No. SC95318

In the
Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

AMANDA N. BAZELL,

Appellant.

Appeal from the Circuit Court of Cass County
Seventeenth Judicial Circuit
The Honorable R. Michael Wagner, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant, Amanda Bazell, was charged in the Circuit Court of Cass County as a prior and persistent offender with two counts of first-degree burglary, three counts of felony stealing, and one count of misdemeanor stealing (L.F. 37-42). This cause was tried by a jury beginning on January 27, 2014, the Honorable R. Michael Wagner presiding (L.F. 5).

The sufficiency of the evidence is not at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: On Sunday, March 10, 2013, at around 5:00 a.m., appellant, accomplice Benjamin Astorga, Jr., and Nicole Carter were at a home in Lee's Summit (Tr. 207, 377-378). Astorga injected some heroin around that time and also took some methamphetamine that morning (Tr. 380-381). Sometime after that, the three left in Carter's blue Kia Sportage SUV to take Carter to meet a friend at a storage unit facility in Garden City (Tr. 380-382). Astorga was driving, but soon started getting sick from the drugs, so he pulled over, threw up, and then got in the back seat and lay down (Tr. 381-382). Appellant drove to the storage unit, where they dropped Carter off (Tr. 382-383). Astorga fell asleep (Tr. 383).

Meanwhile, at their home in Garden City, victims Nancy and Phillip Connaughton were getting ready for church (Tr. 207). Mrs. Connaughton

went to pull her car out of the garage (Tr. 207-208). As she did, she noticed a "really shiny" bright blue vehicle—the Kia Sportage driven by appellant—driving by (Tr. 209, 383). Mr. Connaughton also saw the car from the living room (Tr. 222-223). After passing the residence, appellant drove to State Highway N around a mile and a half away and pulled the vehicle over (Tr. 223, 383).

At around 8:55, the Connaughtons left for church (Tr. 208). After they closed the gate at the end of their driveway and were going to pull out onto State Highway N, they saw the same blue vehicle turning around and coming back towards the house (Tr. 208-209, 223). A female was driving the vehicle (Tr. 209, 223). Mr. Connaughton said that it looked like the driver was looking for something (Tr. 209). They did not find that out of the ordinary, however, so they drove away (Tr. 209).

As appellant was turning the vehicle around, Astorga woke up (Tr. 383). After the Connaughtons left, appellant pulled into the driveway and came to a stop (Tr. 383). Astorga fell back asleep (Tr. 383). He woke up again when appellant threw two black bags on top of him (Tr. 383-384). He crawled into the front seat (Tr. 384). Appellant told him, "[W]e got to go. I hit a lick," meaning she had stolen something (Tr. 384, 395). Astorga asked her to take him to his father's house in Pleasant Hill and fell asleep again (Tr. 384).

When he woke up, they were at a gas station in Pleasant Hill (Tr. 384). Astorga opened up the bags; inside he saw a handgun, a rifle, and a couple of jewelry boxes (Tr. 385). After Astorga got some gas and a drink, they left again (Tr. 385). Instead of going to his father's house, however, appellant said that they needed to make a stop at a friend's house (Tr. 386). She pulled into a driveway, got out, and walked around the back side of the house (Tr. 386). Astorga fell asleep again (Tr. 386).

Inside that house, victim Mark Stout, who had worked into the early morning, was asleep (Tr. 251-253). His wife had gone to church (Tr. 253). Around 10:00 a.m., he heard the doorbell ring twice (Tr. 253). He got up and looked out a window and saw a small blue SUV in his driveway (Tr. 253, 255). He saw appellant (whom he did not know) walking back to the vehicle, so he went back to bed (Tr. 256). He woke up again when he heard his back door creak open (Tr. 256). He peeked out his bedroom door and saw appellant in his dining room standing facing the table with her back to him looking through something (Tr. 257-259). He walked to the dining room and asked appellant what she was doing there (Tr. 261). Appellant jumped and turned around, telling Mr. Stout that he had scared her (Tr. 261). She asked if "Ashley" was there, and Mr. Stout told her that she had the wrong house (Tr. 261). He asked her what address she was looking for (Tr. 261). The address

she said was a downtown Kansas City address (Tr. 261-262). She said that she was there to drop something off for Ashley and pick up a dog (Tr. 262). She had nothing in her hands that she appeared to be "dropping off" (Tr. 262). He asked to see the address that Ashley had given appellant; appellant said that it was in the car (Tr. 263). He suggested they go out to her car to verify the address (Tr. 263). At that point, appellant "bolted" very quickly out the front door, so Mr. Stout went through the garage to catch up with her at the vehicle (Tr. 263-264).

