

No. SC86083

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

JEREMY D. PIKE,

Appellant.

**Appeal from the Circuit Court of Platte County, Missouri
6th Judicial Circuit, Division 5
Honorable Abe Shafer, Judge**

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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INDEX

TABLE OF AUTHORITIES 2

JURISDICTIONAL STATEMENT 7

STATEMENT OF FACTS 8

ARGUMENT

 POINT I: Constitutionality of § 577.023 (Equal Protection) 12

 POINT II: Constitutionality of § 577.023 (Due Process) 23

 POINT III: Denial of Motion to Suppress 31

 POINT IV: Sufficiency of the Evidence/Intoxication 39

 POINT V: Sufficiency of the Evidence/Following Too Closely 45

CONCLUSION 48

CERTIFICATE OF COMPLIANCE AND SERVICE 49

APPENDIX 50

TABLE OF AUTHORITIES

Cases

<u>Almendarez-Torres v. United States</u> , 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)	17, 26
<u>Baldasar v. Illinois</u> , 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980)	16
<u>California v. Ramos</u> , 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)	20-21
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	40, 46
<u>Katzenbach v. Morgan</u> , 384 S.W.2d 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966)	21
<u>Nichols v. United States</u> , 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994)	16, 29
<u>North v. Russell</u> , 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1973)	18-19
<u>San Antonio Indep. Sch. Dist. v. Rodriguez</u> , 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973)	16
<u>Shadwick v. City of Tampa</u> , 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972)	19
<u>A.B. v. Frank</u> , 657 S.W.2d 625 (Mo. banc 1983)	18
<u>Deck v. State</u> , 68 S.W.3d 418 (Mo. banc 2002)	28
<u>Ensor v. Department of Revenue</u> , 998 S.W.3d 782 (Mo. banc 1999)	14, 24-25
<u>Hoskins v. Business Men’s Assur.</u> , 79 S.W.3d 901 (Mo. banc 2002)	13-14, 24-25
<u>In re Marriage of Kohring</u> , 999 S.W.2d 228 (Mo. banc 1999)	15, 18, 27
<u>Miss Kitty’s Saloon, Inc. v. Missouri Dept. of Revenue</u> , 41 S.W.3d 466 (Mo. banc 2001)	18, 27
<u>State v. Baker</u> , 524 S.W.2d 122 (Mo. banc 1975)	

<u>State v. Burns</u> , 994 S.W.2d 941 (Mo. banc 1999)	29
<u>State v. Chaney</u> , 967 S.W.2d 47 (Mo. banc), cert. denied 525 U.S. 1021 (1998)	39-41, 44, 45-46
<u>State v. Deck</u> , 994 S.W.2d 527 (Mo.banc), cert. denied 528 U.S. 1009 (1999)	32
<u>State v. Edwards</u> , 116 S.W.3d 511 (Mo. banc 2003), cert. denied 540 U.S. 1186 (2004)	34
<u>State v. Jaco</u> , SC85594, 2005 WL 44391 (Mo. banc January 11, 2005)	29
<u>State v. Kerr</u> , 905 S.W.2d 514 (Mo. banc 1995)	28
<u>State v. Kinkead</u> , 983 S.W.2d 518 (Mo.banc 1998)	40
<u>State v. Hefflin</u> , 89 S.W.2d 938 (Mo. 1935)	17, 26
<u>State v. Troupe</u> , 891 S.W.2d 808 (Mo. banc 1995)	27
<u>State v. Williams</u> , 97 S.W.3d 462 (Mo. banc 2003)	34
<u>Carr v. Director of Revenue</u> , 95 S.W.3d 121 (Mo.App.,W.D. 2002)	42
<u>City of Springfield v. Hampton</u> , 150 S.W.3d 322 (Mo.App., S.D. 2004)	35
<u>Misemer v. Director of Revenue</u> , 134 S.W.3d 761 (Mo.App.,W.D. 2004)	42
<u>State v. Abeln</u> , 136 S.W.3d 803 (Mo.App., W.D. 2004)	37
<u>State v. Ball</u> , 113 S.W.3d 677 (Mo.App., S.D. 2003)	41, 43
<u>State v. Buckler</u> , 988 S.W.2d 565 (Mo.App.,W.D. 1999)	43
<u>State v. Cole</u> , 148 S.W.3d 896 (Mo.App., S.D. 2004)	34
<u>State v. England</u> , 92 S.W.3d 335 (Mo. App., W.D. 2002)	35
<u>State v. Franklin</u> , 144 S.W.3d 355 (Mo.App., S.D. 2004)	33

<u>State v. Garriott</u> , 151 S.W.3d 403 (Mo.App., W.D. 2004)	35
<u>State v. Gibson</u> , 122 S.W.3d 121 (Mo.App., W.D. 2003)	17
<u>State v. Hanway</u> , 973 S.W.2d 892 (Mo.App.,W.D. 1998)	43
<u>State v. Haughton</u> , 97 S.W.3d 533 (Mo. App., E.D. 2003)	34
<u>State v. Heyer</u> , 962 S.W.2d 401 (Mo.App., E.D. 1998)	35
<u>State v. Hill</u> , 812 S.W.2d 204 (Mo.App., W.D. 1991)	37, 47
<u>State v. Kickham</u> , 91 S.W.3d 229 (Mo.App., S.D. 2002)	43
<u>State v. Logan</u> , 914 S.W.2d 806 (Mo. App., W.D. 1995)	35
<u>State v. Malaney</u> , 871 S.W.2d 634 (Mo.App., S.D. 1994)	37
<u>State v. Peterson</u> , 964 S.W.2d 854 (Mo.App., S.D. 1998)	35
<u>State v. Reed</u> , 21 S.W.3d 44 (Mo.App., S.D. 2000)	34
<u>State v. Scholl</u> , 114 S.W.3d 304 (Mo.App., E.D. 2003)	43
<u>State v. Shaon</u> , 145 S.W.3d 499 (Mo.App., W.D. 2004)	34
<u>State v. Shifkowski</u> , 57 S.W.3d 309 (Mo.App., S.D. 2001)	33
<u>State v. Todd</u> , 935 S.W.2d 55 (Mo.App., E.D. 1996)	43
<u>State v. Williams</u> , 46 S.W.3d 35 (Mo. App., E.D. 2001)	34
<u>State v. Wolf</u> , 91 S.W.3d 636 (Mo.App., W.D. 2002)	33
<u>State v. Zoellner</u> , 920 S.W.2d 132 (Mo.App., E.D. 1996)	17-18, 21, 27
<u>State ex rel. Anglin v. Mitchell</u> , 596 S.W.2d 779 (Tenn. 1980)	20
<u>State ex rel. Collins v. Bedell</u> , 460 S.E.2d 636 (W.Va 1995)	20

