

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,)
)
 Respondent,)
)
 vs.) **No. SC87125**
)
CHRISTOPHER MILO WHITELEY,)
)
 Appellant.)

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF DALLAS COUNTY, MISSOURI
THIRTIETH JUDICIAL CIRCUIT
THE HONORABLE JOHN W. SIMS, JUDGE**

APPELLANT’S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts the jurisdictional statement set forth in his original brief.

STATEMENT OF FACTS

Appellant adopts the statement of facts set forth in his original brief.

POINTS RELIED ON

I.

The trial court erred in refusing to instruct the jury on the lesser offense of third degree assault, because this offense is a lesser included offense of second degree robbery, and failing to so instruct the jury violated appellant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lower since there was evidence that appellant acted under a claim of right, as comprehended in § 570.070.1(1), since there was evidence that Hamilton had not paid him for his work as promised, and there was evidence that appellant struck Hamilton.

State v. Belton, 108 S.W.3d 171 (Mo.App. W.D., 2003);

State v. Ide, 933 S.W.2d 849 (Mo.App. W.D. 1996);

State v. Quisenberry, 639 S.W.2d 579 (Mo. banc 1982);

State v. Yeargain, 926 S.W.2d 883 (Mo.App. S.D. 1996);

Section 556.061(20);

Section 565.070.1(3);

Section 569.030; and

MAI-CR 3d 312.06.

II.

The trial court abused its discretion in overruling defense counsel's objections and in admitting evidence that on September 1, 2003, and earlier, appellant threatened to rape Hamilton's wife and threatened the family in an incident in which the Hamilton family was forced to hide out and in which a window of Hamilton's truck was broken, because that evidence was neither logically nor legally relevant and its admission violated appellant's rights to due process of law and to be tried only for the crime with which he was charged, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, and 18(a) of the Missouri Constitution, in that the result was a trial within a trial forcing appellant to defend against a charge that had never been filed and creating a likelihood that he was convicted because he had committed the uncharged crimes.

State v. Conley, 873 S.W.2d 233 (Mo. banc 1994);

State v. Barriner, 34 S.W.3d 139 (Mo. banc 2000);

State v. Wallace, 943 S.W.2d 721 (Mo. App., W.D. 1997);

State v. Garner, 14 S.W.3d 67 (Mo. App., E.D. 1999);

I.

The trial court erred in refusing to instruct the jury on the lesser offense of third degree assault, because this offense is a lesser included offense of second degree robbery, and failing to so instruct the jury violated appellant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lower since there was evidence that appellant acted under a claim of right, as comprehended in § 570.070.1(1), since there was evidence that Hamilton had not paid him for his work as promised, and there was evidence that appellant struck Hamilton.

Considered in order, the state's arguments are not supported by the statutes and caselaw.

A.

The offense of second degree robbery involves the use or threatened use of physical force. § 569.030.1, RSMo. Although the force need not result in physical injury, the term "force" implies more than casual contact. In *State v. Belton*, 108 S.W.3d 171, 175 (Mo.App. W.D., 2003), the court defined the term "physical force" as

“power, violence, compulsion, or constraint exerted upon or against a person or thing[.] ... FORCE is a general term for exercise of strength or power, esp[ecially] physical, to overcome resistance[.] ... [T]o press, drive, attain to, or effect as indicated against resistance or inertia by some positive compelling force or action.” [citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 887 (1971).]

This “force” must be sufficient to overcome resistance to the taking of property, or forcing the delivery of property. § 569.030. Force involves physical contact. Third degree assault is committed by physical contact that one knows to be regarded as “offensive or provocative.” § 565.070.1.

The word “offensive” “is defined by Webster's New International Dictionary (3rd Ed.) as: ‘causing, or such as to cause, displeasure or resentment; insulting, disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingsness.’” *State v. Yeargain*, 926 S.W.2d 883, 888 (Mo.App. S.D. 1996). The “force” used in the commission of second degree robbery fits within the definition of “offensive.” The use of physical force in second degree robbery requires commission of third degree assault.

