

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILLIP WAYNE LOWERY,

APPELLANT

APPELLATE CASE NO 2018-002242

RECORD ON APPEAL

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

STATE’S EXHIBIT NO. 1 (DASHCAM VIDEO)

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STATE EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	Dash Cam Video	82	82
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ALL EXHIBITS WERE RETAINED BY THE GREENVILLE COUNTY CLERK
OF COURT

1 December 12, 2108

2 THE COURT: For purposes of the record, let's
3 call to bar The State vs. Phillip Wayne Lowery,
4 indictment for driving under the influence.

5 Gentlemen, have each of you had the opportunity
6 to read the narration on the indictment? That's a
7 yes?

8 MR. FOWLER: Yes, judge.

9 MR. GRAVLEE: Yes, Your Honor, I did.

10 THE COURT: Okay. I will redact such portion of
11 it that indicates that it wasn't a first offense. I
12 presume the defense is conceding jurisdiction of this
13 court?

14 MR. GRAVLEE: Yes, sir, Your Honor.

15 THE COURT: All right, good enough.

16 (WHEREUPON, the jury venire entered the
17 courtroom.)

18 THE COURT: All right, good afternoon, everybody
19 welcome to courtroom. I'm Rob Stilwell, I know I
20 didn't have the pleasure of qualifying you yesterday
21 morning, I think that was Judge Miller who did that.
22 It may have been Judge Gravely but think it was
23 Miller. In any event, we're going to go through a
24 similar process as the one you did yesterday in
25 selecting a jury for the trial that's being called to

1 bar this afternoon. Now, I remind you yesterday
2 morning that when you were qualified you took an
3 oath, an oath to tell the truth. And I'll remind
4 that will you are still under that oath to tell the
5 truth and to honestly answer the questions that are
6 posed to you.

7 Now, ladies and gentlemen, the distinction
8 between the process for selecting a jury in a case
9 and the process of qualification is that we're asking
10 questions that bear upon the appropriateness or
11 suitability of you serving as jurors in the case
12 that's being called to bar as opposed to general
13 qualifications for jury service. Now, ladies and
14 gentlemen, the process will be very similar in that
15 I'll pose questions and if your response is in the
16 affirmative, what I would ask that you do is stand
17 up, state your name and your juror number and then
18 give me any appropriate response to the question.
19 I'll ask you again, to state your name and juror
20 number. Not because that's just a arbitrary
21 requirement, it's because Ms. Herron is the court
22 reporter and she's taking down everything that's
23 being said in the courtroom. Which means if you
24 stand up and you just begin to talk, then you're an
25 unidentified person on the record. And we need to

1 make sure that the record clearly indicates who is
2 addressing the court.

3 So, ladies and gentlemen, we are going to call
4 to bar this afternoon the case of The State vs.
5 Phillip Wayne Lowery. And it is Indictment number
6 2018-GS-23-4107, an indictment for driving under the
7 influence. Ladies and gentlemen, I'm going to read
8 for you the allegations that appear on the
9 indictment. That is the charging paper. Now, I want
10 to make sure that you understand that when I read for
11 you the allegations on the charging paper, that does
12 not mean that I'm making a representation to you of
13 what the facts are in this case. As the judge in
14 this case, I have no opinion about what the facts are
15 in the case. Ultimately, 12 deliberating jurors will
16 determine what the facts are in this case and will
17 make a determination as to whether The State has met
18 its burden of proving each and every element of the
19 offense beyond a reasonable doubt.

20 So, don't take from my representation to you or
21 my reading to you of these allegations that I'm
22 representing to you the facts of case, I honestly am
23 not. The reason I'm reading it to you is that so you
24 can intelligently answer the questions that I pose to
25 you thereafter.

DAVID VALLIN-DIRECT BY MR. FOWLER (IC)

1 that you may need, give you the opportunity to use
2 the restroom before we get started. When you come
3 back in, we'll swear you in as jurors in this case
4 and then begin the trial. All right, thank you.

5 (WHEREUPON, the jury left open court at
6 approximately 3:28 p.m.)

7 THE COURT: All right, Mr. Fowler, you have a
8 Jackson v. Denno?

9 MR. FOWLER: Yes, sir, Judge.

10 THE COURT: All right, call your witness.

11 MR. FOWLER: Yes, sir, Judge. The State calls
12 Trooper D.J. Vallin.

13 THE CLERK: Place your left hand on the Bible,
14 raise your right hand.

15 D.J. Vallin, after being duly sworn, testified
16 as follows:

17 THE CLERK: Thank you, you may be seated.
18 Please state your full name for the record.

19 THE WITNESS: David Vallin.

20 DIRECT EXAMINATION

21 BY MR. FOWLER:

22 Q All right, Trooper Vallin, where are you
23 employed?

24 A The South Carolina Department of Public Safety.

25 Q How long have you worked there?

DAVID VALLIN-DIRECT BY MR. FOWLER (IC)

1 A Approximately three years.

2 Q Okay. Were you working there on January 26th,
3 2018?

4 A Yes.

5 Q Do you remember responding to a call about a car
6 accident on Piedmont Highway?

7 A Yes.

8 Q Okay. Can you tell us a little bit about your
9 initial response to that call?

10 A There was a car that had been over turned by
11 another vehicle who had left the scene. We got a call a
12 little while later from the Greenville County Sheriff's
13 Office saying that they believe that they had located the
14 vehicle in a, I believe it was the Spinx parking lot, and
15 they responded to that scene.

16 MR. GRAVLEE: Your Honor, I to object to what
17 was said from Greenville County Sheriff's Office,
18 they're not here.

19 THE COURT: Okay. All right. I know we had
20 talked in-camera about the prior accident. The way
21 the officer characterized it is fine exactly the way
22 it happened. And I think it's an honest reflection
23 of it. But I want to be careful talking about the
24 hit and run. I rather characterize it as responding
25 to an accident and leave it at that. Because what I

DAVID VALLIN-DIRECT BY MR. FOWLER (IC)

1 don't want to do, again, is take up the issue of the
2 accident itself. Because we're here on a DUI, right?

3 THE WITNESS: Yes, sir.

4 THE COURT: Okay.

5 MR. FOWLER: Yes, sir, Judge.

6 BY MR. FOWLER:

7 Q So, did you respond to that Spinx as a result of
8 a call about this accident?

9 A Yes, sir.

10 Q And was there a vehicle there with front end
11 damage?

12 A Yes.

13 Q Was there a gentleman standing near that
14 vehicle?

15 A Yes, sir.

16 Q Was he -- through your investigation, did you
17 determine if he was the driver of that vehicle?

18 A Yes, sir.

19 Q Did you approach him?

20 A Yes.

21 Q Did you question him?

22 A Yes.

23 Q While you were questioning him were there other
24 law enforcement officers around?

25 A Yes.

10

DAVID VALLIN-DIRECT BY MR. FOWLER (IC)

1 Q Approximately how many?

2 A I'd say maybe three or four.

3 Q Okay. At any point during your questioning was
4 he handcuffed?

5 A No, sir.

6 Q Was he seated in the back of your vehicle or
7 anything?

8 A No.

9 Q So, y'all were standing outside of both
10 vehicles?

11 A Correct.

12 Q Okay. And this is a Spinx parking lot?

13 A Yes.

14 Q And during your conversation with him, were you
15 investigating a car accident?

16 A Yes.

17 Q And as you spoke with him, did that develop into
18 something else?

19 A Yes.

20 Q Okay. But initially your initial contact was
21 just in regards to a car accident?

22 A Correct.

23 Q Now, was he free to leave that scene after you
24 first walked up to him?

25 A No, sir.

DAVID VALLIN-DIRECT BY MR. FOWLER (IC)

1 Q Okay. But was that because he was under
2 investigation for a crime or you were trying to figure out
3 who caused this wreck?

4 A We were investigating who caused the collision.

5 Q Okay. Did you have a dash cam in your vehicle
6 that night?

7 A Yes.

8 Q Was it in operation?

9 A Yes.

10 Q Was it recorded?

11 A Yes.

12 Q Have you had a chance to review that footage?

13 A Yes.

14 Q Is this a DVD copy of that footage?

15 A Yes.

16 Q You tell me what that is right there?

17 A My initials and the date.

18 Q Okay. The date you reviewed it?

19 A The date I reviewed it, correct.

20 Q And is it a fair and accurate copy to the best
21 of your recollection of the events of that night?

22 A Yes.

23 Q Okay.

24 MR. FOWLER: Judge, I'm going to play the dash
25 cam video.

DAVID VALLIN-DIRECT BY MR. FOWLER (IC)

1 THE COURT: Okay. All right.

2 MR. FOWLER: I'm going to start this as I would
3 for the jury, Judge.

4 THE COURT: Okay.

5 (WHEREUPON, the dash cam video was played.)

6 BY MR. FOWLER:

7 Q Okay, Trooper Vallin, just to be clear, who is
8 the person in the highway uniform who we saw in that
9 video?

10 A That was myself.

11 Q Who was the fella in look like a white T-shirt?

12 A That was the Defendant.

13 Q That's the Defendant right here?

14 A Yes, sir.

15 Q Okay.

16 That's all I got, if you'll answer any
17 questions that the defense counsel might have.

18 THE COURT: Mr. Gravlee.

19 MR. GRAVLEE: Thank you, Your Honor. I don't
20 know if this is the appropriate time to ask that we
21 sequester the witnesses just so that we're on the
22 same page. On the same page of questioning.

23 THE COURT: Okay. All right. If there's
24 objection then I'll issue an order of sequestration.

25 MR. FOWLER: That's fine with me, Judge. This

DAVID VALLIN-CROSS BY MR. GRAVLEE

1 is both of them right here, so.

2 THE COURT: Okay.

3 You're fine, you're still under oath. You're
4 good.

5 MR. GRAVLEE: May it please the Court.

6 CROSS-EXAMINATION

7 BY MR. GRAVLEE:

8 Q Trooper Vallin, when you pulled up at the Spinx
9 gas station, there was three or four law enforcement
10 deputies on scene?

11 A I believe so.

12 Q County law enforcement?

13 A Right.

14 Q Not troopers?

15 A Right.

16 Q They're there when you pulled up? When you
17 pulled up their blue lights were on, correct?

18 A I believe so, I can't remember.

19 Q Okay. And all of those deputies were in
20 uniform?

21 A Yes.

22 Q Okay. Firearms on?

23 A Yes.

24 Q Okay. In front of the gas station, correct?

25 A Right in the parking lot.

DAVID VALLIN-CROSS BY MR. GRAVLEE

1 Q Okay. But like in front of the entrance, kind
2 of next to the building?

3 A Right. Somewhere next to the building, I can't
4 remember exactly where positioned in the building.

5 Q Okay. So, when you pulled up you were not next
6 to his car or the car that was found there?

7 A I was not directly next to it.

8 Q And Mr. Lowery was not standing next to this
9 car?

10 A He was either next to the car or sitting in the
11 car.

12 Q When you pulled up he was standing next to the
13 three deputies that we just saw on the video, correct?

14 A I can't remember right off the top of my head.

15 Q From the video, do you want to play the video
16 again?

17 A Yeah, sure.

18 THE COURT: I'll take judicial notice that there
19 was a substantial number of law enforcement officers
20 there and blue lights were flashing.

21 MR. GRAVLEE: Thank you, Your Honor.

22 THE COURT: Yes, sir.

23 BY MR. GRAVLEE:

24 Q So -- and your testimony earlier that he was not
25 free to leave?

DAVID VALLIN-CROSS BY MR. GRAVLEE

1 A Correct.

2 Q So, if he had taken off running, y'all would
3 have attacked him?

4 A We would have stopped him, yes.

5 Q Some sort of force to restrain him?

6 A Yes, sir.

7 Q Because he was not allowed to leave?

8 A Correct.

9 Q And, you know, the initial contact that was
10 made, again, was not by you but other law enforcement?

11 A Correct.

12 Q Okay. And when you pulled up at the scene or
13 pulled up to talk to him, you said, I'm Trooper Vallin,
14 I'm here to investigate this collision?

15 A Correct.

16 Q So, at the time -- at any point in time during
17 that you didn't tell him that he could leave?

18 A No, sir.

19 Q You didn't tell him that he was free to
20 terminate the interrogation at that point?

21 A No, sir.

22 Q Okay. So, he was, I guess, flanked on either
23 side by you and three other -- three or four other
24 deputies?

25 A I can't remember exactly where he was at at that

DAVID VALLIN-CROSS BY MR. GRAVLEE

1 time.

2 Q Okay. Some of those questions that you asked,
3 you know, at the time that he asked you if he could call
4 someone?

5 A Correct.

6 Q You told him no.

7 A Right.

8 Q We're not going to allow you to call somebody?

9 A Correct.

10 Q During your questions you got a little
11 accusatory, is that fair to say? You believed he was
12 involved in this collision?

13 A Yes, sir, from the evidence I saw I did believe
14 that he was involved.

15 Q And he was not under -- you didn't have him in
16 handcuffs at the time?

17 A Correct.

18 Q But if the investigation did ultimately prove
19 that if the answers that you got, that ultimately led to
20 his arrest; correct?

21 A The answers along with the tests and the
22 information that he gave us, yes.

23 Q Sure. And at the time of this, you know, I
24 guess in January, you'd been -- you'd been a trooper for
25 about two years at the time, I suppose?

DAVID VALLIN-CROSS BY MR. GRAVLEE

1 A Yes.

2 Q When you pulled up, you also had your blue
3 lights on, correct?

4 A I can't remember, honestly.

5 Q Would it refresh your recollection if I had
6 played?

7 A If the other officers also had their blue lights
8 it would be hard for me to tell if my blue lights were
9 also on.

10 Q All right.

11 Beg the court's indulgence for just one
12 moment.

13 THE COURT: Sure.

14 BY MR. GRAVLEE:

15 Q All right. Just to be clear, though, at the end
16 of this, I'd say 30 minutes later, he was arrested?

17 A Correct.

18 Q And these answers that you elicited, you shared
19 with the other trooper, then eventually secured his
20 arrest?

21 A I would say more than likely I did, I can't
22 remember at the time.

23 MR. GRAVLEE: All right, no further questions,
24 thank you.

25 THE COURT: Thank you.

DAVID VALLIN-CROSS BY MR. GRAVLEE

1 Any follow up?

2 MR. FOWLER: No, sir, Judge. We would say that
3 pursuant to Jackson v. Denno that this Defendant was
4 not in custodial custody of the police and as such
5 Miranda Warnings were not required. These statements
6 were freely and voluntarily given. As such we
7 contend that any of these statements are admissible
8 in trial, Judge.

9 THE COURT: Okay.

10 All right, Mr. Gravlee.

11 MR. GRAVLEE: Your Honor, I believe this a
12 plain, clear custodial interrogation. He's not free
13 to leave, that was directly from the trooper's mouth.
14 He said he couldn't leave. Said if he ran away they
15 would have apprehended him, made sure that he would
16 have stand there. I'm not sure how much custodial
17 can be. But some of the points that I wanted to hit,
18 a lot of these are outlined in State v. Williams.
19 That's a Court of Appeals case from 2013.

20 But it discusses, you know, there's about 12
21 factor -- 12, 13 factors where it talks about, you
22 know, whether the, you know, law enforcement contact
23 what's to be considered. Law enforcement contact,
24 who initiates it, the trooper's here, actually the
25 county deputies who are not present today. Who we're

1 not able to cross-examine, not able to determine
2 whether they made a miranda. That's neither here nor
3 there because they aren't here today to testify to
4 that.

5 We know that Trooper Vallin's did not Mirandize
6 him. But going back to these factors, you know, he
7 let's them -- one of them as whether he was
8 questioned as a suspect. And he shows up and says,
9 We're investigating this collision. There's no other
10 way that they're doing that other than they believe
11 that he's a suspect there. It's at a gas station.
12 Where is kind of a factor that's considered. He's
13 not at home. He's not in a place where, you know,
14 he's, you know, feels free to leave or that he could
15 terminate. Because if they're saying that's his car,
16 he obviously can't leave there. And the trooper
17 testified that he would be apprehended if he tried to
18 leave.

19 The -- whether he was informed he was under
20 arrest or not, said he wasn't sure but I think in
21 terms of the eventual arrest it's clear. And that's
22 another factor that he was, you know, eventually
23 arrested at that time as a result of this custodial
24 interrogation. He wasn't informed that he could
25 leave and terminate at any time. A lot of

1 restrictions of his movement, he's surrounded by law
2 enforcement at that time. There is, at least, five
3 total officers present during the questioning. They
4 control the interrogation. Mr. Lowery is just
5 responding.

6 And then, you know, whether he believes that he
7 did it, you know, he said the officer believed that
8 he did it.

9 He said, We're investigating this crash.

10 He starts making the pretty accusatory
11 statements during it where he's saying, Well, how did
12 you get down here? You don't even know how you got
13 down here. Your tires, you know, on the rim but you
14 don't know how you got here. You didn't know that.
15 And he says, You can't call somebody, no we're not
16 letting you call somebody. Why do you need to call
17 her?

18 I think those factors are more, Your Honor, show
19 that this is a custodial interrogation. If miranda
20 had been read at the beginning, right as soon as he
21 hops out, I don't think we have any shot here. But I
22 think that it's clear that it's custodial from the
23 totality of the circumstances here. Blue lights all
24 around, officers flanking him, he's not free to leave
25 and that's exactly what miranda -- miranda is

1 supposed to prevent from happening.

2 So, I think that statement -- this state that
3 was made on this and all subsequent statements that
4 were made were given in violation of miranda.

5 THE COURT: Okay.

6 MR. FOWLER: Respectfully, Judge, I think --
7 I've got a case here that I'm going to hand up, State
8 v. Morgan. It's a Supreme Court case it from 1984
9 but it's been cited as recently as 2017. I got a
10 copy for you, Judge. And it makes the distinction
11 that I think Mr. Gravlee said it himself, they were
12 investigating a collision. In this case, I've got
13 that portion highlighted. There was a wreck,
14 essentially, the police responded. I mean, you can
15 read it as well as I can.

16 And as you go on to the next page, the holding
17 says in part, A traffic accident had just occurred,
18 Dotson, who's the witness, volunteered information
19 that he and the defendant had seen the accident.
20 What followed was a routine investigation of the
21 calls. The statements made by the defendant were
22 made during the course of this routine investigation,
23 Miranda Warnings were not required.

24 And I would -- I would contend that this fits
25 pretty solid rate at that same fact pattern, sir.

1 You know, the questions he's asking him and I would
2 maybe disagree a little bit if they had accusatory
3 tone but regardless the questions he's asking him
4 were in an effort to figure out what had caused or
5 who had caused this traffic accident. As such I'd
6 miranda was not required.

7 THE COURT: Okay. All right. After having
8 heard the testimony and hearing the video tape, I
9 find that the statements and the tape is admissible.
10 Whether the Defendant was in custody is an objective
11 determination to be made by the trier of fact. And
12 based on my review of the tape and the officer's
13 testimony, I find objectively that he was not in
14 custody at the time. It's clear that there was a lot
15 of law enforcement around. However, they were
16 standing in the middle of a parking lot, he was not
17 being physically impeded in any way. Either through
18 contact from the officers or by handcuffs. Nor was
19 he within the confines of a patrol car. He was
20 simply standing there.