Astorga woke up when appellant and Mr. Stout came outside (Tr. 387). Appellant got back into the vehicle (Tr. 264, 387). Mr. Stout asked appellant and Astorga for the address; Astorga pretended to look on the phone for it (Tr. 265). They could not find the address (Tr. 265). He also asked to see the item appellant was dropping off for Ashley; they rummaged around for a while and then appellant handed him a "makeup-type bag" that was in the car (Tr. 266, 388). Mr. Stout suggested calling Ashley, but Astorga claimed that she was at church (Tr. 267). He asked to see Astorga's phone, secretly planning to call the police, but the phone was in update mode and could not be used (Tr. 268-269). Mr. Stout told them he was going to go verify their story and that they needed to stay there (Tr. 389). As he went inside, Mr. Stout got the license plate number of the vehicle (Tr. 269). When he came

back outside, appellant and Astorga had left (Tr. 270, 389). He called the police (Tr. 272).

As they went to Astorga's father's house, appellant showed Astorga a jewelry box that she had taken from the Stout residence (Tr. 389). At the house, Astorga decided he did not want "to bring any drama to [his] father's house," so he called friend Samantha Harshner to come and pick them up (Tr. 359, 390). Astorga told his father that the vehicle was having car trouble and that they needed to leave it there (Tr. 353, 390). Astorga's father noted that both he and appellant (whom he did not know but whom Astorga introduced as "Amanda") looked tired and appellant looked "worried" (Tr. 353).

Appellant and Astorga left with Harshner (Tr. 390-391). Appellant, whom Astorga called "Amanda," was "jittery" (Tr. 362-363). They took the bags from the Connaughton burglary with them (Tr. 309, 362, 391). They planned to sell the stolen items, telling Harshner they had to get rid of the items because they had been somewhere they were "not supposed to be" (Tr. 391-392). Appellant punched Astorga for "giving out too much information" (Tr. 364, 393). They drove to appellant's friend's house in Independence (Tr. 364, 392). At the house, Amanda grabbed some of the stolen property and went into the house, leaving the rest of the stuff in Harshner's car (Tr. 365-366, 394). Astorga gave Harshner the keys to the Kia and asked her to drop

them off with the vehicle, then left and walked to a different friend's house (Tr. 366-367, 394, 396).

Around noon, the Connaughtons returned home to find the gate to their residence, their front door, and their back door open and all of the lights in the back of the house turned on (Tr. 210). Their bedroom had been ransacked—drawers were pulled open and things were thrown all over the place (Tr. 210, 232). A drawer in the spare bedroom where Mr. Connaughton kept a handgun was also open (Tr. 211). They called the police (Tr. 210-211).

The items stolen from the Connaughton residence included a jewely box containing jewelry from the top of Mrs. Connaughton's dresser, a jewelry box belonging to Mr. Connaughton, a laptop computer from a drawer in the living room, two pairs of shoes, a telescope, a coin jar half full of coins, a fingernail kit, a sewing kit, a "baby book," some paperwork, a Ruger 10/22 rifle with a scope, and a Berretta .40 caliber pistol (Tr. 213-214, 218, 224). The "jewelry box" stolen from the Stout home was a ring holder Mrs. Stout used in the kitchen while washing dishes (Tr. 278). She had left three rings, including her wedding ring, on the holder the night before (Tr. 278-279). The rings had a value of $8000 (Tr. 279).

Law enforcement found the blue SUV at Astorga's father's home as they were responding to the Stout residence (Tr. 305-306, 333-335). Mr.

Astorga told them that no one else but he and his wife were home (Tr. 307). He described his son to the deputies and said he had seen his son 10-15 minutes earlier at the residence with a female named Amanda (Tr. 307, 337). He said they had left with a female named Samantha in a gray sedan (Tr. 309). Officers contacted the owner of the SUV, Nicole Carter's grandmother, and got her permission to search the vehicle (Tr. 338). There was no stolen property in the vehicle, but the case that Astorga had shown Mr. Stout to convince him they were trying to drop something off for a friend was in it (Tr. 310, 338-339).

As one of the deputies was preparing to leave Mr. Astorga's residence, he saw a gray sedan slow down "significantly" on northbound BB Highway as if it was going to turn into the residence, but then drove off (Tr. 312-313, 339-340). The deputy left, heading south on BB, when he saw the same sedan turning back onto BB heading towards the residence a second time (Tr. 313). The deputy was able to verify that the vehicle was registered to a Samantha, so he caught up with the vehicle and stopped it (Tr. 314). Harshner was driving and a female named Devin was in the passenger seat (Tr. 314, 367). The deputy told her that he had stopped her because of the information about her vehicle picking up burglary suspects; she agreed and said she had picked up Astorga and a white female (Tr. 315). She said that she was bringing keys

"to "some vehicle" back to Astorga's father's house (Tr. 319). The deputy got permission to search the vehicle and found the black bags in the back seat (Tr. 316). Harshner told him they belonged to Astorga and the white female (Tr. 316). Harshner told the deputy he could take the bags (Tr. 318-319, 368).

