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

BRIEF OF THE APPELLANT

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Preliminary Statement

The City of Raymore appeals from the circuit court's dismissal of its prosecution for a violation of its municipal "disorderly conduct" 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."

The defendant was convicted in Raymore Municipal Court and requested a trial *de novo* in circuit court. She then moved to dismiss the case on three grounds: (1) the City's information failed to charge an offense because she was acting in lawful defense of her property; (2) the Ordinance is unconstitutionally vague; and (3) the Ordinance is unconstitutionally overbroad. The circuit court dismissed the case without stating its reasons.

This was error. First, a defense-of-property defense only can be submitted to the factfinder if the defendant first meets her burden to produce supporting evidence. It is not an essential element of disorderly conduct, so the City did not need to plead or negate it in the information. And even if the court could make a pretrial ruling on the merits of this defense, it never received any evidence, so it had no evidence on which to base its decision.

Second, the Ordinance is not vague because it uses plain words understood by people of ordinary intelligence, to give fair warning that it is illegal to gather for the purpose of causing a fight, and it is not subject to arbitrary enforcement. Third, it is not overbroad because it fairly may be construed to apply to unprotected "fighting words" speech inciting violence.

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

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Jurisdictional Statement

This is a city's appeal from an order of the Circuit Court of Cass County dismissing its municipal ordinance violation charge against a defendant before trial.

This case does not involve the validity of a Missouri statute or constitutional provision or of a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction, and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Cass County. Under § 477.070, R.S.Mo., venue lies in the Western District.

Statement of Facts

A. Background and municipal court proceedings

In September 2014, Raymore, Missouri police cited Respondent Lori O'Malley for disorderly conduct, a municipal ordinance violation under City of Raymore Municipal Code § 210.230 ("the Ordinance") (L.F. 6). A copy of the Ordinance was produced below and is included in the appendix to this brief (Tr. 44; Appx. A8). The Raymore Municipal Court convicted Ms. O'Malley after a bench trial and she requested a trial *de novo* in the Circuit Court of Cass County (L.F. 9-10). Because the circuit court never actually received any evidence, the following background facts are based solely on the charges, statements, and arguments of counsel:

Ms. O'Malley is a business owner in Raymore who leased a portion of her commercial building to Warren Wiseman to operate a pizza restaurant (L.F. 16). According to Ms. O'Malley, Mr. Wiseman agreed in the lease that items he physically attached to the real property would become part of the real property and would belong to her when the lease expired (L.F. 16). Mr. Wiseman's business closed and he moved out of the building, leaving behind some countertops and venting he had installed (L.F. 16).

Ms. O'Malley and Mr. Wiseman disagreed about the nature of their relationship after Mr. Wiseman moved out of the building – she claimed he had abandoned the lease and so was a former tenant with no right of access to the property, whereas he believed he still was a tenant because the lease had not yet expired (Tr. 12, 14-15, 24-26, 41-42, 44-45).

Mr. Wiseman claimed he had an appointment with Ms. O'Malley at the property on September 13, 2014, but she was not there when he arrived (L.F. 20). He had no access because she had changed the locks the day before, so he called police (L.F. 20). Ms. O'Malley claimed that Mr. Wiseman showed up with his parents and the police "in tow," and the police ordered her to open the door to the Wisemans (L.F. 16; Tr. 12). The police assured her Mr. Wiseman would remove only personal property and not the fixtures of the building, so she let the Wisemans inside (L.F. 16; Tr. 12).

Ms. O'Malley alleged that at that point, the Wisemans began ripping out countertops, venting, and door trim with power tools and chains (L.F. 17; Tr. 12). Conversely, Mr. Wiseman said he had paid for and installed all items removed that day, and except for a part of the bar, he unscrewed or dismounted those items (L.F. 20).

The police would not stop what Ms. O'Malley viewed to be the theft and destruction of her property (L.F. 17; Tr. 13). The City alleged she then commented, "Well, I'm going to go get some big guys and throw them out," approached some people nearby, and returned to the business with those third parties, where a disturbance occurred (L.F. 13-14; Tr. 16-17, 48-49). Ms. O'Malley disputed that she "recruited" anybody to assist her, and instead claimed these third parties saw what was going on, were concerned about the alleged abuse of power, and came over to support her (Tr. 16-17, 48-49).

Raymore police officers cited Ms. O'Malley for disorderly conduct under the Ordinance, alleging she "[a]cted in a violent manner by pushing a door against another; [f]ighting in public" (L.F. 6). The Raymore Municipal Court

convicted her after a bench trial, and she requested a trial *de novo* before the Circuit Court of Cass County (L.F. 9-10).

B. Circuit court proceedings

The City filed an amended information in the circuit court, charging Ms. O'Malley for disorderly conduct under section (A)(5) of the Ordinance, alleging that on September 13, 2014, she

> did then and there assemble or congregate with another or others for the purpose of causing, provoking, or engaging in any fight or brawl, to wit: did recruit and bring onto the scene a number of unknown male parties with the intention of "find[ing] some big guys to throw [Larry D. Wiseman and Warren O. Wiseman] out" of the building in which they were located.

(L.F. 7; Appx. A2).