21 And I do find that Morgan is a persuasive in
22 that he wasn't investigating a DUI, he was
23 investigating a traffic accident and asked fairly
24 innocuous questions regarding the traffic accident.
25 To which the Defendant offered very voluntarily and

1 openly answers to the questions that were posed. So,
2 I find that by -- that he was not in custody and that
3 Miranda Warnings were not required. I also find that
4 it was in furtherance of a routine traffic violation
5 that's contemplated in the Morgan case. I further
6 find the statement was freely and voluntarily given.
7 And I find that by a preponderance of the evidence.
8 Certainly, I'll give the jury the opportunity to make
9 the determination as to whether it was voluntary
10 beyond a reasonable doubt as required under the law.

11 Okay. All right. Anything else?

12 MR. GRAVLEE: Thank you, Your Honor.

13 MR. FOWLER: Just to be clear, as far as
14 discussion about the wreck, that's 95 percent of the
15 portion of the tape from this trooper that I intend
16 to play. I'm going to skip ahead about 10 minutes to
17 show another car pulling up, the Defendant's daughter
18 gets out of and that's it from this witness.

19 THE COURT: Okay. All right. Not for the
20 pre-trial hearing but for the --

21 MR. FOWLER: Right.

22 THE COURT: All right, Mr. Gravlee, as you look
23 at that, I know that there were some threshold
24 objections to its admissibility. But I know that we
25 disused something that was concerning to you, which

1 was the characterization of it as a hit and run. So,
2 I think we've covered that with a friendly admonition
3 to Officer Vallin, don't characterize it as that,
4 it's a accident.

5 MR. GRAVLEE: And I don't know what time it
6 would be appropriate for me but just to make the
7 pre-trial objection not only that I know we've talked
8 about accident but I wanted to put on the record for
9 pre-trial purposes, that the accident itself and
10 reported that there was an accident is hearsay. And
11 their investigation of that incident is entirely
12 based on the hearsay from the witnesses and the
13 alleged victims that were in the car that was found
14 as a result of this. Their investigation from that
15 they talk to -- they talked to these folks and said,
16 hey, it was a dark red, SUV that was traveling,
17 speeding, had a flat tire, left the scene. And went,
18 you know, down the road. We didn't see who it was.

19 The issue is that I'm not able to cross-examine
20 the source of that information. And it's sequential
21 hearsay that it's an out of court statement that's
22 offered to prove the truth of the matter asserted
23 that there was a wrecked car that was being driven
24 that struck the victims. And it ultimately led to
25 the discovery of that car by some unknown county

1 deputies. Which they then piggyback on to say, hey,
2 we are just here to investigate this crash.

3 THE COURT: Okay.

4 MR. GRAVLEE: And, Your Honor, just briefly. I
5 just want to make sure that I mention a case. And
6 it's State v. King and that's 422 SC 47. And that
7 one talks about an attempted murder. And it talks
8 about testimony that the officer was able to use and
9 that they tried to get into evidence as investigative
10 hearsay because it's just this is what we learned and
11 this is how we came about it.

12 THE COURT: Right, I understand. I gotcha.

13 MR. GRAVLEE: The Supreme Court said--

14 THE COURT: I gotcha. How you're going to
15 establish the driving?

16 MR. FOWLER: Judge, in relative part to that
17 video right there, the Defendant said, I left wild
18 country the bar. I pulled in here, I was the only
19 person in the car. I was turning in here to get
20 something to eat. I was turning in here to change my
21 tire. I guess I screwed up, I cant lie. If I hit
22 anybody I'm sorry.

23 And that would be, you know, pretty essential
24 part of my evidence. I understand where Mr. Gravlee
25 is coming from and I'm not trying to try a hit and

1 run or a traffic wreck case here by any means. But I
2 do think it's appropriate for The State to be able to
3 bring in the fact that they were investigating a car
4 wreck that led to them finding this Defendant in this
5 gas station about a mile, half a mile up from where
6 the incident happened.

7 THE COURT: Okay. Here's the ruling on that.
8 That evidence can't be introduced for the purpose of
9 demonstrating that his faculties to drive were
10 materially and appreciably impaired. Now, obviously
11 it can be introduced as well he talks about it in the
12 video but it can't be -- again, absent direct
13 testimony of the same. Therefore, if you were to
14 have the victim of the traffic accident take the
15 stand and say it was an accident it was a red car and
16 it left the scene, then all of that could come in.
17 But I don't think all of that can come in through the
18 officer.

19 MR. FOWLER: Yes, sir, Judge. But, I mean, I
20 would say that playing that tape right there, which
21 we just ruled admissible, let's that in. That goes
22 to one of the elements that I got to prove this case
23 that he was driving the car. That's the point for
24 putting this in is having those statements from him--

25 THE COURT: Yeah, but only the statements go to

1 the element of the crime. Not the officers
2 statements and not the officers representations.
3 Because I think I know that Mr. Gravlee is correct
4 about that. You can't get it in unless it's through
5 a first person witness who can testify about it.

6 MR. FOWLER: And I wouldn't intend to bring them
7 up and say, Did y'all think he just hit this car or
8 anything like that. I just want to play -- literally
9 play that tape to establish that he was driving that
10 car right there. Then the next trooper will
11 establish his impairment. And this trooper just
12 basically establishes the fact that he was driving
13 through his statements that we just heard.

14 THE COURT: Okay. You know, again, there's
15 either going have to be some redaction of the
16 statement he hit a highway patrolman's or a officer's
17 daughter's car.

18 MR. FOWLER: Okay.

19 THE COURT: Or that in a threshold. Then there
20 may need to be a curative charge to let them know
21 that that does not that an alleged prior accident
22 cannot be proof of one of the elements of the crime.
23 Unless you're going to put the driver of the other
24 car up. Now if you put the driver of the other car
25 up, then you solve that problem.

1 MR. FOWLER: Yeah and I wish we had that driver
2 available, Judge. But we don't. I mean, I would
3 contend that we could show, look there was -- a car
4 was hit nearby. We received a reports that there was
5 another car just up the road that had damage matching
6 the car that we found down the road. We find this
7 guy, he talks about driving, he talks -- I mean, he
8 says, if I hit somebody I'm sorry. I mean, he all
9 but admits to hitting them.

10 THE COURT: Yeah, that's great evidence, it's
11 just hearsay. I mean, I love it too. If I was the
12 prosecution I would want to get it in too. How do
13 you get that in through any other means other than
14 hearsay?

15 MR. FOWLER: I would say that's admission by a
16 party opponent and admission again self interest.

17 THE COURT: Everything he says is fine.

18 MR. FOWLER: That's fine.

19 THE COURT: There's no issue of that.
20 Everything that he says on that tape is fine. I
21 don't know that everything that the officer says on
22 the tape is fine. Or representation that there was
23 an accident and it was a red car and it caused this
24 damage and all this and the pieces all fit together.
25 Even though logically, they may. I don't take

1 exception to that. The question is how you get it in
2 absent hearsay? Right? Because this officer wasn't
3 at the scene, was he?

4 MR. FOWLER: No, sir.

5 THE COURT: So, the only person that was at the
6 scene during the time of the accident was the other
7 driver?

8 MR. FOWLER: Well, the other officer came upon
9 the scene. He talked to those people and that was
10 hearsay.

11 THE COURT: So, that's the problem. That's the
12 problem. You know, when it's simply establishing the
13 investigatory process, it's fine. But when it's
14 offered to prove the truth to the matter asserted,
15 that he was driving and it was a red car and it
16 causes damage and he left the scene, that's when you
17 start getting into prejudicial hearsay testimony.

18 MR. FOWLER: Okay. So, I just want to make sure
19 we're on the same page here.

20 THE COURT: I do too.

21 MR. FOWLER: So, if we play this tape, you want
22 to redact the portions where he says he hit a
23 trooper's daughter.

24 THE COURT: I do.

25 MR. FOWLER: And is that it? Am I -- and not

1 talk -- obviously not going to hear me in closing
2 argument say, he just hit these people and drove on
3 up the road.

4 THE COURT: That's right, that's right. And
5 then it may be --

6 And, Mr. Gravlee, you're going to have to think
7 about this, whether you want a curative charge with
8 respect to for what purpose that suggestion or
9 allegation could be considered by the jury.

10 MR. GRAVLEE: When it's played, Your Honor.

11 THE COURT: When it's played or during closing,
12 the closing charge or whenever, okay.

13 MR. GRAVLEE: Yes, sir, Your Honor. And we've
14 pretty much touched on it in that, you know, The
15 State just wants to try the DUI. Wants to try the
16 DUI in a vacuum. It doesn't contemplate the hit and
17 run which was the basis for the ultimate
18 investigation. And they want to do that without
19 calling the witnesses there that have records of
20 false reports and they have records of traffic, a lot
21 of traffic violations, some meth charges and some
22 unlawful neglect. I don't know if that's the reason
23 why, I don't want to speculate there. But certainly,
24 that would be something that we could challenge if
25 they had tried the hit run with it. But without

1 that, we're not here today on that hit and run, we're
2 just here on the DUI.

3 THE COURT: Yeah.

4 MR. GRAVLEE: And so, I just like to emphasize
5 that we're objecting to the use of any
6 characterization of that car, what car was being
7 driven and the accident and how it got there.
8 Because it's just a wrecked car that's sitting there.
9 And there's nobody that can testify that a car was
10 even being driven by anyone much less that
11 Mr. Lowery, aside from these people that were in the
12 car that were victims of this hit and run.

13 THE COURT: And his statements.

14 MR. GRAVLEE: Aside from his statements, Your
15 Honor.

16 THE COURT: Yeah, I'm with you. I think we're
17 singing the same tune.

18 MR. GRAVLEE: Yes, sir.

19 THE COURT: And I know The State does want to
20 try it the way you suggest but I'm not going to let
21 them. Essentially, what I've done is I've sustained
22 your objection in that regard. And we'll do the
23 appropriate redactions.

24 MR. GRAVLEE: Thank you, Your Honor.

25 THE COURT: Okay. All right.

1 So, let's take a short break. I don't know if
2 you want to look at your tape again so you can make
3 those redactions. I know it's hard to erase it, I
4 know I couldn't do it, maybe you can. But you might
5 just want to be looking at that ticker so you know
6 when to start and stop, okay.

7 All right. And then what we'll do is to the
8 extent during the entire video tape, we redacted the
9 first portion that you had already voluntarily
10 redacted and then that portion. And then, we'll, if
11 necessary, we can fashion a curative charge to make
12 sure that the evidence upon which they are
13 determining, whether he was driving a car is based
14 upon his testimony or his acknowledgment and his
15 acknowledgment alone. Okay.

16 MR. FOWLER: All right. Thank you, Judge.

17 THE COURT: Okay. All right, good. We'll take
18 about a five minute break then we'll come back in.

19 Thanks officer.

20 (WHEREUPON, a short break was taken.)

21 THE COURT: Mr. Cannon, turn the lights on. You
22 can put that up too.

23 Okay, bring the jury in, please.

24 (WHEREUPON, the jury came into open court at
25 approximately 4:14 p.m.)

1 THE COURT: All right, ladies and gentlemen, I'm
2 sorry that took a little bit longer than I
3 anticipated. I don't have any secrets. I told you
4 what I was going to determine whether evidence was
5 going to be admissible or not. As part of that I had
6 to look at a video tape. And I still got a little
7 bit of work to do on it. I've ruled on it but what I
8 ruled is that portions of it are and portions of it
9 are not admissible. So, the attorneys are going to
10 have to get together and make sure that the portions
11 that are played are the appropriate portions.
12 Basically, it's called a redaction, okay. So, I
13 didn't want y'all to be sitting back there and
14 waiting on us to get the video precisely perfect for
15 presentation.

16 So, what we're going to do is we're going to go
17 ahead and do our opening statements, we'll go ahead
18 get you sworn in. And then we'll do opening
19 statements, then I'm going to send y'all home and ask
20 you to come back tomorrow at 9:00. And we'll start
21 all of the presentation of evidence tomorrow. I
22 think we're still on a glide path and a schedule to
23 be done by mid afternoon. Because we got -- we
24 still -- we've gotten some of the hard stuff out of
25 the way already.

1 So, having said that, I'm going to let the clerk
2 swear you in. Now, when you started yesterday
3 morning, you took an oath to tell the truth. This is
4 a different oath. This is an oath to try this case
5 in accordance with the law and in accordance with the
6 evidence in the case.

7 Ms. White, I'll turn it over to you to
8 administer the oath.

9 THE CLERK: Ladies and gentlemen, if you will
10 stand, raise your right hand. The correct response
11 to the oath is, I will.

12 (WHEREUPON, the jury was sworn at)

13 THE CLERK: Thank you, you may be seated.

14 THE COURT: Okay. All right, Mr. Fowler.

15 MR. FOWLER: Yes, sir, Judge, thank you, may it
16 please the Court?

17 THE COURT: Yes, sir.

18 OPENING STATEMENT

19 MR. FOWLER: Good afternoon, ladies and
20 gentlemen, my name is Brann Fowler, I'm a assistant
21 solicitor here for the 13th Circuit Solicitor's
22 Office in Greenville, South Carolina. That means
23 that my job is to prove to you all beyond a
24 reasonable doubt that the Defendant, Phillip Wayne
25 Lowery, is guilty of the crime of which he is

1 charged. Tomorrow you're going to hear the
2 presentation of The State's evidence. That will
3 consists of video and testimony from two highway
4 patrolmen. Trooper McNeely and Trooper Vallin.
5 You're going to hear and see in these videos the
6 admit to driving, you're going to hear him admit to
7 drinking. You're then going to see his performance
8 on three standard field sobriety tests. It will then
9 be up to you to decide whether the Defendant is
10 materially and appreciably impaired to operate a
11 motor vehicle. I suspect this case will move
12 relatively quickly. And I look forward to working
13 with all of you. Thank you.

14 THE COURT: All right, Mr. Gravlee.

15 OPENING STATEMENT

16 MR. GRAVLEE: Thank you, Your Honor.

17 May it please the Court?

18 THE COURT: Yes, sir.

19 MR. GRAVLEE: Ladies and gentlemen of the jury,
20 this is a DUI, as you heard. This isn't going to be
21 the most exiting thing you've ever seen. It's not a
22 murder, it's not 30 witnesses, it's not going to be
23 gunshot residues that we're over here testing. But
24 you are going to hear some different things. What
25 you're going to hear is a bunch of different

1 testimony from officers, you may hear from some
2 witnesses and you'll hear some things on video as
3 well. But you're not going to hear just admissions.
4 You're going to hear a wacky story from a guy who is
5 inebriated. He is drunk. He is drunk as a skunk.
6 And we're not in any way debating that, okay.

7 But what we're talking about here is evidence of
8 driving. And here, I want you to keep an open mind
9 throughout the case. I know when the Defense comes
10 in and The State starts up here, the Defense has got
11 to kind of work its way back up to be even. So we
12 even have some kind of level playing field. Because
13 the presumption of innocence is the presumption of
14 innocence. But you hear somebody charged on TV and
15 you think, Oh, God, well they probably did it.

16 Well, that's not how things work in the legal
17 system. In here we have a trial specifically for
18 that purpose. Because the State's got the burden of
19 proving its case to you of Mr. Lowery's guilt beyond
20 a reasonable doubt. And that level is the highest
21 burden of legal proof in our legal system. It's not
22 some evidence, it's not preponderance of the
23 evidence, which is somewhere around here, we start
24 working our way up. It's not clear and convincing
25 evidence, it's beyond a reasonable doubt. It's the

1 highest burden of legal proof in the American legal
2 system.

3 So, what I want to you do, all I can ask of you,
4 is just keep an open mind. Look at the evidence, see
5 who's testifying, see what's being testified to. And
6 just think about that. When you go back into your
7 jury rooms, I want you to think about the burden that
8 The State has to prove. That it is that high burden.
9 That it's beyond a reasonable doubt. It's not that
10 maybe something happened. Or that likely something
11 happened. But it's a doubt that's beyond a
12 reasonable doubt. Okay.

13 And you'll hear the Judge will explain that to
14 you later before you go back and deliberate about
15 that standard, okay. It's the kind of doubt that's
16 going to make you hesitate to act. When you hesitate
17 to act because you don't know the whole story here
18 and because the issues here cannot be proven beyond a
19 reasonable doubt, even just one element of the crime
20 that Mr. Lowery's been charged with. Right here,
21 American just like all of us. And if that was you in
22 his position, to be able to say, I want to have a
23 fair trial. That's all we can ask of you.

24 So, when you go back, eventually, please
25 consider that burden. Think about that, that they

1 have to prove their case beyond a reasonable doubt.
2 Mr. Lowery is presumed innocent. And just like the
3 Judge told you, he wears that robe. Just like the
4 Judge wears. And unless they prove their case to you
5 beyond a reasonable doubt, that cloak stays on him
6 just like every other American. So, at the end of
7 the trial I'm going to ask you to come back with a
8 verdict of not guilty. Thank you.

9 THE COURT: All right, ladies and gentlemen, as
10 promised, we're going to break for the day, okay.
11 Y'all are going to break for the day, we're not going
12 to break for the day. But I'll ask you to be back
13 tomorrow at nine o'clock. Please be on time. Not
14 out of respect or consideration for the parties or
15 for me but out of respect and consideration for each
16 other. Because we won't be able to start until all
17 13 of you are here. So, don't be the last one to
18 show up. So, tonight when you're home, please don't
19 discuss the case. When we get back here tomorrow
20 we'll start as promptly as we can. And again, I
21 think we can, if we go quickly and efficiently, we
22 can probably be done by about mid-afternoon. No
23 promises, that's what I think based on what I've seen
24 to far. So, ladies and gentlemen, y'all a good
25 evening and I'll see you tomorrow morning.

1 (WHEREUPON, the jury left open court at
2 approximately 4:23 p.m.)

3 THE COURT: Okay, anything further this
4 afternoon, gentlemen?

5 MR. FOWLER: Nothing from the State, Judge.

6 MR. GRAVLEE: Nothing from the Defense, Your
7 Honor.

8 THE COURT: All right, good enough. See y'all
9 tomorrow morning. Have a good evening.

10 MR. FOWLER: Nine clock here?

11 THE COURT: Well, here's the deal, I want y'all
12 to talk. If y'all have any issues before that, send
13 me an email and tell me you need to talk to me before
14 the fact, okay. All right.

15 MR. GRAVLEE: With regard to the video?

16 THE COURT: With regard to anything. Anything
17 under the sun. If y'all need to talk to me about it
18 before we get started with the jury then let me know
19 beforehand, okay? Because I don't want -- I really
20 an sensitive to the jury sitting and waiting.

21 MR. GRAVLEE: Yes, sir, Your Honor.

22 THE COURT: So, we'll try to start as promptly
23 as possible.

24 MR. GRAVLEE: In light of that, in one of the
25 last trials we had, I just want to make sure we're

1 clear.

2 THE COURT: Sure.

3 MR. GRAVLEE: I did have a very brief motion
4 just on exploitation that we didn't get around to.

5 THE COURT: Okay.

6 MR. GRAVLEE: I don't know if you'd like to hear
7 that now, I don't imagine it's going to take more
8 than five minutes.

9 THE COURT: Yes, sir, yes, sir. We got some
10 found time so we need to take advantage of it.

11 MR. GRAVLEE: Yes, sir. And I guess to do so, I
12 would need to call Trooper McNeely to the stand.

13 THE COURT: Okay.

14 MR. GRAVLEE: With regard to the exploitation
15 issue.

16 THE COURT: All right.

17 Now, y'all asked for an order of sequestration.

18 MR. GRAVLEE: Yes, sir.

19 THE COURT: And it don't look like we're
20 following it. So, are we or are we not?

21 MR. GRAVLEE: She's not a witness, Your Honor.

22 THE COURT: Okay.

23 MR. GRAVLEE: I'm going to leave that to The
24 State over there.

25 THE COURT: All right.

1 THE CLERK: Place your left hand on the Bible,
2 raise your right hand.

3 BRANDON MCNEELY, after being duly sworn,
4 testified as follows:

5 THE CLERK: Thank you, you may be seated.
6 Please state your full name for the record.

7 THE WITNESS: Brandon Lee McNeely.

8 DIRECT EXAMINATION

9 BY MR. GRAVLEE:

10 Q Mr. McNeely, did you -- Trooper McNeely, did you
11 have occasion to investigate the circumstances of this
12 case?

13 A I'm sorry?

14 Q Did you have -- were you able to investigate, in
15 this case, the circumstances of the collision and the
16 ultimate arrest?

