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No. SC92257

In the Missouri Court Supreme Court

STATE OF MISSOURI,

Respondent,

v.

LARRY WRIGHT,

Appellant.

Appeal from Stoddard County Circuit Court
Thirty-Fifth Judicial Circuit
The Honorable William L. Syler, Special Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATE OF MISSOURI

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STATEMENT OF FACTS

Appellant, Larry Wright, was charged in the Circuit Court of Stoddard County with forcible rape, armed criminal action, felonious restraint, and unlawful use of a weapon (L.F. 21-22). On August 5 and 6, 2010, appellant was tried before a jury, the Honorable William L. Syler presiding (Tr. 65-422). Appellant challenges the sufficiency of the evidence to support his conviction for unlawful use of weapon.[1] Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

In the afternoon of January 22, 2009, S.M. walked from school to her house in Malden, Missouri (Tr. 143-146). S.M. saw her cousin, Terrell Crigler, and they started walking together (Tr. 146). At the corner of Davis and Kimball Streets, S.M. saw people outside a house (Tr. 147). Then S.M. heard appellant yelling for her (Tr. 149). S.M. knew appellant because he had dated her cousin (Tr. 149-150). S.M. and Crigler continued to walk on Kimball Street, and S.M. noticed that appellant was following them (Tr. 150-151). Appellant asked S.M. where she was going (Tr. 151-152). S.M. said that she was going home (Tr. 152). Crigler asked appellant to "leave [S.M.] alone" (Tr. 152). Appellant showed

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[1] The jury acquitted appellant of the charges of forcible rape, armed criminal action, and felonious restraint (L.F. 47-50). A brief reference to the facts related to these charges is included to clarify the issues on appeal.

Crigler a gun that he had "in his pants" and told him to leave (Tr. 152, 360). Crigler complied (Tr. 152).

Appellant told S.M. to "come here," and pulled out the gun (Tr. 152-153). Appellant ordered S.M. to walk to an abandoned house (Tr. 157). Appellant closed the door and put the gun on the ground (Tr. 157). S.M. testified that appellant touched her breasts and her vagina, that he ordered her to go to another room in the house, and that he had sexual intercourse with her (Tr. 159-166). S.M. stated that appellant put the gun on the floor beside her head when he had intercourse her (Tr. 163, 166). After that, appellant allowed S.M. to leave (Tr. 167).

S.M. went to her grandmother's house and told her grandmother what had happened (Tr. 170-171). S.M.'s grandmother called the police (Tr. 171).

Officers Russell Miller and Ira Schatz arrested appellant in the same house where S.M. first saw appellant (Tr. 251). Appellant was standing in the yard holding a drink and a paper towel (Tr. 256). Appellant started backing up with his hands up and asked, "What did I do? What do you want?" (Tr. 257). Officer Schatz pulled out his Taser and told appellant to stop (Tr. 257). Appellant stopped, and the officers placed him in handcuffs (Tr. 257). The officers patted appellant down and found a gun in his waistband (Tr. 252, 257). The gun was fully loaded (Tr. 252).

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Appellant called four witnesses in his defense (Tr. 350-381). Appellant's girlfriend testified that appellant was with her between 3:30 p.m. and 4:30 p.m. on January 22, 2009 (Tr. 374-377). Appellant's cousin, Quentin Wright, testified that S.M. told him that this was a "set up" (Tr. 370-371). The parties entered into a stipulation that Robert Ison, a witness who did not appear, would have testified that he saw appellant in the afternoon of January 22, 2009, but that he did not see S.M. and that he did not see appellant following S.M. (Tr. 365-366). Appellant also called Terrell Crigler who testified that appellant did not pull a gun on him (Tr. 357). Crigler testified appellant had the gun in his pants and that he showed him the gun when he told Creigler to leave (Tr. 358-360).

At the close of all the evidence, the jury acquitted appellant of the forcible rape, the armed criminal action, and the felonious restraint, and it convicted him of unlawful use of a weapon (L.F. 47-50). After appellant waived jury sentencing, the court sentenced him to four years in the Missouri Department of Corrections (L.F. 53-54).

On December 9, 2011, the Court of Appeals, Southern District, affirmed appellant's conviction and sentence. State v. Wright, No. SD30872 (Mo. App., S.D. December 9, 2011). Thereafter, appellant sought, and this Court granted transfer. This appeal followed.

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ARGUMENT

The trial court did not abuse its discretion in overruling appellant's motion for judgment of acquittal because the evidence was sufficient to support appellant's conviction for unlawful use of a weapon.

Appellant claims that the evidence was insufficient to support his conviction for unlawful use of a weapon because the state did not present evidence that the weapon was concealed and that it was functional (App. Br. 5-14).

