IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC 84538
	)	
KAREL M. SAMMONS	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF MARION COUNTY, MISSOURI
10TH JUDICIAL CIRCUIT, DIVISION I
HONORABLE ROBERT M. CLAYTON, II, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant Karel M. Sammons appeals his conviction, after a jury trial in Marion County, of two counts of the class B felony of delivery or sale of a controlled substance, §195.211 RSMo Cum. Supp. 1998.[1] He was sentenced, as a prior offender to two fifteen-year terms of imprisonment, to run consecutively. After the Missouri Court of Appeals, Eastern District, issued it opinion in ED 78920, it transferred the case to this Court pursuant to Rule 83.02. This Court has jurisdiction of this appeal under Article V, §10, Mo. Const. (as amended 1976).

[1] All further statutory references will be to RSMo Cum.Supp. 1998 unless otherwise noted.

STATEMENT OF FACTS

The Northeast Missouri Narcotics Task Force had evidence that Craig Haley had delivered a controlled substance (Tr. 125). A member of the task force approached Haley and offered him the opportunity to help himself by becoming a confidential informant (Tr.125, 192). Haley agreed to cooperate (Tr. 192).

On December 6, 1999, Haley informed investigating agent Michael Beilsmith that he could buy crack cocaine from "Red" (Tr. 193). Haley did not know "Red's" true name (Tr. 194). Sgt. Douglas Rader did (Tr. 167). He believed that "Red" was Appellant Karel Sammons (Tr. 171). Over the course of four or five years, Rader had had "probably" ten conversations with "Red," some in person and some over the telephone (Tr. 168).

Agent Beilsmith and Haley then set up a buy from "Red" (Tr. 127). They met at a confidential location and Beilsmith thoroughly searched Haley for drugs, money, or weapons (Tr. 127). He then had Haley telephone "Red," who had given Haley his number earlier that day (Tr. 196). "Red" told Haley to meet him at Steve's house (Tr. 197). Haley was given $50.00 (Tr. 130), and a body wire was placed on him (Tr. 129). He and Beilsmith drove to Steve's house in Hannibal (Tr. 132). Beilsmith parked so that he could observe Haley walking toward Steve's house, but he could not see him enter (Tr. 133). He could, however, hear what was going on through his receiver (Tr. 129). At the same time, Special Agent Patti Talbert was recording the transaction from another vehicle (Tr. 181).

"Red" was already at Steve's when Haley arrived (Tr. 200). Haley told him he wanted to buy a $50 piece of crack and he gave "Red" the money that had been photocopied by Beilsmith (Tr. 206, 130). "Red" was wearing white pants and tennis shoes (Tr. 206). He told Haley he would be back in five minutes and left (Tr. 207). Beilsmith saw a black male with light colored pants leaving Steve's house (Tr. 142). He could not see his face (Tr. 142). He also saw him return (Tr. 142). "Red" had been gone about five minutes when he returned with a bag of crack containing "several" pieces (Tr. 207). He cut a $50 piece and gave it to Haley (Tr. 208). Haley then asked him if he could buy a 1/16 ounce or an 8 ball and "Red" said he could "handle it" (Tr. 209). Haley said he would call "Red" later that evening and he left (Tr. 209).

Haley walked back to Beilsmith's car and gave him the crack cocaine (Tr. 210). Beilsmith put the baggie of crack in his buttoned shirt pocket (Tr. 159) until later that night when he returned to his office and "properly packaged it and labeled it and sealed it and then eventually turned it over to Lt. Hunold at the Hannibal Police Department" (Tr. 137).

Based on "Red's" assurance that he could handle another buy, Beilsmith took Haley back to the confidential location where he was again searched for contraband (Tr. 209, 140). This time Haley was given $100.00 (Tr. 140). Haley called "Red" and arranged for the buy (Tr. 141). Haley and Beilsmith returned to Steve's residence (Tr. 142). This time, Sgt. Rader was with Agent Talbert, running

the recording system (Tr. 168). Rader heard Appellant's voice being recorded (Tr. 170).

"Red" was already at Steve's house when Haley arrived (Tr. 213). He took Haley's money and left (Tr. 213). Again, Beilsmith saw a black male with light colored pants leaving Steve's residence (Tr. 143). After waiting an hour and ten minutes for "Red" to come back, Haley returned to Beilsmith's car without the money and without any drugs (Tr. 143, 213).

