

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC98298
	)	
RODNEY KNOX,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS CITY
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 13
THE HONORABLE CLINTON R. WRIGHT, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

In the Circuit Court of St. Louis City, Cause No. 1722-CR01577, the State of Missouri charged that the Appellant, Rodney Knox, committed robbery in the first degree, § 570.023, RSMo (Counts I, III, V); armed criminal action, § 571.015, RSMo (Counts II, IV, VI); and resisting an arrest, § 575.150, RSMo (Count VII) [D. 2 p. 1-3].¹ On the day of trial, the State dismissed Count VII.

A jury found Mr. Knox guilty of the lesser-included charge of felony stealing, §570.030.5.1, RSMo (cum. supp. 2016), on Count I, and guilty of the lesser-included charges of misdemeanor stealing on Counts III and V. The jury found Mr. Knox not guilty of armed criminal action on Counts II, IV, and VI. On September 21, 2018, the Honorable Clinton R. Wright, Judge of Division 13, sentenced Mr. Knox to five years' imprisonment on Count I in the Missouri Department of Corrections, but suspended the execution of sentence and placed Mr. Knox on probation for five years. On Counts III and V, the court sentenced Mr. Knox to six months' imprisonment in the city jail concurrent with Count I with time-served. Mr. Knox timely filed his notice of appeal on September 27, 2018.

On November 12, 2019, the Missouri Court of Appeals reversed the judgments of the trial court and entered convictions of the lesser-included offense of class D misdemeanor stealing on all three counts. The court also remanded for resentencing

¹ Appellant will cite to the system-generated legal file in this appeal by document and page number, per Rule 84.04(e) “[D# p. #],” and to the transcript as “[Tr. #].”

because the sentence imposed on each count exceeded the statutory minimum for a class D misdemeanor.

On November 29, 2019, the State filed its Motion for Rehearing or Transfer to the Missouri Supreme Court with the Court of Appeals. On December 18, 2019, the Court of Appeals denied the State's motion.

On January 2, 2020, the State filed its Application for Transfer to the Missouri Supreme Court. On January 15, 2020, this Court ordered Mr. Knox to file Suggestions in Opposition, which Mr. Knox timely filed on January 27, 2020. On February 18, 2020, this Court sustained the State's Application for Transfer. This Court has jurisdiction over this appeal, pursuant to Mo. Const., Art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

Mr. Knox wanted to buy an ounce of marijuana [Tr. 446; 448]. He made a Facebook status and his uncle, Dion Williams, responded that he had a source [Tr. 446]. Mr. Knox and Mr. Williams, despite their familial relationship, were not close [Tr. 447]. Mr. Williams told Mr. Knox to meet him at the Civic Center in downtown St. Louis, Missouri [Tr. 449]. Mr. Knox took the MetroLink from the North Hanley Station to the Civic Center [Tr. 449]. Once Mr. Knox arrived at the Civic Center, he called Mr. Williams to pick him up [Tr. 449].

Mr. Knox had in his possession a registered gun and \$1,700 in cash [Tr. 449-50]. Mr. Knox had been robbed and pistol-whipped before, so he lawfully carried a gun for his protection [Tr. 450]. The \$1,700 was Mr. Knox's entire savings [Tr. 450]. He carried it with him because his mother, a person suffering from heroin addiction, would steal it if he left it at home [Tr. 447; 449].

Mr. Williams picked up Mr. Knox in a white Ford Explorer [Tr. 450-51]. Mr. Knox's other uncle, Donnoven Williams, was in the truck, as well as another man whose identity was unknown to Mr. Knox [Tr. 451-452]. The men drove a block or two and parked [Tr. 453]. Together, all four men entered an apartment building located at 918 Olive Street [Tr. 269; 454]. Once inside, Dion Williams asked Mr. Knox for money for the marijuana [Tr. 454]. When Mr. Knox objected, Mr. Williams told him that the seller would not be comfortable with Mr. Knox being present, since the seller did not know Mr. Knox [Tr. 454]. Mr. Knox gave Mr. Williams \$200 [Tr. 454].

