

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
)	Respondent,
)	
vs.)	No. SC95461
)	
JAMES C. SMITH,)	
)	
)	Appellant.

APPEAL TO THE
MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF PETTIS COUNTY, MISSOURI
18th JUDICIAL CIRCUIT
THE HONORABLE ROBERT L. KOFFMAN, JUDGE

APPELLANT'S SUPPLEMENTAL SUBSTITUTE BRIEF

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INDEX

	<u>Page</u>
TABLE OF AUTHORITIES.....	3
STATEMENT OF FACTS.....	4
POINT RELIED ON	5
ARGUMENT.....	6
CONCLUSION	14
CERTIFICATE OF COMPLIANCE AND SERVICE	15

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Mussachio v. United States</i> , 136 S.Ct. 709 (2016).....	13
<i>Ossana v. State</i> , 699 S.W.2d 72 (Mo. App. E.D. 1985).....	9
<i>State v. Bazell</i> , __ S.W.3d __, 2016 WL 4444392 (Mo. banc Sept. 20, 2016)	<i>passim</i>
<i>State v. Chavez</i> , 735 S.W.2d 127 (Mo. App. W.D. 1987).....	9
<i>State v. Claycomb</i> , 470 S.W.3d 358 (Mo. banc 2015)	9
<i>State v. Dixon</i> , 24 S.W.3d 247 (Mo. App. E.D. 2000)	9
<i>State v. Herret</i> , 965 S.W.2d 363 (Mo. App. E.D. 1998)	9
<i>State v. Hodges</i> , 829 S.W.2d 604 (Mo. App. E.D. 1992).....	13
<i>State v. McMillian</i> , WD 79440, 2016 WL 6081923 (Mo. App. W.D., Oct. 18, 2016).....	5, 11-13
<i>State v. Zetina-Torres</i> , 482 S.W.3d 801 (Mo. banc 2016)	5, 9, 13
<i>Thornton v. Denny</i> , 467 S.W.3d 292 (Mo. App. W.D. 2015)	9
<u>CONSTITUTIONAL PROVISIONS:</u>	
U.S. Const., Amendment 14	5, 6
Mo. Const., Art. I, Section 10.....	5, 6
<u>STATUTES:</u>	
570.030	<i>passim</i>
<u>RULES:</u>	
Rule 30.20.....	5, 8, 9

STATEMENT OF FACTS

Mr. Smith relies on the Statement of Facts from his opening Substitute brief.

POINTS RELIED ON

VIII.

The trial court plainly erred in entering judgment for the class C felonies of stealing on Counts 2, 4, 7 and 10, and in sentencing Mr. Smith to seven years imprisonment for those offenses, because this violated Mr. Smith’s right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Missouri Constitution, and Section 570.030.3, RSMo (Cum. Supp. 2009), in that neither stealing property or services valued at five hundred dollars or more nor stealing any firearms are class C felonies, since the sentencing enhancement factors contained in Section 570.030.3 only apply to “any offense in which the value of property or services is an element,” and value is not an element of stealing under Section 570.030.1; therefore, Mr. Smith could only have been convicted of and sentenced for misdemeanor stealings in Counts 2, 4, 7 and 10, resulting in manifest injustice.

State v. McMillian, 2016 WL 6081923 (Mo. App. W.D., Oct. 18, 2016);

State v. Bazell, __ S.W.3d__, 2016 WL 4444392 (Mo. banc September 20, 2016);

State v. Zetina-Torres, 482 S.W.3d 801 (Mo. banc 2016);

U.S. Const., Amend 14; Mo. Const., Art. I, Section 10;

Section 570.030 RSMo. Cum Supp. 2009; and

Rule 30.20.

ARGUMENT

VIII.

The trial court plainly erred in entering judgment for the class C felonies of stealing on Counts 2, 4, 7 and 10, and in sentencing Mr. Smith to seven years imprisonment for those offenses, because this violated Mr. Smith's right to due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Missouri Constitution, and Section 570.030.3, RSMo (Cum. Supp. 2009), in that neither stealing property or services valued at five hundred dollars or more nor stealing any firearms are class C felonies, since the sentencing enhancement factors contained in Section 570.030.3 only apply to "any offense in which the value of property or services is an element," and value is not an element of stealing under Section 570.030.1; therefore, Mr. Smith could only have been convicted of and sentenced for misdemeanor stealings in Counts 2, 4, 7 and 10, resulting in manifest injustice.

Introduction

On October 27, 2016, this Court issued an Order, requesting the parties "to file supplemental briefs addressing the effect of *State v. Bazell*, SC95318 (Mo. banc August 23, 2016), on the sentences received by Appellant on the stealing charges in this cause." Mr. Smith's Point and Argument VIII, contained herein, addresses this question, and he relies on his original Substitute Brief and Substitute Reply Brief as to the remaining seven issues presented.

Facts and Preservation

Mr. Smith was charged with four felony stealing counts as follows:

COUNT 2

...the defendant, in violation of Section 570.030, RSMo, committed the class C felony of stealing...in that on or about April 10, 2012, in the County of Pettis, State of Missouri, the defendant appropriated a handgun and a television, which property had a total value of at least five hundred dollars and which included a firearm...

COUNT 4

...the defendant, in violation of Section 570.030, RSMo, committed the class C felony of stealing...in that on or about April 10, 2012, in the County of Pettis, State of Missouri, the defendant appropriated three Stihl string trimmers, three Stihl blowers, a laptop computer, and a tablet device, property having a total value of at least five hundred dollars...

COUNT 7

...the defendant, in violation of Section 570.030, RSMo, committed the class C felony of stealing...in that on or about September 27, 2012 in the County of Pettis, State of Missouri, the defendant appropriated two laptop computers and software of a value of at least five hundred dollars...

COUNT 10

...the defendant, in violation of Section 570.030, RSMo, committed the class C felony of stealing...in that on or about March 4, 2013, in the County of Pettis, State of

Missouri, the defendant appropriated a computer, 1/64 scale motorcycle replica, another motorcycle replica, Pioneer stereo receiver and bottle of liquore [sic], property having a total value of at least five hundred dollars...

(LF 21-23).

Trial counsel did not object to Mr. Smith being charged with these four felonies for the charged conduct nor argue that the correct interpretation of Sections 570.070.1 and 570.070.3 makes such conduct only a misdemeanor offense.

After Mr. Smith's case was transferred to this Court on the question of prejudice resulting from several instructional errors, this Court issued its opinion in *State v. Bazell*, __S.W.3d__, 2016 WL 4444392 (Mo. Sept. 20, 2016). In *Bazell*, this Court held that certain stealing offenses could not be enhanced from misdemeanors to felonies under Section 570.070.3 because "[t]he value of the property or services appropriated is not an element of the offense of stealing." *Id.* at 2.

Because Mr. Smith's case was pending on direct appeal when *Bazell* was decided, and because Mr. Smith was sentenced to four felony stealing counts that, under *Bazell*, would only constitute misdemeanors, undersigned counsel moved this Court to remand Mr. Smith's case to the trial court for resentencing on Counts 2, 4, 7 and 10. After oral argument, this Court ordered supplemental briefing on the issue of the effect of *Bazell* on Mr. Smith's stealing convictions.

Standard of review

Because this issue was not presented to the trial court, it must be reviewed for plain error under Rule 30.20; “[t]he sufficiency of the sentence may be reviewed on appeal.” *State v. Chavez*, 735 S.W.2d 127, 132 (Mo. App. W.D. 1987) (finding manifest injustice where the defendant was sentenced to eight years when guilty only of what amounted to a class C felony, citing Rule 30.20). Furthermore, this Court recently determined in *State v. Claycomb* that sufficiency claims are reviewed on the merits even if not raised in the trial court. 470 S.W.3d 358, 362 (Mo. banc 2015); *see also State v. Zetina-Torres*, 482 S.W.3d 801, 808-09 (Mo. banc 2016).

Mr. Smith was sentenced to concurrent seven-year prison sentences for his four felony stealing convictions (Counts 2, 4, 7 & 10), yet he only should have been sentenced for four misdemeanors on these counts. This resulted in a manifest injustice. Where a defendant’s sentence has been improperly enhanced, his right to due process has been violated, and the result is a manifest injustice. *State v. Dixon*, 24 S.W.3d 247, 250 (Mo. App. E.D. 2000); *State v. Herret*, 965 S.W.2d 363, 364 (Mo. App. E.D. 1998).

Furthermore, the mere interpretation of a statute that was in effect at the time of Mr. Smith’s trial and sentencing does not create “new law” for retroactivity purposes. *See Thornton v. Denny*, 467 S.W.3d 292, 298 (Mo. App. W.D. 2015). In *Bazell*, this Court merely clarified the language of an existing statute, which did not create a new rule of law. *Id.* Mr. Smith seeks application of a statute – properly construed – that was in effect at the time of his trial and sentencing. *Id.*

Additionally, a sentence that is contrary to the law cannot constitute a final judgment. *Ossana v. State*, 699 S.W.2d 72, 73 (Mo. App. E.D. 1985). In order to

constitute a final judgment, it is axiomatic that the sentence not be contrary to law. *Id.*

Since the original sentences in this case did not comply with the statute, the trial court did not exhaust its jurisdiction until it renders sentences in accordance with the law. *Id.*

Analysis

In *Bazell*, this Court considered a challenge by the defendant to her convictions for two counts of felony stealing under Section 570.030. *State v. Bazell*, __ S.W.3d __, 2016 WL 4444392 (Mo. banc September 20, 2016). This Court analyzed the felony enhancement provision in section 570.030.3, which provides:

3. Notwithstanding any other provision of law, any offense in which the value of property or services is an element is a class C felony if:

(1) The value of the property or services appropriated is five hundred dollars or more but less than twenty-five thousand dollars; or

(2) The actor physically takes the property appropriated from the person of the victim; or

(3) The property appropriated consists of:

...

(d) Any firearms[.]

This Court found that the felony enhancement provision only applies, on its face, to an offense “in which the value of property or services is an element [...]”

Bazell, __S.W.3d at __, 2016 WL 4444392 at 2.

Section 570.030.1 defines “stealing” as “appropriat[ing] property or services of another with the purpose to deprive him or her thereof, either without his consent or by means of deceit or coercion.” *Id.* This Court held that the “value of property or services” is *not* an element of stealing for purposes of Section 570.030.3, explaining:

[w]e cannot know why the legislature, in 2002, decided to amend section 570.030.3 to add the requirement that only offenses for which “the value of property or services is an element” may be enhanced to a felony, but this is what the legislature clearly and unambiguously did. As a result, section 570.030.3 does not apply here. Defendant's offenses must be classified as misdemeanors because they cannot be enhanced to felonies by the terms of section 570.030.3.

Id. at 3 (footnote omitted).

In *State v. McMillian*, No. WD 79440, 2016 WL 6081923, at 2 (Mo. App. W.D., Oct. 18, 2016), the Court of Appeals, Western District, held that the *Bazell* opinion made no distinction between the various ways the enhancement provision in Section 570.030.3 could be triggered:

Bazell found that the statute under which McMillian was charged, section 570.030.1, does not contain as an element “the value of property or services.” *Id.* Therefore, section 570.030.3, which *only* applies where “the value of property or services” is an element of the offense, is inapplicable. The specific character of the enhancement sought under section 570.030.3 is irrelevant because the enhancement simply does not apply to section

570.030.1. What a verdict director incorporates as an element of the offense for the jury's deliberation is inconsequential, as the law does not provide for the enhancement sought by the State.

McMillian, No. WD 79440, 2016 WL 6081923, at 2.

The Western District further noted that:

[A]t oral argument [in *McMillian*], the State argued that *Bazell* only applies where the felony enhancement is based on the stealing of a firearm, motor vehicle, or other item and not where, as here, the enhancement is based on the stealing property or services with a value of over five hundred dollars. The State identifies in support the verdict director for the offense when the enhancement is sought, which includes as an element of the offense the stealing of property or services valued at over five hundred dollars.¹

McMillian, No. WD 79440, 2016 WL 6081923, at *2. But the Western District found “no support in *Bazell* for the interpretation advocated by the State.” *Id.* Therefore, pursuant to *Bazell*, the charge against *McMillian* could not be enhanced to a felony but, as a matter of law, could only be a class A misdemeanor. *See* Section 570.030.10. *Id.*

This Court should apply *Bazell's* plain language statutory analysis, and *McMillian's* correct application of *Bazell*, to Mr. Smith's four stealing convictions. The plain language of the statute should apply equally to each subsection of Section

¹ Like Mr. Smith, Defendant *McMillian* was charged under Section 570.030 with stealing property valued at over \$500. *Id.* at 2.

570.030.3, and none of them apply to enhance Mr. Smith's convictions because "the value of the property or services appropriated is not an element of the offense of stealing." *Bazell* at 2. Nothing in Section 570.030.3 suggests that Section 570.030.3 itself can be used to provide an element lacking in Section 570.030.1.

This is true even if value is recited as an "element" in the jury instruction. *McMillian, supra*. Indeed, recently this Court clearly held that the essential elements of a crime are not determined by how the jury was instructed, but by how the crime is charged. *Zetina-Torres*, 482 S.W.3d at 809 (citing *Mussachio v. United States*, 136 S.Ct. 709, 715 (2016)). Therefore, whether "value" is included in the jury instruction is irrelevant when the plain language of the statute does not include "value" as an element of the crime of stealing. Any such requirement added into charging document does not emanate from the statute and is surplusage.²

This Court should reverse Mr. Smith's convictions on each of these four felony stealing counts and remand for resentencing as misdemeanors.

² "As the name implies, surplusage is the inclusion of words or phrases which are unnecessary to charge the *statutory elements* of the offense." *State v. Hodges*, 829 S.W.2d 604, 607 (Mo. App. E.D. 1992) (emphasis added).

CONCLUSION

For the reasons set forth above and in his opening brief, this Court must reverse Mr. Smith's convictions and remand for a new trial on Counts 1, 3, 4, 6, 7 & 9, and reverse his conviction and discharge him under Count 5.

For the reasons set forth in his Supplemental brief, this Court must reverse and remand Mr. Smith's convictions and sentences on Counts 2, 4, 7 & 10, for resentencing as misdemeanors.

Respectfully submitted,

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Certificate of Compliance

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b), and was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the Supplemental Substitute Brief contains **2,374** words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 10th day of November, 2016, an electronic copy of Appellant's Substitute Supplemental brief was placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Amy M. Bartholow

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