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DRIVER ACQUITTED IN 3 I-20 DEATHS

Bob Stuart, Staff writer

A Chapin man was acquitted Friday night of three counts of reckless homicide for charges stemming from a 1990 car accident that killed three construction workers.

A Lexington County jury deliberated more than three hours before acquitting David Waites, 27, of Route 3.

The acquittal came after a four-day trial in Lexington. Waites was accused of reckless homicide in a Nov. 16, 1990, automobile crash on I-20 near Broad River Road.

According to the state Highway Patrol, Waites' Pontiac Fiero hit a flashing-arrow road sign that four construction workers were pushing down the interstate.

Killed were Lewis O'Shields, 24, and Shannon Parr, 18, both of Saluda. Another worker, Clarence Edwards of Saluda, died of his injuries two days later.

Defense attorney **Jack Swerling** said Friday that medical testimony showed that Waites had suffered an epileptic seizure just before the accident, which caused him to go through several barricades and hit the sign.

Swerling said other testimony, including an engineer's, indicated that Waites would have been able to stop before hitting the sign if not for the seizure.

"There had to be something wrong," **Swerling** said. "And there was no evidence of alcohol or controlled substances."

Not Guilty

The Newsletter for Criminal Defense Attorneys

Volume 3, No. 6 - June, 1992 — *Michael J. McGreevy, Esq. - Editor*

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USING VISUAL DISPLAYS TO ILLUSTRATE THE CREDIBILITY OF THE WITNESSES

"The credibility of the witnesses, I believe was the deciding factor in the case It wasn't really a matter of who's telling the truth, but who's lying the least."

- The jury foreman.

Defense attorney **Sheryl Bussell** illustrated the credibility of the witnesses literally as well as figuratively.

Her client, Charles Butler, 37, was charged with three counts of arson and one count of burglary. The prosecution's theory was that Butler had assisted David Doane and Donald Gulick in the burning of several buildings on the Fredonia, Kansas, square.

Both Doane and Gulick struck deals with the prosecution that were characterized by Bussell as extreme. Doane and Gulick, true to form, linked Butler to the burnings.

Bussell, who was appointed, emphasized the need to press the court in appointed cases for whatever is needed. In this case, she filed an immediate motion that an investigator be appointed for the defense. The judge agreed.

The defendant had maintained that he *"was in a bar in another town at the time of the fire"* The investigator, by being on the spot quickly, was able to track down several witnesses from the other town and the defense was able to present a partial alibi.

"If you don't act quickly, the investigator does not have nearly as good a chance of finding what is needed. Who remembers exactly where they were or what they ate two weeks ago Thursday. And the longer the time period becomes, the worse the problem," said Bussell.

When Doane and Gulick testified, Bussell went through their pre-preliminary hearing testimony, their preliminary hearing testimony and what they had now said at trial. *"These two are not in the same area, they are not even in the same town, they are not even on the same planet when you compare their testimony with one another,"* she told the jury. Even worse was when you compared their individual testimony from one hearing to another.

". . . most people learn and retain much more visually rather than orally ."

Bussell told NOT GUILTY, *"I come from a background in Social Work and there I learned most people learn and retain much more visually rather that orally."*

For that reason, she prepared a large canvas depicting the testimony of Doane and Gulick from one hearing to another. She put the statements made before trial, the preliminary testimony, and the trial testimony of each informant in different colors. *"Doane's testimony was the most outlandish and changed the most so I put his trial testimony in RED."*

Bussell noted that all but the trial testimony can be prepared before trial. The canvas made a striking visual display of the fact that Doane and Gulick changed their testimony freely as they went along—the idea being that

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each with an extensive criminal record was trying to tell the prosecution what the prosecution wanted to hear.

The assistant attorney general trying the case objected to the large, multi-colored canvas. Bussell told the judge, *"No one has ever objected to this type of thing before. This is just Bussell's Dog and Pony Show. The assistant attorney general just doesn't like it because it is in color."*

The judge allowed the use of the large canvas.

The assistant attorney general mentioned to Bussell that this was the first time he had tried a felony against a woman defense attorney. Bussell told him, *"Well, John you know we have been making casseroles and putting them in the freezer for a long time. We tend to be prepared."*

That preparation paid off. The jury found Butler NOT GUILTY.

TRIAL DATE: January, 1992
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A MEDICAL DEFENSE

David Waite, 28, faced three counts of reckless homicide in the deaths of three construction workers. Waite was a sheet metal worker and roofer employed by his father.

In November, 1989, as Waite was driving down Interstate 26 he approached a construction area. Waite did not slow down but drifted into the left lane. Driving 65 miles-per-hour, Waite sped past signs stating: REDUCE SPEED, ROAD CONSTRUCTION and MERGE TO RIGHT.

He crashed through 14 wooden barriers. The barriers were roughly 50 feet apart and were placed in the left lane to block traffic. Waite struck a pickup truck occupied by construction company employees who were picking up orange cones in the construction area. Three of the workers were killed in the collision.

The prosecution's case against Waite was based on the premise that Waite's driving constituted a reckless disregard for the safety of others.

Defense attorney **Jack Swerling** based the defense on the theory that this was an accident resulting from his client's medical condition, not a case of criminal liability.

The defendant's medical history was important in the presentation of his defense. Since the age of eight or nine he had suffered from epilepsy - having both Grand Mal and petit seizures. From the age of 11, Waite took dilantin and phenobarbital as prescribed to treat his epilepsy.

In 1984, Waite crashed the car he was driving into a tree. He had no recollection of the accident, and it was determined that he had suffered a Grand Mal seizure. Under South Carolina law his driver's license was suspended. In 1986, after having been seizure-free for one year, Waite regained his license.

The government offered the testimony of a State Trooper, who investigated the case. According to the trooper, Waite was fully oriented and alert at the scene of the accident.

The defense countered that with other disinterested witnesses from the scene who testified Waite was disoriented. One such witness testified that the State Trooper who testified as to Waite's condition never went near Waite at the accident scene.

The emergency room physician who treated Waite following the accident initially concurred with the State Trooper that Waite did not seem to have suffered a seizure. When being treated soon after the accident, Waite denied having a seizure and both the State Trooper and the emergency room physician mentioned that statement.

Fortunately, Swerling was able to explain some things to that emergency room physician. The basic information conveyed to the physician was:

- The defense's investigation, which was not challenged, showed that from the first impact to the point at which his vehicle came to rest, Waite traveled a distance of 800 feet. In that entire distance, there were no skid marks; and no sign of any kind of evasive action.

- The defendant said (and he testified to this also) that as he was driving along about 65 miles per hour, he glanced to his right and observed a car passing him. He stated that he saw no highway construction signs and that until he struck something it was like he was out-of-body and it seemed like he was going through a tunnel.

Based in part on that information the emergency room physician testified "that it sounded like a seizure."

Additionally, Swerling argued that, in the hospital, when his client said that he had had no seizure he had no knowledge that anyone had been killed. The defense attorney had two doctors testify that such a denial was still consistent with actually having had a seizure. One point Swerling emphasized was that the defendant knew he would lose his license if he had had a seizure - making a denial a natural response.

The defense did make use of the emergency room examination. The report showed no drugs or alcohol were in Waite's blood stream - except for traces of dilantin and phenobarbital: And those were the prescribed medications Waite was suppose to be taking for his epilepsy.

Swerling told NOT GUILTY, *"The presence of dilantin and phenobarbital helped since it corroborated that (Waite) had been taking his medicine."*

The defense also put on the stand the neurologist who had treated Waite for years. The neurologist gave his opinion that Waite had probably had a seizure based on the facts and Waite's own description of the occurrence.

The neurologist testified that the car passing on the right and the abrupt presence of the construction site could have occurred so quickly that it could trigger a seizure.

The defense added to its seizure contention by calling the accident reconstruction specialist who had investigated the crash scene for Waite's insurance company. That expert testified that even at 65 miles per hour, Waite's vehicle should have been stopped after 350 feet at the worst - not the 800 foot distance involved here.

Swerling established that the accident specialist had worked close to 1,000 accidents and previously had encountered only two other instances where the distance from first impact to stopping was so inexplicably long. In the first case, the distance was explained by the driver being in a total drunken stupor; in the second case, the driver struck his head on the steering wheel or dash board. That lead the accident specialist to conclude a seizure was the "most likely" explanation for the accident.

The defense complemented its medical case by pointing a finger at the conditions at the construction (accident) site.

Swerling had two independent witnesses testify that in near proximity to the time of the accident, they had been through the construction area and had seen no warning signs or flashing lights.

Swerling put on yet two more witnesses who testified that they also had been through the construction area shortly before the accident and had been right on top of the construction work before they noticed any signs.

The defense attorney discovered (Brady Motion) a 25-year-old engineer had written the Highway Department relating he had been through the accident scene shortly prior to the accident and complained about the inadequate markings and reported he had been forced to slam on his brakes to avoid trouble. (Needless to say, Swerling also called him as a witness.)

