STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. From Lower Court: 2018-002242

THE STATE, ... PETITIONER,

v.

PHILLIP WAYNE LOWERY,.....RESPONDENT.

APPENDIX

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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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TESTIMONY (CONTINUED)

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
STATE'S EXHIBIT NO. 1 (DASHCAM VIDEO)
STATE'S EXHIBIT NO. 2 (DASHCAM VIDEO)

STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF GREENVILLE	)	2018-GS-23-04107
	)	
	)	ORIGINAL
	)	
STATE OF SOUTH CAROLINA	)	
PLAINTIFF	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
PHILLIP WAYNE LOWERY	)	
DEFENDANT	)	

December 12-13, 2018
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge; and a jury.

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

BRAN FOWLER, ESQ.
Attorney for the State

J. MAX GRAVLEE, ESQ.
Attorney for the Defendant

APRIL HERRON
Official Court Reporter

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In Camera-(IC)

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ALL EXHIBITS WERE RETAINED BY THE GREENVILLE COUNTY CLERK OF COURT

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December 12, 2108

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

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

MR. FOWLER: Yes, judge.

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

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

MR. GRAVLEE: Yes, sir, Your Honor.

THE COURT: All right, good enough.

(WHEREUPON, the jury venire entered the courtroom.)

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

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

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

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

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

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

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

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

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

MR. FOWLER: Yes, sir, Judge.

THE COURT: All right, call your witness.

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

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

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

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

THE WITNESS: David Vallin.

DIRECT EXAMINATION

BY MR. FOWLER:

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

A The South Carolina Department of Public Safety.

Q How long have you worked there?

DAVID VALLIN-DIRECT BY MR. FOWLER (IC)

A Approximately three years.

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

A Yes.

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

A Yes.

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

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

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

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

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

THE WITNESS: Yes, sir.

THE COURT: Okay.

MR. FOWLER: Yes, sir, Judge.

BY MR. FOWLER:

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

A Yes, sir.

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

A Yes.

Q Was there a gentleman standing near that vehicle?

A Yes, sir.

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

A Yes, sir.

Q Did you approach him?

A Yes.

Q Did you question him?

A Yes.

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

A Yes.

Q Approximately how many?
A I'd say maybe three or four.
Q Okay. At any point during your questioning was he handcuffed?
A No, sir.
Q Was he seated in the back of your vehicle or anything?
A No.
Q So, y'all were standing outside of both vehicles?
A Correct.
Q Okay. And this is a Spinx parking lot?
A Yes.
Q And during your conversation with him, were you investigating a car accident?
A Yes.
Q And as you spoke with him, did that develop into something else?
A Yes.
Q Okay. But initially your initial contact was just in regards to a car accident?
A Correct.
Q Now, was he free to leave that scene after you first walked up to him?
A No, sir.

DAVID VALLIN-DIRECT BY MR. FOWLER (IC)

Q Okay. But was that because he was under investigation for a crime or you were trying to figure out who caused this wreck?
A We were investigating who caused the collision.
Q Okay. Did you have a dash cam in your vehicle that night?
A Yes.
Q Was it in operation?
A Yes.
Q Was it recorded?
A Yes.
Q Have you had a chance to review that footage?
A Yes.
Q Is this a DVD copy of that footage?
A Yes.
Q You tell me what that is right there?
A My initials and the date.
Q Okay. The date you reviewed it?
A The date I reviewed it, correct.
Q And is it a fair and accurate copy to the best of your recollection of the events of that night?
A Yes.
Q Okay.
MR. FOWLER: Judge, I'm going to play the dash cam video.

THE COURT: Okay. All right.

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

THE COURT: Okay.

(WHEREUPON, the dash cam video was played.)

BY MR. FOWLER:

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

A That was myself.

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

A That was the Defendant.

Q That's the Defendant right here?

A Yes, sir.

Q Okay.

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

THE COURT: Mr. Gravlee.

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

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

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

is both of them right here, so.

THE COURT: Okay.

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

MR. GRAVLEE: May it please the Court.

CROSS-EXAMINATION

BY MR. GRAVLEE:

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

A I believe so.

Q County law enforcement?

A Right.

Q Not troopers?

A Right.

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

A I believe so, I can't remember.

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

A Yes.

Q Okay. Firearms on?

A Yes.

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

A Right in the parking lot.

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DAVID VALLIN-CROSS BY MR. GRAVLEE

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

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

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

A I was not directly next to it.

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

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

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

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

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

A Yeah, sure.

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

MR. GRAVLEE: Thank you, Your Honor.

THE COURT: Yes, sir.

BY MR. GRAVLEE:

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

A Correct.
Q So, if he had taken off running, y'all would have attacked him?
A We would have stopped him, yes.
Q Some sort of force to restrain him?
A Yes, sir.
Q Because he was not allowed to leave?
A Correct.
Q And, you know, the initial contact that was made, again, was not by you but other law enforcement?
A Correct.
Q Okay. And when you pulled up at the scene or pulled up to talk to him, you said, I'm Trooper Vallin, I'm here to investigate this collision?
A Correct.
Q So, at the time -- at any point in time during that you didn't tell him that he could leave?
A No, sir.
Q You didn't tell him that he was free to terminate the interrogation at that point?
A No, sir.
Q Okay. So, he was, I guess, flanked on either side by you and three other -- three or four other deputes?
A I can't remember exactly where he was at at that

time.

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

A Correct.

Q You told him no.

A Right.

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

A Correct.

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

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

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

A Correct.

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

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

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

A Yes.

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

A I can't remember, honestly.

Q Would it refresh your recollection if I had played?

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

Q All right.

Beg the court's indulgence for just one moment.

THE COURT: Sure.

BY MR. GRAVLEE:

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

A Correct.

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

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

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

THE COURT: Thank you.

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DAVID VALLIN-CROSS BY MR. GRAVLEE

Any follow up?

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

THE COURT: Okay.

All right, Mr. Gravlee.

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

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

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

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

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

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

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

He said, We're investigating this crash.

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

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

supposed to prevent from happening.

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

THE COURT: Okay.

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

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

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

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

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

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

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

Okay. All right. Anything else?

MR. GRAVLEE: Thank you, Your Honor.

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

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

MR. FOWLER: Right.

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Right, I understand. I gotcha.

MR. GRAVLEE: The Supreme Court said--

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

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

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

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

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

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

THE COURT: Yeah, but only the statements go to

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

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

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

MR. FOWLER: Okay.

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

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

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

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

THE COURT: Everything he says is fine.

MR. FOWLER: That's fine.

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

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

MR. FOWLER: No, sir.

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

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

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

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

THE COURT: I do too.

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

THE COURT: I do.

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

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

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

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

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

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

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

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

THE COURT: Yeah.

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

THE COURT: And his statements.

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

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

MR. GRAVLEE: Yes, sir.

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

MR. GRAVLEE: Thank you, Your Honor.

THE COURT: Okay. All right.

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

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

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

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

Thanks officer.

(WHEREUPON, a short break was taken.)

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

Okay, bring the jury in, please.

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

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

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

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

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

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

(WHEREUPON, the jury was sworn at)

THE CLERK: Thank you, you may be seated.

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

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

THE COURT: Yes, sir.

OPENING STATEMENT

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

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

THE COURT: All right, Mr. Gravlee.

OPENING STATEMENT

MR. GRAVLEE: Thank you, Your Honor.

May it please the Court?

THE COURT: Yes, sir.

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

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

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

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

highest burden of legal proof in the American legal system.

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

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

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

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

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

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

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

MR. FOWLER: Nothing from the State, Judge.

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

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

MR. FOWLER: Nine clock here?

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

MR. GRAVLEE: With regard to the video?

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

MR. GRAVLEE: Yes, sir, Your Honor.

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

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

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clear.

THE COURT: Sure.

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

THE COURT: Okay.

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

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

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

THE COURT: Okay.

MR. GRAVLEE: With regard to the exploitation issue.

THE COURT: All right.

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

MR. GRAVLEE: Yes, sir.

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

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

THE COURT: Okay.

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

THE COURT: All right.

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

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

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

THE WITNESS: Brandon Lee McNeely.

DIRECT EXAMINATION

BY MR. GRAVLEE:

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

A I'm sorry?

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

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

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

A I was at the original scene of the collision.

Q The alleged hit and run.

A Yes, sir.

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

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

pictures of the scene.

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

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

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

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

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

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

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

A Yeah, I mean, certainly.

Q Okay.

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

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

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

THE COURT: What evidence do you want to exclude?

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

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

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

Because I think the issue before the jury is

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

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

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

THE COURT: Yeah, I gotcha.

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

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

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

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

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

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

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

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

video. There's flashing lights and stuff.

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

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

THE COURT: Okay. What are the questions?

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

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

THE COURT: Yeah, redact all that.

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

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

MR. FOWLER: When he first pulls up--

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

MR. FOWLER: Right.

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

MR. FOWLER: Yes, sir.

MR. GRAVLEE: Thank you, Your Honor.

THE COURT: He or she may appear.

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

MR. GRAVLEE: I appreciate you letting me put

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that exploitation motion--

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

All right, so we're good?

MR. GRAVLEE: Yes, sir.

MR. FOWLER: Yes, sir.

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

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

MR. FOWLER: No, sir, Judge.

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

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

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

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

MR. GRAVLEE: He has, yes, sir.

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

MR. GRAVLEE: Thank you, Your Honor.

THE COURT: Yes, sir.

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

December 13, 2018.

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

The State ready?

MR. FOWLER: Yes, sir, Judge.

THE COURT: And the Defense?

MR. GRAVLEE: Yes, sir, Your Honor.

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

THE CLERK: Thank you, you may be seated.

Please state your full name for the record.

THE WITNESS: David Vallin.

DIRECT EXAMINATION

BY MR. FOWLER:

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

A South Carolina Highway Patrol.

Q How long have you been working there?

A Approximately three years.

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

A Yes.

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

A Yes.

Q Okay. Where did that accident take place?

A Piedmont Highway Greenville, South Carolina.

Q That's in Greenville County?

A Yes, sir.

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

A Yes.

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

contact with an individual?

A Yes, sir.

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

A Correct.

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

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

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

A Yes.

Q What kind of vehicle was it?

A It was a red SUV.

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

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

Q Okay. Were there other law enforcement officers there?

A Yes.

Q Were they from your agency or different agency?

A Different agency.

Q What agency was that?

A Greenville County Sheriff's Office.

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

A Yes, sir, I did.
Q Okay. And did you begin to question him about the car accident?
A Yes, sir.
Q Could you tell us a little bit about that?
A Well, we responded to the collision, got a report one of the vehicles was located at the Spinx.
MR. GRAVLEE: Your Honor, objection.
THE COURT: What's the basis of the objection?
MR. GRAVLEE: Your Honor, I think this is a matter we need to take up outside the jury.
THE COURT: All right, y'all come up.
(WHEREUPON, an off-the-record bench conference was held in the presence of the jury but out of the hearing of the jury.)
THE COURT: All right, the objection is sustained.
BY MR. FOWLER:
Q Okay. So, you're talking to Mr. Lowery, did he -- did he have keys to that car at that point?
A I'm not sure.
Q Okay. Did he -- did he smell like anything that night?
A He did smell strongly of a alcoholic beverage.
Q Okay. And is your car equipped with a dash

camera?
A Yes, sir.
Q Was it running that night?
A Yes, sir.
Q Okay. I'm going show you a copy of a DVD. Now, have you had a chance to review that footage?
A Yes, sir.
Q Okay. Is that that DVD that you reviewed?
A It is.
Q What's that say right there?
A Those are my initials and the date. Today's date.
Q Okay. And that's when you reviewed it?
A Yes, sir.
Q Okay. And is that to the best of your recollection a fair and accurate copy of events as you remembered them that night?
A Yes, sir.
Q Okay.
Your Honor, The State would move to enter into evidence as State's number one, a dash video from Trooper Vallin's car.
THE COURT: Objection, sir?
MR. GRAVLEE: Your Honor, just subject to the redactions.

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

MR. FOWLER: Yes, sir.

THE COURT: Okay.

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

THE COURT: Yeah, you already have it marked?

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

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

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

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

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

THE COURT: You can do it afterwards, okay.

THE COURT REPORTER: Thank you.

THE COURT: All right, good enough. So entered

as State's Exhibit number one.

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

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

BY MR. FOWLER:

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

A That was myself.

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

A That was the Defendant.

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

A No, sir.

Q Okay. Is that unusual?

A No, sir.

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

A No, sir.

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

A Yes, sir.

Q Do you know who that was?

A That was his daughter.

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

A I believe--

MR. GRAVLEE: Your Honor, objection.

THE COURT: Yes, sir.

MR. GRAVLEE: May we approach?

THE COURT: Sure.

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

BY MR. FOWLER:

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

A Wild Country.

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

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

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

THE WITNESS: Yes, sir.

MR. GRAVLEE: May it please the court?

THE COURT: Yes, sir.

CROSS-EXAMINATION

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?

A Correct.
Q And that's surrounded by two or three county deputies?
A Yes.
Q And Mr. Lowery?
A Yes, sir.
Q And that is not next to the car?
A Correct.
Q Okay. Thank you. So, you testified earlier you weren't sure whether keys were found or not?
A Right.
Q Okay. You testifies that Mr. Lowery smelled of alcohol?
A Yes.
Q Okay. He was slurring his speech?
A Yes. According to the video seems so, yes.
Q You know, and you, in your experience, you've worked a lot of DUIs, I would imagine?
A Yes, sir.
Q Okay. About how many? Could you ballpark it?
A In the last three years, maybe 150.
Q Okay. And each time that you respond on those DUIs -- let's back up here, how long have you been a trooper?
A Approximately three years.

Q Okay. And before you were allowed to become a trooper, you have to attend training?
A Correct.
Q The academy?
A Yes, sir.
Q And at the academy, they train you about investigating accidents. And they train you about retaining evidence?
A Yes, sir.
Q Taking notes.
A Yes, sir.
Q Because when a trial happens, if something, you know, goes down the line, it could be years down the road?
A Correct.
Q And at that time your memory isn't as good as it was at the time of the accident?
A Correct.
Q So, that teach you the importance of documenting the important evidence of a crime scene?
A Yes, sir.
Q Okay. And when you respond they teach you to write up an incident report?
A Yes.
Q Correct? And writing incident reports, they want you to be complete?

A Yes.
Q And thorough?
A Yes, sir.
Q And accurate?
A Yes, sir.
Q In this case, you didn't prepare an incident report.
A No, sir.
Q You don't have any notes?
A No, sir.
Q You don't have any pictures?
A Personally, no, sir.
Q Okay. So, going back to your experience with DUIs, you've done about 150?
A Yes, sir.
Q Something like that. In your experience, if somebody is intoxicated in your opinion, a lot of times they'll slur their speech?
A Yes, sir.
Q Bloodshot eyes?
A Sometimes, yes, sir.
Q They stagger around?
A Yes, sir.
Q They have trouble making sense?
A Yes, sir. Sometimes.

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

A I'm not sure.

Q You don't recall where the store was?

A Orientation to this video, no, sir.

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

A You mean like from which entrance or?

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

A From the video I'm not sure.

Q It's a convenient store, correct?

A Correct.

Q And it's a Spinx?

A Correct.

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

A To your right.

Q To the right?

A Yes, sir.

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

A It recall where it is because we watched the

video yesterday, yes, sir.

Q And just now?

A And just now, correct.

MR. GRAVLEE: Thank you, no further questions.

THE COURT: Okay.

Any redirect, sir?

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

THE COURT: Comfortable with that, sir?

MR. GRAVLEE: No objection, Your Honor.

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

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

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

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

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

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

THE WITNESS: It's Brandon Lee McNeely.

