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JUN 13 2016  
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County

Steven H. John, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

MICHAEL ANTHONY BUTLER, JR.,

APPELLANT

APPELLATE CASE NO. 2014-001595

---

ANDERS BRIEF OF APPELLANT

---

LAURA R. BAER  
Appellate Defender

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PO Box 11589  
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ATTORNEY FOR APPELLANT

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**STATEMENT OF ISSUES ON APPEAL**

- I. Whether the trial court erred in denying Appellant's motion for directed verdict in his trial for felony driving under the influence causing death where there was no direct evidence or substantial circumstantial evidence that Appellant was the driver of the vehicle at the time of the collision?
  
- II. Whether Appellant's conviction should be set aside because the State's witness, Phillip Johnson, testified without having first been properly sworn?

STATEMENT OF THE CASE

On June 19, 2014, Appellant was indicted by the Horry County grand jury for felony DUI with death. R. 554 – 555 (Indictment).

On July 14-17, 2014, Appellant appeared for trial before the Honorable Steven H. John and a jury. Appellant was represented by James C. Galmore, III and Catherine D. Owens, and the State was represented by assistant solicitors Lauree Richardson and Thomas G. Terrell, III. R. 1. The jury found Appellant guilty of the charged offense. R. 498, ll. 17-25; R. 556 (Verdict Form). Judge John sentenced Appellant to eight years, suspended upon the service of four years. R. 510, l. 21-25; R. 557 (Sentencing Sheet).

This appeal follows.

## STATEMENT OF FACTS

Appellant was indicted for felony driving under the influence with death in connection with a collision that occurred at approximately 3:00 a.m. on February 16, 2010. R. 154, l. 9-12; R. 320, ll. 8-12; R. 554 – 555(Indictment). The collision involved three vehicles – a silver Mercury Sable, a black Hyundai, and a pick-up truck. R. 245, ll. 21-25; R. 253 l. 13 – 254, l. 17; R. 257, ll. 1-25; R. 389, l. 6 – 392, l. 4. The Sable was travelling southbound in the northbound lane on Highway 17, a four lane road with a “Jersey barrier” divider in the middle. The Sable collided with the Hyundai, causing the vehicles to spin. The Sable then spun into the front end of the truck. The sedan came to rest on top of the Jersey barrier. R. 96, l. 5 – 98, l. 24; R. 107, ll. 2-20; R. 156, ll. 14-25; R. 160, l. 14 – 162, l. 18; R. 252, ll. 13 – 254, l. 17.

The driver of the pick-up truck was Eric Pierce. R. 99, ll. 7-17. The Hyundai was driven by Crystal Alden. Alden was celebrating her birthday that night, but claimed that she was not intoxicated, having had only one glass of wine during dinner and two shots at Bully’s bar over what was approximately a seven hour period. However, she was not given any field sobriety tests and no breathalyzer test was administered to Alden. Her intoxicated friend, Bradley Burns, was riding in the front passenger seat. R. 154, l. 9 – 156, l. 23; R. 159, l. 22 – 160, l. 13; R. 173, l. 23 – 175, l. 13; R. 178, l. 13 – 179, l. 24; R. 194, ll. 24-25. Burns testified that Alden did not drink “a whole lot,” however he could not recall how much either of them actually drank that night. R. 188, ll. 13-25; R. 190, ll. 2-8.

The occupants of the Sable were Appellant and Mitchell White. Mitchell White died at the scene of the accident prior to the arrival of emergency services personnel. His body went partially through the rear windshield on the passenger side of the vehicle, such

that his torso was resting on the trunk of the Sable toward the passenger side, while the lower half of his body remained inside. R. 101, ll. 16-25; R. 139, l. 4 – 140, l. 12.; R. 144, ll. 6-17; R. 166, ll. 2-15; R. 201, l. 25 – 202, l. 9; R. 323, l. 22 – 324, l. 11. The official cause of death was “extensive trauma sustained in a motor vehicle collision.” R. 117, ll. 7-11. White’s blood alcohol level was .236. R. 125, ll. 7-14. He also tested positive for marijuana and marijuana metabolite, indicating that he used marijuana both within a few hours of his death and within two weeks of his death. R. 125, l. 14 – 127, l. 3.