17 A Yes, sir, I was the lead investigating officer.

18 Q Okay. So, were you at the original scene?

19 A I was at the original scene of the collision.

20 Q The alleged hit and run.

21 A Yes, sir.

22 Q With -- when you were there, you got out a
23 camera, did you -- you had a camera?

24 A I can't recollect because of the time that it
25 happened. Must likely, though, there was a camera taking

BRANDON MCNEELY-DIRECT BY MR. GRAVLEE-(IC)

1 pictures of the scene.

2 Q Do you recall taking pictures of the car at the
3 scene?

4 A Offhand I do not. I can't say 100 percent, sir.

5 Q Okay. Would it refresh your recollection if we
6 showed you a video that showed you taking pictures of that
7 car?

8 A Yeah, I mean, if we went over it. Like I said,
9 I don't 100 percent remember if I did. General standard
10 that we do on a situation like that.

11 Q Okay. And with regard to the red SUV that was
12 found at the gas station, were you able to take pictures
13 of it there?

14 A I don't recollect taking pictures of the SUV.

15 Q Okay. Would it help if you refresh your
16 recollection if we were to play you the video that showed
17 you taking pictures -- or at least audio of that?

18 A Yeah, I mean, certainly.

19 Q Okay.

20 MR. FOWLER: Judge, we're happy to stipulate to
21 the fact that the pictures were taken. We don't plan
22 on putting them into evidence. I'm not here to talk
23 about them at all.

24 THE COURT: All right. Does that obviate the
25 necessity of this exploitation motion?

1 MR. GRAVLEE: Yes, sir. Just with regard to --
2 I'm not going to get back into the video just because
3 it does show him requesting -- the truck before it
4 pulls up to take pictures. Then at the scene of the
5 collision, then the gas station again before it's
6 pulled up more pictures are taken.

7 THE COURT: What evidence do you want to
8 exclude?

9 MR. GRAVLEE: So, Your Honor, it's not that the
10 evidence we want to exclude, the argument is that
11 it's a due process violation. Because I believe if
12 we had these photos here, that were taken of the
13 damage that occurred from one car to the other, we
14 would be able to challenge and to use those in
15 cross-examination to determine, you know, if we got a
16 bright yellow car and a blue car and there's bright
17 yellow and blue on each respective car then, that
18 would show something.

19 In this case, there's certainly paint scrapes
20 that, you know, we could analyze here. Because the
21 State's case is that his -- the statements that were
22 made to law enforcement, originally, arose out of the
23 investigation of this collision. That is going to be
24 talked about. And if I were to have that evidence
25 there, I would be able to at least cross-examine

1 about whether this didn't line up at all, here's some
2 pictures from the collision. Even if we're not
3 talking about it being a hit and run, kind of
4 excluding that. And I think that would give me the
5 opportunity to challenge it. This wasn't even the
6 car involved with the initial call. And therefore,
7 you know, the -- I just don't think that it provides,
8 in fairness, that the trial requires that having the
9 evidence here to put forth, Your Honor.

10 THE COURT: Okay.

11 MR. GRAVLEE: It's the Cheeseboro argument, it's
12 the second prong of it that it doesn't say that we
13 have to have, you know, the bad faith. That's the
14 second prong. Not that there's bad faith here but
15 these pictures are no where to be found. I talked to
16 Mr. Fowler about it a few months ago, a couple of
17 weeks ago, something like that, he shared with me
18 they didn't have it either. So, I think that those
19 photos would have possessed an exculpatory value
20 before the evidence was destroyed or lost. And we
21 have no other way to go about obtaining that
22 evidence.

23 THE COURT: Okay.

24 MR. GRAVLEE: So, Your Honor, just based on
25 exploitation argument there, I think that that is

1 certainly an issue that deprives Mr. Lowery here of
2 his due process right to a fair trial.

3 THE COURT: Okay. All right. Well, I think
4 that if I've already ruled that specific evidence of
5 the nature and circumstances of the accident are
6 inadmissible, then I've ruled that the only thing
7 they can put into the record is that they were
8 talking to him because they were investigating an
9 accident, that the nature of the damages to his car
10 are not relevant. And I don't even know whether that
11 will be admitted.

12 Now, the -- and I think that with regard to a
13 exploitation motion, that goes to the charge.
14 Wherein, I would charge the jury that if The State
15 chose not to admit evidence that was in their
16 control, that the jury can find that that the
17 evidence would not adhere to their benefit,
18 essentially. But I haven't seen the evidence yet to
19 determine whether exploitation charge is admissible
20 or not. And I think the context with the prior
21 evidentiary rulings that I've made, the facts,
22 circumstances and any suggestions or inferences to be
23 made from the damage wouldn't be relevant to the
24 issue before the jury.

25 Because I think the issue before the jury is

1 does his statement at the scene, standing alone, is
2 that evidence sufficient for The State to meet its
3 burden of demonstrating that he was driving a motor
4 vehicle while his faculties to drive were materially
5 and appreciably impaired? Because what I'm trying to
6 do is make sure that evidence absent the victim, that
7 is the other driver showing up, absent the other
8 driver showing up, that he can't use that as proof of
9 driving.

10 So, I'm not prepared to do exploitation yet.
11 But I think if you get into cross-examination of the
12 witness regarding whether he took pictures or not and
13 what the nature of the damages are, then you open it
14 up.

15 MR. GRAVLEE: Understood, Your Honor. Just for
16 the purposes of pre-trial --

17 THE COURT: Yeah, I gotcha.

18 MR. GRAVLEE: -- was that cross tailored there.

19 THE COURT: I gotcha. I gotcha. I don't think
20 that's a due process violation. I mean, it could be
21 exploitation but that's a subject for the charge as
22 opposed to a subject for -- and it could be subject
23 of exclusion of evidence.

24 But you're not going to put in any pictures of
25 the car?

1 MR. FOWLER: No, sir, Judge. We talked about
2 this a while back. Basically, it all goes back to
3 the wrecker pulls up and he says to the wrecker
4 driver, Hold on, let me take some pictures. And
5 nobody is really sure if any pictures were ever, in
6 fact, taken. We couldn't find any. I certainly
7 don't plan on talking about paint scrapes on the car
8 or anything like that. The only thing maybe that
9 could come up is that, you know, the other trooper
10 said to him, That tire is really flat, that's not
11 just a little bit of leaking air. That's the only
12 mention at all of damage to the vehicle that I think
13 is going to come up. If at all.

14 THE COURT: All right. Okay. So, what's the --
15 what's the substance of Mr. McNeely's testimony?
16 What is he going to say?

17 MR. FOWLER: He's the trooper who actually
18 performs the field sobriety tests on him.

19 THE COURT: Okay. I understand. I understand.
20 He's not going to talk about the damage and he's not
21 going to talk about the investigation of the first
22 accident, just strictly field sobriety test.

23 MR. FOWLER: You see the back end of
24 Mr. Lowery's car, but the damage is on the other end
25 so you can't really see the damage at all on the

1 video. There's flashing lights and stuff.

2 THE COURT: I'm not worry about representations
3 of that car in that video, I'm worried about oral
4 representations in the nature of the previous
5 accident by any witness. That's what I'm worried
6 about.

7 MR. GRAVLEE: He does, Your Honor. He does the
8 same kind of thing, we talked about it, in terms of
9 the interrogation being one or two, you know,
10 distinct things. Because he's first questioned by
11 Trooper Vallin as we just saw in the video. Second
12 one, Trooper McNeely shows up and he says the same
13 thing, all right, what happened here? And he says --
14 [defense attorney mumbles] -- I don't know. So, at
15 that point he says, Will you do a field sobriety test
16 for me and he walks over. So, I think that the
17 substance of his testimony is will you perform field
18 sobriety test for me and walks over there. He keeps
19 questioning him the whole time as he walking over to
20 perform these field sobriety tests in front of the
21 car.

22 THE COURT: Okay. What are the questions?

23 MR. FOWLER: I mean, it's been a couple of hours
24 since I watched it but I don't really remember there
25 being a whole lot of conversation at all. I mean, I

1 think like he hit a trooper's daughter came up at
2 some point with Trooper McNeely, too, we'll certainly
3 redact that.

4 THE COURT: Yeah, redact all that.

5 MR. FOWLER: But I don't remember there being a
6 whole lot of conversation about the wreck at all.

7 MR. GRAVLEE: Just like immediately when he
8 shows up--

9 MR. FOWLER: When he first pulls up--

10 MR. GRAVLEE: -- the back -- the videos, they're
11 kind of right even the screen.

12 MR. FOWLER: Right.

13 THE COURT: So, y'all look at that. I mean,
14 y'all know what I've ruled is that the only evidence
15 that you can use to support bad driving is what he
16 may have said on the scene. And I'm not
17 characterizing that as an admission, I'm not
18 characterizing that has a confession, that's what you
19 got. Absent the other driver showing up.

20 MR. FOWLER: Yes, sir.

21 MR. GRAVLEE: Thank you, Your Honor.

22 THE COURT: He or she may appear.

23 MR. FOWLER: I think he's probably figured out
24 why he never called me back, Judge.

25 MR. GRAVLEE: I appreciate you letting me put

1 that exploitation motion--

2 THE COURT: No, that's okay. That's okay. You
3 did the right thing. That's what I wanted to do
4 while the jury was out and we had some time. Okay.

5 All right, so we're good?

6 MR. GRAVLEE: Yes, sir.

7 MR. FOWLER: Yes, sir.

8 THE COURT: All right, you can step down. Thank
9 you, I appreciate it.

10 Anything else, before we bring the jury in
11 tomorrow morning?

12 MR. FOWLER: No, sir, Judge.

13 MR. GRAVLEE: I don't believe so, Your Honor.

14 THE COURT: Okay. All right, y'all take a look
15 at that tape. Okay. All right. Thank you.

16 MR. GRAVLEE: Your Honor, with regard to the
17 bond.

18 THE COURT: He can stay out. He's been out on
19 his bond, I presume?

20 MR. GRAVLEE: He has, yes, sir.

21 THE COURT: Okay, he can stay out on his bond.

22 MR. GRAVLEE: Thank you, Your Honor.

23 THE COURT: Yes, sir.

24 (WHEREUPON, the proceedings were concluded for
25 the day to be reconvened on December 13, 2018.)

1 December 13, 2018.

2 THE COURT: All right, good morning, I hope
3 everybody is doing well today. All right, good
4 enough. We ready for the jury?

5 The State ready?

6 MR. FOWLER: Yes, sir, Judge.

7 THE COURT: And the Defense?

8 MR. GRAVLEE: Yes, sir, Your Honor.

9 THE COURT: Okay. All right, good enough.
10 Okay, bring the jury in, please.

11 Mr. Lowery, I see you got your phone, just make
12 sure you turned it off, okay?

13 MR. LOWERY: It's turned it off. It's not on.

14 THE COURT: Okay.

15 (WHEREUPON, the jury came into open court at
16 approximately 9:07 a.m.)

17 THE COURT: All right, good morning, everybody.
18 Thank you for being on time, I appreciate it. So,
19 let's go ahead and get started.

20 Mr. Fowler, you may call your first witness,
21 sir.

22 MR. FOWLER: Yes, sir, Judge, The State calls
23 Trooper D.J. Vallin.

24 THE CLERK: Mr. Vallin, please place your left
25 hand on the Bible, raise your right hand.

1 D.J. Vallin, after being duly sworn, testified
2 as follows:

3 THE CLERK: Thank you, you may be seated.

4 Please state your full name for the record.

5 THE WITNESS: David Vallin.

6 DIRECT EXAMINATION

7 BY MR. FOWLER:

8 Q All right, Trooper Vallin, where do you work?

9 A South Carolina Highway Patrol.

10 Q How long have you been working there?

11 A Approximately three years.

12 Q Okay. So, were you working there on
13 January 26th, 2018?

14 A Yes.

15 Q And on the night of January 26, did you respond
16 to reports of a car accident?

17 A Yes.

18 Q Okay. Where did that accident take place?

19 A Piedmont Highway Greenville, South Carolina.

20 Q That's in Greenville County?

21 A Yes, sir.

22 Q Okay. And did that later lead you to a gas
23 station?

24 A Yes.

25 Q Okay. And at that gas station did you come into

D.J. VALLIN-DIRECT BY MR. FOWLER

1 contact with an individual?

2 A Yes, sir.

3 Q And is he seated here in the courtroom here
4 today?

5 A Correct.

6 Q Could you point him out for us and describe what
7 he's wearing?

8 A The Defendant, wearing a tan shirt and blue
9 jeans.

10 Q Okay. When you came into contact with him, was
11 he near a vehicle?

12 A Yes.

13 Q What kind of vehicle was it?

14 A It was a red SUV.

15 Q Okay. Was he inside of it or was he just around
16 it?

17 A I can't remember off the top of my head.

18 Q Okay. Were there other law enforcement officers
19 there?

20 A Yes.

21 Q Were they from your agency or different agency?

22 A Different agency.

23 Q What agency was that?

24 A Greenville County Sheriff's Office.

25 Q Okay. Did you approach Mr. Lowery that night?

D.J. VALLIN-DIRECT BY MR. FOWLER

1 A Yes, sir, I did.

2 Q Okay. And did you begin to question him about
3 the car accident?

4 A Yes, sir.

5 Q Could you tell us a little bit about that?

6 A Well, we responded to the collision, got a
7 report one of the vehicles was located at the Spinx.

8 MR. GRAVLEE: Your Honor, objection.

9 THE COURT: What's the basis of the objection?

10 MR. GRAVLEE: Your Honor, I think this is a
11 matter we need to take up outside the jury.

12 THE COURT: All right, y'all come up.

13 (WHEREUPON, an off-the-record bench conference
14 was held in the presence of the jury but out of
15 the hearing of the jury.)

16 THE COURT: All right, the objection is
17 sustained.

18 BY MR. FOWLER:

19 Q Okay. So, you're talking to Mr. Lowery, did
20 he -- did he have keys to that car at that point?

21 A I'm not sure.

22 Q Okay. Did he -- did he smell like anything that
23 night?

24 A He did smell strongly of a alcoholic beverage.

25 Q Okay. And is your car equipped with a dash

D.J. VALLIN-DIRECT BY MR. FOWLER

1 camera?

2 A Yes, sir.

3 Q Was it running that night?

4 A Yes, sir.

5 Q Okay. I'm going show you a copy of a DVD. Now,
6 have you had a chance to review that footage?

7 A Yes, sir.

8 Q Okay. Is that that DVD that you reviewed?

9 A It is.

10 Q What's that say right there?

11 A Those are my initials and the date. Today's
12 date.

13 Q Okay. And that's when you reviewed it?

14 A Yes, sir.

15 Q Okay. And is that to the best of your
16 recollection a fair and accurate copy of events as you
17 remembered them that night?

18 A Yes, sir.

19 Q Okay.

20 Your Honor, The State would move to enter
21 into evidence as State's number one, a dash video from
22 Trooper Vallin's car.

23 THE COURT: Objection, sir?

24 MR. GRAVLEE: Your Honor, just subject to the
25 redactions.

D.J. VALLIN-DIRECT BY MR. FOWLER

1 THE COURT: Okay. All right, fair enough. Then
2 I'll allow it in as State's Exhibit -- is that number
3 one?

4 MR. FOWLER: Yes, sir.

5 THE COURT: Okay.

6 MR. FOWLER: Sir, may I go ahead and publish
7 this to the jury?

8 THE COURT: Yeah, you already have it marked?

9 MR. FOWLER: I don't have it marked yet, Judge.
10 We talked about it, I don't want to put the little
11 sticker on it yet, I'm scared it's going to mess up
12 the laptop.

13 THE COURT: I gotcha. I gotcha. Do you have
14 the little pouch? I just want to make sure that the
15 court reporter has the opportunity to mark it before
16 we move on too much.

17 MR. FOWLER: Darn it, I don't have a individual
18 pouch for it, I just got a sleeve.

19 THE COURT: Okay. All right. So, we'll just --
20 Do you need to enter it, Ms. Herron?

21 THE COURT REPORTER: It's fine, Judge, I can do
22 it afterwards.

23 THE COURT: You can do it afterwards, okay.

24 THE COURT REPORTER: Thank you.

25 THE COURT: All right, good enough. So entered

D.J. VALLIN-DIRECT BY MR. FOWLER

1 as State's Exhibit number one.

2 (WHEREUPON, State's Exhibit No. 1 was marked for
3 identification and received into evidence.)

4 (WHEREUPON, State's exhibit one was published to
5 the jury.)

6 BY MR. FOWLER:

7 Q Now, Trooper Vallin, just to be clear, the
8 person we saw there in the highway patrol uniform, who was
9 that?

10 A That was myself.

11 Q And the other gentleman there in the ball cap
12 and white t-shirt, who was that?

13 A That was the Defendant.

14 Q Okay. And those deputies there, did you get
15 their names by chance?

16 A No, sir.

17 Q Okay. Is that unusual?

18 A No, sir.

19 Q Okay. When you got there, was there anyone else
20 around that car other than Mr. Lowery?

21 A No, sir.

22 Q Okay. And that we saw that other car pull up,
23 right?

24 A Yes, sir.

25 Q Do you know who that was?

D.J. VALLIN-DIRECT BY MR. FOWLER

1 A That was his daughter.

2 Q Okay. All right. And Wild Country, you said he
3 was pulling out of, what kind of establishment is that?

4 A I believe--

5 MR. GRAVLEE: Your Honor, objection.

6 THE COURT: Yes, sir.

7 MR. GRAVLEE: May we approach?

8 THE COURT: Sure.

9 (WHEREUPON, an off-the-record bench conference
10 was held in the presence of the jury but out of
11 the hearing of the jury.)

12 BY MR. FOWLER:

13 Q Did the Defendant say where he was coming from
14 that night?

15 A Wild Country.

16 Q And what kind of business -- or what is Wild
17 Country?

18 A I've never been inside, I believe it's a type of
19 bar.

20 MR. FOWLER: Okay. All right. Thank you,
21 Trooper Vallin, if you would answer any questions
22 Mr. Gravlee may have.

23 THE WITNESS: Yes, sir.

24 MR. GRAVLEE: May it please the court?

25 THE COURT: Yes, sir.

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BY MR. GRAVLEE:

Q Trooper Vallin, so when Mr. Fowler was just asking you, you pulled up and he was near the vehicle?

A Yes, sir.

Q Okay. In fact, when you pulled up he's standing
sounded by three county officers, correct?

A Well, I don't remember from the video if he was actually on screen anywhere.

Q When you pulled up you immediately stepped out of your car and you went and stood next to the trooper -- to the county cops, correct?

A Correct.

Q Who was next to Mr. Lowery?

A I'm not sure. Like I said, I don't remember him actually being on the screen in the video. And I can't remember off the top of my head.

Q Do we need to replay the video to refresh your recollection?

A If you'd like to rewind it, replay it; yes, sir.

MR. GRAVLEE: Sure.

