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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CALVIN EARL BURKS,

Appellant/Petitioner,

v. CASE NO. 79,122

STATE OF FLORIDA,

Appellee/Respondent.

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

Appellee disagrees with the Statement of Facts contained in Appellant's initial brief. Several of Appellant's "factual" statements are not supported by citations to the record on appeal and some are defense counsel's conclusions which are improper in a statement of facts. Accordingly, Appellee states the facts of the instant case as follows:

Police Officers Carl W. Heaton and Woodrow Delton Kilpatrick, arrived at the scene of the accident in Putnam County, Florida. (R 105, 124). They saw "a tractor trailer across the northbound lanes of US 17 facing from east to west." (R 106, 125). That vehicle was blocking the northbound lanes. (R 106). The tractor part of the truck "was sitting in the paved median . . .." (R 155).

The weather was "very clear that morning," the road was dry and there were no defects in the road. (R 113, 125, 129). Officer Kilpatrick, the homicide investigator, testified that there was nothing obstructing Burks' view when he pulled onto the highway. (R 129). There were no skid marks left by the vehicles. (R 157).

The other vehicle involved was a motorcycle, owned by Charles Courtemarche, which "lay on its left side in the left lane of the northbound two lanes . . .." (R 125, 106, 158). The body of Charles Courtemarche was lying in the other lane. (R 107, 125, 127, 156). There were head and facial wounds on the body. (R 155). Mr. Courtemarche was dead. (R 107).

The police determined that at the time of the accident, "[t]he motorcycle had the right of way.'' (R **128).** It was travelling north on the highway at the time of the accident. (R **129).** There were gouge marks in the pavement made by the "engine casing on the left side of the motorcycle." (R 128-129). The motorcycle impacted with the tractor trailer "in the left front hub of the tractor." (R 155). "The hub that covers the wheel bearings of the front axel (sic) out. And there was a trial (sic) of lubricant leading back to the point of impact . . .." (R 156).

Appellant, Calvin Earl Burks [hereinafter "Burks"], was present at the scene, and Officer Heaton noticed that his "eyes were bloodshot and watery," and he was "extremely upset." (R 106, 115, 122). He had "[a] strong alcoholic beverage smell on his breath . . .." (R 106). Burks walked about the scene "slowly, unsurely," "he was disoriented and "his speech was slurred." (R 110-111). The officer testified that Burks' reaction time was impaired. (R **119).** "He was slow reacting to anything I asked him or anything he was doing at the scene." (R 119-120). Based on his training, experience and observations of Burks, Officer Heaton concluded that he was under the influence of alcohol and his normal faculties were impaired. (R 113, 117). The blood test taken shortly after the accident showed that Burks' blood contained .14 per cent alcohol. (R 144).

Officer Heaton terminated the accident investigation and began a criminal investigation. (R 118). He told Burks that he was "no longer doing **a** traffic investigation as **far** as **the**

accident was concerned, but now was doing a criminal investigation." (R 118). He told him the difference between a homicide investigation and an accident investigation. (R 118). Officer Heaton spoke to Burks "very slowly and thoroughly to where he would understand." (R 118). Later, Officer Heaton also "explained to Mr. Burks that the homicide investigator was there for the death investigation." (R 119).

Officer Heaton testified that before he began the criminal investigation he advised Burks of his *Miranda* rights. (R 107-108, 120). The officer believed that Burks understood those rights and voluntarily made the subject statements. (R 109). Burks told the officer that: (1) "[H]e had rolled through a stop sign and in order to cross the road and it was a common practice for semis to do that;" (2) He was the driver of the semi truck: and, (3) He "had been drinking real heavily that evening before." (R 109-110). Burks repeated his statements "on the way to the hospital." (R 114).

During the hearing on the motion in limine, Officer Heaton was asked, "Other than the observations of him, was there anything that you learned that indicated he had been driving a vehicle?" (R 69). The officer replied, "Other than him telling me that he was driving, the supervisor said he was driving the vehicle." *Id.* **At trial,** on cross examination, Officer Heaton testified that Burks' supervisor asked him if Burks "could drive his vehicle away and continue on his run." (R 121).

SUMMARY OF ARGUMENT

POINT ONE: This Honorable Court lacks jurisdiction to consider the instant case. Further, the instant issue is not preserved for review. The trial court did not err in denying Appellant's motion for judgment of acquittal based on the claim that the state failed to establish the corpus delicti of the crime charged justifying admission of his confession. Finally, even if the confession was improperly admitted, the error was harmless beyond a reasonable doubt.

POINT TWO: This Court does not have jurisdiction of this case. Further, this issue is procedurally barred. On the merits, the district court correctly distinguished between a confession and an admission against interest and properly applied that distinction to the instant case. Appellant's statements were admissible as admissions against interest. Finally, any error in admission of the statements was harmless beyond a reasonable doubt.

POINT THREE: This Court does not have jurisdiction of the instant case. Further, this issue is not preserved for appellate consideration. The trial court did not err in denying the acquittal motion because the evidence admitted prior to that motion established a prima facie case of causation. Neither did the court err in permitting the state to reopen its case after it rested and appellant made his motion for judgment of acquittal. Finally, any error was harmless beyond a reasonable doubt.

POINT FOUR: This Court lacks jurisdiction to consider this case. Further, this issue is procedurally barred. The trial court did not err in denying Appellant's motion to suppress his confession which was contained in his motion in limine. The confession is not privileged under the terms of the state's mandatory accident reporting statute. Finally, any error was harmless beyond a reasonable doubt.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL BASED ON THE CLAIM THAT THE STATE FAILED TO ESTABLISH THE **CORPUS** DELICTI OF THE CRIME: CHARGED JUSTIFYING ADMISSION OF APPELLANT'S CONFESSION.[1]

Appellant, Calvin Earl Burks [hereinafter "Burks"], claims that the trial judge should have granted his motion for judgment of acquittal because the state failed to establish the corpus delicti of the crime of DUI manslaughter independently of his confession. He contends that proof of the corpus delicti requires proof of all elements of the crime. Without the confession, Burks argues, the evidence failed to establish one such element, i.e., that he was the driver of the tractor trailer, and therefore, his confession should not have been admitted into evidence against him. Appellee, the State of Florida [hereinafter "the state"], contends that this Honorable Court does not have jurisdiction of this case.

