: I did.

ROA. p. 251, line 11 - p. 252, line 1.

Manning was not in Corporal Hallman's presence at the time, so he directed Trooper Baker, who was at the hospital, to have Manning's blood drawn. ROA. p. 252. Corporal Hallman explained why he directed Trooper Baker to do this as follows: "In my experience and my determination, I determined him as the driver of the vehicle. And with

there being a death involved, a legal blood sample was drawn. . . .” ROA. p. 252, lines 16-21.

Manning’s blood alcohol content was .173%. ROA. p. 409. As the forensic toxicologist testified, at this level of intoxication, an individual’s reaction time would be slowed, their vision would be impaired, and their judgment adversely affected. ROA. pp. 409-410.

Corporal James O’Donnell of the South Carolina Highway Patrol testified as an expert in accident reconstruction. He determined that the vehicle veered off to the right of a left hand curve, traveled on the shoulder, struck a culvert, became airborne and flipped several times, ultimately traveling about 535 feet from where it left the road to the resting spot. The vehicle was going about 89 m.p.h. when it reached the curve. O’Donnell noted that the driver has more obstacles than a passenger would to keep from being ejected. He also testified that the steering wheel could have caused Manning’s injuries in the abdomen. ROA. pp. 424-440; pp. 458-460.

Manning did not testify or call any witnesses in his defense.

## ARGUMENT

### I.

**The arresting officer was not required to provide an affidavit concerning the reason why Petitioner's conduct at the scene of the accident was not videotaped where law enforcement did not arrive at the scene of the accident until after Petitioner was transported to the emergency room.**

Petitioner Manning argues that his felony DUI charge should have been dismissed because the arresting officer should have provided an affidavit concerning the failure to videotape Manning's conduct at the incident site. Manning misconstrues the statute. Videotaping was not required because law enforcement did not arrive at the incident site until after Manning was transported to the hospital. Manning's argument fails because no part of the statute applies where a defendant leaves the incident site before law enforcement arrives.<sup>1</sup> Since Manning allowed himself to be taken to the hospital for treatment before law enforcement arrived, law enforcement was not required to execute an affidavit.

Under S.C. Code Ann. § 56-5-2953:

(A) A person who violates Section 56-5-2930, 56-5-2933, or

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1     In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers. D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 482 S.E.2d 558 (1997) *overruled on other grounds by* Evins v. Richland County Historic Preservation Comm., 341 S.C. 15, 532 S.E.2d 876 (2000).

56-5-2945 must have his conduct at the incident site and the breath test site video recorded.

(1)(a) The video recording at the incident site must:

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

In the instant case, since law enforcement arrived after Manning left the incident site, blue lights were activated, if at all, after Manning left. There was no conduct to videotape, post-activation of the blue lights, at the incident site. The statute does not apply in the instant case.

Since the petition for writ of certiorari was filed, this Court issued its opinion in State v. Elwell, Op. No. 27259 (S.C. Sup.Ct., filed May 29, 2013). In that case, this Court determined whether video recording at the site of the breath test is required past the point a DUI suspect refuses the breath test. This Court found it was not required, noting the legislative purpose of section 56-5-2953 “is to create direct evidence of a DUI arrest.” Id. at 4 (internal quotations and citations omitted). This Court noted that once the suspect refuses a breath test, “the evidence gathering portion is over.” Id. Accordingly, this Court found the video recording excluding post-refusal recording sufficient, concluding: “To require otherwise would result in the officer having to undergo a useless and absurd act.” Id.

Like Elwell, for the law enforcement officer to make a video recording when a DUI suspect is not present at the incident site runs counter to the legislative purpose of the statute. It only applies when there is actual conduct by the suspect to videotape. The statute is not implicated in the instant case.

Further, Manning misconstrues the requirements to meet the exceptions found in §

56-5-2953(B), which are set out as follows:

(B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video equipment at the time of the arrest or probable cause determination, . . . was in an inoperable condition, . . . , in the alternative, submits a sworn affidavit that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the video recording based on the totality of circumstances; . . . .

