

No. SC85355

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

vs.

PAUL E. WILLIAMS,

Appellant.

**Appeal from the Circuit Court of Jackson County, Mo.
16th Judicial Circuit, Division No. 8
The Honorable Peggy Stevens McGraw, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal from convictions for assault in the second degree, §569.060, RSMo 2000, and armed criminal action, §571.015.1, RSMo 2000, obtained in the Circuit Court of Jackson County for which appellant was sentenced, as a persistent offender and a dangerous offender, to concurrent terms of seven and five years, respectively, in the custody of the Department of Corrections. The appeal does not involve any issues or matters within the exclusive jurisdiction of the Missouri Supreme Court. Therefore the Court of Appeals, Western District, had jurisdiction. Art. V, §3, Missouri Constitution (as amended 1982). This appeal is properly before this Court because of this Court's July 1, 2003 order of transfer. Rule 83.04.

STATEMENT OF FACTS

Appellant, Paul E. Williams, was charged by information with assault in the second degree, assault in the third degree, and armed criminal action (L.F. 11-12). The information also alleged that appellant was a prior, persistent, and dangerous offender based on his prior convictions for assault in the first degree, assault in the second degree, and burglary in the second degree (L.F. 12). On August 20, 2001, appellant waived his right to a jury trial and the cause went to trial in the Jackson County Circuit Court, the Honorable Peggy Stevens McGraw presiding (Tr. 4, 7-8).

Viewed in the light most favorable to the verdicts, the following evidence was adduced: On May 9, 2001, the victim, Marva Mosley, was attempting to get her ex-boyfriend, the appellant, to move out of her house at 3018 Highland in Jackson County, but appellant refused to leave (Tr. 21, 103). The victim enlisted the assistance of her sister, who talked to the appellant and told him that he needed to leave (Tr. 103-104). He left, but warned that he would return to pick up his belongings (Tr. 104). The victim told him that “he didn’t need to come back” because she would “pack his things” and deliver them to him the next day (Tr. 104). At some point that evening, Mosley heard the front door being unlocked as she talked with her sister on the telephone (Tr. 104). Mosley told her sister to call the police (Tr. 104).

Appellant made repeated trips into the house to retrieve his possessions (Tr. 104). At one point, he started to pick up the television set (Tr. 104). She protested that he had given her the TV set as a gift, and the appellant announced that “he wasn’t going to have some other man looking at the TV he bought” (Tr. 104). Appellant threw the TV to the floor, causing the set to

shatter (Tr. 104). Then he picked up some more of his belongings and took them to his car (Tr. 104).

When he left the house, the victim locked the door (Tr. 104). The appellant responded by kicking in the front door (Tr. 104). The victim attempted to block the entrance to her house and instructed the appellant to leave (Tr. 104). Appellant then punched her in the face with his fist (Tr. 104).

At that point, Mosley's sister, Ivy Anderson, arrived, and began talking to the appellant (Tr. 104). Mosley told her sister that the appellant had struck her in the face (Tr. 110). When the appellant realized that the police were coming down the street, he began running towards his car (Tr. 104-105).

Shortly after 11 p.m. on that evening, Officers Howard Periman and Greg Harmon, of the Kansas City, Missouri Police Department, arrived at the scene in a marked patrol car and saw appellant running from the front door of the house (Tr. 20-23, 24, 36, 55). The victim, Marva Mosley, was running out of the house after him (Tr. 25).

Appellant, entered his vehicle, which was parked on the street outside the house (Tr. 25). However, before he could drive away, Mosley ran into the street and began waving her arms, as if she were signaling to the two officers (Tr. 26). The appellant started the car (Tr. 26). Since a van that was parked in front of his car, appellant pulled forward for a short distance, and then backed up so that he could get around the van (Tr. 27, 57). As the appellant pulled out of his parking spot and prepared to drive off, the victim stood in the street, blocking his path (Tr. 27, 57). Appellant's vehicle began inching forward; as it started picking up speed,

and the victim placed both of her hands on the hood and started backpedaling as fast as she could (Tr. 27, 57). Appellant then accelerated, and the front end of his vehicle struck the victim in the thigh, catapulting her onto the hood of the vehicle (Tr. 28, 57). As the appellant's vehicle continued down the street, the victim rolled off of the hood onto the street "and rolled approximately two times" (Tr. 28, 57).

Officers Periman and Harmon radioed for assistance and an ambulance, and pursued appellant in their patrol car at speeds reaching 45 to 50 miles an hour (Tr. 29). When the appellant finally stopped, he refused the officers' commands to exit the vehicle and had to be forcibly extricated (Tr. 30-32). The appellant was arrested for assault and driven back to 3018 Highland (Tr. 33).

When the officers went up to the house, they observed that there was some damage to the front door and the door frame (Tr. 33). They went inside and spoke with the victim, who was being treated by MAST paramedics for abrasions to her hands and feet (Tr. 34). She appeared to have just stopped crying, but still seemed upset (Tr. 34).

The officers noticed that the victim had a bloody lip (Tr. 34). She told the officers that she had received that injury when the appellant punched her in the face (Tr. 99). She told the officers that she began arguing with the appellant and told him that she wanted him out of her house (Tr. 100). She said she told him to wait outside while she gathered his belongings, and locked the front door to make sure he would stay outside (Tr. 100). The victim said that appellant kicked the front door open with his foot, splintering part of the door, and entered the house against her wishes (Tr. 100). When she ordered him to leave, he struck her in the mouth

with a closed fist, then ran out of the house (Tr. 100). She also told the officers that the appellant intentionally struck her with his car, although Mosley testified at trial that she did not remember that part of her statement (Tr. 101-102).

On the following day, Mosley made a detailed statement at police headquarters to Detective Steve Shaffer (Tr. 102-105). In that statement, the victim said that appellant had punched her in the face with his fist (Tr. 104). She described how she told her sister that appellant had struck her in the face (Tr. 110). She also described how appellant drove his car into the street and “ran into” her (Tr. 105). She told the detective that she had some bruises and scratches to her right arm and wrist, and also to her left foot as the result of being struck by the appellant’s vehicle as it sped away (Tr. 105).

