

No. SC95847

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ORLANDO NAYLOR,

Appellant.

Appeal from Circuit Court of Ste. Genevieve County
24th Judicial Circuit
The Honorable Wendy Horn, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dora.Fichter@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

This an appeal from the Ste. Genevieve County Circuit Court convicting appellant, Orlando Naylor, as a prior and persistent offender, of burglary in the first degree, §569.160, RSMo., misdemeanor stealing, §570.030, RSMo., and driving while revoked, §302.321, RSMo. (L.F. 62-64, 69-70). The burglary and stealing charges were for events that happened at Missy's Family Restaurant. Appellant was tried by a jury with the Honorable Wendy Horn presiding (Tr. 16-260). Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

Elsie McCartney managed the Collinsville Farm Fresh Store (Tr.128). On May 15, 2014, she and another employee, Margaret Cooper, started closing the store at about 9:00 p.m. (Tr.128). Ms. McCartney noticed that the change bag was missing (Tr.129). It was usually kept in a drawer in the store or in a locked filing cabinet in the back office (Tr.129). The office had signs that said "Employees only" (Tr.130). The outside security camera showed a car back up to the side of the building at about 2:30 p.m. (Tr.130). The driver got out of the car and entered the building (Tr.130). The security cameras inside the business showed that he went through the store and into the office (Tr.132). He searched the desk and then he went to the filing cabinet (Tr.132). He removed money from the blue bag in the filing cabinet (Tr.132).

He came back into the store area and bought beef jerky before leaving (Tr.132).

After viewing the video, Ms. McCartney called the police (Tr.133). She showed the officer the videos and he asked her if she could make copies for him but she was unable to do that (Tr.134). The officer took two pictures of the video with his phone (Tr.134; state's exhibits 7 and 8).

Detective Christopher Warren of the Collinsville Police Department, investigated the theft from the Farm Fresh Store (Tr.138). The car in the video was a two-door Pontiac Grand Prix (Tr.141). Appellant appeared to be the person in the video (Tr.141).

Dean Wilson was working at the Sandwich Shop in Collinsville, Illinois on May 15, 2014 (Tr.144-145). The Sandwich Shop was about three-quarters of a mile from the Farm Fresh Store (Tr.144). At about 3:00 p.m., he saw a man in the kitchen (Tr.146). Mr. Wilson said that he was the only person allowed in the kitchen (Tr.147). Mr. Wilson identified appellant as the man in the kitchen (Tr.147). Mr. Wilson asked appellant what he needed and appellant asked if the Sandwich Shop was hiring (Tr.147). Appellant left through the back door after Mr. Wilson told him they were not hiring (Tr.148-149). Mr. Wilson described appellant's voice as "a little raspy, real low" (Tr.148). He identified appellant's voice on appellant's interview with the police (Tr.148).

Geralyn Hale was also working at the Sandwich Shop on May 15, 2014 (Tr.149). She followed appellant out the back door and saw him get into a “burnt orange” car (Tr.151). Ms. Hale recorded the first part of the license plate as “PH5” and noted that there was also a “6” on the license plate (Tr.151).

Melissa Giesler owned Missy’s Family Restaurant in Ozora, Missouri (Tr.152-153). The restaurant was near the Ozora Truck Stop (Tr.153). There was an office in the restaurant that had a sign that said “Office” (Tr.153, 154; state’s exhibit 10). There was a hallway leading to the office (state’s exhibit 10). There was an area for hanging clothes in front of the office and some filing cabinets (state’s exhibit 10). There was no door that led to the office from outside; instead, a person had to go into the hallway to enter the office (Tr. 154). The closest door to the office that led outside was the side door that was kept locked and it was not used by the general public (Tr. 155, state’s exhibit 13). The side door could be unlocked only from inside (Tr. 156). The side door was accessible from inside through a storeroom that was off the office (Tr.157, state’s exhibit 12).

Ms. Giesler arrived at work at about 6:00 a.m. on May 16, 2014 (Tr.157). She had \$165 in her purse (Tr.158). She put her purse on the corner of a desk in the office (Tr.159). When the restaurant closed at 9:00 p.m., Ms. Giesler went into the office getting ready to leave when she noticed the

money was missing from her purse (Tr.159). Ms. Giesler contacted Mitzi Aufdenberg, the general manager for the Ozora Truck Stop (Tr.160). She asked Ms. Aufdenberg to check the surveillance tapes (Tr.160). Ms. Giesler also noticed that the door from the office to go outside was unlocked (Tr.160).

