IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SD 28715
	)	
TERRELL C. GAW,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF NEWTON COUNTY, MISSOURI
FORTIETH JUDICIAL CIRCUIT
THE HONORABLE TIMOTHY W. PERIGO, JUDGE

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Terrell C. Gaw was convicted of driving while intoxicated, Section 577.010, RSMo 2006 Cum. Supp., following a bench trial in Newton County, Missouri. The Honorable Timothy W. Perigo sentenced Mr. Gaw to five years in the Missouri Department of Corrections as a "chronic alcohol offender." This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, and jurisdiction lies in the Missouri Court of Appeals, Southern District, Article V, Section 3, Missouri Constitution (as amended 1982), Section 477.060, RSMo 2000.

STATEMENT OF FACTS

On September 30, 2006, Sergeant Michael Frazier of the Missouri Highway Patrol was dispatched at 4:22 p.m., to the scene of a one vehicle accident on Route K west of Racine, Missouri (Tr. 3-4, 13, 37).[1] The dispatcher did not say when the accident had happened (Tr. 13). Sgt. Frazier arrived to find a Ford Ranger pickup truck resting on the driver's side off to the south side of the roadway (Tr. 4). Sgt. Frazier identified Terrell Gaw as the apparent driver because he was the only person not associated with emergency responders at the scene, he appeared slightly disheveled, and was rummaging in the cab of the truck (Tr. 4-5, 39). Sgt. Frazier asked Mr. Gaw if he owned the truck, and Mr. Gaw replied that he did (Tr. 5). He asked Mr. Gaw how the accident happened, and Mr. Gaw answered that he did not know (Tr. 5, 15). Mr. Gaw said that his girlfriend or a friend of hers probably wrecked the truck (Tr. 5, 15).

Sgt. Frazier thought that he might have a drunk driver (Tr. 41). Mr. Gaw's eyes were glassy and bloodshot, he had an odor of intoxicants, and he swayed while walking and needed to support himself with parked vehicles (Tr. 6, 21-22, 39).

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[1] The record on appeal consists of a legal file (L.F.) and a transcript of a suppression hearing and trial (Tr.).

Sgt. Frazier also smelled an odor of burnt marijuana about Mr. Gaw (Tr. 6, 15). Many times if the trooper asks people to give him their marijuana, they will (Tr. 16). He asked Mr. Gaw to hand over his marijuana (Tr. 6). Mr. Gaw pulled a small baggie of marijuana out of his pants pocket and gave it to Sgt. Frazier (Tr. 6). Sgt. Frazier placed Mr. Gaw under arrest (Tr. 6). He handcuffed Mr. Gaw for protection (Tr. 16). Sgt. Frazier patted Mr. Gaw down, and removed a small marijuana pipe from another pants pocket (Tr. 6, 19). Mr. Gaw was in custody, and not free to leave (Tr. 51). Sgt. Frazier did not advise Mr. Gaw of his rights under ***Miranda*** at that time (Tr. 51).

Sgt. Frazier then asked Mr. Gaw if he would provide a breath sample for a portable breathalyzer test (Tr. 19). Mr. Gaw did so, and the test showed a high concentration of alcohol (Tr. 19). Sgt. Frazier claimed at trial that he believed that he had enough evidence to arrest Mr. Gaw for driving while intoxicated even when Mr. Gaw was denying that he had driven the truck (Tr. 58). The prosecutor noted at trial that Sgt. Frazier had evidence that Mr. Gaw was intoxicated, and asked Sgt. Frazier what more evidence he had to arrest Mr. Gaw for driving while intoxicated (Tr. 58). Sgt. Frazier claimed to not understand the question (Tr. 58). The prosecutor also noted that simply being intoxicated at the scene of an accident will not prove driving while intoxicated, so he asked Sgt. Frazier, "what further investigation did you do?" (Tr. 42). Sgt. Frazier answered that he again asked Mr. Gaw who was driving the truck (Tr. 19, 42). Mr. Gaw

again said it was either his girlfriend or her friend (Tr. 42-43). Sgt. Frazier told Mr. Gaw that he did not believe him (Tr. 43). Mr. Gaw finally said, "later on," that he had been driving the truck (Tr. 19-20).

