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NOTE

Assuming the Worst: Eliminating the Forcibly Steals Element from Second-Degree Robbery

State v. Brooks, 446 S.W.3d 673 (Mo. 2014) (en banc).

ROSS VALORE*

I. INTRODUCTION

The Supreme Court of Missouri recently decided two cases dealing with the troubling distinction between second-degree robbery and stealing.¹ The crimes of second-degree robbery and stealing are distinguished by whether the defendant uses or threatens the immediate use of physical force in the commission of the offense.² After three decades of disagreement within Missouri appellate courts over what standard should be applied when determining whether the defendant used or threatened the immediate use of physical force, the Supreme Court of Missouri stepped in to resolve the conflict in the case of *State v. Brooks*.³ Unfortunately, the objective standard the court articulated was unclear in its application and will likely cause more confusion in the lower courts that try to interpret it. In an attempt to resolve the confusion surrounding the court's decision in *Brooks*, this Note attempts to define the standard articulated by the court, while also looking at alternative ways the Missouri General Assembly can resolve the conflict between robbery and stealing.

This Note begins with an exploration of the factual circumstances that gave rise to the court's determination that an objective standard should be applied when determining whether a threat of the immediate use of physical force exists in second-degree robbery cases. This Note then discusses the conflict among Missouri appellate courts regarding the determination of

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1. See *State v. Coleman*, 463 S.W.3d 353 (Mo. 2015) (en banc); *State v. Brooks*, 446 S.W.3d 673, 674 (Mo. 2014) (en banc).

2. MO. REV. STAT. § 569.030 (2000) (defining second-degree robbery); *id.* § 569.010(1) (defining stealing).

3. 446 S.W.3d 673.

whether a threat of force exists, while also looking at how other states have handled this issue. Next, this Note provides an analysis of the Supreme Court of Missouri's reasoning in *Brooks* and, finally, explores how the objective standard articulated by the court will be applied, along with a possible alternative solution to the conflict between stealing and robbery in bank theft cases.

II. FACTS AND HOLDING

On August 25, 2011, Claude Dale Brooks entered a Regions Bank in St. Charles County dressed in a baggy sweatshirt, baseball hat, sunglasses, and dreadlocked wig.⁴ When Brooks arrived at the counter, he handed the bank teller a note.⁵ The note read, "Fifties, hundreds, no bait money and bottom drawer."⁶ The bank teller, Angela Ebaugh, typically worked at the drive-through window, but had moved to the lobby that day because the bank was busy.⁷ After reading the note, Ebaugh slowly began to walk away from the counter to retrieve the money from her drawer near the drive-through window.⁸ Unsure of what Ebaugh was doing, Brooks slammed his hand on the counter and told her to "get back here."⁹

Brooks then instructed Ebaugh to take the money from her drawer in the lobby, and Ebaugh explained that there was no money in that drawer and that she would have to go to the drawer by the drive-through to retrieve the cash.¹⁰ Brooks watched intently as Ebaugh walked to the drive-through window, collected the bills from the bottom drawer, and laid the money on the counter in front of him.¹¹ Brooks also requested his note back, and Ebaugh complied.¹² Brooks then took the money, put it in a shopping bag, and left the bank.¹³

Once Brooks exited the bank, Ebaugh signaled the police by putting her bait bills on the counter.¹⁴ When the police arrived, Ebaugh provided a description of Brooks and the events that had taken place at the bank.¹⁵ The police noted that Ebaugh seemed quite nervous and upset.¹⁶

4. Appellant's Substitute Brief at 6, *Brooks*, 446 S.W.3d 673 (No. SC 94154), 2014 WL 4277591, at *6.

5. Respondent's Brief at 4, *Brooks*, 446 S.W.3d 673 (No. SC 94154), 2013 WL 5405170, at *4.

6. *Id.*

7. *Id.*

8. *Id.* at *5.

9. *Id.*

10. *Id.* at *5.

11. *Id.* at *5–6.

12. Appellant's Substitute Brief, *supra* note 4, at *7.

13. *Id.*

14. *Id.*

15. *Id.* at *8.

16. Respondent's Brief, *supra* note 5, at *6.

Meanwhile, a separate officer also responded to the call and began patrolling the area where Brooks was last seen.¹⁷ The officer noticed Brooks walking down the sidewalk on a street near the bank, but he did not have dreadlocks or a hat as the description provided.¹⁸ Nevertheless, the officer stopped Brooks to ask him whether he had seen anyone matching the description the officer provided.¹⁹ Brooks replied that he saw someone matching that description running in the area and told the officer what direction he was heading.²⁰ While questioning Brooks, the officer noticed that he appeared to be nervous and out of breath, and as Brooks began to walk away, the officer told him to stop.²¹ Brooks ignored the officer's request, and after the officer told him to stop a second time, Brooks began running.²²

The officer notified the patrol officer in the area that the suspect was running in his direction, and the second officer stopped Brooks and put him in handcuffs.²³ Upon searching Brooks, the officer found a brown plastic bag with money inside that matched the amount Ebaugh believed was stolen from the bank.²⁴ Shortly after Brooks was placed under arrest, the dreadlocked wig and baseball hat were found in a storm drain nearby.²⁵

