No. SC90738

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

WILLIAM SCHROEDER,

Appellant.

Appeal from Franklin County Circuit Court
Twentieth Judicial Circuit, Division Five
The Honorable Gael D. Wood, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

William Schroeder ("Schroeder") appeals from his convictions in Franklin County Circuit Court of driving while intoxicated ("DWI"), driving while revoked ("DWR"), and failure to dim headlights. He was sentenced to a total of five years of imprisonment.

Schroeder raises three claims of error on appeal. First, he claims that the evidence was insufficient to sustain his conviction for the infraction of failure to dim headlights. Second, he claims that the trial court erred in overruling his motion to suppress the evidence seized as a result of his purportedly unlawful traffic stop. And third, he claims that Missouri's DWI statute, § 577.010, is void because the terms "intoxicated" and "under the influence" are unconstitutionally vague.

Because Schroeder challenges the constitutional validity of a Missouri statute, this Court has exclusive jurisdiction. MO. CONST. art. V, § 3.

STATEMENT OF FACTS

Schroeder was charged in Franklin County Circuit Court with one count of DWI (§ 577.010),[1] one count of DWR (§ 302.321), and one count of failure to dim headlights (§ 307.070) (L.F. 10-11). Before trial, Schroeder filed a motion to dismiss the DWI charge, alleging that Missouri's DWI statute was void for vagueness (L.F. 65-68). He also filed a motion to suppress evidence, alleging that the law-enforcement officer unlawfully detained him on the roadside and that any evidence gathered during or after that detention should be suppressed (L.F. 18-23, 37-42). The trial court held a hearing on Schroeder's motion to suppress, and thereafter overruled both pre-trial motions (L.F. 6, 8; Tr. 25). On November 29, 2009, Schroeder waived his right to a jury trial and agreed to submit the case to the court for decision based on his driving record and the police report (L.F. 8; Tr. 25-33; St. Ex. 1, 2).

Viewed in the light most favorable to the verdict, the evidence showed as follows: On October 13, 2006, just before 2:00 a.m., Missouri Highway Patrol Corporal L.J. Keathley observed a white Dodge Magnum, which had been traveling in front of Keathley in the same direction, pull to the shoulder and stop (St. Ex. 2; A24, A30). As Keathley started to pass the stopped vehicle, he saw its bright headlights come on (St. Ex. 2; A30). As he drove by, the high beams stayed on (St. Ex. 2; A30). Keathley turned around and pulled in behind the Dodge to see if the driver needed help and to "take enforcement action" for failure to dim headlights (St. Ex. 2; A30).

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[1] Statutory citations herein are to RSMo. Cum. Supp. 2006 unless otherwise noted.

Corporal Keathley activated his emergency lights as he pulled onto the shoulder behind the Dodge (St. Ex. 2; A30). A man, later identified as defendant Schroeder, stepped out of the driver's seat and walked to the passenger side of the vehicle, looking at the tires (St. Ex. 2; A30). Keathley asked Schroeder what was wrong (St. Ex. 2; A30). Schroeder replied that the car did not feel right and he had stopped to make sure there was no problem (St. Ex. 2; A30). His speech was slurred, his eyes were glassy and bloodshot, and he was so unsteady on his feet that he almost fell into the ditch during his conversation with Keathley (St. Ex. 2; A30). Keathley asked to see Schroeder's driver's license (St. Ex. 2; A30). Schroeder said that he did not have one (St. Ex. 2; A30). At Keathley's request, Schroeder sat down in Keathley's patrol car (St. Ex. 2; A30).

Schroeder provided Corporal Keathley with his name and birthdate (St. Ex. 2; A30). The trooper ran a computer check, which showed that Schroeder's driver's license had been revoked (St. Ex. 2; A30). Keathley could smell alcohol on Schroeder's breath (St. Ex. 2; A30). He asked Schroeder if he had been drinking (St. Ex. 2; A30). Schroeder answered that he had had six beers (St. Ex. 2; A30). Keathley gave Schroeder a preliminary breath test, which came back positive for the presence of alcohol (St. Ex. 2; A26, A30). Keathley asked Schroeder to step out of the patrol car to perform field sobriety tests, and Schroeder agreed (St. Ex. 2; A30).