The next day, Beilsmith had Haley view a photographic line-up (Tr. 146). Haley selected Appellant's photograph as the man he knew as "Red" (Tr. 146, 229).

Beilsmith turned over the baggie of crack cocaine to Hannibal Police Lt. Joe Hunold the day after the buy (Tr. 232). Hunold logged it into evidence and took it to the crime lab for testing (Tr. 232).

Josh Robertson, criminalist for the Missouri Highway Patrol, tested the contents of State's Exhibit Number 2 and found that it was cocaine base (Tr. 235).

Appellant was arrested shortly before Christmas (Tr. 130). He was charged by Amended Information with one count of the class A felony of distribution, delivery or sale of a controlled substance near schools, §195.214, and one count of the class B felony of distribution, delivery or sale of a controlled substance §195.211 (L.F. 9)

Because there was no evidence that Appellant knew he was delivering a controlled substances within 2000 feet of a school, the jury was instructed on both counts as B felonies (Tr. 257). The jury found Appellant guilty on both counts (Tr. 285, 286).

Appellant's motion for new trial was denied (Tr. 290), and he was sentenced, as a prior offender, to two fifteen-year terms of imprisonment, to be run consecutively (Tr. 296, L.F. 91). Notice of Appeal was timely (L.F. 93).

POINT RELIED ON

I

The trial court erred in overruling Appellant's motions for judgment of acquittal, giving Instruction #8, the verdict director for Count II of the Amended Information, and in sentencing him upon his conviction of selling a controlled substance because the State did not prove that offense beyond a reasonable doubt, in violation of Appellant's right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Missouri Constitution, in that the State did not present any evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Appellant "knowingly sold" crack cocaine to Craig Haley.

People v. Braithwaite, 162 Misc.2d 613, 617 N.Y.S.2d 284 (N.Y. 1994);

People v. Jackson, 59 Cal.2d 468, 381 P.2d 1, 30 Cal.Rptr. 329 (Cal. In bank 1963);

State v. Werner, 657 P.2d 1136, 8 Kan.App.2d 364 (1983);

State v. Alvarado, 178 Ariz. 539, 875 P.2d 198 (App. 1994);

U.S. Const.,Amend. V;

U.S. Const., Amend. XIV;

Mo. Const., Art. I, §10;

KRS §218.020;

KRS § 218.010(10);

§817.563, Fla. State. (1981);

IC 16-6-8-2(h) Ind.Ann.Stat. x 35—3332(h) (Burns 1972 Supp.);

Ill.Rev.Stat. 1955, chap. 38, par. 192.1(10);

§ 2361 M.R.S.A. Title 22;

§195.211;

§ 195.010(8);

§ 195.101(36);

§574.010.1;

§570.030.7;

A.R.S. §13-3405(A)(4);

§50-32-101 MCA 17;

The Uniform Controlled Substances Act, K.S.A. 65-4101 *et seq;*

N.Y. Penal Law §220.00(1);

Rule 29.11(d);

American Heritage Dictionary 862 (1985).

ARGUMENT

I

The trial court erred in overruling Appellant's motions for judgment of acquittal, giving Instruction #8, the verdict director for Count II of the Amended Information and in sentencing him upon his conviction of selling a controlled substance because the State did not prove that offense beyond a reasonable doubt, in violation of Appellant's right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Missouri Constitution, in that the State did not present any evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Appellant "knowingly sold" crack cocaine to Craig Haley.

Preservation:

Appellant filed a Motion for Judgment of Acquittal and the Close of All of the Evidence (L.F. 63) which was overruled (Tr. 238). He objected to the giving of Instruction No. 8, the verdict director for Count II, sale of a controlled substance, and that objection was overruled (Tr. 259). He included this claim of error in the Motion for New Trial (L.F. 79, 89 paras 3 and 48). This claim of error is properly preserved for review by this Court. Rule 29.11(d).

Standard of Review:

In deciding whether the evidence is sufficient to support the conviction, this Court must view the record in the light most favorable to the verdict and accept as true all evidence and reasonable inferences drawn therefrom. *State v. Grim*, 854 S.W.2d 403, 405 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993).

