STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER DOUGLAS BARCLAY,

APPELLANT

Appellate Case No. 2012-212639

INITIAL BRIEF OF APPELLANT

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2. Did the trial court commit reversible error by declining to instruct the jury that felony DUI, S.C. Code § 56-5-2945, requires proof that "the person's faculties to drive a motor vehicle [were] materially and appreciably impaired," as provided by § 56-5-2930, the DUI statute?

3. Did the trial court commit reversible error by allowing into evidence the results of appellant's blood test since the drawing of appellant's blood without a warrant constituted an unreasonable search and seizure prohibited by the Fourth Amendment, as interpreted by *Missouri v. McNeely*, US Sup. Ct. Op. No. 11-1425, decided April 17, 2013?

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5. Did the trial court commit reversible error by excluding from evidence a contemporaneous video recording of appellant offered by the defense to impeach the arresting officers' account of appellant's purported mental and physical impairment and confusion after the accident, as the court's ruling ignored Rules 104 and 901, SCRE, and also violated appellant's right to present a complete defense?

6. Did the trial court commit reversible error by declining to dismiss the charges against appellant due to the failure of the arresting officers to record appellant's conduct when they initially transported him from the hospital to the detention center, as required by S.C. Code § 56-5-2953?

STATEMENT OF THE CASE

Shortly after 6:00 pm on the evening of December 8, 2008, a 2004 Chevrolet Silverado pickup driven by appellant Walter Douglas Barclay and a 1996 Chevy Geo occupied by driver Alvaro Garcia and a passenger, Jose Davila, collided at a curve on narrow, oak-lined Point of Pines Road, which traverses the eastern tip of Edisto Island. Tr. 249. Barclay and Davila survived, but Garcia died at the scene.

On April 4, 2011, a Charleston County grand jury returned indictments charging appellant with two counts of felony DUI: Indictment 2011-GS-10-2817, felony DUI causing great bodily injury (Davila), and 2011-GS-10-2848, felony DUI causing death (Garcia).

On October 24 through November 1, 2011, Barclay stood trial on these charges in the Charleston County Court of General Sessions, the Honorable Deadra L. Jefferson presiding.[1] The jury convicted appellant of felony DUI causing the death of Garcia, but acquitted him of felony DUI causing great bodily injury to Davila. The court sentenced appellant to imprisonment for twelve years and, by written order dated July 18, 2012, denied appellant's motion for a new trial.

This direct appeal follows.

[1] The court heard pretrial motions October 20 and 21, 2011.

ARGUMENT

Issue 1

The trial court committed reversible error by declining to instruct the jury on driving under the influence, S.C. Code § 56-5-2930, as a lesser-included offense of felony DUI, § 56-5-2945, since there was evidence the decedent himself was at fault in proximately causing the collision, so that appellant would have been guilty of only the lesser offense.

At trial the State and the defense introduced conflicting evidence on whether the actions of Barclay or the decedent, Garcia, had been the proximate cause of the collision. The parties agreed that the driver who had crossed the center line into the lane of oncoming traffic on the island road was at fault. Both indictments alleged that appellant caused the accident by crossing the center line. ROA __.

Garcia's passenger, Davila, testified for the State (via an interpreter of Spanish) that Barclay's "gray truck . . . was in our lane" at the moment of impact. Tr. 456-7. Deputy William Brinson, the State's (first-time, Tr. 143-4) expert in traffic fatality investigation, explained, "Speed was not a factor in this collision. It was the placement of the vehicles at the time of the collision . . . ." Tr. 192-3. In Brinson's opinion, appellant veered over into Garcia's lane "almost completely" as both drivers entered the curve and collided with his vehicle head-on. Tr. 197-8; tr. 211.

Defense witness Melody Bailey, who knew Davila through her charitable work on behalf of area migrant workers, testified that two months before appellant's trial, a fearful Davila had sought her help, disclosing that "he had been approached by two ladies and a law officer who said that if he did not come to court and testify that the accident was Mr.

Barclay's fault that he would go to jail." Tr. 226-8. In fact, Baily continued on cross-examination, Davila had expressly told her that "the accident was not Mr. Barclay's fault, he did not feel it was Mr. Barclay's fault." Tr. 836-41. Although appellant did not testify at trial (Tr. 929), Deputy Michael Burrell testified that appellant had insisted, when questioned in the hospital the night of the accident, "I didn't kill anybody." Tr. 355-6.

Shortly before the conclusion of the State's case, in response to an inquiry from the bench, defense counsel informed the court that appellant would be requesting a charge on driving under the influence, S.C. Code § 56-5-2930, as a lesser-included offense of felony DUI, § 56-5-2945. Tr. 666. The court expressed its view that, at that point in the trial, "the facts would not support it in this case." *Id.* At the start of the defense case, the court indicated that, according to its analysis, DUI might not be a lesser-included offense of felony DUI as a matter of law. Tr. 755-70. These two charge colloquies occurred prior to Melody Bailey's testimony for the defense.

At the conclusion of the defense case, the State did not dispute that DUI might be a lesser-included offense of felony DUI, but questioned whether "it applies in this case." Tr. 924. "I think that on a boiler-plate definition of lesser-included offense that DUI would be lesser-included," the court concurred, though it still doubted the evidence in the case supported the charge. Tr. 925-7.

