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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

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

STATEMENT OF FACTS

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

ARGUMENT

I.

The cases cited by the State are not similar to Mr. Naylor's case. There was no evidence in this case like in those cited by the State that the office area of the restaurant was clearly marked to exclude the public.

The cases cited by the State are distinguishable. It first cites ***State v. Brown***, 457 S.W.3d 772, 779-80 (Mo.App.E.D. 2014), for the proposition that the question in this case is "whether the defendant was aware that the area he entered was not open to the public." (Resp.Br. 14). But in ***Brown***, the Eastern District Court of Appeals held that the State's evidence was insufficient to show that the defendant had knowledge that the sacristy of a church was not open to the public. *Id*. at 781-82. Although the doors to the sacristy were not marked, the Court also noted that "the sacristy is where the church keeps the priests' vestments, the chalices, and the wine and host for mass." *Id*. at 780. There was also a safe where the collections were kept. *Id*. This was clearly not a prayer room or other recognizable public area. That is much like Mr. Naylor's case, where the sole marking –

"office" – gave no indication that the public was excluded, nor did the fact that it was a place where there was a desk (State's Ex. 14).

In this case, there was no testimony or other evidence as to what else was in the hallway leading to the door marked "office"—whether that was the location of the restrooms, or the kitchen, or similar areas where a customer would not automatically know he was excluded. Nor was there evidence as to what, if anything, marked the transition between the restaurant seating area and the hallway. As in ***Brown***, there were no signs stating anything such as, " 'private,' 'no admittance,' 'authorized personnel only,' or anything of that nature that would inform a person that the door led to a private area rather than to a public area[.]" *Id*. at 781. ***Brown*** supports Mr. Naylor, not the State.

Similarly, the State argues from ***State v. McGinnis***, 622 S.W.2d 416, 419 (Mo.App.S.D. 1981), that "open to the public" means "premises which by their physical nature, function, custom, usage, notice or lack thereof or other circumstances at the time would cause a reasonable person to believe no permission to enter or remain is required." (Resp.Br. 14, quoting ***McGinnis***). But this definition was taken from an Oregon statute which had a specific definition of "open to the public." *Id*. Missouri has no such statutory definition. Further, this phrasing of the holding fails to recognize

that it was the State's burden to prove that the "office" area was *not* open to the public.

Importantly, in ***McGinnis*** the defendant argued that a portion of a city utility facility was *in fact* open to the public. *Id*. He made no argument that he had no knowledge of the fact that it was not, likely because the defendant was a former employee of that facility, *id*, and would have gained knowledge as to the public and private areas. Thus an argument that the State had failed to prove knowledge would have been to no avail.

State v. Norfolk, 745 S.W.2d 737 (Mo.App. E.D. 1987), also does not aid the State. In that case, there were signs on the door to and inside the stock room stating, "Authorized Personnel Only." *Id*. at 738. The single word, "office," in this case carries no such clear meaning.

The State further claims that a sign on the outside of the back door marked, "All visitors report to front desk" gave notice to Mr. Naylor that he was entering a nonpublic area. (Resp.Br. 15). It also argues that Mr. Naylor's apparently false statement about his car, and the fact that there was evidence of another theft in Illinois to which Mr. Naylor was connected, "supported an inference that [Mr. Naylor] knew that the office in Missy's restaurant was not open to the public." (Resp.Br. 14-15). It offers no reasons why an unrelated alleged crime would have a bearing on

whether there were any indications that the office area of Ms. Giesler's restaurant was not open to the public. Nor did it provide any evidence that Mr. Naylor saw the sign on the back door – there was no evidence that he entered that way, or whether he could have entered through the restaurant seating or other clearly public areas.

The State overstates the holding of ***State v. Stanley***, 736 S.W.2d 510 (Mo.App. E.D. 1987). (Resp.Br. 16). The State claims that it stands for the proposition that "Assuming, for the sake of argument, that defendant is correct in asserting that the room he entered was open to the public, any privilege or license he possessed stopped short of the area set off by the cubicle, including the desk drawers, and did not extend to the interior offices." (Resp.Br. 16; quoting ***Stanley***, 736 S.W.2d at 512-13). But the State fails to note that the issue there was not the sufficiency of the evidence to prove burglary, but simply whether a police officer had *probable cause* to arrest the defendant for trespassing. *Id*. at 512. That does not, without more, mean that a defendant who looks in desk drawers *knows* that he has left the public area of a business otherwise open to the public.