Mosley also obtained an ex parte order of protection against the appellant (Tr. 106). In her sworn petition, she said that on May 9, 2001, he physically injured her and unlawfully imprisoned her by trying to run her over with his car (Tr. 94, 106). She said in her petition that he also hit her in the face and physically prevented her from using the telephone to call for help (Tr. 94, 106).

Appellant did not testify on his own behalf. However, by the time of the trial, the victim was appellant’s fiancé and she testified for him (Tr. 110-111). At trial, Mosley testified that she lied to police when she told them that he had punched her in the mouth, kicked in her door and tried to run her over with his car (Tr. 81-93). She said she was just trying to get him into trouble, because she was mad at him for talking with his ex-girlfriend (Tr. 82-84, 87, 90-91, 93-94).

She said she stood in front of the appellant's car, hoping that he would stay until the police came, but that she "jump[ed] on the hood of the car" because she thought that would cause the appellant not to drive off (Tr. 91, 92, 93). She also said that the appellant had not intentionally struck her in the mouth (Tr. 108). She said she and the appellant were struggling over the TV, when it fell to the floor and broke (Tr. 108). As she was bending over with a broom, trying to clean up the broken glass, the appellant brushed past her, and, as he bumped her, the broom handle hit her in the mouth (Tr. 108).

The trial court had granted appellant's motion for a judgment of acquittal at the close of the State's case as to the count of assault in the third degree, which was based on the appellant striking the victim with his fist, because the victim had not testified at that time and the State had conceded that it had not proven its case on that matter without her testimony (Tr. 80). At the close of all of the evidence, the instructions and the argument, the trial court found that appellant was guilty of the counts of assault in the second degree which was based on appellant striking the victim with his car, and the accompanying count of armed criminal action (L.F. 48).

On November 26, 2001, the trial court sentenced appellant, as a persistent offender and a dangerous offender to concurrent terms of seven and five years, respectively, in the custody of the Department of Corrections (L.F. 48-50). On December 7, 2001, Judge McGraw entered a written order denominated "Amended/Judgment," memorializing the sentences previously imposed on November 26, 2001 (L.F. 48-50).

ARGUMENT

I.

The trial court did not commit plain error when it denied appellant’s untimely attack on the sufficiency of the assault in the second degree charge in the information, Count I, on the theory that it failed to allege that the appellant took a substantial step toward the completion of the crime because this so-called “defect” involved an allegation that did not need to be contained in an information, and its absence did not prejudice the appellant.

Likewise, the trial court did not commit plain error when it rejected the appellant’s untimely challenges to the armed criminal action charge, Count III, because it was unnecessary to allege in that count that the appellant “knowingly” committed the offense of armed criminal action or that he attempted to cause serious physical injury or death to the victim, and the appellant could not have been prejudiced by the absence of these allegations (Responds to Points I, II and V of the appellant’s brief).

Points I, II and V of the appellant’s brief all involved belated challenges to the sufficiency of the amended information that are not preserved for appeal. Under Point I of his brief, the appellant challenges the sufficiency of Count I of the amended information, which charged him with assault in the second degree. That count alleged that the appellant attempted to cause physical injury to the victim, but it did not specify that he took a “substantial step” toward that objective (App.Br. 24-34).

Under Point II of his brief, appellant makes an untimely attack on Count III of the amended information, which charged him with armed criminal action, because it did not allege that he “knowingly” committed that offense, and because it “did not describe the conduct by which the offense was allegedly committed” (App.Br. 35-43). Under Point V, he asserts, for the first time on appeal, that Count III was fatally defective because its allegations “would not demonstrate that [his] vehicle constituted a ‘dangerous instrument’ for purposes of the statute proscribing armed criminal action, because the State failed to “demonstrate that [he] used the vehicle with the purpose of causing death or serious physical injury” (App.Br. 58-62).

None of his challenges to the sufficiency of Counts I, II or V of the amended information have any validity at all, and would not have required the State to amend the charges, even if they had been raised in a timely fashion. Nevertheless, since all three of the appellant’s arguments were not raised until after the judge’s verdict, the appellant’s arguments have no chance of success, because the appellant obviously was not prejudiced by any of these supposed “defects.”

A. Standard of review and general analysis

As previously emphasized, the issues the appellant raises under Points I and II of his brief were first raised after verdict, in a pleading styled “Defendant’s Motion for Arrest of Judgment Pursuant to Rule 29.13” (L.F. 20-24). The claim he asserts under Point V of his brief is being raised for the first time on appeal.

Where, as here, the defendant fails to challenge the indictment or information prior to verdict, the indictment will be deemed insufficient:

only if it is so defective that (1) it does not by any reasonable construction charge the offense of which the defendant was convicted or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the even of acquittal are prejudiced. In either event, a defendant will not be entitled to relief based on a post-verdict claim that the information or indictment is insufficient unless the defendant demonstrates actual prejudice.

State v. Parkhurst, 845 S.W.2d 31, 35 (Mo.banc 1992).

In Parkhurst, the information left out an entire element of the offense, “knowingly.” Nevertheless, this Court held that such a defect did not entitle the defendant to relief, where, as here, it was asserted for the first time after verdict. This Court concluded that, since the information cited the correct statute, and otherwise alleged the specifics of the offense, the omission of the word “knowingly” did not impact on the preparation of his defense or prevent him from asserting double jeopardy in the event he were to be acquitted. Id. at 35. This Court held that the “only reasonable construction of the information” led to the “inescapable conclusion” that the defendant was charged with the offense of which he was convicted, and that the failure to include the word “knowingly” in the information was not a fatal defect. Id.

This Court reiterated its holding in State v. Briscoe, 847 S.W.2d 792 (Mo.banc 1993). There, this Court upheld the defendant’s convictions of three counts of the sale of cocaine, even though the information was technically insufficient because it failed to allege that the

sales were made “knowingly,” an essential element of the offenses. This Court emphasized that “[t]he import of Parkhurst is that we will not longer persist in requiring reversal in every case involving an insufficient information.” State v. Briscoe, supra at 794. This Court repeated that “[w]hen the insufficiency is first objected to after trial, the defendant must allege and demonstrate actual prejudice.” Id.

