IN THE
SUPREME COURT OF MISSOURI

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| 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 REPLY BRIEF

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***OTHER AUTHORITY:***

## JURISDICTIONAL STATEMENT

Mr. Brooks adopts and incorporates by reference the jurisdictional statement from his opening brief.

## STATEMENT OF FACTS

Mr. Brooks adopts and incorporates by reference the Statement of Facts from his opening brief.

## ARGUMENT

### A. Putting a victim in fear of injury is not sufficient by itself to establish the offense of robbery.

The State cites *State v. Rounds*, 796 S.W.2d 84, 86 (Mo. App. E.D. 1990) for the proposition that the force necessary to constitute robbery "may consist [of] the intimidation of the victim, or putting him in fear." (Rsp. Brf. 11). However, the Western District Court of Appeals specifically rejected the State's argument "that placing a person in fear of injury is sufficient to establish the offense of robbery" in *State v. Tivis*, 884 S.W.2d 28, 30 (Mo. App. W.D. 1994).

The apparent conflict between *Rounds* and *Tivis* stems from how the courts interpreted a change to the applicable robbery statute. The Western District noted in *Tivis* that an older version of the statute stated that a person is guilty of robbery in the first degree if the person takes "the property of another from his person, or in his presence, and against his will, by violence to his person, or *by putting him in fear of some immediate injury to his person* . . ." *Id.*, citing section 560.120, RSMo 1959 (emphasis added). The current version of section 569.030 went into effect in 1979. The new statute removed the language from the previous statute indicating that a person is guilty of robbery if he or she puts a person in fear of some immediate injury. Instead, the Western District noted in *Tivis* that section 569.030 "requires a finding of forcible stealing which under section 569.010(1) requires the use or threatened use of immediate physical force."

884 S.W.2d at 30. Because of this change in the law, the Western District appropriately rejected the State's argument "that placing a person in fear of injury is sufficient to establish the offense of robbery." *Id.*

The Eastern District did not discuss the change in the law in *Rounds*, 796 S.W.2d at 86. Instead, the court cited *State v. Duggar*, 710 S.W.2d 921, 922 (Mo. App. S.D. 1986) for the proposition that the "force necessary to constitute robbery may be constructive as well as actual, and may consist [of] the intimidation of the victim, or putting him in fear." *Id.* (modification in original).

The Southern District *did* discuss the change in law in *Duggar*. The court stated, "[t]he statutory phrase 'threatens the . . . use of physical force,' made applicable by § 569.010(1) has yet to receive a definitive construction, but a panel of this court has refused to construe that phrase more narrowly than the words 'putting [the victim] in fear of some immediate injury to his person' which appeared in our former robbery statute." 710 S.W.2d at 922, citing *State v. Foster*, 665 S.W.2d 348, 349-50 (Mo. App. S.D. 1984).

In *Foster*, the Southern District cited to 67 Am.Jur.2d instead of sections 569.010 and 569.030 for the proposition that "as a matter of general law the force necessary to constitute robbery may be constructive as well as actual, and may consist in the intimidation of the victim, or putting him in fear." 665 S.W.2d at 350. The Southern District went on to state, "[w]e are wholly unwilling to give the phrase 'threatens the . . . use of physical force," made applicable by § 569.010(1), any construction narrower than the words 'putting [the victim] in fear of some immediate injury to his person' which appeared in former § 560.120." *Id.* at 350-51.

The Southern District incorrectly determined that the change in the robbery statute had no effect on how it should be interpreted. This Court has stated that "[t]he legislature is not presumed to have intended a useless act." *State v. Liberty*, 370 S.W.3d 537, 552 (Mo. banc 2012), citing *Kilbana v. Director of the Department of Revenue*, 544 S.W.2d 9, 11 (Mo. banc 1976). This Court has further stated that "the legislature's action of repeal and enactment is presumed to have some substantive effect such that it will not be found to be a meaningless act of housekeeping. *Id.*, citing *City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441 (Mo. banc 1980).

