No. SC89820

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

TERRELL C. GAW,

Appellant.

Appeal from the Newton County Circuit Court
Fortieth Judicial Circuit
The Honorable Timothy W. Perigo, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of the class B felony of driving while intoxicated (chronic offender), §§ 577.010, and 577.023.5, RSMo Cum. Supp. 2007, obtained in the Newton County Circuit Court, the Honorable Timothy W. Perigo presiding. Appellant was sentenced to serve a term of five years in the Missouri Department of Corrections. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the Missouri Court of Appeals, Southern District. MO. CONST., Art. V, § 3.

STATEMENT OF FACTS

Appellant, Terrell C. Gaw, was charged by information, as a chronic offender, § 577.023.5, RSMo Cum. Supp. 2007, with driving while intoxicated, § 577.010, RSMo 2000 (L.F. 12, 16). After a bench trial, appellant was found guilty (Tr. 75). Viewed in the light most favorable to the verdict, the facts of appellant's crime were as follows:

On September 30, 2006, at about 12:45 p.m., appellant started drinking some beers while he drove around in his truck (Tr. 45). Over the next few hours, appellant drank six to nine beers while he was in his truck (Tr. 45). During that same time, appellant took about four "hits" of marijuana (Tr. 46). Appellant stopped drinking when he was involved in a single-vehicle accident and rolled his truck (Tr. 37, 45). After the accident, appellant did not consume any more alcohol (Tr. 45).

The road where appellant wrecked his vehicle was a "highly traveled road," and, thus, someone reported the accident shortly after it occurred (*see* Tr. 38, 53). When the arresting officer arrived on the scene, first responders were still on the scene, and the accident appeared to have occurred recently (Tr. 38, 53). The arresting officer did not recall exactly when he arrived, but it was still daylight (Tr. 38).

After making contact with appellant, the arresting officer believed that appellant was "very intoxicated" (Tr. 40). The officer smelled the odor of intoxicants and burnt marijuana (Tr. 40). The officer noticed that appellant's eyes were glassy and bloodshot, and that appellant swayed as he walked and used nearby vehicles to

steady himself (Tr. 39). Appellant's speech was also a bit slurred (Tr. 41). Appellant told the officer that the truck belonged to him (Tr. 39).

The officer asked appellant for his marijuana, and appellant reached into his pocket and produced a baggie of marijuana (Tr. 41). The officer then patted down appellant and found a marijuana pipe in one of appellant's other pockets (Tr. 41-42). The officer then formally placed appellant under arrest (Tr. 42). The officer asked appellant to take a portable breath test, and the test revealed a high blood alcohol content (Tr. 42). The officer asked if appellant had been driving, and appellant said that his girlfriend or her friend had been driving (Tr. 42-43). Later, the arresting officer asked about the accident again, and appellant admitted that he had been driving the vehicle (Tr. 43, 52, 54).

While driving to the jail, the officer advised appellant of the *Miranda* warnings (Tr. 43). Appellant stated that he understood his rights, and he proceeded to admit that he had been driving the vehicle and that he had "apparently" had an accident (Tr. 44-45). Appellant also admitted that he had not had any alcohol since the accident, and that he had drunk six to nine beers while driving around from 12:45 until the accident (Tr. 45). Appellant also admitted that he had taken four "hits" of marijuana during that time (Tr. 96).

At the jail, appellant was advised of the implied consent law, and appellant said that he understood it (Tr. 46). Appellant then agreed to a Breathalyzer test; the

test revealed a BAC of .216 (Tr. 46-47).

At trial, on August 15, 2007, appellant did not testify or offer any other evidence. The trial court found appellant guilty of driving while intoxicated (Tr. 75).

On September 10, 2007, the trial court sentenced appellant, as a chronic offender, to serve five years in the Missouri Department of Corrections (Tr. 84). On September 13, 2007, appellant filed his notice of appeal.

