

**IN THE  
MISSOURI SUPREME COURT**

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<b>STATE OF MISSOURI,</b>	)	
	)	
<b>Respondent,</b>	)	
	)	
<b>vs.</b>	)	<b>No. SC 86024</b>
	)	
<b>CHAD D. MADORIE,</b>	)	
	)	
<b>Appellant.</b>	)	

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI  
TWENTY-NINTH JUDICIAL CIRCUIT, DIVISION II  
THE HONORABLE DAVID C. DALLY, JUDGE**

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**APPELLANT'S SUBSTITUTE REPLY BRIEF**

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## **JURISDICTIONAL STATEMENT**

Chad Madorie appeals his conviction following a jury trial in the Circuit Court of Jasper County, Missouri, for the class D felony of driving while intoxicated, § 577.010.<sup>1</sup> The Honorable David C. Dally sentenced Mr. Madorie to three years imprisonment. After the Missouri Court of Appeals, Southern District, issued its opinion in SD 25651, this Court granted the State's application for transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

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<sup>1</sup> All statutory citations are to RSMo 2000, unless otherwise stated.

## **STATEMENT OF FACTS**

Mr. Madorie incorporates herein by reference the Statement of Facts from his original brief in SD 25651 as though set out in full.

## ARGUMENT

### I.

**Mr. Madorie did not argue that the State had to prove that *he* drove while intoxicated to admit his statements, but that its proof failed on the central question of whether *some* person drove the car while intoxicated, because it offered no evidence as to which man drove the car or whether the second man at the scene was intoxicated.**

The State's argument misses the point in several respects. It quotes the correct rule -- that before the defendant's statements may be admitted, there must be proof that a crime occurred, but then it goes on to analyze the evidence as though proof of intoxication, alone, sufficed to establish the *corpus delicti* (Resp.Br. 8-9). Mr. Madorie does not argue that the State must independently prove that *he* committed the offense before his statements become admissible. The question is whether the State showed evidence that a crime was committed at all -- that *anyone* committed the offense of driving while intoxicated, without resort to Mr. Madorie's statements.

There were two men at the scene when the officer arrived -- Mr. Madorie and Mr. Dunn (Tr. 111-12, 139-40). Although Mr. Madorie smelled of intoxicants and showed signs of impairment (Tr. 112-13, 115), there was no evidence that Mr. Dunn exhibited such signs, and there was no evidence, absent his statements, that Mr. Madorie was driving. Therefore, there was no indication that anyone drove while intoxicated, *i.e.*, that a crime was committed.

The State cites cases holding that only slight corroboration is required of the *corpus* to make a defendant's statements admissible. *See, i.e., State v. Nicks*, 883 S.W.2d 65 (Mo.App. S.D. 1994); *State v. Hammons*, 964 S.W.2d 509 (Mo.App. W.D. 1998); *State v. McVay*, 852 S.W.2d 408 (Mo.App. E.D. 1993).

These cases do not support the State's argument that there was sufficient corroboration in this case; there was far more in the cited cases. In *Nicks*, which involved an arson charge, there were burn patterns consistent with a flammable substance having been poured on the floor of the kitchen, as well as in a doorway between the kitchen and the bathroom where the body was found, extending five or six inches into the bathroom. 883 S.W.2d at 67. This is strong evidence that a crime was committed by someone, thus corroborating the defendant's confession. There is no such evidence here, where the State did not show that the driver was intoxicated.

*Hammons* was a driving while intoxicated case, in which the defendant was the only person at the accident site when witnesses arrived. He was intoxicated, and conceded that he did not have access to intoxicants from the time the first witness arrived, who had been passed on the road by the defendant only three miles before. And the officer at the scene concluded that anyone in the accident would have sustained injuries, and the defendant complained of leg soreness. *Hammons*, 964 S.W.2d at 512.

The *Hammons* court distinguished *State v. Friesen*, 725 S.W.2d 638 (Mo.App. W.D. 1987), saying that, in *Friesen*, "there were two men standing near the vehicle that was involved in the accident . . . the State did not eliminate the second man as the

potential driver and there was no evidence that the second man was intoxicated. . . .” *Hammons*, 964 S.W.2d at 513. Mr. Madorie’s case is more like *Friesen* than *Hammons*, because there were two men who could have been driving, Mr. Madorie and Mr. Dunn, “and there was no evidence that the second man [Mr. Dunn] was intoxicated.”

Finally, in *McVay*, the defendant confessed, and the victim testified, to a history of sexual abuse involving defendant and the victim. The Court said that “[t]his history, as well as [Victim’s] testimony that oral sex did occur in August, 1990, on at least one occasion, are sufficient to establish the *corpus delicti*.” 852 S.W.2d at 414. This again distinguishes the case from the one at bar, because unlike the facts of Mr. Madorie’s case, there was direct testimony that the defendant committed the crime charged. *McVay* does not apply here.

The State has cited no case that holds that the “slight corroboration” needed to make a defendant’s statement’s admissible may be based on speculation that the defendant was the driver, bolstered by speculation that he drove near the time at which he was thought to be intoxicated.