The Facts:

Based on Appellant's earlier assurance that he could handle another buy, Beilsmith took Haley back to the confidential location where he was again searched for contraband (Tr. 209, 140). Haley was given $100.00 (Tr. 140). Haley then telephoned Appellant and arranged for the buy (Tr. 141). Haley and Beilsmith returned to Steve's residence (Tr. 142). This time, Sgt. Rader was with Agent Talbert, running the recording system (Tr. 168). Rader heard Appellant's voice being recorded (Tr. 170).

Appellant was already at Steve's house when Haley arrived (Tr. 213). He took Haley's money and left (Tr. 213). Again, Beilsmith saw a black male with light colored pants leaving Steve's residence (Tr. 143). After waiting an hour and ten minutes for Appellant to return, Haley returned to Beilsmith's car without the money and without any drugs (Tr. 143, 213).

Argument:

Appellant was wrongly convicted of Count II, sale of a controlled substance because there was no evidence from which the trier of fact could find

that he had the intent to sell crack cocaine to Craig Haley. If anything, the evidence shows an intent to steal $100.00.

§195.211 makes it unlawful "for any person to distribute, deliver, manufacture, produce or attempt to distribute, deliver, manufacture or produce a controlled substance or to possess with intent to distribute, deliver, manufacture, or produce a controlled substance."

§ 195.010(8) defines "deliver" or "delivery", in relevant part, as the "actual, constructive, or attempted transfer from one person to another . . .of a controlled substance. . .and includes a sale".

§195.010(36) defines "sale", in relevant part, to include "barter, exchange, or gift, or offer therefor".

In Appellant's case, the jury was given Instruction #8, the verdict director for Count II which instructed as follows:

> As to Count II, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about December 6, 1999, in the Township of Macon, County of Marion, State of Missouri, the defendant knowingly sold cocaine, a controlled substance, to CI 287, and
>
> Second, that defendant knew that the substance he sold was cocaine, a controlled substance,

then you will find the defendant guilty under Count II of selling a controlled substance.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

Sale includes barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee.

(L.F.72).

The question presented here is whether a "sale" of a controlled substance may be committed by simply offering to sell a drug, or must there be some proof that the seller actually has the controlled substance to sell and the specific intent to sell it? Appellant submits that in order to hold an individual criminally liable for the sale of a controlled substance, there must be more than words exchanged, there must be some proof that the seller had the ability and intent to actually deliver the controlled substance.

In *State v. Hendricks*, 944 S.W.2d 208 (Mo. banc 1997), the question of what constitutes an "offer" was before this Court. The Court declined to address the issue on the merits however, citing deficiencies in the Appellant's brief which made a decision impossible. *Id*. at 210.

This is an issue of first impression in Missouri. But courts in other states have addressed the issue. The cases which are most factually on point are: *People*

v. *Jackson*, 59 Cal.2d 468, 381 P.2d 1, 30 Cal.Rptr. 329 (Cal. In bank 1963); and *People v*. *Braithwaite*, 162 Misc.2d 613, 617 N.Y.S.2d 284 (N.Y. 1994).

In *Jackson*, the defendant offered to sell heroin to an undercover narcotics agent. Defendant took the agent's money, but failed to deliver heroin or anything else. 30 Cal.Rptr. at 329. He was convicted by a jury of offering to sell narcotics and appealed, arguing that the statute under which he was convicted did not encompass an offer to sell when nothing was delivered. *Id*. The court rejected this argument stating that it was settled, "that delivery is not an essential element of the offense of offering to sell a narcotic" *Id*. (citations omitted).

The court did reverse however, finding the jury instruction erroneous because it "states that the only intent required is the intent to make an offer and that an intent to make a sale is not necessary." *Id*. at 330. The court noted that in *People v*. *Brown*, 55 Cal.2d 64, 68, 9 Cal.Rptr. 816, 818, 357 P.2d 1072, 1073 the court held that "a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under §11501. Persons who offer to sell narcotics with no intention of performing are not engaged in narcotics traffic. Their behavior is not materially different from that of other 'bunco' offenders and is not subject to the severe penalties imposed by §11501." *Id*.