Mitzi Aufdenberg was at home when she was contacted by Ms. Giesler (Tr.200). Ms. Aufdenberg was able to log into the video cameras through her laptop and view some of the video (Tr.201). She could see a person exiting the side door and walking toward the truck stop (Tr.202, 204; state's exhibit 15, 16). The next day Ms. Aufdenberg checked the surveillance cameras at the truck stop (Tr.205). It showed the person who left through the side door of Missy's Family Restaurant getting into a car at the truck stop parking lot (Tr.205-206; state's exhibits 16 and 17).

Randy Lee Schott managed a body shop (Tr.208). After examining photos of the car used in the theft from the Farm Fresh Store and the car used in the burglary and stealing from Missy's Family Restaurant, including damage and after-market additions, Mr. Schott determined that they were similar (Tr.209-213).

Appellant's driver's license was suspended on October 5, 2005, for failing to appear in court on a traffic offense (Tr.214, 215; state's exhibit 27(b)). That suspension was terminated on May 30, 2014 (Tr.215). Appellant had a second suspension for defaulting on a judgment (Tr.216-217; state's

exhibit 27(b)). The second suspension went into effect on May 11, 2005, and was terminated on June 3, 2014 (state's exhibit 27(b), certified June 27, 2014, page 2). Appellant's driver's license was suspended again on July 26, 2014 (Tr.219).

Deputy Sheriff Jerod Darnell was working on May 30, 2014 (Tr.162). He was on Interstate 55 when he noticed a car following another car too closely (Tr.162). He pulled the car over (Tr.163). It was a 2001 Pontiac Grand Prix with a license plate of "PH5 U6Y" (Tr.164, 165). Appellant was driving the car (Tr.165). Deputy Sheriff Darnell got appellant's Missouri identification card (Tr.166). Deputy Darnell placed appellant under arrest for driving while suspended and requested permission to search appellant's car (Tr.167, 168). Appellant gave him consent to search his car (Tr.168).

Detective Lieutenant Lance White and Detective Corporal Austin Clark responded to the traffic stop (Tr.167, 168). Detective Clark searched the car while Deputy Sheriff Darnell transported appellant to the sheriff's department (Tr.169).

Detective Clark was investigating the theft at Missy's Restaurant (Tr.171-172). He was contacted because the car that appellant was driving matched the description of the car that was used in the burglary at Missy's Family Restaurant (Tr.172). Detective Clark searched the car and found a cap (Tr.173; state's exhibit 21). He also found \$675 in the car (Tr.175).

Detective Clark interviewed appellant (Tr.176-177; state's exhibit 19(b)). Appellant told the detective that he was going to Cape Girardeau to speak with the football coach at SEMO for his son (Tr.177). Appellant said that this was the first time he had taken the car out of St. Louis because "it got a lot of flat tires and that the engine wasn't very strong" (Tr.178). The detective showed appellant pictures from the Ozora Truck Stop video (Tr.178-179; state's exhibits 17 and 18). Appellant denied being the person in the video (Tr.179). Appellant said that the cap was his and that he was not employed (Tr.179). Appellant said that he won part of the \$675 playing poker and the rest was given to him by his girlfriend (Tr.179).

Officer Jason Harrison of the Collinsville, Illinois Police Department testified for appellant (Tr.229). Detective Harrison testified that he responded to the report of a burglary at the Collinsville Farm Fresh Store on May 15, 2014 (Tr.229). The detective said that he watched the surveillance video once and that he requested that he be provided with a copy of the video (Tr.230). Detective Harrison testified that Ms. McCartney was unable to make copies of the video (Tr.230). The detective described the person on the video as a black male wearing a hat, sunglasses, light colored pants, and a cream colored jacket with black sleeves (Tr.232). He further described the person as being about six feet tall, weighing about 225 pounds, and having no facial hair (Tr.232).

The jury found appellant guilty of burglary in the first degree, misdemeanor stealing, and driving while revoked (L.F.62-62). The court sentenced appellant to fifteen years of imprisonment for burglary; one year in jail stealing; and seven years in prison for driving while revoked with the sentences to be served concurrently (Tr.281-282).

On June 21, 2016, the Court of Appeals, Eastern District, issued an opinion vacating appellant's conviction for burglary in the first degree and entering a conviction of burglary in the second degree. *State v. Naylor*, ED103010 (Mo.App.E.D. June21, 2016). On July 26, 2016, the Court of Appeals issued an order transferring this case to this Court.

ARGUMENT

I.

The trial court did not err in overruling appellant's motion for judgment of acquittal of burglary in the first degree because the state presented evidence that appellant knowingly entered a restricted area of the restaurant.

In his first point, appellant claims that the evidence did not show that appellant knew that the office was closed to the public (App.Br. 16-21).