(WHEREUPON, State's Exhibit 1 was published.)

BY MR. GRAVLEE:

Q Okay. So, that's the point in the video where you step out of your patrol car?

D.J.VALLIN-CROSS BY MR. GRAVLEE

1 A Correct.

2 Q And that's surrounded by two or three county
3 deputies?

4 A Yes.

5 Q And Mr. Lowery?

6 A Yes, sir.

7 Q And that is not next to the car?

8 A Correct.

9 Q Okay. Thank you. So, you testified earlier you
10 weren't sure whether keys were found or not?

11 A Right.

12 Q Okay. You testifies that Mr. Lowery smelled of
13 alcohol?

14 A Yes.

15 Q Okay. He was slurring his speech?

16 A Yes. According to the video seems so, yes.

17 Q You know, and you, in your experience, you've
18 worked a lot of DUIs, I would imagine?

19 A Yes, sir.

20 Q Okay. About how many? Could you ballpark it?

21 A In the last three years, maybe 150.

22 Q Okay. And each time that you respond on those
23 DUIs -- let's back up here, how long have you been a
24 trooper?

25 A Approximately three years.

D.J.VALLIN-CROSS BY MR. GRAVLEE

1 Q Okay. And before you were allowed to become a
2 trooper, you have to attend training?

3 A Correct.

4 Q The academy?

5 A Yes, sir.

6 Q And at the academy, they train you about
7 investigating accidents. And they train you about
8 retaining evidence?

9 A Yes, sir.

10 Q Taking notes.

11 A Yes, sir.

12 Q Because when a trial happens, if something, you
13 know, goes down the line, it could be years down the road?

14 A Correct.

15 Q And at that time your memory isn't as good as it
16 was at the time of the accident?

17 A Correct.

18 Q So, that teach you the importance of documenting
19 the important evidence of a crime scene?

20 A Yes, sir.

21 Q Okay. And when you respond they teach you to
22 write up an incident report?

23 A Yes.

24 Q Correct? And writing incident reports, they
25 want you to be complete?

D.J.VALLIN-CROSS BY MR. GRAVLEE

1 A Yes.

2 Q And thorough?

3 A Yes, sir.

4 Q And accurate?

5 A Yes, sir.

6 Q In this case, you didn't prepare an incident
7 report.

8 A No, sir.

9 Q You don't have any notes?

10 A No, sir.

11 Q You don't have any pictures?

12 A Personally, no, sir.

13 Q Okay. So, going back to your experience with
14 DUIs, you've done about 150?

15 A Yes, sir.

16 Q Something like that. In your experience, if
17 somebody is intoxicated in your opinion, a lot of times
18 they'll slur their speech?

19 A Yes, sir.

20 Q Bloodshot eyes?

21 A Sometimes, yes, sir.

22 Q They stagger around?

23 A Yes, sir.

24 Q They have trouble making sense?

25 A Yes, sir. Sometimes.

D.J.VALLIN-CROSS BY MR. GRAVLEE

1 Q So, just to be clear here, when you pulled up,
2 that store -- the store front is directly where you're
3 orientated in the video right there, the store's in front
4 of you? Like where you're facing, correct?

5 A I'm not sure.

6 Q You don't recall where the store was?

7 A Orientation to this video, no, sir.

8 Q Okay. So, you don't recall how you pulled up at
9 the scene?

10 A You mean like from which entrance or?

11 Q Yeah. I mean, you can tell where the store is
12 in that video?

13 A From the video I'm not sure.

14 Q It's a convenient store, correct?

15 A Correct.

16 Q And it's a Spinx?

17 A Correct.

18 Q Okay. And can you show me where you standing
19 right there, where the burgundy SUV is?

20 A To your right.

21 Q To the right?

22 A Yes, sir.

23 Q So, you recall where that is but you don't
24 recall where the store is?

25 A It recall where it is because we watched the

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 video yesterday, yes, sir.

2 Q And just now?

3 A And just now, correct.

4 MR. GRAVLEE: Thank you, no further questions.

5 THE COURT: Okay.

6 Any redirect, sir?

7 MR. FOWLER: No, Judge. And we'd ask this
8 witness be excused.

9 THE COURT: Comfortable with that, sir?

10 MR. GRAVLEE: No objection, Your Honor.

11 THE COURT: All right, thank you, Officer
12 Vallin, I appreciate it. Thank you for being here
13 today.

14 All right, you may call your next witness, sir.

15 MR. FOWLER: Yes, sir, Judge. The State calls
16 Trooper McNeely.

17 THE CLERK: Place your left hand on the Bible,
18 raise your right hand.

19 BRANDON MCNEELY, after being duly sworn,
20 testified as follows:

21 THE CLERK: Thank you, you may be seated. And
22 please state your full name for the record.

23 THE WITNESS: It's Brandon Lee McNeely.

24 DIRECT EXAMINATION

25 BY MR. FOWLER:

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 Q Okay, Trooper McNeely, where do you work?

2 A For the South Carolina Highway Patrol.

3 Q How long have you been working there?

4 A Almost two years.

5 Q Were you working there this past January as
6 well?

7 A Yes, sir.

8 Q Okay. Did you -- did you respond to a Spinx on
9 the night of January 26th, 2018?

10 A Yes, sir.

11 Q And were there other law enforcement officers
12 there?

13 A Yes, sir.

14 Q Do you remember who all was there?

15 A There was Trooper Vallin as well as some other
16 deputies.

17 Q All right. Okay. And was there a -- was there
18 a subject there? Was there a individual, a person there?

19 A Yes, sir.

20 Q Okay. And was that person, is he sitting in the
21 room right now?

22 A Yes, sir, it's the Defendant.

23 Q Okay. And when you got there -- let me -- so --
24 and could you tell me, when you got there, did you
25 approach that individual?

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 A Yes, sir, I did.

2 Q Okay. And did you -- did you smell anything on
3 him?

4 A There was the order of an alcoholic beverage
5 emitting from his person.

6 Q Okay. Was he having any trouble standing or did
7 he give you any suspicion that he might be impaired?

8 A Yes, sir, he did demonstrate signs of
9 impairment.

10 Q Okay. Do y'all have training and instruction on
11 what to do in that situation?

12 A Yes, sir, we do.

13 Q Okay. Could you tell me a little bit about
14 that?

15 A Well we have, in situations like this, we offer
16 what is called a Standardized Field Sobriety Test. Which
17 gives them the opportunity, if they're willing to, to
18 demonstrate if they do not show signs of impairment.

19 Q Okay. Are there three standard tests in these
20 field sobriety tests?

21 A Yes, sir.

22 Q Could you just name them for me real quick?

23 A There's the horizontal gaze nystagmus test, the
24 one leg stand and the walk and turn.

25 Q Okay. And so, the horizontal gaze nystagmus,

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 could you explain to the jury real quick what that is?

2 A Horizontal gaze nystagmus is an involuntary
3 movement of the eyes that is brought upon from being under
4 the influence. Whether if be narcotics or alcohol.

5 Q And is this the test -- could you explain how
6 that test is performed?

7 A Initially with the test what you do is take a
8 fixed point. And the subject is going to concentrate on
9 that fixed point as you move it from side to side. The
10 eyes will follow it but they have a involuntary tick to go
11 back to their original set point, so they move on their
12 own.

13 Q Okay. And what are you looking for in that
14 test?

15 A Well, in that you're looking to see if there
16 is -- if there is any nystagmus at all. Because a normal
17 person at rest does not display nystagmus.

18 Q Okay. And nystagmus, again, could you explain
19 that real quick? South Carolina education here.
20 Nystagmus is what?

21 A It's the involuntary movement of your eyes.

22 Q Okay. And the walk and turn test, could you
23 explain that real quick for us?

24 A So, with the walk and turn, it is -- you're
25 going to -- it's based off of balance and ability to

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 follow some commands and instructions. It's going to be,
2 essentially, you're taking nine heel/toe steps toward a
3 fixed point. Then you're going to take a series of small
4 steps to turn around and take nine heel toe steps back.
5 You're also counting out loud your steps and you're
6 also -- your arms are down by your side.

7 Q And you hit on it there but you said the phrase,
8 ability to follow instructions. Is that a segment of each
9 of these tests?

10 A Yes, sir. It's -- with each of these tests
11 you're -- one of the things you're judged on is the
12 ability to comprehend some of the basic commands that are
13 asked.

14 Q Okay. And I realize that, you know, this is
15 quite a little elementary, but is it a silent impairment
16 that you have trouble following commands?

17 A Yes, sir.

18 Q Okay. And is balance or lack of balance another
19 sign of impairment?

20 A Yes, sir.

21 Q And we've already said nystagmus is a sign of
22 impairment.

23 A Yes, sir.

24 Q Okay. And so, we talked about HGN and walk and
25 turn, what's the other test?

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 A The other test is the one leg stand.

2 Q Okay. And could you explain that to us real
3 quick?

4 A The one leg stand is you're going to take
5 whichever leg you feel most comfortable with and you're
6 going to lift it approximately six inches off of the
7 ground. And you're going to maintain that six inches off
8 of the ground while counting in a manner of one thousand
9 one, one thousand two and so on. And all while doing
10 that, you do it for 30 seconds. Or more. And during that
11 30 seconds or more you got to maintain your balance, don't
12 stop once you start and make sure you're counting out
13 loud.

14 Q Okay. And these are all done in an effort to
15 find signs of impairment?

16 A Yes, sir.

17 Q And in addition to that, do you also just use
18 your general everyday evaluation of experience of being
19 around drunk people?

20 A Yes, sir.

21 Q All right. Okay. Was your car equipped with a
22 dash camera that night?

23 A Yes, sir.

24 Q Was it operational?

25 A Yes, sir.

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 Q Was it running?

2 A Yes, sir.

3 Q Did you have an opportunity to review that
4 footage before now?

5 A Yes, sir.

6 Q Is this a DVD copy of that footage?

7 A Yes, sir.

8 Q Can you tell me what that says right there?

9 A That's my initials with today's date.

10 Q Okay. And that's when you reviewed that
11 footage?

12 A Yes, sir.

13 Q Is it a -- to the best of your recollection, is
14 it a fair and accurate copy of the events that night as
15 they took place?

16 A Yes, sir.

17 Q Okay.

18 Your Honor, we move to enter into evidence
19 States number two, Trooper McNeely's dash video.

20 THE COURT: Objection, sir?

21 MR. GRAVLEE: Just subject to the redactions,
22 Your Honor.

23 THE COURT: Okay, same is admitted as State's
24 Exhibit number two.

25 MR. FOWLER: Yes, sir, Judge. May I go ahead

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 and publish this to the jury?

2 THE COURT: You may.

3 (WHEREUPON, State's Exhibit No. 2 was marked for
4 identification and received into evidence.)

5 (WHEREUPON, State's Exhibit NO. 2 was published
6 to the jury.)

7 BY MR. FOWLER:

8 Q I'm going to stop that right there for just a
9 second. Was that the HGN test that we just watched right
10 there?

11 A Yes, sir, it was.

12 Q And did he exhibit signs of impairment on that
13 test?

14 A Yes, sir. There was nystagmus on the entirety
15 of the test.

16 Q Okay. And he -- was he -- did he appear to be
17 swaying or moving at all in that video to you?

18 A Yes, sir.

19 Q And is that also a sign of impairment?

20 A Yes, sir, can't keep balance.

21 Q Okay. We're going to keep moving.

22 (WHEREUPON, State's Exhibit NO. 2 was continued
23 to be published.)

24 MR. GRAVLEE: Your Honor, we've already watched
25 this.

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 THE COURT: I know, he's just trying to find the
2 spot. I understand.

3 (WHEREUPON, State's Exhibit NO. 2 was continued
4 to be published.)

5 THE COURT: That liberal arts degree isn't doing
6 you much good right now.

7 BY MR. FOWLER:

8 Q All right, well, we'll just go on from there.
9 Okay, Trooper McNeely, so, y'all went and performed the
10 walk and turn and the one leg stand, correct?

11 A Yes, sir.

12 Q And did he exhibit signs of impairment on those
13 tests?

14 A Yes, sir.

15 Q Okay. And I believe he mentioned something
16 about needing to use the bathroom?

17 A That's correct. Yes, sir.

18 Q Did he use the bathroom while y'all were there?

19 A Yes, sir, he did.

20 Q Okay. Did he use it in a toilet or?

21 A No, sir, he urinated on himself.

22 Q Okay. Is that, in your opinion, a sign of
23 impairment?

24 A Yes, sir, it can be one of them.

25 Q Okay. Now, let me ask you this, I believe you

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 said that was his daughter's car, is that correct?

2 A Yes, sir.

3 Q Did you have a chance to check the registration
4 of that vehicle?

5 A Yes, sir. It was in, I believe, it's in his
6 daughter's name but the same address as what's on his
7 license.

8 Q That's where I was going. So, it's the same
9 address he lives, correct?

10 A Yes, sir.

11 Q And in your experience, it is unusual for a
12 household to have vehicles registered in one persons name
13 but other people drive them?

14 A It's not unusual.

15 Q Okay. Now, I'm going to ask you about this.
16 That Spinx right there, did it have any, you know, outdoor
17 cameras or anything?

18 A Yes, sir, it did?

19 Q Okay. And did you think to check and get that
20 footage?

21 A No, sir, I did not.

22 Q And, you know, is that unusual sometimes we miss
23 stuff?

24 A No, it's not unusual.

25 Q Okay. All right. And as a result of performing

BRANDON MCNEELY-DIRECT BY MR. FOWLER

1 these field sobriety tests and all this, did you place him
2 under arrest?

3 A Yes, sir?

4 Q Okay. Did you place him under miranda before
5 you arrested him?

6 A No, sir, it was after the initial arrest.

7 Q Well, you put handcuffs on him?

8 A Yes, sir, handcuffs.

9 Q Was your camera operational during that?

10 A Yes, sir.

11 Q Okay.

12 WHEREUPON, State's Exhibit NO. 2 was continued
13 to be published.)

14 MR. FOWLER: Judge, may we approach real quick?

15 THE COURT: Yeah.

16 (WHEREUPON, an off-the-record bench conference
17 was held in the presence of the jury but out of
18 the hearing of the jury.)

19 THE COURT: Ladies and gentlemen, we were just
20 discussing the inadequacy of Mr. Fowler's Furman
21 history degree and he can't use that to actually use
22 a computer. Just so you know.

23 MR. FOWLER: Anyway. I'm in no position to
24 dispute that right now.

25

BRANDON MCNEELY-CROSS BY MR. GRAVLEE

1 BY MR. FOWLER:

2 Q Trooper McNeely, I know we didn't finish that
3 video, but you said you mirandized him, correct?

4 A Yes, sir.

5 Q Does miranda appear on that video?

6 A Yes, sir.

7 Q Okay.

8 That's all I have, if you'd answer any
9 questions the defense counsel may have.

10 THE COURT: Okay.

11 MR. GRAVLEE: Thank you, Mr. Fowler.

12 May it please the Court?

13 THE COURT: Yes, sir.

14 CROSS-EXAMINATION

15 BY MR. GRAVLEE:

16 Q All right, Trooper McNeely, when you arrived you
17 spoke with Mr. Fowler?

18 A Yes, sir.

19 Q Okay. You say he smelled of alcohol?

20 A Yes, sir.

21 Q Coming right out of his mouth?

22 A He had the presence of a alcoholic beverage
23 emitting from not only his person but his breathe.

24 Q So, it's coming out of his pores, his mouth, his
25 ears?

BRANDON MCNEELY-CROSS BY MR. GRAVLEE

1 A Well, essentially, you can smell it on him.

2 Q Sure. And so, you had a good suspicion that he
3 was impaired?

4 A Yes, sir.

5 Q Okay. And so, you did the HGN, the nystagmus,
6 just eye wiggle test, essentially? That's the first one
7 you did, correct?

8 A Yes, HGN was first.

9 Q Okay. While doing that he was swaying back and
10 forth?

11 A Yes, sir.

12 Q Okay. And he was stumbling around before you
13 walked over there -- I mean, before you started the HGN as
14 well, correct?

15 A Yes, sir.

16 Q Okay. He was slurring his speech?

17 A Yes, sir.

18 Q Okay. The -- you did that walk and turn test
19 and it's supposed to measure balance and stability to
20 follow directions, I believe is what you said?

21 A Yes, sir.

22 Q And he failed that one?

23 A Well, there's no pass or fail, it just
24 demonstrates indicators of impairment.

25 Q Okay. But you found that he was -- indicated

BRANDON MCNEELY-CROSS BY MR. GRAVLEE

1 impairment?

2 A Yes, sir.

3 Q A lot of clues, as you say, to whether he was
4 impaired?

5 A Yes, sir.

6 Q And in your opinion he was?

7 A Yes, sir.

8 Q Okay. Let's see, during one of the tests, I
9 believe you testified, let me back up real quick. I
10 believe Mr. Lowery told you when you were doing the
11 test -- and excuse me but I'm quoting he says, I have
12 piss.

13 Is that correct?

14 A Yes, sir.

15 Q And you said -- I mean, you didn't allow him to
16 go use the restroom or anything at that point?

17 A No, sir.

18 Q Okay. So, then this Mr. Lowery, who you believe
19 was impaired, correct?

20 A Yes, sir.

21 Q Peed on himself?

22 A Yes, sir.

23 Q Down his blue jeans?

24 A Yes, sir.

25 Q Okay. And then I believe later on he said that

BRANDON MCNEELY-REDIRECT BY MR. FOWLER

1 he had to -- he said it, again, that he had to go use the
2 restroom [indiscernible] this time?

3 A Yes, sir.

4 Q Okay. And again, you didn't allow him to do
5 that?

6 A Yes, sir.

7 Q So he just urinated on himself?

8 A Yes, sir.

9 Q Okay. And eventually you ended up arresting him
10 because you, in fact, believed he was inebriated?

11 A Yes, sir.

12 MR. GRAVLEE: No further questions.

13 THE WITNESS: Thank you.

14 THE COURT: Redirect, sir?

15 MR. FOWLER: Just real briefly.

16 REDIRECT EXAMINATION

17 BY MR. FOWLER:

18 Q Trooper McNeely, after you -- after your initial
19 interaction with him -- and I point -- once we get to the
20 point where Mr. Lowery said he needed to use the bathroom,
21 were you investigating a crime at that point?

22 A Yes, sir.

23 Q Was he the subject of that investigation?

24 A Yes, sir.

25 Q Could it potentially harm that investigation had

BRANDON MCNEELY-REDIRECT BY MR. FOWLER

1 he left in the middle of the field sobriety test?

2 A Yes, sir.

3 MR. FOWLER: Okay, that's it, Judge.

4 THE COURT: Any recross?

5 MR. GRAVLEE: None from the Defense, Your Honor.

6 THE COURT: Thank you, trooper, I appreciate
7 your here, sir.

8 MR. FOWLER: Judge, that's the completion of The
9 State's evidence. So, at this time The State rests
10 and we'd ask that this witness be excused.

11 THE COURT: Any objection to this witness being
12 excused, sir?

13 MR. GRAVLEE: No objection, Your Honor.

14 THE COURT: Okay, good enough.

15 Okay, Mr. Gravlee, do you intend to call
16 witnesses to the stand and present evidence, sir?

17 MR. GRAVLEE: Yes, sir, Your Honor. But I think
18 first we just have some matters to take up.

19 THE COURT: I know that. We're going to get
20 there, okay.

21 MR. GRAVLEE: I believe we will, Your Honor.

22 THE COURT: Okay. And I'm not holding you to it
23 because I know you're going to have a discussion with
24 your client.