The main fact in dispute during the trial was whether Appellant or White was the driver of the vehicle. The State’s evidence regarding who was driving consisted of testimony from Said Canto, Phillip Johnson, and Heather Swarthout, none of whom actually saw Appellant operating the Sable at the time of the collision.

Said Canto was driving behind the Hyundai and the truck. He did not see the collision actually occur, but he saw the smoke and stopped his vehicle. He called for emergency assistance and tried to keep the occupants of the vehicles calm. Canto testified that when he approached the Sable, he saw Appellant in the driver seat. At first he appeared to be sleeping, but then he started to move. Canto signaled to him to stay there and that help was on the way. Appellant did not say anything. Canto then went to check on the occupants of the Hyundai, and when he returned Appellant was out of the Sable and looked “kind of dizzy.” R. 140, l. 17 – 142, l. 2; R. 143, l. 11 – 144, l. 5; R. 152, l. 11 – 153, l. 1. On cross-examination, Santo admitted that he did not see the Sable being driven, so he did not see who was actually driving at the time of the collision. He was also unable to recall whether Appellant was wearing a seatbelt. Notably, contrary to the photographs of the accident and the testimony of other witnesses, Canto testified that White was hanging out of

the back seat window on the passenger side and not out of the back windshield. His final testimony on the subject was that Appellant's legs were "on the pedals maybe like he was driving." R. 146, l. 2 – 151, l. 25.

Phillip Johnson was a firefighter/E.M.T. who responded to the scene and conducted a medical assessment of Appellant. R. 198, l. 16 – 199, l. 14; R. 203, ll. 12-17. Unlike the rest of the witness, the record does not reflect that Johnson was sworn-in prior to giving his testimony. R. 198, ll. 9-25. Nonetheless, Johnson testified that Appellant had a laceration to the right side of his forehead and just below his right eye. R. 209, l. 23 – 210, l. 13. Johnson's partner asked Appellant where he was seated in the car. According to Johnson, "[o]riginally he [Appellant] stated he was the driver of the vehicle, and then he stated that he was in Loris,<sup>1</sup> and then he stated that he wasn't the driver." R. 206, ll. 1-9; R. 213, ll. 2-22. Though the State alluded to the idea that Appellant changed his response because he realized that White was seriously injured or dead, Johnson testified that he did not inform Appellant of White's condition. R. 206, ll. 10-12; R. 219, l. 8 – 220, l. 5.

Michael Dangerfield testified for the State as an expert in "accident reconstruction." He was the head of the Multi-disciplinary Accident Investigation Team ("MAIT") that investigated the collision. R. 223, l. 19 – 252, l. 12. As a result of their investigation, they determined that the Sable was the "at-fault vehicle" in the accident. R. 278, l. 13 – 279, l. 1. However, MAIT did not conduct an occupant kinematics analysis, so Dangerfield could not give any opinion regarding who was driving the Sable. While such an analysis could have been conducted, Dangerfield testified that none was requested in this case. R. 279, l. 2 – 281, l. 1.

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<sup>1</sup> Loris is a small town in Horry County, South Carolina.

Heather Swarthout testified that she placed Appellant in the back of a police car after the accident because he refused medical treatment, was unstable on his feet, and needed to be kept out of the way of emergency services personnel. R. 325, l. 19 – 327, l. 10. She then had a discussion with Officer Shuster<sup>2</sup> and the Sergeant on the scene, during which “Officer Schuster advised that he had determined that Michael Butler [Appellant] was the driver of the silver Sable and that he had planned on starting the DUI process and – but that he was overwhelmed, and he asked if I would take over that process for him.” R. 327, ll. 11-21. Swarthout then conducted field sobriety tests, after which she placed Appellant under arrest. R. 328, l. 14 – 334, l. 12; R. 355, ll. 7-20; State’s Ex. 29 (In-car Video). Officer Schuster then began asking Appellant questions. Appellant responded that there was both a black male and white male in the vehicle with him. Then, when asked about White specifically, Appellant responded that he “dropped him [White] off.” Schuster then asked who was driving and Appellant responded that it was a white male but could not give them a name or tell them where that individual was then. He then asked about White again, and Appellant responded that White was a passenger and was not driving. R. 334, l. 15 – 335, l. 8. Swarthout also later testified on cross-examination that before she arrested Appellant, he told her that he came to the scene in an ambulance. Appellant then told her that he believed he was in Loris, rather than on a large bridge in North Myrtle Beach. R. 360, l. 7 – 362, l. 11.