Standard of review

In reviewing the sufficiency of evidence, the Court limits its determination to whether a reasonable juror could have found the defendant guilty beyond a reasonable doubt. *State v. Freeman*, 269 S.W.3d 422, 425 (Mo. 2008) (citing *State v. Belton*, 153 S.W.3d 307, 309 (Mo. 2005)). “The evidence and all reasonable inferences therefrom are viewed in the light most favorable to the verdict, disregarding any evidence and inferences contrary to the verdict.” *Belton* at 309.

This inquiry does not require the Court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v.*

Bateman, 318 S.W.3d 681, 686-687 (Mo. 2010). On appeal, the Court “does not act as a super juror with veto powers, but gives great deference to the trier of fact.” *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. 1998). Indeed, courts “faced with a record of historical facts that supports conflicting inferences must presume--even if it does not affirmatively appear in the record--that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” *Id.* at 54 (quoting *Jackson v. Virginia*, 443 U.S. 307, 326 (1979)); *See Freeman*, 269 S.W.3d at 425 (holding that an appellate court should “not weigh the evidence anew since ‘the fact-finder may believe all, some, or none of the testimony of a witness when considered with the facts, circumstances and other testimony in the case’”) (quoting *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. 2002)).

Discussion

“A person commits the crime of burglary in the first degree if he knowingly enters unlawfully ... a building ... for the purpose of committing a crime therein, and ... while in the building[,] ... [t]here is present ... another person who is not a participant in the crime.” § 569.160.1(3). “[A] person ‘enters unlawfully...’ in or upon premises when he is not licensed or privileged to do so.” § 569.010(8). “A person who, regardless of his purpose, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or

remain, personally communicated to him by the owner of such premises or by other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.” *Id.*

In analyzing whether one enters unlawfully, courts look to whether the defendant knew he did not have a license or privilege to enter. *State v. Brown*, 457 S.W.3d 772, 779-790 (Mo.App.E.D. 2014); *State v. Hunt*, 451 S.W.3d 251, 257 (Mo. 2014). Specifically, the question becomes whether the defendant was aware that the area he entered was not open to the public. *Id.* A person acts “knowingly” with respect to his conduct or attendant circumstances when he is “aware of the nature of his conduct or that those circumstances exist.” Section 562.016.3(1); *State v. Hunt*, 451 S.W.3d at 257. Accordingly, a person “enters unlawfully” when he is aware he has no privilege to enter. *Id.* Knowledge is typically inferred from circumstantial evidence because direct evidence is rarely available. *Id.*

Missouri courts have determined that a portion of a building is open to the public if the “premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe no permission to enter or remain is required.” *State v. McGinnis*, 622 S.W.2d 416, 419 (Mo.App.S.D. 1981). A license or

privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. *State v. Norfolk*, 745 S.W.2d 737, 739 (Mo.App.E.D. 1987).

The evidence at trial established appellant's knowledge that he was entering an area of the restaurant that was not open to the public. Appellant parked his car at the truck stop parking lot and walked to Missy's Restaurant (Tr.205-206; state's exhibits 9, 16 and 17). Melissa Giesler's purse was in a room clearly marked as an "Office" (Tr.153, 154; state's exhibit 10). Appellant had to go into a hallway to enter the office (Tr. 154). Appellant left through the side door of the restaurant that could only be unlocked from inside (Tr.205-206; state's exhibits 16 and 17). There was also a sign on the back door of the restaurant that said "All visitors report to front desk" (Tr.155; state's exhibit 11).

When appellant was arrested two weeks later, he claimed that he had not taken his car outside of St. Louis because "it got a lot of flat tires and that the engine wasn't very strong" (Tr.178). Appellant had \$675 in the car although he was unemployed (Tr.175). The baseball cap used by the burglar was found in appellant's car (Tr. 179). Appellant was identified as the person who drove a similar car on the previous day in Collinsville, Illinois, where he entered the restricted areas of the Farm Fresh Store and the Sandwich Shop

(Tr. 128-157). This evidence supported an inference that appellant knew that the office in Missy's Restaurant was not open to the public.

In *State v. Norfolk*, 745 S.W.2d at 738, the defendant entered a stock room that was in an area not open to the public. A security officer saw the defendant with some merchandise. *Id.* The defendant initially claimed that he was an employee, but when he could not produce identification, he claimed that he was looking for the restroom. *Id.* The stock room had a sign "Authorized Personnel Only." *Id.* The Court held that this evidence was sufficient to show that the defendant knew that it was unlawful to enter the stock room. *Id.* at 739. The Court observed that there was a sign indicating that the area was restricted, that the defendant had merchandise in his hands, and that he falsely claimed to be an employee. *Id.*

In *State v. Stanley*, 736 S.W.2d 510, 512 (Mo.App.E.D. 1987), the defendant entered into a private office and searched through some desk drawers. The defendant did not exit as requested, but proceeded down a hallway toward the inner offices. *Id.* The Court of Appeals rejected the defendant's claim that he entered an area open to the public. *Id.* The Court stated, "Assuming, for the sake of argument, that defendant is correct in asserting that the room he entered was open to the public, any privilege or license he possessed stopped short of the area set off by the cubicle, including the desk drawers, and did not extend to the interior offices." *Id.* at 512-513.

