STATE OF COUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	Warrant Number: 2015A1021001053
	)	Indictment Number: 2016GS1003454
	)	Charge: Reckless Homicide
vs.	)	
	)	
JOHN ANDREW BIGGS,	)	**STATE'S REPLY TO DEFENSE MOTION FOR NEW TRIAL**
Defendant.	)	

The State has been served a copy of the Defendant's Motion for New Trial in this case. Pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure the State respectfully requests that this Court summarily deny the Defendant's motion without a hearing. The State believes this Court properly denied each of the Defendant's motions during the trial, and further, does not believe the legal grounds provided by the Defendant merit a new trial. Moreover, the trial record will accurately reflect sufficient evidence to support the jury's verdict finding Defendant guilty of reckless homicide. If this Court does not summarily deny the Defendant's motion for a new trial, the State respectfully request ten day notice prior to any hearing so the victim's family can be notified and given an opportunity to be present.

I. THE COURT PROPERLY CHARGED THE JURY ON THE LAW OF RECKLESS HOMICIDE

Defendant contends that the Court erred by charging the jury that the State does not have to prove specific intent, and by failing to charge to the jury that recklessness is more than mere negligence, and recklessness does not lie in speed alone and that civic traffic violations tending to prove negligence do not prove criminal recklessness. The State submits that the Court properly charged the jury regarding intent, and furthermore, the additional charges requested by

Defendant would have stood to confuse the jury by forcing them to consider additional legal elements not applicable nor required to be proven for a jury to find an individual guilty of reckless homicide.

The case law interpreting S.C. Code Ann. §56-5-2910 provides a clear explanation that "[t]o convict an individual of reckless homicide [in addition to the other elements of causing injury to another, and death resulting within three years as a proximate result of the injury], the State must prove the individual was driving a vehicle in reckless disregard of the safety of others." *State v. Rowell*, 326 S.C. 313, 315 (1997) (internal quotations omitted). The *Rowell* Court went on to provide that "[r]eckless disregard for the safety of other signifies and indifference to the consequences of one's acts. It denotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof. *Id*, (see also *State v. Tucker*, 273 S.C. 736 (1979)). The definition of reckless disregard for the safety of others makes clear that the intent required to be proven by the State is one of a general recklessness, and not a specific intent to cause the harm resulting from reckless conduct. Accordingly, the State submits the Court properly charged the jury regarding reckless homicide because the general intent required to be proven is encompassed by the definition of reckless disregard, which the Court provided to the jury in this case. Furthermore, the State believes that Court properly outlined that there was no specific intent requirement involved in the charge of reckless homicide. The Defendant's misleading contention that the Court's charge on intent was improper appears to ignore the full context of the Court's charge regarding intent. Following the Court's comment that "[i]ntent is not an element of the crime," there was lengthy additional commentary that contextually made clear the Court was merely differentiating between the required general intent already encompassed in the definition of reckless disregard

of the safety of others and the not required element that Defendant specifically intended to cause harm to the victim. Therefore, Defendant's motion was properly denied at trial.

Defendant further contends the Court erred by not charging the jury that recklessness is more than mere negligence, that recklessness "does not lie in speed alone," and that civil and traffic violations tending to prove negligence do not prove criminal recklessness as provided by S.C. Code Ann. §56-5-6170. The State believes the Court properly excluded those requests from its jury instructions each request is wholly inapplicable to the current criminal elements of reckless homicide and would have only stood to confuse the jury. See generally *State v. Peer*, 320 S.C. 546, 553 (Ct. App. 1996), *State v. Blurton*, 352 S.C. 203, 208 (2002), *State v. Rothell*, 301 S.C. 168, 169-70 (1990).

The *Rowell* court, as Defendant properly points out in his motion, provided that "the State [in a criminal prosecution for reckless homicide] cannot rely on civil concepts of negligence and recklessness, that is, statutory violations, to meet its burden of proving the defendant's state of mind. ***The import to the terms negligence and reckless as used in the civil law and in the criminal are neither equivalent nor interchangeable.***" *Rowell*, 326 S.C. at 317 (emphasis added). Accordingly, the State submits it would have been improper for the Court to instruct the jury regarding the difference between reckless and negligence as the *Rowell* Court has made clear that civil negligence concepts should play no part in a criminal prosecution for reckless homicide.

Defendant's charge request regarding speed stems from *State v. Rachels*, 218 S.C. 1 (1950), which was a reckless homicide case where the defendant was operating a gasoline tanker truck that collided with a passenger bus at a narrow opening on to a two way bridge. In that case, the Court outlined that speed should not be the only consideration of the jury in determining

recklessness, and that rather, juries should consider the totality of the circumstance. *Rachels* is not analogous to present case in that the Defendant's speed in that instance was only marginally over the speed limit and thus the Court's comments regarding speed stand for the proposition that juries should properly consider other factors that may indicate recklessness in addition speed as opposed to just speed. *Id.* at 9. In the present case, Defendant was travelling at speeds more than double the posted speed limit thus the rationale of the *Rachels'* court inapplicable. The State submits that any additional charge regarding speed would have stood to confuse the jury and was thus properly denied by this Court. See *Peer*, 320 S.C. at 553, *Blurton*, 352 S.C. at 208, *Rothell*, 301 S.C. at 169-70. Moreover, the State would further submit that the definition of reckless disregard of the safety of others that was provided to the jury by this Court inherently encompasses the totality of the circumstances standard advocated by the *Rachels'* Court and additional instructions regarding speed or any other facts or circumstances would have been redundant and unnecessary to properly instruct the jury. *Id.*

Defendant also requested that the Court charge S.C. Code Ann. § 56-5-6170. That statute provides that the Department of Public Safety has the responsibility to administer the regulations provided by statute and that law enforcement officers shall enforce applicable statutes in their jurisdictions. More specifically, that "no police officer in investigating a traffic shall necessarily deem the fact that an accident has occurred as giving rise to the presumption that a violation of the law has occurred." *Id.* As the statute plainly provides, it establishes the authority of the Department of Public Safety and law enforcement officers to administer and enforce enacted statutory regulations and that police officers should not assume that traffic accidents are per se criminal violations. *Id.* In light of the plain meaning of the statute, the State struggles to see how it is applicable to a criminal prosecution and submits that the Court properly declined to provide

the instruction. Moreover, the charge would have been redundant and possibly confusing to the jury in light of the Court's other instructions on the law applicable to reckless homicide.

