STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERALD LEWIS,

APPELLANT.

APPELLATE CASE NO. 2016-002166

PRO SE RESPONSE TO ANDERS BRIEF

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

The Trial Court Erred In Denying Appellant's Motion For A Directed Verdict, In Light Of The Fact That The Evidence Admitted At Trial Did Not Establish Appellant's Guilt On The Charges Of Leaving The Scene Of An Accident And Felony Driving Under The Influence Resulting In Death.

STATEMENT OF THE CASE

On May 27, 2015, the Georgetown County Grand Jury indicted Appellant Gerald Lewis for leaving the scene of an accident (2015-GS-22-00446) and felony driving under the influence (2015-GS-22-00445) amended at trial (2016-GS-22-00856). R. 119-122.

On September 19-21, 2016, Appellant proceeded to trial before the Honorable William H. Seals and a jury. John Hilliard represented the State.

At the conclusion of the State's evidence, Appellant moved for a directed verdict on the charges where the State failed to prove that Appellant was driving the truck at the time that it struck the decedent. R. 228, L. 20 - 229, Line 16.

The trial court denied Appellant's directed verdict motion. R. 230, L. 2.

At the conclusion of the defense's evidence, Appellant moved for a directed verdict on the charges where the Appellant established who was driving the vehicle at the point in time - when-shortly before the accident happened and when the parties left the residence of an uninterested person and who was driving the vehicle shortly before the accident happened. R. 251, L. 17 - 252, Line 1.

The trial court denied Appellant's directed verdict motion. R. 252, L. 10.

ARGUMENT

I. The Trial Court Erred Denying Appellant's Motion For A Directed Verdict, In Light Of The Evidence Admitted At Trial Did Not Establish Appellant's Guilt On The Charges Of Leaving The Scene Of An Accident And Felony Driving Under The Influence Resulting In Death.

A person accused of a crime has a due process right to have each element of the offense charged proved beyond a reasonable doubt. Here, there was no direct evidence and no substantial circumstantial evidence tending to prove the essential element of the identity of the Appellant as the driver of his vehicle at the time it struck the decedent.

A verdict must be directed "in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment." Rule 19(a), SCRCrimP. In cases where the State has failed to present evidence of the offense charged in the indictment, State v. Hepburn, 406 S.C. at 423-24 (Dec. 11, 2013), or if the State has presented evidence which merely raises a suspicion that the accused is guilty of the crime alleged in the indictment, State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004), a criminal defendant is entitled to a directed verdict.

In the instant case, Appellant was convicted on circumstantial evidence exclusively. There was no eyewitness to the accident. In these types of cases, when the State seeks to establish guilt through circumstantial evidence, a directed verdict motion must be granted unless the evidence is "substantial." Id., 361 S.C. at 593-94, 606 S.E.2d at 478 (citation omitted). Circumstantial evidence is substantial when it reasonably tends to prove the guilt of the accused, or when it provides a basis from which the guilt of the accused may be fairly and logically deduced. Id., 361 S.C. at 594, 606 S.E.2d at 478 (citations omitted).

At the close of the State's case-in-chief, defense counsel moved for a directed verdict, on the ground that the State presented no evidence that Appellant was driving the truck at the time it struck the decedent. Based on evidence before the accident happened some 18-23 miles away from where Appellant was arrested, that while the facts and circumstances in this case are strongly suspicious, there was no direct evidence that Appellant was driving at the time the accident occurred. That there was no evidence about what happened prior to the time Appellant was arrested other than the fact that the decedent became deceased by the use of Appellant's truck. R. 228, L. 20 - 229, L. 17. The trial judge denied the motion. R. 230, L. 2.

Then, at the close of Defendant's case-in-chief, Appellant made a directed verdict motion on the ground that Appellate established who was driving the vehicle at the point in time - shortly before the happened, when the individuals

left a person's house, that is the only evidence in the record concerning who was driving the vehicle shortly before the accident happened and who was driving the vehicle quite a while and distance away from the accident. R. 251, L. 17-252, L. 1. The trial judge denied the motion. R. 252, L. 10.

Defense counsel, after the verdict of the jury was announced, then renewed the directed verdict motions and a motion of judgment notwithstanding the verdict on the basis "that there was no reasonable way that the jury could have reached the conclusion that they reached. R. 309, L. 21-310, L. 1. The trial judge denied the motions. R. 310, L.L. 2-3.

A. <u>The State failed to offer evidence sufficient to establish Appellant's guilt.</u>

A person accused of a crime has a due process right to have each element of the offense charged proved beyond a reasonable doubt. Here, there was no direct evidence and no substantial circumstantial evidence tending to prove the elements of felony driving under the influence resulting in death. The resulting convictions for felony DUI resulting in death and leaving the scene of an accident is a violation of state law and constitutional due process. Fourteenth Amendment, U.S. Const. Amend. XIV.