Likewise, in *State v. Smith*, 650 S.W.2d 640, 641 (Mo.App.E.D. 1983), the Court of Appeals found that the evidence was sufficient to support the defendant's conviction for burglary in the second degree where the defendant entered an office after receiving permission from a store clerk to use the restroom. Instead of going to the restroom, the defendant went into the adjoining office where he took money from a safe. *Id.* The owner's wife saw the defendant in the office, and when she challenged him the defendant dashed out. *Id.* The defendant hid and had several hundred dollars in his possession. *Id.*

Similarly, in the present case, the evidence established appellant's knowledge that the office where the owner kept her purse was not an area open to the public. As discussed above, the office was accessible only through a hallway and it was clearly marked as an "office." The fact that appellant parked by a nearby business and that he exited through the side door that was locked showed that appellant knew that the office area was not open to the public. Appellant's subsequent conduct of lying about not driving his car outside the St. Louis area, his possession of \$675 despite being unemployed, and his acknowledgement that the baseball cap worn by the burglar was his was additional circumstantial evidence supporting an inference of guilt. Moreover, appellant's acts of entering the restricted areas of two other businesses on the previous day while wearing the same clothes and driving

the same car showed appellant's knowledge that the office at Missy's Restaurant was not open to the public. See also *State v. Girardier*, 484 S.W.3d 356, 362 (Mo.App.E.D. 2015) (the evidence that the women's restroom was visibly marked with a sign on the door, at eye level, that stated it was "for women only," supported a finding that the defendant, a male, knowingly entered and remained unlawfully in the women's restroom).

Appellant cites to *State v. Weide*, 775 S.W.2d 255 (Mo.App.W.D. 1989), to support his claim (App.Br.19-20). *Weide* is distinguishable. The defendant in *Weide* followed the restaurant manager through an unmarked door to the kitchen area of the restaurant where he attempted to assault him. *Id.* at 256. The Court held that this evidence did not establish the defendant's knowledge that he was entering a portion of the restaurant that was not open to the public because the door was unmarked and it could have led to areas open to the public, such as restrooms. *Id.* The Court also observed that the defendant was not attempting to conceal his purpose of entering the kitchen, but that he made it clear that he followed the manager because he wanted to assault him. *Id.*

Unlike in *Weide*, the office door was clearly marked as an office door and it was accessible through a hallway that did not have any areas open to the public. Appellant exited through the side door that was near the office, which he had to unlock. Appellant parked at a distance from the restaurant.

He lied to the police about not using his car outside the St. Louis area, he had \$675 in his car despite being unemployed, and the police found the hat worn by the burglar in appellant's car. These facts distinguish this case from *Weide*. There was sufficient evidence to support appellant's conviction for burglary in the first degree. Appellant's claim should be denied.

II.

The evidence was sufficient to support appellant's conviction for burglary in the first degree because appellant entered a building where another person who was not a participant of the crime was present.

In his second point, appellant claims that the evidence was insufficient to support appellant's conviction for burglary because the evidence did not show that anyone was present in the office when appellant entered it (App. Br. 22-28). Appellant argues that the state had to prove that a person who was not a participant in the crime was present in the office when appellant entered it (App. Br. 22-28).

Section 569.160 provides in pertinent part:

1. A person commits the offense of burglary in the first degree if he or she knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing an offense therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, the person or another participant in the offense:

(3) *There is present in the structure another person who is not a participant in the crime.*

§569.160. (emphasis added).

According to the plain meaning of the statute, the state had to show that appellant unlawfully entered a structure in which another person who was not a participant of the crime was present. There is no requirement that the person who is not a participant in the crime had to be present in the office where appellant entered to steal the money from the victim's purse.

In *State v. Walker*, 693 S.W.2d 237, 238 (Mo.App.S.D. 1985), the court found that the defendant committed a burglary when he robbed a floral shop while people were in their residence, which was attached to the shop. The court stated that the residence and the flower shop were one building, reasoning as follows:

Proof that any burgled building contained people who were not participants in the ongoing felonious break-in meets the statutory requirement to prove first degree burglary. The living quarters and flower shop were integral parts of the same structure. The [victims] were physically present in the structure at the time of the incident in question, and there was a felonious burglary of the structure for the purpose of stealing.

Id. at 239.

