

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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the jurisdictional statement from his substitute brief as if set forth fully herein.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the statement of facts from his substitute brief as if set forth fully herein.

REPLY 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.

Appellant stands on his argument in his substitute brief for Point I.

POINT II

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.

Reply Analysis

The Due Process Clause requires the State to prove every element of the crime of which a defendant has been convicted. *In re Winship*, 397 U.S. 358, 364 (1970); *State v. McClain*, 301 S.W.3d 97, 99 (Mo. App. 2010). In its Response argument, Respondent attempts to turn this basic tenant of constitutional law on its head by conflating a conviction with a sentence. Brief for Respondent at 23, *State v. Knox*, ED107183 (September 18, 2019). Citing *Apprendi v. New Jersey*, the State argues that it has no burden “to disprove facts that serve to mitigate a defendant’s sentence.” *Id.* But sentence mitigation is not at issue here. The issue is that the defendant was sentenced to one which exceeds the maximum punishment because the evidence adduced only supports a conviction of a class D misdemeanor stealing offense. As such, *Apprendi* and its progeny does not aid Respondent.

Respondent argues that this Court should interpret the class A misdemeanor as the default classification, but the plain language of the statute renders it a catch-all. In

previous versions of the stealing statute, class A misdemeanor stealing was the lowest offense of stealing. 570.030, RSMo 2013. Respondent’s argument fails to consider how the addition of the class D misdemeanor offense changes the class A misdemeanor offense in the new, current law. Because there now exists a lower offense, class A misdemeanor stealing *does* have elements aside from simply stealing that it did not have under the previous version.

The plain language of subsection 8 reads: “The offense of stealing is a class A misdemeanor *if* no other penalty is specified in this section.” §570.030.8, RSMo (emphasis added). The plain language directs the reader to determine whether or not other subsections apply *before* choosing the class A misdemeanor as the correct charge. Although Respondent alleges Mr. Knox is attempting to “rewrite” the statute, Mr. Knox’s conclusions are drawn by the directive of the statute itself. It is only by reading the rest of the statute – including subsection 7, which defines class D misdemeanor stealing – that one is able to determine what is and what is not a class A misdemeanor. *See* Appendix to Appellant’s Substitute Brief at A22 and A23.

Thus, as suggested by Appellant in his substitute brief, through process of elimination, there are two ways to prove class A misdemeanor stealing:

- 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 guilty 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 guilty at any point in time prior to the current offense.

Despite accusing Mr. Knox of “rewriting” the statute to come to these two options, Respondent uses this very process of elimination to conclude that the pattern instruction and Notes on Use of MAI-CR 424.02.1 are incorrect in setting forth the definition of a class A misdemeanor, because both lack any reference on submitting a class A misdemeanor where the defendant has a stealing-related prior finding of guilt. Brief for Respondent at 23, note 6, *State v. Knox*, ED107183 (September 18, 2019). Respondent notes that “[s]uch a crime is a class A misdemeanor regardless of the value,” citing subsection 7 and subsection 8 of §570.030, RSMo to come to this conclusion. *Id.*

Respondent argues that “[a]t 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.” Brief for Respondent at 24-25, *State v. Knox*, ED107183 (September 18, 2019). To read subsection 8 as allowing the prosecutor to disregard both value and any prior conviction in charging class A misdemeanor stealing places the burden on the defendant to prove he or she can only be convicted of a class D misdemeanor, rather than forcing the State to prove a class A misdemeanor. The State may certainly only seek a class A misdemeanor in a situation where it elects to not seek a *higher* classification of which it could prove, but it may not prevail on a conviction where the evidence adduced only supports a *lower* classification.

The practical implication of Respondent’s argument shifts the burden to Mr. Knox to prove the items alleged to have been retained by him were not of the types listed in

subsection 2, 3, 5, or 6 of §570.030, that the value of the items alleged to have been retained were each less than \$150, and that Mr. Knox did not have any prior stealing convictions to be convicted of a class D misdemeanor. Rather than require the State to prove each element as it would have to in order to prove a class A-E felony, Respondent asks this Court to carve out an exception for the class D misdemeanor and shift the burden of proof to the defendant.