After Mr. Gaw said that he had been driving the truck, Sgt. Frazier took him to the police station (Tr. 7-8). During the drive, Sgt. Frazier advised Mr. Gaw of his ***Miranda*** rights (Tr. 7-8). He then, '[j]ust basically asked [Mr. Gaw] again what had happened…." (Tr. 8). Mr. Gaw "repeated" his prior statements; that he had been to a funeral, that he had been driving the truck, that he drank six to eight beers and had four hits of marijuana while driving, and that after the accident he left the scene but then returned (Tr. 8). Mr. Gaw was not arrested for driving while intoxicated until sometime after he arrived at the police station (Tr. 43).

The State charged Mr. Gaw with driving while intoxicated (L.F. 10-11, 12). Mr. Gaw filed a motion to suppress his statements to Sgt. Frazier because the trooper interrogated him while in custody and prior to being advised of his ***Miranda*** rights (L.F. 13-14). He moved to suppress both the pre-***Miranda*** and post-***Miranda*** statements (L.F. 13-14). The trial court heard evidence and argument on this motion before trial, and took the motion under advisement (Tr. 3-24). The trial court later denied Mr. Gaw's motion (L.F. 2).

Mr. Gaw waived a jury trial, and the cause was tried before the trial court (L.F. 15, 27). He renewed his objection to admission of his statements, and asked

the trial court to reconsider his motion to suppress the statements "at the appropriate time." (Tr. 34, 60). After hearing evidence and argument, the trial court stated:

> [T]he case boils down to whether or not the statement was suppressed, and in the Court's opinion it was not suppressed. The Court finds beyond a reasonable doubt that Mr. Gaw was the driver. He was the owner of the vehicle and other evidence to support that. If evidence was suppressed, then clearly the defendant would be found not guilty. The Court has overruled your motion to suppress. Defendant is found guilty.

(Tr. 75).

Mr. Gaw also filed a motion for judgment of acquittal at the close of the State's evidence, and specifically argued the second basis alleged in the motion, that the State had failed to establish the corpus delicti of the offense of driving while intoxicated in the absence of Mr. Gaw's statements to Sgt. Frazier (L.F. 17-18, Tr. 65-66). Mr. Gaw argued that the statements were inadmissible in the absence of independent proof of the elements of the offense (Tr. 65-66). The trial court denied the motion, holding that the State had established the corpus delicti because the truck was "on its side on a highway" (Tr. 66).

The court entered a judgment finding Mr. Gaw guilty, and sentencing him to five years in the Missouri Department of Corrections (L.F. 22-23). This appeal follows (L.F. 24-25).

POINTS RELIED ON

I.

The trial court erred in admitting Mr. Gaw's statements to Sgt. Frazier into evidence at trial over objection because this ruling violated Mr. Gaw's privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Missouri Constitution, in that Mr. Gaw was subjected to custodial interrogation without being warned of his rights under *Miranda*. Furthermore, the statements made by Mr. Gaw after the *Miranda* warnings must also be excluded as improper tactics rendered the warnings ineffective in that a reasonable person in Mr. Gaw's position could not have understood them to convey a message that he retained a choice about continuing to talk to the trooper.

Miranda v. Arizona, 384 U.S. 436 (1966);

State v. Glass, 136 S.W.3d 496 (Mo. banc 2004);

Rhode Island v. Innis, 446 U.S. 291 (1980);

Missouri v. Seibert, 542 U.S. 600 (2004);

U.S. Const., Amends V and XIV; and

Mo. Const., Art. I, Sec. 19.

II.

The trial court erred in overruling Mr. Gaw's motions for judgment of acquittal at the close of the State's case and at the close of all evidence, and in sentencing him for driving while intoxicated, in violation of Mr. Gaw's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to convict Mr. Gaw of driving while intoxicated because the State failed to present sufficient evidence to establish the corpus delicti of the crime independent of Mr. Gaw's statements to Sgt. Frazier, and absent independent proof of the corpus delicti, a defendant's statement is not substantive evidence upon which a conviction can be based.

