

No. SC98298

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

RODNEY KNOX,

Appellant.

Appeal from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit
The Honorable Clinton R. Wright, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant, Rodney Knox, was charged in the Circuit Court of the City of St. Louis with three counts of first-degree robbery, three counts of armed criminal action, and one count of resisting arrest (L.F. 2:2-3). The robbery and armed criminal action counts¹ were tried by a jury beginning on August 7, 2018, the Honorable Clinton R. Wright presiding (L.F. 10:1).

The sufficiency of the evidence to support appellant's conviction for felony stealing is at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: On January 13, 2017, victim Jabari Turner was living in a loft apartment on the fifth floor in a building at 918 Olive Street in Kansas City (Tr. 269-270). That evening, he had three friends over, including victims Vincent Alexander and Robert Page (Tr. 270-272). They had planned to invite some others over to spend the evening at the apartment (Tr. 272).

At some point during the evening, a man who had come around on occasion to obtain marijuana from Turner knocked on the door (Tr. 272-275). The man asked for a "blunt of weed" (Tr. 274-275). Turner gave the man a "little bit of marijuana" (Tr. 276). At that point, Alexander decided to leave, but

¹A memorandum of *nolle prosequi* as to the resisting arrest count was filed after the start of trial (L.F. 1:15).

came right back in, saying that there were men down the hall by the elevators dressed all in black (Tr. 276). Shortly after that, there was another knock (Tr. 277). When Turner asked who was at the door, a person on the other side “gave a noise that sounded familiar,” so Turner opened the door (Tr. 277).

As soon as Turner opened the door, someone pointed a gun into the door, and then the door was pushed open (Tr. 277). Four men ran in, each wearing dark clothing with something covering their faces (Tr. 278, 280-281). A larger man with a “big gun” was the first person to come in, followed by appellant (Tr. 281). Turner believed that appellant was carrying a gun and a bag (Tr. 281). Three of the men, including appellant, started going through cabinets looking for “stuff” while the larger man stood in the middle of the living room pointing a gun at the victims (Tr. 281, 283-285). The big man made the victims get down on the floor (Tr. 284). One of the men struck Alexander with his gun because Alexander would not unlock his phone for them (Tr. 285).

Turner had \$1200 in cash in his pocket (Tr. 287). The robbers went through his pockets and took the money (Tr. 406). Turner believed that Page also likely had some cash on him (Tr. 287). The men left the apartment after about three minutes (Tr. 296).

Officers on foot patrol in the area were dispatched to the building in response to a robbery call and arrived at the building within 30 seconds of the dispatch (Tr. 361-362). Residents of the building in the lobby told them that

there had been “entries” into apartments on the upper floors of the building (Tr. 363). As the officers received this information, the elevator door opened, and appellant and his three accomplices quickly exited (Tr. 363). They were still wearing hoods or scarves over their faces and were carrying items; one man had two large bags that looked “hastily stuffed” with numerous items while another, later shown to be appellant, had a pair of headphones and a designer belt around his neck (Tr. 363). They exited the building, and the officers followed (Tr. 368). One of the officers ordered them to stop, but they did not; instead, they started to run in different directions and started discarding the items they were holding (Tr. 372). Appellant was grabbed and detained at that point (Tr. 411). Appellant told police that he had a gun in his possession; the gun was recovered (Tr. 413, 417-418). The gun was loaded, and there was a round in the chamber (Tr. 419).

Another of the men, Donnoven Williams, ran to the west while the other three men ran to the east (Tr. 372, 377). The officer chased Williams, continuously telling him to stop (Tr. 373). Williams turned north onto North 10th Street and then west into the alley (Tr. 373). At that point, he took a large semiautomatic pistol from his waistband (Tr. 373). Williams ran until he reached an impassible wrought-iron gate (Tr. 373). The officer ordered Williams to drop the weapon; Williams threw the gun either underneath or behind a dumpster and then tried to hide behind the dumpster (Tr. 373).