25 MR. GRAVLEE: Yes, sir.

1 THE COURT: But how many, as you sit here now,
2 do you anticipate you will call?

3 MR. GRAVLEE: Witnesses?

4 THE COURT: Yes, sir.

5 MR. GRAVLEE: If we do, a maximum of two.

6 THE COURT: Okay.

7 MR. GRAVLEE: And I don't believe that it will
8 take longer than, depends on how long Mr. Fowler is
9 on cross, but I doubt it would be longer than 30, 40
10 minutes.

11 THE COURT: Okay. All right, good enough.
12 Thank you very much.

13 Ladies and gentlemen, the reason I ask that on
14 the record in front of y'all is so that we all know
15 where we stand in the trial. So, we're going to take
16 a short break. And when The State rests its case,
17 then at that point, procedurally, I must take up a
18 few matters of law. And we'll do that now. And then
19 after I've heard those matters of law, then we'll
20 come back in we'll resume the case. Now, I'm going
21 to give y'all a little bit of homework while y'all
22 are waiting for us to get through these matters.
23 It's not going to take long but I'm going to give you
24 a little bit of homework.

25 One of you, one of the initial 12 needs to act

1 as foreperson of the jury. And I want you to,
2 please, elect a foreperson of the jury. Now,
3 before you go in and do that, I'll tell you what a
4 foreperson does. It's not -- the duties of the
5 foreperson of a jury is fairly simple. And that is
6 that that person has responsibility to make sure that
7 every single person on the jury during deliberations
8 has a voice. And has the opportunity to offer his or
9 her opinion. You know that when 12 people get
10 together, you never met each other, you're going to
11 have some people who are very opinionated and ready
12 to voice their opinions and concerns. Then you're
13 going to have other people who are more reticent and
14 reluctant to offer their opinions. The foreman's job
15 is to make sure, a foreperson job, is to make sure
16 that everyone has the opportunity to be heard during
17 deliberations.

18 Beyond that, I can't tell you what duties the
19 foreman will assume while in deliberations. That is,
20 each juror decides the best and most efficient way of
21 proceeding in deliberations. I've never been on a
22 jury and I'm not allowed to go in your jury room
23 while you deliberate, so I don't know exactly how
24 juries deliberate. But I do know that each jury
25 decides and settles on their own way of deliberating.

1 The foreman can facilitate that. The foreperson may
2 facilitate that to the extent that he or she feels is
3 appropriate.

4 Also, after I've given you a charge on the law
5 and you received all the evidence, if there are any
6 questions, the foreman can write down the questions
7 and present them to the bailiff who will then give
8 them to me. And I'll answer them if I can. A lot of
9 times, just give you a heads up, I get questions from
10 jurors that I can't answer. I told you I don't have
11 an opinion about the facts of the case and I'm not
12 allowed to under the law. So, sometimes jurors will
13 ask me questions like, what does this mean? Or is
14 there evidence of X or Y? And I can't answer that
15 question. So, you'll get a pretty terse response
16 from me which will be I can't say that question. So,
17 understand I'm not trying to be evasive, it's just
18 some questions I can't answer, okay. I can answer
19 questions about the law. Okay.

20 So, ladies and gentlemen, I'll send you back to
21 your jury room with that tasking. And if you'll will
22 just write down who you elect, give it to the bailiff
23 so I'll know. Thank you very much, don't discuss the
24 case yet.

1 (WHEREUPON, the jury left open court at
2 approximately 9:56 a.m.)

3 THE COURT: Okay, motions?

4 MR. GRAVLEE: Yes, sir, Your Honor. At this
5 time The Defense would move for a directed verdict of
6 not guilty. The State has failed to put forward
7 evidence to prove to the corpus delicti in this case.
8 Under -- there's a few cases, one of them being the
9 City of Easley the Court there talks about corpus
10 delicti here where you have three requirements. You
11 know, three elements that are within the -- to meet
12 the corpus delicti doctrine DUI. The first the most
13 important is that there's a driving vehicle. That
14 there's independent, corroborating evidence of
15 someone driving a vehicle.

16 And I know the case law says not necessarily the
17 defendant but somebody. There has been not a shred
18 of testimony or evidence to show, aside from
19 Mr. Lowery's own statements that the car was ever
20 driven. We don't have testimony from either trooper
21 that there was, you know, skid marks or that there
22 were scrapes coming into that parking lot. All we
23 know is that there is a car sitting there that has a
24 flat tire. No testimony that that car was warm.
25 There's no testimony that from the county police

1 officers that were not there to say oh we saw
2 somebody pull in. They didn't offer surveillance
3 footage that was, you know, no doubt there in some
4 way shape or form at one point in time, from that gas
5 station, to show some independent corroborating
6 evidence.

7 They chose not to put the hit and run on the
8 document -- I mean, on the trial docket and chose not
9 to call those witnesses even though The State's got
10 the subpoena power to do so. And if they don't want
11 to show up that's one thing but they didn't subpoena
12 them. Even if they don't like what they're going to
13 say, it's their burden to prove their case beyond a
14 reasonable doubt. And it's their burden to prove
15 corpus delicti in this case. I just don't think that
16 there's -- there's evidence, aside from Mr. Lowery,
17 that there's independent, corroborating evidence that
18 a vehicle was driven in this case. Especially, how
19 The State has presented it.

20 Trooper McNeely couldn't testify to driving,
21 Trooper Vallin couldn't testify to driving. Three to
22 four of those deputies couldn't testify to driving.
23 And were not called here today, you know. And one of
24 the things that the City of Easley -- the Portman
25 case talks about -- and that is, just for the record,

1 327 S.C. 593. They talk about they find, you know,
2 the cars at the scene. No question, you know, where
3 it's just run off the road and a lot of the other
4 corpus delicti cases that are cited have that same
5 thing. State v. Smith is a another one, '97.
6 Everybody's found nearby. There's independent,
7 corroborating evidence in those cases where somebody
8 else has said, yeah, we saw him or we told these
9 folks. And there's witnesses on the scene here.
10 There's not that here.

11 And in State v. Smith, this case differs from
12 that, too. In that case where they found there was
13 sufficient evidence for it to be corpus delicti, the
14 car was found at the scene, the driver was next to
15 the accident, they're witnesses there. Unlike this
16 one, the guy in State v. Smith was chewing on blades
17 of grass, there's no blades of grass here. But as
18 far as, you know, everything differs from those cases
19 because it's not at the scene of this wreck and
20 there's no proof that he was driving that day.

21 THE COURT: Okay, thank you.

22 Yes, sir, Mr. Fowler.

23 MR. FOWLER: Yes, sir, Judge. You know, I would
24 probably categorize Mr. Lowery's statements a little
25 different from Mr. Gravlee. I think that is -- I

1 think excellent evidence and certainly enough for a
2 jury question as to whether or not he was driving. I
3 mean, some quotes that pulled from it was, I left,
4 Wild Country. I pulled in here to change my tire. I
5 turned in here to get something to eat. If I hit
6 anybody, I'm sorry. I guess I screwed up, I can't
7 lie. Then at one point he says, I was the only
8 person in this car. Further on you can hear him on
9 video making plans to bond out of jail. I mean, I
10 think that what is in effect a confession by the
11 Defendant is certainly good evidence that a crime was
12 committed.

13 We've conceded, you know, I think we're all on
14 the same page here, that the only real issue for the
15 jury in this case is was he, in fact, driving? And
16 have a car registered to his address, in his
17 daughter's name, when he's the only person there.
18 And he makes statements about driving that car there,
19 I think it's certainly enough to rise to a jury
20 question as to whether or not he was driving car.

21 THE COURT: Okay. All right.

22 Yes, sir.

23 MR. GRAVLEE: Your Honor, may I respond briefly?

24 THE COURT: Yeah.

25 MR. GRAVLEE: I don't think it's in evidence

1 that the car -- neither trooper testified that, I
2 don't believe, that the car was registered and that
3 he lived at the residence. He didn't say that he
4 lived at that residence.

5 MR. FOWLER: He did.

6 THE COURT: He said something to that extent.
7 It could be construed as that.

8 MR. GRAVLEE: Okay. But again, it's not the
9 standard for meeting corpus delicti doctrine. It's
10 not whether there's good statements from the
11 Defendant. It says, Good statement from the
12 defendant, plus independent, corroborating evidence.
13 And there is none. Mr. Vallin didn't address any
14 independent, corroborating evidence. He just said
15 there's lots of statement from the Defendant here.

16 THE COURT: Okay. All right. Okay, I do find
17 that there is sufficient evidence in the record to
18 overcome a motion for directed verdict. Of course,
19 the standard that The Court applies is not whether
20 there's sufficient evidence but whether there's any
21 evidence in the record. There's evidence presented
22 by and through the statements of the Defendant. And
23 then there's also circumstantial evidence which
24 includes the car being there, the registration of the
25 car being to a household member.

1 And again, go back to the statements, the
2 statements themselves. Also, look at the proximity.
3 Although, there's some question about, and this is a
4 question for the jury, as to whether that proximity
5 is sufficient to meet The State's burden of proof.
6 But, you know, being at the Spinx, in the fairly
7 immediate proximity of the car I think is
8 circumstantial evidence of driving as well.

9 So, I think that there is sufficient evidence
10 upon which The State -- the jury can determine that
11 The State has met its burden of proof.

12 MR. GRAVLEE: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 MR. FOWLER: Thank you, Judge.

15 THE COURT: Yes, sir.

16 Do you want me to have a colloquy with your --
17 Mr. Lowery?

18 MR. GRAVLEE: Yes, sir, Your Honor.

19 THE COURT: Okay, Mr. Lowery, if you'd stand up,
20 please, sir, raise your right hand.

21 PHILLIP LOWERY, after being duly sworn,
22 testified as follows:

23 EXAMINATION

24 BY THE COURT:

25 Q Mr. Lowery, you know that you have a right to

PHILLIP LOWERY-EXAMINATION BY THE COURT (IC)

1 remain silent?

2 A Yes, sir.

3 Q Which means that you don't have to take the
4 stand and testify in this case. You don't have to present
5 any evidence at all. Under the Constitution, you have a
6 right against self-incrimination. Which means you don't
7 have to prove anything, The State has to prove each and
8 every element of the offense beyond a reasonable doubt.
9 Now, what that means is you don't have to take the stand
10 and testify. And if you elect not to testify, then you
11 understand that you assume a risk because you're not in
12 the position to tell the jury your side of the story.

13 However, do understand that you can testify
14 if you want to. And you would have the opportunity to
15 tell the jury your side of the story. However, if you do
16 testify, then The State would have the opportunity to
17 cross-examine you in an attempt to question your
18 credibility, bring your credibility into question. That
19 is to impeach you. They could potentially, and I don't
20 know because we haven't talked about it yet, but they
21 could potentially introduce evidence of prior convictions
22 that you may have. Now, they would also try to ask you
23 questions related to your testimony to try to impeach your
24 credibility. So, you assume a risk when you testify as
25 well.

PHILLIP LOWERY-EXAMINATION BY THE COURT (IC)

1 Now, understand that you can receive advice
2 from your attorney, friends, family, from whomever about
3 whether it's wise for you to testify or not testify. But
4 ultimately, it's your constitutional right and it's your
5 decision as to whether you will testify or not. And it's
6 your decision alone, okay?

7 A Yes, sir.

8 Q So, we're going to take a quick break and then
9 we'll come back on the record and you can have a
10 discussion with Mr. Gravlee and then you can tell me
11 whether you want to testify or not. Do you have any
12 questions at all regarding your right to remain silent
13 and/or corresponding right to testify?

14 A No, sir.

15 THE COURT: Okay. All right, good enough. .

16 Let's take a five minute break, then we'll come
17 back in.

18 MR. GRAVLEE: Your Honor, before I speak with my
19 client --

20 THE COURT: Yes, sir.

21 MR. GRAVLEE: -- I wanted to address impeachable
22 offenses, if any.

23 THE COURT: Okay.

24 MR. FOWLER: I don't think there really are any,
25 Judge. I mean, he's got convictions but nothing in

1 the timeframe that we could use.

2 THE COURT: Okay. All right.

3 MR. GRAVLEE: So, I mean, there's not going to
4 be any unless he opens the door.

5 MR. FOWLER: Right. Right.

6 THE COURT: Okay.

7 MR. GRAVLEE: Thank you, Your Honor.

8 THE COURT: All right, fair enough.

9 (WHEREUPON, a short break was taken.)

10 THE COURT: Okay, bring the jury in, please.

11 Mr. Gravlee, has Mr. Lowery made a decision?

12 MR. GRAVLEE: He has, Your Honor.

13 THE COURT: Okay.

14 MR. GRAVLEE: He plans to testify.

15 THE COURT: Okay, good. So, you're going to
16 have two witnesses?

17 MR. GRAVLEE: Yes, sir, Your Honor.

18 THE COURT: Okay, good enough.

19 (WHEREUPON, the jury came into open court at
20 approximately 10:15 a.m.)

21 THE COURT: All right, Mr. Sharp, thank you for
22 assuming that responsibility, I appreciate it. You
23 can put it on all your resumes going forward that you
24 acted as foreperson for the jury. I'll attest to it
25 for you.

1 All right, Mr. Gravlee, you may call your first
2 witness, sir.

3 MR. GRAVLEE: Thank you, Your Honor, may it
4 please The Court. We call Mr. Lowery to the stand.

5 THE CLERK: Mr. Lowery, please place your left
6 hand on the Bible and raise your right hand.

7 PHILLIP LOWERY, after being duly sworn,
8 testified as follows:

9 THE CLERK: Thank you, you may be seated. State
10 your full name for the record.

11 THE WITNESS: It's Phillip Wayne Lowery.

12 DIRECT EXAMINATION

13 BY MR. GRAVLEE:

14 Q Mr. Lowery, I'm going to stand back here, just
15 make sure you speak up so the jury can hear you.

16 A Okay.

17 Q All right, thank you. Mr. Lowery, how old are
18 you?

19 A Fifty-seven.

20 Q Okay. And where are you from?

21 A Greenville, South Carolina.

22 Q Okay. You been here your whole life?

23 A All my life. All my life.

24 Q Okay. What do you do?

25 A I'm a paint contractor.

PHILLIP LOWERY-DIRECT BY MR. GRAVLEE

1 Q Okay. You paint around here?

2 A Yes, sir.

3 Q Okay. You like to shoot pool in off time?

4 A Yes, sir.

5 Q You drink?

6 A Yes, sir.

7 Q Okay.

8 A Or I did. I hadn't drank here in about a year
9 now.

10 Q Well, that's good. Well, let's talk about the
11 night in question though.

12 A Okay.

13 Q Can you tell me little bit about that night?

14 A Well, me and a friend, we're at my house and we
15 went to -- [indiscernible] corner to prong shop, shoot
16 pool and drink. I drank quite a few beers.

17 Q Okay. Let's talk about that.

18 A Okay.

19 Q How many beers do you think you drink that
20 night?

21 A Well, I wun't [verbatim] counting, I'd say quite
22 a few.

23 Q Okay?

24 A Plus some shots of Fireball. Probably had five
25 or six shots of them.

PHILLIP LOWERY-CROSS BY MR. FOWLER

1 Q So, beer and liquor?

2 A Beer and liquor, yes, sir.

3 Q Okay. Do you remember much about that night?

4 A Well, the start of the night I do but as the
5 night went on, it got worst. I know about ten o'clock I
6 got a phone call from my daughter. Told me her car was in
7 the Spinx station parking lot with a flat tire.

8 Q All right. Well, so let's -- I mean, let's
9 tackle this head on. Were you driving that night?

10 A No, sir.

11 Q Okay. And who was driving? Who was driving
12 when you arrived?

13 A I was riding with a friend of mine, Kim Pryor.

14 Q Okay. So to be clear, were you driving that
15 that night and were you driving a red SUV?

16 A No, sir.

17 Q Okay.

18 MR. GRAVLEE: No further questions, thank you.

19 THE WITNESS: Thank you.

20 THE COURT: Cross-examination, sir?

21 MR. FOWLER: Yes, sir.

22 CROSS-EXAMINATION

23 BY MR. FOWLER:

24 Q Okay, Mr. Lowery, so that SUV, that's your
25 daughter's car?

PHILLIP LOWERY-CROSS BY MR. FOWLER

1 A That's my daughter's vehicle.

2 Q Okay. And so, your contention is that she was
3 driving that night?

4 A I don't know who was driving, it's her car.

5 Q Okay. Well, you got a call that she had a flat
6 tire in the parking lot?

7 A Right.

8 Q Is that correct? And then how did you get
9 there?

10 A Ms. Pryor took me.

11 Q Okay. And then where did Ms. Pryor go?

12 A She went home.

13 Q Okay. And was your daughter there when you got
14 there?

15 A No.

16 Q Okay. So now, you just said that you'd been
17 drinking that night, correct?

18 A Yes, sir.

19 Q Quite a good bit it sounds like?

20 A Yes, sir. Yes, sir.

21 Q Okay. So, Ms. Pryor took you up there and
22 nobody else was there?

23 A The car was sitting there, my daughter wasn't
24 there yet.

25 Q Okay.

PHILLIP LOWERY-CROSS BY MR. FOWLER

1 A So, Ms. Pryor had to go home, she lived in
2 Hartwell. Which is about an hour ride and was late. So,
3 I just said, well I'll just stand here and wait on my
4 daughter.

5 Q Okay. So, she just dropped you off there?

6 A Yeah, she set there a few minutes.

7 Q Yeah, knowing that you were over served, you
8 were drunk, she just left you alone in the parking lot?

9 A Yes.

10 Q Okay. At night?

11 A Yeah.

12 Q Okay. How old is your daughter?

13 A Thirty.

14 Q She's 30?

15 A Yeah.

16 Q Okay. And, you know, it safe to assume, she's
17 been driving for how long?

18 A Since she was 18, 16 something like that.

19 Q Okay. Now, we saw her pull up in a car that
20 night, how did she how -- did she -- how did that work
21 out?

22 A I couldn't tell you that.

23 Q Okay. So, she somehow went from the scene of
24 the accident to somewhere else?

25 A Yes, sir.

PHILLIP LOWERY-CROSS BY MR. FOWLER

1 Q And got into another car?

2 A Yes, sir.

3 Q Okay. And then drove back to where her flat
4 tire was?

5 A Yes, sir.

6 Q And we don't know that happened?

7 A I don't know how that happened.

8 Q Whose car was that she pulled up in?

9 A I couldn't tell you that.

10 Q And it was just her in that car, right?

11 A As far as I know. I don't remember a lot about
12 that night.

13 Q Okay. So, what I'm trying to get at here,
14 Mr. Lowery, is, I mean, how did she -- so, you just don't
15 know how she got there?

16 A Well, when she called me, all she said was her
17 car was at the Spinx station with a flat tire.

18 Q Okay.

19 A She didn't say she was at the Spinx station, she
20 just said her car was there with a flat tire.

21 Q Okay.

22 A So, I don't know. I was at Franco's, I could
23 not tell you.

24 Q All right. Now, Mr. Lowery, you know, did you
25 make any moves to change that tire?

PHILLIP LOWERY-CROSS BY MR. FOWLER

1 A No.

2 Q Why not?

3 A Because I was intoxicated.

4 Q Okay. Well, did you know you were intoxicated
5 before you got there?

6 A I didn't realize that I was that bad until after
7 I left.

8 Q Okay. Well, let me ask you about some of the
9 statements you made to the police that night, okay?

10 A Okay.

11 Q Now, at one point you said, I pulled in.

12 What did you mean by that?

13 A Well, I guess, I pulled into the parking lot
14 with Ms. Pryor.

15 Q Okay. And you said, At one point I was turning
16 in to get something to eat.

17 What was that about?

18 A I don't know.

19 Q Okay. What about, if I hit anybody, I'm sorry.

20 What was that about?

21 A I couldn't tell you. I don't remember half that
22 night.

23 Q Okay.

24 A What I said.

25 Q Well, now--

PHILLIP LOWERY-CROSS BY MR. FOWLER

1 MR. GRAVLEE: Your Honor, I'm going to object to
2 that. If we can come up and approach?

3 THE COURT: Okay.

4 (WHEREUPON, an off-the-record bench conference
5 was held in the presence of the jury but out of
6 the hearing of the jury.)