In *State v. Allen*, 944 S.W.2d 580, 582-583 (Mo.App.W.D. 1997), the Court found sufficient evidence to support the defendant's conviction for burglary in the first degree. In *Allen*, the defendant entered the house's garage where the house's residents could access the garage directly from inside of the house. *Id.*

In *State v. Bowman*, 311 S.W.3d 341, 347 (Mo.App.W.D. 2010), the Court held that the common area of a duplex was a part of each apartment for the purposes of the burglary statute. The Court observed the following:

Th[e] reasoning [of *State v. Allen*] is easily applicable to the common areas of an apartment building. In many cases, these areas are collectively secured by the tenant group and not otherwise open to the public. And, while one particular tenant does not have exclusive control over common areas so such tenant could not, for example, have another tenant arrested for trespassing, each tenant should feel secure in those areas. A criminal intruder who unlawfully enters those areas violates that security. Furthermore, a criminal intruder who enters those areas is likely to encounter other people, which increase the odds that the intruder's criminal activities will put an innocent person in harm's way. Thus, we conclude that the common areas in an apartment building can constitute part of the apartment for the

purposes of section 569.160 as long as the common area in question is a secured area not otherwise open to the public...

Id. The court upheld the defendant's conviction for burglary in the first degree because the owner of the duplex was present in the common area when the defendant burglarized the apartments. *Id.* at 383-384.

Similarly, in the present case, the evidence was sufficient to support appellant's conviction for burglary in the first degree. The victim was present in the structure while appellant entered an office area of the structure (Tr. 157-159). The office was an integral part of the structure, and it was accessible from the inside of the restaurant (Tr.153, 154; state's exhibit 10). The victim did not have to be present in the office; she only had to be present in the structure while appellant committed the burglary.

Appellant's reliance on *State v. Washington*, 92 S.W.3d 205 (Mo.App.W.D. 2002), is misplaced (App.Br. 26-27). In *Washington*, the issue before the court was whether an attached garage was an inhabitable structure under the second-degree burglary statute. *Id.* 210-211. The evidence in *Washington* showed that the defendant entered a garage while the residents were inside the house. *Id.* at 207. The Court concluded that the garage was not a part of an "inhabitable structure" because, while it shared a common wall, a common roof, and a common porch with the house, one could not access the house directly from the garage. *Id.* at 209

Appellant was not charged with entering an inhabitable structure, but with entering a part of a building that was not open to the public (L.F. 15). Unlike in *Washington*, the office was an integral part of the building. The office was inside the building and it could be accessed through a hallway. The state presented evidence that Melissa Giesler was in the building when the stealing occurred. This is all that was required to support appellant's conviction for burglary in the first degree. Appellant's claim should be denied.

III.

The trial court did not abuse its discretion in admitting evidence that appellant committed two burglaries in Collinsville, Illinois, on the day before he committed the burglary of Missy's Restaurant because this evidence was admissible to show appellant's knowledge and intent, the identity of the perpetrator, and a complete picture of the crime.

In his third point, appellant claims that the trial court abused its discretion in admitting evidence that appellant committed two burglaries in Collinsville, Illinois, before he committed the burglary at Missy's Restaurant (App.Br. 29-43).

Facts

Prior to trial, the court held a hearing on the state's motion to introduce evidence that appellant entered the non-public areas of the Farm Fresh Eggs and the Sandwich Shop in Collinsville, Illinois, on the day before he committed the burglary in the Missy's Restaurant (L.F. 25-32, Tr. 2). The prosecutor told the court that appellant lived near Cosuff Avenue in St. Louis, and that around 2:30 p.m. on May 15, 2014, he entered the Farm Fresh Dairy in Collinsville, Illinois (Tr. 4). The prosecutor stated that appellant went in the back office, opened filing cabinets, and stole money (Tr. 4). The prosecutor said that there was a photograph of the person and the car

used in this burglary (Tr. 4). The prosecutor argued that the person resembled appellant, that he wore the same clothing as appellant when he committed the burglary of Missy's Restaurant, and that the car used in both burglaries was similar (Tr. 19).

The prosecutor further stated that around 3:00 p.m. on the same day, appellant entered the kitchen area of the Sandwich Shop in Collinsville and that he was confronted by Dean Wilson (Tr. 5). The prosecutor said that Mr. Wilson asked appellant what he was doing there, and appellant said that he was looking for a job or that he wanted to buy stoves (Tr. 5). The prosecutor stated that appellant had a distinctive voice as if he had laryngitis (Tr. 5). The prosecutor stated that appellant was arrested driving the same distinctive car and that a baseball cap similar to the cap worn by the man committing all three burglaries was found in the car (Tr. 6, 16, 19, 25-26). The prosecutor argued that appellant had the same "scratchy" voice described by the witnesses at the attempted burglary of the Sandwich Shop (Tr. 26).

