No. SC90583

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

RYAN SEELER,

Appellant.

Appeal from St. Louis County Circuit Court
Twenty-first Judicial Circuit
The Honorable John A. Ross, Judge

RESPONDENT'S BRIEF

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STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Rules

Legislation

Other Authorities

JURISDICTIONAL STATEMENT

Appellant, Ryan Seeler, was convicted on January 9, 2009, in the Circuit Court of St. Louis County after trial by jury. D.S. 3, 7-9, L.F. 261-66.[1] Appellant had been found guilty by the jury of the class B felony of manslaughter in the first degree. D. S. 3, 214 Tr. 1421-24. After the penalty phase, the jury recommended a sentence of seven years. L.F. 237-38, Tr. 1498-1501.

On January 9, 2009, Appellant was sentenced to seven years in the Department of Corrections. D.S. 3, L.F. 261-66.

As part of the appeal, Appellant challenges the constitutionality of a state statute, Section 565.024. This case was originally filed in the Missouri Court of Appeals, Eastern District, but was transferred by order to this Court based on the Court of Appeals's finding that the challenge was sufficiently "real and substantial." If that claim is sufficiently "real and substantial," such a claim would bring this case within the exclusive jurisdiction of the Missouri Supreme Court. Mo. Const. art. V, § 3. If not, jurisdiction would lie with the Missouri Court of Appeals. *Id.*

[1] References to the record shall be abbreviated as follows in this brief: "D.S." for references to the docket sheets contained within the Legal File, "L.F." for references to the Legal File, "Tr." for references to the Transcript, and "Dep. Tr." for references to the transcript of the Deposition of Derek Eichholz.

STATEMENT OF FACTS

On July 6, 2007, Andrew Wiggins had two tickets to a Cardinals baseball game and invited Appellant to go to the game with him. Tr. 610. Mr. Wiggins had known Appellant for at least six years, and Mr. Wiggins's wife had known Appellant for even longer and was friends with Appellant's wife. Tr. 609. According to Mr. Wiggins, Appellant had at least one beer and maybe more at the game. Tr. 614-16. After the game ended, Appellant and Mr. Wiggins went to a restaurant and bar near the stadium. Tr. 617. While at the bar, Appellant and Mr. Wiggins ran into another group of people that they knew. Tr. 620-21. At some point, Mr. Wiggins and Appellant separated, and Mr. Wiggins did not see Appellant later that evening. Tr. 625-26.

On the early morning of July 7, 2007, Derek Eichholz[2] was driving westbound on Highway 40. Dep. Tr. 5. At that time, there was not a lot of traffic on Highway 40. Dep. Tr. 5. While he was driving on Highway 40, Mr. Eichholz was passed by a vehicle travelling at a "very high rate of speed." Dep. Tr. 5. At the time that this vehicle passed

[2] Mr. Eichholz testified by videotaped deposition as he had been deployed out of state on active duty. Tr. 511, Dep. Tr. 4. The jury viewed a redacted copy of the videotape. Tr. 514. Apparently, some objections from the deposition were sustained and others were not sustained. Tr. 255-61, 511. For purposes of the record, a copy of the full videotape of the deposition, and copies of the redacted and unredacted transcripts were marked as exhibits but not published to the jury. Tr. 511-15. On information and belief, the redacted transcript was filed by Appellant as an exhibit in this cause.

Mr. Eichholz, Mr. Eichholz was driving at near the speed limit of 65 miles per hour. Dep. Tr. 6. Mr. Eichholz identified this vehicle as a newer looking mini-van. Dep. Tr. 6. It was a darker colored vehicle. Dep. Tr. 7. Based on the speed that he was driving, Mr. Eichholz estimated that the vehicle that passed him had to be going at least 90 miles per hour.[3] Dep. Tr. 8.

[3] The unredacted transcript shows that, during the deposition, Appellant objected to this testimony based on the lack of foundation for the estimate and the relevance of the speed of an unknown vehicle. Appellant then filed a motion in limine to exclude evidence of speeding by Appellant. L.F. 158-59.

Prior to the start of jury selection, immediately after the conclusion of jury selection, and immediately prior to the start of the evidence, the trial court and counsel discussed what portions of the deposition would be admissible based on that motion in limine filed by Appellant. L.F. Tr. 13, 235-47, 255-61, 511-15. Counsel objected to the admission of the evidence regarding the speed of the minivan on several theories: 1) that Mr. Eichholz while describing the minivan as similar to the one that Appellant was driving was not absolutely sure that the speeding minivan was actually Appellant's vehicle; 2) Mr. Eichholz lacked the qualifications to estimate the speed, 3) the speeding took place several miles away from the collision and thus was not relevant to the circumstances of the collision; and 4) the charged negligent action was driving in the lanes undergoing road work not speeding and thus speeding was not relevant to the charge. Tr. 235-47, 255-61. From the discussion, it appears that the trial court and

As Mr. Eichholz continued driving on Highway 40, he encountered a construction zone. Dep. Tr. 8-9. In this construction zone, traffic cones had gradually merged the lanes down into one lane of traffic – the far right-hand lane. Dep. Tr. 9-10. The placement of the cones forced vehicles to drive partially on the fog line separating the lanes of traffic from the shoulder. Dep. Tr. 9.

Ken Cavaness worked for a company that was subcontracted to do the hauling for the construction work. Tr. 999. His job involved transporting asphalt from the plant to the paver and then returning to the plant for the next load. Tr. 999. On the morning of July 7, Mr. Cavaness was driving his dump truck toward the construction zone. Tr. 1000. When he reached the spot where the traffic merged into a single lane, vehicles began to stack up behind him. Tr. 1000-02. At some point, Mr. Cavaness had moved his truck into the construction zone, particularly the middle lane. Tr. 1000-01. Later, Mr. Cavaness returned to the open right-hand driving lane. Tr. 1003.

On July 7, 2007, Mark Zahner was driving a rented light-colored Dodge Durango westbound on Highway 40. Tr. 318-19, 336-37. On that part of Highway 40, vehicles

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counsel treated the post-jury selection discussion as a hearing on the motion in limine, but treated the discussion prior to the introduction of evidence as part of the trial even though the tape was not formally offered into evidence until after the first three witnesses had testified. Tr. 235-57, 255-61, 511-15. Appellant did ask questions regarding his speed prior to the accident with the first witness, and both sides asked questions about speed with the second witness. Tr. 341-343, 349-50, 363, 371-72, 395-96.

were having to merge from three lanes down to a single lane due to construction work. Tr. 320, 359-60. Besides Mr. Zahner, Sonja Mills and her children were also in the car. Tr. 321, 357-59. They were returning from a vacation. Tr. 321, 358-59. Mr. Zahner had already moved from the left-hand lane to the center lane as he approached an entrance/exit interchange. Tr. 321-22. As he was starting to move into the right-hand lane (the only lane that was open ahead), a minivan came up from behind and passed on the right hand side. Tr. 322-23, 359.

Mr. Zahner and Ms. Mills then observed the minivan approach a dump truck which was on the road ahead of Mr. Zahner and the minivan. Tr. 325, 361-63. The minivan went onto the shoulder of the highway in an apparent effort to pass the dump truck. Tr. 325-26. On at least two separate occasions, the minivan went onto the shoulder in an apparent effort to see if it could pass the dump truck and then pulled back into the driving lane. Tr. 326, 363. On both occasions, the driver of the minivan applied his brakes after returning to the driving lane. Tr. 326.

After the last attempt to pass on the shoulder, the driver of the minivan put his left blinker on and pulled into the center lane. Tr. 327, 363. Ms. Mills saw a construction worker, later identified as Gavan Donohue, standing in the construction zone. Tr. 364. Shortly afterward, Mr. Zahner noticed some object flying, apparently from near the location of the minivan. Tr. 327. Ms. Mills was able to see that the minivan had struck Mr. Donohue. Tr. 364-65. At this point, there were cones that had been blocking the center and the left-hand lane from traffic as those lanes were in the process of being resurfaced. Tr. 327-28, 362. When Mr. Zahner reached the spot where the collision with

the minivan had occurred, he saw a body lying on the right hand side of the center lane. Tr. 329. Ms. Mills then called 9-1-1. Tr. 331, 366-67.

Mr. Eichholz eventually reached the scene where the minivan had struck Mr. Donahue. Dep. Tr. 11. At a point where there was still only one lane open, he saw what appeared to be a body off to his left. Dep. Tr. 11. Mr. Eichholz then saw two vehicles parked on the shoulder. Dep. Tr. 11. One of these vehicles was Mr. Zahner's vehicle. Tr. 331, 367-68, . Mr. Eichholz also parked his vehicle on the shoulder. Dep. Tr. 11.

Mr. Eichholz exited his vehicle and went and checked on Mr. Donahue. Tr. 332, Dep. Tr. 11. He observed a large pool of blood streaming from the head of Mr. Donahue who was lying face down. Dep. Tr. 12. Mr. Donahue's body was located within the two lanes that had been blocked off and repaved, near the open lane. Dep. Tr. 12. Mr. Eichholz then repositioned some of the cones. Dep. Tr. 13. Mr. Eichholz then contacted the occupants of one of the two parked vehicles (apparently Mr. Zahner and Ms. Mills) and had them move their vehicle closer to the body and had them turn on their hazard lights. Dep. Tr. 13-14.

Mr. Eichholz returned to Mr. Donahue's body to see if he was responsive. Dep. Tr. 14. Mr. Donahue was not responsive. Dep. Tr. 14. Mr. Eichholz then contacted 9-1-1. Dep. Tr. 14. After talking with the 9-1-1 operator, Mr. Eichholz turned Mr. Donahue over to administer first aid. Dep. Tr. 14-15.

Ms. Mills later saw the minivan parked on the road up ahead and noticed the driver. Tr. 368. She also observed the driver of the minivan being arrested by the police. Tr. 369-70, Dep. Tr. 42-44. Mr. Eichholz also observed the minivan, and the driver being

detained. Dep. Tr. 20. The description that Mr. Eichholz gave of this minivan was similar to the description that he gave of the minivan that had passed him earlier. Dep. Tr. 6-7, 20.

Officer Ryan Broeker of the Chesterfield Police Department was dispatched to the scene of the collision shortly after 3:00 a.m. Tr. 531-32. At the point that Officer Broeker arrived, only Officer Michael Ryffel was at the scene. Tr. 532. When Officer Ryffell arrived on the scene, he noticed one cone that had been moved. Tr. 1180. Officer Ryffel directed Officer Broeker to go with Appellant, who was the driver of the minivan that struck Mr. Donohue. Tr. 533. When Officer Broeker approached Appellant, he asked Appellant for his driver's license and insurance car. Tr. 533-34. Officer Broeker also saw the minivan which had damage to the windshield and front. Tr. 534.

The first thing that Appellant said to Officer Broeker was along the lines of "I can't believe he jumped out in front of me." Tr. 535. When Officer Broeker asked Appellant where he was coming from, Appellant claimed that he was coming from work. Tr. 535.

Officer Ryffel talked with Mr. Zahner and Ms. Mills. Tr. 1195. Mr. Zahner and Ms. Mills told Officer Ryffel that Appellant was driving erratically and attempted to pass the dump truck on the shoulder. Tr. 1196-97. Officer Ryffel remembered Mr. Zahner and Ms. Mills as testifying that Appellant passed them by driving into the closed center lane. Tr. 1197-98.