Brooks was charged with robbery in the second degree.²⁶ In a bench trial, Brooks admitted to stealing money from the bank, but he denied committing a robbery in the second degree, arguing that he did not use or threaten the use of immediate physical force.²⁷ A person commits robbery when, "in the course of stealing, . . . he uses or threatens the immediate use of physical force upon another person."²⁸ Based on this argument, Brooks moved for acquittal at the close of the evidence.²⁹ The trial court denied the motion and found Brooks guilty of robbery in the second degree.³⁰ The trial court reasoned that "his disguise, the note he handed the teller, his unusual knowledge of bank procedure, and the gesture of slamming his hand down on the bank counter 'show[ed] . . . an actual immediate threat of physical force.'"³¹ The trial court handed down a twenty-five-year sentence to Brooks, classifying

17. Appellant's Substitute Brief, *supra* note 4, at *8.

18. Respondent's Brief, *supra* note 5, at *6.

19. *Id.*

20. Appellant's Substitute Brief, *supra* note 4, at *8.

21. *Id.*

22. *Id.*

23. *Id.* at *8–9.

24. *Id.* at *9.

25. *Id.*

26. *State v. Brooks*, 446 S.W.3d 673, 674 (Mo. 2014) (en banc).

27. *Id.* at 674–75.

28. MO. REV. STAT. § 569.010(1) (2000).

29. *Brooks*, 446 S.W.3d at 674–75.

30. *Id.* at 675.

31. *Id.*

him as a prior and persistent offender because of his two previous federal bank robbery convictions.”³²

Brooks appealed this decision to the Missouri Court of Appeals for the Eastern District, which, in a 2-1 decision, vacated Brooks’s conviction for robbery in the second degree.³³ In making its decision, the appellate court relied on *Patterson v. State*, which states that the use of force “may be implied from the fact that the defendant displayed a weapon, engaged in behavior that gave the appearance that he was armed, or used [a] phrase[] like, ‘This is a holdup.’”³⁴ The appellate court reasoned that because Brooks had not threatened physical force, had no weapon, and did nothing to indicate that he had a weapon, there was no affirmative act, beyond stealing, that justified his conviction for second-degree robbery.³⁵ The dissenting opinion found the majority’s articulation of what constituted an affirmative act too narrow and reasoned that Brooks’s knowledge of bank procedure, disguise, note, and slamming of his hand on the counter was sufficient evidence that Brooks’s actions constituted a threat of physical force.³⁶

On transfer, the Supreme Court of Missouri affirmed the trial court’s ruling that Brooks’s actions constituted a threat of immediate physical force and that he was correctly convicted of second-degree robbery.³⁷ The court relied on *United States v. Gilmore*, which held that a demand for money in a bank was an “implicit threat of the use of force in and of itself.”³⁸ The court held that Brooks’s disguise, the note, slamming his fist on the counter and telling Ebaugh to “get back here,” along with his apparent knowledge of bank procedure, was sufficient to cause a reasonable person to infer that Brooks would use immediate physical force if his demands were not met.³⁹

III. LEGAL BACKGROUND

Over the past three decades, Missouri courts have struggled to distinguish what constitutes an immediate threat of physical force in second-degree robbery cases where the defendant does not make physical contact with the victim or use verbal threats. Some courts have held that simply stealing from a bank or a store is sufficient to find a threat of force,⁴⁰ while other courts have required that the defendant engage in an affirmative threatening act to

32. *Id.*

33. *State v. Brooks*, No. ED99427, 2014 WL 606526, at *5 (Mo. Ct. App. Feb. 18, 2014), *aff’d*, 446 S.W.3d 673.

34. *Id.* at *4 (alterations in original) (quoting *Patterson v. State*, 110 S.W.3d 896, 904 (Mo. Ct. App. 2003)).

35. *Id.*

36. *Id.* at *5–7 (Gaertner, J., dissenting).

37. *Brooks*, 446 S.W.3d at 677.

38. *Id.* at 676 (citing *United States v. Gilmore*, 282 F.3d 398, 402 (6th Cir. 2002)).

39. *Id.* at 677.

40. *Id.* at 676.

satisfy this element.⁴¹ This Part will first cover the different definitions of threat of force, then how Missouri courts have interpreted threat of force in the past, and finally, how other states have interpreted threat of force in robbery cases.

A. Defining “Threat of Force”

Second-degree robbery is defined as the “forcible stealing of property.”⁴² Forcible stealing occurs when a person “‘in the course of stealing . . . uses or threatens the immediate use of physical force upon another person for the purpose of’ either defeating resistance to the theft or compelling the surrender of the property.”⁴³ The crimes of second-degree robbery and stealing are distinguished by whether the defendant uses or threatens the immediate use of physical force in the commission of the offense.⁴⁴ Unfortunately, the statute does not go on to define what a threat of force is, and there is not any legislative commentary to offer guidance.⁴⁵

As a result of this lack of guidance, there was considerable disagreement regarding how the threat of force is determined when the defendant does not verbally threaten or make physical contact with the victim. Some courts have used an objective standard as, “whether a reasonable person would believe [the defendant’s] conduct was a threat of the immediate use of physical force.”⁴⁶ Under this standard, the trier of fact uses the victim’s and witness’s testimony, along with other circumstantial evidence, to determine whether a reasonable person would believe the defendant’s conduct constituted an immediate threat of physical force.⁴⁷

A second approach looks at whether the defendant engaged in any affirmative conduct that exhibits a threat of immediate physical force.⁴⁸ A recent Missouri decision, *State v. Coleman*, reasoned that a victim’s objectively reasonable fear is not enough, as there “‘must be some affirmative conduct on the part of the defendant, *beyond the mere act of stealing*, which communicates that he will *immediately* employ ‘physical force’ if the victim resist[s] . . . the taking of the property.”⁴⁹

41. *State v. Coleman*, No. WD 76520, 2014 WL 4815414, at *4 (Mo. Ct. App. Sept. 30, 2014), *aff’d*, 463 S.W.3d 353 (Mo. 2015) (en banc).