Williams was then taken into custody, patted down, and taken back to the scene (Tr. 373-374).

Another officer started to help with the pursuit, going farther north upon hearing that a white Explorer was fleeing the area (Tr. 404, 423). The officer then went back to the building and spoke to the victims, getting a description of the robbers (Tr. 424). They then had the victims do a “show up” with appellant and Williams (Tr. 424-425). Turner identified appellant and Williams (Tr. 301-302, 379-381).

The men were arrested and searched (Tr. 381-382). A cell phone was recovered from Williams (Tr. 378). In addition to the belt and headphones, appellant had a wireless Bluetooth speaker, a watch, a Ziplock baggie containing pills, and \$1,570 in “sorted U.S. currency” (Tr. 382, 412). The victims identified numerous bags, articles of clothing, electronics, and other property that had been stolen from them (Tr. 297-301). The cell phone was identified as Alexander’s iPhone (Tr. 300-301).

A blue hoodie had been dropped near the scene; in a pocket was a receipt with the name “Dion Williams” on it referring to an Explorer (Tr. 385-387, 403-404). Dion Williams was later identified in a photo lineup (Tr. 304-306).

Appellant testified in his own defense, claiming that he only went to the apartment because his uncle, Dion Williams, said that he knew a place to buy marijuana (Tr. 447-455). While he went to the building, he claimed that he

never went into the apartment (Tr. 455-458, 466). He testified that the other men came out of the apartment with the property from the apartment; when Donnoven told appellant to pick up stuff that they dropped, appellant did so (Tr. 457-459). He testified that he did not know about the robbery as no plan to commit the robbery was discussed with him (Tr. 452-453, 461-462). Appellant claimed that he had \$1700 with him that night, \$200 of which he gave to Dion before Dion went into the apartment (Tr. 450, 454).

Appellant was found guilty of the lesser-included offenses of felony stealing on Count I and misdemeanor stealing on Counts III and V, and was acquitted of all counts of armed criminal action² (L.F. 18:1-6). The court sentenced appellant to concurrent terms of five years for felony stealing and six months for each count of misdemeanor stealing; the court suspended the execution of the felony sentence and placed appellant on probation (L.F. 23:2-4; Tr. 547-548).

²Appellant claims in his statement of facts that he was “acquitted” of the three counts of robbery (App. Br. 11). Because Missouri is not an “acquittal first” state (i.e., the jury does not need to find the defendant not guilty before considering a lesser included offense), a finding of guilt for a lesser included offense is not an acquittal of the greater offense. *State v. Johnson*, 284 S.W.3d 561, 574 (Mo. 2009).

ARGUMENT

I.

The trial court plainly erred in entering a finding of guilt for a class C felony “stealing < \$500” on Count I in the sentence and judgment because appellant was found guilty of stealing of more than \$750, a class D felony. Therefore, an amendment of the judgment by a *nunc pro tunc* order is required.

Appellant claims that the trial court plainly erred in entering a finding of guilt for a class C felony of “stealing < \$500” because appellant’s crime was committed under the amended stealing statute effective January 1, 2017, making stealing a class D felony for stealing property worth more than \$750 (App. Br.). Appellant’s point is well taken. Because appellant was found guilty of felony stealing under the amended statute and because the trial court considered the actual range of punishment for the class D felony when imposing appellant’s sentence, the error in the judgment should be corrected by a remand for entry of a *nunc pro tunc* order.

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., E.D. 2017); Supreme Court Rule 29.12(c). An error is clerical when it does not cause a substantive change to the party’s rights. *Id.* If there is a basis in the record

to support an amendment to the judgment and the trial court's intentions regarding the defendant's sentence are clear from the record, such mistakes can be corrected by a *nunc pro tunc* order.