Other Authorities

Article V, § 3, Missouri Constitution (as amended 1982)	7
§ 302.321, RSMo Cum. Supp. 2003	7
§ 304.015, RSMo Cum. Supp. 2003	37
§ 304.017, RSMo 2000	7, 35, 46
§ 479.200, RSMo 2000	29
§ 544.216, RSMo 2000	36
§ 577.010, RSMo 2000	7, 41
§ 577.020, RSMo Cum. Supp. 2003.	43
§ 577.023, RSMo Cum. Supp. 2003	14-15, 25-26
§ 577.037, RSMo Cum. Supp. 2003	41
Supreme Court Rule 30.06	41
Supreme Court Rule 30.20	33
Supreme Court Rule 37.54	29
Supreme Court Rule 37.61	29
Supreme Court Rule 37.71	29
Supreme Court Rule 37.74	29
Supreme Court Rule 84.04	41
19 CSR 25-30.060	42
Division of Motor Vehicle and Driver Licensing, Missouri Department of Revenue, <u>Missouri Driver Guide</u> , 67 (Revised September 2004)	36

JURISDICTIONAL STATEMENT

This appeal is from convictions for felony driving while intoxicated¹, § 577.010, RSMo 2000, misdemeanor driving while revoked, § 302.321, RSMo Cum. Supp. 2003, and following too closely, § 304.017, RSMo 2000, obtained in the Circuit Court of Platte County, and for which appellant was sentenced to three years in the custody of the Department of Corrections for the driving while intoxicated and 90 days concurrent for the driving while revoked, and a \$100 fine for driving too closely. Because appellant is challenging the validity of a statute of this state, jurisdiction resides with the Missouri Supreme Court. Article V, § 3, Missouri Constitution (as amended 1982).

¹For the sake of brevity, respondent will often refer to “driving while intoxicated” as “DWT” throughout its brief.

STATEMENT OF FACTS

Appellant, Jeremy D. Pike, was charged by information with felony driving while intoxicated (L.F. 9-10). An amended information was later filed joining additional counts of driving while revoked, possession of intoxicating liquor by a minor, and following too closely (L.F. 41-42). Appellant waived his right to a jury trial, and this cause went to trial by the court on October 22, 2003, in the Circuit Court of Platte County, the Honorable Abe Shafer presiding (L.F. 6, Tr. 62).

The sufficiency of the evidence is at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: Early in the morning of August 23, 2003, Missouri State Highway Patrol Trooper Benjamin Comer was on patrol in Platte County, Missouri (Tr. 88-89). Shortly after 2:20 a.m., Comer was parked on the right shoulder of Highway 152 just east of Green Hills Road when, in his rear view mirror, he saw three vehicles in single file in the right lane approaching his position (Tr. 90). As the three cars passed him at a speed greater than 45 miles per hour, he saw that the second and third cars were following too closely, as the second car was only one car length from the first vehicle, and the third was one-and-a-half car lengths behind the second car (Tr. 91-94). Comer started to pursue the three vehicles, and as he followed he saw the second car twice drift over the fog line and onto the shoulder of the highway (Tr. 94). When the second car started to exit the highway at North Platte Purchase, Comer stopped the car (Tr. 94-95).

Comer approached appellant, the eighteen-year-old driver of the car, and noticed that there were three other subjects in the car, one of whom was under age 21, and the other two

under age 17 (Tr. 96-97). Appellant gave Comer a non-driver state identification card, and Comer asked appellant to come back to his patrol car (Tr. 97). During this time, Comer noticed that appellant was emitting a strong odor of intoxicating beverages and had watery, glassy, bloodshot, and staring eyes (Tr. 97-98). Comer asked if appellant had been drinking anything, and appellant said that he had consumed four beers (Tr. 98). The two also discussed appellant's driving status upon Comer finding out that appellant's license was revoked (Tr. 97). During this conversation, appellant's speech was slurred and mumbling (Tr. 98-99). At that point, Comer asked appellant to take some field sobriety tests, which appellant agreed to do (Tr. 98-99).

Comer first conducted the horizontal gaze nystagmus test on appellant, and appellant failed all six possible points on the test (Tr. 99-100). Comer asked appellant to recite the alphabet from letters C to W, but appellant recited from letters G to Z (Tr. 101). Comer then conducted the Romberg balance test, in which appellant was to tilt his head slightly back and silently judge when thirty seconds had elapsed (Tr. 101-102). Appellant did not indicate thirty seconds until after forty seconds had elapsed, which was outside the 4-5 second deviation cutoff for passing the test (Tr. 102, 140-141). After administering a portable breath test, Comer had appellant take the one-leg stand test, which appellant failed by using his hands to balance, stepping down twice, and swaying while balancing (Tr. 103-104). At that point, appellant was placed under arrest for driving while intoxicated and was placed in the patrol car, at which time he started "whining" and crying about "his situation" (Tr. 104, 170-171).

Prior to taking appellant to the police station, Comer removed a cooler from the car

which contained bottles of Bud Light beer and cans of Natural Light beer (Tr. 123).

At the police station, appellant was informed of his rights and of the Implied Consent law, and agreed to take a breath analysis test (Tr. 105-107). Appellant said that he had been at a party and admitted that he had been drinking, saying that he had drunk five Bud Lights (Tr. 108-109). Appellant's breath analysis revealed that his blood alcohol content was .121% (Tr. 116).

The parties stipulated to the introduction of: appellant's driving record, showing that his license was revoked at the time of this incident; records showing that notice of that revocation had been sent to appellant's address; prior convictions for driving while intoxicated, including one municipal conviction from Oakview, Missouri, for operating a motor vehicle while intoxicated and one state court conviction from Platte County; and records showing the required maintenance for the Datamaster machine used to test appellant's breath (Tr. 70-73).

Appellant presented no testimony in his defense (Tr. 182).

At the close of the evidence and arguments of counsel, the court found appellant guilty of felony DWI, driving while revoked, and following too closely, and not guilty of minor in possession (L.F. 6, 72-73; Tr. 187-188). On the DWI charge, the court sentenced appellant to three years in the custody of the Department of Corrections with placement in an institutional treatment center and consideration for probation within 120 days (L.F. 71-74). The court also sentenced appellant to a concurrent 90 day sentence for driving while revoked and a \$100 fine for following too closely (L.F. 72-74). This appeal follows.

ARGUMENT

I.

The trial court did not err in finding that § 577.023 was constitutional because that statute's provision allowing municipal convictions adjudicated by judges who are lawyers to be used to enhance punishment for prior and persistent dwi offenders but not those convictions adjudicated by non-lawyer judges does not violate the equal protection clauses in that the distinction between the two types of convictions is rationally related to the legitimate state interest in ensuring that prior convictions were fully litigated before legally-trained judges before subjecting a defendant to increased punishment.

Appellant claims that the trial court erred in failing to find that the sentencing enhancement provisions of § 577.023 were unconstitutional (App.Br. 24). Appellant argues that the statute violates the Equal Protection clauses of the United States and Missouri constitutions because it treats similarly-situated offenders—those who have been convicted of prior municipal ordinance violations for driving while intoxicated—differently, as only those whose municipal convictions were before a lawyer judge could have their sentences enhanced based on the municipal offense (App.Br. 29-36). Although appellant contends that his fundamental right to liberty was deprived by the distinction, but even if strict scrutiny does not apply, he claims that the distinction “does not pass constitutional muster,” as “there is simply no rational basis” for the distinction (App.Br. 28-29, 35).

