IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

CASE NO. 5D07-2376

WAYNE C. SYVERUD,

Appellant,

v. L.T. Case No. 2005-2465-CF

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Defendant, Wayne C. Syverud ("Mr. Syverud"), challenges a dispositive order denying his pre-trial motion in limine to exclude any statements that he may have made to law enforcement, rescue personnel, and others that he was driving a Ford Explorer that crashed into two other vehicles on County Road 210 in St. Johns County on December 25, 2005.

Facts Related to the December 25, 2005 Accident

On December 25, 2005, at approximately 6:09 p.m., two vehicles were struck by a red Ford Explorer while traveling on County Road 210, near Ponte Vedra Beach, Florida. (R-I-71.) The Ford Explorer, which was traveling westbound on County Road 210, struck the rear of an eastbound Ford Expedition, and then collided almost head-on with an eastbound Jeep Cherokee. (R-I-1; R-I-71-72; R-II-274-75.) The occupants of the Ford Expedition were not injured, although the vehicle was damaged. (R-I-1; R-II-284-87.) The driver of the Jeep Cherokee died, and two of his four passengers were seriously injured. (R-I-1; R-I-71-72; *see also* R-II-301, 324-26.)

Sergeant David E. Dupont of the Florida Highway Patrol investigated the accident. (R-I-60; R-II-329-30.) Sergeant Dupont conducted the traffic crash investigation and assisted with the criminal investigation. (R-II-329-30, 331-34; *see also id.* at 344-45.) Sergeant Dupont required Mr. Syverud to perform a series

of field sobriety exercises; however, he never advised Mr. Syverud of his *Miranda* rights. (R-I-60-61; R-II-331-32.) Upon the completion of Sergeant Dupont's investigation, Mr. Syverud was arrested, and cited with DUI manslaughter, four charges of DUI with serious bodily injury, two charges of DUI with property damage, and driving on the wrong side of a divided roadway. (*See* R-I-1-14.)

On March 31, 2006, the State filed the Information, charging Mr. Syverud with one count of DUI manslaughter, two counts of DUI with serious bodily injury, and one count of DUI with injury to property or person. (R-I-18-19.) The State filed its Announcement of No Information as to the two counts of DUI with property damage. (R-I-20.) Mr. Syverud entered his not guilty plea on April 18, 2006. (R-I-23-24.)

Defendant's Motions in Limine

The defense filed several motions in limine in January and February, 2007, among those the Defendant's Fourth Motion in Limine (Crash Report Privilege) and the Defendant's Sixth Motion in Limine (*Corpus Delicti* Issue). (R-I-60-62; R-I-71-75.)

Defendant's Fourth Motion in Limine (Crash Report Privilege) (the "Motion to Exclude Crash Report") sought to prohibit the State from introducing reports regarding the traffic crash investigation or any statements made by Mr. Syverud to law enforcement. (R-I-60-61.)

Defendant's Sixth Motion in Limine (*Corpus Delicti* Issue) (the "*Corpus Delicti* Motion in Limine") sought to exclude from evidence any admission by Mr. Syverud to law enforcement, rescue personnel, or any others that he was driving the Ford Explorer that caused the accident. (R-I-71-75.) Absent proof independent of those statements, the defense argued, the State necessarily could not establish the *corpus delicti* of the charged offenses. (*Id.* at 72-75.)

The Evidentiary Hearing on the Motions in Limine

On March 2, 2007, the trial court held an evidentiary hearing on the various motions in limine, including the Motion to Exclude Crash Report and the *Corpus Delicti* Motion in Limine. At the hearing, the State presented the testimony of eight witnesses, none of whom could identify Mr. Syverud as the driver of the Ford Explorer on the day of the accident. (R-I-95-97; R-II-277-78, 279-80, 289-90, 296, 310-13.)

The evidence before the trial court established that on December 25, 2005, Mr. Syverud assisted in serving Christmas dinner at an American Legion Post in Palm Valley, Florida. (R-II-310-13.) The American Legion, which is less than a mile from County Road 210 (*id.* at 310), typically closes at 6 p.m. on Christmas Day (*id.* at 311.) Alcohol was served there. (*Id.* at 312.) One of the State's witnesses, Michael Holland, testified at the evidentiary hearing that when he left

the American Legion at around 4:30 or 4:45 p.m. on the afternoon of December 25, 2005, Mr. Syverud was still there. (*Id.* at 312-13.)

The accident occurred at about 6:09 p.m. on County Road 210. (R-II-315.) The State relied on the testimony of Investigator Robert Hardwick, who testified that County Road 210 is the most direct route from the American Legion to Mr. Syverud's residence. (R-II-338-40.) According to Investigator Hardwick, the distance between the American Legion and the scene of the crash is approximately 8.1 miles, which would take about ten minutes to drive at the posted speed limit. (*Id.* at 340-41.)

The State did not elicit testimony from any witness who had seen Mr. Syverud driving a red Ford Explorer at any time on December 25, 2005. (*See* R-II-279-80, 296, 311-13.) Two of the witnesses to the accident, Meagan Limbo Bonds and John Aguilera, admitted that they did not see who was driving the Ford Explorer, whether before or after the accident, and did not know how many people were in the Explorer at the time of the crash. (R-II-279-80, 296.) Ms. Bonds specifically stated that she could not see inside the Ford Explorer. (*Id.* at 279-80.)

After the crash, Ms. Bonds and Mr. Aguilera first saw Mr. Syverud leaning against the front bumper or the front passenger side of the Ford Explorer. (*Id.* at 277-78; *id.* at 289, 296.) According to the description of the two witnesses, Mr. Syverud's face was red, his eyes were bloodshot, and he was staring at the

deceased driver of the Jeep Cherokee with "a glazed look on his face." (*Id.* at 278, 289-90.) Mr. Aguilera noted that Mr. Syverud appeared to be under the influence of alcohol. (*Id.* at 290.) Mr. Aguilera approached Mr. Syverud to ask a question, but received no response. (*Id.* at 290-91.)