42. MO. REV. STAT. § 569.030 (2000).

43. *Brooks*, 446 S.W.3d at 675 (quoting § 569.010.1).

44. Robert H. Dierker, *Crimes Against Persons*, 32 MO. PRAC., MISSOURI CRIMINAL LAW § 21.3 (2d ed. 2015).

45. § 569.030; *see also* *State v. Applewhite*, 771 S.W.2d 865, 867 (Mo. Ct. App. 1989) (“Our statutes do not define the term ‘force’ itself nor do they define the quantum of ‘force’ necessary to constitute forcible stealing.”).

46. *Brooks*, 446 S.W.3d at 676.

47. *See id.*

48. *State v. Coleman*, No. WD 76520, 2014 WL 4815414, at *4 (Mo. Ct. App. Sept. 30, 2014), *aff’d*, 463 S.W.3d 353 (Mo. 2015) (en banc).

49. *Id.* (alterations in original) (quoting MO. REV. STAT. § 569.010 (2000)).

A third approach is one taken by the U.S. Court of Appeals for the Eighth Circuit when prosecuting under the federal bank robbery statute.⁵⁰ The Bank Robbery and Incidental Crimes statute altered the typical language of robbery statutes by adding intimidation to the types of threats defendants could make in order to avoid the “incongruous results” that would commonly arise when the defendant would not use or threaten force during the commission of the crime and, therefore, would not be liable under the statute for robbery.⁵¹ Taking by intimidation is defined as “the willful taking in such a way as would place an ordinary person in fear of bodily harm.”⁵² In interpreting this statute, courts have consistently rejected the argument that affirmative threats of bodily harm, threatening body signals, or the possibility of a concealed weapon are required to establish bank robbery under the federal statute.⁵³

B. How Threat of Force Has Been Interpreted in Missouri

There has been a significant split in Missouri courts in determining what constitutes a threat of force in second-degree robbery cases. Appellate courts across the state have applied confusing and often contradictory reasoning when determining what constitutes a threat of force, resulting in differing outcomes – depending on which court hears the case. The following cases illustrate the confusion.

In *State v. Carter*, the Missouri Court of Appeals for the Eastern District overturned a conviction for second-degree robbery, finding there was no force or threat of force used when the defendant reached into the victim’s pocket and took her purse.⁵⁴ In *Carter*, the victim and her grandson were walking to their car in a Family Dollar parking lot when the defendant approached the victim and started asking questions about her grandson.⁵⁵ When the victim turned her back to enter her vehicle, the defendant said, “Give me your purse,” and the defendant held out his hand.⁵⁶ The victim then instructed the defendant to take the purse out of her coat pocket, and the defendant reached into her coat pocket, took the purse, and ran away.⁵⁷ The court reasoned that the evidence was insufficient to show the defendant used or threatened to use physical force against the victim sufficient for a second-degree

50. 18 U.S.C. § 2113(a) (2012).

51. See C. T. Drechsler, *Validity and Construction of Federal Bank Robbery Act*, 59 A.L.R.2d 946 § 2(b) (1958).

52. *United States v. Bingham*, 628 F.2d 548, 548 (9th Cir. 1980).

53. *Coleman*, 2014 WL 4815414, at *7 n.7 (Mitchell, J., dissenting).

54. 967 S.W.2d 308, 309 (Mo. Ct. App. 1998).

55. *Id.* at 308.

56. *Id.*

57. *Id.*

robbery conviction, because the defendant had no weapon and did not harm or threaten the victim.⁵⁸

In *State v. Tivis*, the Missouri Court of Appeals for the Western District reversed a conviction for second-degree robbery because the defendant did not threaten the immediate use of physical force when stealing a purse from the victim.⁵⁹ In *Tivis*, the defendant approached the victim as she was unloading her groceries from her car and asked if she was interested in purchasing a stuffed pumpkin.⁶⁰ The victim declined, and the defendant continued to follow the victim to her apartment door, where he “yanked” the purse off her shoulder and ran off.⁶¹ The victim testified that the defendant did not threaten her, there was no struggle when the purse was taken, and the defendant took the purse by the strap and did not touch her.⁶² In overturning the conviction for second-degree robbery, the appellate court noted that the only evidence of a threat of force was the defendant yanking the purse from the victim’s shoulder, but the defendant made no contact with the victim, and there was no struggle.⁶³ The court reasoned that there was no “evidence in the case at bar of the use or threatened use of immediate physical force” and overturned the conviction for second-degree robbery.⁶⁴