State v. Culbertson, 999 S.W.2d 732 (Mo. App., W.D. 1999);

State v. McVay, 852 S.W.2d 408 (Mo. App., E.D. 1993);

State v. Sardeson, 220 S.W.3d 458 (Mo. App., S.D. 2007);

State v. Benton 812 S.W.2d 736 (Mo. App., W.D. 1991);

U.S. Const., Amend XIV;

Mo. Const., Art. I, Sec. 10; and

MAI-CR 331.02.

ARGUMENT

I.

The trial court erred in admitting Mr. Gaw's statements to Sgt. Frazier into evidence at trial over objection because this ruling violated Mr. Gaw's privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Missouri Constitution, in that Mr. Gaw was subjected to custodial interrogation without being warned of his rights under *Miranda*. Furthermore, the statements made by Mr. Gaw after the *Miranda* warnings must also be excluded as improper tactics rendered the warnings ineffective in that a reasonable person in Mr. Gaw's position could not have understood them to convey a message that he retained a choice about continuing to talk to the trooper.

Standard of review

Factual questions on motions to suppress are mixed questions of law and fact. ***State v. Werner***, 9 S.W.3d 590, 595 (Mo. banc 2000). The reviewing court defers to the trial court's factual findings and credibility determinations, but examines questions of law *de novo*. ***State v. Rousan***, 961 S.W.2d 831, 845 (Mo. banc 1998).

Preservation

Although Mr. Gaw did not specifically renew his objection to admission of his statements during Sgt. Frazier's testimony, this failure should not waive preservation of the question. The motion to suppress had been filed and heard pre-trial (L.F. 13-14, Tr. 3-24). Mr. Gaw waived a jury and tried the case to the court (L.F. 15, Tr. 27). He renewed the objection prior to trial, and at the close of the evidence (Tr. 34-60). Mr. Gaw and the State renewed their arguments regarding the suppression before the trial court decided the case (Tr. 60-64). The trial court understood that the case "boils down to whether or not the statement was suppressed" (Tr. 75). The parties and the court could not have concluded that Mr. Gaw was waiving the issue. Because the case was tried to the judge and not a jury, a motion for new trial or judgment of acquittal is not necessary to preserve the issue for appeal. Rule 29.11(e)(2). This issue is adequately preserved for review. ***State v. Martin***, 79 S.W.3d 912, 915 (Mo. App., W.D. 2002); ***State v. Taylor***, 929 S.W.2d 925, 927 (Mo. App., S.D. 1996).

The unwarned statements

Within just a few minutes of arriving at the scene, Sgt. Frazier concluded that Mr. Gaw was intoxicated, and the trooper thought that he was dealing with a drunk driver (Tr. 7, 41). But at this point, when Sgt. Frazier asked Mr. Gaw if he was driving the truck, Mr. Gaw said he had not driven the truck, that it was

probably his girlfriend or her friend who had been driving it (Tr. 5, 15). Sgt. Frazier did not believe that, and he even claimed at trial that he believed he had enough evidence to arrest Mr. Gaw for driving while intoxicated at that time (Tr. 43, 58). But, he did not arrest Mr. Gaw for driving while intoxicated at that time.

Instead, Sgt. Trooper acted on his impression that Mr. Gaw smelled of burnt marijuana by asking Mr. Gaw to had over his marijuana (Tr. 6, 15). When Mr. Gaw handed over a small baggie of marijuana, Sgt. Frazier placed him under arrest for possession of the drug, handcuffed him, patted him down, and seized a marijuana pipe from Mr. Gaw's pants pocket (Tr. 6, 16, 19). Sgt. Frazier conceded that at that point Mr. Gaw was in custody and not free to leave (Tr. 51). Mr. Gaw would not have reasonably believed otherwise. But even then, Sgt. Frazier did not advise Mr. Gaw of his ***Miranda*** rights (Tr. 51).

