WD80152

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

CITY OF RAYMORE, MISSOURI,

Appellant,

vs.

LORI L. O'MALLEY,

Respondent.

On Appeal from the Circuit Court of Cass County
Honorable Daniel Olson, Associate Circuit Judge
Case No. 15CA-CR00149

REPLY BRIEF OF THE APPELLANT

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The City explained in its opening brief that the circuit court never received *any* evidence, including sworn testimony or any other formally admitted evidence, and explained that its recitation of the background facts (i.e., what allegedly happened the day of the dispute and during municipal court proceedings) was based solely on statements of counsel, which are not evidence (Brief of the Appellant ("Aplt.Br.") 2-4, 11, 18-19).

In her statement of facts, Ms. O'Malley ignores the posture of this case and cites her counsel's statements as undisputed evidence (Brief of the Respondent ("Resp.Br.") 4-7) (citing L.F. 16-19; Tr. 12, 15, 22-26, 42, 45-46). This misleadingly implies that her version of events is supported by actual evidence in the record, as opposed to the non-evidentiary assertions of counsel. *See Curry Inv. Co. v. Santilli*, 494 S.W.3d 18, 27 (Mo. App. 2016) (counsel's reference to the substance of requests for admission was a "bare assertion[ ] by counsel" and not evidence of the facts presented).[1] This also misleadingly omits that there *were* factual disputes between the parties on material issues – including whether Mr. Wiseman had a right to access the property in dispute and take the items he removed, whether he was destructive in doing so, and whether Ms. O'Malley's actions in response were reasonable – as the City pointed out both below and in its opening brief (Aplt.Br. 2-5, 16-19; L.F. 20; Tr. 13-14, 24-25, 41, 44, 46-47).

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[1] The City acknowledges that its statements below likewise are not evidence and offers them merely to provide background to the Court and illustrate the parties' factual disputes.

Ms. O'Malley also implies that there was documentary evidence properly before the circuit court because while her counsel was arguing her motion to dismiss, he showed or referred to – supposedly without objection by the City – photographs, a lease, and the municipal court transcript, which purportedly supported her version of events (Resp.Br. 6-7). But the City specifically argued that counsel's reference to these items ***was not*** competent evidence, and in fact the circuit court had no evidence from which it could decide Ms. O'Malley's motion to dismiss:

> [T]his transcript was taken at a – the trial, the original trial before the municipal division. This is a trial de novo, and that means that it's as if the first trial never took place. So using prior transcripts of – or a transcript of the prior proceeding where she was found guilty and that's the reason we're here, I don't think is proper. There has to be evidence before this Court that her belief that she was protecting her property must be reasonable.

(Tr. 24).

> And I think the defendant is treating this like a summary judgment motion and, of course, you know, there really aren't any facts before you, Judge. I'm just telling you what I anticipate the evidence would be at trial. I don't think there's anything that this Court can rule on, even with this transcript of the prior hearing, which I object to the use of.

(Tr. 25).

> Again, Judge, we're arguing facts that really are better presented under oath at trial. … I'm going to wait till the evidence is in before I can determine whether or not [Ms. O'Malley's defense-of-property instruction is] supported by the facts, and that's what we have a trial for, Judge.

(Tr. 46).

Further, Ms. O'Malley neglects to mention that she *never* formally introduced or offered into evidence any of these purported exhibits, so there was no formal opportunity for the City to object. Plainly, the City objected – to the extent it had an opportunity to do so. The circuit court never formally received these purported exhibits as evidence. Nor were they "constructively" admitted, as they were never marked, identified, testified to, used in cross-examination, or treated by the City as if they had been received into evidence. *Cf. Harris v. Divine*, 272 S.W.3d 478, 483 (Mo. App. 2008) (exhibit constructively admitted where it was marked, identified and testified about, objected to by opposing party, then used by opposing party on cross-examination); *State v. Gott*, 191 S.W.3d 113, 115 n.3 (Mo. App. 2006) (same; exhibits relied on by and provided to jury with consent of both parties). And since these purported exhibits were not admitted below, they are not part of the record before the circuit court and cannot be considered on appeal. *McCormick v. Cupp*, 106 S.W.3d 563, 569 (Mo. App. 2003).

The circuit court had no evidence before it. This Court should reject Ms. O'Malley's arguments otherwise.

Reply as to Point I

In its first point, the City explained that the circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground she was entitled to use reasonable force to defend her property and so the information failed to charge a crime (Aplt.Br. 10-19). Because defense of property is a special negative defense, *not* an element of disorderly conduct, the City did not need to plead or negate that defense to bring a valid information against Ms. O'Malley (Aplt.Br. 11-16).