In *State v. Clark*, the Missouri Court of Appeals for the Eastern District affirmed a conviction for second-degree robbery because a note the defendant handed to the victim was reasoned to be a threat to use immediate force.⁶⁵ In *Clark*, the defendant entered a fast food restaurant and handed the cashier a note that read, “This is a holdup. Give me all the money in the register.”⁶⁶ The cashier took the bills out of the register and laid them on the counter, and the defendant grabbed them and ran out of the restaurant.⁶⁷ The defendant appealed his conviction for second-degree robbery, arguing that he did not use or threaten to use force on the victim.⁶⁸ The court noted in its opinion that there were no Missouri cases that had dealt with the issue of whether a defendant threatens to use immediate force when he hands the victim a note but engages in no other threatening behavior.⁶⁹ The court relied on reasoning applied by a court in Pennsylvania, which found that “[t]he expression ‘holdup,’ in its ordinary significance, means a forcible detention of the person held with the intent to commit robbery and implies the necessary force to

58. *Id.* at 309.

59. 884 S.W.2d 28, 30 (Mo. Ct. App. 1994).

60. *Id.* at 29.

61. *Id.*

62. *Id.*

63. *Id.* at 30.

64. *Id.*

65. 790 S.W.2d 495, 497 (Mo. Ct. App. 1990).

66. *Id.* at 495–96.

67. *Id.* at 496.

68. *Id.* at 495.

69. *Id.* at 497.

carry out that purpose.”⁷⁰ Applying this reasoning, the court held that the defendant’s note satisfied the element of forcibly steals in that the note was intended to cause an immediate threat of force so that the cashier would give the defendant the money in the register.⁷¹

In *State v. Henderson*, the Missouri Court of Appeals for the Southern District reversed a conviction for second-degree robbery where the defendant brushed the arm of the victim when grabbing money from the cash register.⁷² In *Henderson*, the defendant entered a convenience store, took a drink from the cooler, and went to the clerk and handed her a five-dollar bill.⁷³ When the clerk opened the cash register, the defendant jumped over the counter and grabbed the money out of the register and, in the process, “kind of brushed” the clerk’s arm, which caused her to jump back.⁷⁴ In reasoning that the defendant did not use force, the court stated that the brush amounted to “*de minimus* [sic] contact incidental to the money snatch” and was not a threat or use of force.⁷⁵

In *State v. Coleman*, a majority for the Missouri Court of Appeals for the Western District reversed the conviction for second-degree robbery of a defendant who told a bank teller to put money in a bag because the defendant engaged in no affirmative action which suggested immediate force or the threat of force.⁷⁶ In *Coleman*, the defendant entered a bank wearing sunglasses and walked directly to the teller, leaned forward with his arms on the counter, and told her, “I need you to do me a favor. Put the money in this bag.”⁷⁷ The defendant handed the teller a bag, and while the teller was putting the money in the bag, another employee approached the defendant.⁷⁸ The defendant told the employee, “Ma’am, stop where you are and don’t move any farther.”⁷⁹ The employee obeyed the defendant’s instructions, the teller handed the defendant the bag of money, and the defendant then swiftly left the bank.⁸⁰

The majority in *Coleman* relied on the reasoning of *Tivis*, which the court interpreted to mean that a conviction for second-degree robbery requires that the defendant “communicated, through affirmative conduct and/or words, an intent to immediately use physical force if the victim fails to deliver up the

70. *Id.* (quoting *Brown v. State*, 397 So.2d 1153 (Fla. App. 1981) (citing *State v. Anderson*, 101 P. 198, 200 (1909)).

71. *Id.*

72. 310 S.W.3d 307, 309 (Mo. Ct. App. 2010).

73. *Id.* at 307.

74. *Id.* at 307–08.

75. *Id.* at 309.

76. No. WD 76520, 2014 WL 4815414, at *4 (Mo. Ct. App. Sept. 30, 2014), *aff’d*, 463 S.W.3d 353 (Mo. 2015) (en banc).

77. *Id.* at *1.

78. *Id.*

79. *Id.*

80. *Id.*

property or otherwise resists his taking of the property.”⁸¹ The *Tivis* opinion, summarized above, does not include the phrase “affirmative conduct,” which makes the reasoning applied by a majority of the Western District especially novel.⁸² The court in *Coleman* went on to explain the need for the affirmative conduct element by reasoning that “then virtually all stealing other than by means of deceit will be the same as robbery in the second degree.”⁸³ By not enforcing the physical threat element of robbery in the second degree, the court would render the robbery in the second-degree statute superfluous.⁸⁴ Following this logic, the majority determined that the defendant’s words did not imply a threat of force and that his body language did not indicate that he possessed a weapon or had any intention to attack.⁸⁵

The dissent in *Coleman* argued that the majority incorporated a mens rea of “purposely” into both the conduct and result elements of the second-degree robbery statute, where the mens rea should only apply to the result element of the crime or to the “obtaining of property against the will of another.”⁸⁶ Further, the dissent argued that the objective standard – whether a reasonable person would conclude that the defendant engaged in conduct that threatened the immediate use of physical force – should have been used.⁸⁷ The dissent concluded that a reasonable fact finder could find that the defendant’s objective was to have the teller deliver the money, and that a bad result would occur if she did not.⁸⁸

The Supreme Court of Missouri granted review and upheld Coleman’s conviction for second-degree robbery.⁸⁹ Coleman attempted to distinguish his case from *Brooks*, arguing that he did not “make any threatening physical gestures or raise his voice in a threatening manner.”⁹⁰ In holding that Coleman’s actions constituted an implicit threat of force, the court reiterated the objective standard announced in *Brooks*,⁹¹ and that a demand for money in a bank is an “implicit threat of the use of force in and of itself.”⁹² Further, the court dismissed Coleman’s argument that *Brooks* should be overturned because it stands for the proposition that all thefts from a bank would constitute

81. *Id.* at *3 (citing *State v. Tivis*, 884 S.W.2d 28, 30 (Mo. Ct. App. 1994)).