The videotaping was not done at the incident site because Manning was not there. Under the plain language of the statute, the arresting officer is required to submit an affidavit when videotaping is not performed only if: (1) videotaping equipment is inoperable, (2) the person needed emergency medical treatment, or (3) exigent circumstances existed.

The problem was not that the equipment was inoperable, so that provision does not apply. Law enforcement was never in a position to determine, first hand, whether Manning needed emergency medical treatment or whether another exigent circumstance existed; therefore, the arresting officer is not required to submit an affidavit concerning a

subject to which neither he nor other law enforcement officers have first-hand knowledge. Manning is in a superior position to determine if emergency medical treatment was needed, because he was there. By the time law enforcement arrived, there was no conduct to record. Manning allowed himself to be taken from the scene by emergency personnel.

The facts of the case are more aligned with the next set of enumerated exceptions, where the blue lights are not activated due to road blocks, traffic accident investigations, and citizen arrests, and where video recording is required once practicable. Manning was removed by individuals other than law enforcement and law enforcement was investigating an obvious traffic accident. In the instant case, video recording never became practicable at the site, since Manning was not there, and therefore video recording never needed to begin.

The Court of Appeals found as follows:

Despite the failure to provide an affidavit under subsection B, the video recording was not required because Corporal Hallman was conducting an investigation of a traffic accident and Manning was arrested at the hospital. See §56-5-2953(B) (“In circumstances including, but not limited to, . . . traffic accident investigations . . . , where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal.”).

Manning, 400 S.C. at 266, 734 S.E.2d at 318.

Additionally, the Court of Appeals correctly found that the totality of circumstances exception applied to the instant case because law enforcement was not at the incident site before Manning was taken away by medical personnel. Id., 400 S.C. at 266, 734 S.E.2d at 318-19.

Manning's reliance on City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007) is misplaced. In that case, the Supreme Court did not review whether the totality of circumstances exception applied, as determined by the magistrate, because the reviewing circuit court did not address the issue in its order and the City failed to preserve the issue. In the instant case, the totality of circumstances issue applies and, further, the statute only applies when the defendant is found at the incident site, not when he has absconded or was already taken away by medical personnel. Accordingly, the trial court did not err.

## II.

**Law enforcement had probable cause to believe Applicant committed felony DUI and therefore, the trial court did not err in denying the motion to suppress the blood test results.**

Manning alleges law enforcement did not have probable cause to believe Manning was the driver of the vehicle. However, evidence at trial shows otherwise. S.C. Code Ann. § 56-5-2946 provides, in relevant part, as follows:

Notwithstanding any other provision of law, a person must submit to either one or a combination of chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or a combination of alcohol and drugs if there is probable cause to believe that the person violated or is under arrest for a violation of Section 56-5-2945.

Corporal Hallman testified that when he arrived at the scene, a strong smell of alcohol emanated from what remained of the vehicle. At the hospital, Trooper Baker smelled the odor of alcohol on Manning. ROA. pp. 267-268. Jake was undoubtedly dead. Corporal Hallman spoke with the emergency personnel who heard Manning's comments implicating himself as the driver. ROA. pp. 251-252.<sup>2</sup> The DMV records tied the vehicle to Manning's residence.<sup>3</sup>

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2 There was some confusion as to whether emergency personnel relayed this information to Baker or Hallman or both. See ROA. p. 83, p. 85, p. 269, pp. 335-337. However, whether thru direct conversation with emergency personnel or relayed by Baker, it is apparent that Hallman became aware that emergency personnel heard statements indicating Manning was the driver when determining that Manning's blood should be taken.

3 Manning claims in his brief that Hallman was not aware of the matching addresses at the time he requested Baker to get the blood test. However, Hallman testified he had this information at the time he determined probable cause. ROA. p. 94, lines 4-10, p. 96, lines 3-4.