The prosecutor argued that the evidence of the two burglaries committed on May 15, 2014, the day before the burglary of Missy's Restaurant were admissible to show the identity of the assailant, appellant's intent and absence of a mistake (Tr. 8-20, 25). The court held as follows:

THE COURT: All right, gentlemen. I will say that I think both of you have made actually very, very compelling arguments, because for me I think that this is kind of a tough issue.

I will also say that I read your motion prior to taking the bench, and I was actually fully prepared not to allow the evidence. And that was kind of where I was going and where I was thinking before we heard argument.

I think it is very, very clear that the courts in general, and this is what everybody knows, in general will not admit evidence of prior uncharged acts but for specific exceptions. So clearly there are exceptions in which uncharged acts or prior bad acts are admissible

I think your strongest argument for me was, of course, the identity exception. Clearly, that is what this case is. And I think, again, it's a close call, because I think that, again, this evidence is highly prejudicial to the defendant. I think everybody would agree with that. So the question is, is it more probative than prejudicial. And I think that at that point I have to take a look at the exceptions and then determine whether or not I think that's the case.

I think after review of the cases that I've been looking at during your arguments, and as much as I have to say I think it's a close call, I am going to allow it, because I do think that in this case there are exceptions that the State wishes to use them for. And I think for the limited purpose of offering such evidence on the issues of motive, intent, absence of mistake or accident, but especially identity and also a common scheme or plan, after hearing argument it is my ruling that such evidence will be allowed.

(Tr. 28-29).

At trial, the state presented evidence that the security cameras of the Collinsville Farm Fresh Store showed a two-door Pontiac Grand Prix back up to the side of the building around 2:30 p.m. on May 15, 2014 (Tr. 129-130). The cameras showed that the driver went through the store and into the office that had a sign "Employees only" (Tr.132). He searched the desk and then he went to the filing cabinet (Tr.132). He removed money from the blue bag in the filing cabinet (Tr.132). He came back into the store area and bought beef jerky before leaving (Tr.132). The police took two pictures on the video, one depicting the burglar and the other depicting an orange car (Tr.134; state's exhibits 7 and 8).

The state's evidence further showed that about 3:00 p.m. on the same day, a man entered the kitchen area of the Sandwich Shop in Collinsville, Illinois, about three-quarters of a mile from the Farm Fresh Dairy Store (Tr.144). Dean Wilson spoke to the man, whom he identified as appellant (Tr. 146-147). Appellant asked if the Sandwich Shop was hiring (Tr.147). Appellant left through the back door after Wilson told him they were not hiring (Tr.148-149). Wilson described appellant's voice as "a little raspy, real low" and identified it as the appellant's voice on the recorded interview with the police (Tr.148).

Geralyn Hale followed appellant out the back door of the Sandwich Shop and saw him get into a "burnt orange" car (Tr.149-151). She recorded the first part of the license plate as "PH5" and noted that there was also a "6" on the license plate (Tr.151).

Mitzi Aufdenberg, the manager of the Ozora Truck Stop, saw a person exit the side door of Missy's Restaurant and enter an orange car with blue stripes parked at the truck stop parking lot (Tr. 202-206; state's exhibits 16 and 17). The person wore similar clothing as the man who entered the office at the Farm Fresh Store (state's exhibits 8, 18, Tr. 133, 204-205).

Appellant was arrested on May 30, 2014 (Tr.162). He was driving a 2001 Pontiac Grand Prix with a license plate of "PH5 U6Y" on Interstate 55 (Tr.162-163). The car had a distinctive orange color with blue stripes (state's

exhibits 23 and 24). Inside the car the police found a hat similar to the hat worn by the assailant (Tr. 173, state's exhibit 21). In his interview with the police appellant acknowledged that his hat was the same as the hat worn by the burglar (state's exhibit 19(b)).

Randy Lee Schott examined photos of the car used in the theft from the Farm Fresh Dairy Store and the car used in the burglary and stealing from Missy's Family Restaurant, including damage and after-market additions and determined that they were similar (Tr. 209-213).

In his closing argument, the prosecutor argued that appellant was the person who burglarized Missy's Restaurant based on the distinctive car that he drove when he was arrested (Tr. 244). The prosecutor argued that this was the car seen at the Farm Fresh and the Sandwich Shop in Collinsville with "PH5" and then a "6" in its license plate (Tr. 244). The prosecutor argued that appellant did not have time to change his clothes, and that he wore the same clothes that he had on the day before (Tr. 245). The prosecutor pointed out that the same baseball cap worn by the burglar was in appellant's car when appellant was arrested and that appellant had a distinctive voice (Tr. 245).

The jury was given the following instruction:

INSTRUCTION No.11

If you find and believe from the evidence that the defendant was involved in offenses other than the one for which

he is now on trial, you may consider that evidence on the issue of identification, motive, intent, absence of mistake or accident or presence of a common scheme or plan of the defendant. You may not consider such evidence for any other purpose.

