

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC 94154
)	
CLAUDE D. BROOKS,)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF
ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT
THE HONORABLE JON A. CUNNINGHAM, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Claude Brooks appeals his conviction after a bench trial in St. Charles County, Missouri, for the class B felony of Robbery in the second degree, § 569.030.¹ On December 20, 2012, Judge Jon A. Cunningham sentenced Mr. Brooks to twenty-five years in prison. (LF 41-43). Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Eastern District. Article V, § 3, Mo. Const.; § 477.050. This Court thereafter granted the State's application for transfer, so this Court has jurisdiction. Article V, §§ 3 and 10, Mo. Const. and Rule 83.04.

¹ Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

Claude Brooks was charged by a third amended felony information as a prior and persistent offender with the class B felony of robbery in the second degree. (LF 34-35). This amended information alleged that on August 25, 2011, Mr. Brooks “forcibly stole U.S. currency in the possession of Angela Ebaugh.” (LF 34). At a bench trial held on October 30, 2012, the following evidence relevant to the issues on appeal was presented:

Angela Ebaugh was working as a teller at Regions Bank on August 25, 2011. (TR 12-13). A person later determined to be Mr. Brooks came into the bank wearing sunglasses and a hat. (TR 14). Mr. Brooks also had very long dreadlocks that one witness described as a wig. (TR 14; 56). The bank had a rule against wearing hats and sunglasses in the bank lobby. (TR 14). As Mr. Brooks approached the counter, he handed Ms. Ebaugh a note that said “Fifties, hundreds, no bait money² and bottom drawer.” (TR 15). Ms. Ebaugh was concerned that Mr. Brooks knew what bait money was, and that he knew the bottom drawer had larger amounts of money in it; she felt scared. (TR 16).

Ms. Ebaugh started to slowly leave her station in the lobby to go to her drawer, and Mr. Brooks slammed his hand down. (TR 16). Ms. Ebaugh thought he did not want her to leave. (TR 16). Another teller thought the bank was being

² Bait money refers to money that is used to alert law enforcement and bank security of a situation that warrants their attention. (TR 15).

robbed when she heard the hand slap. (TR 45). Ms. Ebaugh was terrified because he was wearing a hoodie sweatshirt, and she “had no idea” if he had a weapon underneath it. (TR 17). Mr. Brooks had a brown plastic bag, and Ms. Ebaugh did not know if he had a weapon in it. (TR 17).

When Mr. Brooks slammed his hand down on the counter, he asked where Ms. Ebaugh was going and indicated he wanted money from the drawer at the counter. (TR 17). Ms. Ebaugh admitted during cross-examination that Mr. Brooks was getting her attention with this slam. (TR 32). Ms. Ebaugh explained to him that she did not have any money in that drawer, and that she needed to go to her station at the drive-through window. (TR 17). Mr. Brooks moved his position so he could watch her as she went to her station. (TR 18, 28). Ms. Ebaugh got the money from the bottom drawer and took it back and laid it on the counter. (TR 18). Mr. Brooks took the money, stuck it in his bag, and left the bank. (TR 18). Mr. Brooks also asked for the note back before leaving the bank. (TR 59).

During the incident, Mr. Brooks never shouted at Ms. Ebaugh and he spoke in a low tone. (TR 32-33). Mr. Brooks never indicated or implied that he had a weapon by doing things such as putting a hand in his pocket, grabbing his waistband, or reaching inside his clothing. (TR 34). Mr. Brooks kept his hands on the counter throughout the incident. (TR 34). Mr. Brooks never tried to touch or strike Ms. Ebaugh, and he never raised his voice. (TR 34).

After Mr. Brooks left, Ms. Ebaugh went back to her station and laid her bait money onto the counter to signal the police. (TR 19). She also started to write

down a description of Mr. Brooks. (TR 19). Another teller yelled for the branch manager to lock the door and called 911. (TR 62). Ms. Ebaugh talked to the police officers about what had happened after they arrived. (TR 19). Though Ms. Ebaugh still works in the banking industry, she has seen a few therapists and has not slept well since this incident. (TR 19-20).