This Court should apply a deferential standard, reversing only where the trial court's ruling is not supported by evidence found in the record. See State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) (setting out the standard that should be applied for motions to suppress on Fourth Amendment grounds). The trial court's factual findings that relate to this analysis should be reviewed for clear error only. State v. Brockman, 339 S.C. 57, 528 S.E.2d 661 (2000) (finding review of Fourth Amendment issue that was largely a question of fact should be reviewed like any other trial court's factual findings and should be reversed only if there is clear error).

"Probable cause to arrest without a warrant generally exists when facts and circumstances within an arresting officer's knowledge are sufficient for a reasonable person to believe that a crime has been or is being committed by the person to be arrested." State v. Cuevas, 365 S.C. 198, 203, 616 S.E.2d 718, 721 (Ct. App. 2005) (citation omitted).

"Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officers disposal." State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911 (1996). "Probable cause turns not on the individual's actual guilt or innocence, but on whether the facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of the crime." Jackson v. City of Abbeville, 366 S.C. 662, 666, 623 S.E.2d 656, 658 (Ct. App. 2005). "The determination of probable cause is not an academic exercise in hindsight." Id., 366 S.C. at 667, 623 S.E.2d at 659.

"The term 'probable cause' does not import absolute certainty." State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1996). "Rather, in determining whether a search warrant should be issued, magistrates are concerned with probabilities, not

certainties.” Id. “A finding of probable cause may be based upon less evidence than would be necessary to support a conviction.” Lapp v. South Carolina Dept. of Motor Vehicles, 387 S.C. 500, 692 S.E.2d 565 (Ct. App. 2010).

“In other words, a police officer has probable cause to arrest without a warrant where he in good faith believes that a person is guilty of a felony, and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise.” Cuevas, 335 S.C. at 204, 616 S.E.2d at 721 (Internal quotations and citations omitted).

Abundant information supported Corporal Hallman’s determination of probable cause. Manning and the wreck smelled of alcohol, and the address for his driver’s license and the registration were identical. That alone should be sufficient for probable cause. However, evidence supports that Corporal Hallman was informed that Manning indicated to emergency personnel he was the driver, adding further evidence for Hallman to establish probable cause. The information within Corporal Hallman’s knowledge was sufficient to establish probable cause and the evidence in the record supports the trial court’s ruling.

Additionally, as the Court of Appeals correctly noted, evidence supports that Trooper Baker would have probable cause if he was determined to be the arresting officer: “based on a statement made to him by a Highway Patrol officer indicating Manning was the driver, his observations at the hospital that Manning smelled of alcohol, and his observations that Manning sustained trauma consistent with having been in an accident.” Manning, 400 S.C. at 268, 734 S.E.2d at 319. Accordingly, the ruling should be affirmed.

## III.

**The trial court did not err in denying Petitioner's motion for mistrial and the issue is not preserved, especially since Petitioner failed to timely raise his motion to sever and refused a curative instruction.**

Manning committed two crimes that night. When he was arrested, he was in possession of a quantity of hydrocodone and acetaminophen, a schedule three controlled substance. Manning waited until after both indictments were read to the jury to move to sever the two charges. The trial court granted the severance. The trial court offered to give an instruction to the jury to disregard the severed charge. Seemingly as an afterthought, Manning moved for a mistrial. After the trial court denied the mistrial motion, Manning declined the curative instruction. Yet Manning claims reading both indictments prejudiced him. The issue should not be reviewed.

An issue is not preserved for review unless a contemporaneous objection is made to and ruled upon by the trial court. State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). A party cannot complain of court error created by his own conduct. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984). Reviewing courts do not sit to relieve self-inflicted wounds. Rish v. Rish by and Through Barry, 296 S.C. 14, 17, 370 S.E.2d 102, 104 (Ct. App. 1988) (Bell, J., concurring). The Court of Appeals correctly found that the objection to presenting both indictments was not timely raised. Manning, 400 S.C. at 269-70, 734 S.E.2d at 320.