A. Facts

Prior to trial, appellant filed a motion to dismiss and suggestions in support, challenging the constitutionality of § 577.023 (L.F. 11-23). Appellant argued, in part, that the statute's distinction between those who had been convicted of a municipal alcohol-related driving offense before a lawyer judge and those convicted before a non-lawyer judge had "no legitimate basis" and that any plea before a municipal judge, whether lawyer or non-lawyer, is "presumably reliable" (L.F. 19-20). After a hearing on the motion, the trial court denied the motion (L.F. 43-47)

At trial, the parties stipulated to the admissibility of State's Exhibit 1, a certified copy of a municipal court conviction from the Oakview Municipal Division of the Clay County Circuit Court, showing that appellant had pled guilty on January 8, 2003, to "knowingly operat[ing] a motor vehicle on a public street while intoxicated" on October 18, 2002 (Tr. 71-72). The record of the plea showed that appellant was represented by counsel and that the municipal judge who accepted the plea was an attorney (Tr. 71-72). The State then admitted the record of conviction without objection (Tr. 73). At the close of the State's evidence, appellant filed a motion to dismiss, again arguing that the statute was unconstitutional (Tr. 176; L.F. 57-58). The court later found appellant guilty of felony DWI (Tr. 189).

B. Standard of Review

Statutes are strongly presumed to be constitutional. Hoskins v. Business Men's Assur., 79 S.W.3d 901, 904 (Mo. banc 2002). That presumption is overcome only when the statute clearly contradicts a constitutional provision. Ensor v. Department of Revenue, 998 S.W.3d 782, 783 (Mo. banc 1999). Because of the strong presumption of validity, this Court only

inquires as to whether the challenged statute is “clearly and undoubtedly” prohibited. Id. This Court will resolve any doubts in favor of the procedural and substantive validity of an act of the legislature. Hoskins, 79 S.W.3d at 904.

C. Analysis

1. § 577.023

Section 577.023 governs the enhancement of punishment for driving while intoxicated, making the offense a felony where the defendant is a persistent offender, i.e. has two prior convictions for intoxication-related traffic offenses within ten years of the charged offense. § 577.023.1(2)(a), RSMo Cum. Supp. 2003. Appellant’s attack on § 577.023 rests entirely on the definition of an “intoxication-related traffic offense” under that statute, which is contained in § 577.023.1(1). That subsection reads as follows:

(1) An "intoxication-related traffic offense" is driving while intoxicated, driving with excessive blood alcohol content, involuntary manslaughter pursuant to subdivision (2) of subsection 1 of section 565.024, RSMo, assault in the second degree pursuant to subdivision (4) of subsection 1 of section 565.060, RSMo, assault of a law enforcement officer in the second degree pursuant to subdivision (3) of subsection 1 of section 565.082, RSMo, *or driving under the influence of alcohol or drugs in violation of state law or a county or municipal ordinance, where the judge in such case was an*

attorney and the defendant was represented by or waived the right to an attorney in writing[.]

§ 577.023.1(1), RSMo Cum. Supp. 2003 (emphasis added). Therefore, because the statute permits enhancement of punishment for a DWI conviction where the offender has a prior municipal DWI conviction where the judge is a lawyer, but not where the judge is not a lawyer, and because his prior municipal conviction was before a judge, appellant alleges a violation of his equal protection rights (App.Br. 24).

2. Equal Protection

a. “Rational Relationship” Test Applies

When considering a claim that a statute violates the Equal Protection Clause, the first step is to determine whether the challenged statutory classification operates either to cause a disadvantage for a suspect class or to impinge upon a fundamental right explicitly or implicitly protected by the Constitution. In re Marriage of Kohring, 999 S.W.2d 228, 231-32 (Mo. banc 1999). A suspect class is one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Suspect class designation has traditionally been limited to classifications based on race, national origin, illegitimacy, and, in some cases, gender. Kohring, 999 S.W.2d at 232. Here, no such suspect class distinction exists, nor does appellant claim one.

Appellant does claim that the distinction in § 577.023 impinges upon a fundamental

right, namely, the right to liberty, as the statute “transform[s]” a misdemeanor into a felony (App.Br. 28). In reliance, appellant relies primarily language in a concurring opinion in Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980), stating that an uncounseled conviction could not be later used to enhance punishment. Baldasar, 446 U.S. at 224-230.² To the extent that any opinion in Baldasar, which featured a per curiam judgment supported by three different concurring opinions, had any precedential value, such was negated when Baldasar was expressly overruled in Nichols v. United States, 511 U.S. 738, 748, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994).³

Far more instructive is Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which reaffirmed the traditional rule that a statutory provision specifying a greater penalty based on recidivism defines a sentencing factor rather than a separate crime or element of a crime. Almendarez-Torres, 523 U.S. at 239-47. That rule has long been recognized by this Court, which has stated sentence enhancements based on prior convictions “do not create a separate offense, but merely subject second offenders to heavier

²Appellant also cites to this Court’s opinion in A.B. v. Frank, 657 S.W.2d 625 (Mo. banc 1983), which explicitly refused to answer any question regarding the constitutionality of the DWI enhancement statute, finding the claim moot. Id. at 627.

³The confusion caused by the multiple decisions in Baldasar was best summed up by Justice Souter’s concurring opinion in Nichols, which said that he did not believe that Baldasar had a holding that could be overruled because “no common ground united any five Justices.” 511 U.S. at 749 (J. Souter, concurring in the judgment).

punishment for the crimes they commit[,]” is still applicable. State v. Hefflin, 89 S.W.2d 938, 941 (Mo. 1935).

Because the enhancement of a sentence based on prior convictions is not a new offense, appellant’s liberty is not impugned by the enhancement statute. Appellant’s liberty was placed at stake by committing the offense of driving while intoxicated and being tried for that offense, not by the statute enhancing the punishment for that statute. The fact that appellant would be subject to resentencing for a lesser offense should he prevail shows that the claim is not truly one affecting a fundamental right to liberty, as he is still “deprived” his “liberty.” See, e.g., State v. Gibson, 122 S.W.3d 121, 131 (Mo.App., W.D. 2003). Therefore, the enhancement statute does not involve a fundamental right. See State v. Zoellner, 920 S.W.2d 132, 135 (Mo.App., E.D. 1996)(due process attack to using municipal ordinance convictions to enhance DWI punishment did not involve fundamental right). Where there is no suspect class or fundamental right affected by government action, review is limited to a determination of whether the classification is rationally related to a legitimate state interest. Kohring, 999 S.W.2d at 232.

b. Distinction in Statute Rationally Related to Legitimate State Interest

Under the rational relationship analysis, a court will strike down the legislation only if the challenger shows that “the classification does not rest upon any reasonable basis and is purely arbitrary.” Miss Kitty’s Saloon, Inc. v. Missouri Dept. of Revenue, 41 S.W.3d 466, 467 (Mo. banc 2001). When using rationality review, this Court will not substitute its judgment for that of the legislature as to the wisdom, social desirability, or economic policy underlying

a statute. Kohring, 999 S.W.2d at 233. Under this standard, a classification is constitutional “if any state of facts can be reasonably conceived to justify it.” Miss Kitty’s Saloon, 41 S.W.3d at 467.