Ms. Bonds and Mr. Aguilera testified that when they first noticed Mr. Syverud, they saw another man standing near the passenger side of the Ford Explorer. (R-II-281-82, 296-99.) This unidentified male, who was wearing a Florida State University ("FSU") pullover, was talking low on a cell phone (*id.* at 281) and looked upset (*id.* at 296-97). Neither of the witnesses could state how or when this unidentified male arrived at the scene of the accident. (*Id.* at 296-97.)

Meanwhile, rescue personnel and law enforcement officers arrived at the scene, along with neighbors from the homes located adjacent to County Road 210. (*Id.* at 278-79, 281, 291-96.) At least ten neighbors appeared at the scene, together with approximately seven fire rescue personnel and three sheriff's officers. (*Id.* at 295-96.) Many of the houses along this stretch of County Road 210 are set back from the road, with long driveways. (*Id.* at 293-94, 302.) Consequently, Ms. Bonds testified that there was some delay before the neighbors and other bystanders appeared at the accident site. (*Id.* at 281.)

A St. Johns County Fire Rescue battalion chief, Jeffrey Prevatt, also testified on behalf of the State. (*Id.* at 314-15.) Chief Prevatt arrived at the accident scene

at 6:17 p.m. (*Id.* at 315.) Like Mr. Aguilera and Ms. Bonds, Chief Prevatt testified that he first saw Mr. Syverud standing near the passenger side of the Ford Explorer. (*Id.* at 317.) According to Chief Prevatt, Mr. Syverud was "standing by the passenger side rear tire, leaning against the vehicle." (*Id.* at 317-18.) When asked by Chief Prevatt if he had been involved in the accident, Mr. Syverud answered, "I was driving," and pointed to the Ford Explorer. (*Id.* at 318.)

In addition to the testimony of Chief Prevatt, the State elicited testimony from a former St. Johns County Sheriff's Officer, Theresa Meers. (R-II-299.) Ms. Meers (formerly Sergeant Meers) testified that she responded to the crash scene on December 25, 2005; she arrived fifteen to twenty minutes after she received the dispatch. (*Id.* at 299-300.) Fire and rescue personnel and several bystanders were at the scene, along with Deputy Petty of the St. Johns County Sheriff's Office. (*Id.* at 300-302.)

Ms. Meers asked Deputy Petty to identify the witnesses to the actual crash so that "when Florida Highway Patrol arrived on scene, we knew who to identify [as] the participants in the crash." (*Id.* at 300.) She also asked Deputy Petty to secure the scene so that law enforcement could investigate the crash and determine who was involved in the accident. (*Id.* at 300, 306-307.)

Ms. Meers testified that she first saw Mr. Syverud standing on the passenger side of the Ford Explorer, staring "in shock" at the deceased driver of the Jeep

Cherokee. (*Id.* at 303-304.) According to Ms. Meers, at one point Mr. Syverud began walking westbound on County Road 210, toward U.S. 1. (*Id.* at 304). She testified that Mr. Syverud was approximately thirty to forty feet from his vehicle when she asked him to come over and talk to her. (*Id.* at 305.) When Mr. Syverud complied with her request, she asked where he was going. According to Ms. Meers:

> He said he was walking. And I asked him if he was the driver of the red Ford Explorer. I pointed to the vehicle and he said yes. I asked him if he was hurt in any way or had any injuries and he said no.

(*Id.*) She then asked the St. Johns County Sheriff's Deputy to secure Mr. Syverud in a police vehicle for the Florida Highway Patrol's investigation. (*Id.* at 305, 307-308.)

The State also called David E. Dupont, an officer with the Florida Highway Patrol. (R-II-320.) Sergeant Dupont investigated the crash as a traffic homicide sergeant for Flagler, Putnam, and St. Johns County. (*Id.* at 320-21, 329-30.) He testified that when he arrived at the scene of the accident at 6:38 p.m., other law enforcement personnel and fire rescue were already there, along with bystanders. (*Id.* at 321.)

Sergeant Dupont first saw Mr. Syverud walking off into the woods, approximately fifty to sixty feet east of the Ford Explorer and probably forty feet off County Road 210. (*Id.* at 322-23.) Sergeant Dupont had reason to believe that

Mr. Syverud, who was wearing a red shirt, was one of the drivers involved in the crash. (*Id.* at 322, 330.)

When Sergeant Dupont approached Mr. Syverud and asked whether he was driving one of the vehicles, Mr. Syverud responded that he was. (*Id.* at 323.) Sergeant Dupont observed that Mr. Syverud had a moderate odor of alcoholic beverage and a flushed face, and appeared impaired. (*Id.*) Sergeant Dupont did not ask Mr. Syverud why he was in that area. (*Id.* at 331.) Instead, he asked Mr. Syverud to come back up to the roadway and to stay behind the fire truck. (*Id.* at 324, 327.)

After Sergeant Dupont spent a few minutes talking with Mr. Aguilera at the accident scene, he heard a deputy state that they could not find the subject. (*Id.* at 327.) Sergeant Dupont then went around to the front of the fire truck and found Mr. Syverud, who thereafter may have been placed in a patrol car. (*Id.* at 327-28.) At that point, Sergeant Dupont conceded, Mr. Syverud was not free to leave. (*Id.* at 331.)

Sergeant Dupont led Mr. Syverud through field sobriety tests at the scene. (*Id.* at 332.) He did not ever read Mr. Syverud his *Miranda* rights. (*Id.* at 331-32.)