A sergeant who arrived took the bags into custody and looked through them (Tr. 319). He found numerous items from the Connaughton burglary which he took to the sheriff's office (Tr. 341-343). The deputy who was investigating the scene at the Connaughton residence got a call for them to come to the sheriff's office because a vehicle had been found with a lot of their items in it (Tr. 216, 237, 343). Police had found the shoes, the laptop computer, the fingernail and sewing kits, the coin jar (with the coins removed), and the jewelry box (missing the "good jewelry") (Tr. 214-215).

Meanwhile, a deputy investigating the scene at the Stout residence received information that Nicole Carter was associated with the suspect vehicle (Tr. 302). The deputy told Mr. Stout that he might have an idea who the female who entered the house might be (Tr. 274). The officer showed him a picture of Carter on his in-car computer (Tr. 275, 303). Mr. Stout said that it "looked like her, but if she had acne and piercings, that would be her," as the person in the house had more acne and piercings than the female in the photo did (Tr. 275, 304).

Later that day, a photo lineup was prepared with Carter's picture in it (Tr. 347, 422). A deputy showed the lineup to Harshner (Tr. 368-369, 418). Harshner did not identify Carter as the female with Astorga (Tr. 347, 369, 425).

Astorga, appellant, and possibly Carter were identified as possible suspects (Tr. 432). Detective Steve Catron interviewed Carter and, based on that interview and other information from the investigation, was able to rule her out as a suspect (Tr. 438). Detective Caton then put together a photo lineup with appellant's picture to show Harshner (Tr. 369, 439, 445-447). Harshner identified appellant (Tr. 369, 448).

Mr. Stout went to the sheriff's office to get an update on the case from Detective Catron a few days later (Tr. 279). As he arrived, he saw the blue SUV with the same license plate parked outside with a female in it and a female outside looking through the backseat (Tr. 279-280). He went in and told the receptionist about the vehicle, but when it appeared that the vehicle was about to leave, he went outside and confronted Carter, the driver (Tr. 281-282, 451). Seeing her, he realized that Carter had not been the person in his house that day (Tr. 282-283). He told the detective that Carter was not the woman in his house (Tr. 283-284). The detective agreed, telling Mr. Stout that she was not involved in the burglary (Tr. 451). Detective Catron showed

him pictures of two people they were investigating and asked if Mr. Stout was "happy with what [he] was seeing" (Tr. 284). Mr. Stout said that he was satisfied that the detective was on the right track as he recognized appellant and Astorga from those photos (Tr. 284-285, 452).

While Astorga was in custody, appellant was prohibited from having contact with him (Tr. 457). Appellant, acting through a third party, tried to send Astorga two letters falsely labeled as "legal mail" which were intercepted by jail personnel (Tr. 456-458). One letter, written on the back of a page of a copy of a report made to look like it was a packet of discovery materials for Astorga, told Astorga, "I didn't say anything swear! Just put it on Nicole!" and "I'm sry [sic] we're in this situation" (Tr. 464-465; St. Exh. 27). The other letter said, in part, "I don't care what them boys tell you I didn't say anything about anything swear just wait for the paperwork you'll see! I just hope you dont [sic] say anything too!" (Tr. 463; St. Exh. 29).

Appellant presented no evidence in her defense (Tr. 481-485).

Appellant was found guilty as charged on all but the burglary count for the burglary of the Connaughton home[1]; the jury hung on that count and a

[1]A note from the jury suggested that it could not decide whether or not the Connaughton burglary was committed by appellant while she was "armed with a deadly weapon" (L.F. 53; Tr. 533-534). No lesser included offense was

mistrial was declared (L.F. 62-66; Tr. 538-539).[2] The court sentenced appellant as a persistent offender to concurrent terms of twelve years for all of the felony counts and one year for the misdemeanor stealing count (L.F. 73-74). This appeal followed.

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submitted (L.F. 53-58).

[2]The State subsequently dismissed that count by writ of *nolle prosequi* (Tr. 560).

ARGUMENT

I.

The trial court did not plainly err in convicting appellant for two different counts of felony stealing for stealing two different firearms because a double jeopardy violation does not appear on the face of the record in that the punishable unit of prosecution for the offense of stealing is each individual item stolen and sentencing enhancement provisions do not implicate the Double Jeopardy Clause. Moreover, appellant's felony sentence for a second count of stealing based on the theft of a second firearm from the same victim at the same time and place did not exceed the maximum prescribed punishment for those offenses as the ambiguities in § 570.030 should be resolved in favor of the legislative intent to protect the safety of the public and the rights of gun owners.