In ***State v. Smith***, 650 S.W.2d 640, 641 (Mo.App. E.D. 1983), the Court offered no analysis; its consideration of this issue in its opinion states in full:

> The state's evidence: A store clerk gave defendant permission to use the restroom. Instead defendant went into the adjoining office and was heard rattling coins. When the owner's wife returned to her office she saw defendant and the opened safe. When she challenged him he dashed out, pursued by the store owner and police. They found him hiding and out of breath. He carried several hundred dollars, including eighty-two dollars later found to be missing from the safe.
>
> Defendant did not testify.
>
> We deny defendant's claim of insufficient evidence. The evidence related above sufficed to prove burglary.

Even though the Court gave no indication as to the basis for its holding, Mr. Naylor suggests that the fact that the defendant asked permission to use the restroom and deviated from the scope of that permission supported an inference that he knew he was where he was not allowed to be. Such evidence does not exist in this case.

Finally, the State's attempt to distinguish ***State v. Weide***, 775 S.W.2d 255 (Mo. App. W.D. 1989), falls short. The State argues that, unlike ***Weide***, Ms. Giesler's "office door was clearly marked as an office door and it was

accessible only through a hallway that did not have any areas open to the public." (Resp.Br. 18). Mr. Naylor has addressed that contention above; the word "office" does not exclude the public as does "authorized personnel only," or the like. It argues that Mr. Naylor left through the side door that was near the office, which he had to unlock. (Resp.Br. 18). But that does not indicate anything about whether the inside access to that door excluded the public. And the State offers no reason why such facts as Mr. Naylor's parking at a distance from the restaurant, allegedly lying to the police about not using his car outside the St. Louis area, having $675 while unemployed, or having a hat similar to the thief who stole Ms. Giesler's money (Resp.Br. 18-19) have any bearing on his knowledge that the office was not open to the public.

For the reasons stated herein and in his opening brief, Mr. Naylor asks this Court to reverse his conviction for first degree burglary and discharge him from his sentence.

II.

The State's authority is distinguishable from Mr. Naylor's case, because the restaurant was open for business, therefore there could be no burglary until a person entered a nonpublic area, where there was no person present who was not involved in the crime.

The State argues that this case is like ***State v. Walker***, 693 S.W.2d 237 (Mo.App. S.D. 1985). (Resp.Br. 19-20). In ***Walker***, the Court considered the situation where the defendant broke into a floral shop that was attached to a residence. *Id*. at 238. The defendant argued that he could not be convicted of first degree burglary because the owners of the shop were in their residence at the time he broke in during the night, not in the shop. *Id*. at 238-39.

Walker is inapposite because in that case, the entire building was closed to the public. 693 S.W.2d at 238. The structure at issue was therefore the entire building. Because there were people present in the building, the defendant's conviction for burglary in the first degree was properly affirmed.

Unlike in ***Walker***, there could be no burglary in the public portion of the restaurant during business hours. Instead, there could only be a

burglary in a nonpublic area, such as the office, if the Court rejects Mr. Naylor's argument in Point I, *supra*. Therefore, if the State wishes to elevate the level of that burglary to first degree, it must show the presence of another person in that area.

State v. Bowman*,** 311 S.W.3d 341 (Mo. App. W.D. 2010), is similar to ***Walker. In that case, the defendant entered unlawfully into an apartment unit in a duplex while the victim was in a common area of the building. ***Id*** at 342. The defendant argued that this common area was open to the public, and that his conviction for burglary in the first degree should be reversed. ***Id***. at 345. The Western District, though, determined that the common area was not open to the public, and that it was actually a locked area. ***Id***. The Court further determined that the secured common area was actually a part of the apartment unit. ***Id***. Therefore, just as in ***Walker***, no part of the duplex was open to the public, and the defendant was trespassing as soon as he stepped foot in the building. This is in contrast to the present case, where the restaurant *was* open to the public.

