IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC95847
	)	
ORLANDO M. NAYLOR,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
STE. GENEVIEVE COUNTY, MISSOURI
TWENTY-FOURTH JUDICIAL CIRCUIT
THE HONORABLE WENDY HORN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Orlando Naylor, was convicted following a jury trial in Ste. Genevieve County, Missouri of burglary in the first degree, §569.160, misdemeanor stealing, §570.030, and driving with a revoked license, §302.321.[1] As a result, he was sentenced to serve fifteen years for the burglary, one year for the stealing and seven years for the driving while revoked.

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, § 3, Mo. Const. (as amended 1982); § 477.050. The Court of Appeals, Eastern District, issued a signed majority opinion and subsequently granted both the State's and Mr. Naylor's application for transfer. This Court has jurisdiction pursuant to Article V, sections 3 and 10, Mo. Const. and Rule 83.024.

[1] Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

Melissa Giesler, the owner of Missy's Restaurant in Ste. Genevieve, started her workday at the restaurant at 6:00 AM on May 16, 2014. (Tr. 153, 157).[2] As was her usual routine, she left her purse on a desk in the office area of the restaurant while she worked. (Tr. 159). She testified that this office area was not open to the general public. (Tr. 160). When she collected her purse before leaving work that evening, she discovered that money had been taken from it. (Tr. 159). She also discovered that a side door to the building which lead to an area outside the office was unlocked. (Tr. 160). The door is always kept locked with a deadbolt on the inside, making it impossible to unlock from the outside. (Tr. 155-156). The door had been locked when Ms. Giesler started her shift on May 15, 2014. (Tr. 156).

Apart from the main entrance to Missy's restaurant, there is also a back door and the side door that leads to the area outside of the office. (Tr. 155, 156). The back door has a sign posted that reads "all visitors report to front desk." (Tr. 155). Inside the restaurant there is also a door which

[2] References to Appellant's jury trial held on March 9, 2014, will be designated as "Tr." References to the pre-trial conference held on March 6, 2015, will be designated as "PTC Tr."

leads to the office area from where Ms. Giesler's purse was taken. (Tr. 154). That door is marked with a sign that says "office." (Tr. 154). There is no door that leads directly from the office area to the outside. (Tr. 154). The closest door to the office area that leads to the outside is the side door that is kept locked with a dead bolt. (Tr. 157). To get from the office to that door one would have to go through a "secondary office." (Tr. 157).

After Ms. Giesler discovered that the money had been stolen from her purse, she called Mitzi Aufdenberg who manages the truck stop neighboring Missy's restaurant and also owns the building where the restaurant is located. (Tr. 160, 200). Ms. Aufdenberg was able to view footage from her security camera which showed someone exiting the restaurant through the side door. (Tr. 200-201). Video from a separate camera showed an individual, who Ms. Aufdenberg believed to be the same individual, pulling his car into the truck stop, exiting the car, vanishing from the field of view, then returning to the car. (Tr. 205).

On May 30, 2014, Officer Jerod Darnell of the Ste. Genevieve Sheriff's Department pulled Appellant over for following the car in front of him too closely. (Tr. 162). A sergeant who was with Darnell at the stop recognized the car as matching the description of the one on the security video outside Missy's restaurant on the day of the theft. (Tr. 172). This

prompted the officers to call Detective Austin Clark, who had been assigned to the theft. (Tr. 171-172).

Detective Clark arrived at the scene and, after Appellant gave consent, proceeded to search the car. (Tr. 173). The search led to the discovery of $675 in cash. (Tr. 175). Appellant was arrested for driving with a revoked license and Detective Clark spoke to him at the police station. (Tr. 167, 176). Despite Clark's multiple attempts to get Appellant to admit to the theft of the money from Ms. Giesler's purse, Appellant maintained that he had nothing to do with the crime. (Tr. 191-192). Appellant was released, but arrested a few days later for the theft at Missy's Restaurant. (Tr. 192, 181).

Appellant was charged with burglary in the first degree and stealing for the theft from the restaurant, as well as driving with a revoked license in relation to the May 30th traffic stop. (L.F. 15-18). Prior to trial, the state filed a "motion in limine regarding uncharged prior bad acts to establish motive, intent, absence of mistake, identity, and common scheme or plan, and complete and coherent picture." (L.F. 25-33). That motion asked the trial court to court to allow evidence that Appellant had stolen from one store in Illinois and attempted to steal from another store in Illinois the day prior to the theft from Missy's Restaurant. (L.F. 25-33). Specifically, the

motion alleged that on May 15, 2014, in Collinsville, Illinois, a man whose appearance is similar to that of Appellant was seen on video entering a Farm Fresh Store, taking a bag of money from the back office, making a purchase and then driving away. (L.F. 25-26). The money from the Farm Fresh Store was discovered to be missing later in the day when the business was closing. (L.F. 25-26). Further, the motion alleged that shortly after the theft from Farm Fresh, a person resembling Appellant, who was wearing the same clothes as the person from the Farm Fresh video and the person from the Missy's Restaurant video, entered a sandwich shop in Collinsville, Illinois, and tried to get into the back office area. (L.F. 26). He was confronted by employees of the sandwich shop before leaving in a car that resembled the car seen in the Farm Fresh video as well as the video from Missy's restaurant. (L.F. 26).

