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No. SC95461

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

JAMES CALVIN SMITH,

Appellant.

Appeal from the Pettis County Circuit Court
Eighteenth Judicial Circuit
The Honorable Robert L. Koffman, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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ARGUMENT

I.

The decision in *Bazell* requires a new trial on Count 2, but it does not affect the convictions on Counts 4, 7, and 10.

After briefing was completed, but before the case was submitted, Mr. Smith filed a motion requesting resentencing on Counts 2, 4, 7, and 10, as a result of the Court's opinion in *State v. Bazell*, 497 S.W.3d 263 (Mo. 2016). In each of those four counts, Mr. Smith had been charged with the class C felony of stealing, and the jury had found him guilty as charged.

The Court took Mr. Smith's motion with the case. After oral argument, however, the Court issued an order and requested that the parties "file supplemental briefs addressing the effect of State v. Bazell, SC95318 (Mo. banc August 23, 2016) on the sentences received by Appellant on the stealing charges in this cause."

A. Mr. Smith's conviction on Count 2 should be reversed and remanded for a new trial

In *State v. Bazell*, 497 S.W.3d at 265, the defendant was found guilty of, *inter alia*, three counts of the class C felony of stealing—two counts based on the theft of firearms, and one count based on the theft of jewelry with a value of $8,000. On appeal, the defendant asserted that her right to be free from double jeopardy was violated by the two convictions that were based on the

theft of the firearms. She claimed that she could be found guilty only of one felony offense for the theft of the two guns during the single burglary. *Id*.

Instead of resolving the double jeopardy question, the Court concluded that the defendant had not—in relation to the theft of the firearms—been found guilty of two felony stealing offenses. *Id*. at 266-67. Rather, the Court held that because the class C felony enhancement found in § 570.030.3, RSMo Cum. Supp. 2009, did not apply to the theft of firearms, the defendant was guilty only of a class A misdemeanor stealing as to those two counts. *Id*. The Court, thus, reversed those stealing convictions and remanded the case.

In reaching this conclusion, the Court quoted from § 570.030.3, which includes the following:

> 3. Notwithstanding any other provision of law, *any offense in which the value of property or services is an element is a class C felony* if:
>
> (1) The value of the property or services appropriated is five hundred dollars or more but less than twenty-five thousand dollars; or
>
> (2) The actor physically takes the property appropriated from the person of the victim; or
>
> (3) The property appropriated consists of:
>
> ...

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(d) Any firearms.

(emphasis added). The Court then observed that "the felony enhancement provision, by its own terms, only applies if the offense is one 'in which the value of property or services is an element.' " *Id*. at 266.

The Court further observed that the offense of "[s]tealing is defined in section 570.030.1 as 'appropriat[ing] property or services of another with the purpose to deprive him or her thereof, either without his consent or by means of deceit or coercion.' " *Id*. The Court concluded, "The value of the property or services appropriated is not an element of the offense of stealing." *Id*.

In other words, because the "firearms" element under § 570.030.3(3)(d) did not include any value, and because the basic definition of stealing under § 570.030.1 did not include any value, the Court held that the defendant's convictions for stealing a firearm were not class C felonies and were, instead, misdemeanor offenses. *See id*. at 267. The Court observed that the legislature had amended § 570.030.3 in 2002 so that "only offenses for which 'the value of property or services is an element' may be enhanced to a felony," and the Court concluded that, "[a]s a result, section 570.030.3 ***does not apply here***." *Id*. at 267 (emphasis added).

Similarly, in Mr. Smith's case, the class C felony enhancement of stealing a firearm did not apply to the stealing offense as it was submitted to the jury in Count 2. In Count 2, the State had charged that items stolen by

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Mr. Smith "had a total value of at least five hundred dollars," and that the items "included a firearm" (L.F. 21). However, in drafting the verdict director for Count 2, the State elected to submit the theft of the firearm alone—which was, as the Court later made plain under *Bazell*—merely a misdemeanor.