The Court of Appeals, Southern District, reversed and remanded appellant's case for a new trial, holding that appellant's incriminating, post-*Miranda* statements were obtained in violation of *Miranda* pursuant to a "two-stage" interrogation akin to the two-stage interrogation condemned in *Missouri v. Seibert*, 542 U.S. 600 (2004). *State v. Gaw*, No. SD28715, slip op. at 6 (Mo.App. S.D. November 7, 2008). On January 27, 2009, this Court granted respondent's application for transfer.

ARGUMENT

I.

The trial court did not abuse its discretion in admitting appellant's post-*Miranda* statements, and any error in admitting appellant's pre-*Miranda* statement (wherein he admitted driving the vehicle) was harmless beyond a reasonable doubt.

Appellant contends that the trial court improperly admitted his statements to the arresting officer into evidence (App.Br. 12). He argues that his pre-*Miranda* statements should have been suppressed because he was subjected to custodial interrogation without the benefit of the *Miranda* warnings, and that his post-*Miranda* statements should have been suppressed (pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004)) because the administration of *Miranda* warnings in the middle of an ongoing custodial interrogation was not effective in advising appellant of his rights (App.Br. 12, 16-20).

A. The standard of review

The trial court has broad discretion to admit or exclude evidence, and the appellate court will reverse only upon a showing of an abuse of discretion. *State v. Simmons*, 944 S.W.2d 165, 178 (Mo. banc 1997). A trial court abuses its discretion when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of

careful consideration[.]" *State v. Brown*, 939 S.W.2d 882, 883 (Mo. banc 1997).

When reviewing a trial court's ruling on a motion to suppress, there must be "substantial evidence" to support the ruling. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). "In reviewing preserved error relating to a trial court's order on a motion to suppress evidence, the facts and reasonable inferences from such facts are considered favorably to the trial court's ruling and contrary evidence and inferences are disregarded." *State v. Galazin*, 58 S.W.3d 500, 507 (Mo. banc 2001).

"When reviewing the trial court's overruling of a motion to suppress, this Court considers the evidence presented at both the suppression hearing and at trial to determine whether sufficient evidence exists in the record to support the trial court's ruling." *State v. Pike*, 162 S.W.3d 464, 472 (Mo. banc 2005). "Deference is given to the trial court's superior opportunity to determine the credibility of witnesses." *State v. Rousan*, 961 S.W.2d at 845. The reviewing court gives deference to the trial court's factual findings but reviews questions of law *de novo*. *Id*.

B. The *Miranda* warnings were effective in advising appellant of his rights; thus, the trial court properly admitted appellant's post-*Miranda* statements

1. Factual background

Viewed in the light most favorable to the trial court's ruling, the arrest and questioning of appellant occurred as follows: Shortly after arriving on the scene, the arresting officer, Sergeant Frazier, made contact with appellant (Tr. 4, 37). Sergeant

Frazier believed, based on his observations and sensory perceptions, that appellant was intoxicated, and that appellant had been smoking marijuana (Tr. 40-41). Because he smelled burnt marijuana, Sergeant Frazier simply asked appellant for his marijuana, and appellant took a baggie of apparent marijuana from his pocket and gave it to Sergeant Frazier (Tr. 41). Sergeant Frazier found a marijuana pipe in appellant's pocket, and he placed appellant under arrest (Tr. 41-42).

Appellant then agreed to take a portable breath test, and the test showed that appellant had a high BAC (Tr. 42). Sergeant Frazier asked appellant if he had been driving the vehicle, and appellant said that it must have been his girlfriend or her friend (Tr. 42-43). A short time later, and after he had expressed his disbelief, Sergeant Frazier again asked appellant whether he had been driving the vehicle, and appellant admitted that he had been driving (Tr. 43).[1]