The Southern District essentially determined in *Foster* that the legislature intended a useless act when it removed language indicating that placing a person in fear is sufficient to constitute a robbery. *Foster*, *Duggar*, and *Rounds* all rely on this faulty premise. Because the legislature removed this language, the Western District properly determined in *Tivis* that placing a person in fear of injury is *insufficient* to establish a robbery. 884 S.W.2d at 30. Therefore, the State cannot rely on the fact that Ms. Ebaugh was frightened by the incident in the present case to support Mr. Brooks's conviction.

**B. There was no threat of the immediate use of force in the present case**

Under section 569.010, a person forcibly steals only when he or she "uses or threatens the immediate use of physical force . . ." The State admits that Mr. Brooks "did not display a weapon or specifically threaten physical force . . ." (Rsp. Brf. 16). Instead, the State argues that Mr. Brooks "threatened immediate use of physical force through other means." (Rsp. Brf. 16).

However, nothing the State mentions amounts to a threat of the immediate use of force. For instance, the State mentions that Mr. Brooks "entered the bank wearing a disguise that included a long wig with dreadlocks, baseball cap, sunglasses, and hoodie." (Rsp. Brf. 11). The State neither cites any authority for the proposition that a disguise can be a threat to use force nor does it make any argument as to why that is the case. This is unsurprising since a disguise implies nothing more than the fact that the person wishes to conceal his or her identity.

The State also asserts that the note Mr. Brooks handed Ms. Ebaugh constituted an implied threat. (Rsp. Brf. 11). However, the note merely read, "[f]ifties, hundreds, no bait money and bottom drawer." (TR 11). The State compares this note to a note in *State v. Clark*, 790 S.W.2d 495, 497 (Mo. App. E.D. 1990). The note in that case stated, "[t]his is a holdup." (Rsp. Brf. 12-13). However, Eastern District determined the defendant in *Clark* committed a robbery because "[t]he expression 'holdup,' in its ordinary significance, means a forcible detention of the person held with the intent to commit robbery and implies the necessary force to carry out that purpose." 790 S.W.2d at 497, quoting *Brown v. State*, 397 So.2d 1153 (Fla.App. 1981). The note in the present case contains no similar language. Therefore, the note does not threaten the immediate use of physical force, as required by section 569.010.

The State finally asserts that Mr. Brooks's act of slamming his hand on the counter and ordering Ms. Ebaugh to "get back here" "could reasonably be seen as a threat of physical force to the teller should she refuse to comply." (Rsp. Brf. 13-14). However, Ms. Ebaugh believed Mr. Brooks was merely getting her attention with this hand slap. (TR

16, 32). This hand slap therefore did not constitute a threat of the immediate use of physical force.

The State argues that the present case is similar to *State v. Lybarger*, 165 S.W.3d 180 (Mo. App. W.D. 2005). However, the defendant in that case kept his right hand in his pocket when speaking to the clerk. *Id.* at 186. The Western District reasonably determined that this action suggested he had a weapon. *Id.* at 187. In the present case, however, Mr. Brooks kept his hands on the counter during the entire transaction, and he therefore did not engage in behavior that gave the appearance he was armed. (TR 34). The defendant in *Lybarger* also handed the clerk a note stating, "[t]his is a robbery." *Id.* at 186. As stated previously, the note in the present case did not contain similar language. (TR 11).

Mr. Brooks did not forcibly steal money from the bank because he did not threaten the immediate use of physical force. The Eastern District therefore correctly determined that his conviction for robbery in the second degree should be reversed.

### C. A demand for money at a bank should not be treated differently than a demand for money at other places

The State cites *States v. Gilmore*, 282 F.3d 398, 402 (6th Cir. 2002) for the proposition that "a bank is an environment that is regularly a target of robberies, in which there exists a heightened awareness of security threats, such that a demand for money in that context is an implicit threat of harm in and of itself." (Rsp. Brf. 14) However, the defendant in *Gilmore* was convicted under a federal statute that only applies to banks,

credit unions, and savings and loan associations. 282 F.3d at 400. *See* 18 U.S.C. § 2113(a). The Sixth Circuit was therefore not differentiating banks from other places as implied by the State. Furthermore, the federal statute at issue in *Gilmore* criminalized taking money from a bank using mere intimidation. *Id.* at 401-402. As stated previously, to be guilty of robbery in the second degree in Missouri, a person must actually use or threaten the immediate use of physical force. Section 569.010(1). Therefore, *Gilmore* is inapposite to the present case.