82. *See generally Tivis*, 884 S.W.2d at 28.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at *6.

87. *Id.*

88. *Id.* at *7.

89. *State v. Coleman*, 463 S.W.3d 353, 355 (Mo. 2015) (en banc).

90. *Id.* at 354–55.

91. *See State v. Brooks*, 446 S.W.3d 673, 676 (Mo. 2014) (en banc) (“[T]he existence of a threat depends on whether a reasonable person would believe [the defendant’s] conduct was a threat of the immediate use of physical force, which is an objective test.”).

92. *Coleman*, 463 S.W.3d at 355.

second-degree robbery.⁹³ The court stated that “neither *Brooks* nor this case holds that all thefts of money from a bank necessarily involve forcible stealing and, therefore, constitute robbery. Instead, these cases recognize that context matters.”⁹⁴ The court reasoned that a theft from a bank would raise a “strong implication of a threat,” but the facts of each case would ultimately determine whether it constituted a threat or implied threat of the use of force.⁹⁵

C. How Other States Interpret Threat of Force in Robbery Cases

Other states have faced similar problems in trying to articulate what constitutes a threat of force when a victim of robbery is not touched or verbally threatened. There seems to be a pattern, and it appears in Missouri cases as well, that while appellate courts tend to find that force or the threat of force was not present in close cases, trial and state supreme courts are more likely to find the defendant’s conduct was sufficient for a conviction of second-degree robbery. The following cases exhibit the uncertainty that courts face when trying to determine if a defendant has used or threatened physical force when the victim has not been touched or verbally threatened.

In *People v. Taylor*, the Illinois Supreme Court reversed the decision of the appellate court, which vacated the robbery conviction of a defendant who stole a necklace off a victim without touching her.⁹⁶ The Illinois Supreme Court reasoned that the necklace was attached to the victim, and removing it from her neck required force.⁹⁷ In *Taylor*, the defendant approached the victim while she was talking on a payphone, snatched the necklace off of her neck, and then stared at her for an uncomfortable period before running away.⁹⁸ Illinois defines robbery as the taking of property from the “person or presence of another by the use of force or by threatening the imminent use of force.”⁹⁹ In finding the defendant guilty of robbery, the court distinguished the taking of a necklace off of a person from the taking of a purse off of a shoulder, reasoning that when an item is “attached to the person of the victim in such a manner as to create a resistance to its taking,” it is sufficient to find the element of force.¹⁰⁰ Interestingly, the court here did not find the defendant used constructive force or the threat of force, but that the taking of the necklace constituted actual force.¹⁰¹

93. *Id.*

94. *Id.*

95. *Id.*

96. 591 N.E.2d 677, 680 (Ill. 1989).

97. *Id.*

98. *Id.* at 678.

99. *Id.* at 678–79 (quoting ILL. COMP. STAT. 1983 / 18-1(a) (West 2016)).

100. *Id.* at 681.

101. *Id.*

In *State v. Collingsworth*, the Washington State Court of Appeals affirmed the conviction for second-degree robbery of a defendant who robbed seven different banks using a similar method of demanding money from the teller, but using no force or verbal threats.¹⁰² In *Collingsworth*, the defendant would enter banks wearing baggy clothing and directly approach the teller, telling her some variant of “I need your hundreds, fifties and twenties,” and “No bait, no dye.”¹⁰³ The teller in each scenario gave the money to the defendant and testified to feeling threatened, even though no weapon was shown or indicated.¹⁰⁴ Washington has a similar second-degree robbery statute to Missouri; it requires the State prove that the defendant took the money “by the use or threatened use of immediate force, violence, or fear of injury.”¹⁰⁵

The court noted that no previous Washington case had decided whether a defendant who does not use threatening language or actual force is liable for robbery, so the court relied on decisions interpreting the federal bank robbery statute.¹⁰⁶ The federal bank robbery statute criminalizes the “taking of property from a bank ‘by force and violence, or by intimidation.’”¹⁰⁷ Following cases interpreting the federal statute, the court reasoned that the literal meaning of the words used by the defendant, although non-threatening, were “fraught with the implicit threat to use force,” and that any threat, no matter how insignificant, which causes a person to hand over their property is “sufficient to sustain a robbery conviction.”¹⁰⁸

IV. INSTANT DECISION

The issue in *Brooks* was whether handing the bank teller a non-threatening note, banging his fist on the counter, and having an apparent knowledge of bank procedure was sufficient to find that Brooks threatened the immediate use of physical force necessary for a second-degree robbery conviction.¹⁰⁹ Brooks argued on appeal that he did not threaten force because he had no weapon, did not engage in any behavior that gave the appearance that he had a weapon, and did not use threatening language during the theft.¹¹⁰ Judge Zel M. Fischer wrote the unanimous opinion of the Supreme Court of Missouri, which held that Brooks’s actions did constitute an immediate threat of physical force and affirmed Brooks’s conviction of second-degree robbery.¹¹¹

102. 966 P.2d 905, 908–09 (Wash. Ct. App. 1997).