In the present case, regardless of the technical sufficiency of Counts I and III of the amended information, it is clear that they effectively charged him with assault in the second degree, in violation of §565.060, RSMo 2000, by attempting to cause physical injury to the victim by means of a dangerous instrument (“a car”), and armed criminal action, in violation of §571.015.1, RSMo 2000, by committing the offense of assault in the second degree “by, with and through the use, assistance and aid of a dangerous instrument” (L.F. 11-12).

Both charges were based upon the appellant’s act of driving his automobile into the body of his girlfriend, Marva Mosley, knocking her onto the hood of his vehicle as he sped away from police (L.F. 11-12). Clearly, none of the supposed “defects” contained in Counts I and III rendered those counts “so defective” that they did not, “by any reasonable construction,” charge the appellant with assault in the second degree or armed criminal action. State v. Parkhurst, supra at 35. Nor did they affect the appellant’s substantial rights to such an extent that they prevented him from preparing a defense or pleading former jeopardy in the event of an acquittal. Id.

As outlined by Counts I and III, the charges were clear: The appellant had committed the crimes of assault in the first degree and armed criminal action by ramming his motor vehicle

into the victim, employing it as a “dangerous instrument,” while attempting to inflict serious physical injury. Unquestionably, even if the counts could have gone into more explicit detail, that supposed lack of specificity did not keep the appellant from preparing his defense, which was that the victim had jumped on the hood of his car, rather than being struck by the appellant’s vehicle (Tr. 91-93).

Since it is clear that, under Parkhurst and Briscoe, Counts I and III were not so defective that they did not, by any “reasonable construction,” charge the appellant with the crimes of second-degree assault and armed criminal action, and since it is equally clear that these “defects” did not prejudice his substantial rights to prepare a defense and plead former jeopardy in the event of an acquittal, there is no reason to consider these issues in any more depth.

Nevertheless, in the event this Court undertakes to conduct a more thorough examination of the appellant’s untimely attacks on the amended information, the State would

again note that *none* of the arguments the appellant advances under Points I and III of his brief have any merit.¹

B. More specific analysis as to Count I: Assault in the second degree

Should this Court choose to examine the appellant's claims more closely, Count I of the amended information, which charged the appellant with assault in the second degree, alleged, in pertinent part, as follows:

. . . [T]he defendant, **Paul E. Williams**, in violation of Section 565.060, RSMo, committed the **Class C Felony of Assault in the Second Degree**, punishable upon conviction under Sections 558.011 and 560.011, RSMo, in that on or about 05/09/2001, in the County of Jackson, State of Missouri, the defendant attempted to cause physical injury to Marva Mosley by means of a dangerous instrument, to wit: a car.

(L.F. 11; emphasis in original).

¹Appellant repeatedly relies on State v. Gilmore, 650 S.W.2d 627 (Mo.banc 1983), without noting that the holding of that case was expressly overturned in State v. Parkhurst, 845 S.W.2d 31, 34 (Mo.banc 1992) (App.Br. 25, 35, 37, 44, 61)

The appellant's sole attack on this count, which he advanced for the first time in his post-verdict "Motion for Arrest of Judgment Pursuant to Rule 29.13" (L.F. 20-22), is based upon its failure to specifically allege that the appellant took a "substantial step" toward the completion of his objective, i.e, his attempt to cause physical injury to Ms. Mosley (App.Br. 27). The appellant, citing State v. Withrow, 8 S.W.3d 75, 78 (Mo.banc 1999), asserts that the crime of attempt has two elements and that one of them, according to Withrow, is the "doing of an act which is a substantial step toward the commission of that offense" (App.Br. 29).

Although it may be true, as Withrow holds, that the crime of "attempt" under Missouri law has is defined as being made up of two elements, i.e., having the purpose of committing the offense and doing an act that is a "substantial step toward the commission of" the intended offense, it does not necessarily follow that to effectively charge the crime of assault in the second degree the information or indictment must specifically allege that the defendant took a substantial step toward his attempt to cause physical injury to the victim. By alleging that the defendant attempted to commit the offense of assault in the second degree, the State has implicitly and necessarily alleged that the defendant both had the purpose of committing assault in the second degree and that he has taken a substantial step towards that offense, even though neither of those allegations expressly appear in the information, because these matters are the definition of an attempt.

MACH-CR 19.04 (10-1-98), in effect at the time the amended information was filed, read, in pertinent part, as follows:

. . . [T]he defendant, in violation of Section 565.060, RSMO, committed the class C felony of assault in the second degree, punishable upon conviction under Sections 558.011 and 560.011, in that (on) (on or about) [*date*], in the (City) (County) of _____, State of Missouri, the defendant [*Insert one or more of the following. Omit brackets and number.*]

* * *

[1] (knowingly caused) (attempted to cause) physical injury to [*name of victim*] by means of a (deadly weapon) (dangerous instrument).

A comparison between this pattern charge and Count I of the information reveals that they are, in all substantial aspects, identical, except for the fact that Count I contains a description of the dangerous instrument (“a car”) that MACH-CR 19.04 (10-1-98) did not require.

Since the amended charge was filed, MACH-CR 19.04 has been revised, effective September 1, 2001. Attempting to cause physical injury is now covered by the material contained in bracket [2] of the pattern instruction and reads as follows:

attempted to cause physical injury to [*name of victim*] by means of a (deadly weapon) (Dangerous instrument) by [*insert means by which attempt was made such as shooting, stabbing, etc.*] him.

Note on Use 4 to MACH-CR 19.04 (9-1-01) expressly provides that “[i]t is not necessary to use MACH-CR 18.03 to charge an attempt under this form,” i.e., it is not necessary to expressly allege that the defendant took a “substantial step” toward the commission of the completed offense, or to describe the nature of that step.