Once Mr. Knox gave Mr. Williams the \$200, all four men got on the elevator [Tr. 454]. The three other men got off the elevator at the fifth floor, but Mr. Knox continued to the sixth floor where he got off to wait [Tr. 455]. After roughly 15 minutes, Mr. Knox returned to the fifth floor to wait for the other men [Tr. 457]. After a few minutes, the three men came out of the apartment, walking quickly, with bags and property in their hands [Tr. 457-458]. Items began to fall out of the bag and Mr. Williams told Mr. Knox to pick up the property [Tr. 458]. He complied [Tr. 458]. Mr. Knox did not have a bag, so he grabbed the items – a pair of headphones, a belt, and a Bluetooth speaker – and placed them in his pocket and around his neck [Tr. 459; 462]. The four men got on the elevator to return to the first floor [Tr. 459].

As they exited the elevator, there was a police office in the lobby [Tr. 460]. Mr. Knox did not think anything was wrong, so he continued walking to the door [Tr. 460]. However, the other three men took off running [Tr. 411; 460]. Mr. Knox walked out of the building [Tr. 460]. The police officer, Officer Duke of the St. Louis Metropolitan Police Department, told Mr. Knox to stop [Tr. 460]. Officer Pierce, who was outside of the apartment building, also yelled for Mr. Knox to stop [Tr. 140]. The other three individuals ran [Tr. 411]. Mr. Knox complied with the officers' orders and informed the officer he had a gun in his possession [Tr. 460]. Officer Duke testified that Mr. Knox was found with \$1,570, unknown pills later identified as Mr. Knox's ADHD medication, a watch, a belt, a wireless Bluetooth speaker, and headphones [Tr. 382-383]. Mr. Knox testified that he never entered the apartment nor did he know about or participate in the robbery [Tr. 466].

The State charged Mr. Knox with three counts of robbery in the first degree and three counts of armed criminal action, as well as resisting an arrest [D. 1 p. 1-3]. At trial, complaining witness Jabari Turner testified that Mr. Knox, along with three other men, robbed him in his apartment [Tr. 281]. Mr. Turner claimed that he did not sell marijuana, but instead gave Dion Williams a blunt – a hollowed-out cigar filled with marijuana and rewrapped to be smoked² – when Mr. Williams knocked on his door [Tr. 274]. Mr. Turner did not know Mr. Williams’ name, but stated that Mr. Williams had knocked on his door three times prior asking for a blunt and Mr. Turner always complied [Tr. 275]. After Mr. Turner gave Mr. Williams the blunt, Mr. Williams left [Tr. 275].

Mr. Turner testified that moments later, there was a knock at his apartment door again [Tr. 277]. Mr. Turner asked who it was and the person knocking made a familiar noise, so Mr. Turner opened the door [Tr. 277]. A gun was pushed through and four individuals entered the apartment [Tr. 279-80]. Mr. Turner identified one of the individuals as Mr. Knox [Tr. 281]. According to Mr. Turner, Mr. Knox carried a gun and a bag with him [Tr. 281].

Mr. Turner explained that the four men forced him and his guests to lie on the floor [Tr. 284]. The men went through the apartment, going through cabinets and turning over Mr. Turner’s bed [Tr. 284-85]. Mr. Turner stated he had \$1,200 in his pocket, but

² Kayla Williams, *What’s the difference between joints, blunts, and spliffs?*, Leafly (January 7, 2015), <http://www.leafly.com/news/cannabis-101/whats-the-difference-between-joints-blunts-and-spliffs>

never stated that Mr. Knox, nor anyone else, took the money from him [Tr. 287]. Mr. Turner speculated that one of his guests, Robert, probably had money on his person, too [Tr. 287]. Mr. Turner never alleged that anyone, including Mr. Knox, took any money from Robert, either [Tr. 287].

A jury found Mr. Knox not guilty of the three counts of armed criminal action [D. 18 p. 2, 4, and 6]. For the three counts of robbery in the first degree, the jury acquitted Mr. Knox, but found him guilty of one count of felony stealing and two counts of misdemeanor stealing, all lesser-included charges to the robbery in the first-degree charges [D18 p. 1, 3, and 5].

Despite eligibility for jury sentencing, Mr. Knox opted to be sentenced by the trial court [Tr. 529]. The trial court sentenced Mr. Knox to five years' imprisonment in the Missouri Department of Corrections on Count I – felony stealing – but suspended the execution of the sentence and placed Mr. Knox on five years' probation [D23 p. 2]. On Counts III and V – both misdemeanor stealing – the trial court sentenced Mr. Knox to six-months' imprisonment in the St. Louis City Medium Security Institution with credit for time served on each count [D23 p. 2-3].