Ms. O'Malley pleaded not guilty and requested a jury trial (L.F. 2, 21; Tr. 3-4). She moved *in limine* to exclude speculation about what she said, if anything, to the third parties before the disturbance, and to exclude evidence that she had initiated a civil suit against the Wisemans for property damage (L.F. 13-14). The circuit court heard arguments on the motion but did not receive any evidence (Tr. 10-19).

Several months later, Ms. O'Malley moved to dismiss the case (L.F. 16-19; Appx. A4-7). She argued that even taking as true the City's allegation she recruited some big guys to throw the Wisemans out of the building, she had the right under § 563.041, R.S.Mo., to use or threaten physical force to defend her property, and so the information failed to charge a crime (L.F. 17-

18; Appx. A5-6). She also argued the Ordinance was unconstitutionally vague and overbroad because it did not adequately inform her that "recruiting" others to forcibly eject a thief was illegal, and because it impinged on her constitutionally-protected speech and property rights (L.F. 18; Appx. A6).

The City agreed generally that while a person may use reasonable force to defend her property, defense of property is an affirmative defense Ms. O'Malley had to raise at trial and it had no bearing on whether the City's information sufficiently charged a crime (L.F. 20). As to the constitutionality of the Ordinance, the City argued that Ms. O'Malley had waived the issue because she failed to raise it earlier despite ample opportunity to do so (L.F. 21).

The circuit court heard arguments on the motion to dismiss but again did not receive any testimony or admit any exhibits into evidence (Tr. 22-50). The City emphasized several times that there was no evidence before the court on which it could make any determination about the reasonableness of Ms. O'Malley's actions in her purported defense of property (Tr. 24, 26, 41, 46-47). The parties did not argue the constitutional issue further (Tr. 42-50).

The court summarily granted Ms. O'Malley's motion to dismiss without giving any reasons (L.F. 23; Tr. 50; Appx. A1). The City then timely appealed to this Court (L.F. 24-25).

Points Relied On

I. 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 *because* an information is sufficient if it contains all essential elements of the offense and clearly apprises the defendant of the facts constituting the offense, it need not plead or negate potential defenses, and defense of property under § 563.041, R.S.Mo., is a special negative defense that the defendant must prove with evidence at trial *in that* the information contained the essential elements of disorderly conduct under the Ordinance and the material facts constituting the offense, it did not have to allege Ms. O'Malley was not reasonably acting in defense of her property under § 563.041, and there was no evidence before the court on which it could rule on the merits of that defense.

State v. O'Connell, 726 S.W.2d 742 (Mo. banc 1987)

State v. Achter, 514 S.W.2d 825 (Mo. App. 1974)

State v. Dowell, 311 S.W.3d 832 (Mo. App. 2010)

State v. Wright, 431 S.W.3d 526 (Mo. App. 2014)

II. The circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground that the Ordinance is unconstitutionally vague in violation of U.S. Const. Amend. XIV or Mo. Const. Art. I, § 10 *because* an ordinance is not vague if it gives adequate notice of proscribed conduct and protects against arbitrary enforcement *in that* the Ordinance gives fair warning in plain terms that it is illegal to gather for the purpose of causing a fight and is sufficiently definite to protect against arbitrary enforcement.

State v. Koetting, 616 S.W.2d 822 (Mo. banc 1981)

State v. Faruqi, 344 S.W.3d 193 (Mo. banc 2011)

State v. Vaughn, 366 S.W.3d 513 (Mo. banc 2012)

City of Pagedale v. Murphy, 142 S.W.3d 775 (Mo. App. 2004)

III. The circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground that the Ordinance is unconstitutionally overbroad in violation of U.S. Const. Amend. I or Mo. Const. Art. I, § 8 *because* an ordinance is not overbroad if it fairly may be construed in a manner that limits its application to a core of unprotected expression *in that* the Ordinance fairly may be construed to apply to unprotected "fighting words" speech.

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)
City of St. Louis v. Tinker, 542 S.W.2d 512 (Mo. banc 1976)
State v. Carpenter, 736 S.W.2d 406 (Mo. banc 1987)
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Argument

Standard of Review as to All Points

Generally, this Court reviews a trial court's ruling on a motion to dismiss an ordinance violation prosecution for abuse of discretion. *City of Columbia v. Henderson*, 399 S.W.3d 493, 494 (Mo. App. 2013). "A trial court abuses its discretion when its decision is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* (quotation marks omitted). But when a trial court's decision to dismiss a charge turns on a question of law, including whether an information fails to state an offense or whether an ordinance is unconstitutional, this Court's review is *de novo*. *Id.; State v. Metzinger*, 456 S.W.3d 84, 89 (Mo. App. 2015); *State v. Meacham*, 470 S.W.3d 774, 745-46 (Mo. banc 2015).

Further, the circuit court did not state its reasons for granting Ms. O'Malley's motion to dismiss. "If a trial court fails to state a basis for its dismissal, this Court presumes the dismissal was based on the grounds in the motion to dismiss. If the dismissal is justified on any ground alleged in the motion, the judgment will be affirmed." *State v. Merritt*, 467 S.W.3d 808, 810-11 (Mo. banc 2015) (citations and quotation marks omitted).