7 BY MR. FOWLER:

8 Q Okay. And, Mr. Lowery, in your experience is it
9 illegal to help your daughter change a tire in the parking
10 lot?

11 A No, sir.

12 Q Okay. Then what did you mean when you said to
13 the first trooper, I guess I screwed up, I can't lie?

14 A I said a lot of things to him. I don't remember
15 a lot of what he was saying to me.

16 Q Okay.

17 A I couldn't tell you why.

18 Q Okay.

19 A I was severely intoxicated.

20 Q Well, now, you know, Mr. Lowery, I don't
21 necessarily disagree with you there but I think maybe we
22 disagree on the level because at one point you were
23 talking to the trooper and you asked him to make a phone
24 call. Do you remember watching that just a few minutes
25 ago?

PHILLIP LOWERY-CROSS BY MR. FOWLER

1 A I remember watching it.

2 Q Okay. And he asked who are you calling? And I
3 believe you said it was your brother, right?

4 A I think he said my sister.

5 Q Okay. And then he said, Well, why are you
6 calling him?

7 And he said, I guess, I'm going to need him
8 to come get me out of jail.

9 A Well, I had these cops up there with me. I
10 figured I was going to jail for being drunk. I was drunk.

11 Q Okay.

12 A I mean.

13 Q Now, Mr. Lowery, you know, if this is all just a
14 big confusion that Ms. Pryor could have helped, wouldn't
15 it have been helpful to say let's get Ms. Pryor back up
16 here?

17 A Well, she was going to Lake Hartwell.

18 Q Right. But you didn't want to go to jail that
19 night, did you?

20 A They didn't nobody ask me to get somebody back
21 up there. I assumed I was guilty.

22 Q Okay. Now, Mr. Lowery, a little bit afterwards
23 you told Trooper McNeely, A guy dropped me off; do you
24 remember that?

25 A I don't know exactly what I said to him. Until

PHILLIP LOWERY-CROSS BY MR. FOWLER

1 I heard that.

2 Q Well, now, Ms. Pryor, we refer to here as a Ms.
3 so we can assume she's not a guy, correct?

4 A Yeah.

5 Q Okay. Then a little bit later you told him, my
6 daughter dropped me off.

7 A I didn't say my daughter.

8 Q Okay. Which one is it?

9 A Ms. Pryor was with me at Franco's. She came to
10 my house and picked me up that day.

11 Q Okay. And about how long after she dropped you
12 off, do you think, was it that the police showed?

13 A When I got out of Ms. Prior's car, I lit a
14 cigarette and before I could smoke that cigarette they
15 pulled up.

16 Q So, it wasn't too long.

17 A No, it wun't long.

18 Q So, it wouldn't have been that hard for her to
19 turn around, right?

20 A I don't know.

21 Q I mean --

22 A I'm standing there talking to the law. I was
23 supposed to call her and tell her to come back. I'm
24 drunk, I'm intoxicated.

25 Q Right. My point being, Mr. Lowery, you had it

PHILLIP LOWERY-REDIRECT BY MR. GRAVLEE

1 together enough to know that you needed to call somebody
2 to get you out of jail the next day. It seems to me like
3 it would have been useful to come and say he wasn't
4 driving, correct?

5 A I tried to tell that highway man I wasn't
6 driving.

7 Q Right. But he clearly didn't believe you,
8 right?

9 A He wouldn't let me use the phone to call nobody
10 either.

11 Q Well -- okay. Mr. Lowery, let's just agree on
12 this, how about. If you were accused of a crime and you
13 had somebody who could prove you didn't do that crime, it
14 would be helpful to have them there, correct?

15 A I guess yes, sir.

16 Q Okay. And at any point that night was the name
17 Kim Pryor used by you?

18 A Nobody ever asked me no questions about that or
19 nothing. I asked to use my phone. They told me no.
20 Couldn't use my phone. So, why ask anything else.

21 MR. FOWLER: Okay, that's all I've got, Judge.

22 THE COURT: Okay, any redirect, sir?

23 MR. GRAVLEE: Briefly, Your Honor.

24 THE COURT: Okay.

25 REDIRECT EXAMINATION

PHILLIP LOWERY-REDIRECT BY MR. GRAVLEE

1 BY MR. GRAVLEE:

2 Q Mr. Lowery, you said a lots of things that
3 night, correct?

4 A Yes, sir.

5 Q Okay. At one appoint you tell the troopers you
6 were driving. At one point, according to Mr. Fowler, you
7 said your sister dropped you off, your brother dropped you
8 off, a buddy dropped you off. And you had how much to
9 drink?

10 A I probably drank ten beers, about five shots of
11 liquor.

12 Q Okay. That night when you were so drunk that
13 you peed on yourself?

14 A Yes, sir. They wouldn't let me go to the
15 bathroom.

16 Q Okay. And they wouldn't let you call anybody,
17 either?

18 A Wouldn't let me call nobody either.

19 MR. GRAVLEE: No further questions.

20 THE COURT: Okay, any recross?

21 MR. FOWLER: No, sir, Your Honor.

22 THE COURT: All right, Mr. Lowery, thank you,
23 sir, you can step down.

24 All right, Mr. Gravlee, you may call your next
25 witness to the stand.

KIM PRYOR-DIRECT BY MR. GRAVLEE

1 MR. GRAVLEE: Call Kim Pryor. Defense calls
2 Ms. Kim Pryor to the stand. I'll step outside and
3 get her.

4 THE CLERK: Ms. Pryor, please place your left
5 hand on the Bible, raise your right hand.

6 KIM PRYOR, after being duly sworn, testified as
7 follows:

8 THE CLERK: Thank you, you may be seated. State
9 your full name for the record.

10 THE WITNESS: It's Kimberly Chandler Pryor.

11 DIRECT EXAMINATION

12 BY MR. GRAVLEE:

13 Q All right, Ms. Pryor, I'm going to talk to you
14 from back here.

15 A Okay.

16 Q Make sure that the jury hears you well.

17 A Okay.

18 Q If you need to speak into that microphone.

19 A Okay.

20 Q Okay?

21 A Okay.

22 Q So, Ms. Pryor, where do you live?

23 A I live on Lake Hartwell in Anderson, South
24 Carolina.

25 Q How long have you lived there?

KIM PRYOR-DIRECT BY MR. GRAVLEE

1 A Thirteen years.

2 Q Okay. How about where you from?

3 A Greenville.

4 Q Okay. You grow up here?

5 A I did.

6 Q Okay. And how do you know Mr. Lowery?

7 A He and I started elementary school together.

8 Q Okay. I don't mean to show your age or anything
9 but has that been a got bit of time ago?

10 A Yeah, we're both 57.

11 Q Now, let's talk about you that night. Can you
12 tell us a little bit about what happened that night?

13 A Well, it was a Friday night. My husband was out
14 to town. And Wayne and I had been planning a night out.
15 See, we have been friends -- we're like brothers and
16 sisters. And we have been planning an outing for a while.
17 And I called him up and told him the night we were going
18 out. He said that's fine. So, I went down and picked him
19 up. I picked him up around 6:30 -- around 6:30, somewhere
20 in that area.

21 Q Okay.

22 A He and I left there. We drove to Franco's,
23 which is on Piedmont Highway. It's a little place where
24 you can play pool and you can eat. And kind of has a
25 little restaurant, a little bar. We had a little bit of

KIM PRYOR-DIRECT BY MR. GRAVLEE

1 dinner, I did. And Wayne drank. He drank most of the
2 time we were there. He was drinking on and off. And we
3 both were playing pool. We played pool problem about an
4 hour, hour and a half on and off. And, I guess, it was
5 probably about a quarter till ten, I think is when his
6 daughter called and said that she had a flat tire. And
7 Wayne asked her where was she at? And she says she was at
8 the Spinx station on Piedmont Highway. Well, that
9 happened to be just about three doors down from where we
10 were at Franco's.

11 So, he said, well just stay still and I'll
12 get Kim to bring me down there. And it was getting late
13 anyway for me. Because from there it was about an hour
14 and 15 minute drive for me back home. So, we drove down
15 there. And I wish I'd stayed with Wayne because he was --
16 he had pretty much to drink. He had a lot to drink. But
17 I knew I needed to get home, it was a long drive home. So
18 I pulled into the Spinx station. I dropped him off at his
19 daughter's car. And when I pulled out of the parking --
20 when I pulled out of the Spinx station, Wayne was standing
21 on the passenger side car door of his daughter's car. She
22 wasn't there. I don't know where she walked off to or
23 where she went to but he was standing there alone when I
24 left. And, I mean, that was the gist of the night. I
25 mean, it wasn't nothing spectacular to talk about.

KIM PRYOR-DIRECT BY MR. GRAVLEE

1 Q Yes, ma'am. So, you know, let's talk about you
2 and Wayne. You were saying that, you know, you've known
3 him for a while. So, when your husband was out of town,
4 that wasn't weird to--

5 A Oh, God, no. No, no, no, no. He's just as good
6 of a friend to Wayne as I am.

7 Q Okay.

8 A As a matter of fact, he and Wayne's older
9 brother are best friends.

10 Q Okay.

11 A Yeah.

12 Q So, it wasn't strange at all --

13 A No, no, no, no. It wasn't strange at all.

14 Q Okay.

15 A No.

16 Q And that night were you drinking?

17 A No, I don't drink.

18 Q Okay. And why not?

19 A Because I'm high risk for diabetes and I only
20 have one kidney.

21 Q Okay.

22 A And so, there's no drinking any alcohol for me.
23 I mean, that. . .

24 Q Can you tell me about that? You know, I don't
25 mean to get too personal about the kidney but what's going

KIM PRYOR-DIRECT BY MR. GRAVLEE

1 on there?

2 A Well, there's kidney disease in my family plus
3 we're Portuguese. My father and my grandmother, my
4 brother, two uncles, two aunts and four cousins all have
5 died from this disease. So, when I lost my kidney -- I
6 didn't drink before I lost my kidney just because I knew
7 how bad it was.

8 Q Yes, ma'am.

9 A So, drinking is something I don't do. And I
10 can't drink beer because I'm allergic to yeast. Which
11 drinking beer would be healthy for my one kidney. It
12 would be good for my one kidney. But I can't drink it
13 because I'm allergic to yeast.

14 Q Okay.

15 A But I don't drink liquor period. And also, one
16 of the main reasons I don't drink and drive is it's been
17 almost over 28 years now, my sister was killed by a drunk
18 driver. He hit her head on and she was decapitated.

19 Q When was that?

20 A Twenty-eight years ago. I was 24, she was 28 at
21 the time. And she was decapitated. My parents couldn't
22 open the casket or anything. So, I -- after that
23 happened, she left behind a four-year-old child at the
24 time, I would never drink and drive because of that.

25 MR. GRAVLEE: All right, thank you, Ms. Pryor.

KIM PRYOR-CROSS BY MR. FOWLER

1 No further questions.

2 THE WITNESS: Okay.

3 THE COURT: Okay, cross?

4 CROSS-EXAMINATION

5 BY MR. FOWLER:

6 Q Okay, Ms. Pryor.

7 A Uh.

8 Q Just a few quick questions.

9 A Okay.

10 Q Now, you said Wayne talked to his daughter that
11 night, right?

12 A He did. He did.

13 Q And she said she had a flat tire at the gas
14 station right up the street?

15 A Right up the street.

16 Q And you just a minute ago said that Wayne told
17 her, well stay right there, we'll be up there in a minute,
18 right?

19 A Uh-huh.

20 Q About how long from that phone call was it to
21 y'all getting to the gas station?

22 A Probably no more than, I guess, about by time I
23 paid my tab and Wayne paid his tab, probably about 18
24 minutes maybe. There was a little bit of time there.

25 Q Okay.

KIM PRYOR-CROSS BY MR. FOWLER

1 A Went to the bathroom, a few other things. But
2 we got there pretty quick.

3 Q Pretty quick, right?

4 A Right.

5 Q Okay. And his daughter didn't have anybody with
6 her?

7 A No. Well, I take that back, I don't know.
8 Because when I got there she wasn't there.

9 Q Right. So, that's what I'm getting at.

10 A Yeah.

11 Q Now, you didn't find that odd?

12 A Well, with being Cheria [ph] I didn't find it
13 odd because Cheria's a little odd. So, I really didn't
14 fine it odd. Not being her. I figured maybe she called
15 one of her friends up right quick that lived right in that
16 area, maybe they had come down there. But I knew I had a
17 long drive home and I was very tired.

18 Q Right. Now, I heard you say it was about ten
19 o'clock when you got there. And you said it was about an
20 hour back to your house?

21 A It was about an hour and 40 minutes, really.

22 Q Okay. All right. So, anyway, but were y'all
23 planning on going home until you got that call from his
24 daughter?

25 A No, we was -- we might would have stayed there a

KIM PRYOR-CROSS BY MR. FOWLER

1 few more minutes but we were wrapping it up.

2 Q Okay. And this was a Friday night, correct?

3 A This was a Friday night.

4 Q Did you have work to on Saturday?

5 A No. No.

6 Q Okay. So, you didn't think it strange at all
7 that she had abandoned the vehicle there?

8 A Knowing her, I didn't.

9 Q Okay.

10 A No, because she -- I mean, knowing her, as I
11 know Cherie, she liable walk off and leave you stranded
12 anywhere. I mean, she's just one of those typical girls
13 at that age, she's barely 19 or 20, you know, she just
14 don't think, you know.

15 Q Well, now just a moment ago I thought I heard
16 Mr. Lowery say she was 30.

17 A Is she 30?

18 Q Well, he --

19 A Maybe she is 30. If she's 30 then -- I'm going
20 through menopause, she could be 30, I don't know.

21 Q Okay. Well, she's still on the younger side of
22 things.

23 A She's still on the younger side, yeah.

24 Q So, you didn't think it strange at all, that at
25 ten o'clock at night on a Friday night, y'all couldn't

KIM PRYOR-CROSS BY MR. FOWLER

1 kind this young lady?

2 A No because all he asked me to do was drop him
3 off and leave him there. Because, I mean, for all I know
4 she could have been in the store in the bathroom. I mean,
5 I didn't know. All he said was just leave me here at her
6 car, you know, and I'll try to help her change her tire.
7 Even though he was intoxicated.

8 Q Uh-huh.

9 A You know, I'll give him that. I thought maybe
10 that she had called one of her friends that lived right
11 around in that area. Because she use to live in that
12 area.

13 Q Right. That was going to be my next question.
14 Because you said you went and picked Wayne up from his
15 house, right?

16 A I did.

17 Q And he lives with his daughter, correct?

18 A Well, she lives with him on and off.

19 Q Okay.

20 A Uh-huh.

21 Q Okay.

22 A It's his home.

23 Q Okay. How far away from that is that gas
24 station?

25 A Let's see probably take you 30 -- probably about

KIM PRYOR-CROSS BY MR. FOWLER

1 30 minutes.

2 Q So, it's not right around the corner?

3 A No.

4 Q It's not walking distance?

5 A No. No.

6 Q Okay. So, she -- let's see. So, now let me ask
7 you this, when did this incident happen? This was back
8 January 2018, right?

9 A Right.

10 Q Have you called the police since January 2018?

11 A No.

12 Q You called the solicitor's office?

13 A No.

14 Q You were aware -- were you aware that Wayne was
15 facing charges?

16 MR. GRAVLEE: Your Honor, I object to this.
17 This is burden shifting right now that he's asking
18 her to disprove.

19 THE COURT: Okay, overruled.

20 You may proceed.

21 BY MR. FOWLER:

22 Q Were you aware that Wayne was facing charges?

23 A I really didn't -- I wasn't aware of it. I
24 thought most of his old charges, you know, just old
25 charges. I really didn't know the extent of it. I really

KIM PRYOR-CROSS BY MR. FOWLER

1 didn't.

2 Q Okay. Well, you didn't know the extent of it,
3 does that mean you knew there was some of it?

4 A Knew there was some of it.

5 Q Okay. All right. Now, you said, and I quote
6 you, y'all are like brothers and sisters?

7 A We are, we are.

8 Q Okay. Now, if my brother or sister was in
9 trouble, I'd want to help them out, right?

10 A Right.

11 Q Okay. And if I could do that by calling and
12 saying, no, this is all just a big misunderstanding, I
13 might would that; right?

14 A Well, I wasn't asked to. I mean, when he was in
15 jail, I took money to the jail. I did all those things
16 that a brother or sister would do, that you're close to.
17 But I wasn't asked to. You know, he didn't ask me to. I
18 mean, he didn't get in my private no more than I get in
19 his. I mean, we're close but we don't get into each
20 private lives, you know. That's his -- I felt as though
21 that was a mistake he made that night. That's his
22 business. You know, he didn't ask me. If he would have
23 asked me--

24 Q Well, I think that's exactly it. You said it
25 right there, that's a mistake he made that night.

KIM PRYOR-CROSS BY MR. FOWLER

1 A Uh-huh.

2 Q And so, what I'm getting at Ms. -- is that you
3 went and brought him money in the jail, right?

4 A Uh-huh, I took money to the jail.

5 Q So, you knew it was a serious enough crime that
6 he was in jail for?

7 A Right.

8 Q And now, you, according to your testimony today,
9 you knew that he was innocent of the crime?

10 A He is.

11 Q Don't think this worth while the past 11 months,
12 basically a year, to come tell anybody that?

13 A No because I thought if he wanted me but when he
14 got a lawyer -- I knew once Wayne got a lawyer, got his
15 act together, I knew that he would -- just like I'm here
16 now. I mean, I knew I'd be here. I mean, I knew that.

17 MR. FOWLER: All right, thank you, ma'am, no
18 further questions.

19 THE WITNESS: Uh-huh.

20 THE COURT: Any redirect, sir?

21 MR. GRAVLEE: No, Your Honor.

22 THE COURT: Thank you, ma'am, I appreciate your
23 being here.

24 THE WITNESS: Uh-huh. Uh-huh.

25 THE COURT: All right. Anything further from

KIM PRYOR-CROSS BY MR. FOWLER

1 the Defense?

2 MR. GRAVLEE: At this time the Defense rests,
3 Your Honor.

4 THE COURT: Okay, anything in reply from The
5 State?

6 MR. FOWLER: No, sir, Your Honor.

7 THE COURT: Okay.

8 All right, ladies and gentlemen, we're going to
9 take a quick break. I'm going to have a discussion
10 with the attorneys about charge so that we're all on
11 the same sheet of music when we comes to agreement.
12 And we won't have any surprises. And I'm going to
13 ask y'all if you will return to your jury room for a
14 few minutes. And when we are ready to proceed
15 forward, we'll bring you back in and we'll go to
16 closing arguments and charge, okay. Please don't
17 discuss the case.

18 (WHEREUPON, the jury came into open court at
19 approximately 10:40 a.m.)