Furthermore, the State has presented no evidence that a bank is more prone to robberies than any other place. (Rsp. Brf. 14). In fact, statistics compiled by the FBI contradict the notion that robberies are more likely to occur in banks. According to crime reports issued by the FBI, there were 354,520 robberies nationwide in 2012. *See Crime in the United States 2012, Robbery*, available at http://www_fbi_gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/robbery (last viewed September 4, 2014) (underscore used in place of period in order to ensure hyperlinks do not exist). The FBI defines the term "robbery" as "the taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear." *Id.* According to the crime reports, robberies at banks constituted only 1.9 percent of all robberies in 2012. *Id.* In contrast, robberies at convenience stores constituted 5.1 percent of all robberies, robberies at homes constituted 16.9 percent of all robberies, and robberies that occurred on streets or highways constituted 43.5% of all robberies. *Id.* There is therefore no reason

to treat demands for money at banks differently than demands for money at any other place.

This is especially true considering that it is common knowledge that bank employees are trained to comply with demands for money. Ms. Ebaugh testified, for instance, that she was trained to give the person the money they asked for "under all circumstances." (TR 29). She further testified that she was "trained that [she] needed to give the person the money, what they wanted, whether they had a weapon or not." (TR 29). Because of these policies, a person would actually be *less* likely to use force at a bank than other places. Therefore, a demand for money at a bank should not be treated differently than a demand for money at any other place.

**D. *State v. Carter* is not distinguishable from the present case**

Mr. Brooks argued in his initial brief that the present case is similar to *State v. Carter*, 967 S.W.2d 308 (Mo. App. E.D. 1998). In that case, the defendant demanded the victim's purse as she was getting into her car. *Id.* he State argues that *Carter* is distinguishable first because the stealing occurred on the street and not in a bank. (Rsp. Brf. 15). However, as stated previously, according to the FBI crime statistics, robberies are actually *more* likely to occur on streets and highways than in banks.

Next, the State mentions Mr. Brooks's use of a disguise. (Rsp. Brf. 15). Again, the State does not explain why a disguise is indicative of a threat to immediately use physical force.

Next, the State asserts that the note Mr. Brooks gave Ms. Ebaugh distinguishes the present case from *Carter*. However, the State does not provide any authority or explanation for why a note is more indicative of a threat to use physical force than an oral demand.

Finally, the State asserts that Mr. Brooks's act of slamming his hand on the counter and ordering Ms. Ebaugh to "get back here" distinguishes the present case from *Carter*. (Rsp. Brf. 15). However, the defendant in *Carter* told the victim, "[g]ive me your purse." 967 S.W.2d at 308. The defendant then extended his hand toward the victim. *Id.* The State does not explain what separates the actions taken in the present case from the actions taken in *Carter*. Furthermore, as previously stated, the hand slap and the demand to "get back here" cannot constitute a threat to immediately use physical force since Ms. Ebaugh believed Mr. Brooks was merely getting her attention with these actions. (TR 16, 32). The present case is therefore indistinguishable from *Carter*, and Mr. Brooks's conviction for robbery in the second degree should be reversed.

The Eastern District properly determined that there must be some affirmative conduct beyond the mere act of stealing to constitute robbery. (Slip Opinion at *7-8). This holding is consistent with past case law and the plain language of sections 569.010 and 569.030. Because Mr. Brooks did not threaten the immediate use of physical force, his conviction for robbery in the second degree must be reversed.

## 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,

/s/ Samuel Buffaloe

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## Certificate of Compliance and Service

I, Samuel 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, and this certificate of compliance and service, the reply brief contains 2,602 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 4th day of September, 2014, electronic copies of Appellant's Substitute Reply Brief were placed for delivery through the Missouri e-Filing System to Robert J. (Jeff) Bartholomew, Assistant Attorney General, at jeff.bartholomew@ago.mo.gov.

/s/ Samuel Buffaloe
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