Instead of advising Mr. Gaw of his rights upon being taken into custody and before being further interrogated, Sgt. Frazier returned to pursuing an inculpatory statement from Mr. Gaw about driving the truck at the time of the accident. He asked Mr. Gaw to perform a portable breath test for the presence of alcohol, and Mr. Gaw did so (Tr. 19). This test showed a high concentration of alcohol (Tr. 19). Then, Sgt. Frazier again asked Mr. Gaw if he had been driving the truck (Tr. 19, 42). Again, Mr. Gaw said that he was not the driver, either his girlfriend or her friend probably was (Tr. 42-43). Sgt. Frazier told Mr. Gaw that he did not believe him (Tr. 43). After Sgt. Frazier continued to pursue an

inculpatory statement, Mr. Gaw eventually admitted that he had been driving the truck, that he drank six to eight beers and taken four hits of marijuana while driving the truck, and that after the accident he had left the scene and returned (Tr. 8, 19-20). Even at this point, Sgt. Frazier did not place Mr. Gaw under arrest for driving while intoxicated (Tr. 43).

Sgt. Frazier only advised Mr. Gaw of his ***Miranda*** rights in the patrol car en route to the police station, and only later at the police station did he advise Mr. Gaw that he was under arrest for driving while intoxicated (Tr. 7-8, 43).

There is no question that at the time Mr. Gaw made the inculpatory statement that he had been driving the truck, he was in custody. A person is in custody when they are formally arrested or under any other circumstances where they are deprived of their freedom of action in any significant way. ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966). Mr. Gaw was formally under arrest, handcuffed, and not free to leave (Tr. 6, 51). Even Sgt. Frazier knew that Mr. Gaw was legally in custody at that moment (Tr. 51).

There is also no question but that Sgt. Frazier's continued questioning about the accident was custodial interrogation. The Missouri Supreme Court describes custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody." ***State v. Glass***, 136 S.W.3d 496, 511 (Mo. banc 2004). After Sgt. Frazier arrested Mr. Gaw and placed him in handcuffs, he renewed his questioning of Mr. Gaw regarding the accident and

who was driving the truck at the time (Tr. 19, 42). "A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect amounts to interrogation." ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980).

The privilege against self-incrimination includes the requirement that the police warn those taken into custody that they have the right to remain silent. ***Miranda***, 384 U.S. at 444. Failure to give the prescribed warning and obtain a waiver of rights before custodial interrogation requires exclusion of any statements obtained. ***Missouri v. Seibert***, 542 U.S. 600, 608 (2004). The trial court erred in admitting the statements Sgt. Frazier elicited from Mr. Gaw before he advised Mr. Gaw of his ***Miranda*** rights.

The warned statements

After Mr. Gaw succumbed to Sgt. Frazier's persistent, unwarned, interrogation about driving the truck at the time of the accident and made incriminating statements, Sgt. Frazier finally advised Mr. Gaw of his ***Miranda*** rights (Tr. 7-8). But this late warning is not sufficient to make the post-***Miranda*** statements admissible in evidence. ***Seibert***, 542 U.S. 600 at 612-616.

After Mr. Gaw made unwarned, incriminating statements at the scene of the accident, Sgt. Frazier drove him to the police station (Tr. 7-8). During that drive, Sgt. Frazier finally advised Mr. Gaw of his rights under ***Miranda*** (Tr. 7-8).

After advising Mr. Gaw of his rights, Sgt. Frazier "[j]ust basically asked [Mr. Gaw] again what had happened…." (Tr. 8). Mr. Gaw "repeated" his earlier, unwarned, incriminating statements (Tr. 8). Mr. Gaw also repeated those earlier statements at the police station when Sgt. Frazier completed an Alcohol Influence Report (Tr. 9, 10-11).

The question for the trial court in this case was whether under these circumstances the ***Miranda*** warnings could reasonably be found effective. ***Seibert***, 542 U.S. at 612, n. 4. If not, then the subsequent statement is inadmissible for want of adequate ***Miranda*** warnings, because the earlier and later statements are realistically seen as part of a single, unwarned sequence of questioning. ***Id***. The ***Seibert*** Court found that when ***Miranda*** warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." 124 S.Ct. at 2611, *citing* ***Moran v. Burbine***, 475 U.S. 412 (1986). The Court noted that it is highly unlikely that a suspect could retain any such understanding when the interrogator leads him a second time through a line of questioning the suspect has already answered fully. ***Seibert***, 124 S.Ct. 2611, n. 5.