At a hearing on the motion, the prosecuting attorney argued that the evidence of the thefts in Illinois, while not admissible to prove that Appellant "had a propensity to commit crimes using an orange Grand Prix with blue stripes to commit burglaries of back offices," was admissible "for purposes of establishing motive, intent, absence of mistake, identity, or common scheme or plan." (PTC Tr. 3-4). Specifically, the prosecuting attorney argued that Appellant's presence in the Ste. Genevieve area was

explained by the fact that he nearly got caught stealing at the sandwich shop in Collinsville, Illinois. (PTC Tr. 4-6). He also argued that the fact that the theft and attempted theft in Illinois were committed in a manner similar to the theft at Missy's Restaurant showed Appellant's intent and the absence of mistake. (PTC Tr. 8-11). Finally, the prosecutor argued that, because the person in the security video from Missy's Restaurant was wearing the same clothes as the individual seen in the Collinsville incidents, had a similar distinct voice, and was seen driving a similar car, the evidence should come in to show identity. (PTC Tr. 11-16).

After hearing arguments from both sides, the court held that, while the issue was a "close call," testimony regarding the two incidents in Illinois would be admitted into evidence. (PTC Tr. 28). The court reasoned that, although the evidence was "highly prejudicial to (Appellant)," that prejudice was overcome by its probative value, particularly for establishing the identity of the individual involved in the theft from Missy's Restaurant. (PTC Tr. 28).

Elsie McCartney testified at trial that she was working at the Farm Fresh Store in Collinsville, Illinois on May 15, 2014. (Tr. 127-128). When she closed the store that evening she noticed that a bag of money was missing. (Tr. 129). The bag of money had been taken from an office where

the general public was not allowed. (Tr. 129). The door to this office was marked "employees only." (Tr. 130). She later reviewed the security video which showed an individual entering the office area and taking the money before making a purchase and leaving. (Tr. 130-133). She then called law enforcement. (Tr. 133).

Detective Christopher Warren of the Collinsville police Department was assigned to investigate the theft. (Tr. 138). As part of his investigation he watched the security video multiple times and looked at still pictures from the video.[3] (Tr. 139-140). He identified the car that the suspect left in as a two-door Pontiac Grand Prix. (Tr. 141). He further claimed that he believed Appellant to be the person from the Farm Fresh surveillance video. (Tr. 141).

Dean Wilson testified that he was working as a cook at the Sandwich Shop in Collinsville on May 15, 2014. (Tr. 144-45). While he was working he saw a man whom he identified at trial as Appellant standing in the kitchen area of the restaurant. (Tr. 146-147). Only employees are allowed in this area. (Tr. 147). Wilson asked the man why he was in the kitchen, and the man replied that he was inquiring about a job. (Tr. 147). Wilson

[3] The video surveillance system at Farm Fresh was unable to make a copy of the entire video. (Tr. 140).

described the man's voice as "raspy, real low." (Tr. 148). He testified that he had listened to the questioning of Appellant in relation to the Ste. Genevieve theft and that the voice on that recording was the same as the voice of the man at the Sandwich Shop. (Tr. 148). Once Wilson informed the man that there were no job openings the man left out the back door. (Tr. 148-149).

Garalyn Hale, a waitress at the Sandwich Shop, followed the man out the back door in an effort to get the license plate number for the car he was leaving in. (Tr. 151). She was able to write down that the license plate number started with "PH5," but could not write the rest down in time. (Tr. 151). The license plate of the car Appellant was pulled over driving in St. Genevieve on May 30, 2014, did begin with "PH5." (Tr. 164).

After hearing evidence and argument, the jury found Appellant guilty of burglary in the first degree, stealing and driving with a revoked license. (Tr. 262). He was sentenced to fifteen years imprisonment on the burglary, one year on the stealing, and seven years on the driving with a revoked license. (Tr. 281). This appeal follows.

POINTS RELIED ON

I. The trial court erred in overruling Appellant's motions for judgment of acquittal and imposing sentence and judgment upon him on the charge of burglary in the first degree, because these ruling were in violation of his right to due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution as well as Article I, Section 10 of the Missouri Constitution, in that sufficient evidence was not presented from which a reasonable juror could have found beyond a reasonable doubt that Appellant *knowingly* entered unlawfully into the office area of Missy's Restaurant, particularly given that there was no sign indicating that the area was closed to the public.

State v. Weide, 775 S.W.2d 255 (Mo. App. W.D. 1989);

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

In re Winship, 397 U.S. 358 (1970);

State v. Sonnier, 422 S.W.3d 521 (Mo. App. E.D. 2014);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10.