For example, if the State charged a defendant with a class B felony under subsection 3.3, it would have to prove that the property consisted of a motor vehicle, watercraft, or aircraft, and that the person had previously been convicted of two stealing-related offenses committed on two separate occasions which both occurred within ten years of the present offense. §570.030.3(3). If the State only proved that the defendant had appropriated a motor vehicle, watercraft, or aircraft, but failed to prove the prior convictions, the defendant could only be convicted of a class D felony under §570.030.5(3)(a). In that situation, if the State did not prove the motor vehicle, watercraft, or aircraft's value was not equal to or greater than \$25,000, but the court erroneously entered a conviction of a class C felony, the State could not argue that it was the defendant's burden to prove the value of the motor vehicle, watercraft, or aircraft was *less* than \$25,000 to be convicted and sentenced to the class D felony. If the State had wanted to convict the defendant of the class C felony, rather than the D, it would have had to adduce evidence that the value of the item stolen was greater than \$25,000. §570.030.4, RSMo.

Here, it was the State's burden to adduce the value of the items Mr. Knox allegedly retained. It is clear that the State's trial strategy was to attain a conviction on robbery in the first degree, not stealing, but that trial strategy failed. However, the State's failure at its own trial strategy does not relieve it of its burden to also adduce evidence to support a lesser conviction.

By following the directive of subsection 8 to determine if the crime alleged falls within any other subsection of §570.030 before relying on the class A misdemeanor classification, it is clear that without value proven or a showing of a prior stealing-related conviction, the State failed to prove Mr. Knox guilty of class A misdemeanor stealing. Thus, the sentence imposed by the trial court exceeded the maximum punishment allowed by law. At most, Mr. Knox can only be convicted of a class D misdemeanor based on the evidence adduced by the State at trial.

However, Mr. Knox can only be convicted of a class D misdemeanor if this Court finds that class D misdemeanor stealing is a lesser-included charge to robbery in the first degree. If this Court determines that class D misdemeanor stealing is not a lesser-included of robbery in the first degree, then Mr. Knox's convictions should be vacated and the trial court ordered to discharge him on Counts III and V.

Practical implications of Respondent's lesser-included argument

The State argues that because a class D misdemeanor requires more than just the element of stealing to secure a conviction, then pursuant to §556.046.1, RSMo, class D misdemeanor stealing cannot be considered a lesser-included offense of robbery, because it requires additional elements (i.e. value) not found in the robbery statute. On the other

hand, Respondent argues that class A misdemeanor stealing is a lesser-included offense of robbery, based on case law interpreting the previous version of the robbery and stealing statute. Brief for Respondent at 17-18, *State v. Knox*, ED107183 (September 18, 2019).

Respondent's argument, however, fails to consider how the legislature's redrafting of the stealing statute fundamentally altered class A misdemeanor stealing by the addition of the class D misdemeanor offense. As previously explained, the inclusion of the class D misdemeanor offense creates elements in the class A misdemeanor offense (value or a prior stealing related conviction) that did not exist under the previous version.

Thus, an important question before this Court is whether or not the inclusion of the class D misdemeanor offense on the new, current statute imposes additional elements on the class A misdemeanor offense. If this Court agrees that class A misdemeanor stealing does have elements, either value or a previous stealing conviction, then class A misdemeanor stealing cannot be a lesser-included of robbery. If this Court determines that both class A misdemeanor stealing and class D misdemeanor stealing have additional elements that preclude them from being lesser-included offenses to robbery, then both of Mr. Knox's misdemeanor stealing convictions must be vacated.

If this Court rejects Mr. Knox's argument that a class A misdemeanor, by process of elimination of the other subsections of the statute, does require additional elements, such as value or previous findings or guilt or the lack thereof, and finds a class D misdemeanor is *not* a lesser-included of robbery, then Mr. Knox's two convictions of

class A misdemeanor stealing must stand. However, based on this reasoning, his class D felony stealing conviction must be vacated.

