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IN THE

Supreme Court of Virginia

AT RICHMOND

8178

LLOYD WAYNE DELAWDER

V.

COMMONWEALTH OF VIRGINIA

Appendix

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IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

RECORD NO. 8178

LLOYD WAYNE DELAWDER, APPELLANT

v.

COMMONWEALTH OF VIRGINIA, APPELLEE

APPENDIX

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LLOYD WAYNE DELAWDER, APPELLANT

v.

COMMONWEALTH OF VIRGINIA, APPELLEE

APPENDIX

I. Basic Initial Pleading

True bill returned February 21, 1972, by the Rockingham County Circuit Court Grand Jury charging defendant, Lloyd Wayne Delawder, with involuntary manslaughter in connection with death of Earl Everette Mason on October 7, 1971.

II. Judgment Appealed From

Judgment of guilty of involuntary manslaughter and sentence of six months confinement in jail and $1,000 fine entered in accordance with verdict of jury, July 11, 1972.

III. The Assignments of Error

1. The trial court erred in overruling the defendant's motion

to strike the Commonwealth's evidence. Even assuming that the defendant was exceeding the speed limit, which was the only evidence of negligence on the part of the defendant presented by the Commonwealth, the Commonwealth did not sustain its burden of proving involuntary manslaughter, since the only logical inference to be drawn from the evidence adduced was that the death of Earl Everette Mason was caused by the negligence of Lonnie Mook; consequently if the defendant was guilty of negligence, such was the remote cause of the death of Earl Everette Mason.

2. The trial court erred in refusing to grant an instruction tendered by the defendant under which the jury could find the defendant guilty of exceeding the speed limit or reckless driving if it believed the evidence insufficient to establish beyond a reasonable doubt that the defendant was guilty of involuntary manslaughter. The refusal to grant this instruction was error because the only evidence of negligence on the part of the defendant offered by the Commonwealth was that he drove at an excessive rate of speed immediately prior to an accident which resulted in the death of Earl Everette Mason. According to the Commonwealth's witnesses, the defendant was struck from the rear immediately prior to the accident, by another vehicle which was traveling at an excessive rate of speed. The court, therefore, erred when it refused the instruction on excessive speed or

reckless driving which would have given the jury an opportunity to make its finding in accordance with the defendant's theory of the case, i.e., that the death of Earl Everette Mason was proximately caused by the negligence of the other driver, Lonnie Mook.

3. The trial court erred in sustaining the objection of the Commonwealth to an attempt by the defendant to elicit testimony about the statements of Lonnie Mook made to a state trooper shortly after the accident. Such statements were admissible as a part of the res gestae. This ruling was prejudicial in that it prevented the defendant from further establishing the negligence of Lonnie Mook as the proximate cause of the death of Earl Everette Mason.

4. The trial court erred in overruling the defendant's motion to set aside the jury's verdict as contrary to the law and evidence. Even assuming that the defendant was exceeding the speed limit, which was the only evidence of negligence on the part of the defendant presented by the Commonwealth, the Commonwealth did not sustain its burden of proving involuntary manslaughter, since the only logical inference to be drawn from the evidence adduced was that the death of Earl Everette Mason was caused by the negligence of Lonnie Mook; consequently, if the defendant was guilty of negligence, such was the remote cause of the death of Earl Everette Mason.

Submitted by Lloyd Wayne Delawder, by counsel, August 8, 1972.

IV. Instruction No. 6 on proximate cause

The court instructs the jury that to be guilty of involuntary manslaughter, the defendant, Lloyd Delawder, must have been guilty of gross negligence which was the proximate cause of the death of Earl Everette Mason. Proximate cause connotes a causal relationship and not nearness in point of time and space. Such causal relationship must be by natural and unbroken sequence between the gross negligence complained of and the injury suffered. Thus, the defendant cannot be held criminally responsible where there intervened the independent act of a third person, between defendant's gross negligence and the death of Earl Everette Mason, which independent act was itself the proximate cause of such death.

V. Proposed Instruction on lesser and included offenses of speeding and reckless driving

The court instructs the jury that if you believe the evidence is insufficient to establish beyond a reasonable doubt that the defendant is guilty of involuntary manslaughter, you may, nevertheless, find the defendant guilty of exceeding the speed limit or reckless driving. To do so you must be convinced beyond a reasonable doubt that the defendant exceeded the speed limit or operated his automobile in a careless or reckless manner. If you find defendant guilty of exceeding the speed limit, you may impose a fine of not

less than one nor more than ten days, or both. If you find the defendant guilty of reckless driving you may impose a fine of not more than one thousand dollars or a jail sentence of not more than twelve months or both.

VI. Transcript of trial

1. WITNESS - CAROLYN MONGOLD SIMMERS

2. DIRECT EXAMINATION BY MR. DEPOY:

3. Q. Have you just recently been married?

4. A. Yes sir.

5. Q. Were you formerly Carolyn Mongold?

6. A. Yes sir.

7. Q. And where do you live?

8. A. Timberville.

9. Q. Did you know Earl Mason?

10. A. Yes sir.

11. Q. Did you use to date him?

12. A. Yes sir.

13. Q. Do you recall whether or not you were dating him back on 8-22-71?

14. A. Yes sir.

15. Q. Carolyn, do you recall the events which occurred on the evening of

16. that date?

17. A. Yes sir.

18. Q. What was that day? What day of the week was that?

19. A. It was on a Sunday.

20. Q. Sunday?

21. A. Yes sir.

22. Q. Now Carolyn, do you recall what the weather was on that particular

23. day?

24. A. Well it was warm and real sunny.

1. Q. Alright now do you recall approximately what time you and young
2. Mason left your home?
3. A. I'd say around six.
4. Q. Around six. Now where were you going?
5. A. (Inaudible).
6. Q. Alright now Carolyn, what road are we talking about?
7. A. Route 259.
8. Q. Alright now is that in Rockingham County?
9. A. Yes.
10. Q. Now what is the nature of this roadway there? Are there houses
11. or is this just open country?
12. A. No there is houses on that road.
13. Q. How many? Do you know?
14. A. No. There's a good many.
15. Q. Are there any places of business along there?
16. A. Yes sir.
17. Q. Now as you and young Mason left your home how were you travelling?
18. A. We were walking.
19. Q. Walking?
20. A. Yes.
21. Q. And in what direction did you walk? I don't mean north, south,
22. east, or west. Were you headed towards the road?
23. A. Towards the road.
24. Q. Alright and is your home at road level?

1. A. It sets up kind of on a bank.
2. Q. Alright now how were you going down the bank?
3. A. I was coming down the steps and across the driveway.
4. Q. Alright now Carolyn, how close to the road were you when you first
5. realized that everything wasn't just as it should be?
6. A. About three steps.
7. Q. About three steps?
8. A. Yes.
9. Q. Now what at that point caught your attention?
10. A. I heard a noise like a car motor racing...
11. Q. Alright now where was this sound coming from?
12. A. It was coming from up the road.
13. Q. To your left or to your right?
14. A. To my left.
15. Q. Alright now did you look in that direction?
16. A. When I heard the car motor racing.
17. Q. Alright and what did you see?
18. A. I didn't see anything the first time I looked.
19. Q. Alright and what occurred then?
20. A. . . a car came up the road and I looked up and I didn't see anything . .
21. Q. Well where was Earl when you looked back again?
22. A. Across the road.
23. Q. He was across the road?
24. A. He was across the road.

1. Q. Alright and you looked back again and what did you see?
2. A. I saw two cars coming down the road and then I heard something like
3. a crash. Then I saw one fender of a car go up in the air and then I
4. saw the other car coming sideways towards me . . .
5. Q. Alright now let me ask you this, when you observed these cars did
6. you know what type of automobiles they were when you first saw them?
7. A. No I didn't.
8. Q. Alright now did you later learn who the drivers were?
9. A. Yes sir.
10. Q. Who were the drivers?
11. A. One was Lonnie Mook and the other was Delawder.
12. Q. The defendant?
13. A. Yes sir.
14. Q. Alright now do you know, do you recall, which person was driving
15. which car in regard to the front and rear car?
16. A. Yes.
17. Q. Tell the jury which was which.
18. A. The defendant was driving the car in front and Lonnie Mook was
19. driving the car in back.
20. Q. Alright now when you first observed these cars were they on a
21. straight piece of road or were they in a turn?
22. A. The cars were starting out of a turn.
23. Q. Is that turn do you recall as you would stand there facing up the road,
24. is it a turn to the left or to the right?

