

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	
)	SC 95629
)	
PHILLIP L. RANSBURG)	
)	
Appellant)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF HENRY COUNTY, MISSOURI
TWENTY-SEVENTH JUDICIAL CIRCUIT
HONORABLE JAMES K. JOURNEY

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Phillip L. Ransburg, appeals his convictions for: first degree burglary, Section 569.160, RSMo 2000¹; second degree domestic assault, Section 565.073; second degree assault, Section 565.060; armed criminal action, Section 571.015; and violation of an Order of Protection, Sections 445.010; 455.045, 455.085, following a bench trial before the Honorable James K. Journey in the Circuit Court of Henry County. (L.F. 9-10). The trial court found Appellant guilty on all counts and sentenced him as a prior felony offender to concurrent terms of: eight years for burglary; seven years for domestic assault; seven years for second degree assault; five years for armed criminal action; and one year for violating the order of protection. Notice of appeal was timely filed, and Appellant was permitted to appeal *in forma pauperis*, on March 4, 2015. (L.F. 38).

On appeal, the Missouri Court of Appeals, Western District, reversed Appellant's convictions for second degree assault and armed criminal action on February 16, 2016, *State v. Ransburg*, WD78448 (2/16/16).

On May 24, 2016, on the State's application, this Court ordered transfer of this case. Mo. Const., Article V, Section 9, Rule 83.04, therefore jurisdiction lies in this Court.

¹ Unless otherwise noted, all further citations will be to RSMo 2000 as updated through the 2013 Cumulative Supplement.

STATEMENT OF FACTS

On May 20, 2014, the State filed an Information charging Appellant with the following crimes: first degree burglary, Section 569.160, RSMo 2000; second degree domestic assault, Section 565.073; second degree assault, Section 565.060; armed criminal action, Section 571.015; and violation of an Order of Protection, Sections 445.010; 455.045, 455.085 (L.F. 9-10).

Prior to trial Appellant requested a pretrial mental examination which the trial court ordered (L.F. 17, 18). Although Appellant was diagnosed with schizophrenia, disorganized type, and post-traumatic stress disorder (L.F. 23), he was found competent to stand trial (L.F. 24). The examiner noted however, that “it is imperative the defendant continue to receive psychotropic medications” (L.F. 24).

On October 14, 2014, Appellant waived a jury trial (L.F. 25; WTr. 3, 14)², and on November 19, 2014 a bench trial took place before the Honorable James K. Journey. The State adduced the following evidence.

Tammy Masoner and Appellant had dated for a year or a year-and-a-half (Tr. 33). During part of that time Appellant lived with Masoner in her trailer at 407 E. Walnut, Clinton, Henry County (Tr. 33). In September, 2013, Appellant

² There are four transcripts in this case which are cited as follows: arraignment (ATr.); waiver of jury trial (WTr.); bench trial (Tr.); and sentencing (STr.)

began to get violent and so Masoner sought and obtained an order of protection against him (Tr. 34). On March 3, 2014, that order of protection was still in effect (Tr. 46).

On that evening, Tammy Masoner, her fiancé³ James Blackman, and her daughter Sarah, were sitting in Masoner's trailer watching television (Tr. 43, 60). Sometime between 10:00 and 10:30 p.m., they heard something outside and when Masoner looked, she saw it was Appellant trying to come inside (Tr. 43, 56).

Masoner tried to hold the door shut but he got in anyway (Tr. 43). Appellant charged at Blackman while holding a long stick (Tr. 45, 68). According to Blackman, Appellant had both hands on the stick but he did not swing it or jab at him with it (Tr. 70, 78). "He was charging [at Blackman] like a football player would hit another attacker." (Tr. 78). Blackman, along with Sarah, ran into the bedroom and closed the door (Tr. 45). The stick Appellant had been holding was similar to a broom stick (Tr. 44). Masoner was used to seeing Appellant dance with that stick (Tr. 57).

After Blackman and Masoner's daughter were in the bedroom, Appellant tried to grab Masoner's wrist and when she tried to move her hand, Appellant punched her on the right side of her forehead with his closed fist (Tr. 45, 62). The blow hurt, left a mark, and gave her a "bad" headache for a couple of days (Tr. 45).

³ Masoner and Blackman were married at the time of trial (Tr. 66).