In other words, neither version of MACH-CR 19.04 required the State to have included “substantial step” language in charging the offense of second-degree assault in cases where the defendant allegedly “attempted to cause physical injury” to the victim.

Rule 23.01(b)(2) requires that an indictment or information must “[s]tate plainly, concisely, and definitely the essential facts constituting the offense charged.” Subsection (e) of this rule further provides that “[a]ll indictments or informations which are substantially consistent with the forms of indictments or informations which have been approved by this Court shall be deemed to comply with the requirements of this Rule 23.01(b).”

Rule 23.01(e), obviously, means what it says. Where, as here, the information or indictment tracks the appropriate charge, it cannot be fatally defective. In fact, there does not appear to be a single reported case in Missouri where a conviction has been overturned because of a defective information or indictment where, as here, that information or indictment accurately tracked the appropriate pattern charge.

Quite simply, if an information or indictment is substantially consistent with the appropriate MACH-CR pattern charge, it will not be deemed to be insufficient. State v. Bailey, 760 S.W.2d 122, 124 (Mo.banc 1988); State v. Frances, 51 S.W.3d 18, 22-23 (Mo.App., W.D. 2001); State v. Pride, 1 S.W.3d 494, 502-503 (Mo.App., W.D. 1999); State v. Kenney, 973

S.W.2d 536, 544[14] (Mo.App., W.D. 1998); State v. Woodworth, 941 S.W.2d 679, 693 (Mo.App., W.D. 1997); State v. Williams, 865 S.W.2d 794, 800 (Mo.App., S.D. 1993); State v. Hyler, 861 S.W.2d 646, 649 (Mo.App., W.D. 1993); Rule 23.01(e). Additionally, in charging an attempt, the State “need not be as explicit and specific as when charging a completed crime.” State v. Helsop, 842 **S.W.2d** 72, 76 (Mo.banc 1992).

Moreover, the State would note in passing that, even if the rule were otherwise, and the State had been required to have included the “substantial step” language that the appellant now insists should have been contained in Count I, the appellant still would not be entitled to relief, even if he had raised this issue in a timely fashion. State v. McCullum, 63 S.W.3d 242, 250 (Mo.App., S.D. 2001).

In McCullum, the defendant complained on appeal of the trial court’s failure to dismiss a charge of *first*-degree assault because the information, contrary to the requirements of MACH-CR 18.02, did not contain the necessary “substantial step” allegations. The Court of Appeals rejected this challenge because the defendant had not been prejudiced by this omission. Among other things, the Court of Appeals noted that the failure to list the substantial step in the information did not hinder his defense (that he did not intentionally set the victim on fire), and that the information also was sufficient to allow the defendant to plead former jeopardy, since it cited the correct statute and detailed the conduct upon which the charges were based. State v. McCullum, *supra* at 250.

The same is true in the instant case. The amended information, in relevant part, charged that the appellant, “in violation of Section 565.060,” the statute defining second-degree assault,

“attempted to cause physical injury to Marva Mosley by means of a dangerous instrument, to wit: a car” (L.F. 11). Obviously, failing to list the substantial step the appellant took in connection with this attempt (i.e., “striking her with the vehicle”) did not hinder his defense, which was that Ms. Mosley jumped on the hood of his car (Tr. 91-93). And the “substantial step” omission did not preclude him from pleading former jeopardy, since Count I listed the gist of the offense “attempt[ing] to cause physical injury” to the victim “by means of a dangerous instrument, to wit: a car,” as well as the correct statute number (§565.060) for the crime of assault in the second degree.

Additionally, appellant fails to recognize that “[t]he information alone is not conclusive of the question regarding double jeopardy: one must look to the proceedings as a whole when analyzing double jeopardy claims.” State v. McCullum, *supra* at 250. Therefore, even if one could not tell whether double jeopardy would occur in a subsequent proceeding by looking at the information, one could certainly make that determination from the information when combined with the rest of the record in the case. However, as was described above, in the case at bar one can certainly make the double jeopardy determination from the facts alleged in the information. Thus, appellant’s claim concerning the count of assault in the second degree in the information is without merit.

C. More specific analysis as to Count III: armed criminal action

The appellant also attempts to raise two separate untimely challenges to the sufficiency of Count III of the amended information, which read, in relevant part, as follows:

. . . [T]he defendant, **Paul E. Williams**, in violation of Section 571.015, RSMo, committed the **Felony of Armed Criminal Action**, punishable upon conviction under Section 571.015, RSMO, in that on or about 05/09, 2001, in the County of Jackson, State of Missouri, the defendant committed the felony of Assault charged in Count I, all allegations of which are incorporated herein by reference, and the defendant committed the foregoing felony of Assault by, with and through, the use, assistance and aid of a dangerous instrument.

(L.F. 12; emphasis in original).

As earlier noted, the appellant attempts to challenge the sufficiency of Count III, the armed criminal action charge, on two separate grounds: He asserts, under Point II of his brief, that this count was fatally defective because it failed to allege that he “knowingly” committed the offense of armed criminal action, and because it “did not describe the conduct by which the offense was allegedly committed” (App.Br. 35-43), and he further contends, under Point V of his brief, that the count was fatally defective since its allegations “would not demonstrate that [his] vehicle constituted a ‘dangerous instrument’ for purposes of the statute proscribing armed criminal action,” because the State failed to “demonstrate that [he] used the vehicle with the purpose of causing death or serious physical injury” (App.Br. 58-62).