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[1] Citing testimony from the suppression hearing, appellant asserts that Sergeant Frazier elicited various incriminating facts at this point, prior to the administration of any *Miranda* warnings, and later had appellant "repeat" them after the *Miranda* warnings (App.Br. 14-15, 17). But, in fact, a review of Sergeant Frazier's testimony reveals that he only elicited the fact that appellant admitted to driving the vehicle prior to the *Miranda* warnings. The other information – that appellant had drunk six to nine beers and taken four "hits" of marijuana while driving his vehicle – was only elicited once, after the *Miranda* warnings, when Sergeant Frazier filled out the

Sergeant Frazier then transported appellant to the county jail, and, during transport, Sergeant Frazier advised appellant of the *Miranda* warnings (Tr. 43). Sergeant Frazier testified that this delay in administering the *Miranda* warnings was not part of an intentional plan to withhold the *Miranda* warnings (Tr. 58).

After receiving the *Miranda* warnings, appellant said that he understood his rights, and he indicated that he was willing to speak to Sergeant Frazier (Tr. 43). At that point, appellant again admitted that he had been driving the vehicle, and he admitted that he had "apparently" been in an accident (Tr. 44). Appellant stated that he had started drinking around 12:45, and that he had drunk six to nine beers and had had four "hits" of marijuana while driving his vehicle (Tr. 45-46). Appellant also told Sergeant Frazier that he had not consumed any alcohol since the accident (Tr. 45).

2. Appellant's post-*Miranda* statements were properly admitted

Citing to the plurality opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004),

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alcohol influence report (*see* Tr. 8-11). This chronology was clarified on cross-examination, when defense counsel walked Sergeant Frazier through the police report and clarified that the only pre-*Miranda* admission was appellant's admission that he had been driving (Tr. 16-21). And, similarly, at trial, the only incriminating pre-*Miranda* statement was appellant's admission that he had been driving the vehicle (Tr. 43).

appellant argues that the late *Miranda* warnings provided in this case were "not sufficient to make the post-*Miranda* statements admissible in evidence" (App.Br. 16). But appellant's reliance on the plurality opinion in *Missouri v. Seibert* is misplaced.

In *Missouri v. Seibert*, the defendant was arrested for murder at 3:00 a.m. and taken to the police station where she was interrogated about the murder for thirty to forty minutes. 542 U.S. at 604-605. The police officers deliberately withheld *Miranda* warnings during this initial stage of questioning, and the defendant confessed to her involvement in the murder. *Id*. at 605-606. The police then gave the defendant a break. *Id*. When the police returned, they turned on a tape recorder, advised the defendant of the *Miranda* warnings, obtained a waiver, and resumed questioning. *Id*. The police confronted the defendant with her previous incriminating statements, and the defendant repeated the incriminating information in the second half of the interrogation. *Id*.

In a plurality opinion, the Court criticized this method of questioning as "a police strategy adapted to undermine the *Miranda* warnings." *Id*. at 616. And, after discussing *Oregon v. Elstad*, 470 U.S. 298 (1985) – another case where the defendant was questioned both before and after the *Miranda* warnings – the plurality opinion identified various "relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object[.]" *Id*. at 615-616. The opinion stated:

> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615. But a majority of the Court did not adopt this reasoning.

The judgment of the Court was controlled by the concurring vote cast by Justice Kennedy, who also issued a concurring opinion. In the concurring opinion, Justice Kennedy agreed that "The interrogation technique used in this case [was] designed to circumvent *Miranda v. Arizona*[.]" *Id*. at 618. But, with regard to the plurality's view that "admissibility of the postwarning statement should depend on 'whether [the] *Miranda* warnings delivered midstream could have been effective enough to accomplish their object' given the specific facts of the case," Justice Kennedy opined that such a "test cuts too broadly." *Id*. at 621-622.

He observed that "*Miranda*'s clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity." *Id*. at 622. Thus, he concluded that courts should "apply a narrower test

applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id*. at 622. In short, the holding of *Seibert* was that "deliberate"two-stage interrogations could render a post-*Miranda* confession inadmissible if the *Miranda* warnings (and, perhaps, other "curative measures" like a "substantial break in time") did not effectively apprise a person of his or her rights. *Id*. at 622.