Here, appellant claims that the only legitimate State interest involved in this case is the State’s interest in deterring or severely punishing repeat offenders (App.Br. 29). It is true that the State has a legitimate interest in deterring prior DWI offenders from committing that offense again and in severely punishing “those who ignore the deterrent message.” Zoellner, 920 S.W.2d at 135, citing A.B. v. Frank, 657 S.W.2d 625, 628 (Mo. banc 1983). However, this is not the only State interest involved here. By limiting the use of prior municipal convictions for enhancement only to those found by a lawyer judge, the State is balancing its interest in strictly punishing recidivists with a legitimate interest in protecting defendants whose prior cases were not reviewed by a judge fully trained in the law.

In North v. Russell, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1973), the United States Supreme Court found that Kentucky’s use of non-lawyer judges for DWI cases was constitutional where there was an opportunity to have review sought in a trial de novo before a lawyer judge. North, 427 U.S. at 329-39. In discussing the concept of non-judicial officers performing judicial acts, the Court cited to Shadwick v. City of Tampa, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972), which dealt with lay magistrates making probable cause determinations. Id. at 337-38. In Shadwick, the Court upheld that practice, but noted:

All this is not to imply that a judge or lawyer *would not normally provide the most desirable review* of warrant requests.

But our federal system warns of converting desirable practice into constitutional commandment. It recognizes in plural and diverse state activities one key to national innovation and vitality. States are entitled to some flexibility and leeway in their designation of magistrates, so long as all are neutral and detached and capable of the probable-cause determination required of them.

Id. at 353-54 (emphasis added).

This passage recognizes that, although the Constitution does not require all judicial determinations to be made only by lawyer judges, there is an important and desirable interest in having lawyer judges make such determinations. That the legislature believes that decisions of non-lawyer judges in municipal prosecutions require greater protection, even for guilty pleas, can be seen from its grant of the right to a trial de novo for guilty pleas where the judge is not licensed to practice law in the state, but not for guilty pleas before licensed judges. § 479.200.1-2, RSMo 2000. This interest is heightened when imprisonment is possible, requiring additional safeguards to insure that the non-lawyer judge's rulings are legally accurate. See, e.g., State ex rel. Anglin v. Mitchell, 596 S.W.2d 779, 785-88, 791 (Tenn. 1980)(only lawyer judges permitted to conduct juvenile adjudications); State ex rel. Collins v. Bedell, 460 S.E.2d 636, 642-45 (W.Va 1995)(due process permits non-lawyer magistrate to preside over trial so long as there is meaningful review on appeal by a lawyer judge). The legislature's decision to only use lawyer-judge-adjudicated municipal convictions to subject

a defendant to greater punishment for a DWI conviction recognizes the important and desirable interest of ensuring that the prior conviction was reviewed by a judge fully trained in the law.

Appellant appears to anticipate this argument, arguing that the municipal convictions entered by non-lawyer judges are “reliable” because those judges are required to follow the rules in the acceptance of a guilty plea and because those judges must undergo some judicial training and continuing education (App.Br. 29-31). Respondent does not disagree that municipal convictions by non-lawyer judges are valid and may be considered constitutionally “reliable.” However, the State is not required to pass laws that only provide the minimal constitutional protection available. “States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.” California v. Ramos, 463 U.S. 992, 1014, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). It is irrelevant that neither the United States nor Missouri Constitutions requires the protection afforded DWI defendants by this statute, as the legislature was free to provide the greater protection available by having only the convictions entered by lawyer judges used to enhance punishments.

Appellant also argues that this Court’s opinion in State v. Baker, 524 S.W.2d 122 (Mo. banc 1975), compels a finding that this statute violates equal protection, as it prohibits treating similarly-situated defendants differently based on “‘happenstance’ or a fortuitous event, i.e. appearing before a lawyer judge or a non-lawyer judge (App.Br. 31-35)). However, Baker provides no relief. In Baker, this Court struck down a mandatory consecutive-sentencing statute which differentiated between defendants solely on the basis of the date of their final

sentencing, finding that there was absolutely no rational reason at all for the distinction based on the date of sentencing. Id. at 127-31. While the sentencing date, like the status of the judges in this case, did involve factors outside the control of the defendant, the differentiation in this case is unlike that in Baker because it is rationally related to the legitimate state interest in providing heightened levels of protection to defendants in the use of municipal convictions to enhance punishment. The fact that some recidivists wind up not having their prior municipal convictions used against them does not render the statute unconstitutional, as the legislature is not required to strike “all evils at the same time.” Katzenbach v. Morgan, 384 S.W.2d 641, 657, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966); Zoellner, 920 S.W.2d at 136.

Because the State has a legitimate interest in ensuring that a defendant’s prior convictions were fully litigated before legally-trained judges before enhancing punishment, and because the statute preventing prior municipal convictions before non-lawyer judges from being used to enhance punishment is rationally related to that interest, § 577.023 does not violate constitutional equal protection provisions. Therefore, the trial court did not err in finding that § 577.023 was constitutional, and appellant’s first point on appeal must fail.

II.

The trial court did not err in finding that § 577.023 was constitutional because that statute's provision allowing municipal convictions to be used to enhance the punishment of a conviction for driving while intoxicated from a misdemeanor to a felony does not violate appellant's constitutional rights to due process of law in that the law is rationally related to the legitimate state interest of deterring drunk driving and severely punishing those who repeatedly do so, appellant failed to demonstrate that he actually suffered any violation of procedural due process, and thus has no standing to raise such a claim, and municipal court proceedings provide sufficient process to satisfy due process requirements.

Appellant claims that the trial court erred in overruling his motion to dismiss based on an allegation that the sentencing enhancement provisions of § 577.023 are unconstitutional (App.Br. 37). He claims that the provision violates his due process rights because it allows municipal convictions to be used to enhance the punishment for a state court conviction for driving while intoxicated (App.Br. 40). He claims that due process is offended because the state criminal system provides more protections for a defendant than the municipal court system, but still permits those convictions obtained in the municipal courts to be used to invoke a greater punishment in a criminal prosecution (App.Br. 40-45).

A. Facts

Prior to trial, appellant filed a motion to dismiss and suggestions in support, challenging the constitutionality of § 577.023 (L.F. 11-23). Appellant argued, in part, that the statute's use

of municipal convictions in a state court proceeding to enhance punishment violated due process because the “different standards and circumstances involving municipal prosecutions versus state prosecutions” meant that municipal court prosecutions did not “comport to the same prevailing notions of fundamental fairness existing in state prosecutions” (L.F. 20-22). After a hearing on the motion, the trial court denied the motion (L.F. 43-47)

At trial, the parties stipulated to the admissibility of State’s Exhibit 1, a certified copy of a municipal court conviction from the Oakview Municipal Division of the Clay County Circuit Court, showing that appellant had pled guilty on January 8, 2003, to “knowingly operat[ing] a motor vehicle on a public street while intoxicated” on October 18, 2002 (Tr. 71-72). The State then admitted the record of conviction without objection (Tr. 73). At the close of the State’s evidence, appellant filed a motion to dismiss, again arguing that the statute was unconstitutional (Tr. 176; L.F. 57-58). The court later found appellant guilty of felony DWI (Tr. 189).