First, Corporal Keathley had Schroeder try the one-leg stand (St. Ex. 2; A30). Schroeder failed the test—he was unable to keep his balance beyond the count of "one" (St. Ex. 2; A26, A30). He also swayed and used his arms to balance (St. Ex. 2; A26, A30). Schroeder remarked, "I couldn't do this when I'm straight" (St. Ex. 2; A30).

Next, Corporal Keathley performed the horizontal-gaze-nystagmus ("HGN") test (St. Ex. 2; A26, A30). He found that Schroeder's eyes lacked smooth pursuit, showed a distinct nystagmus at the maximum deviation, and had onset prior to 45 degrees in both eyes (St. Ex. 2; A26, A30-A31). Schroeder swayed as he stood during the test (St. Ex. 2; A31).

Corporal Keathley arrested Schroeder for DWI (St. Ex. 2; A31). He took Schroeder to the local police station, where he advised Schroeder of his *Miranda* rights and the implied-consent law (St. Ex. 2; A31). Schroeder refused to give a breath sample for chemical testing, and decided partway through the interview that he did not want to answer questions (St. Ex. 2; A27, A31).

Based upon this evidence, the trial court found Schroeder guilty of DWI, DWR, and failure to dim headlights (L.F. 8, 71-74). Before sentencing, the court found beyond a reasonable doubt that Schroeder was a chronic offender as defined in section 577.023 (L.F. 8, 69-70; Tr. 35). The court sentenced Schroeder to a five-year term of imprisonment for the DWI and a concurrent one-year jail term for DWR (L.F. 72; Tr. 36-37). For failure to dim headlights, the court imposed a $25 fine (L.F. 73; Tr. 37).

ARGUMENT

I. (sufficiency—failure to dim headlights)

The evidence was sufficient to allow the trial court to find beyond a reasonable doubt that Schroeder had committed the infraction of "failure to dim headlights."

In his first point, Schroeder argues that his conviction for failure to dim headlights must be vacated because the State's evidence was insufficient to prove the offense beyond a reasonable doubt. App. Br. at 12-17. He attacks the sufficiency of the evidence in two respects. First, he argues that there was "no evidence" that he was within 300 feet behind another vehicle when he switched his high beams on. App. Br. at 15-16. Second, he argues that there was "no evidence" that his lights produced "glaring rays" or that they were "so aimed as to 'project into the eyes of' any driver." App. Br. at 17.

Both arguments are meritless. Corporal Keathley's report stated that Schroeder's bright lights came on and stayed on *as the trooper passed by* (St. Ex. 2; A30). From this statement alone, the trial court could reasonably infer that Schroeder's high beams were on when Keathley was fewer than 300 feet ahead of Schroeder's car. Additionally, the court could infer that the "glaring rays" from the lights were aimed so as to project into Keathley's eyes, given that Keathley perceived (with his eyes) that the high beams had been activated, and common experience teaches that high-beam headlights shine into the eyes of nearby drivers. Schroeder's point should be denied.

A. Standard of review

The standard for reviewing the sufficiency of the evidence in a court-tried case is the same as it is in a jury-tried case. *State v. Sladek*, 835 S.W.2d 308, 310 (Mo. banc 1992).

Appellate review is limited to determining whether sufficient evidence exists from which a reasonable fact-finder might have found the defendant guilty beyond a reasonable doubt. *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. banc 2008). In applying this standard, the "evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict." *Id*. As this Court explained in *State v. Grim*,

> If an appellate court sets itself up to select between two or more acceptable inferences, it ceases to function as a court and functions rather as a juror, actually a 'super juror' with veto powers. It is not the function of the court to decide the disputed facts; it is rather the court's function to assure that the [fact-finder], in finding the facts, does not do so based on sheer speculation.