Meanwhile, in the bedroom, Sarah told Blackman to “go out there” because she feared that Appellant would hit her mother (Tr. 70). Blackman decided to try and charge back at Appellant (Tr. 71). He came out of the bedroom in time to see Appellant hit Masoner on the right side of her forehead with his closed fist (Tr. 71). Appellant then left the trailer (Tr. 46, 71).

According to Masoner, Appellant was not “acting normal”, he was mumbling, but not threatening or yelling (Tr. 63, 65). She could not understand anything he said (Tr. 64).

Sarah had called the police (Tr. 72), and City of Clinton Police Officer Patrick Meeks responded (Tr. 82). Meeks could see the damage to the front door (Tr. 83). He also noted that Masoner had a “large swelling contusion area on her left forehead.” (Tr. 84).

Meeks saw Appellant later that day (Tr. 83). He was familiar with Appellant from having seen him dancing with his stick on the Clinton town square (Tr. 83). Meeks testified that the stick looked like a four foot broom handle covered in tape (Tr. 84). Appellant was not carrying the stick when Meeks arrested him (Tr. 84).

After the State rested (Tr. 94), the Appellant filed a Motion for Judgment of Acquittal (L.F. 27; Tr. 94). That motion was denied (Tr. 95) and Appellant took the stand (Tr. 96).

Appellant testified that he had been in jail until 3:00 p.m. on March 3, 2014 (Tr. 105). After he got out, he went to a friend’s house but left there and went

dancing with his stick, ending up at the trailer park (Tr. 107), but he did not go to Masoner's trailer (Tr. 107). When he was dancing back to his friend's house he was arrested (Tr. 107).

Appellant rested and his Motion for Judgment of Acquittal At The Close of All of the Evidence (L.F. 29; Tr. 133) was denied (Tr. 142). After closing arguments, the trial court took the case under advisement (Tr. 142).

On December 12, 2014 the trial court found Appellant guilty on all counts (STr. 4-5), and on March 4, 2015 sentenced Appellant to concurrent terms of imprisonment as follows:

First degree burglary	8 years
Domestic assault 2 nd	7 years
Assault 2 nd	7 years
Armed criminal action	5 years
Violation of an order of protection	1 year

(L.F. 36, STr. 20).

Notice of Appeal was timely filed on March 12, 2015 (L.F. 39-40), and this appeal follows.

POINTS RELIED ON

I

The trial court erred in overruling Mr. Ransburg’s motion for judgment of acquittal at the close of all of the evidence and in finding him guilty of assault in the second degree and thereafter sentencing him to imprisonment for that offense because doing so violated Mr. Ransburg’s right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was insufficient evidence from which the trial court could have found, beyond a reasonable doubt, that Mr. Ransburg attempted to cause physical injury to James Blackman by means of a dangerous instrument.

State v. Reese, 436 S.W.3d 738 (Mo App., W.D. 2014);

State v. Poole, 563 S.W.2d 156 (Mo App., KCD 1978);

State v. Loyd, 326 S.W.3d 908 (Mo. App., W.D. 2010);

In re Winship, 397 U.S. 358 (1970);

United States Constitution, Amendment XIV;

Missouri Constitution, Article 1, Sec. 10;

Secs. 556.061.1(9), 562.016.2, 564.011.1; and

Rule 29.11(e)(2).

II

The trial court erred in overruling Mr. Ransburg's motion for judgment of acquittal at the close of all of the evidence and in finding him guilty of armed criminal action and thereafter sentencing him to imprisonment for that offense because doing so violated Mr. Ransburg's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the armed criminal action count related to Count III, assault in the second degree, and since there was insufficient evidence to support that conviction, there is no basis for the armed criminal action conviction.

State v. Dublo, 243 S.W.3d 407 (Mo. App., W.D. 2007);

United States Constitution, Amendment XIV;

Missouri Constitution, Article 1, Section 10; and

Section 571.015.1.

ARGUMENT

I

The trial court erred in overruling Mr. Ransburg’s motion for judgment of acquittal at the close of all of the evidence and in finding him guilty of assault in the second degree and the attendant count of armed criminal action and thereafter sentencing him to imprisonment for these offenses because doing so violated Mr. Ransburg’s right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was insufficient evidence from which the trial court could have found, beyond a reasonable doubt, that Mr. Ransburg attempted to cause physical injury to James Blackman by means of a dangerous instrument.