Numerous courts, including the Court of Appeals, Western District, have held that Justice Kennedy's narrower holding supplies the standard that must be applied in analyzing these types of claims. *See State v. Hughes*, 272 S.W.3d 246, 253 (Mo.App. W.D. 2008) ("We accordingly join numerous other courts which have held that Justice Kennedy's concurring opinion supplies the standard we must apply, since it constitutes the " 'position taken by those Members [of the Court] who concurred in the judgments on the narrowest grounds.' "); *United States v. Carter*, 489 F.3d 528, 535 (2nd Cir. 2007); *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006); *United States v. Ollie*, 442 F.3d 1135, 1142 (8th Cir. 2006); *United States v. Williams*, 435 F.3d 1148, 1157-1158 (9th Cir. 2006); *United States v. Kiam*, 432 F.3d 524, 532-533 (3rd Cir. 2006); *United States v. Mashburn*, 406 F.3d 303, 308-309 (4th Cir. 2005); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004). And, in fact, this Court, too, reached a similar conclusion in *State v. Glass*, 136 S.W.3d 496, 511 (Mo. banc 2004), where the Court distinguished Mr. Glass's case from *Seibert* because in the initial unwarned

questioning, the interrogating officer "did not purposefully fail to read Glass his *Miranda* rights for fear Glass might assert them."

Under this narrower test, it cannot be said that the trial court clearly erred in determining that appellant was adequately advised of the *Miranda* warnings, and that appellant's waiver was valid. Here, as the record shows, Sergeant Frazier testified that the delay in administering the *Miranda* warnings was not intentional (Tr. 58). This was testimony the trial court was entitled to believe, *see State v. Abeln*, 136 S.W.3d 803, 807-808 (Mo.App. W.D. 2004), and in light of the circumstances present in this case, it was not clearly erroneous for the trial court to conclude that Sergeant Frazier's questioning was not a calculated scheme.

Appellant attempts to characterize Sergeant Frazier's pre-*Miranda* questioning as a "dogged" attempt to obtain the incriminating fact that appellant was driving his vehicle (*see* App.Rep.Br. 13-14). But appellant's characterization of the record does not comport with the standard of review, and it is incorrect, in any event. As the record shows, when Sergeant Frazier first arrived on the scene, he asked several on-the-scene investigatory questions of the type that *Miranda* permits (Tr. 15). He ascertained that the vehicle involved in the accident belonged to appellant, and he asked appellant whether he had been driving (Tr. 15). At that point, appellant said that "it must have been his girlfriend and her friend that wrecked the vehicle" (Tr.

15). Sergeant Frazier indicated that he did not believe appellant (Tr. 42-43). (Appellant's girlfriend was not present at the scene.)

Sergeant Frazier then noticed the smell of burned marijuana, and he asked appellant to turn over his marijuana (Tr. 15-16). When appellant turned over a baggie of marijuana, Sergeant Frazier arrested appellant and searched his pockets (Tr. 16, 18). Sergeant Frazier then conducted a breath test, and appellant's breath test "showed a high concentration of alcohol" (Tr. 19). Sergeant Frazier then "brought up again the accident, the vehicle being off the road," and appellant "admitted that he was the driver" (Tr. 19). Thereafter, as Sergeant Frazier transported appellant to the police station, Sergeant Frazier advised appellant of the *Miranda* warnings and obtained a waiver before eliciting any further incriminating information (Tr. 20).

Thus, as the record shows, prior to giving the *Miranda* warnings, and after appellant was placed under arrest, Sergeant Frazier only asked appellant once about the accident.[2] Sergeant Frazier did not subject appellant to lengthy or repeated

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[2] The initial questions about who owned the vehicle, and who was driving the vehicle, were asked before appellant was arrested; thus, they were permissible on-the-scene investigatory questions. *See State v. Dravenstott*, 138 S.W.3d 186, 196 (Mo.App. W.D. 2004) (" 'General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by [the *Miranda*] holding.' ").

unwarned custodial interrogation, and in light of Sergeant Frazier's testimony that he did not employ an intentional plan to withhold *Miranda* (Tr. 58), the trial court did not clearly err in concluding that the remainder of appellant's statements were properly obtained after appellant received the *Miranda* warnings and waived his right to remain silent.