Here, the record shows that appellant was convicted of felony stealing under the recently amended version of § 570.030. The verdict director for felony stealing instructed the jury to find appellant guilty if he retained property with a combined value of at least \$750 (L.F. 17:9). That instruction was patterned after MAI-CR 4th 424.02.1, the pattern instruction for offenses committed after January 1, 2017, submitting the elements of stealing set out under the 2016 version of the stealing statute. § 570.030.1,.5(1), RSMo 2016; MAI-CR 4th 424.02.1, Notes on Use 1 (2017). That statute punishes stealing over \$750 worth of property as a class D felony. § 570.030.5(1), RSMo 2016. The jury found appellant guilty of that offense (L.F. 18:1). Therefore, appellant was found guilty of a class D felony, not a class C felony of stealing more than \$500 as set forth in the judgment and sentence (L.F. 23:1).

That the court stated that appellant was found guilty of a class C felony instead of a class D felony does not mean that there was any change to appellant's substantive rights. The court's finding of a class C felony of stealing more than \$500 was not based on any understanding of the current stealing statute, which does not include such an offense. § 570.030, RSMo 2016. Instead, it reflects an interpretation of the pre-2017 stealing statute, which

purportedly made the act of stealing property worth more than \$500 a class C felony. § 570.030.3(1), RSMo Cum. Supp. 2013; *State ex rel. Fite v. Johnson*, 530 S.W.3d 508, 511 (Mo. 2017). Thus, the court's entry on the sentence and judgment was merely a clerical error referring to the pre-2017 statute instead of the statute effective January 1, 2017, which applied to this case. Even if the trial court erroneously believed it was sentencing appellant under the old statute, there was no effect on the sentence because the range of punishment for a class C felony prior to 2017 and a class D felony after January 1, 2017, are identical: a term not to exceed seven years. § 558.011.1(3), RSMo Cum. Supp. 2003; § 558.011.1(4), RSMo 2016. Because the error in the sentence and judgment did not affect appellant's substantive rights, it is merely clerical and can be corrected *nunc pro tunc*. Therefore, this Court should remand this case to the circuit court to enter an order correcting the judgment to reflect a conviction for the class D felony of stealing.³

³Appellant also argues that there is a Casenet error showing that appellant was convicted of first-degree robbery (App. Br. 18). Because appellant's judgment is being corrected, a Casenet entry reflecting that change may be entered at the time the trial court corrects the judgment. Thus, any claim regarding the accuracy of Casenet is not ripe.

II.

The trial court did not plainly err in entering judgment for two class A misdemeanors of stealing on Counts III and V because the offenses were class A misdemeanors and not class D misdemeanors in that the class D misdemeanor of first-offense stealing under \$150 is not a lesser included offense of first-degree robbery, but the class A misdemeanor of stealing is a lesser included offense.

Appellant claims that his punishment for two counts of misdemeanor stealing exceeded the maximum punishment for the offense of stealing because a first-time stealing offender stealing property worth less than \$150 has committed a class D misdemeanor (App. Br. 19-27). But the class D misdemeanor of stealing less than \$150 by a first-time stealing offender was not a lesser included offense of the charged offense of first-degree robbery. Therefore, the trial court did not plainly err in sentencing appellant to class A misdemeanors on Counts III and V.

Appellant admits that he did not object to being sentenced for class A misdemeanors (App. Br. 19). To the contrary, appellant affirmatively told the trial court that the crimes were class A misdemeanors (Tr. 548).⁴ Review is

⁴Typically, an affirmative representation to the court showing that the lack of objection was not inadvertent waives even plain error review. *State v.*

available, if at all, only for plain error. Supreme Court Rule 30.20. To warrant relief under the plain error rule, a defendant must show that a trial court error occurred that so substantially affected his rights that a manifest injustice or miscarriage of justice will result if the error is not corrected. *State v. Perry*, 548 S.W.3d 292, 300-01 (Mo. 2018). A claim that the trial court imposed a sentence that exceeded the maximum punishment permitted by law raises a claim of plain error resulting in manifest injustice. *State v. Hawkins*, 308 S.W.3d 776, 777 (Mo. App., E.D. 2010).