Appellate review of the sufficiency of the evidence is limited to a determination whether a reasonable juror could have found the defendant guilty beyond a reasonable doubt. State v. Donelson, 343 S.W.3d 729, 734 (Mo. App., E.D. 2011), State v. Freeman, 269 S.W.3d 422, 425 (Mo. banc 2008). The Court views the evidence and all reasonable inferences therefrom in the light most favorable to the verdict and disregards all evidence and inferences to the contrary. State v. Donelson, 343 S.W.3d at 734. Circumstantial and direct evidence are afforded the same weight. Id. at 735. The Court "will not re-weigh the evidence because the jurors might have believed all, some, or none of the witnesses' testimony when considered with the facts, circumstances, and other testimony in the case." Id., citing State v. Freeman, 269 S.W.3d at 425.

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Appellant was charged with unlawful use of a weapon pursuant to Section 571.030 (1) (L.F. 24). The jury was instructed to find appellant guilty if they believed that on January 22, 2009, appellant knowingly carried a weapon upon or about his person that was concealed from ordinary observation and that the weapon was capable of lethal use (L.F. 24, 40).

The weapon was concealed

A weapon is concealed is when the weapon is so carried as not to be discernible by ordinary observation. State v. Rowe, 67 S.W.3d 649, 657 (Mo. App., W.D. 2002). "A weapon is not concealed simply because it is not discernable from a single vantage point if it is clearly discernable from other positions." Id. However, a weapon may be concealed "where it is discernable only from one particular vantage point." Id.

The evidence supported a finding that the weapon was concealed. The evidence showed that around 4:00 p.m. on January 22, 2009, appellant followed S.M. and Crigler (Tr. 149-152). Appellant showed Crigler a gun that appellant had "in his pants," and told him to leave (Tr. 152, 358, 360). Appellant did not pull out the gun, but only showed it to Crigler (Tr. 358, 360). After Crigler left, appellant pulled out a gun and showed it S.M. (Tr. 153). Luster Johnson saw appellant when he followed S.M. and Crigler, but he did not see the weapon (Tr. 241).

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Appellant was arrested around 5:00 p.m. at the house where S.M. saw appellant earlier (Tr. 250-251). Appellant was standing in the yard, holding a drink and a paper towel (Tr. 256). Appellant started backing up with his hands up and asked, "What did I do? What do you want?" (Tr. 257). Officer Schatz pulled out a Taser and told appellant to stop (Tr. 257). Appellant stopped, and the officer placed him in handcuffs (Tr. 257). The officers patted appellant down and found a gun in his waistband (Tr. 252, 257). The weapon was a 9-millimeter gun and it was fully loaded (Tr. 252). From this evidence the jury could infer that the weapon was concealed in appellant's waistband and that it was visible only when appellant displayed it.

In a similar case, State v. Cole, 662 S.W.2d 297, 300 (Mo. App., E.D. 1983), the defendant committed a robbery using a weapon. The weapon was visible to the victim during the robbery and to one of the two witnesses who saw the defendant leave the gas station. Id. The police officer who responded found the defendant crouched down in a stairwell in a dark backyard. Id. The officer placed the defendant under arrest, and when he searched the defendant, the officer found the gun in his waistband. Id. The defendant was wearing a long blue jean jacket. Id.

The Court of Appeals held that this evidence was sufficient to show that the weapon was concealed. Id. The court stated: "The fact that defendant was wearing a jacket that extended well below his waist, that the gun was found in

his waistband, and that it was not discovered until a search of his person, was sufficient to support a finding that the weapon was not discernible by ordinary observation." Id.

Similarly, in the present case, the evidence supported a finding that the gun in appellant's waistband was not discernible by ordinary observation. S.M. and Crigler saw the weapon because appellant showed it to them (Tr. 152-153, 358, 360). Luster Johnson saw appellant walk behind S.M., but appellant never displayed the weapon to Johnson, and he never saw it (Tr. 241). The police officers found the weapon in appellant's waistband only after they arrested appellant and patted him down (Tr. 252, 257). This evidence supported a reasonable inference that the weapon was in appellant's waistband and that it was not discernible by ordinary observation. *See also* State v. Hornbuckle, 746 S.W.2d 580, 587 (Mo. App., E.D. 1988) (the victim's testimony that she saw a knife following a struggle between the defendant and a police officer and the police officer's testimony that a knife fell to the ground during the struggle and that defendant was wearing a knife holder on his belt, supported the conviction for carrying a concealed weapon).

Appellant argues that the police officers did not testify specifically that the weapon was not visible before they patted down appellant (App. Br. 9). But there is no requirement for the state to present such testimony. The officers saw appellant holding items in his hands, and they found the weapon in appellant's

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waistband only after they patted him down (Tr. 252, 257). It is reasonable to infer that the officers did not see the gun until they patted down appellant. Indeed, if the officers had seen the gun, they probably would have mentioned it, as most officers would consider it highly significant that a person was armed. In other words, the officers' silence about a gun until after the pat down is proof that they did not see the gun before the pat down. The facts supported a reasonable inference that the weapon was not discernible by ordinary observation.