Lack of Jurisdiction:

The question posed by the district court in its instant opinion was **not** certified to be **a question of great** public importance as required by the appellate rule. Fla. R. App. P. 9.030(2)(v). ***See Burks v. State,*** **16** F.L.W. 2814, 2815 (Fla. 5th DCA Nov. 7, 1991). Further, the district court denied Burks' motion

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[1] In arguing this point, Appellant's subject statements will be treated, **and** referred to, **as** a "confession." However, Appellee fully agrees with the district court's classification of the statements as an "admission against interest." See Point 11, *infra,* at **19-24.**

for certification of direct conflict with ***Farley v. City of Tallahassee,*** 243 So.2d 161 (Fla. 1st DCA 1971). (Appendix B). ***See*** Fla. R. **App.** P. 9.030(2)(vi). Finally, the instant decision does not directly and expressly conflict with *Farley* or ***State v. Allen,*** 335 So.2d 823 (Fla. 1976). ***See*** Fla. R. **App.** P. 9.030(2)(iv). Accordingly, this Honorable Court lacks jurisdiction of this cause.

Farley v. City of Tallahassee:

In ***Farley,*** the defendant was convicted of "driving while under the influence of alcohol." 243 So.2d at 161. Other than Farley's "admission at the scene that he was the driver, there was no other evidence on that critical element of the offense charged." *Id.* at 162. In the instant case, there was other evidence that Burks was the driver of the semi. The following exchange occurred during Burks' cross examination of Officer Heaton:

> Defense Counsel: [D]id *you* have another conversation with Mr. Burks?
>
> Officer Heaton: The fact of him wanting to leave....?
>
> . . *
>
> Defense Counsel: Concerning the question of **whether** or not **he could drive his vehicle away and continue ~~on his run~~.**
>
> Officer Heaton: I believe him and the supervisor asked me that.
>
> . . *
>
> Officer Heaton: . . . I advised Mr. Burks' supervisor that he wasn't under arrest at that time.

> Defense Counsel: Did *you* say something to the effect that it was up to him if he wanted to drive?
>
> Officer Heaton: I said it to his supervisor.
>
> . . .
>
> Officer Heaton: I told the supervisor I didn't advise him that it was a good idea, that he been (sic) drinking.

(emphasis added) (R 121-122). In addition, there is circumstantial evidence indicating that Burks was the truck's driver. ***See*** argument, *infra*, at 9, 16-17.

A further distinction is that Farley was taken from the scene to the police station where he was charged with the crime. 243 So.2d at 162. However, in the instant case, Burks was free to go at all times. (R 81, 121-122). He was not arrested until some five weeks later, and he was not charged with the crime until almost three months after he made his confession.[2] (R 1, 3).

The state contends that the only confessions which are not admissible are those made after the person is under arrest, charged with a crime, or, at most, otherwise restrained. *Parrish v. State*, *90* Fla. 25, 105 So. 130, 133 (1925). Since Burks' confession was made before any of those things occurred, it was

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[2] The instant record shows that Burks was free to leave at any time after he gave the accident report. Officer Heaton testified that he told Burks when he had terminated the accident report, and he gave Burks' *Miranda* rights and told him he was commencing a criminal investigation. (R 107-108, 118). Officer Kilpatrick testified that Burks was "free to go anywhere he wanted to go." (R 81). Officer Heaton testified at trial on cross examination that Burks was not under arrest and was free to leave. (R 121-122). Burks was not arrested until March 23, 1990, and he was not charged with the instant crime until May 2, 1990. (R 1, 3).

properly admitted. Under these circumstances, its admission does not conflict with the *Farley* decision.

***State v. Allen*:**

In *State v. Allen*, this Court said proof beyond a reasonable doubt is not the standard for determining whether the corpus delicti has been sufficiently demonstrated to permit admission of a confession. 335 So.2d at 825-826. This Court found purely circumstantial evidence adequate to indicate that the deceased person was not the driver, and therefore, the only other person found at the scene, Allen, must have been. 335 So.2d at 825.

Applying the *State v. Allen* standard to the instant case, the circumstantial evidence shows that the victim, Mr. Courtemarche, was not the driver of the semi, and therefore, the only other person found at the scene, Burks, must have been. That evidence includes:

When Officer Heaton arrived on the scene, the only persons there were "[s]ome volunteer fireman and some Sheriff's Office personnel" and Burks. (R 106). The deceased body of Mr. Courtemarche was lying near his motorcycle in the roadway. (R 106, 107). There was a "tractor trailer across the northbound lanes," blocking them. (R 106). The officer noticed that Burks had "[a] strong alcohol c beverage smell on his breath, [and his] eyes were bloodshot and watery." (R 106). Burks' speech was slurred, and he was upset and crying. (R 115-116).

There is no conflict with *State v. Allen*. *See also*, argument, *infra*, at **13-16.**

Procedural **Bar**:

Assuming *arguendo* that the question has been properly certified and/or the instant decision conflicts with *Farley* and/or *State v. Allen,* the instant claim should not be considered because it is not preserved for appellate review. Burks did not interpose an objection to admission of the evidence until after the state's witness, Officer Heaton, testified to the incriminating statements Burks made at the scene. The following exchange occurred:

> Prosecutor: Did he [Burks] agree to speak with you?
>
> Officer Heaton: **Yes,** sir.
>
> Prosecutor: And what did he **tell** you about the accident?
>
> Officer Heaton: At that point in time he advised he had rolled through a stop sign and in order to cross the road....
>
> Prosecutor: Did he admit to you that he was the driver of that semi?
>
> Officer Heaton: Yes, sir, he did.
>
> Prosecutor: What did he tell you at that time about drinking alcoholic beverages that night?
>
> Officer Heaton: He had had some personal trouble and that he had been drinking real heavily that evening before.
>
> [Defense Counsel]: Judge, may we approach the bench?
>
> **The Court:** Yes, sir.
>
> (Side-bar discussion had out of the hearing of the jury and the reporter.)