As submitted here, a person commits the class D felony offense of stealing by retaining¹ property valued at seven hundred fifty dollars or more. §570.030.5(1), RSMo. By Respondent’s reasoning, because value is not an element of robbery in the first degree, this subsection of class D felony stealing, of which Mr. Knox was convicted by a jury, cannot be a lesser-included of robbery,

The jury instruction² for class D felony stealing was submitted by the defense as a lesser-included of robbery in the first degree [D17 p. 9; Tr. 495]. The State did not object either to the instruction or its construction [Tr. 495]. As submitted, the instruction required the jury to find that Mr. Knox (1) retained US currency and headphones owned by complaining victim Jabari Turner; (2) that Mr. Knox did so for the purpose of withholding it from the owner permanently; and (3) that the property retained had a combined value of at least seven hundred fifty dollars [D17 p. 9]. Thus, Mr. Knox was

¹ §570.030.1(1) requires a person “appropriates property of services of another to deprive him or here thereof, either without his or her consent by means of deceit or coercion and under 570’s chapter definitions, “appropriate” is defined as “to take, obtain, use, transfer, conceal, retain or dispose.” §570.010(2), RSMo.

² 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. #].”

convicted by the jury of §570.030.5(1), by retaining property valued at seven hundred fifty dollars or more.

Following the reasoning outlined by Respondent that class D misdemeanor stealing is not a lesser-included of robbery because value must be proven, then neither is §570.030.5(1), because that section requires proof of value as an additional element. If this Court accepts Respondent's argument that class A misdemeanor stealing only requires evidence that the defendant retained property belonging to another, then Mr. Knox's felony conviction on Count I can only be a class A misdemeanor.

However, if this Court determines that Mr. Knox's reading of class A misdemeanor stealing is correct and that it does, by process of elimination of the other subsections, require proof of elements of value and either proof of a previous stealing-related conviction or lack thereof, then class A misdemeanor stealing is not a lesser-included of robbery and Mr. Knox's class D felony conviction must be vacated and he must be discharged by the trial court.

If this Court finds that class D misdemeanor stealing is a lesser-included of robbery, then this Court must vacate Mr. Knox's class D felony conviction on the basis that there was insufficient evidence on which to convict Mr. Knox of stealing, as outlined in Point III.

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.

Reply Analysis

In its Response argument, Respondent argues that the jury was free to make an inference of guilt on Count I without testimony by any witness that the crime of stealing actually occurred. Despite its assertion in its Statement of Facts that the "robbers went through [Jabari Turner's] pockets and took the money," no such testimony was adduced. Brief for Respondent at 6, *State v. Knox*, ED107183 (September 18, 2019). Two witnesses testified on this matter: complaining witness Jabari Turner and Sergeant Adam Duke of the St. Louis Metropolitan Police Department.

The relevant testimony of Mr. Turner begins on the last line of the trial transcript on page 286:

Prosecutor: Okay. Did you have anything in your pockets at this time?

Turner: My phone was on the counter, so I just had money in my pocket.

Prosecutor: Okay. And do you remember how much money you had in your pocket?

Turner: Specifically I had \$1,200.

Prosecutor: You had \$1,200?

Turner: Yeah.

Prosecutor: And how do you know that specifically?

Turner: Because that was my rent money.

Prosecutor: That was your rent money?

Turner: Right. I never missed my rent.

Prosecutor: Okay. Did you know if Robert or Vincent, were you aware if they had any cash on them in the apartment?

Turner: Yeah. I don't know if Calvin or Vincent carried cash.

Prosecutor: Okay.

Turner: But Robert, yeah, would have something on him. He has a job and a daughter, too.

[Tr. 286-287].

At no point during his testimony does Mr. Turner ever state that any of the robbers went through his pocket or the pockets of the other victims. At no point during his testimony does the State ask Mr. Turner if the robbers went through his pocket or the pockets of the other victims. The State simply asks Mr. Turner if he had anything in his pocket at the time of the robbery. At no point does the State ask Mr. Turner if the money in his pocket was even stolen. The State simply asks what Mr. Turner had in his pocket at the time of the robbery.

Respondent goes to great lengths to argue that Mr. Turner's use of the past tense to describe what was in his pocket during an event that occurred in the past means that the money in Mr. Turner's pocket was actually stolen. Brief for Respondent at 28-29, *State v. Knox*, ED107183 (September 18, 2019). The use of the past tense to describe events that occurred in the past does not establish that a crime was committed.