Appellant claims that her two convictions for felony stealing violated her right to be free from double jeopardy as the statute's prohibition against possessing "any firearms" is "at least ambiguous" as to the unit of prosecution, in that the word "any" could refer to a single firearm or multiple firearms, and therefore the rule of lenity requires that she could only be convicted of one count of stealing firearms regardless of the number of

firearms stolen (App. Br. 16-22). But a double jeopardy violation does not appear on the face of the record in that the punishable unit of prosecution for the offense of stealing is each individual item stolen and sentencing enhancement provisions do not implicate the Double Jeopardy Clause. Moreover, appellant's felony sentence for a second count of stealing based on the theft of a second firearm from the same victim at the same time and place did not exceed the maximum prescribed punishment for those offenses as the ambiguities in § 570.030 should be resolved in favor of the legislative intent to protect the safety of the public and the rights of gun owners. Therefore, the trial court did not plainly err.

A. Standard of Review

Appellant did not raise a double jeopardy objection to the charge of multiple counts, the submission of multiple instructions, or the entry of multiple convictions (Tr. 151-152, 190-191). Constitutional claims are typically waived if not raised at the first opportunity. *State v. Sutton*, 320 S.W.3d 729, 735 (Mo. App., E.D. 2010). Plain error review of a double jeopardy claim, however, is available if the reviewing court can conclude from the face of the record that the trial court had no power to enter the conviction. *Id.* Plain error is "evident, obvious and clear" error for which relief is only available when an alleged error so substantially affects a defendant's

rights that a manifest injustice or miscarriage of justice would "inexorably result" if the error was left uncorrected. *State v. Louis*, 103 S.W.3d 861, 864 (Mo. App., E.D. 2003).

B. There was No Double Jeopardy Violation

"The double jeopardy clause protects a defendant both from successive prosecution for the same offense and from multiple punishments for the same offense." *State v. Roggenbuck*, 387 S.W.3d 376, 381 (Mo. banc 2012). Where the defendant's conduct is continuous or involves more than one item or one victim, the test for whether multiple convictions constitutes double jeopardy focuses on the conduct the legislature intended to proscribe under the statute. *State v. Liberty*, 4370 S.W.3d 537, 546 (Mo. banc 2012). In determining whether there is a double jeopardy violation, the reviewing court looks to the legislature's definition of the "unit of prosecution" to see if cumulative punishments were intended by the legislature. *Roggenbuck*, 387 S.W.3d at 381.

Section 570.030 makes it a crime to appropriate property of another with the purpose to deprive her of it without her consent. § 570.030.1, RSMo Cum. Supp. 2009. In *State v. Heslop*, 842 S.W.2d 72 (Mo. banc 1992), this Court examined § 570.030 to determine the allowable unit of prosecution for stealing. In that case, the defendant claimed that his two convictions for

stealing two different trucks from the same victim at the same time violated the Double Jeopardy Clause. *Id.* at 74. This Court held that the multiple convictions did not constitute double jeopardy. *Id.* at 76. The Court declared that the common law "single larceny rule," requiring a finding that all property stolen from the same owner from the same time and place constituted a single stealing, was no longer good law. *Id.* It held that the stealing statute showed a legislative intent to punish the commission of separate crimes and that the act of stealing each of the two trucks was "a separate distinct stealing." *Id.* at 76.

In *State v. Ross*, SD33071, slip opinion (Mo. App., S.D. May 5, 2015), the Southern District applied *Heslop* to a stealing case similar to this one. The defendant in *Ross* stole two guns from the same victim at the same time and was charged with two counts of stealing, each enhanced to a felony because the property stolen were firearms. *Id.* at 1-2. Ross claimed that two convictions for stealing constituted double jeopardy *Id.* at 2. The Southern District relied on *Heslop*, finding that the defendant "committed the crime of stealing twice, once for each gun. He could be charged with both crimes, found guilty twice, and punished twice." Thus, the theft of two different guns from the same victim at the same time and place is two different crimes and can be twice punished.

The Southern District suggested that a claim that a defendant received two felony *punishments* for two acts of stealing two of the same kind of property from the same victim at the same time and place was different than a claim that a defendant was twice *convicted* for that conduct. *Ross*, slip op. at 3-4. In doing so, it implicitly but necessarily concluded that the issue of what sentence the defendant could receive for each conviction was not a double jeopardy issue, i.e., whether the defendant could receive a second punishment at all for the stealing of the second gun. That implicit conclusion is consistent with case law in other circumstances which hold that the Double Jeopardy clause is not implicated where the ultimate issue is the severity of the defendant's sentence, not whether he is punished more than once for an offense. *Morgan v. State*, 865 S.W.2d 791, 793 (Mo. App., E.D. 1993) (using the same convictions to apply two different sentencing enhancements did not implicate the Double Jeopardy Clause); *see also State v. Kelley*, 189 P.3d 853, 855 (Wash. App. 2008) (a firearm enhancement to an assault charge where the weapon was an element of the underlying crime did not violate double jeopardy). That reasoning should apply here. Appellant stole two different items of property and thus could be punished twice. Whether or not each of those punishments could be enhanced to a felony punishment does not implicate the Double Jeopardy Clause. Therefore, appellant's two stealing

convictions did not constitute double jeopardy.