1. A. To the right.
2. Q. Alright now at the time you first observed these automobiles how
3. far apart were they?
4. A. It looked to me like they were right together.
5. Q. By that do you mean the rear car was very close to the car in front?
6. A. Yes sir.
7. Q. Alright now what speeds were they travelling?
8. A. I'd say a high rate of speed.
9. Q. Now what is a high rate of speed to you, Carolyn?
10. A. Between 80 and 100.
11. Q. Now you live - how long have you lived along this stretch of road?
12. A. About ten years.
13. Q. Are you familiar with the way traffic lies here?
14. A. Yes sir.
15. Q. Now were you watching the vehicles when they came in contact with
16. each other?
17. A. Yes I was looking that way.
18. Q. Now do you know what caused this contact?
19. A. No.
20. Q. Now I believe you have testified after the contact you observed
21. the vehicles start into a slide, is that correct?
22. A. The one in front started into a slide.
23. Q. Now do you know whether or not it went off the road at that time?
24. A. I guess he would have to be off the road because there was a lot of

1. dust.

2. COURT: I didn't hear the question.

3. A. I guess he would have to be off the road because there was a lot of

4. dust.

5. COURT: You guess they would have to be off the

6. road because there was a lot of dust?

7. A. Yes.

8. Q. Now is this when you turned away?

9. A. Yes when the cars started coming towards me I turned away.

10. Q. Did you move or did you just stand there?

11. A. (Inaudible).

12. Q. Now let me ask you this, when you observed young Mason on the other

13. side of the road was he close to anything over there?

14. A. Two mailboxes.

15. Q. Two mailboxes? Are they for houses on that side of the road or are

16. they for your -

17. A. For our house.

18. Q. Now do you know how these mailboxes were constructed?

19. A. One was on a post and the other was in a milk can.

20. Q. What kind of posts were they?

21. A. Just regular fence posts.

22. Q. Alright now where was he in relation to those posts. Was he in regard

23. to the direction these cars were coming, was he in front of the posts

24. or was he behind the posts?

1. A. When I last saw him he was a little ways in front of them on the side.
2. Q. Now Carolyn, when you first observed these cars you testified to
3. what you feel their rate of speed was, were they travelling at
4. approximately the same rate of speed?
5. A. I would say so yes.
6. CROSS EXAMINATION BY MR. HOOVER:
7. Q. Mrs. Simmers, I would like to talk a little bit about the scene
8. itself in the way of the land. You testified in response to the
9. Commonwealth's Attorney's question that there were places of
10. business along this road, what do you mean by that?
11. A. A service station.
12. Q. Is this right at the scene?
13. A. It's a little ways.
14. Q. How far away?
15. A. Well one is not quite a half a mile.
16. Q. A half mile? That's the closest one?
17. A. Yes sir.
18. Q. So right in the immediate area there is no business?
19. A. No.
20. Q. In fact there is a good bit - it's all sort of open country or trees
21. along there isn't it?
22. A. Yes.
23. Q. Except for your house I believe.
24. A. (Inaudible).

1. Q. Which way?
2. A. Towards Broadway.
3. Q. Towards Broadway I believe there's a trailer.
4. A. Then there's some other houses.
5. Q. Yes towards Broadway but there are no businesses around -
6. A. Not to mention.
7. Q. Right and between the mailboxes you discussed and the curve that you
8. also mentioned there is no houses -
9. A. No.
10. Q. There is just trees along side. You said your house is up on a hill
11. and this is on the south side of 259, is that right?
12. A. I don't know directions.
13. Q. Toward Harrisonburg?
14. A. Yes.
15. Q. Tell me about the land on the other side of the road beyond the
16. mailbox where it happened.
17. A. Well it's kind of down a bank and then you go down to the river and
18. it's several feet down.
19. Q. So there is a bank beginning approximately at the edge of the road?
20. A. At the mailbox.
21. Q. And it continues to go down towards the river.
22. A. (Inaudible).
23. Q. In fact I believe the old 259 goes down below the level of the new 259?
24. Miss Simmers, you say - you say you were looking at the two vehicles

1. when you heard the crash and you say you saw something go up in the
2. air. Can you describe that a little bit more?
3. A. Well when I saw the two . . . it was blue.
4. Q. It was blue?
5. A. Yes. It looked kinda like the fender coming up over the tire.
6. I don't know I didn't see where it landed.
7. Q. How high up in the air did it go?
8. A. It went a good ways up.
9. Q. The automobile that was in the front was I believe you said that was
10. Mr. Delawder's automobile, what color was that?
11. A. Orange.
12. Q. An orange one? What color was the car that was following?
13. A. Blue.
14. Q. Now you saw the cars when you heard the crash . . . and then you
15. testified the front car, Mr. Delawder's car, started skidding or
16. coming towards you in a sideways fashion?
17. A. Yes sir. The passenger side towards me.
18. Q. The passenger side towards you. Did that start immediately upon
19. the crash. I mean did it start into that sideways pattern as soon
20. as the crash happened?
21. A. Pretty soon.
22. Q. Alright and you say you saw dust I believe.
23. A. Yes.
24. Q. Which was I guess at the same time of the crash. Did that car

1. stay in that passenger side leading position all the way down the
2. road until you stopped looking at it?
3. A. Yes when it started sliding towards me that's when I turned around.
4. Q. And you turned the other way. Did you ever see it again before it
5. came to a halt?
6. A. No.
7. Q. Now on this business of speed Mrs. Simmers, how do you figure
8. how fast it was going? Just tell me how you do that?
9. A. Well I drive myself and I have lived there for an awful long time
10. . . . .
11. Q. So the sound indicated it to you that there was an exceptional speed?
12. A. Yes.
13. Q. And you don't know from what vehicle - do you know from what
14. vehicle the sound was coming from?
15. A. No.
16. Q. There really was sound that leads you to conclude that there was
17. an exceptional speed. The fact of the matter is when you looked at
18. these two cars they were coming directly towards you and you said
19. they had just come out of the curve.
20. A. Yes.
21. Q. So it really was difficult to see you know other than an object
22. coming towards you about in terms of the car moving. Miss
23. Simmers, you saw that car coming the passenger side leading, did
24. you think it was going to come up to where you were?

1. A. I guess I thought it would.
2. Q. So it was a pretty frightening experience for you too as to what
3. was unfolding before your eyes. Did you run back or just turn your
4. head away?
5. A. Well I turned completely around towards the house . . .
6. Q. I see so you weren't aware of any of the other . . .
7. REDIRECT EXAMINATION BY MR. DEPOY:
8. Q. Carolyn, I believe you indicated when you first heard the cars is when
9. you gained the impression of speed. When you actually saw them did
10. this actually confirm it in your mind or what was your thought when
11. you saw them there?
12. A. (Inaudible).
13. CROSS EXAMINATION BY MR. HOOVER:
14. Q. On the same point if I may, the sequence of events I believe is that
15. when you looked back and saw the cars for the first time that's
16. about the same time you saw the crash.
17. A. Yes.
18. Q. So you really didn't have a chance to see the cars for any length of
19. time prior to the crash.
20. COURT: Mrs. Simmers, the recording device may
21. not have been in operation when you answered your
22. first question. Would you state for the record your
23. full name, your age, and your place of residency?
24. A. Carolyn Mongold Simmers. I am eighteen and I live at Timberville.

1. WITNESS - MERLE OREBAUGH

2. DIRECT EXAMINATION BY MR. DEPOY:

3. Q. State your name please.

4. A. Merle Orebaugh.

5. Q. Where do you live, Mr. Orebaugh?

6. A. On Route 259 west of Broadway.

7. Q. Do you recall an accident that occurred on Route 259 back in August,

8. 1971?

9. A. Yes sir.

10. Q. Is that an accident in which the defendant, Delawder, was involved?

11. A. Yes sir.

12. Q. Alright now Mr. Orebaugh, where did this occur in relation to where

13. you live at?

14. A. Right in front of my house.

15. Q. Right in front of your house. Are you familiar with the surroundings

16. there in that particular area?

17. A. Yes sir.

18. Q. What type of roadway is this at that particular point?

19. A. It's a two lane highway.

20. Q. Now is it in what you would describe as open country or are there

21. houses and other establishments on this stretch?

22. A. It's populated.

23. Q. Do you recall approximately how many homes or other places there

24. are along there?

1. A. Oh in that immediate area it's six or eight.
2. Q. Alright now are there houses and places of business possibly in the
3. immediate west of this area?
4. A. Yes.
5. Q. Alright and what about to the immediate east back towards
6. Broadway?
7. A. Yes.
8. Q. Alright now what is the nature of this Route 259? Is it a straight
9. stretch of road for long distances or what is the general nature of it?
10. A. It's generally straight with slight curves . . .
11. Q. Alright are there any dips or hills?
12. A. No.
13. Q. Are you speaking right at the scene?
14. A. Yes sir.
15. Q. Well how about generally?
16. A. (Inaudible).
17. Q. Does this involve curves or dips?
18. A. (Inaudible).
19. Q. Alright how long have you lived along the roadway there, Mr. Orebaugh?
20. A. I moved there just prior to this accident.
21. Q. Just prior to this accident. How long?
22. A. I reckon about thirty days.
23. Q. Where had you lived prior to this?
24. A. In Timberville.