The City further explained that as a special negative defense, defense of property becomes relevant only if the defendant meets her initial burden of producing evidence *at trial* to support it, so the circuit court could not make a pretrial ruling on its applicability in Ms. O'Malley's case (Aplt.Br. 13-14, 16-18). And even if the circuit court somehow *could* make such a determination at the pretrial stage, in this case it had no evidence before it from which to do so (Aplt.Br. 18-19).

A. Ms. O'Malley concedes that defense of property is a special negative defense, not an element of disorderly conduct, and so the City did not need to plead or negate it in its information.

In her response, Ms. O'Malley does not dispute that defense of property is a special negative defense in which she carries the initial burden of injecting the issue (Resp.Br. 8-9). She does not argue that the City was required to plead or negate the defense in the information, nor does she contend that the information was missing an essential element or that it failed to apprise her of the essential facts constituting the alleged offense

(Resp.Br. 8-12). Ms. O'Malley therefore tacitly concedes the City's point that the information was sufficient on its face.

B. The undisputed material facts (if any) did not conclusively establish Ms. O'Malley's defense-of-property defense, the law of Missouri provides no mechanism for a pretrial determination of this defense, and so Ms. O'Malley was not entitled to dismissal as a matter of law.

Ms. O'Malley nonetheless argues that the City's information failed to charge a crime because, regardless of whether defense of property is normally an issue to be determined at trial, in this case the City (through counsel's statements) conceded the facts necessary to establish the defense (Resp.Br. 8-9). According to Ms. O'Malley, the City's supposed factual concessions meant that her defense both was: (1) capable of determination without trial of the general issue, so the circuit court's pretrial ruling was proper under Rule 24.04(b)(1); and (2) established conclusively under the undisputed facts, so the circuit court's ruling was correct (Resp.Br. 9-12).

There are two fundamental problems with this argument. First, it incorrectly presupposes that there was evidence before the circuit court and that the material facts were undisputed, both of which are not true. *Supra* at 1-3, 6-7. Second, citing no authority, it assumes that in some circumstances a defense-of-property defense can be decided as a matter of law, and so can be an appropriate basis for a pretrial dismissal. But as the City explained, defense of property *always* is a question of *trial evidence* and so cannot be decided as a matter of law at the pretrial stage (Aplt.Br. 13-14, 16-18).

1. The undisputed material facts (if any) did not conclusively establish Ms. O'Malley's defense-of-property defense.

As the City explained in its opening brief (Aplt.Br. 18-19) and *supra* at 1-3, the circuit court had *no evidence* before it, and an attorney's statements are not evidence. *Curry Inv. Co.*, 494 S.W.3d at 27. The City in no way agreed or acquiesced that counsel's statements were evidence by "represent[ing] to the trial court what its evidence *would be*," as Ms. O'Malley now argues (Resp.Br. 9) (emphasis added). The City specifically argued below that despite statements and arguments from both parties' counsel, the circuit court had no evidence before it from which it could make a ruling on Ms. O'Malley's defense-of-property defense (Tr. 24-25). Her suggestion that counsels' statements became "evidentiary facts" simply because the City outlined its anticipated trial evidence (Resp.Br. 8-9) is without merit.

But even if the circuit court somehow had evidence before it, the parties disputed material facts that bore on the applicability of Ms. O'Malley's defense-of-property defense. As the City explained, a defendant asserting defense of property must inject the issue at trial by producing evidence that she used physical force "when and to the extent … she *reasonably* believe[d] it necessary to prevent what … she *reasonably* believe[d] to be the commission … of stealing, property damage or tampering." § 563.041, R.S.Mo. (emphasis added) (Aplt.Br. 13-14, 17-18). The touchstone of this defense is the *reasonableness* of the defendant's beliefs and actions under the circumstances, which the trier of fact is free to accept or reject.

The City pointed out below, in its opening brief, and *supra* at 1-3 that the parties disputed several material facts relevant to the defense, including: (1) whether Mr. Wiseman had a right to access the property in dispute and take the items he removed; (2) whether he was destructive in doing so; and most importantly (3) whether Ms. O'Malley's beliefs and actions in response to the alleged theft and destruction of property were reasonable under the circumstances (Aplt.Br. 2-5, 16-19; L.F. 20; Tr. 13-14, 24-25, 41, 44, 46-47). Ms. O'Malley's attempt to recast the dispute as a purely "legal issue" is unsupported by the record. Further, *even if* the only dispute was whether Ms. O'Malley reasonably believed the property she was protecting was her own, as she claims (Resp.Br. 10-11), the reasonableness of her belief ***still*** is a question for the trier of fact at trial. *See* MAI-Cr.3d 306.12.