B. Standard of Review

Statutes are strongly presumed to be constitutional. Hoskins v. Business Men’s Assur., 79 S.W.3d 901, 904 (Mo. banc 2002). That presumption is overcome only when the statute clearly contradicts a constitutional provision. Ensor v. Department of Revenue, 998 S.W.3d 782, 783 (Mo. banc 1999). Because of the strong presumption of validity, this Court only inquires as to whether the challenged statute is “clearly and undoubtedly” prohibited. Id. This Court will resolve any doubts in favor of the procedural and substantive validity of an act of the legislature. Hoskins, 79 S.W.3d at 904.

C. Analysis

1. § 577.023

Section 577.023 governs the enhancement of punishment for driving while intoxicated, making the offense a felony where the defendant is a persistent offender, i.e. has two prior convictions for intoxication-related traffic offenses within ten years of the charged offense. § 577.023.1(2)(a), RSMo Cum. Supp. 2003. Appellant's attack on § 577.023 rests entirely on the definition of an "intoxication-related traffic offense" under that statute, which is contained in § 577.023.1(1). That subsection reads as follows:

(1) An "intoxication-related traffic offense" is driving while intoxicated, driving with excessive blood alcohol content, involuntary manslaughter pursuant to subdivision (2) of subsection 1 of section 565.024, RSMo, assault in the second degree pursuant to subdivision (4) of subsection 1 of section 565.060, RSMo, assault of a law enforcement officer in the second degree pursuant to subdivision (3) of subsection 1 of section 565.082, RSMo, *or driving under the influence of alcohol or drugs in violation of state law or a county or municipal ordinance*, where the judge in such case was an attorney and the defendant was represented by or waived the right to an attorney in writing[.]

§ 577.023.1(1), RSMo Cum. Supp. 2003 (emphasis added). Therefore, because the statute permits enhancement of punishment for a state court DWI conviction where the offender has a prior municipal DWI conviction, appellant alleges a violation of his due process rights (App.Br. 37).

2. Due Process

a. “Rational Relationship” Test Applies

As in appellant’s first point, he claims that his fundamental right to “liberty” is impugned by the statute, and thus review of the statute is subject to “strict scrutiny” (App.Br. 37-38). However, as explained in Point I, supra, appellant’s liberty was placed at stake by committing the offense of driving while intoxicated and being tried for that offense, not by the statute enhancing the punishment for that statute. See Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); State v. Hefflin, 89 S.W.2d 938, 941 (Mo. 1935). Therefore, the enhancement statute does not involve a fundamental right. See State v. Zoellner, 920 S.W.2d 132, 135 (Mo.App., E.D. 1996)(due process attack to using municipal ordinance convictions to enhance DWI punishment did not involve fundamental right). Where there is no fundamental right affected by government action, review is limited to a determination of whether the law is rationally related to a legitimate state interest. State v. Troupe, 891 S.W.2d 808, 812 n. 5 (Mo. banc 1995).

b. Statute Rationally Related to Legitimate State Interest

Under the rational relationship analysis, a court will strike down the legislation only if the challenger shows that the legislation “does not rest upon any reasonable basis and is purely

arbitrary.” Miss Kitty’s Saloon, Inc. v. Missouri Dept. of Revenue, 41 S.W.3d 466, 467 (Mo. banc 2001). When using rationality review, this Court will not substitute its judgment for that of the legislature as to the wisdom, social desirability, or economic policy underlying a statute. Kohring, 999 S.W.2d at 233. Under this standard, a law is constitutional “if any state of facts can be reasonably conceived to justify it.” Miss Kitty’s Saloon, 41 S.W.3d at 467.

In State v. Zoellner, the Eastern District of the Court of Appeals considered and rejected a claim that the use of municipal convictions to enhance punishment for subsequent DWI convictions violated substantive due process. Zoellner, 920 S.W.2d at 135. The Court found that the State’s interest in deterring prior DWI offenders and severely punishing those who ignore the law’s deterrent message was a legitimate state interest, and that the use of municipal convictions to enhance that punishment was rationally related to that purpose. Id. This is clearly a correct statement of law. The use of prior municipal convictions to enhance punishment for subsequent DWI convictions allows the State to deter recidivism and punish recidivist drunk drivers, and prevents one from evading the import of the law simply because his or her cases were resolved in municipal court. Therefore, the use of municipal convictions to enhance subsequent punishment is rationally related to a legitimate state interest, and thus appellant’s substantive due process rights are not violated.

c. Procedural Due Process

Appellant’s claim that his due process rights are violated because municipal prosecutions do not require as vigorous protections as state criminal convictions must also fail. First, it must be noted that, in his municipal proceeding, appellant pled guilty, thus waiving

most, if not all, of the procedural due process that he claims a municipal ordinance violator is denied (Tr. 71-72). Appellant further does not identify any process that he specifically was denied in his municipal case. A defendant has no standing to raise hypothetical situations in which a statute might be unconstitutionally applied. State v. Kerr, 905 S.W.2d 514, 515 (Mo. banc 1995). Therefore, any procedural due process claim should fail based on a lack of standing. See Deck v. State, 68 S.W.3d 418, 432 (Mo. banc 2002)(no standing to challenge time limits for filing Rule 29.15 motion when the movant timely filed his motion).

Further, a review of the specific areas of due process which appellant refers to actually reveals that there are sufficient due process protections for municipal ordinance violator. The specific violations appellant points to are the differences in discovery, the right to a jury trial, and the right to appellate review (App.Br. 41). First, there is no general right to discovery in criminal cases—the Due Process clause only requires that 1) a defendant has no duty to disclose information unless granted a reciprocal right to discovery, and 2) that any exculpatory evidence must be disclosed. State v. Jaco, SC85594, 2005 WL 44391, *4 (Mo. banc January 11, 2005). Clearly, the disclosure of exculpatory evidence would be required by justice, thus requiring a municipal court to exercise its discretion to permit such discovery. Supreme Court Rule 37.54. Second, a municipal defendant does have the right to a jury trial, and that trial is conducted according to the rules of criminal procedure. Supreme Court Rule 37.61(d)-(e). Third, there is no constitutional right to appeal, as the right to appeal is purely statutory. State v. Burns, 994 S.W.2d 941, 941 (Mo. banc 1999). Further, a party aggrieved following a municipal court conviction without a jury trial is entitled to a trial de novo, and is further

permitted a right of appeal from any trial by jury in front of an associate circuit judge. § 479.200.2,.4, RSMo 2000, Supreme Court Rules 37.71, 37.74. Therefore, a municipal defendant is granted sufficient process in the litigation of his municipal violation, and appellant's claim must fail.

Finally, appellant claims that the fact that the punishment for a misdemeanor DWI conviction can exceed the punishment for a municipal conviction, which in some cases may not even permit incarceration, creates a due process violation (App.Br. 41-44). However, in Nichols v. United States, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), the United States Supreme Court held constitutional the use of an uncounseled misdemeanor conviction, which could only have been valid if no imprisonment had been ordered, to enhance punishment for a subsequent conviction. Nichols, 511 U.S. at 748-749. Therefore, the fact that either no imprisonment or less imprisonment may possibly result from a municipal conviction does not create a constitutional problem in the subsequent use of such a conviction to enhance punishment.