(R 109-110).

Apparently Burks raised the corpus delicti issue at the side-bar discussion. (R **162-163).** However, any objection he raised was made too late to preserve for appellate review the issue of the admissibility of his confession. This issue not having been preserved by contemporaneous objection, and Burks not having alleged or demonstrated fundamental error in this regard, it is procedurally barred. ***See Steinhorst v. State,*** **412** So.2d **332 (Fla. 1982).**

Merits:

Assuming *arguendo* that the issue raised on appeal is properly before this Honorable Court, Burks is not entitled to relief. At trial, his corpus delicti argument **was** made as the basis for a motion for judgment of acquittal. (R **162-163).** The law is well settled that a court should not grant a motion for judgment of acquittal unless no view of the evidence favorable to the state will support the guilty verdict. ***Brewer v. State,*** **413 So.2d 1217** (Fla. 5th DCA **1982);** ***Herman v. State,*** **472** So.2d **770** (Fla. **5th** DCA 1986), ***rev. denied,*** **482 So.2d 348** (Fla. **1986).** For purposes of appellate review, the movant admits all facts in evidence, and every conclusion which may be inferred therefrom, which are favorable to the state. ***Herman v. State,*** **472** So.2d **at 771.** Where the state has brought forth competent evidence to support every element of the crime, a judgment of acquittal is not proper. ***Anderson v. State,*** **504** So.2d **1270, 1271** (Fla. 1st DCA 1986).

Burks asserts that an essential part of the corpus delicti of his crime is that he was driving the vehicle at the time of the accident. He claims that "[t]here is no testimony whatsoever linking the Appellant with any of the vehicles at the scene." (Appellant's brief at 14). He adds "[t]here was no testimony or evidence other than the admission of the Appellant himself, as to who was driving the vehicles at the time of the alleged accident." (Appellant's brief at 16). The state disagrees.

In the instant case, the evidence shows:

When the police arrived at the scene of the accident, they saw "a tractor trailer across the northbound lanes of US 17 facing from east to west." (R 106, 125). That vehicle was blocking the northbound lanes and the median of the four lane highway. (R 106, 155). The weather was "very clear that morning," the road was dry and there were no defects in the road. (R 113, 125, 129). Officer Kilpatrick, the homicide investigator, testified that there was nothing obstructing Burks' view when he pulled onto the road. (R 129). There were no skid marks left by the vehicles. (R 157).

The other vehicle involved was a motorcycle, owned by Charles Courtemarche, which "lay on its left side in the left lane of the northbound two lanes . . . ." (R 125, 106, 158). The body of Mr. Courtemarche was laying in the other lane. (R 107, 125, 127, 156). There were head and facial wounds on the body. (R 155). Mr. Courtemarche was dead. (R 107).

The police determined that at the time of the accident, "[t]he motorcycle had the right of way." (R 128). There were

gouge marks in the pavement made by the "engine casing on the left side of the motorcycle." (R 128-129). It was determined that the motorcycle impacted with the tractor trailer "in the left front hub of the tractor." (R 155). "The hub that covers the wheel bearings of the front axel (sic) was shattered and all the lubricant had leak (sic) out. And there was a trial (sic) of lubricant leading back to the point of impact . . .." (R 156).

Burks was present at the scene, and Officer Heaton immediately noticed that he had bloodshot eyes and was "extremely upset." (R 115, 122). He walked about the scene "slowly, unsurely," "he was disoriented and "his speech was slurred." (R 110-111). Based on his training, experience and observations of **Burks,** Officer Heaton concluded that he was under the influence of alcohol and his normal faculties were impaired.[3] (R 113, 117). The blood test taken shortly after the accident showed that Burks' blood contained .14 per cent alcohol. (R 144).

In ruling on the acquittal motion, the trial court concluded that the evidence and reasonable inferences therefrom show that "Burks was driving the tractor trailer and that they collided and that that collision caused the death of Courtemarche." (R 161). The motion for judgment of acquittal was denied. (R 162). The state asserts that the trial court did not err in so ruling.

In ***State*** v. ***Allen,*** 335 So.2d 823, 824 (Fla. 1976), the sole point of law concerned "the state's burden of proving the "corpus delicti" before a defendant's confession may be admitted into

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[3] The officer testified that Burks' reaction time was impaired. (R 119). "He was slow reacting to anything I asked him or anything he was doing at the scene," (R 119-120).

evidence." (footnote omitted). The defendant was only guilty of the crime charged if the person who was killed in an accident involving Allen's car was not the driver of that vehicle. 335 So.2d at 825. Allen claimed that the state had to prove that he was the driver of the vehicle before his confession to that effect could be admitted. *Id.* This Court rejected that contention, Stating that "[w]e also reject . . . that identification of the defendant as the guilty party is a necessary predicate for the admission of a confession." (emphasis added) *Id.*

Thereafter, the identification issue was addressed in *Anderson v. State,* 467 So.2d 781, 783 (Fla. 3d DCA 1985). In *Anderson,* the defendant was charged with "manslaughter by operating a motor vehicle while intoxicated." A truck ran a stop sign and struck a car, resulting in the death of the driver of the car. 467 So.2d at 783. It was shown that "the truck took no evasive action prior to impact." *Id.* Anderson and his two companions were thrown out of the truck. *Id.* Anderson was found lying near the driver's side of the truck and his companions were lying near the front of the truck. *Id.* Beer cans were on the ground near the truck and others were found inside the truck. *Id.* A test of Anderson's blood showed that he had a blood alcohol level in excess of the legal limit. *Id.*