Finally, ***State v. Allen***, 944 S.W.2d 580 (Mo. App. W.D. 1997), in no way supports the State's position. In that case, the defendant had previously been told to stay off of the property in question by Mrs. Crocker. ***Id***. at 582. Despite this warning, the defendant entered the garage

of the house and committed an assault against Mr. Crocker. ***Id***. Before doing this, the defendant had attempted to entice Mr. Crocker into a fight. ***Id***. Mr. Crocker, though, rejected this enticement, stating that he did not have a problem with the defendant. ***Id***. The defendant argued that he did not enter the garage unlawfully because Mr. Crocker's statement nullified Mrs. Crocker's earlier warning to stay off of the property. ***Id***. at 583. The Western District Court of Appeals, though, properly determined that Mr. Crocker was not inviting the defendant into the garage, but was instead merely stating that he did not want to fight the defendant. ***Id***. There were obviously people (such as the victim of the assault) present in the garage at issue when the defendant unlawfully entered it. ***Id***. Allen is completely inapposite.

The State's attempt to distinguish ***State v. Washington***, 92 S.W.3d 205 (Mo. App. W.D. 2002), also falls short. The State argues that unlike the garage in ***Washington***, the office of the restaurant here "was an integral part of the building." (Resp.Br. 24). That was not the holding in ***Washington***; the garage *was* part of the building, the difference was whether there was interior access. At any rate, the thrust of Mr. Naylor's argument was not that ***Washington*** was directly on point, but that this Court should "follow the lead of ***Washington***" and hold that the fact that

no one was present in the office when money was taken from Ms. Giesler's purse is similar to the situation in ***Washington***, where no one was present in the garage when the defendant unlawfully entered it.

For these reasons and those in his opening brief, Mr. Naylor asks this Court to reverse his conviction for first degree burglary.

III.

The State does not explain why, in trying to prove that Mr. Naylor was the man who allegedly committed or attempted to commit burglaries in Illinois, evidence that included the fact that crimes were committed was necessary to identify Mr. Naylor as the burglar in Missouri. Nor does it explain how allegedly committing the crimes in Illinois meant that Mr. Naylor knew that the office area of the restaurant was closed to the public.

The State offers no reason why it had to show evidence of not one, but *two* burglaries in Illinois simply to be able to argue that Mr. Naylor was the person who stole Ms. Giesler's money.

The court allowed the evidence primarily under the "identity" and "common scheme or plan" exceptions to uncharged misconduct evidence (PTC Tr. 28-29). But the State could have shown that Mr. Naylor was present in Illinois with a similar hat, car, and raspy voice, without going forward with evidence that he committed or attempted two unrelated burglaries.

The bottom line is that the State is arguing that the fact of the prior burglaries proved Mr. Naylor's knowledge that he was excluded from the

office of Missy's Restaurant. Again, that is nothing but propensity, which is prohibited. ***State v. Davis***, 211 S.W.3d 86, 88 (Mo. banc 2006) (Courts " 'should require that the admission of evidence of other crimes be subjected to rigid scrutiny' because such evidence 'could raise a legally spurious presumption of guilt in the minds of the jurors.' " (footnotes and citations omitted).

The State notes the long-standing rule that "[l]ogically and legally relevant evidence of uncharged crimes may be admitted 'to establish motive, intent, the absence of mistake or accident, a common plan or scheme, or the identity of the person charged with the commission of the crime on trial.' " (Resp.Br. 32, quoting, ***State v. Phillips***, 477 S.W.3d 176, 181 (Mo.App. E.D. 2015). But its argument that Mr. Naylor's knowledge of his exclusion of the restaurant office is another permissible subject for uncharged-crimes evidence is unsupported. And it is unsupportable, because again, it is purely propensity evidence.

As in previous points, the cases cited by the State are distinguishable. It argues that ***State v. Winder***, 50 S.W.3d 395, 406-07 (Mo.App. S.D. 2001), holds that evidence of stolen checks, for which he was not charged, "was properly admitted to establish the defendant's knowledge of the other stolen property for which he was on trial and to

show the complete picture of the crime." (Resp.Br. 34). But this issue was raised as plain error in. *Id*. at 406. The issue Mr. Naylor raised is preserved (Tr. 120-21). Further, the property obtained with the stolen checks by Mr. Winder was found with other stolen property for which he was on trial for receiving. *Id*. at 406-07. And the Court noted that § 570.080.2(2) "allows for the admission of evidence that Defendant was found in possession or control of property stolen on separate occasions from two or more persons. In light of Defendant's strategy of denying any knowledge that the property in the house was stolen, the State was entitled to rely on the statutory provision to prove the requisite knowledge and establish through circumstantial evidence this element of the crime." *Id*. at 406-07. There is no statute permitting the State to present such evidence in this case.