A person may be convicted of an offense included in an offense charged in the indictment or information. § 556.046.1, RSMo 556.046. An offense is “included” in the charged offense under three circumstances:

Johnson, 284 S.W.3d 561, 582 (Mo. 2009). Respondent assumes, however, that a defendant cannot waive review of a claim that his punishment exceeds the maximum sentence for an offense where the face of the record shows that the trial court had no power to impose the sentence. *See, e.g., State v. Baker*, 551 S.W.3d 68, 70 (Mo. App., W.D. 2018) (a guilty plea, which waives all non-jurisdictional defects, does not waive a claim that the sentence exceeded the maximum punishment). Thus, the decision to review this claim rests wholly within this Court’s discretion. *State v. Rieser*, 569 S.W.3d 452, 455 (Mo. App., E.D. 2018).

(1) when the offense is established by proof of the same or less than all the facts required to establish the charged offense;

(2) when the offense is specifically denominated by statute as a lesser degree of the offense charged;

(3) when the offense consists of an attempt to commit the offense charged or to commit an offense otherwise included in the charged offense.

§ 556.041.1, RSMo 2016.

Appellant was charged with robbery in the first degree (L.F. 2:2-3). A person commits first-degree robbery when he forcibly steals property and, in the course thereof, he or another participant causes serious physical injury, is armed with a deadly weapon, uses or threatens the immediate use of a dangerous instrument, displays or threatens the use of what appears to be a deadly weapon or dangerous instrument, or steals any controlled substance from a pharmacy. § 570.023.1, RSMo 2016. As relevant here, a person commits the class D misdemeanor of stealing:

(1) when he appropriates property or services of another with the purpose of depriving the other person of the property without consent, or when he deprives the owner of property of a lawful interest in the

property by receiving, retaining or disposing of the property knowing or believing that it had been stolen;
and

(2) when the property is not of a special type listed in the stealing statute, when the property has a value of less than \$150, and when the person does not have any previous findings of guilty for a stealing-related offense.

§ 570.030.1, .7, RSMo 2016.

Under the plain language of these two statutes, the class D misdemeanor of stealing is not a lesser included offense of first-degree robbery. While the “forcibly steals” portion of the robbery statute is sufficient to encompass the act of stealing as defined by the stealing statute, the proof of the class D misdemeanor requires proof of additional facts not required to prove the offense of robbery: that the property was not of a special type listed in the statute, that the property had a value of less than \$150 dollars, and that the defendant did not have any prior findings of guilt for a stealing-related offense. §§ 570.023.1, 570.030.7, RSMo 2016. Thus, the class D misdemeanor requires proof of facts not required to prove the charged offense. Therefore, class D misdemeanor stealing is not a lesser included offense of first-degree robbery under § 556.041.1(1).

The class D misdemeanor of stealing is also not a lesser included offense of first-degree robbery under the other subdivisions of § 556.041.1. Class D misdemeanor stealing is not a “lesser degree” of robbery or a lesser degree of stealing. § 570.030.1, .7, RSMo 2016. Class D misdemeanor stealing is also not defined as an attempt to commit first-degree robbery or a different type of stealing. § 570.030.1, .7, RSMo 2016. Thus, the class D misdemeanor of stealing does not satisfy any of the provisions of § 556.041.1. Therefore, the class D misdemeanor of stealing is not a lesser-included offense of first-degree robbery.

To the contrary, as the trial court found, the class A misdemeanor of stealing is a lesser included offense of robbery. The class A misdemeanor of stealing is any stealing which does not fall into a special category of stealing set out in the stealing statute, i.e., stealing where “no other penalty is specified in this section.” § 570.030.8, RSMo 2016. In other words, a person commits the class A misdemeanor of stealing when he commits the conduct elements of stealing as set forth in § 570.030.1. Under the plain language of the statute, no additional facts need to be proven to convict a person of the class A misdemeanor of stealing. § 570.030.1,.8, RSMo 2016. First-degree robbery is committed when one “forcibly steals,” which is defined as the use or threatened immediate use of physical force upon another person “in the course of stealing[.]” § 570.010(13), RSMo 2016. Thus, the class A

misdemeanor of stealing is a lesser included offense of first-degree robbery. *See, e.g., State v. Wright*, 383 S.W.3d 1, 5 (Mo. App., W.D. 2012) (stealing was a lesser included offense of stealing under the previous version of the robbery and stealing statutes). Therefore, appellant could be convicted of the class A misdemeanors of stealing.