In *Braithwaite*, the defendant was tape recorded offering a confidential informant an ounce of cocaine. 162 Misc.2d at 614. In seeking dismissal, the defendant argued that the State had failed to prove beyond a reasonable doubt that he "knowingly and unlawfully sold a preparation, compound or mixture weighing

in the aggregate one-half ounce or more containing a narcotic drug" *Id* at 614-615. New York law defined the term "Sell" to mean "to sell, exchange, give or dispose of to another, or to offer or agree to do the same." Penal Law §220.00(1). In *People v. Gondolfo*, 94 Misc.2d 696 (Sup. Ct., NY County 1978). In), the court had set out a two-pronged test for determining what constituted an "offer": "[o]f course, not every casual offer is made criminal but where a defendant has made a bona fide offer or agreement to sell and there is sufficient evidence to indicate an ability and intent on the part of the defendant to complete the transaction, a conviction for sale may be obtained without proof of possession of the contraband." *Id*. at 702. The *Braithwaite* court concluded that because the defendant had used words like "if I can get", "you want like an ounce or so"; and "you willing to spend like $800", there was insufficient evidence presented to permit a finding that the defendant had an ability and intent to complete the transaction. 162 Misc.2d at 615.

Other states have addressed issues that are not identical to the issue presented here but do offer some guidance. In *State v. Werner*, 657 P.2d 1136, 1139, 8 Kan.App.2d 364 (1983), the defendant sold an undercover police officer five tablets of LSD. He then asked the officer if he was interested in buying some amphetamines, but the officer refused. 657 P.2d at 1137. The officer did not see any containers or substance resembling amphetamines. Werner was convicted of selling LSD and offering to sell amphetamines. *Id*. In reversing the conviction for offering to sell amphetamines, the Kansas court held that: The Uniform

Controlled Substances Act, K.S.A. 65-4101 *et seq*., seeks to regulate the use and distribution of certain drugs by prohibiting their sale, offers for sale or possession with intent to sell. However, unless the person offering to sell a regulated drug intends to actually carry out a sale, his conduct in no way furthers or promotes the distribution of drugs. Therefore, we hold that the specific intent to sell is an essential element of the crime of offering for sale a controlled substance in violation of K.S.A. 65-4127(b).

In *Paige v. State*, 995 P.2d 1020 (Nev. 2000), the Court was presented with the issue whether NRS 453.321 required, as an essential element of the offense of the crime of offering to sell a controlled substance, that the controlled substance actually exist.[2] The Court answered in the affirmative. The statute under review, NRS 453.321, provided in relevant part:

> [I]t is unlawful for a person to import, transport, manufacture, compound, sell, exchange, barter, supply, prescribe, dispense, give away, or administer a controlled or counterfeit substance or to offer or attempt to do any such act.

In reversing Paige's conviction for offering to sell cocaine, the Court noted that if it adopted the state's position, that in offering to sell, the controlled substance need not exist, then the offense of offering to sell a controlled substance would be the only type of transaction prohibited by NRS 453.321 which did not require that an actual controlled substance exist. The Court rejected this argument

holding "we conclude that the plain language of NRS 453.321 requires the existence of an actual controlled substance in order to sustain a conviction for offering to sell a controlled substance." *Id*. at 1022.

The Montana Supreme Court was called upon to interpret §45-9-101 MCA in *State v. Starr*, 204 Mont. 210, 664 P.2d 893 (1983). That statute provided in part:

> (1) A person commits the offense of criminal sale of dangerous drugs if he . . . offers to sell . . .any dangerous drug as defined in §50-32-101.

Starr has offered to sell an undercover officer one pound of "cocaine for $30,000." What he was actually selling was lidocaine, which was not defined as a dangerous drug. *Id*. 204 Mont. At 214. In reversing Starr's conviction, the Court held that the State was required to prove that (1) Starr (2) offered to sell (3) a defined dangerous drug," and did so either purposely or knowingly. *Id.* Therefore, if Starr believed that the drug he sold was really cocaine, he would have the requisite mental state for conviction. However, if he knew that what he was selling was not a dangerous drug, he could not be convicted. *Id*. at 220. The Court affirmed Starr's conviction for felony attempt (theft) on the basis of his actions in attempting to defraud the undercover agent in the transaction by his deception for an amount in excess of $150. *Id*. at 223.

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[2] Paige had sold the undercover agent fake rocks of cocaine. 995 P.2d at1021.