The weapon was functional

Appellant next argues that the state failed to prove that the weapon was "functional" (App. Br. 10-14). Section 571.030 does not require the state to prove that a firearm is "functional." Appellant was charged with unlawful use of a weapon under Section 571.030.1(1), which provides that a person commits the crime of unlawful use of a weapon when he "Carries concealed upon or about his or her person a knife, a firearm, a blackjack or *any other weapon readily capable of lethal use*." §571.030.1, RSMo 2000. (emphasis added). Thus, the statute creates four ways to violate this offense: 1) by carrying a "knife;" 2) by carrying a "firearm;" 3) by carrying a "blackjack;" or 4) by carrying "any other weapon readily capable of lethal use." 571.030.1(1), RSMo 2000. As relevant her, the plain language of the statute requires only that a person carry a concealed

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firearm. The statute does not require the state to prove that the firearm is functional.

This analysis is further supported by the fact that the legislature has provided for a special negative defense to the crime of carrying a concealed weapon in Subsection 3 for a weapon that is being transported in a "non-functioning state." If the functionality of a concealed weapon was an element of this crime, then the special negative defense in §571.030.3 would be meaningless. In applying the provisions of Section 571.030, Missouri cases have consistently held that there is no requirement for a firearm to be loaded or operational. State v. Richardson, 886 S.W.2d 175, 177 (Mo. App., E.D. 1994); State v. Geary, 884 S.W.2d 41, 45 (Mo. App., S.D. 1994); State v. Lutjen, 661 S.W.2d 845, 847 (Mo. App., W.D. 1983).

Appellant relies on State v. Purlee, 839 S.W.2d 584, 590 (Mo. banc 1992), to argue that the functionality of a firearm is an element of the offense (App. Br. 10). This Court's decision in Purlee is inapplicable. The defendant in Purlee claimed that he was exempt from the provisions of Section 571.030.1 because he was "traveling in a continuous journey peaceably through the state." State v. Purlee, 839 S.W.2d at 589, 591. This exemption is inapplicable to appellant. The exception applies to interstate and intrastate travel, but its application depends on whether the defendant was a traveler on a journey. State v. O'Toole, 83 S.W.3d 622, 627 (Mo. App., E.D. 2002). Here, appellant did not leave his local

community and was not a traveler on a journey as provided for in Section 571.030. *See* State v. Murray, 925 S.W.2d 429, 494 (Mo. App., E.D. 1996) (the exception enabled travelers to protect themselves "against perils which typically do not face them back home among their neighbors" and it did not apply to the defendant who never left his community, but made stops to obtain and conceal a weapon and returned to his family).

Furthermore, the exemption for travelers on a peaceful journey is a special defense, and it must be first raised by the defense before the burden shifts to the state to prove that the exemption did not apply. State v. Purlee, 839 S.W.2d at 591; State v. Ramines, 152 S.W.3d 385, 406 (Mo. App., W.D. 2004); State v. Davis, 71 S.W.3d 659, 666 (Mo. App., W.D. 2004). Appellant never asserted this defense.

Appellant maintains that the opinion in Purlee directs that the functionality of the weapon is an element of the crime, not a special negative defense (App. Br. 10). While the opinion in Purlee contains language which refers to the functionality of the weapon as an "element," the opinion further points out that the exemption requiring the state to prove the functionality of the weapon under the exemption for travelers on a peaceful journey is a defense that must be raised the defendant before the burden shifts to the state. State v. Purlee, 839 S.W.2d at 591. Later cases have recognized that the "element" language of Purlee was dicta. *See* State v. Richardson, 886 S.W.2d 175, 177 (Mo.

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App., E.D. 1994) (the language in State v. Purlee that the weapon must be a "functional lethal weapon" must be dicta). This Court made it plain in Purlee that the exemption for travelers on a peaceful journey, which requires the state to prove the functionality of the weapon, is a defense that must be raised the defendant before the burden of proof shifts to the state. This is consistent with the provisions of Section 571.030. Thus, the state was not required to prove that the concealed weapon was functional.

In any event, even if the state had to prove that the weapon was functional, the evidence supported such an inference. The gun was fully loaded and the bullets were admitted into evidence (Tr. 252-253). Appellant showed the weapon to S.M. and Crigler in order to threaten them (Tr. 152-153, 358, 360). The jury could reasonably conclude that the weapon appellant used to threaten people, and which was fully loaded, was functional. *See* King v. State, 839 S.W.2d 709, 713-714 (Mo. App., W.D. 1992) (even if there was a requirement for the state to prove that the weapons were operable the evidence established this fact; the weapons were all either loaded or accompanied by live ammunition, and the defendant testified that the weapons were for protection); State v. Richardson, 886 S.W.2d at 177 (the evidence was sufficient to show that the weapon the defendant used was readily capable of lethal use where the defendant used it to threaten people, stating that he was going to "blow" the victim away, that he "had enough in his hand to take care of everybody," and

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that he was "gonna shoot" everyone); and State v. Geary, 884 S.W.2d at 45 (evidence that the defendant removed a shotgun from his vehicle and pointed it toward a motorcyclist as the motorcyclist ran toward a house, coupled with the fact that the defendant was pursuing the motorcyclist in his car and that struck him, was sufficient to sustain conviction for unlawful use of a weapon despite the lack of evidence that the gun was loaded). Appellant's claim should be denied.

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CONCLUSION

In light of the foregoing, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 2,831 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 13th day of June, 2012, to:

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