Both arguments are devoid of merit. First of all, the Court of Appeals has made it clear in State v. Cruz, 71 S.W.3d 612, 618-619 (Mo.App., W.D. 2002), and State v. Hill, 88 S.W.3d

527, 530 (Mo.App., W.D. 2002), that, notwithstanding MACH-CR 32.02, the pattern charge for armed criminal action, it is *not* necessary to allege that a defendant had a mental state for armed criminal action. This is because the mental state for armed criminal action is found in the definition of the underlying offense, which for the assault in this case required a finding that appellant attempted, i.e., had the purpose, to cause physical injury to the victim with a dangerous instrument (L.F. 11).²

State v. Gilpin, 954 S.W.2d 570, 580 (Mo.App., W.D. 1997), which is cited by appellant as holding that “armed criminal action requires a culpable mental state of acting purposely, knowingly, or recklessly,” does not hold that these mental states are required to be in the information or instructions for armed criminal action (App.Br. 40). As State v. Hernandez, 815 S.W.2d 67, 72 (Mo.App., S.D. 1991), which is cited by appellant, states, “By definition, armed criminal action incorporates all the elements of the underlying felony” (App.Br. 40). See also State ex rel. Bullock v. Seier, 771 S.W.2d 71, 75-76 (Mo.banc 1989). Thus, as long as the requisite mental element is in description of the underlying offense in the information, armed criminal action is properly charged.

In any event, since Count III adopted and incorporated by reference the allegations contained in Count I, and since Count I alleged that the appellant “attempted to cause physical injury to Marva Mosley by means of a dangerous instrument, to wit: a car,” Count III *did* allege

²**This Court granted transfer of Cruz, heard argument, and then retransferred the case to the Court of Appeals.**

that the appellant had committed the offense of armed criminal action knowingly, since a person cannot unknowingly attempt to cause physical injury to another.

Furthermore, the allegations incorporated by reference from Count I-that the appellant attempted to cause physical injury to Ms. Mosley by means of a dangerous instrument, and that the “dangerous instrument was ‘a car’”-certainly were sufficient to advise the appellant of the “conduct by which the offense was allegedly committed,” despite what the appellant claims in the second half of his argument under Point II.

Remaining to be considered, then, is the claim the appellant advances under Point V of his brief, i.e., that Count III was fatally defective because it failed to allege that the appellant “used the vehicle with the purpose of causing death or serious physical injury” (App.Br. 58).

However, that language does not appear in the statute defining the elements of armed criminal action. § 571.015, RSMo 2000, states that armed criminal action occurs when a person “commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon....” It was obvious from the language in Counts III, which incorporated all the allegations in Count I, that the dangerous instrument in question was the car that appellant used to ram the victim (L.F. 11-12).

Generally, it is enough ‘to charge the offense in the language of the statute alleged to be violated if the statute sets out all of the elements of the offense.’” State v. Allen, 905 **S.W.2d** 874, 879 (1995)(citation omitted). The information set out all of the elements of the offense of armed criminal action and the State was not required to define all terms in it, such as dangerous instrument, though the State did make it clear that the dangerous instrument in

question was “a car” (L.F. 11-12). Appellant’s failure to file a motion for a bill of particulars requesting additional facts about the offense waived any complaint about the sufficiency of the facts pled in the information. State v. Long, 972 S.W.2d 559, 561 (Mo.App., W.D. 1998). Additionally, as is discussed in Point III of this brief, the language that appellant argues is missing from the information is not an accurate definition of the term “dangerous instrument.”

Further, the the applicable MACH-CR pattern charge, MACH-CR 32.02, does not require the information to allege that the defendant had the intent to kill or cause serious physical injury to the victim. As was mentioned above, an information that is consistent with the appropriate pattern charge will not be deemed to be insufficient. State v. Bailey, supra at 124; State v. Frances, supra at 22-23.

D. Summary of Argument

As a direct result of the holdings in Parkhurst and Briscoe, a defendant who attacks an indictment or information after verdict has the almost-impossible burden of showing that he suffered substantial prejudice from the perceived defects in the charging document.

In this case, the appellant cannot meet the burden, if only because the supposed “defects” in the amended information were not defects at all, but rather involved matters that did not need to be alleged. In any event, in view of the relative simplicity of the charges (attempting to cause physical injury to the victim by using his motor vehicle as dangerous instrument) and the nature of the appellant’s defense (that the victim jumped, and was not

knocked, onto the hood of the car), any defects in the amended information could not have been prejudicial and certainly could not have resulted in manifest injustice.

For all of these reasons, Points I, II and V of the appellant's brief are without merit and entitle him to no relief.

II.

The trial court did not commit plain error or error of any type in overruling the appellant's request for a new trial based upon the State's alleged "Brady violation" by supposedly failing to timely disclose that the victim, Marva Mosley, had retracted her initial version of events in two telephone conversations with an assistant prosecutor, because the appellant waived this claim by not raising it before trial, the prosecution, in fact, notified the defense of the witness's recantation months before trial, and Ms. Mosley testified as a defense witness (Responds to Point III of the appellant's brief).

Under Point III of the appellant's brief, he asserts that the trial court erred in overruling his oral motion for a new trial because the "State failed to disclose that the alleged victim had told a member of the prosecuting attorney's office, shortly after the alleged offense[s] took place, that she had lied to police concerning the alleged events for which [he] was charged" (App.Br. 45-46).

However, the appellant's failure to timely raise this claim before his trial is fatal to his claim on appeal because it constitutes a waiver of the claim. State v. Barnett, 980 S.W.2d 297, 304-305 (Mo. banc 1998), **cert. denied** 525 U.S. 1161 (1999). As will be discussed in greater detail below, it is clear that the appellant's trial counsel was well-aware of the alleged discovery violation in question before appellant's trial, but that the appellant proceeded to trial without raising this claim (App.Br. 50; Supp.Tr. 35). He waited until the sentencing hearing to litigate this issue (Supp.Tr. 15-46). If the appellant had objected before trial, he may have been given the opportunity to cure any prejudice that could have resulted from the alleged discovery

violation. As this Court has stated, “requiring timely objection minimizes the incentive for ‘sandbagging,’ an improper tactic sometimes employed to build in error for exploitation on appeal should an unfavorable verdict obtained.” Id. (quoting State v. Borden, 605 S.W.2d 88, 90 (Mo. banc 1980)). Thus, this Court should deny appellant’s claim as having been waived.