Sergeant Dupont testified that the Ford Explorer was titled to Susan M. Syverud, 14222 Fern Hammock Drive, Jacksonville, Florida 32258. (*Id.* at 335.) Mr. Syverud's address was listed as 14772 Fern Hammock Drive. (*Id.*)

Upon the conclusion of the State's evidence, the defense called Corporal Gregory Allen Cone, a traffic homicide investigator with the Florida Highway Patrol. (R-II-342.) Corporal Cone investigated only the fatality that resulted from the crash. (*Id.* at 344-45.)

The defense sought to elicit testimony from Corporal Cone about a recorded statement that Ms. Bond had given during the investigation. (*Id.* at 348-50.) The trial court refused to allow the defense to impeach Ms. Bond's testimony with any testimony from Corporal Cone. (*Id.* at 350.) The trial court did allow the defense to proffer Corporal Cone's deposition testimony, during which he testified that Ms. Bonds (then Ms. Limbo) had given a recorded statement in which she indicated that she thought she had seen two occupants in the Ford Explorer. (*Id.* at 351-52.) The trial court stated that it would not rely on the proffered testimony in considering its ruling. (*Id.* at 352-53.)

Argument on the Motions

The trial court heard argument on the *Corpus Delicti* Motion in Limine on March 7, 2007. At the hearing, the defense argued that the State had not met its burden of proving substantial evidence, independent of Mr. Syverud's admissions, to establish the *corpus delicti* of the charged offenses. (R-III-398.) The defense emphasized the evidence showing that: (1) no witness could place Mr. Syverud behind the wheel of the Ford Explorer at any time on December 25, 2005, whether

before the crash or when the accident occurred; (2) no witness had seen Mr. Syverud (or any other individual, for that matter) exit the Ford Explorer after the accident; (3) two of the witnesses to the accident, along with law enforcement and fire rescue personnel, testified that they had first seen Mr. Syverud leaning against the passenger side of the Ford Explorer; (4) the same two witnesses to the accident testified that right around this same time, they saw another, unidentified male in an FSU pullover, standing very close to the passenger side of the Ford Explorer; and (5) because the houses along this stretch of County Road 210 are set back from the roadway, neighbors did not immediately appear at the scene of the accident. (*Id.* at 394-96.)

The State opposed the *Corpus Delicti* Motion in Limine, asserting that the State was required only to introduce evidence that "tends" to show the elements of the crime. (*Id.* at 398-99.) The State sought to establish a timeline for the afternoon of the crash, arguing that: (1) Mr. Syverud left the American Legion at 6:00 p.m.; (2) the accident occurred at 6:09 p.m. on County Road 210, the only direct route between the American Legion and Mr. Syverud's residence; (3) no one had been seen inside the Ford Explorer; (4) the Ford Explorer was weaving and swerving immediately before the accident; (5) after the accident, Mr. Syverud, who appeared impaired, was seen leaning on the Ford Explorer that was registered to his wife, staring in shock at the deceased driver of the Jeep Cherokee; (6) Mr.

Syverud twice attempted to walk away from the scene of the accident, consistent with a guilty mind, responsibility, and the lack of any other means of transportation; and (7) numerous bystanders were meandering about the scene of the accident immediately afterwards. (*Id.* at 400-406.)

At the conclusion of the hearing, the trial court granted the Motion to Exclude Crash Report, but deferred ruling on the *Corpus Delicti* Motion in Limine. (*Id.* at 409, 418.)

On March 12, 2007, Mr. Syverud filed another memorandum in support of his *Corpus Delicti* Motion in Limine. (R-I-89-93.) This second memorandum emphasized that the evidence before the trial court did not support the State's purported timeline of events. Specifically, the defense argued, there was no evidence to establish when, how, or with whom Mr. Syverud left the American Legion on the afternoon of December 25, 2005, or to show that he had driven the Ford Explorer to or from the American Legion that day. (*Id.* at 89-90.)

The Trial Court's Rulings

On March 21, 2007, the trial court entered its Order on the Defendant's Sixth Motion in Limine (*Corpus Delicti* Issue) (the "Order"). (R-I-103-107.) The trial court ruled that the State met its burden of establishing the *corpus delicti*, eliciting "substantial circumstantial evidence that tends to show the Defendant was

behind the wheel of the Ford Explorer when the accident at issue occurred." (*Id.* at 106.) The trial court summarized this evidence, finding:

> The Defendant was involved in a motor vehicle accident on the only direct route home from the place he was seen earlier in the day. The accident occurred only 9 minutes after the place the Defendant had been closed for the evening. The Defendant's wife was the owner of the Ford Explorer involved in the accident. The Defendant was seen at the accident site, just after the crash, leaning against the Ford Explorer staring at the decedent. The Defendant was later seen walking away from the accident scene, as opposed to driving away, as he would have if he had another vehicle to leave in. Further, there was no evidence produced at the hearing to show there was more than one person in the Ford Explorer at the time of the accident.

(*Id.*)

The trial court distinguished the case law relied upon by the defense, noting that here, unlike the facts of the cited cases, there is "no evidence that anyone other than the Defendant was in the Ford Explorer at the time the accident occurred." (*Id.*; *see also id.* at 105 (stating that "there was no evidence introduced at the hearing to establish there were two people in the Ford Explorer").) Consequently, the trial court denied the *Corpus Delicti* Motion in Limine. (*Id.* at 106.)

The Defendant's *Nolo Contendere* Plea

Thereafter, the defense asked the trial court to find the Order dispositive and to accept Mr. Syverud's plea of *nolo contendere*, subject to a reservation of his

right to appeal the Order. (R-I-109-116; R-III-424; R-III-433-34, 440.) The State opposed this request. (R-III-440-43.)