Swarthout identified the DNA analysis report produced by SLED. Appellant’s DNA matched both the DNA swab taken from the driver side airbag and the passenger side airbag. R. 349, l. 19 – 353, l. 19; Defendant’s Ex. 4 (SLED DNA analysis report). The samples were taken from the lower, left quadrant of the driver side airbag and from the left side of the passenger side airbag. R. 414, l. 10 – 415, l. 7.

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<sup>2</sup> Officer Schuster did not testify at Appellant’s trial.

At the close of the State's case, defense counsel made a motion for directed verdict based on the State's failure to produce evidence that Appellant was the driver of the vehicle. R. 371, ll. 3-24. The State argued that Canto's testimony that Appellant's "butt was in the driver seat" and Alden's testimony that she saw headlights coming at her "indicate that it [the Sable] was being driven and also that it was driven by Mr. Butler [Appellant]." R. 372, ll. 1-13. In its denial of the motion, the trial court pointed to Canto's testimony and the DNA evidence. R. 372, l. 14 – 375, l. 8. The judge found that Canto testified that immediately after the accident occurred, he stopped and got out of his vehicle. He further stated:

The driver of the vehicle or the person that appears to be the driver of the vehicle was unconscious as according to Mr. Canto. He said the driver was knocked out, he was unconscious, behind the wheel of the vehicle.

He was seated in the driver's seat. His whole body was in the driver's seat and he was unconscious in the driver's seat, and this is immediately after the accident. It was only later that that person came to and exited the vehicle.

R. 372, l. 14 – 374, l. 15. The judge also cited the fact that Appellant's DNA was found on both airbags. R. 374, ll. 16-19. He found that this was both direct substantial circumstantial evidence reasonably tending to prove the guilt of the accused as the driver of the vehicle. R. 374, l. 19 – 375, l. 8.

The defense presented one witness, David Lee, who was qualified as an expert in accident reconstruction. R. 378, l. 11 – 387, l. 21. He agreed with MAIT's determination of how the collision occurred, but went one step further to conduct an occupant kinematics analysis. R. 393, l. 19-25; R. 404, l. 19 – 406, l. 20. Lee determined that White was the driver and Appellant was riding in the front passenger seat. R. 387, l. 22 – 389, l. 3; R. 406, ll. 17-25.

Based on the photographs of the vehicles, and consistent with MAIT findings, Lee determined that the driver of the Sable appeared to be wearing a seatbelt and that the

passenger was unrestrained. The collision occurred when the Hyundai and Sable struck each other near the passenger side headlights. That caused the vehicles to rotate clockwise while the occupants of the vehicle continued to move in the original direction of the vehicle until they struck something in the car that changed their direction. The driver would have hit something in the vicinity of the driver door and the passenger would hit something towards the center of the console, air bags, or between the air bags. The passenger side rear corner of the Sable then collided with the pick-up truck, with enough impact to push the corner brake light almost to the center under the license plate, causing the Sable to rotate counter-clockwise. That would have pinned the driver against the side of the vehicle and thrust the passenger further toward the driver side of the car.

When the vehicle came to a final stop, the energy was released such that the driver slid up from under the seatbelt and was ejected backwards toward the right rear quarter panel of the vehicle. This was evidenced by scrapes on both of White's legs from just below the shorts line down to the foot and a flesh wound on the ankle. It was also consistent with photographs showing what appeared to be blood<sup>3</sup> along the ridge of the driver side seatbelt. The passenger would have been forced across the vehicle and onto the driver side. Lee further testified that the location of Appellant's blood on both the driver and passenger sides airbags was consistent with his analysis because Appellant was the only occupant with the opportunity to be on both sides of the vehicle. Additionally, the two injuries to Appellant's right eye were consistent with his being the passenger. R. 389, l. 4 – 390, l. 2; R. 391, l. 4 – 392, l. 4; R. 394, l. 15 – 404, l. 11.