DIRECT EXAMINATION

BY MR. FOWLER:

Q Okay, Trooper McNeely, where do you work?
A For the South Carolina Highway Patrol.
Q How long have you been working there?
A Almost two years.
Q Were you working there this past January as well?
A Yes, sir.
Q Okay. Did you -- did you respond to a Spinx on the night of January 26th, 2018?
A Yes, sir.
Q And were there other law enforcement officers there?
A Yes, sir.
Q Do you remember who all was there?
A There was Trooper Vallin as well as some other deputies.
Q All right. Okay. And was there a -- was there a subject there? Was there a individual, a person there?
A Yes, sir.
Q Okay. And was that person, is he sitting in the room right now?
A Yes, sir, it's the Defendant.
Q Okay. And when you got there -- let me -- so -- and could you tell me, when you got there, did you approach that individual?

A Yes, sir, I did.

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

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

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

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

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

A Yes, sir, we do.

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

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

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

A Yes, sir.

Q Could you just name them for me real quick?

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

Q Okay. And so, the horizontal gaze nystagmus,

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

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

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

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

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

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

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

A It's the involuntary movement of your eyes.

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

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

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

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

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

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

A Yes, sir.

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

A Yes, sir.

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

A Yes, sir.

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

A The other test is the one leg stand.

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

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

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

A Yes, sir.

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

A Yes, sir.

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

A Yes, sir.

Q Was it operational?

A Yes, sir.

Q Was it running?
A Yes, sir.
Q Did you have an opportunity to review that footage before now?
A Yes, sir.
Q Is this a DVD copy of that footage?
A Yes, sir.
Q Can you tell me what that says right there?
A That's my initials with today's date.
Q Okay. And that's when you reviewed that footage?
A Yes, sir.
Q Is it a -- to the best of your recollection, is it a fair and accurate copy of the events that night as they took place?
A Yes, sir.
Q Okay.

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

THE COURT: Objection, sir?

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

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

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

and publish this to the jury?

THE COURT: You may.

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

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

BY MR. FOWLER:

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

A Yes, sir, it was.

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

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

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

A Yes, sir.

Q And is that also a sign of impairment?

A Yes, sir, can't keep balance.

Q Okay. We're going to keep moving.

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

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

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

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

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

BY MR. FOWLER:

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

A Yes, sir.

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

A Yes, sir.

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

A That's correct. Yes, sir.

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

A Yes, sir, he did.

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

A No, sir, he urinated on himself.

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

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

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

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

A Yes, sir.

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

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

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

A Yes, sir.

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

A It's not unusual.

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

A Yes, sir, it did?

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

A No, sir, I did not.

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

A No, it's not unusual.

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

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

A Yes, sir?

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

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

Q Well, you put handcuffs on him?

A Yes, sir, handcuffs.

Q Was your camera operational during that?

A Yes, sir.

Q Okay.

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

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

THE COURT: Yeah.

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

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

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

BY MR. FOWLER:

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

A Yes, sir.

Q Does miranda appear on that video?

A Yes, sir.

Q Okay.

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

THE COURT: Okay.

MR. GRAVLEE: Thank you, Mr. Fowler.

May it please the Court?

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. GRAVLEE:

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

A Yes, sir.

Q Okay. You say he smelled of alcohol?

A Yes, sir.

Q Coming right out of his mouth?

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

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

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

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

A Yes, sir.

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

A Yes, HGN was first.

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

A Yes, sir.

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

A Yes, sir.

Q Okay. He was slurring his speech?

A Yes, sir.

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

A Yes, sir.

Q And he failed that one?

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

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

impairment?

A Yes, sir.

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

A Yes, sir.

Q And in your opinion he was?

A Yes, sir.

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

Is that correct?

A Yes, sir.

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

A No, sir.

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

A Yes, sir.

Q Peed on himself?

A Yes, sir.

Q Down his blue jeans?

A Yes, sir.

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

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

A Yes, sir.

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

A Yes, sir.

Q So he just urinated on himself?

A Yes, sir.

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

A Yes, sir.

MR. GRAVLEE: No further questions.

THE WITNESS: Thank you.

THE COURT: Redirect, sir?

MR. FOWLER: Just real briefly.

REDIRECT EXAMINATION

BY MR. FOWLER:

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

A Yes, sir.

Q Was he the subject of that investigation?

A Yes, sir.

Q Could it potentially harm that investigation had

he left in the middle of the field sobriety test?

A Yes, sir.

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

THE COURT: Any recross?

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

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

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

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

MR. GRAVLEE: No objection, Your Honor.

THE COURT: Okay, good enough.

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

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

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

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

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

MR. GRAVLEE: Yes, sir.

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

MR. GRAVLEE: Witnesses?

THE COURT: Yes, sir.

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay, motions?

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

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

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

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

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

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

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

THE COURT: Okay, thank you.

Yes, sir, Mr. Fowler.

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

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

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

THE COURT: Okay. All right.

Yes, sir.

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

THE COURT: Yeah.

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

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

MR. FOWLER: He did.

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

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

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

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

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

MR. GRAVLEE: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. FOWLER: Thank you, Judge.

THE COURT: Yes, sir.

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

MR. GRAVLEE: Yes, sir, Your Honor.

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

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

EXAMINATION

BY THE COURT:

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

remain silent?

A Yes, sir.

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

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

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

A Yes, sir.

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

A No, sir.

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

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

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

THE COURT: Yes, sir.

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

THE COURT: Okay.

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

the timeframe that we could use.

THE COURT: Okay. All right.

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

MR. FOWLER: Right. Right.

THE COURT: Okay.

MR. GRAVLEE: Thank you, Your Honor.

THE COURT: All right, fair enough.

(WHEREUPON, a short break was taken.)

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

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

MR. GRAVLEE: He has, Your Honor.

THE COURT: Okay.

MR. GRAVLEE: He plans to testify.

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

MR. GRAVLEE: Yes, sir, Your Honor.

THE COURT: Okay, good enough.

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

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

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

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

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

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

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

THE WITNESS: It's Phillip Wayne Lowery.

DIRECT EXAMINATION

BY MR. GRAVLEE:

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

A Okay.

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

A Fifty-seven.

Q Okay. And where are you from?

A Greenville, South Carolina.

Q Okay. You been here your whole life?

A All my life. All my life.

Q Okay. What do you do?

A I'm a paint contractor.

Q Okay. You paint around here?
A Yes, sir.
Q Okay. You like to shoot pool in off time?
A Yes, sir.
Q You drink?
A Yes, sir.
Q Okay.
A Or I did. I hadn't drank here in about a year now.
Q Well, that's good. Well, let's talk about the night in question though.
A Okay.
Q Can you tell me little bit about that night?
A Well, me and a friend, we're at my house and we went to -- [indiscernible] corner to prong shop, shoot pool and drink. I drank quite a few beers.
Q Okay. Let's talk about that.
A Okay.
Q How many beers do you think you drink that night?
A Well, I wun't [verbatim] counting, I'd say quite a few.
Q Okay?
A Plus some shots of Fireball. Probably had five or six shots of them.

Q So, beer and liquor?

A Beer and liquor, yes, sir.

Q Okay. Do you remember much about that night?

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

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

A No, sir.

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

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

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

A No, sir.

Q Okay.

MR. GRAVLEE: No further questions, thank you.

THE WITNESS: Thank you.

THE COURT: Cross-examination, sir?

MR. FOWLER: Yes, sir.

CROSS-EXAMINATION

BY MR. FOWLER:

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

A That's my daughter's vehicle.
Q Okay. And so, your contention is that she was driving that night?
A I don't know who was driving, it's her car.
Q Okay. Well, you got a call that she had a flat tire in the parking lot?
A Right.
Q Is that correct? And then how did you get there?
A Ms. Pryor took me.
Q Okay. And then where did Ms. Pryor go?
A She went home.
Q Okay. And was your daughter there when you got there?
A No.
Q Okay. So now, you just said that you'd been drinking that night, correct?
A Yes, sir.
Q Quite a good bit it sounds like?
A Yes, sir. Yes, sir.
Q Okay. So, Ms. Pryor took you up there and nobody else was there?
A The car was sitting there, my daughter wasn't there yet.
Q Okay.

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

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

A Yeah, she set there a few minutes.

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

A Yes.

Q Okay. At night?

A Yeah.

Q Okay. How old is your daughter?

A Thirty.

Q She's 30?

A Yeah.

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

A Since she was 18, 16 something like that.

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

A I couldn't tell you that.

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

A Yes, sir.

PHILLIP LOWERY-CROSS BY MR. FOWLER

Q And got into another car?
A Yes, sir.
Q Okay. And then drove back to where her flat tire was?
A Yes, sir.
Q And we don't know that happened?
A I don't know how that happened.
Q Whose car was that she pulled up in?
A I couldn't tell you that.
Q And it was just her in that car, right?
A As far as I know. I don't remember a lot about that night.
Q Okay. So, what I'm trying to get at here, Mr. Lowery, is, I mean, how did she -- so, you just don't know how she got there?
A Well, when she called me, all she said was her car was at the Spinx station with a flat tire.
Q Okay.
A She didn't say she was at the Spinx station, she just said her car was there with a flat tire.
Q Okay.
A So, I don't know. I was at Franco's, I could not tell you.
Q All right. Now, Mr. Lowery, you know, did you make any moves to change that tire?

A No.
Q Why not?
A Because I was intoxicated.
Q Okay. Well, did you know you were intoxicated before you got there?
A I didn't realize that I was that bad until after I left.
Q Okay. Well, let me ask you about some of the statements you made to the police that night, okay?
A Okay.
Q Now, at one point you said, I pulled in.
What did you mean by that?
A Well, I guess, I pulled into the parking lot with Ms. Pryor.
Q Okay. And you said, At one point I was turning in to get something to eat.
What was that about?
A I don't know.
Q Okay. What about, if I hit anybody, I'm sorry.
What was that about?
A I couldn't tell you. I don't remember half that night.
Q Okay.
A What I said.
Q Well, now--

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

THE COURT: Okay.

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

BY MR. FOWLER:

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

A No, sir.

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

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

Q Okay.

A I couldn't tell you why.

Q Okay.

A I was severely intoxicated.

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

A I remember watching it.

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

A I think he said my sister.

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

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

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

Q Okay.

A I mean.

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

A Well, she was going to Lake Hartwell.

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

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

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

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

PHILLIP LOWERY-CROSS BY MR. FOWLER

I heard that.

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

A Yeah.

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

A I didn't say my daughter.

Q Okay. Which one is it?

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

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

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

Q So, it wasn't too long.

A No, it wun't long.

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

A I don't know.

Q I mean --

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

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

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

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

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

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

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

A I guess yes, sir.

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

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

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

THE COURT: Okay, any redirect, sir?

MR. GRAVLEE: Briefly, Your Honor.

THE COURT: Okay.

REDIRECT EXAMINATION

PHILLIP LOWERY-REDIRECT BY MR. GRAVLEE

BY MR. GRAVLEE:

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

A Yes, sir.

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

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

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

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

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

A Wouldn't let me call nobody either.

MR. GRAVLEE: No further questions.

THE COURT: Okay, any recross?

MR. FOWLER: No, sir, Your Honor.

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

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

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

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

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

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

THE WITNESS: It's Kimberly Chandler Pryor.

DIRECT EXAMINATION

BY MR. GRAVLEE:

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

A Okay.

Q Make sure that the jury hears you well.

A Okay.

Q If you need to speak into that microphone.

A Okay.

Q Okay?

A Okay.

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

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

Q How long have you lived there?

A Thirteen years.
Q Okay. How about where you from?
A Greenville.
Q Okay. You grow up here?
A I did.
Q Okay. And how do you know Mr. Lowery?
A He and I started elementary school together.
Q Okay. I don't mean to show your age or anything but has that been a got bit of time ago?
A Yeah, we're both 57.
Q Now, let's talk about you that night. Can you tell us a little bit about what happened that night?
A Well, it was a Friday night. My husband was out to town. And Wayne and I had been planning a night out. See, we have been friends -- we're like brothers and sisters. And we have been planning an outing for a while. And I called him up and told him the night we were going out. He said that's fine. So, I went down and picked him up. I picked him up around 6:30 -- around 6:30, somewhere in that area.
Q Okay.
A He and I left there. We drove to Franco's, which is on Piedmont Highway. It's a little place where you can play pool and you can eat. And kind of has a little restaurant, a little bar. We had a little bit of

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

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

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

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

Q Okay.

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

Q Okay.

A Yeah.

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

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

Q Okay.

A No.

Q And that night were you drinking?

A No, I don't drink.

Q Okay. And why not?

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

Q Okay.

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

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

on there?

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

Q Yes, ma'am.

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

Q Okay.

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

Q When was that?

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

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

No further questions.

THE WITNESS: Okay.

THE COURT: Okay, cross?

CROSS-EXAMINATION

BY MR. FOWLER:

Q Okay, Ms. Pryor.

A Uh.

Q Just a few quick questions.

A Okay.

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

A He did. He did.

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

A Right up the street.

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

A Uh-huh.

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

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

Q Okay.

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

Q Pretty quick, right?

A Right.

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

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

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

A Yeah.

Q Now, you didn't find that odd?

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

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

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

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

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

few more minutes but we were wrapping it up.

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

A This was a Friday night.

Q Did you have work to on Saturday?

A No. No.

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

A Knowing her, I didn't.

Q Okay.

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

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

A Is she 30?

Q Well, he --

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

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

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

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

kind this young lady?

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

Q Uh-huh.

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

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

A I did.

Q And he lives with his daughter, correct?

A Well, she lives with him on and off.

Q Okay.

A Uh-huh.

Q Okay.

A It's his home.

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

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

30 minutes.

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

A No.

Q It's not walking distance?

A No. No.

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

A Right.

Q Have you called the police since January 2018?

A No.

Q You called the solicitor's office?

A No.

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

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

THE COURT: Okay, overruled.

You may proceed.

BY MR. FOWLER:

Q Were you aware that Wayne was facing charges?

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

didn't.

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

A Knew there was some of it.

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

A We are, we are.

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

A Right.

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

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

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

A Uh-huh.
Q And so, what I'm getting at Ms. -- is that you went and brought him money in the jail, right?
A Uh-huh, I took money to the jail.
Q So, you knew it was a serious enough crime that he was in jail for?
A Right.
Q And now, you, according to your testimony today, you knew that he was innocent of the crime?
A He is.
Q Don't think this worth while the past 11 months, basically a year, to come tell anybody that?
A No because I thought if he wanted me but when he got a lawyer -- I knew once Wayne got a lawyer, got his act together, I knew that he would -- just like I'm here now. I mean, I knew I'd be here. I mean, I knew that.
MR. FOWLER: All right, thank you, ma'am, no further questions.
THE WITNESS: Uh-huh.
THE COURT: Any redirect, sir?
MR. GRAVLEE: No, Your Honor.
THE COURT: Thank you, ma'am, I appreciate your being here.
THE WITNESS: Uh-huh. Uh-huh.
THE COURT: All right. Anything further from

the Defense?

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

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

MR. FOWLER: No, sir, Your Honor.

THE COURT: Okay.

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

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

THE COURT: Okay, motions?

MR. FOWLER: None from The State, Judge.

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

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

THE COURT: Okay.

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

THE COURT: Okay. Yes, sir.

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

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

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

MR. GRAVLEE: Thank you, Your Honor.

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

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

THE COURT: Okay.

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

THE COURT: Okay.

From The State?

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

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

MR. FOWLER: Okay.

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

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

(Mr. Fowler shook his head.)

Okay, so--

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

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

MR. FOWLER: That's plenty, Judge.

THE COURT: All right.

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

MR. FOWLER: That's good, Judge.

THE COURT: How's that?

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

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

MR. GRAVLEE: Thank you, Your Honor.

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

sure that it suites you, okay.

MR. GRAVLEE: Thank you, Your Honor.

MR. FOWLER: Thank you, Judge.

(WHEREUPON, a short break was taken.)

THE COURT: Okay, ready for the jury?

MR. FOWLER: Yes, sir, Judge.

THE COURT: Mr. Gravlee?

MR. GRAVLEE: Yes, sir, Your Honor.

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

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

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

CLOSING STATEMENT

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

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

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

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

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

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

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

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

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

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

MR. GRAVLEE: Thank you, Your Honor.

THE COURT: So, you may continue, sir.

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

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

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

An example I like to give folks is imagine most

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

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

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

THE COURT: Mr. Gravlee.