Mr. Knox filed a notice of appeal in the circuit court on September 27, 2018 [D25]. On November 12, 2019, the Missouri Court of Appeals reversed the judgments of the trial court and entered convictions of the lesser-included offense of class D misdemeanor stealing on all three counts. The court also remanded for resentencing because the sentence imposed on each count exceeded the statutory maximum for a class D misdemeanor.

On November 29, 2019, the State filed its Motion for Rehearing or Transfer to the Missouri Supreme Court with the Court of Appeals. On December 18, 2018, the Court of Appeals denied the State's motion.

On January 2, 2020, the State filed its Application for Transfer to the Missouri Supreme Court. On January 15, 2020, this Court ordered Mr. Knox to file Suggestions in Opposition, which Mr. Knox timely filed on January 27, 2020. On February 18, 2020, this Court sustained the State's Application for Transfer. To avoid unnecessary repetition, additional facts may be adduced in the argument portion of the brief.

POINTS RELIEF ON

I. The trial court plainly erred in entering a judgment against Appellant on Count I for stealing over \$500, as a class C felony under §570.030, RSMo because this was a higher felony than that of which Appellant was convicted in violation of Appellant's rights to due process and a fair trial under the U.S. Const., Amends. V, VI, and XIV, and the Mo. Const., Art. I, §§ 10 and 18(a). The jury convicted Appellant of felony stealing, a class D felony, as authorized by §570.030, RSMo 2016, for an offense occurring after January 1, 2017, where the value of the property retained was \$750 or more, but less than \$25,000.

§ 570.030, RSMo 2016

MAI-CR 4d 424.02.1

Missouri Supreme Court Rule 30.20

State v. Garrett, 642 S.W.2d 376 (Mo. App. 1982)

II. The trial court plainly erred by entering a judgment against Appellant on Counts III and V for class A misdemeanor stealing and sentencing Appellant to six months' imprisonment in the St. Louis City Jail, because this exceeded the maximum punishment authorized by law, in violation Appellant's rights to due process and a fair trial under the U.S. Const., Amends. V, VI, and XIV, and the Mo. Const., Art. I, §§ 10 and 18(a), in that the evidence only supported convictions for two class D misdemeanors.

§570.030, RSMo 2016

MAI-CR 4d 424.02.1

Missouri Supreme Court Rule 30.20

State v. Greer, 879 S.W.2d 683 (Mo. App. 1994)

III. The trial court erred in overruling Appellant's motions for judgment of acquittal and new trial and entering a judgment of conviction on Count I, felony stealing, because there was not sufficient evidence from which a reasonable juror could have found the Appellant guilty beyond a reasonable doubt, in violation of Appellant's rights to due process of law under the U.S. Const., Amends. V and XIV, and the Mo. Const., Art. I, § 10, in that the State failed to prove that Appellant retained money and property in value of \$750 or more from complaining witness Jabari Turner.

§570.030, RSMo 2016

In re Winship, 379 U.S. 358 (1970)

Jackson v. Virginia, 433 U.S. 307 (1979)

State v. Bowen, 523 S.W.3d 483 (Mo. App. 2017)

ARGUMENT

I. The trial court plainly erred in entering a judgment against Appellant on Count I for stealing over \$500, as a class C felony under §570.030, RSMo because this was a higher felony than that of which Appellant was convicted in violation of Appellant’s rights to due process and a fair trial under the U.S. Const., Amends. V, VI, and XIV, and the Mo. Const., Art. I, §§ 10 and 18(a). The jury convicted Appellant of felony stealing, a class D felony, as authorized by §570.030, RSMo 2016, for an offense occurring after January 1, 2017, where the value of the property retained was \$750 or more, but less than \$25,000.

Preservation

Defense counsel did not raise any objections to the propriety of the judgment on Count I. Mr. Knox therefore respectfully requests this Court review the trial court’s judgment under the plain error standard pursuant to Rule 30.20.

Standard of Review

“Allegations of error that are not briefed or are not properly briefed on appeal shall not be considered by the appellate court *except errors respecting the sufficiency of the information or indictment, verdict, judgment or sentence.*” Rule 30.20 (emphasis added). “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.” *Id.* The sufficiency of judgment is a matter of jurisdictional import and must be reviewed even if not properly preserved. *State v. Garrett*, 462 S.W.3d 376, 378 (Mo. App. 1982).