I. 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 *because* an information is sufficient if it contains all essential elements of the offense and clearly apprises the defendant of the facts constituting the offense, it need not plead or negate potential defenses, and defense of property under § 563.041, R.S.Mo., is a special negative defense that the defendant must prove with evidence at trial *in that* the information contained the essential elements of disorderly conduct under the Ordinance and the material facts constituting the offense, it did not have to allege Ms. O'Malley was not reasonably acting in defense of her property under § 563.041, and there was no evidence before the court on which it could rule on the merits of that defense.

* * *

The first ground Ms. O'Malley alleged in her motion to dismiss was that the City's information against her failed to charge a "crime"[1] because she

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[1] Prosecutions for municipal ordinance violations are not truly "criminal" proceedings, but instead are civil proceedings with quasi-criminal aspects. *Tupper v. City of St. Louis*, 468 S.W.3d 360, 371 (Mo. banc 2015). The rules of criminal procedure applicable to misdemeanors apply to trials *de novo* in circuit court. *Id.* at 371-72; Rule 37.74. An appeal from a trial *de novo* of a municipal ordinance violation proceeding is governed by the rules for an appeal of a misdemeanor conviction. *City of St. Louis v. Hill*, 488 S.W.3d 156, 159 (Mo. App. 2016).

had the right under § 563.041 to use reasonable force to defend her property (L.F. 17-18; Appx. 5-6).

This argument fails for two reasons. **First**, defense of property is not an essential element of the crime of disorderly conduct that the City had to plead in the information. Instead, it is a special negative defense the defendant must inject: the defendant has the burden of producing evidence to support it, and the City need not plead or negate it in the information. **Second**, even assuming *arguendo* that the circuit court could make a pretrial ruling on the merits of the defense, the circuit court had ***no evidence*** from which it could do so, as the proceeding was a trial *de novo* and Ms. O'Malley never submitted any testimony or other evidence.

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

A. The information was sufficient because it stated the essential elements of disorderly conduct and clearly apprised Ms. O'Malley of the essential facts constituting the offense, and it did not need to negate her defense-of-property defense.

The purpose of an indictment or information is to inform the defendant of the charges against her so she can prepare an adequate defense and prevent retrial on the same charges if she is acquitted. *State v. O'Connell*, 726 S.W.2d 742, 746 (Mo. banc 1987). A charging document is sufficient if it contains all essential elements of the offense as set out in the instrument creating the offense and clearly apprises the defendant of the facts constituting the offense alleged. *Id.*; *see also* Rule 23.01 (describing the form

of an indictment or information); *City of Columbia v. Henderson*, 399 S.W.3d 493, 494 n.2 (Mo. App. 2013) (doctrine applies to municipal ordinance violation prosecutions).

Section (A)(5) of the Ordinance provides:

> A. Any person who shall do or engage in the following shall be guilty of disorderly conduct and shall be guilty of a misdemeanor:[2]
>
> …
>
> 5. Any person who shall assemble or congregate with another or others for the purpose of causing, provoking, or engaging in any fight or brawl.

(Appx. A8).

Here, the City's amended information charged Ms. O'Malley with disorderly conduct under this provision because, on September 13, 2014, in Raymore, she

> did then and there assemble or congregate with another or others for the purpose of causing, provoking, or engaging in any fight or brawl, to wit: did recruit and bring onto the scene a number of unknown male parties with the intention of "find[ing] some big guys to throw [Larry D. Wiseman and Warren O. Wiseman] out" of the building in which they were located.

(L.F. 7; Appx. A2).

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[2] *See* Footnote 1, *supra* at 10.

The information directly tracked the Ordinance's language and so contained all essential elements of the offense charged: that Ms. O'Malley "did then and there assemble or congregate with another or others for the purpose of causing, provoking, or engaging in any fight or brawl" (L.F. 7; Appx. A2). Further, it identified the specific conduct constituting the offense: that she "did recruit and bring onto the scene a number of unknown male parties with the intention of 'find[ing] some big guys to throw [Larry D. Wiseman and Warren O. Wiseman] out' of the building in which they were located" (L.F. 7; Appx. A2). Plainly, the information was sufficient to notify Ms. O'Malley of the alleged offense, allow her to prepare an adequate defense, and prevent retrial on the same charge if she were acquitted.

Nonetheless, Ms. O'Malley argued that the information failed to charge a crime because she had the right under § 563.041 to use reasonable force to defend her property (L.F. 17-18; Appx. A5-6). Section 563.041 provides:

> 1. A person may … use physical force upon another person when and to the extent that he or she reasonably believes it necessary to prevent what he or she reasonably believes to be the commission or attempted commission by such person of stealing, property damage or tampering in any degree.
>
> …
>
> 4. The defendant shall have the burden of injecting the issue of justification under this section.

§ 563.041.

But defense of property under this section is a special negative defense, which, just as the statute says, is an issue ***at trial*** that the defendant has the burden of injecting: the defendant has the burden to produce evidence sufficient to put the issue before the trier of fact, after which the prosecution would have the burden of persuasion. § 556.061(3), R.S.Mo.; MAI-Cr. 3d 304.11(E); MAI-Cr. 3d 304.11 – Charts; MAI-Cr. 3d 306.12.