Officer Paul Powers of the Chesterfield Police Department was dispatched to the scene of the collision shortly after 3:00 a.m. Tr. 400-01. Officer Powers noted that the

left-hand lane and the center lane were closed down. Tr. 404-05. There were road closure signs and cones that narrowed traffic down to the one right-hand lane. Tr. 406. When Officer Powers arrived on the scene, Officer Ryffel was still with the body of the victim. Tr. 406-08. Officer Ryffel directed Officer Powers to assist Officer Broeker who was with Appellant. Tr. 408-09.

Appellant had been driving a Chrysler Town and Country minivan. Tr. 409-10. The minivan had damage to the front end, including the hood and windshield. Tr. 410-11. Inside the vehicle, there was what appeared to be blood and a hole in the dashboard area. Tr. 415.

After looking at the minivan, Officer Powers approached Appellant who was sitting down. Tr. 415-16. Officer Powers asked Appellant to stand up. Tr. 416. Appellant stumbled both as he was getting up and after he was standing. Tr. 416. Even after Appellant had recovered his balance, Appellant continued to sway. Tr. 416.

Officer Powers asked Appellant where he was coming from, and Appellant responded that he was coming from the Cardinals ballgame. Tr. 417. Officer Broeker overheard this statement. Tr. 537. Officer Powers knew that the ballgame had ended shortly after 10:00 p.m. Tr. 417. When Officer Powers asked Appellant several times what Appellant had done after the ballgame, Appellant continued to state that he was

going straight home from the ballgame.[4] Tr. 417-18. Officer Powers then checked Appellant for injuries, but did not observe any injuries. Tr. 418-19. While checking Appellant for injuries, Officer Powers detected the odor of an alcoholic beverage. Tr. 419. Officer Powers also noticed that Appellant had a slow reaction to light which was something that Officer Powers had previously learned could be an indication of intoxication. Tr. 419.

Based on these observations, after consulting with his supervising officer, Officer Powers placed Appellant under arrest for driving while intoxicated, and directed Officer Broeker to take Appellant to the hospital to draw a blood sample. Tr. 424, 538. As Officer Broeker was taking Appellant to his patrol car, Appellant stumbled several times. Tr. 425, 540. As he was placing Appellant into his patrol car, Officer Broeker smelled the odor of alcohol. Tr. 540-41.

When they reached the hospital, Officer Broeker read Appellant the warning under the implied consent law. Tr. 542-43. Officer Broeker then asked Appellant to submit to providing a sample. Tr. 544. Appellant denied consent and indicated that he wanted to speak to a lawyer first. Tr. 544. Officer Broeker informed Officer Powers that Appellant had refused to provide a blood sample. Tr. 425-26, 545-46. Officer Broeker continued to

[4] In his report, Officer Broeker indicated hearing Appellant state that he had gone to his home or somebody's home after the game and hung out before heading home. Tr. 570-73.

observe Appellant at the hospital until Officer Powers and other officers arrived. Tr. 546-47.

While Officer Broeker was with Appellant at the hospital, Officer Broeker permitted Appellant to make phone calls to his family. Tr. 546. During one of those phone calls, Officer Broeker overheard Appellant saying that the police wanted to draw his blood and that the police were going to find out that he had been drinking. Tr. 546, 589.

Officer Timothy Deckard, who does accident reconstruction for the Chesterfield Police Department, arrived on the scene at around 4:15 a.m. Tr. 765. Officer Deckard started his investigation where the body of Mr. Donohue was located and worked his way back to the point of impact. Tr. 768-74. When Officer Deckard arrived on the scene, the body had not yet been moved by the medical examiner and Mr. Donohue was still wearing a reflective vest. Tr. 771. As Officer Deckard walked back towards the point of impact, he observed blood, hair tissue, and clothing fibers that were consistent with Mr. Donohue's body sliding and tumbling after being struck. Tr. 773. As Officer Deckard approached the point of impact, the blood, tissues, and fibers stopped, and Officer Deckard found the helmet that Mr. Donohue was wearing as well as the reflectors that Mr. Donohue would have been placing on the pavement. Tr. 773. Finally, Officer Deckard found the scuff marks from Mr. Donohue's shoes that would have marked the point of impact. Tr. 773-74.

Officer Deckard also took measurements at the scene. Tr. 780-801. Based on Officer Deckard's measurements, the cones blocking off the construction zone from the

open right-hand lane did not have exactly uniform spacing with the spacing between cones ranging from fifty-five to fifty-nine yards.[5] Tr. 781. The point of impact was approximately twelve yards from the spot where the last reflector was placed by Mr. Donohue prior to being struck.[6] Tr. 783. Mr. Donohue's body came to rest approximately fifty-five yards from the point of impact. Tr. 792. From the point of impact to the location where the body first hit the pavement was approximately thirty-

[5] During cross-examination of Officer Deckard, Appellant asked about whether the distancing between cones complied with the *Manual on Uniform Traffic Control Devices*. Tr. 824. Officer Deckard indicated that he did not know. Tr. 824. Later during cross-examination of Randy Besand, Mr. Besand calculated that, based on the *Manual*, the cones should have been about 30 yards apart. Tr. 897. However, the trial court sustained an objection to a question to Mr. Besand about whether or not the actual distance between the cones (assuming that Officer Deckard's measurements were correct) complied with the *Manual*. Tr. 899-902. The basis of the objection was relevancy, and the trial court concluded that whether there was strict compliance with the national standards on how lanes should be properly closed was not relevant to the issue of whether it was actually closed and or to the issue of whether Appellant was negligent in entering a lane that Appellant would have known was closed. Tr. 900-01.

[6] The crew laying down the new pavement was approximately one mile to the west of the collision site with Mr. Donohue placing temporary reflector tabs on the new pavement which had already been laid down. Tr. 825-28, 923.

four yards. Tr. 792. There were no skid marks from Appellant's vehicle near the point of impact, but paint chips were found. Tr. 786, 789. The victim's vehicle was just under 250 yards away from the point of impact, apparently in the construction zone prior to the point of impact.[7] Tr. 808.

Based on the damage to Appellant's vehicle and the injuries suffered by Mr. Donohue, Officer Deckard concluded that Mr. Donohue was heading toward the median when he was struck by Appellant's vehicle.[8] Tr. 797. The initial impact caused the victim's body to go up onto the hood and into the windshield. Tr. 797. After striking the windshield, Mr. Donohue's body continued to rise, going over the roof of the vehicle before landing off the passenger side of the vehicle. Tr. 800. After striking the pavement, Mr. Donohue's body continued to travel to its final resting spot. Tr. 800-01.

Based on the measurements taken, Officer Deckard calculated that Appellant's vehicle was traveling at between 42 miles per hour and 62 miles per hour at the time that

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[7] Appellant tried to claim that the victim's vehicle was further behind the victim than it should have been. Tr. 827, 924-28, 984-85.

[8] Based on the information provided to Officer Deckard, Mr. Donohue would have been working in the center lane near the cones placing reflector tabs on the pavement on the center-lane side of the cones. Tr. 825-26. Mr. Donohue apparently saw Appellant's vehicle in the center lane to the left of the cones and the dump truck in the right-hand lane to the right of the cones and began to head toward the median to get out of the way of Appellant's vehicle. Tr. 825-26.

it struck Mr. Donohue. Tr. 805, 807. The speed limit on the highway was 45 miles per hour. Tr. 805. To cause Mr. Donohue to strike the windshield, Appellant had to be driving at least 35 miles per hour. Tr. 806. Based on a speed of 35 miles per hour, Appellant would have struck Mr. Donohue approximately 14 to 15 seconds after passing Mr. Donohue's vehicle. Tr. 809-10. At that same speed, the cones were approximately 3 seconds apart. Tr. 810. At higher speeds, those times are reduced. Tr. 810-11.

After being told that Appellant refused to provide a blood sample, Officer Powers obtained a search warrant to take samples. Tr. 426-28. Officer Powers then went to the hospital, read Appellant the search warrant, and had Richard Dupuis, a nurse, take the blood samples. Tr. 428-39, 650. The first blood sample was taken at 7:55 a.m. with a second sample taken at 8:25 a.m. Tr. 430-33, 435-37. For both samples, Officer Powers looked at the tubes before the blood was drawn to make sure that they were not damaged, confirmed that the antiseptic swab was a non-alcoholic betadine swab, and observed the blood being withdrawn. Tr. 431, 436-37. The tubes used were Vacutainer tubes, which contained preservatives. Tr. 652, 655-56. Officer Powers also had a urine sample taken from Appellant. Tr. 433-34. Officer Powers secured all three samples, packaged them as evidence, and took them to St. Louis County Intake where there is a secured refrigerator for the lab. Tr. 437-38.

The samples were later analyzed by Ryan Campbell who worked for the St. Louis County Police Crime laboratory. Tr. 695, 697-99. As part of the analysis, Mr. Campbell tests each sample three times. Tr. 707. If the results of the analysis are sufficiently close, Mr. Campbell then averages the two closest and then drops all digits after the hundredths.

Tr. 707. For the 7:55 a.m. blood sample, the results of the analysis ranged from a low of 0.1573 to a high of 0.1644. Tr. 708. The average for the 7:55 a.m. sample was 0.1635 which was reported as being 0.16. Tr. 708. For the 8:25 a.m. blood sample, the results of the analysis ranged from a low of 0.1552 to a high of 0.1568 for an average of 0.1564 which was reported as being 0.15.[9] Tr. 712-13.

Randy Besand was construction manager for Pace Construction. Tr. 876. Pace Construction was the company that was hired to do the road repaving on Highway 40. Tr. 877. Mr. Donohue was part of the crew involved in the road repaving. Tr. 877. On the morning of the accident, Mr. Besand was asked to inspect the road to determine if the signage and other materials connected with the construction zone were properly placed. Tr. 879. Mr. Besand started with the first set[10] of signs which read "Road Work Ahead." Tr. 884, 886. Approximately 390 yards later, Mr. Besand found the second set of signs which said "Reduced Speed Ahead." Tr. 884, 887. Approximately 380 yards later, Mr. Besand found the third set of signs indicating a speed limit of 45 miles per hour. Tr. 884, 887. Attached to the speed limit signs were signs indicating that this stretch of road

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[9] The videotaped deposition of Dr. Christopher Long was played for the jury. Tr. 941-44. Apparently, Dr. Long concluded, using some type of regression based on the difference between the two blood samples, that the blood alcohol level at the time of the accident as being somewhere around 0.24. Tr. 1257, 1261-62, 1395, 1408-09.

[10] For each of the warning signs, there is one sign posted on the left-hand side of the road and one posted on the right-hand side of the road. Tr. 886.

was a work zone. Tr. 887-88. Approximately 315 yards later, Mr. Besand found a fourth set of signs indicating that the left two lanes were closed ahead. Tr. 885, 888. Approximately 425 yards later, there was a directional arrow indicating the need to merge to the right. Tr. 885, 888-89. After the directional arrow, cones were set out tapering off the lanes which were closed. Tr. 885. The length of the taper closing the left-hand lane was approximately 220 yards with thirteen arrows pointing traffic to merge to the right within those 220 yards. Tr. 885. There were a total of thirteen arrow boards and one flashing arrow sign for this taper. Tr. 888-89. Mr. Besand did not have the time to measure the distance of the taper for the center lane, but there would have been a similar number of arrows within that taper. Tr. 885-86.

An autopsy was performed on Mr. Donohue by Dr. Raj Nanduri. Tr. 935. Dr. Nanduri observe a large cut to the side of Mr. Donohue's face, and several smaller cuts, with blood coming out from both ears. Tr. 935. The bleeding from the ears was an indication of substantial injury to the head, including broken bones near the ears. Tr. 936. There were also several scratches and bruising to the front and back of the chest and abdominal areas. Tr. 935. There were also bruises and cuts to the legs, primarily on the front of the legs. Tr. 935. One of the lacerations to the left leg was bone-deep. Tr. 935-36.