Argument

The trial court plainly erred in entering Count I in the Sentence and Judgment [D. 23 p. 1]. Under the charge description for Count I, the Judgment reads “stealing over \$500,” and classifies the charge as a class C felony [D23 p. 1; A11]. On January 1, 2017, Missouri revised its criminal code and the stealing statutes were altered. RSMo 2016. Under the new law, effective January 1, 2017, “the offense of stealing is a class D felony if: (1) the value of the property or services appropriated is seven hundred fifty dollars or more,” but less than twenty-five thousand dollars. §570.030.5 and §570.030.4, RSMo 2016.

Jury Instruction 6, MAI-CR 4d 424.02.1, from which the jury convicted Mr. Knox of felony stealing, reads in pertinent part:

First, that on or about January 13, 2017 in the city of St. Louis, State of Missouri, the defendant retained US currency and headphones owned by Jabari Turner, and
Second, that defendant did so without the consent of Jabari Turner, and
Third, that defendant did so for the purpose of withholding it from the owner permanently, and
Fourth, that the property retained had a combined value of at least seven hundred fifty dollars,
then you will find the defendant guilty under Count I of felony stealing under this instruction.

[D. 17 p. 9].

Mr. Knox’s Judgment should read that he was convicted of felony stealing, a class D felony, not stealing over \$500, a class C felony. The sentence given by the trial court on Count I is authorized for a class D felony; therefore, the sentence does not need

correction on Count I. Finally, Missouri's Case.net website should reflect that Mr. Knox was convicted of felony stealing, a class D felony, not robbery in the first degree [A20].

Where a clerical error concerning a judgment exists, the appellate court may remand to the trial court for the error to be corrected. *State v. Partain*, 310 S.W.3d 765, 769 (Mo. App. 2010). Clerical errors in the sentence and judgment in a criminal case may be corrected by an order *nunc pro tunc* if the written judgment does not reflect what was accurately done. *State v. Moore*, 518 S.W.3d 877, 889 (Mo. App. 2017); Supreme Court Rule 29.12(c).

Previously, the State conceded this Point, agreeing that the court should remand to the circuit court to enter an order correcting the judgment to reflect a conviction for the class D felony of stealing. Brief for Respondent at 11, *State v. Knox*, No. ED107183 (September 18, 2019).

Conclusion

Mr. Knox respectfully requests this Court to remand with an order *nunc pro tunc* to amend the written judgment that Mr. Knox was found guilty of felony stealing, a class D felony, and to change the entry in Case.net to reflect as such.

II. The trial court plainly erred by entering a judgment against Appellant on Counts III and V for class A misdemeanor stealing and sentencing Appellant to six months' imprisonment in the St. Louis City Jail, because this exceeded the maximum punishment authorized by law, in violation Appellant's rights to due process and a fair trial under the U.S. Const., Amends. V, VI, and XIV, and the Mo. Const., Art. I, §§ 10 and 18(a), in that the evidence only supported convictions for two class D misdemeanors.

Preservation

Defense counsel did not raise any objection to the propriety of the judgments or sentences on Counts III and V, and, in fact, erroneously agreed with the trial court that they were class A misdemeanors [Tr. 548]. Therefore, Mr. Knox respectfully requests this Court to review the trial court's sentences and judgments under the plain error standard pursuant to Rule 30.20.

Standard of Review

"Allegations of error that are not briefed or are not properly briefed on appeal shall not be considered by the appellate court *except errors respecting the sufficiency of the information or indictment, verdict, judgment or sentence.*" Rule 30.20 (emphasis added). Under Rule 30.20, the sufficiency of a sentence is a jurisdictional question that must be reviewed even if not properly preserved. *State v. Greer*, 879 S.W.3d 683, 684 (Mo. App. 1994).

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. Rule 30.20. “An unauthorized sentence affects substantial rights and results in manifest injustice.” *Drennen v. State*, 906 S.W.3d 880, 882 (Mo. App. 1995). Where a defendant has been improperly sentenced, a manifest injustice has occurred and it is appropriate for plain error review. *State v. Dixon*, 24 S.W.3d 247, 250 (Mo. App. 2000).

Argument

On January 1, 2017, Missouri revised its criminal code. As part of the revision, the stealing statutes were altered, adding a class D misdemeanor stealing offense. Prior to that change, the lowest stealing offense was classified as a class A misdemeanor. Mr. Knox was charged with robbery in the first degree for an alleged offense occurring on January 13, 2017, thus subjecting him to the revised law. The jury in his trial found him guilty of the lesser-included charge of stealing based on the jury instruction requested by the defense [D17 p. 14 and 18].