In light of the fact that *Bazell* overruled prior case law that generally supported the State's submission (namely, *State v. Passley*, 389 S.W.3d 180 (Mo.App. S.D. 2012)), the State's error in selecting which felony enhancement to submit to the jury should be deemed instructional error, which was not preserved, and which was not asserted on appeal. And, to the extent that Mr. Smith suffered manifest injustice due to the lack of a jury finding on an essential element of the offense, the State should be permitted to prove at a new trial that Mr. Smith was guilty of the class C felony otherwise alleged in the information in lieu of indictment, namely, that Mr. Smith stole items with "a total value of at least five hundred dollars" (*see* L.F. 21).[1]

Alternatively, if the Court were to conclude that there was not merely instructional error, or if the Court holds that stealing property with a value of

[1] As will be discussed below in Part B, when it is alleged that the stolen property had a value of $500 or more, it is the State's contention that the value of property is an element of the offense—*i.e.*, that stealing property with a value of $500 or more is a felony.

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$500 or more is *not* a class C felony, then the Court should reverse the conviction on Count 2 (along with the other three counts discussed in Part B) and remand for resentencing.

B. The decision in *Bazell* does not affect the convictions on Counts 4, 7, and 10

The stealing offenses charged in Counts 4, 7, and 10, each alleged that Mr. Smith stole property with a value of $500 or more, and the jury found as to each offense that the property was worth $500 or more (*see* L.F. 46, 53, 59). Accordingly, the decision in *Bazell* is not applicable to those counts.

As outlined above, the class C felony enhancement applies only when the definition of an offense includes "the value of property." Here, each of Mr. Smith's felony stealing offenses was charged pursuant to § 570.030.3(1), and, accordingly, each felony offense included value as an element of the offense, *i.e.*, "value of at least five hundred dollars" (*see* L.F. 21-23). Consequently, the class C felony enhancement of § 570.030.3 was applicable to each of the felony stealing offenses charged in Mr. Smith's case.

Mr. Smith focuses on the language in *Bazell* that cites to § 570.030.1 for the definition of stealing (App.Supp.Br. 10-11). He also cites to a recent Court of Appeals decision that supports his position and asserts that because the definition of stealing in subsection 1 does not include value, none of the class C felony enhancements contained in subsection 3 can ever be charged

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(App.Supp.Br. 12-13, citing *State v. McMillian*, 2016 WL 6081923 (Mo.App. W.D. Oct. 18, 2016)). *See also State v. Turrentine*, 2016 WL 6818938 (Mo.App. S.D. 2016) (following *McMillian* in applying *Bazell*). He asserts, "Nothing in Section 570.030.3 suggests that Section 570.030.3 itself can be used to provide an element lacking in Section 570.030.1" (App.Supp.Br. 13).

But the Court's reference in *Bazell* to the basic definition of stealing in subsection 1 should not be interpreted to mean that the Court was ignoring subsection 3 in analyzing whether "the value of property" was an element of the offense charged in that case. To the contrary, as outlined above, the Court also quoted from subsection 3, ostensibly to demonstrate that the element charged by the State in that case—"Any firearms" under subsection 3(3)(d)—also did not included the value of property. It was only after quoting from subsection 3 and subsection 1 that the Court held that "section 570.030.3 *does not apply here*." *Bazell*, 497 S.W.3d at 267 (emphasis added). The Court did not hold that all prosecutions for the class C felony under § 570.030.3(1)—which includes value—were precluded.

In fact, the Court in *Bazell* affirmed a 12-year sentence for one count of class C felony stealing that had been charged under § 570.030.3(1). *See id.* at 265, 267 n. 4, 269. That sentence was twelve times longer than the sentence authorized by law for a class A misdemeanor. *See* § 558.011, RSMo. Cum. Supp. 2013. Had the Court intended to invalidate all class C felony offenses,

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it could (and arguably should) have reversed that conviction *sua sponte* for plain error, as "being sentenced to a punishment greater than the maximum sentence for an offense constitutes plain error resulting in manifest injustice." *State v. Taborn*, 412 S.W.3d 466, 474 (Mo.App. W.D. 2013); *see also* Rule 30.20 ("Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom."). The fact that the Court *did not* reverse that conviction suggests that the Court also *did not* hold that the class C felony enhancement of subsection § 570.030.3 was rendered entirely meaningless by the 2002 amendment to § 570.030.