The undisputed material facts (if any) did not conclusively establish Ms. O'Malley's defense-of-property defense. Her arguments otherwise are without merit.

2. The law of Missouri provides no mechanism for a pretrial determination of a defense-of-property defense, and so Ms. O'Malley was not entitled to dismissal as a matter of law.

The City explained that because defense of property is a question of *trial evidence*, and is only submitted to the trier of fact if the defendant meets her initial burden to produce evidence supporting the defense, it is not "capable of determination without trial of the general issue" and so is not amenable to pretrial disposition under Rule 24.04(b)(1) (Aplt.Br. 14-14, 16-18).

Like Rule 24.04(b)(1), its federal counterpart, Fed. R. Crim. P. 12(b)(2) (2002)[2] authorizes a trial court to resolve motions "that the court can determine without a trial of the general issue." *See State v. Wright*, 431 S.W.3d 526, 533 n.12 (Mo. App. 2014) (comparing Rule 24.04(b)(1) to Fed. R. Crim. P. 12(b)(2)); *State v. Coor*, 740 S.W.2d 350, 354-55 (Mo. App. 1987) (same).

> In a criminal case, the "general issue" is defined as evidence relevant to the question of guilt or innocence. … Thus, the [U.S.] Supreme Court has instructed, Rule 12 permits pretrial resolution of a motion to dismiss the indictment only when trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense. … If contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion, Rule 12 doesn't authorize its disposition before trial.

United States v. Pope, 613 F.3d 1255, 1259 (10th Cir. 2010) (citations omitted) (emphasis in the original); *see also Coor*, 740 S.W.2d at 354-55 (defense of double jeopardy did not implicate the defendant's guilt or innocence and so could be determined without trial of the general issue).

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[2] Fed. R. Crim. P. 12 was amended in 2014 to substitute the more modern phrase "trial on the merits" for the archaic phrase "trial of the general issue," and the substance of (b)(2) was moved to (b)(1). *See* Fed. R. Crim. P. 12, Advisory Committee Notes, 2014 Amendments. No change in meaning was intended. *Id.*

The defense-of-property defense directly implicates the defendant's guilt or innocence. "Inherent in [its] concept … is the idea that the act charged was committed, but by reason of the defense, it did not possess the quality of criminality." *State v. Quisenberry*, 639 S.W.2d 579, 583 n.8 (Mo. banc 1982). If the trier of fact finds that the defense applies, then otherwise-criminal conduct is deemed noncriminal and the defendant must be acquitted. *See* MAI-Cr.3d 306.12 ("the use of force to protect property is lawful in certain situations" and if the defense applies "you must find the defendant not guilty"). Ms. O'Malley's suggestion that the "general issue" of a criminal trial only concerns the elements of the offense, regardless of any applicable defenses bearing on the defendant's guilt or innocence, plainly is incorrect (Res.Br. 10-11).

Defense of property is exactly the type of defense that *must* be determined in a trial of the general issue – i.e., a trial where the guilt or innocence of the defendant is determined – and so *cannot* be determined pretrial under Rule 24.04(b)(1). As this Court acknowledged in *Wright*, "there is no currently recognized procedural mechanism in Missouri akin to summary judgment in the criminal context." 431 S.W.3d at 533. Rule 24.04(b)(1) provides no authority for pretrial consideration of defenses that are, by definition, questions of trial evidence, and does not permit a trial court to look at evidence outside the charging document to decide a motion o dismiss. *See id.* at 533 n.12 (citing *State v. Keeth*, 203 S.W.3d 718, 722-23 (Mo. App. 2006)); *see also State v. Dowell*, 311 S.W.3d 832, 837 (Mo. App.

2010) (sustaining a motion to dismiss based on affirmative defense requires the defense to be irrefutably established *by the pleadings*).[3]

Ms. O'Malley fails to address *Wright* and distinguishes *Keeth* only on the basis that it involved a motion to dismiss for insufficient evidence, not a motion to dismiss based on defense of property or a similar defense (Resp.Br. 10-11). This distinction makes no difference, because both an insufficient-evidence defense and a defense-of-property defense ultimately are questions of *trial evidence* that cannot be resolved without a trial at which the defendant's guilt or innocence is determined. *Keeth* is directly on point with this case.

