

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. ED 100807
)	
JEFFREY WEINHAUS,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FROM THE CIRCUIT COURT OF FRANKLIN COUNTY
TWENTIETH JUDICIALCIRCUIT
THE HONORABLE KEITH SUTHERLAND, JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

I.

The trial court erred in overruling Jeff's motion for judgment of acquittal at the close of evidence, and entering judgments and sentences against him for assault of a law enforcement officer in the first-degree and the corresponding armed criminal action, violating his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I, §10, because the state's evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt in that it failed to establish that Jeff attempted to kill or cause serious physical injury to Sgt.Folsom, since the evidence only showed that the officers did not consider Jeff a threat, he does not have a criminal history, he thought he was getting his computers back, he prayed for a peaceful interaction on the way to the gas station, he issued no verbal threats to the officers in the seconds between exiting his vehicle and being shot four times; rather, the evidence showed that, when questioned about why he had a gun—which he lawfully wore openly—Jeff manipulated the flap of his holster, told the officers they would have to shoot him, put his hand on the stock and began to remove it, which conduct may have placed the officers in apprehension of immediate physical injury, giving them the right to shoot him, but their reaction does not evince an attempt by Jeff to kill or cause serious physical injury to them.

In response to Jeff's claim that the evidence was insufficient to sustain his conviction for assault of a law enforcement officer, Respondent states that "the evidence strongly indicated that Mr. Weinhaus was about to draw his weapon and shoot Sergeant Folsom and that the only reason he did not do so was because the officers managed to shoot him first." (Resp. Br. 21). However, Respondent's statement merely proves Jeff's point and corroborates what the evidence showed – that Jeff had not drawn his weapon before the officers shot him.

Indeed, the evidence showed that the officers arranged the meeting that very day, ostensibly to return Jeff's computers, which was a ruse to effectuate an arrest (TR 208, 385). Therefore, Jeff drove to the meeting believing that he would get his computers back, which was the result he had been wanting since they were seized from him (TR 291). He had no reason to believe or fear that his arrest was imminent, or that it was necessary to have an armed confrontation with the officers. Wearing a gun on his hip was not something unusual or unique on this day, as Jeff routinely openly carried – as is every Missouri citizens' right (PTr. 54).

Both officers testified that they had no reason to fear Jeff, they did not believe he was a dangerous or violent person, he was not a threat, and they were not wearing their vests or taking any other precautions for safety (TR 216, 286, 293, 295, 389). Indeed, the question of whether or not to arrest Jeff immediately or whether to "further monitor his movements before September 17th" was only recently decided (TR 207). Folsom, himself, did not believe that it was

appropriate to arrest Jeff and testified that it was not his idea to do so (TR 208, 274).

The entire encounter with the officers lasted a mere seconds before Jeff was gunned down and lay unconscious on the ground. Folsom was reprimanded after this shooting and is no longer allowed to work as a state trooper (TR 254-255). Indeed, Respondent is correct that the gun never came out of Jeff's holster, because Folsom shot Jeff within seconds of Jeff exiting his car (TR 421).

The circumstances are not sufficient to "strongly indicate that the defendant had a firmness of purpose to pull the trigger and kill or seriously injure" Folsom. *See State v. Rollins*, 321 S.W.3d 353, 361 (Mo. App. W.D. 2010). Indeed, the officers did not stop Jeff from pulling the trigger because his gun had not been drawn (TR 421). Respondent only cites a portion of *Rollins*, but the overall lesson to be taken from *Rollins* is the "principle...that not 'every threat with a deadly weapon' can be viewed as constituting first-degree assault." *Id.* at 362 (*quoting State ex rel. Verweire v. Moore*, 211 S.W.3d 89, 93 (Mo. banc 2006)). The Court specifically noted that "some instances might be third-degree assault instead." *Id.* at 362. And "[t]he message of *Verweire* might be to remind us that a purported 'substantial step' cannot be found to be 'strongly corroborative of the firmness of the actor's purpose' unless it tends logically to show that the actor formed a purpose to complete the crime in question." *Id.*

If the facts are consistent with the notion that the purpose of the defendant was only to threaten, then it makes sense that the *threat itself* cannot be "strongly

corroborative” of a purpose to *do more than* threaten. *Id.* at 361. There must be strongly corroborating evidence that it was the defendant's conscious objective to carry out the threat. *Id.* Under the State's approach, every threat with a deadly weapon would constitute a substantial step toward the commission of first degree assault. *Id.*

The evidence here does not indicate that Jeff had a firm purpose to shoot Folsom. It certainly falls short of the very specific intent required by the actor to cause serious physical injury. And a mere threat, even coupled with the ability to carry out the threat, does not constitute an attempt to commit the assault without strongly corroborating evidence that it was the defendant's conscious object to carry out the threat. *State v. Dublo*, 243 S.W.3d 407 (Mo. App. W.D. 2007). This record is completely void of any strongly corroborating evidence that it was Jeff's conscious object to carry out any perceived threat of harm towards Folsom. This Court must reverse his conviction.