The *Anderson* court said that the manner in which the truck was driven prior to the impact and the presence of alcoholic beverage cans showed that the victim "was killed due to the criminal agency of another by someone who was driving the "death

truck" in an intoxicated state." *Id.* The court pointed out that under ***State v. Allen,*** it was not necessary to show that Anderson "was the guilty party--i.e., the driver of the "death truck"--in order to lay a predicate for the admission of [his statement that he was the driver]." *Id.* at **783-784.**

In the instant case, the weather and road conditions were ideal, and **the** driver of the tractor trailer had an unobstructed view of the oncoming motorcycle, yet **he** ran a stop sign. The driver **did** not apply his brakes hard enough to leave skid marks, if at all, and he operated his truck in such a manner as to completely block the two northbound lanes and the median of the roadway. The state asserts that the jury could reasonably conclude from this evidence that no reasonable driver would have driven the truck in this manner unless his normal faculties were impaired. There was overwhelming evidence indicating that a person at the scene had been drinking alcoholic beverages and was intoxicated to the extent that his normal faculties were impaired. The state contends that this evidence laid the proper predicate for admission of Burks' confession. ***See Anderson,*** 467 So.2d at 783-784.

It is important to remember that "beyond a reasonable doubt" is **not** the standard for determining whether the corpus delicti has been sufficiently demonstrated to permit admission of a confession. ***State*** *v. Allen,* 335 So.2d at 825-826. It is sufficient if the evidence "tends to show that the crime was committed." ***Farinas*** *v.* ***State,*** **569** So.2d 425, 430 (Fla. 1990). Purely circumstantial evidence may adequately show "the existence of

of each element of the crime." 335 So.2d at *825*. In *State* v. *Allen*, this Court said that the evidence "must show that a harm has been suffered of the type contemplated by the charges . . . and that such harm was incurred due to the criminal agency of another." *Id*.

In the instant case, the evidence, and the reasonable inferences therefrom, meet the *State v. Allen* standard. Mr. Courtemarche suffered the harm, dying from injuries received in a collision with the tractor trailer which was driven by another. That his death occurred due to the unlawful operation of the tractor trailer is shown by the fact that it was blocking both northbound lanes (and the median) of the four-lane highway. Further, the manner in which the semi was operated indicates that the driver's normal faculties were impaired. Accordingly, the **state** met its burden of introducing evidence tending to show that the charged crime was committed. It was not necessary to identify Burks **as** the guilty party, i.e., the driver of the semi, prior to admission of his confession. *State* v. *Allen.*

However, assuming *arguendo* that it was necessary to make a prima facie showing that Burks was driving the semi before his confession to that effect could be admitted, the state asserts that it did so. When Officer Heaton arrived at the scene, there were two persons (other than rescue workers) present - Burks and Mr. Courtemarche. Mr. Courtemarche was dead, and his body was lying in the roadway near his wrecked motorcycle. The tractor trailer was blocking both northbound lanes and the median of the four-lane highway. Burks smelled strongly of alcohol, his *eyes*

were bloodshot and watery, and his speech was slurred. He was upset and crying. (R 115-116). The state submits that a reasonable inference from this circumstantial evidence is that Burks was the driver of the semi, and his normal faculties were impaired by alcohol. Therefore, the state made a prima facie showing, establishing the corpus delicti, and authorizing admission of Burks' confession.

Further, the state contends that the confession was admissible to help establish the corpus delicti. In *Hodges* v. *State*, 176 So.2d 91, 92 (Fla. 1965), this Court said: "[W]hile the corpus delicti cannot be established by a confession alone, confessions and admissions may be considered in connection with other evidence to establish it." The state contends that the circumstances existing at the scene of the crime when Officer Heaton first arrived, if not alone sufficient to establish the corpus delicti, were sufficient to justify admission of the confession to establish the corpus delicti. Accordingly, introduction of the confession was not error.

Finally, assuming *arguendo* that the trial court erred in admitting the subject statements, that error was harmless because all elements of the crime were proved at trial independently of Burks' admissions.[4] That Burks was the driver of the semi was

[4] In *State* v. *Allen*, this Court said that "it is preferable that the occurrence of a crime be established before" a confession is admitted. 335 So.2d at 825. The state contends that because it is "preferable" as opposed to "essential," harmless error analysis is clearly applicable. Further, in *Hodges v. State*, 176 So.2d 92, 93 (Fla. 1965), this Court said: "[T]hough ordinarily evidence of a confession should not be admitted in advance of prima facie proof of the corpus delicti if this occurs and "additional proof of the corpus delicti is afterwards introduced,

established at trial on crass examination of Officer Heaton. (R 121-122). As recognized by the district court, the record shows that, "[t]he trooper testified, without objection, that appellant's supervisor came to the scene and inquired if appellant "could drive his vehicle away and continue on his run.'" *Burks*, 16 F.L.W. at 2815 n.4. Additionally, as argued hereinabove, circumstantial evidence also shows that he was the semi's driver. The evidence that Burks was under the influence to the extent that his normal faculties were impaired and that the operation of the semi truck caused Mr. Courternarche's death, as set out hereinabove, is overwhelming. The state asserts that there is no reasonable possibility that the error in admission of Burks' statements, if any, contributed to the guilty verdict. Therefore, the alleged error is harmless beyond a reasonable doubt, and the verdict should be upheld. *State* v. *Diguilio*, 491 So.2d 1129 (Fla. 1986).

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independent, of the confession, which ***prima facie*** established the corpus delicti and would have justified the admission of such confession, the technical error in prematurely admitting the confession will be cured."