An examination of the skull showed a big fracture, all the way to the bottom of the skull, in the back. Tr. 936. There were areas of bleeding on the top of the brain, cuts to the back of the brain, and the brain stem was cut as well. Tr. 937. Many of the injuries to the brain would have been individually fatal. Tr. 937. An examination of the organs

of the chest showed bruising to the lungs, tears to the inside of the aorta (the main artery leading from the heart), tears to the spleen, and bleeding around the kidneys. Tr. 938-39. All of the injuries to the chest were consistent with blunt force trauma either from a blow or a fall. Tr. 938-39. An examination of the left leg showed that both the tibia and the fibula were broken, approximately twelve inches above the sole of the foot. Tr. 940. The cause of death was the trauma to the head which was consistent with injuries caused by being struck by a moving vehicle. Tr. 940-41.

On July 9, 2007, a Complaint was filed alleging that Appellant committed the offense of the class C felony of involuntary manslaughter in the first degree based on Appellant being under the influence of alcohol or a controlled substance and driving in a closed highway construction zone. D.S. 1, L.F. 1-2. Subsequently, an Amended Complaint was filed adding the allegation that Appellant left the highway's right-of-way, thereby making the offense a class B felony. D.S. 1, L.F. 4. On August 8, 2007, an Indictment was filed formally charging Appellant with the class B felony of involuntary manslaughter in the first degree. D.S. 2-3, L.F. 31-32.

On October 27, 2008, Appellant filed a motion to dismiss indictment and declare Section 565.024.1(3)(a) unconstitutional. D.S. 7, L.F. 155-57. The essence of this motion was that the enhancement provisions of Section 564.024.1(3)(a) regarding highways and highway right-of-ways were ambiguous and vague. L.F. 155-56. This motion was denied with the trial court finding that the statute was not facially ambiguous or vague. Tr. 12-13.

At the close of the State's evidence, Appellant filed a motion to dismiss the indictment, or to enter a judgment of acquittal, for lack of jurisdiction. D.S. 8, L.F. 161-62. This motion alleged that the evidence did not support the language in the indictment that he "was driving in a close construction zone, thereby leaving said highway's right of way." L.F. 161 (sic). Appellant contended that the construction zone, while it may have been closed to traffic, was legally part of the highway's right of way. L.F. 161. As such, Appellant contended that the indictment did not charge an offense. L.F. 161. After this motion was filed, the State requested leave to file an information in lieu of indictment to conform to the evidence to clarify that Appellant was being charged with leaving the open part of the highway. Tr. 960-62. Based on that representation, the trial court denied the motion to dismiss. Tr. 963. The following day, the formal written information in lieu of indictment was filed which alleged, instead of "thereby leaving said highways right of way," that Appellant "drove into a lane closed to traffic." D.S. 8, L.F. 165-67. Appellant objected to the amendment as untimely. Tr. 963. The trial court overruled the objection based on its conclusion that the amendment did not change the acts charged, merely the legal description of the act, and, therefore, Appellant's defense was not prejudiced. Tr. 964, 966.

Appellant testified at trial. In his testimony, Appellant claimed that he was not intoxicated. Tr. 1023. Appellant testified that, between the time that he met Mr. Wiggins prior to the ballgame and the time that he left the bar after the game, he had four beers to drink. Tr. 1025-1038. Appellant stated that he left the bar at around 2:00 a.m. Tr. 1033. According to Appellant, he had $100.00 in cash at the start of the evening, and, that after

what he spent on food, beer, and parking, he had $38.00 at the end of the evening.[11] Tr. 1038. Appellant did admit to seeing the signs for the start of the construction zone. Tr. 1104-11. Appellant claimed that, when he got into the construction zone, at one point, he saw the dump truck move into the middle lane and pulled in behind him. Tr. 1046-47. Appellant denied noticing the cones still being on his left approximately three seconds apart after entering the start of the work zone, claiming that he was focused on the dump truck. Tr. 1113-14. Appellant stated that, given the way that the cones were lined up and the fact that the left two lanes were paved and his lane was not paved, he was not sure which lane he was supposed to be in. Tr. 1047-49. Appellant then moved into the center lane. Tr. 1049-50. Appellant agreed that he had moved over to sort of look around the dump truck twice. Tr. 1116. Appellant claimed that he did not see Mr. Donohue before hitting him. Tr. 1050. Appellant also claimed that, despite the lack of skid marks, he used his brakes immediately after hitting Mr. Donohue. Tr. 1149.

Appellant called Terry Martinez to testify regarding the analysis of the blood samples taken from Appellant. Mr. Martinez testified that if the blood was not drawn

[11] In rebuttal testimony, the manager of the bar testified as to the price of beer at the bar which was lower than what Appellant claimed to have paid. Tr. 1322-23. The manager of the parking facility matching the description given by Appellant of the place that he parked – Appellant did not remember the name of the facility -- also testified as to a lower charge for parking. Tr. 1076-77, 1332. In addition, that parking facility would have closed one hour after the game ended. Tr. 1333.

correctly there could potentially be problems with the test results. Tr. 1237-53. Mr. Martinez also testified that for an average, non-alcohol tolerant suspect, the behavior observed of Appellant was inconsistent with the blood alcohol content inferred by Dr. Long. Tr. 1257-62. Mr. Martinez speculated, based on the alleged inconsistency, that something might have been done wrong with the blood sample. Tr. 1260-61. Mr. Martinez also used Appellant's claims regarding what he had consumed that evening to give the opinion that Appellant's blood alcohol level would have been near 0.0 at 3:00 a.m. Tr. 1266-67. Mr. Martinez also opined that if Appellant had consumed all of the alcohol that Appellant admitted to consuming, but had consumed it all at the same time, that the maximum blood alcohol level would have been 0.11. Tr. 1267. Mr. Martinez also testified that his personal standard, but not necessarily the standard in the testing community, was that the blood samples should have been taken further apart to give a better estimate of the elimination rate (the rate at which the blood alcohol level declines) for Appellant. Tr. 1278.

On cross-examination, Mr. Martinez admitted that there were tests that could have been done on the blood samples to verify his speculations, but that to the best of his knowledge no such tests were done. Tr. 1303. Mr. Martinez also admitted that his knowledge of how much alcohol Appellant consumed came from Appellant and Appellant's counsel. Tr. 1299-1300. Mr. Martinez admitted that his calculations would be off if Appellant's version of how much alcohol was consumed was false. Tr. 1302.

At the close of all of the evidence, Appellant made an oral motion for judgment of acquittal claiming that, due to the alleged problems with the blood samples, there was

inadequate proof of intoxication and that there was inadequate evidence that the lane in which the accident occurred was actually closed. Tr. 1341-42. The oral motion was denied, and leave was given to file a written motion supplementing the oral motion. Tr. 1341-42. In the instruction conference, the sole objection to the verdict directors on involuntary manslaughter in the first degree[12] and involuntary manslaughter in the second degree was the claim that describing the lane in which Appellant was driving as a construction zone as opposed to merely a lane closed to traffic was improperly prejudicial. Tr. 1353-54. That objection was overruled. Tr. 1354-55.

The jury returned a verdict finding Appellant guilty of involuntary manslaughter in the first degree. L.F. 214, Tr. 1421-24.

During the penalty phase evidence was presented from the parents of Mr. Donohue. Mr. Donohue was an engineering student at the University of Missouri at Rolla who had been interning with the construction company during the summer. Tr. 1438-39. While at school, Mr. Donohue had belonged to a group called Engineers without Borders and had traveled to Guatemala to help earthquake-proof a school. Tr. 1440. After the penalty phase, the jury recommended a sentence of seven years. L.F. 237-38, Tr. 1498-1501.

Appellant filed a post trial motion. D.S. 9, L.F. 253-59. In that motion for new trial, Appellant alleged, in relevant part, that the trial court erred in denying his motion to

[12] No instruction was offered on the lesser-included class C felony of involuntary manslaughter in the first degree. Tr. 1353-56.

dismiss and declare the statute unconstitutional, in denying his motion in limine regarding evidence that Appellant was speeding, in denying his motion to dismiss indictment or enter a judgment of acquittal and permitting the filing of an information in lieu of indictment. L.F. 253-54, 257-58. Appellant did not directly raise the exclusion of questions regarding the Manual on Uniform Traffic Control Devices, but did claim that the trial court erred in not allowing questions regarding training procedures and policies. L.F. 254-55. The motion was denied, and Appellant was sentenced to seven years in the Department of Corrections. D.S. 3, 9, L.F. 261-66.

Appellant filed a notice of appeal. L.F. 278-79.

ARGUMENT

Point I (Constitutionality of Section 565.024.1(3)(a) -- Responds to Points I & II)

The trial court did not err in denying Appellant's motion to dismiss on grounds that Section 564.021.(3)(a) is unconstitutionally vague because Appellant failed to state a real and substantive claim of unconstitutionality in that Section 564.024.1(3)(a) provides sufficiently clear guidance as to what conduct is covered by its terms and, to the extent that Appellant alleges that some of the terms are ambiguous, any ambiguity can be rectified by this Court construing those terms to give sufficiently clear guidance. Furthermore, Appellant's claims that, based on the alleged ambiguity, it would be unconstitutional to interpret the statute to include his conduct is not a true claim that the statute is unconstitutional but an argument as to the proper interpretation of the statute.

To the extent that the claim raised in his point of error is interpreted as an argument that the charged and proven conduct does not fit within the proper scope of the enhancement provisions of Section 565.024.1(3)(a), the trial court did not err because the clear meaning and intent of Section 565.024.1(3)(a) is to permit additional punishment for intoxicated individuals who kill pedestrians or individuals in or on other vehicles.

A review to the constitutionality of a statute is a matter of law which is reviewed de novo. *State v. Richard,* 298 S.W.3d 529, 531 (Mo. banc 2009). Likewise, the proper interpretation of a statute is a matter of law which is reviewed de novo. *State ex rel. Wolfrum v. Wiesman,* 225 S.W.3d 409, 411 (Mo. banc 2007). In reviewing the

constitutionality of a statute, this Court presumes that the statute is constitutional, and the burden is on the party challenging the statute to prove that it is unconstitutional. *Richard,* 298 S.W.3d at 531.

In his first point, Appellant claims that Section 565.024(3)(a) is ambiguous with regard to the meaning of "including leaving a highway . . . or highway's right of way" and, as such, should be strictly interpreted in accordance with the rule of lenity. Appellant's Brief at 23-46. In his second point, Appellant claims that, because the meaning of Section 565.024(3)(a) is ambiguous, the statute is unconstitutionally vague. Appellant's Brief at 47-58. Because these points are connected, they are properly addressed together.

As an initial point, a statute is unconstitutionally vague if it fails to convey "a sufficiently definite warning of the proscribed conduct" to a person of ordinary intelligence "when measured by common understanding and practices." *State v. Pribble,* 285 S.W.3d 310, 315 (Mo. banc 2009). If by means of statutory construction, a reasonably clear interpretation of the statute is possible, then that interpretation will be given effect, and the statue will not be found to be void for vagueness. *Id.; Harjoe v. Hertz Financial,* 108 S.W.3d 653, 655 (Mo. banc 2003).

A. Statutory Language and Issue of Ambiguity

At the time of the offense, Subsection 565.024.1 defined alternative ways of committing the offense of involuntary manslaughter in the first degree, with subsection

565.024.2 defining the penalties for the same.[13] Under subsection 565.024.2, involuntary manslaughter in the first degree is a class C felony for violations of Paragraphs (1), (2), and (4) of subsection 565.024.1, but is a class B felony if the offense is for a violation of Paragraph (3) of subsection 565.024.1. Section 565.024.2. Furthermore, Paragraphs (2) and (3) contain similar language criminalizing the killing of another person by the criminally negligent operation of a motor vehicle while in an intoxicated condition. However, paragraph (3) contains several alternative subparagraphs which are alternative elements distinguishing a violation of paragraph (3) from a violation of paragraph (2).[14]

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[13] In 2008, Section 565.024.1 was amended to include reference to accident involving vessels on the water. In particular, a new paragraph (5) was added which was similar to paragraph (4) except that paragraph (5) dealt with vessels on the water instead of motor vehicle. Also, paragraphs (2) and (3) were altered to refer to both vehicles and water vessels. See Ninety-Fourth General Assembly, House Bill 1715 (2008). For the purposes of this case, there is no material difference between the two versions except to the extent that the inclusion of language related to vessels in Section 565.024.1(3)(a) reveals the interpretation placed by the Ninety-Fourth General Assembly of the language previously enacted.

[14] Because paragraph (3) contains all of the elements of the offense under paragraph (2), paragraph (2) qualifies as a lesser-included offense of paragraph (3) under Section 556.046.1. As such, if this Court were to grant any of Appellant's claims regarding the validity of the additional element contained in subparagraph (a), the proper

In this case, Appellant was charged based on the alternative in subparagraph (a). L.F. 31-32, 165-67. Reading the relevant portions of Subsection 1 together (omitting the other paragraphs and subparagraphs), subparagraph (a) provided, at the time of the offense, that a person violates that subparagraph if: "[the defendant] . . . [w]hile in an intoxicated condition, operated a motor vehicle in this state, and, when so operating, acts with criminal negligence to . . . [c]ause the death of any person not a passenger in the vehicle operated by the defendant, including the death of an individual that results from the defendant's vehicle leaving the highway, as defined by Section 301.010, RSMo, or the highway's right-of-way. . . ." This provision contains two parts.

The main part contains three clear and unambiguous elements. First, the defendant must be operating a motor vehicle while in an intoxicated condition. Second, the defendant, while operating a motor vehicle, must act with criminal negligence to cause the death of another person. Third, the person killed must not be a passenger in the vehicle operated by the defendant. Appellant implicitly concedes that this language is unambiguous.

Appellant's claim of ambiguity comes from the other part of the sentence: "including the death of an individual that results from the defendant's vehicle leaving the

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remedy would be to remand with instructions to enter a judgment on the class C felony of involuntary manslaughter as the jury necessarily had to find all of those elements beyond a reasonable doubt before it could convict Appellant of the class B felony of involuntary manslaughter.

highway . . . or the highway's right-of-way." Appellant's Brief at 29-30. As Appellant notes, this Court has, in multiple cases, recognized that the term "including" can be ambiguous or create ambiguity under some circumstances. *See, e.g., State v. Young*, 701 S.W.2d 429, 437 (Mo. banc 1985); *Kieffer v. Kieffer*, 590 S.W.2d 915, 918 (Mo. banc 1979).

While noting that the meaning of "including" can vary depending on the statutory language, the *Kieffer* Court recognized that "including" typically enlarges the meaning of the phrase modified instead of restricting the meaning of that phrase. *Id.* In particular, the use of the term "including" implies that the list that follows "including" is not a complete list of the objects covered by the term being modified by "including." *See St. Louis County v. State Highway Commission*, 409 S.W.2d 149, 152-53 (Mo. 1966); *see also Rice v. Board of Zoning Adjustment of Village of Bel-Ridge*, 804 S.W.2d 821, 824 (Mo. App. E.D. 1991). In some circumstances, "including" can be used in a restrictive sense with the list following "including" being used as examples to narrow the scope of an otherwise broad category. *Cf. State ex inf. Huffman v. Sho-Me Power Co-op*, 354 Mo. 892, 905-08, 191 S.W.2d 971, 976-77 (Mo. banc 1946) (finding that list of included activities after the phrase "any agricultural or mercantile business including" was designed to illustrate the types of businesses permitted and thus "including" was used in a restrictive sense). [15]

[15] The discussion of "including" as restrictive or expansive seems to turn, in part, on the relationship between the modified term and the list that follows including. In both

Furthermore, as Appellant notes, courts are reluctant to treat language in a statute as having no meaning. *Middleton v. Missouri Department of Corrections,* 287 S.W.3d 193, 196 (Mo. banc 2009). However, clarifying language is not deemed to be surplusage or have no meaning. *Executive Board of Missouri Baptist Convention v. Carnahan,* 170 S.W.3d 437, 449 n. 7 (Mo. App. W.D. 2005).

Taking all of these matters into consideration, there appear to be four potential approaches to how "including" can be used in a statute. The first approach treats the phrase following "including" as emphasizing that a particular circumstance is not excluded. The second approach treats the phrase following "including" as words of enlargement, essentially treating "including" as synonymous with the word "or." The third approach treats the phrase following "including" as a restrictive and exclusive list with the State having to prove those facts as an additional element, effectively treating "including" as synonymous with "and." The final approach treats the phrase following "including" as a non-exclusive list designed to illustrate the circumstances covered by the preceding clause. Under this final approach, "including" essentially means "by means

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types of uses, the list following "including" in some sense clarifies and emphasizes the meaning of the modified term. *See, e.g. Huffman,* 354 Mo. at 907, 191 S.W.2d at 977; *Village of Bel-Ridge,* 804 S.W.2d at 822-24. These decisions seem to focus either expressly or implicitly on three factors: 1) the breadth or narrowness of the modified term; 2) how the list relates to the modified term; and 3) how the particular facts raised in the case (always something not in the list) relates to the modified term and the list.

like." This approach requires examining the list for the common elements to determine what qualifies as "like" with the State being required to then prove that the means in a particular case fits within that broader category.

Because the meaning of the term "including" can be ambiguous, it is necessary to engage in a more detailed analysis to determine the intent of the General Assembly. In construing a statute, the purpose is to give effect to the intent of the General Assembly. *American National Life Insurance Company of Texas v. Director of Revenue,* 269 S.W.3d 19, 21 (Mo. banc 2008). To do this, this Court uses recognized principles of statutory construction. *United Pharmacal Company of Missouri, Inc., v. Missouri Board of Pharmacy,* 208 S.W.3d 907, 911-12 (Mo. banc 2006). However, in doing so, this Court has recognized that those principles and canons are subordinate to the ultimate goal of determining and applying the actual intent of the General Assembly. *Budding v. SSM Healthcare System,* 19 S.W.3d 678, 682 (Mo. banc 2000).

There are two different avenues often used in construing a statute. One consists of an examination of the context of the statute and, when appropriate, related statutes to determine if the full context in which an allegedly ambiguous term exists can clarify the meaning of that term. *See, e.g., South Metropolitan Fire Protection District v. City of Lee's Summit,* 278 S.W.3d 659, 666 (Mo. banc 2009). The other consists of considering the history of the provision in question to determine what the choices made by the General Assembly reveal about the intent of the General Assembly. *See, e.g., State ex rel. Zoological Park Subdistrict of the City and County of St. Louis v. Jordan,* 521 S.W.2d 369, 372-73 (Mo. 1975).

In trying to determine the meaning of "including," Missouri courts have always tried to look at the surrounding language in the statute to determine the intended meaning of "including." As this Court has noted, words derive their meaning from their context. *J.B. Vending Company, Inc., v. Director of Revenue,* 54 S.W.3d 183, 187 (Mo. banc 2001) ("The issue is not whether a particular word in a statute, considered in isolation, is ambiguous, but whether the *statute* itself is ambiguous."). In looking at the context, this Court does not insist that the General Assembly perfectly follow the rules of grammar or write a statute with absolute clarity. *Lewis v. Gibbons,* 80 S.W.3d 461, 465 (Mo. banc 2002). However, in giving effect to the full language of a statute, courts do interpret language according to its ordinary meaning and in its grammatical context. *See, e.g., Brooks v. State,* 128 S.W.3d 844, 847 (Mo. banc 2004). In interpreting language, it is important to do justice to the intent of the entire provision, and a clause should not be interpreted to nullify the remainder of the sentence. *Middleton,* 287 S.W.3d at 196.

An examination of the multiple cases involving the use of the word "including" indicates that a significant part of the interpretation of the term is to look at the natural context and flow of the sentence to see what is being modified and determine how the terms being modified logically relate to the list of terms that follows "including." *Scanwell Freight Express STL, Inc., v. Chan,* 162 S.W.3d 477, 482 (Mo. banc 2005); *Automobile Club of Missouri v. City of St. Louis,* 334 S.W.2d 355, 361 (Mo. 1960); *Huffman,* 354 Mo. at 907; 191 S.W.2d at 976-77; *In re S.J.S.,* 134 S.W.3d. 673, 677 (Mo. App. E.D. 2004); *State ex rel. Nixon v. Estes,* 108 S.W.3d 795, 800 (Mo. App. W.D. 2003); *Village of Bel-Ridge,* 804 S.W.2d at 824.

B. Plain Natural Meaning

In Section 565.024.1(3)(a), the phrase immediately preceding "including" is "death of any person not a passenger in the vehicle operated by the defendant." The phrase following "including" refers to the "death of an individual that results from the defendant's vehicle leaving the highway." The similarity of language indicates the intended relationship between the two parts of the statutes. The logical reading of the statute is that the "including" phrase is intended to emphasize the main phrase.

This language is equivalent to a parent telling his child that "you are not to leave the house including leaving to go to the movies." No reasonable person would construe "including leaving to go to the movies" as somehow narrowing the primary dictate to stay in the house and authorizing the child to leave the house to visit a friend or go to the shopping mall. Instead, most people would interpret "including to go to the movies" as being designed to emphasize a particularly forbidden possible destination or excuse for breaking the primary rule.

Likewise, in this case, the primary dictate is that a driver is not to cause the death of someone who is not a passenger in that driver's vehicle. The including language emphasizes that it does not matter if the death occurs within the normal lane of traffic or outside the normal lane of traffic. This is the plain and natural reading of Section 565.024.1(3)(a), and it is sufficiently clear to a person of ordinary intelligence. As such, all that Section 565.024.1(3)(a) requires to upgrade involuntary manslaughter in the first degree from a class C felony to a class B felony is that the decedent is someone who is not a passenger in the defendant's vehicle. As the evidence in this case was undisputed

that Mr. Donohue was a construction worker and not a passenger in Appellant's vehicle, the evidence was sufficient to support the finding of guilt and the instructions properly submitted this element.

If this Court does not accept that this reading is the plain and natural meaning of Section 565.024.1(3)(a), then it would be appropriate to consider the rules of construction.

C. Rules of Construction

There are several different rules of construction potentially implicated in the interpretation of Section 565.024.1(3)(a), and the issues raised by Appellant.

As an initial point, Appellant concedes and Respondent agrees that the last antecedent rule and the complete text of Paragraph would prohibit interpreting "including" to modify criminal negligence. See Appellant's Brief at 33-42. Instead, it is clear that the phrase following "including" should be read as being related to causing the death of a person.

In arguing that the phrase beginning with including sets forth an element of the offense, Appellant's position is implicitly based on the doctrine of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another).[16]

[16] Additionally, in a footnote, Appellant suggests that the list in *Huffman* was an exhaustive list. Appellant's Brief at 33 n.10. However, this Court in *Huffman* did not hold that the list was an exhaustive list. 354 Mo. at 907; 191 S.W.2d at 976-77. Instead, it noted that a list following the term "including" can be intended as an illustration or

Appellant's Brief at 32-39. As this Court has noted in the past, this doctrine is to be carefully invoked only in circumstances in which the legislation creates a sufficiently clear contrast as to indicate a legislative intent for the use of that doctrine.[17] *Six Flags*

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example of what can be covered and further held that the list restricted the meaning of the modified term without further discussion of whether or not the list was exhaustive as the proposed activity in *Huffman* was not similar to the listed activities. *Id.; see also Automobile Club of Missouri*, 334 S.W.2d at 361 (citing to *Huffman* as a case in which "including" was used for illustrative purposes).

[17] While Appellant cites to *State Public Defender v. Iowa District Court for Black Hawk County*, 633 N.W.2d 280 (Iowa 2001), as an example of a list being read as an exclusive list, that case is actually better seen as an example of a court using the canon of *in pari materia* to read related statutes together. In that case, the terms following "including" was a cross-reference to two other statutes. *Id.* at 282. As such, the Iowa Supreme Court examined those two statutes to determine how the three statutes related to each other. *Id.* at 282-83. Based on that reading of those two statutes, the Iowa Supreme Court held that the cross-reference could not be read as expanding the underlying statute to the circumstances pending before it (whether the records of the public defender had to be surrendered to the juvenile court for sealing in a juvenile case). *Id.* Similarly, Appellant's citation to *Auer v. Commonwealth*, 46 Va. 637, 646, 621 S.E.2d 140, 144 (Va. App. 2005), is also flawed. While *Auer* noted that in some circumstances a list following "included" or "including" can be restrictive and exclusive, *Auer* also noted that

Theme Park, Inc., v. Director of Revenue, 179 S.W.3d 266, 269-70 (Mo. banc 2005). However, if the General Assembly wanted the doctrine of *expressio unius* to apply in this case, the better choice of words would have been "and" or "limited to" rather than "including." *Cf. Village of Bel-Ridge,* 804 S.W.2d at 824 ("If the Village had intended the listed business to be the only permitted businesses, it would not have said 'such as and including.' Instead, it could have said 'limited to.'") The term "and" would have suggested that what followed was an additional requirement to what went before. The term "including," however, suggests that what follows is a partial list.[18]

As such, the proper canon to apply to the phrase following "including" is not *expressio unius*. Instead, the proper canons to be applied are *noscitur a soccis* (using

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such a list can be expansive and partial. 46 Va. at 645-46, 621 S.E.2d at 144. In *Auer,* the Virginia Court of Appeals held that the listing of certain sources for prior convictions which could be introduced during the penalty phase was not an exclusive list. 46 Va. at 650, 621 S.E.2d at 146.

[18] Appellant cites to multiple definitions in his brief which indicate that, in the ordinary usage of the word, the list following "including" can be either a complete or partial list. Appellant's Brief at 31-32. However, because the dictionary definitions recognize both options, they do not support Appellant's argument that the list must be read as exclusive. While Appellant claims that the General Assembly could have added additional language to indicate that the list was not exclusive, the General Assembly could also have added additional language to indicate that the list was exclusive.

accompanying and associated terms to interpret an ambiguous term) and *ejusdem generis* (meaning of a general term is implied to embrace items/acts similar to the specific terms). *See, e.g., State v. Bratina*, 73 S.W.3d 625, 627 & n.2 (Mo. banc 2002); *State v. William*, 100 S.W.3d 828, 833 (Mo. App. W.D. 2003). Both of these canons give effect to the fact that Missouri courts have traditionally treated "including" as suggesting what follows is a partial, non-exclusive, list or an illustrative list. *Scanwell Freight Express STL, Inc.*, 162 S.W.3d at 482; *Automobile Club of Missouri*, 334 S.W.2d at 361; *In re S.J.S*, 134 S.W.3d. 673, 677 (Mo. App. E.D. 2004); *Estes*, 108 S.W.3d at 800; *Village of Bel-Ridge*, 804 S.W.2d at 824.

The list that follows "including" is a subcategory of the broader category of actions taken by a defendant in the course of operating a motor vehicle that could contribute to causing the death of a person who was not a passenger in that defendant's vehicle and may in some circumstance demonstrate that the defendant was criminally negligent. Contrary to Appellant's suggestions, it is not necessary to deem that the General Assembly intended them as per se being criminally negligent or even prima facie evidence of criminal negligence to give effect to them as something other than an exclusive list. Instead, it is necessary to examine the list to see what the alternatives have in common. While the original list created by the General Assembly only had the two alternatives that apply to a vehicle – leaving a highway and leaving a highway's right-of-way -- the subsequent amendment in 2008 added an additional alternative to the list that applied to a vessel – leaving the water. Section 565.024.1(3)(a). In adding that alternative, the General Assembly implicitly interpreted the existing list as having

something in common with a vessel leaving the water. As such, the 2008 amendment reveals the understanding that the General Assembly had of the meaning of Section 565.024.1(3)(a) prior to that amendment.[19]

The first thing that stands out about the list is that the one term that applies to all three alternatives is the word "leaving." By its very nature, leaving implies a departure from something.

The second thing that stands out about the list is that all of the places that are "left" are someplace that the item being operated normally has a right to be operated on or in. A motor vehicle has the right to be on a highway or within the right of way of a highway. Likewise, the proper place for operating a vessel is on the water.

The existence of these common features is consistent with a legislative intent that this list was non-exclusive. They demonstrate a broader category that distinguishes situations in which the death is caused by leaving the proper place for operation of a vehicle/vessel with those situations in which the fatality was caused by a different means (e.g. failing to stop at a stop sign and colliding with another car of failing to yield to another vessel that had the right of way).

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[19] This amendment to Subparagraph (3)(a) gains added significance from the fact that the General Assembly, instead of merely amending Paragraph (4) to add water vessels to situations involving the death of emergency personnel, enacted an entirely new paragraph – Paragraph (5) to deal with the such deaths from water vessel incidents. House Bill 1715.

In short, the canon of constructions do not support Appellant's reading of "including" as being both restrictive and exclusive. Instead, the canons of constructions support three potential alternative readings. First, they support a construction of Section 565.024.1(3)(a) under which the "including" clause was merely intended to illustrate and emphasize a particular way in a which a non-passenger might be killed to clarify that the statute should be read as including that means of killing without any intent to exclude other potential means. Second, they support a construction of Section 565.024.1(3)(a) under which the "including" clause was intended as an expansion of the situations authorizing the finding of guilt for a class B felony – essentially as an alternative to the death of a non-passenger. Third, they support a construction of Section 565.024.1(3)(a) under which the "including" clause was intended as a limitation (essentially an additional element) but as a non-exclusive list of what is required to support a conviction for the class B felony – i.e. requiring the State to prove both a non-passenger and a travelling outside the authorized portion of the road.

As noted above, Respondent believes that that the proper reading of the statute is the first alternative (emphasizing and illustrating a particular way that a non-passenger may be killed without excluding other ways that a non-passenger might be killed). However, the evidence in this case supports all three of the potential alternatives which

are consistent with proper statutory construction.[20] While statutory construction does not indicate which of these three meanings was most likely intended by the General Assembly, the legislative history does.

D. Legislative History

The legislative history of the 2005 amendments to Section 565.024 also does not support Appellant's claims. In his discussion of the legislative history, Appellant focuses on the history of two of the bills from 2005 – Senate Bill 37 and House Bill 526. Appellant's Brief at 43-45. However, in doing so, Appellant misses much of the actual legislative history from 2005.

During the 2005 regular session, there were two bills that were ultimately enacted that contained similar changes to Section 565.024 – House Bill 972 and Senate Bill 37.[21]

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[20] The only potential construction not supported by the evidence is the one that Appellant asserts – that the vehicle must actually leave the highway with a construction zone being part of the highway. However, as noted above, this construction is not consistent with the canons of statutory construction.

[21] Section 565.024 was amended again during an extraordinary session and in 2006, but neither amendment altered the language of the relevant provisions of subparagraph (3)(a) but did reorganize the structure of the new provisions. Ninety-Third General Assembly, First Extraordinary Session, House Bill 2 (2005); Ninety-Third General Assembly, Senate Bill 872 (2006).

Senate Bill 37[22] had emerged from the Senate Committee on the Judiciary and Civil and Criminal Jurisprudence as a consolidated bill which combined Senate Bill 37, Senate Bill 78, Senate Bill 322, Senate Bill 351, and Senate Bill 424. Of the five original bills, only Senate Bill 37 and Senate Bill 424 had originally included language on involuntary manslaughter with the other three bills dealing with other alcohol-related issues. Appendix at A-19-A-21. Besides House Bill 972, Senate Bill 37, and Senate Bill 424, at least two other bills were introduced regarding involuntary manslaughter – House Bill 526 and Senate Bill 356 – but these bills were never taken up or heard in committee. See Appendix at A-1-A-5.

As originally introduced, these bills proposed five alternative elements which would result in a classification other than a class C felony for deaths resulting from the negligent operation of a motor vehicle while intoxicated. The first proposed element was for killing a person who was not a passenger in the motor vehicle being operated by the defendant. House Bill 972 (introduced version); Senate Bill 356; Senate Bill 424; Appendix at A-4, A-6, A-21. The second proposed element was the death of multiple individuals. House Bill 972 (introduced version); Senate Bill 356; Senate Bill 424; Appendix at A-4, A-6, A-21. The third proposed element was unique to House Bill 972 – the death of a juvenile. House Bill 972 (introduced version); Appendix at A-6. The fourth proposed element was based on the level of blood alcohol with the different levels

[22] For ease of convenience, the post-Senate Committee consolidated bill is referred to as Senate Bill 37 instead of Senate Bill 37, 78, 322, 351, and 424.

ranging from to proposed by the various bills. House Bill 526; House Bill 972; Senate Bill 37 (introduced version); Senate Bill 356; Senate Bill 424; Appendix at A-1, A-4, A-6, A-19, A-21. The fifth proposed element was the vehicle leaving the highway. House Bill 526; Senate Bill 37 (introduced version); Appendix at A-2, A-20.

In short, the two phrases at issue in this case began as separate elements in separate bills. One phrase (involving the characteristics of the victim) started in three bills – House Bill 972, Senate Bill 356, and Senate Bill 424. The other (involving the operation of the motor vehicle) started in two bills – House Bill 526 and Senate Bill 37. One other difference between the five bills was that the three bills which included the death of a non-passenger as a new element proposed that these provisions be contained in a new section – Section 565.022 – and that this new offense be classified as a class B felony. House Bill 972 (introduced version); Senate Bill 356; Senate Bill 424; Appendix at A-4, A-6, A-21. On the other hand, the two bills that involved the vehicle leaving the highway proposed the new elements as enhancement provisions within Section 564.024 and classified the enhanced version of Section 565.024 as a class A felony, with a mandatory minimum term of 85% of the sentence imposed. House Bill 526; Senate Bill 37; Appendix at A-1-A-2, A-19-A-20.

As noted above, Senate Bill 356 and House Bill 526 did not emerge from committee. The consolidated Senate Bill 37 that did emerge from committee included both provisions – a new Section 565.022 creating a class B felony of aggravated involuntary manslaughter for killing a non-passenger and an enhancement provision in Section 565.024 making it a class A felony for leaving the highway. Senate Bill 37

(Senate Committee Substitute); Appendix at A-22. The House Committee Substitute for House Bill 972 kept the relevant language of Section 565.022 intact from the initial bill, and did not alter Section 565.024. Appendix at A-7.