1. Q. Alright now on this particular date and in reference to the time the
2. accident happened, what were you doing?
3. A. We were on our way home. We were coming up 259 into our house.
4. Q. Alright now by we who are you speaking of?
5. A. My wife and three children and myself.
6. Q. Alright how were you travelling, Mr. Orebaugh?
7. A. In a pickup truck.
8. Q. A pickup. Now who was driving on this particular occasion?
9. A. My boy was.
10. Q. Is that Jeffrey?
11. A. Yes.
12. Q. Now where were you seated in the pickup?
13. A. He was driving and my wife was in the middle and I was on the outside.
14. Q. And where were the other children?
15. A. They were on the back.
16. Q. On the back of the pickup. Now do you recall at approximately what
17. time this was?
18. A. It was late in the evening.
19. COURT: If he stated a time I didn't hear him.
20. MR. DEPOY: No he didn't.
21. COURT: He just said late -
22. MR. DEPOY: Late in the evening.
23. Q. Now Mr. Orebaugh, when did you first notice there was something
24. unusual?

1. A. When I saw these two cars coming around the turn.
2. Q. As you were there on the road, I guess you would have been travelling
3. in a westerly direction?
4. A. That's right.
5. Q. And you observed two vehicles, now where were they in relation to
6. your field of view?
7. A. Well my field of view ended at the curve in the road and they came
8. around the curve.
9. Q. Alright now how far or approximately how far were you from the
10. turn when you first observed the automobiles?
11. A. I don't know in feet how much. It was an easily sighted distance . . .
12. Q. Alright now can you describe the automobiles?
13. A. One was a Dodge and one was a Chevrolet Corvette.
14. Q. Alright and the Dodge was it in front or in the rear as it came around
15. the turn?
16. A. It was in front.
17. Q. Alright now just tell the jury what occurred, what you observed there?
18. A. Well the two cars came around the turn at an apparent high rate of
19. speed and the Dodge car evidently slowed its pace and the Chevrolet
20. hit it in its rear.
21. Q. And what happened?
22. A. The Chevrolet went down over the bank and tore up the side of the
23. road. The Dodge travelled along the edge of the road.
24. Q. On the left or right side?

1. A. On the north side. It finally struck a mailbox and went down over the
2. bank and started to going end over end. At the end of the first
3. turn over the boy was struck.
4. Q. What boy are you referring to?
5. A. The Mason boy.
6. Q. The Mason boy. Had you seen him prior to this time?
7. A. Yes he crossed the road as we were coming up the road.
8. Q. As you were coming up had you seen the car as he crossed the road
9. at the time he was crossing the road?
10. A. Yes sir.
11. Q. Alright you say the cars came together. Now at the time they came
12. together do you know what Mason's position was?
13. A. He was across the road.
14. Q. Across the road?
15. A. Yes sir.
16. Q. Alright and in relation to the mailboxes you spoke of was he anywhere
17. around these mailboxes?
18. A. Yes he was east and slightly north of them.
19. Q. Alright now after the accident and as the cars were skidding down the
20. road, were you able to observe what Mason was doing?
21. A. Well when the cars first crashed together he was more or less
22. standing still. And he evidently saw that the car was coming toward
23. him and he started to run and he took about three steps or three
24. feet before he was killed.

1. Q. Alright now what happened again when he was struck?
2. A. Well he was thrown several feet. I don't remember the number of
3. feet he travelled through the air. He landed just north of my
4. pickup.
5. Q. Did you see out to the tree where the approximate point he was
6. struck?
7. A. Yes sir.
8. Q. Now as this scene unfolded in front of you what did your son do in
9. relation to the operation of your truck?
10. A. He pulled to the side of the road.
11. Q. To the left or right side?
12. A. Right side.
13. Q. Now where did the Delawder, the defendant's car, end up in relation
14. to you as you were sitting along the road?
15. A. Well just beyond and to the right.
16. Q. In other words it went through behind you?
17. A. Yes.
18. Q. Alright were you watching it during this period of time?
19. A. Yes.
20. Q. You had indicated that it had rolled over. Do you know approximately
21. how many times it turned over?
22. A. Not really but it must have been about six or seven.
23. Q. Was it flopping end for end or side for side or what?
24. A. It went end for end the first time and then it went sideways a couple

1. of times and then it just slid on its top until it stopped.
2. Q. Alright now at the time it went by you what was it doing?
3. A. Sliding on its top.
4. Q. Sliding on its top. Now did it strike anything there close to you?
5. A. It hit a small tree which was about four inches.
6. Q. What was the result of that?
7. A. It tore the tree out and then the car came sliding on its top. . . .
8. Q. What do you mean it tore the tree out?
9. A. When it came sliding it tore the tree out of the ground.
10. Q. And then you say it travelled a short distance and stopped?
11. A. Yes.
12. Q. Now at the time you first observed these vehicles could you tell
13. that there was any appreciable difference in their speed?
14. A. No I wouldn't say that.
15. Q. Now what would you be able to say about their speed, Mr. Orebaugh?
16. A. Well it was a high rate of speed. I think I estimated it would be
17. about 80 miles an hour.
18. Q. Do you think that that's a safe estimate?
19. A. That's what I thought.
20. Q. But by that do you mean that they could have been travelling
21. somewhat faster or somewhat slower?
22. A. Yes I guess they could.
23. MR. DEPOY: Answer any questions that Mr. Hoover has.
24.

1. CROSS EXAMINATION BY MR. HOOVER:

2. Q. Mr. Orebaugh, could you go back to the immediate vicinity and
3. you testified, I believe, that there were some houses to the immediate
4. west of this, well let's say at the mailboxes . . . Are there any
5. houses between that point west and the curve you testified to when
6. you saw the cars first?
7. A. No that is a high bank on the left of the road and the river bank on
8. the right as far as about 400 yards.
9. Q. All the way up to the curve as far as you can see at least?
10. A. Well not as far as you can see the houses start on the right about
11. the turn.
12. Q. Are the trees up next to the road all along that stretch there?
13. A. Trees.
14. Q. And right up to the curve?
15. A. Yes.
16. Q. Does the trees there prevent you from seeing around the curve?
17. A. Depending on the folage. This time of the year they would.
18. Q. This was August I believe.
19. A. Yes.
20. Q. Now again on this immediate vicinity, Mr. Orebaugh, could you
21. describe the condition of the shoulder of the road to the north of
22. the mailboxes and the area where this car was turning over and
23. coming towards you? What happens when the road stops there. What
24. actually is the shoulder on to the north?

1. A. At the mailbox?
2. Q. Yes right there in that northward area of the mailbox.
3. A. Well there is a trailer on up just below there and they have a yard.
4. And the bank slopes down into their yard.
5. Q. Does it slope all the way from the mailboxes going towards the
6. river and going towards Broadway? Is that right? In other words
7. kind of a -
8. A. Well the farther down you get the less slope it is. It goes back
9. into the river.
10. Q. The old road goes back down off the drop there doesn't it? So any
11. vehicle that would be travelling there would have the additional
12. assistance of a slope going down in terms of travelling on that
13. direction.
14. A. Well from the road down there is a very possibly . . .
15. Q. That's the area that this Delawder car was travelling was in that
16. direction.
17. A. The boy was hit along the bank .
18. Q. Mr. Orebaugh, you were looking at . . . turn the other way to this
19. collision. Could you hear the collision?
20. A. No sir.
21. Q. You couldn't hear it. What made you notice it was a collision?
22. A. The cars turned.
23. Q. Did you see any other signs that indicated there had been a collision?
24. A. Yes. A portion of the Chevrolet went about thirty feet straight up

1. in the air.
2. Q. Thirty feet up in the air. This was a portion of the Chevrolet
3. vehicle?
4. A. Yes sir.
5. Q. Could you tell what portion?
6. A. It was a fiberglass body on it. I thought at the time it was
7. possibly . . . I really don't know and I didn't look.
8. Q. You didn't look?
9. A. No. It was a large portion.
10. Q. You didn't see that piece after the accident along the road did you?
11. A. (Inaudible).
12. Q. I believe you said that you couldn't tell that there was any
13. appreciable difference in the speed of the two vehicles as they
14. came around the -
15. A. No sir I didn't.
16. Q. In fact what you saw was the cars sort of coming at you as they came
17. out of the curve, isn't that right?
18. A. As they rounded and came out of the curve.
19. Q. But you couldn't see beyond the curve because all you saw was them
20. coming towards you. And it's a little bit difficult to tell the speed
21. of vehicles that are oncoming unless you have a view of them from
22. the side I guess. And you did testify that they could have been
23. coming either slower or faster than the speed you estimated they
24. were going.