C. Multiple Felony Punishments Should be Deemed Permissible

Even if the Double Jeopardy Clause does apply to this case or even if appellant's claim can be interpreted to argue that, even if appellant could be twice convicted of stealing, he could not be twice punished with felony sentences for each count of stealing, appellant's claim should still fail. The punishment for stealing is a class A misdemeanor unless the property stolen is among those designated under § 570.030.3. § 570.030.3, .8, RSMo Cum. Supp. 2009. Stealing can be punished as a class C felony if "[t]he property appropriated consists of ... [a]ny firearms." § 570.030.3(3)(d), RSMo Cum. Supp. 2009.

It is true, as appellant notes, that the word "any," by itself, *can* be singular or plural and thus refer to the "one, some, or all" of whatever kind or quantity (App. Br. 29-31). "Any," *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/any (last accessed January 12, 2015); *see also Liberty*, 370 S.W.3d at 548, 551-52 ("any obscene material" was ambiguous); *State v. Baker*, 850 S.W.2d 944 (Mo. App., E.D. 1993). Here, respondent agrees that the statutory language regarding the appropriation of "any firearms" is ambiguous as to how many felony sentences for stealing firearms are permitted. The statutory language could reasonably be read to

punish the theft of one firearm individually (as stealing property consisting of one firearm would constitute stealing property containing "any firearms") or several firearms. The statute could be referring to "any [number of] firearms," which would support appellant's claim, or "any [kinds of] firearms," which would support the trial court's actions below. Thus, the statute is ambiguous as to whether multiple felony convictions are authorized by the statute. When a statute is ambiguous—meaning that the plain language of the statute does not answer the current dispute as to its meaning—the reviewing court applies established rules of statutory construction to determine the intent of the legislature and give effect to that intent whenever possible. *Derousse v. State Farm Mut. Ins. Co.*, 298 S.W.3d 891, 895 (Mo. banc 2009).

To resolve this ambiguity, appellant points this Court to subsection 6 of § 570.030 (App. Br. 20-22). That subsection, which was actually subsection 5 of the statute in effect at the time of appellant's crimes, states, "The theft of any item of property or services pursuant to subsection 3 of this section which exceeds five hundred dollars may be considered a separate felony and may be charged in separate counts." § 570.030.5, RSMo Cum. Supp. 2009. Appellant argues that this means the State was required to prove that the value of each firearm stolen was more than $500 before the sentence could be enhanced for the stealing of each weapon (App. Br. 20, 22). Respondent agrees that, read in

isolation from subsection 3, appellant's argument regarding subsection 5 is a reasonable interpretation of that provision. But subsection 5 cannot be read in isolation from subsection 3, and reading those provisions together shows that subsection 5 was not meant to apply to the explicit list of property set out in subsection 3(3), but to subsection 3(1).

First, the plain language of most of the other subsections of 3(3) do not suffer the same ambiguity as affects subsection 3(3)(d). Eleven of the sixteen subsections do not use the plural formation of "any _____" to set out whether the crime permits enhancement, but instead use a singular formation, e.g., "any motor vehicle," "any will or unrecorded deed," "any credit card." § 570.030.3(3), RSMo Cum. Supp. 2009. In these circumstances, the use of "any" is not ambiguous because the object does not permit a plural interpretation. For example, you cannot have "two motor vehicle" or "two credit card" without absurdly distorting the English language. Statutes will not be interpreted to produce an absurd or illogical result. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo. banc 2012). Because the plainest reading of these provisions provides for a felony sentence for the stealing of each individual item, subsection 3(3) permits multiple enhancements for each conviction for stealing each individual item when more than one such item is stolen, such as permitting two enhanced sentences for stealing two cars. To

apply subsection 5 to those portions of subsections 3(3) is therefore illogical and renders the subsection 5, at the very least, ambiguous as to which provisions of subsection 3 the legislature intended subsection 5 to belong to.