For the foregoing reasons, appellant's second point on appeal must fail.

III.

The trial court did not err, plainly or otherwise, in overruling appellant's motion to suppress and in admitting evidence discovered following the stop of appellant on the grounds that the stop of the vehicle appellant was driving was illegal because the stop of appellant's vehicle was justified in that it was based on probable cause that appellant had committed the traffic offense of following too closely, as well as being based on appellant's unusual operation of the car by repeatedly drifting onto the shoulder of the highway.

Appellant claims that the trial court erred in failing to grant his motion to suppress because the officer did not have probable cause to believe any traffic violations had occurred, nor did he have a "reasonable, articulable suspicion" that any of the occupants of the car were involved in criminal activity (App.Br. 46). Appellant argues that the evidence that appellant was following the vehicle in front of him too closely and that he twice drifted off of the lane of traffic and onto the shoulder of the highway failed to establish that traffic violations occurred (App.Br. 56-64).

A. Facts

Appellant filed a pretrial motion to suppress and suggestions in support, arguing that there was insufficient evidence that appellant committed any traffic offense by following the car in front of him too closely or in twice drifting from the lane of traffic over the fog line up to a foot onto the shoulder of the highway (L.F. 24-26, 29-33).

In his testimony at the suppression hearing and at trial,⁴ Trooper Comer testified that he first saw the vehicle appellant was driving in his rear view mirror as the second of three vehicles in a single file line in the right lane of traffic (Tr. 14, 90). The cars were not exceeding the 55 mile-per-hour speed limit, but they were driving faster than 45 miles per hour (Tr. 25, 92-93). As they got closer, he could see that they were following each other “fairly closely” (Tr. 14). During this time, he noticed no variation in the speed of the three vehicles on his radar unit, nor did herecall seeing any reduction in speed of the vehicles at all (Tr. 26, 127). As the vehicles passed his car, he noticed that the second vehicle (driven by appellant) was following the first vehicle by about a car length, and that the third vehicle was following appellant by one-and-a-half car lengths (Tr. 14, 92). In Comer’s opinion, based on his prior experience watching traffic as a trooper as well as with accidents he had “worked,” Comer believed that the one car length between the first vehicle and appellant’s vehicle was too close (Tr. 93-94). At that point, Comer started following the three vehicles (Tr. 94).

As he started to follow the vehicles, Comer saw appellant’s vehicle drift up to a foot onto the shoulder of the highway, drift back into the lane of traffic, and then drift again onto the shoulder prior to taking the exit at North Platte Purchase Drive (Tr. 14-16, 94-95). Comer observed nothing in the roadway or any other traffic which would have justified appellant’s

⁴In reviewing the trial court’s decision whether or not to suppress evidence, the reviewing court will examine the record made both at the suppression hearing and at trial. State v. Deck, 994 S.W.2d 527, 534 (Mo.banc), cert. denied 528 U.S. 1009 (1999).

driving onto the shoulder (Tr. 15). At that point, Comer decided to stop appellant for following too closely and for leaving the lane of traffic, and did so on the exit ramp (Tr. 15-16, 95).

The trial court overruled appellant's motion to suppress and appellant's subsequent objection at trial (L.F. 5; Tr. 95).

B. Preservation and Standard of Review

In both his post-trial motion for judgment of acquittal and his point relied on, appellant only objected to the denial of his "motions" to suppress, not to the subsequent admission of the evidence at trial (L.F. 59-60; App.Br. 21). Generally, a trial court's ruling on a pretrial motion to suppress cannot be asserted as a claim on appeal because the pretrial motion to suppress and the subsequent admission of the evidence at trial are two separate procedures. State v. Franklin, 144 S.W.3d 355, 358 (Mo.App., S.D. 2004). A point attacking the denial of the motion to suppress, without attacking the court's ruling admitting the evidence, is deficient as it does not identify the actual ruling that is subject to challenge, and therefore, does not preserve the issue for review, and such a point relied on is "fatally defective." State v. Shifkowski, 57 S.W.3d 309, 316 (Mo.App., S.D. 2001); State v. Wolf, 91 S.W.3d 636, 642 (Mo.App., W.D. 2002). Because appellant's point only refers to the motion to suppress and not the actual admission of the evidence at trial, it should be reviewed only for plain error. Supreme Court Rule 30.20.

Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice would occur if the error was left uncorrected. State v. Williams, 97 S.W.3d 462, 470 (Mo.

banc 2003). Plain error does not embrace all trial error, and this Court's discretion to reverse a conviction based on plain error should be utilized sparingly. State v. Williams, 46 S.W.3d 35, 40 (Mo. App., E.D. 2001). Appellant bears the heavy burden of demonstrating manifest injustice or a miscarriage of justice. State v. Haughton, 97 S.W.3d 533, 534 (Mo. App., E.D. 2003). An assertion of plain error places a much greater burden on a defendant than an assertion of prejudicial error. State v. Reed, 21 S.W.3d 44, 47 (Mo.App., S.D. 2000).

Should this Court believe that appellant's objection at trial to the introduction of evidence was sufficient to justify the omission of that ruling from his point relied on, rendering appellant's point preserved, appellant review of a trial court's ruling on a motion to suppress is limited to a determination of whether the evidence from the record as a whole was sufficient to support the finding. State v. Cole, 148 S.W.3d 896, 899 (Mo.App., S.D. 2004); State v. Shaon, 145 S.W.3d 499, 504 (Mo.App., W.D. 2004). The appellate court will review the evidence in the light most favorable to the trial court's ruling, and will defer to the trial court's determinations of credibility. State v. Edwards, 116 S.W.3d 511, 530 (Mo. banc 2003), cert. denied 540 U.S. 1186 (2004). Reversal is only required if the trial court's decision was clearly erroneous. Id.

C. The Traffic Stop was Justified

The stop of a motor vehicle and detention of its occupants is a seizure for purposes of the Fourth Amendment. State v. Logan, 914 S.W.2d 806, 808 (Mo. App., W.D. 1995). However, there is a sufficient basis for such a stop where the officer has an articulable suspicion that the driver has committed or is committing a traffic offense, as “reasonable suspicion” justifying a traffic stop includes reasonable suspicion of traffic offenses. City of Springfield v. Hampton, 150 S.W.3d 322, 326 (Mo.App., S.D. 2004); State v. England, 92 S.W.3d 335, 339 (Mo. App., W.D. 2002); see also § 544.216, RSMo 2000. A routine traffic stop based upon violation of state traffic laws is a justifiable seizure under the Fourth Amendment. England, 92 S.W.3d at 339. Further, a traffic stop may be justified by observation of conduct which may not itself constitute a traffic violation but merely an unusual operation. State v. Garriott, 151 S.W.3d 403, 409 (Mo.App., W.D. 2004); State v. Peterson, 964 S.W.2d 854, 856 (Mo.App., S.D. 1998); State v. Heyer, 962 S.W.2d 401, 407 (Mo.App., E.D. 1998).