The only decision Ms. O'Malley cites in support of her position that the circuit court properly made a pretrial ruling on her defense is *State v. Topel*, 322 S.W.2d 160 (Mo. App. 1959) (Resp.Br. 9-10). In *Topel*, the defendant was subpoenaed to testify at a hearing on a worker's compensation claim. *Id.* at 161. She refused to answer a question about where she lived, and subsequently was charged with contempt for this refusal. *Id.* She then moved to dismiss the contempt charge and presented a transcript of the worker's compensation hearing, which showed that her response to the question about where she lived was "I refuse to answer any questions because I might incriminate myself." *Id.* at 161-62. The trial court dismissed the contempt charge and this Court affirmed on appeal, reasoning that "the

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[3] Unlike Missouri courts, federal courts are split on the issue of whether a trial court can look beyond the charging document to undisputed facts in deciding a pretrial motion to dismiss. *Wright*, 431 S.W.3d at 533 n.12.

defendant could not be charged with contempt for claiming her immunity" from self-incrimination. *Id.* at 162-63.

Topel is inapposite. Unlike defense of property, which is a defense to be decided by the trier of fact after hearing the trial evidence, the determination of whether the privilege against self-incrimination applies is solely a question for the court. *Roberts v. United States*, 445 U.S. 552, 560 n.7 (1980); *State v. Lingle*, 140 S.W.3d 178, 185 (Mo. App. 2004). It follows that when a defendant raises this privilege as a defense to a contempt charge, it is the court, not the trier of fact, who decides the applicability of the defense. So, the defense is "capable of determination without trial of the general issue" and is amenable to pretrial resolution under Rule 24.04(b)(1).

Finally, Ms. O'Malley argues that "adopting the City's construction that no facts outside the [charging document] can ever be considered … would substantially destroy the very purpose behind Rule 24.04(b)(1)" and would preclude a trial court from "ever passing pre-trial on such well-recognized doctrines as 'void for vagueness or 'unconstitutionally as applied'" (Resp.Br. 11-12). This is incorrect. As long as the pretrial challenge – constitutional or otherwise – involves only questions of law and does not depend on the resolution of facts outside the charging document bearing on the question of guilt or innocence, it can be determined by the court without a trial of the general issue. *Cf. Pope*, 613 F.3d at 1262.

The law of Missouri provides no mechanism for pretrial determination of a defense-of-property defense in a criminal case. The defense bears directly on the defendant's guilt or innocence of the alleged offense and

always is a question for the trier of fact based on the trial evidence. Ms. O'Malley was not entitled to dismissal as a matter of law and her arguments otherwise are without merit.

Reply as to Point II

In its second point, the City explained that the circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground that the Ordinance is unconstitutionally vague (Aplt.Br. 20-26). The Ordinance, which prohibits "assembl[ing] or congregat[ing] with another or others for the purpose of causing, provoking, or engaging in any fight or brawl," is not unconstitutionally vague because it gives adequate warning in plain terms of its proscribed conduct and is sufficiently definite to protect against arbitrary enforcement (Aplt.Br. 20-26). The City specifically noted that Ms. O'Malley's defense-of-property defense has no bearing on whether the Ordinance gives fair warning of the proscribed conduct and it does not make the Ordinance vague either on its face or as applied (Aplt.Br. 25-26).

In her response, Ms. O'Malley does not address a single decision the City cited in its opening brief or seriously attempt to refute the City's argument that the plain language of the Ordinance gives fair warning of the proscribed conduct and protects against arbitrary enforcement (Resp.Br. 13-16). Instead, she argues that because her actions were lawful under the circumstances of the case – that is, because she claims she reasonably was acting in defense of property – the Ordinance did not "advise" her that her conduct was unlawful and so it was vague as applied (Resp.Br. 13-14).[4]

The obvious problem with this argument, of course, is that the lawfulness of her actions in this case depends on whether the trier of fact

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[4] Ms. O'Malley appears to abandon any claim that the Ordinance is unconstitutionally vague on its face.

finds that her beliefs and actions were reasonable under the circumstances and that her otherwise-criminal behavior was justified (Aplt.Br. 13-14, 16-18; *supra* at 6-7). That the trier of fact ultimately may find Ms. O'Malley's actions were justified does not mean the Ordinance fails to give fair warning of potentially-criminal conduct.

Looked at another way, if the trier of fact finds that Ms. O'Malley's actions were *not* justified, then Ms. O'Malley has no argument that that the Ordinance failed to warn her of the proscribed conduct. The potential applicability of her defense simply has nothing to do with whether the Ordinance is vague. *See United States v. Christie*, 825 F.3d 1048, 1065-66 (9th Cir. 2016) (rejecting argument that penal statute was unconstitutionally vague because defendants would have difficulty predicting in advance whether potentially-applicable affirmative defense would immunize them from liability).

