IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC 92257**
	)	
LARRY W. WRIGHT,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF STODDARD COUNTY, MISSOURI
THIRTY-FIFTH JUDICIAL CIRCUIT
THE HONORABLE WILLIAM L. SYLER, SPECIAL JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Larry Wright appeals his conviction following a jury trial in the Circuit Court of Stoddard County, Missouri, for unlawful use of a weapon, § 571.030.[1] On September 21, 2010, the Honorable William L. Syler, Special Judge, sentenced Mr. Wright to four years of imprisonment (L.F. 53),[2] and notice of appeal was timely filed on September 30, 2010 (L.F. 56). After the Missouri Court of Appeals, Southern District, affirmed Mr. Wright's conviction, No. SD 30872, this Court sustained Mr. Wright's application for transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

[1] All statutory citations are to RSMo 2000, unless otherwise stated.

[2] The Record on Appeal consists of a legal file (L.F.) and a transcript (Tr.).

STATEMENT OF FACTS

Statement of the case.

The Dunklin County prosecutor charged Larry Wright with forcible rape, armed criminal action, felonious restraint, and unlawful use of a weapon (L.F. 14). The unlawful use charge was based upon Mr. Wright's allegedly possessing a concealed firearm at the time of his arrest on the other charges (L.F. 14; Tr. 405-06). Following a change of venue to Stoddard County, the case was tried before a jury on August 5 and 6, 2010, at the conclusion of which the jury found Mr. Wright not guilty of rape, armed criminal action, and felonious restraint, and found him guilty of unlawful use of a weapon (L.F. 47-50). Mr. Wright waived jury sentencing, and the court sentenced him to four years of imprisonment (L.F. 53-54; Tr. 423-25).

Facts.

Shakeena M. alleged that Mr. Wright took her to an abandoned house in Malden and raped her on January 22, 2009, using a gun to compel her submission (Tr. 143, 149, 154, 163-65). Mr. Wright at one time dated Shakeena's cousin (Tr. 149-50). Shakeena was 16 years old at the time of trial (Tr. 143).

When Malden police officers Russell Miller and Ira Schatz went to arrest Mr. Wright that same day, they found him in the yard of the house where Shakeena said she encountered him (Tr. 149, 250-51, 255-56). When Schatz told Mr. Wright to come over to the car, Mr. Wright backed away "with his hands up saying, 'What did I do? What do you want?'" (Tr. 257). Miller and a third officer secured Mr. Wright

and put him in handcuffs (Tr. 257). After they put the cuffs on him, Miller patted Mr. Wright down and located a loaded nine millimeter handgun in his waistband (Tr. 252, 257). Neither officer was asked whether they could see the gun upon approaching Mr. Wright, and neither was asked whether he had tested it to determine whether it was functional.[3]

[3] The prosecutor argued in closing that, "It was in the waistband of his pants when the police arrested him. That's the only element of that. He had it carried on his person, a weapon readily, a firearm readily capable of lethal use, concealed to the ordinary observation. Police didn't even see it till they patted him down. Couldn't even find it because it was under his jacket, under his shirt and in the waistband of his pants." (Tr. 405-06).

POINT RELIED ON

The trial court erred in overruling Mr. Wright's motion for judgment of acquittal at the close of all the evidence, and in entering judgment on the verdict of guilty of Count IV, unlawful use of a weapon, because the rulings violated Mr. Wright's right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish beyond a reasonable doubt two essential elements of the offense charged: 1) that the firearm was concealed; and 2) that it was functional; neither officer testified that he could not see the pistol in Mr. Wright's waistband, nor did the State present any evidence that it had been test-fired or was known in any other way to be functional.

State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001);

State v. Purlee, 839 S.W.2d 584 (Mo. banc 1992);

State v. Carson, 941 S.W.2d 518 (Mo. banc 1997);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

§§ 556.051, 562.031, 562.076, 563.031, and 570.070, RSMo 2000;

§ 571.030, RSMo Cum. Supp. 2008; and

MAI-CR3d 304.11, 306.06, 308.16, 310.52, 324.02, and 333.00.

ARGUMENT

The trial court erred in overruling Mr. Wright's motion for judgment of acquittal at the close of all the evidence, and in entering judgment on the verdict of guilty of Count IV, unlawful use of a weapon, because the rulings violated Mr. Wright's right to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish beyond a reasonable doubt two essential elements of the offense charged: 1) that the firearm was concealed; and 2) that it was functional; neither officer testified that he could not see the pistol in Mr. Wright's waistband, nor did the State present any evidence that it had been test-fired or was known in any other way to be functional.