Mr. Madorie’s case is most like *Friesen*. In *Friesen*, the defendant and his roommate were traveling from Jefferson City to Sedalia when a wheel of their truck became stuck in a culvert. 725 S.W.2d at 639. The defendant waved to a passing car for assistance, and the car turned out to be a Missouri Highway Patrol vehicle, which returned to help. *Id.* The defendant admitted that he “overshot the driveway.” *Id.* But the trooper never saw either man driving or sitting in the vehicle and did not say

whether the keys were in the ignition. *Id.* The car belonged to the defendant, who admitted drinking earlier in the day. *Id.* However, the trooper did not ask the roommate if he had been drinking or had driven the vehicle. *Id.*

The Western District held that the evidence established that the defendant was intoxicated, but did not show, “either by direct or circumstantial evidence, that he or anyone else operated the truck while under the influence.” *Id.* at 640. As the Court noted, the only evidence of the *corpus delicti* was the defendant’s statement to the trooper that he overshot the driveway. *Id.* Importantly, the Court relied on the presence of the defendant’s roommate and the fact that the questioning did not eliminate the possibility that the roommate was the driver. *Id.*

Similarly, in Mr. Madorie’s case, Officer Kelly’s questioning on the scene and testimony at trial failed to eliminate the possibility that Dunn was the driver. Officer Kelly testified that he did not see either Mr. Madorie or Dunn driving or sitting in the car (Tr. 137-38). Officer Kelly also did not investigate the car to determine if any keys were in the ignition, the engine was running, or the hood was warm (Tr. 138-39). There was no evidence that Officer Kelly determined whether Dunn was intoxicated or asked him whether he had been driving the vehicle. And the officer did not know whether there were any alcoholic beverage containers in or around the car (Tr. 140). Thus, he could not know whether Mr. Madorie drank *after* driving. In short, the State did not show that anyone drove while intoxicated. It did not show the *corpus delicti* of the offense, and Mr. Madorie’s statements were not admissible.

The State also misunderstands Mr. Madorie's argument when it claims that he argued that the State was required to prove which man was driving the car. (Resp.Br. 12). The context of Mr. Madorie's argument, as set forth above, is that without evidence as to which man was the driver, the State has not shown that a crime was committed by *anyone*, because if Mr. Dunn was driving, there was no evidence that he was intoxicated, so there was no evidence of a crime. It is only when one assumes that Mr. Madorie was driving, and doing so near the time the officer arrived, that one can conclude that there was a crime committed by someone. But, as stated, the State has provided no authority that justifies avoiding the application of the *corpus delicti* rule based solely on that assumption.

"The corpus delicti cannot be presumed. The state has the burden to prove the corpus delicti by legal evidence sufficient to show that the crime charged has been committed by someone." *Friesen*, 725 S.W.2d at 640. Here, while the evidence may have established that Mr. Madorie was intoxicated, there was no independent evidence that anyone operated the vehicle while intoxicated. Because of the lack of independent evidence of the *corpus delicti*, Mr. Madorie's statements were inadmissible, and this Court should, therefore, reverse his conviction and remand for a new trial.<sup>2</sup>

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<sup>2</sup> Mr. Madorie concedes that this is the proper remedy, rather than discharge.

## II.

**Mr. Madorie's argument was not that whether his arrest was within one and one-half hours of driving is an element of the offense of driving while intoxicated; rather, his point was that the State did not show this to be a legal arrest, thus rendering his statements inadmissible. The State misses that point by arguing that it was Mr. Madorie's burden to inject this issue, however, § 542.296 applies to this issue and places upon the State the burden of going forward with the evidence. Also, Mr. Madorie asked for a hearing on this issue, which was denied; therefore the State cannot fault Mr. Madorie for not doing what he was not allowed to do. Finally, the evidence, without Mr. Madorie's statements following his arrest, cannot be considered overwhelming because a defendant's admissions are always the most significant evidence against him, and this is especially true here where there were two people by the car and there was no witness to Mr. Madorie driving.**

The State does not contest that Mr. Madorie's arrest was unlawful if it was made more than one and one-half hours after the alleged violation. (Resp.Br. 16). It also does not counter Mr. Madorie's position that if the arrest was unlawful, his statements made after that arrest were not admissible. But, relying on *State v. Litterell*, 800 S.W.2d 7 (Mo.App. W.D. 1991), it says the burden was his to inject this issue, and that he did not do so. (Resp.Br. 17-18).

The State confuses the question of the validity of the conviction itself -- which was what was at issue in *Litterell* -- with the issue Mr. Madorie raised herein: that the trial court should have conducted a hearing on his motion to suppress his statements because they were the product of an illegal arrest. Mr. Madorie did not argue that an arrest within one and one-half hours is an element of the offense; therefore *Litterell* does not apply.

Further, a challenge to the admission of a confession on the grounds of involuntariness is considered under § 542.296. *State v. Edwards*, 30 S.W.3d 226, 229 (Mo.App. E.D. 2000). Under that section, the State bears the burden of going forward with the evidence and the burden of persuasion remain on the State. § 542.296.6. Therefore, it was not Mr. Madorie's burden to produce evidence that his arrest came more than one and one-half hours after the alleged violation.