The only testimony adduced by the State that the robbers went through Mr. Turner's pocket was during the testimony of Sergeant Duke. The relevant testimony is as follows:

Prosecutor: And [Jabari Turner] said that the individuals robbing him went through his pockets?
Sergeant Duke: He did.

[Tr. 406].

At no time during Sergeant Duke's testimony did the State ask if Mr. Turner told Sergeant Duke if the robbers took any money – or anything else – from his pocket or the pockets of the other victims. It is impossible to believe that if Mr. Turner had told Sergeant Duke that the robbers had stolen money from his pocket and the pockets of the other victims, that the sergeant would have failed to testify to that fact. It is even more unbelievable that the State, knowing the facts of the case, failed to adduce *any* testimony any money had actually been stolen from anyone, unless the State knew that such testimony did not exist.

Respondent relies on four Missouri cases to suggest that this Court, upon review, should rely on reasonable inferences to determine that Mr. Knox retained money stolen from Mr. Turner's pocket. Brief for Respondent at 28, *State v. Knox*, ED107183 (September 18, 2019). None of these cases, which all analyze claims of insufficient evidence, involve facts where testimony was not adduced of a crime even occurring.

In *Stewart*, the defendant was charged with domestic assault in the third degree. *State v. Stewart*, 560 S.W.3d 531, 533 (Mo. banc 2018). There, testimony was adduced by the victim that the defendant was a member of her household and that the defendant

placed her in *subjective* apprehension of immediate physical injury by knocking on her bedroom door while holding a gun and discharging it into the ceiling. *Id.* at 533-34. The victim testified that she was startled by the shot and forcefully told him to leave. She testified that had the bullet hit her, it would have done some damage. After she moved to shut the door behind the defendant, he fired a second shot into the house. This Court, using the plain and ordinary meaning of the word “apprehension,” determined that there was sufficient evidence for a reasonable juror to find beyond a reasonable doubt that the victim subjectively perceived, comprehended, or conceived immediate physical injury. This Court affirmed the judgment.

In *Naylor*, the defendant was charged with first-degree burglary for knowingly entering the office area of a restaurant labeled “Office” unlawfully when another person was present in the structure. *State v. Naylor*, 510 S.W.3d 855, 858 (Mo. banc 2017). This Court determined that there was sufficient evidence from which a reasonable juror to convict the defendant because he had parked in another parking lot, accessed the restaurant from the front door, left the restaurant area down a hall past employee lockers and coats, and entered into a room behind a closed door labeled “office” while another person was in the building. *Id.* This Court affirmed the judgment. *Id.*

In *Hudson*, the Missouri Court of Appeals determined that a reasonable inference could be made that the defendant had committed the crime of robbery in the first degree despite a lack of evidence that the defendant was actually armed with a deadly weapon. *State v. Hudson*, 574 S.W.3d 796, 799 (Mo. App. 2019). There, the victim testified that the defendant opened her driver side vehicle door, pressed a sharp object to her side

(which she believed to be a weapon), told her to get out of the vehicle, told her to leave her purse when she reached to take it with her, and drove off with her vehicle. *Id.* at 800. The victim testified that she was “really scared” and “feared for her life.” *Id.* The court found that there was sufficient evidence to support the robbery conviction, using the objective test that examines whether a reasonable person would believe the defendant’s conduct was a threat of the immediate use of physical force either explicitly or implied by words, physical behavior, or both. *Id.*

Finally, in *Meuller*, the Court of Appeals found sufficient evidence to support a conviction of assault in the first degree on accomplice liability theory. *State v. Mueller*, 568 S.W.3d 62, 66 (Mo. App. 2019). There, the victim was a seventeen-month-old child who suffered severe physical injury, including a traumatic brain injury, skull fracture, broken shoulder, and broken arm. *Id.* Evidence adduced included testimony by both medical experts and investigators. *Id.* at 72-73. The defendant changed her story multiple times on how the child was injured, did not inquire as to the child’s condition, and deflected questions about the victim’s injuries. *Id.* at 72. There was evidence the child had previously suffered serious physical injury under the care of the defendant. *Id.* She was reluctant to call 911. *Id.* The explanation of how the child was injured was not supported by the evidence of the injuries sustained. *Id.* She made internet searches that indicated the child was not injured in the manner she reported. *Id.* Finally, she continued to associate with the only other person in the household at the time the child was injured. *Id.* at 73. Using all these facts, the court determined that the jury could make a reasonable

inference that, based on accomplice liability theory, the defendant had committed assault in the first degree and affirmed the conviction. *Id.*