When Senate Bill 37 reached the full Senate, a Senate Substitute was adopted. Senate Bill 37 (Perfected Version); Appendix at A-23. The Senate Substitute made unaggravated involuntary manslaughter a class B felony. Appendix at A-23. It also consolidated the changes to involuntary manslaughter into Section 565.024 and eliminated the separate Section 565.022. Appendix at A-23. Additionally, the Senate Substitute introduced the language at issue in this case "including the death of an individual that results from the defendant's vehicle leaving a highway, as defined by section 301.010, RSMo, or the highway's right-of-way." Senate Bill 37 (Perfected Version); Appendix at A-23. All of these additional circumstances were also class B felonies with the only enhancement to a class A felony being for a blood alcohol level of 0.24%. Senate Bill 37 (Perfected Version); Appendix at A-23.

On the other hand, the version of House Bill 972 passed by the House of Representatives kept the language from the House Committee Substitute with aggravated involuntary manslaughter being kept separate in new Section 565.022. House Bill 972 (Perfected Version); Appendix at A-8.

A Senate Committee Substitute changed the language of House Bill 972 to match the language of Senate Bill 37. House Bill 972 (Senate Committee Substitute); Appendix at A-9. Likewise, the House Committee Substitute for the Senate Substitute for the

Senate Committee Substitute for Senate Bill 37 changed the language in Senate Bill 37 to match House Bill 972. Senate Bill 37 (House Committee Substitute); Appendix at A-24.

The Senate took up House Bill 972 on the same day that the House took up Senate Bill 37. See Appendix at A-18, A-36. Substitutes and amendments were filed on the floor of both houses which brought the manslaughter language of the two bills into conformity. Appendix at A-18, A-25, A-36. Under the final version, the unenhanced form of involuntary manslaughter remained a class C felony. House Bill 972 (Truly Agreed Version); Senate Bill 37 (Truly Agreed Version); Appendix at A-10, A-26. As with the original versions of House Bill 972 and Senate Bill 424, the enhanced "aggravated" version of involuntary manslaughter was a class B felony except that a second conviction under the blood alcohol enhancement was a class A felony. House Bill 972 (Truly Agreed Version); Senate Bill 37 (Truly Agreed Version); Appendix at A-10, A-26. Furthermore, the final version used a blood alcohol content of 0.18% as the threshold under the third option. House Bill 972 (Truly Agreed Version); Senate Bill 37; Appendix at A-10, A-26. The proposal from House Bill 972 that the age of the victim could be a basis for the class B felony was deleted. House Bill 972 (Perfected Version); House Bill 972 (Truly Agreed Version); Senate Bill 37 (Truly Agreed Version); Appendix at A-10, A-26.

A comparison of the original proposals reveals that from the beginning leaving the highway was seen as alternative to killing a non-passenger. None of the original bills required both the killing of a non-passenger and leaving the highway. The fact that leaving the highway was not intended to be an additional requirement is corroborated by

the bill summaries prepared for the final versions of House Bill 972 and Senate Bill 37. Appendix at A-14-A-16, A-33-A-34. Both bill summaries only note that the death of a non-passenger is required to enhance involuntary manslaughter to a class B felony. Appendix at A-15, A-33.

Taking all of this information into account, the legislative history clearly indicates that the General Assembly did not intend for "including" to be interpreted as meaning "and." The best reading of the legislative history would indicate that the General Assembly saw the "including" clause as merely an emphasis on the remaining language of that subparagraph. Accordingly, Section 565.024.1(3)(a) should be read as merely requiring that the decedent be a non-passenger. As the evidence in this case was undisputed that Mr. Donohue was a construction worker and not a passenger in Appellant's vehicle, the evidence was sufficient to support the finding of guilt and the instructions properly submitted this element.

E. Rule of Lenity & Void for Vagueness

In arguing for his interpretation of Section 565.024.1(3)(a) as making leaving the highway an additional element, Appellant requests that this Court use the rule of lenity. Appellant's Brief at 45. However, the rule of lenity applies only if, after the use of the other tools for statutory construction, there remain competing reasonable interpretations of the meaning of a statutory provision. See *Turner v. State*, 245 S.W.3d 826, 828 (Mo. banc 2008).

For the reasons discussed above, Respondent contends that Appellant's proposed interpretation of Section 565.024.1(3)(a) is not a viable or reasonable interpretation after the application of the proper rules of construction. The most reasonable interpretation is treating "leaving the highway" consistent with the legislative summary as merely emphasizing the remainder of the subparagraph. The second best interpretation would be treating "leaving the highway" in the way that it started -- as an alternative element similar to a high blood alcohol level or multiple victims.[23] As such, the rule of lenity does not apply in this situation.

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[23] Even the third best interpretation does not aid Appellant. As noted above, the third best interpretation -- based solely on the use of the canons of constructions and ignoring the legislative history – would interpret the list as an additional element but as a non-exclusive list. Under that interpretation, the State would be required to prove that Appellant drove his vehicle outside the authorized lanes of traffic. In this case, there was substantial proof that Appellant drove his vehicle into a lane which had been closed for use as part of a construction zone and, therefore, committed the class B felony. Under the instructions submitted in this case, the jury was required to find that Appellant drove his vehicle into a closed lane to return a verdict of guilty on the class B felony. L.F. 178. It is only by ignoring the canons of construction and making an implausible reading of the sequence of the changes to the 2005 amendment that Appellant can contend for his interpretation of Section 565.024.1(3)(a). As such, his interpretation is not a reasonable interpretation.

For similar reasons, the doctrine of void for vagueness does not apply to Section 565.024.1(3)(a) and the constitutional challenge raised by Appellant is not colorable. Appellant's main argument supporting his claim that the statute is void for vagueness is the fact that the trial attorneys and the trial judge reached different conclusions as to what the proper interpretation of the statute is. Appellant's Brief at 53-57. As this Court has previously recognized, the role of an advocate is to present the best argument for a particular interpretation of the statute, but the presentation of the argument does not mean that the argument is correct. *South Metropolitan Fire Protection District,* 278 S.W.3d at 666, 668. The mere fact that parties disagree over the interpretation of a provision does not make that provision ambiguous, much less vague. *J.B. Vending Company*, 54 S.W.3d at 188.

As noted at the start of this discussion, the rule on vagueness is that if this Court can determine a reasonable interpretation for a statute, the statute is not void for vagueness. *Pribble,* 285 S.W.3d at 315. It is not unusual after the enactment of a new statute or a new provision in an existing statute that parties will disagree about the interpretation of the new language. The parties in this case have presented competing arguments as to the proper interpretation of Section 565.024.1(3)(a). Appellant has presented nothing based on the fact of the offense committed or on the statutory language that makes Section 565.024.1(3)(a) different from any other new statute that uses the term "including." Under Appellant's theory of the case, the mere use of the term "including" would make any criminal statute void for vagueness.

In the present case, even without Section 565.024.1(3)(a), defendants like Appellant were on notice that it was illegal to drive while intoxicated, Section 577.010; that it was illegal to kill or injure another person as a result of driving while intoxicated, Section 565.024 (2000) and Section 565.060; that it was illegal to drive a motor vehicle outside the proper lanes of a highway, Section 304.015; and that it was illegal to drive into the actual construction zone, Section 304.585. Any claim by Appellant that he or any reasonable person would not know that his behavior was illegal is simply not credible.

Likewise, any claim by Appellant related to difficulties in enforcing and applying the statute could be made for any new statute that a party claims has some latent ambiguity. As with other new statutes, these issues are merely colorable and not substantive, and do not give rise to a claim that the statute is "void for vagueness." Any difficulty based on the potential that the statute might be erroneously interpreted will be eliminated once this Court has declared the correct interpretation.

Points I and II should be denied.

Point II (Information in Lieu of Indictment -- Responds to Point III)

The trial court did not abuse its discretion in permitting the State to file an information in lieu of indictment to conform the charge to the evidence because the amended information did not prejudice the defense in that the defense was on notice that the State's theory was that Appellant was guilty of a class B felony because the victim was a non-passenger and had been struck in a construction zone and, thus, any changes to the wording of the instruction did not prevent Appellant from preparing a defense to that theory.

A decision permitting the State to file an amended charging document is reviewed for abuse of discretion. *State v. Smith,* 242 S.W.3d 735, 742 (Mo. App. S.D. 2007); *State v. McGinness,* 215 S.W.3d 322, 324 (Mo. App. E.D. 2007); *State v. Folson,* 197 S.W.3d 658, 661 (Mo. App. W.D. 2006).

Rule 23.08 permits the State to file an amended charge "at any time before verdict" as long as the amended charge does not charge "an additional or different offense" and does not prejudice a "defendant's substantial rights." In the present case, the original indictment charged that the defendant committed the class B felony of involuntary manslaughter in the first degree in that, while intoxicated, he "caused the death of Gavin Donahue by striking him with a motor vehicle when operating a motor vehicle with criminal negligence in that defendant was driving in a **close** construction zone, **thereby leaving said highway's right of way** and, Gavin Donahue was not a passenger in the vehicle operated by the defendant." L.F. 31 (sic) (emphasis added to words deleted by information in lieu of indictment). At the close of the State's evidence,

the State asked for leave to file an information in lieu of indictment to conform to the evidence. Tr. 961-62. After argument by both sides, that request was granted. Tr. 961-66. The State then filed an information in lieu of indictment which charged that the defendant had committed the class B felony of involuntary manslaughter in the first degree in that the defendant, while intoxicated had "caused the death of Gavin Donohue by striking him with a motor vehicle when operating a motor vehicle with criminal negligence in that defendant was driving in a construction zone **and drove into a lane closed to traffic,** and Gavin Donohue was not a passenger in the vehicle operated by the defendant." L.F. 8, 165 (emphasis added to words added by information in lieu of indictment).

Appellant alleged at trial and alleges on appeal that this alteration substantially prejudiced his defense. At trial, Appellant claimed that he was prejudiced because his defense was based on the fact that he never left the highway. Tr. 963. At trial, Appellant also argued that leaving the highway was a necessary element and that leaving the highway's right of way was different than driving into the closed construction zone. Tr. 963. However, the trial court noted that the original charge noted that Appellant had left the highway by driving into the closed construction zone. Tr. 966. As such, the trial court deemed that the information in lieu of indictment still charged the same acts, just with different "legal" language. Tr. 966.

Appellant now contends that he was substantially prejudiced because it made his defense that the never left the highway inapplicable. Appellant's Brief at 7, 58-59, 61-65. Appellant also contends that this amendment had the effect of precluding the presentation

of evidence showing that he was not negligent because of the improper arrangement of the construction zone. Appellant's Brief at 7, 58-59, 65-67.

It is easiest to address the last claim first as it is based on a misunderstanding of the charge. Both before and after the amendment, the State charged that Appellant was criminally negligent due to driving in the closed portion of a construction zone. L.F. 31, 165. As such, to the extent that Appellant had relevant evidence demonstrating that he was not criminally negligent when he drove in the center lane of the highway, the amendment of the charge did not have the effect of changing the relevance of that evidence. A defendant is criminally negligent when "he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

As will be discussed further in Point III (responding to Point IV), the relevance of the proffered evidence from the *Manual on Uniform Traffic Control Devices* relates to whether the alleged failure to comply with the guidelines in that manual by the company doing the construction work would have altered how a reasonable person in Appellant's position would have acted. Because the State was still required to prove that Appellant drove in the closed lane of the construction zone, both before and after the amendment, and that Appellant was criminally negligent in doing so, the amendment had no effect on this portion of the case. In fact, the jury was instructed as to both the charged offense and the lesser-included offense of manslaughter in the second degree that "[Appellant] was

driving in a construction zone and drove into a lane closed to traffic, and . . . . was thereby criminally negligent."[24] L.F. 178, 181.