At the formal charge conference, the court declined to charge non-felony DUI, stating, "[T]here is no support for it in the record that he was simply driving under the influence. . . . [T]he only testimony in the record is that he was driving, he was significantly impaired, that he crossed the center line and caused death and great bodily

injury to Mr. Davila and Mr. Garcia." Tr. 940; see also tr. 944-5; tr. 948-50. Defense counsel objected to the omission of a DUI charge. Tr. 941.

After the court had given its final instructions to the jury, counsel took exception to the absence of the lesser-included offense. Tr. 1066. The court responded, "I have changed my opinion about whether it is a lesser-included. I don't think it is, because . . . the felony DUI statute does not use the terms 'materially and appreciably impaired,' so it really does not contain the elements of the greater offense." *Id.* (Concerning the latter point, see Issue 2, below.) Defense counsel directed the court's attention to *State v. Bodiford*, 282 S.C. 378, 318 S.E.2d 567, 568 (1984), in which the Supreme Court held, shortly after the felony DUI statute was enacted in 1983, that "Section 56-5-2945 specifies driving under the influence as an element." Tr. 1068.

Counsel renewed his motions and objections after the jury found appellant guilty of felony DUI causing death. Tr. 1082. In a written post-trial motion, counsel requested a new trial on the ground "[t]he trial court erred in failing to charge the jury on the lesser-included offense of driving under the influence, first offense." ROA __. In a written order denying the motion, the court wrote, "Section 56-5-2945 does not include the language 'materially and appreciably impaired,' as it only requires the State to prove the Defendant was 'driving under the influence.' . . . DUI is not a lesser-included offense of Felony DUI . . . . Further, even if DUI were a lesser-included offense of Felony DUI, such an instruction was not factually supported by the evidence presented in this case." ROA __. Both rulings were erroneous.

"The test for determining whether one offense is a lesser included offense of the crime charged is whether the greater of the two offenses includes all the elements of the

lesser offense. [Citation omitted.] If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater. [Citation omitted.]" *State v. Bland*, 318 S.C. 315, 317, 457 611, 612 (1995); *State v. Gilliland*, S.C. Ct. App. Op. No. 5053, filed November 28, 2012.

S.C. Code § 2945(A), felony driving under the influence, provides in relevant part, "A person who, while under the influence of alcohol . . . drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of the offense of felony driving under the influence . . . ." In this case, the felony DUI statute required the State to prove three elements: (1) appellant drove his vehicle while under the influence of alcohol; (2) appellant did an act forbidden by law or neglected a duty imposed by law; and (3) the act or neglect proximately caused Garcia's death. *State v. Cribb*, 310 S.C. 518, 523, 426 S.E.2d 306, 309 (1992); *State v. Dantonio*, 658 S.C. 594, 658 S.E.2d 337 (Ct. App. 2008).

Section 56-5-39(A), non-felony driving under the influence, provides in relevant part, "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 . . . ." The necessary elements of DUI are: (1) driving a motor vehicle (2) while under the influence of alcohol (3) to the extent that the driver's faculties are materially and appreciably impaired. *State v. Salisbury*, 343 S.C. 520, 541 S.E.2d 247 (2001); *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001).

As the Supreme Court held in *Bodiford*, cited at trial and above, DUI is "an element" of felony DUI. In other words, felony DUI is "simple" DUI plus an illegal act or the neglect of a legal duty which proximately causes death or serious bodily injury to another.

The evidence presented at trial determines the law to be charged to the jury. *State v. Lee,* 298 S.C. 362, 364, 380 S.E.2d 834 (1989); *State v. Dennis*, S.C. Ct. App. Op. No. 5222, filed April 3, 2013. If there is any evidence supporting a jury instruction, the trial court must, upon request, give the instruction. *State v. Smith*, 391 S.C. 408, 706 S.E.2d 12 (2011); *State v. Niles*, S.C. Ct. App. Op. No. 5034, filed November 14, 2012.

"A trial judge is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater." *State v. Drafts*, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986); *State v. Gilliland.* "When reviewing the trial court's refusal to deliver a requested jury instruction, appellate courts must consider the evidence in a light most favorable to the defendant." *State v. Commander*, 396 S.C. 254, 721 S.E.2d 413, 422 (2011); *State v. Gilmore*, 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011).

According to conflicting evidence presented by the State and the defense at trial, either Garcia or Barclay proximately caused the accident by crossing the center line into the other's lane of traffic. If the jury found Davila's pretrial statement to Bailey that appellant was without fault in causing the accident more credible than his trial testimony, appellant would have been guilty of DUI, not felony DUI.

The trial court's denial of a jury instruction on the lesser offense entitles appellant to a new trial.

Issue 2

The trial court committed reversible error by declining to instruct the jury that felony DUI, S.C. Code § 56-5-2945, requires proof that "the person's faculties to drive a motor vehicle [were] materially and appreciably impaired," as provided by § 56-5-2930, the DUI statute.

In order to prove appellant guilty of felony DUI, the court instructed the jury, the State had to prove beyond a reasonable doubt "the defendant was sufficiently under the influence to impair his ability to drive with reasonable care, with due regard for others and himself, or as a reasonably prudent person would drive. It is not necessary to show that the defendant was in a helpless condition, passed out, or even intoxicated." Tr. 1057.