Here, at the very least, Trooper Comer had an articulable suspicion that appellant had committed the driving offense of driving too slowly, which is following another vehicle “more closely than is reasonably safe and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway.” § 304.017.1, RSMo 2000. Prior to the vehicles reaching his car, Comer noticed that appellant was following “fairly closely,” and observed no slowing of the first car, either by sight or by radar, that would have shown that appellant’s close proximity to the first car was not caused by any action by the driver of the

first vehicle or that it had just occurred at the point when Comer saw the vehicles (Tr. 14, 26, 127). As the cars passed, Comer saw that appellant was actually driving one car length away from the first vehicle (Tr. 14, 92). The vehicles were traveling between 45 and 55 miles per hour (Tr. 25, 92-93). The Missouri Driver Guide, published by the Division of Motor Vehicles, states that anything less than a three-second gap between vehicles would constitute driving too closely. Division of Motor Vehicle and Driver Licensing, Missouri Department of Revenue, Missouri Driver Guide, 67 (Revised September 2004). Common experience would show that a car traveling 45-55 miles per hour would travel a single car length in far less than three seconds.

Further, it was dark outside, which would require more caution than during the day, as all of the drivers involved would have less of an opportunity to see and react to any obstructions in the road (Tr. 14, 90). Also, the other traffic—the driver following appellant too closely—would have necessitated appellant to follow the first car at a reasonable distance, as any traffic maneuver by the first car necessitating a decrease in speed would require appellant to be at a safe enough distance to gradually slow, as to not cause the third car to crash into his vehicle (Tr. 14, 91-92). Finally, the trooper's experience in observing traffic and investigating accidents led him to believe that, taking into account the vehicles' speeds, the traffic, and the road conditions, that appellant was following the first vehicle too closely. Such testimony by a highway patrol officer is admissible to prove that a vehicle is following too closely. State v. Hill, 812 S.W.2d 204, 208-09 (Mo.App., W.D. 1991). Therefore, in light of all of this evidence, there was sufficient evidence to support Comer's articulable suspicion that

appellant was following too closely. Thus, the stop of appellant was justified based on articulable suspicion of that traffic offense alone.

Additionally, during the time Comer was following appellant, he observed appellant twice drift up to a foot onto the shoulder of the highway, which was unexplainable by any other traffic or potential obstruction on the highway (Tr. 14-16, 94-95). While appellant contends that this is not a traffic offense, it arguably is a violation of § 304.015.5(1), requiring a vehicle to be driven as nearly as practicable within a single lane. § 304.015.5(1), RSMo Cum. Supp. 2003; but see State v. Abeln, 136 S.W.3d 803, 810 (Mo.App., W.D. 2004)(noting other jurisdictions holding that crossing the fog line is not a traffic offense justifying a traffic stop in support of trial court's decision to grant a motion to suppress). As there was nothing in the road that would have accounted for appellant's drifting from the roadway, and as the officer did not observe either of the other two vehicles do the same, which would have suggested some reason for the diversion, appellant did not drive "as nearly as practicable within a single lane." However, even if the movement onto the shoulder was not a traffic offense, it was unusual operation which would have justified a stop, as it may have led a reasonable officer to believe the driver was "drunk, asleep, or for some reason inattentive." State v. Malaney, 871 S.W.2d 634, 637-38 (Mo.App., S.D. 1994)("virtual weaving" within a single lane is unusual operation justifying a traffic stop; cites cases of other jurisdictions with same holding).

Because Trooper Comer had an articulable suspicion that appellant committed the traffic offense of following too closely, and observed unusual behavior in appellant's repeated movement onto the shoulder of the highway, the traffic stop was justified. Therefore, there

was sufficient evidence to support the trial court's decision overruling appellant's motion to suppress, and appellant's third point on appeal must fail.

IV.

The motion court did not err in overruling appellant's motions for judgment of acquittal on the grounds of insufficient evidence that appellant was driving while intoxicated because there was sufficient evidence that appellant was driving while intoxicated in that the evidence showed that appellant had a .121% blood alcohol content, had the smell of intoxicants emanating from him, had bloodshot, watery, glassy, and staring eyes, had slurred and mumbling speech, and failed several field sobriety tests.

Appellant claims that there was insufficient evidence to support appellant's conviction for driving while intoxicated (App.Br. 67). Appellant claims that none of the evidence supporting his conviction can be relied on because it was either inadmissible or otherwise unreliable, arguing that much of this evidence could also have innocent explanations (App.Br. 75-92).

In examining the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable trier of fact might have found a defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc), cert. denied 525 U.S. 1021 (1998). The appellate court does not act as a "super juror" with veto powers, but gives great deference to the trier of fact. Id. In applying the standard, the appellate court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. Id. Further, "an appellate court 'faced with a record of historical

facts that supports conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” Id. at 53, quoting Jackson v. Virginia, 443 U.S. 307, 326, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). “[T]his inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. at 52, quoting Jackson, 443 U.S. at 318-19.

Much of appellant’s point seems to be based on two basic misunderstandings of law. First, appellant attempts to show that the evidence was insufficient because it was not admissible. For example, he argues that evidence of field sobriety tests were not admissible because they were not videotaped (Tr. 75-78). He also argues that the breath analysis test performed at the police station was invalid because appellant had been chewing gum at the scene of the traffic stop (Tr. 90-91). These arguments are irrelevant, as, when examining the sufficiency of the evidence to support a conviction, the court considers all of the evidence before the trier of fact, not just evidence the defendant claims should have been admissible, as the State was entitled to rely on the trial court’s admission of evidence, even if erroneous. State v. Kinkead, 983 S.W.2d 518, 519 (Mo.banc 1998). Because the questions of admissibility and sufficiency are different, had appellant wished to challenge the admissibility of any of this evidence, he was required to do so in a separate point on appeal. Supreme Court Rules 30.06(c), 84.04(d). Because he has not raised any such challenge, this Court should

consider all of the evidence before the trial court to determine the sufficiency of the evidence.

Second, appellant claims that, because certain facts may also have innocent explanations, such as that the smell of intoxicants is not “substantial evidence of intoxication” and that there are “numerous nonalcoholic reasons” for bloodshot and watery eyes, they cannot support the guilty verdict. These arguments seem to apply the equally valid inferences rule, which has been abolished by this Court. Chaney, 967 S.W.2d at 54. Under the proper standard, any of these potentially “innocent” explanations for any of the evidence must be disregarded, as to accept them would be to fail to view the evidence in the light most favorable to the verdict.

To convict appellant of driving while intoxicated, the State had to prove that appellant operated a motor vehicle while in an intoxicated or drugged condition. § 577.010.1, RSMo 2000. If a person has a blood alcohol percentage of .08 % or more, that alone establishes a prima facie case that the person was intoxicated. § 577.037.1, RSMo Cum. Supp. 2003; State v. Ball, 113 S.W.3d 677, 679 (Mo.App., S.D. 2003). Here, appellant’s blood alcohol percentage was .121%, more than 50% higher than that necessary to establish a prima facie case that appellant was intoxicated. § 577.037.1, RSMo Cum. Supp. 2003.