Under the new, January 1, 2017 law, “the offense of stealing is a class D misdemeanor if the property is not of a type listed in subsection 2, 3, 5, or 6 of this section, the property appropriated has a value of less than one hundred and fifty dollars, and the person has no previous findings of guilt for a stealing-related offense.”

§570.030.7, RSMo 2016.

Jury Instructions

At the request of the defense, Jury Instruction 10 and 13 were submitted to the jury for their consideration as lesser-included charges of robbery in the first degree for Counts III and V [D.17 p. 14 and 18]. The State did not object to the instructions [Tr. 495]. The trial court granted the instructions [Tr. 495].

For Count III, the instruction reads in pertinent part:

As to Count III, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about January 13, 2017, in the City of St. Louis, State of Missouri, the defendant retained a watch owned by Vincent Alexander, and

Second, that the defendant did so without the consent of Vincent Alexander, and

Third, that the defendant did so for the purpose of withholding from the owner permanently, and
then you will find the defendant guilty under Count III of misdemeanor stealing under this instruction.

[D17 p. 14].

For Count V, the jury instruction reads in pertinent part:

As to Count V, if you believe from the evidence beyond a reasonable doubt:

First, that on or about January 13, 2017, in the City of St. Louis, State of Missouri, the defendant retained a wireless Bluetooth speaker owned by Robert Page, and

Second, that defendant did so without the consent of Robert Page, and

Third, that defendant did so for the purpose of withholding it from the owner permanently, and
then you will find the defendant guilty under Count V of misdemeanor stealing under this instruction.

[D17 p. 18].

As submitted to the jury, the MAI-CR instruction requires a verdict of a class D misdemeanor. MAI-CR 424.02.1. Had the State intended to convict Mr. Knox of a class A misdemeanor, the submitted instruction must have included paragraph 4 of the MAI-CR instruction, which would have read, “Fourth, that the property retained had a value of at least one hundred fifty dollars.” MAI-CR 424.02.1; [A11, A14]. Without proof of value of at least one hundred and fifty dollars, a stealing charge is a class D misdemeanor under the new statute. §570.030.7, RSMo 2016.

However, the Sentence and Judgment convicts Mr. Knox of two class A misdemeanors, rather than two class D misdemeanors [D23 p. 1; A3]. The trial court sentenced Mr. Knox to six months' jail time in the St. Louis City Medium Security Institution with credit for time served [D23 p. 2-3]. The only punishment authorized for a class D misdemeanor is a fine not to exceed five hundred dollars. §558.004, RSMo 2016. When considering the imposition of a fine, the court shall proportion the fine to the the burden that such payment will impose in view of the financial resources of the individual. §558.004, RSMo 2016.

On Counts III and V, based on the jury instructions that the jury used to reach the verdict, Mr. Knox was convicted of class D misdemeanor stealing, and the sentence imposed by the trial court exceeded the sentenced authorized by law. This Court should reverse.

Statutory Interpretation

As mentioned above, when Missouri revised its criminal code in 2017, a new, class D misdemeanor classification was added to the stealing statute. To Mr. Knox's knowledge, §570.030.7, RSMo 2016 has not been interpreted by this Court. Statutory interpretation is a question of law that a reviewing court considers *de novo*. *State v. Whipple*, 501 S.W.3d 507, 513 (Mo. App. 2016). The primary rule of statutory interpretation is to give effect to the legislative intent as reflected in the plain language of the statute. *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. banc 2007). Where, as here, a court is interpreting a criminal statute, the "rule of lenity requires the statute to be strictly construed against the state." *Id.* The court reads all provisions of a legislative act

together, and, where possible, construes each provision to harmonize with the others. *Dickerman v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 (Mo. banc 2018); *see also Whipple*, 501 S.W.3d at 514.