On May 14, 2007, the trial court granted Mr. Syverud's request and ruled that the Order was dispositive. (R-III-453.) The trial court allowed Mr. Syverud to enter a *nolo contendere* plea to the four-count Information, reserving his right to appeal the dispositive Order. (R-III-453-54, 462.)

The Judgment and Sentence

On June 11, 2007, the trial court adjudicated Mr. Syverud guilty of one count of DUI manslaughter, two counts of DUI with serious bodily injury, and one count of DUI with injury to property or person. (R-II-206-211.) The trial court sentenced Mr. Syverud to twenty years, with ten years suspended, followed by a total of fifteen years of community control/probation. (R-II-208; R-III-508-14.)

Mr. Syverud timely filed his notice of appeal of the final judgment of conviction entered pursuant to his plea of *nolo contendere*, and the prior dispositive Order denying his motion to exclude statements made to law enforcement, fire rescue personnel, and any others, based upon the State's failure to establish the *corpus delicti* independent of those statements. (R-II-228-55.)

SUMMARY OF ARGUMENT

The State failed to introduce substantial evidence, independent of the defendant's own statements, to show that Mr. Syverud was driving the Ford Explorer on the night of the accident. The State did not elicit testimony from a single witness who could identify Mr. Syverud as the driver of the Ford Explorer on December 25, 2005. Instead, Mr. Syverud was first seen after the accident, leaning against the passenger side of the Ford Explorer, along with another, unidentified man wearing an FSU pullover, who was standing "very, very close" to the Ford Explorer. This evidence, in and of itself, illustrates the State's failure of proof.

The circumstantial evidence presented by the State is insufficient. Regardless of whether Mr. Syverud was seen leaning against his wife's Ford Explorer after the accident, the State fails to show that he was driving the car when the accident occurred. No matter "the number of intoxicated persons at the scene of an accident, even if they are car owners," there can be no crime "unless and until it be shown that an intoxicated person was driving or in physical control of a vehicle." *Farley v. City of Tallahassee*, 243 So. 2d 161, 162 (Fla. 1st DCA 1971), *overruled on other grounds*, *J.B. v. State*, 689 So. 2d 360 (Fla. 1st DCA 1997).

Here, the State cannot prove this critical element of the *corpus delicti.* Statements that Mr. Syverud made to law enforcement, rescue personnel, and any others that he was driving the Ford Explorer are thus inadmissible.

Nonetheless, the trial court denied the *Corpus Delicti* Motion in Limine, ruling that the State had presented substantial circumstantial evidence tending to show that Mr. Syverud was driving the Ford Explorer when the accident occurred. Even under the abuse of discretion standard of review, the trial court's denial of the *Corpus Delicti* Motion in Limine should be reversed. The trial court misinterprets the law and relies on a clearly erroneous assessment of the facts to conclude that the State adequately showed the required *corpus delicti.*

The trial court's error requires reversal not only of the prior dispositive Order, but also of the Judgment and Sentence of conviction. If the State cannot introduce at least *prima facie* proof of the charged offenses to allow for the admissibility of Mr. Syverud's statements, the State necessarily cannot prove its case at trial, where the *corpus delicti* must be proven beyond a reasonable doubt.

Therefore, Mr. Syverud respectfully requests that this Court reverse the Order, along with the Judgment and Sentence, and remand with instructions to discharge Mr. Syverud.

ARGUMENT

I. ABSENT SUFFICIENT PROOF TO ESTABLISH THE *CORPUS DELICTI* INDEPENDENT OF MR. SYVERUD'S ADMISSIONS, HIS DUI CONVICTIONS MUST BE REVERSED.

Mr. Syverud appeals the Judgment of conviction and Sentence entered upon his *nolo contendere* plea. Mr. Syverud expressly reserved his right to appeal the prior dispositive Order. *See* Fla. R. App. P. 9.140(b)(2)(A)(i).

This appeal presents one question for the Court: specifically, whether the trial court erred in ruling that the State introduced sufficient circumstantial evidence to establish the *corpus delicti* of the DUI-related offenses, independent of any statement by Mr. Syverud to law enforcement, rescue personnel, and any others that he was driving the Ford Explorer when the accident occurred. Absent the necessary independent proof that Mr. Syverud was behind the wheel of the Ford Explorer when the accident occurred – which is perhaps the "critical element of the offense of driving while intoxicated" – his convictions cannot be upheld. *Esler v. State*, 915 So. 2d 637, 640 (Fla. 2d DCA 2005) (quoting *State v. Hepburn*, 460 So. 2d 422, 426 (Fla. 5th DCA 1984)).

Standard of Review. The standard of review of a trial court's ruling on a motion in limine is abuse of discretion. *State v. Polak*, 598 So. 2d 150, 152 (Fla. 1st DCA 1992). Essentially, a motion in limine is a motion to suppress evidence. *Id.* Because "the trial court sits as both trier of fact and of law" in matters

concerning the suppression of evidence, the trial court's rulings as to the "credibility of the witnesses and the weight of the evidence presented are matters within the province of the trial judge." *Id.* (citations omitted).

The trial court's discretion is limited by the rules of evidence and the principles of *stare decisis*. *McDuffie v. State*, 2007 Fla. LEXIS 2199, *32-*33 (Fla. Nov. 21, 2007) (citing *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980), for the principle that "[j]udges dealing with cases essentially alike should reach the same result"). A trial court also may abuse its discretion

> if its ruling is based on an "erroneous view of the law or on a clearly erroneous assessment of the evidence."

McDuffie, 2007 Fla. LEXIS, at *33 (quoting *Cooter & Gell v. Hartmarx Corp.*, 497 U.S. 384, 405 (1990)).

A. This Court has jurisdiction to review the trial court's dispositive Order under Rule 9.140 of the Florida Rules of Appellate Procedure.

As a preliminary matter, Mr. Syverud addresses this Court's jurisdiction to reverse his convictions upon a plea of *nolo contendere*.

Mr. Syverud appeals his convictions under Florida Rule of Appellate Procedure 9.140(b)(2)(A)(i). (R-III-242-55.) This Rule allows the appeal of a conviction based upon a plea of *nolo contendere* only if the defendant "expressly reserves the right to appeal a prior dispositive order of the trial court." *Sloss v.*

State, 917 So. 2d 941, 942 (Fla. 5th DCA 2005), *reh'g denied* (Fla. 5th DCA Jan. 13, 2006); *accord Jones v. State*, 806 So. 2d 590, 592 (Fla. 5th DCA 2002).

The trial court found its prior Order denying the *Corpus Delicti* Motion in Limine to be dispositive, and accepted the *nolo contendere* plea. (R-III-453-54.) This is sufficient to establish the Court's appellate jurisdiction. *Cf. C.L.M. v. State*, 752 So. 2d 67, 67 (Fla. 5th DCA 2000) (dismissing appeal for lack of jurisdiction, where there was neither a stipulation as to the dispositive nature of the motion to suppress or a specific finding by the trial court); *Teague v. State*, 728 So. 2d 1203, 1203 (Fla. 5th DCA 1999) (dismissing appeal for lack of jurisdiction, for defendant "did not specify that the ruling on the motion to suppress was dispositive nor did the trial court make such an express finding").

In any event, the record reflects the dispositive nature of the trial court's Order. An issue is legally dispositive "only if it is clear that regardless of whether the appellate court affirms or reverses the trial court's decision, there will be no trial." *Jones v. State*, 806 So. 2d 590, 592 (Fla. 5th DCA 2002) (citing *Vaughn v. State*, 711 So. 2d 64, 65 (Fla. 1st DCA), *review denied*, 722 So. 2d 195 (Fla. 1998)). If the State cannot proceed to trial without the evidence that the defendant seeks to suppress, the legal test of dispositiveness has been met. *See Vaughn*, 711 So. 2d at 66; *Morgan v. State*, 486 So. 2d 1356, 1357 (Fla. 1st DCA 1986); *cf. Jones*, 806 So. 2d at 592 (finding that appealed issue was not dispositive;

"[r]egardless of the trial court's ruling on the motion to suppress, the other evidence available to the State would have been sufficient for the case to have gone to trial").

Here, the trial court ruled that because the State introduced substantial circumstantial evidence tending to show that Mr. Syverud was behind the wheel when the accident occurred, any admissions by Mr. Syverud to law enforcement, rescue personnel, or anyone else that he was driving the Ford Explorer at the time of the crash are admissible. (R-I-105-106.) Yet if this Court reverses the Order on appeal – and excludes the admissions for failure to establish the *corpus delicti* of the offenses charged – the State necessarily will be unable to prove the charges at trial, where the *corpus delicti* must be proven beyond a reasonable doubt. *See Esler v. State*, 915 So. 2d 637, 640 (Fla. 2d DCA 2005); *accord Farley v. City of Tallahassee*, 243 So. 2d 161, 162 (Fla. 1st DCA 1971) (reversing conviction), *overruled on other grounds*, *J.B. v. State*, 689 So. 2d 360 (Fla. 1st DCA 1997);[1] *see also Schwab v. State*, 636 So. 2d 3, 6 (Fla. 1994) (discussing general order of proof) (citing *Cross v. State*, 96 Fla. 768, 780-81, 119 So. 380, 384 (1928)).

[1] In *J.B.* the First District Court of Appeal overruled *Farley* only to the extent that it suggested that the failure to prove the *corpus delicti* at trial is a fundamental error that may be raised for the first time on appeal. 689 So. 2d at 360. The Florida Supreme Court approved *J.B.*, ruling that the issue of *corpus delicti* must be preserved by contemporaneous objection at trial. *J.B. v. State*, 705 So. 2d 1376, 1377 (Fla. 1998).

Absent Mr. Syverud's admissions, no other evidence will be available to the State to prove a crucial element of the charged offenses. *See Esler*, 915 So. 2d at 640; *Farley*, 243 So. 2d at 162. Regardless of whether this Court affirms or reverses the trial court's Order, there will be no trial. *See Jones*, 806 So. 2d at 492. Thus, the trial court's Order is dispositive, and appellate jurisdiction arises under Florida Rule of Appellate Procedure 9.140(b)(2)(A)(i).

B. Because the State failed to introduce substantial evidence – independent of Mr. Syverud's admissions – to establish the *corpus delicti* of the DUI-related offenses, the trial court's dispositive Order should be reversed, along with Mr. Syverud's convictions.

On appeal, the trial court's dispositive Order, along with its judgment of conviction, should be reversed. The trial court misapprehends the law – and clearly misconstrues the undisputed evidence – when it finds that the State met its burden of establishing the *corpus delicti*. The State is unable to elicit substantial circumstantial evidence tending to show that Mr. Syverud was behind the wheel of the Ford Explorer when the accident occurred. (R-I-106.) Consequently, any statement by Mr. Syverud to law enforcement, rescue personnel, and any others that he was driving the Ford Explorer on the night of the accident are inadmissible. Absent the necessary, independent proof of this critical element of the *corpus delicti*, Mr. Syverud's convictions cannot be sustained.

1. The critical element of *corpus delicti* requires proof, independent of a defendant's admissions, that he was driving the vehicle when the accident occurred.