Conversely, the prosecution "bears the burden of disproving special negative defenses beyond a reasonable doubt ***if, but only if,*** the defendant produces evidence interjecting such a defense." *State v. McLemore*, 782 S.W.2d 127, 130 (Mo. App. 1989) (emphasis added).[3] "Inherent in the concept of the special negative defense is the idea that the act charged was committed, but by reason of the defense, it did not possess the qualities of criminality." *State v. Quisenberry*, 639 S.W.2d 579, 583 n.8 (Mo. banc 1982).

This Court and the Supreme Court of Missouri uniformly always have rejected the argument that the prosecution must plead in the charging document those defenses for which the defendant carries the initial burden of producing evidence. This is because

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[3] A special negative defense is like an affirmative defense in that it is not submitted to the trier of fact unless the evidence supports it. *See* § 556.061(2)-(3); MAI-Cr. 3d 304.11(E)-(F). The difference is that the defendant retains the burden of persuasion on an affirmative defense, whereas with a special negative defense the prosecution has the burden to disprove it once the defendant carries her initial burden. *Id.*

> if the ingredients constituting the offense are capable of exact definition, without reference to the exception … such reference may with safety be omitted since the matter contained in the exception … is not descriptive of the offense, but only a matter of defense to be brought forward by the accused ….

State v. Achter, 514 S.W.2d 825, 829 (Mo. App. 1974) (quoting *State v. Bockstruck*, 38 S.W. 317, 320 (Mo. 1896)).

In *Williams v. State*, the information charged the defendant with illegal sale of a stimulant drug. 437 S.W.2d 82, 83 (Mo. 1969). He pleaded guilty but later sought post-conviction relief, arguing the information was faulty because it failed to "negative the exceptions" set out in the drug-sale statute. *Id.* at 84, 86. The Supreme Court rejected his argument, explaining:

> It is true that when the exception constitutes part of the description of the offense sought to be charged the information must negative the exception, and if it does not do so, no offense is charged. But where such exceptions are not part of the statutory definition of the crime … it is not usually necessary to either plead them or prove them. Such exceptions are pure matters of affirmative defense. The persons described in the seven independent clauses or subsections of the [drug-sale statute] are merely those not within the operation and effect of the law denouncing the crime, which is otherwise completely defined without reference to such proviso. That a person comes within the class of persons named in the proviso is a matter of defense

> and the fact that a given defendant charged with the violation of the section does not come within the terms of the proviso ***need not*** be covered by negative averment in the indictment or information.

Id. at 86 (emphasis added); s*ee also Achter*, 514 S.W.2d at 829-30 (collecting cases for 125 years).

Here, disorderly conduct under § (A)(5) of the Ordinance is completely defined without reference to the defense-of-property statute (Appx. A8). So, the City was not required to plead that Ms. O'Malley was *not* acting reasonably in defense of her property, because defense of property is not an element or descriptive of the disorderly-conduct offense. *Achter*, 514 S.W.2d at 829. Instead, the defense purely is a matter that Ms. O'Malley first must inject by producing evidence to support it. *Id.*

The information as it stood sufficiently charged a violation of the Ordinance. The circuit court erred in holding otherwise.

B. The circuit court could not make a pretrial ruling on the merits of Ms. O'Malley's defense-of-property defense, and even if it could there was no evidence before it on which it could make that determination.

1. The circuit court could not make a pretrial ruling on the merits of Ms. O'Malley's defense-of-property defense.

A court may grant a defendant's motion to dismiss based on an affirmative or special negative defense only if that defense is irrefutably established on the face of the plaintiff's pleading – in a criminal case, the

information or indictment. *See State v. Dowell*, 311 S.W.3d 832, 836-37 (Mo. App. 2010); *Murray v. Fleischaker*, 949 S.W.2d 203, 205-06 (Mo. App. 1997). This Court's review of a motion to dismiss assumes every fact in the plaintiff's pleading to be true and gives the plaintiff the benefit of every favorable inference reasonably derived from those facts. *Dowell*, 311 S.W.3d at 837.

As shown above, defense of property is a special negative defense that the City did not need to plead in order to bring a valid information against Ms. O'Malley, and so the City did not include it in the information. Logically, because a court deciding a motion to dismiss considers ***only*** the face of the plaintiff's pleading, any evidence the defendant produced would be irrelevant. As this Court recognized in *State v. Wright*,

> When ruling on a motion to dismiss premised upon a claim that the charging document failed to charge an offense, the court need not examine evidence outside the four corners of the charging document itself …. The trial court's reliance on extensive facts, not included in the information, raises the possibility that the trial court attempted to grant something akin to summary judgment in favor of [the defendant] on the criminal charges. But, unlike in civil cases, ***there is no currently recognized procedural mechanism in Missouri akin to summary judgment in the criminal context.***

431 S.W.3d 526, 533 (Mo. App. 2014) (citations omitted) (emphasis added).

Here, Ms. O'Malley's defense-of-property defense was ***not*** irrefutably established from the face of the information. To the contrary, the defense only would become relevant if Ms. O'Malley first met her burden to produce evidence on which that defense could be submitted to the trier of fact. § 556.061(3); 563.041(4). By definition, whether Ms. O'Malley had met her burden would be a question of *trial evidence*, so it is not the sort of defense "capable of determination without trial of the general issue" and amenable to pretrial disposition under Rule 24.04(b). *See State v. Keeth*, 203 S.W.3d 718, 722-23 (Mo. App. 2006) (sufficiency of prosecution's evidence was a trial issue that could not be determined in pretrial motion to dismiss).