In concluding that the trial court had erred in its factual findings and abused its discretion in admitting appellant's post-*Miranda* statements, the Court of Appeals, Southern District, relied on *State v. Wilson*, 169 S.W.3d 870, 879 (Mo.App. W.D. 2005), a case in which the Court of Appeals, Western District, concluded that under similar facts, the police officer had employed a questioning technique that was "precisely" like the technique condemned in *Seibert*. But *Wilson* does not compel reversal in appellant's case for at least two reasons.

First, *Wilson* did not discuss the narrower test set forth in Justice Kennedy's concurring opinion in *Seibert*. 169 S.W.3d at 879-880. Thus, as the Western District noted in its more recent opinion in *State v. Hughes*, there is reason to question the correctness of *Wilson*. *See State v. Hughes*, 272 S.W.3d at 253, n. 5 ("None of those cases [including *Wilson*] considers whether the plurality decision, or instead Justice Kennedy's concurrence, provides the controlling rule, however.").

Second, even though *Wilson* did not reference Justice Kennedy's concurring opinion, the court effectively stayed within the narrower test outlined by Justice

Kennedy when it pointed out that "there is evidence from which the trial court could have found that the delay in providing Mr. Wilson his *Miranda* warnings was *strategic*." *State v. Wilson*, 169 S.W.3d at 879 (emphasis added). It is also significant that the court in *Wilson* was reviewing an order *suppressing* evidence. In other words, the record had to be viewed in the light most favorable to suppression of the evidence. Here, by contrast, the evidence must be viewed in the light most favorable to admitting the evidence. Thus, if there is evidence to support the conclusion that Sergeant Frazier's brief, unwarned questioning was not part of an intentional plan designed to undermine appellant's ability to exercise his free will, it should be concluded that the trial court relied on that evidence and determined that there was no deliberate plan to undermine appellant's understanding of the *Miranda* warnings. And, indeed, there is no reason to believe that appellant did not understand the subsequent *Miranda* warnings and validly waive his rights before answering additional questions.

Unlike *Seibert*, where there was a deliberate violation of *Miranda*, the violation in this case was more like the violation that occurred in *Oregon v. Elstad*, 470 U.S. 298. In that case, law enforcement officers received information that the defendant was involved in a burglary. *Id*. at 300. The police obtained a warrant and went to the defendant's residence to execute the warrant. *Id*. One officer took the defendant's mother into another room to explain what was happening, and the other officer

stayed with the defendant in the defendant's bedroom. *Id*. at 300-301. The officer who remained with the defendant then asked the defendant a series of questions (without any *Miranda* warnings), and, when the officer stated that he thought the defendant was involved in the burglary, the defendant admitted, "Yes, I was there." *Id*. at 301.

In rejecting the defendant's claim that the unwarned confession had "tainted" the later confession, the Court held that while the unwarned questioning of the defendant was properly suppressed, the unwarned questioning did not require the suppression of the defendant's voluntary post-*Miranda* statements. *Id*. at 309. The Court observed that "Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Id*. The Court explained: "It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." *Id*.

Likewise, here, while appellant's unwarned incriminating statement made after his arrest probably should have been suppressed, the *Miranda* violation that occurred in appellant's case should not operate to render the remainder of appellant's statements inadmissible. Officer Frazier's error was not accompanied by

any actual coercion, and it was not part of a deliberate plan to undermine appellant's ability to exercise his free will. *See id*. at 314 ("absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion").

To the contrary, after only brief, unwarned questioning, Officer Frazier recognized the necessity of the *Miranda* warnings, and he administered them before asking the questions that resulted in appellant's much more detailed confession. In short, because appellant was advised of the warnings, and because appellant indicated that he understood them and was willing to answer questions, the trial court did not err in concluding that appellant's confession was knowingly, intelligently, and voluntarily made. *See id*. ("A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.").