POINT TWO

THE DISTRICT COURT DID NOT ERR IN DISTINGUISHING BETWEEN A CONFESSION AND AN ADMISSION AGAINST INTEREST AND APPLYING THAT DISTINCTION TO THE ISSUE OF CORPUS DELICTI; APPELLANT'S STATEMENTS WERE ADMISSIBLE AS AN ADMISSION AGAINST INTEREST.

Lack of Jurisdiction and Procedural Bar:

The state reasserts its position that this Honorable Court does not have jurisdiction of the instant case and that the issue of admission of Burks' subject statements is procedurally barred. On the jurisdictional issue, the state realleges and incorporates by this reference, its arguments made in Paint One, *supra,* at 6-9. On the procedural bar issue, the state realleges and incorporates by this reference, its arguments made in Point One, ***supra,*** at 10-11.

Merits:

Assuming *arguendo* that this matter is properly before this Honorable Court, Burks is entitled to no relief because his subject statements constitute an admission against interest rather than a confession. Burks claims that even under the district court's instant decision, his admissions "constitute a 'confession.'" (Appellant'sbrief at 17). The state disagrees.

The district court's definition of "confession" is:

> A voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged[.]
> . . .

> A statement made by a defendant disclosing his guilt of crime with which he is charged and excluding possibility of a reasonable inference to the contrary[.] . . .
>
> Voluntary statement made by one who is a defendant in a criminal trial at a time when he is not testifying in trial and by which he acknowledges certain conduct of his own constituting a crime for which he is on trial; a statement which, if true, discloses his guilt of that crime and excludes possibility of reasonable inference to contrary. . . .

(unbroken underline - emphasis in original; bold and underline - emphasis added) *Burks v. State*, 16 F.L.W. 2814, 2815 (Fla. 5th DCA Nov. 7, 1991). The district court quoted from caselaw as follows:

> A confession leaves nothing to be determined, in that it is a declaration of his [defendant's] intentional participation in a criminal act. . . .

(emphasis added) *Id.* (quoting *People v. Beverly*, 233 Cal.App.2d 702, 43 Cal. Rptr. 743, 750 (Cal. Dist. Ct. App. 1965), *cert. denied*, 384 U.S. 1014, 86 S.Ct. 1937, 16 L.Ed.2d 1035 (1966)).

To prove the crime of DUI manslaughter, it is necessary to establish the following:

(1) A person was under the effect of alcohol to the extent that his faculties were impaired or that he had a blood alcohol level in excess of .1;

(2) The person "operates a vehicle;" and,

(3) As a result of the operation of the vehicle, a person is killed.

§ 316.193(3), Fla. Stat. (1989). Unless Burks' admission "leaves nothing to be determined" because it acknowledges his guilt of DUI manslaughter, it is not a confession. Burks' admitted:

(1) "[H]e had rolled through a stop sign and in order to cross the road and it was a common practice for semis to do that." (emphasis added) (R 109).

(2) He was the driver of the semi truck. (R 109).

(3) He "had been drinking real heavily that evening before." (emphasis added) (R 110).

As is apparent, Burks did not admit his guilt of the crime charged because he did not admit guilt of each element thereof. Although he stated that he had ingested a lot of alcohol the evening before the crime, he did not admit that he was under its influence to the extent that his faculties were impaired at the time he was drinking it, muchless the following morning when the collision occurred.[5] Further, his explanation that he rolled through the stop sign because it was the normal practice for semi truck drivers is exculpatory, tending to show that his action was not caused by alcohol impairment. Under these circumstances, Burks can hardly be said to have confessed his guilt.

Likewise, Burks did not admit that his operation of the semi caused the collision, nor did he admit that anyone died as a result of the operation of the semi. While rolling through a

[5] Neither did he admit that his blood alcohol level exceeded .1.

stop sign is a violation of the traffic laws, it is not an element of DUI Manslaughter, nor does it, standing alone, prove any element thereof. Clearly, that Burks' rolled through a stop sign does not prove that his action in doing so caused the death of any person.

The only thing which Burks admitted was that he was the driver of the semi.[6] After his admission, there was a great deal still to be determined in order to prove commission of the charged crime. Therefore, Burks' admission was not a "confession."

In *Davis v. State*, 582 So.2d 695, 700 (Fla. 1st DCA 1991), the district court said: "[N]ot all extra-judicial statements against interest amount to "confessions," notwithstanding that Florida courts as well as courts in other jurisdictions have, on occasion, used the words "confession" and "admission" interchangeably to describe such statements." The court concluded that "admissions are admissible as prima facie evidence of the corpus delicti." *Id.* at 700.

An admission against interest is:

> A statement made by one of the parties to an action which amounts to a prior acknowledgment by him that one of the material facts relevant to the issues is not as he now claims . . . Any statements made by or attributable to a party to an action, which constitute

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[6] The state maintains that caselaw indicates that in order to establish the corpus delicti of a crime, the only showing required is that someone committed the crime. The identity of the criminal is not required to be proved for this purpose. *See* Point One, *supra*, at 13-15.

> admissions against his interest and tend to establish or disprove *any* material fact in the case.

Burks *v.* ***State,*** 16 F.L.W. 2814, 2815 (Fla. 5th DCA Nav. 7, 1991)(quoting Black's Law Dictionary, Fifth Edition). Burks' statements identifying him as the semi's driver tended "merely to establish one material fact and did not acknowledge guilt." (footnote omitted) *Id.* Accordingly, his statements were admissions against interest and were admissible at trial to help establish the corpus delicti. ***Hodges*** *v.* ***State,*** 176 So.2d 91, 92 (Fla. 1965); *Davis v.* ***State,*** 16 F.L.W. at 700. ***See*** § 90.804(2)(c), Fla. Stat. (1989).