As relevant here, a person commits the offense of stealing if he or she appropriates property of another with the purpose to deprive that person of their property without that person's consent, or if he or she retains property of another for the purpose of depriving that lawful owner thereof, knowing or believing the property to be stolen. §570.030.1(1), (3), RSMo 2016. There are seven separate classifications for stealing: §570.030.2 (class A felony); 570.030.3 (class B felony); 570.030.4 (class C felony); 570.030.5 (class D felony); 570.030.6 (class E felony); 570.030.7 (class D misdemeanor); and 570.030.8 (class A misdemeanor) (for a visual representation of §570.030, RSMo, see the chart titled "What Classification of Stealing Applies: A Flow Chart" in the Appendix on A22 and A23). A class A felony is committed only when certain types of property are stolen and a class C felony is committed only when a certain value is stolen. 570.030.2; 570.030.4. A person can commit a class B felony, D felony, E felony, and D misdemeanor multiple ways that may include value of property or services, type of property, or the manner in which the property was taken from the owner. After providing for the class A-E felonies and the class D misdemeanor, the statute provides a catch-all provision: "[t]he offense of stealing is a class A misdemeanor if no other penalty is specified in this section." §570.030.8, RSMo 2016.

To determine here what constitutes a class A misdemeanor, as relevant here, the class C-E felony and class D misdemeanor classifications must be analyzed. A class C

felony is committed when the value of the property or services appropriated is equal to or greater than \$25,000. §570.030.4, RSMo 2016. A class D felony is committed one of three ways: (1) where the value of the property or services appropriated is equal to or greater than \$750, but not more than \$24,999.99; (2) the offender physically takes property from the person of the victim; or (3) the property consists of anything listed in subsections (3)(a)-(p), regardless of its value, unless the value is equal to or greater than \$25,000 (in which the State could charge the offender with a class C felony). §570.030.5, RSMo 2016. A class E felony is committed one of two ways: (1) the property appropriated is an animal, unless the animal is classified as livestock, captive wildlife held under permit, or live fish raised for commercial sale valued at \$75 or more (in which the State could charge the offender with a class B or D felony, depending on the facts); or (2) where the offender has been previously found guilty of three stealing-related offenses committed on three separate occasions where such offenses occurred within ten years of the date of occurrence of the present offense. §570.030.6, RSMo 2016. A class D misdemeanor is committed when: (1) the property stolen is not of a type listed in subsection 2, 3, 5, or 6; (2) the property appropriated has a value of less than \$150; and (3) the person has no previous findings of guilt. §570.030.7, RSMo 2016.

Reading the above provisions together, as directed by subsection 8, the reader is left with two ways a person can commit a class A misdemeanor stealing offense:

- 1) Stealing is a class A misdemeanor where:
 - a) the value of the property or services appropriated is equal to or greater than \$150, but less than \$750; and
 - b) the defendant does not have a previous finding of guilt for a stealing-related offense; or

- 2) Stealing is a class A misdemeanor where:
 - a) the value of the property or services appropriated is \$749.99 or less; and
 - b) the defendant does have a previous finding of guilt at any point in time prior to the current offense.

§570.030, RSMo 2016.

Due process requires the State to prove every element of the crime of which a defendant has been convicted. *State v. McClain*, 301 S.W.3d 97, 99 (Mo. App. 2010). Where value of the property stolen determines the severity of the crime of stealing, the burden is on the State to prove value beyond a reasonable doubt. *State v. Calicotte*, 78 S.W.3d 790, 794 (Mo. App. 2002). To prove Mr. Knox guilty of class A misdemeanor stealing, it had to do so by adducing evidence of value of \$150, or at least one previous stealing-related conviction and any value equal to or less than \$749.99. It proved neither. In fact, the State, in previous briefings, conceded that no evidence of value of any of the items stolen was presented at trial. Brief for Respondent at 17, *State v. Knox*, No. ED107183 (September 18, 2019). The State did not meet its burden of proof on the charges against Mr. Knox for the two class A misdemeanor convictions. This Court should reverse.

Lesser-Included

Mr. Knox anticipates the State to argue that class D misdemeanor stealing is not a lesser-included offense of class A misdemeanor stealing, and therefore preemptively addresses that argument here.

“A lesser included offense is one established by proof of the same or less than all the facts required to establish the commission of the charged offense.” *State v. Smith*, 522

S.W.3d 221, 225 (Mo. banc 2017); §556.046.1(1), RSMo. As established above, there are two ways class A misdemeanor stealing may be proven:

- 1) Stealing is a class A misdemeanor where:
 - a) the value of the property or services appropriated is equal to or greater than \$150, but less than \$750; and
 - b) the defendant does not have a previous finding of guilt for a stealing-related offense; or
- 2) Stealing is a class A misdemeanor where:
 - a) the value of the property or services appropriated is \$749.99 or less; and
 - b) the defendant does have a previous finding of guilt at any point in time prior to the current offense.