CLOSING STATEMENT

MR. GRAVLEE: Thank you, Your Honor.

Mr. Fowler.

May it please the Court?

THE COURT: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FOWLER: Yes, sir, just briefly.

CLOSING STATEMENT

MR. FOWLER: Yes, sir, just briefly.

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

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

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

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

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

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

JURY CHARGE

THE COURT: All right, ladies and gentlemen,

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

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

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

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

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

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

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

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

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

Ladies and gentlemen, in any case that comes

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

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

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

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

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

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

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

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

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

voluntary statement. Now understand, just like every other element of the offense, The State has the burden of proving beyond a reasonable doubt that the statement that was given by the Defendant was voluntary. If you find, again, that it was not voluntary then you shouldn't consider the statement at all.

Ladies and gentlemen, the charge before you this morning is driving under the influence. The State must prove each and every element of the offense beyond a reasonable doubt. And for the charge of driving under the influence, ladies and gentlemen, The State must prove that the Defendant was driving a motor vehicle in The State of South Carolina while under the influence of alcohol or drugs to the extent that his faculties to drive were materially and appreciably impaired. So, you kind of sparse that down. There are three elements to that, okay. That he was driving in State of South Carolina while he was under the influence of drugs or alcohol or a combination of the two, to the extent that his faculties to drive were materially and appreciably impaired. Okay.

Now, ladies and gentlemen, I'm going to show you before you go back into your jury room the verdict

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form. I show it to you out here so that you won't see it for the first time when you get back there and you start your deliberations. It's a very simply verdict form, I'll go over it with you. It has the caption of the case here, Verdict. Then it says, As to the charge of driving under the influence, we, the jury, by unanimous consent find the Defendant. Now what's important about that is unanimous, okay. Your verdict must be unanimous. You have to all agree on the verdict. It can't be 11 to one or ten to two. It's got to be a unanimous verdict. Your verdict has to be based on the law and the evidence that was presented in the case. It can't be based on conjecture, sympathy, prejudice, caprice, passion. It can only be based on a deliberate analysis of the evidence that's been presented in this case and in context with the law as I've given it to you.

Okay, so you got two options here. And I prepared the verdict form. So, don't think I'm sending you any subliminal messages by the order in which I put the options, okay. They're two options, I've got to put them in some order, okay. And this is just what I arbitrarily selected, okay. So, two options. First of all, not guilty of driving under the influence. Now, if after your deliberations you

find that The State has not met its burden of proving each and every element of the offense beyond a reasonable doubt, then Mr. Sharp, you would simply X or initial there. Either one is fine. Just so it's clear to me what your intent was, okay. If, however, your analysis of the evidence you do find that The State has met its burden of proof, then you would check the second option, which is guilty of driving under the influence.

After you come to a unanimous verdict, sir, you would sign as foreperson of the jury and date the verdict form. Let the bailiff know that you've come to a unanimous verdict, then we'll bring you back out here and we'll receive the verdict, okay. Now, I'm going to ask you to return to your jury room. Don't begin your deliberations yet because at this point what we're going to do is I'll give the attorneys the opportunity to do a quality control check on my charge, make sure I didn't leave something out or just misstate something. Which happens from time to time. And also, we're going to do a inventory of the evidence. I think we've got video tapes. And what we'll do is we'll make sure we have them and something for you to play it on. If you want to see those video tapes, let me know and I'll get a sterile

computer and I'll send it back to you with those tapes. You may want it, you may not. It's entirely up to y'all. Okay. So, when you get this verdict form, then you'll know it's time to begin your deliberations, okay. But not yet. Not until you actually receive the verdict form, okay. All right, thank you. You can return to your jury room.

(WHEREUPON, the jury left open court at approximately 11:22 a.m.)

THE COURT: All right, exceptions to the charge?

MR. FOWLER: None from The State, Judge.

THE COURT: Mr. Gravlee?

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

THE COURT: Okay. All right, gentlemen, did a good job, I appreciate it. Good luck to you. What I'm going to do is I'm going to send the verdict form back to the jury and let them begin their deliberations. I'm going to dismiss the alternate from chambers. And y'all just have a computer ready in case they want to see those, okay.

MR. FOWLER: Yes, sir.

THE COURT: And then also, Mr. Fowler, get a way of marking those two as well.

MR. FOWLER: I think we can put the little things on there.

THE COURT: Well, I don't know that. Why don't we defer to Ms. Herron on that.

THE COURT REPORTER: Thank you, Your Honor. They're on there and it can be played.

MR. FOWLER: Okay, thank you.

(WHEREUPON, deliberations began at approximately 11:24 a.m.)

WHEREUPON, court was in recess awaiting a verdict.)

THE COURT: Okay, I've been advised that we have a verdict in this case.

State ready to receive the verdict?

THE CLERK: Yes, sir, Your Honor.

MR. FOWLER: Yes, sir, Judge.

THE COURT: Bring them in, please.

(WHEREUPON, the jury came into open court at approximately 2:50 p.m.)

VERDICT

THE COURT: All right, Mr. Sharp, has the jury reached a unanimous verdict, sir?

MR. FOREMAN: Yes, sir, Your Honor.

THE COURT: Sir, would you pass the verdict form to the bailiff?

Okay, Madam Clerk, would you publish the verdicts, please, ma'am?

THE CLERK: Your Honor, this is case number 2018-GS-23-004107, The State of South Carolina vs. Phillip Wayne Lowery, as to the charge of driving under the influence, we, the jury, by unanimous consent find the Defendant guilty of driving under the influence. Signed, Scott Sharp, foreperson of the jury, December 13th, 2018, Greenville, South Carolina.

This is your verdict, so say you all. Please signify by raising your right hand.

(WHEREUPON, all members of the jury raised their right hand.)

Thank you.

THE COURT: Anything further from this jury from The State?

MR. FOWLER: No, sir, Judge.

THE COURT: From the Defense, sir?

MR. GRAVLEE: Not from the Defense, Your Honor.

THE COURT: Okay.

All right, ladies and gentlemen, thank you for you service on the jury. If you'll return to your jury room, you can collect your phones and your materials and you can take off. I'll come back there in just a few seconds and I'll dismiss you informally and give you the opportunity to ask me any questions

or make any comments that you might have. Then you will be on your way. Thank you very much.

(WHEREUPON, the jury left open court at approximately 2:53 p.m.)

THE COURT: Okay, counsel, if you would get the sentencing sheets ready. What I'll do is I'll go informally dismiss the jury. And then I'll come back in in five or ten minutes, whenever they're done asking any questions they may have and we'll proceed to sentencing.

MR. FOWLER: Yes, sir.

(WHEREUPON, a short break was taken.)

SENTENCING

THE COURT: Okay, we're prepared to proceed to the sentencing hearing? All right, I've heard testimony from The State, Mr. Fowler, is there anything additional that you would like to put on the record with respect to sentencing, sir?

MR. FOWLER: No, sir, Judge. I think you have a pretty good idea of his record, I'll be happy to give you that.

THE COURT: I would like to hear the record, please.

MR. FOWLER: Okay, 1983 DUI. 1985, public disorderly conduct. 1990, criminal domestic

violence. 1993, criminal domestic violence. 1994, breach of peace. 1995, DUI, DUS. 1999, breach of peace. 2002, criminal domestic violence, second. 2005, possession of cocaine. 2008, criminal domestic violence second. 2011, DUI. And 2017, DUI, DUS. And he pled on those charges almost exactly a year prior to this taking placement.

THE COURT: Okay. How much time did Mr. Lowery do in jail on this offense, if any?

MR. FOWLER: We've got 40 jail days and 180 on HIP.

THE COURT: Does that sound right, Mr. Gravlee?

MR. GRAVLEE: Yes, sir.

THE COURT: So, 40 and 180.

MR. GRAVLEE: Yes, sir.

THE COURT: So, we're look at 220?

MR. GRAVLEE: Two hundred and twenty, yes, sir, Your Honor.

THE COURT: All right. Okay.

Mr. Gravlee, I'll be happy to hear from you, sir.

MR. GRAVLEE: Thank you, Your Honor, may it please the Court. I think you heard a lot about the case and you learned a little bit about Mr. Lowery and some of his record. But I will say that since

this arrest he shares with me that he hadn't had a drink in pretty much 11 months. He works full-time. Works 40, 50 hours a week. These are some of his coworkers, his boss and coworker here. Scott and Lisa, I believe. He works 40, 50 hours a week with them. I think he's pretty essential to their business. It's a two man paint job for the most part where he's fully employed. And I hear he's pretty good at what he does.

He lives by himself. He's got a house in Piedmont. He's a little worried about, you know, what's going to happen with that and all his possessions inside. Your Honor, with those 220 days that he's already served and definitely 40 behind bars, we would ask for some kind of home incarceration sentence that could be served here if you're inclined to go along with that. And probation to follow. I think that might help him keep him on the straight and narrow with his sobriety right now. And I do believe his boss would like to speak at the appropriate time, Your Honor.

THE COURT: Yes, sir, I'd be happy to hear from you. State your name for the record, please.

THE BOSS: Scott Percluse [ph].

THE COURT: Yes, sir.

THE BOSS: I've known him for about a year, he's worked with me and Lisa. And I didn't know much about his past or anything. I did know when I met him that he had had recent troubles. And I've never known him to do anything outside of just what's been stated in the last year. No problems, no issues. For me, he's always on time. He's a integral part of my company. Without him it's going to be major problems for us. I know it's not immediate to the situation but it would really effect things. I wouldn't have him working for me if I thought -- I've had a lot of painters that I used before and in general I struggle. But I haven't had a single problem with Wayne.

THE COURT: Thank you for being here and I appreciate you addressing the court.

THE BOSS: Thank you.

THE COURT: Yes, sir, Mr. Gravlee, anything else?

MR. GRAVLEE: No, Your Honor, that's it for us.

THE COURT: Okay, Mr. Lowery, anything you'd like to put on the record, sir?

MR. LOWERY: No, sir.

THE COURT: Okay. Mr. Lowery, I appreciate what's been said here about you, Mr. Lowery. I don't

necessarily think and I wouldn't contend that you're a bad guy. You got a pretty lengthy record for nonviolent offenses for the most part. But it's clear that you have a profound substance abuse problem. You've had a difficult time managing that. The problem is that you find yourself here before the court after having had multitude of DUIs. And your prior record bodes against you. So, I'll sentence you and I sentence you without any personal animist or ill will. I'm not mad at you. But I do have to apply the law to your conduct, which is my job that I've taken as a circuit Judge.

I will tell you as well, Mr. Lowery, that in speaking with the jury, none of them believed the story that you told. I'm not in a position to judge whether you're credible or not but I will tell you that they summarily dismissed the notion that you weren't driving. And Ms. Pryor's representations to the court that she took you to that gas station. As a matter of fact, I thought that might give them some cause to pause and think about probable cause. And they disabused that notion. And they told me that it took them about two seconds to make a determination that y'all weren't being truthful. I only tell you that just because that's the take away from 12 people

from the community who heard your story and then weighed the evidence. I don't take a position on it one way or the other. But I thought it would be important for you to know that.

MR. LOWERY: Yes, sir.

THE COURT: Sentence of the Court, sir, is that you be committed to the Department of Corrections for a period of two years and a fine in the amount of $2,100.00. Credit for the time served of 220 days. Good luck to you, sir.

MR. GRAVLEE: Thank you, Your Honor.

MR. FOWLER: Thank you, Judge.

(WHEREUPON, the proceedings were concluded.)

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

April P. Herron

APRIL P. HERRON, Court Reporter

WITNESSES

Brandon L McNeely

S. C. Highway Patrol

1/26/2018

ARREST WARRANT NUMBER
20182370167586

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ACTION OF GRAND JURY
TRUE BILL
Clay Tutt
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

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

Indictment for

3359

DRIVING UNDER THE INFLUENCE

VIOLATION §56-5-2930

152

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
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South Carolina Commission on Indigent Defense
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PO Box 11589
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ATTORNEY FOR APPELLANT

This 22nd day of June, 2020.

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

FINAL BRIEF OF APPELLANT

TAYLOR D. GILLIAM
Appellate Defender

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STATEMENT OF ISSUE ON APPEAL

I. Did the trial court err in admitting Appellant's statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily, where law enforcement would not let him use the restroom and admitted he was not free to leave?

II. Did the trial court err in failing to dismiss Appellant's charge, where the dashcam video failed to comply with the driving under the influence statute and did not include all of the field sobriety tests administered or any of the officers reading Appellant his Miranda rights?

STATEMENT OF THE CASE

Appellant was indicted by a Greenville County grand jury on June 5, 2018 for driving under the influence. R. 152. He proceeded to trial before the Honorable Robin B. Stilwell and a jury on December 12, 2018. J. Max Gravlee represented Appellant; Brann Fowler appeared on behalf of the state. R. 1. After a two-day trial, the jury found Appellant guilty. R. 144, ll. 1 – 8. Judge Stilwell sentenced Appellant to two years' incarceration.

This appeal follows.

ARGUMENT

I. The trial court erred in admitting Appellant's statement where he was the subject of custodial interrogation and his statements were not made freely and voluntarily, where law enforcement would not let him use the restroom and admitted he was not free to leave.

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). " An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant facts

Neither of the two witnesses called by the state at Appellant's trial observed him driving a car at any point on the night he was arrested. David Vallin, an officer with the South Carolina Highway Patrol, could not remember vital details from the night, January 26, 2018. R. 102, l. 6 – R. 104, l. 21. During direct examination, he could not recall whether Appellant was inside or around his daughter's car, a red SUV, in a gas station parking lot when law enforcement arrived. Id. He was likewise unsure whether Appellant even had keys to the car at the time. Id. The state admitted the dashcam video from Vallin's car as an exhibit, and it was published to the jury. R. 105, l. 20 – R. 107, l. 5; State's Exhibit 1.

Vallin, who had been a trooper for approximately three years at the time of Appellant's trial, did not prepare an incident report. R. 110, l. 22 – R. 112, l. 15. Additionally, he did not take any photographs or write down any notes. Id.

Brandon McNeely was the state's only other witness. At the time of trial, he had been with the South Carolina Highway Patrol for almost two years. R. 115, ll. 1 – 16. Like Vallin, he arrived at the gas station parking lot on January 26, 2018. Id. McNeely remarked that the gas station had outdoor cameras and that he neglected to even consider obtaining that footage. R. 123, ll. 15 – 24.

The video from McNeely's car was admitted as State's Exhibit 2 and published to the jury. R. 119, l. 21 – R. 121, l. 6; State's Exhibit 2. McNeely indicated that Appellant showed signs of impairment. R. 121, ll. 8 – 20. Appellant also urinated on himself. R. 122, ll. 18 – 24. McNeely arrested Appellant and then read him his Miranda rights. R. 123, l. 25 – R. 124, l. 8.

McNeely freely admitted that Appellant was not allowed to use the restroom. Appellant twice urinated on himself because law enforcement refused to allow him to use the restroom. R. 77, l. 15 – R. 78, l. 8. McNeely suggested that he was investigating a crime at the time when Appellant said he needed to use the restroom. R. 78, ll. 18 – 24. He candidly disclosed that Appellant was the subject of the investigation. Id.

After offering the testimony of Vallin and McNeely, the state rested. R. 79, ll. 8 – 10. Appellant moved for a directed verdict on the grounds that the state failed to prove the *corpus delicti* in the case. R. 83, l. 4 – R. 85, l. 20. He argued that neither trooper witnessed Appellant or anyone else driving the red SUV, that there was no testimony regarding scrape marks or the temperature of the car, and that there was no proof Appellant had been driving.

The assistant solicitor opined, in response, that Appellant's statement from the dashcam videos was "excellent evidence and certainly enough for a jury question as to whether or not he was driving." R. 85, l. 23 – R. 86, l. 20. The trial judge denied Appellant's motion for a directed verdict. R. 87, l. 16 – R. 88, l. 11.