Officer Steven Eisenbath responded to the call concerning the bank robbery. (TR 74). He saw a black man later determined to be Mr. Brooks walking on the sidewalk on a street near the bank, but this man did not have dreadlocks and he was not wearing a baseball hat. (TR 75). Nonetheless, Officer Eisenbath stopped Mr. Brooks to ask him if he saw anyone matching the description of the suspect. (TR 76). Mr. Brooks answered that he had seen a person matching the description, and he pointed in the direction from which he was coming. (TR 76). Officer Eisenbath observed that Mr. Brooks seemed nervous, that he was sweating, and that he was trying to control his heavy breathing as if he had just been running. (TR 76-77). Mr. Brooks started to walk away, and he ignored Officer Eisenbath's requests for him to stop. (TR 77). Officer Eisenbath yelled for him to stop, and Mr. Brooks started to run away from him. (TR 77).

Officer Eisenbath got in his car and notified dispatch that he believed he had seen the robbery suspect. (TR 77). He saw a police car traveling down the street, and he knew that the car belonged to Officer Duncan. (TR 78). He yelled on his radio to Officer Duncan to notify him that Mr. Brooks was running right at him. (TR 78). Officer Duncan jumped out of his patrol car and drew his

department-issued handgun. (TR 78). Officer Duncan ordered Mr. Brooks to get on the ground. (TR 78). He then placed Mr. Brooks in handcuffs and he patted him down. (TR 78-79). He found a brown plastic bag that had money in it. (TR 79).

A man approached Officer Eisenbath and told him that he had seen Mr. Brooks acting suspiciously and that Mr. Brooks might have put what he thought was an animal wrapped in a blue hoodie down a storm drain. (TR 79-80). The officers searched the storm drain and found a wig, a baseball hat, and a blue hoodie. (TR 80).

About ten minutes after the incident, some of the workers at the bank were asked to identify Mr. Brooks. (TR 48). One worker was able to identify him because his facial features were the same as the person in the bank and he had jeans with studs on them just as the person in the bank had. (TR 48-49). The police later returned the money that had been taken. (TR 20). Ms. Ebaugh had determined that \$5,150 had been taken, and this is the exact amount that was returned. (TR 20).

At trial, Mr. Brooks's counsel argued that the evidence was insufficient to show that a robbery occurred because the State failed to show Mr. Brooks "forcibly" stole the money from the bank. (TR 128-129). He argued that there was no evidence of any physical force being used or threatened. (TR 129).

The trial court found Mr. Brooks guilty of robbery in the second degree. This appeal follows.

POINT RELIED ON

The trial court erred in overruling Mr. Brooks's motion for judgment of acquittal at the close of the evidence and imposing judgment and sentence against him for the class B felony of robbery in the second degree because this violated Mr. Brooks's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I § 10 of the Missouri Constitution in that there was insufficient evidence to prove beyond a reasonable doubt the essential element of the crime that Mr. Brooks forcibly stole money from the bank.

Patterson v. State, 110 S.W.3d 896 (Mo. App. W.D. 2003);

State v. Carter, 967 S.W.2d 308 (Mo. App. E.D. 1998);

State v. Lybarger, 165 S.W.3d 180 (Mo. App. W.D. 2005);

State v. Tivis, 884 S.W.2d 28 (Mo. App. W.D. 1994);

United States Constitution, Amendment XIV;

Missouri State Constitution, Article I, Section 10; and

Sections 569.010.1(a) and 569.030.

ARGUMENT

The trial court erred in overruling Mr. Brooks’s motion for judgment of acquittal at the close of the evidence and imposing judgment and sentence against him for the class B felony of robbery in the second degree because this violated Mr. Brooks’s right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I § 10 of the Missouri Constitution in that there was insufficient evidence to prove beyond a reasonable doubt the essential element of the crime that Mr. Brooks forcibly stole money from the bank.

A. Standard of Review and Preservation

The due process clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const., Amend. 14; Mo. Const. Art. I, § 10. 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). Appellate review in a court-tried case is the same as in a jury-tried case; it is limited to determining whether there was sufficient evidence from which a reasonable trier of fact could have found each element of the offense to have been established beyond a reasonable doubt. *State v. McLarty*, 327 S.W.3d 557, 562 (Mo. App. W.D. 2010). There must be more

than a “mere modicum” of evidence, because “it could not seriously be argued that such a ‘modicum’ of evidence could by itself rationally support a conviction beyond a reasonable doubt.” *Jackson*, 443 U.S. at 320.