The court also instructed the jury that evidence of a blood-alcohol concentration of 0.08 allowed them to infer that "the defendant was under the influence." Tr. 1059-60. See S.C. Code § 56-5-2950(G)(3). (The State contended that appellant's blood-alcohol level tested at 0.208 more than three hours after the accident. Tr. 558; tr. 718.)

Defense counsel took exception to the absence of a jury instruction that the State had to prove "the defendant was materially and appreciably impaired," as provided in the DUI statute, § 56-5-2930(A). Tr. 1063-64. "In response to that," the court ruled, "he was charged with felony DUI, those terms are not in that statute, therefore not applicable." *Id.* (At this time, the court also decided for much the same reason that DUI was not a lesser-included offense of felony DUI. Tr. 1066. See Issue 1, above.) In short, the court held, a conviction for felony DUI does not require proof the accused was "materially and appreciably impaired." Tr. 1067-70.

Counsel renewed his motions and objections after the jury found appellant guilty of felony DUI causing death. Tr. 1082. In a written new trial motion reasserting this ground of error, counsel observed that the court had included the "materially and appreciably impaired" requirement in its charge to the jury in the felony DUI case of *State v. Martin*, 392 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011). ROA __. In its order denying the new trial motion, the court wrote, "Although articulated differently, the charge given essentially parallels the language in the DUI statute and has the same connotation as 'materially and appreciably impaired'." ROA __.

"A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *State v. Mattison*, 388 S.C. 469, 697 S.E.2d 578, 584 (2010); *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443 (Ct. App. 2005). "'It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge.'" *State v. Williams*, 367 S.C. 192, 624 S.E.2d 443, 445 (Ct. App. 2005), quoting *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000); *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007).

The cardinal rule of statutory construction is to determine the intent of the legislature. *State v. Baucom*, 340 S.C. 339, 342, 531 S.E.2d 922 (2000); *State v. Brannon*, 379 S.C. 487, 666 S.E.2d 487 (Ct. App. 2008). The language of a statute must be interpreted in light of its intended purpose. *State v. Gaines*, 380 S.C. 23, 667 S.E.2d 728 (2008); *State v. Jihad*, 342 S.C. 138, 536 S.E.2d 79 (Ct. App. 2000). "[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*, 303 S.C. 270, 403 S.E.2d 660, 662 (1991); *State v. Dupree*, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003).

S.C. Code § 56-5-2945(A), felony driving under the influence, provides in relevant part, "A person who, while under the influence of alcohol . . . drives a motor vehicle and when driving a motor vehicle does any act forbidden by law or neglects any duty imposed by law in the driving of the motor vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of the offense of felony driving under the influence . . . ." S.C. Code § 56-5-30(A), non-felony driving under the influence, states, "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 . . . ."

DUI is a lesser-included offense of felony DUI. *State v. Bodiford.* (See Issue 1, above.) DUI requires proof that the defendant's ability to drive was materially and appreciably impaired. *City Of Orangeburg v. Carter*, 303 S.C. 290, 400 S.E.2d 140 (1991). "Driving under the influence is . . . established by proof that defendant's ability to drive was materially and appreciably impaired." *State v. Kerr*, 330 S.C. 132, 498 S.E.2d 202, 218 (Ct. App. 1998).

The *Kerr* court explained, "Prior case law speaks in terms of the ability to operate a vehicle with reasonable care and as a prudent driver with due regard for himself and others. These are proper standards with which to compare the defendant when determining whether defendant's driving abilities were materially and appreciably impaired." *Id.* The legislature made its intent expressly clear when it amended § 56-5-30(A) to require proof of material and appreciable impairment after the Court Of Appeals

issued its opinion in *Kerr. State v. Knuckles*, 354 S.C. 626, 583 S.E.2d 51 (2003). As with the inference provided by S.C. Code § 56-5-2950, lack of reasonable care and prudence (essentially a civil tort standard) may be some evidence of material and appreciable impairment, but is not itself the level of proof required by §§ 56-5-2930 and 56-5-2945.

By omitting a charge on the correct standard of proof necessary for a conviction of felony DUI, while at the same time charging an evidentiary inference of driving under the influence derived from § 56-5-2950(G)(3), the court effectively instructed the jury on the nonexistent offense of felony driving with an unlawful alcohol concentration (DUAC), not felony DUI. S.C. Code § 56-5-2933(A), the pertinent section of DUAC statute, states, "It is unlawful for a person to drive a motor vehicle within this State while his alcohol concentration is eight one-hundredths of one percent or more." In *S.C. Department Of Motor Vehicles v. Blackwell*, 389 S.C. 293, 698 S.E.2d 770, 771-2 (2010), the Supreme Court observed, "The offense of DUAC carries a permissible inference of being under the influence. A conviction under § 56-5-2930 requires a driver to be under the influence to a certain extent. A driver may have an alcohol concentration sufficient to support a conviction of DUAC and trigger the inference, but his faculties may not be impaired to the degree required for a conviction under § 56-5-2930. Both offenses are predicated upon a driver operating a vehicle while under the influence of alcohol, albeit to potentially different extents."

The trial court's omission of the requested jury instruction that felony DUI requires proof that "the person's faculties to drive a motor vehicle [were] materially and appreciably impaired" entitles appellant to a new trial.

Issue 3

The trial court committed reversible error by allowing into evidence the results of appellant's blood test since the drawing of appellant's blood without a warrant constituted an unreasonable search and seizure prohibited by the Fourth Amendment, as interpreted by *Missouri v. McNeely*, US Sup. Ct. Op. No. 11-1425, decided April 17, 2013.