20 THE COURT: Okay, motions?

21 MR. FOWLER: None from The State, Judge.

22 MR. GRAVLEE: Your Honor, I'd just like to renew
23 all prior objections here. And I'd like to, again,
24 raise, because I don't believe I could
25 contemporaneously at the time that the video was

1 admitted because we didn't see how it was going to
2 play out. But the -- I don't know what is on that
3 video and what can and can't be played. The field
4 sobriety tests weren't shown in full there and
5 neither was miranda as required by the statute shown
6 on camera. He testified to it but the statute is
7 that it be shown on camera and it needs to be shown
8 to the trier of fact. I think that's what the law
9 contemplates and it wasn't done here.

10 THE COURT: Okay.

11 MR. GRAVLEE: I'd move, again, for a directed
12 verdict here for failure to meet the requirements as
13 required under the DUI law that what needs to be
14 shown.

15 THE COURT: Okay. Yes, sir.

16 MR. FOWLER: Judge, I, you know, feel like we
17 addressed this at the bar a minute ago. And I would
18 just, as a matter of record, Mr. Gravlee and
19 Ms. Henderson and I all redacted that video together
20 last night. So, we're all on the same page what is
21 on there.

22 THE COURT: Okay. All right, good. I think
23 that The State has substantially complied with the
24 requirements under the law. There may have been a
25 technical glitch but the video itself was introduced

1 into evidence and I think that is the requirement.
2 So, I'll respectfully deny the directed verdict
3 motion. Now --

4 MR. GRAVLEE: Thank you, Your Honor.

5 THE COURT: So, do y'all have any requests for
6 charge?

7 MR. GRAVLEE: Your Honor, just I would request
8 that you include the hesitate to act claim on
9 reasonable doubt.

10 THE COURT: Okay.

11 MR. GRAVLEE: If possible. But other than that
12 no, just stand charge.

13 THE COURT: Okay.

14 From The State?

15 MR. FOWLER: I mean, I've got the standard DUI
16 printed off, y'all probably got the same thing. The
17 only thing I would request is, you know, it's more of
18 a problem where the video messed up. But in the one
19 where it kind of jumps around and we redacted things.
20 I request some kind charge that, you know, that's not
21 The State trying to hid anything, that's redaction to
22 comply with the rules of evidence, that we're not
23 trying to pull anything on anybody.

24 THE COURT: I'll let you tell them, okay in your
25 argument.

1 MR. FOWLER: Okay.

2 THE COURT: I'll give you an extra three second
3 during your closing arguments to say that, okay.

4 Do y'all need any tough love on time for closing
5 arguments?

6 (Mr. Fowler shook his head.)

7 Okay, so--

8 MR. GRAVLEE: What were you contemplating, Your
9 Honor?

10 THE COURT: State opens on the law, opens in
11 full. Fifteen minutes sufficient?

12 MR. FOWLER: That's plenty, Judge.

13 THE COURT: All right.

14 Then, Mr. Gravlee, you have 15 minutes to
15 respond. Then The State will have five minutes in
16 reply.

17 MR. FOWLER: That's good, Judge.

18 THE COURT: How's that?

19 MR. GRAVLEE: That's fine, Your Honor.

20 THE COURT: Okay. All right. So, let's take a
21 quick break, then we'll come back in and we'll go to
22 closing arguments and charge.

23 MR. GRAVLEE: Thank you, Your Honor.

24 THE COURT: And during you break you can come up
25 and take a look at the verdict form, just to make

1 sure that it suites you, okay.

2 MR. GRAVLEE: Thank you, Your Honor.

3 MR. FOWLER: Thank you, Judge.

4 (WHEREUPON, a short break was taken.)

5 THE COURT: Okay, ready for the jury?

6 MR. FOWLER: Yes, sir, Judge.

7 THE COURT: Mr. Gravlee?

8 MR. GRAVLEE: Yes, sir, Your Honor.

9 THE COURT: All right, bring them in, please.

10 (WHEREUPON, the jury came into open court at
11 approximately 10:52 a.m.)

12 THE COURT: Okay. All right. Mr. Fowler, you
13 may proceed, sir.

14 CLOSING STATEMENT

15 MR. FOWLER: Yes, sir, may it please the Court.

16 Ladies and gentlemen, you have heard that
17 testimony a scene a evidence in this case. And in
18 just a minute when Mr. Gravlee and finishes our
19 closing arguments, the Judge is going to give you the
20 law by which you interpret that information. He's
21 going to tell you that the Defendant is guilty of
22 driving under the influence. If The State can prove
23 beyond a reasonable doubt that the Defendant was
24 driving a motor vehicle while materially or
25 appreciably impaired by alcohol or drugs. We are all

1 in agreement here that Mr. Lowery was impaired by
2 alcohol that night. That is not a fact in dispute.
3 We're in agreement that that vehicle that he's
4 purported to be driving, is a motor vehicle.

5 In fact, the only thing that is left for you to
6 decide is was Mr. Lowery driving? Now, the evidence
7 we have to show that is, of course, Mr. Lowery is
8 standing by himself with a car, that is registered to
9 his daughter who he lives with. We also have his
10 statements. They are, I left Wild Country. I pulled
11 in. I was the only person in this car. I was
12 turning in to get something to eat. I was turning in
13 to change this flat tire. I guess I screwed up, I
14 can't lie.

15 Ladies and gentlemen, Mr. Lowery knew that night
16 that he had committed a crime. That's why he was
17 already making preparations to get out of jail.
18 Mr. Lowery knew that night that he drove that car
19 there and he wasn't supposed to. Mr. Lowery knows
20 that he is guilty, ladies and gentlemen.

21 Now, you heard some talk from Ms. Pryor that she
22 dropped him off there and that this was all trying to
23 help out his daughter who had just gotten a flat
24 tire. Well folks, that just does not make sense.
25 And one of the main things that you bring, the reason

1 we try cases like this for the jury, is we want you
2 all to use your good common sense. And that just
3 does not make sense folks. If you're having car
4 trouble and you call somebody to come help and they
5 pull up and they find your car there and not you
6 there. Nobody who purports to be as close as brother
7 and sister with Mr. Lowery, is just going to leave
8 with this 30 year-old-woman no were to be found at
9 night on the side of the road. You're just not going
10 to do that.

11 Further, ladies and gentlemen, if your brother
12 or sister is in jail and you were the only person who
13 can show, hey, this is all a big confusion, I am so
14 sorry. You'd come and tell that. You'd tell us that
15 this was all a big mistake, you were driving, they
16 got the wrong guy. Also, if you're Mr. Lowery--

17 MR. GRAVLEE: Your Honor, I hate to do this but
18 just object to the burden shifting here again. He's
19 saying that it's our job to submit evidence here.

20 THE COURT: Okay. All right. Well, I'll
21 explain to the jury in my charge who has the burden
22 of proof and what that is.

23 MR. GRAVLEE: Thank you, Your Honor.

24 THE COURT: So, you may continue, sir.

25 MR. FOWLER: It also doesn't make any sense, if

1 you're Mr. Lowery, and you're standing on the side of
2 the road about to be arrested and you know that
3 there's this other person who can prove your
4 innocence, and you're trying to call people, why
5 don't you call them? The first time we heard Kim
6 Pryor's name was today at trial. When you go back
7 and you watch those videos, you will never hear the
8 words, Kim Pryor said. You will hear a guy dropped
9 me off, you will hear talk about his daughter. You
10 will never hear the words, Kim Pryor.

11 Now finally, ladies and gentlemen, beyond a
12 reasonable doubt, I want to talk to you a little bit
13 about the law. Beyond a reasonable doubt is a phrase
14 that I imagine we've all heard before. However, I
15 caution you that though you may have heard that
16 phrase, you might not be exactly 100 percent familiar
17 with the exact legal definition of reasonable doubt.
18 Now, this is something that Mr. Gravlee and I agree
19 on. One of the definitions that we both like is
20 reasonable doubt is doubt that could cause a
21 reasonable person to hesitate to act. But I caution
22 you that beyond a reasonable doubt doesn't mean
23 beyond all doubt. It doesn't mean without a doubt.
24 It doesn't mean beyond a shadow of a doubt.

25 An example I like to give folks is imagine most

1 of you either own you're own house or own a car.
2 When you were researching to make that purchase, you
3 probably looked at other houses, you probably looked
4 at other cars. You probably went to come different
5 lenders, got some difference rates. You gathered as
6 much evidence, in effect, as you could about that
7 purchase. You then made a decision. You may still
8 today harbor some doubts as to whether or not that
9 was the right decision. But I will put to you that
10 that decision was made beyond a reasonable doubt.
11 You gathered as much information as you could. You
12 examined all the evidence that you could find. The
13 result is, the completes the picture is you don't
14 know the depreciation value of your car or the
15 depreciation value your house might get. You made a
16 decision. That decision, folks, is beyond a
17 reasonable doubt.

18 And that's what I want you to do here, folks. I
19 want you to go back in your jury room, I want you to
20 carefully and deliberately consider all the evidence
21 that's been put before you. I want you to watch
22 these two videos. And I want you to reach the only
23 conclusion that this evidence allows. And that is
24 that the Defendant, Mr. Phillip Wayne Lowery, is
25 guilty of the charge of driving under the influence.

1 Thank you very much. It's been a pleasure working
2 with you.

3 THE COURT: Mr. Gravlee.

4 CLOSING STATEMENT

5 MR. GRAVLEE: Thank you, Your Honor.

6 Mr. Fowler.

7 May it please the Court?

8 THE COURT: Yes, sir.

9 MR. GRAVLEE: In a criminal trial every American
10 is presumed innocent. From the start until the
11 finish. Until a verdict comes back. It is not
12 Mr. Lowery's job or any other person that's charged
13 with a crime to try to prove his innocence. It is
14 Mr. Fowler's job to prove his guilt beyond a
15 reasonable doubt. Any suggestion that it's our job,
16 that we need to submit evidence, that we need to
17 submit proof, that we need to call witnesses to prove
18 his innocence is wrong. And you'll hear that from
19 the Judge. The burden is on The State to prove
20 Mr. Lowery's guilt beyond a reasonable doubt.

21 Like I told you at the beginning, in opening,
22 that is the highest standard of legal proof in our
23 legal system. It's not some evidence, it's not
24 maybe, it's not perhaps, it's not probably, it's not
25 even, yeah it might have happened. It is beyond a

1 reasonable doubt. It is a doubt that leave you to
2 hesitate to act because you don't have the entire
3 picture. Because what we don't have tonight and what
4 we don't have today and what has not been said in
5 this trial, there is evidence that The State could
6 have gotten, should have shown you and you could have
7 seen that would have provided absolute, clear,
8 objective evidence that a crime occurred.

9 You heard from both of the troopers. The only
10 troopers there. Neither of them show up, neither of
11 them can testify to anyone driving that car. We
12 don't know whether that car was warm. We don't know
13 whether there were tracks coming in, scrap marks.
14 There's a flat tire. There's nothing that says this
15 is car was being driven that day, that night, two
16 weeks ago, three weeks ago. This is at a Spinx. And
17 Spinx tends to put a good bit of money into their gas
18 stations. And follow nicer than, you know, a lot of
19 standard run of the mill gas station.

20 Outside of those gas stations are a bunch of
21 cameras. Cameras from all different angles. Cameras
22 that have surveillance footage that The State could
23 have subpoenaed, they have the money, they have the
24 power, they can do that. It is not our job, a year
25 later, to try to get evidence to put that in. You're

1 not to consider that in you deliberations and the
2 Judge will tell you that too.

3 They talk about Ms. Kim Pryor. Says if
4 something had happened that day, why didn't she call
5 the next day? He had already been charged and
6 jailed. It's not our job to prove his innocence two
7 days later. This today is Mr. Lowery's day in court.
8 That's why we're here to challenge the evidence and
9 to prove his innocence. But it's not our job to
10 prove his innocence. It's their job to prove his
11 guilt. But I think we've done that today. We had
12 Mr. Lowery testify and Ms. Pryor. We do not have the
13 burden of doing so. We chose to do that voluntarily.
14 He doesn't have take the stand at all. He can remain
15 silent. And the Judge would instruct you just as --
16 the Judge would instruct you if he didn't take the
17 stand, you couldn't hold his silence against him.
18 But he chose to testify today.

19 Let's go back to the officers in this case. You
20 didn't hear any testimony about keys. The officer
21 couldn't tell you whether keys were found or not.
22 That would be pretty helpful. Were keys found on
23 him? I don't know. Was it video? We don't know.
24 Was there testimony that the car was warm? No. Is
25 there pictures? Is there scrap marks? Are there

1 tire marks? Is there anything to prove that that car
2 was being driven that night?

3 The State is going to tell you, look, already
4 did, said, just have to look at these statements and
5 he says that Mr. Lowery said I was driving. He said
6 lots of things. He said he was driving, somebody
7 dropped me off, somebody picked me up, I was leaving
8 here, I was leaving there. And you saw the same man
9 piss himself. Excuse me, but that's what happened
10 during field sobriety test. That is how drunk he
11 was. And again, like Mr. Fowler said, we're in
12 agreement here that he was drunk. But the single
13 issue is here whether a car was being driven and
14 whether Mr. Lowery was the one driving that night
15 beyond a reasonable doubt.

16 You've heard testimony on both sides. And for
17 you to go back and find a verdict of guilty, you have
18 to be firmly convinced and not hesitate to act that
19 Mr. Lowery, in fact, was that driver that night. You
20 got a daughter leaving the scene, comes back to the
21 scene. We don't know what's going on. But I can
22 tell you what we do know. Is that it is not his job
23 to prove his innocence today.

24 Now, the other week I was watching a football
25 game. Love my Panthers but they're terrible right

1 now. So, you see a call where the, you know, the
2 call was pretty close. And, you know, we're not sure
3 whether the refs made the right call. But the
4 standard is irrefutable evidence, okay. And the
5 replay doesn't meet that standard. And we have seen
6 replays where we say to ourselves, whoa, we're not
7 sure that we would have called it that way. But the
8 standard on the field is irrefutable evidence to
9 reverse that call. In a criminal trial, the call on
10 the field is not guilty. He's presumed innocent and
11 he's not guilty through this whole trial.

12 So, the question you got to answer is whether
13 The State, not Mr. Lowery, but whether The State has
14 produced enough irrefutable evidence to prove it's
15 case beyond a reasonable doubt. Today, I submit to
16 you they have not. That call on the field is not
17 guilty. And I ask that you let that call stand.
18 Thank you very much.

19 THE COURT: All right, Mr. Fowler, you may
20 briefly respond, sir.

21 MR. FOWLER: Yes, sir, just briefly.

22 CLOSING STATEMENT

23 MR. FOWLER: Yes, sir, just briefly.

24 Ladies and gentlemen, Mr. Gravlee is exactly
25 right, it is not Mr. Lowery's job to prove his

1 innocence, I would not done otherwise. However, by
2 taking the stand and testifies, Mr. Lowery opens
3 himself up to cross-examination. You are, in fact,
4 allowed to take into evidence, into consideration,
5 whether you consider that testimony truth. Or
6 truthful. You heard Mr. Gravlee say that we had
7 clear, objective evidence of guilt that will prove
8 beyond all reasonable doubt that he was guilty.
9 Folks, if we had that, I don't know that we would be
10 sitting here today.

11 You heard both of these troopers say that there
12 were things they wish they had done on that scene.
13 They wish they had gotten those deputies names and
14 information so we could have heard from them. You
15 heard Trooper McNeely said he didn't think to get the
16 Spinx footage. You also heard one of these trooper's
17 say that they're both relatively new to the force.
18 And I put to you that mistakes happen all the time in
19 the collection of evidence.

20 We very seldomly can know on the spot what
21 information, a year later, is going to be so crucial
22 at this trial. I also put to you that when you watch
23 these videos, you're going to notice that it seems to
24 skip from place to place. Now, I hope you have
25 better luck with Mr. McNeely's video than I did. But

1 I will tell you that that skipping, those are
2 redactions that we made in an effort to comport with
3 the rules of evidence. So, that we're trying a fair
4 case here, ladies and gentlemen. We're not trying to
5 hide anything from you or keep anything from you.

6 And again, folks, you're to examine all the
7 evidence and testimony that you saw on those videos,
8 that you heard from that witness stand. And what you
9 heard were essentially two theories of the case. You
10 heard that Mr. Lowery's daughter got a flat tire.
11 Mr. Lowery, after drinking heavily, was called and
12 told to be taken there. He was taken there, dropped
13 off at an abandoned vehicle and left. Even though he
14 was heavily inebriated. We didn't know anything
15 about this witness until a year later. Or you can
16 believe that Mr. Lowery was driving that vehicle that
17 was registered to his address, after drinking. You
18 can believe that he was drunk and that he initially
19 was speaking the truth to the police. And then after
20 realizing the gravity of the matter, changed his
21 story. I contend to you that that's exactly what
22 happened. Thank you very much, I look forward to
23 your verdict.

24 JURY CHARGE

25 THE COURT: All right, ladies and gentlemen,

1 when we started the trial I told you had certain
2 function and roles to perform and that I had certain
3 roles and functions to perform. Now, when you
4 started the case you took an oath to try the case in
5 accordance with the law and the evidence that was
6 presented in the case. So, my job is obviously to
7 tell you the law as it relates to the evidence in
8 this case. And under your oath you must accept the
9 law as I give it to you. If you come into the
10 courtroom with any preconceived notions or prior
11 opinions about what the law is or about what the law
12 should be, then I charge you now to disregard that.
13 For under your oath you must accept the law as I give
14 it to you.

15 Now, ladies and gentlemen, I've told you already
16 when we began this case, both when we were selecting
17 the jury and before we started, that the Defendant
18 enjoys the presumption of innocence under the
19 Constitution. And what that means is that he retains
20 that presumption of innocence, even as we sit here
21 now. And he will continue to wear that cloak of
22 innocence until such time as 12 of you determine
23 whether or not The State has met its burden of
24 proving each and every element beyond a reasonable
25 doubt.

1 Now, ladies and gentlemen, we bandied around the
2 term reasonable doubt and you probably heard the term
3 before just in your everyday lives. You may have
4 seen it on TV, may have been in a courtroom before.
5 So, you know that every time a party comes into a
6 courtroom, someone will have a burden of proof. And
7 most civil cases that burden of proof is going to be
8 preponderance of the evidence. And that means just
9 by the greater weight of the evidence, greater than
10 50 percent. You got higher burden of proof in some
11 civil trials, like in a fraud trial. Or when there
12 is a request for punitive damages or clear and
13 convincing evidence, which is a higher burden of
14 proof. But in all criminal cases in The United
15 States of America, the burden of proof is beyond a
16 reasonable doubt. And The State has the burden of
17 proving each and every element of the offense beyond
18 a reasonable doubt.

19 Now, ladies and gentlemen, reasonable doubt has
20 been defined in any number of ways. It's been
21 defined as the type of doubt that would cause a
22 reasonable person to hesitate the act. Proof beyond
23 a reasonable doubt is proof which firmly convinces
24 you of the Defendant's guilt. Now, there's nothing
25 on the face of the earth that you can know with

1 absolute certainty and the law doesn't require that
2 The State prove its case beyond any possible doubt.
3 However, if after your review of the evidence you're
4 firmly convinced of the Defendant's guilt, then under
5 your oath you would find the Defendant guilty.
6 However, after your review of the evidence if you
7 feel that there is a real possibility that the
8 Defendant is not guilty, then under your oath you
9 would find the Defendant not guilty.

