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 REPLY BRIEF

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CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	1
ARGUMENT	
Functionality is an essential element of carrying a concealed firearm, and the State did not prove that element	2
CONCLUSION	8
CERTIFICATE OF COMPLIANCE AND SERVICE	9

TABLE OF AUTHORITIES

Page

***CASES*:**

City of Grandview v. Madison, 693 S.W.2d 118 (Mo.App. W.D. 1985) 3

State v. Bratina, 73 S.W.3d 625 (Mo. banc 2002) 3

State v. Eckhardt, 232 Mo. 49, 133 S.W. 321 (1910) 3

State v. Geary, 884 S.W.2d 41 (Mo.App. S.D. 1994) 4, 5

State v. Hawkins,137 S.W.3d 549 (Mo.App. W.D. 2004) 5

State v. Lutjen, 661 S.W.2d 845 (Mo.App. W.D. 1983) 5, 6

State v. Purlee, 839 S.W.2d 584 (Mo. banc 1992) 2, 4, 6

State v. Richardson, 886 S.W.2d 175 (Mo.App. E.D. 1994) 4, 5

State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001) 7

***STATUTES*:**

Section 569.020, RSMo 2000 7

Section § 571.115, RSMo 1978 6

Section 571.010, RSMo 2000 2

Section 571.030, RSMo Cum. Supp. 2008 ..... 2, 4, 5, 6

***OTHER*:**

Commentary to § 16.030 of Proposed Missouri Criminal Code (1973) 6

MAI-CR3d 333.00 3

JURISDICTIONAL STATEMENT

Appellant, Larry Wright, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Mr. Wright, incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

ARGUMENT

This Court's statement in *State v. Purlee* that functionality is an essential element of carrying a concealed firearm was not *dicta*. The structure of § 571.030 and the Committee Comments to that section indicate that it is an element. Mr. Wright did not raise the defense of the peaceable traveler exception to the statute. The State's evidence does not lead to a reasonable inference that the firearm was functional.

The State's argument is that a firearm need not be functional to qualify as an object that is prohibited to carry concealed under § 571.030.1(1) (Resp.Br. 11). But just framing the question in that manner refutes the State's claim. What purpose would the legislature have for prohibiting carrying what would merely be a lump of metal that happened to be in the shape of a firearm? What harm or danger does such a prohibition address?

In claiming that the statute does not require a firearm to be functional, the State ignores its plain language. The statute clearly says that the item at issue must be readily capable of lethal use, and a nonfunctioning firearm does not meet that requirement. The State claims that § 571.030.1(1) posits four separate items, or categories of items, that are prohibited under the statute: 1) knife; 2) firearm; 3) blackjack; 4) any other weapon readily capable of lethal use. (Resp.Br. 11).[1]

[1] "Blackjack," "firearm," and "knife" are defined in § 571.010(2), (8), and (12), respectively, but there is no statutory definition of "readily capable of lethal use." A

First, by its use of the word "other" in the phrase "any *other* weapon[,]" the statute indicates that only those weapons, even in the first three categories, that are readily capable of lethal use are prohibited.[2] So unless the State proves that what appears to be a firearm can actually function as one, it has not met its burden of proof. The applicable rule of statutory construction is *ejusdem generis*: "[t]he words 'other' or 'any other,' following an enumeration of particular classes, are therefore to be read as 'other such like,' and to include only others of the like kind or character." ***City of Grandview v. Madison***, 693 S.W.2d 118, 119, n.2 (Mo.App. W.D. 1985), *quoting*, ***State v. Eckhardt***, 232 Mo. 49, 133 S.W. 321, 321-22 (1910) (internal quotes omitted). Again, a nonfunctional firearm does not fit this class.

Another applicable maxim of statutory construction is *noscitur a sociis* ("it is known from its associates"). ***State v. Bratina***, 73 S.W.3d 625, 626-27, n.5 (Mo. banc 2002). "The meaning of a word can be ascertained by referring to other words or phrases associated with it." *Id*. (citation omitted). Thus, the meaning of "firearm" necessarily includes the associated phrase, "readily capable of lethal use." This

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definition of that phrase in MAI does not address functionality: "Readily capable of lethal use [*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." MAI-CR3d 333.00.

[2] Instr. No. 12 also required the jury in this case to find: "Third, that the firearm was readily capable of lethal use[.]" (L.F. 40).

makes sense when one considers the difference between what it means to carry an *unloaded* firearm versus a *nonfunctional* one.

As the State notes, Mr. Wright relies on this Court's decision in ***State v. Purlee***, 839 S.W.2d 584 (Mo. banc 1992). (Resp.Br. 13). Although the State claims, as it did in the Court of Appeals, that Mr. Wright misunderstands ***Purlee*** (Resp.Br. 13-14), the reverse is actually true. The State's theory is that ***Purlee's*** statement that the concealment of a *functional* lethal weapon is an "*essential element*[] *of the offense*, *id*. at 590, is *dicta* because what was "really" going on in ***Purlee*** is that the defendant raised the "special negative defense" of peaceable travel through the state. (Resp.Br. 13-14).