In *State v. Alvarado*, 178 Ariz. 539, 875 P.2d 198 (App. 1994), the court reversed Alvarado's conviction of offering to sell marijuana on the following facts. The conviction was based on a conversation between Alvarado and an undercover agent in which Alvarado agreed that for $5,000 he would go to Douglas and obtain a load of marijuana. He would then bring the marijuana back to Phoenix where he would sell it to a third party and give the undercover agent 100% return on his investment and an option on another 500 pounds of marijuana. *Id.* 875 P.2d at 200.

Alvarado was arrested before the undercover agent gave him the $5,000, and was charged with offering to sell marijuana. *Id*. On appeal, the state argued that offering to sell marijuana was a strict liability offense and that the speaker's intent was irrelevant. *Id*. The court disagreed. A.R.S. §13-3405(A)(4) provided" "A person shall not knowingly . . . offer to sell or transfer marijuana." The court noted that, "[t]he State's theory is that, if the speaker knows what he says, and if what he says sounds to a reasonable person like an offer to sell marijuana, the speaker is guilty of offering to sell marijuana no matter what his intentions." *Id*. at 201. In rejecting that argument, the court held that such an interpretation would "criminalize mere words, even those spoken without criminal intent." The court held that to commit the crime of offering to sell marijuana, the defendant must be aware or believe that he has made an offer to sell the substance, not that he has told a lie or made a joke." *Id*. The court concluded that "Appellant could not be convicted of offering to sell marijuana to Flores if his only intention was to take

Flores' money and disappear." *Id*. See also *State v. Strong*, 178 Ariz. 507, 508, 875 P.2d 166, 167 (App. 1993).

In *Shanks v. Commonwealth*, 463 S.W.2d 312 (Ken.App. 1971) Shanks initially sold an undercover agent a $20 bag of heroin. *Id* at 312. He then took another $20 from the agent and sold him a bag of sugar. *Id*. The court was asked to decide whether Shanks could be convicted for the second sale. The conviction was obtained under KRS §218.020 which prohibited the sale of narcotic drugs. Under Kentucky law at the time, a "sale" included "barter, exchange, or gift, or offer therefor and each such transaction made by any person whether as principal, proprietor, agent, servant or employee" § 218.010(10). *Id* at 314.

In reversing Shanks' conviction, the court held:

> We are of the opinion that under the act if one offers for sale what he reasonably believes to be a narcotic drug and it later turns out in fact not to be a narcotic, this is sufficient to support a conviction. For here we have present the union of an act and a criminal intent, both of which are normally required to constitute a crime. This is not true of the case before us, for the reason that Shanks knew the material he sold was sugar and not a narcotic. We do not believe this will support a conviction under the statute.

Id. at 315. The Florida Court of Appeals reached the same conclusion in *State v. Thomas*, 428 So.2d 327 (Fl. App. 1983). The Florida statute provided that: "It is unlawful for any person to agree, consent, or in any manner offer to unlawfully

sell to any person a controlled substance. . .”§817.563, Fla. State. (1981). The court reversed the lower court’s ruling that the statute was unconstitutional but in doing so held that to obtain a conviction, the “State must prove beyond a reasonable doubt that the defendant agreed, consented or offered to sell a substance which the defendant knew to be a controlled substance (and then sold an uncontrolled substance in lieu thereof).” *Id*. at 329-330. Thus the statute was constitutional because it required mens rea.

The Indiana Court of Appeals has held that “any offer is alone sufficient to constitute a violation,” *Hilyard v. State*, 163 Ind. App. 406, 324 N.E.2d 516 (Ind.App. 1975). However, the Indiana statute contained the following language not found in the Missouri statute:

> . . . any and every sale includes . . .(2) exposure, offer or any other proffer, whether or not the offeror has the present ability or capability to complete said transaction by delivering dangerous drugs. . .

IC 16-6-8-2(h) Ind.Ann.Stat. x 35—3332(h) (Burns 1972 Supp.).

Ohio is another state which holds that the failure to deliver does not ipso facto exonerate a defendant accused of offering drugs for sale. *State v. Patterson*, 69 Ohio St.2d 445, 432 N.E.2d 802 (Ohio 1982). In *Patterson*, the trial court had dismissed the indictments against the appellants because the substance they had sold was not a controlled substance. *Id*. 69 OhioSt.2d at 445. The Court held that the state was required to prove only that the defendants “knowingly” offered to

sell a controlled substance and that the court would not amend the statute to add a "fraudulent transfer" defense. *Id*. at 804. The court remanded the cases to give the lower court an opportunity to "consider the totality of circumstances and decide whether, in a particular scenario, there is sufficient evidence to prove beyond a reasonable doubt that the accused has knowingly offered to sell a controlled substance." *Id*. at 447.