II. The trial court erred in overruling Appellant's motions for judgment of acquittal and imposing sentence and judgment against him for the charge of burglary in the first degree, because these rulings were in violation of his right to due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution as well as Article I, Section 10 of the Missouri Constitution, in that the state failed to present sufficient evidence that, at the time Appellant entered the office area of the restaurant and took money from Ms. Giesler's purse, there was anyone else present in the room.

State v. Washington, 92 S.W.3d 205 (Mo. App. W.D. 2002);

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

In re Winship, 397 U.S. 358 (1970);

State v. Sonnier, 422 S.W.3d 521 (Mo. App. E.D. 2014);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, § 10.

III. The trial court abused its discretion in allowing testimony regarding a theft and an attempted theft in Illinois the day before the theft from Missy's restaurant into evidence and in allowing the state to refer to this evidence in its opening statement and closing argument because this testimony violated Appellant's rights to due process of law and to be tried only for the crime with which he was charged as guaranteed by the Fourteenth Amendment to the United States Constitution as well as Article I, Section 10, 17 and 18(a) of the Missouri Constitution, in that this evidence had no legitimate tendency to establish Appellant's guilt for the theft at Missy's Restaurant, was more prejudicial than probative, and was presented only to show that Appellant had a propensity to commit burglaries of businesses and engage in criminal activity generally.

State v. Mathis, 375 S.W.2d 196 (Mo. banc 1964);

State v. Brown, 475 S.W.3d 772 (Mo. App. E.D. 2014);

State v. Summers, 362 S.W.2d 537 (Mo. banc 1962);

State v. Miller, 650 S.W.2d 619 (Mo. banc 1983);

U.S. Const., Amend., XIV;

Mo. Const., Art. I, §§ 10, 17 and 18(a).

ARGUMENT

I. The trial court erred in overruling Appellant's motions for judgment of acquittal and imposing sentence and judgment upon him on the charge of burglary in the first degree, because these ruling were in violation of his right to due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution as well as Article I, Section 10 of the Missouri Constitution, in that sufficient evidence was not presented from which a reasonable juror could have found beyond a reasonable doubt that Appellant knowingly entered unlawfully into the office area of Missy's Restaurant, particularly given that there was no sign indicating that the area was closed to the public.

Relevant Facts

There are three doors that lead into Missy's Restaurant from the outside: a back door, a side door, and a front door.[4] (Tr. 155-156). None of the three doors lead directly into the office area where Ms. Giesler's purse was stolen from. (Tr. 154). The back door has a sign posted that reads "all

[4] There was actually no evidence presented regarding the front door to the restaurant. Counsel for Appellant assumes that one exists however due to the fact that the other two doors are designated as a "back" door and a "side" door.

visitors report to front desk." (Tr. 155). The closest door to the office area was the side door, which leads to a "secondary office" which in turn has access to the office area. (Tr. 157). That door is always kept locked with a deadbolt on the inside, making it impossible to unlock from the outside. (Tr. 155-156). The door was locked when Ms. Giesler started her shift on May 16, 2014. (Tr. 156). Therefore, the individual who stole the money from the purse must have entered the restaurant through either the front door or the back door, even if they ultimately left through the side door.

There is a door inside the restaurant which leads to the office area. (Tr. 154). That door is marked with a sign that says "office." (Tr. 154). No testimony was presented regarding where that door is in relation to the front or back door.

Standard of Review

The Due Process Clause contained in the Fourteenth Amendment of the United States Constitution as well as Article I, Section 10 of the Missouri Constitution protects the accused in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***State v. Poole***, 216 S.W.3d 271, 277 (Mo. App. S.D. 2007), quoting ***In re Winship***, 397 U.S. 358 (1970). Furthermore, "the state has the burden and must

prove each and every element of a criminal case, and if the state fails to produce sufficient evidence to sustain the convictions, the judgment of the trial court is reversed." ***State v. Sonnier***, 422 S.W.3d 521, 523 (Mo. App. E.D. 2014) (internal citations omitted).

In reviewing a claim of insufficient evidence, an appellate court's "review is limited to whether the State has introduced sufficient evidence for any reasonable juror to have been convinced of guilt beyond a reasonable doubt." ***State v. Bateman***, 318 S.W.3d 681, 686-687 (Mo. banc 2010). Further, "the reviewing court will not weigh the evidence, but accepts as true all facts and inferences favorable to the verdict and disregards evidence and inferences to the contrary." ***State v. Hawthorne***, 74 S.W.3d 826, 828 (Mo. App. W.D. 2002). However, the reviewing court may "not 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).

Analysis

Count I of the information charged Appellant with first degree burglary by alleging that he "*knowingly* (entered) unlawfully in a room in a building not open to the public." (L.F. 15).[5] (Italics added for emphasis).

[5] The information mistakenly left out the word "entered."

Section 569.160 states, in relevant part, that an individual commits burglary "when he *knowingly* enters unlawfully…in a building or inhabitable structure for the purpose of committing a crime therein." (Italics added for emphasis). Because the state in this case failed to produce evidence that Appellant had knowledge that he was not allowed to be in the office area of Missy's Restaurant, Appellant's conviction for burglary must be reversed.