854 S.W.2d 403, 414 (Mo. banc 1993).

B. Analysis

A driver whose vehicle is equipped with multiple-beam headlights commits the infraction of failure to dim headlights if he (1) fails to adjust his headlights so that their "glaring rays are not projected into the eyes of the other driver" when he is (2) within 500 feet of an oncoming vehicle or within 300 feet to the rear of a vehicle traveling in the same direction. § 307.070. Schroeder does not dispute that his vehicle was equipped with multiple-beam headlights. Nor could he. Corporal Keathley's report stating that Schroeder's "bright headlights" came on as Keathley passed him raised the clear inference that the vehicle had switched from a low-beam setting (St. Ex. 2; A30). And, for the reasons that

follow, the evidence was sufficient to permit the trial court to find each remaining element beyond a reasonable doubt.

1. The evidence was sufficient to prove that Schroeder was within 300 feet behind Corporal Keathley's patrol car when he activated his high beams.

Schroeder argues that "no evidence was adduced regarding the distance" between his vehicle and Corporal Keathley's patrol car at the time Schroeder activated his high beams. App. Br. at 16. This is incorrect. In his report, Keathley wrote, "As I *began to pass* [Schroeder's] vehicle, I noticed its bright headlights came on and stayed on after I went by them" (St. Ex. 2; A30) (emphasis added). The phrase "as I began to pass" necessarily implies that Keathley moved from behind Schroeder's vehicle to the front. From this, the trial court could reasonably infer that Schroeder switched to his high beams when Keathley's vehicle was no more than a few feet away—well-within the 300 feet required by the statute.

2. The evidence was sufficient to prove that the "glaring rays" from Schroeder's high beams were aimed so as to project into Corporal Keathley's eyes.

Schroeder also argues that the evidence was insufficient to prove that "glaring rays projected into the eyes of the other driver." App. Br. at 16. The term "glaring rays," as used in section 307.070, refers merely to the light emitted from a vehicle's high-beam headlights. "Glaring" is commonly understood to mean "shining with a too bright, dazzling light." WEBSTER'S NEW WORLD DICTIONARY 593 (2d Coll. Ed. 1984). Schroeder's implication that the term "glaring rays" has a specialized meaning that requires some sort of additional proof is unsupported by any authority. Despite the awkward language of a statute first passed in the 1940s, the offense is straightforward—when a motorist activates his bright

headlights such that they shine into the eyes of other drivers nearby, he violates the law. *See e.g. Garey v. Anco Mfg. & Supply Co.*, 221 F.2d 683, 686-87 (8th Cir. 1955) (finding instruction proper where jury was asked to find whether the "bright glare of [the defendant's] headlights" blinded an oncoming driver); *Fuller v. Baxter*, 284 S.W.2d 66, 70 (Mo. App. K.C. Dist. 1955) (approving of instruction asking jury to find whether defendant was driving with his high beams on and whether "the glaring rays of the headlights" projected into the eyes of the oncoming driver).

Sufficient evidence was presented here to allow the trial court to conclude that the "glaring rays" from Schroeder's high beams were "so aimed" that they projected into Corporal Keathley's eyes. Keathley reported that he noticed Schroeder's bright lights come on as he passed Schroeder's stopped vehicle, and that the high beams remained on behind him as he continued down the road (St. Ex. 2; A30). It is evident that the bright light was "projected into" Keathley's eyes—otherwise he would not have been able to perceive it. Further, it is a matter of common experience that when a vehicle activates its high-beam headlights when close behind another car, the light will reflect off of the leading car's rearview mirror into the eyes of the driver. *Cf. State v. Clay*, 975 S.W.2d 121, 139 (Mo. banc 1998) (noting that prosecutors may call upon common experience in arguing a case to the jury).

Because reasonable inferences from the evidence, viewed in the light most favorable to the verdict, permitted the court to find each element of the offense beyond a reasonable doubt, the trial court did not err in finding Schroeder guilty of failure to dim headlights. Point I should be denied.