Appellant argues that the class D misdemeanor, and not the class A misdemeanor, is the proper lesser included offense (App. Br. 22-26). He argues that a class A misdemeanor requires proof of not only the conduct elements of stealing, but also that the stealing was not of a listed type of property and that either the defendant had a prior stealing-related finding of guilt or that the value of the property was \$150 or more (App. Br. 23-26). He then argues that the class D misdemeanor is essentially the “default” offense of stealing when no other facts are proven. To reach this conclusion, appellant not only ignores the plain language of the stealing statute, but effectively rewrites it.

In interpreting a statute, the role of courts is to ascertain the intent of the legislature from the language in a statute and give effect to that intent if possible. *State v. Smith*, 595 S.W.3d 143, 146 (Mo. 2020). Words and phrases in a statute shall be taken in their plain or ordinary and usual sense. § 1.090, RSMo 2016. Courts presume the legislature intended every word in a statute and did not include excess or superfluous language. *State v. Johnson*, 524 S.W.3d 505, 511 (Mo. 2017). “When the words are clear, there is nothing to

construe beyond applying the plain meaning of the law.” *Id.* (internal citation omitted).

The statutory language shows that the class A misdemeanor, and not the class D misdemeanor, is the “default” offense of stealing where no other facts relevant to the classification of the offense are required. The stealing statute contains several subsections setting forth various felony punishments for stealing based on the value or character of the property stolen or the number of prior stealing convictions. § 570.030.2-.6, RSMo 2016. Subsection 7 of the statute then states, “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 fifty dollars, and the person has no previous findings of guilt for a stealing-related offense.” § 570.030.7, RSMo 2016. Finally, subsection 8 states, “The offense of stealing is a class A misdemeanor if no other penalty is specified in this section.” § 570.030.8, RSMo 2016. Thus, under the plain language of the statute, where no additional facts are pled or proven establishing a different classification for the offense, the crime of stealing is a class A misdemeanor. *Id.*

In this case, the items of stolen property for which appellant was convicted of stealing—a cell phone and a Bluetooth speaker—were not types subject to enhanced punishment based on their character. § 570.030.2-3, .5-.6, RSMo 2016. There was no evidence of the value of those items, so

enhancements based on value were inapplicable. § 570.030.4, .5(1), RSMo 2016. And there was no evidence that appellant had findings of guilt for three prior stealing offenses; thus, the enhancement based on prior findings of guilt did not apply. § 570.030.6(2), RSMo 2016. Thus, none of the provisions enhancing the range of punishment applied here. But—most importantly for the claim raised here—the evidence did not show that appellant had no prior findings of guilt for stealing or that the value of the items stolen was less than \$150. The plain language of the statute requires that both of those things be true for the crime to be a class D misdemeanor. § 570.030.7, RSMo 2016. Thus, under the plain language of the statute, appellant’s two convictions for stealing were properly class A misdemeanors.

Appellant’s argument rests on the faulty assumption that the lowest classification of the offense is the presumptive punishment for the offense and that every higher classification enhances the offense. Appellant proposes that the statute for the class A misdemeanor actually reads in effect:

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.