1. A. Yes I estimated it would be a speed of 80 miles an hour and that's
2. what the speedometer turned.
3. Q. That's right and how do you come up with that figure?
4. A. I guess if I see a car's motor running -
5. Q. It is however, somewhat easier to estimate the speed of a car if
6. you have a chance to see it at more of an angle then when it comes
7. toward you, is that correct?
8. A. Yes.
9. Q. When you came over and pulled off on the side of the road - no, let
10. me go back just a minute, Mr. Orebaugh. After the collision would
11. you describe how the Delawder vehicle was coming toward you? What
12. did you see? Was it coming directly toward you sideways or how?
13. A. It came straight with one wheel off the hard surface of the road.
14. It was on the wrong side of the road.
15. Q. On the wrong side.
16. A. That's the way they were travelling. It just barely missed my
17. mailbox. They travelled down and went farther off the road. It
18. hit the mailboxes along side the road -
19. Q. Was it coming directly or was it leaning to the side or how was it
20. coming towards you?
21. A. It was coming just in a normal way, still at a high speed.
22. Q. You couldn't tell if it was in a skid or not?
23. A. It wasn't really a skid.
24. Q. You said one vehicle -

1. A. It skidded to the swerve or whatever you want to call it and then
2. more or less straightened up and came on back straight down along
3. the side of the road.
4. Q. But you said one wheel was off the hard surface north on the wrong
5. side of the road?
6. A. That's right.
7. Q. That would indicate then if there was only one wheel off that it
8. was coming sideways, isn't that right?
9. A. Well I mean one set of wheels.
10. Q. Oh one set of wheels. Now you were on the passenger side of your
11. vehicle so that is on the wrong side of the road as far as you are
12. testifying that the Delawder vehicle was driving. Were you scared?
13. A. You're darn right.
14. Q. In other words you thought there was a chance that vehicle might
15. hit you?
16. A. Yes.
17. WITNESS - MAXINE OREBAUGH
18. DIRECT EXAMINATION BY MR. DEPOY:
19. Q. State your name please.
20. A. Maxine Orebaugh.
21. Q. Mrs. Orebaugh, was that your husband, Merle, who just finished
22. testifying?
23. A. Yes it was.
24. Q. I believe you were with he and the children on the date that this

1. accident has given rise for this case to occur, is that correct?
2. A. Yes sir.
3. Q. Now Mrs. Orebaugh, there has been given testimony that just prior
4. to this accident you and your husband and children were headed home.
5. A. That's correct.
6. Q. But your son, Jeffrey, was driving the pickup, your husband was seated
7. on the passenger side, and you were seated in the middle.
8. A. That's correct.
9. Q. Alright now from that point I would like for you to just tell the jury
10. just what you observed there.
11. A. Well as we passed the trailer we -
12. Q. Now what trailer is this?
13. A. The house trailer that sits on the right.
14. Q. Alright.
15. A. We were going on by and instructed Jeffrey to be sure and give his
16. signal in time because he wasn't supposed to be driving at that time.
17. And he proceeded to do this and this is when we observed the cars
18. coming toward us. It went out of control and went down over the
19. bank. And the other one went up the side of the highway I would say
20. . . . and then veered over and came up towards us in our lane.
21. Q. Do you know whether or not that was the defendant's vehicle?
22. A. Yes sir.
23. Q. Alright go ahead.
24. A. It then proceeded to hit the mailbox which was on our side and hit the

1. boy standing between the mailboxes . . .
2. Q. Alright and where did it finally come to rest?
3. A. A short distance from the house trailer which we had just passed.
4. Q. Was it in front or behind you when the car came to a rest?
5. A. Behind us.
6. Q. Behind you. Now Mrs. Orebaugh, are you a driver yourself?
7. A. Yes sir.
8. Q. How long have you been?
9. A. Twenty some years.
10. Q. Twenty some years. Alright now let me ask you this. Where were
11. the automobiles when you first observed them?
12. A. Well if you were going west which we were and you would continue
13. past our driveway which we wouldn't pass ordinarily it would be a
14. slight bearing to the right at this turn. And they were coming toward
15. us is where I observed them first.
16. Q. Were they in this slight turn or had they already come out of this
17. slight turn?
18. A. They were still coming out of the turn.
19. Q. Now where was the young Mason boy at this point, do you know?
20. A. At which point?
21. Q. When you first observed the cars.
22. A. He had already crossed the highway and was standing by the mailbox.
23. Q. Alright now at this point approximately how far were you and the
24. other members of your family from this turn you are referring to?

1. A. Well it was a good little distance to see. It was considerable feet
2. but you could see quite well.
3. Q. Do you ever attend football games?
4. A. Not very often.
5. Q. Could you give us some estimate in yards as to how far from this turn
6. you were?
7. A. I really couldn't say in feet because I can't tell distances. Oh I
8. guess possibly - I don't know if it would be a football field length or
9. not. I don't think it would be quite that far.
10. Q. Did you have any idea from the time you say the two vehicles how
11. far you all travelled before you came to a stop?
12. A. Well we travelled maybe a car length. Maybe seven or eight.
13. Q. Until you came to a stop?
14. A. Yes.
15. Q. Now I believe you testified that the car ended up behind you.
16. A. Yes sir.
17. Q. Now did you see any impact between the vehicles?
18. A. This was my impression that possibly it had been because one was
19. right behind the other one and because of the car was the one that
20. went out of control first.
21. Q. Which one?
22. A. The little car.
23. Q. Was that in the rear?
24. A. Yes.

1. Q. I believe that was a blue vehicle?
2. A. Yes sir.
3. Q. And you say that it went out of control first.
4. A. Yes.
5. Q. Alright now where was it in relation to this slight turn you
6. indicated?
7. A. Well it was between the slight turn and our driveway which was not
8. quite halfway to us.
9. Q. So it was some place in that vicinity. Now do you have any estimate
10. of the speed that these vehicles were travelling when you observed
11. them?
12. A. Well I testified before and I don't think I have changed my mind. I
13. said approximately I would say about 80 miles an hour. They were
14. going quite fast.
15. Q. Now what's your basis for this?
16. A. By the rate we had travelled along the highway. I would say Jeffrey
17. was going maybe 40 miles or maybe not quite that fast because we
18. were approaching our driveway and he had slowed down a little bit
19. for that. And they were going quite a lot fast than that.
20. Q. Were they driving at a usual or unusual rate of speed?
21. A. Possibly an unusual.
22. Q. Now this whole thing that you and your husband have testified to,
23. how long did the whole thing take in a matter of time?
24. A. Just a very short while. In time I would say not over a minute if it

1. lasted that long.
2. Q. Now did you see the Mason boy at the time he was struck?
3. A. Yes.
4. Q. Where was he in relation to the roadway there?
5. A. He was off the highway a considerable distance.
6. Q. Was he down over an embankment?
7. A. It was a slight incline.
8. Q. And I assume that this is the path of the Delawder vehicle followed?
9. A. Yes sir.
10. Q. Now after the vehicle got down over that slight incline did it continue
11. on a down hill road or was the grade along its course of travel
12. following that a level grade?
13. A. Well there's a slight incline and then there is part of an old road
14. and on that I think he was down just a little bit.
15. Q. So after he got down over that incline what was its course of
16. travel? Down farther or on a near level area?
17. A. He was more on a level area because he was rolling over.
18. Q. Could you estimate the approximate number of times it rolled over?
19. A. I'd say four or five times.
20. Q. And was it during this period that the Mason boy was hit?
21. A. He wasn't hit while the car was rolling over. The way I saw it
22. when the car went off the highway and of course it was on a bank
23. it wasn't level there. The boy tried to get away from the car.
24. Q. Was it after this that the car turned over?

1. A. In my opinion it was. That's the way I remember it.
2. Q. Now as the Delawder car, the defendant's car, went by you, what
3. was its position?
4. A. At one time it was going end over end.
5. Q. As it went by you?
6. A. Well it - I don't know how to say it. But it seemed to me it made . . .
7. Q. Now approximately how far did it go on the other side?
8. A. (Inaudible).
9. Q. Did you get out of your vehicle there?
10. A. Yes.
11. Q. Did you have an occasion to observe the defendant's car?
12. A. Yes it was upside down.
13. Q. It was upside down. And where was the defendant?
14. A. He was in the back seat.
15. Q. He was still inside the car but in the back?
16. A. Yes sir.
17. CROSS EXAMINATION BY MR. HOOVER:
18. Q. Mrs. Orebaugh, you testified I believe that the rear car which is the
19. Chevrolet was out of control first.
20. A. It seemed to me like it was.
21. Q. Could you describe what brought you to that conclusion? What do you
22. mean by that?
23. A. Because it went off the highway while the other car continued to
24. come up the highway.