But it is the State that does not understand that the Court *first*, in Part A of this section of the opinion, found that all the essential elements of the offense had been proven, *id*. at 589-91, and *then*, in Part B, it went on to deal with, and reject, the defense of peaceable travel. *Id*. at 591-92. Because the Court rejected Purlee's entitlement to claim that exception, there would have been no need for to discuss the essential elements of the offense unless functionality was indeed one of those elements. The State also does not understand that Mr. Wright did not invoke the peaceable traveler exception and has never argued that it applied. Mr. Wright meant the discussion of the concept of special negative defense in his opening brief to address the question whether functionality is an element of the offense in the absence of a claim that the traveler exception under § 571.030.3 applies.

In that context, the State's claim is incorrect that "[i]n 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." (Resp.Br. 12). The State cites ***State v. Richardson***, 886 S.W.2d 175 (Mo.App. E.D. 1994), ***State v. Geary***, 884 S.W.2d 41 (Mo.App. S.D. 1994), and ***State v. Lutjen***, 661 S.W.2d 845 (Mo.App. W.D. 1983).[3] The State's argument is also misleading because ***Richardson***, ***Geary***, and ***Lutjen*** all involved charges under § 571.030.1(4) – exhibiting a weapon in an angry manner – not carrying a concealed weapon under § 571.030.1(1). In fact, in ***Richardson***, after (erroneously) saying that this Court's statement in ***Purlee*** that functionality is an essential element "may be dicta[,]" the Court went on to hold that it did not matter, because "[c]arrying a concealed weapon is a different offense from exhibiting a lethal weapon." 886 S.W.2d at 177.

In ***Geary***, not only was the charge exhibiting, but the sole issue apparently was whether the firearm was loaded; the Court did not discuss the issue of functionality, nor did it undertake any analysis of whether being loaded was necessary, merely saying, "[i]t was not necessary for the state to prove that the shotguns were loaded to

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[3] The State does not note that in ***State v. Hawkins***,137 S.W.3d 549, 562 (Mo.App. W.D. 2004) (opinion by Judge Breckenridge), the Court relied on ***Purlee*** for the proposition, in a concealed-weapon case, that a firearm "is concealed under the statute if it meets three criteria: . . . (3) it is operational and loaded, or if not loaded, ammunition is within easy reach of any of the vehicle's occupants."

prove the offense charged." 884 S.W.2d at 45. Among the cases the ***Geary*** Court cited was ***Lutjen***, which is interesting, because that case points out that not only are the offenses of exhibiting and carrying concealed different, but it is a crucial difference that supports Mr. Wright's argument.

The ***Lutjen*** Court noted that § 571.030, enacted two years after the rest of the Criminal Code, replaced the former unlawful use of weapons offenses under § 571.115, and used different terminology, changing "dangerous and deadly weapon" to "weapon readily capable of lethal use." 661 S.W.2d at 848. The Court noted that the difference was "explained in the commentary to § 16.030 of the Proposed Criminal Code for the State of Missouri (1973) [from which present § 571.030 directly derives]. It noted that "the Comment [at p. 218] explains:

> The danger of carrying concealed weapons does not exist if the weapon is non-functional or not readily accessible. 'Non-function' means broken down or incapable of being fired if loaded. It remains a felony to carry a concealed but unloaded, functional firearm.

Id.

Finally, the State argues that if it was required to prove that the gun in Mr. Wright's case was functional, the jury could have inferred that proposition from the evidence that it was loaded and Mr. Wright "showed the weapon to [Shakeena M.] and Crigler in order to threaten them." (Resp.Br. 14). First, Mr. Wright points out that he was acquitted of all offenses charging conduct with Shakeena, including

forcible rape, felonious restraint, and its lesser-included offense of false imprisonment (L.F. 35, 37, 38, 47-49). Thus, the State is not entitled to have this Court view the evidence concerning those charges in its favor. In fact, the rule is that the evidence is to viewed in the light most favorable to the *verdict*. ***Purlee***, 839 S.W.2d at 587. Mr. Wright, not the State, is entitled to the benefit of the rule, meaning that no conclusion is possible from Shakeena's testimony.[4]

More important is the fact that the State's argument does not lead to a reasonable inference. As this Court is aware, people use toy guns, fake guns, all kinds of objects, even a finger in a pocket, to try to make people *believe* that they have a functioning gun, especially in robbery cases. That is why an actual gun is not necessary to a first degree robbery conviction. § 569.020. Even if Shakeena's testimony is considered, it is no more than speculation that Mr. Wright had a functioning gun. 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).

For these reasons, as well as those in his opening brief, Mr. Wright asks this Court to reverse his conviction on Count IV and discharge him from his sentence.

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[4] Crigler testified that Mr. Wright did not "pull" a gun on him (Tr. 358); he also testified both that he did and did not see Mr. Wright with a gun (Tr. 358, 360-61).

CONCLUSION

For the reasons set forth herein and in his opening brief, 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 reply 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, and this certificate of compliance and service, the brief contains 1,854 words, which does not exceed the 7,750 words allowed for a reply brief.

On the 25th day of June, 2012, the foregoing substitute reply 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.

/s/ *Kent Denzel*
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