(L.F. 57).

Discussion

The trial court is vested with broad discretion in determining the admissibility of evidence, and the Court on appeal will not disturb its ruling absent a clear abuse of that discretion. *State v. Johnson*, 207 S.W.3d 24, 42 (Mo.banc 2006). The trial court abuses its discretion when its ruling is “clearly against the logic of the circumstances then before the court, and is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.” *State v. Roggenbuck*, 387 S.W.3d 376, 382 (Mo.banc 2012). This Court reviews the trial court’s ruling for prejudice, not mere error, and it will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *State v. Forrest*, 183 S.W.3d 218, 223

Generally, “proof of the commission of separate and distinct crimes is not admissible unless such proof has some legitimate tendency to directly establish the defendant’s guilt of the charge for which he is on trial.” *State v. Phillips*, 477 S.W.3d 176, 181 (Mo.App.E.D. 2015). “The rationale for this rule

is that ‘evidence of other crimes, when not properly related to the cause on trial, violates defendant’s right to be tried for the offense for which he is indicted.’” *Id.* “Where evidence of uncharged crimes is properly related to the cause on trial--i.e., where it is both logically and legally relevant--it may be admitted under one of the several well-established exceptions to the rule.” *Id.* “Evidence is logically relevant if it ‘tends to establish guilt for the charged crime,’ and legally relevant if it has ‘probative value [that] outweighs its prejudicial effect.’” *Id.* “Logically and legally relevant evidence of uncharged crimes may be admitted ‘to establish motive, intent, the absence of mistake or accident, a common plan or scheme, or the identity of the person charged with the commission of the crime on trial.’” *Id.* Relevant evidence of uncharged crimes that are part of the sequence of events or circumstances surrounding the charged offense may also be admitted “to present a complete, coherent picture of the overall events.” *Id.*

Here, the evidence of appellant’s entry in two businesses in Collinsville on the day before the burglary at Missy’s Restaurant was admissible to show the identity of the perpetrator and a complete and coherent picture of the crime. The testimony of Elsie McCartney (the manager of Farm Fresh Store), Dean Wilson (Sandwich Shop’s employee), and Geralyn Hale (Sandwich Shop employee) placed appellant in the same orange car on the day before the Missy’s Restaurant burglary. Geralyn Hale provided a partial license plate

number which connected suspect's car to the one appellant was driving on May 30, 2014, when he was arrested. The clothes the suspect was wearing during his entries at the Farm Fresh Store and the Sandwich Shop were the same as the clothes worn by the burglar at Missy's Restaurant. The baseball cap worn by the man identified as appellant from Collinsville's business entries was the same worn by the suspect in the Missy's Restaurant surveillance videos, and the same cap was found in appellant's car during the May 30, 2014, traffic stop. The evidence of the Collinsville burglaries also showed that appellant was the person with the distinctive voice. Dean Wilson testified that the man in the Sandwich Shop on May 15, 2014, had a "low," "raspy" voice, and he recognized the voice appellant's after listening to an audio recording of appellant's interview with police (Tr. 148). Detective Warren also testified that appellant's voice was "gravelly," "scratchy," and "deep." (Tr. 142).

In a similar case, *State v. Robinson*, 684 S.W.2d 529, 530 (Mo.App.E.D. 1984), the defendant was charged with a burglary of a grocery store. The state presented evidence that following the burglary, the defendant committed another burglary for which he was not on trial, but for which he was arrested and some of the stolen property from the first burglary was found in his van at the time of his arrest. *Id.* at 531. The Court held that this

evidence was relevant to establish the defendant's identity and to present the complete and coherent picture of the crime. *Id.*

Likewise, in *State v. Winder*, 50 S.W.3d 395, 406-407 (Mo.App.S.D. 2001), the Court held that the evidence of stolen checks and property obtained with the stolen checks that were found in a house with other stolen was admissible to show the identity of the person who possessed the stolen items and to show that the defendant was the man using the stolen checks. The Court further found that the evidence of the stolen checks was properly admitted to establish the defendant's knowledge of the other stolen property for which he was on trial. *Id.*

In *State v. Jackson*, 228 S.W.3d 603 (Mo.App.W.D. 2007), the defendant was charged with tampering for driving a stolen truck. The state introduced evidence that the defendant and another man used the stolen truck to commit a burglary with which the defendant was not charged. *Id.* at 606-607. The Court held that the evidence of the uncharged burglary was admissible to show the defendant's knowledge of the stolen truck and to explain how the defendant was identified as the driver of the stolen truck. *Id.*

Similarly, in the present case, the evidence of the thefts in Collinsville focused on the similarities between the suspect's appearance and car in the Missy's Restaurant video and appellant's appearance. Appellant put his identity in issue by claiming that he was not the person on the pictures and

the surveillance video of the crime. The evidence that the appellant was the person with the distinctive voice who drove the orange Pontiac with blue stripes and who wore the cap found in the car was admissible to show the identity of the perpetrator.