It is true that Ms. Giesler testified at trial that the office area of her restaurant was not open to the general public. (Tr. 160). However, it is unreasonable to conclude that the general public would be aware of this fact. The only thing that designated the office as such was a sign on a door leading to it that read "office." A sign that says "office" is a far cry from a sign that says "no trespassing" or "employees only." The state failed to present sufficient evidence to show that Appellant knew that he was not allowed to be in the office area of the restaurant.

The issue presented in this point of Appellant's brief is strikingly similar to the issue the Western District Court of Appeals confronted in ***State v. Weide***, 775 S.W.2d 255 (Mo. App. W.D. 1989). In that case, a customer at a restaurant was in an argument with the manager of the restaurant. ***Id***. at 256. As the manager walked through a door into the

kitchen area of the restaurant, Appellant followed with an apparent intention to assault the manager. ***Id***. The door through which the defendant walked to enter the kitchen had no sign indicating that the room was a kitchen or that patrons were not allowed. ***Id***. at 257. The door did, however, have a small window at eye level. ***Id***. Testimony was presented that only employees were allowed in the kitchen. ***Id***. The state charged the defendant in ***Weide*** with burglary based on the theory that he unlawfully entered the kitchen of the restaurant with the intent to commit assault. ***Id***. at 258.

The Court reversed the accused's conviction for burglary in ***Weide***, finding that the state's evidence failed to show that the defendant made his unlawful entry "with knowledge." ***Id***. In so holding, the Court noted that "no visible signs indicated that the restaurant prohibited public entry through the swinging door or even indicated what was behind the door." ***Id***.

As was the case in ***Weide***, in the present case there was no sign indicating that the general public was not allowed in the office area of Missy's Restaurant. While in the present case there was a sign on the door marked "office," there was nothing to indicate that patrons of the restaurant were not allowed in the area. As was the case in ***Weide***, the

state presented insufficient evidence to show that Appellant "knowingly" entered the office area of the restaurant unlawfully.

Conclusion

The state failed to produce sufficient evidence to establish that Appellant knowingly entered the office area of Missy's Restaurant unlawfully. A door marked "office" is simply not enough to put the general public on notice that a particular room at a business is not open to the public. Because the state failed to show that Appellant entered the office area unlawfully, his conviction for burglary in the first degree should be reversed and he should be discharged as to that offense.

II. The trial court erred in overruling Appellant's motions for judgment of acquittal and imposing sentence and judgment against him for the charge of burglary in the first degree, because these rulings were in violation of his right to due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution as well as Article I, Section 10 of the Missouri Constitution, in that the state failed to present sufficient evidence that, at the time Appellant entered the office area of the restaurant and took money from Ms. Giesler's purse, there was anyone else present in the room.

Relevant Facts

The information charged that Appellant committed the crime of burglary in the first degree because he "knowingly (entered) unlawfully in a room in a building not open to the public…for the purpose of committing stealing therein, *and while in such there was present in such building Melissa Giessler, a person who was not a participant in the crime*." (L.F. 15). Indeed, Ms. Giesler testified at trial that she was as the restaurant from 6:00 AM until 9:00 PM on the day in question. (Tr. 157, 159). It was during the time that she was working at the restaurant that the money was taken from her purse. (Tr. 159). No evidence was presented, however,

which in any way indicated that anyone other than Appellant was present in the office of the restaurant at the time the money was taken.

Standard of Review

The Due Process Clause contained in the Fourteenth Amendment of the United States Constitution as well as Article I, Section 10 of the Missouri Constitution protects the accused in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***State v. Poole***, 216 S.W.3d 271, 277 (Mo. App. S.D. 2007), quoting ***In re Winship***, 397 U.S. 358 (1970). Furthermore, "the state has the burden and must prove each and every element of a criminal case, and if the state fails to produce sufficient evidence to sustain the convictions, the judgment of the trial court is reversed." ***State v. Sonnier***, 422 S.W.3d 521, 523 (Mo. App. E.D. 2014) (internal citations omitted).

In reviewing a claim of insufficient evidence, an appellate court's "review is limited to whether the State has introduced sufficient evidence for any reasonable juror to have been convinced of guilt beyond a reasonable doubt." ***State v. Bateman***, 318 S.W.3d 681, 686-687 (Mo. banc 2010). Further, "the reviewing court will not weigh the evidence, but accepts as true all facts and inferences favorable to the verdict and

disregards evidence and inferences to the contrary." ***State v. Hawthorne***, 74 S.W.3d 826, 828 (Mo. App. W.D. 2002). However, the reviewing court may "not 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).

Analysis

Section 569.160(3) states, in relevant part, that:

> A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure…*there is present in the structure another person who is not a participant in the crime*.

(Italics added for emphasis). By contrast, Section 569.170 states, in relevant part "a person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein."