(App. Br. 24-25). But this redrafting is contrary to the plain language of the statute. Had the legislature wanted to write the statute to make the class A misdemeanor just another enhanced classification of the statute instead of the presumptive classification for all stealing offenses, the language of subsections 2 through 6 shows that the legislature was well aware of how to draft the class A misdemeanor provision in such a manner if that had been the legislature's intent. In determining legislative intent, the statute is read as a whole and *in pari materia* with related sections. *City of Aurora v. Spectra Communications Group, LLC*, 592 S.W.3d 764, 783 (Mo. 2019). The explicit exceptions set out in the remainder of the section shows that the legislature intended the class A misdemeanor to be the presumptive classification for stealing and all of the other classifications to be exceptions requiring charging and proof. To read the statute in the manner proposed by appellant effectively rewrites the statute. “[T]his Court, under the guise of discerning legislative intent, cannot rewrite the statute.” *State ex rel. Heart of America Council v. McKenzie*, 484 S.W.3d 320, 327 (Mo. 2016). Thus, appellant’s proposed rewriting of the stealing

statute, contrary to the plain language of the statute and the statute as a whole, must fail.

Appellant also relies on the new pattern instruction and Notes on Use for stealing to support his argument that the offenses are class D misdemeanors (App. Br. 21). It is true that the Notes on Use state that stealing is a class A misdemeanor if the property appropriated “is one hundred fifty dollars or more but less than seven hundred fifty dollars.” MAI-CR 4th 424.02.1 (2017). But this is incorrect. The pattern instruction assumes the same thing appellant assumes—that stealing is presumptively a class D misdemeanor unless other facts are established. But this assumption is contrary to the plain language of the statute which makes the class A misdemeanor the presumptive classification for stealing and only permits the finding of a class D misdemeanor when those other facts are established. While Missouri Approved Instructions are presumed to be valid, a particular MAI that does not accurately state the law should not be submitted to the jury. *State v. Julius*, 453 S.W.3d 288, 300 (Mo. App., E.D. 2014).⁵ Because the pattern instruction

⁵While the verdict directors for Counts III and V were patterned after MAI-CR 4th 424.02.1, they did not submit any facts other than the elements for the presumptive offense of stealing and thus were sufficient to support the finding of the class A misdemeanor (L.F. 17:14,18).

and the Notes on Use do not accurately reflect the will of the legislature as expressed in the plain language of § 570.030, they cannot aid appellant.⁶

In its wisdom, the legislature has decided to provide prosecutors with the option to charge first-time stealing offenders who steal property of lower value with a reduced sentencing range. The legislature was free to create such sentence reductions without placing a burden on the State to disprove those reductions in every stealing case, i.e., to make the reduced sentencing range an exception, not a rule. The United States Constitution places no burden on the State to disprove facts that serve to mitigate a defendant's sentence. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 n. 16 (2000) (facts in mitigation of a sentence are not subject to the requirement that they be proven to a jury beyond a reasonable doubt); *see also State v. Cuevas*, 361 P.3d 581, 593 (Or. 2015) (*Apprendi* does not apply to factual findings that reduce a defendant's

⁶That the pattern instruction and Notes on Use are incorrect in setting forth the definition of the class A misdemeanor can be seen from the lack of any reference on submitting a class A misdemeanor when the defendant has a stealing-related prior finding of guilt. Such a crime is a class A misdemeanor regardless of the value. § 570.030.7-.8, RSMo 2016. Yet the Notes on Use includes no guidance for instructing the jury under that scenario. MAI-CR 4th 424.02.1, Notes on Use 3 (2017).

sentence). Thus, the legislature was free to make the presumptive classification for stealing higher than the lowest possible sentence for any particular stealing offense. The plain language of the statute shows that this is what the legislature intended.

That the statute gives the prosecutor the discretion to charge a defendant with no prior stealing-related findings of guilt with a class D misdemeanor or a class A misdemeanor does not render the statute ambiguous or the class D misdemeanor provision a superfluous nullity. Where a single offense may constitute an offense under two statutory provisions, the prosecutor has the discretion to decide under which statute to charge the defendant. *See, e.g., State v. Miller*, 372 S.W.3d 455, 470 (Mo. 2012); *State v. Conaway*, 557 S.W.3d 372, 384 (Mo. App., W.D. 2018); *State v. Ondo*, 232 S.W.3d 622, 629 (Mo. App., S.D. 2007). “The fact that two statutes which proscribe substantially the same conduct carry a different category of crime and punishment does not eliminate the prosecutor's discretion to charge the defendant under the statute with harsher punishment.” *Ondo*, 232 S.W.3d at 629 (citing six other cases reaching a similar holding).