Discussion

Vallin testified *in camera* at a Jackson v. Denno[1] hearing. He claimed to have received a call from the Greenville County Sheriff's Office "saying that they believe that they had located" a car, in a Spinx parking lot, which they contended had left the scene of an accident. R. 8, ll. 8 – 15. Vallin plainly admitted to questioning Appellant near the red SUV in the Spinx parking lot after he arrived. R. 9, ll. 7 – 22. Vallin indicated that "maybe three or four" other officers were nearby at the time of the questioning. All were in uniform and armed. R. 13, ll. 8 – 23. The blue lights from officers' cars were flashing. R. 14, ll. 18 – 20. Appellant was not handcuffed at the time, but he was not free to leave. R. 10, ll. 3 – 25. Vallin claimed that his questioning of Appellant was part of an investigation into a car accident. Id.

If Appellant had attempted to leave, law enforcement officers would have used to force to restrain him; he was not allowed to leave. R. 15, ll. 2 – 21. Vallin never advised Appellant that he could leave or that he was free to terminate the interrogation at any point. Id. During the questioning, Appellant inquired if he would be allowed to call someone; he was told no. R. 15, ll. 2 – 14. Vallin believed Appellant was involved in the prior collision. Id. Notably, Vallin admitted that the answers Appellant gave, coupled with the tests he was given at the scene, led to Appellant's arrest. R. 16, ll. 18 – 22.

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[1] 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Counsel for Appellant correctly argued that Appellant was in custody and should have been notified of his rights:

> Your Honor, I believe this [is] a plain, clear custodial interrogation. He's not free to leave, that was directly from the trooper's mouth. He said he couldn't leave. Said if he ran away they would have apprehended him, made sure that he would have [to] stand there. I'm not sure how much [more] custodial [that] can be.

R. 18, l. 11 – R. 21, l. 4. Counsel cited State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013) and requested that Appellant's statement be suppressed. The assistant solicitor suggested that the officers were investigating the accident. R. 21, l. 6 – R. 22, l. 6.

The trial judge found the statements and dashcam videos to be admissible. R. 22, l. 7 – R. 23, l. 10. The court found "objectively that he was not in custody at the time." Id.

Counsel for Appellant successfully argued that the state's witnesses should not refer to the accident; the trial judge ruled that any references to the prior accident were inadmissible unless the other party from the accident testified. R. 26, ll. 7 – 18; R. 31 ll. 19 – 23. As such, the trial court questioned how the state was going to establish driving, and the assistant solicitor divulged the importance of Appellant's statement in the video:

> Judge, in relative part to that video right there, the Defendant said, I left wild country the bar. I pulled in here, I was the only person in the car. I was turning in here to get something to eat. I was turning in here to change my tire. I guess I screwed up, I can't lie. If I hit anybody I'm sorry.
>
> And that would be, you know, pretty essential part of my evidence. I understand where [defense counsel] is coming from and I'm not trying to try a hit and run or a traffic wreck case here by any means.

R. 25, ll. 16 – 1.

In Jackson v. Denno 378 U.S. 368, 376 (1964), the United States Supreme Court indicated "that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or

falsity of the confession." Accordingly, a defendant has the right to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness. Id. at 376–77. "In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)." State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010).

The state may not use statements stemming from custodial interrogations of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege of self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, (1966). Custodial interrogation entails questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Id. Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating response. State v. Kennedy, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996), aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998).

Whether a suspect was in "custody is determined by an objective analysis of 'whether a reasonable man in the suspect's position would have understood himself to be in custody.' " State v. Ledford, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582

S.E.2d 407, 410 (2003). A person is "in custody" when a person's freedom has been restricted. State v. Caulder, 287 S.C. 507, 515, 339 S.E.2d 876, 881 (Ct.App.1986).

The Miranda warnings are not required if the defendant is not in custody or significantly deprived of his freedom. State v. Neely, 271 S.C. 33, 40, 244 SlE.2d 522, 526 (1978). To determine whether a suspect was in custody for the purposes of Miranda, the Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Maryland v. Shatzer, 559 U.S. 98, 112, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010).

In Morgan v. State, Robert Morgan and a man named Dotson returned to the scene of an accident in a Camaro after the Mustang they were racing wrecked. 282 S.C. 409, 410, 319 S.E.2d 335, 336 (1984). The Camaro was not involved in the accident, but Morgan admitted to having driven it. Id. He also admitted to using alcohol and marijuana. Id. He was not given any Miranda warnings. Id. Morgan's statements, the only evidence that he had been driving the Camaro, were found to be voluntary and admissible. Id. at 411, 319 S.E.2d at 336.

In holding that Miranda warnings were not required, the South Carolina Supreme Court wrote:

> A traffic accident had just occurred. Dotson volunteered the information that he and [Morgan] had seen the accident. What followed was a routine investigation into the cause. The statements made by [Morgan] were made during the course of this routine investigation. Miranda warnings were not required.

Morgan at 411-412, 319 S.E.2d 335, 336-337 (internal citations omitted).

The present case can be distinguished from Morgan in numerous ways. Morgan and Dotson returned to the scene of the accident. As such, they likely felt free to leave. Appellant was surrounded by law enforcement officers and undoubtedly the sole focal point of their attention. The uncontradicted testimony by witnesses at Appellant's trial is that he was not free

to leave. Therefore, Morgan is inapplicable; Appellant was in custody and not free to leave. He was not allowed to use the restroom and was forced to urinate on himself. The interrogation was not "temporary and brief" as was the case in Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

The questioning of Appellant was not incident to an ordinary traffic stop. He was in custody, as admitted by the state's witnesses. Appellant likely felt completely at the mercy of the police, especially after he was denied the opportunity to use the restroom. There was never a pathway that led to Appellant leaving the parking lot in anything other than handcuffs.

Appellant's freedom of action was curtailed to a "degree associated with formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983). Even if a motorist who has been detained pursuant to a traffic stop is thereafter subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda. Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977).

Law enforcement admitted Appellant was a suspect. He was not free to leave and therefore was in custody. He was deprived of the ability to use the restroom, and he was not allowed to make a telephone call to his sister. The questions asked by Vallin were designed to elicit an incriminating response, and Appellant's answers to the questions were described by the assistant solicitor as "excellent evidence" and "certainly enough for a jury question as to whether or not he was driving." R. 85, l. 23 – R. 86, l. 20. Appellant was asked how much he had to drink; this was irrelevant to the accident. See State v. Medley, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016). His statement should have been suppressed.

II. The trial court erred in failing to dismiss Appellant's charge, where the dashcam video failed to comply with the driving under the influence statute and did not include all of the field sobriety tests administered, or any of the officers reading Appellant his Miranda rights.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. Thus, on review, the appellate court is limited to determining whether the trial judge abused his discretion." State v. Garris, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011) (citations omitted). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." Id. (citations omitted).

Discussion

Appellant moved for dismissal of the charges "for failure to meet the requirements as required under the DUI law" because the state failed to include in the dashcam video the field sobriety tests and the administering of Appellant's Miranda rights. R. 116, l. 22 – R. 117, l. 14. The trial judge found that the state "substantially complied with the requirements under the law." R. 117, ll. 22 – 24. The court ruled that "the video itself was introduced into evidence and ... that is the requirement." R. 117, l. 22 – R. 118, l. 3.

Appellant was alleged to have driven under the influence, in violation of S.C. Code Ann. § 56-5-2930. R. 152. "A person who violates Section 56-5-2930... must have his conduct at the incident site and the breath side video recorded." S.C. Code Ann. § 56-5-2953. The video recording at the incident site must include any field sobriety tests administered and include the arrest of a person for driving under the influence and show the person being advised of his

Miranda rights. Id. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge ... **"if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest ... was in an inoperable condition."** S.C. Code Ann. § 56-5-2953(i). (emphasis added). No affidavits were offered by law enforcement in this case.

A violation of this section may result in dismissal of the DUI charges. S.C.Code Ann. § 56–5–2953(B); see also City of Rock Hill v. Suchenski, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding dismissal of DUI charge is an appropriate remedy if the officer fails to produce a satisfactory video recording unless an exception applies).

It is not possible to determine if Appellant actually heard and understood his Miranda rights. The officers failed to capture the arrest and Miranda warnings on the videotape. The trial court in the matter *sub judice* abused its discretion in finding that the video complied with the statutory requirements. State v. Kinard, 427 S.C. 367, 831 S.E.2d 138 (Ct. App. 2019). Petitioner's charge should have been dismissed.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court reverse his conviction and dismiss the charge against him, or in the alternative, remand the case for a new trial.

s/Taylor D. Gilliam
Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of July, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

July 8, 2020

s/Taylor D. Gilliam
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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-002242

THE STATE, ...RESPONDENT,

v.

PHILLIP WAYNE LOWERY,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. The trial judge properly allowed the State to introduce evidence of Appellant's incriminating statements because they were not made during a custodial interrogation, but during a routine traffic stop which did not require Miranda warnings.

II. The trial judge properly denied the motion to dismiss Appellant's charge where the dashcam video recording depicted the issuing of Miranda warnings to Appellant, but those warnings were not played for the jury due to technical issues with the edited dashcam video. Further, the recording statute does not require jurors actually view the issuing of Miranda warnings, which are irrelevant to the non-custodial statements made by Appellant and shown in the recording.

STATEMENT OF THE CASE

On June 5, 2018, Appellant was indicted by the Greenville County Grand Jury for driving under the influence. On December 12–13, 2018, Appellant proceeded to a jury trial before the Honorable Robin B. Stilwell. Assistant Solicitor Brann Fowler, Esquire, represented the State; J. Max Gravlee, Esquire, represented Appellant. The jury found Appellant guilty as charged and the trial judge sentenced him to two years' incarceration.

Appellant timely filed a notice of appeal and brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Prior to trial, a Jackson v. Denno[2] hearing was held for the State's two testifying witnesses: Troopers David Vallin and Brandon McNeely with the South Carolina Department of Public Safety. Trooper Vallin testified that on night of Appellant's arrest, he had responded to a call about a car accident.[3] A short distance from the accident, officers located a vehicle with front-end damage at a Spinx gas station and Trooper Vallin arrived at the location after a few other officers. There, they found Appellant outside of the vehicle in question. Trooper Vallin turned on his dashboard camera, approached Appellant, and asked him about the vehicle; particularly, whether he was its driver. At that point, Trooper Vallin's sole objective was to determine whether Appellant and/or the vehicle were involved in the accident and who was at fault in said accident, and even stated such. As Trooper Vallin began speaking with him, Appellant quickly made several incriminating statements; notably, he initially claimed he turned into the gas station to change a flat tire but then stated he "guess [he] screwed up," he could not lie, and "[i]f [he] hit anybody [he was] sorry." (R.p.7, line 20–R.p.12, line 15; State's Exhibit 1)

On cross-examination, Trooper Vallin testified that once questioning of Appellant began, he was not free to leave and that he did not tell Appellant he was free to termination the interrogation at that point. Further, other officers were in the immediate vicinity around the men. However, Appellant was not in handcuffs at that time. (R.p.13, line 6–R.p.17, line 25)

Trial counsel objected to the admission, claiming that pursuant to Jackson v. Denno, arguing that Appellant's statements were made during a custodial interrogation and, because he

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[2] Jackson v. Denno, 378 U.S. 368 (1964)

[3] The original incident was a hit-and-run. Because Appellant's involvement in that incident was not the subject of Appellant's trial, the trial judge limited reference to that incident as an accident. (R.p.8, line 5–R.p.9, line 5)

was not given Miranda warnings, they were inadmissible. Trial counsel further argued that because Appellant was formally placed under arrest later, it was "clear" he was under arrest at that time. Trial counsel also claimed that Trooper Vallin's testimony, which indicated Appellant was not free to leave the scene, further supported his position. The State disagreed, and pointed to the Supreme Court of South Carolina's opinion in State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984), in which it found Miranda warnings were not required when officers questioned persons during a "routine investigation" of a traffic accident. The State noted Trooper Vallin asked basic questions of Appellant in an effort to ascertain who or what caused the initial traffic accident, during which Appellant volunteered his inculpatory statements. (R.p.18, line 2–R.p.22, line 6)

The trial judge ultimately concluded that Officer Vallin's recording, and Appellant's inculpatory statements within, were generally admissible. Based on his review of the testimony and the recording, the trial judge found Appellant was not in custody at the time he was questioned and volunteered his incriminating. The trial judge further found Trooper Vallin's questions were "fairly innocuous" and focused on the traffic accident, pursuant to a routine investigation. Thus, Trooper Vallin's actions fell within those "contemplated in the [Morgan] case." (R.p.22, line 7–R.p.23, line 11)

However, after hearing trial counsel's concerns regarding the characterization of the car accident within the recording, the trial counsel instructed the parties to redact the portions of the recording which unnecessarily discussed the earlier traffic incident. The trial judge made it clear that he wanted to parties to discuss any and all issues with the video recording and other evidence in the case, including the separate recording of Appellant's sobriety tests, and send him

an email before the trial began in earnest the following day. (R.p.23, line 12–R.p.32, line 16; R.p.39, lines 3–23; R.p.47, line 14–R.p.50, line 15)

The following day, the trial began. Neither party had any objections when the State began presenting its evidence. (R.p.51, lines 1–19)

Trooper McNeely testified that he arrived at the Spinx sometime after Trooper Vallin. When he arrived, he immediately noticed signs of impairment from Appellant such as the great effort it took him to even stand. Trooper McNeely offered Appellant the chance to demonstrate he was not intoxicated by participating in the standardized field sobriety test. During the first procedure, the horizontal nystagmus test, Appellant was unable to focus his eyes on Trooper McNeely's finger and follow it through a range of motions. When Appellant participated in the second exercise, the walk and turn test, during which Appellant struggled to walk in a line and to follow Trooper McNeely's oral commands. The third and final test, the one-legged stand, required Appellant to stand on the leg of his choosing and maintain balance for thirty seconds while verbally counting the time. Again, like with the first two tests, Appellant struggled greatly when attempting the task. The results of these three tests, combined with Appellant's drunken demeanor, alcoholic odor, and urination on himself became the basis upon which Trooper McNeely arrested him. Through Trooper McNeely's testimony, the State admitted the dashboard camera recording of the tests he performed on Appellant along with the conversation between the two men. When the trial court, sua sponte, asked trial counsel whether he had an objections to this recording, trial counsel had no objection provided the agreed redactions were performed on it. (R.p.64, line 24–R.p.74, line 2; State's Exhibit 2)

Trooper McNeely then testified that after Appellant was arrested and placed in handcuffs, he issued him Miranda warnings. However, when Appellant tried to play that portion of the

recording, the State requested an off-the-record bench conference. When the parties returned, the trial judged announced the State was having technical difficulties with playing that portion of the recording. However, Trooper McNeely confirmed that the video did record and show him providing Appellant with his Miranda warnings. Trial counsel did not lodge any objection to playing the recording despite the State's inability to display the portion showing the Miranda warnings. (R.p.74, line 4–R.p.75, line 7)

After the State rested its case, trial counsel moved for a directed verdict of not guilty, claiming the State failed to provide evidence, other than Appellant's own self-incriminating statements about driving the car, that the car had been driven by Appellant that night; none of the officers saw Appellant driving car and no one checked to see whether "the car was warm." The State responded that Appellant himself admitted to driving the vehicle, which was more than enough evidence to support a denial of the motion. The trial judge agreed with the State and denied the motion. Again, no objection relating to the admission of Trooper McNeely's recording was made by trial counsel. (R.p.79, line 8–R.p.80, line 10; R.p.83, line 4–R.p.88, line 15)

After the defense presented its case, trial counsel again moved for a directed verdict. This time, however, the basis for Appellant's motion was the failure to play the portion of Trooper McNeely's recording which showed him issuing the Miranda warnings. Trial counsel claimed he did not object previously because he did not know how the video was "going to play out" and did not know what was on the video and what could or could not be played. Trial counsel maintained that the DUI statute required that the issuance of Miranda warnings be recorded and such recording needs to be shown to the trier of fact. (R.p.116, line 20–R.p.117, line 15)

In response, the State noted that the recording issue was addressed at bar, on the record, just shortly before. The State noted that it, along with trial counsel, redacted that video together the night before to ensure the parties complied with the trial judge's pretrial rulings and Appellant knew the Miranda warnings were contained in the recording. The trial judge denied the motion, noting the State "substantially complied" with the requirements of the recording statute. (R.p.117, line 16–R.p.118, line 3)

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a statement will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998). "[T]he appellate court does not re-evaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2008).