Finally, even if this case were more closely analogous to *Seibert*, the facts of appellant's case do not show that the *Miranda* warnings were rendered ineffective by Sergeant Frazier's actions. Appellant's case simply did not involve the type of

questioning that the Court in *Seibert* condemned as undermining the effectiveness of the *Miranda* warnings. Indeed, even under the various factors discussed in the plurality opinion, the facts of appellant's case demonstrate that the *Miranda* warnings were effective in apprising appellant of his rights.

Here, as stated above, there was no deliberate strategy employed to undermine the effectiveness of the warnings. Unlike *Seibert*, this case does not involve a single, lengthy interrogation that was merely punctuated in the middle with *Miranda* warnings. To the contrary, while Sergeant Frazier obtained an incriminating statement at the scene, he did not subject appellant to a lengthy pre-*Miranda* interrogation. Rather, he merely briefly enquired, as part of his investigation into the accident, whether appellant had been driving the vehicle. This questioning may have violated *Miranda* – inasmuch as appellant was plainly in custody at that time for the marijuana offense – but it was not the type of intense and comprehensive unwarned questioning that occurred in *Seibert*.

Additionally, unlike *Seibert*, after the unwarned statement, the interrogation halted and the relationship between appellant and Sergeant Frazier changed in a couple of important respects. First, they left the scene of the accident; thus, appellant would have realized that Sergeant Frazier had completed any preliminary steps of investigation. Second, because appellant had admitted to driving the vehicle (but not yet admitted to driving while intoxicated), appellant knew that he was a prime

suspect in any continuing investigation; thus, when the warnings were administered, appellant was expressly put on notice that he could incriminate himself in that continuing investigation. Third, inasmuch as appellant knew that he was being transported to the county jail, appellant knew that he was not going to simply be released, and that he would likely be subjected to further inquiry. In short, in light of these various changed circumstances, there is no reason to believe that appellant would not have understood the import of the warnings. *Cf. Missouri v. Seibert*, 542 U.S. at 613 (where the defendant only heard the Miranda warnings in the "aftermath of interrogation," the court concluded that it was not reasonable to conclude that she would have believed that she "had a genuine right to remain silent, let alone persist in so believing once the police began to lead [her] over the same ground again").

Also unlike *Seibert*, appellant was not simply asked to repeat incriminating statements that he had already made. He had admitted to driving the vehicle, but he had not yet admitted the facts showing that he was driving while intoxicated (even if appellant's intoxication was evident to Sergeant Frazier). Thus, unlike the defendant in *Seibert*, appellant was not laboring under the psychological pressure of knowing that he had already let the cat entirely out of the bag through his statements. Moreover, unlike *Seibert*, appellant's post-*Miranda* statement was not prompted by Sergeant Frazier making references to his earlier, unwarned

statements. *Cf. id*. at 616 ("The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given."). In fact, aside from admitting that he had been driving, appellant had not described his alcohol and marijuana consumption prior to the *Miranda* warnings. *Cf. id*. (because the defendant had already been questioned extensively about her involvement in the crime, it was likely that administering the warnings before asking the same questions all over again would have led to "perplexity").

In short, in most material respects, the questioning in appellant's case was unlike the questioning in *Seibert*. Appellant was not subjected to extensive, unwarned custodial interrogation that was designed to secure a confession outside the framework of *Miranda*, and appellant was not interrogated and then advised of his rights and urged to simply repeat his previous incriminating statements. To the contrary, appellant was simply asked about whether he had, in fact, been driving the vehicle, and when it came time to question appellant about his intoxication, appellant was specifically advised of the *Miranda* warnings under circumstances that would have rendered the warnings effective.