Stealing is a class D misdemeanor when value of the property is not proven to be equal to or greater than \$150, as required to prove a class A misdemeanor, and not proven to be a type found in subsections 2, 4, 5, or 6, in which case the value is irrelevant and is subject to enhanced classification. If the accused has one or more prior stealing-related offenses, the class D misdemeanor classification does not apply. If the accused does have a previous finding of guilt on a stealing-related offense, then to prove a class A misdemeanor, the State must prove valuation of equal to or less than \$749.99 *and* the existence of a prior stealing-related finding of guilt.

Conclusion

To prove class D misdemeanor stealing, there is no evidence required that is not required to prove a class A misdemeanor. In fact, a class D misdemeanor is proven by a lack of evidence – a lack of a previous finding of guilt for a stealing-related offense. Therefore, class D misdemeanor stealing is a lesser-included of class A misdemeanor

stealing. This Court should vacate Mr. Knox's convictions for class A misdemeanor stealing and enter convictions for class D misdemeanor stealing on Counts III and V.

In the event this Court disagrees that class D misdemeanor stealing is a lesser-included of class A misdemeanor stealing, Mr. Knox respectfully requests this Court to vacate his convictions on Counts III and V due to the State's failure to prove his convictions of class A misdemeanors beyond a reasonable doubt.

III. The trial court erred in overruling Appellant's motions for judgment of acquittal and new trial and entering a judgment of conviction on Count I, felony stealing, because there was not sufficient evidence from which a reasonable juror could have found the Appellant guilty beyond a reasonable doubt, in violation of Appellant's rights to due process of law under the U.S. Const., Amends. V and XIV, and the Mo. Const., Art. I, § 10, in that the State failed to prove that Appellant retained money and property in value of \$750 or more from complaining witness Jabari Turner.

Preservation

At the close of State's evidence, trial counsel made a motion for judgment of acquittal arguing that the evidence was insufficient as a matter of law to support a finding of guilt, and that the evidence was in such conflict in material respects that it failed to establish the guilt of the defendant of the offense charged beyond a reasonable doubt [D16 p. 1; Tr. 444]. The trial court denied the motion [Tr. 445]. At the close of Defense's evidence, trial counsel made a motion for a judgment of acquittal at the close of all evidence, but the trial court noted it had not asked the State if it had any rebuttal evidence, which it did not [Tr. 478]. After the close of all evidence, trial counsel once again made a motion for acquittal at the close of all evidence, which the trial court denied [Tr. 487]. After trial, trial counsel filed a motion for new trial [D22]. At sentencing, the trial court denied the motion for new trial [Tr. 538]. This Court should review Mr. Knox's claims on the merits.

Standard of Review

Review of claims challenging the sufficiency of the evidence is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *State v. Clay*, 975 S.W.2d 121, 139 (Mo. banc 1998). The reviewing court views the evidence in a light most favorable to the verdict, considering all favorable inferences and disregarding all evidence and inferences contrary to the verdict. *State v. Kuhn*, 115 S.W.3d 845, 849 (Mo. App. 2005). This Court must consider whether, on this evidence, a reasonable juror could find each of the elements of the crime beyond a reasonable doubt. *State v. Grim*, 854 S.W.2d 403, 411 (Mo. banc 1993).

Argument

To support a conviction, the State must prove beyond a reasonable doubt that the defendant committed each element of the offense charged. *In re Winship*, 397 U.S. 358, 364 (1970); *State v. Johnson*, 741 S.W.3d 70, 73 (Mo. App. 1987). A jury given a proper “reasonable doubt” instruction “may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury.” *Jackson v. Virginia*, 443 U.S. 307, 317 (1979). For the reviewing court, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 320; *see also State v. Guenther*, 744 S.W.2d 564, 565 (Mo. App. 1988).

To prove Mr. Knox committed the class D felony of stealing, the State had the burden to prove, beyond a reasonable doubt, that Mr. Knox had either appropriated the property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion; or, for the purpose of depriving the owner of a lawful interest therein, received, retained, or disposed of property of another knowing that it had been stolen, or believing it had been stolen. §570.030.1(1), (3), RSMo 2016. Here, Mr. Knox was convicted of a class D felony,³ which is when the “value of the property or services appropriated is seven hundred fifty dollars or more,” but less than twenty-five thousand dollars. §570.030.4-.5, RSMo 2016. Thus, to prove class D felony stealing, the State had the burden to prove that the property stolen was valued between \$750 and \$24,999.99.