Sgt. Frazier believed that Mr. Gaw was driving the truck at the time of the accident. He rejected Mr. Gaw's denials, and continued to question Mr. Gaw after he was arrested and in custody, without the required ***Miranda*** warnings,

about who was driving the truck until Mr. Gaw finally made incriminating statements. Only after incriminating himself was Mr. Gaw provided with the required warnings. And after advising Mr. Gaw of his rights, Sgt. "[j]ust basically asked [Mr. Gaw] again what had happened…." (Tr. 8). Mr. Gaw simply repeated his earlier, unwarned incriminating statements (Tr. 8).

This sort of interrogation was found to violate a suspect's privilege against self-incrimination by the United States Supreme Court in ***Seibert***. Seibert was interrogated by the police regarding a death at her home, but without first being advised of her ***Miranda*** rights. 542 U.S. at 605. After making incriminating statements, Seibert was given a twenty minute break, and then the officers returned, read the ***Miranda*** warnings to her, and received from her a signed waiver of those rights. ***Id***. The officers then simply went over the same information again, getting Seibert to repeat her prior, unwarned, incriminating statements. ***Id***. Because this two-step process deprives the suspect of his or her ability to make a knowing and effective waiver of rights after having already made prior incriminating statements, the United States Supreme Court held that the post-***Miranda*** statements were also inadmissible in evidence. 542 U.S. at 613-614, 616-617.

The officer in ***Seibert*** candidly admitted that it was his intention to use the two-step process to secure post-***Miranda*** incriminating statements by first securing unwarned incriminating statements. 542 U.S. at 605. Sgt. Frazier

asserted that it was not his "plan" to "intentionally not read [Mr. Gaw] his rights and ask questions about who was driving the vehicle." (Tr. 58). Yet, that is exactly what he did. The United States Supreme Court noted in ***Seibert*** that "[b]ecause the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work." 542 U.S. at 617, fn 6.

In this case, facts apart from Sgt. Frazier's assertion of his intention clearly demonstrate the two-step process at work. Frazier had fifteen years of experience as a Missouri Highway Patrol trooper and had risen to the rank of sergeant (Tr. 36). On the witness stand he claimed the belief that he had sufficient evidence to arrest Mr. Gaw for driving while intoxicated even when Mr. Gaw was denying having driven the truck (Tr. 58). The prosecutor noted at trial that Sgt. Frazier had evidence that Mr. Gaw was intoxicated, and asked Sgt. Frazier what more evidence he had to arrest Mr. Gaw for driving while intoxicated (Tr. 58). Sgt. Frazier claimed to not understand the question (Tr. 58). It is simply unbelievable that a trooper with fifteen years of law enforcement experience does not understand that in addition to a person's intoxication he must also have evidence that the person was driving a vehicle in order to arrest the person for driving while intoxicated. This is made obvious by the subsequent colloquy between the prosecutor and Sgt. Frazier. The prosecutor

pointed out for Sgt. Frazier that simply being intoxicated at the scene of an accident will not prove driving while intoxicated, so he asked Sgt. Frazier, "what further investigation did you do?" (Tr. 42). What Sgt. Frazier did was to again ask Mr. Gaw who was driving the truck (Tr. 19, 42). It is clear that Sgt. Frazier knew exactly what more he needed to arrest Mr. Gaw for driving while intoxicated: evidence that Mr. Gaw was actually driving the truck. It is also clear that Sgt. Frazier knew full well that he had no such evidence, and he therefore needed to secure Mr. Gaw's confession. It was for this reason that he employed the two-step interrogation process.

Sgt. Frazier shifted from questioning Mr. Gaw about driving the truck to questioning him about the odor of marijuana. After locating the marijuana and putting Mr. Gaw under arrest, handcuffing him, and taking him into custody, Sgt. Frazier still did not give Mr. Gaw the ***Miranda*** warning. Instead, he shifted his focus back to who was driving the truck, and pursued that matter until Mr. Gaw had made unwarned, incriminating statements. After that success, Sgt. Frazier gave the required warning and had Mr. Gaw repeat his incriminating statements. The focus is not on Sgt. Frazier's asserted intent, but on whether the ***Miranda*** warning given after Mr. Gaw incriminated himself could effectively advise him of his rights and make Mr. Gaw aware that he could refuse to incriminate himself anew. As in ***Seibert***, the warning interjected in the manner that it was by Sgt. Frazier could not have been effective.