Further, an issue is not preserved when the trial court's offer of a curative instruction is refused. State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996); see State v. Watts, 321 S.C. 158, 164, 467 S.E.2d 272, 276 (Ct. App. 1996) ("In rejecting the

trial court's offer to strike the testimony or give a curative instruction, [the defendant] waived any complaint he had to the challenged testimony").<sup>4</sup>

Manning waited for the indictments to be read before raising his challenge. Then he wanted a mistrial for the indictments being read to the jury. His objection to the reading of the indictments is too late, his alleged injury was self-inflicted. The trial court ruled as follows:

Well, I'm not going to get trapped into a mistrial. In that regard then, we're going to go forward. Now, you are not going to have it both ways. Either you want to go forward or you don't.

You didn't make that motion before the jury was qualified, and the Court is not going to be trapped like that. I'll be glad to give whatever instruction you want me to give them, but the case was called for trial in front of the Court. It was qualified.

There were no motions at the time, except one y'all brought up to me in chambers on the continuance. So if it prejudiced him, that's a self-inflicted wound. **That's not a wound inflicted by the State or by this Court.**

I'm not here to inflict any wounds on either the State nor the Defendant. I'll charge whatever you want in regard to that or I'll say nothing, but I don't see where it's – where the court could respond like that.

ROA. p. 108, lines 6-24 (emphasis added).

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4 Manning argues that the Court of Appeals erred in finding that the issue was waived by waiving a curative charge. For the reasons listed above, Respondent disagrees. However, the Court of Appeals did not address the Respondent's argument in this regard, but found that the issue was not timely raised and that the trial court did not abuse its discretion on the merits.

The trial court did not abuse its discretion. “A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very plain and obvious reasons.” State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial). “The granting of a mistrial motion is an extreme measure to be taken only where an incident is so grievous that its prejudicial effect can be removed in no other way.” State v. Dempsey, 340 S.C. 565, 570, 532 S.E.2d 306, 309 (Ct. App. 2000). “A mistrial should only be granted when ‘absolutely necessary,’ and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.” State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005) (citations omitted). “The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice.” State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983).

In the instant case, Manning cannot show prejudice. If Manning thought he was going to be prejudiced by going forward on the felony DUI charge, he would have accepted the offer for an instruction. Instead, as evidenced by Manning declining the instruction, Manning must have thought it was more likely the jury would not focus on the severed charge and did not want to call further attention to the matter. Further, mistrial was not dictated by manifest necessity. The jury had ample evidence to convict Manning for felony DUI and there is no doubt that he was convicted on the evidence presented to the jury at trial, and not a pretrial event. See generally, State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) (“[A] vague reference to a defendant’s prior [crimes] is not sufficient to justify a mistrial where there is no attempt by the State to introduce

evidence that the accused has been convicted of other crimes”).

The Court of Appeals correctly found: “the single reference to the schedule three drug charge contained in the indictments read at the beginning of trial does not constitute sufficient prejudice to justify a mistrial.” Manning, 400 S.C. at 270, 734 S.E.2d at 320. The Court of Appeals further found: “Ample evidence in the record supports Manning’s conviction for felony DUI, and there is no evidence the jury considered the severed drug charge in reaching its verdict.” Id., 400 S.C. at 269-70, 734 S.E.2d at 320.

Accordingly, the trial court did not commit error.

## IV.

**The trial court's charge to the jury on implied consent was not a comment on the facts and the charge as a whole was not misleading and was free from error.**

The trial court charged the exact language of the implied consent statute, S.C. Code Ann. § 56-5-2950 and Manning complains it was error as a comment on the facts. Even viewed in isolation, the jury was certain to understand that it was not a comment on the facts and understood its duty to make its own factual determination that Manning was the driver. However, looking at the charge as a whole, the trial court clearly charged the jury with the duty to determine if they were convinced beyond a reasonable doubt that Manning was the driver from their own view of the evidence.

The trial court included on its charge on the elements of felony DUI the following: "Felony D.U.I. requires proof of three elements: Number one, **the actor drives a vehicle** while under the influence of alcohol and/or drugs; . . ." ROA. p. 495, lines 1-3 (emphasis added). The trial court further instructed the jury as follows:

In every case tried in this court before a jury, the jury becomes the sole and exclusive judge of the facts in a case. A trial judge cannot intimate, state, comment on or make any statement to a trial jury about the facts in the case.