So, the circuit court ***only*** could have granted Ms. O'Malley's defense-of-property defense if it looked to evidence ***not*** included on the face of the information. This was improper at the motion to dismiss stage, and the court erred in doing so. *Wright*, 431 S.W.3d at 533.

2. The circuit court had no evidence before it on which it could rule on Ms. O'Malley's defense.

Further, even if the circuit court somehow could consider evidence outside the information to decide Ms. O'Malley's motion to dismiss, there was ***no evidence*** before it upon which it could make that determination.

The case was before the circuit court was a trial *de novo*, which means that any evidence from the proceedings before the Raymore Municipal Court was irrelevant. *See City of Kan. City v. Johnney*, 760 S.W.2d 930, 931 (Mo. App. 1988) (trial *de novo* in circuit court is a new prosecution that proceeds as if no action had been taken in the municipal court).

Even if the circuit court could have considered the evidence adduced during the municipal court trial, that evidence never formally was introduced or admitted in the circuit court (Tr. 9-19, 22-26, 40-50). The circuit court never heard any sworn testimony or formally received any evidence of any kind. And though defense counsel alleged the defendant's version of events (L.F. 13-19; Tr. 11-19, 22-26, 40-50), ***an attorney's statements and arguments are not evidence***. *State v. Hashman*, 197 S.W.3d 119, 135 (Mo. App. 2006).

Simply put, the City's information *did not* irrefutably establish Ms. O'Malley's defense-of-property defense. The circuit court could not rely on any evidence outside the information to decide the motion to dismiss. Even if it could, it had ***no evidence*** before it.

The circuit court erred in granting Ms. O'Malley's motion to dismiss based on her defense-of-property defense. This Court should reverse the circuit court's dismissal of the City's prosecution and should remand this case for further proceedings.

II. The circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground that the Ordinance is unconstitutionally vague in violation of U.S. Const. Amend. XIV or Mo. Const. Art. I, § 10 *because* an ordinance is not vague if it gives adequate notice of proscribed conduct and protects against arbitrary enforcement *in that* the Ordinance gives fair warning in plain terms that it is illegal to gather for the purpose of causing a fight and is sufficiently definite to protect against arbitrary enforcement.

Additional Standard of Review

This Court reviews a trial court's interpretation of a municipal ordinance *de novo*. *City of Cape Girardeau v. Kuntze*, 507 S.W.3d 89, 92 (Mo. App. 2016). Ordinances are presumed constitutional. *City of Pagedale v. Murphy*, 142 S.W.3d 775, 778 (Mo. App. 2004). Further, ordinances enacted under a municipality's police powers are presumed reasonable. *Id.* The party challenging the validity of the ordinance has the burden of proving it unconstitutional. *See State v. Vaughn*, 366 S.W.3d 513, 517 (Mo. banc 2012).

If an ordinance is susceptible to any reasonable construction that will sustain it, it will not be held unconstitutional. *See Murphy*, 142 S.W.3d at 778; *State ex rel. Payton v. City of Riverside*, 640 S.W.2d 137, 140 (Mo. App. 1982); *K-Mart Corp.* v. *St. Louis Cnty.*, 672 S.W.2d 127, 132 (Mo. App. 1984).

* * *

The second ground Ms. O'Malley alleged in her motion to dismiss was that the Ordinance is unconstitutionally vague in violation of the Fourteenth Amendment to the U.S. Constitution and Mo. Const. Art. I, § 10, because it

did not adequately inform her that "recruiting" others to eject a thief forcibly was illegal (L.F. 18; Appx. A6).

This is without merit. Because the Ordinance gives adequate warning of its proscribed conduct – here, gathering for the purpose of causing a fight, and is sufficiently definite to protect against arbitrary enforcement, it is not unconstitutionally vague. This Court should reverse the circuit court's dismissal of the City's prosecution and should remand this case for further proceedings.

The vagueness doctrine is premised on the due process requirements of Fourteenth Amendment and Art. I, § 10. *Murphy*, 142 S.W.3d at 778; *City of Kan. City v. Thorpe*, 499 S.W.2d 454, 456 (Mo. 1973).

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement .... Due process does not, however, require perfection. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language").

State v. Faruqi, 344 S.W.3d 193, 199-200 (Mo. banc 2011) (citations and quotation marks omitted).

Further, a criminal law's purported vagueness may be mitigated by the existence of a scienter (culpable mental state) requirement, especially with

respect to adequacy of notice of the proscribed conduct. *Vaughn*, 366 S.W.3d at 522.