In an earlier Ohio case, *State v. Mosley*, 55 Ohio App.2d 178, 380 N.E.2d 731 (Ohio App. 1977), the court was faced with the same question. Is it illegal to offer to sell a substance the seller knows is not a controlled substance? The court answered in the affirmative, stating: "[t]he statute makes it a crime to offer to sell heroin. The defendant made an offer to sell heroin, thereby violating the law. The crime was committed when the offer was made, not when the transaction was consummated." *Id*. at 183. But in reaching that decision the court went on to state: "There is evidence that defendant's statements were not made in jest or to express an idea which would involve freedom of speech, or in a manner as not to be taken seriously by others." *Id.* Thus it seems that under the Ohio statute, if a defendant can prove that he had no present ability or intent to consummate the deal, an "offer to sell" has not been made.

In *People v. Robinson*, 14 Ill.2d 325, 153 N.E.2d 65 (Ill. 1958), Robinson had prepared capsules of heroin and given one each to three friends. One of the three gave Robinson $2.00, one promised to pay him later, and one said nothing at all about paying for the heroin. *Id*. at 328. The friends consumed the drug so it

was not available for trial, but the three testified that, based on their past experience with the drug, what they had injested was heroin. *Id*.

The issue being addressed by the Illnois court was whether the state had met its burden of proving that the substance was, in fact, heroin, and whether a sale had occurred since two of the men paid Robinson nothing.

In holding that the state had met its burden, the court referenced the fact that under its criminal code, the sale of drugs included "barter, exchange, or gift, or offer therefore." Ill.Rev.Stat. 1955, chap. 38, par. 192.1(10). *Id*. at 332. The court then concluded, without discussion, that under that statute, "a mere gift, a simple offer or agreement to sell, or the delivery to one who has agreed to purchase, constitutes a sale of narcotics." *Id*.

Finally, in *Stewart v. Texas*, 718 S.W.2d 286 (Tx.App. 1986), the Texas court was called upon to decide whether the delivery of a simulated controlled substance constituted a sale of a controlled substance. *Id*. at 287. Appellant had sold an undercover officer $100 worth of what he said was heroin but which turned out to be a harmless, unidentified substance. *Id*. The appellant had been charged with delivery of a controlled substance by offer to sell. *Id*. The court affirmed his conviction holding that "[t]he offense is complete when, by words or deed, a person knowingly or intentionally *offers* to sell what he states is a controlled substance. *Id*. at 288. The court went on to hold that the chemical properties or the presence or possession of any substance is not necessary to the offense." *Id*. at 289.

In his dissent, Judge Clinton, joined by three other members of the court rejected the majority's analysis as wrong and in conflict with an earlier Texas case, *Stewart v. State*, 693 S.W.2d 11 (Tex.App –Houston 1985) since it dispensed with the requisite culpable mental states of intentionally and knowingly which the dissent argued were required by the statute. The dissent also pointed out that the two federal cases cited as support for the majority opinion did not deal with offers to sell controlled substances, but rather with conspiracies to distribute controlled substances. Both of those cases in addition, did require a finding that the defendants acted knowingly and that they *believed* the substance they were conspiring to sell was, in fact, a controlled substance. 718 S.W.2d at 290, FN3, (emphasis in the original), citing *United States v. Roman*, 728 F.2d 846, 859 (CA7 1984); *United States v. Pietri*, 683 F.2d 877, 879 (CA5 1982).

In the dissenting opinion from the Eastern District Court of Appeals, the court cites *State v. Allen*, 292 A.2d 167 (Me. 1972) for the proposition that the Maine court found that a mere offer to transfer a controlled substance constitutes a sale under similar statutory language. *State v. Sammons*, ED 78920 (dissent, p.4, Mooney, J.). However, *Allen* is not on point. In *Allen*, the issue was whether one who merely acted as a agent in procuring marijuana for another could be convicted of a sale. *Id*. at 170. The Maine statute at issue defined "sale" to include "barter, exchange or give, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, *agent*, servant or employee." § 2361 M.R.S.A. Title 22. (emphasis added).