Although Mr. Wright was charged with unlawful use of a weapon for possessing a concealed firearm, there was no evidence going to the two essential elements – that it was concealed, and that it was functional.

Standard of Review

Before the State can deprive Mr. Wright of his liberty, the Due Process Clause requires that it prove each element of the charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364 (1970); ***State v. O'Brien***, 857 S.W.2d 212, 215 (Mo. banc 1993). This impresses "upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. ***Jackson v. Virginia***, 443 U.S. 307,

315 (1979). The critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Id*. at 318.

This Court considers "whether a reasonable juror could find each of the elements beyond a reasonable doubt." ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993). In reviewing the case on appeal, this Court takes the evidence and *reasonable* inferences therefrom in the light most favorable to the State. *Id*. It disregards inferences contrary to the verdict, "unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them." *Id*. The Court must also ensure that the jury did not decide the facts "based on sheer speculation." *Id*. at 414. Neither the jury nor this Court may "supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences." ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001).

The Offense

Under § 571.030.1(1), RSMo Cum. Supp. 2008 (App. A-3 – A-7), a person commits the crime of unlawful use of weapons if he knowingly, "[c]arries concealed upon or about his or her person a . . . firearm . . . or any other weapon readily capable of lethal use."

Discussion

The sum total of the State's evidence against Mr. Wright was that three officers spotted him, physically subdued him, and located a handgun in his waistband (Tr. 252-53, 257). There was no testimony as to whether they could see the gun in his

waistband. There was no testimony regarding whether Mr. Wright's clothing covered it. There was no testimony even whether it was in the front or back of his waistband, nor whether the officers viewed him from more than one angle. And there was no testimony whether the gun was tested and found to be functional.

There was no evidence that the gun was "concealed."

"The test of concealment is whether a weapon is so carried as not to be discernible by ordinary observation." ***State v. Purlee***, 839 S.W.2d 584, 590 (Mo. banc 1992), *citing*, ***State v. Bordeaux***, 337 S.W.2d 47, 49 (Mo. 1960). The Court also noted, "[w]hen the weapon is not fully covered or enclosed, the court of appeals has formulated the test as follows:"

> [A] weapon is not concealed simply because it is not discernible from a single vantage point if it is clearly discernible from other positions. It may be concealed, however, where it is discernible only from one particular vantage point.

Purlee, 839 S.W.2d at 590 (citations omitted).

Although the prosecutor *argued* during closing that some of these facts were presented – he told the jury, "Police didn't even see it till they patted him down. Couldn't even find it because it was under his jacket, under his shirt and in the waistband of his pants" (Tr. 405-06) – he neglected to provide *evidence* as to these alleged facts. Perhaps when he made his argument to the jury the prosecutor remembered something the officers said in their reports. But he did not base it on

what they said on the witness stand, or even on reasonable inferences from the facts as testified to by the officers.

In other cases, the courts of this state have depended on the proof by the State of the essential elements. In ***State v. Williams***, 958 S.W.2d 87, 89 (Mo.App. E.D. 1997), officers saw the defendant, whom they recognized, and who was acting suspiciously. They did not see a weapon on him. *Id*. They chased him when he ran, and they saw him drop a handgun and a plastic bag containing crack cocaine. *Id*. The defendant argued on appeal that the testifying officer's testimony did not support the conclusion that he had a full view of the defendant's front during the chase, and therefore, the State did not prove that he "had a concealed weapon that was not discernible from ordinary observation." *Id*. at 90. The Court disagreed, noting that the officer's testimony showed that at different times "he had a view of defendant's front, left, right, and back sides." *Id*.

There was no comparable testimony in Mr. Wright's case. Neither officer said they viewed Mr. Wright from different angles and did not see that he had the gun until Miller patted him down. Neither testified that they viewed him from more than a single vantage point, whether the gun was in the front or back of his waistband, or whether his clothing covered it.

In ***State v. Tibbs***, 772 S.W.2d 834, 837-38 (Mo.App. S.D. 1989), an undercover officer sat with the defendant in defendant's car for some time, without seeing the handgun that the defendant had under his thigh. The Court held that where it was only the defendant's movement of his hand toward the weapon that drew the

officer's attention to it, it was a jury question whether the weapon was discernible by ordinary observation. *Id*. at 838-40.