Finally, assuming *arguendo* that the trial court erred in admitting the subject statements, that error was harmless because all elements of the crime were proved at trial independently of Burks' admissions.[7] That Burks was the driver of the semi was established at trial on cross examination of Officer Heaton and

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[7] In ***State*** v. ***Allen,*** *335* So.2d 823, 825 (Fla. 1976), this Court said that "it is preferable that the occurence of a crime be established before" a confession is admitted. The state contends that because it is "preferable" as opposed to "essential," harmless error analysis is clearly applicable. Further, in ***Hodges*** v. ***State,*** 176 So.2d 92, 93 (Fla. 1965), this Court said:

> [T]hough ordinarily evidence of a confession should not be admitted in advance of prima facie proof of the corpus delicti if this occurs and "additional proof of the corpus delicti is afterwards introduced, ***independent,*** of the confession, which *prima* ***facie*** established the corpus delicti and would have justified the admission of such confession, the technical error in prematurely admitting the confession will be cured.

through circumstantial evidence. (R 121-122); Point One, *supra*, at 16-17. The evidence that Burks was under the influence to the extent that his normal faculties were impaired and that his operation of the tractor trailer caused Mr. Courtemarche's death is overwhelming. See Point One, *supra*, at 12-13. The state asserts that there is no reasonable possibility that the error in admission of Burks' statements, if any, contributed to the guilty verdict. Therefore, the alleged error is harmless beyond a reasonable doubt, and the verdict should be upheld. *State v. Diguilio*, 491 So.2d 1129 (Fla. 1986).

POINT THREE

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO REOPEN ITS CASE AFTER IT RESTED AND APPELLANT MADE HIS MOTION FOR JUDGMENT OF ACQUITTAL OR IN DENYING THE ACQUITTAL MOTION BASED ON LACK OF **PROOF OF CAUSATION.**

Lack pf Jurisdiction:

The state reasserts its position that this Honorable Court does not have jurisdiction of the instant case. On the jurisdictional issue, the state realleges and incorporates by this reference, its arguments made in Point One, *supra,* at 6-9. Further, the state contends that this Court lacks jurisdiction because neither the district court's question nor either of the two cases on which Burks seeks conflict jurisdiction encompass the instant issue. *See Burks v. State,* 16 F.L.W. 2814, 2816 (Fla. 5th DCA Nov. 7, 1991); *Farley v. City of Tallahassee,* 243 So.2d 161 (Fla. 1st DCA 1971); *State* v. *Allen,* 335 So.2d 823 (Fla. 1976).

Procedural Bar:

Assuming *arguendo* that the question has been properly certified and the instant issue is encompassed therein and/or the instant decision conflicts with *Farley* and/or *State* v. *Allen,* the instant claim should not be considered because it is not preserved for appellate review. Burks complains that the trial judge should not have permitted the state to reopen its case after he moved for a Judgment of Acquittal. He alleges that at that point, the state failed to make a prima facie showing that the tractor trailer he operated caused the death of the victim,

Mr. Courtemarche. He also claims that he objected to the reopening of the state's case.

The record shows that after the state made its motion to reopen the case, the following occurred:

> The Court: [Defense Counsel], what say you with regard to the State's motion to reopen.
>
> . . .
>
> Defense Counsel: . . . Judge, all I can do is object. I think they've had time to get this case together. And the causation thing has been looming there.

(R 153-154). The trial court granted the request to reopen the case. (R 154).

The state asserts that Burks has failed to preserve this issue for appellate review. His "objection" to the reopening of the state's case is nothing more than a barebones, generic objection. It says nothing about the prejudice he tells this Court he suffered, nor does it claim that a trial judge cannot defer ruling on an acquittal motion under the instant circumstances or even suggest that the trial court would be abusing its judicial discretion to reopen the case.

A valid contemporaneous objection must be specific. ***See Carr v. State,*** 561 So.2d 617, 619 (Fla. 5th DCA 1990); *Dodd* v. ***State, 232*** So.2d 235, 238 (Fla. 4th DCA 1970). "When an objection is made on one ground at trial, no new or different ground may be considered on appeal." *Hines* v. ***State,*** 425 So.2d 589, *590* (Fla. 3d DCA 1983), ***pet. rev. denied,*** 430 So.2d 452 (Fla. 1983). ***See also Sanderson*** *v.* ***State,*** 390 So.2d 744, 745 (Fla. 5th DCA 1980)[only basis on which defendant may attack denial of trial court motions

is the specific one argued below]. Burks' failure to raise any meaningful objection to the reopening of the state's case bars consideration of this issue by this Honorable Court.

Merits:

Assuming *arguendo* that this issue is properly before this Honorable Court, Burks' position is without merit. The state contends that the evidence which had been admitted prior to the acquittal motion was sufficient to establish a prima facie case of causation, and the trial court did not abuse its judicial discretion in granting the state's motion to reopen its case.

A court should not grant a motion for judgment of acquittal unless no view of the evidence favorable to the state will support the guilty verdict. ***Brewer v. State, 413*** So.2d 1217 (Fla. 5th **DCA 1982); *Herman v. State,*** 472 So.2d 770 (Fla. 5th DCA 1986), ***rev. denied,*** **482** So.2d ***348*** (Fla. 1986). For purposes of appellate review, the movant admits all facts in evidence and every conclusion which may be inferred therefrom which are favorable to the state. ***Herman v. State,*** **472** So.2d at **771.** Where the state has brought forth competent evidence to support every element of the crime, a judgment of acquittal is not proper. ***Anderson v. State,*** **504 So.2d 1270, 1271 (Fla. 1st DCA 1986).**

Regarding the issue of causation, the record shows:

(1) Burks was the driver of the tractor trailer found at the scene of the subject accident.[8] (R 109). Burks "had been

[8] Even if Burks' confession that he was the driver of the tractor trailer is not considered in determining causation, the record still establishes, through Burks' cross examination of Officer

drinking real heavily that evening before" the accident. (R 110). His eyes were bloodshot, and he was "extremely upset." (R 115, 122). His walk was unsteady, he was disoriented and "his speech was slurred." (R 110-111).

(2) The weather was "very clear that morning," the road was dry and there were no defects in the road. (R 113, 125, 129).