The plain language of § 570.030.8 makes the class A misdemeanor the default classification for stealing. At the prosecutor's discretion, any stealing, from one dollar to one million dollars, whether committed by a first time or a repeat offender, could be charged as a class A misdemeanor if the prosecutor

believed the best interests of justice would be served by such a charge. The class D misdemeanor, on the other hand, requires proof of additional facts not required to prove the class A misdemeanor of stealing. Therefore, the class A misdemeanor of stealing, and not the class D misdemeanor, was the lesser included offense of first-degree robbery on Counts III and V. The trial court thus did not plainly err by convicting and sentencing appellant for two counts of class A misdemeanor of stealing.

For the foregoing reasons, appellant's second point on appeal must fail.

III.

The trial court did not err in denying appellant's motion for judgment of acquittal at the close of all evidence as to Count I, felony stealing, because there was sufficient evidence that appellant stole more than \$750 from the victim and was still in possession of more than \$750 when detained by police.

Appellant claims that there was insufficient evidence to support his conviction for felony stealing because the evidence failed to establish that the money found on appellant was the same money that was stolen from the victim (App. Br. 28-32). But the evidence permitted the reasonable inference that appellant and his accomplices stole \$1200 from the victim. Therefore, there was sufficient evidence of felony stealing.

In examining the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable trier of fact might have found a defendant guilty beyond a reasonable doubt. *State v. Stover*, 388 S.W.3d 138, 146 (Mo. 2012). The appellate court gives great deference to the trier of fact. *Id.* In applying the standard, the appellate court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. *Id.*

A person commits stealing if he appropriates the property or services of another with the purpose to deprive him of that property, either without

consent or by means of coercion, or if he receives, retains, or disposes of another's property for the purpose of depriving the owner of his lawful interest in the property knowing or believing it has been stolen. § 570.030.1(1),(3), RSMo 2016.⁷ Stealing is a class D felony if the value of the property appropriated, received, retained, or disposed of is \$750 or more. § 570.030.5(1), RSMo 2016.

Here, there was sufficient evidence that appellant appropriated (and thus received) more than \$750. Victim Jabari Turner testified that he “had” \$1200 in his pocket at the time of the robbery (Tr. 286-287). Turner identified appellant as one of the robbers (Tr. 327-328, 347, 349-350). Sergeant Adam Duke testified that Turner told him that the robbers went through his pockets (Tr. 406). Appellant had more than \$1200 in his pocket when detained by the

⁷Appellant was not charged with stealing by retention, but with first-degree robbery (L.F. 2:2). While appellant chose to tender a lesser-included offense instruction for stealing based only on retention (L.F. 17:9), at the point the court determined the sufficiency of the evidence, the court could consider whether there was sufficient evidence under any theory established by the evidence. Because a sufficiency claim rises before the jury is instructed, such claims are reviewed without regard for the effect of the instructions. *See, e.g., State v. Jones*, 296 S.W.3d 506, 509 (Mo. App., E.D. 2009).

police as he was trying to leave the scene immediately after the robbery (Tr. 382, 412). And the jury necessarily rejected appellant's claim that he had brought the money to the scene of the robbery, permitting an inference of guilt (Tr. 450, 454). *See State v. Bowen*, 523 S.W.3d 483, 488 (Mo. App., E.D. 2017) (a reasonable inference of guilt may be drawn from the "unexplained possession" of property when the jury rejects the defendant's self-serving testimony). From this evidence, a juror could reasonably infer that appellant took the money from Turner or was given the money stolen by an accomplice and retained it. Thus, there was sufficient evidence that appellant appropriated, received, or retained property worth \$750 or more.