An inference of guilt is permissible from an unexplained possession of property recently stolen as to the offense of stealing. *State v. Bowen*, 523 S.W.3d 483, 487 (Mo. App. 2017). In *Bowen*, the Court of Appeals explained that the word “unexplained” does not mean that the defendant did not offer an explanation for his possession of the stolen property, but rather that the jury may disbelieve his explanation and then the possession is considered unexplained. *Id.* Under that circumstance, it is permissible for the jury to draw an inference of guilt. *Id.*

In *Bowen*, the defendant was observed by police officers walking down the street holding the same wicker basket that was recently stolen from the victim’s home. *Id.* The

³ See Point I.

basket was filled with electronics that had also been stolen. *Id.* The victim's cell phone was tracked to the defendant's house. *Id.* The defendant claimed that he found the basket and electronics in a dumpster. *Id.* at 488. The court concluded that the jury could disbelieve the defendant's story and infer that the defendant had stolen the property, and affirmed the conviction. *Id.*

Here, Jabari Turner testified that he had exactly \$1,200 in his pocket at the time of the robbery. He never testified that Mr. Knox or any other the other three individuals went through his pockets or actually took the money from his pockets. Sergeant Duke testified that Mr. Turner told him the robbers went through his pockets and the pockets of his guests, but even the police officer failed to testify that Mr. Turner ever told him he had the money in his pocket stolen [Tr. 287]. Sergeant Duke testified that Mr. Knox was found with \$1,570 on him at the time of his arrest and that the money was sorted together [Tr. 382]. The \$1,200 was not noticeably separate from the rest of the money, suggesting that the money was not randomly taken from the victims. Mr. Knox testified that the money was his entire savings and that he kept it with him at all times to keep his mother, a person suffering from heroin addiction, from stealing it [Tr. 447; 449-450].

Even ignoring Mr. Knox's testimony, viewed in the light most favorable to the verdict, it is clear that the record does not reflect that Mr. Knox retained U.S. currency belonging to Mr. Turner. It is not reasonable to infer that Mr. Knox sorted the money from Mr. Turner with money from other victims during the robbery or during the 5-floor elevator ride down from the robbery. Most importantly, it is not reasonable to infer that

Mr. Knox stole \$1,200 from Mr. Turner, because the State failed to adduce any testimony whatsoever that Mr. Turner had money stolen from him during the course of the robbery.

Where there is no evidence a crime has been committed, a conviction must be reversed. *C.f. State v. Celmars*, 399 S.W.2d 145, 146 (Mo. App. 1966). While a jury may make reasonable inferences from the evidence presented at trial, where the State fails to present the relevant evidence at trial, there is no basis upon which the jury can form an inference. *State v. McQuary*, 173 S.W.3d 663, 668 (Mo. App. 2005) (without evidence of essential element of crime, jury has no basis for forming reasonable inference). Because the State failed to adduce any evidence that Mr. Turner's money was actually stolen, there was no basis for the jury to infer that Mr. Knox stole or received Mr. Turner's money. There was insufficient evidence to convict Mr. Knox of felony stealing.

Conclusion

The State failed to meet its burden in proving that Mr. Knox committed the crime of class D felony stealing by retaining property belonging to Mr. Turner valuing at least \$750. This Court should vacate Mr. Knox's conviction on Count I.

CONCLUSION

WHEREFORE, based on his argument in Points I – III of his substitute brief, Appellant Rodney Knox respectfully requests that this Court, on Count I, to either vacate his conviction for insufficient evidence or remand to the trial court so it may correct the judgment and entry in Case.net; and, on Count III and V, to remand to the trial court so it may correct the judgement and resentence Mr. Knox according to statutory guidelines, or vacate for insufficient evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 103.08, I hereby certify that on this 9th day of March, 2020, a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, via the Missouri e-Filing System, care of Mr. Shaun Mackleprang, Office of the Attorney General, at shaun.mackelprang@ago.mo.gov.

/s/ Nina McDonnell
Nina McDonnell

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. The brief was prepared with Microsoft Word for Windows, uses Times New Roman 13-point font, and does not exceed the word and page limits for an appellant's brief in this court. The word-processing software identified that this brief contains 7180 words and 34 pages, including the cover page, signature block, and certificates of service and of compliance. It is in searchable PDF form.

/s/ Nina McDonnell
Nina McDonnell