That ambiguity is resolved by looking at the likely legislative intent for the amendment of § 570.030 to include subsection 5. The subsection was added to the statute as subsection 4 in 1996. § 570.030.4, RSMo Cum. Supp. 1996. This followed a Missouri court opinion which held that, where the State chose to aggregate property with values less than the threshold felony amount in order to punish stealing as a felony under § 570.050, the State could not then charge multiple felonies for distinct parts of that property. *State v. Snider*, 869 S.W.2d 188, 197-99 (Mo. App., E.D. 1993) (prohibiting the State from charging multiple felonies for stealing more than $150 over separate periods during a "continuous course of conduct"). The legislature is presumed to know the existing law when enacting a new piece of legislation. *Humane Society of United States v. State*, 405 S.W.3d 532, 538 (Mo. banc 2013). Thus, the reasonable conclusion from the legislature's action in adding subsection 5 (then subsection 4) to the stealing statute was to permit the State to still aggregate lesser values to enhance a stealing charge for property of lesser amounts and to also punish as a felony the theft of property stolen at the same time when individual parts were also of a felony value.

Therefore, this history behind the statute shows that it was intended to apply to the portion of subsection 3 that explicitly dealt with the value of property—subsection 3(1)—and not the remainder of the statute where the value of property is not at issue. Subsection 5 should not be relied on to resolve the ambiguity found in § 570.030.3(3)(d).

Appellant also relies on the rule of lenity to contend that the ambiguity must be resolved in her favor (App. Br. 18, 20). But the rule of lenity is a default rule that is only used if other canons of construction are inapplicable. *Turner v. State*, 245 S.W.3d 826, 828 (Mo. banc 2008). The rule of lenity does not require that the reviewing court ignore either common sense or evident statutory purpose. *State v. Harrison*, 390 S.W.3d 927, 929 (Mo. App., S.D. 2013).

Here, there is an evident statutory purpose which shows that the legislature intended to permit multiple punishments for each act of stealing a firearm. The different classes of specific property designated for enhancement under § 570.030.3 appear to satisfy one of three different public policy purposes: 1) protecting items which would presumptively be worth more than the $500 which would otherwise make the stealing a felony, such as the stealing of motor vehicles, credit devices, or livestock; 2) protecting items that may not have a high market value in and of themselves but are extremely

valuable for civic or administrative purposes, such as a U.S. flag, voter registration list, or original copies of legislation; and 3) preventing items that could be used for dangerous criminal purposes from being used for such purposes, such as anhydrous ammonia. § 570.030.3, RSMo Cum. Supp. 2009. Firearms fit into this third class as they are certainly dangerous in the hands of criminals. Because the prohibition on stealing firearms is a public safety issue, the public policy supporting the enhanced punishment for such a stealing would more logically apply to the theft of any individual gun; each gun unlawfully taken is a gun that can be introduced into the stream of commerce for unlawful weapons and then unlawfully be used to commit crimes. Preventing the stealing and subsequent use of guns is a valid public policy interest. *See, e.g., State v. Sales*, 255 S.W.3d 565, 571 (Mo. App., S.D. 2008) (explaining the policy for punishing burglary while armed when a gun is stolen during a burglary). Thus, the interpretation that best supports this public policy is to permit multiple punishments for each stolen firearm.

Additional support for concluding that multiple punishments for appropriating each individual firearm can be seen from cases analyzing the unit of prosecution in other weapons cases. Missouri courts have recognized that multiple punishments can be imposed for each individual use of a weapon under the unlawful use of a weapon statute. *Yates v. State*, 158

S.W.3d 798, 802 (Mo. App., E.D. 2005) (each shot constitutes a different offense of firing into a dwelling house); *State v. Barber*, 37 S.W.3d 400, 404 (Mo. App., E.D. 2001) (each flourishing constitutes a different offense of unlawful use of a weapon). "Each exhibiting constitutes a separate offense because the conduct proscribed is complete upon one threatening flourish of a weapon. A subsequent exhibiting, whether separated by location or whether moments or a substantial amount of time later, re-creates the same danger that the statute was intended to prevent." *Barber*, 37 S.W.3d at 404.

The same is true here. Each stolen weapon re-creates the same danger—that one who has demonstrated an unwillingness to follow the law will either unlawfully use a gun in the future or permit those guns to be used unlawfully by others. *See State v. McCoy*, 468 S.W.3d 892, 898 (Mo. banc 2015) (it is "well-established" that felons are more likely to commit violent crimes than are other law-abiding citizens). The more guns a thief steals, the more chance she or someone else will use one of those guns in another future crime. Thus, under the logic permitting multiple punishments for multiple uses of a gun, the stealing of multiple guns should also permit multiple punishments.

Additionally, appellant's interpretation of the enhancement would lead to an absurd result. Under her interpretation, a person who steals one gun is

no different than a person who steals ten guns. But the stealing of ten guns has the potential to create ten times the danger for society as the stealing of one gun. Thus, to aggregate all firearms into one prosecution would lead to the absurd result of under-punishing the defendant who causes the greater harm. Such a result cannot accurately reflect the will of the legislature as statutes will not be interpreted to produce an absurd or illogical result. *See Orr*, 366 S.W.3d at 540. Thus, appellant's interpretation of § 570.030.3(3)(d) should be rejected.