The real change caused by this amendment was the elimination of the language alleging that Appellant left the highway. L.F. 31, 165. From the beginning of trial, Appellant contended that "leaving the highway" was an essential element of the charge. L.F. 155-57, Tr. 10-12. However, it was clear from the beginning of the trial that the State disagreed with Appellant's contention and did not believe that it was necessary to prove that Appellant left the highway. Tr. 12.

Whether or not the proper interpretation of Section 565.024.1(3)(a) requires the State to prove that Appellant left the highway is the subject of Appellant's first two issues on appeal which were responded to in Point I. If this Court accepts Appellant's theory of the statute, this issue becomes moot. If this Court accepts Respondent's position on the proper interpretation of the statute, the defense that Appellant did not actually leave the highway becomes a "technical" defense. "Loss of a technical defense is not the type of prejudice referred to in Rule 23.08." *State v. Walter,* 918 S.W.2d 927, 929 (Mo. App. E.D. 1996); *State v. Endicott,* 881 S.W.2d 661, 664 (Mo. App. W.D. 1994). The

[24] While Appellant chooses to characterize a substantial portion of his evidence as being solely relevant to the issue of whether Appellant left the highway, a review of the evidence cited in Appellant's brief indicates that it also was relevant to the issue of whether he was criminally negligent in leaving the unpaved lane and entering the closed paved lane. Appellant's Brief at 62 n. 21, 64 n.22.

elimination of a defense based upon language included in the original charging document not necessary to the actual crime charged does not constitute prejudice under Rule 23.08. *State v. Bratton,* 779 S.W.2d 633, 634-35 (Mo. App. W.D. 1989).

The test for substantial prejudice is similar to the test for a fatal variance.[25] There is a fatal variance between the instructions and the charging document if it prevents the defendant "ability to adequately defend against the charges presented to the information and given to the jury in the instructions." *State v. Lee,* 841 S.W.2d 648, 650 (Mo. banc 1992). In *Lee,* the jury was instructed in a case alleging robbery in the first degree on serious physical injury when the actual charge involved possession of a deadly weapon. *Id.* at 649-50. However, all of the evidence indicated that the injury was caused by a gunshot. *Id.* at 650-61. As such, the defense evidence in that case still was viable. *Id.*

Likewise in this case, most of the evidence presented by Appellant was still relevant. In opening statement, Appellant presented two major defenses. First, he claimed that the evidence would show that he was not intoxicated. Tr. 280-82. This theory was still a defense after the amendment to the charge. Second, he claimed that the

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[25] Logically, the same or a greater degree of prejudice should be required for a claim that an amended charging document creates substantial prejudice. In the absence of leave to amend, the claim would become that there was a variance between the instruction and the charges. If it would not be error to instruct the jury as it was done in this case in the absence of the amendment to the charge, then there can be no prejudice from actually permitting the amendment.

design of the construction zone confused him as to which lane he was supposed to be driving in, and, thus, that he was not negligent when he drove in the center lane. Tr. 288-89. This theory was also still a defense after the amendment.

The rule permits the State to conform its information and the instructions to the evidence presented. *State v. Prigett*, 470 S.W.2d 459, 462 (Mo. 1971) (permitting addition of alternative means of causing death in homicide case when evidence raised that possibility). As such, the rule makes clear that slight changes to the charging document are permissible until the verdict is returned as long as the essential accusation and the essential elements remain the same.

In this case, as recognized by the trial court, the essential language of the original indictment was that Appellant was intoxicated and that he was criminally negligent when he went into the closed portion of the construction zone. L.F. 31, Tr. The information in lieu of indictment did not change the essential accusation or the essential elements.

Point III should be denied.

Point III (Manual on Uniform Traffic Control Devices -- Responds to Point IV)

The trial court did not abuse its discretion in excluding the Manual on Uniform Traffic Control Devices from evidence because such evidence was collateral to the issues on trial in that the issue before the jury was whether Appellant was criminally negligent in driving into a closed lane and, as such, the only issue about the design of the construction zone which was relevant to the jury's decision was whether Appellant recognized that he was entering a closed lane, not whether the design of that closed lane fully complied with the professional standards used in road maintenance work. Furthermore, there was no prejudice from the exclusion of the manual because the manual would not have demonstrated that the design was improper, evidence of the standards had already been presented to the jury through witness testimony, and Appellant admitted seeing the cones and recognizing that a lane was closed (claiming that he was confused as to which side of the cones was the open lane).

The trial court's ruling on the admission or exclusion of evidence is reviewed for abuse of discretion. *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009). A trial court abuses its discretion when its ruling is "clearly against the logic of the circumstances." *Id.* Furthermore, any error in excluding evidence must prejudice the defendant. *Id.* at 837.

Appellant in this case sought to ask certain questions about the *Manual on Uniform Traffic Control Devices* (hereinafter the "*Manual*") to Randy Besand, a supervisor with the construction company that was working this construction zone, and Officer Timothy Deckard, who did the measurements at the scene of the accident. Tr.

822-24, 896-99. Some questions were permitted, but other questions were not permitted.[26] Tr. 896-99. In particular, Appellant was permitted to ask Mr. Besand what the national standard for spacing between cones in a construction zone was. Tr. 897. Appellant was also allowed to ask what the distance between the cones in this construction zone actually was. Tr. 822-23, 899. Appellant was not permitted to have Mr. Besand draw the legal conclusion about whether the cones complied with the national standard. Tr. 899-900.

In discussing this issue with the attorneys, the trial court ruled that whether or not the spacing technically complied with the national standards was not material to whether or not the lane was closed to traffic. Tr. 900-01. In other words, the trial court saw the issue of compliance with the national standards as a collateral issue. "If evidence pertaining to collateral matters bring into the case a whole new controversial matter which would result in confusion of the issues . . .," it is not an abuse of discretion to

[26] There is no indication in the record that Appellant ever actually offered the *Manual* into evidence. The only question to which an objection was actually sustained was asking the witness whether the distance between the cones in this case actually complied with the standard. Tr. 899-900. As such, other than that one question, it is unclear what additional evidence Appellant believes was improperly excluded. It is also unclear which version Appellant was using – the original 2003 version, the 2004 revisions to the 2003 version, or the 2007 revisions to the 2003 version. However, all three versions are substantially the same for the issues presented in this case.

exclude the issues. While Appellant contends that this evidence was material to his defense, a review of the *Manual*, the associated federal regulations, and the actual issue in the case demonstrates that this issue was collateral to the real issue.

Appellant ultimately concedes that the real issue is whether the spacing of the cones would have contributed to a reasonable person being confused about whether the lanes were closed. Appellant's Brief at 73. As such, to make the rules in the *Manual* relevant, Appellant would either have had to demonstrate that a reasonable person or Appellant himself would know what those standards were so that a deviation of the type allegedly present in this case would cause that person to be confused about the status of the lanes. There was, of course, no such evidence in this case. Because no reasonable traveler on the road would have recognized the alleged deviations from the standard, the question for the jury was whether a reasonable person would have been confused by the actual layout of the cones regardless of whether or not those cones complied with the proper standards.[27] Allowing additional evidence regarding the standards would have only confused this issue.

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[27] For example, other standards related to construction zones include the type and size of warning signs. As such, using Appellant's theory, a construction zone would be improper and in violation of the standards if a sign was two inches too small. The typical person would not even notice that violation or assume that there was no construction zone because the standard was violated. There might be violations of the requirements for signage which might be confusing (e.g. an arrow pointing in the wrong way), but the

Furthermore, Appellant's argument about why this evidence is important reflects a misinterpretation and misunderstanding of the actual content of the regulations and manual. Under federal regulations, the purpose of the *Manual* is to "obtain basic uniformity of traffic control devices on all streets and highways. 23 C.F.R. §655.601. As such, construction projects using federal funding are required to use traffic control devices which conform to the *Manual.* 23 C.F.R. §655.603(d)(3).

In the case of construction zones, the purpose of the regulations on temporary traffic control devices, like cones, is to reduce fatalities by "establishing minimum requirements and providing **guidance"** to construction project. 23 C.F.R §630.1102 (emphasis added).[28] The agencies with authority of such projects are to impose such requirements based on "consideration of the standards and/or **guidance**" in the *Manual.* 23 C.F.R. §630.1106(b) (emphasis added). Use of traffic control devices, like cones, should "be given **appropriate consideration**" to reduce the risk of a motor vehicle intruding into the work zone. 23 C.F.R. §630.1108(c).

This distinction between mandatory rules and those things which are intended as guidance for the consideration of those planning and running construction zones is

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reason for the confusion is not that the sign violates the rule but that the sign is actually confusing.

[28] It should be noted that Section 630 of Title 23 of the Code of Federal Regulations involves pre-construction procedure. In other words, this part of the regulations deal with things that should be considered in planning the construction work.

continued in the *Manual.* In the introduction chapter of the *Manual*, it is stated "the heading Standard, Guidance, Option, and Support are used to classify the nature of the text that follows." *Manual*, at I-1. According to the *Manual*, those headings mean:

1. Standard – a statement of **required, mandatory or specifically prohibitive practice** regarding a traffic control device. . . . The verb **shall** is typically used. Standards are sometimes modified by Options.
2. Guidance – a statement of **recommended, but not mandatory, practice** in typical situations, with **deviations allowed** if engineering judgment or engineering study indicates the deviation to be appropriate. . . . The verb **should** is typically used. Guidance statements are sometimes modified by Options.
3. Option – a statement of practice that is a permissive condition and carries no requirement or recommendation. Options may contain allowable modifications to a Standard or Guidance. . . . The verb may is typically used.
4. Support – an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. . . . The verbs shall, should, and may are not used in Support statements.

Id. at I-1, I-3; Appendix at A-37-A-38. In other words, the *Manual* contains both actual mandatory standards and suggestions of best practice that are not binding. For example,

the *Manual* contains rules on the size, shape, color, and placement of lines on the highway (in the technical language "longitudinal pavement markings"). Those rules impose a mandatory standard that a "normal line" is 100 millimeters to 150 millimeters wide, that a "wide line" is at least twice that width, that a double line is two parallel lines separated by a "discernable" space. *Manual,* Section 3A.05 at 3A-2; Appendix at A-40. On the other hand those same rules, merely give guidance as to the length and gaps between the segments of a broken line, suggesting that they should be 3 meters in length and should be separated by 9 meter gaps or a similar ration as appropriate given traffic speed and the "need for delineation." *Id.*; Appendix at A-40

There are two parts of the *Manual* that are relevant to this case – one of which hurts Appellant and the other of which is neutral. The part of the *Manual* that hurts Appellant is Section 1A.08. That Section clearly provides in a **Standard** that "[w]hen the public agency or the official having jurisdiction over a street or highway has granted proper authority, others such as **contractors** and public utility companies shall be permitted to install temporary traffic control devices in temporary traffic control zones." *Manual,* Section 1A.08 at 1A-3; Appendix at A-39. As such, there was no legal or factual support for Appellant's attempts to argue that there was no valid construction zone or lane closure because the closure was done by the construction company.