In any event, in the argument portion of his brief, the appellant appears to concede that the claim as stated in his point relied on is factually incorrect (App.Br. 50). It was, in fact, undisputed that Jenifer Valenti, an assistant Jackson County prosecutor, had informed the appellant’s trial attorney, Vincent Esposito, that the victim, Marva Mosley, had “disclosed to [her] office that she lied to police” (Supp.Tr. 35).³ In fact, Ms. Valenti stressed, she had “several” conversations with Mr. Esposito on this topic, the first of which had occurred “as

³**The designation “Supp.Tr.” refers to the transcript of the hearing of November 8, 2001, on the appellant’s motion for arrest of judgment pursuant to Rule 29.13.**

early as June 13, 2001,” less than a month after the conversations took place, and more than two months prior to the appellant’s August 20, 2001 trial (Supp.Tr. 34-35; L.F. 38).⁴

It is, therefore, readily apparent that, despite what the appellant asserts in his third point relied on, the State *did* disclose to the appellant’s trial attorney, more than two months prior to trial, that Ms. Mosley had recanted her first version of events, and told the prosecutor’s office that her first account (that the appellant had intentionally struck her with his vehicle) was a lie, and that she had jumped on the hood of the appellant’s vehicle.

The appellant’s real argument appears to be that the State was obligated by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), to have *immediately* informed the appellant’s attorney of the two conversations, including the specific person (Aimee Riederer) that Ms. Mosley talked with, even though Mr. Esposito never asked the State for the name of the specific person that Ms. Mosley talked to (App.Br. 44-51).

⁴**Although Ms. Valenti was not under oath when she emphasized that she had, in fact, informed defense counsel of Ms. Mosley’s recantation, the appellant’s attorney stipulated that her statements could “be considered as evidence by the Court” (Supp.Tr. 48).**

If this is, in fact, the appellant's argument, it is utterly devoid of merit. Brady provides that the State is required by the Due Process Clause to disclose to the defense evidence in its possession that is favorable to the accused if the evidence is "material" to the defendant's guilt or punishment. Brady v. Maryland, *supra* 373 U.S. at 87; Rousan v. State, 48 S.W.3d 576, 590 (Mo.banc 2001), *cert. denied* 534 U.S. 1017 (2001). Impeachment evidence, as well as purely exculpatory evidence, falls within the scope of the Brady rule. United States v. Bagley, 473 U.S. 667, 676-677, 105 S.Ct. 3375, 3380-3381, 87 L.Ed.2d 481 (1985); Rousan v. State, *supra*.

In order to establish his right to such information, a defendant must make a plausible showing that demonstrates precisely how the information would have been material and favorable to him. Rousan v. State, *supra*. Favorable evidence is "material" and thus its nondisclosure constitutes constitutional error "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, *supra* 473 U.S. at 682; State v. Shafer, 969 S.W.2d 719, 741 (Mo.banc 1998), *cert. denied* 525 U.S. 969 (1998). A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." United States v. Bagley, *supra*.

In this case, Ms. Mosley's conversations with the prosecutor's office clearly constituted "favorable" evidence that was discoverable under Brady, and the appellant might have a viable argument if (1) the State had not timely disclosed the nature of the conversations

to the appellant; and (2) as a result of that nondisclosure, the appellant had been deprived of her testimony at trial.

However, shortly after Ms. Mosley's conversations with Ms. Riederer, she contacted the Public Defender's Office, which then was representing the appellant, and executed a detailed affidavit in which she stated, under oath, that she had "lied" when she said that the appellant struck her in the mouth and attempted to run her over in his car, and that, in fact, she had climbed on the hood of the appellant's car as he was driving away (Supp.Tr. 16-18).

Ms. Mosley testified that she executed this affidavit "[a]bout a week or two after the incident" (Supp.Tr. 16). At the appellant's preliminary hearing, which was held on May 24, 2001, the appellant's attorney produced this affidavit (L.F. 38).

Ms. Mosley later testified at trial as a defense witness—in fact, she was the defense's only witness. She told the court that the appellant was her fiancé, and that she lied to police when she told them that he had punched her in the mouth, kicked in her door and tried to run her over with his car (Tr. 81-93). She said she was just trying to get him into trouble, because she was mad at him for talking with his ex-girlfriend (Tr. 82-84, 87, 90-91, 93-94).

She testified that she stood in front of the appellant's car, hoping that he would stop until the police came, but that she "jump[ed] on the hood of the car" because she thought that would cause the appellant not to drive off (Tr. 91, 92, 93). She also said that the appellant had not intentionally struck her in the mouth (Tr. 108). She said she and the appellant were struggling over the TV, when it fell to the floor and broke (Tr. 108). As she was bending over

with a broom, trying to clean up the broken glass, the appellant brushed past her, and, as he bumped her, the broom handle hit her in the mouth (Tr. 108).

Obviously, then, the State's supposed "nondisclosure" of Ms. Mosley's conversation with Ms. Riederer had no impact whatsoever on the presentation of his defense. Ms. Mosley, after all, *was* the appellant's defense. Furthermore, although the appellant argues that the State committed a Brady violation by not furnishing the defense with the name of the specific assistant prosecutor that Ms. Mosley spoke with, Ms. Mosley testified at a post-trial hearing that she told Mr. Esposito about her conversation with Ms. Riederer (Supp.Tr. 19).

Ms. Mosley backed away from this testimony on redirect examination, stating that, while she remembered telling Mr. Esposito that she had talked with Ms. Riederer, she was not certain she said to him, "I told her I lied to the police" (Supp.Tr. 21). Nevertheless, even if Ms. Mosley's testimony on cross-examination was incorrect, since Ms. Valenti later told Mr. Esposito that Ms. Mosley "disclosed to [the prosecutor's] office that she had lied to the police" (Supp.Tr. 34-35). Mr. Esposito obviously was capable of putting two and two together and correctly concluding that Ms. Mosley had told *Ms. Riederer* that she had lied to the police. In fact, Mr. Esposito, never claimed that he was not aware of this conversation and that it was with Ms. Riederer. Curiously, appellant did not present his testimony at the sentencing hearing.