Second degree robbery may also be committed by the purposeful threat of the immediate use of physical force to compel delivery of property. § 569.030. Cases involving the threat of force generally involve “a threat or fear being from the defendant to lay harm on the victim...” *State v. Ide*, 933 S.W.2d 849, 853 (Mo.App. W.D. 1996).

Although actual force need not be used, constructive force involves intimidation and putting the victim in fear. *State v. Rounds*, 796 S.W.2d 84, 86 (Mo.App. E.D. 1990). The threatened force must be calculated to compel the delivery of the property. As such, it necessarily encompasses the elements of third degree assault, which involve purposely placing another in apprehension of immediate physical injury. § 565.070.1(3). For example, in *State v. Lybarger*, 165 S.W.3d 180, 186 (Mo. App., W.D. 2005), the defendant placed the victim in apprehension of immediate physical injury in order to compel the delivery of property by intimidating that he had a weapon in his pocket.

Instruction No. 7 required the jury to find that appellant struck Christopher Hamilton (L.F. 33). Instruction A required the jury to find that he “attempted to cause physical injury” to Hamilton by striking him (Supp. L.F. 1). “Physical injury” means “physical pain, illness, or any impairment of physical condition.” § 556.061(20). The act of striking

demonstrates an attempt to cause physical pain, and the state does not contest that appellant “might have actually had that intent under the *facts* of this case....” (Resp. Br. 17). Instruction No. 7 submitted an intentional act to cause pain – striking Hamilton

The trial court refused the instruction on the incorrect ground that third degree assault was not a lesser included offense (Tr. 461). If there was any error as the state now complains, it “was the type of mistake that could have been easily corrected by Appellant had the state pointed it out below.” *State v. Derenzy*, 89 S.W.3d 472, 475 (Mo.banc 2002).

Third degree assault is a lesser included offense of second degree robbery. Instruction No. A was a third degree assault instruction that was justified by the evidence. It should have been submitted to the jury.

B.

Respondent correctly points out that *State v. Quisenberry*, 639 S.W.2d 579 (Mo. banc 1982), was not a robbery case. Its brief omits, however, the Court’s observation in that case that “an honest albeit erroneous belief in the right to take the money of another in satisfaction of a debt owed negated the felonious intent necessary for the crime of *robbery*.” *Id.* at 582 (emphasis added).

This Court is not bound by *State v. Williams*, 34 S.W.3d 440, 442-43 (Mo. App., S.D. 2001), which held that *Quisenberry* only addresses burglary. There is no basis for this holding; the commission of stealing is as indispensable to a robbery conviction as it is to burglary.

C.

The evidence was far from clear that Hamilton had fully paid appellant to appellant's satisfaction. The terms of the contract were verbal and Hamilton only testified to his own understanding (Tr. 167). Hamilton was by no means clear that he actually paid appellant the night of the incident; he told that to the authorities but had no independent recollection of what happened (Tr. 217). Hamilton admitted that a lot of what he told the authorities the night of the incident was untrue (Tr. 188).

Hamilton's subjective beliefs, and the state's position, are not evidence of appellant's honest belief. There was a jury question as to whether appellant "acted in the honest belief that he had the right" to take money from Hamilton for payment for his services. § 570.070.

The state argues that appellant's commission of assault is fatal to his defense. This disregards the point that, even though appellant did not have the right to strike Hamilton, he "lack[ed] the requisite mental state for stealing...." *Quisenberry*, 639 S.W.2d at 582 (Mo. banc 1982).

Therefore, “an honest albeit erroneous belief in the right to take the money of another in satisfaction of a debt owed negated the felonious intent necessary for the crime of robbery.” *Id.*

State v. Smith, 684 S.W.2d 576, 580 (Mo. App., S.D. 1984), notes that “[a] claim of right is a special negative defense and inherent in its concept is that the act charged occurred, but by reason of the defense, the act did not possess the qualities of criminality.” Here, the defense conceded that Hamilton’s testimony might have established an assault, but maintained that the attempt to recover money was not robbery if appellant honestly believed Hamilton owed it to him. The act of taking did not, therefore, involve dishonesty and did not possess the qualities of criminality.

D.