The part of the *Manual* that Appellant relied upon at the trial level and in this Court, also does not support Appellant's position. Section 6F.58 contains some Standards regarding channeling devices. However, the language concerning spacing is found in a Guidance statement. See *Manual,* Section 6F.58 at 6F-29; Appendix at A-41.

As such, under the definition of a Guidance from the Introduction, deviation from the suggested maximum spacing is authorized. Thus, Appellant's attempt to convince the trial court and the jury that such deviations invalidated the construction zone were misleading at best.

Because the manual authorized deviations from the suggested maximum separation between cones of ninety feet, the issue of whether the construction company was negligent in its decision regarding the proper spacing was a collateral issue. It did not matter whether or not the spacing was legally proper. What mattered was the impression that a person driving on the road would have had of the meaning of those cones.

Even if such evidence was not collateral, the exclusion of the evidence was not prejudicial for two basic reasons. First, the evidence was cumulative. Second, Appellant's own testimony included admissions that he saw the cones and recognized the existence of the construction zone, thereby eliminating this aspect of the design of the construction zone as a relevant issue.

As to the first reason, prior to the objection, Officer Deckard had testified as to the spacing of the cones being between 160 and 180 feet. Tr. 822-23. Mr. Besand believed that the spacing was less than Officer Deckard had measured, but did not remember the exact spacing. Tr. 899. Mr. Besand had testified that, given the authorized speed at this location, the formula in the *Manual* indicated that the cones should have been no more than 90 feet apart. Tr. 897, 902. The area of questioning which was not permitted was the ultimate conclusion of whether or not the placement of the cones violated the *Manual.*

Tr. 899-901. However, the facts allowing the jury to make that conclusion had already been presented to the jury, and they were just as capable as Mr. Besand of reaching that conclusion. As such, this specific area of testimony was cumulative to the evidence already presented to the jury. The failure to admit cumulative evidence is not prejudicial. *State v. Glass,* 136 S.W.3d 496, 519 (Mo. banc 2004); *cf. Forrest v. State,* 290 S.W.3d 704, 710 (Mo. banc 2009) (defendant not prejudiced by failure of counsel to present cumulative evidence).[29]

Furthermore, Appellant was not prejudiced because, in his testimony, he made judicial admissions concerning his awareness of the construction zone. "When a defendant makes a voluntary judicial admission of fact before a jury, it substitutes for evidence and dispenses with proof of the actual fact and the admission is conclusive on him for the purposes of the case." *State v. Roberts,* 948 S.W.2d 577, 588 (Mo. banc 1997).

[29] While there are some differences between prejudice on direct appeal and prejudice on a claim of ineffective assistance of counsel, both types of prejudice are concerned with the effect on the outcome of the verdict. In this case, Appellant had already made the point that the cones were not properly placed. There is no reasonable likelihood that having Mr. Besand agree with that fact would have resulted in a different decision from the jury as to whether or not Appellant was negligent in not recognizing that the paved lanes were closed despite the cones being three seconds apart instead of being slightly over one second apart.

When Appellant testified, he admitted that he saw the start of the construction zone and that it was clear that the lanes were tapering off with the left two lanes being closed. Tr. 1042, 1111-12. Appellant also admitted that when he first encountered the dump truck, the cones were in the lane that he was in forcing him onto the shoulder. Tr. 1045-47. Appellant admitted that he followed the truck first into the middle lane and then back into the right lane, and that the cones were still in that lane forcing him to drive on the rumble strip of the shoulder. Tr. 1047-48, 1114-16, 1118, 1140-41. Appellant also admitted seeing the cones approximately 50 yards apart. Tr. 1048-50. Appellant admitted knowing that either the paved lane or the unpaved lane was closed. Tr. 1116, 1120. Appellant claimed that he thought the cones were closing his lane and that the paved lane was the open lane. Tr. 1121-22, 1142, 1144-45, 1146-48.

In short, Appellant consistently testified to being aware of the presence of the cones and that the cones were intended to separate the closed lanes from the open lanes. As such, any argument by Appellant that the separation between the cones confused him as to whether or not a lane was closed is foreclosed by his own judicial admission that he was aware that the purpose of the cones was to indicate that a lane was closed. As such, Appellant could not be prejudiced by the exclusion of evidence intended to suggest that the spacing of the cones made it unclear whether or not he was still in an area where lanes were closed.

Appellant's testimony limited his defense on the issue of criminal negligence to the question of which lanes were open and which lanes were closed (and whether his claimed confusion about which lane constituted "a failure to be aware of a substantial and

unjustifiable risk that circumstances exist" and "a gross deviation from the standard of care that a reasonable person would exercise in that situation"). It foreclosed any argument that the spacing between the cones led him to believe that all of the lanes were open and that he was out of the construction zone.

Because Appellant's own testimony removed the issue of the spacing from being a valid issue for the jury to consider, he did not suffer any prejudice from the minimal restriction on being able to offer evidence related to the issue of spacing.

Point IV should be denied.

Point IV (Speeding Minivan -- Responds to Point V)

The trial court did not abuse its discretion in permitting testimony from Derek Eichholz that he had been passed by a newer dark-colored minivan, similar to Appellant's, which was driving at a speed of approximately 90 miles per hour several miles before the collision site because such evidence was relevant and admissible in that this evidence tends to establish a motive for why Appellant drove into the construction zone (i.e., being in a hurry and not wanting to be slowed down by the dump truck). Furthermore, to the extent that Appellant claims that this evidence was insufficiently probative on that issue, the same arguments preclude a finding of prejudice from the admission of that evidence and go to weight not admissibility.

The trial court's ruling on the admission or exclusion of evidence is reviewed for abuse of discretion. *State v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009). A trial court abuses its discretion when its ruling is "clearly against the logic of the circumstances." *Id.* Furthermore, any error in excluding evidence must prejudice the defendant. *Id.* at 837.

Appellant's main argument is that the evidence should have been excluded because it was not an element of the offense. Appellant's Brief at 80-86. Implicit in Appellant's argument is the claim that evidence of speeding was improper propensity evidence because his negligent act was driving in the construction zone not speeding.

In making this argument, Appellant ignores that evidence of uncharged crimes can be admissible to prove motive. *See, e.g., State v. Edwards*, 116 S.W.3d 511, 533 (Mo. banc 2003); *State v. Mayes*, 63 S.W.3d 615, 629 (Mo. banc 2001). As the State

explained to the trial court, evidence of Appellant's speeding approximately five miles before reaching the construction zone would tend to demonstrate Appellant's impatience, especially when combined with other evidence of his driving near the time that he encountered the dump truck. Tr. 244-45. As such, the trial court correctly ruled that such evidence did have a tendency to show why (i.e. the motive) Appellant went into the closed construction lane. Tr. 246-47.

Similarly, when uncharged events are part of the sequence that includes the charged crime, evidence of such crimes is admissible. *State v. Wolfe,* 13 S.W.3d 248, 262 (Mo. banc 2000). Here, the evidence tended to demonstrate the circumstances and actions of Appellant immediately prior to entering the construction zone.

Appellant's remaining arguments deal with the "reliability" of Mr. Eichholz's testimony. Appellant's Brief at 86-88. As this Court has repeatedly noted, factors that undermine the appropriate weight or reliability of evidence like remoteness, or minor changes in the appearance of a scene between the time of the crime and the time that a photograph is taken of the scene or problems with the basis for an expert's opinion do not automatically preclude the admissibility of such evidence. *See, e.g. Elliott v. State,* 215 S.W.3d 88, 95 (Mo. banc 2007); *State v. Jaco,* 156 S.W.3d 775, 778-79 (Mo. banc 2005); *State v. Smith,* 32 S.W.3d 532, 554 (Mo. banc 2000); *State v. Richardson,* 932 S.W.2d 301, 320 (Mo. banc 1996).

The evidence from Mr. Eichholz demonstrated that he had encountered a dark-colored, newer model minivan on Highway 40 several miles east of the collision site.[30] Dep. Tr. 6-7. According to Mr. Eichholz, there wasn't a lot of traffic on Highway 40. Dep. Tr. 5. Mr. Eichholz testified that the minivan was travelling very fast, possibly in excess of 90 miles per hour. Dep. Tr. 8. When Mr. Eichholz encountered Appellant's minivan, he also described Appellant's minivan as a darker, newer looking minivan. Dep. Tr. 20.

The question for the trial court and the jury in determining the probative value of the evidence from Mr. Eichholz was the likelihood that in the early morning hours with

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[30] There was no precise testimony as to the distance, but Appellant's counsel estimated the difference at "over five miles." Tr. 242. Mr. Eichholz testified that he was passed near the exit for Highway 141 (Exit 22) Dep. Tr. 8. The construction zone began near the Clarkson/Olive overpass (between Exit 19B and Exit 20). Tr. 320. Maps indicate that the distance between 141 and the Clarkson/Olive overpass is about 3 miles. Appellant's minivan was on Highway 40 by that location as it passed Mr. Zahner after the furthest left lane had merged into the center lane but before the center lane had merged into the right-hand lane. Tr. 358-60. Mr. Besand testified that the equipment was actually near Long's Road (Exit 16). Tr. 920. The accident apparently occurred about one mile east of Boone's Crossing (which should be Exit 17). Tr. 920-21. This would place the distance at close to five miles. Mr. Eichholz described the distance as several miles. Dep. Tr. 29.

light traffic that there would be two dark-colored, newer model minivans. If a juror believed that it was unlikely, then Mr. Eichholz testimony was entitled to some weight. If a juror believed that there was a good chance of two such vehicles, then the probative value was less. However, the prejudicial value of the evidence (the possibility that Appellant committed other bad acts and should be convicted for that reason) is based on the same evaluation. Thus, there is a direct and proportional link between the probative value and the prejudicial value of the evidence. In fact, Appellant's argument as to why the evidence is prejudicial requires the jury to first draw the conclusion that the speeding vehicle was Appellant's van.[31]

Even if the evidence was improperly admitted, there was no reasonable likelihood that it had any effect on the verdict of the jury. As noted in Point III, Appellant admitted to still seeing the cones which were forcing him onto the shoulder. The only reasonable conclusion from his testimony is that he was aware and knew that he was in a construction zone with closed lanes. The evidence also made clear that, at the start of

[31] Furthermore, this argument is based on a claim that the State's closing argument was improper because it made inferences not supported by the evidence. Appellant's Brief at 87-90. However, Appellant has raised no point alleging that the closing argument was improper. As such, this claim is not properly presented for review by this Court. Needless to say, improper argument regarding properly admitted evidence does not make the evidence inadmissible.

the construction zone, the left-hand lanes were closed and traffic was forced to merge to the right.

In light of this evidence, Appellant's claim that he was confused because he was having to drive partially on the shoulder was incredible and at odds with common experience. It is not unusual in a construction zone for the paving work to go partially into an open right-hand lane forcing vehicles to drive on the shoulder for extended distances. If the construction work had moved to the right-hand lane and the left-hand lanes were open, common experience would indicate that there would be a set of cones or other barriers directing the traffic which had been in the right-hand lane into the left-hand lanes. The jury did not convict Appellant because he might have been speeding. The jury convicted Appellant because he thought he could get away with driving in the closed lanes and did not consider the possibility that he might suddenly encounter a person working in the closed lane. There is no reasonable likelihood that the verdict in this case would have been different if the trial court had excluded the evidence that Mr. Eichholz had been passed by a speeding mini-van similar to Appellant's.

Point V should be denied.

CONCLUSION

The judgment of the trial court 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 16,043 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 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 17th day of February, 2010, to:

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