II.¹

The trial court erred in overruling Jeff’s motion for judgment of acquittal at the close of evidence, and entering judgments and sentences against him for assault of a law enforcement officer in the first-degree and the corresponding armed criminal action, violating his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I,§10, because the state’s evidence was insufficient to sustain a finding of guilt beyond a reasonable doubt in that Instruction 8—the verdict director for first-degree assault of Sgt.Folsom—required the jury to find that Jeff attempted to kill or cause serious physical injury to Sgt.Folsom “by shooting him,” and there was no evidence that Jeff actually shot Sgt.Folsom.

Respondent does not provide any substantive response to the legal issues presented in Points II and III of Jeff’s opening brief. Rather, Respondent asserts that the “Instruction No. 8” included in the legal file (LF 178), is not an accurate copy of the Instruction No. 8 that must have been submitted to the jury. Respondent provides no alternative instruction that it believes to have been submitted to the jury. As noted in Jeff’s opening brief, undersigned counsel, as an

¹ Respondent made a singular response to Points II and III of Jeff’s opening brief, which is contained in Respondent’s Argument II. This reply responds to Respondent’s argument as to both Points II and III.

officer of the court, and under a duty of candor toward the tribunal, states that through her discussions with the Circuit Clerk of Franklin County, it was determined that the “Instruction No. 8” – as well as all of the instructions contained in the legal file – are the only instructions contained in the Circuit Court’s file. If these, in fact, are not the instructions that were provided to the deliberating jury, then there has been a violation of *Rule 28.02(e)*, which provides that “the original of all numbered instructions and all verdict forms shall be handed to the jury for its use during its deliberation and *shall be returned to the court and filed at the conclusion of the jury’s deliberation.*”

Further, if Respondent takes issue with the accuracy of Instruction No. 8, and disputes that it was the instruction given to the jury, *Rule 30.04(c)* provides that,

If the respondent is dissatisfied with the appellant’s record on appeal, the respondent may file within the time allowed for filing respondent’s brief such additional parts of the record on appeal as respondent considers necessary.

As Respondent filed no additional record with its brief, this further supports the Circuit Clerk’s statement that no other instructions exist.

Finally, if there is any dispute concerning the correctness of the legal file or transcript, that part of the record shall be settled and approved by the trial court. *Rule 30.04(g)*. And, if anything material is omitted from the record on appeal, this court may, on its own initiative, direct that the omission or misstatement be

corrected. *Rule 30.04(h)*. This Court may, if it deems necessary, order that a supplemental record on appeal be prepared and filed by the clerk of the trial court, including any additional part of the trial record, proceedings and evidence, or the clerk may be directed to send up any original documents or exhibits. *Rule 30.04(h)*. If this Court questions whether Instruction No. 8, as provided in the legal file, is the accurate instruction provided to his jury, then it should remand to the trial court to conduct a hearing on the matter, and correct the record accordingly. However, there are several reasons to believe that the instructions contained in the legal file are, in fact, the instructions received by the jury.

First, the instructions are numbered sequentially. If, as Respondent suggests, these were only “draft instructions that ultimately were not given to the jury” (Resp. Br. 36), there was no reason for them to be numbered at all. It is more reasonable to believe that the instructions were numbered after they were discussed and determined to be final.

Secondly, the wording of Instructions No. 8 and No. 10 correspond with the wording of Counts 4 and 6 of the Indictment, which charged that Jeff committed first degree assault on a law enforcement officer by attempting to kill or cause serious physical injury to Folsom (Count 4) and Mertens (Count 6) by “shooting him” (LF 20-21). Beyond the obvious question of how the Franklin County Prosecutor was able to obtain an Indictment from the grand jury in the first place when the evidence did not support such charges, it is reasonable to assume that the State’s instructions tracked the original charging document.

Thirdly, it is obvious that the assault instructions were confusing to the jury. This is because, during its deliberations, the jury sent a note asking for a definition of assault in the first-degree (LF 193; TR 645). One obvious reason for such a question is that Instructions No. 8 and No. 10 submitted that Jeff actually shot the officers. The jury had every right to be confused since the evidence did not comport with these Instructions.

Finally, the e-filing entry on CaseNet for Jeff's case in the trial court reflects that these exact instructions that were certified by the Circuit Clerk and included in the legal file, were submitted and filed on October 8, 2013, the first day of trial, and they were labeled "FINAL." Even if the trial court corrected its own version before reading it to the jurors, there is no indication that a corrected version was submitted to the jury. Rather, the clerk's office recorded that the instructions were "final" – the reasonable inference being that they were the ones submitted to the jury.