For the first time, the state attacks Instruction No. 7 as not including language instructing on the “claim of right.” Instruction No. 7 was submitted by the defense and is not the subject of this appeal. The issue raised by this appeal is the trial court’s refusal to submit the lesser included offense of third degree assault that was justified by the evidence.

E.

Reversal of the robbery conviction compels reversal of the murder conviction. It is true that a felony need not be entered as a separate

conviction in order to sustain a conviction of felony murder. *State v. Graham*, 2 S.W.3d 859, 866 (Mo. App., W.D. 1999). If the jury finds that the defendant attempted the underlying felony, this supports a felony murder conviction. *Id.*

In *Graham*, the jury was properly instructed as to the elements of the underlying offense; “[t]he error was in the sentencing range the jury was told it should use...” *Id.* Here, by contrast, the jury was not properly instructed as to the law of robbery. It was not given the opportunity to consider third degree assault as a lesser included offense. Had it done so, it may have acquitted appellant of second degree robbery and convicted him of misdemeanor assault. *Graham* presupposes a properly instructed jury, which was not the case here.

MAI-CR 3d 312.06 makes it clear that a jury cannot return inconsistent verdicts as to second degree felony murder and the underlying felony. A jury cannot both convict of second degree murder and acquit the defendant of an underlying felony. The reversal of appellant’s attempted robbery conviction necessitates reversal of the murder conviction.

II.

The trial court abused its discretion in overruling defense counsel's objections and in admitting evidence that on September 1, 2003, and earlier, appellant threatened to rape Hamilton's wife and threatened the family in an incident in which the Hamilton family was forced to hide out and in which a window of Hamilton's truck was broken, because that evidence was neither logically nor legally relevant and its admission violated appellant's rights to due process of law and to be tried only for the crime with which he was charged, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§10, 17, and 18(a) of the Missouri Constitution, in that the result was a trial within a trial forcing appellant to defend against a charge that had never been filed and creating a likelihood that he was convicted because he had committed the uncharged crimes.

Hamilton testified that he hired appellant to do work for him and did not pay him in a timely fashion (Tr. 167-68). Jeannie Green testified that appellant told her that he was going to get money from Hamilton (Tr. 380-81, 393-94). There was abundant evidence of motive.

Evidence of other bad acts, however, is only admissible if the defendant puts his motive at issue. *State v. Conley*, 873 S.W.2d 233, 237 (Mo. banc 1994). Otherwise, “the prejudicial effect of admitting the evidence is substantial.” *State v. Wallace*, 943 S.W.2d 721, 725 (Mo. App., W.D. 1997).

There was no need to introduce such inflammatory matters as threatened rape. Furthermore, any threat to Hamilton’s wife had no relevance because the instant offense did not involve her. *State v. Barriner*, 34 S.W.3d 139, 148 (Mo. banc 2000) (threat to harm ex-girlfriend’s son inadmissible in prosecution for murder of her mother and daughter).

State v. Garner, 14 S.W.3d 67, 74 (Mo. App., E.D. 1999) is distinguishable from this case. That case involved simple evidence that the defendant had threatened the victim over a debt. There was no evidence of a threat to rape the victim’s wife and there was no evidence suggesting that the defendant had vandalized the victim. The defendant actually committed the killing, and threats regarding money supplied a motive for the murder.

Any evidence of a threat to rape Hamilton’s wife or terrorizing the family served no purpose in establishing motive, since the evidence did not link them to the money Hamilton owed appellant (Tr. 172-74). The

evidence was gratuitous and only served to portray him as a violent person with a proclivity for assaultive behavior.

In a case where the victim lied and the physical evidence refuted the claims that he continued to hold to; and the state never investigated the physical evidence on its own but simply went after appellant, “[t]his Court cannot say that the inadmissible evidence did not contribute to the jury's verdict.” *Barriner*, 34 S.W.3d at 152. Appellant's conviction should be reversed.

CONCLUSION

For the reasons set forth above, as well as for the reasons set forth in appellant's initial brief, appellant requests that this Court reverse and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Rosalynn Koch, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,592 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in December, 2005. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 20th day of December, 2005, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Rosalynn Koch

APPENDIX

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