In ***State v. Jackson***, 228 S.W.3d 603, 606 (Mo.App. W.D. 2007), in which the defendant was charged with tampering for driving a stolen truck, the Court held that evidence that he used the truck to commit a burglary was admissible "to paint a complete picture of the charged offense and the events that transpired," and, "it was necessary to establish the identity of Jackson as the perpetrator." The defendant was caught in the act of the burglary, and the police chased him, leading the Court to also

note that "[w]ithout evidence of the burglary, it would not be clear why the police were chasing the pick-up and why the pick-up occupants might have hidden from police." *Id*. The Court added, although not argued by the State, that the evidence also permitted an inference of knowledge that the truck was stolen because it was apparently taken for use in the burglary. *Id*. Again, there is no such connection here. Mr. Naylor's car was not stolen, and there was no need to go into such detail about the circumstances under which he was seen in the car previously.

The facts of ***State v. Robinson***, 684 S.W.2d 529, 531 (Mo.App. E.D. 1984), are similar to ***Jackson***, in that the evidence of an uncharged burglary was necessary to prove the identity of the defendant as the perpetrator of the charged offense. And those details that led to the inference of identity were inherently details of the other offense. *Id*. With little analysis, the Court held that the evidence was relevant to show identity, a common scheme or plan, and a complete, coherent picture of the burglary for which the defendant was charged. *Id*.

But as argued, nothing stopped the State in this case from simply putting on evidence that someone who looked like Mr. Naylor, wearing a hat similar to the one found in his car, was seen at the businesses in Illinois. The State made no such effort because it is plain that that was not

its purpose. Rather, its purpose was to present evidence of somewhat similar crimes, so that it could argue, not that Mr. Naylor was identified in connection with the same car, but that his mixed success in stealing money in Illinois, narrowly evading capture, led him to try his luck in Missouri (Tr. 248). The State relied on its evidence not to show identity, but to show propensity.

Finally, the State attempts to distinguish ***State v. Brown***, 457 S.W.3d 772 (Mo. App. E.D. 2014), arguing that here,

> . . . the evidence of [Mr. Naylor's] acts in Collinsville and at Missy's Restaurant were similar and they occurred within a short time. [Mr. Naylor] wore the same clothes and used the same vehicle. A witness from the Sandwich Shop recognized [Mr. Naylor] by his distinctive voice and identified it from the videotaped statement to the police.

(Resp.Br. 36-37). But again, all of this could have been presented without referring to the Illinois events as crimes.

The State goes on to argue that the "evidence that [Mr. Naylor] entered the restricted areas of the Farm Fresh Store and the Sandwich Shop on the day before he entered the office of Missy's restaurant was admissible to establish [his] knowledge that the office was not open to the

public and to show the events leading to the burglary of Missy's Restaurant." (Resp.Br. 37). The State does not explain this leap of logic, how entering a restricted area in one business provides any support for the proposition that the allegedly restricted part of Missy's Restaurant was marked in such a way as to provide notice of that fact to the public. Again, that is propensity evidence.

Finally, the State says that "unlike in ***Brown***, the identity of the perpetrator was in issue in the present case. In ***Brown***, the defendant admitted being at the crime scene. Here, [Mr. Naylor] denied being the man on the surveillance video" (Resp.Br. 37). Mr. Naylor can only repeat what he has said: since the video from Illinois itself was not presented, only stills taken from the video by an officer (Tr. 134), there was no need to describe that video as evidence of an uncharged crime.

For these reasons and those presented in his opening brief, the evidence of the theft and attempted thefts in Illinois were merely propensity evidence, the admission of which was improper. Mr. Naylor asks this Court to reverse his convictions and remand this case for a new and fair trial.

CONCLUSION

For the reasons presented in Points I and II herein and in his opening brief, Mr. Naylor respectfully requests that this Court reverse his conviction for burglary in the first degree. For the reasons presented in Point III herein and in his opening brief, Mr. Naylor requests that this Court reverse his convictions for stealing and driving with a revoked license and remand his case for a new trial on those charges, or, in the alternative to the relief requested on Points I and II, for a new trial on all charges.

Respectfully submitted,

/s/ Casey A. Taylor

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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 in Book Antiqua size 13 point font, which is no smaller than Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the brief contains 3,785 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 14th day of October, 2016, an electronic copy of Appellant's Substitute Reply Brief was served through the Missouri e-Filing System on Dora A. Fichter, Assistant Attorney General, at dora.fichter@ago.mo.gov.

/s/ Casey A. Taylor

Casey A. Taylor