Appellant was charged with driving under the influence of alcohol initially. R. 107, L. 25-108, L. 8. Appellant's charges arose from an accident in Georgetown County. The accident occurred between 6:30-6:45 p.m. when

Appellant's white Ford F-150 truck struck the back of a scooter ridden by Donald Sumpter. R.66, L.L.1-9; R.119, L.6-125, L.3. Sumpter was almost certainly killed instantly. Appellant's truck did not stop. There were no witnesses.

Whether Appellant's truck was involved in the accident was not an issue at trial. Whether Appellant was intoxicated at the time of the collision was not in dispute. The sole issue was whether Appellant was driving the truck at the time of the collision. This issue was intensely contested.

On the day of the accident, Appellant went fishing in a canal in a rural portion of Georgetown County from 8:00 a.m. until around 4:00 p.m. with his friend, Jobie Aklin, and Aklin's son, Rashad. R.233, L.14-236, L.5. Several of the friends and other people that interacted with Appellant and his friend, Jobie Aklin and Aklin's son, Rashad prior to the accident testified at trial. As the group finished fishing, Appellant's truck became struck in the mud surrounding the canal at approximately 3:30 p.m. Id.

Appellant's brother had to come and pull Appellant's truck free, Appellant and the Aklins followed Appellant's brother to a nearby service station and then on to the brother's house. R.243, L.14-244, L.10. Appellant's brother last saw him around 5 p.m. Id.

After leaving his brother's house, Appellant and the Aklins then went to a friend's house, Will Sumter's house. When the three arrived, Sumter was hosting a cookout at his barn. Sumter would recall at trial that the

three men stayed for about an hour and that Appellant was highly intoxicated. R. 237, L. 12 - 240, L. 5.

Sumter stated that the three men left in Appellant's truck with Rashad driving at sometime between 5 p.m and 6 p.m. Id. Sumter's wife also testified during the defense's case. She stated that Appellant's truck arrived at her house covered in mud. R. 247, L. 13 - 249, L. 1. Appellant and the Aklins stayed at her house for approximately forty-five minutes to one hour. Id. She further testified that Appellant "was really drunk. They put him on the passenger's side in the back and Rashad got into the driver's wheel[side], and they left." R. 248, L. 1 - 4.

Jobie Aklin testified for the State as a rebuttal witness. Corroborating the defense witness account of the day, Aklin stated that he, Appellant, and Rashad spent most of the day fishing. R. 259, L. 2 - 262, L. 23. Aklin admitted that Rashad was driving Appellant's truck when the three left Sumter's house. Id. He initially claimed that Appellant's son's wife met the group at a church and "took us home." Id. He then immediately contradicted himself and alleged that he and Rashad got dropped off at the church and that Appellant then drove his truck away around 6 p.m. Id.

On cross-examination, Aklin clarified that they ran into "my girlfriend's friend" after leaving Sumter's house and that this unidentified woman drove he and Rashad home. R. 263, L. 12 - 265, L. 24. Aklin said that he and Rashad left a highly intoxicated Lewis alone with truck. In his final version of events, the woman the two

men received a ride from was Rashad's girlfriend. Id.

Aklin was adamant that Rashad only drove Appellant's truck from Sumter's house until the group ran into whichever woman gave him and Rashad a ride. Aklin also could not identify the church where he, Appellant, and Rashad ran into the woman that gave them a ride. Aklin admitted on cross-examination that Rashad had recently left the area as had Rashad's girlfriend. Id.

The trial judge erred in denying Appellant's directed verdict motions and judgment notwithstanding the verdict. Due process requires that the State prove each essential element beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); U.S. Const. amend. XIV. Here, the State failed to prove the essential element of identity.

The only evidence linking Appellant to the accident was that Appellant was observed apparently driving his truck approximately eighteen to twenty miles from scene of accident, leading a line of cars, while traveling approximately thirty miles per hour, struggling to keep his truck on the road. R. 83, L. 1 - 88, L. 23. This siting occurred forty minutes early.

The State failed to prove the identity of the Appellant as the person who committed the crime charged. The evidence is insufficient to identify the Appellant as the driver at the time of the accident. The State had the burden of proving beyond a reasonable doubt the identity of the defendant as the person who committed the charged crime. See Gibbs v. State,

403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013); See also State v. Jackson, 656 A.2d 1056, 1060 (Conn. App. Ct. 1995)("Identity of a defendant as the one who committed the crime is an element common to proof of all crimes, which the State must prove beyond a reasonable doubt."); Brooks v. United States, 717 A.2d 323 (D.C. 1998)("The identity of the defendant as the person who committed the charged crime is an essential element that the government must always prove beyond a reasonable doubt."); Akridge v. State, 970 So.2d 917 (Fla. Dist. Ct. App. 2007)("The burden is upon the State to prove beyond a reasonable doubt all of the elements of the alleged crime including the identity of the defendant."); People v. Burson, 308 N.E.2d 200 (Ill. App. Ct. 1974)("[O]ne of the essential points which the State must prove beyond a reasonable doubt is the identity of the accused as the one who committed the crime charged."); Commonwealth v. Brooks, 7 A.3d 852, 857 (Pa. Super. Ct. 2010)("In addition to proving the statutory elements of the crimes charged beyond a reasonable doubt, the Commonwealth must also establish the identity of the defendant as the perpetrator of the crimes."). The evidence is insufficient to establish the identity of Appellant as driving his truck at the time of the accident. The trial judge erred in refusing to direct a verdict of acquittal.