103. *Id.* at 905–06.

104. *Id.* at 906.

105. WASH. REV. CODE ANN. § 9A.56.190 (West 2016).

106. *Collingsworth*, 966 P.2d at 907–08.

107. *Id.* at 907 (quoting 18 U.S.C. § 2113(a) (2012)).

108. *Id.* at 908.

109. *State v. Brooks*, 446 S.W.3d 673, 675 (Mo. 2014) (en banc).

110. *Id.*

111. *Id.* at 674, 677.

The court began its analysis by outlining the authority Brooks used to support his contention that he did not threaten the use of force.¹¹² The court first identified *Patterson*, where the Missouri Court of Appeals for the Western District articulated several factual scenarios Missouri courts should look to when determining whether the defendant threatened force.¹¹³ These factors include the presence of a weapon or behavior that would indicate the defendant had a weapon and the use of phrases such as “[t]his is a holdup” or “stickup.”¹¹⁴ The court also noted Brooks’s use of *Tivis*,¹¹⁵ where the Western District held that there was not a threat of force sufficient for a conviction of second-degree robbery when the defendant yanked a purse off of the victim’s shoulder.¹¹⁶

The court then looked to the authority provided by the State to support its primary argument that Brooks’s actions constituted a threat of immediate physical force. The court first identified *State v. Rounds*, where the Missouri Court of Appeals for the Eastern District held that a defendant who had a hand in his pocket, implying he had a weapon, and who also told the victim not to “be a hero . . . or [the defendant] was going to blow [the victim’s] head off,” was sufficient evidence of a threat of immediate physical force.¹¹⁷ More on point, the court also noted the State’s use of *State v. Duggar*, where the Missouri Court of Appeals for the Southern District held that a defendant threatened force because he “had a firm purpose, an unusual knowledge of the internal security system in the cash register, and a hand concealed in his jacket,” which gave the appearance he was armed.¹¹⁸

Further, the court referenced cases the State used to support its secondary argument that Brooks’s actions created the “inference of a threat of immediate harm because he put the victim in fear.”¹¹⁹ In *State v. Lybarger*, the Western District reasoned that the defendant telling the victim, “This is a robbery,” while keeping his hand in his pocket, implied he had a gun and was sufficient evidence for a finding of an inference of a threat of immediate harm.¹²⁰ Lastly, the court noted *Applewhite*, where the Eastern District held that a defendant who pushed a store employee as he fled the robbery had giv-

112. *Id.* at 675.

113. *Brooks*, 446 S.W.3d at 675 (citing *Patterson v. State*, 110 S.W.3d 896 (Mo. Ct. App. 2003)).

114. *Id.* (quoting *Patterson*, 110 S.W.3d at 904–05).

115. *State v. Tivis*, 884 S.W.2d 28, 30 (Mo. Ct. App. 1994).

116. *Brooks*, 446 S.W.3d at 675–76.

117. *Id.* at 676 (alteration in original) (quoting *State v. Rounds*, 796 S.W.2d 84, 86 (Mo. Ct. App. 1990)).

118. *Id.* (quoting *State v. Duggar*, 710 S.W.2d 921, 922 (Mo. Ct. App. 1986)).

119. *Id.*

120. *Id.* (quoting *State v. Lybarger*, 165 S.W.3d 180, 186–87 (Mo. Ct. App. 2005)).

en the inference of a threat of immediate harm sufficient for a finding of second-degree robbery.¹²¹

The court then articulated the standard used to determine the existence of a threat of force as “whether a reasonable person would believe his conduct was a threat of the immediate use of physical force.”¹²² In determining that Brooks did create an implicit threat of force, the court placed particular emphasis on the setting where the theft occurred.¹²³ The court reasoned that banks are “regular targets of robberies, and their employees have a heightened awareness of security threats. A demand for money in that context is an implicit threat of the use of force in and of itself.”¹²⁴ The court supported this reasoning by citing a U.S. Court of Appeals for the Sixth Circuit case, *United States v. Gilmore*, where the defendant was prosecuted under the federal bank robbery statute, which requires that the crime take place in a “bank, credit union, or any savings and loan association.”¹²⁵

Looking to the facts of the case, the court noted Brooks’s use of a wig, cap, and sunglasses as evidence of his “clear purpose to steal money.”¹²⁶ The court found the threat of force to become immediate when Brooks handed the teller the note that demanded money.¹²⁷ Further, when Brooks slammed his fist on the counter, which the court noted was forceful enough to startle the other tellers, this could also be considered a threat of the use of immediate physical force.¹²⁸ Then, when the teller walked away to retrieve the money, Brooks continued to watch her closely, which the court interpreted as a warning to the teller that Brooks understood bank procedure and would know if she did anything to alert the police.¹²⁹ The court found that a reasonable inference was that Brooks’s actions exhibited a threat of immediate physical force if the teller did not obey Brooks’s commands.¹³⁰

Finally, the court applied the objective standard for a threat: “[W]hether a reasonable person would believe his conduct was a threat of the immediate use of physical force.”¹³¹ Intriguingly, the court applied this standard by looking at how the teller reacted to Brooks’s actions, as opposed to whether a reasonable person in Brooks’s shoes would believe his conduct induced a threat as the standard states.¹³² Reasoning that the victim “felt threatened,”

121. *Id.* (citing *State v. Applewhite*, 771 S.W.2d 865, 867–68 (Mo. Ct. App. 1989)).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* (citing *United States v. Gilmore*, 282 F.3d 398, 402–03 400 (6th Cir. 2002)); *Gilmore*, 282 F.3d at 400 n.1 (quoting 18 U.S.C. § 2113(a) (2012)).