The accident occurred at 6:06 pm.[2] Tr. 96. Emergency and fire personnel responded within minutes, followed shortly by Deputy Dustin Luckadoo. Tr. 130. An ambulance transported appellant to the Medical University of South Carolina (MUSC) in Charleston, a trip of 40 minutes. Tr. 113; tr. 116-7. At 7:30 pm, Deputy Herman Martin entered the emergency room. Tr. 604-5. In the meantime, Deputies William Brinson and Michael Burrell had arrived at the accident scene and started their investigation. Tr. 164. Brinson, the lead investigator, concluded he had probable cause to arrest appellant for felony DUI and obtain a blood sample after speaking with Luckadoo (first by telephone on his way to the location) and rescue workers at the scene and then with Martin by telephone at the hospital. Oct. 21 tr. 62-4; tr. 134-5.

Shortly before 9:50 pm, by telephone Brinson and Burrell directed Martin to obtain a sample of appellant's blood. Oct. 21 tr. 14; Oct. 21 tr. 64. None of the officers involved made any effort to secure a warrant. At 9:50 pm, a nurse drew two vials of blood by needle inserted into a vein in appellant's arm. Tr. 556-8.

Defense counsel filed a pretrial motion to suppress the blood evidence "by reason of illegal seizure of defendant's blood without a warrant." ROA __. At a hearing on the motion, the State argued, "[T]hey don't have to get a warrant first . . . because of the

[2] Times given are approximate.

exigent circumstances and the evidentiary nature of the blood, there is no need for a warrant," citing *State v. Williams*, 297 S.C. 290, 376 S.E.2d 773 (1989). Oct. 21 tr. 131; Oct. 21 tr. 135. The court denied the motion to suppress on that basis. Oct. 21 tr. 140-2.

In *State v. Williams*, cited by the State, the South Carolina Supreme Court interpreted *Schmerber v. California*, 384 U.S. 757 (1966), and *Cupp v. Murphy*, 412 US 291 (1973), to hold that "the warrantless seizure of [a defendant's] blood [does] not violate his fourth amendment rights if there [is] probable cause to arrest at the time of the accident." 376 S.E.2d at 774. In *Missouri v. McNeely*, US Sup. Ct. Op. No. 11-1425, decided April 17, 2013, however, a majority of the United States Supreme Court specifically rejected a *per se* rule such as *Williams* established: "In *Schmerber v. California*, 384 U. S. 757 (1966), this Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer 'might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.' *Id.*, at 770 (internal quotation marks omitted). The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances."

In *McNeely*, en route to the police station, the defendant informed the officer who had arrested him for DUI that he would not submit to a breath test. Without seeking to obtain a warrant, the officer transported the defendant to a nearby hospital, where a lab

technician secured a blood sample approximately 30 minutes after the arrest. The State of Missouri appealed the order granting the defendant's motion to suppress, arguing that DUI cases present a *per se* exigency, but did not seek to justify the particular warrantless blood test in question on the basis of any individualized exigency.

Deputy Brinson ordered Deputy Martin to obtain appellant's blood more than three hours after Deputy Luckadoo initially responded to the accident and more than two hours after Brinson and Deputy Burrell began their investigation. As in *McNeely*, at trial the State relied on a *per se* rule that unconstitutionally dispensed with the Fourth Amendment's warrant requirement. It did not attempt to justify the absence of a warrant on the basis of exigent circumstances.

The error of admitting the blood evidence at trial was far from harmless. The State's forensic toxicologist testified that appellant's blood-alcohol level tested 0.208. Tr. 718. In closing, the State stressed the accuracy and conclusiveness of the blood evidence and informed the jury that "in cases like this . . . if someone's blood alcohol content is .08 or higher, you are allowed to . . . infer that the defendant was driving under the influence." Tr. 1021-7; tr. 1033-5. The court also instructed the jury that evidence of a blood-alcohol concentration of 0.08 alone permitted them to infer that "the defendant was under the influence." Tr. 1059-60. See S.C. Code § 56-5-2950(G)(3).

The trial court's denial of appellant's motion to suppress the blood evidence due to the absence of a warrant entitles appellant to a new trial.

Issue 4

The trial court committed reversible error by allowing evidence of an empty Jim Beam bottle found by the side of the road near the accident scene, as the State failed to establish any evidentiary link between the bottle and appellant, so that it was irrelevant under Rules 401 and 402, SCRE, and more prejudicial than probative under Rule 403, SCRE.

On arriving at the accident scene, investigating officers observed "a cooler and some beer cans and a liquor bottle." Tr. 171-2. Some of the unopened beer cans had burst in the wreck. Tr. 220.

Investigator Kathy Kjellman took pictures of the cooler and the beer cans. Tr. 319. She also photographed "a Jim Beam bottle, empty," which she estimated was located ten feet from the cooler, "off the side of the road, in some bushes . . . visible from the roadway." Tr. 320; tr. 334. Although Kjellman collected these items as potential evidence, she never tested them for fingerprints. Tr. 321. Kjellman admitted she had no idea how the Jim Beam bottle came to be at the accident scene. Tr. 334-5. But "[i]t looked like it had freshly been put there, thrown there, tossed there, tossed there recently," she added, without elaboration or explanation. Tr. 337.