In other words, the factor that changes what would normally be second degree burglary into first degree burglary is the presence in the structure being burglarized of another person who is not a participant in the crime.[6] In the present case, the state chose to charge Appellant with first degree burglary rather than second under the theory that Ms. Giesler was in the restaurant when the theft of money from her purse occurred. (L.F. 15). Indeed, Ms. Giesler clearly testified that she set her purse in the office area of the restaurant when she started her day, and that when she collected her purse at the conclusion of the day money had been taken from it. (Tr. 159-160) It could certainly be inferred from this testimony that Ms. Giesler was present in the restaurant at the time the money was taken from her purse. However, absolutely no testimony was presented to show that Ms. Giesler, or anyone other than Appellant for that matter, was present in the office area of the restaurant at the time the money was taken.

It stands to reason that, by virtue of being a restaurant, much of Missy's Restaurant was open to the public on May 16, 2014. It also cannot be disputed that had the purse been in an area of the restaurant open to the public at the time money was taken from it, Appellant could not be

[6] Section 569.160 lists other ways that burglary in the first degree can be committed not relevant to this appeal.

charged with burglary at all because the state would be unable to produce evidence of unlawful entry. In order to get around this, and charge Appellant with the more serious charge of burglary rather than stealing, the state has opted to divide Missy's Restaurant into the area open to the public and the area not open to the public. As a result, the state was able to allege that Appellant committed burglary by entering the potion of the restaurant not open to the public, the office area.

It would be unconscionable, however, to now allow the state to charge Appellant with first rather than second degree burglary based on the theory that Ms. Giesler was present in the portion of the restaurant that was open to the public. If the state wishes to essentially divide Missy's restaurant into two separate territories, one open to the public and one not, then they must be required to show that someone else was actually present in the area not open to the public if they wish to have a conviction for first degree burglary sustained. To allow otherwise would essentially enable the state to treat Missy's Restaurant as one building when it benefits them, but then ignore this distinction of their creation when it does not.

Appellant's charge and conviction for first degree burglary in the present case shares similarities to the situation encountered by the Western District Court of Appeals in ***State v. Washington***, 92 S.W.3d 205 (Mo. App.

W.D. 2002). In ***Washington***, the accused was charged with first degree burglary after he stole items from an individual's garage. ***Id***. at 206-207. He was charged with first degree burglary rather than second due to the fact that people were in the home, though apparently not in the garage, at the time of the theft. ***Id***. at 207. After concluding that the garage in that case was not part of the same inhabitable structure as the rest of the house, the Court held that the conviction for first degree burglary could not stand. ***Id***. at 209-210. The Court further held that, because the jury had found that the accused entered the garage, albeit with no one else present, with the intent to steal, that the appropriate remedy was to remand the case to the circuit court for re-sentencing on the charge of second degree burglary. ***Id***. at 210-211.

Just as the accused in ***Washington*** entered the garage unlawfully, in the present case there was clearly sufficient evidence presented to show that Appellant entered an area of Missy's restaurant where he was not permitted. Also, just as there were people present in the entirety of the house in ***Washington***, Ms. Giesler was clearly present in the entirety of the restaurant in the present case. Finally, just as there was no one present in the actual garage in ***Washington***, in the present case there was no one present in the office when money was taken from Ms. Giesler's purse. As

a result, this Court should follow the lead of ***Washington*** and reverse Appellant's conviction for burglary in the first degree and discharge him for that offense.

Conclusion

The state cannot be allowed to have it both ways in this case. The state chose to draw a distinction between the portion of Missy's Restaurant that is open to the public and the portion that was not in order to charge Appellant with burglary rather than simply stealing. The state cannot now ignore that distinction when it comes to someone else being present in order to charge Appellant with first rather than second degree burglary. As a result, Appellant's conviction for burglary in the first degree should be reversed and he should be discharged for that offense.

III. The trial court abused its discretion in allowing testimony regarding a theft and an attempted theft in Illinois the day before the theft from Missy's restaurant into evidence and in allowing the state to refer to this evidence in its opening statement and closing argument because this testimony violated Appellant's rights to due process of law and to be tried only for the crime with which he was charged as guaranteed by the Fourteenth Amendment to the United States Constitution as well as Article I, Section 10, 17, and 18(a) of the Missouri Constitution, in that this evidence had no legitimate tendency to establish Appellant's guilt for the theft at Missy's Restaurant, was more prejudicial than probative, and was presented only to show that Appellant had a propensity to commit burglaries of businesses and engage in criminal activity generally.