II. (motion to suppress)

The trial court did not clearly err in overruling Schroeder's motion to suppress the evidence gathered during Corporal Keathley's DWI investigation.

In his second point, Schroeder argues that the evidence gathered during Corporal Keathley's DWI investigation was the fruit of an unlawful traffic stop, and thus should have been suppressed. App. Br. at 18-25. Specifically, he contends that because his alleged "failure to dim headlights" was the basis for the traffic stop, and the evidence did not show that he was actually guilty of that infraction, the stop was illegal. App. Br. at 20-24.

But Schroeder misunderstands the facts. Corporal Keathley did not stop Schroeder's vehicle—Schroeder pulled over on his own, and the trooper paused to check on his well-being and to take an enforcement action for failure to dim headlights. When Keathley made contact with Schroeder, it was immediately apparent that Schroeder was probably under the influence of alcohol. At that point, Keathley had reasonable suspicion that Schroeder was breaking the law, authorizing him to detain Schroeder to investigate the possible DWI. Because Schroeder was never unlawfully detained, his motion to suppress evidence was properly overruled.

A. Standard of review

The trial court's ruling on a motion to suppress is reviewed "in the light most favorable to the ruling," and the reviewing court will defer to the trial court's determinations of credibility. *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009). "The inquiry is limited to whether the decision is supported by substantial evidence, and it will be reversed

only if clearly erroneous." *Id*. "The Court will consider evidence presented at a pre-trial hearing as well as any additional evidence presented at trial." *Id*.

B. Analysis

The right to be free from "unreasonable searches and seizures" is guaranteed by the Fourth Amendment to the United States Constitution and Article I, section 15 of the Missouri Constitution. *Oliver*, 293 S.W.3d at 442; U.S. CONST. amend. IV; MO. CONST. art. I, § 15. But not every encounter between citizens and law enforcement constitutes a "seizure." *State v. Nylon*, 311 S.W.3d 869, 885 (Mo. App. E.D. 2010); *see also INS v. Delgado*, 466 U.S. 210, 215 (1984). A "seizure" occurs only when a citizen's freedom of movement is restrained by either physical force or a show of authority. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). Law-enforcement officers may approach a citizen and ask questions, including asking to see the citizen's identification, without conducting a "seizure"—so long as the officers "do not convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991).

An initially consensual encounter between law enforcement and a citizen may be transformed into a seizure within the meaning of the Fourth Amendment "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Delgado*, 466 U.S. at 215. At that point, continued detention is lawful only if the law-enforcement officer has "'reasonable suspicion, based on 'specific, articulable facts' that illegal activity has occurred or is occurring." *State v. Pike*, 162 S.W.3d 464, 472 (Mo. banc 2005) (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)).

"Reasonable suspicion" is a less demanding standard than "probable cause." *Pike*, 162 S.W.3d at 473 (citing *Alabama v. White*, 496 U.S. 325, 330 (1990)). It is determined objectively: "would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?'" *Pike*, 162 S.W.3d at 472 (quoting *Terry*, 392 U.S. at 21-22). An officer who has reasonable suspicion that an individual has committed, is committing, or is about to commit a crime may detain the individual briefly to investigate. *State v. Keeth*, 203 S.W.3d 725-26 (Mo. App. S.D. 2006) (citing *Miranda v. Arizona*, 384 U.S. 436, 439-40 (1966)).

In this case, Corporal Keathley's initial encounter with Schroeder was consensual—it was not a seizure. Although Schroeder complains that he was unlawfully stopped, he was not, in fact, stopped by law enforcement at all. Schroeder voluntarily stopped on the shoulder of the highway without any prompting by Keathley (Tr. 7; St. Ex. 2; A30). Keathley would have passed on by, but he saw Schroeder activate his high beams, so he turned around and pulled in behind Schroeder to see if he needed help and to address the "failure to dim headlights" (Tr. 7; St. Ex. 2; A30). Before Keathley could exit his patrol car, Schroeder got out of his vehicle and started to examine his tires (Tr. 8; St. Ex. 2; A30).