Since you the jury are the sole judge of the facts, you are not to infer from what I have said during the progress of this trial, in ruling upon the admissibility of evidence or otherwise, or anything that I now say during the course of this instruction to you that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case.

That is a matter solely for you the jury to determine. As jurors it is your duty to determine the effect, the value, the weight, and the truth of the evidence presented during this trial.

ROA. p. 498, line 24 - p. 499, line 15.

The trial court again charged the elements of felony DUI as follows:

... The State must first prove beyond a reasonable doubt that the Defendant drove a vehicle in this State while under the influence of alcohol and/or drugs.

An issue in this case is the identification of the Defendant as the person who committed the crime charged. The State has the burden of proving identity beyond a reasonable doubt. You the jury must be satisfied beyond a reasonable doubt of the accuracy of the identification of the Defendant before you may convict the Defendant.

The State must further prove beyond a reasonable doubt that the Defendant drove a vehicle while under the influence of alcohol and/or drugs. . . .

ROA. p. 504, lines 9-23.

In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987).

Article V, §21 of the South Carolina Constitution states: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." South Carolina law dictates a trial judge should refrain from any comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused. State v. Jackson, 297 S.C. 523, 377 S.E.2d 570, 572 (1989); State v. Smith, 288 S.C. 329,

342 S.E.2d 600, 601 (1986). However, jury instructions must be considered in their entirety and, if in their entirety they are free from error, then any potentially misleading portions do not constitute reversible error. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869, 874 (1994); Jackson, 377 S.E.2d at 572.

“A charge that states the legal conclusions that would result from the establishment of certain facts is not necessarily an improper charge, nor a mandate to the jury to assume the truth of the facts as stated.” State v. Dickey, 380 S.C. 384, 402, 669 S.E.2d 917, 927 (Ct. App. 2008). “The test is how a reasonable juror would have understood the charge.” Id.

In the instant case, the trial court charged the exact language of the statute and did not intimate his belief as to whether Manning was in fact the driver. His instructions as a whole clearly require the jury to make their own decision on whether evidence proved beyond a reasonable doubt that Manning was the driver. The instructions in their entirety were not misleading and were free from error. Accordingly, the trial court did not err.

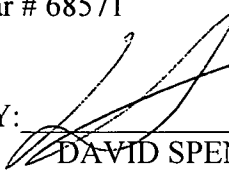
**CONCLUSION**

For all of the foregoing reasons, the petition for writ of certiorari should be denied.  
If this Court should see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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BY: 

\_\_\_\_\_  
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ATTORNEYS FOR RESPONDENT

May 30, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lexington County

The Honorable R. Knox McMahon, Circuit Court Judge

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THE STATE,

RESPONDENT,

v.

CHRISTOPHER MANNING

PETITIONER.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

LaNelle DuRant, Esquire  
South Carolina Office of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29211

This 30<sup>th</sup> day of May, 2013

  
JEAN R. INDRIAGO  
LEGAL ASSISTANT

# The Supreme Court of South Carolina

The State, Respondent,

v.

Christopher Manning, Petitioner.

Appellate Case No. 2012-213685

Lower Court Case No. 2009-GS-32-02855

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## ORDER

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This matter is before the Court on a petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Manning*, 400 S.C. 257, 734 S.E.2d 314 (Ct. App. 2012). The petition is denied.

  
C.J.  
FOR THE COURT

Columbia, South Carolina

June 11, 2014

cc: The Honorable Jenny Kitchings  
The Honorable Beth Carrigg  
LaNelle Cantey DuRant, Esquire  
David A. Spencer, Esquire



## The South Carolina Court of Appeals

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June 26, 2014

The Honorable Beth Carrigg  
205 E Main St Ste 146  
Lexington SC 29072-3557

### REMITTITUR

Re: The State v. Manning, Christopher  
Lower Court Case No. 2009GS3202855  
Appellate Case No. 2010-161686

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

cc: LaNelle Cantey DuRant, Esquire  
David A. Spencer, Esquire