126. *Brooks*, 446 S.W.3d at 676–77.

127. *Id.* at 677.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 676.

132. *Id.* at 677.

the court held that Brooks “implicitly threatened the use of immediate physical force,” and his conviction of second-degree robbery was affirmed.¹³³

V. COMMENT

The difficulty in determining whether a defendant threatened the immediate use of physical force is reflected in the inconsistent outcomes that Missouri courts have reached in second-degree robbery cases over the past three decades. The Supreme Court of Missouri has apparently sensed the confusion that trial and appellate courts are operating under and has taken on transfer of two second-degree robbery cases dealing with the threat of force in the past year.¹³⁴ It appears the court is attempting to define a uniform standard by which Missouri courts should measure the threat of force, and the standard appears to be quite prosecutor-friendly.

This Part begins by explaining the significance between being convicted of second-degree robbery and stealing, then examines the standard applied in *Brooks*, followed by a discussion of an alternative solution to the problem of determining whether a defendant threatened force when taking money from a bank.

A. *Why the Difference Between Second-Degree Robbery and Stealing Matters*

For a criminal defendant, the difference between being convicted of second-degree robbery and stealing is more than just a matter of semantics. In 2013, only eighteen percent of defendants convicted of stealing (value \$150 or more) were sentenced to time in prison, and those who were given prison time were given an average sentence of only 4.4 years.¹³⁵ However, fifty-three percent of defendants convicted of second-degree robbery were required to serve time in prison and were sentenced to an average of 8.7 years in prison.¹³⁶ With the average prison sentence for second-degree robbery almost twice that of stealing, it is crucial that the Supreme Court of Missouri articulate a clear standard for examining a threat of force so that criminal defendants and their attorneys are able to present their best argument at trial.

B. *Defining the Standard*

The problem with the standard articulated by the court in *Coleman* is that it is not entirely clear from whose perspective the threat is being evaluated – the victim or the defendant. The standard, as the Supreme Court of Mis-

133. *Id.*

134. *Id.* at 673; *State v. Coleman*, 463 S.W.3d 353 (Mo. 2015) (en banc).

135. MO. SENTENCING ADVISORY COMM’N, USER GUIDE 2012–2013, at 44 (Apr. 26, 2013), <http://www.mosac.mo.gov/file.jsp?id=45394>.

136. *Id.* at 37.

souri articulated it, is “whether a reasonable person would believe his conduct was a threat of the immediate use of physical force.”¹³⁷ The plain meaning of this standard seems to be whether a reasonable defendant would believe his conduct would be perceived as a threat. However, contrary to the literal reading of the standard, the court applied the standard as whether a reasonable person in the victim’s position would feel threatened by the defendant’s conduct.¹³⁸ For example, in applying the standard, the court looked at whether a reasonable teller would interpret Brooks’s disguise as a threat,¹³⁹ whether the teller would feel threatened by Brooks watching her as she got the money,¹⁴⁰ and whether Brooks banging his hand on the counter would be perceived as a threat.¹⁴¹ Thus, in application, the court is actually applying a different standard than the one articulated in *Brooks*. Of course, instituting an objective standard has appeal when trying to determine something as subjective as a threat, where a statement that might be perceived as a threat to some people would not be interpreted as a threat by others. However, by creating an ambiguous standard, the court has not resolved the confusion surrounding the threat of force in second-degree robbery cases.

Assuming the standard the court intended to articulate was whether a reasonable person would interpret the words or actions of the defendant as a threat, the court set a low bar for prosecutors to prove that the defendant’s actions constituted a threat of the immediate use of physical force. The reason the bar is lower for prosecutors under the new standard is that it is inherent in an act of stealing that a reasonable person would feel threatened by any action that the defendant takes, whether or not their conduct implies the immediate use of physical force. For example, the court reasoned in *Brooks* that by Brooks slamming his hand forcefully on the counter, of which the forcefulness was a matter of factual dispute,¹⁴² the teller “[n]aturally . . . felt ‘terrified’ and that she ‘had to follow through with the note to keep [her] co-workers and [her] self safe.’”¹⁴³ The court acknowledged that Brooks did not use any threatening language or physical mannerisms during the theft other than the hand slap,¹⁴⁴ so it hardly seems determinative that a hand slap alone would cause someone to fear the immediate use of physical force.

The crucial factor that was not contemplated in the court’s standard is that this theft took place in a bank, a unique factual setting that distinguishes it from many other robberies. Instead, the court noted that banks are a regular target for robberies, and bank employees have a “heightened awareness of

137. *Brooks*, 446 S.W.3d at 676.

138. *Id.* at 677.

