

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC95318
)	
AMANDA N. BAZELL,)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF CASS COUNTY, MISSOURI
SEVENTEENTH JUDICIAL CIRCUIT, DIVISION TWO
THE HONORABLE R. MICHAEL WAGNER, JUDGE

APPELLANT’S SUBSTITUTE REPLY BRIEF

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INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	3
STATEMENT OF FACTS.....	3
ARGUMENT	4
CONCLUSION	7

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES:</u>	
<i>Ball v. United States</i> , 470 U.S. 856 (1985).....	5
<i>State v. Baker</i> , 850 S.W.2d 911 (Mo. App., E.D. 1993)	6
<i>State v. Barber</i> , 37 S.W.3d 400 (Mo. App., E.D. 2001).....	6
<i>State v. Heslop</i> , 842 S.W.2d 72 (Mo. banc 1992).....	4
<i>State v. Ross</i> , No. SD33071 (Mo. App., S.D., filed May 5, 2015)	4, 5
<i>Yates v. State</i> , 158 S.W.3d 798 (Mo. App., E.D. 2005).....	6
 <u>STATUTES:</u>	
Section 570.030	4, 6

JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from her original brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from her original brief.

ARGUMENT¹

The Western District Court of Appeals reversed Amanda Bazell's conviction of stealing firearms, holding that her conviction of two counts of stealing firearms in the course of the same burglary violated her right to be free from double jeopardy. The Southern District Court of Appeals reached the opposite result in a similar case, *State v. Ross*, No. SD33071 (Mo. App., S.D., filed May 5, 2015). The Western District in its opinion acknowledged *Ross*, but found it to have been incorrectly decided, since it did not discuss subsection 6 of Section 570.030. The Southern District had relied on the case of *State v. Heslop*, 842 S.W.2d 72 (Mo. banc 1992), which was decided by this Court before the existence of subsection 6.

Read as a whole, Section 570.030 shows a legislative intent not to allow multiple punishments for a single incidence of theft of multiple firearms not valued over \$500. Subsection 6, which makes a separate unit of prosecution for items valued over \$500, makes that clear and *Heslop* inapposite. The Southern District's opinion was in error, and the Western District was correct in its decision.

In its brief, respondent claims that the *Ross* Court "implicitly" concluded that the issue of what sentence Amanda received was not a double jeopardy issue – that a claim that Amanda received two felony punishments for two acts of stealing two of the same kind of property was different than a claim that Amanda was

¹ Appellant replies only as to Point I and stands on her original brief as to Point II.

twice convicted for that conduct. (Resp. br. at 19, citing *Ross*, slip op at 3-4). Of course, Amanda was twice convicted – she received two convictions of stealing two different firearms from the same house (L.F. 37-42). It does not matter that the sentences are concurrent for purposes of a double jeopardy analysis.

In *Ball v. United States*, 470 U.S. 856, 864 (1985), the United States Supreme Court determined that Congress did not intend to punish defendants for illegally receiving *and* possessing the same firearm. *Id.* The Fourth Circuit had reached the same conclusion; however, it had determined that a defendant may be convicted under both statutes, but that the separate sentences must run concurrently. *Id.* at 858, n. 5.

The United States Supreme Court reversed the Fourth Circuit, holding that “[t]he remedy of ordering one of the sentences to be served concurrently with the other cannot be squared with Congress’ intention.” *Id.* at 864. The Court determined that the second conviction “does not evaporate simply because of the concurrence of the sentence.” *Id.* at 864-865. The Court pointed out that this other conviction “has potential adverse collateral consequences” such as delaying parole eligibility, an increased sentence under a recidivist statute, or the State’s ability to later impeach the defendant with two convictions instead of one. *Id.* at 865. The Court held that “the second conviction, even if it results in no greater sentence, is an impermissible punishment.” *Id.* *Ball* therefore stands for the proposition that a conviction in and of itself constitutes “punishment” for the purposes of the Double Jeopardy Clause.

Significantly, respondent agreed that the statutory language “any firearms” is ambiguous (Resp. br. at 20), but seems to believe that the benefit therefore inures to the State of Missouri, arguing that “public safety” (Resp. br. at 25), and the constitutional right to own and possess firearms (Resp. br. at 27) drive this result. Appellant agrees that victims have a right not to have their possessions stolen, but disagrees that this general principle adds much to the analysis.

Finally, respondent analogizes to unlawful use of a weapon cases, where Missouri courts have held multiple gunshots to constitute multiple offenses. *Yates v. State*, 158 S.W.3d 798 (Mo. App., E.D. 2005); *State v. Barber*, 37 S.W.3d 400 (Mo. App., E.D. 2001). Yet this becomes a relevant analogy only if one accepts a public policy construct. Since this is a clear case of statutory construction, this Court should not reach a public policy argument at all.

The legislature has written that the crime of stealing “any firearms” is a felony. Section 570.030.3. That is a single unit of prosecution by its plain language. As in *State v. Baker*, 850 S.W.2d 911 (Mo. App., E.D. 1993), discussed in Amanda’s opening brief, the use of the phrase “any firearms” is at least ambiguous to the allowable unit of prosecution and that ambiguity must be resolved against turning a single transaction into multiple offenses. Therefore, because it is not clear that multiple convictions for the simultaneous theft of multiple firearms was intended by the Missouri legislature, the ambiguity must be resolved in Amanda’s favor. This Court must reverse one of Amanda’s stealing convictions (Counts 3 or 4) and order her discharged from that sentence.

CONCLUSION

For the reasons presented in this reply brief and her original brief, appellant respectfully requests that this Court reverse either Count III or IV outright, and reverse and remand the other counts for a new and fair trial.

Respectfully submitted,

/s/ Ellen H. Flottman

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 961 words, which does not exceed twenty-five percent of the 31,000 words allowed for an appellant's brief.

On this 11th day of February, 2016, an electronic copy of Appellant's Substitute Reply Brief was placed for delivery through the Missouri e-Filing System to Richard Starnes, Assistant Attorney General, at Richard.Starnes@ago.mo.gov.

/s/ Ellen H. Flottman

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