Jeff does not concede that the offense was submitted as read by the trial court. It is not at all evident, as suggested by Respondent, that the offense was correctly submitted. Rather, the overwhelming conclusion is that Instruction No. 8, as submitted to the jury, required it to find that Jeff attempted to assault Officer Folsom "by shooting him." (LF 178). For all the reasons set forth in Points II and III of Jeff's opening brief, this Court must reverse Jeff's conviction under Count IV, and discharge his from that sentence.

IV.²

The trial court erred in overruling Jeff’s motion for judgment of acquittal at the close of all the evidence and in accepting the jury’s guilty verdict for possession of a controlled substance (Count I), and sentencing him upon that conviction, because these rulings violated his right to due process of law as guaranteed by U.S.Const., Amend XIV and Mo.Const., Art.I, §10, in that the evidence was insufficient to establish beyond a reasonable doubt that Jeff possessed the morphine pills that were found in a jointly-controlled area of the home he shared with other people.

Respondent concedes that Jeff did not have actual possession of drugs that were found in his basement, and that the question is whether he had constructive possession (Resp. Br. at 26-27). However, in arguing that the evidence was sufficient to infer that Jeff constructively possessed the drugs, Respondent misstates the evidence.

First, the evidence does not reflect Respondent’s assertion that Jeff screamed to his wife that the police “would be looking for *the* drugs.” The transcript page cited by Respondent reflects nothing about what Jeff screamed (TR

² Respondent made a singular response to Points IV and V of Jeff’s opening brief, which is contained under Argument I of Respondent’s brief. This reply responds to Respondent’s argument as to both Points IV and V.

176), but the next page reflects that Jeff screamed that the police “were looking for drugs.” (TR 177). Respondent’s version of the facts, which is not borne out by the record, is more incriminating because it assumes that Jeff knew that *the* drugs existed in the house. What the record truly reflects is that Jeff was warning the others in the house that the police wanted to search for drugs – any drugs.

More importantly, Respondent completely ignores that Jeff shared a house with at least two other people. In the basement where the drugs were located was a bedroom belonging to Jeff’s teenaged son (TR 266-267). Jeff’s presence on shared premises was not enough to connect him with the drugs. *State v. Yarber*, 5 S.W.3d 592, 594 (Mo. App. S.D. 1999). And his proximity to the contraband, alone, does not tend to prove ownership or possession as among several persons who share the premises. *State v. Bowyer*, 693 S.W.2d 845, 847 (Mo. App. W.D. 1985). There was no evidence presented that Jeff was the only person with access to this common area or that he had superior access to the area, as Respondent seems to suggest (Resp. Br. 30).

The trial court was correct in stating that the evidence to support the drug charges was “weak” (TR 543). But it should have granted Jeff’s motions for judgment of acquittal on both of the drug charges. This Court must reverse Jeff’s convictions under Counts I and III, and order his discharged.

VI.

The trial court abused its discretion in overruling Jeff’s motion to sever the count of judicial tampering from the remaining counts and erred in joining these counts for trial, violating Jeff’s rights to due process of law and a fair trial guaranteed by U.S.Const.,Amends.VI, XIV and Mo.Const., Art.I,§10,18(a), in that Jeff was substantially prejudiced since the jurors were likely to consider the evidence for the tampering count—namely, the inflammatory YouTube video—on the other counts, and because the YouTube video would not have been admissible in a trial of the other charges, it was highly prejudicial to Jeff’s right to a fair trial on those charges.

Respondent asserts that Jeff was not prejudiced by the joinder of the judicial tampering count with the other counts, or by the failure of the trial court to sever that count from the others, because the various alleged crimes were “connected” and “intertwined” and that the YouTube video that related only to the tampering charge would have been admissible in a separate trial on the other charges (Resp. Br. at 38-39, 41). Respondent argues that the YouTube video would have been admissible in a separate trial to “provide a complete and coherent picture of the investigation, to prove Mr. Weinhaus’s intent to harm law enforcement officers...and to provide context for the officers’ actions in using force against Mr. Weinhaus.” (Resp. Br. 41). This reasoning cannot withstand scrutiny.

First, Respondent forgets that the trial court itself ultimately found that the YouTube video proved nothing. Indeed, the trial court found that the YouTube video was “offensive, rude and a lot of other things” but that Jeff had First Amendment rights to say the things he said (TR 544-545). Further the Court noted that, “there just isn’t anything there to support the [judicial tampering] charge” without more than the YouTube video (TR 545). Given these statements by the trial court, it is unclear how Respondent believes that the YouTube video would be admissible to prove anything, and especially Jeff’s intent.