1. Q. Was there any collision between the two cars that you could
2. observe?
3. A. Well there was a piece of something that flew up in the air.
4. Q. What was that Mrs. Orebaugh?
5. A. I think it was determined to be the rear glass of one of the cars.
6. Q. The rear glass?
7. A. That's what I assumed it was. I never went down to see it.
8. Q. You don't know you saw an object go up in the air.
9. A. Yes sir.
10. Q. How high in the air do you think that object went?
11. A. It went higher than a car.
12. Q. Higher than a car. Can you estimate that in feet?
13. A. Maybe ten or twelve feet. You don't just sit and think about that.
14. Q. After you saw that what seemed to be a collision between the two
15. vehicles, how did you observe the defendant's car coming towards
16. you. What-
17. A. It seemed as though it went too far on his side of the road so it did
18. appear to be out of control.
19. Q. It did appear to be out of control?
20. A. Yes.
21. Q. How? Was it careening or leaning or what?
22. A. Well it just more or less as if he had gotten off the shoulder. And
23. it looked to me as if he weren't getting it back on the highway. . .
24. Q. He was off the hard surface then from the time of the collision?

1. A. Shortly after I would say.
2. Q. You testified, I believe, that one car was right behind the other
3. but it was hard to tell just how close they were. I mean just how
4. much distance separated them.
5. A. You couldn't tell exactly.
6. Q. That car was coming at you sort of head on?
7. A. That's right.
8. Q. How was it you were able to determine the speed when they were
9. coming head on if you couldn't tell how far they were between each
10. other?
11. A. Because they were just approaching quite fast.
12. Q. In fact it was all quite a frightening experience wasn't it? I mean
13. they were coming towards you so that you were actually scared for
14. your own safety.
15. A. Well when you see one coming up the lane directly toward you, it gives
16. you a pretty funny feeling.
17. WITNESS - JAMES L. PORTER
18. DIRECT EXAMINATION BY MR. DEPOY:
19. Q. State your name please.
20. A. James L. Porter
21. Q. Mr. Porter, where are you employed?
22. A. Clark, Bradshaw, Jolly, and Smith law firm, Harrisonburg.
23. Q. Are you formerly a Virginia trooper?
24. A. Yes I am.

1. Q. Were you so employed back in August of last year?
2. A. Yes sir I was.
3. Q. And in the course of your duties as a trooper did you have an
4. occasion to investigate an accident which occurred near Broadway
5. on that particular date?
6. A. Yes sir I did.
7. Q. Approximately what time were you notified of this accident?
8. A. I was notified approximately at 6:30.
9. Q. Alright and do you recall where you were at that time, Mr. Porter?
10. A. As best I can recall I was working radar on Interstate 81 at the sign
11. near Mauzy.
12. Q. Now did you proceed directly to the accident?
13. A. I did.
14. Q. When you arrived there what did you observe?
15. A. There were two vehicles . When I first arrived I could see the one
16. and that was a 1970 Dodge, 2-door hardtop which I later found was
17. driven by Lloyd Wayne Delawder of Bergton, Virginia.
18. Q. Is that the defendant in this case?
19. A. It is.
20. Q. Alright.
21. A. I was then further advised down the road there was a second vehicle
22. which was down over the bank. And I went down and that was a
23. 1967 Chevrolet Corvette, 2-door hardtop driven by Lonnie Williams
24. Mook of Bergton, Virginia.

1. Q. Alright now trooper on this particular date and this particular time
2. what was the - what were the weather conditions there?
3. A. The road alinement was curved well over the open country. It was
4. daylight. The road was dry. There were no defects. The traffic
5. lanes were marked. The weather was clear. It was a black top
6. surface on the road.
7. Q. I believe Route 259 is a two lane - what we refer to as a two-lane.
8. A. Correct.
9. Q. What day of the week was this?
10. A. This was a Sunday.
11. Q. Alright and what were the traffic conditions on Route 259 there?
12. A. Actually I couldn't say. When I got down there there was approximately
13. 200 or 250 people there. When I arrived there the spectators
14. and everything, the people had pulled up that had seen the accident.
15. Q. What was the traffic flow on Route 259?
16. A. By the time I got there very heavy. I mean word had gotten out
17. that somebody had had a wreck.
18. Q. In the course of your duty were you generally familiar with traffic
19. on 259?
20. A. Fairly familiar.
21. Q. How would you describe the traffic flow on that particular road?
22. A. With the exception of morning traffic going in and evening traffic
23. getting off from work, I would call it moderate.
24. Q. Moderate. Alright now Officer were you able to establish a point

1. of impact of the vehicles?
2. A. Unless they are not as such we call it approximate.
3. Q. Alright.
4. A. Approximate point of impact which goes from the brake skid mark.
5. As far as indentations in the road or anything like that it didn't have
6. any.
7. Q. Now did you make a number of measurements and take a number of
8. photographs there at the scene?
9. A. Yes sir I did.
10. Q. Was this in the course of your investigation of the accident?
11. A. Yes sir it was.
12. Q. Do you have those photographs with you at this time?
13. A. Yes sir I do.
14. Q. Now let me ask you this, Officer, did you take all the photographs
15. contained in this group?
16. A. The small photographs were taken by me and the two larger
17. photographs were taken by Tommy Thompson of the Daily News
18. Record at my direction.
19. Q. Were you present when these were -
20. A. Yes sir I was.
21. Q. Do these photographs contained in this group here generally and
22. pretty fairly accurately reflect what they are intended to reflect?
23. A. Yes sir. Both of them show the vehicles as they were and some of
24. them were taken the next day to show the outline of the road - the

1. general area.

2. COURT: Have you seen the photographs, Mr. -

3. MR. HOOVER: I have not, no sir. You say the smaller ones were taken

4. by you and the larger ones by Mr. Thompson?

5. A. Yes sir.

6. MR. HOOVER: Is he not here, is he?

7. A. No sir. He is no longer employed by the News Record.

8. MR. HOOVER: I'm going to object to the introduction of these. I don't

9. feel that they have any further value since they are not going to be

10. verified. I have an objection to these larger ones. I have no objection to

11. these smaller ones. Since Mr. Thompson is not here to testify to them.

12. COURT: Let us then take those to which there

13. is no objection.

14. MR. HOOVER: Sure.

15. MR. DEPOY: Your Honor, I would ask for the admission of the two larger

16. ones in the light that the trooper testified that he was present. And they

17. were taken at his direction.

18. COURT: Alright let's take up those to which there

19. is no objection to. Is it desirable that they be

20. marked in any particular sequence?

21. MR. DEPOY: No particular sequence, Your Honor.

22. COURT: Well they are already numbered.

23. MR. DEPOY: Not all of them, Your Honor.

24. COURT: They seem to have two different numbers

on them. So I will just/literate the other numbers -

MR. DEPOY: Yes.

COURT: As Commonwealth's Exhibit 1 and Exhibit 2 and Exhibit 3 Exhibit 4. Well we have two numbers so I will have to change one of these numbers. Exhibit 4 Exhibit 5 Exhibit 6 Exhibit 7 Exhibit 8 Exhibit 9 And Exhibit 10 will be received in evidence without objection.

MR. HOOVER: I will withdraw my objection, Your Honor.

COURT: Very well now and as the witnesses refer to the photographs let his question or his answer make clear the number of the Exhibit to which he is referring to. Because the record at this time does not establish what any of the exhibits establish. Mark these Exhibits 11 and 12.

Q. Mr. Porter, I ask you to put these back in the order you had them before and step over to the jury and explain them to the jury.

Mr. Porter, I hand you Commonwealth's Exhibit Number 1 and ask you to just hold it up so the members of the jury can see it. And just explain what it shows or what it intends to show.

A. This is Route 259. You are looking west on two vehicles which were headed in an easterly direction coming out of the curve.

Q. When you say the two vehicles, are you referring to the defendants?

1. A. Vehicle and Mr. Mook's vehicle.
2. Q. Alright so in this direction Mr. Orebaugh would have been travelling
3. in a westerly direction. This would have been his view, Mr. and Mrs.
4. Orebaugh?
5. A. Correct.
6. Q. Now let me ask you this trooper, is your car parked at any significant
7. point there?
8. A. Well it's parked where Mr. Delawder's vehicle came to rest.
9. And that's approximately down here to the right of my vehicle.
10. Q. Alright and the mailboxes sitting along the road there, are they the
11. only mailboxes on that side of the road?
12. A. In that scene they are.
13. Q. Could you tell whether or not these mailboxes had been struck?
14. A. They had been replaced. They were not down. They had been replaced.
15. This was taken several days after.
16. Q. But were they replaced in the same position?
17. A. I couldn't say but they were approximately the same. It was
18. approximately the same place.
19. Q. Now the driveway that these people were coming in is that the
20. Mongold driveway there?
21. A. That's the first one . . . the second one and that would be the
22. Orebaugh's.
23. Q. Is that driveway approximately directly across the road from these
24. mailboxes?