Keathley approached Schroeder and asked what was wrong (St. Ex. 2; A30). Schroeder answered that the car didn't feel right and he had stopped to check that everything was okay (Tr. 8-9; St. Ex. 2; A30). Keathley could smell alcohol on Schroeder's breath (Tr. 9). He also noticed that Schroeder's eyes were bloodshot and glassy and that his speech was slurred (Tr. 9; St. Ex. 2; A30). And Schroeder had difficulty balancing—he swayed so much that he nearly fell into the ditch as Keathley talked to him (St. Ex. 2; A30). Keathley asked

to see Schroeder's driver's license; Schroeder responded that he did not have one (Tr. 9; St. Ex. 2; A30). At that point, Corporal Keathley asked Schroeder to accompany him to his patrol car, after which he ran a computer check on Schroeder, asked him some additional questions, performed field sobriety tests, and eventually placed Schroeder under arrest for DWI (Tr. 9-17; St. Ex. 2; A30-A31).

Under these circumstances, Schroeder was seized, at the earliest, when Corporal Keathley took him to his patrol car for additional investigation. Before that point, Keathley neither said nor did anything at all to impose his authority on Schroeder or suggest that Schroeder might not be free to leave. He merely asked Schroeder what was wrong, and then asked to see his driver's license. As noted above, a law-enforcement officer's request to see identification does constitute a seizure. *Bostick*, 501 U.S. at 434-35; *see also State v. Dixon*, 218 S.W.3d 14, 19 (Mo. App. W.D. 2007) (noting that an officer's "mere request for [the defendant's] driver's license and examination of his license does not constitute a seizure.").

And by the time Corporal Keathley did seize Schroeder, he did so based upon (at least) reasonable suspicion that Schroeder was driving while under the influence of alcohol. Defendant's breath smelled like alcohol, he had bloodshot, glassy eyes, his speech was slurred, and he swayed so much that he nearly toppled over (Tr. 8-9; St. Ex. 2; A30). Any reasonable officer would suspect that a person exhibiting these characteristics was intoxicated, and would believe it was appropriate to conduct further investigation. *See e.g. Keeth*, 203 S.W.3d at 726 (holding that officer had reasonable suspicion that defendant was driving while intoxicated based upon defendant's red eyes, slurred speech, alcohol-tinged breath, and stumbling gait).

At no point was Schroeder unlawfully detained. His motion to suppress was meritless and was properly overruled by the trial court. Point II should be denied.

III. (void-for-vagueness challenge)

The trial court did not err in overruling Schroeder's motion to dismiss the DWI charge because Missouri's DWI statute is not unconstitutionally vague.

In his final point, Schroeder argues that the trial court erred in overruling his motion to dismiss the DWI charge. App. Br. at 26-36. He claims that the DWI statute is void for vagueness in that the terms "intoxicated condition" and "under the influence" are so indefinite that a person of ordinary intelligence would be unable to discern what conduct is prohibited. App. Br. at 29-32.

But Schroeder's argument is expressly contrary to the overwhelming weight of authority, both in Missouri and in other jurisdictions, holding that ordinary persons can readily understand what is meant by the terms "intoxicated condition" and "under the influence" without need for further definition. Moreover, Schroeder forgets that this Court reviews a vagueness challenge by applying the language of the statute to the facts of the instant case. Here, no matter how narrowly one might define "intoxicated condition," Schroeder was unquestionably intoxicated when he pulled his vehicle onto the shoulder on October 13, 2006. Under these circumstances, Schroeder is not entitled to relief based on a claim that the DWI statute is unconstitutionally vague.

A. Standard of review

Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. *State v. Pribble*, 285 S.W.3d 310, 313 (Mo. banc 2009). If at all feasible, the statute must be interpreted in a manner consistent with the constitution, and any doubt about the constitutionality of a statute will be resolved in favor of

the statute's validity. *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992). The party challenging the validity of the statute has the burden of proving that the act "clearly and undoubtedly" violates constitutional limitations. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008).