In short, under these facts, it cannot be said that appellant's waiver was induced by improper police tactics. The brief unwarned questioning that occurred in this case was not part of a deliberate plan to undermine *Miranda*, and it cannot be

said that such brief unwarned questioning rendered the subsequent *Miranda* warnings ineffective.

3. Any error in admitting appellant's pre-*Miranda* admission was harmless beyond a reasonable doubt

Lastly, it seems apparent that appellant was questioned in violation of *Miranda* immediately after his arrest for possession of marijuana. Thus, this brief questioning about the accident and the driver of the vehicle should have been preceded by *Miranda* warnings. But inasmuch as appellant's subsequent warned statements also revealed that he was the driver (along with much more incriminating evidence of driving while intoxicated), any error in admitting appellant's unwarned admission that he was the driver was harmless beyond a reasonable doubt. *See United States v. Robinson*, 20 F.3d 320, 322-323 (8th Cir. 1994) (admission of pre-*Miranda* statements was harmless error where defendant made identical voluntary post-*Miranda* statements). This point should be denied.

II.

The trial court did not err in denying appellant's motions for judgment of acquittal, because the state's evidence sufficiently established the *corpus delicti* of the crime of driving while intoxicated, and, thus, appellant's incriminating statements were properly admitted and considered by the trial court in determining appellant's guilt.

Appellant argues that the stated failed to prove the *corpus delicti* of the crime of driving while intoxicated (App.Br. 22). He argues that "Apart from [his] statements to Sgt. Frazier, there is no evidence that any crime was committed" (App.Br. 29). Thus, he argues that inasmuch as his statements cannot be considered in the absence of proof of the *corpus delicti*, the evidence was insufficient to support his conviction (App.Br. 29-30).

A. The standard of review

The *corpus delicti* rule is a rule of evidence. *State v. Daggett*, 170 S.W.3d 35, 43 (Mo.App. S.D. 2005) ("The corpus delicti rule is essentially evidentiary in nature because it determines whether the defendant' confession of guilt may be considered substantive evidence of guilt.").

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Madorie*,156 S.W.3d 351, 355 (Mo. banc 2005). "This standard of review compels the reversal of a trial court's ruling on the admission of evidence only if the court has clearly abused its discretion." *Id*.

B. The state's evidence sufficiently established the *corpus delicti* of driving while intoxicated; thus, appellant's incriminating statements were properly admitted and considered by the trial court

"Extrajudicial admissions or statements of the defendant are not admissible in the absence of independent proof of the commission of an offense, i.e. the corpus

delicti." *State v. Madorie*, 156 S.W.3d at 355. "Evidence, however, that the defendant was the criminal agent is not required before the defendant's statement or confession is admitted." *Id*. "In addition, absolute proof independent of his statement or confession that a crime was committed is not required." *Id*." 'All that is required is evidence of circumstances tending to prove the corpus delicti corresponding with the confession. *Slight corroborating facts* are sufficient to establish the corpus delicti.' " *Id*. (quoting *State v. Hahn*, 640 S.W.2d 509, 510 (Mo.App. S.D. 1982), and adding emphasis).

Here, there were "slight corroborating facts" sufficient to establish the corpus delicti. "A person commits the crime of 'driving while intoxicated' if he operates a motor vehicle while in an intoxicated or drugged condition." § 577.010, RSMo 2000. "The corpus delicti of driving while intoxicated under section 577.010 consists of evidence that someone operated a motor vehicle while intoxicated." *State v. Madorie*, 156 S.W.3d at 355-356.

In this case, the facts corroborating appellant's statements were sufficient to establish that someone operated the vehicle in question while intoxicated. "Operating" means "physically driving or operating a motor vehicle." § 577.001.1, RSMo 2000. In this case, there was sufficient evidence corroborating appellant's statement that he was driving his vehicle when the accident occurred. First, while the officer did not recall precisely when he arrived at the scene of the crime, he

observed, and was aware of, facts that led him to believe that the accident must have occurred recently, or within less than an hour (Tr. 38, 53). Additionally, the vehicle in question had rolled onto its side into a ditch, and appellant (who admitted to owning the truck) was there, rummaging through the vehicle (Tr. 39, 45, 54). These facts – appellant's presence at the scene, the unusual position of the vehicle, and appellant's apparent ownership of the vehicle (as demonstrated by his exercising control over the vehicle) – provided sufficient corroboration for appellant's statement that he was driving the vehicle immediate before the accident. *See State v. Madorie*, 156 S.W.3d at 356.