The State also cites *State v. Eppenauer*, 957 S.W.2d 501 (Mo.App. W.D. 1997) (Resp.Br. 19), which cites *Litterell* for the proposition, “[t]hat a warrantless arrest was or was not made within the time limitation does not bear on the criminality of the conduct alleged against a defendant, and the State is not required to prove, as an element of the offense, that the arrest was made within the time limit.” *Id.*, at 503-04. Apparently, like *Litterell*, the defendant in *Eppenauer* also sought to invalidate his conviction because of the lack of proof of the time between the driving and the arrest. Again, that is not the case here; the issue is the entitlement to a suppression hearing based on the unlawful arrest. Mr. Madorie did not seek to invalidate his conviction itself.

The *Edwards* court said, “[t]he Missouri practice contemplates a preliminary or voir dire examination to determine the competency of a confession before it is presented to the jury.” *Id.* This is exactly what Mr. Madorie requested, and what the court denied him. The State’s argument is that Mr. Madorie’s appeal fails because he did not do what he complains that he was not allowed to do -- have a full hearing outside the jury’s hearing on the admissibility of his alleged statements. This Court should not accept this reasoning.

The State cites *State v. Blackwell*, 978 S.W.2d 475 (Mo.App. E.D. 1998), for the proposition that, when Mr. Madorie “objected to Officer Kelly’s testimony on statements made by [Mr. Madorie] after his arrest, in order to inject the issue at trial, it was necessary for [him] to make an offer of proof as to any evidence which would show that the arrest did, in fact, occur more than an hour and a half after [Mr. Madorie] was driving.” (Resp.Br. 21).

Actually, *Blackwell* has nothing to do with this issue. The defendant in that case was convicted of first degree burglary, armed criminal action, unlawful use of a weapon, resisting arrest, and possession of a controlled substance. *Id.*, at 477. Driving while intoxicated and § 577.039 were not considered. The closest the Court came to addressing the issue in Mr. Madorie’s case was when it said, “[t]his court has held that when an objection is sustained on proffered evidence, the offering party must make an offer of proof to properly preserve for appellate review.” *Id.*, at 478.

Mr. Madorie objected to the *State*’s introduction of evidence, and the validity of that objection required a hearing outside the jury’s presence. Mr. Madorie

requested such a hearing before the jury heard the contested evidence, and the court made it clear it would not consider the matter (Tr. 7).

Finally, the State argues that the introduction of Mr. Madorie's statements was "harmless." (Resp.Br. 21). In arguing that there was other evidence to support the conviction, the State takes no heed of a fundamental principle, that "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . ." *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991). And in *Jackson v. Denno*, 378 U.S. 368, 376, 84 S.Ct. 1774, 1780, 12 L.Ed.2d 908 (1964), the Court said that:

It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, *in whole or in part*, upon an involuntary confession, without regard for the truth or falsity of the confession [citation omitted], and even though there is ample evidence aside from the confession to support the conviction.

(Emphasis added).

All Mr. Madorie said before his arrest was: 1) that he was driving and saw a friend walking and as he turned around to give him a ride he went into the ditch (Tr. 113-15); and 2) that he had "had a little bit [to drink] earlier in the evening." (Tr. 117). Neither statement indicates when the drinking occurred, and neither indicates when the driving occurred. While these statements may be considered incriminating (subject to the application of the *corpus delicti* rule, Point I, *supra*), they are not conclusive of guilt. The more incriminating statements were those made after the

arrest, when Mr. Madorie said that he was driving and that he knew he was intoxicated, but the officer had not seen the keys in the ignition, and he would get out of trouble with a lawyer (Tr. 137). This more directly ties the drinking and driving. Therefore, these more damaging statements were not cumulative of Mr. Madorie's other admissions, and their admission was not harmless under *Fulminante*.

For these reasons, as well as those set out in his opening brief filed in the Court of Appeals, Mr. Madorie asks this Court to remand for a hearing to determine whether there was any evidence that Mr. Madorie was arrested within one and one-half hours of driving. This Court should also direct that if the trial court finds he was not arrested within that time, Mr. Madorie should be granted a new trial without evidence of his statements being admitted.

## CONCLUSION

For the reasons set forth in Point I herein and in his opening brief filed in the Court of Appeals, appellant Chad Madorie respectfully requests that this Court reverse his conviction and sentence and remand for a new trial without his statements. For the reasons set forth in Point II herein and in his opening brief, Mr. Madorie respectfully requests that the Court remand for a hearing on whether his arrest came within one and one-half hours of any driving, and if not, that a new trial be ordered without evidence of his statements following his arrest.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Kent Denzel, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,099 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in August, 2004. According to that program, these disks are virus-free.

On the \_\_\_\_\_ day of August, 2004, two true and correct copies of the foregoing reply brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to Stephanie Morrell, Assistant Attorney General, 221 W. High Street, Jefferson City, MO 65101.

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