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. *State v. Botts*, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). The State may rely upon direct and circumstantial evidence to meet its burden of proof. *State v. Howell*, 143 S.W.3d 747, 752 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993). But this 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). This same standard of review applies when this Court reviews a motion for a judgment of acquittal. *Botts*, 151 S.W.3d at 375.

Mr. Brooks filed a motion for judgment of acquittal at the close of the State’s evidence and again at the close of all of the evidence. (LF 36-39). Mr. Brooks’s counsel further orally argued to the trial court that the evidence was insufficient to show that a robbery occurred because the State failed to show Mr. Brooks “forcibly” stole the money from the bank. (TR 128-129). He argued that there was no evidence of any physical force being used or threatened. (TR 129). Thus, this issue is preserved for review.

B. Relevant Facts

Angela Ebaugh was working as a teller at Regions Bank on August 25, 2011. (TR 12-13). A person later determined to be Mr. Brooks came into the bank wearing sunglasses and a hat. (TR 14). Mr. Brooks also had very long dreadlocks that one witness described as a wig. (TR 14; 56). As Mr. Brooks approached the counter, he handed Ms. Ebaugh a note that said “Fifties, hundreds, no bait money and bottom drawer.” (TR 15). Ms. Ebaugh was concerned that Mr. Brooks knew what bait money was, that he knew the bottom drawer had larger amounts of money in it, and she felt scared. (TR 16).

Ms. Ebaugh started to slowly leave her station in the lobby to go to her drawer, and Mr. Brooks slammed his hand down as though he did not want her to leave. (TR 16). Another teller thought the bank was being robbed when she heard the hand slap. (TR 45). Ms. Ebaugh was terrified because he was wearing a hoodie sweatshirt, and she “had no idea” if he had a weapon underneath it. (TR 17). Mr. Brooks had a brown bag, and Ms. Ebaugh did not know if he had a weapon in it. (TR 17).

When Mr. Brooks slammed his hand down on the counter, he asked where Ms. Ebaugh was going and indicated he wanted money from the drawer at the counter. (TR 17). Ms. Ebaugh admitted during cross-examination that Mr. Brooks was getting her attention with this slam. (TR 32). Ms. Ebaugh explained to him that she did not have any money in that drawer, and that she needed to go to her station at the drive-through window. (TR 17). Mr. Brooks moved his position so

he could watch her as she went to her station. (TR 18, 28). Ms. Ebaugh got the money from the bottom drawer and took it back and laid it on the counter. (TR 18). Mr. Brooks took the money, stuck it in his bag, and left the bank. (TR 18). Mr. Brooks also asked for the note back before leaving the bank. (TR 59).

During the incident, Mr. Brooks never shouted at Ms. Ebaugh and he spoke in a low tone. (TR 32-33). Mr. Brooks never indicated or implied that he had a weapon by doing things such as putting a hand in his pocket, grabbing his waistband, or reaching inside his clothing. (TR 34). Mr. Brooks kept his hands on the counter throughout the incident. (TR 34). Mr. Brooks never tried to touch or strike Ms. Ebaugh, and he never raised his voice. (TR 34).

C. Analysis

To obtain a conviction for second-degree robbery, the State must prove that the defendant forcibly stole property. *State v. Lybarger*, 165 S.W.3d 180, 186 (Mo. App. W.D. 2005); Section 569.030. As applied in this case, the phrase “forcibly stole” is defined by statute as when a person “uses or threatens the immediate use of physical force upon another person for the purpose of . . . overcoming resistance to the taking of the property . . .” Section 569.010.1(a).³

³ In contrast, to support a conviction for stealing under § 570.030, “the State does not have to prove the element of force.” *State v. Williams*, 313 S.W.3d 656, 659 (Mo. banc 2010).

Since there is no allegation that Mr. Brooks actually used any physical force at the bank, the State was therefore required to prove Mr. Brooks threatened the immediate use of physical force. It is true that “[t]he threat of physical harm need not be explicit; it can be implied by the defendant’s words, behavior, or both.” *Patterson v. State*, 110 S.W.3d 896, 904 (Mo. App. W.D. 2003) (citations omitted). “The requisite threat of physical force may be implied from the fact that the defendant displayed a weapon, engaged in behavior that gave the appearance that he was armed, or used of [sic] phrases like, ‘This is a holdup,’ or that it is a ‘stickup.’ *Id.* (citation omitted).