The trial court erred in admitting Mr. Gaw's pre-***Miranda*** and post-***Miranda*** statements into evidence. The typical relief from such error would be to reverse the judgment of the trial court and remand the cause for a new trial without the inadmissible statements. But in this case, the trial court noted that without the statements it would have found Mr. Gaw not guilty of the charged offense (Tr. 75). In this situation, the only appropriate remedy is to vacate the conviction and to discharge Mr. Gaw from confinement.

II.

The trial court erred in overruling Mr. Gaw's motions for judgment of acquittal at the close of the State's case and at the close of all evidence, and in sentencing him for driving while intoxicated, in violation of Mr. Gaw's right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to convict Mr. Gaw of driving while intoxicated because the State failed to present sufficient evidence to establish the corpus delicti of the crime independent of Mr. Gaw's statements to Sgt. Frazier, and absent independent proof of the corpus delicti, a defendant's statement is not substantive evidence upon which a conviction can be based.

Mr. Gaw filed a motion for judgment of acquittal at the close of the State's evidence, and specifically argued the second basis alleged in the motion, that the State had failed to establish the corpus delicti of the offense of driving while intoxicated in the absence of Mr. Gaw's statements to Sgt. Frazier (L.F. 17-18, Tr. 65-66). Mr. Gaw argued that the statements were inadmissible as substantive evidence in the absence of independent proof of the elements of the offense (Tr. 65-66). The trial court denied the motion, holding that the State had established the corpus delicti because the truck was "on its side on a highway" (Tr. 66).

Standard of review and preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. ***In re Winship,*** 397 U.S. 358, 364 (1970). It is the state's burden to prove each and every element of a criminal offense. ***State v. Keeler***, 856 S.W.2d 928 (Mo.App. S.D., 1993).

The corpus delicti rule is generally viewed as a rule of evidence, and a defendant's statements are typically challenged for admissibility into evidence. But in ***State v. Crawford***, 32 S.W.3d 201 (Mo. App., S.D. 2000), the appellant referred to the failure to independently establish the corpus delicti of the crime, and argued that the evidence was insufficient to prove the offense. 32 S.W.3d at 205, fn. 3. This Court addressed both issues. ***Id***.

In reviewing a challenge to sufficiency of the evidence, this Court considers whether the court could reasonably have found Mr. Gaw guilty beyond a reasonable doubt of the charged offense. ***State v. Dawson***, 985 S.W.2d 941, 951 (Mo.App. W.D., 1999). In applying this standard, this Court must look to the elements of the crime and consider each in turn, taking the evidence in the light most favorable to the state and granting the state all reasonable inferences from the evidence. ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993), *cert. denied*, 510 U.S. 997 (1993). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror

would be unable to disregard them. ***Id***. But this Court may not supply missing evidence, or give the state the benefit of unreasonable, speculative or forced inferences. ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001).

Mr. Gaw moved for and argued in favor of an acquittal at the close of the State's evidence (L.F. 17-18, Tr. 65-66). He also filed a motion for acquittal at the close of all evidence, even though he presented no additional evidence on his own behalf (L.F. 19-20). This adequately preserved the claim for appeal. ***State v. Nunley***, 992 S.W.2d 892, 894 (Mo. App., S.D. 1999), fn.2. Because the case was tried to the judge and not a jury, a motion for new trial or judgment of acquittal is not necessary to preserve the issue for appeal. Rule 29.11(e)(2).

Corpus delicti rule

"The corpus delicti rule deals specifically with whether the defendant's confession of guilt may be considered substantive evidence of guilt. . . . Generally, the State must prove the commission of a crime with evidence independent of a confession of the accused." ***State v. Culbertson***, 999 S.W.2d 732, 736 (Mo. App., W.D. 1999) (citations omitted). The requirement of corroboration to establish the *corpus delicti* is rooted in "a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused." ***Smith v. United States***, 348 U.S. 147, 153 (1954). Extrajudicial statements,

admissions or confessions, are both inadmissible and insufficient to sustain a conviction unless there is independent proof of the essential elements of the *corpus delicti*. ***State v. McVay***, 852 S.W.2d 408, 414 (Mo. App., E.D. 1993).