None of the cases cited by Respondent support the notion that in the present case, without any testimony adduced that a crime had even occurred, a reasonable juror could infer that Mr. Knox retained the money of Mr. Turner. The only “evidence” Respondent cites is Mr. Turner’s use of the past tense to describe events that occurred in the past and that Mr. Knox had more than the amount of money Mr. Turner claimed was in his pocket at the time of the robbery when Mr. Knox was apprehended without incident by police.

The State completely failed to establish a crime had been committed. There is insufficient evidence to support Mr. Knox’s conviction of class D felony stealing. Mr. Knox’s conviction on Count I must be vacated by this Court.

Lesser-included

In the alternative, if this Court does find that the State proved beyond a reasonable doubt that Mr. Knox did commit the offense of class D felony stealing by retaining US currency valued at least \$750, then it must consider, in light of its decision on Point II, whether class D felony stealing is a lesser-included offense to robbery in the first degree.

To avoid needless repetition, Mr. Knox directs this Court to his argument in Point II and briefly summarizes it here. If this Court accepts Respondent’s argument in Point II that class D misdemeanor stealing is not a lesser-included offense of robbery in the first degree because the class D misdemeanor offense includes an element of value, then class D felony stealing cannot be a lesser-included offense of robbery either, as it too requires a finding of value. The jury found Mr. Knox guilty of retaining U.S. currency and

headphones belonging to Mr. Turner and that the value those items was equal to or greater than \$750. By Respondent's analysis of a lesser-included offense, class D felony stealing is not a lesser-included of robbery. Therefore, just as in Point II, the trial court plainly erred by entering a judgment on Count I for class D felony stealing and sentencing him to five years' imprisonment in the Missouri Department of Corrections, suspending the execution of the sentence and placing Mr. Knox on five years' probation. If this Court determines that class D misdemeanor stealing is not a lesser-included offense of robbery because of the value element, this Court must find that class D felony stealing is also not a lesser-included and vacate Mr. Knox's conviction on Count I.

Then, if this Court determines that the new, current class A misdemeanor stealing offense does not require proof past the element of stealing and is therefore a lesser-included offense of robbery, then this Court should vacate Mr. Knox's class D felony conviction and enter a conviction of class A misdemeanor stealing.

But, if this Court determines that the new, current class A misdemeanor stealing offense does require proof of elements aside from stealing – value of the property retained or evidence of a prior stealing conviction or lack thereof – and is not a lesser-included offense to robbery in the first degree, this Court should vacate Mr. Knox's class D felony conviction on Count I discharge him.

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. Turners valuing at least \$750. This Court should vacate Mr. Knox's conviction on Count I. In the alternative,

should this Court determine that class D misdemeanor stealing is not a lesser-included offense to robbery in the first degree, this Court should vacate Mr. Knox's conviction on Count I as class D felony stealing cannot be a lesser-included offense to robbery in the first degree and either: 1) find that class A misdemeanor stealing is a lesser-included offense to robbery in the first degree and enter a conviction of class A misdemeanor stealing on Count I; or 2) find that class A misdemeanor stealing is not a lesser-included offense to robbery in the first degree and discharge Mr. Knox 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, vacate Mr. Knox’s conviction on Count I, or in the alternative, either find that class A misdemeanor stealing is a lesser-included offense to robbery in the first degree and enter a conviction of class A misdemeanor stealing on Count I or find that class A misdemeanor stealing is not a lesser-included offense to robbery in the first degree and discharge Mr. Knox him; 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 11th day of May, 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. Richard Starnes, Office of the Attorney General, at richard.starnes@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 5026 words and 24 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