The State must prove the *corpus delicti* of the crimes charged before a defendant's confession or admission may be allowed into evidence. *State v. Hepburn*, 460 So. 2d 422, 425 (Fla. 5th DCA 1984) (citing *State v. Allen*, 335 So. 2d 823, 824 (Fla. 1976)); *accord Farinas v. State*, 569 So. 2d 425, 430 (Fla. 1990). Independent proof of the *corpus delicti*, or the "body of the crime," assures that "someone actually committed the offense described in the information or indictment." *Baxter v. State*, 586 So. 2d 1196, 1198 (Fla. 2d DCA 1991). Without independent evidence to substantiate the crime, the defendant's admission alone is insufficient to prove a criminal act. *Allen*, 335 So. 2d at 825.

> The judicial quest for truth requires that no person be convicted out of derangement, mistake or official fabrication.

Id.

The State must "bring forth substantial evidence tending to show the commission of the charged crime." *Allen*, 335 So. 2d at 825 (quoting *Tucker v. State*, 59 So. 941 (1912); *Lambright v. State*, 16 So. 582 (1894)). While this standard does not require uncontradicted or overwhelming proof – and may be satisfied with direct or circumstantial evidence – the State "must at least show the existence of each element of the crime." *Allen*, 335 So. 2d at 825; *accord Burks v.*

State, 613 So. 2d 441, 443 (Fla. 1993); *Esler*, 915 So. 2d at 640. To establish the *corpus delicti* of homicide, the State must prove three elements: (1) the fact of death; (2) the criminal agency of another person as the cause of death; and (3) the identity of the deceased person. *State v. Colorado*, 890 So. 2d 468, 470 (Fla. 2d DCA 2004) (citing *Jefferson v. State*, 128 So. 2d 132, 135 (Fla. 1961)).

Whether Mr. Syverud acted with criminal agency to cause the death of another depends upon whether the State can prove that he was "driving or in actual physical control" of the Ford Explorer when the accident occurred. *See* § 316.193(1), Fla. Stat.; *id.* § (3)(a)-(c); *accord* Fla. Std. Jury Instr. (Crim.) 7.8. Absent evidence that Mr. Syverud was behind the wheel at the time of the crash, the State cannot prove a critical element of the DUI charges. *See Farley*, 243 So. 2d at 162; *accord Colorado*, 890 So. 2d at 471-72; *Hepburn*, 460 So. 2d at 426.

> A, if not the, critical element of the corpus delicti of the offense of driving while intoxicated is evidence that the defendant was driving at the time [he] allegedly committed the offense.

State v. Hepburn, 460 So. 2d 422, 426 (Fla. 5th DCA 1984) (citing *Farley*, 243 So. 2d 161); *accord Esler*, 915 So. 2d at 640 (ruling that "[t]here can be no conviction for DUI with serious bodily injury without proof that the defendant was driving a vehicle and was impaired at the time of the crash").

2. The State failed to prove the critical element of the *corpus delicti* of the offense of driving under the influence.

Here, the State failed to introduce substantial circumstantial evidence to prove that Mr. Syverud was driving the Ford Explorer when the accident occurred.

First, the State did not elicit testimony from a single witness who could identify Mr. Syverud as the driver of the Ford Explorer on December 25, 2005 – whether before, during, or after the crash. (*See* R-II-279-80, 296, 311-13.) For example, although one witness testified that he had seen Mr. Syverud at a Christmas party earlier that day at the American Legion, the witness could not testify as to when, how, or with whom Mr. Syverud left the American Legion. (*See* R-II-310-313.) This witness could testify only that when he left the American Legion at around 4:30 or 4:45 p.m., Mr. Syverud was still there. (*Id.* at 313.) The State did not establish that Mr. Syverud had even driven the Ford Explorer to or from the American Legion that day. (*See id.* at 310-313; *see also* R-I-89-90.)

Likewise, none of the witnesses testified that Mr. Syverud was behind the wheel of the Ford Explorer at the time of the crash. (R-II-279-80, 296.) One of the two witnesses to the accident, Ms. Bonds, was in another westbound vehicle traveling behind the Ford Explorer: she admitted that she could not see inside the red Ford Explorer. (*Id.* at 279-80.) Another witness, Mr. Aguilera, did not observe anyone get out of the Ford Explorer after the accident and did not know how many people were occupants of the vehicle at the time of the crash. (*Id.* at 296.)

Both of these witnesses testified that they first saw Mr. Syverud leaning against the passenger side of the Ford Explorer after the accident. (R-II-277-78, 289, 296.) This testimony is consistent with the testimony of law enforcement and rescue personnel, who also observed Mr. Syverud standing or leaning against the Explorer's passenger side after the accident. (R-II-303-304, 317-18.) Two of the State's witnesses also testified that right around the time they first saw Mr. Syverud – before St. Johns County Fire Rescue or the neighbors had appeared at the scene – they saw another, unidentified male standing "very, very close to where the red Ford Explorer [was]." (R-II-297; *see also* R-II-281.) The witnesses described this man, who was not Mr. Syverud, wearing an FSU sweatshirt or pullover, and "talking low on a cell phone." (R-II-281, 296-97.) He, too, appeared upset by the accident. (*Id.* at 297). Evidence that another, unidentified man wearing an FSU pullover was standing "very, very close" to the Ford Explorer almost immediately after the accident tends to show that he – not Mr. Syverud – could have been driving the Ford Explorer.