Ms. O'Malley also suggests that the Ordinance must be struck down because – as applied to this case – it conflicts with § 563.041, which permits the use of physical force to defend property in certain circumstances (Resp.Br. 13-14). This argument does not remotely relate to unconstitutional vagueness, is obviously without merit, and would lead to absurd results if accepted.

A municipal ordinance conflicts with a state statute if it prohibits what the statute permits or vice-versa. *Morrow v. City of Kan. City*, 788 S.W.2d 278, 281 (Mo. banc 1990). The Ordinance does not prohibit what the defense-of-property statute permits; it is *subject to* that statute. If an action is

justified under the statute, then it also would not violate the Ordinance. But again, that is a question for the trier of fact in determining the defendant's guilt or innocence during a trial on the merits. So, there is no conflict between the Ordinance and the statute.

If this Court accepted Ms. O'Malley's argument, then no municipality in Missouri ever could prosecute an assault charge, because § 563.031, R.S.Mo., permits the use of physical force to defend people in certain circumstances. Put another way, because § 563.031 allows a person to punch another in the face in legitimate self-defense, Ms. O'Malley's argument would mean no city constitutionally could enact an ordinance prohibiting punching people in the face generally. Clearly, that is absurd. The Court should reject such an irrational result.

The circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground that the Ordinance is unconstitutionally vague. Ms. O'Malley's arguments otherwise are without merit.

Reply as to Point III

In its third point, the City explained that the circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground that the Ordinance is unconstitutionally overbroad (Aplt.Br. 27-35). The Ordinance, which prohibits "assembl[ing] or congregat[ing] with another or others for the purpose of causing, provoking, or engaging in any fight or brawl," plainly is directed at conduct (and related speech) tending to incite immediate violence and so fairly may be construed to apply to "fighting words" speech unprotected by the First Amendment to the U.S. Constitution or Mo. Const. Art. I, § 8 (Aplt.Br. 29-35).

Ms. O'Malley's response entirely ignores the City's argument that the Ordinance narrowly, constitutionally regulates unprotected "fighting words" conduct and related speech (Resp.Br. 17-19). Her argument is largely unclear, but she appears to contend that because she was acting in lawful defense of her property: (1) her alleged speech and conduct did not constitute "fighting words" (Resp.Br. 14); and (2) the Ordinance is overbroad as applied to her because it regulated her lawful conduct (Resp.Br. 17-19).[5]

As the City has explained extensively, the lawfulness of Ms. O'Malley's actions in this case depends on whether the trier of fact finds that her beliefs

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[5] Ms. O'Malley appears to abandon any claim that the Ordinance is unconstitutionally overbroad on its face. The City addresses Ms. O'Malley's as-applied overbreadth claim, though it is unclear whether such a claim even is cognizable. *See McCullen v. Coakley*, 708 F.3d 1, 11 (1st Cir. 2013), *rev'd on other grounds by McCullen v. Coakley*, 134 S.Ct. 2518 (2014).

and actions were reasonable under the circumstances and that her otherwise-criminal behavior was justified (Aplt.Br. 13-14, 16-18; *supra* at 6-7). If the trier of fact finds her actions were justified, then she did not violate the Ordinance, and the Ordinance does not impermissibly prohibit her lawful conduct. The potential applicability of her defense-of-property has no bearing on whether the Ordinance is overbroad as applied to her. *Cf. Christie*, 825 F.3d at 1065-66 (potential applicability of affirmative defense does not make penal statute unconstitutionally vague).

The City agrees with Ms. O'Malley's general proposition that laws that regulate both unprotected and protected speech may be struck down as overbroad (Resp.Br. 17-18). In its opening brief, the City thoroughly discussed the decisions Ms. O'Malley cites and explained why those decisions support the constitutionality of the Ordinance in this case, which applies only to unprotected "fighting words" speech (Aplt.Br. 29-34). Ms. O'Malley has no meaningful response.

The circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground that the Ordinance is unconstitutionally overbroad. Ms. O'Malley's arguments otherwise are without merit.

Conclusion

The Court should reverse the circuit court's dismissal of the City's prosecution and should remand this case for further proceedings.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2016 in Century Schoolbook, size-13 font, which is not smaller than Times New Roman, 13-point font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule XLI, as this brief contains 4,043 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that on June 2, 2017, I filed a true and accurate Adobe PDF copy of this reply brief via the Court's electronic filing system, which notified the following of that filing:

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