1. A. It's just a little bit below them as I recall. Maybe five or six feet.
2. Q. (Inaudible).
3. A. Well in other words the mailboxes are here going on west. I would say
4. they are five or six feet west of the mailboxes.
5. Q. Now trooper did you have an occasion to measure the distance from
6. the point where your vehicle was parked on the bank of this turn?
7. A. No not from my vehicle. I did from Mr. Delawder's vehicle that
8. evening.
9. Q. That evening? Alright.
10. A. This is actually where the skid marks started.
11. Q. Well how far?
12. A. Several distances from the skid marks and wet marks from the dirt
13. where he went off the shoulder of the road. Several distances -
14. approximately 640 feet.
15. Q. Now this is the point on the road which would have been in this
16. direction where you were able to observe what?
17. A. Well the skid marks started back here and came across and then there
18. were tire impressions and wet soil when he came down the shoulder
19. to the end of this tree line. Then tire marks down through the bank.
20. Of course the ground was torn up very badly down through here
21. and went down before he started in the other direction.
22. Q. And that was how far?
23. A. Approximately 643 feet. I measured with a six-foot tape.
24. Q. Now trooper could you as best you can recall testify how far these

1. skid marks started from the turn?
2. A. Well they started to where they go off the edge of the road is 300.
3. Q. Now I'm talking about from the turn itself and I asked you as you
4. come out of this turn, how far was it that these skid marks started?
5. A. I couldn't say I didn't measure it.
6. Q. Mr. Porter, I hand you Commonwealth's Exhibit Number 2 and ask
7. you to look at this and explain to the jury what it shows.
8. A. This is skid marks. And they come on across and go off the road
9. here. And I believe Mr. Mook's vehicle is down over the bank.
10. And some of these skid marks start back on the other side of the
11. road and go down.
12. Q. And your investigation discloses -
13. A. This would be looking at an easterly direction. In other words this
14. would be the curve and looking here.
15. Q. Alright your investigation disclosed these skid marks left by the
16. Mook vehicle?
17. A. Well they seem to go down and follow Mr. Mook's vehicle and come
18. around. And they join up with the tracks in the grass and go on
19. down the bank.
20. Q. Being the what vehicle?
21. A. That would be the Delawder vehicle.
22. Q. I hand you Commonwealth's Exhibit Number 3 and ask you to look at
23. it and tell the jury what it shows.
24. A. This is a view of Mr. Mook's vehicle where he went down over this

1. embankment.
2. Q. It was the end of this skid mark there -
3. A. Right. The heavier set of skid marks.
4. Q. I hand you Commonwealth's Exhibit Number 4 and ask you to tell the
5. jury what it shows.
6. A. This again is just a photo of Mr. Mook's vehicle down over the
7. bank. Where it turned upside down.
8. Q. Now how far from the point of impact were the places where these
9. skid marks commences was the Mook vehicle?
10. A. Approximately 337 feet.
11. Q. I hand you Commonwealth's Exhibit Number 7 and ask you to explain
12. it for us.
13. A. This is where the Delawder vehicle went down over the embankment.
14. You can see where the ground was torn up where it went down the
15. rock pile. And I think it is a little hard to see where it went down
16. through . . . the mailboxes here which had been replaced. They were
17. knocked down.
18. Q. Alright now these same mailboxes you referred are the same as in
19. Commonwealth's Exhibit Number 1?
20. A. Correct. Mr. Mason was standing in this vicinity approximately.
21. Q. Was this spot where you were standing went down over there . . .
22. A. Miss Mongold and the Orebaugh's gave me an approximate position
23. that he was standi ng there.
24. Q. Now how far is this right here shown in this photograph from the point

1. where the skid marks first started?
2. A. It would be approximately 139 feet. In other words the skid marks
3. stopped where Mr. Mook's vehicle went over and started on the grass.
4. Of course the vehicle went over the embankment and tore up some
5. grass along the edge of the highway.
6. Q. How far was this from where you were standing from the point of
7. impact? What would be the total distance from the time the
8. vehicles first started sliding or leaving marks on the road to this
9. point?
10. A. Well it would be approximately 476 feet.
11. Q. I hand you Commonwealth's Exhibit Number 4 and ask you to look
12. at it.
13. A. It again is just another view again that shows the mailboxes which
14. had been replaced.
15. Q. Does it in any way show where the Mook vehicle came to rest?
16. A. Not the Mook vehicle, the Delawder vehicle came to rest at this
17. point down here.
18. Q. Well now you can see here where the mailboxes are situated. I
19. assume the road to be right here in this area, is that correct?
20. A. (Inaudible).
21. Q. Is this a slight incline?
22. A. It is. In fact it is a little more elevated than it looks there.
23. Q. Well what would be the distance from this area down here back up
24. to the point at the mailboxes?

1. A. That's approximately I would say maybe 20 feet.
2. Q. Twenty feet. Alright now after you reach the area down here what
3. is this?
4. A. A private road. In other words this is a yard and this is an old road
5. that is no longer used.
6. Q. And would you show the jury where the Delawder vehicle travelled
7. the road.
8. A. It went down over the bank here and travelled this road on up and
9. came to rest in this vicinity down here.
10. Q. Well after it went down over the bank it was travelling in this left
11. area.
12. A. (Inaudible).
13. Q. I hand you Commonwealth's Exhibit Number 10 and ask you to look at
14. that.
15. A. This shows a tree that was struck out by the Delawder vehicle. This
16. is again looking from another picture where the Delawder vehicle came
17. to rest.
18. Q. I believe the vehicle is shown.
19. A. Right. That is the Delawder vehicle.
20. Q. Now trooper how far is the tree from the point on the road where you
21. first saw the skid marks?
22. A. Approximately 624 feet.
23. Q. When you first observed -
24. A. From the point where the skid marks first started to the tree.

1. Q. And did your investigation show whether or not this Delawder vehicle
2. struck this tree?
3. A. I was told it had. All around here it was torn up freshly and of course
4. the tree was all scraped up.
5. Q. Well could you follow the path of the vehicle at that particular time?
6. At the time you made your investigation?
7. A. The tracks lead down almost to it. By the time I got there people of
8. course had milled around. Some things had been moved. All I can
9. say is that there was approximately 200-250 people down there.
10. Everybody was going around and it was kind of hard to follow the
11. exact path.
12. Q. What is the approximate size of that tree in diameter?
13. A. (Inaudible).
14. COURT: I can't see your - Will the record show
15. a diameter of approximately six inches.
16. Q. I hand you Commonwealth's Exhibit Number 9 and ask you to look at
17. that and explain what that shows.
18. A. Just as the Delawder vehicle came to a rest as I found it when I
19. arrived at the scene.
20. Q. Does that not show generally the side?
21. A. Right.
22. Q. I hand you Commonwealth's Exhibit Number 8 and ask you to explain it.
23. A. This is a front view of the Delawder vehicle when it came to rest.
24. Q. I hand you Commonwealth's Exhibit Number 5.

1. A. This is the rear view of the Delawder vehicle as I found it. This is
2. part of the tree.
3. Q. Is that a branch -
4. A. That's a branch - part of the tree.
5. Q. I hand you Commonwealth's Exhibit Number 6.
6. A. This again is the side . . .
7. Q. I hand you Commonwealth's Exhibit Number 11.
8. A. This is just more or less a blown-up view of the same thing. The
9. side of the car.
10. Q. Officer did you have an occasion to check these vehicles following
11. the accident?
12. A. Yes sir.
13. Q. Other than the damage which was obvious were you able to detect
14. any defects in the vehicles?
15. A. No sir. In other words tires and everything appeared in both cars
16. were pretty well destroyed. The tires and everything appeared to
17. be in good shape as far as tread.
18. Q. Now the marks that are shown that you traced from the point of
19. apparent impact to the place where the Delawder vehicle came to rest
20. are these brake marks? Are you able to testify one way or the other?
21. A. I can't say for sure that they would be heavily laid down. In other
22. words how much is brake and how much of it is skid.
23. Q. And you of course don't know what position the vehicle was as it
24. came down the road there?

1. A. No sir.

2. CROSS EXAMINATION BY MR. HOOVER:

3. Q. Mr. Porter, when the jury was shown Exhibit Number 9 I believe it
4. shows a picture of the road and the mailbox and the bank as it goes
5. down the hill. You mentioned when the picture was shown to the jury
6. that the bank was more aggravated then it appeared in that picture.
7. A. That's correct. I think it has more of an angle or slope than what
8. I projected.
9. Q. In other words it is hard to capture in a two-dimensional picture
10. the exact slope of a bank. Could you give any indication or estimate
11. what the degree of slope was there in terms of the bank going down?
12. A. No I just couldn't.
13. Q. It was just a slope and it was more aggravated then it appeared on
14. that picture?
15. A. That's correct other than it was full of rocks.
16. Q. This bank was the long path of the Delawder vehicle as you determined
17. its course in your investigation. What evidence did you find of a
18. collision, Mr. Porter? That there had been a collision of these two
19. vehicles?
20. A. I found blue paint on the left rear of the Delawder vehicle which I
21. didn't have it sent off to be analyzed but it appeared to be the same
22. color on Mr. Mook's vehicle.
23. Q. Was this on the fender or the bumper?
24. A. It was on the bumper. It shows in one of the pictures you can see.