Nonetheless, when the law in question implicates the freedom of expression under the First Amendment to the U.S. Constitution, the standard of permissible vagueness is stricter so as to prevent a chilling effect on the exercise of that freedom. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603-04 (1967); *City of St. Louis v. Tinker*, 542 S.W.2d 512, 517 (Mo. banc 1976).

Here, § (A)(5) of the Ordinance prohibits "assembl[ing] or congregat[ing] with another or others *for the purpose of* causing, provoking, or engaging in any fight or brawl" (Appx. A8) (emphasis added). Both "assemble" and "congregate" are words of common usage and definition that a person of ordinary intelligence would understand to mean "to bring together" or "to come together," particularly in a crowd. *See* WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 56, 206 (1989). Likewise, "fight" and "brawl" are words of common usage and definition that a person of ordinary intelligence would understand in context to mean "a battle" or "a physical struggle for victory." *Id.* at 117, 350. And the Ordinance contains a specific scienter requirement that the gathering be done "for the purpose of" causing a fight (Appx. A8).

So, by the Ordinance's plain language, a person of ordinary intelligence would understand it to prohibit gathering for the purpose of causing a fight and would be put on notice that doing so is unlawful. Further, because the Ordinance's language is plain and its scienter requirement is clear, it is not

susceptible to arbitrary enforcement. Even under the stricter standards applicable to laws implicating the First Amendment, the Ordinance is not unconstitutionally vague.

Two decisions of the Supreme Court of Missouri, *Vaughn*, 366 S.W.3d at 513, and *State v. Koetting*, 616 S.W.2d 822 (Mo. banc 1981), are instructive. In *Vaughn*, the defendant was charged with violating a particular subsection of the State's harassment statute, which criminalized when a person

> [w]ithout good cause engages in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person, cause[s] such person to be frightened, intimidated, or emotionally distressed, and such person's response to the act is one of a person of average sensibilities considering the age of such person.

366 S.W.3d at 521 (quoting § 565.090.1(6), R.S.Mo. (2008)).

The trial court found the subsection was unconstitutionally vague and dismissed the charge. 366 S.W.3d at 517. In particular, it found that the terms "frighten," "intimidate," and "emotional distress" made the statute vague. *Id.* at 521. But the Supreme Court rejected this conclusion, instead holding that "frighten" was a word of common usage and definition, and "intimidate" and "emotional distress" also were words with common understanding. *Id.*[4] And the statute did not predicate liability on a third

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[4] In her motion to dismiss, Ms. O'Malley cited *Vaughn* for the proposition that the words "frighten," "intimidate," and "emotional distress" made the

person's subjective reaction to the proscribed conduct, but used an objective "reasonable person" standard. *Id.* at 522. So, the statute adequately placed the public on notice about the level of conduct that triggered criminal liability. *Id.* Further, the phrase "good cause" gave notice to the public and provided a sufficiently concrete standard to mitigate the potential for arbitrary enforcement. *Id.*

In *Koetting*, the defendant was convicted of harassment under § 565.090.1(2), R.S.Mo. (1978), which criminalized a person who "for the purpose of frightening or disturbing another person, ... makes a telephone call or communicates in writing and uses coarse language offensive to one of average sensibility." 616 S.W.2d at 823-24.

The Supreme Court rejected the defendant's argument that the statute was vague because the words "frightening" and "disturbing" were susceptible to different definitions. *Id.* at 824-25. Instead, the Court found that "frighten" and "disturb" were words of common usage and definition, and the statute also contained a scienter requirement that the actor engage in the prohibited conduct with the "purpose" (another word of common usage) of frightening or disturbing. *Id.* Criminal liability would attach based on the mental state of the actor, not the subjective reaction of a third party. *Id.* at 824. Because a person of ordinary intelligence would know by reading the statute that if he acts with the purpose of upsetting another, he subjects

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statute unconstitutionally vague and so failed adequately to inform the public about what speech would result in criminal liability (L.F. 18; Appx. A6). This is the opposite of what the Supreme Court actually held in *Vaughn*.

himself to criminal liability, that portion of the statute was not vague. *Id.* at 825.

The portion of the statute specifically prohibiting "coarse language offensive to one of average sensibility" also was not vague or an impermissible attempt to regulate speech by giving officials too much discretion to determine what speech violated the statute. *Id.* at 825-26. Rather, the Court held that the phrase was sufficiently definite to give notice of the proscribed conduct and to provide guidance for its enforcement, especially because it contained a scienter requirement that the defendant act with the purpose of causing a particular reaction. *Id.* at 826.

Just like the statutes at issue in *Vaughn* and *Koetting*, the Ordinance here uses plain words that are understandable by people of ordinary intelligence, and it contains a scienter requirement that, to violate it, the defendant must have acted with the particular purpose of bringing about a certain result. Specifically, it gives fair warning that it is illegal to gather for the purpose of causing a fight, and its scienter requirement both ensures the public has notice of the proscribed conduct and mitigates the potential for arbitrary enforcement (Appx. A8). The Ordinance is not unconstitutionally vague.