Over the objection of defense counsel, during Kjellman's testimony the State introduced three photographs (State's Exhibits 12, 13 and 14) of the cooler, the beer cans the Jim Beam bottle taken at the scene. Tr. 317. Kjellman utilized the photographs to demonstrate the location of the bottle in relation to the accident, when she encountered it. Tr. 319-20.

Defense counsel initially objected to the Jim Beam evidence in a written pretrial motion. ROA __. At a hearing on the motion, the assistant solicitor revealed that "Jose

[Davila] said he saw a man immediately after the collision picking up the cans and the bottle . . . and putting them back in the cooler . . . and then when my officers get there . . . they appear to be on the side of the road . . . . It's my understanding that he's friends with the defendant." Oct. 20 tr. 22; tr. 26-8. Davila corroborated this account later at trial. Tr. 458-60; tr. 504.

The man Davila saw, Ray Woods, accompanied by his son, Brian, happened upon the accident moments after it happened and called 911. Tr. 858-9. Woods testified at trial he had known both Davila and Barclay previously. Tr. 860-1. He was not asked if he had moved the beer cans or Jim Beam bottle before the police arrived, nor was he questioned about the nature of his prior association with appellant. Tr. 863.

At the pretrial hearing, the assistant solicitor also disclosed that the investigating officers had destroyed the Jim Beam bottle itself prior to trial, in violation of its own departmental policy. Oct. 20 tr. 23-4. The trial court interjected, "It's unlikely they would have found any fingerprints on any of those beer cans or bottles." *Id.* The assistant solicitor concurred. Oct. 20 tr. 25.

At trial, Sergeant Burrell admitted that he had instructed Investigator Kjellman to destroy the Jim Beam bottle prior to trial in violation of departmental policy. Tr. 411-2. Kjellman corroborated Burrell's testimony, but insisted, "The condition of . . . the bottle [was] not conducive to collecting latent prints. I could visually inspect it, and I could tell it wasn't . . . the dust and dirt and everything on the outside of the bottle, the chances of getting a fingerprint from that bottle were remote." Tr. 333-6.

When defense counsel argued at the pretrial hearing that the Jim Beam evidence should be excluded at trial because "there's no evidence of ownership," the court replied,

"Well, inferentially there's a lot of circumstantial evidence as to the ownership . . . They have a [witness, Davila] who says they saw somebody picking up these things and attempting to put them back in the cooler. And through their investigation, they've determined that person is connected to your client . . . ." Oct. 20 tr. 29-30. The court then chastised counsel for not testing the bottle for fingerprints himself before it was destroyed. Oct. 20 tr. 32-6. "So," the court added, "apparently it was not at the forefront of being that important to you." Oct. 20 tr. 39.

The court ruled, "So, at this point it's all speculative . . . . I haven't heard anything that would make it exculpatory . . . . [Y]ou haven't presented anything beyond light speculation that it would be exculpatory." Oct. 20 tr. 40. The motion to exclude the Jim Beam evidence was denied. Oct. 20 tr. 41-4.

Counsel renewed the objection after appellant had been convicted (Tr. 1082) and in his written new trial motion. ROA __. In its order denying the motion, the court wrote, "Investigator Kjellman was properly allowed to testify on where the evidence came from based on her years of law enforcement experience, her rational perception, and investigation of the scene. The issue comes down to witness credibility and believability." ROA __.

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, [the South Carolina Rules of Evidence], or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. *See*, also, *State v. Green*, 397 S.C. 268, 724 S.E.2d 664 (2012); *State v. Douglas*, 359 S.C. 187, 597 S.E.2d 1 (Ct. App. 2004).

The burden of establishing the relevance of evidence rests with its proponent. *State v. Salley*, 398 S.C. 160, 727 S.E.2d 740 (2012); *State v. Spears*, 393 S.C. 466, 713 S.E.2d 324 (Ct. App. 2011). The State's inability to establish an evidentiary link between the empty Jim Beam bottle found near the scene and appellant meant that the trial court should have excluded it from evidence. *See State v. McConnell*, 323 S.C. 278, 350 S.E.2d 179 (1986); *Holman v. State*, 381 S.C. 491, 674 S.E.2d 171 (2009); compare *State v. Garris*, 394 S.C. 336, 714 S.E.2d 888 (Ct. App. 2011), and *State v. Spears*.

Investigator Kjellman's testimony regarding the provenance of the bottle was purely speculative. By her own admission, Kjellman had no idea where the bottle had come from. Her conjecture that it appeared to have been "put there, thrown there, . . . tossed there recently" was qualified by the State's admission that Ray Woods had tampered with the evidence before she and the other officers arrived at the scene.[3]

The court's brief discussion of Kjellman's testimony in the order denying the new trial is similarly conclusory. Moreover, the court turned the State's burden of

[3] The State's pretrial assertion that appellant's "friendship" with Ray Woods provided the necessary evidentiary link between appellant and the Jim Beam bottle was wholly abandoned at trial. In this regard, *see State v. Edwards*, 383 SC 66, 678 S.E.2d 405 (2009). In any case, there was no evidence appellant had directed Woods' activities at the scene in any way.

demonstrating relevance on its head by requiring the defense to prove instead that the bottle would have been exculpatory had not the police destroyed it prior to trial.