Appellant’s argument that the trooper could not recall checking for foreign substances such as gum in appellant’s mouth during the fifteen-minute waiting period negated the validity of the test is meritless. First, the trooper testified that he watched appellant for the requisite fifteen minutes and that appellant did not smoke, vomit, or have any oral intake during that time, and that he would have seen it if appellant had done any of these things (Tr. 111-112).

This testimony would have allowed the trial court to reach the reasonable inference that appellant had nothing in his mouth during the fifteen minute period, even if Comer could not specifically recall the actual checking of appellant's mouth for gum. Second, the trooper's testimony complied with the dictates of 19 CSR 25-30.060 and Carr v. Director of Revenue, 95 S.W.3d 121 (Mo.App.,W.D. 2002), as all that regulation requires is that, during the fifteen minutes, appellant did "not smoke, vomit, or place anything into his mouth." 19 CSR 25-30.060; Carr, 95 S.W.3d at 126; see also Misemer v. Director of Revenue, 134 S.W.3d 761, 764-65 (Mo.App.,W.D. 2004)(testimony that the officer did not see the driver smoke, vomit, drink, or place anything in mouth satisfied foundation for introduction of breath results, and evidence that the driver may have had two Roloids tablets in his mouth at the time of the test did not rebut prima facie case). Therefore, the results of the breath test validly supported appellant's conviction.

In addition, numerous other pieces of evidence provided sufficient evidence that appellant was intoxicated. First, appellant had the strong smell of alcoholic beverages emanating from him, which could be smelled from several feet away. (Tr. 98, 167). The strong smell of intoxicants upon a driver supports the finding of intoxication. Ball, 113 S.W.3d at 679; State v. Scholl, 114 S.W.3d 304, 307 (Mo.App., E.D. 2003); State v. Hanway, 973 S.W.2d 892, 897 (Mo.App.,W.D. 1998). Second, appellant had glassy, watery, bloodshot, and "staring" eyes (Tr. 97-98). Such observations also support a finding of intoxication. Id. Third, appellant's speech was slurred and mumbling, which also supports the finding of intoxication (Tr. 98-99). Id. Fourth, appellant admitted to drinking 4-5 beers, which also

supports the inference that he was intoxicated by those beers at the time he was driving (Tr. 98, 108-109). State v. Kickham, 91 S.W.3d 229, 231 (Mo.App., S.D. 2002); State v. Buckler, 988 S.W.2d 565, 568 (Mo.App.,W.D. 1999); State v. Todd, 935 S.W.2d 55, 61 (Mo.App., E.D. 1996).

Finally, Trooper Comer's testimony established that appellant failed numerous field sobriety tests, including the horizontal gaze nystagmus test, the alphabet test, and the one-leg stand test, which support a finding of intoxication (Tr. 99-104). Ball, 113 S.W.3d at 679; Buckler, 988 S.W.2d at 567. Appellant mounts an attack on all of the tests, claiming they should be disregarded because they were not videotaped (App.Br. 75-78). However, the plain reading of the statute authorizing the admission of the videotape of field sobriety tests does not make mandatory the videotaping of such tests. § 577.020.7, RSMo Cum. Supp. 2003. Appellant's contention that videotaping was required for admission is complete unsupported, and should be disregarded. Appellant also points out a contradiction in the trooper's testimony whether three or six points on the one-leg stand test were required to fail (Tr. 84, 104). Any such contradiction was for the trier of fact to resolve, and this Court presumes that the contradiction was resolved in favor of the verdict. Chaney, 967 S.W.2d at 53.

Because the State adduced evidence that appellant had a blood alcohol content of .121%, had an odor of intoxicating beverages, bloodshot and watery eyes, and slurred speech, admitted to drinking several intoxicating beverages that night, and failed several field sobriety tests, the State presented not only sufficient, but overwhelming evidence that appellant operated a motor vehicle in an intoxicated condition. Therefore, appellant's fourth point on

appeal must fail.

V.

The trial court did not err in overruling appellant's motions for judgment of acquittal with regard to the sufficiency of the evidence to convict him of following too closely because there was sufficient evidence that appellant was guilty of following too closely in that appellant was one-car length behind the vehicle in front of him, the vehicles were driving 45-55 miles per hour at night, appellant had another car following closely behind him, and Trooper Comer testified that, based on his experience in observing traffic and investigating accidents, that appellant was following too closely.

Appellant claims (entirely by reference to his argument in Point III) that there was insufficient evidence to convict him of following too closely (App.Br. 93).

In examining the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable trier of fact might have found a defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc), cert. denied 525 U.S. 1021 (1998). The appellate court does not act as a "super juror" with veto powers, but gives great deference to the trier of fact. Id. In applying the standard, the appellate court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. Id. Further, "an appellate court 'faced with a record of historical facts that supports conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the

prosecution, and must defer to that resolution.” Id. at 53, quoting Jackson v. Virginia, 443 U.S. 307, 326, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). “[T]his inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Id. at 52, quoting Jackson, 443 U.S. at 318-19.

To prove that appellant committed the offense of following too closely, the State had to prove that appellant followed the vehicle in front of him “more closely than is reasonably safe and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway.” § 304.017.1, RSMo 2000. In this case, there was sufficient evidence that appellant followed too closely.

Prior to the vehicles reaching his car, Comer noticed that appellant was following “fairly closely,” and did not observe, either by sight or by radar, any slowing of the first car that would have shown that appellant’s close proximity to the first car either was caused by any action by the driver of the first vehicle or had just occurred at the point when Comer saw the vehicles (Tr. 14, 26, 127). As the cars passed, Comer saw that appellant was actually driving one car length away from the first vehicle (Tr. 14, 92). The vehicles were traveling between 45 and 55 miles per hour, which common experience shows would allow appellant’s car to travel the single car length in a fraction of a second—not a sufficient amount of time in which to respond to a decrease in the first car’s speed (Tr. 25, 92-93).

Further, it was dark outside, which would require more caution than during the day, as all of the drivers involved would have less of an opportunity to see and react to any obstructions in the road (Tr. 14, 90). Also, the other traffic—the driver following appellant too closely—would have necessitated appellant to follow the first car at a reasonable distance, as any traffic maneuver by the first car necessitating a decrease in speed would require appellant to be at a safe enough distance to gradually slow, as to not cause the third car to crash into his vehicle (Tr. 14, 91-92). Finally, the trooper’s experience in observing traffic and investigating accidents led him to believe that, taking into account the vehicles’ speeds, the traffic, and the road conditions, that appellant was following the first vehicle too closely. Such testimony by a highway patrol officer is admissible to prove that a vehicle is following too closely. State v. Hill, 812 S.W.2d 204, 208-09 (Mo.App., W.D. 1991).

The totality of the evidence, in the light most favorable to the verdict, demonstrated that appellant followed the vehicle more closely than was reasonably safe and prudent under the circumstances. Therefore, there was sufficient evidence to support appellant’s conviction for following too closely, and appellant’s final point on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 10,425 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 16th day of February, 2005, to:

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APPENDIX

Sentence and Judgment A-1

§ 304.017, RSMo 2000 A-4

§ 577.010, RSMo 2000 A-5

§ 577.023, RSMo Cum. Supp. 2003 A-6

19 CSR 25-30.060 and Form #7 A-9