Again, there was no such testimony from the officers in this case. They simply approached Mr. Wright, told him to come to them, and when he backed away instead, they subdued him and put handcuffs on him (Tr. 252-53, 257).

Of similar reasoning and result are ***State v. Dowdy***, 724 S.W.2d 250, 252 (Mo.App. W.D. 1986) (three police officers carefully observed the defendant and did not detect the knife he carried in his pocket); ***State v. Cole***, 662 S.W.2d 297, 300 (Mo.App. E.D. 1983) (defendant was wearing a jacket that extended well below his waist, the gun was found in his waistband, and it was not discovered until a search of his person); and ***State v. Watson***, 643 S.W.2d 830, 832 (Mo.App. E.D. 1982) (officers viewed the defendant from several angles, with none seeing a gun until defendant cast it away). But the defendant's conviction was reversed in ***State v. Payne***, 654 S.W.2d 139, 140-41 (Mo.App. E.D. 1983), where the officers admitted that the handle of a handgun was visible upon their approach to defendant's vehicle.

In Mr. Wright's case, there was no evidence of any observations by the officers, and no evidence as to whether the gun was covered by Mr. Wright's clothing.[4] Without something to show that it was not discernible by ordinary

[4] The officers did not testify to how Mr. Wright was dressed; a shirt, jeans, and a pair of shoes were admitted into evidence (Tr. 337), but there was no mention of a coat or jacket, or whether the shirt was worn tucked in or not.

observation, the State's proof failed as to the element of concealment. The jury could only speculate, which is contrary to ***Grim*** and ***Whalen***.

There was no evidence that the gun was functional.

The second deficiency in the State's case is that § 571.030.1(1), RSMo Cum. Supp. 2008, applies to concealed weapons "readily capable of lethal use." As stated in ***Purlee***, "[t]he *essential elements of the offense* are the knowing *concealment* and accessibility of a *functional* lethal weapon." 839 S.W.2d at 590 (emphasis added). Therefore, although the State argued in the Court of Appeals that functionality is not an element of the offense (Resp.Br. 11), ***Purlee*** makes it clear that the "readily capable of lethal use" element requires a firearm to be functional.

In fact, this Court noted in ***Purlee*** that a trooper testified that the gun at issue was loaded, and a Highway Patrol forensic analyst testified that it was operational. *Id*. Thus the Court held that the "evidence established that Purlee knew there was a lethal weapon . . . that . . . was functional and loaded." *Id*. But in Mr. Wright's case, although the evidence was that the gun was loaded (Tr. 252), there was not one word of testimony going to the required element of whether it was functional.

Mr. Wright is aware that the courts have held that § 571.030.3, the "'non-lethal use exemption,' is a special negative defense which must be properly raised by the defendant by introducing evidence that the weapon was in a nonfunctioning state." ***State v. Ramires***, 152 S.W.3d 385, 406 (Mo.App. W.D. 2004), *citing*, ***State v. Davis***, 71 S.W.3d 659, 666 (Mo.App. W.D. 2002). Subsection 3 states in relevant part that,

"[s]ubdivisions (1), (5), (8), and (10) of subsection 1 of this section do not apply when the actor is transporting such weapons in a nonfunctioning state or in an unloaded state when ammunition is not readily accessible or when such weapons are not readily accessible." (App. A-5).

The reasoning of ***Davis*** and ***Ramires*** is flawed; this is not a "special negative defense," but rather an element of the defense as defined by the statute. MAI-CR3d 304.11, "Defenses," states in Part E, Special Negative Defenses, "[s]ince the publication of MAI-CR 2d, those issues at trial upon which the defendant has the burden of injecting the issue (the burden of producing evidence), but the state has the burden of persuasion, have been labeled 'special negative defenses.'" (App. A-8 – A-9). But where the legislature intended a special negative defense, the statute at issue clearly says so:

> When the phrase "The defendant shall have the burden of injecting the issue" is used in the code, it means
>
> (1) The issue referred to is not submitted to the trier of fact unless supported by evidence; and
>
> (2) If the issue is submitted to the trier of fact any reasonable doubt on the issue requires a finding for the defendant on that issue.

§ 556.051.