Relevant Facts

Prior to trial, the state filed a "motion in limine regarding uncharged prior bad acts to establish motive, intent, absence of mistake, identity, and common scheme or plan, and complete and coherent picture." (L.F. 25-33). That motion asked the trial court to court to allow evidence that Appellant had stolen from one store in Illinois and attempted to steal from another store in Illinois the day prior to the theft from Missy's Restaurant. (L.F. 25-

33). Specifically, the motion alleged that on May 15, 2014, in Collinsville, Illinois, a man whose appearance is similar to that of Appellant was seen on video entering a Farm Fresh Store, taking a bag of money from the back office, making a purchase and then driving away. (L.F. 25-26). The money from the Farm Fresh Store was discovered to be missing later in the day when the business was closing. (L.F. 25-26). Further, the motion alleged that shortly after the theft from Farm Fresh, a person resembling Appellant, who was wearing the same clothes as the person from the Farm Fresh video and the person from the Missy's Restaurant video, entered a sandwich shop in Collinsville, Illinois, and tried to get into the back office area. (L.F. 26). He was confronted by employees of the sandwich shop before leaving in a car that resembled the car seen in the Farm Fresh video as well as the video from Missy's restaurant. (L.F. 26).

At a hearing on the motion, the prosecuting attorney argued that the evidence of the thefts in Illinois, while not admissible to prove that Appellant "had a propensity to commit crimes using an orange Grand Prix with blue stripes to commit burglaries of back offices," was admissible "for purposes of establishing motive, intent, absence of mistake, identity, or common scheme or plan." (PTC Tr. 3-4). Specifically, the prosecuting attorney argued that Appellant's presence in the Ste. Genevieve area was

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Detective Christopher Warren of the Collinsville police Department was assigned to investigate the theft. (Tr. 138). As part of his investigation he watched the security video multiple times and looked at still pictures from the video.[7] (Tr. 139-140). He identified the car that the suspect left in as a two-door Pontiac Grand Prix. (Tr. 141). He further claimed that he believed Appellant to be the person from the Farm Fresh surveillance video. (Tr. 141).

Dean Wilson testified that he was working as a cook at the Sandwich Shop in Collinsville on May 15, 2014. (Tr. 144-45). While he was working he saw a man whom he identified at trial as Appellant standing in the kitchen area of the restaurant. (Tr. 146-147). Only employees are allowed in this area. (Tr. 147). Wilson asked the man why he was in the kitchen, and the man replied that he was inquiring about a job. (Tr. 147). Wilson

[7] The video surveillance system at Farm Fresh was unable to make a copy of the entire video. (Tr. 140).

described the man's voice as "raspy, real low." (Tr. 148). He testified that he had listened to the questioning of Appellant in relation to the Ste. Genevieve theft and that the voice on that recording was the same as the voice of the man at the Sandwich Shop. (Tr. 148). Once Wilson informed the man that there were no job openings the man left out the back door. (Tr. 148-149).

Garalyn Hale, a waitress at the Sandwich Shop, followed the man out the back door in an effort to get the license plate number for the car he was leaving in. (Tr. 151). She was able to write down that the license plate number started with "PH5," but could not write the rest down in time. (Tr. 151). The license plate of the car Appellant was pulled over driving in St. Genevieve on May 30, 2014, did begin with "PH5." (Tr. 164).

Standard of Review and Preservation of the Issue

The determination of whether any prejudice outweighs the probative value of evidence of uncharged acts is within the sound discretion of the trial court. ***State v. Taylor***, 407 S.W.3d 153, 158 (Mo. App. E.D. 2013) (citation omitted). "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances before it and when the ruling is so arbitrary and unreasonable as to shock our sense of justice and indicate a lack of careful consideration." ***State v. Garvey***, 328 S.W.3d

408, 417 (Mo. App. E.D. 2010) (internal quotation marks omitted). Even where the trial court has discretion, it must "be exercised in careful consideration of [the accused's] rights as a criminal defendant." ***State v. Rauch***, 118 S.W.3d 263, 276 (Mo. App. W.D. 2003). A reviewing Court reviews trial court decisions regarding the admissibility of evidence "for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial." ***State v. Tokar***, 918 S.W.2d 753, 761 (Mo. banc 1996). Improperly admitted evidence is only harmless if "it was harmless beyond a reasonable doubt." ***State v. Miller***, 650 S.W.2d 619, 621 (Mo. banc 1983), quoting ***Chapman v. California***, 386 U.S. 18, 24 (1967).

Defense counsel argued at a pre-trial hearing that the state's motion in limine regarding the uncharged bad acts should not be granted. (PTC Tr. 20-25). He also filed his own motion in limine in which he sought an order prohibiting the state from introducing any testimony regarding uncharged acts of misconduct allegedly committed by Appellant. (L.F. 39). During the prosecuting attorney's opening statement, defense counsel objected on the first occasion that the Collinsville thefts were referenced. (Tr. 120). This objection was overruled, but defense counsel was granted a continuing objection "to any and all inquiries or statements related to the

alleged bad acts, specifically bad acts that occurred May 15, 2014, in Collinsville, Illinois." (Tr. 120-121). The claim that the trial court erred in granting the state's motion in limine and allowing into evidence testimony regarding the thefts in Collinsville was included in Appellant's motion for a new trial. (L.F. 65-66). This issue has been properly preserved for appellate review. *Rule 30.20*.