Swerling also put a Highway Department Engineer on the stand to establish that the construction company had failed to notify the Highway Department of the work as required; and that no matter what version of the construction signing was believed, such signing was inadequate and not in compliance with department regulations.

" . . . it is a mistake to feel you have to fight and contest every issue . . . I conceded from the beginning that my client did it."

Swerling told NOT GUILTY, *"One thing I have learned in trying a lot of cases is that it is a mistake to feel you have to fight and contest every issue. I know there is a tendency to do that, especially among young lawyers.*

"In this case I conceded from the beginning that my client did it. He was driving. He was driving 65 miles per hour. I centered the defense on the idea that there was no malice and no criminal liability here. Our position was that this certainly was a civil case, but not a criminal case. I think the obvious concessions help the defense lawyer gain a measure of credibility with the jury.

"Also, that approach helped in this case when the prosecution wanted to introduce some photographs of the victims. They were awful pictures. I was able to tell the judge, 'We have conceded that Mr. Waite was driving, that

he was driving 65 miles per hour, that he disregarded any highway signs that were posted, and the ensuing collisions caused the deaths. We have agreed to the cause of death and the manner of death and the location of death. These photographs are not going to help determine any issue in question.'"

The trial judge agreed with Swerling's argument and excluded the photographs as not being relevant given the defense's stipulations.

The jury found Waite NOT GUILTY.

TRIAL DATE: March, 1992
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CLOSELY EXAMINING THE CHILDRENS' REPORTS IN CHILD MOLESTATIONS CASES

Dr. Lawrence Hooper, a pediatrician, faced three counts of indecency with a child and two counts of aggravated sexual assault.

Dr. Hooper was accused of molesting his adopted daughter, who was seven at the time of the trial, and two other girls, who were ages 11 and 18 at the time of the trial.

Defense attorney **Charles Roberts** made good use of the experience he had garnered a couple of years earlier when representing a woman charged with 33 counts of child molestation. That woman was convicted and received a sentence of life plus 33 years, but that conviction was reversed on the ground that the video tape of the questioning of the children involved alone did not allow the woman to confront the witnesses against her.

In the retrial, she was found Not Guilty.

Roberts ironically introduced the video tapes himself in the retrial. But the videos were part of a defense plan to show how the charges came about and the unlikely nature of the charges and the childrens' reports.

Roberts said the videos showed the leading questions asked and indicated clearly that the questioner was planting the general ideas the state was pursuing. *"I'm convinced that the protocols in virtually every child interview in this type of case conducted by a lay person, like the child protective service worker, or the Youth Services Office of the police department are leading and highly suggestive,"* Roberts told NOT GUILTY.

A danger with the statements and audios and videos that come from such interrogations according to Roberts is that they might not seem suggestive or leading to a layman.

In the earlier case, Roberts constructed many poster boards and placed side-by-side on the boards, THE QUESTION, and on the other side, THE ANSWER. This made it clear that THE QUESTIONS were where the focus and all the information came from. The answers were usually "un huh" or "nun huh."

Roberts stressed that in many such cases by highlighting the questioning done by the state of the children and analyzing the audios and videos you can detect the state's goal and that this has all been an educational effort aimed at the child.

Roberts also used Dr. Lus Natalicio, a El Paso psychologist, who is an expert in clinical testing, child development and child psychology. Dr. Natalicio supported the defense's contention that the facts and information came from the state. Additionally, he pointed out that the children did not act like children in the state's scenario. Dr. Natalicio added credence to Roberts' theory that the questioning of the children is really teaching them what to say but pointing out that often children are taught by questioning, i.e. *"Is that the right thing to do?," "Are you suppose to play in the streets?"*

Roberts added that this testimony pointed out that often in this type of case, the outcries or reports attributed to children do not match the vocabulary of a child nor the sentence structure of a child.

In the recent trial of Dr. Hooper, the charges came about a year after the doctor was supposed to have molested the 11-year-old who was staying with his 7-year-old daughter. He was also charged with molesting his daughter on the same occasion.

The 11-year-old's mother worked in the same hospital and clinic as Dr. Hooper and was a very disgruntled employee.

In cross-examining the 11-year-old, Roberts got the following response to a question:

A. *My mother told me what happened.*

Q. (By Roberts) *Your mother told you what happened because she already knew something had happened?*

A. *Yes.*

Q. *And you love your mother?*

A. *Yes.*