As examples of special negative defenses, MAI-CR3d 304.11 refers to claim of right, § 570.070 (MAI-CR3d 324.02); self-defense, § 563.031 (MAI-CR3d 306.06); involuntary intoxication, § 562.076 (MAI-CR3d 310.52); and belief in the legality of

conduct (ignorance and mistake), § 562.031 (MAI-CR3d 308.16). Every one of these statutes expressly includes a provision imposing on the defendant the burden of injecting the issue:

> "The defendant shall have the burden of injecting the issue of claim of right." § 570.070.2;
>
> "The defendant shall have the burden of injecting the issue of justification under this section." § 563.031.5;
>
> "The defendant shall have the burden of injecting the issue of intoxicated or drugged condition." § 562.076.2;
>
> "The burden of injecting the issue of reasonable belief that conduct does not constitute an offense under subdivisions (1) and (2) of subsection 2 is on the defendant." § 562.031.3.

But § 571.030, RSMo Cum. Supp. 2008, contains no such provision. Whether the gun was functional – whether it was "readily capable of lethal use" – is an element of the offense that the State must prove in *every* case – exactly as this Court noted in ***Purlee***. 839 S.W.2d at 590.

The Court of Appeals attempted to distinguish ***Purlee***, saying that ***Purlee***'s holding as to functionality applies only where the defendant claims that he fits within one of the exceptions in § 571.030.3. Slip Op. at 4-5. But that is inconsistent with ***Purlee***, in which this Court clearly stated that functionality is an "essential element" of the offense. 839 S.W.2d at 590. This becomes clear when one analyzes the ***Purlee*** opinion. It was only *after* the Court noted that the State had proven that the gun was

functional, and after it had considered at length whether it was concealed, that it went on to discuss, in a separate part B of the opinion, Purlee's defense that he fell under the "peaceable traveler" exception. *Id*. at 590-91. It did not say that the question whether the gun was functional was only relevant when that defense was specifically raised. Again, the State offered no evidence whatsoever as to this "essential element."

The Court of Appeals concluded:

> Section 571.030.1 provides only that the person charged with a violation of that section "[c]arries concealed upon or about his or her person a knife, a *firearm*, a blackjack or any other weapon readily capable of lethal use." (emphasis added). The verdict director provided that the gun had to be readily capable of lethal use, not that it had to be functional. The definition of "readily capable of lethal use" provided in MAICR 3d 333.00 is, "[As used in Chapter 571] means readily capable of causing death. If the weapon is a firearm, it is readily capable of lethal use whether loaded or unloaded."
>
> In this case, Appellant was concealing a loaded firearm. By definition, it was readily capable of lethal use.

Slip Op. at 5.

The Court's reliance on MAI-CR3d 333.00 was misplaced, because that definition is inconsistent with the substantive law. *See*, ***State v. Carson***, 941 S.W.2d 518, 520 (Mo. banc 1997) (". . . this Court has held that MAI–CR and its Notes on Use are 'not binding' to the extent they conflict with the substantive law. [citation

omitted] Procedural rules adopted by MAI cannot change the substantive law and must therefore be interpreted in the light of existing statutory and case law." [citations omitted]). MAI-CR3d 333.00 is inconsistent with substantive law because it essentially eliminates the limiting phrase "readily capable of lethal use" from the governing statute, at least as far as firearms are concerned. This Court implicitly recognized that principle when it found it necessary to discuss in ***Purlee*** both the law – that functionality is an essential element – and the evidence – the gun was both loaded and operational. 839 S.W.2d at 590.

An unloaded and/or nonfunctional "firearm" is no more than a lump of metal. Admittedly, it could *conceivably* be used in a lethal manner, but it is not, in that condition, a "weapon" that is "readily capable" of such use. Such an interpretation would criminalize the concealed possession of any other lump of metal, including many common items – even a cell phone could be used as a club as "readily" as could an unloaded or nonfunctional handgun. There is no indication the legislature intended such an interpretation.

Because the State proved neither that the handgun could not be discerned by ordinary observation, nor that it was a functional lethal weapon, it failed to support the charge of unlawful use of a weapon, and this Court must therefore reverse Mr. Wright's conviction on Count IV and discharge him from his sentence.

CONCLUSION

For the reasons set forth herein, appellant Larry Wright respectfully requests that this Court reverse his conviction and sentence for unlawful use of a weapon and discharge him therefrom.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 3,656 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using Symantec Endpoint Protection, updated in April, 2012. According to that program, these disks are virus-free.

On the 20th day of April, 2012, the foregoing substitute brief was placed for filing and delivery through the E-file system to Dora A. Fichter, Assistant Attorney General, 221 W. High Street, Jefferson City, MO 65102.

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