The error of admitting the Jim Beam evidence at trial was not harmless. The State's evidence against appellant was not overwhelming and was controverted by the defense. The Jim Beam bottle was the only legally-significant open container, *see* S.C. Code § 61-4-110, found at the scene.[4]

The trial court's denial of appellant's motion to suppress the evidence entitles appellant to a new trial.

[4] Other than an empty beer can found in the front seat of Garcia's automobile.

Issue 5

The trial court committed reversible error by excluding from evidence a contemporaneous video recording of appellant offered by the defense to impeach the arresting officers' account of appellant's purported mental and physical impairment and confusion after the accident, as the court's ruling ignored Rules 104 and 901, SCRE, and also violated appellant's right to present a complete defense.

The accident occurred at 6:06 pm[5] on December 8, 2008. Tr. 96. Emergency and fire personnel responded within minutes, followed over the next hour by law enforcement. Tr. 130; tr. 164. An ambulance transported appellant to the Medical University of South Carolina (MUSC) in Charleston, a trip lasting forty minutes. Tr. 113; tr. 116-7.

Deputy Herman Martin met the ambulance at the emergency room at 7:30 pm. Tr. 604-5. At 9:00 pm (Tr. 567), Martin claimed, appellant still "had the smell of alcoholic beverage on him, bloodshot eyes. That's basically it, that I can recall." Tr. 607.

At 9:50 pm, a nurse drew a sample of appellant's blood. Tr. 557-8. "[H]e just didn't seem too awfully concerned . . . struck me as being intoxicated," the nurse testified. Tr. 554; tr. 560.

At 10:02 pm, Deputies William Brinson and Michael Burrell arrived at MUSC from the accident scene. Tr. 212; tr. 355. The hospital discharged appellant into their custody at 10:15 pm. Tr. 569. Brinson testified, "[W]e kind of helped him walk out to the car . . . we had to help him." Tr. 216-7. The officers permitted appellant to smoke a

[5] Times given are approximate.

cigarette in the parking lot. *Id.* They headed to the Charleston County Detention Center at 10:44 pm. Tr. 413.

By 10:55 pm, the officers and appellant had arrived at the detention center, and appellant sat for several minutes on a picnic bench outside, while the officers completed their paperwork. Tr. 214. According to Brinson, appellant was "[v]ery sluggish, still had the obvious odor of alcohol about him." *Id.* Then, Brinson continued, appellant suddenly "fell off the back of the bench and hit his head on the wall behind him, so we had to take him back down to the Medical University again to get checked out before we could take him to jail." *Id.*

By 11:30 pm, they were back at the MUSC emergency room, where Brinson and Burrell continued with their paperwork at the foot of appellant's bed. Oct. 21 tr. 69. Brinson testified that appellant was "kind of in and out, falling asleep in the bed in the ER. He woke up at one point and asked where he was, why was he here . . . ." Tr. 214.

Burrell described appellant at that time as "[v]ery jovial, very funny, his speech was extremely slurred, his eyes were extremely bloodshot, clothes were disheveled, he didn't think he had been, or why he was even there, he didn't know." Tr. 355-6. According to Burrell, appellant "woke up and said, 'What am I doing here?' And I looked at him, and I said, 'You've been in a crash.' 'I haven't been in any Goddamn crash.' And I said, 'Yes, sir, you were in a crash and you killed somebody.' 'I didn't kill anybody.' . . . Shortly thereafter, [defense counsel] walked in." *Id.*

On cross-examination of Deputy Burrell, defense counsel informed the court that he intended to impeach the witness with "a videotape that was taken at the hospital at the exact same time that this officer testified Mr. Barclay appears in this [intoxicated]

condition." Tr. 359-60. In the video, which was recorded at 12:37 am that morning (Tr. 916), appellant appears lucid, oriented and unimpaired. He also asserts that Garcia caused the accident by crossing the center line. Counsel made the recording with a digital camera. Tr. 369.

When counsel sought to have the video marked for identification, the court objected that it had to be "authenticated" by "the person who took it" and informed counsel, "[Y]ou cannot introduce it through this witness because you do not have the ability to authenticate it at this time." Tr. 360-1. When counsel explained that he had made the recording himself, the court warned that it would disqualify counsel from representing appellant if he attempted to authenticate the recording. Tr. 362-3. It directed counsel to "show the video to the State, see if they can agree to the admissibility . . . ." Tr. 364. When counsel again tried to get the video marked for identification, the court responded, "You're going to do what I have instructed you to do . . . and then we'll go from there." *Id.*

After the court listened to the audio portion of the recording, it lodged another objection: "It is self-serving statements which were asked by his attorney clearly anticipating this case. So they don't come within any exception." Tr. 366. If appellant elected to testify, however, the court indicated it might allow the video to be played for the jury "without audio to show his condition." *Id.* "But I think . .. you open a Pandora's Box if you try to introduce it," the court cautioned. Tr. 368. Counsel said he would give the court's advice some thought. *Id.* Barclay later chose not to testify. Tr. 929.

At this point, the court inquired if the State, which had heretofore been silent on the matter, objected to the video. Tr. 368-9. "Well . . . it is self-serving," the assistant

solicitor agreed. *Id.* "It is clearly bolstering," the court said. *Id.* The "problem," as the court saw it, "is you have a witness who says his speech was slurred, and the video shows the speech wasn't slurred." *Id.* But, the court quickly added, "I didn't see it; his speech does sound delayed to me and very deliberate, as if someone is impaired." *Id.* Also, the court indicated, "I'm not hearing any inconsistency for impairment purposes." Tr. 373-4.