Defense counsel renewed the motion for directed verdict at the close of his case, which the trial court again denied. R. 426, l. 5 – 428, l. 3.

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<sup>3</sup> No sample was collected or tested from the driver side seatbelt. R. 400, l. 19 – 401, l. 7.

## ARGUMENT

- I. The trial court erred in denying Appellant's motion for directed verdict in his trial for felony driving under the influence causing death where there was no direct evidence or substantial circumstantial evidence that Appellant was the driver of the vehicle at the time of the collision.**

The State presented insufficient evidence that Appellant was the driver of the Sable such that the trial judge should have granted the defense's motion for directed verdict. The State's expert witness failed to conduct any occupant kinematics analysis such that he could not provide any opinion regarding where Appellant and White were located within the vehicle prior to the accident. The defense expert reasonably and logically explained how and why Appellant's blood was on both airbags, Appellant sustained injuries to the right side of his head, and White was ejected from the driver seat through the passenger side rear windshield. Canto's testimony, heavily relied upon by the State and the trial court, is perhaps the most worthless since he unequivocally testified that he did not see the Sable before the collision and did not see the collision actually occur. Moreover, the defense expert explained how and why Appellant would have landed in the driver seat even though he was an unrestrained passenger in the front seat prior to the collision.

"A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Lane, 406 S.C. 118, 121, 749 S.E.2d 165, 167 (Ct. App. 2013) (quoting State v. Brannon, 388 S.C. 498, 501, 697 S.E.2d 593, 595 (2010)). "The State has the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime or crimes." Id.; see also State v. Schrock, 283 S.C. 129, 133, 322 S.E.2d 450, 452 (1984) (noting the State has the burden of proving "the accused was at the scene of the crime when it happened and that he committed the criminal act"). "The jury weighs the evidence but when there is an

absence of evidence, it becomes the duty of the trial judge to direct a verdict and a corresponding duty is imposed on this Court.” State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984). “Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011). “The lower court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty.” State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000) (emphasis added). “‘Suspicion’ implies a belief or opinion as to guilt based upon facts or circumstances [that] do not amount to proof.” State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402,404–05 (2001).

“A felony driving under the influence charge requires proof of three elements: (1) the actor drives a vehicle while under the influence of alcohol or drugs; (2) the actor does an act forbidden by law or neglects a duty imposed by law; and (3) the act or neglect proximately causes great bodily harm or death to another person.” State v. Dantonio, 376 S.C. 594, 604, 658 S.E.2d 337, 342 (Ct. App. 2008). In the present case, the evidence presented to satisfy the first element was insufficient to submit the case to the jury, as it raised only a suspicion that Appellant was the driver of the Sable.

The only direct statement indicating that Appellant was the driver of the Sable was allegedly made to the treating firefighter/E.M.T., Phillip Johnson. However, he gave several other varying accounts that night, likely the result of his being knocked unconscious by the accident and suffering some a head injury. In addition to that, there was the testimony of Said Canto regarding Appellant’s location in the driver seat of the Sable after the crash. Importantly, Canto did not actually observe the Sable being driven and expressed uncertainty about whether what he observed was actually an indication that Appellant was

the driver. While the court pointed to the DNA evidence as reflective of Appellant's location on the driver side of the vehicle, there was no dispute that he ended up on the driver side at the end of the crash. Moreover, the defense presented expert testimony that the location of Appellant's DNA on both airbags was consistent only with his having been the passenger. Additionally, the expert testified that the only way that White could have been ejected out of the passenger side rear windshield was if he was the driver. The State's expert did not conduct any occupant kinematics analysis and thus did not render any opinion on the occupants' locations. Despite all of this, the trial judge denied the motion for directed verdict, finding that there was both direct evidence and substantial circumstantial evidence.

It was the duty of the trial judge to grant the motion for directed verdict because, even viewing the evidence in the light most favorable to the State, the evidence presented did not reasonably tend to prove Butler's guilt and fails our Supreme Court's well settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury. As discussed above, a mere suspicion is not sufficient evidence for submission to the jury. Accordingly, Butler's conviction should be reversed.