There was also sufficient independent evidence that corroborated appellant's statement to the officer that he was intoxicated while operating his vehicle. A person is in an "intoxicated condition" when "he is under the influence of alcohol." § 577.001.2, RSMo 2000. Here, when appellant made contact with the arresting officer at the scene of the accident, appellant smelled of intoxicants and burnt marijuana, appellant's eyes were glassy and blood shot, and appellant swayed as he walked (Tr. 39-40). Later, a portable breath test revealed a high BAC, and a regular breathalyzer test revealed a BAC of .216 (Tr. 42, 46-47). This evidence of intoxication plainly corroborated appellant's statement that he was operating his vehicle while intoxicated. *See State v. Madorie*, 156 S.W.3d at 356.

Appellant argues that without his statements, there is no "independent

evidence" of the crime of driving while intoxicated (App.Br. 25). He argues that the state's evidence, absent his statements, failed to show "any criminal agency on the part of the driver" (App.Br. 25). He points out that "Such an accident can be caused by many factors unrelated to being operated by an intoxicated driver" (App.Br. 25). For instance, appellant points out, "There could have been a mechanical failure that caused the driver to lose control," or "The driver could have swerved to avoid an animal or other obstacle in the road" (App.Br. 25-26). He concludes, "The fact that a motor vehicle leaves the roadway does not establish that the driver was intoxicated" (App.Br. 26).

But appellant's argument fails to recognize that the state is not required to present independent proof of the defendant's criminal agency, outside of the defendant's admissions, to establish the corpus delicti. *State v. Madorie*, 156 S.W.3d at 356. "The State is only required to prove that someone committed the crime with '[i]ndependent evidence of circumstances which "correspond and interrelate" with the circumstances described in the statement or confession.'" *Id*. (quoting *State v. Stimmel*, 800 S.W.2d 156, 158 (Mo.App. E.D. 1990)).

And, here, when the arresting officer arrived at the scene of the overturned vehicle, appellant was the only person present at the accident scene (aside from first responders), appellant was the apparent owner and driver of the vehicle (inasmuch as he was rummaging through the vehicle and claimed ownership of the vehicle),

and appellant was obviously intoxicated. This evidence – which gave rise to a fair inference that appellant had operated his vehicle while intoxicated (or which, at the very least, provided "slight corroboration" of that fact) – sufficiently corresponded and interrelated with the circumstances described in appellant's subsequent statements to establish the corpus delicti of driving while intoxicated.[3] *See id*. This point should be denied.

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[3] Appellant cites two cases – *State v. Thurston*, 84 S.W.3d 536 (Mo.App. S.D. 2002), and *State v. Chambers*, 207 S.W.3d 194 (Mo.App. S.D. 2006) – where the court found the evidence insufficient to support the defendant's conviction for driving while intoxicated (App.Br. 26-27). Appellant apparently cites these cases in an attempt to suggest that the state's corroborating evidence did not establish the corpus delicti. But inasmuch as these cases examined the sufficiency of the evidence (as opposed to whether the defendant's statements were properly admitted under the corpus delicti rule, which only requires slight corroboration of the defendant's statements), they are inapposite. In terms of the sufficiency of the evidence, here, the evidence included appellant's various admissions; thus, the evidence in appellant's case was far stronger than the evidence in *Thurston* and *Chambers*.

CONCLUSION

Appellant's conviction and sentence 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 Rule 84.06(b) and contains 5,885 words, excluding the cover, this certification, the signature block, and the appendix, as determined by Microsoft Word 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

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