Appellant argues that the evidence was insufficient because Turner did not explicitly testify that the money that was in his pocket prior to the robbery was actually taken out of his pocket during the robbery (Tr. 31). This argument is contrary to the standard of review. Repeated holdings of this Court and the Court of Appeals state that the reviewing court reviews the evidence and "all reasonable inferences therefrom...in the light most favorable to the verdict" to see if "any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Stewart*, 560 S.W.3d 531, 533 (Mo. 2018); *State v. Naylor*, 510 S.W.3d 855, 858-59 (Mo. 2017); *see also State v. Hudson*, 574 S.W.3d 796, 801 (Mo. App., W.D. 2019); *State v. Mueller*, 568 S.W.3d 62, 66 (Mo. App., S.D. 2019). The victim's testimony was that he "had

money” prior to the robbers going through his pockets and that, “Specifically, I *had* \$1,200” (Tr. 287). Because the victim used the past tense word “had,” the jury could have reasonably concluded that the victim no longer had that money after the robbers went through his pockets. The victim also testified about the importance of having that money on him: because it “was” for his rent and he “never missed on [his] rent” (Tr. 287). This testimony further supported the reasonable inference that Turner was describing the amount of money that he had in his pocket prior to the robbery because that money was taken from him during the robbery; otherwise, the testimony had no relevance at all. The reasonable inferences from his testimony—along with the presence of more than that amount of money in appellant’s pocket after the robbery—supported the conclusion that a rational fact-finder could make: that the robbers took \$1200 out of his pocket. To require an explicit statement that “the robber took that money out of my pocket” when the evidence otherwise supported the reasonable inference that the victim only had that money in his pocket prior to the robbery and, thus, that it had been stolen during the robbery is to disregard the fact-finder’s right to draw reasonable inferences from the evidence. Thus, Turner’s testimony and the victims’ statements to police supported the reasonable inference that the robbers stole the money from Turner’s pocket.

Appellant also argues that the State failed to prove that the money found on appellant was the same money taken from Turner because the amount

recovered was more than Turner said was stolen from him and the \$1200 was “sorted together” with other money and “not noticeably separate” from that other money (App. Br. 31-32; Tr. 382-383). But this did not establish that the money, as a matter of law, was not Turner’s money. First, there was no description of the denominations of money that Turner had or a description of what the officer meant by “sorted.” Even if the officer meant that the bills were sorted by denomination, had Turner had 12 \$100 bills in his pocket, that money would appear “sorted” when placed next to other bills. Further, Turner testified that victim Robert Page would have also had some cash on him (Tr. 287). The jury could have reasonably inferred that \$1200 of the money found on appellant was taken from Turner and the rest from Page, after which appellant or his accomplice could have put the two stacks of money together. Because there were numerous reasonable scenarios explaining how the money could appeared “sorted” yet included the money that was taken from Turner, the fact that the money appeared “sorted” presented a factual question for the jury to resolve. As such, the testimony about the money recovered from appellant being a different amount than that stolen from Turner and the “sorted” nature of the money did not render the evidence insufficient.

The evidence that appellant “had” \$1200 in his pocket that “was” for his rent prior to the robbery and that the robbers went through the pockets of the victim supported the reasonable inference that the money was taken from his

pockets during the robbery. The evidence that appellant had at least that much money in his pocket immediately after the robbery supported the reasonable inference that appellant was in possession of that money. Therefore, there was sufficient evidence that appellant committed felony stealing. Appellant's final point on appeal must fail.

CONCLUSION

In view of the foregoing, this Court should remand this case for the entry of a *nunc pro tunc* order correcting the sentence and judgment on Count I. In all other respects, appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06, contains 6,636 words as determined by Microsoft Word 2010 software, and was served on all other parties through the electronic filing system pursuant to Supreme Court Rule 103.08.

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