The State charged Appellant with assault in the second degree, Section 565.060, and armed criminal action, Section 571.015. The Information alleged that on March 3, 2014, Appellant committed the class C felony of assault in the second degree when he “attempted to cause physical injury to James Blackmon (sic) by means of a dangerous instrument by advancing toward Blackmon (sic) with a large stick in defendant’s hand” (L.F. 10). The assault in the second degree charge formed the basis for the armed criminal action count (L.F. 10).

Appellant waived a jury and was tried by the trial court (L.F. 25).

Appellant’s motions for judgment of acquittal at the close of the State’s evidence

(L.F. 27), and at the close of all of the evidence (L.F. 29) were denied (Tr. 95, 133-134), and the trial court found him guilty as charged.

Appellant submits that the trial court erred in finding him guilty of those two offenses because the evidence does not establish, beyond a reasonable doubt, that Appellant attempted to cause physical injury to Mr. Blackman by means of a dangerous instrument.

Facts relevant to the issue:

Tammy Masoner, Appellant's ex-girlfriend (Tr. 32), testified that Appellant tried to chase after her fiancé, James Blackman, with a "big-old stick" in his hands (Tr. 44). Masoner was familiar with the stick because Appellant danced with it (Tr. 45). Masoner stated that "when Phillip came through my door, then Mr. Blackman and my daughter Sarah ran into my bedroom. And then that's whenever he punched me in the face." Appellant had dropped the stick before striking Masoner (Tr. 60).

James Blackman, the alleged victim, testified that Appellant "charged" at him with both hands on a pool stick or broom handle (Tr. 68, 70). Blackman ran into Masoner's bedroom along with Masoner's daughter Sarah (Tr. 60, 70). Blackman testified that Appellant was not swinging the stick, nor did he try and jab Blackman with the stick (Tr. 78). Appellant never touched Blackman with the stick (Tr. 78). Blackman described Appellant's action as "he was charging at me like a football player would hit another attacker." (Tr. 78). When, at the urging of

Sarah, Blackman opened the bedroom door, he saw Appellant pick up the stick and run out of the trailer. (Tr. 61, 71).

Clinton Police Officer Patrick Meeks testified that he was familiar with Appellant from seeing him dancing with his stick on the Clinton town square (Tr. 83). He described the stick as a broom handle, approximately four feet long, wrapped in tape (Tr. 83-84).

Preservation:

A claim that there is insufficient evidence to sustain a criminal conviction is preserved for review without regard to whether it was raised below. Rule 29.11(e)(2), *State v. Helmig*, 924 S.W.2d 562, 565 (Mo. App., E.D. 1996). A motion for new trial is not necessary to preserve error in cases tried without a jury. Rule 29.11(e)(2)

Standard of Review:

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that the State prove each element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). This impresses upon the fact finder “the need to reach a state of near certitude of the guilt of the accused” and thereby symbolizes the significance that our society attaches to liberty. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

On a challenge to the sufficiency of the evidence, this Court will determine only whether there is sufficient evidence from which a reasonable trier of fact might have found the defendant guilty beyond a reasonable doubt. *State v. Scholl*,

114 S.W.3d 304, 307 (Mo. App., E.D. 2003). The evidence, including all reasonable inferences drawn therefrom, is viewed in the light most favorable to the verdict, and all evidence and inferences to the contrary are disregarded. *Id.* While inferences are to be taken in the light most favorable to the verdict, neither the trier of fact nor this Court may “supply missing evidence or give the [State] the benefit of unreasonable, speculative or forced inferences.” *State v. Loyd*, 326 S.W.3d 908, 916 (Mo. App., W.D. 2010).

Discussion:

The State charged that:

The defendant, in violation of Section 565.060, RSMo, committed the class C felony of assault in the second degree, punishable upon conviction under Sections 558.011 and 560.011, RSMo, in that on or about March 3, 2014, in the County of Henry, State of Missouri, the defendant attempted to cause physical injury to James Blackmon (sic) by means of a dangerous instrument by advancing toward Blackmon (sic) with a large stick in defendant’s hand.

(L.F. 10).