Not that it mattered to whom Ms. Mosley talked. Since the appellant's attorney did not dispute that the prosecution "disclosed that Ms. Mosley had recanted her false accusations" (Supp.Tr. 42) months prior to trial, there clearly was no Brady violation. Although the appellant

appears to be asserting that, if he had known the particular person to whom Ms. Mosley had spoken, he might have been able to use that testimony at trial, this contention is incorrect.

Ms. Mosley's statement to Ms. Riederer was a prior consistent statement, i.e., consistent with her trial testimony that the appellant had not tried to run her over. Prior consistent statements are admissible for the purpose of rehabilitating a witness only if that witness's credibility is attacked by express or implied claims of recent fabrication of trial testimony. State v. Norville, 23 S.W.3d 673, 678 (Mo.App., S.D. 2000).

Although the appellant claims that the State made an effort at trial to suggest that Ms. Mosley's trial testimony had been recently fabricated, that was not, in fact, the case, since it was undisputed at trial that Ms. Mosley had made a statement to the Public Defender's Office, recanting her earlier statements to police, shortly after the alleged offenses occurred (Tr. 107-108).

That is to say, everyone-including the trial judge in this jury-waived case-was aware that Ms. Mosley's trial testimony was not "recently fabricated" and was consistent with the version of events that she gave to the Public Defender's Office approximately two weeks after the incident. The State never contended otherwise.

Nor could it be justifiably claimed that the State violated the directives of Brady by not *immediately* informing the defense of its conversations with Ms. Mosley. Brady material must be disclosed in time for its effective use at trial. United States v. Gil, 297 F.3d 93, 105 (2nd Cir. 2002). It necessarily follows, then, that no denial of due process occurs if Brady material is disclosed in time for its effective use at trial. United States v. Starusko, 729 F.2d 256, 262

(3rd Cir. 1984). Where, as here, evidence is disclosed at trial in time for it to be put to effective use, a new trial will not be granted simply because it was not disclosed as early as it might have been. United States v. O’Keefe, 128 F.3d 885, 898 (5th Cir. 1997) cert. denied, 523 U.S. 1078 (1998).

In the instant case, Ms. Mosley’s recantation was disclosed to the defense months before trial, and Ms. Mosley was called as a defense witness at trial. There was, obviously, no Brady violation and no prejudice. No purpose would be served by discussing this issue at any greater length; Point III of his brief is completely bereft of merit and entitles the appellant to no relief.

III.

The trial court did not err in convicting and sentencing the appellant for armed criminal action, because the trial judge, as the trier of fact, could reasonably have found that the appellant used his car as a “dangerous instrument” when he used his car as a weapon by ramming the victim’s body with it (Responds to Point IV of the appellant’s brief).

The appellant, in his fourth point on appeal, challenges the sufficiency of the evidence to support his conviction of armed criminal action on the theory that the evidence, as a matter of law, was insufficient to show that his car was used as a “dangerous instrument,” as that term is defined in § 556.061, RSMo 2000, because the State allegedly failed to show that appellant’s “intent or motive [was] to cause death or serious physical injury to the alleged victim, Marva Mosley” when he rammed his car into her body (App.Br. 53).

However, it was not necessary for the State to prove that the appellant intended to inflict death or serious injury upon the victim, even though there was sufficient evidence of that. Rather, it was sufficient that the evidence showed that appellant had the intent required for the underlying offense, which is undisputed, and that he used the motor vehicle in a way that made it “readily capable” of causing her death or serious physical injury, another fact that the appellant does not dispute.

A. Standard of review

The sufficiency of the evidence in a judge-tried case is determined by the same standard of review as in a jury-tried case. State v. Sladek, 835 S.W.2d 308, 310 (Mo.banc 1992). That

standard is well-settled: **In reviewing a challenge to the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable finder of fact might have found the defendant guilty beyond a reasonable doubt. State v. Dulany, 781 S.W.2d 52, 55 (Mo.banc 1989). State v. Grim, 854 S.W.2d 403, 405-408 (Mo.banc 1993), cert. denied, 510 U.S. 997 (1993). The evidence, together with all reasonable inferences to be drawn therefrom, is viewed in the light most favorable to the verdict and evidence and inferences contrary to the verdict are ignored. State v. Feltrop, 803 S.W.2d 1, 11 (Mo. banc 1991), cert. denied, 501 U.S. 1262 (1991). Appellate courts do not weigh the evidence. State v. Villa-Perez, 835 S.W.2d 897, 900 (Mo.banc 1992).**

B. Analysis

Pursuant to §571.015.1, RSMo 2000, a person commits the crime of armed criminal action if he commits “any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon.” The term “dangerous instrument” is defined in § 556.061(9), RSMo 2000, as “any instrument, article or substance which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.”

“Missouri Courts have often held that seemingly innocuous items may be dangerous instruments.” State v. Carpenter, 72 **S.W.3d** 281, 283 (**Mo.App., S.D.** 2002)(handcuffs); State v. Burch, 939 **S.W.2d** 525, 530-531 (**Mo.App., W.D.** 1997)(an elbow); State v. Davis, 611 **S.W.2d** 384, 386-387 (**Mo.App., S.D.** 1981)(a metal sign; other cases cited involving shoes,

a hoe handle, and bottles). To determine whether a utilitarian object is a dangerous instrument, one must look at the circumstances under which it is used. State v. Seagraves, 700 **S.W.2d** 95, 97 (**Mo.App., E.D.** 1985).

In the case at bar, the Court of Appeals properly stated:

The language of the Statute requires only that, for an ordinary object to constitute a dangerous instrument for purposes of 571.015.1, there must be proof that the defendant had the requisite mental state to commit the underlying felony offense and, in the course thereof, used the ordinary object under circumstances and in a manner in which it was readily capable of causing death or serious physical injury to the victim. It was not necessary for the State to prove that the harm be death or serious physical injury.

State v. Williams, No. WD60855, slip op. at 22 (**Mo.App., W.D.** 2003).

Here, the evidence showed that the appellant used his car as a weapon and that he rammed the victim with it (Tr. 25-29). When a car is used as a weapon against a pedestrian, it cannot be reasonably argued that it is not a dangerous instrument because “under the circumstances in which it is used, [it] is *readily capable* of causing death or serious physical injury.” §556.061(9), RSMo 2000 (emphasis added).