139. *Id.*

140. *Id.*

141. *Id.*

142. See Appellant’s Substitute Brief, *supra* note 4, at *6; Respondent’s Brief, *supra* note 5, at *6.

143. *Brooks*, 446 S.W.3d at 677 (alterations in original).

144. *Id.* at 675, 677.

security threats.”¹⁴⁵ In fact, the court placed such emphasis on the location of the theft in its reasoning that it stated, “[a] demand for money in [a bank] is an implicit threat of the use of force in and of itself.”¹⁴⁶ The court is essentially stating that any theft that occurs in a bank while customers or employees are present is *necessarily* an implicit threat of force, regardless of whether the defendant acts in a threatening manner or not. As a result, the *Brooks* standard and reasoning contemplates an act of stealing that takes place in a bank and ignores how this lenient standard will affect those defendants charged with second-degree robbery outside of the bank context.

C. Bank Robbery Statute

A solution to the outcome in *Brooks* would be for the Missouri legislature to enact a separate bank robbery statute that removes the force or threat of force element, while maintaining the traditional forcible stealing element for thefts that occur outside of a bank or financial institution. Rather than focus on whether the party who steals from a bank uses or threatens force, the statute would penalize stealing¹⁴⁷ and robbery the same, thereby eliminating the need to find force in order to convict under the statute. This seems to be what the court was suggesting in *Brooks*, as it relied heavily on cases applying the federal bank robbery statute,¹⁴⁸ which includes both stealing and robbery as alternative conduct elements for the crime. Further, enacting a statute that specifically punishes bank robbery would also be significant for the public policy it encourages: if you steal or attempt to steal from a bank, there will be a harsh punishment, regardless of whether force is threatened, due to the inherent security risks that accompany that crime.

One significant benefit of having a state statute specifically for bank robbery is that it can punish anyone who steals from a bank uniformly, as opposed to the problematic system of trying to determine whether the defendant committed second-degree robbery or stealing. For example, Michigan has enacted a bank robbery statute that finds a person guilty of bank robbery if he or she commits the crime of stealing or robbery, or has the intent to commit robbery or stealing from a bank.¹⁴⁹ Including the intent to commit the crime of stealing or robbery in the statute further removes the need to focus on the use of force in the crime. Rather, the use of force is treated as a determinative factor in the sentencing of the crime, where the sentence is harsher if force was used in the commission of the robbery.¹⁵⁰

145. *Id.* at 676.

146. *Id.*

147. MO. REV. STAT. § 570.030 (Cum. Supp. 2013).

148. *Brooks*, 446 S.W.3d at 677.

149. MICH. COMP. LAWS ANN. § 750.531 (West 2016).

150. *See id.*

The federal government has also enacted a specific bank robbery statute, as alluded to in the *Brooks* decision.¹⁵¹ Similar to the statute enacted in Michigan, the federal statute makes it a criminal offense to even enter a bank with the intent to commit stealing or robbery.¹⁵² The federal statute was originally limited to robbery, but expanded the statute to include stealing due to the “incongruous results” that would commonly arise when the defendant would not use or threaten force during the commission of the crime and therefore not be liable under the statute for robbery.¹⁵³ Also like the Michigan statute, the federal statute imposes higher penalties for anyone who attempts to steal from a bank and puts someone’s life in danger in the process, allowing punishment up to and including the death penalty if someone is killed during the commission of the offense.¹⁵⁴

A possible criticism of enacting a state bank robbery statute could be that there is not a substantive difference between robbery of a bank and robbery of a person on the street that merits separate standards. Admittedly, all types of robbery pose significant threats to the victim’s safety, regardless of the location of the act. However, the robbery of a bank is inherently more dangerous, as there are typically armed security guards, customers, and a number of employees the defendant has to communicate with to retrieve the money or property they demand. For example, there were 3972 reported robberies and larcenies committed at banks and financial institutions across the United States in 2014.¹⁵⁵ During the commission of those offenses, sixty-three people were injured, and an additional thirteen were killed.¹⁵⁶ In 2014, Missouri had ninety-three robberies at banks and financial institutions – among the highest in the country.¹⁵⁷ Compared to a standard robbery where there is usually only one victim,¹⁵⁸ the policy behind punishing bank robbery more severely is based upon the higher number of victims present and the increased probability a victim would be hurt or killed.

VI. CONCLUSION

The court in *Brooks* articulated a uniform standard to be applied when determining whether a defendant used or threatened the immediate use of physical force during the commission of a robbery. This decision was based in large part on the fact that the robbery took place in a bank, and the Su-

151. 18 U.S.C. § 2113 (2012).

152. *Id.* § 2113(a).

153. Drechsler, *supra* note 51, at § 2(b).

154. *Id.* at § 3.

155. FBI, *Bank Crime Statistics*, U.S. DEP’T JUST. 1, <https://www.fbi.gov/stats-services/publications/bank-crime-statistics-2014/bank-crime-statistics-2014> (last visited Jan. 10, 2015).

156. *Id.* at 3.

157. *Id.* at 6.

158. Dierker, *supra* note 44.

preme Court of Missouri issued an overly lenient standard for what constitutes a threat of force that will now apply to all second-degree robbery cases. A practical solution to the problem the court was trying to address would be for the Missouri legislature to enact a bank robbery statute that eliminates the force element for the crime of robbery when committed in a bank, but retain force as an element in ordinary robbery cases.