Defense counsel stated, "I just want the record to reflect we actually offered this videotape." Tr. 375. The court responded, "[T]he only way you can do that right now is make yourself a witness, and I don't think that is a good idea." *Id.* "I would like to watch it before I make any decisions regarding whether you will testify," the court added. Tr. 376.

Defense witness Dr. Ronald Hargrave, a physician living in Mount Pleasant, was qualified as an expert in emergency medicine. Tr. 883. In preparation for his testimony at trial on the issue of appellant's impairment, Dr. Hargrave reviewed, among other things, the video recording of appellant at the hospital. Tr. 886-7. In his opinion, "Relying on what I saw in the video tape . . . it did not appear that he was significantly impaired. His appearance was not consistent with significant impairment. His appearance reflected . . . no bloodshot eyes; he was lucid; he was oriented; he was cooperative; he did not slur his speech; he performed simple tasks without any errors. My assessment of what I saw was this was a man who was not impaired." Tr. 901-2.

Defense counsel renewed his motions and objections after the jury found appellant guilty of felony DUI causing death. Tr. 1082. In his written new trial motion, counsel argued, "The trial court erred in failing to allow the video recording of the defendant at the hospital on the night of the accident to be used as impeachment

evidence, as it contradicted the testimony of Deputies Brinson and Burrell as to defendant's appearance and as to whether defendant then knew how the accident happened." ROA __. In the order denying appellant a new trial, the court wrote, "The court instructed defendant's counsel he would need an alternate method to authenticate the video to avoid making himself a witness at trial. The information obtained in the video could have been elicited from the defendant, but the defendant chose to exercise his right to remain silent and did not testify at trial." ROA __.

The court's order also reflects some confusion about the sequence and timing of events at the hospital and the detention center. ROA __. Specifically, the court wrote that "over two (2) and a half hours passed between Deputy Brinson and Sergeant Burrell's original observations of the defendant and the interview on the video recording" and concluded that "the defendant was attempting to impeach the detectives' testimony from observations taken at a totally different timeframe," which, the court held, rendered the video both irrelevant and more prejudicial than probative. ROA __. However, Burrell clearly testified that his observations of appellant at issue occurred shortly before defense counsel arrived at the hospital and made the recording.[6]

Rule 901(a), SCRE, provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *See State v. Anderson*, 386 S.C. 120, 687 S.E.2d 35 (2009); *State v. Aragon*, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003).

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[6] At trial the court confirmed the video was made during defendant's second trip to the hospital, "This is after he has hit his head and gone back to the hospital to be reexamined..." Tr. 377.

First, the challenge to the authenticity of the video, initially voiced by the trial court, was a legalistic red herring. Judging by their testimony, neither Brinson nor Burrell, who were in the vicinity when it was recorded, questioned its genuineness.

Second, Rule 104(a), SCRE, states in pertinent part, "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges." Subdivision (c) of Rule 104, SCRE, provides, "Hearings on the admissibility of . . . statements by an accused shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests." The note appended to Rule 104 observes, "Subsection (c) modifies the federal rule by adding the phrase 'or statements made by an accused, and pretrial identifications of an accused.' This addition is made to emphasize the fact that hearings on the admissibility of all statements made by a criminal defendant, whether inculpatory or exculpatory, must be made outside the presence of the jury. *State v. Primus*, 312 S.C. 256, 440 S.E.2d 128 (1994); *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971)." *See*, also, *State v. Cheatam*, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002). Subsection (d) of the rule indicates, "The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case."

The court erred by ignoring Rules 104 and 901, SCRE, and instead conditioning the admissibility of the video upon appellant's waiver of one of two constitutional rights: (1) his right not to testify before the jury ("remain silent") or (2) his right to counsel,

since the court held that counsel's testimony on the matter would result in his subsequent disqualification as Barclay's attorney for the balance of trial.

Pursuant to Rules 104 and 901, SCRE, a hearing on the authenticity of the video (assuming its necessity) should have been held outside the presence of the jury, where appellant would have testified on that limited issue. As to the court's promise to disqualify defense counsel should he attempt to authenticate the recording himself, *see State v. Sanders*, 341 S.C. 386, 534 S.E.2d 696 (2000).

The seminal case of *State v. Schmidt*, 288 SC 301, 342 S.E.2d 401, 402 (1986), explains, "The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. These basic rights are applicable to the states through the due process clause of the Fourteenth Amendment. The Amendment essentially 'constitutionalizes' the right to present a defense in an adversary criminal trial." *See*, also, *State v. Lyles*, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008).

At a minimum, the video recording was admissible to impeach Brinson and Burrell's claims of appellant's mental and physical impairment between 10:00 pm and 12:30 am and to refute their assertion that he was oblivious to the circumstances of the collision. The error of excluding the evidence was not harmless. The State's case against appellant was not overwhelming and was controverted by the defense.

The trial court's exclusion of the video recording of appellant entitles appellant to a new trial.

Issue 6

The trial court committed reversible error by declining to dismiss the charges against appellant due to the failure of the arresting officers to record appellant's conduct when they initially transported him from the hospital to the detention center, as required by S.C. Code § 56-5-2953.