ANALYSIS

I.

The trial judge properly allowed the State to introduce evidence of Appellant's incriminating statements because they were not made during a custodial interrogation, but during a routine traffic stop which did not require Miranda warnings.

Appellant argues the trial judge erred in allowing the State to introduce Appellant's incriminating statements in which he, among other things, admitted to driving his vehicle that night. The State disagrees with this allegation of error. Appellant's statements were non-custodial and made during a routine traffic investigation by officers. Accordingly, they were properly admissible as evidence at trial.

Miranda warnings are designed to protect several constitutional rights of an accused, most importantly, the privilege against self-incrimination. State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988). In order to assure that an accused's right to remain silent is not compromised during custodial interrogation, the United States Supreme Court ruled that "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444 (1966). "A statement, whether exculpatory or inculpatory, obtained as a result of custodial interrogation is inadmissible unless the person was advised of and voluntarily waived his rights under Miranda . . . ." State v. Kennedy, 325 S.C. 295, 302, 479 S.E.2d 838, 842 (Ct. App. 1996) aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998).

The special procedural safeguards outlined in Miranda are not required if a suspect is simply taken into custody, but only if a suspect in custody is subjected to interrogation. Id., at, 303, 479 S.E.2d at, 842 (Ct. App. 1996) aff'd as modified, 333 S.C. 426, 510 S.E.2d 714 (1998).

The interrogation requirement of Miranda is met by express questioning or its functional equivalent, and includes words or actions the police should know are reasonably likely to elicit incriminating responses from a criminal suspect. Rhode Island v. Innis, 446 U.S. 291 (1980); State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989); Kennedy, 333 S.C. at 426, 510 S.E.2d at 714. Volunteered statements not made in response to custodial interrogation do not require Miranda warnings. Arizona v. Mauro, 481 U.S. 520 (1987). Miranda warnings are inapplicable to volunteered statements not the product of interrogation. State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989). In Howard, the court stated:

> In formulating a definition of interrogation, the [Innis] Court pointed out that "the concern of the Court in Miranda was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." The Court noted that interrogation must reflect a measure of compulsion above and beyond that inherent in custody itself.

296 S.C. at 488, 374 S.E.2d at 288 (emphasis added).

Notably, courts have repeatedly found that the questioning of a motorist during a routine traffic stop is not considered "custodial interrogation" for the purposes of Miranda. In Berkemer v. McCarty, 468 U.S. 420 (1984), the United States Supreme Court held that a traffic stop, although considered a "seizure" pursuant to the Fourth Amendment, was not a situation considered unduly coercive which required the issuing of Miranda warnings to a seized person for two primary reasons: (1) detention of a motorist during a traffic stop is "presumptively temporary and brief" and a motorist expects that he or she will most likely be allowed to continue on his or her way, a situation drastically different from an interrogation at a police station which is presumptively long and will continue until the individual provides interrogators with the information they seek; and (2) circumstances associated with a typical traffic stop are

not such that the motorist feels he or she is "completely at the mercy of the police" because the public location of such detainment, which allows for the presence of witnesses and passing motorists "reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse." Id. at 437–39.

Due to these two important factors, the Berkemer court found routine traffic stops to be analogous to Terry stops which allow officers to investigate individuals and circumstances which "provoke suspicion" by asking a detained individual a "moderate number of questions" to determine identity and obtain information proving or dispelling an officer's suspicions. Notably, a detainee is only arrested in such situations if his or her answers provide an officer with problem cause to initiate the arrest. Id. at 439.

In Morgan, the Supreme Court of South Carolina cited with approval to Berkemer and its ruling that routine investigation into the cause of a traffic accident, and a defendant's statements made during such investigation, were not custodial interrogations requiring Miranda warnings. Id. at 411–12, 319 S.E.2d 336–37. In State v. Peele, 298 S.C. 63, 378 S.E.2d 254 (1989), the Supreme Court, citing to both Berkemer and Morgan, specifically stated sobriety tests performed during routine traffic stops were non-custodial interrogations which did not require the issuance of Miranda warnings. Id. at 64–66, 378 S.E.2d at 255–56.

In the instant case, Appellant's questioning by police officers was not a "custodial interrogation" requiring Miranda warnings. Just because Appellant was not free to leave while he was being questioned does not convert the traffic stop into a custodial interrogation; notably, every traffic stop involves some detention. When stopped by police, motorists must pull over and answer questions from police before being allowed to continue on their way. Notably,

Appellant's questioning by police occurred in an even less-intrusive setting that most traffic stops: (1) Officer Vallin did not "stop" Appellant, Appellant chose to stop at the gas station without any involvement from police; and (2) the questioning took place in the parking lot of the gas station, a much more "public" place than the side of a road.

Further, Officer Vallin's intent to, eventually, arrest Appellant is a non-factor in determing both whether Appellant was in a custodial interrogation or the voluntariness of his statements: the Berkemer court specifically noted "[a] policeman's unarticulated plan has no bearing on the question of whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Id. at 468 U.S. at 442. As noted above, Appellant chose to spoke to officers in a public place after he, of his own volition, pulled his car into the gas station. Officer Vallin never informed Appellant he was under arrest until after he had performed poorly during his field sobriety tests. Accordingly, the trial judge properly admitted Appellant's incriminating statements into evidence.

Public Safety Exception

Should the court conclude the statements made by Appellant were interrogative in nature, the State submits the questions fall within the public safety exception to Miranda delineated in New York v. Quarles, 467 U.S. 649 (1984). In Quarles, a woman approached two police officers who were on road patrol and told them that she had just been raped. Id. at 649. The victim described her assailant, and told them that the man had just entered a nearby supermarket and was carrying a gun. Id. While one of the officers radioed for assistance, the other entered the store and saw the defendant, who ran toward the rear of the store. Id. The officer pursued him but lost sight of him for several seconds. Id. Upon apprehending the defendant, the officer frisked him and discovered that he was wearing an empty shoulder holster. Id. After handcuffing him,

the officer asked him where the gun was. Id. Defendant nodded toward some empty cartons and responded that "the gun is over there." Id. The officer then retrieved the gun from one of the cartons, formally arrested respondent, and read him his Miranda rights. Id. The court created a public safety exception to the Miranda warnings, saying:

> [T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

Id. at 657.

The trial court judge applied this reasoning in the instant case. Officers were investigating a serious car accident in which the second vehicle fled the scene. Just over a mile away from the scene of the accident, officers found a badly damaged vehicle which appeared to be the vehicle which fled that scene. Officers needed to find the driver and other potential occupants of the vehicle due to the potential injuries by those in car and for the possibility that the driver of the vehicle may try to operate the vehicle again, which due to his own impairment or the existing damage to the vehicle, could cause additional accidents or harm. As soon as officers began questioning Appellant, the officers had good reason to believe he was under the influence of some intoxicant, but they did not know the nature or the amount of the substance Appellant consumed. For his safety, and for those of the bystanders around them, the officers needed to assess the volatile situation quickly. Thus, should the Court find Appellant's initial questioning

was asked during a custodial interrogation, the question and its incriminating response falls within the narrow public safety exception to Miranda, and is thereby admissible.

II.

The trial judge properly denied the motion to dismiss Appellant's charge where the dashcam video recording depicted the issuing of Miranda warnings to Appellant, but those warnings were not played for the jury due to technical issues with the edited dashcam video. Further, the recording statute does not require jurors actually view the issuing of Miranda warnings, which are irrelevant to the non-custodial statements made by Appellant and shown in the recording.

Appellant claims the trial judge erred in denying his motion to dismiss his charges because the recording of the traffic stop did not show the officers issuing Miranda warnings to him. The State disagrees with this allegation of error for several reasons. First, the video did, in fact, contain the relevant Miranda warnings, but those warnings were not shown to the jury; nothing in the relevant Statutes require that the jury see the issuing of Miranda warnings. Furthermore, the evidence submitted on that second recording, mainly Appellant's performance during field sobriety testing, was non-custodial in nature and did not require any prior Miranda warnings. Finally, S.C. Code Ann. § 56-5-2953(B) gives judges the discretion to "consider[] any other valid reason for the failure to produce the video recording based upon the totality of the circumstances," and the technical difficulties acknowledged by the trial judge and the parties is a more-than-adequate justification for the State's failure to play that portion of the video to the jury.

Pursuant to S.C. Code Ann. § 56-5-2930(A):

> It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances which cause

impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired.

(Supp. 2014).

Section 56-5-2953 requires:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a) The video recording at the incident site must:
>
> (i) not begin later than the activation of the officer's blue lights;
>
> (ii) include any field sobriety tests administered; and
>
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and **show the person being advised of his Miranda rights.**
>
> . . .
>
> (B) Nothing in this section may be construed as prohibiting the introduction of other relevant evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the video recording equipment at the time of the arrest or probable cause determination, or video equipment at the breath test facility was in an inoperable condition, stating which reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the video recording because the person needed emergency medical treatment, or exigent circumstances existed. In circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the video recording equipment has not been activated by blue lights, the failure by the arresting officer to produce the video recordings required by this section is not alone a ground for dismissal. However, as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section. **Nothing in this section prohibits**

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

S.C. Code Ann. § 56-5-2953(A)–(B) (Supp. 2014) (emphasis added).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. State v. Gaines, 380 S.C. 23, 32, 667 S.E.2d 728, 733 (2008). A statute's language must be construed in light of the intended purpose of the statute. Id. at 33, 667 S.E.2d at 733. Whenever possible, legislative intent should be found in the plain language of the statute itself. Id.

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161. However, the statute must also be read as a whole and in harmony with its purpose. State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). Accordingly, "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). "The statute must be interpreted with realistic circumstances and rationales in mind." State v. Elwell, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011)(emphasis added); State v. Baker, 310 S.C. 510, 512, 427 S.E.2d 670, 672 (1993) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."). Courts will reject an interpretation of a statute leading to an absurd result clearly unintended by the legislature. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998)

("However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature. . . .").

"[T]he primary intention section 56-5-2953 was to reduce the number of DUI trials heard as swearing contests by mandating the State videotape important events in the process of collecting DUI evidence." Elwell, 396 S.C. at 336, 721 S.E.2d at 454. This Court has explained: "the purpose of section 56-5-2953 . . . is to create direct evidence of a DUI arrest." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 347, 713 S.E.2d 278, 285 (2011).

Initially, the State notes nothing in §§ 56-5-2930 or 56-5-2953 requires that the jury actually be shown the issuance of Miranda warnings to a defendant; the presence of the Miranda warnings is solely related to whether the trial judge should admit the video into evidence and is not included as an element of the offense defined with S.C. Code Ann. § 56-5-2930. In fact, § 56-5-2930(J)(3) specifically allows for "a video recording of the person's conduct at the incident site and breath testing site taken pursuant Section 56-5-2953 . . . **subject to redaction under the South Carolina Rules of Evidence**." (emphasis added). Notably, the parties and trial judge all knew the Miranda warnings were present on the original and edited recordings. In fact, trial counsel participated in the redaction of the videos with the State to ensure they complied with the requirements set forth by the trial judge, and the copies of the recording currently possessed by the parties all contain the portion of the video in which Appellant is given Miranda warnings. It would be an extreme act to reverse Appellant's conviction when the recording of his sobriety tests complied with the letter of the law. Further, it is counterintuitive to exclude the use of **non-custodial** statements made by Appellant based solely on the presence of Miranda warnings, a requirement for **custodial** statements.

Appellant claims that failure to play the portion of the video including the Miranda warnings to the jury is problematic for Appellant's conviction because "[i]t is not possible to determine if Appellant actually heard and understood his Miranda rights." (Br. of Appellant p.11). What Appellant fails to recognize is this very statement illustrates why the presence of Miranda warnings was unimportant to the jury's deliberations: Miranda warnings were not required to be given to Appellant before Officer McNeely conducted the field sobriety tests because, as explained supra in Issue I, field sobriety testing is not considered "custodial interrogation" for the purposes of Miranda. See, e.g., Peele, 298 S.C. at 64–66, 378 S.E.2d at 255–56. In fact, field sobriety testing is an important factor in determining whether probable cause exists for an arrest for driving while intoxicated. See Lapp v. SCDMV, 387 S.C. 500, 505–06, 692 S.E.2d 565, 568–69. (Ct. App. 2010).

The trial judge and the parties all acknowledged that the reason the jury was unable to view the recorded Miranda warnings was due to technical difficulties with the redacted video. The technical issues were in no way attributed to the State's handling of the recording. Further, it is undisputed that the unedited version of the recording depicts an officer giving Appellant his Miranda warnings. Accordingly, the trial judge did not err in admitting the evidence of Appellant's field sobriety testing and finding the circumstances justified denial of Appellant's motion.

CONCLUSION

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

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July 9, 2020

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-002242

THE STATE, ...RESPONDENT,

v.

PHILLIP WAYNE LOWERY,.....APPELLANT.

CERTIFICATE OF COUNSEL

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

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July 9, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Phillip Wayne Lowery, Appellant.

Appellate Case No. 2018-002242

Appeal From Greenville County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5903
Heard March 8, 2022 – Filed April 6, 2022

REVERSED AND REMANDED

Appellate Defender Taylor Davis Gilliam, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General William M. Blitch, Jr., and Assistant Attorney General Ambree Michele Muller, of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, all for Respondent.

THOMAS, J.: Phillip Wayne Lowery appeals his driving under the influence (DUI) conviction, arguing the trial court erred in (1) admitting statements he made on a dash camera recording and (2) not dismissing the charge due to the State's

failure to comply with the DUI statute regarding a second dash camera recording. We reverse and remand.

FACTS

During a *Jackson v. Denno*[1] pre-trial hearing, Trooper David Vallin of the South Carolina Department of Public Safety testified he responded to a call about an accident. Shortly thereafter, Vallin responded to another call indicating a vehicle that left the scene of the accident was at the Spinx gas station. When he arrived at the Spinx, Vallin noted the vehicle had front end damage, Lowery was standing next to the vehicle, and three or four other officers were already present and surrounding Lowery. Vallin testified he preliminarily questioned Lowery about the car accident, but it developed into a DUI investigation. Vallin testified he had a dash cam in his vehicle and it recorded the investigation. The State played Vallin's video for the trial court. In Vallin's video, Lowery made many incriminating statements, including admitting he had been driving the vehicle. Vallin admitted his questioning of Lowery was accusatory because Vallin believed Lowery was involved in the accident.

Lowery argued his statements on Vallin's video should not be admitted because he was in custody, being interrogated, and had not yet been given *Miranda*[2] warnings. The State argued the video was admissible because Vallin was investigating an accident. After reviewing Vallin's video, the court ruled Lowery was not in custody and recitation of *Miranda* warnings was not required. The court also found the questions were "fairly innocuous questions regarding the traffic accident" and asked in "furtherance of a routine traffic violation." Thus, the court found the video was admissible. The court ruled any evidence of the accident as a hit and run was inadmissible; thus, all references to the accident were to be redacted from Vallin's video.

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[1] 378 U.S. 368, 376−77 (1964) (entitling a defendant in a criminal case to an evidentiary hearing on the voluntariness of a statement).

[2] *Miranda v. Arizona*, 384 U.S. 436, 471−76 (1966) (explaining a suspect's statement obtained as a result of custodial interrogation is inadmissible unless he was advised of and voluntarily waived his rights).

Vallin similarly testified before the jury, additionally claiming Lowery smelled strongly of alcohol and his speech was slurred. Vallin's video was played for the jury.

Trooper Brandon Lee McNeely, of the South Carolina Highway Patrol, testified he was also present at the Spinx. McNeely testified Lowery smelled of alcohol and displayed signs of impairment. McNeely's dash cam was activated. McNeely testified the horizontal gaze nystagmus (HGN) sobriety test, which tests for involuntary eye movement due to the influence of drugs or alcohol, was given. According to McNeely, the HGN test indicated Lowery was impaired. Lowery performed a walk and turn test and a one leg stand test, which McNeely testified indicated Lowery's impairment. Lowery was placed under arrest, handcuffed, and then given *Miranda* warnings.

The court admitted McNeely's video and the video began playing for the jury. After the video showed the HGN test and at least one of the other sobriety tests, the video stopped playing. An off-the-record bench conference was held, the court commented on the State's inability to use the computer, and the State asked McNeely, "I know we didn't finish that video, but you said you [*M*]*irandized* him, correct?" and "Does [*M*]*iranda* appear on that video?" McNeely responded "yes" to both questions.[3] The State rested, and Lowery moved for a directed verdict. Lowery argued the State failed to provide evidence Lowery was driving a vehicle. The court denied the motion.

Lowery presented a defense indicating he rode with a friend that night and was not driving the vehicle. At the close of evidence, Lowery renewed his motion for a directed verdict and also argued the State failed to comply with the statute requiring the dash cam video to show all of the field sobriety tests and the *Miranda* warnings. Lowery argued, "I don't know what is on that video and what can and can't be played. The field sobriety tests weren't shown in full there and neither was [*M*]*iranda* as required by the statute shown on camera." The State argued, "[W]e addressed this at the bar a minute ago," and the parties redacted the video together. The court denied Lowery's motions, finding the State substantially complied with

[3] The video transported to this court stops playing at approximately five minutes into the twelve minute video. The final sobriety test and *Miranda* warnings are not viewable.

the statute. Lowery was convicted and sentenced to two years' imprisonment and a fine. This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Gordon*, 414 S.C. 94, 98, 777 S.E.2d 376, 378 (2015). "[A]n appellate court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

LAW/ANALYSIS

A. Admissibility of Statements

Lowery argues the trial court erred in admitting the statements he made before being *Mirandized* because he was in custody at the time and being interrogated; thus, his statements were not freely and voluntarily made. We agree.

"A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." *State v. Pittman*, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007). The State must establish the defendant voluntarily and knowingly waived his *Miranda* rights when giving a statement. *State v. Miller*, 375 S.C. 370, 379, 652 S.E.2d 444, 449 (Ct. App. 2007). *Miranda* warnings are only required if a suspect "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

The State argues Lowery was not in custody because this was merely a routine traffic stop. "[R]outine traffic stops do not constitute 'custodial interrogation' for purposes of the *Miranda* rule." *State v. Peele*, 298 S.C. 63, 65, 378 S.E.2d 254, 255 (1989) (citing *Berkemer v. McCarty*, 468 U.S. 420 (1984) and *Pennsylvania v. Bruder*, 488 U.S. 9 (1988)). We find guidance from *State v. Easler*, in which police officers responded to a call regarding an automobile accident after one of the parties involved had left the scene. 327 S.C. 121, 125–26, 489 S.E.2d 617, 620 (1997), *overruled on other grounds by State v. Greene*, 423 S.C. 263, 283, 814 S.E.2d 496, 507 (2018). Easler was convicted of numerous charges, including felony DUI causing death and felony DUI causing great bodily injury. *Id.* at 125, 489 S.E.2d at 619. The officers found Easler, who matched a description given to the officers, at the pay phone at a convenience store. *Id.* at 126, 489 S.E.2d at 620.

The officers questioned Easler about his involvement in the accident, and Easler admitted he had been involved. *Id.* When asked why he left the scene, Easler stated he was afraid and had no driver's license. *Id.* An officer requested Easler return to the scene, and Easler asked for a package he had left at the pay phone, which contained a six-pack of beer and cigarettes. *Id.* The officer asked Easler when he had his last drink, and Easler admitted "he'd had a Milwaukee's Best just prior to the accident . . . ." *Id.*

The court found the case did not involve a routine traffic stop, stating, "[o]n the contrary, the officers, having been advised there had been an accident and that someone had left the scene, went looking for that individual based upon a description given by two eyewitnesses." *Id.* at 127, 489 S.E.2d at 620. The court concluded the questioning was "clearly interrogation[, and t]he only remaining inquiry [was] whether Easler was 'in custody' at the time." *Id.* at 127, 489 S.E.2d at 621.[4]

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[4] The court found Easler was not "in custody" for purposes of *Miranda*, stating the following:

> [T]he officers had no basis to suspect Easler of DUI or to know the extent of the injuries in the accident. Accordingly, they requested him to return to the scene of the accident where, upon seeing the injuries and realizing Easler's intoxicated state, they arrested him and issued *Miranda* warnings. Given the totality of these circumstances, we find Easler was not 'in custody' for purposes of *Miranda.*

Id. at 128–29, 489 S.E.2d at 621 (footnote omitted); *see State v. Morgan*, 282 S.C. 409, 411–12, 319 S.E.2d 335, 336–37 (1984) (finding the defendant was not in custody where he and a companion returned to the scene of an accident, the companion volunteered information that they had seen the accident, and the defendant made statements "during the course of this routine investigation"); *State v. Barksdale*, 433 S.C. 324, 335, 857 S.E.2d 557, 562 (Ct. App. 2021) (finding the defendant was not in custody where the police officer responded to the scene of a traffic accident, questioned the defendant to investigate the accident, permitted the defendant to move about freely, and questioned the defendant about his alcohol consumption).

We likewise find Lowery's questioning was more than a routine traffic stop. Vallin first went to the scene of the accident and was given a description of a vehicle. Vallin admitted his questioning was accusatory because he believed Lowery was involved in the accident. We have reviewed Vallin's video and, like the situation in *Easler*, we find the questioning was interrogational. *See State v. Kennedy*, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996) ("The special procedural safeguards outlined in *Miranda* are not required if a suspect is simply taken into custody, but only if a suspect in custody is subjected to interrogation. Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.").

Next, we look to whether Lowery was in custody. *See State v. Williams*, 405 S.C. 263, 273, 747 S.E.2d 194, 199 (Ct. App. 2013) ("To determine whether a suspect was in custody for the purposes of *Miranda*, the Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."); *Easler*, 327 S.C. at 128, 489 S.E.2d at 621 ("The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody."). We find Lowery was in custody.[5]

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[5] The State argues that even if Lowery was subjected to custodial interrogation, the public safety exception applies. We disagree, finding *State v. Medley*, 417 S.C. 18, 787 S.E.2d 847 (Ct. App. 2016) instructive. In *Medley*, officers chased a suspect that fled from a checkpoint. *Id.* at 22, 787 S.E.2d at 849. When he was found at his parents' house, handcuffed, and pinned to the ground, an officer "asked Medley whether he had a license and how much he had been drinking. Medley responded that he did not have a license and '[t]oo much.'" *Id.* (alteration in original). Medley was arrested and *Miranda* warnings were given. *Id.* This court held Medley was in custody and under interrogation when he made his statement about his alcohol consumption. *Id.* at 26, 787 S.E.2d at 852. In a footnote, this court summarily rejected the State's argument that the public safety exception applied and stated "[a]sking Medley how much he had to drink, although perhaps relevant to his own health and safety, was simply irrelevant to the public's safety. The only purpose for asking such a question was to obtain evidence for his DUI case." *Id.* at 27 n.5, 787 S.E.2d at 852 n.5.

"In determining whether a suspect is 'in custody,' the totality of the circumstances, including the individual's freedom to leave the scene and the purpose, place and length of the questioning must be considered." *Easler*, 327 S.C. at 127, 489 S.E.2d at 621. "The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody." *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003).

The *Williams* court stated the following factors have been considered by courts in determining whether an interrogation was "custodial" within the meaning of *Miranda*:

> (1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview; (2) whether the express purpose of the interview was to question the person as a witness or suspect; (3) where the interview took place; (4) whether the police informed the person he or she was under arrest or in custody; (5) whether they informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom; (6) whether there were restrictions on the person's freedom of movement during the interview; (7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it; (11) whether the police were aggressive, confrontational, or accusatory; (12) whether the police used interrogation techniques to pressure the suspect; and (13) whether the person was arrested at the end of the interrogation.

Williams, 405 S.C. at 276–77, 747 S.E.2d at 201.

In this case, the factors used to determine custody indicate Lowery was in custody. First, he was surrounded by numerous officers and denied his request to use the telephone or the restroom. Lowery was being questioned as a suspect rather than as a witness. The interrogation was initiated by Vallin. Lowery's movements were restricted by the officers surrounding him. Vallin admitted his interrogation was accusatory. Given these factors, we find a reasonable person in Lowery's position would have believed he was in custody. Accordingly, we find there was a custodial interrogation that necessitated *Miranda* warnings.

Our analysis next requires us to determine whether the failure to give *Miranda* warnings until after Lowery's arrest was harmless error. *See State v. White*, 410 S.C. 56, 59, 762 S.E.2d 726, 728 (Ct. App. 2014) ("[A]ny error in the failure to suppress a statement allegedly taken in violation of *Miranda* is subject to a harmless error analysis."). There was evidence Lowery was intoxicated from the officers' testimony. However, there was no direct evidence he was driving the vehicle except from his statements made during Vallin's interrogation. Therefore, Lowery's incriminating statements made prior to *Miranda* warnings, while being interrogated and in custody, could reasonably have affected the verdict. Thus, we find the error was not harmless. *See State v. Byers*, 392 S.C. 438, 447−48, 710 S.E.2d 55, 60 (2011) ("[T]he materiality and prejudicial character of [a trial] error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." (quoting *State v. Reeves*, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990))).

B. Section 56-5-2953

Lowery argues the trial court erred in not dismissing the DUI charge when the dash cam videos failed to comply with the DUI statute because the dash cam videos "did not include all of the field sobriety tests administered, or any of the officers reading [Lowery] his *Miranda* rights." Although we disagree dismissal is required, we agree the video failed to comply with the DUI statute.

McNeely's video was not introduced until his trial testimony before the jury. It appears from the record that the State experienced technical issues in publishing McNeely's video to the jury; thus, not all of the sobriety tests were viewed by the jury, and *Miranda* warnings were not seen on the video.

Lowery was convicted of violating South Carolina's DUI statute, found in section 56-5-2930 of the South Carolina Code (2018). The statute governing the video recording of a DUI offense, section 56-5-2953 provides:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
> (1)(a) The video recording at the incident site must:
> (i) not begin later than the activation of the officer's blue lights;
> (ii) *include any field sobriety tests administered*; and
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, *and show the person being advised of his Miranda rights*.
> . . .

S.C. Code Ann. § 56-5-2953(A) (2018) (emphases added). The purpose of the statute is two-fold: "The first purpose is to create direct evidence of a DUI arrest by requiring the video include any field sobriety tests administered. The other purpose . . . is to protect the rights of the defendant by 'requiring video recording of the person's arrest and of the officer issuing *Miranda* warnings.'" *State v. Kinard*, 427 S.C. 367, 372, 831 S.E.2d 138, 140−41 (Ct. App. 2019) (internal citation omitted) (quoting *State v. Taylor*, 411 S.C. 294, 306, 768 S.E.2d 71, 77 (Ct. App. 2014)).

Statutory language "should be given a reasonable and practical construction consistent with the purpose and policy of the Act." *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 214, 423 S.E.2d 101, 103 (1992). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." *Bennett v. Sullivan's Island Bd. of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). "[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). Section 56-5-2953 is "a statute which governs the admissibility of certain evidence." *State v. Sawyer*, 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014).

The statute requires a video recording of all of the sobriety tests and the issuance of *Miranda* warnings. The recording at trial did not comply with the statute. Until recently, dismissal of a DUI charge was an appropriate remedy if a police officer failed to produce a video in compliance with the statute unless an exception applied. *See City of Rock Hill v. Suchenski*, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007) (explaining dismissal as a proper remedy and noting exceptions that excuse compliance with section 56-5-2953(A) are provided in section 56-5-2953(B)). However, in *State v. Taylor*, Op. No. 28085 (S.C. Sup. Ct. filed Feb. 23, 2022) (Howard Adv. Sh. No. 7 at 24, 29), our supreme court found a violation of the statute as to *Miranda* warnings no longer required a per se dismissal of the DUI charge. The court stated any statements made by the defendant in violation of the statute should be considered the same as any other violation of *Miranda*. *Id.* The court did not apply this new rule in *Taylor*, stating it applied "from this point forward." *Id.* at 32. Based on *Taylor*, we find the remedy for the failure to meet the statutory requirement is not dismissal.

CONCLUSION

Accordingly, Lowery's conviction is

REVERSED AND REMANDED.

MCDONALD and HEWITT, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stilwell., Circuit Court
Judge Appellate Case Tracking No. 2018-002242
Opinion No. 5983

State of South Carolina, Respondent,

vs.

Phillip Wayne Lowery, Appellant.

PETITION FOR REHEARING

On April 6, 2022, this Court in a published opinion State v. Lowery, Opinion No. 5903 (filed April 6, 2022) (Shearouse Adv. Sh. No. 12 at 72) reversed and remanded Appellant's conviction for driving under the influence finding the trial court abused its discretion in admitting statements Appellant made on a dash camera recording and the State failed to comply with the DUI statute regarding a second dash camera recording. This Court misapprehended the relevant standard of review regarding whether Appellant was in custody and the need for Miranda at the time he gave the relevant statements. Additionally, this Court overlooks relevant facts supporting the trial court's determination that Appellant was not in custody at the time the statement at issue was given. Finally, this Court misapprehends or overlooks the statutory requirements related to the video of the incident scene and the fact nothing in the statutory scheme requires the video be played for the jury.

Accordingly, pursuant to Rule 221(a), SCACR, this Court should grant the State's petition for rehearing and affirm Appellant's conviction because the trial court did not err in admitting statements from the dash cam and did not err in denying Appellant's motion for a directed verdict due to noncompliance with the DUI statute regarding a second dash camera recording.

Admissibility of Statements

While this Court acknowledges the basic standard of review, this Court's opinion completely disregards the standard of review and fails to give the trial court's determination the appropriate deference. The appellate court does not re-evaluate the facts based upon its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by **any evidence.** (Emphasis added). State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2008). The trial judge ruled that the statements made on the dash cam were admissible in part because Appellant was not in custody. As a result, this Court is to determine if there is any evidence to support this finding by the trial court and not conduct a de novo review to determine if this Court would ultimately agree with the trial court's ruling. See State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003) ("Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is supported by the record.").

This court relies on the thirteen factors set forth in Williams to determine whether an interrogation was "custodial" yet fails to address eight of the thirteen factors and fails to give the trial court's ruling its proper deference. State v. Williams, 405 S.C. 263, 747 S.E.2d 194, 199 (Ct. App. 2013). The first factor is whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview. Id. In its analysis, this court stated that "the interrogation was initiated by Vallin" State v. Lowery, Opinion No. 5903 (filed April 6, 2022) (Shearouse Adv. Sh. No. 12 at 79). This court neglected

to address the fact that Appellant voluntarily pulled in to the gas station, Officer Vallin did not conduct a traffic stop of Appellant, he merely arrived at the same gas station as Appellant. Significantly, Appellant never hesitated to speak to Officer Vallin and did not indicate that he was unwilling to talk to Vallin. This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The second factor under Williams is whether the express purpose of the interview was to question the person as a witness or suspect. The court states "Lowery was being questioned as a suspect rather than as a witness." State v. Lowery, Opinion No. 5903 (filed April 6, 2022) (Shearouse Adv. Sh. No. 12 at 79). On the contrary, Lowery was not being questioned as a suspect for DUI, he was being questioned in connection with a car accident. Under this Court's analysis, anytime an accident is being investigated, Miranda warnings would be required prior to discussing the accident. This is not and should not be the case. See State v. Barksdale, 433 S.C. 324, 857 S.E.2d 557 (Ct. App. 2021) and State v. Morgan, 282 S.C. 409, 319 S.E.2d 335 (1984). This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The third factor under Williams is where the interview took place. Although this Court does not address this factor in its analysis, it's important to note that the interview took place in a gas station which is a much more public place than the side of the road. The United States Supreme Court has previously held that a traffic stop, although a "seizure," was not a situation considered unduly coercive which required the issuing of Miranda warnings because it is presumptively temporary and brief compared to an interrogation in a police station which is presumptively long, and the circumstances are not such that the motorist feels he or she is completely at the mercy of the police because of the public location and presence of witnesses. Berkemer v. McCarty, 468 U.S. 420 (1984). A gas station parking lot is even more public than the side of the road at a traffic

stop and is more temporary than the inside of an interrogation room. This is additional evidence supporting the trial judge's ruling that Appellant was not in custody.

The fourth factor, whether the police informed the person he or she was under arrest or in custody, is another factor that this Court does not address in its analysis. Not only does this Court not address it, but it completely ignores the statement made by Officer Vallin in the dash cam video "okay well we don't know if we're arresting you yet so just hang on for that okay?" (State's Exhibit 1 at 4:29) This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The fifth Williams factor is whether law enforcement officers informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom. This Court did not address this factor, but the State acknowledges Appellant was never specifically told he could leave, so this factor could support a finding of custody.

The sixth factor concerns whether there were restrictions on the individual's freedom of movement during the interview. In the analysis of this factor, this Court completely misstates the facts. This Court states Appellant was "denied his request to use the telephone or the restroom." While he was denied his request to use the telephone, after incriminating statements were already made, nowhere in State's Exhibit 1 dash cam footage with Officer Vallin does Appellant request to use the restroom. In State's Exhibit 2, while he is in the middle of his field sobriety tests, he does ask to use the restroom and is denied, but this is well after his incriminating statements. The custody determination is whether a person is in custody at the time of his statements not whether he was ever in custody. In State v. Kerr, Appellant argued that his statements admitting that he had been drinking should have been suppressed because he was in custody at the time of his

statements and should have been given Miranda warnings. This court held that a defendant was not "in custody" at the time he made the statements to the Officer because the officer was performing a routine investigation into the cause of a traffic accident when Appellant stated to the officer that he had been drinking. State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998). Custody Determination is made at the time the statements are made not whether the defendant is ever in custody. Further, this Court fails to address that Appellant was neither handcuffed nor sitting in a police car at the time of the questioning. In fact, Officer Vallin allows him to smoke a cigarette (is he walking around in the public gas station parking lot or is he cornered or completely surrounded?) during this time. (State's Exhibit 1). This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The seventh factor is the length of the interrogation. The Court does not address this factor in its analysis and likely because it clearly favors the judge's ruling as the entire questioning by Officer Vallin lasted approximately six minutes and the first incriminating statement is made within 26 seconds. This evidence supports the trial judge's ruling that Appellant was not in custody.

The eighth factor is the number of officers participating. The Court embellishes its analysis of this factor and states "he was surrounded by numerous officers" yet fails to address that only one officer is asking questions and actually participating in the interview. Further, although there was testimony that there were two or three deputies around Appellant only one was close enough to him to be visible or heard in the dash cam video. "Additionally, the presence of multiple officers at the scene of an accident has not deterred our appellate courts from finding a DUI suspect was not in custody while being questioned in the presence of multiple police officers." State v.

Barksdale, 433 S.C. 324, 336, 857 S.E2d 557, 563 (Ct. App. 2021). This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The ninth factor is whether law enforcement dominated and controlled the course of the interrogation. This Court did not address this factor in its analysis. A review of the beginning of State's Exhibit 1 when the relevant statements were made clearly demonstrates Officer Vallin and Appellant were having a conversation. Vallin was not peppering Appellant with questions. Some of Appellant's statements were made without being prompted by a question. This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The tenth factor is whether law enforcement manifested a belief that the person was culpable and had the evidence to prove it. In its analysis of this factor, this Court adopts trial counsel's language in stating that "Vallin admitted his interrogation was accusatory." State v. Lowery, Opinion No. 5903 (filed April 6, 2022) (Shearouse Adv. Sh. No. 12 at 79). Vallin testified "from the evidence I saw I did believe that he was involved." Id. at the Jackson v. Denno hearing prior to trial. That fact was not made known at the scene and more importantly it was not made known to Appellant until Vallin testified at the Jackson v. Denno hearing. See Barksdale. This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The eleventh factor is whether the police were aggressive, confrontational, or accusatory. The Court somewhat addresses this factor in the statement regarding Vallin's testimony being accusatory, however in watching the dash cam footage, Vallin's demeanor and tone in his questioning is the exact opposite of aggressive, confrontational, and accusatory, and is extremely understanding and conversational. (State's Exhibit 1). This is evidence supporting the trial judge's ruling that Appellant was not in custody.

The twelfth factor is whether the police used interrogation techniques to pressure the suspect. This Court does not address this factor in its analysis again likely because it supports the judge's ruling that Appellant was not in custody because no interrogation techniques were used. As already mentioned, Officer Vallin and Appellant merely entered into a conversation regarding the automobile accident and Appellant's possible involvement.

The thirteenth factor is whether the person was arrested at the end of the interrogation. Again this factor is not addressed in this Court's analysis. Appellant was not arrested at the end of the interrogation. He was passed off to another officer to go through the field sobriety tests. This is evidence supporting the trial judge's ruling that Appellant was not in custody.

This court stated it looked at the totality of the circumstances through these thirteen factors, however they completely neglected to address eight of the thirteen factors. This court oversteps its power by disregarding the standard of review as it is not this court's job to completely reevaluate the facts to determine whether Appellant was in custody, but to determine if there is **any evidence** that supports the trial court's ruling that the statements were admissible based on Appellant not being in custody. Twelve of the thirteen factors have clear evidence supporting the trial judge's ruling. Therefore, this court should reconsider the ruling that the trial judge erred in admitting statements from the dash cam video, and find in accordance with its standard of review, that there exists evidence to support the trial court's determination.

Section 56-5-2953

On appeal, Appellant argues that the trial judge erred by denying Appellant's motion to dismiss. That is not the issue that was raised at trial. At trial, trial counsel moved for a directed verdict for failure to meet the requirements under section 56-5- 2953. This is the issue that should have been ruled upon. (R. 117). A defendant is entitled to a directed verdict when the State fails

to produce evidence of the offense charged. The offense charged was driving under the influence (S.C. Code Ann §56-5-2930(A). The elements of the DUI offense that the State must prove are a person must, drive a motor vehicle within this state and be under the influence of alcohol, drugs, or a combination to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired. Id. There is certainly evidence supporting all of the required elements of DUI and Appellant has not alleged that the State has failed to establish any of the elements. As a result, this Court should reconsider its ruling and find the trial court did not err in denying the motion for a directed verdict.

First, this Court ruled that a dismissal was not required, but for the wrong reason. This Court relies on the reasoning in State v. Taylor[1] that the remedy for the failure to meet a statutory requirement is not dismissal, however a dismissal isn't required here because trial counsel asked for a directed verdict and compliance with a procedural requirement is irrelevant for the purposes of a directed verdict. Showing a recorded video of the field sobriety tests and Miranda warnings is not an element of the DUI offense and therefore a directed verdict would be improper.

Second, this Court attempts to add a requirement to the procedural prerequisite for the State that is nowhere in the statute. This Court ruled that the second, redacted dash cam video played only at trial failed to comply with the DUI statute. The statute governing the video recording of a DUI offense, section 56-5- 2953 provides:

> (A) A person who violates Section 56-5-2930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and the breath test site video recorded.
>
> (1)(a)The video recording at the incident site must:
> (i) not begin later than the activation of the officer's blue lights;
> (ii) include any field sobriety tests administered; and
> (iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that

[1] State v. Taylor 411 S.C. 294, 768 S.E.2d 71 (Ct. App. 2014).

> the person violated Section 56-5-2945, and can show the person being advised of his Miranda rights.
> ...

S.C. Code Ann § 56-5-2953(A). Nowhere in the statute does it state that this video must be shown to the trier of fact. This Court quotes State v. Kinard stating the purpose of this statute is twofold: "The first purpose is to create direct evidence of a DUI arrest by requiring the video include any field sobriety tests administered. The other purpose... is to protect the rights of the defendant by 'requiring video recording of the person's arrest and of the officer issuing Miranda warnings." State v. Kinard, 427 S.C. 367, 372, 831 S.E.2d 138, 140-141 (Cr. App. 2019). "The purpose" of the video is not to show to the trier of fact, but to provide the defendant with what evidence the State has against him and to protect his rights by allowing him to make an informed decision on whether to proceed to trial knowing all of the evidence against him. There is no requirement the State play any portion of the video for the jury and if the State sought to prove its case entirely based on other evidence it is free to do so. This Court's opinion seems to put a requirement on how the State prosecutes its case and presents its evidence and this is a decision for the prosecutor and not the judiciary. "In carrying out his duty, the prosecutor independently decides whether to prosecute, decides what evidence to submit to the court, and negotiates the State's position in plea bargaining. In re Richland County Magistrates Court, 389 S.C. 408, 411, 699 S.E.2d 161 (2010).

By adding the requirement that the video recording of the field sobriety tests and Miranda warnings must be shown at trial, this court oversteps its authority by telling the State how they must present their case. Nothing in the statute requires the video recording be shown to the trier of fact, but rather that it simply must exist. "The video recordings of the incident site and of the breath test site **are admissible** pursuant to the South Carolina Rules of Evidence in a criminal, administrative, or civil proceeding by any party to the action." (Emphasis added) S.C. Code Ann

§56-5-2953(3). The statute states the video recordings are admissible not that they must be admitted as this Court is indicates.

Third, the full video produced by the arresting officer does comply with the statute. There is a video that was turned over to Appellant which shows all of the field sobriety tests as well as Appellant being Mirandized; however at trial there were technical issues, and it just wasn't played for the trier of fact because of computer issues. It is clear from the record however that there is a full video.[2] First, had the video been incomplete prior to trial, trial counsel would have made a pretrial motion to dismiss because the video did not comply with the DUI statute. No such pretrial motion was made. Further, there is discussion about making redactions to the video with the field sobriety tests because at the beginning of the video there is some discussions about a hit and run and the damage to the vehicle. (R. 47-49) Later, trial counsel claims "I don't know what is on that video and what can and can't be played" (R. 117). Trial counsel then makes his directed verdict motion for failure to meet the requirements under the DUI law. (R. 117). The State responds by stating that the State and trial counsel made the redactions together and both know what the video includes (R. 117).

The Court of Appeals misapplied the standard of review, misconstrued a directed verdict motion as a motion to dismiss, neglected to properly analyze all of the factors in Williams, as well as misinterpreted §56-5-2953. Therefore this petition for rehearing should be granted.

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[2] The State intends to file a motion to supplement the record pursuant to Rule 212(b) SCACR with the full unredacted dashcam video.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant this petition for rehearing, find that the trial court did not err in admitting statements made by Appellant on a dash camera recording, that the State did comply with the DUI statute, and therefore affirm Appellant's convictions.

Respectfully submitted,

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April 21, 2022

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-002242

THE STATE, Respondent,

v.

PHILLIP WAYNE LOWERY, Appellant.

MOTION TO ALLOW THE STATE TO SUPPLEMENT RECORD ON APPEAL

The State through its undersigned counsel, would respectfully show unto the Court as follows:

I.

On June 5, 2018, Appellant was indicted by the Greenville County Grand Jury for driving under the influence. On December 12-13, 2018, Appellant proceeded to a jury trial before the Honorable Robin B. Stilwell. The Jury found Appellant guilty as charged and the trial judge sentenced him to two years' incarceration.

II.

On appeal, Appellant has raised two separate issues, however the second issue is the purpose of this motion. Appellant contends that "the trial court erred in failing to dismiss Appellant's charge, where the dashcam video failed to comply with the driving under the

influence statute and did not include all of the field sobriety tests administered or any of the officers reading Appellant his Miranda Rights." There were two dash cam videos. The first was Officer Vallin's Dashcam video that showed his questioning of Appellant. Vallin then turned Appellant over to Trooper McNeely to conduct the field sobriety tests. The second dashcam video is a recording of the field sobriety tests and ultimately the Miranda warnings. Trial counsel had concerns regarding the characterization of the prior car accident, that led to this investigation, within the recordings. After hearing those concerns, the trial judge instructed the parties to redact the portions of the recording which unnecessarily discussed the earlier traffic incident. The trial judge made it clear that he wanted the parties to discuss any and all issues with the video recordings and send him an email before the trial began in earnest the following day. (R. p. 23, Line 12-R. p. 32, line 16; R. p. 39, lines 3-23; R. p. 47, line 14-R. p. 50, line 15).

Through Trooper McNeely's testimony, the State admitted the dashcam recording of the tests he performed on Appellant along with the conversation between the two men. (R.p.70). When asked whether the defense counsel had any objections, defense counsel had none provided the agreed redactions were performed on it. (R. p. 64-72). In Trooper McNeely's testimony he would explain the test he performed and then that portion of the video would be shown to the trier of fact. (R. p. 64-72). Trooper McNeely then testified that after Appellant was arrested and placed in handcuffs, he issued him Miranda warnings. However, when the State tried to play that portion of the video, the State requested an off-the-record bench conference. (R. 74). When the parties returned, the trial judge announced the State was having technical difficulties with playing that portion of the recording. (R. 74). However, Trooper McNeely confirmed that the video did record and showed him providing Appellant with Miranda warnings. (R. 75).

Defense counsel did not lodge any objection to playing the recording despite the State's inability to display the portion showing the Miranda warnings. (R. 74-75). After the State rested its case, defense counsel moved for a directed verdict claiming the State failed to provide evidence other than Appellant's own statements that he was driving the vehicle but made no objection relating to the admission of Trooper McNeely's recording. (R. 83-85). It was not until after the defense presented its case that defense counsel then again moved for a directed verdict, this time for failure to play the portion of Trooper McNeely's recording, which showed him issuing the Miranda warnings. (R. 117). Defense counsel claimed he did not object previously because he did not know how the video was "going to play out" and did not know what was on the video and what could or could not be played. (R. 116-117). Defense counsel maintained that the DUI statute required the issuance of Miranda warnings be recorded and such recording needs to be shown to the trier of fact. (R. 116-117).

In response, the State noted that the recording issue was addressed at bar, on the record, just shortly before and that the State along with trial counsel redacted the video together the night before to ensure the parties complied with the trial judge's pretrial rulings. As a result Appellant knew the Miranda warnings were contained in the recording. (R. 117).

III.

Pursuant to Rule 212(b), SCACR, the State moves for the leave of this Court to supplement the record on appeal to include the Trooper McNeely's unredacted dashcam video. There is evidence in the record that the video exists and was before the trial court even though it was not admitted as an exhibit at trial. There is evidence that the State and defense counsel had both seen the full unredacted video. The statute governing the video recording of a DUI offense, section 56-5- 2953 provides:

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

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

(i) not begin later than the activation of the officer's blue lights;
(ii) include any field sobriety tests administered; and
(iii) include the arrest of a person for a violation of Section 56-5-2930 or Section 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and can show the person being advised of his Miranda rights.

...

S.C. Code Ann § 56-5-2953(A). The State respectfully submits that it is important for this Court to review the full unredacted video that the State and defense counsel had access to in order to determine whether the State properly complied with the DUI statute. Therefore, the State requests leave from this Court to supplement the record on appeal with Trooper McNeely's full unredacted dashcam video.

WHEREFORE, Respondent prays that this Court will allow the State to supplement the Record on Appeal with a copy of the full unredacted video; accept the filing of the State's copy of the video; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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April 21, 2022

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

PHILLIP WAYNE LOWERY,

APPELLANT

APPELLATE CASE NO. 2018-002242

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

Opinion No. 5983

RETURN TO MOTION TO ALLOW THE STATE TO SUPPLEMENT THE RECORD ON APPEAL

Appellant respectfully requests that this Court deny Respondent's Motion to Allow the State to Supplement the Record on Appeal ("Motion"), because the extrajudicial video the state seeks to add to the Record on Appeal through its untimely motion was not viewed by either the trial judge or the jury, nor was it even made an exhibit at trial. As such, Rule 210, SCACR prevents its inclusion in the Record on Appeal. Further, the state failed to designate this video at the time the Initial Brief of Respondent and Designation of Matter were filed on May 22, 2020, over 700 days ago.