1. Q. Perhaps we could take a look at that. Is that the picture of the -
2. A. Of the car -
3. Q. Of the Delawder vehicle?
4. A. That's correct.
5. Q. Could I ask you to pick out that picture so that we could specifically
6. point that out to the jury, Mr. Porter? Perhaps we could go over
7. and point that out to the jury if you will please.
8. Q. Is this the bumper?
9. A. This is the bumper. It is Exhibit Number 5.
10. Q. Is that paint in your opinion?
11. A. This is blue paint. It appeared to be the same color paint as on
12. Mr. Mook's vehicle.
13. Q. Mr. Porter, did you find any debris around the point where you
14. estimated the point of impact to be?
15. A. No sir not to amount to anything. As I said again people had been in
16. and out and I don't know how many cars had been through. The
17. accident occurred at approximately 6:05 and I didn't arrive until
18. approximately 6:50.
19. Q. Six-fifty.
20. Q. And like I say there was an awful lot of people and an awful lot of
21. vehicles parked on up and down the road. Other than just - I couldn't
22. say it was debris from the vehicles. There was stuff that looked
23. like it had been from one of the cars.
24. Q. I believe you have already testified what these cars were but let's go

1. over that again. Mr. Delawder was driving what kind of a car?
2. A. 1970 Dodge - I believe they call it a Super Bee.
3. Q. A Super Bee?
4. A. I believe that is what they call it.
5. Q. Is that a conventional car? I mean is there anything peculiar about
6. it? Could you tell us what you observed about it in terms of -
7. A. I would say it appeared to be a high-performance engine. In other
8. words it had what they call a rally pack. It had more of the racer
9. type equipment on the wheel covers and scoops on the hood and things
10. of such. I believe it had a strip around the rear and the head lights.
11. Q. You didn't see anything unusual about the car other than the fact
12. that that kind of car looked - it didn't have any special gadgets on it
13. other than the normal apparatus -
14. A. The only thing different was that it had a floor shift in it. Other
15. than that anybody could have bought one.
16. Q. What about the other car? What was that?
17. A. That was a Corvette.
18. Q. What kind of vehicle is that?
19. A. This is again more of a sporty car. Although I believe it had a
20. floor shift in it. I'm not prepared to say for sure. . . .
21. Q. Was that a sports car?
22. A. (Inaudible).
23. Q. Did it have a high-performance engine in it?
24. A. I would say yes. I believe it had a 427-engine in it. It might not be a

1. high-performance engine in it.
2. Q. Was any of these cars heavier or lighter than usual as far as you know?
3. Were they heavy cars?
4. A. Mr. Delawder's vehicle I would say is pretty close to being heavy.
5. The Corvette may possibly be a little bit lighter. It had a fiberglass
6. body and I'm not sure of the weight.
7. Q. Did you talk to Mr. Delawder after the accident?
8. A. It was quite a while after he was hospitalized. I finally spoke with
9. him . . .
10. Q. Did you speak with Mr. Mook after the accident?
11. A. Yes sir I did.
12. Q. Did he make any statement to you about the way in which he was
13. operating his vehicle?
14. A. Well I asked him what happened and he gave me a statement.
15. Q. Would you explain that to the jury.
16. MR. DEPOY: Your Honor, I am going to have to object to this.
17. COURT: Was Delawder questioned on that?
18. A. No sir he was not. He was taken to the hospital.
19. COURT: The objection is sustained.
20. MR. HOOVER: Your Honor, if it just had to do with this possible talking
21. on the part of the driver, I think that whatever he said would be possibly
22. relevant here.
23. COURT: Do you claim it was a . . . aspect?
24. MR. HOOVER: Yes I think so. Was it made immediately after the

1. accident or -
2. A. Well as I say they both had been taken to the hospital and I talked to
3. him in the emergency room. Of course Mr. Delawder was in
4. intensive car and I couldn't see him. And I spoke to Mr. Mook in the
5. emergency room.
6. Q. I think I am going to -
7. COURT: Your objection is sustained.
8. Q. I think in response to a question by the Commonwealth, Mr. Porter,
9. you testified you were unable to determine whether the mark that
10. you found for the Delawder vehicle was a skid mark or a mark from
11. braking. In other words it was just a mark. You don't know really-
12. A. I know it was a tire mark and I can't say whether it was where a
13. brake had been applied or where his car had slid to one side.
14. Q. And this is true for the mark throughout which length it travelled.
15. You have no way to determine what caused the mark or the sign that
16. was laid down by the path of this vehicle.
17. A. Correct. I just followed - in other words it led towards the rear
18. of the vehicle. The same way with Mr. Mook's vehicle - I couldn't
19. say whether it was a skid mark or a slide mark.
20. MR. DEPOY: The Commonwealth would rest at this time.
21. MR. HOOVER: May it please the Court, I want to make a motion that the
22. Commonwealth evidence be struck. The essence of his evidence and I
23. think as you can see there has been a good bit of testimony about this and
24. so forth. Other than some testimony about a possible speed there is no

1. testimony which indicates that this man was at fault other than the
2. slight speed he might have had and this is questionable. It links him
3. with the cause of death in this case. In other words there is no evidence
4. for the approximate cause here. Clearly there was a collision. In fact
5. the Commonwealth's evidence itself indicates there was a collision that
6. sent the defendant's vehicle out of control. I submit this that there is
7. not enough evidence even for a jury on this issue. We cite the Hubbard
8. case - Hubbard against Murray. . . . where it was found - it was admitted
9. that a bus was negligent of parking on a hard surface but there was no
10. evidence to link that to the cause of death, which is . . . in a charge of
11. involuntary manslaughter. In fact the only evidence we have here is of
12. some speed and there is no evidence that he was driving his car in a
13. negligent manner. None whatsoever. There were several witnesses who
14. were scared to death and thought that he was going 80 miles an hour or
15. in fact much slower than that. But the linkage here is essential. I think
16. it is the kind of case that wouldn't even keep a jury. I think the jury should
17. not be given this case because in the Commonwealth's own evidence he has
18. established that kind of linkage . . .
19. COURT: The motion will be overruled and we
20. note your exception to the Court's ruling.
21. WITNESS - LLOYD WAYNE DELAWDER
22. DIRECT EXAMINATION BY MR. HOOVER:
23. Q. State your full name and age please.
24. A. Lloyd Wayne Delawder - 28.

1. Q. Where do you live?
2. A. Bergton, Virginia.
3. Q. You were, Mr. Delawder, involved in this accident on August 22, 1971,
4. were you not?
5. A. Yes.
6. Q. What injury did you receive in this accident?
7. A. I lost an arm and ribs broke.
8. Q. And what?
9. A. Ribs broke.
10. Q. Ribs broke? You were in the hospital for a period of time?
11. A. Three weeks.
12. Q. Three weeks? Now I would like for you to explain to the jury, Mr.
13. Delawder, what happened on this day immediately preceeding and
14. during the accident to the best of your recollection. Perhaps you
15. could start with having been proceeding east on Route 259 the day of
16. the accident?
17. A. I was coming towards Broadway and Lonnie pulled in behind me and
18. we dropped around a slight turn -
19. Q. Now excuse me, what - where did Lonnie pull in behind you?
20. COURT: Are you referring to Lonnie Mook?
21. A. Yes.
22. Q. Where did he pull in behind you?
23. A. At Cootes Store.
24. Q. Cootes Store. And then what happened?

1. A. Well we came out of the turn and I seen a boy run across the road.
2. I hit my brakes and the car turned sideways.
3. Q. And you say that's all?
4. A. That's all I remember.
5. Q. You don't know what happened after that? Were you aware of having
6. hit anybody?
7. A. No.
8. Q. Did you know when your car came to a rest?
9. A. No sir.
10. Q. In other words you just don't know what happened after the
11. accident?
12. A. No.
13. Q. You were coming from where?
14. A. Lost River State Park.
15. Q. And heading where?
16. A. Timberville - I was going out to my brother's.
17. Q. And do you know how fast you were travelling as you were going
18. around that curve?
19. A. At a reasonable speed. Fifty-five or sixty.
20. Q. You didn't look specifically. I mean you don't know exactly but you
21. think that you were going at a normal rate of speed or a faster rate
22. of speed than normal?
23. A. Normal rate.
24. Q. You knew that this car driven by Lonnie Mook was behind you, didn't

1. you?
2. A. Yes.
3. Q. And you say you saw somebody in the road, is that right?
4. A. I say a boy run across the road.
5. Q. You saw him run across the road and you say you hit your brakes?
6. A. Yes sir.
7. Q. Now would you explain that. Did you hit them hard? Or light or -
8. A. I hit them light.
9. Q. Were you afraid you were going to hit him?
10. A. No sir.
11. Q. You weren't?
12. A. No.
13. Q. How far would you say you were from him when you saw him and hit
14. your brakes?
15. A. Four hundred feet.
16. Q. So you didn't feel you were in any -
17. COURT: Did he say 400 feet?
18. Q. Four hundred feet?
19. A. Yes.
20. Q. You didn't feel you were in any immediate danger of hitting him.
21. And you applied your brakes, did you say in a normal manner?
22. A. Yes sir.
23. Q. And then after that what happened?
24. A. The car slid out of control.