This is not a case, then, in which substantial evidence, whether direct or circumstantial, places Mr. Syverud behind the wheel of the Ford Explorer when the accident occurred. *See Burks*, 613 So. 2d at 444 (ruling that evidence that the defendant's supervisor arrived at the scene of the accident to ask whether the defendant "could drive his vehicle away and continue on his run" sufficiently

established the *corpus delicti* for DUI manslaughter); *Allen*, 335 So. 2d at 825 (finding sufficient circumstantial evidence of *corpus delicti* to allow defendant's admission: the defendant, who had been seen driving the car earlier that day, also had been seen getting into the driver's side of the car five or ten minutes before the accident, and was found after the accident with his feet on the driver's side); *State v. Kester*, 612 So. 2d 584, 586 (Fla. 3d DCA 1992) (relying on evidence that the defendant "was the only person standing next to his car" – which was the only car at the scene of an accident involving a "mangled blue bike" – to conclude that the State met its burden of proving *corpus delicti*); *Anderson v. State*, 467 So. 2d 781, 784 (Fla. 3d DCA 1985) (concluding that evidence that the defendant "was found lying near the driver's side of the truck," along with evidence that beer cars and a vodka bottle had been found in and around the truck and that the truck took no evasive action before impact, sufficiently established the *corpus delicti* of DUI manslaughter, independent of the defendant's admission); *County of Dade v. Pedigo*, 181 So. 2d 720, 721 (Fla. 3d DCA 1966) (reasoning that the trial court properly admitted into evidence the defendant's admission that he was the driver; the defendant was found "standing at the left front fender of his vehicle, leaning against the car," and "[t]here was no indication that anyone else was connected with the operation of the car").

3. Principles of *stare decisis* require reversal of the trial court's dispositive Order. The trial court abused its discretion in refusing to rely on case law that is directly on point.

State v. Colorado, 890 So. 2d 468 (Fla. 2d DCA 2004), is directly on point. There, the Second District Court of Appeal ruled that the State did not satisfy the *corpus delicti* to establish DUI manslaughter and affirmed the trial court's ruling to exclude the defendant's admission that he was the driver of the vehicle. *Id.* at 469.

In *Colorado*, the victim died in a one-car accident. *Id.* at 469. The State charged the defendant with DUI manslaughter, among other charges, and alleged that the defendant was behind the wheel when the accident occurred. *Id.* at 470. Notwithstanding that the car in which the defendant was traveling was the only car involved in the accident, an eyewitness did not see anyone flee from the scene, the defendant was seen at the scene of the accident minutes after the accident, the defendant's breath smelled of alcohol, and his blood/alcohol level exceeded legal limits, the Second District ruled that the State failed to establish the *corpus delicti* for each DUI-related charge against the defendant. *Id.* at 469, 471.

Here, just like the facts of *Colorado*, no witness could identify the defendant as the driver, the car was not registered in his name, and the State was unable to produce any physical or circumstantial evidence that placed the defendant behind the wheel at the time of the accident. *See id.* at 469-71.

Evidence that the Ford Explorer was registered to Mr. Syverud's wife is not dispositive. *See, e.g.*, *Hepburn*, 460 So. 2d at 424-26. In *Hepburn*, the Fifth District Court of Appeal found that even though the evidence showed that the defendant had been drinking before the accident in question – and that a day after the accident she was driving the same automobile, registered to her ex-husband, that had struck the three pedestrians – the State was unable to prove the *corpus delicti* of the DUI-related offenses. *Id.* at 426. Because "there were no witnesses to the accident and . . . the pedestrians did not know what hit them," the *Hepburn* Court concluded that "there is no evidence which places [defendant] behind the wheel at the time the accident occurred." *Id.*

As in *Hepburn*, there is no direct evidence before this Court to show that Mr. Syverud was behind the wheel of the Ford Explorer. The trial court attempts to distinguish *Hepburn*, noting that unlike *Hepburn*, Mr. Syverud appeared "at the scene of the accident just *after* the accident occurred." (R-I-106 (emphasis added).) His presence there, however, does not establish that he was driving the Ford Explorer at the time of the crash. *See Colorado*, 890 So. 2d at 470 (distinguishing *Allen*).

Evidence that Mr. Syverud was seen leaning against his wife's Ford Explorer after the accident is not enough to prove that he committed any crime. *See Farley*, 243 So. 2d at 162; *cf. Burks*, 613 So. 2d at 442-43 (considering

evidence that the defendant's supervisor appeared at the scene of the accident to ask whether the defendant could drive his vehicle away and continue on his run); *Kester*, 612 So. 2d at 586 (noting, among other circumstantial evidence, that the defendant was the only person standing next to his car).

> Regardless of the number of intoxicated persons at the scene of an accident, even if they are car owners, there is no violation . . . unless and until it be shown that an intoxicated person was driving or in physical control of a vehicle.

Farley, 243 So. 2d at 162 (citation omitted).

Like *Hepburn* and *Colorado*, the First District Court of Appeal's decision in *Farley* governs the facts of this case. In *Farley*, the First District Court of Appeal reversed the petitioner's DUI conviction, ruling that

> [a]side from petitioner's admission at the scene that he was the driver, there was no other evidence on that critical element of the offense charged.

243 So. 2d at 162. Without any independent proof, the First District ruled, the trial court committed fundamental error in admitting into evidence the petitioner's statement that he was driving when he ran off the road and overturned in a ditch. *Id.* at 161-62. The First District reached this conclusion despite evidence that the petitioner owned – and occupied – the vehicle at the time of the accident. *Id.*

Colorado, *Hepburn*, and *Farley* all illustrate the State's failure to show, with substantial circumstantial evidence, the critical element of the charged offenses.

Because there is no proof, independent of his own admissions, that Mr. Syverud was behind the wheel of the Ford Explorer when the accident occurred, the *corpus delicti* of the DUI offenses cannot be met. The trial court abused its discretion in ruling otherwise. *See Farley*, 243 So. 2d at 162; *accord Esler*, 915 So. 2d at 639-40; *see also McDuffie*, 2007 Fla. LEXIS 2199, at *35-*38 (relying on cases decided on similar facts to find that the trial court abused its discretion by improperly admitting evidence over the defendant's objections).