The state should not be permitted to add evidence to the record at this late stage, particularly evidence that was not before the trial court. Additionally, the state did not confer with the undersigned prior to the filing of the Motion. Appellant vehemently opposes the motion and respectfully asks this Court to deny it.

At the outset, the state's motion strangely omits any reference to the published opinion this Court issued on April 6, 2022 or its own Petition for Rehearing, filed April 21, 2022.[1] State v. Lowery, Op. No. 5903 (S.C. Ct. App. filed April 6, 2022) (Howard Adv. Sh. No. 12 at 72). In that opinion, this Court plainly stated: "The video transported to this court stops playing at approximately five minutes into the twelve minute video. The final sobriety test and *Miranda* warnings are not viewable." Id. n. 3. The state does not appear to dispute that the video transported to this Court from the Greenville County Clerk of Court is the same video seen by the trial judge and jury after the solicitor moved it into evidence.[2] The video the state now seeks to include in the Record on Appeal is *different* than the one seen by the fact finder and the trial judge. It was not made an exhibit, and there is no evidence in the trial transcript that the circuit court judge saw this unredacted video. Rather, the state seeks to introduce evidence that was in the possession of its solicitor yet never made an exhibit at trial.

The state's motion is untimely. Following the filing of its 1) Initial Brief of Respondent, 2) Designation of Matter, 3) Final Brief of Respondent, 4) the Record on Appeal, and *after* oral argument and the issuance of a published opinion and *after* filing its Petition for Rehearing, the state now seeks to supplement the record with a video that was not shown to the judge or jury and

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1 The state's petition for rehearing inadvertently cites to the *Shearouse* Advance Sheets.

2 This Court issued a Transportation Order on June 23, 2020, directing that two exhibits (State's Exhibits 1 and 2) be transported to this Court.

was not made an exhibit. This motion should be denied under Rule 210, SCACR, and the accompanying authority laid out below.

The sole authority referenced by the state in its motion is Rule 212(b), SCACR; the state does not rely on any case law to support its position. Rule 212 sets forth:

> (a) By the Court. The appellate court may require copies of all or any part of the transcript of proceedings *or other matter which was before the lower court* or administrative tribunal to be sent up for its inspection and consideration. It may likewise require a report of the trial or hearing, or of any matters relative thereto, to be made by the trial judge or administrative tribunal. These matters shall become part of the Record on Appeal.
>
> (b) By a Party. With the written consent of all attorneys of record, a party may supplement the Record on Appeal at any time before argument commences. Without such consent or after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so. In response to that motion, the other party(s) shall designate any supplemental materials which that party desires to add if the Court grants the motion.

Rule 212(a) & (b), SCACR (emphasis added).

In Jones v. Builders Inv. Group, LLC, this Court received a motion to supplement the record pursuant to Rule 212(a), SCACR. 415 S.C. 321, 781 S.E.2d 737 (Ct. App. 2015). According to footnote 7, the appellant "did not submit [evidence to the circuit court] prior to the court's order granting JNOV, [so] the court refused to consider it." Id. at 330, 781 S.E.2d at 742, n. 7. Eight days before the oral argument in Jones, this Court received a motion pursuant to Rule 212(a), SCACR, wherein the appellant sought to include a letter documenting payments he made on the loan in dispute. Id. This Court denied the motion.[3] Id. As such, Rule 212, SCACR, is improperly relied upon for relief by the state in this case.

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[3] Although not referenced in the opinion, the Order denying the motion found "the motion to be an untimely request and is not evidence which should be considered on appeal." See Order dated September 4, 2015, available at https://ctrack.sccourts.org/public/caseView.do?csIID=55512 (last accessed April 22, 2022). Appellate Case No. 2013-002673.

In addition, Rule 210, SCACR also serves as a bar to the inclusion of the extraneous video in the Record on Appeal. The relevant portion provides "[t]he Record *shall not, however, include matter which was not presented to the lower court* or tribunal." Rule 210(c), SCACR (emphasis added). Also, "the appellate court will not consider any fact which does not appear in the Record on Appeal," with limited exceptions. Rule 210(h), SCACR.

As discussed during oral argument on March 8, 2022, and as evident in the existing Record on Appeal, the trial judge did not view the video the state now seeks to place before this Court. None of the citations listed in the state's current motion refer to statements by the solicitor, defense counsel, or the trial judge concluding that the trial judge watched the video in question. Instead, the trial judge observed the properly admitted video before this Court, technical glitch included. Essentially, the state is asking this Court to decide an issue in dispute based on evidence never presented to the circuit court.

The Record on Appeal before this Court belies the state's assertion that this video was "before the trial court." Motion p. 3. Contrary to the state's assertion, the Record does not contain *any evidence* that the unredacted video was viewed by the trial judge. The solicitor states, in response to an objection by defense counsel: "Judge, I, you know, feel like we addressed this at the bar a minute ago. And I would just, as a matter of record, [defense counsel] and Ms. Henderson and I all redacted that video together last night. So we're all on the same page what is on there." R. 117, ll. 16 – 21. It is notable that the solicitor does not reference the judge watching the video, nor does the trial judge indicate that he watched it when he denied the renewed directed verdict motion. R. 117, l. 22 – R. 118, l. 3. There is no evidence, nor reason to believe, the judge or the jury watched the unredacted video. The state failed to establish the record; it must live with its own mistake.

An abundance of law supports Appellant's position. "This Court does not sit as a trial court to receive evidence on disputed issues of fact; [this Court's] function is to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court." Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984). This Court can derive guidance from numerous cases which interpret Rule 210, SCACR consistent with the rule's plain language.

In State v. Gordon, 408 S.C. 536, 759 S.E.2d 755, n. 2 (Ct. App. 2014), this Court noted how "the record does not indicate whether the circuit court reviewed the recording [of a DUI arrest] or not." This Court noted "[t]he State did not put on the record the fact that the circuit court allegedly did not view the recording or raise any objection to the court allegedly not reviewing the recording." Id. Citing Rule 210(h) SCACR, this Court concluded "we cannot consider the state's assertion the circuit court did not review the recording." Id.

In State v. Elwell, a case cited by the state in its brief before this Court in the matter *sub judice*, this Court dealt with a similar situation regarding a video and an unpreserved argument by the state. 396 S.C. 330, 721 S.E.2d 451 (Ct. App. 2011). In Elwell, the appellant refused a breath test and a police officer turned off the video recorder at the breath-testing site. Id. at 332, 721 S.E.2d at 452. The trial court had previously granted Elwell's motion to dismiss, "holding a suspect must be videotaped for twenty minutes even when the suspect refuses to take a breath test." Id. Although this Court reversed, it still held that "whether the videotape in fact depicts the entire waiting period is unpreserved." Id. at 333, 721 S.E.2d at 452, n. 3. In its entirety, footnote 3 explained how the state failed to raise a nearly identical matter in an untimely fashion:

> During oral argument, the State sought to supplement the record with a DVD of the breath test to prove Elwell was videotaped for twenty minutes. Defense counsel objected. This court did not rule on the motion, and the State did not follow-up with a written motion. In any event, both parties agreed during oral argument that

> the court could access an online version of the video using information properly included in the record. The record included an internet link, username, and password to access the video, and the court has reviewed the online video. *However, whether the videotape in fact depicts the entire waiting period is unpreserved.* The State did not contest that issue before the trial court, and its oral argument before this court was the first time the issue was raised.

Id. (emphasis added and internal citations omitted).

"It is simply not the proper role of an appellate court to create a record for the parties and then search through it... attempting to identify the critical information necessary to make the case for a litigant." Groveland Water & Sewer, Dist. v. City of Blackfoot, 505 P.3d 722, 727 (Idaho 2022) (citing Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (Idaho 2010)). An appellate court has no jurisdiction to review evidence that is not in the record on appeal, and it cannot receive new evidence. Niemann v. Crosby Dev. Co., 2011-1337 (La. App. 1 Cir. 5/3/12), 92 S.o.3d 1039, 1044. "It is the responsibility of the parties ... to ensure that all documentation relevant to the disposition of an appeal are duly filed with the clerk of court before the issuance of [an] appellate decision." Williams v. Food Lion, 213 Ga.App. 865, 868, 446 S.E.2d 221 (1994).

In the case at bar, the state brought to this Court's attention the video discrepancy *for the first time* at oral argument. Until last week, after the published opinion had been issued, there was no motion to supplement the record filed. It was only *after* the opinion, unfavorable to the state, was issued did the state seek to supplement the record. As such, this matter is wholly unpreserved, and the state's motion should be denied.

The principle of Rule 210, SCACR, has been consistently applied to appellate parties in South Carolina for decades. "The transcript of record is the source of our information as to what occurred in the trial of the case below; its very object is to inform the Court authoritatively of the legal questions contested below and of the facts pertaining thereto." South Carolina State Highway Dept. v. Meredith, 241 S.C. 306, 128 S.E.2d 179 (1962) (citing Sawyer, Wallace & Co. v.

Macaulay, 18 S.C. 543 (1883). "This Court will not consider any fact which does not appear in the transcript of record nor will any fact stated in an exception be considered unless it appears from the record that it is true. Likewise, counsel is prohibits from embodying in their briefs any fact which does not appear in the record." Meredith, supra, at 311, 128 S.E.2d at 182.

In Helms Realty, Inc. v. Gibson-Wall Co., our Supreme Court declined to address a party's claim regarding an allegedly improper jury charge, where the charge did not appear in the Record on Appeal. 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005). In Spreeuw v. Barker, the South Carolina Supreme Court also refused to consider a fact that did not appear in the record, citing Rule 210(h), SCACR. 385 S.C. 45, 68, 682 S.E.2d 843, 854 (2009).

More recently before this Court was State v. Hawes, 423 S.C. 118, 813 S.E.2d 513 (Ct. App. 2018). In Hawes, this Court held that the appellant abandoned his argument regarding the admissibility of various exhibits, because the challenged exhibits were not included in the designation of matter. Id. at 128, 813 S.E.2d at 518 ("Hawes failed to include the challenged exhibits in his designation of matter to be included in the record on appeal, and neither the crime scene video nor the autopsy photographs appear in the record."). Similarly, in this case the state did not designate the unredacted video—seemingly because Counsel knew the video did not comply with the South Carolina Appellate Court Rules because it was not made an exhibit and was not before the trial court.

In State v. Bonilla, this Court cited Rule 210(h) and noted its scope of review was limited by the evidence in the Record on Appeal. 429 S.C. 253, 274, 838 S.E.2d 1, 11 (Ct. App. 2019) ("Thus, this court's review is limited to the testimony provided by Bonilla and his attorney, who took care not to reveal the substance of his confidential discussions with Bonilla. Without more

information regarding what Bonilla and his attorney actually discussed, this court cannot find that the circuit court's determination regarding informed consent was 'clearly wrong.' ").

Just two years ago in Fountain v. Fred's, Inc., this Court maintained the integrity of Rule 210, SCACR, when it refused to allow evidence not presented to the circuit court to be included on the Record on Appeal:

> On November 29, 2017, this court issued an order striking the settlement agreement from the record on appeal in this case based on Rule 210(c), SCACR because the settlement agreement was never presented to the circuit court. Because the parties failed to present the settlement agreement to the circuit court and the settlement agreement is not part of the record on appeal, we find this argument is not preserved for this court's review. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised and ruled on by the [circuit] court.").

429 S.C. 553, 554, 839 S.E.2d 475, 486 n. 18 (Ct. App. 2020).[4]

Interestingly, our state Supreme Court also referenced Rule 210, SCACR, in its opinion in the same case:

> Although the trial court concluded Fred's conducted periodic inspections, the evidence to support this finding is not included in the record on appeal, and under our de novo standard of review, we are unable to reach the same conclusion. *See* Rule 210(h), SCACR (providing an appellate court will not consider any fact which does not appear in the record on appeal).

Fountain v. Fred's, Inc. Op. No. 28086 (S.C. Sup. Ct. filed March 2, 2022) (Howard Adv. Sh. No. 8 at 15).

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[4] Similar to the state in the matter at bar, the appellant in Fountain argued (unsuccessfully) that the settlement agreement should remain in the Record on Appeal *even though it was not entered into evidence.* See "Appellant's Response to Respondent Wildevco, LLC's Motion to Strike Matter and Exclude Matter from Record on Appeal" dated October 25, 2017 available at https://ctrack.sccourts.org/public/caseView.do?csIID=64457 (last accessed April 22, 2022). In granting the motion to strike, this Court noted "the agreement was not actually presented to the lower court."

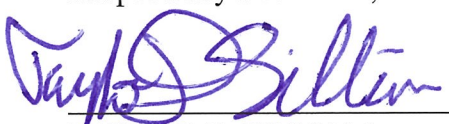
Respondent is improperly attempting to introduce new evidence into the record. This is improper:

> A reviewing court must generally consider only those issues that the record shows were presented and considered by the district court in deciding the matter before it, and is limited to consideration of the evidence in the record, as it existed at the time the trial court rendered its judgment. Thus, the appellate court will not take into account evidence presented for the first time on appeal, and will not consider new facts, testimony, exhibits, or other factual materials relating to the merits of an appeal that were not presented to the trial court and included in the trial court record.

5 AM. JUR. 2d *Appellate Review* § 413 (footnotes omitted).

Accordingly, the state's supplemental material should be excluded pursuant to Rules 210 and 212, SCACR, and the Motion should be denied.

Respectfully Submitted,



TAYLOR D GILLIAM
Appellate Defender

This 27th day of April, 2022.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-002242

THE STATE, Respondent,

v.

PHILLIP WAYNE LOWERY, Appellant.

STATE'S REPLY

On April 27, 2022, Appellant filed a return to the State's motion to supplement the record. Appellant relied on Rule 210, SCACR, stating the State should not be permitted to add evidence to the record that was not before the trial court. As mentioned in the State's motion to supplement the record, the full unredacted video was in front of the trial court and is mentioned several times in the record. Trial counsel had concerns regarding the characterization of the prior car accident that led to this investigation, within the recordings. After hearing those concerns, the trial judge instructed the parties to redact the portions of the recordings which unnecessarily discussed the earlier traffic incident. The trial judge made it clear that he wanted the parties to discuss any and all issues with the video recordings and send him an email before the trial began in earnest the following day. (R 23-32, 39, 47-50). Further when trial counsel alleged he did not object earlier because he did not know what could or couldn't be played, the State responded that the recording issue was addressed at bar, on the record, and that the State along with trial counsel

redacted the video together the night before to ensure the parties complied with the trial judge's pretrial rulings. It is incorrect to assert that because the full unredacted video was not made an exhibit at trial that it was not before the trial court.

Appellant also argues that this motion is untimely under Rule 212, SCACR. Rule 212 states that without consent or after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so. It does not say that it is not allowed, just that in order to do so after arguments one must motion the court. Rule 212, SCACR. Appellant cites to Jones v. Builders Inv. Group, LLC[1] in support of his argument stating that this Court denied a motion to supplement because it was not submitted to the circuit court prior to the court's order granting JNOV, so it wasn't considered. (Appellant's Return p. 3). This case differs because in Jones, the trial was held in 2012 and Jones was attempting to supplement the record with a letter documenting payments he made on a loan and the letter was dated May 8, 2014. In this case, the State is attempting to supplement the record with a video that was in existence at the time of trial and was available to the circuit court.

WHEREFORE, Respondent prays that this Court will accept the filing of the State's Supplemental Record on Appeal; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

AMBREE MULLER
Assistant Attorney General

[1] Jones v. Builders Inv. Group, LLC, 415 S.C. 321, 781 S.E.2d 737 (Ct. App. 2015)

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May 2, 2022

The South Carolina Court of Appeals

The State, Respondent,

v.

Phillip Wayne Lowery, Appellant.

Appellate Case No. 2018-002242

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

The State also filed a motion to supplement the record. Lowery filed a return, and the State filed a reply. After review of the filings, the motion to supplement is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
William M. Blitch, Jr., Esquire

FILED
May 18 2022

Taylor Davis Gilliam, Esquire
William Walter Wilkins, III, Esquire
Ambree Michele Muller, Esquire
The Honorable Robin B. Stilwell