In addition, it is not uncommon for elements of a higher-class offense to be stated in later subsections of a statute—after the basic offense has been defined in an earlier subsection. For example, the class C felony of first-degree sexual abuse is defined in § 566.100.1, RSMo Cum. Supp. 2013: "A person commits the offense of sexual abuse in the first degree if he or she subjects another person to sexual contact when that person is incapacitated, incapable of consent, or lacks the capacity to consent, or by the use of forcible compulsion." However, subsection 2 adds the element of age to enhance the crime to a Class B felony. Even though age is not an element of first-degree sexual abuse, if the State charges and proves beyond a reasonable doubt that the victim was under 14, that is an element that serves to change the class of

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the crime. Again, this is not uncommon. *See*, *e.g.*, § 565.050, RSMo 2000 (assault in the first degree); § 566.060, RSMo Cum. Supp. 2013 (sodomy in the first degree); § 566.030, RSMo Cum. Supp. 2013 (rape in the first degree).

Moreover, it is apparent that the legislature contemplated a felony offense of stealing based on value because § 570.030.5, RSMo Cum. Supp. 2009, stated that each item of property or services that itself exceeds $500 may be charged as a separate felony count, and § 570.030.7, RSMo Cum. Supp. 2009, stated that stealing over $25,000 is a class B felony. And, significantly, like subsection 3, subsection 8 also limited itself to offenses in which value is an element. Finally, § 570.030.8, RSMo Cum. Supp. 2009—a catchall—stated that if no other penalty is specified, stealing is a class A misdemeanor. In short, the various parts of the statute make plain that the legislature intended stealing to be a graded offense based on the value of the property stolen.

Finally, the elements of class C felony stealing have long been understood to include the factual circumstances included in § 570.030.3. *See*, *e.g.*, MAI-CR 3d 324.02.1, Notes on Use 2-7 (explaining how to draft verdict directors for the graded stealing offenses); *see also State v. Miller*, 466 S.W.3d 635, 636 (Mo.App. S.D. 2015) (" 'Absent substantial evidence as to the value, an essential element of the felony stealing charge is not proved.' "); *State v. Brown*, 457 S.W.3d 772, 785 (Mo.App. E.D. 2014) (treating class A

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misdemeanor of stealing as an included offense of class C felony stealing, where the felony was based on stealing property worth $500 or more); *State v. Slocum*, 420 S.W.3d 685, 687 (Mo. App. E.D. 2014); *State v. Calcotte*, 78 S,W.3d 790, 794 (Mo App. S.D. 2002).[2] In short, what the Court made plain in *Bazell* was not that the "value" elements contained in subsection 3 are no longer elements of the offense, but, rather, that—after the 2002 amendment to § 570.030—only the "value" elements can serve to enhance the offense of stealing to a class C felony.

In sum, because value was an element of all of the class C felony offenses charged in Mr. Smith's case, Mr. Smith's request for resentencing should be denied. Mr. Smith was properly charged with a class C felony in Counts 2, 4, 7, and 10, and, except for the instructional error as to Count 2 (which was belatedly brought to light by *Bazell*), Mr. Smith is not entitled to have his convictions on those counts reversed.

[2] The Court in *Bazell* did not overrule any case that has held that value as set forth in subsection 3 is an element of class C felony stealing.

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CONCLUSION

The Court should affirm Mr. Smith's convictions and sentences, except for Count 2, which should be reversed and remanded for a new trial due to instructional error.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief complies with Rule 84.06(b) and contains 2,445 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 6th day of December, 2016, to:

AMY M. BARTHOLOW
Woodrail Centre
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, Missouri 65203
Tel.: (573) 777-9977
Fax: (573) 777-9974
amy.bartholow@mspd.mo.gov

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent