

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 REPLY BRIEF

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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. Turrentine, 2016 WL 6818938 (Mo. App. S.D. 2016);

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

Section 570.030 RSMo. Cum Supp. 2009.

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.

Bazell requires resentencing on Counts 2, 4, 7 and 10

Respondent argues that this Court's decision in *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016), requires a new trial on Count 2, and does not affect Mr. Smith's convictions on Counts 4, 7, and 10 (Resp. Br. 4-12). Respondent's conclusion is based on the faulty premise that *Bazell* prohibits the felony sentence enhancements of § 570.030.3 from being applied to certain stealing charges under § 570.030.1, where value is not an element, but not to other stealing charges where value is also not an element.

This is clearly contrary to this Court’s express holding in *Bazell* that “the felony enhancement provision, by its own terms, only applies if the offense is one ‘in which the value of property or services is an element.’” *Id.* at 266. The *elements* of stealing – any stealing – are defined in Section 570.030.1. They are not defined in Section 570.030.3. The *elements* of the crime of stealing in Section 570.030.1 are clear, and they do not include the “value” of the property. This Court explicitly stated as much in *Bazell* when it said that the offense of “[s]tealing is defined in Section 570.030.1 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,’” and “[t]he value of the property or services appropriated is not an element of the offense of stealing.” *Id.* This comes directly from the plain language of Section 570.030.1.

The Legislative Comments leave no doubt that the *elements* of the crime of stealing under Section 570.030.1 do not include “value.” The Comments provide:

Because of these problems, the Code provides for a new stealing statute, which more clearly lists the elements of the offense.

Under the Code, the following are the essential elements:

1. There must be an *appropriation*
2. of *property* or *services*
3. of *another*
4. with the *purpose to deprive* the other thereof
5. accomplished
 - a. *without* the owner's *consent*, or

b. *by means of deceit*, or

c. *by means of coercion*.

These are the only essential elements under the proposed statute, and are defined by statute. See definitions in § 570.010.

Mo. Ann. Stat. § 570.030.

In *Bazell*, this Court did not say that essential elements of stealing under § 570.030.1 could be imported from § 570.030.3. This Court did not say that definitions contained in the enhancement provision itself could add additional elements into the underlying stealing charge that were not contained in § 570.030.1. Respondent misconstrues the basic holding of *Bazell* when it states:

In other words, because the “firearms” element under § 570.030.3(3)(d) did not include any value, and because the basic definition of stealing under § 570.030.1 did not include any value, the Court held that the defendant’s convictions for stealing a firearm were not class C felonies and were, instead, misdemeanor offenses.

(Resp. Br. at 6). But that is not what the *Bazell* opinion stated in its own words or in any other words. Respondent cannot conflate § 570.030.3 with § 570.030.1 to expand the statutory elements set out by the Legislature. While Respondent may think that “value” should be an element under § 570.030.1, the plain language of the statute shows that it is not. *Bazell* recognized this, and other courts have applied *Bazell*’s plain reading of the statute. See *State v. McMillian*, 2016 WL 6081923 (Mo. App. W.D. Oct. 18, 2016) (application for transfer filed December 7, 2016, SC96094) (“*Bazell* made no distinction

between the various ways the enhancement provision could be triggered.... 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.”); *State v. Turrentine*, 2016 WL 6818938 (Mo. App. S.D. 2016) (fn 5 - there is “clear and unequivocal language in *Bazell*—“The value of the property or services appropriated is not an element of the offense of stealing”).

Respondent is similarly incorrect when it states that “each of Mr. Smith’s felony stealing offenses was charged pursuant to § 570.030.3(1), and, accordingly, each felony offense included value as an element of the offense, *i.e.*, “value of at least five hundred dollars” (Resp. Br. at 8). This is wholly false. Respondent was charged with stealing offenses pursuant to § 570.030.1, not § 570.030.3(1). The elements of the crime of stealing are found only in § 570.030.1. Again, Respondent wishes to conflate the two, but § 570.030.1 sets forth the crime, and § 570.030.3 is merely an enhancement section. No element of the crime can be imported from § 570.030.3, because the language of the enhancement section itself clearly predicates its application on the element of value already being present in the charging section: “any offense *in which the value of property or services is an element* is a class C felony if...” There is a plain language condition precedent to the application of enhancement § 570.030.3, and that is that the offense itself must contain “value of property or services” as an element. If that condition is not satisfied, then the enhancement provision does not apply by its plain language.

Respondent cites other statutes for the proposition that elements may come from different subsections of a statute (Resp. Br. 10). But this is a red herring. In the statutes Respondent cites, the additional subsections have no condition precedent to the application of the enhancement section, they merely differentiate the elements that are already present in the section defining the crime. For example, in § 566.100, subsection (2) of the statute only further categorizes the type of victim or action that is already an element in subsection (1) for which enhancement will apply. So, under subsection (2) of § 566.100, a “victim...less than fourteen years of age” is a subcategory of a person who has been subjected to sexual contact and is incapable of consent, which are already elements of the crime under subsection (1). This subcategory of victims, who are already made elements of the crime under subsection (1), are then highlighted for enhancement under subsection (2).

The penalty enhancement provision in § 570.030.3, however, requires by its plain language, that the enhancement may only be applied where “the value of property or services is an element” of the crime. The “elements” are *only* set forth in § 570.030.1, and value is not one of the elements of the crime. It is not this Court’s prerogative to interpret the language of the statute when the language of the statute is plain. “In ascertaining what the phrase ‘in which the value of property or services is an element’ means, this Court employs the primary rule of statutory interpretation, which is to give effect to the plain and ordinary meaning of the statutory language.” *State v. Bazell*, 497 S.W3d at 266. “If the words [of the statute] are clear, the Court must apply the plain

meaning of the law.” *Id.* This Court has already determined in *Bazell* that “value” is not an element of stealing.

Therefore, this Court should reverse Mr. Smith’s convictions on each of his four felony stealing counts and remand for resentencing as misdemeanors.

CONCLUSION

For the reasons set forth above and in his opening substitute brief and supplemental substitute brief, this Court must reverse his conviction and discharge him under Count 5, reverse Mr. Smith's convictions and remand for a new trial on Counts 1, 3, 4, 6, 7 & 9, and/or 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 **1,723** words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 16th day of December, 2016, an electronic copy of Appellant's Substitute Supplemental Reply 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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