4. The trial court clearly misconstrued the circumstantial evidence – and the State's burden of proof – in ruling that the State sufficiently established the *corpus delicti*.

Notwithstanding the rulings of *Colorado*, *Hepburn*, and *Farley*, the trial court ruled that the State met its burden of establishing the *corpus delicti*. (R-I-105-106.) The trial court summarized the evidence, concluding that the State presented "substantial circumstantial evidence that tends to show the Defendant was behind the wheel of the Ford Explorer." (*Id.* at 106.) According to the trial court:

> The Defendant was involved in a motor vehicle accident on the only direct route home from the place he was seen earlier in the day. The accident occurred only 9 minutes after the place the Defendant had been closed for the evening. The Defendant's wife was the owner of the Ford Explorer involved in the accident. The Defendant was seen at the accident site, just after the crash, leaning against the Ford Explorer staring at the decedent. The Defendant was later seen walking away from the accident scene, as opposed to driving away, as he would have if he

> had another vehicle to leave in. Further, there was no evidence produced at the hearing to show there was more than one person in the Ford Explorer at the time of the accident.

(*Id.*)

The trial court's ruling is based on a clearly erroneous assessment of the evidence. This circumstantial evidence is insufficient. At best, the only reasonable inference to be drawn from the State's circumstantial evidence is that Mr. Syverud may have been one of the Ford Explorer's passengers. This inference explains how Mr. Syverud arrived at the scene of the accident, why he was there, why he was leaning against the passenger side of the Ford Explorer (which was registered to his wife), why he appeared upset after the crash, and why he was seen walking away from the accident scene, as opposed to driving another vehicle. Indeed, this is the only inference that explains the presence of another, unidentified man in an FSU pullover, standing "very, very close" to the Ford Explorer right after the accident. (R-II-296-97; *see also* R-II-281-82.)

Yet the trial court disregards this uncontroverted evidence in its Order. (*See* R-I-105-106.) Instead, the trial court rules that because "there is no evidence to establish that two people were in the Ford Explorer at the time of the accident," Mr. Syverud necessarily must have been driving the Ford Explorer. (R-I-105, 106.) According to the trial court:

> Here, there is no evidence that *anyone other than the Defendant was in the Ford Explorer* at the time the accident occurred.

(*Id.* at 106 (emphasis added).)

The trial court simply misapprehends the burden of proof. Essentially, the trial court assumes that, absent undisputed evidence establishing the presence of at least two people in the Ford Explorer, Mr. Syverud necessarily must have been driving when the accident occurred. (*See id.* at 105-106.) Yet it is the State – not the defense – who must introduce substantial circumstantial evidence "tending to show" that the defendant was driving at the time of the accident. *Allen*, 335 So. 2d at 825. The trial court should not have presumed that Mr. Syverud was alone in the Ford Explorer, nor should the trial court have required Mr. Syverud to prove the number or identity of any of the Ford Explorer's occupants. (*See* R-I-105-106.)

The trial court misinterprets the law, and relies on a clearly erroneous assessment of the facts to conclude that the State adequately showed the required *corpus delicti*. Even under the abuse of discretion standard of review, the trial court's ruling must be reversed. *See McDuffie*, 2007 Fla. LEXIS, at *33.

5. The State's failure to prove the *corpus delicti* requires the reversal of the trial court's dispositive Order and the judgment of conviction.

For all these reasons, the State failed to prove the *corpus delicti* of the charged offenses. *See Esler*, 915 So. 2d at 639. Without substantial evidence

tending to show the existence of each element of the crime, the *corpus delicti* rule prohibits the State from relying on Mr. Syverud's statements to law enforcement, rescue personnel, and any others that he was driving the Ford Explorer. *See Colorado*, 890 So. 2d at 471. The trial court erred in ruling Mr. Syverud's statements admissible. *See Farley*, 243 So. 2d at 162.

If the State cannot introduce at least *prima facie* proof of the charged offenses to allow for the admissibility of Mr. Syverud's statements, the State necessarily cannot prove its case at trial, where the *corpus delicti* must be proven beyond a reasonable doubt. *See Schwab v. State*, 636 So. 2d 3, 6 (Fla. 1994) (discussing general order of proof) (citing *Cross v. State*, 96 Fla. 768, 780-81, 119 So. 380, 384 (1928)). Absent evidence that Mr. Syverud was driving at the time of the crash, the State cannot prove a critical element of the offenses charged. *See id.*; *accord Esler*, 915 So. 2d at 639-40; *Colorado*, 890 So. 2d at 471-72; *Hepburn*, 460 So. 2d at 426.

Thus, Mr. Syverud is entitled not only to the reversal of the trial court's dispositive Order, but also to the reversal of the Judgment and Sentence. As the Second District emphasized in *Esler*:

> There can be no conviction for DUI with serious bodily injury without proof that the defendant was driving a vehicle and was impaired at the time of the crash. There must be proof independent of a confession that the defendant was driving the vehicle involved in the crash in order to make that determination.

915 So. 2d at 640. Absent the necessary independent proof, Mr. Syverud's convictions for the charged DUI offenses must be reversed. *Id.*

CONCLUSION

For all the foregoing reasons, Defendant, Wayne C. Syverud, respectfully requests that this Court reverse the Order on Defendant's Sixth Motion in Limine (*Corpus Delicti* Issue) and the Judgment and Sentence, and remand for the trial court to discharge Mr. Syverud for the charged offenses of DUI manslaughter, DUI with serious bodily injury, and DUI causing injury to person or property.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Allison Leigh Morris, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118 by United States Mail, this 19th day of December, 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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