(3) Although there was nothing obstructing Burks' view of the oncoming traffic, he ran a stop sign as he pulled onto the road. (R 109-110, 129).

(4) The tractor trailer stopped, blocking both northbound lanes of the four lane, divided highway. (R 106, 125).

(5) A motorcycle, owned by Charles Courtemarche, was found lying in the left lane of one of the northbound lanes. (R 125, 106, 158). Mr. Courtemarche's dead body was found in the other northbound lane. (R 107, 125, 127, 156). There were head and facial wounds on the body. (R 155).

(6) The police homicide investigator concluded that "[t]he motorcycle had the right of way." (R 128). It had been traveling north. (R 129).

(7) There were gouge marks in the pavement made by the motorcycle's engine casing just "before impact." (R 128-129).

(8) The police officer believed Burks was under the influence of alcohol and that his normal faculties were impaired

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Heaton, that he was the driver of the tractor trailer. *See* Point One, *supra*, at 7-8.

at the time of the accident. (R 113, 117). A blood test showed that Burks' blood alcohol level was .14 per cent. (R 144). All of this evidence came in prior to the making of the acquittal motion. The state asserts that since the northbound motorcycle had the right of way, and the tractor trailer pulled onto the road and blocked both northbound lanes, the only reasonable inference from the evidence is that the operation of the tractor trailer caused the accident.

In *Magaw* v. *State*, 537 So.2d 564, 567 (Fla. 1989), the Court said that:

> The statute required only that the operation of the vehicle should have caused the accident. Therefore, any deviation or lack of care on the part of a driver under the influence to which the fatal accident can be attributed will suffice.

(emphasis added). The Court also said that, "the state is not required to prove that the operator's drinking caused the accident." *Id.* Accordingly, it was only necessary to show that Burks was under the influence of alcohol to the extent that his normal faculties were impaired, not that his intoxication caused the deviation or lack of care which resulted in the accident.

Burks claims that "this Court should reverse the Appellant's conviction on the grounds that the State failed to prove causation . . . at the time it rested its case . . .." (Appellant's brief at 21). The state asserts that despite the trial judge's comment, which appears to indicate to the contrary, the evidence, together with the reasonable inferences therefrom, established that the operation of the tractor trailer caused the

accident.[9] Since the state presented a prima facie case that Burks' caused the accident which killed Mr. Courtemarche prior to the acquittal motion or the reopening of the case for additional testimony on this issue, Burks' motion for judgment of acquittal was properly denied.

It is well settled that a correct result in the trial court will be sustained on appeal even though the reason cited by the trial court for its ruling is incorrect. *Congregation Temple Deltirel v. Aronson,* 128 So.2d 585 (Fla. 1961); *Postell v. State,* 383 So.2d 1159 (Fla. 3d DCA 1980). Accordingly, even if the trial judge was of the opinion that a prima facie showing of causation had not been made at the time of the acquittal motion, his denial of that motion was properly upheld by the district court because the result was correct since the evidence and reasonable inferences therefrom adequately established causation. Under these circumstances, the error, if any, in delaying ruling on the acquittal motion or reopening the case is harmless beyond a reasonable doubt. *See State v. Diguilio,* 491 So.2d 1129 (Fla. 1986).

Assuming *arguendo* that the evidence and reasonable inferences therefrom were not sufficient to establish a prima facie case on the causation issue, the state asserts that the trial judge did

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[9] The state notes that the trial judge said that the state did not prove that the motorcycle struck the truck. (R 151). The state submits that such proof was unnecessary to establish causation. Further, that comment is not equivalent to an opinion that the state had not made a prima facie showing that the operatian of the tractor trailer caused the accident. For example, if Mr. Courtemarche, seeing the truck blocking the road before him, swerved to try to go around the truck, and the motorcycle turned over with him or ran into another object in the attempt, the tractor trailer would still be the cause of the accident involving the motorcycle.

not err in permitting the state to reopen its case to present additional testimony.[10] A trial court's decision to **permit** a party **to** reopen its case is discretionary. *Pitts* ***v. State,*** **185** So.2d 164 (Fla. 1966). Judicial discretion is abused only where no reasonable judge would have granted the **request** to reopen the case. *Canakaris* ***v.*** *Canakaris,* **382** So.2d 1197 (Fla. 1980). The state asserts that under the circumstances of the instant case, especially in light of the "barebones" objection defense counsel made to the state's **request** to reopen its case, no abuse of discretion occurred.

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[10] Burks does not claim that the evidence introduced after the state's case was reopened was insufficient to prove causation.

POINT FOUR

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION ON THE GROUNDS THAT IT **IS PRIVILEGED** BY THE STATE'S MANDATORY ACCIDENT REPORTING STATUTE.

Lack of Jurisdiction:

The state reasserts its position that this Honorable Court does not have jurisdiction of the instant case. On the jurisdictional issue, the state realleges and incorporates by this reference, its arguments made in Point One, *supra,* at 6-9. Further, the state contends that this Court lacks jurisdiction because neither the district court's question nor either of the two cases on which Burks seeks conflict jurisdiction encompass the instant issue. *See Burks* v. *State,* **16** F.L.W. 2814, 2816 (Fla. 5th DCA Nov. 7, 1991); *Farley v.* City *of Tallahassee,* 243 So.2d 161 (Fla. 1st DCA 1971); *State v.* ***Allen,*** **335** So.2d 823 (Fla. **1976).**

Procedural Bar:

Assuming *arguendo* that the question has been properly certified and the instant issue is encompassed therein and/or the instant decision conflicts with *Farley* and/or ***State v. Allen,*** the instant claim should not be considered because it is not preserved for appellate review. Burks claims that the motion to suppress his confession that he was the driver of the tractor trailer, rolled through a stop sign and had been drinking heavily the evening before the accident should not have been denied because his statements were privileged under Florida Statutes

§316.066. The record shows that this motion was contained within his motion in limine. (R 6, 95). That motion was heard prior to the taking of evidence in Burks' jury trial.