The *corpus delicti* entails proof of a loss or injury brought about by criminal agency. ***State v. Litterell***, 800 S.W.2d 7, 10 (Mo. App., W.D. 1990). The *corpus delicti* of driving while intoxicated is the operation of a motor vehicle by a person who is intoxicated. MAI-CR 331.02.

Evidence that the defendant was the criminal agent is not a prerequisite to the admission of his statements or confession into evidence. ***Litterell***, 800 S.W.2d at 10. The substantive offense is sufficiently proven by independent evidence of circumstances that correspond and interrelate with the circumstances rendered in the statement or confession. ***Id***. Full proof of the *corpus delicti*, independent of the confession, is not necessary. ***McVay***, 852 S.W.2d at 414.

In Mr. Gaw's case, there is no evidence of the crime of driving while intoxicated absent his statements to Sgt. Frazier. Without Mr. Gaw's statements, there is no independent evidence of any crime or any person's criminal agency. All the evidence the State has apart from Mr. Gaw's statements is a truck on its side off of the roadway. Nothing in this fact independently establishes any criminal agency on the part of the driver. Such an accident can be caused by many factors unrelated to being operated by an intoxicated driver. There could have been a mechanical failure that caused the driver to lose control. The driver

could have swerved to avoid an animal or other obstacle in the road. The fact that a motor vehicle leaves the roadway does not establish that the driver was intoxicated.

In ***State v. Thurston***, 84 S.W.3d 536, 538 (Mo. App., S.D. 2002), police officers arrived at the scene of a one vehicle accident to find a pickup truck in a ditch off the side of the road. After the officers arrived, they removed the defendant from the vehicle, although the record did not reveal from which side of the truck she was removed. ***Id***. The record also did not reflect whether the key was in the ignition, whether the engine was running, whether the hood or cab of the truck was warm, whether the truck was in gear, whether the lights were on, no one was injured, and no property other than the truck was damaged. ***Id***. A Highway Patrol trooper checked the registration of the truck but he could not remember what that check revealed. ***Id***. This Court held that the evidence was insufficient to support the defendant's conviction for driving while intoxicated. ***Id***. at 540-541.

The defendant was found in the driver's seat of a car and slumped over the steering wheel in ***State v. Chambers***, 207 S.W.3d 194, 195-196 (Mo. App., S.D. 2006). No one knew how long the car was there, nor saw the defendant driving the car. ***Id***. at 195. The headlights were not on, but the windshield wipers may have been working. ***Id***. The engine was not running, but the keys were in the ignition. ***Id***. Beer bottles were located inside and beneath the car. ***Id***. at 196.

But, again, this Court found the evidence to be insufficient to support the defendant's conviction for driving while intoxicated. ***Id***. at 199.

The independent evidence in Mr. Gaw's case consisted of the following. There was a truck on its side off of the roadway (Tr. 4). There was no evidence of how long the truck had been there before Sgt. Frazier was dispatched to the scene (Tr. 13, 52). Mr. Gaw said that he owned the truck (Tr. 5). Mr. Gaw was outside of the truck when Sgt. Frazier arrived (Tr. 4-5, 39). No one saw Mr. Gaw driving the truck (Tr. 52). The engine was not running (Tr. 57). Sgt. Frazier did not check to see if the hood was warm (Tr. 57). He could not recall if the keys were in the ignition (Tr. 56). Sgt. Frazier checked the registration and while he could not specifically recall the result of that check, he assumed it came back to Mr. Gaw because the trooper did not prepare an accident report (Tr. 22). Following ***Thurston*** and ***Chambers***, this evidence will not establish the offense of driving while intoxicated.