B. Analysis

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2004) (citing *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999)). The void-for-vagueness doctrine "ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement." *Feldhaus v. State*, 311 S.W.3d 802, 806 (Mo. banc 2010). "The test in enforcing the doctrine is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id*. Even so, "neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague." *State v. Dunn*, 147 S.W.3d 75, 77 (Mo. banc 2004).

1. <u>It is long-settled that the terms "intoxicated condition" and "under the influence," as used in the Missouri DWI statute, are readily understandable by a person of ordinary intelligence.</u>

Missouri's DWI statute reads, in pertinent part, as follows: "A person commits the crime of 'driving while intoxicated' if he operates a motor vehicle while in an intoxicated or drugged condition." § 577.010.1. "[A] person is in an 'intoxicated condition' when he is

under the influence of alcohol, a controlled substance, or drug, or any combination thereof." § 577.001.3.

Schroeder claims that the terms "intoxicated condition" and "under the influence" are too vague to be understood by a person of ordinary intelligence. App. Br. at 27-36. This does not raise an issue of first impression. Although Respondent is not aware of any Missouri cases directly addressing a void-for-vagueness challenge to the language of the DWI statute, it is nevertheless settled in Missouri that "intoxicated condition," when used in connection with a drunk-driving prohibition, is a phrase that an ordinary person would understand without a need for additional definition or clarification. Nearly 80 years ago, this Court held that a trial court did not err in failing to define "intoxicated condition" for the jury in a DWI case because "the words have a well-understood meaning" and "[a]ny juror would readily understand what was meant by a charge of operating a motor vehicle while defendant was in an intoxicated condition." *State v. Johnson*, 55 S.W.2d 967, 968 (Mo. 1932). Indeed, the Court believed that "[t]o attempt to define such words would tend to confuse rather than clarify the issues." *Id*.

The following year, in rejecting another claim that "intoxicated condition" should have been defined in the jury instructions, this Court explained that the term has a commonly recognized understanding that requires no additional explanation:

> Any intoxication that in any manner impairs the ability of a person to operate an automobile is sufficient to sustain a conviction under the statute in question . . . . A jury would readily understand that what is meant by an "intoxicated condition" in

connection with a charge of this nature is drunkenness to such an extent that it interferes with the proper operation of an automobile by the defendant.

State v. Raines, 62 S.W.2d 727, 729 (Mo. 1933) (citations omitted). Since *Raines* was decided, Missouri courts have consistently recognized that a driver is in an "intoxicated condition" for purposes of a DWI prosecution if his use of alcohol "in any manner impairs [his] ability to operate an automobile." *State v Cox*, 478 S.W.2d 339, 342 (Mo. 1972); *see also State v. Hoy*, 219 S.W.3d 796, 801 (Mo. App. S.D. 2007) ("'Under the influence of alcohol' has long been described as '[a]ny intoxication that in any manner impairs the ability of a person to operate an automobile'"); *State v. Edwards*, 280 S.W.3d 184, 189 (Mo. App. E.D. 2009) (same).

Schroeder argues that, by reading an impairment requirement into the DWI statute, this Court "tacitly recognized" that the statutory language is vague. App. Br. at 27. Not so. In explaining what "intoxicated condition" meant, this Court was simply expressing the common understanding of the term, and explicitly stated that no additional definition needed to be provided by the court. *See Raines*, 62 S.W.2d at 729.

Schroeder states that "[t]he statute permits conviction if the defendant is under *any* amount of influence of an intoxicating substance, however minimal." App. Br. at 31 (emphasis original). Apparently, Schroeder believes that only an egregious degree of intoxication should be prohibited for drivers, and that the statute is vague because it does not specify what degree of intoxication is enough to qualify as an "intoxicated condition." But the degree of intoxication is not relevant. "It is the fact, not the degree, of intoxication that is the significant issue to consider." *Edwards*, 280 S.W.3d at 189. It is undoubtedly true that

there is a continuum upon which various degrees of intoxication could be placed, but *any* degree of intoxication while driving is prohibited under the statute. And, as explained above, there is a common understanding of what it means to be "in an intoxicated condition" or "under the influence" with regard to a person operating an automobile.