II. THE COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A DIRECTED VERDICT

The standard in South Carolina controlling motions for directed verdicts requires that "the evidence must be viewed in the light most favorable to the state, and if there is any direct evidence or any circumstantial evidence tending to prove the guilt of the accused" then the case should properly be submitted to the jury. See *State v. Venters*, 300 S.C. 260 (1990); see also *State v. Edwards*, 298 S.C. 272 (1989).

In the present case, there was overwhelming and practically uncontested evidence presented by the State that the Defendant was driving a Chevy Silverado truck at speeds of 101.5 miles per hour down River's Avenue prior to colliding with the victim who was stopped at a red light in a Ford Mustang on River's Avenue at the intersection of Eagle Landing Drive in North Charleston. Furthermore, there was testimony from witnesses that there was no sign, evidence, or other indicators that the Defendant was not in conscious control of the vehicle at the time of the accident and for at very least a quarter of mile prior to the collision. In addition, there was testimony from several experts and law enforcement witnesses that in their training and experience they have never seen a prior instance where someone was rendered unconscious in which they were able to control their vehicle for any extended period of time.

The Defendant seems to suggest that the State has the additional burden of proving why the Defendant made the choice to drive at speeds of 101.5 miles per hour, and further that the State must prove that the Defendant specifically intended to cause harm to the victim. The State believes both of those arguments to be gross misunderstandings of the law applicable to reckless homicide, and wholly inapplicable to evaluating the denial of Defendant's directed verdict

motion. Accordingly, the State submits that when looking at the evidence in the light most favorable the State the Court properly denied Defendant's motion for a directed verdict, given the abundance of direct and circumstantial evidence tending to prove the Defendant's guilt – as also further evidenced by the jury's finding of guilt in this case.

III. THE COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL

Defendant contends that the Court should have granted a mistrial based on comments made by the State in closing argument. Specifically, Defendant contends that comments made by the State regarding the absence of medical testimony constitutes impermissible burden shifting. The State submits the comments made regarding the absence of medical testimony were proper regardless, but even more so since the Defendant opened the door to such comments based on his own improper arguments regarding facts outside of evidence presented to the jury during his closing arguments. See *State v. Webb*, 389 S.C. 174 (2010) (holding appropriateness of argument left for trial court's discretion, and such decisions should be made in the context of the entire record).

To be sure, comments made by the State regarding Defendant's right to stay silent, failure to testify, or failure to present evidence can and in most instances constitute improper burden shifting. *State v. McFadden*, 318 S.C. 404 (1995). In the present case, however, Defendant presented evidence and also testified and the comments made by the State regarding medical evidence came in direct response to Defendants improper argument to the jury that there must have been some medical emergency that caused the accident. Defendant's argument was offered to the jury despite there being no evidence in the record of any such medical emergency occurring and in fact having testimony in the record that contradicts the theory that there was any such emergency. The State even took caution in prefacing its comments by reiterating to the jury

that entire burden of proof rested upon the state that that the Defendant has no burden to present any evidence or testify despite the fact that he did both in the course of this trial.

South Carolina Courts evaluating the issue of comments made by the State regarding the Defendant's failure to call a witness have held "it is always proper for an attorney in argument to the jury to point out the failure of a party to call a witness." *State v. Hammond*, 270 S.C. 347, 356 (1978); see also *State v. Cook*, 283 S.C. 594 (1985) (no error in allowing solicitor to comment on Defendant's failure to produce his wife); *State v. Bamberg*, 270 S.C. 77 (1977)(comment on failure to produce witness permissible, also differentiating between cases where Defendant presents no evidence and does not testify and cases where Defendant presents evidence and testifies); *State v. Shackelford*, 228 S.C. 9 (1955) (not improper for solicitor to comment upon defendant's failure to produce witnesses). Furthermore, that "[w]here the evidence indicates that there are witnesses, seemingly accessible to the accused, or under his control, who are or should be cognizant of the material and relevant facts and competent to testify thereto, and whose testimony would presumably aid him or substantiate his story if it were true, it is not improper for the prosecuting attorney to comment upon his failure to produce them." *Shackelford*, 283 S.C. at 10. Accordingly, the State's comments were proper given the entire context of the record, and Defense's motion for a mistrial was properly denied.

IV. CONCLUSION

Based upon the foregoing argument that respectfully requests that the Court deny Defendant's Motion for a new trial brought pursuant to Rule 29 of the South Carolina Rules of Criminal Procedure.

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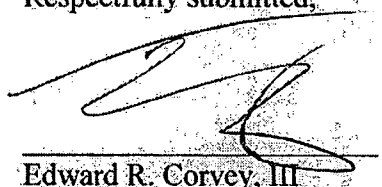
Respectfully submitted,



Edward R. Corvey, III
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Dated: December 22, 2016