However, past cases illustrate that a defendant’s conviction for second degree robbery must be reversed unless there is behavior indicating a threat of the immediate use of physical force. *See State v. Carter*, 967 S.W.2d 308 (Mo. App. E.D. 1998)(insufficient evidence to support a conviction for second degree robbery despite the defendant telling the victim, “[g]ive me your purse.”); *State v. Henderson*, 310 S.W.3d 307, 309 (Mo. App. S.D. 2010)(insufficient evidence for second degree robbery despite the defendant “snatching” money from a cash register and “brushing” the clerk’s arms during the theft.); *State v. Tivis*, 884 S.W.2d 28, 30 (Mo. App. W.D. 1994)(insufficient evidence for second degree robbery despite defendant yanking a purse off of the victim’s shoulder and placing the victim in fear of injury.”).

Missouri cases that have affirmed convictions for robbery in the second degree are significantly different from the present case. In *State v. Lybarger*, for

instance, the defendant kept his hand in his pocket, which suggested to the clerk that he had a weapon. *Id.* In *State v. Clark*, the defendant handed the bank teller a note stating “This is a holdup. Give me all the money in the register.” 790 S.W.2d 495, 497 (Mo. App. E.D. 1990). The Eastern District Court of Appeals interpreted that phrase to be “a threat to use immediate physical force.” *Id.*

Mr. Brooks did not do any of these things. He kept his hands on the counter and therefore did not engage in behavior that gave the appearance he was armed. (TR 34). Furthermore, he never used any phrase such as “holdup” or “stickup.” Instead, the note that he handed the Ms. Ebaugh stated “Fifties, hundreds, no bait money and bottom drawer.” (TR 15). Finally, Mr. Brooks never tried to touch or strike Ms. Ebaugh, and he never raised his voice. (TR 34).

It is true that Ms. Ebaugh was frightened by this incident, but in *State v. Tivis*, the Western District Court of Appeals rejected the argument that placing a person in fear of injury is sufficient by itself to establish the offense of robbery. 884 S.W.2d at 30. In that case, the Court found that the defendant’s yanking of a purse from the victim’s shoulder did not constitute robbery when there was no evidence of a threat or struggle over the purse and when the victim was not injured. *Id.* Similarly, the fact that Mr. Brooks slapped the counter with his hand was not evidence of a threat. (TR 17). Ms. Ebaugh, for instance, testified that this gesture merely indicated Mr. Brooks “did not want [her] to leave,” and she admitted during cross-examination that Mr. Brooks was getting her attention with it. (TR 16, 32).

The present case is similar to *State v. Carter*, 967 S.W.2d at 308. In that case, the defendant approached the victim as she was getting into her car. *Id.* at 308. He told her, “[g]ive me your purse.” *Id.* The victim told him to get the purse out of her coat pocket. *Id.* The defendant reached in the pocket, took her purse, and ran away quickly. *Id.* He never threatened her or hit her, and the victim did not know if he had a weapon. *Id.* The Eastern District reversed his conviction for second degree robbery because the “evidence presented at trial showed that Defendant never threatened or hit Victim and Defendant did not display a weapon.” *Id.* at 309. In reaching this conclusion, the Eastern District was simply applying the plain language of §§ 569.010 and 569.030.

Applying those statutes necessarily leads to the same result in the present case. Simply put, nothing said or done by Mr. Brooks implied the threat of physical harm. *Patterson*, 110 S.W.3d at 904. Though Mr. Brooks stole money from the bank, stealing without the threat of the immediate use of physical force does not constitute robbery in the second degree. Because the evidence was insufficient to support Mr. Brooks’s conviction, in violation of his constitutional rights, this Court should reverse his judgment and sentence.

CONCLUSION

Because Mr. Brooks did not forcibly steal money, his conviction for robbery in the second degree should be reversed, and this Court should enter a conviction for the lesser-included offense of stealing, § 570.030.

Respectfully submitted,

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Certificate of Compliance and Service

I, Samuel E. Buffaloe, 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 3,535 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 11th day of July, 2014, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Jeff Bartholomew, Assistant Attorney General, at Jeff.Bartholomew@ago.mo.gov.

/s/ Samuel Buffaloe

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