Analysis

A criminal defendant has the right to be tried only for the crimes for which he has been charged. ***State v. Hornbuckle***, 769 S.W.2d 89, 96 (Mo. banc 1989). As a rule, evidence is inadmissible if it is offered to show that a defendant is a person of bad character or has a propensity to commit crimes. ***State v. Conley***, 873 S.W.2d 233, 236 (Mo. banc 1994). Trial courts should be wary of propensity evidence because of the prejudicial nature of such evidence. ***State v. Watson***, 986 S.W.2d 249, 253 (Mo. App. S.D. 1998). The difficulty with such evidence is that it tends to run counter to the rule that prevents using a defendant's character as the basis for inferring guilt. ***Id***. Evidence of a defendant's propensity to commit a crime "may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged." ***State v. Burns***, 978 S.W.2d 759, 761 (Mo. banc 1998).

Evidence must be both logically and legally relevant to be admissible. ***State v. Davis***, 318 S.W.3d 618, 639 (Mo. banc 2010). Logical relevance refers to the tendency "to make the existence of a material fact more or less probable." ***State v. Brown***, 337 S.W.3d 12, 15 (Mo. banc 2011), *quoting* ***State v. Anderson***, 306 S.W.3d 529, 538 (Mo. banc 2010). Legal relevance refers to the assessment of probative value relative to the risk of "unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness." ***Id***.

Appellant was charged with burglary and stealing in relation to the theft from Missy's Restaurant in Ste. Genevieve, Missouri, as well as driving with a revoked license. (L.F. 15-18). Despite this, the state introduced evidence that Appellant had also burglarized the Farm Fresh and attempted to burglarize the Sandwich Shop in Collinsville, Illinois. The introduction of this evidence was improper because it was not sufficiently connected to the charged offenses and it was more prejudicial than probative.

This Court found similar evidence to have been improperly admitted in ***State v. Summers***, 362 S.W.2d 537 (Mo. 1962). In that case, the defendant was charged with breaking and entering a building owned by Wilbur Hoffman and stealing gasoline from the building. ***Id***. at 539, 542.

The trial court allowed a deputy sheriff to testify that he had received complaints about stolen gasoline from other people in the same neighborhood around the same time period. ***Id***. at 541. He also testified that "the defendant had admitted a series of thefts of gasoline 'in the neighborhood of five or ten days time.'" ***Id***.

The State argued this evidence was admissible "to show a series of events and actions, a series of thefts, because it was a part of the *res gestae* . . ." ***Id***. This Court disagreed, stating, "Obviously the other offenses referred to were not and could not have been a part of the *res gestae* as urged by the state's attorney." ***Id***. at 542. This Court also stated that "proof of the commission of other crimes by the defendant is not admissible unless such proof tends to establish the charge for which he is on trial, even though the other crimes were of the same general nature and committed at about the same time and place." ***Id***., *citing* ***State v. Garrison***, 116 S.W.2d 23, 24 (Mo. 1938). This Court held that the "evidence concerning other thefts of gasoline committed in the same general neighborhood at about the same time as the offense charged was not competent for any purpose and constituted prejudicial error." ***Id***.

Surely if admission of the other thefts of gasoline by the defendant *in the same general neighborhood* as the charged offense was reversible error

in ***Summers***, admission of evidence of other thefts allegedly committed by Appellant in another state also required reversal. This Court should follow the lead of ***Summers*** and reverse Appellant's convictions and remand his case for a new trial.

Appellant's case is also quite similar to ***State v. Mathis***, 375 S.W.2d 196 (Mo. banc 1964). In that case the defendant was charged with the burglary of a car dealership located at 1210 Truman Road. ***Id***. at 198. However, an officer also testified that a different car dealership located at 1401 Truman Road had been broken into. ***Id***. at 197-98. The officer further testified that this other building had recently been painted, and that the defendant "had paint on his hands similar to that on the building . . ." ***Id***.

The State argued the evidence involving the other building "was properly admitted over objection because it tended to establish intent, absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tended to establish the other, or the identity of the defendant." ***Id***. at 199. This Court disagreed, stating, "(t)he crimes were not related, and the fact that defendant may have broken into a building at 1401 Truman Road could not tend to show his intent to commit an unrelated burglary at some previous time two blocks away at 1210 Truman Road. Neither could it

tend to show absence of mistake or accident in breaking into the building at 1210 Truman Road, or the identity of the one who did so." ***Id***.

Finally, Appellant's case shares similarities with ***State v. Brown***, 475 S.W.3d 772 (Mo. App. E.D. 2014), a case recently decided by Eastern District Court of Appeals. In that case the defendant was charged with burglarizing St. Peter's Church. ***Id***. at 778. During trial, evidence was admitted that the defendant had also burglarized the nearby St. Robert's Church. ***Id***. He was not charged with any crimes related to this incident. ***Id***. On appeal, the defendant argued that evidence related to the St. Robert's Church was improper propensity evidence and should not have been admitted. ***Id***. at 786. The Court agreed that admission of evidence of the theft from St. Robert's was improperly admitted because it was inadmissible propensity evidence. ***Id***. at 787.[8]

As was the case with the evidence from St. Robert's Church in ***Brown***, in the present case evidence of the theft and attempted theft in Illinois were merely propensity evidence. The admission of this evidence was therefore improper.