**II. Appellant's conviction should be set aside because the State's witness, Phillip Johnson, testified without having first been properly sworn.**

The State's witness, Phillip Johnson, testified without having been first duly sworn. It does not appear that this error was recognized during the trial, as defense counsel did not object to the failure to swear the witness. R. 171, ll. 9-25.

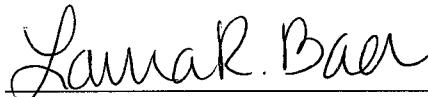
Rule 603, SCRE, mandates that "[b]efore testifying, every witness **shall be required** to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." (emphasis added). This error was so fundamental that it should be addressed on direct appeal. See State v. Taylor, 50 S.E. 247, 250 (W.Va. 1905) (setting aside verdict where eyewitness testified without having been sworn even though the failure was not discovered until after the verdict and was inadvertent because "[a]n oath is a sanction which the law says shall accompany the testimony of every witness, and courts cannot be permitted to dispense with it, even by oversight. It can make no difference that the omission was an innocent mistake."); Gibbons v. Territory, 115 P. 129, 138 (Okla. Crim. App. 1911) (granting a new trial where one of the witnesses against the defendant was not sworn despite discovery after the verdict noting precedent for setting aside verdict on such a basis in a civil case and holding that "[t]he testimony of no witness should be received who has not been properly sworn.").

Appellant is accordingly entitled to a new trial.

CONCLUSION

For the foregoing reasons, Appellant Michael Butler respectfully requests that this Court enter a directed verdict of acquittal (Issue I) or reverse his conviction and remand his case for a new trial (Issue II).

Respectfully submitted,

A handwritten signature in cursive script that reads "Laura R. Baer". The signature is written in black ink and is positioned above a horizontal line.

Laura R. Baer  
Appellate Defender

ATTORNEY FOR APPELLANT

This 30<sup>th</sup> day of June, 2015.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Horry County  
Steven H. John, Circuit Court Judge  
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JUN 30 2015

SC Court of Appeals  
RESPONDENT,

THE STATE,

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MICHAEL BUTLER,

APPELLANT

APPELLATE CASE NO. 2014-001595

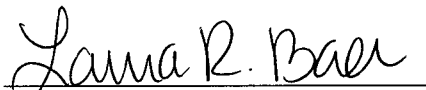
\_\_\_\_\_  
PETITION TO BE RELIEVED AS COUNSEL  
\_\_\_\_\_

Counsel for Michael Butler states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Steven H. John, which was held on July 17, 2014, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed two arguable legal issues which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Michael Butler.

Respectfully submitted,



Laura R. Baer  
Appellate Defender

ATTORNEY FOR APPELLANT

This 30<sup>th</sup> day of June, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

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SC Court of Appeals

THE STATE,

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APPELLATE CASE NO. 2014-001595

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

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

- (1) True-billed indictment(s);
- (2) Transcript of pre-trial hearing held ;
- (3) Transcript of Schermber hearing held
- (4) Transcript of motion hearing held ;
- (5) Transcript of trial held ;
- (6) State's Exhibits 1-13, 15-34;
- (7) Defendant's Exhibits 1-4; and
- (8) Court's Exhibits 1-2.

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

June 30<sup>th</sup>, 2015.



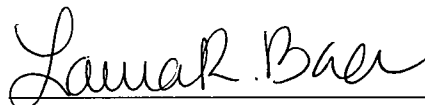
Laura R. Baer  
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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 30<sup>th</sup>, 2015.



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Laura R. Baer  
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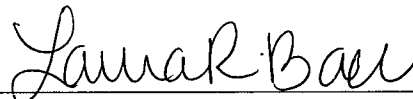
MICHAEL BUTLER,

APPELLANT

APPELLATE CASE NO. 2014-001595

CERTIFICATE OF SERVICE

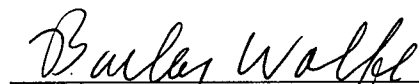
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on Michael Butler, at Walden Correctional Institution, 4340 Broad River Road, Columbia, SC 29210, this 1<sup>st</sup> day of July, 2015.



Laura R. Baer  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 30<sup>th</sup> day of June, 2015.

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: October 24, 2021