Moreover, this evidence showed that appellant went to Missy's Restaurant because he was unsuccessful in burglarizing the Sandwich shop, thus explaining appellant's motive and intent and the sequence of the events surrounding the crime. The state had to show that appellant entered the office of Missy's Restaurant, knowing he did not have a license or privilege to enter. *State v. Brown*, 457 S.W.3d 772, 779-790 (Mo.App.E.D. 2014). See Point I. The evidence that appellant entered areas that were not open to the public in two other businesses on the previous day while driving the same car and wearing the same clothes showed that appellant went to Missy's Restaurant because he was unsuccessful in obtaining money at the Sandwich Shop and showed his knowledge that the office Missy's Restaurant was not open to the public.

State v. Brown 457 S.W.3d 772, 782 (Mo.App.E.D. 2014), cited by appellant is distinguishable. In *Brown*, the defendant was on trial for entering St. Peter's church on two occasions. *Id.* at 776-777. During the first entry, the defendant stole a television that he later sold to a pawn shop. *Id.* An eyewitness saw the defendant enter the rectory of St. Peter's several days

later and items were missing when he left the rectory. *Id.* The rectory was usually locked, and the keys to the rectory that were kept in the sanctuary were missing. *Id.* At trial, the state presented evidence that the defendant entered another church several days later and that he left when asked to do so. *Id.*

The defendant claimed on appeal that the evidence of the defendant's entry into the second church was inadmissible because it was not "a part of a common scheme." *Id.* at 787. The Court of Appeals agreed. The Court found that the acts of entering the second church were different from the acts charged in the burglary of St. Peter's. *Id.* The court held that the state used the evidence of the defendant's entry into the second church to argue the defendant's propensity to commit crimes. *Id.* The Court ultimately found no prejudice from the admission of the evidence observing that the defendant admitted being at St. Peter's at the time of the theft, an eyewitness saw him carrying a black case from the rectory, the defendant had the keys to the rectory when he was arrested, and he was seen on a surveillance video using a credit card stolen during the burglary. *Id.*

Unlike in *Brown*, the evidence of appellant's acts in Collinsville and at Missy's Restaurant were similar and they occurred within a short time before the charged offense. Appellant wore the same clothes and used the same vehicle. A witness from the Sandwich Shop recognized appellant by his

distinctive voice and identified it from the videotaped statement to the police. The evidence that appellant entered the restricted areas of the Farm Fresh Store and the Sandwich Shop on the day before he entered the office of Missy's Restaurant was admissible to establish appellant's knowledge that the office was not open to the public and to show the events leading to the burglary of Missy's Restaurant. Additionally, unlike in *Brown*, the identity of the perpetrator was in issue in the present case. In *Brown*, the defendant admitted being at the crime scene. Here, appellant denied being the man on the surveillance video (Tr. 179). See *State v. Jackson*, 228 S.W.3d 603, 607 (Mo.App.W.D. 2007) ("It would be confusing to the jury to present the identification testimony of Lee [a witness] without presenting the circumstances of the identification."). It was proper for the state to present evidence establishing appellant's identity, and the trial court did not abuse its discretion in admitting this evidence.

In any event, appellant cannot show prejudice. The state did not argue to the jury that the evidence from Collinsville showed appellant's propensity to commit the crime. The prosecutor argued that appellant was the person on the surveillance video of Missy's restaurant based on the clothing, distinctive car, and raspy voice (Tr. 244-245). The jury was also instructed that it may consider the evidence that appellant "was involved in offenses other than the one for which he is now on trial" only on the issues of "identification, motive,

intent, absence of mistake or accident or presence of a common scheme or plan of the defendant,” but that it may not consider it for any other purpose (L.F. 57). The jury is presumed to follow the court’s instructions. *State v. Whitfield*, 107 S.W.3d 253, 263 (Mo. 2003). Appellant cannot show that the jury considered the evidence of his acts in Collinsville as improper propensity evidence. Appellant’s claim should be denied.

CONCLUSION

For the foregoing reasons, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Dora A. Fichter
DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dora.Fichter@ago.mo.gov
ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.0, and contains 7,705 words as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on September 26, 2016, to Casey Taylor, Woodrail Centre, Bldg. 7, Suite 100, 1000 West Nifong, Columbia, MO 65203.

/s/ Dora A. Fichter
DORA A. FICHTER
Assistant Attorney General
Missouri Bar No. 51756

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dora.Fichter@ago.mo.gov
ATTORNEYS FOR RESPONDENT