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[8] The Court also found that, although the evidence in ***Brown*** was improperly admitted, reversal was not required due to the overwhelming evidence against the defendant. ***Id***. at 788-789.

The Eastern District Court of Appeals disagreed, however, and held that, because identity was at issue in the trial, evidence of the alleged crimes in Illinois was properly admitted for the purpose of "establishing the identity of the man captured by the Missy's restaurant surveillance cameras." (Slip Opinion *14-16). In reaching this holding, the Eastern District failed to address or apply the test for evidence to be admissible under the identity exception as stated by this Court in ***State v. Davis***, 211 S.W.3d 86, 88-89 (Mo. banc 2006) and ***State v. Bernard***, 849 S.W.2d 10, 17 (Mo. banc 1993). In ***Bernard***, this Court described the identity exception as follows:

> If the identity of the wrongdoer is at issue, the identity exception permits the state to show the defendant as the culprit who has committed the [ ] crime charged by showing that the defendant committed other uncharged [ ] acts that are sufficiently similar to the crime charged in time, place and method.

Id. This Court went on to state that:

> For the prior conduct to fall within the identity exception, there must be more than mere similarity between the crime charged and the uncharged crime. The charged and

uncharged crimes must be nearly "identical" and their methodology "so unusual and distinctive" that they resemble a "signature" of the defendant's involvement in both crimes. ***Id***.

The Eastern District, rather than following the test set forth in ***Davis***, which would have required an analysis of whether the uncharged crimes were sufficiently similar to the crime charged in "time, place and method," held that the evidence of the uncharged crimes was properly admitted due to the fact that the perpetrators had similar clothing, similar voices and similar cars. Had the Eastern District properly applied the test set forth in ***Davis***, it would have instead ruled that the uncharged crimes out of Illinois were improperly admitted and remanded Appellant's case for a new trial.

The uncharged crimes in Illinois had only mere similarities to the crime at Missy's Restaurant. There were not nearly identical and the methodology used by the perpetrator was not so "unusual and distinctive" as to resemble a signature of the perpetrator's involvement in both the charged and uncharged crimes. The only similarity real similarity between the crimes in Illinois and the stealing at Missy's restaurant is that the perpetrator accessed a part of a business where no one else was present

and stole or attempted to steal money. There is nothing particularly unusual or distinctive about this methodology. As a result, the identity exception to the rule against using uncharged bad acts in the prosecution of someone accused of a crime should not have been applied to allow evidence of the alleged crimes in Illinois to be introduced as evidence against Appellant.

Prejudice

The admission of this evidence was also incredibly prejudicial to Appellant. The prosecuting attorney essentially conceded during closing argument that the evidence regarding the Collinsville thefts was essential in his Ste. Genevieve case when he argued "Collinsville matters. We wouldn't have a case or anywhere near the level of proof beyond a reasonable doubt without Collinsville…" (Tr. 258). The prosecutor was correct in this assessment. Absent the evidence from the Collinsville incidents, the state's case against Appellant would have consisted of evidence that money had been stolen from Missy's restaurant, with no description of the man who went in the office area without permission, and extremely grainy surveillance footage that shows an individual enter and exit the restaurant before leaving in a car that generally matched the car that Appellant was later pulled over driving.

The evidence of the Collinsville thefts prejudiced Appellant not just in regards to the burglary and stealing charges, but in regards to the driving with a revoked license charge as well. While it cannot be argued that admission of this evidence of uncharged crimes showed a propensity on the part of Appellant to commit the particular crime driving with a revoked license, it could have caused the jury to believe that Appellant has a propensity to engage in criminal activity generally. It should be noted that Appellant did not testify on his own behalf at this trial, so had the evidence regarding the Collinsville incidents not been admitted, the jury would have been left with no indication that Appellant had any criminal history at all.

Conclusion

The admission of the Collinsville thefts into evidence was nothing more than inadmissible propensity evidence. There was nothing particularly unusual or distinctive about the way the crimes in Illinois or Missouri were perpetrated. The state cannot show that the introduction of the evidence of the Collinsville thefts was "harmless beyond a reasonable doubt." ***Miller***, 650 S.W.2d at 621. Appellant's convictions should therefore be reversed, and his case should be remanded for a new and fair trial.

CONCLUSION

For the reasons presented in the first and second point of this brief, Appellant respectfully requests that this Court reverse his conviction for burglary in the first degree. Should this Court disagree with the first and second point of this brief, Appellant respectfully requests that this Court reverse his convictions and remand his case for a new trial on all three charges for the reasons presented in the third point of Appellant's brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Casey A. Taylor, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, 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 8,732 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 6th day of September, 2016, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Dora Fichter, Assistant Attorney General, at Dora.fichter@ago.mo.gov.

/s/ Casey A. Taylor

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