It is not necessary that the State produce full proof of the *corpus delicti* independent of a defendant's confession, all that is required is evidence of circumstances tending to prove the *corpus delicti* corresponding to the confession. ***State v. Sardeson***, 220 S.W.3d 458, 470 (Mo. App., S.D. 2007). If there is evidence independent of but corroborating the confession, which tends to prove the offense by confirming matters related to the confession, both the corroborating

circumstances and the confession may be considered in determining whether or not the *corpus delicti* has been established. ***Id***. at 470-471.

The reach of this general rule is defined by the cases applying the *corpus delicti* rule. In ***Sardeson,*** the evidence independent of the defendant's statements indicated the commission of a crime. Independent of the defendant's confession, the evidence demonstrated that the child victim died of asphyxiation; the defendant was present when the victim died; there was a history of the victim suffering physical abuse; there were fresh bruises on the victim's back; victim suffered rib fractures near the time of his death; and the victim had internal hemorrhaging beneath the connective tissue of his chest cavity. ***Id***. at 471. This evidence established criminal agency in the fatal injuries of the child. In other words, this independent evidence established that a crime had been committed.

The defendant in ***McVay, supra***., argued that there was insufficient proof apart from his confession that he molested the victim twice in the month of August to support his conviction of two counts of sexual abuse in that month. 852 S.W.2d at 414. The Court found evidence of the commission of a crime independent of the defendant's confession. There was a history of sexual abuse of the victim by the defendant. ***Id***. The victim testified that oral sex occurred between the defendant and herself in August, on at least one occasion. ***Id***. This independent proof of a crime, the presence of criminal agency, existed apart from

the defendant's confession, and established the *corpus delicti* of the challenged conviction. ***Id***.

The confession challenged in ***State v. Benton*** 812 S.W.2d 736, 740 (Mo. App., W.D. 1991), was that the defendant and the victim argued inside a parked car outside a motel and that he cut the victim's face and arm. ***Id***. Independent of this confession was evidence that the victim suffered cuts to her cheeks, neck, arm and legs; her car was parked outside the same motel; there was blood on the front seat, doors and steering wheel and on papers in the car; the defendant's fingerprints were found in the car; and the defendant had a fresh cut on his hand. ***Id***. Again, this evidence, apart from the defendant's confession, established that the victim had been assaulted, that a crime had been committed.

These cases demonstrate that while a complete crime need not be established, evidence establishing that criminal agency was involved must be established before a defendant's confession will support his or her conviction. Apart from Mr. Gaw's statements to Sgt. Frazier, there is no evidence that any crime was committed. Nothing about a vehicle on its side off of the roadway establishes that any criminal agency was involved in the vehicle being there. Not only does the evidence fail to establish a complete crime, it fails to establish any criminal activity at all. There was no criminality or criminal agency to be corroborated by Mr. Gaw's statements to Sgt. Frazier. The State failed to establish a *corpus delicti* independent of Mr. Gaw's statements, and his statements

therefore cannot be used as substantive evidence of his guilt. ***McVay***, 852 S.W.2d at 414.

Because the State failed to establish the *corpus delicti*, and Mr. Gaw's statements were not substantive evidence of his guilt, the trial court erred in denying Mr. Gaw's motion for acquittal at the close of the State's case. Mr. Gaw's conviction must be vacated, and Mr. Gaw must be discharged.

CONCLUSION

The trial court erred in admitting Mr. Gaw's pre-***Miranda*** and post-***Miranda*** statements into evidence, as set out in Point I. The typical relief from such error would be to reverse the judgment of the trial court and remand the cause for a new trial without the inadmissible statements. But in this case, the trial court noted that without the statements it would have found Mr. Gaw not guilty of the charged offense (Tr. 75). In this situation, the only appropriate remedy is to vacate the conviction and to discharge Mr. Gaw from confinement. Because the State failed to establish the *corpus delicti*, and Mr. Gaw's statements were not substantive evidence of his guilt, as set out in Point II, the trial court erred in denying Mr. Gaw's motion for acquittal at the close of the State's case. Mr. Gaw's conviction must be vacated, and Mr. Gaw must be discharged.

Respectfully submitted,

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Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 6,414 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in April, 2008. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 9th day of April, 2008, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65101.

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Emmett D. Queener

APPENDIX

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