Finally, the State of Missouri has recently reaffirmed its public policy of protecting the right of law-abiding Missouri citizens to own and possess firearms. The Missouri Constitution was recently amended to affirm that the right to bear arms in Missouri "shall not be questioned" and that the State "shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement." Mo. Const., Art. I, § 23 (2014). The interpretation of § 570.030.3(d) urged by the State is consistent with this declaration of public policy. Permitting multiple punishments for the theft of numerous firearms from a Missouri citizen is consistent with the purpose as it serves the governmental obligation to protect the right to gun ownership. Therefore, the general public policy of Missouri regarding gun ownership supports resolving the ambiguity in § 570.030(3)(d) in favor of permitting

multiple enhancements for the theft of each firearm.

Because the public policy for the firearms enhancement supports multiple punishments, application of the rule of lenity would ignore an evident statutory purpose and thus is not required. *Harrison*, 390 S.W.3d at 929. The multiple punishments in this case are most consistent with the evident statutory purposes for enhanced punishment for stealing firearms. Thus, appellant's two felony sentences for stealing two firearms from the same victim at the same time were not plainly erroneous.

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

II.

The trial court did not abuse its discretion in denying appellant's request for a mistrial regarding testimony by Detective Steve Catron about using jail photos to help prepare the lineup with appellant in it because the testimony did not definitely associate appellant with prior bad acts. Moreover, appellant was not prejudiced as there was not a reasonable probability that this testimony affected the outcome of the trial.

Appellant claims that the trial court abused its discretion in denying appellant's request for a mistrial because Detective Catron testified that he compiled the photo lineup with appellant's photo in it from jail photos, which appellant argues was evidence that she had committed prior crimes and had been in jail before which "destroyed the presumption of innocence" (App. Br. 23-26). But the testimony did not definitely associate appellant with prior crimes; the most reasonable interpretation of the testimony was that it referred to the process used to find the other photographs for the lineup, not appellant's photograph. Thus, any possible reference to appellant's photograph being evidence of other crimes was too vague as to require a mistrial. Moreover, appellant was not prejudiced as the strength of the evidence of appellant's guilt and the vague nature of the challenged

testimony show that there was not a reasonable probability that the testimony affected the outcome of the trial. Therefore, the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

A. Facts

Detective Catron testified about preparing a photo lineup with appellant's picture in it (Tr. 441). He stated that he typically gets photographs for the lineups from "jail photographs or through Department of Revenue driver's license photos" (Tr. 441). He testified that the pictures for this lineup were drawn from the Department of Revenue (Tr. 441). He testified that he used the "jail system" to "locate the number of individuals that have similar characteristics to the one I am looking for" (Tr. 441-442). Even though he pulled all of the pictures, including appellant's, from license records, he used jail photographs to get the information to pull the other pictures from the Department of Revenue database, stating, "These were pulled from the Department of Revenue. The initial – the initial information afforded to the photographs was drawn from previous jail photos" (Tr. 442).

As Detective Catron started to testify about putting those pictures together into the lineup, appellant asked to approach (Tr. 442). She argued that the reference to jail photos violated a motion in limine ruling prohibiting evidence of other crimes (Tr. 442-443). She claimed that the testimony

"indicated that the photo that was shown of [appellant] came from a jail photo, which suggests other crimes, suggests that she is in custody, in spite of the fact that he did say at least twice that they were from Department of Revenue photos" (Tr. 442-443). The State argued that the detective said the photos were from the Department of Revenue (Tr. 443). Appellant argued that he "clearly said several times that they were jail photos" and that he was "suggesting that he found a photograph of my client from a jail photo log" (Tr. 443). Appellant moved for a mistrial (Tr. 443). The prosecutor argued that the Detective was talking about his general practice and that it was already clarified that these came from the Department of Revenue (Tr. 443). The court agreed that "that's the way I understood it" (Tr. 444). The court denied the request for a mistrial (Tr. 444).

B. Standard of Review

The decision whether to grant a mistrial is left to the sound discretion of the trial court as trial courts are in the best position to observe the complained-of incident and are in a better position than the appellate court to determine what prejudice, if any, the alleged error had on the jury. *State v. Shaffer*, 439 S.W.3d 796, 801 (Mo. App., W.D. 2014). Review of a trial court's ruling denying a motion for mistrial is for an abuse of that discretion. *Id.* at 800. "An abuse of discretion is found when the trial court's ruling is clearly

against the logic of the circumstances then before it and when the ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration." *Id.* "A mistrial should only be granted when the prejudice to the defendant cannot be removed in any other way." *Id.* at 801.