Missouri courts are not alone in holding that "intoxicated condition" and "under the influence" are commonly understood phrases. Numerous courts in other jurisdictions have reviewed void-for-vagueness challenges to DWI statutes based upon the purported vagueness of the terms "intoxicated" or "under the influence," and every court that has considered the issue has held that the language is not unconstitutionally vague. *See Virgin Islands v. Steven*, 134 F.3d 526, 528 (3d Cir. 1998) (holding that "driving under the influence" is commonly understood and thus puts citizens on fair notice of proscribed conduct); *Sorenson v. National Transp. And Safety Bd.*, 684 F.2d 683, 686 (10th Cir. 1982) (holding that the phrase "under the influence of alcohol" is not unconstitutionally vague because it "can be reasonably understood due to the ordinary meaning of the words"); *State v. Big Head*, 363 N.W.2d 556, 559-60 (S.D. 1985) (rejecting a void-for-vagueness challenge to the phrase "under the influence of an alcoholic beverage"); *State v. Campbell*, 681 P.2d 679, 681 (Kan. Ct. App. 1984) (holding that "under the influence of alcohol" is "commonly understood and that its use does not render the statute void for vagueness"); *People v. Seefeldt*, 445 N.E.2d 427, 429 (Ill. App. Ct. 1983) (explaining that the phrase "under the influence of intoxicating liquor" "is one in longstanding common usage and requires no detailed elaboration" and is not void for vagueness); *People v. Cruz*, 399 N.E.2d 513, 517 (N.Y. 1979) (holding that "intoxication" is a term with an accepted meaning "long recognized in law and life," and was

not so vague and indefinite to render the DWI statute void for vagueness); *Synnott v. State*, 515 P.2d 1154, 1157 (Okla. Crim. App. 1973) ("The condition of being under the influence of intoxicating liquor and its ordinary accompaniments are so much a matter of general knowledge that a definite and sensible interpretation may be given the words of the statute.") (overruled on other grounds by *Harris v. State*, 773 P.2d 1273, 1275 (Okla. Crim. App. 1989)); *State v. Tiernan*, 206 N.W.2d 898, 901 (Iowa 1973) (holding that terms "in an intoxicated condition" and "under the influence of intoxicating liquor" are not unconstitutionally vague); *Cook v. State*, 139 S.E.2d 383, 385-86 (Ga. 1964) (holding that the phrase "under the influence of intoxicating liquor" is not unconstitutional or void because of indefiniteness); *State v. Hightower*, 116 So.2d 699, 701-02 (La. 1960) (rejecting void-for-vagueness challenge to DWI statute because "the terms 'while under the influence of intoxicating liquor' or 'while in an intoxicated condition' are commonly used terms with a well-recognized meaning"); *Weston v. State*, 65 P.2d 652, 653-53 (Ariz. 1937) (holding that the expression "under the influence of intoxicating liquor" had been used and understood by the public long before the DWI statute was passed and required no definition or explanation). Schroeder has not identified a single case in which any court in any jurisdiction has struck down a DWI statute similar to Missouri's on the ground that it is unconstitutionally vague, nor can Respondent find such a case. To the contrary, it appears universally accepted that the terms "intoxicated condition" and "under the influence of alcohol" are commonly understood by ordinary persons and that their use in a DWI statute does not render the statute void for vagueness.

Schroeder points out that several states, including some states mentioned above, have enacted DWI statutes that include more specific definitions of "intoxicated" or "under the influence" than does the Missouri DWI statute. App. Br. at 32-34. But the inclusion of such language in the statutes of other states is irrelevant to whether the language used in Missouri's statute is so indefinite that it is unconstitutionally vague. Notably, Schroeder does not argue that any jurisdiction added the defining language in its statute because a previous version of the statute had been declared void for vagueness. App. Br. at 32-34. Because the language used in Missouri's statute is readily understandable to a person of ordinary intelligence, additional language need not be added to the statute to comply with due process.