Secondly, the YouTube video would not be admissible to provide a “complete and coherent picture of the investigation.” Respondent mischaracterizes this exception. In *State v. Harris*, 870 S.W.2d 798, 810 (Mo. banc 1994), the Supreme Court explained the exception as follows: “An additional exception is recognized for evidence of uncharged crimes that are part of the circumstances or the sequence of events surrounding the offense charged. This evidence is admissible to present a complete and coherent picture of the events that transpired.” But such evidence is admissible only when it has a legitimate tendency to prove the defendant guilty of the *crime charged*. *State v. Pennington*, 24 S.W.3d 185, 190-91 (Mo. App. W.D. 2000). Thus, evidence of other crimes has been admitted to present a complete and coherent picture where it is part of the *res gestae* of the charge being tried. *Id*; *State v. Flenoid*, 838 S.W.2d 462, 467 (Mo. App. E.D. 1992). It has also been admitted where it was “a continuation of a

sequence of events” that occurred only hours later after a murder. *State v. Skillicorn*, 944 S.W.2d 877, 887 (Mo. banc 1997).

Again, the proper exception requires that the evidence of the uncharged crime be “part of the circumstances or the sequence of events surrounding the offense charged.” *Pennington*, 24 S.W.3d at 191; *State v. Conley*, 938 S.W.2d 614, 620 (Mo. App. E.D. 1997). “Evidence of other crimes is highly prejudicial and should be received only when there is strict necessity.” *State v. Williams*, 804 S.W.2d 408, 410 (Mo. App. S.D. 1991). In the present case, the YouTube video, which formed the basis for the judicial tampering charge that was later thrown out, was not a part of the circumstances or sequence of events surrounding the assault charges.

Although Respondent argues that Jeff’s past acts of alleged misconduct may have helped to provide a “complete and coherent picture” of Folsom and Mertens’ actions, the evidence also is not admissible under this exception because evidence of other crimes or misconduct is not admissible to explain the motive of a *witness* in the course of the offense charged. *See Pennington*, 24 S.W.3d at 191. Therefore, the YouTube video would not be admissible to explain the motive of Folsom and Mertens for shooting Jeff.

Respondent spends the first three pages of its brief reciting the content of the YouTube video that was thrown out by the trial court. It was thrown out because it was insufficient to support a criminal charge. Why, then, does Respondent lead with this YouTube video and spend so much time emphasizing

the inflammatory, albeit protected, rhetoric contained therein? Because it paints Jeff in a very bad light. Respondent knows it, and the Franklin County prosecutor wanted the jury to know it. And it served its purpose. After watching that YouTube video, nothing that the trial court could say could unring that bell. A generic statement to the jury that the count of tampering with a judicial officer was “no longer an issue in this case” was insufficient to ameliorate the prejudice (TR 562).

There is no logical reason why the trial court waited until after the evidence was presented to decide that the YouTube video should never have formed the basis of a tampering charge in the first place. The video itself had not changed since the pretrial arguments were heard. The prejudice resulting from the video on the remaining counts was evident, obvious and clear, and it was not strictly necessary to keep them joined together. The trial court erred in failing to sever the counts on Jeff’s motion. This Court must reverse for a new trial.

VII.

The trial court plainly erred in failing to declare a mistrial *sua sponte* after it granted Jeff's motion for judgment of acquittal of judicial tampering, or instruct the jury that it could not consider the YouTube video as evidence of Jeff's guilt on any charge, and these omissions denied Jeff his rights to due process and a fair trial before an impartial jury guaranteed by U.S.Const., Amends.VI, XIV and Mo.Const., Art.I,§10,18(a), in that the YouTube video was a bell that could not be unrung after the trial court granted judgment of acquittal as to the only charge to which the video was relevant, and Jeff could not be guaranteed a fair trial on the remaining charges at all, especially where the trial court did not instruct the jury to disregard the YouTube video for all purposes, and it served to paint Jeff as an extremist who is capable of violence, which resulted in manifest injustice on the charge of first-degree assault on a law enforcement officer.

Respondent makes the same argument here as it did in Point VI. For all of the reasons discussed in Jeff's reply to Point VI, this Court must find that the YouTube video was not admissible under any exception for uncharged crimes, that the resulting prejudice from the video was substantial and that the trial court, after dismissing the tampering count – the only count to which the YouTube video was relevant – should have declared a mistrial or, at the very least, instructed the jury not to consider the YouTube video for any purpose. This Court must reverse.

CONCLUSION

For the reasons presented in Jeff's opening brief and herein, under Points I, II, IV and V, Jeff must be discharged from his convictions. Under Points III, VI, VII and VIII, the Court must grant him a new trial.

Respectfully submitted,

/s/ Amy M. Bartholow

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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). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, table of contents, table of authorities, signature block, this certificate of compliance and service, and appendix, the brief contains **3,722** words, which does not exceed the 3,875 words allowed for an appellant's reply brief.

On this 1st day of December, 2014, electronic copies of Appellant's Reply Brief were 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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