C. Mistrial was Not Required

It is true that evidence of the defendant's involvement in other crimes with no legitimate tendency to directly establish guilt for the charged crime is inadmissible. *State v. Taborn*, 412 S.W.3d 466, 473 (Mo. App., W.D. 2013). But vague or speculative references to appellant's involvement in other crimes do not violate this rule. *Id.* To violate the rule against the admission of evidence of other crimes, the evidence must show that the defendant committed, was accused of, was convicted of, or was definitely associated with the other crimes or misconduct. *Id.* Vague references are not clear evidence associating the defendant with other crimes. *Id.*

Here, the detective's testimony did not definitely associate appellant with any prior crime because it is not clear that the detective was even referring to appellant's photo when talking about the jail photos. The detective explained that he got all of the photos for the lineup from the Department of Revenue database (Tr. 441). This evidence showed that appellant's photo did not come from jail photographs. He then testified that

he used the jail photo system to find other people with comparable characteristics to appellant to fill out the rest of the lineup (Tr. 441-442). His final statement about the jail photos was simply stating that he needed to find information for the comparable people in the jail system to be able to request those photos from the Department of Revenue (Tr. 442). Neither of these statements established that appellant's photo was in the jail system or that he had used the jail system to find her photo. Instead, the most reasonable interpretation of the testimony was that the detective got appellant's picture from the DOR database, used the software for the jail system to find comparable other people, and then got pictures of those people from the DOR database. Thus, the testimony did not even possibly associate appellant with any criminal activity as it did not suggest that there was a photo of her in the jail photo system. Therefore, the testimony did not definitely associate her with any criminal activity.

Further, even if it was possible for the jury to reach the conclusion reached by appellant that the detective was also referring to appellant's photo being in the jail system, she is not entitled to relief. As shown above, that conclusion is not so clear that any reference to jail photos could be deemed explicit. Even the trial court did not believe that the detective was saying he found appellant's photo in the jail system (Tr. 444). Thus, the

reference was a vague reference, which cannot constitute improper evidence definitely associating appellant with other crimes. *Taborn*, 412 S.W.3d at 473. Appellant failed to establish that the jury would have necessarily understood that the detective was saying that he found appellant's photo in the jail photo system and that this meant that she had committed prior crimes. *See, e.g., State v. Wright*, 978 S.W.2d 495, 498 (Mo. App., W.D. 1998) (it is the defendant's burden to show that the reference to "mugshots" constitutes evidence of prior crimes). Because the testimony repeatedly established that appellant's photo came from Department of Revenue records, the plainest reading of the testimony was that the detective was not speaking about appellant's photo when referring to the jail system, and the trial court did not perceive that the detective was saying appellant's photo was found in the jail photos, the testimony did not constitute a clear reference to other crimes. Thus, the testimony did not definitely associate appellant with other crimes. Therefore, the trial court did not abuse its discretion in denying the request for a mistrial.

Finally, appellant failed to demonstrate prejudice from the denial of the mistrial. This Court will not find error in the denial of a mistrial without a clear demonstration showing that appellant was actually prejudiced by the challenged statement. *State v. Taylor*, 382 S.W.3d 251, 260 (Mo. App., W.D.

2012). To show this, there must be a reasonable probability that the error affected the outcome of the trial. *Id.*

There was not such a reasonable probability in this case. The evidence against appellant was overwhelming. She was identified as the burglar by Astorga (her accomplice), Mr. Stout (one of the victims who caught her in his house), and Harshner (the person who drove her to dispose of the stolen property) (Tr. 284-285, 369, 379, 448). Astorga used appellant's first name to identify her to his father and to Harshner (Tr. 353, 362-363). She admitted to Astorga that she had stolen from the Connaughton home and showed appellant what she stole from the Stout home (Tr. 384, 389, 395). She used false statements to Mr. Stout to hide her real purpose at his house, showing her consciousness of guilt (Tr. 261-263). She was placed by Astorga's father and Harsher in the vehicle in which stolen property from the Connaughton home was found (Tr. 309, 315-316, 319, 341-343). And she made incriminating statements in letters sent surreptitiously to Astorga that she had not told on him, that she hoped he had not told on her, that she was sorry they were in this situation, and that she wanted him to blame Nicole Carter for the crimes (Tr. 456-458; St. Exh. 27, 29).

In light of this overwhelming evidence, there was not a reasonable probability that Detective Catron's testimony which only vaguely might have

suggested that appellant had a picture on file with the jail could have had any effect on the outcome of the trial. Where there is overwhelming evidence of guilt, the "extraordinary circumstances" requiring a mistrial are absent. *State v. Moore*, 84 S.W.3d 564, 568 (Mo. App., S.D. 2002). Therefore, appellant suffered no prejudice.

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

CONCLUSION

In view of the foregoing, appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains 7,792 words as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 4th day of February, 2016, to:

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