The dissent also cites *People v. Harper*, 39 Mich.App. 134, 197 N.W.2d 338 (1972) for the same proposition, (Memorandum opinion, ED 78920, dissent, p.4, Mooney, J.), but again, that case is not on point. In *Harper*, the defendant was convicted as an aider and abettor of a consummated sale of hashish. 39 Mich.App. 139. He contended that to be an aider and abettor, there must be evidence that he induced the commission of the crime. *Id*. The court rejected that argument, finding that the defendant's actions of procuring a pipe to allow the buyer to test the product, and his "sales talk" were sufficient to support his conviction. *Id*. at 142.

A reading of these cases clearly indicates that most courts which have dealt with this, or similar issues, require intentionality and an ability to actually carry out a sale of a controlled substance to support a conviction. In Mr. Sammons' case, the state presented no evidence from which a reasonable jury could find, beyond a reasonable doubt, that he "knowingly sold cocaine, a controlled substance" or that "defendant knew that the substance he sold was cocaine" as required by the verdict director (L.F.72). The Missouri approved instruction on sale of a controlled substance interprets §195.211 consistently with the courts in, New York, California, Kansas, Nevada, Montana, Arizona, Kentucky and Florida where the courts have held that an offer cannot be made without the intention and ability to carry it out. The Missouri statute, like many of those listed above in other states, includes "or offer therefor" in its definition of sale. And, like most of those statutes, it does not define offer.

"To determine the ordinary meaning of a term, [the] Court consults standard English language dictionaries." *Hendricks*, 944 S.W.2d at 212 (White, J. dissenting), citing *State v. Carpenter*, 736 S.W.2d 406, 408 (Mo. banc 1987), quoting *State v. Swoboda*, 658 S.W.2d 24, 25 (Mo. banc 1983). According to the American Heritage Dictionary 862 (1985), "offer" means 1. To present for acceptance or rejection; proffer; 2. To put forward for consideration; propose; 3. To present for sale. Clearly, the common usage of "offer" requires that the person making the offer have whatever it is he is offering to the seller. Looking at the plain meaning of the word, what the legislature meant to criminalize was the act of offering for sale, not the act of offering to sell. Otherwise, an individual could be imprisoned for his words alone unaccompanied by any criminal intent. That would be unconstitutional.

"Missouri courts have held that statutes abridging speech are constitutional to the extent that they prohibit only that speech which is likely to incite others to immediate violence." *State v. Carpenter*, 736 S.W.2d 406, 408 (Mo. banc 1987), quoting *State v. Swoboda*, 658 S.W.2d 24, 25 (Mo. banc 1983). In *Carpenter*, this Court found a statute unconstitutionally overbroad in that it criminalized speech alone. §574.010.1 made it a crime to, in relevant part: "unreasonably and knowingly disturb or alarm another person or persons by. . .threatening to commit a crime against any persons."

In finding the statute overbroad, this Court first noted that criminal statutes must be scrutinized with particular care. *Carpenter*, 736 S.W.2d at 407. Next,

this Court noted that §574.010 criminalized spoken words. If the threat was actually carried out, the speaker would have committed a crime punishable by some other criminal statute. *Id*. And, finally, this Court noted that there was no guarantee under the statute that a substantial likelihood existed that the threatened criminal conduct would ever actually take place. *Id*. at 208.

The same analysis can be applied to the case at bar. By convicting Appellant for offering to sell Haley cocaine, the state sought and obtained a criminal conviction for words alone. There is no evidence that Appellant actually had the cocaine to sell, and if he did, he could have been prosecuted for delivery, as he was under Count I of the Amended Information. Finally, there is no evidence that Appellant had the ability to carry out his offer. Without that proof, he is being imprisoned because of his words to Haley, not for any criminal act.

Appellant certainly could have been charged with the class A misdemeanor of stealing, §570.030.7, for taking Haley's $100.00, or an attempted sale or delivery of a controlled substance, but he should not have been convicted of selling a controlled substance without some evidence that he had the specific intent and ability to do so.

This Court should vacate Appellant's conviction for selling a controlled substance and discharge him from his sentence on that count.

CONCLUSION

For the reasons stated in Point Relied On and Argument I, Appellant respectfully requests that this Court vacate his conviction and discharge him from that sentence.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office2000, 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 7,294 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 July, 2001. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 25th day of June, 2002 to Anne Edgington, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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