Finally, any risk that the statutory language in Missouri's DWI statute would be uncertain or misunderstood by an average citizen is ameliorated by the obvious legislative purpose in prohibiting driving while intoxicated. When determining whether language used in a particular statute is unconstitutionally vague, the court may be guided by the legislative purpose underlying the law. *See State v. Davis*, 685 S.W.2d 907, 911 (Mo. App. E.D. 1984) (holding that a law prohibiting possession of weapons while intoxicated was not void for vagueness in light of legislative purpose to protect public safety by keeping weapons away from intoxicated persons). Drunk driving is a serious and often deadly crime. *See e.g. Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion."). The obvious purpose of drunk-driving statutes is "to prevent people from driving unsafely

due to an alcohol-diminished capacity." *Steven*, 134 F.3d at 528; *see also Seefeldt*, 445 N.E.2d at 108-09 ("The legislative intent to prevent driving by those with diminished ability to do so safely because of alcohol consumption is plain enough; the dangers of such conduct are well known to the public . . . ."). Therefore, any person of ordinary intelligence, including potential offenders, police officers, and jurors, will have no difficulty understanding what "in an intoxicated condition" or "under the influence of alcohol" means when used in the DWI statute—it means "any intoxication that in any manner impairs the ability of a person to operate an automobile." *See Raines*, 62 S.W.2d at 729. The statute is not void for vagueness.

2. The Missouri DWI statute is not unconstitutionally vague as applied to the facts of Schroeder's case.

Moreover, this Court reviews a vagueness challenge by applying it to the facts of the case. *Feldhaus*, 311 S.W.3d at 806. "[I]t is not necessary to determine if a situation could be imagined in which the language used might be vague or confusing; the language is to be treated by applying it to the facts at hand." *State v. Self*, 155 S.W.3d 756, 760 (Mo. banc 2005). "If a statute can be applied constitutionally to an individual, that person 'will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Id.* (citations omitted).

Schroeder complains that Missouri's DWI statute is void for vagueness because it is not clear *how* intoxicated a driver must be to violate the law. App. Br. at 30-31. But any

uncertainty as to the precise reach of this statute could not have had any effect on Schroeder, as the record clearly shows that he was intoxicated by anyone's definition.

When Corporal Keathley found Schroeder pulled over on the side of the road, he immediately noticed multiple indicia of intoxication, including Schroeder's bloodshot, glassy eyes, slurred speech, and difficulty balancing (St. Ex. 2; A30). In fact, Schroeder was so unsteady on his feet that he nearly stumbled into the ditch during his conversation with the trooper (St. Ex. 2; A30). Schroeder's breath smelled of alcohol, and a preliminary breath test confirmed that he'd been drinking (St. Ex. 2; A30). When asked, he admitted that he had drunk six beers (St. Ex. 2; A30). And Schroeder failed both field sobriety tests that Keathley performed (St. Ex. 2; A30-A31). He exhibited all six cues denoting intoxication on the HGN test, and he was unable to stay balanced on the one-leg-stand test past the count of "one" (St. Ex. 2; A30-31). After failing the one-leg-stand test, Schroeder blurted, "I couldn't do this when I'm straight" (St. Ex. 2; A30). And, perhaps aware of how intoxicated he was, Schroeder refused to submit to a formal breath test, which would have revealed his blood-alcohol content (St. Ex. 2; A27, A31).

For the reasons outlined in Part III.B.1, *supra*, Missouri's DWI statute is not unconstitutionally vague regardless of the facts of any individual case; the terms used therein are so familiar that anyone of ordinary intelligence would have no difficulty discerning what conduct is prohibited. But even if the statutory language was susceptible to some uncertainty, Schroeder cannot reasonably claim, in his particular case, that the law did not adequately notify him that he was too drunk to drive. Point III should be denied.

CONCLUSION

The trial court did not commit reversible error in this case. Schroeder's convictions should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,505 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2007 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 this 14th day of September, 2010, to:

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APPENDIX