10 Now, you determine whether The State has met its
11 burden of proof by reviewing the evidence. I told
12 you that you are the finders of the facts. So,
13 you're going to determine what the facts are in the
14 case and apply it to the law. Now, when you go about
15 determining what the facts are, you're going to do an
16 analysis of the evidence that was presented in this
17 case. And you're going to decide what's valuable and
18 what's important. You're going to decide how
19 valuable it is and what it means to you and your
20 determination of the facts. So, you may look at a
21 piece of evidence and find that it's very valuable.
22 And look at it very closely and use it to come to
23 your determination or you may entirely discard it.

24 And, in determining what's valuable, you're also
25 going to look at the credibility of the witnesses and

1 decide who's believable and who's not believable.

2 And you know that every day you make judgments about
3 whether someone should be believed or not. You do
4 that when you see people on TV. You do it when
5 you're having conversations with people. And you
6 just use your own intuitive common sense to make that
7 determination. And you look at somebody and you look
8 at what they had to say, how they say it and how they
9 express themselves. You look at their fair
10 expressions, their body language and from all that
11 you make a determination as to whether someone should
12 be believed or not.

13 Well, the same thing is true when you are
14 judging witnesses credibility. You look at it and
15 you determine whether you're going to believe it or
16 not. Then after you determine whether it's
17 believable or not, you determine what value and what
18 weight it has in your determination. Again, you can
19 decide that part of a witness' testimony is very
20 believable and give it great weight and discard the
21 rest. You can believe that is all believable or
22 discard all of it as not believable. It's entirely
23 up to you because that your job. And you'll decide
24 who's to be believed and who's not to be believed.

25 Ladies and gentlemen, in any case that comes

1 before the court, whether it's a criminal trial or
2 whether it is a -- whether it's a civil trial.
3 Evidence is going to take one or two forms. It's
4 either going to be direct evidence or circumstantial
5 evidence. And the law doesn't prefer one over the
6 other, it really doesn't. You decide what has weight
7 and what value it has. Now, direct evidence is
8 evidence which immediately establishes a fact to be
9 proven. Circumstantial evidence, by distinction, is
10 proof of collateral facts or a chain of facts that
11 when taken together prove the main fact to be proven.
12 That's an easy definition. I find that it's easier
13 to understand and conceptualize if I give you an
14 example.

15 So, let's say that tonight we all go to bed.
16 And when we go to bed we look out the front window or
17 our front door and there is no precipitation on the
18 ground at all. Then tomorrow morning we wake up and
19 we look out that very same window or door and there's
20 a blanket of snow on the ground. We look and there
21 are footsteps in the snow which lead to your doorway,
22 then lead away. Well, under that set of
23 circumstances you got direct evidence that it snowed
24 last night because the snow is there. It's
25 immediately established by the presence of the snow

1 itself. You can touch it, you can feel it, it's
2 there.

3 You have circumstantial evidence, however, that
4 someone, either early that morning or that night,
5 walked to your door and then walked away. You can't
6 talk to that person, you can't touch them, you can't
7 see them but you know as a consequence of the timing
8 of that snow fall and the footsteps in the snow, that
9 someone must have come to your house and walked away.
10 Again, that's circumstantial evidence.

11 Now, the law doesn't prefer one over the other.
12 You decide what has weight and you decide what value
13 either circumstantial or direct evidence may have in
14 the case. Do understand, however, that to the extent
15 that The State relies upon circumstantial evidence in
16 its case, those circumstances when taken together
17 must prove its case beyond a reasonable doubt and not
18 can simply create a suspicion of guilt.

19 Now, ladies and gentlemen, in the video tape you
20 heard statements from the Defendant. Now, when we
21 started this case, the Court, I determined whether
22 those statements are admissible or not and I made a
23 determination that they were admissible. But
24 ultimately, you make a determination as to whether
25 that statement was voluntary. Whether it was freely

1 and voluntarily given. If you make a determination
2 that it was freely and voluntarily given, then you
3 may consider it and give it whatever weight you think
4 is appropriate. If you find that it was not freely
5 and voluntarily given then you should not consider it
6 at all.

7 Now, when I say whether it was freely and
8 voluntarily given, was it made under duress or
9 coercion or threat or some other force that caused
10 the Defendant to speak involuntarily or against his
11 will. When you're looking at a statement to
12 determine whether it was voluntary or not, you're
13 going to look at all the facts and circumstances
14 surrounding the statement. You're going to consider
15 his age, his education, his intelligence level.
16 You're going to consider the facts and circumstances
17 at the scene. You're going to look and determine
18 whether he was advised of his Constitutional rights.
19 Such as whether he had a right to remain silent.
20 Whether what he said could be held against him in a
21 court of law. Whether he had a right to counsel and
22 whether he couldn't afford counsel, counsel could be
23 appointed for him.

24 You will look at all of those factors to
25 determine whether you believe whether it was a

1 voluntary statement. Now understand, just like every
2 other element of the offense, The State has the
3 burden of proving beyond a reasonable doubt that the
4 statement that was given by the Defendant was
5 voluntary. If you find, again, that it was not
6 voluntary then you shouldn't consider the statement
7 at all.

8 Ladies and gentlemen, the charge before you this
9 morning is driving under the influence. The State
10 must prove each and every element of the offense
11 beyond a reasonable doubt. And for the charge of
12 driving under the influence, ladies and gentlemen,
13 The State must prove that the Defendant was driving a
14 motor vehicle in The State of South Carolina while
15 under the influence of alcohol or drugs to the extent
16 that his faculties to drive were materially and
17 appreciably impaired. So, you kind of sparse that
18 down. There are three elements to that, okay. That
19 he was driving in State of South Carolina while he
20 was under the influence of drugs or alcohol or a
21 combination of the two, to the extent that his
22 faculties to drive were materially and appreciably
23 impaired. Okay.

24 Now, ladies and gentlemen, I'm going to show you
25 before you go back into your jury room the verdict

1 form. I show it to you out here so that you won't
2 see it for the first time when you get back there and
3 you start your deliberations. It's a very simply
4 verdict form, I'll go over it with you. It has the
5 caption of the case here, Verdict. Then it says, As
6 to the charge of driving under the influence, we, the
7 jury, by unanimous consent find the Defendant. Now
8 what's important about that is unanimous, okay. Your
9 verdict must be unanimous. You have to all agree on
10 the verdict. It can't be 11 to one or ten to two.
11 It's got to be a unanimous verdict. Your verdict has
12 to be based on the law and the evidence that was
13 presented in the case. It can't be based on
14 conjecture, sympathy, prejudice, caprice, passion.
15 It can only be based on a deliberate analysis of the
16 evidence that's been presented in this case and in
17 context with the law as I've given it to you.

18 Okay, so you got two options here. And I
19 prepared the verdict form. So, don't think I'm
20 sending you any subliminal messages by the order in
21 which I put the options, okay. They're two options,
22 I've got to put them in some order, okay. And this
23 is just what I arbitrarily selected, okay. So, two
24 options. First of all, not guilty of driving under
25 the influence. Now, if after your deliberations you

1 find that The State has not met its burden of proving
2 each and every element of the offense beyond a
3 reasonable doubt, then Mr. Sharp, you would simply X
4 or initial there. Either one is fine. Just so it's
5 clear to me what your intent was, okay. If, however,
6 your analysis of the evidence you do find that The
7 State has met its burden of proof, then you would
8 check the second option, which is guilty of driving
9 under the influence.

10 After you come to a unanimous verdict, sir, you
11 would sign as foreperson of the jury and date the
12 verdict form. Let the bailiff know that you've come
13 to a unanimous verdict, then we'll bring you back out
14 here and we'll receive the verdict, okay. Now, I'm
15 going to ask you to return to your jury room. Don't
16 begin your deliberations yet because at this point
17 what we're going to do is I'll give the attorneys the
18 opportunity to do a quality control check on my
19 charge, make sure I didn't leave something out or
20 just misstate something. Which happens from time to
21 time. And also, we're going to do a inventory of the
22 evidence. I think we've got video tapes. And what
23 we'll do is we'll make sure we have them and
24 something for you to play it on. If you want to see
25 those video tapes, let me know and I'll get a sterile

1 computer and I'll send it back to you with those
2 tapes. You may want it, you may not. It's entirely
3 up to y'all. Okay. So, when you get this verdict
4 form, then you'll know it's time to begin your
5 deliberations, okay. But not yet. Not until you
6 actually receive the verdict form, okay. All right,
7 thank you. You can return to your jury room.

8 (WHEREUPON, the jury left open court at
9 approximately 11:22 a.m.)

10 THE COURT: All right, exceptions to the charge?

11 MR. FOWLER: None from The State, Judge.

12 THE COURT: Mr. Gravlee?

13 MR. GRAVLEE: None from the Defense, Your Honor.

14 THE COURT: Okay. All right, gentlemen, did a
15 good job, I appreciate it. Good luck to you. What
16 I'm going to do is I'm going to send the verdict form
17 back to the jury and let them begin their
18 deliberations. I'm going to dismiss the alternate
19 from chambers. And y'all just have a computer ready
20 in case they want to see those, okay.

21 MR. FOWLER: Yes, sir.

22 THE COURT: And then also, Mr. Fowler, get a way
23 of marking those two as well.

24 MR. FOWLER: I think we can put the little
25 things on there.

1 THE COURT: Well, I don't know that. Why don't
2 we defer to Ms. Herron on that.

3 THE COURT REPORTER: Thank you, Your Honor.
4 They're on there and it can be played.

5 MR. FOWLER: Okay, thank you.

6 (WHEREUPON, deliberations began at approximately
7 11:24 a.m.)

8 WHEREUPON, court was in recess awaiting a
9 verdict.)

10 THE COURT: Okay, I've been advised that we have
11 a verdict in this case.

12 State ready to receive the verdict?

13 THE CLERK: Yes, sir, Your Honor.

14 MR. FOWLER: Yes, sir, Judge.

15 THE COURT: Bring them in, please.

16 (WHEREUPON, the jury came into open court at
17 approximately 2:50 p.m.)

18 VERDICT

19 THE COURT: All right, Mr. Sharp, has the jury
20 reached a unanimous verdict, sir?

21 MR. FOREMAN: Yes, sir, Your Honor.

22 THE COURT: Sir, would you pass the verdict form
23 to the bailiff?

24 Okay, Madam Clerk, would you publish the
25 verdicts, please, ma'am?

1 THE CLERK: Your Honor, this is case number
2 2018-GS-23-004107, The State of South Carolina vs.
3 Phillip Wayne Lowery, as to the charge of driving
4 under the influence, we, the jury, by unanimous
5 consent find the Defendant guilty of driving under
6 the influence. Signed, Scott Sharp, foreperson of
7 the jury, December 13th, 2018, Greenville, South
8 Carolina.

9 This is your verdict, so say you all. Please
10 signify by raising your right hand.

11 (WHEREUPON, all members of the jury raised their
12 right hand.)

13 Thank you.

14 THE COURT: Anything further from this jury from
15 The State?

16 MR. FOWLER: No, sir, Judge.

17 THE COURT: From the Defense, sir?

18 MR. GRAVLEE: Not from the Defense, Your Honor.

19 THE COURT: Okay.

20 All right, ladies and gentlemen, thank you for
21 you service on the jury. If you'll return to your
22 jury room, you can collect your phones and your
23 materials and you can take off. I'll come back there
24 in just a few seconds and I'll dismiss you informally
25 and give you the opportunity to ask me any questions

1 or make any comments that you might have. Then you
2 will be on your way. Thank you very much.

3 (WHEREUPON, the jury left open court at
4 approximately 2:53 p.m.)

5 THE COURT: Okay, counsel, if you would get the
6 sentencing sheets ready. What I'll do is I'll go
7 informally dismiss the jury. And then I'll come back
8 in in five or ten minutes, whenever they're done
9 asking any questions they may have and we'll proceed
10 to sentencing.

11 MR. FOWLER: Yes, sir.

12 (WHEREUPON, a short break was taken.)

13 SENTENCING

14 THE COURT: Okay, we're prepared to proceed to
15 the sentencing hearing? All right, I've heard
16 testimony from The State, Mr. Fowler, is there
17 anything additional that you would like to put on the
18 record with respect to sentencing, sir?

19 MR. FOWLER: No, sir, Judge. I think you have a
20 pretty good idea of his record, I'll be happy to give
21 you that.

22 THE COURT: I would like to hear the record,
23 please.

24 MR. FOWLER: Okay, 1983 DUI. 1985, public
25 disorderly conduct. 1990, criminal domestic

1 violence. 1993, criminal domestic violence. 1994,
2 breach of peace. 1995, DUI, DUS. 1999, breach of
3 peace. 2002, criminal domestic violence, second.
4 2005, possession of cocaine. 2008, criminal domestic
5 violence second. 2011, DUI. And 2017, DUI, DUS.
6 And he pled on those charges almost exactly a year
7 prior to this taking placement.

8 THE COURT: Okay. How much time did Mr. Lowery
9 do in jail on this offense, if any?

10 MR. FOWLER: We've got 40 jail days and 180 on
11 HIP.

12 THE COURT: Does that sound right, Mr. Gravlee?

13 MR. GRAVLEE: Yes, sir.

14 THE COURT: So, 40 and 180.

15 MR. GRAVLEE: Yes, sir.

16 THE COURT: So, we're look at 220?

17 MR. GRAVLEE: Two hundred and twenty, yes, sir,
18 Your Honor.

19 THE COURT: All right. Okay.

20 Mr. Gravlee, I'll be happy to hear from you,
21 sir.

22 MR. GRAVLEE: Thank you, Your Honor, may it
23 please the Court. I think you heard a lot about the
24 case and you learned a little bit about Mr. Lowery
25 and some of his record. But I will say that since

1 this arrest he shares with me that he hadn't had a
2 drink in pretty much 11 months. He works full-time.
3 Works 40, 50 hours a week. These are some of his
4 coworkers, his boss and coworker here. Scott and
5 Lisa, I believe. He works 40, 50 hours a week with
6 them. I think he's pretty essential to their
7 business. It's a two man paint job for the most part
8 where he's fully employed. And I hear he's pretty
9 good at what he does.

10 He lives by himself. He's got a house in
11 Piedmont. He's a little worried about, you know,
12 what's going to happen with that and all his
13 possessions inside. Your Honor, with those 220 days
14 that he's already served and definitely 40 behind
15 bars, we would ask for some kind of home
16 incarceration sentence that could be served here if
17 you're inclined to go along with that. And probation
18 to follow. I think that might help him keep him on
19 the straight and narrow with his sobriety right now.
20 And I do believe his boss would like to speak at the
21 appropriate time, Your Honor.

22 THE COURT: Yes, sir, I'd be happy to hear from
23 you. State your name for the record, please.

24 THE BOSS: Scott Percluse [ph].

25 THE COURT: Yes, sir.

1 THE BOSS: I've known him for about a year, he's
2 worked with me and Lisa. And I didn't know much
3 about his past or anything. I did know when I met
4 him that he had had recent troubles. And I've never
5 known him to do anything outside of just what's been
6 stated in the last year. No problems, no issues.
7 For me, he's always on time. He's a integral part of
8 my company. Without him it's going to be major
9 problems for us. I know it's not immediate to the
10 situation but it would really effect things. I
11 wouldn't have him working for me if I thought -- I've
12 had a lot of painters that I used before and in
13 general I struggle. But I haven't had a single
14 problem with Wayne.

15 THE COURT: Thank you for being here and I
16 appreciate you addressing the court.

17 THE BOSS: Thank you.

18 THE COURT: Yes, sir, Mr. Gravlee, anything
19 else?

20 MR. GRAVLEE: No, Your Honor, that's it for us.

21 THE COURT: Okay, Mr. Lowery, anything you'd
22 like to put on the record, sir?

23 MR. LOWERY: No, sir.

24 THE COURT: Okay. Mr. Lowery, I appreciate
25 what's been said here about you, Mr. Lowery. I don't

1 necessarily think and I wouldn't contend that you're
2 a bad guy. You got a pretty lengthy record for
3 nonviolent offenses for the most part. But it's
4 clear that you have a profound substance abuse
5 problem. You've had a difficult time managing that.
6 The problem is that you find yourself here before the
7 court after having had multitude of DUIs. And your
8 prior record bodes against you. So, I'll sentence
9 you and I sentence you without any personal animist
10 or ill will. I'm not mad at you. But I do have to
11 apply the law to your conduct, which is my job that
12 I've taken as a circuit Judge.

13 I will tell you as well, Mr. Lowery, that in
14 speaking with the jury, none of them believed the
15 story that you told. I'm not in a position to judge
16 whether you're credible or not but I will tell you
17 that they summarily dismissed the notion that you
18 weren't driving. And Ms. Pryor's representations to
19 the court that she took you to that gas station. As
20 a matter of fact, I thought that might give them some
21 cause to pause and think about probable cause. And
22 they disabused that notion. And they told me that it
23 took them about two seconds to make a determination
24 that y'all weren't being truthful. I only tell you
25 that just because that's the take away from 12 people

1 from the community who heard your story and then
2 weighed the evidence. I don't take a position on it
3 one way or the other. But I thought it would be
4 important for you to know that.

5 MR. LOWERY: Yes, sir.

6 THE COURT: Sentence of the Court, sir, is that
7 you be committed to the Department of Corrections for
8 a period of two years and a fine in the amount of
9 \$2,100.00. Credit for the time served of 220 days.
10 Good luck to you, sir.

11 MR. GRAVLEE: Thank you, Your Honor.

12 MR. FOWLER: Thank you, Judge.

13 (WHEREUPON, the proceedings were concluded.)
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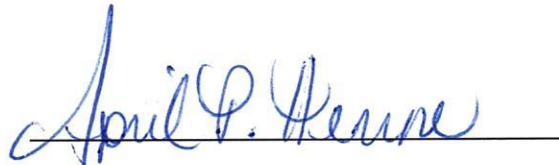
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for
the Thirteenth Judicial Circuit of The State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Court of
General Sessions for Greenville County, South Carolina, on
the 12-13 days of December, 2018.

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

January 6, 2019

A handwritten signature in blue ink, reading "April P. Herron", is written over a horizontal line.

APRIL P. HERRON, Court Reporter

COPY

DOCKET NO. 2018-GS-23-
BWF

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

June TERM 2018

THE STATE

vs.

PHILLIP WAYNE LOWERY

WITNESSES

Brandon L McNeely ✓

S. C. Highway Patrol

1/26/2018

ARREST WARRANT NUMBER
20182370167586ACTION OF GRAND JURY
TRUE BILL

Clay Tuttle

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

3359

Indictment for

DRIVING UNDER THE INFLUENCE

VIOLATION §56-5-2930

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
DRIVING UNDER THE INFLUENCE

JUN 05 2018

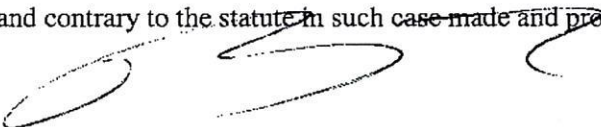
At a Court of General Sessions, convened on

the Grand Jurors of Greenville

County present upon their oath:

That PHILLIP WAYNE LOWERY did in Greenville County, on or about the 26th day of January 2018, drive a motor vehicle while under the influence of alcohol, or other drug or substance or combination of alcohol, other drug and/or substance which caused impairment to the extent that the defendant's faculties to drive were materially and appreciably impaired; such not being the first offense within a period of ten (10) years including and immediately preceding the foregoing date. This is in violation of §56-05-2930 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

BAR # 102029

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

Respectfully Submitted,

s/Taylor D. Gilliam

Taylor D Gilliam

Appellate Defender

RECEIVED

Jun 22 2020

SC Court of Appeals

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

ATTORNEY FOR APPELLANT

This 22nd day of June, 2020.