As appellant initially left the hospital in the custody of Deputies Brinson and Burrell, Brinson testified, "[W]e kind of helped him walk out to the car . . . we had to help him." Tr. 216-7. They gave appellant a cigarette and waited for him to finish smoking it outside their police cruiser in the hospital parking lot before transporting him to the detention center. *Id.* The officers neglected to record appellant at any point after they escorted him out of the hospital.

Defense counsel moved to dismiss the charges against appellant due to the officer's failure to comply with S.C. Code § 56-5-2953 in a written pretrial motion. ROA __. At the pretrial hearing on this motion, Brinson testified that, although their car was equipped with a camera, recording appellant outside the hospital "wasn't practical because we were getting in the car to leave" and speculated that a recording might have endangered appellant's safety because of the position he had parked the cruiser in the parking lot upon arrival. October 21 tr. 95-8. Deputy Burrell conceded that the camera would have captured appellant's conduct had they simply moved him over a few feet within its range. October 21 tr. 118-122. The court denied the motion to dismiss. October 21 tr. 137-140.

In pertinent part, S.C. Code § 56-5-2953 mandates (subject to exceptions contained therein) that the arresting officers record the arrest of a suspect charged with

felony DUI, S.C. Code § 56-5-2945. Even if an exception to the recording mandate initially exists, the statute continues, "as soon as video recording is practicable in these circumstances, video recording must begin and conform with the provisions of this section." See *State v. Henkel*, S.C.Ct.App. Op.No. 5159, filed July 10, 2013.

Section 56-5-2953 has always been strictly construed. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). The purpose of recording is "to create direct evidence of a DUI arrest." 713 S.E.2d at 285. "[T]he primary intention behind 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." *State v. Elwell*, 396 S.C. 330, 721 S.E.2d 451, 454 (Ct.App. 2011) (footnote omitted), reversed on other grounds but quoted with approval, *State v. Elwell*, S.C. Sup. Ct. Op. No. 27259, filed May 29, 2013. The remedy for noncompliance with the statutory mandate is dismissal of the pending charges. *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007).

This case is distinguishable from *State v. Manning*, S.C. Ct. App. Op. No. 5017, refiled October 10, 2012, since no exception to the recording mandate existed after Brinson and Burrell escorted appellant from the hospital and drove him to the detention center.

In essence, Deputy Brinson testified it would have been inconvenient to record appellant outside the police car. "Inconvenience" is not a recognized exception to the statutory mandate. *See State v. Johnson*, 396 S.C. 183, 720 S.E.2d 516 (Ct. App. 2011). Nevertheless, even that thin excuse became unavailable once appellant was inside the police cruiser. *See Murphy v. State*, 392 S.C. 626, 709 S.E.2d 685 (Ct. App. 2011).

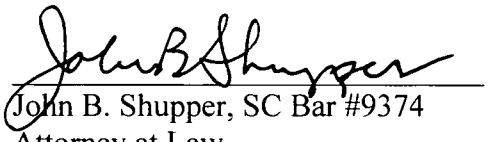
When the officers left the hospital with appellant in their custody, video recording became both "practicable" and mandatory under the statute.

The trial court's denial of appellant's motion to dismiss due to the failure of the arresting officers to comply with S.C. Code § 56-5-2953 was erroneous and requires this Court to dismiss appellant's conviction.

CONCLUSION

Based on the foregoing six arguments, appellant Walter Douglas Barclay, by his undersigned counsel, respectfully requests the dismissal of his conviction (Issue 6) or a new trial (Issues 1 through 5).

Respectfully submitted,



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ATTORNEY FOR APPELLANT

This 17th day of July, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER DOUGLAS BARCLAY,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

A. Pretrial motions:

1. Defendant's motion to suppress blood test results due to state's failure to obtain a warrant;
2. Defendant's motion to suppress evidence relating to Jim Beam bottle;
3. Defendant's motion to dismiss charges due to state's failure to comply with recording requirement of S.C. Code § 56-5-2953.

B. October 20, 2011 pretrial hearing transcript:

1. Pages 16-44;
2. Pages 62-87;
3. Pages 135-136.

C. October 21, 2011 pretrial hearing transcript:

1. Pages 7-122;
2. Pages 131-152;
3. Pages 227-231.

D. October 24 through November 1, 2011 trial transcript:

State's case:

1. Pages 55-151;
2. Pages 164-199;
3. Pages 210-266;
4. Pages 270-339;
5. Pages 347-414;
6. Pages 419-438;
7. Pages 454-514;
8. Pages 522-523;
9. Pages 552-592;
10. Pages 603-623;
11. Pages 663-668;
12. Pages 670-680;
13. Pages 705-738;
14. Page 740.

Defendant's case:

1. Pages 755-771;
2. Pages 776-794;
3. Pages 823-863;
4. Pages 874-888;
5. Pages 891-929;
6. Pages 935-953;
7. Pages 955-1077;
8. Pages 1082-1102.

E. Post-trial motion:

1. Defendant's post-trial motion for new trial;
2. State's response to defendant's post-trial motion;
3. Order denying defendant's post-trial motion.

F. Exhibits:

1. Court's Exhibits 12 and 13, Deputy Brinson's affidavits.
2. State's Exhibits 12, 13 and 14 (photographs taken at scene of accident).
3. Defense counsel's video recording of appellant at hospital

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

July 17, 2013

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon Salley W. Elliott Esquire, by hand delivery at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of July, 2013.

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