“A dangerous instrument is ‘any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury.’” *State v. Fasnut*, 302 S.W.3d 259, 263 (Mo. App., E.D. 2010); Section 556.061(9). “Serious physical injury” is defined as “physical

injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.” Section 556.061.1(28).

To prove an attempt, the State must show that a defendant: 1) had the purpose to commit the underlying offense; and 2) committed an act, which was a “substantial step toward the commission of that offense.” *State v. Reese*, 436 S.W.3d 738, 741 (Mo. App., W.D. 2014) *citing*, *State v. Withrow*, 8 S.W.3d 75, 78 (Mo. banc 1999).

A “substantial step” is conduct that is “strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense.” Section 564.011.1 RSMo. The purpose to commit an offense means it was the defendant’s “conscious object to engage in that conduct or to cause that result.” Section 562.016.2.

The State’s evidence failed to prove, beyond a reasonable doubt, that Appellant’s conscious object was to use his stick as a dangerous instrument. Appellant carried his “dancing” stick with him often (Tr. 45, 83, 107). He never swung the stick at Blackman nor did he jab at him with it (Tr. 78). He never touched Blackman with the stick (Tr. 78). Appellant did not make any oral threats against Blackman. When Blackman ran into the bedroom and closed the door, Appellant did not attempt to force the door open or take any other steps to try and get to Blackman. Instead, he dropped the stick and hit Masoner with his fist (Tr. 60). When Blackman came back into the living room, Appellant did not pick up

the stick and attack him, instead, Appellant picked up his stick and ran from the trailer (Tr. 61).

Blackman's testimony that Appellant came at him like a football player getting ready to tackle an opponent (Tr. 78) casts doubt on the trial court's implicit finding that it was Appellant's "conscious object" to use his stick as a dangerous instrument to cause death or serious physical injury to Blackman. Even if Appellant had succeeded in running into Blackman with the stick held horizontally in front of him, there is no basis for finding that Blackman would have suffered death or serious physical injury as a result.

The facts that Appellant did not use the stick to assault Masoner, made no attempt to enter the bedroom after Blackman and Sarah entered it, and picked up the stick and ran when Blackman reentered the living room are all strongly corroborative of the fact that it was not Appellant's purpose to use the stick as a dangerous instrument.

Missouri appellate courts apply a functional analysis in determining whether a seemingly innocuous object can be turned into a dangerous instrument. *State v. Rousselo*, 386 S.W.3d 919, 923-924 (Mo. App., S.D. 2012). "The key consideration is whether the ceramic bowl was readily capable of causing death or serious physical injury **under the circumstances in which it was used.** *Id.*, citations omitted. In *Rousselo*, the court found that the ceramic bowl became a dangerous instrument when the defendant "slammed it down on the victim's head"

with sufficient force that the victim fell to the ground and needed four staples to close the wound. *Id.* at 921.

In *State v. Eoff*, 193 S.W.3d 366 (Mo. App., S.D. 2006) the Court held that a 1” x 2” x 18” piece of wood, similar to a billy club, was readily capable of causing death or serious physical injury because the defendant used it to bludgeon the victim, hitting her on the head and hand. *Id.* at 374. Similarly, the Court in *Reese, supra*, found that a pencil was a dangerous instrument because the defendant made stabbing motions with it while approaching a correctional officer and saying, “you all don’t want none of this”. From that a fact finder could reasonably infer that Reese was aware that he was using the pencil in a way that might cause death or serious physical injury. 436 S.W.3d at 742. In *State v. Coram*, 231 S.W.3d 865 (Mo. App., S.D. 2007), the Court held that as used, a phone was capable of causing serious physical injury because of the physical condition of the victim (an incapacitated 93-year-old man), the location of the injury (the face), the force with which it had to have been thrown, and the serious disfigurement of the victim (serious bruising and a black eye still visible four days after the incident). *Id.* at 868. In *State v. Arnold*, 216 S.W.3d 203, 209 (Mo. App., S.D. 2007), the Court held that because an ink pen was pushed against the soft tissue of the victim’s neck, and the defendant told his co-defendant to “go ahead and kill her”, the defendant was aware that the pen was being used as a dangerous instrument readily capable of causing death or serious physical injury.