Whether Ms. O'Malley actually was acting in lawful defense of property when she "recruited" (i.e., assembled) people to "throw [the Wisemans] out" of the building (i.e., bodily remove them against their will) (*compare* L.F. 7; Appx. A2 *with* Appx. A8) simply has no bearing on whether the Ordinance gives fair warning of the proscribed conduct. It is a defense to be decided by

the trier of fact, and its potential applicability does not make the Ordinance unconstitutionally vague either on its face or as applied to Ms. O'Malley. Her argument otherwise is without merit.

The circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground that the Ordinance is unconstitutionally vague. This Court should reverse the circuit court's dismissal of the City's prosecution and should remand this case for further proceedings.

III. The circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground that the Ordinance is unconstitutionally overbroad in violation of U.S. Const. Amend. I or Mo. Const. Art. I, § 8 *because* an ordinance is not overbroad if it fairly may be construed in a manner that limits its application to a core of unprotected expression *in that* the Ordinance fairly may be construed to apply to unprotected "fighting words" speech.

Additional Standard of Review

The standard of review applicable to the constitutionality of a municipal ordinance, explained in Point II, *supra* at 20, additionally applies to this point.

* * *

The third ground Ms. O'Malley alleged in her motion to dismiss was that the Ordinance is unconstitutionally overbroad under the First Amendment to the U.S. Constitution and Mo. Const. Art. I, § 8, because it impinged on her constitutionally-protected speech and property rights (L.F. 18; Appx. A6).

This is without merit. Because the Ordinance fairly may be construed to apply to unprotected "fighting words" speech, it is not unconstitutionally overbroad under the First Amendment or Art. I, § 8. This Court should reverse the circuit court's dismissal of the City's prosecution and should remand this case for further proceedings.

The First Amendment and Mo. Const. Art. I, § 8 guarantee the freedom of speech, which limits the government's ability to criminalize spoken words. *State v. Roberts*, 779 S.W.2d 576, 578 (Mo. banc 1989). Because these constitutional guarantees are so important, courts permit people to challenge a criminal law on First Amendment grounds even if their own speech or conduct could be regulated constitutionally, in order to prevent a chilling effect. *Vaughn*, 366 S.W.3d at 518 (*citing Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973)); *State v. Jeffrey*, 400 S.W.3d 303, 308 (Mo. banc 2013).

Still, this "overbreadth" doctrine has more limited application when the law at issue regulates conduct and not merely speech:

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

> To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Broadrick, 413 U.S. at 615 (citations omitted).

Further, the First Amendment does not protect *all* speech or expressive conduct. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Unprotected speech includes "the lewd and the obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572; *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-128 (1991) (Kennedy, J., concurring); *State v. Wooden*, 388 S.W.3d 522, 526 (Mo. banc 2013).

So, if a criminal law fairly may be construed in a manner that limits its application to a core of this constitutionally unprotected expression, it must be upheld against the charge that it is overly broad. *State v. Moore*, 90 S.W.3d 64, 67 (Mo. banc 2002) (citing *State v. Carpenter*, 736 S.W.2d 406, 408 (Mo. banc 1987) (Blackmar, J., dissenting)); *see also Vaughn*, 366 S.W.3d at 518-19; *Jeffrey*, 400 S.W.3d at 309-11.

Here, the Ordinance specifically concerns unprotected "fighting words" speech, which the U.S. Supreme Court in *Chaplinsky* described this way:

> The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile …. Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute [at issue] only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace …. The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker ….

315 U.S. at 573.

Missouri courts have examined "fighting words" in the context of breach-of-the-peace or disorderly-conduct laws on several occasions, all of which illustrate precisely why the Ordinance here does not run afoul of the federal or state Constitutions.

In *Thorpe*, the defendant was charged with violating a municipal ordinance that criminalized when "[a]ny person who, with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned … [c]ongregates with others on a public street and refuses to move on when ordered by the police." 499 S.W.2d at 455. The Court held that because the law of Missouri defined "breach of the peace" to refer *only* to acts or conduct inciting violence or intending to provoke others to violence (i.e., fighting

words), the ordinance did not punish anyone for or deter anyone from exercising their free-expression rights. *Id.* at 457-58.

In *Tinker*, the Court again upheld a municipal breach-of-the-peace ordinance against an overbreadth challenge. 542 S.W.2d at 519. The ordinance stated: "No person shall disturb the peace of others by noisy, riotous or disorderly conduct … *calculated to provoke a breach of the peace*." *Id.* at 514 (emphasis added). Because "breach of the peace" was construed *only* to refer to verbal conduct which tended to excite immediate violence, and *not* to refer merely to abusive or insulting language, the ordinance was not facially unconstitutional. *Id.* at 519.

Compare that with *State v. Swoboda*, in which the Court struck down Missouri's peace-disturbance statute. 658 S.W.2d 24, 24 (Mo. banc 1983). The statute, § 574.010.1(1)(b), R.S.Mo. (1979), prohibited a person from "unreasonably and knowingly" causing "alarm" by means of "loud and abusive language." *Id.* at 24-25. The Court found that the proscription on abusive language reached speech much broader than "fighting words," and so was unconstitutional:

> The proscription of "abusive" language conceivably embraces words that do not by their very utterance tend to incite violence. … One might easily unreasonably and knowingly alarm someone with abusive words and expressions considerably less opprobrious than those spoken by the defendant in this case. This statute as written can encompass virtually any expletive unreasonably and unknowingly uttered at high volume and with

> high intensity, so long as a complainant is alarmed; vehement political discussion obviously contemplated by the first amendment could fall within the statute's proscription.