It is well settled that an objection at trial is required to preserve an issue for appellate review even though that issue was the subject of a motion in limine which was denied. ***Anderson v. State,*** 550 So.2d **488** (Fla. **1989);** *Rankin v. State,* 143 So.2d 193 (Fla. 1962); ***Anderson v. State,*** 549 So.2d 807 (Fla. 5th DCA 1989); *Singleton* ***v. State,*** **303** So.2d 420 (Fla. 2d **DCA** 1974). **The record** shows that Burks' motion in limine and suppression motion contained therein was denied. (R 95). However, when the state called Officer Heaton at trial, Burks did not object to admission of the evidence until after **the** officer testified to the incriminating statements made **by** Burks at the scene. (R 109-110). Failure to make a contemporaneous objection bars consideration of this issue on appeal. ***Steinhorst v. State,*** 412 So.2d 332 (Fla. 1982).

Further, assuming ***arguendo*** that the late objection Burks made preserved **the** corpus delicti issue for appellate review, it did nothing to preserve the instant one. ***See Hines v. State,*** 425 So.2d 589, 590 (Fla. 3d DCA 1983), ***pet. rev. denied,*** 430 So.2d 452 (Fla. 1983). ***See also Sanderson*** v. ***State,*** 390 So.2d **744,** 745 (Fla. 5th DCA 1980)[only basis on which defendant may attack denial of trial court motions is the specific one argued below]. ***See generally*** *Carr v. State,* 561 So.2d 617, 619 (Fla. 5th DCA 1990)[contemporaneous objection must be specific to **be** valid]; ***Dodd v. State,*** 232 So.2d *235,* 238 (Fla. 4th DCA 1970)[same].

Burks simply did not make any objection below based on the statutory privilege. (R 104, 109-110, **162-163).** Therefore, the instant issue is procedurally barred and should not be considered by this Honorable Court.

Merits:

Assuming ***arguendo*** that the issue is properly before this Court, the state contends that Burks' confession is not privileged under Florida Statute § 316.066(4). That statute provides that statements made during an accident investigation will not be used as evidence in a criminal trial. § 316.066(4), Fla. Stat. **(1989).** However, such statements "are admissible if uttered voluntarily in the course of a criminal investigation after the appropriate Miranda warnings have been given." ***West*** *v.* ***State,*** **553** So.2d 254, 256 (Fla. 4th **DCA** 1989).

The *West* court also addressed Burks' claim that it is hard for the citizen to know when an accident investigation has ended and a criminal investigation begun or to understand the significance of the difference. The court said:

> Recognizing that it may be difficult for a defendant to realize when an accident investigation **has** ended and a criminal investigation has begun, courts have held that unless a defendant has been apprised by police that the questions being asked are part of a criminal investigation, the statements made in response to those questions will be deemed privileged pursuant to § 316.066(4).

(citations omitted) ***Id.*** at 256.

In the instant case, Burks made the subject statements to Officer Heaton after the officer told him the difference between a homicide investigation and an accident investigation. (R 118). The officer told Burks that he was "no longer doing a traffic investigation as far as the accident was concerned, but now I was doing a criminal investigation." (R 118). Officer Heaton testified that he explained everything to Burks "very slowly and thoroughly to where he would understand." (R 118).

Officer Heaton testified that when he "changed hats" and began the criminal investigation he advised Burks of his *Miranda* rights. (R 107-108). Burks understood those rights and voluntarily made the subject statements to the officer. (R 109). These statements were made "after Miranda." (R 120).

Subsequently, Officer Heaton also "explained to Mr. Burks that the homicide investigator was there for the death investigation." (R 119). Burks repeated his subject statements thereafter, "on the way to the hospital." (R 114).

The state asserts that Burks' statements were not privileged under section 316.066(4) because they were voluntarily made after the criminal investigation had begun, Burks had been told that a criminal, homicide investigation had begun, and the *Miranda* warnings had been given. ***West*** v. ***State***. Accordingly, it was not error to deny the motion in limine regarding the admission of Burks' confession.

Finally, even if Burks' conviction should not have been admitted, the state asserts that the error was harmless beyond a reasonable doubt. Burks' statements were (1) he was the driver

of the truck, (2) he rolled through a stop sign and (3) he had been drinking heavily the evening before the accident. These facts were established independently of Burks' confession.

First, that Burks was the driver of the tractor trailer was put before the jury by Burks during cross examination of Officer Heaton, and it was established through circumstantial evidence. Second, that Burks was at fault was established by the testimony that the tractor trailer was blocking both northbound lanes and the median of the four lane highway, that the motorcycle was traveling north and that the motorcycle had the right of way. Third, that Burks was under the influence of alcohol to the extent that his normal faculties were impaired was established by Officer Heaton's testimony describing his observations of Burks' physical appearance, Burks' response to questions and the officer's opinion that Burks was intoxicated. In addition, Burks had a blood alcohol level of .14. Since the same factors that Burks' allegedly privileged statements established were also established by other evidence, admission of the subject statements was, at most, harmless error. *See State v. Diguilio*, 491 So.2d 1129 (Fla. 1986).

CONCLUSION

Based on the arguments and authorities cited herein, the appellee respectfully requests this Honorable Court uphold the opinion of the Fifth District Court of Appeal and the judgment and sentence of the trial court in all respects. Should this Court find that any issues presented are not preserved for appellate review, the state requests a clear and express statement that the judgment rests on a state procedural bar. *See Harris v. Reed,* _____ U.S. _____, 109 S.Ct. 1038, _____ L.Ed.2d _____ (1989).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been served by U. S. Mail on Jeffrey L. Dees, Attorney for Appellant, at 120 East Granada Blvd., Ormond Beach, FL 32176, on this 14th day of February, 1992.

Judy Taylor Rush
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