Unlike these cases, the facts in Appellant's case lead to the conclusion that it was not Appellant's conscious object to use his stick as a dangerous instrument. Appellant did not use the stick as a bludgeon or a sword. Appellant did not aim the stick at any vulnerable part of Blackman's body. Nor is there any evidence that Appellant brought the stick with him for the purpose of using it to bludgeon or stab Blackman. The trial court erred in finding that Appellant used his "dancing" stick as a dangerous instrument.

In finding Appellant guilty of assault in the second degree, the trial court had to infer that it was Appellant's purpose to use his stick to cause death or serious physical injury. That finding is not supported by the State's evidence, even when the evidence is taken in the light most favorable to the verdict. As noted above, this Court cannot "supply missing evidence or give the [State] the benefit of unreasonable, speculative or forced inferences." *State v. Loyd*, 326 S.W.3d 908, 916 (Mo. App., W.D. 2010). The trial court's finding of guilt had to be based on the speculation or forced inference that Appellant would have caused Blackman's death or serious physical injury but for Blackman running into the bedroom. "A verdict based on speculation cannot stand." *State v. Poole*, 563 S.W.2d 156 (Mo. App., KCD 1978), quoting, *State v. Thompson*, 428 S.W.2d 742, 744 (Mo. 1968). This Court should reverse Appellant's conviction for assault in the second degree.

Where a conviction has been overturned for insufficiency of the evidence, a reviewing court may enter judgment on a lesser-included offense if the evidence

was sufficient for a fact finder to find each of the elements and the fact finder was required to find each of those elements. *State v. Dublo*, 243 S.W.3d 407 (Mo. App., W.D. 2007) citing, *State v. O'Brien*, 857 S.W.2d, 212, 220 (Mo. banc 1993), see also *State v. Vaughn*, 940 S.W.2d 60, 62-63 (Mo. App., W.D. 1997).

As relevant to this case, Section 565.070.1 RSMo 2014, states that a person commits the crime of assault in the third degree if:

- (1) The person attempts to cause . . . physical injury to another person.

Physical injury means physical pain, illness, or any impairment of physical condition. Section 556.061.1(20) RSMo.

In order to find Appellant guilty of assault in the third degree the trial court would have to find the Appellant attempted to cause physical injury to James Blackman. The State's evidence at trial was sufficient to make this finding. The trial court could have found that by charging at Blackman as though he was going to tackle him (Tr. 78), Appellant was attempting to cause Blackman pain. That is the only element needed for a conviction of assault in the third degree. This Court should enter a conviction for assault in the third degree pursuant to Section 565.070.1(1).

II

The trial court erred in overruling Mr. Ransburg's motion for judgment of acquittal at the close of all of the evidence and in finding him guilty of armed criminal action and thereafter sentencing him to imprisonment for that offense because doing so violated Mr. Ransburg's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the armed criminal action count related to Count III, assault in the second degree, and since there was insufficient evidence to support that conviction, there is no basis for the armed criminal action conviction.

The State charged that:

The defendant, in violation of Section 571.015 RSMo, committed the felony of armed criminal action, punishable upon conviction under Section 571.015.1 RSMo, in that on or about March 3, 2014, in the county of Henry, State of Missouri, the defendant committed the felony of assault in the second degree as charged in Count III, all allegations of which are incorporated herein by reference, and the defendant committed the foregoing felony by, with and through, the knowing use, assistance and aid of a dangerous instrument.

(L.F. 10).

Appellant submits that because the State failed to prove Count III, the felony of assault in the second degree (see Point and Argument I), and because his conviction for armed criminal action relates to that offense, his conviction for armed criminal action must be vacated as there is no basis for it. *State v. Dublo*, 243 S.W.3d 407, 410 (Mo. App., W.D. 2007).

CONCLUSION

For the reasons set forth in Point I, Appellant respectfully requests that this Court reverse his conviction on Count III, assault in the second degree and enter its judgment on the misdemeanor offense of assault in the third degree. For the reasons set forth in Point II, Appellant respectfully requests that this Court reverse his conviction on Count IV, armed criminal action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b) and Special Rule XLI/360. The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,221 words, which does not exceed the 15,500 words allowed for an appellant's initial brief.

On this 13th day of June, 2016, electronic copies of Appellant's initial brief were placed for delivery through the Missouri e-filing System to Collette Neuner, Criminal Appeals Division at collette.neuner@ago.mo.gov.

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