Id. at 25-27.

About a year after *Swoboda*, this Court in turn struck down as facially unconstitutional a municipal ordinance that prohibited disorderly conduct, defined as "[t]he causing or making of any unnecessary loud noise or shouting or yelling or uncooperative or unseemly behavior toward or in the presence of a police officer." *City of Jackson v. Oliver*, 680 S.W.2d 406, 407 (Mo. App. 1984). The Court declined to apply a limiting construction to the ordinance:

> [I]f we were to attempt to construe the ordinance in this case to condemn only "fighting words" as that term was defined in [*Chaplinsky*], we would effectively be rewriting the ordinance to cause it to proscribe words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." There is no way that the phrase "unseemly behavior toward or in the presence of a police officer" in the ordinance can be so limited by judicial construction. The term "unseemly" is defined as "not according with established standards of good form or taste." ... An unending list of examples or utterances could be conjured up which do not comport with "good form or taste" but which are clearly protected by the First Amendment.

Id. at 407-08.

Next, the Supreme Court of Missouri struck down as facially unconstitutional a Missouri statute that prohibited "unreasonably and knowingly disturb[ing] or alarm[ing] another person or persons by … [t]hreatening to commit a crime against any persons." *Carpenter*, 736 S.W.2d at 407. The Court found that the statute regulated pure speech – the communication of a threat to commit "a crime" – for threatened activity that may be neither imminent nor likely. *Id.* at 407-08. And the threatened crime could include something as minimal as stealing a library book, which was not the sort of threat likely to cause an immediate violent response by a reasonable recipient. *Id.* Therefore, the Court held that the statute went far beyond a permissible attempt to regulate "fighting words." *Id.* at 408.

Finally, this Court struck down as facially unconstitutional an ordinance that prohibited "speak[ing], utter[ing], shout[ing] or yell[ing] or us[ing] in the presence of others profane, vulgar or indecent language … which is calculated to be heard by others including those on or off the premises." *City of Maryville v. Costin*, 805 S.W.2d 331, 332 (Mo. App. 1991). This Court held the ordinance unconstitutionally went beyond regulation of "fighting words" because it sought to punish more than face-to-face words and because "profane, vulgar or indecent" language may nor may not constitute fighting words in every instance. *Id.*

The Ordinance here is like those in *Thorpe* and *Tinker*, not the statutes or ordinances in *Swoboda*, *Oliver*, *Carpenter*, or *Costin*, and is constitutional. Section (A)(5) of the Ordinance specifically prohibits "assembl[ing] or congregat[ing] with another or others ***for the purpose of*** *causing, provoking,*

or engaging in ***any fight or brawl***" (Appx. A8) (emphasis added). Plainly, the conduct (and related speech) it targets is directed *narrowly* at exactly what Ms. O'Malley did, inciting an immediate breach of the peace – i.e., a fight or brawl – which is unprotected "fighting words" speech. *See Chaplinsky*, 315 U.S. at 573.

The Ordinance is even more obviously directed at "fighting words" than those upheld in *Thorpe* and *Tinker*, which prohibited speech and conduct intended to provoke a "breach of the peace." The ordinances in *Thorpe* and *Tinker* required a judicial limiting construction that defined "breach of the peace" *only* to refer to verbal conduct which tended to excite immediate violence, whereas here the Ordinance by its own plain language prohibits gathering for purpose of causing a fight or brawl (i.e., immediate violence). And the Ordinance clearly is distinguishable from the laws struck down in *Swoboda*, *Oliver*, *Carpenter*, and *Costin*, ***none of which*** prohibited speech or conduct specifically intended to provoke a fight or brawl.

Section (A)(5) of the Ordinance is directed at conduct, not speech, and it fairly may be construed to apply to constitutionally-unprotected "fighting words" speech. So, the Ordinance is well within the City's plainly legitimate power to proscribe speech or conduct directly aimed at provoking a fight or brawl. It is constitutional on its face.

Finally, to the extent Ms. O'Malley attempted to raise an as-applied challenge to the Ordinance's constitutionality (and it does not appear she actually did so (L.F. 18; Appx. A6)), that argument also would be without merit. First, as shown above, there is no evidence in the record from which

the circuit court or this Court could determine that Ms. O'Malley's alleged "recruitment" of third parties to throw the Wisemans out of the building was constitutionally-protected, expressive speech or conduct. Second, there is no evidence facts in the record to support a finding that her property rights were impinged upon. Again, her defense-of-property defense is a matter to be decided by the trier of fact, and its potential applicability is irrelevant at this pretrial stage of the proceedings.

The circuit court erred in granting Ms. O'Malley's motion to dismiss on the ground that the Ordinance is unconstitutionally overbroad. This Court should reverse the circuit court's dismissal of the City's prosecution and should remand this case for further proceedings.

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 8,141 words.

/s/Jonathan Sternberg
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Certificate of Service

I certify that, on March 29, 2017, I filed a true and accurate Adobe PDF copy of this brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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