1. Q. And you don't remember anything about after you say you started
2. sliding?
3. A. No.
4. Q. Do you remember the car turning over?
5. A. No sir.
6. Q. Remember going off the road?
7. A. No sir.
8. Q. Were you in your own lane? Were you in the right-hand lane as you
9. came out of the curve?
10. A. Yes.
11. Q. How long have you been driving, Lloyd?
12. A. Eight or nine years.
13. Q. Where do you work?
14. A. Walker Manufacturing.
15. Q. Is that where you worked before the -
16. A. Yes sir.
17. Q. So you went back in your old job then?
18. A. Yes.
19. Q. What do you do there? What are you -
20. A. Hand welding.
21. Q. Hand welding? And you say you have been driving about eight years?
22. A. Eight or nine years.
23. Q. You knew that road, did you? I mean you travelled that road
24. frequently?

1. A. Yes.

2. CROSS EXAMINATION BY MR. DEPOY:

3. Q. This road 259 there in the general, I'm not talking about the
4. vicinity, but in the general vicinity of where this accident occurred,
5. did it have a fair number of curves in it and dips and all and hills,
6. is that right?

7. A. Yes.

8. Q. There are also a lot of homes and some places of businesses in the
9. close proximity there, isn't that right?

10. A. Yes.

11. Q. It's a road where people are normally pulling off and on the road
12. and this type of thing in this area. Now where did you say Mook
13. got behind you?

14. A. Right at Cootes Store.

15. Q. Right at Cootes Store? There near Jake Dove's?

16. A. Yes.

17. Q. Isn't that where you passed him?

18. A. No sir.

19. Q. You didn't pass him?

20. A. No sir.

21. Q. Right. Well now is that when he first got behind you or is that the
22. first time you noticed that he was behind you?

23. A. The first time I seen him.

24. Q. Did he come up on you fast?

1. A. Yes he did.
2. Q. And then he just pulled right in behind you there and continued to
3. follow?
4. A. Yes sir.
5. Q. Had you seen him at Lost River State Park that day?
6. A. No sir.
7. Q. Did you know that he was over there?
8. A. No sir.
9. Q. Do you know now that he was over there?
10. A. No.
11. Q. Now were you by yourself?
12. A. Yes.
13. Q. Had you been drinking?
14. A. No.
15. Q. Nothing at all?
16. A. I drank two beers that day.
17. Q. That day? What time that day?
18. A. Before I left . . .
19. Q. Well what were you doing - just out riding around?
20. A. I was going out to my brother's. Some relation from Washington
21. was out there.
22. Q. Is this car you have have the rally pack on it?
23. A. Yes.
24. Q. A pretty hot car?

1. A. I don't know.
2. Q. It will run, won't it?
3. A. Well yes.
4. Q. Alright. And you were operating it in what you say was your normal
5. speed - fifty-five or sixty?
6. A. Yes.
7. Q. Do you recall specifically when you looked at the speedometer?
8. A. No.
9. Q. So then you are not real sure how fast you were going?
10. A. No sir.
11. Q. In other words that car would creep up to 70 or 75 fairly easy,
12. wouldn't it?
13. A. I don't know.
14. Q. And you say that you came around the turn here and you were driving
15. in your lane and the boy ran across some 400 feet in front of you?
16. A. Yes sir.
17. Q. Well why did you think it was necessary to put on your brakes?
18. A. I didn't know whether or not he would run back across or not.
19. Q. Run back across. Well did he go over to the other side and stop?
20. A. Yes.
21. Q. And this was before you were hit?
22. A. Yes.
23. Q. And so as I understand your testimony then you were hit and you
24. don't recall much of anything that happened?

1. A. No.
2. Q. Do you know whether or not you had your brakes on at the time you
3. were hit?
4. A. When I hit the brakes.
5. Q. In other words you still had your foot on the brake at the time you
6. were hit?
7. A. I don't know. I guess I put my foot on the brake and the car started
8. sliding.
9. Q. Were you hit before you started sliding?
10. A. Not to my knowledge.
11. Q. But to your knowledge then your foot was on the brake at the time
12. this all started?
13. A. Yes.
14. Q. Do you recall taking your foot off the brake?
15. A. No.
16. Q. Do you think that you probably continued to put your foot on the
17. brake?
18. A. (Inaudible).
19. Q. Now you are aware how far your car went from that point?
20. A. I am.
21. Q. Six hundred and forty-three feet.
22. REDIRECT EXAMINATION BY MR. HOOVER:
23. Q. Let's clear up a point. You said you were going to your brother's
24. house in Timberville, is that how it was? Is this according to what

you had agreed on up at the park? I mean everybody was to meet there, is that what you were saying? By that I mean your relatives?

A. Yes.

Q. And you were going to meet at your brother's house in Timberville?

A. Yes.

COURT: Does the defense rest?

MR. HOOVER: Yes.

COURT: Mr. DePoy, the defense rests. Does the Commonwealth have any rebuttal evidence?

MR. DEPOY: No sir.

1. ARGUMENT ON ASSEMBLYING INSTRUCTIONS IN CHAMBERS

2. COURT: Now Mr. Hoover, you wanted to tender
3. several other instructions. Go ahead, Mr. Hoover.
4. MR. HOOVER: Number one. I would like to tender instruction which would
5. instruct the jury that if they believe the evidence insufficient to establish
6. beyond a reasonable doubt that the defendant is guilty of involuntary
7. manslaughter the jury may nevertheless find the defendant guilty of
8. exceeding the speed limit or reckless driving. This is the nature of -
9. the opinion of the defendant of a lesser included offense which should be
10. a part of this charge on the basis of the evidence which has been put before
11. the jury in this case. And the instruction goes on to outline the penalties
12. that exist for the -
13. COURT: In other words you contend that reckless
14. driving should be submitted to the jury as a lesser
15. included offense?
16. MR. HOOVER: That's right.
17. COURT: Mr. DePoy.
18. MR. DEPOY: I object, Your Honor, on the grounds of the elements of the
19. case. It is not the same and therefore it is not unnecessarily true . . .
20. COURT: Well the Court has been concerned about
21. this question as to whether this reckless driving
22. is a lesser included offense of involuntary
23. manslaughter. There certainly seems to be
24. circumstances in which a jury could find the

1. defendant was guilty of reckless driving but he
2. was not guilty of such a degree of culpability that
3. the jury would or should find him guilty of invol-
4. untary manslaughter. However, the Common-
5. wealth Attorney points out that the death resulting
6. from the unlawful or culpable operation of a motor
7. vehicle is a necessary element of the offense of
8. involuntary manslaughter. And he has selected
9. to indict the accused only for involuntary mans-
10. laughter and not for reckless driving. And as I
11. read 19.1-259 of the Code which says: As an
12. actual violation of two or more statutes and so
13. forth, convictions of one shall be a bar to the
14. prosecution under the other. That would indicate
15. that if the accused is convicted of involuntary
16. manslaughter, on the same act, assuming that
17. there was only one death as a result of the act,
18. he could not thereafter be prosecuted for reckless
19. driving. However, under the statute, if he is
20. acquitted of reckless driving he possibly could
21. thereafter be prosecuted, if he is acquitted of
22. involuntary manslaughter, he could possibly be
23. thereafter prosecuted for reckless driving. And
24. therefore, under that reading of the statute,

1. reckless driving is not necessarily an included
2. offense of involuntary manslaughter and the Court
3. will refuse the instruction of the defendant's.
4. Exception to the refusal of Instruction A will be
5. noted. Now the defense has tendered an instruc-
6. tion identified as B which the Court has rewritten
7. by inserting the word sole for the word proximate
8. on the next to the last line. And the instruction
9. originally tendered by the defendant is identified
10. as Instruction B.
11. MR. HOOVER: Yes, Your Honor, I would like to except to the addi-
12. tion of the word sole in the next to the last line as it describes the
13. phrase proximate cause since I believe under the facts of this case
14. this addition of the word sole is conceivably prejudicial to the defen-
15. dant. It certainly would be confusing to the jury because it introduces
16. a concept which is not described in other instructions and furthermore
17. is applicable in a case of contributory negligence and in this case where
18. you have two persons involved in an accident, the accident which
19. resulted in the death of a pedestrian, the introduction of the word sole
20. to describe the proximate cause of Earl Mason's death is very possibly
21. prejudicial.
22. COURT: Your exception will be made part of the
23. record.
24.