In State v. Bostick, 392 S.C. at 139, 708 S.E.2d at 776-777, the South Carolina Supreme Court wrote:

> A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove

the guilt of the accused or from which his guilt may be fairly and logically deduced." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000); see also State v. Williams, 321 S.C. 327, 332, 468 S.E.2d 626, 629 (1996). "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...." 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. Id. at 133, 322 S.E.2d at 452 (citing State v. Manis, 214 S.C. 99, 51 S.E.2d 370 (1949)). "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." State v. Irvin, 270 S.C. 539, 543, 243 S.E.2d 195, 199 (1978) (citing State v. Massey, 267 S.C. 432, 229 S.E.2d 332 (1976)). On appeal of the denial of a directed verdict of acquittal, this Court must look at evidence in light most favorable to the State. State v. Martin, 340 S.C. 597, 602, 533 S.E.2d 592, 594 (2000).

The State's case was based entirely on circumstantial evidence:

1) That Appellant's truck was observed "struggling to stay on the highway", with a line of cars behind, due to truck traveling approximately thirty miles per hour; 2) Appellant [or someone] used a turn signal to pull off the highway to the shoulder of highway; and that Appellant was driving the truck after someone turn signaled to pull off the highway; 3) This occurring approximately fifty or more minutes after the accident and approximately twenty miles from the accident scene.

Viewing the evidence in light most favorable to the State, there is not any substantial evidence which tends to prove the identity of the Appellant as the driver of his truck at the time of the accident. In light of the fact, that just minutes prior to the accident, testimony of several witnesses established that another individual - Rashad Aklin was driving Appellant's truck.

In discussing the insufficiency of the evidence, the South Caroling Supreme Court, in State v. Odems, 395 S.C. 582, 590, 720 S.E.2d 48, 52 (2011) wrote:

> The traditional circumstantial evidence illustrates the deficiency in the State's evidence against Petitioner. This definition provided that if the State relies on circumstantial evidence to prove its case, the jury may not convict the defendant unless:
>
> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.
>
> State v. Hernandez, 382 S.C. 620, 626 n. 2, 677 S.E.2d 603, 606 n. 6 (2009) (citing State v. Edwards, 298 S.C. 272, 274-76, (1989) (1989), abrogated by State v. Chevry, 361 S.C. 588, 595-606, 606 S.E.2d 475, 478-82 (2004).
>
> Despite the Court's abandonment of the use of this particular definition as a jury charge in State v. Chevry, the definition illustrates the lack of evidence against Petitioner.
> (footnote omitted).

Viewing the foregoing evidence in the light most favorable to the State, the State did not present substantial circumstantial evidence to reasonably prove Appellant was the driver of the truck at the time of the accident. At most, the evidence the State presented raises only a suspicion that Appellant was the driver at the time of the accident. See State v. Lane, Opinion No. 5175 (Ct. App., July 30th, 2014).

Appellant's convictions and sentences violate due process, in that, the State failed to prove the identity of Appellant as the driver of the truck at the time of the accident, identity being an essential element of the crime charged. See United States v. Gaudin, 515 U.S. 506 (1995); In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979)("[N]o person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."[identity is an essential element]).

As in Odems, the circumstantial evidence presented by the State in the present case does not reasonably tend to prove appellant's guilt and fails the Court's well-settled directive that circumstantial evidence that is not substantial is insufficient to go to a jury. At best, the State's evidence raises a mere suspicion. A mere suspicion is not sufficient evidence for submission to the jury. The judge should have directed a verdict of acquittal on both charges

CONCLUSION

Appellant requests that the Court issue an Order which reverses the trial court's denial of Appellant's motion for a directed verdict, or alternatively, vacate the Appellant's convictions and sentences and remand the case for a new trial.

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This 19th day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GERALD LEWIS,

APPELLANT.

APPELLATE CASE NO. 2016-002166

CERTIFICATE OF SERVICE

The undersigned hereby certifies, under the penalty of perjury (§16-9-10(A)(2), S.C. Code Ann. (1976)) that a true copy of his Pro se Response To Anders Brief in the above referenced case was served on the Clerk for the Court of Appeals for South Carolina, Post Office Box 11629, Columbia, South Carolina 29211, this 19th day of October, 2017.

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October 19, 2017

Clerk
South Caroling Court of Appeals
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Re: State v. Gerald Lewis
Appellate Case No. 2016-002166

Dear Clerk,

Enclosed for filing with your office, please find my pro se Response To Anders Brief, with Certificate of Service.

Thank you for your assistance.

Gerald Lewis
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