The appellant does not dispute that he had committed the crime of second-degree assault, as proscribed by §565.060.1(2), RSMo 2000, by attempting to cause physical injury to another person *by means of a dangerous instrument*. Yet, he appears to take the inconsistent position that, while the motor vehicle he was driving constituted a “dangerous

instrument” under §565.060.1(2), it did not constitute a “dangerous instrument” under §571.015.1.

But, the term “dangerous instrument” retains the same meaning under both statutes: an instrument, article or substance “which, under the circumstances in which it is used, is *readily* capable of causing death or serious physical injury.” §556.061(9), RSMo 2000 (emphasis added).

The appellant’s argument essentially ignores the unambiguous “readily capable” language of §556.061(9), and interprets this statute to require that a defendant actually use the instrument with the *intent* of causing death or serious physical injury. However, the phrase “intent of causing death or serious physical injury is not contained in §556.061(9). If the statutory language is clear, unambiguous, and admits of only one meaning, as occurred in the case at bar, there is no room for construction and the legislature is presumed to have intended what the statute says. Clare v. Director of Revenue, 64 **S.W.3d** 877, 879 (**Mo.App., E.D.** 2002); Corvera Abatement Technologies, Inc. v. Air Conservation Comm’n, 973 S.W.2d 851, 858 (Mo.banc 1998).

In support of his argument, appellant cites in State v. Pogue, 851 S.W.2d 702 (Mo.App., S.D. 1993). In that case, the Southern District of the Court of Appeals held that an automobile was not a “deadly instrument” for purposes of the armed criminal action statute where the defendant, in an intoxicated condition, unintentionally collided with another vehicle, causing the death of its driver. The Court of Appeals relied on a federal decision, Reed v. United States, 584 A.2d 585, 588-589 (D.C.App. 1990), that held that “a car driven with the purpose

of injuring another definitely is a weapon.” This reliance was misplaced because Reed dealt with whether a car was a weapon, not a dangerous instrument, and did not involve an interpretation of a Missouri statute. The court in Pogue ruled that, “[a]pplying the rationale of Reed to §571.015, an instrument not by design a weapon becomes a dangerous instrument when utilized with the *purpose of injuring* another.” State v. Pogue, supra at 706 (emphasis added).

It then stated a different definition which was that “[a] utilitarian instrument becomes a dangerous instrument when circumstances in which it is used demonstrate an *intent and motive to cause death or serious harm to a person*.” Id. (emphasis added). These two different definitions of a dangerous instrument from the Southern District erroneously added words that were not found in the statutory definition of a dangerous instrument, such as “intent and motive or cause death or serious harm to a person” and “purpose of injuring another.” The Pogue decision also ignored the explicit language in the statutory definition that the instrument merely had to be “*readily capable* of causing death or other serious physical injury.” §556.061(9), RSMo 2000.

State v. Idlebird, 896 **S.W.2d** 656 (**Mo.App., W.D.** 1995), the other relevant Missouri case the appellant cites in his brief, does not contain a holding that supports the appellant’s argument (App.Br. 55-56). In Idlebird, the Court of Appeals held that the defendant’s use of fire to seriously burn a child constituted the use of a “dangerous instrument” within the meaning of §571.015.1. In the course of that opinion, this Court stated that “[t]he key issue is whether the instrument . . . is capable of causing death or serious physical injury by the manner

of use, *and whether the circumstances of use demonstrate an intent and motive to cause such death or serious harm.*” Idlebird, 896 S.W.2d at 664 (emphasis added).

Although some of the italicized language in Idlebird is consistent with the language from Pogue, that is cited by the appellant, it is dicta because it was unnecessary to the holding of the Court of Appeals, which was simply that fire, when intentionally set with the intent to injure another, is sufficient to constitute a “dangerous instrument” for purposes of §571.015.1.

That is to say, it is clear that the result in Idlebird would have been the same even if the evidence had showed that the defendant had deliberately set the fire with the intent to injure her husband’s infant, even if she had not intended to inflict death or serious physical injury. It was sufficient, under the terms of the applicable statutes, that fire, as used, was “readily capable” of causing death or serious physical injury.

The language relied on by the appellant in Pogue and Idlebird should be disregarded. The definition contained in §556.061(9) makes it perfectly clear that, with respect to instruments that are not specifically designed as weapons, a “dangerous instrument” is any instrument or object which, as used, is *readily capable*, of inflicting death or serious physical injury.

Obviously, a motor vehicle that is driven head-on into another human being, knocking that person onto the hood of the vehicle and then onto the pavement, is “readily capable” of causing death or serious physical injury. Therefore, a defendant who, like the appellant, intentionally uses his or her vehicle as a battering ram on a human being, guilty of armed criminal action, regardless of whether he actually intended to kill or seriously injure his victim

with his moving vehicle. At this point, it should be emphasized that the trial judge could have reasonably have found that the appellant attempted to kill or seriously injure Ms. Mosley. It was certainly fortunate that Ms. Mosley was catapulted onto the hood of the car, rather than being crushed underneath the vehicle. That is to say, the likely consequence of the appellant's actions was Ms. Mosley's death or serious injury, and she was extremely lucky to have avoided that fate.

This is because it will be presumed that a person intends the natural and probable consequences of her acts. State v. O'Brien, 857 S.W.2d 212, 218 (Mo.banc 1993); State v. Deckard, 18 S.W.3d 495, 503 (Mo.App., S.D. 2000). A person is presumed to have intended that death (or serious physical injury) follow an act that is likely to produce that result. Id; State v. Isom, 906 S.W.2d 870, 874 (Mo.App., S.D. 1995). An intent to cause serious physical injury can be inferred from the defendant's use of a deadly weapon on a vital area of a victim's body. O'Brien, *supra* at 218; Deckard, 18 S.W.3d at 503.

Proof that the appellant accelerated his vehicle to Ms. Mosley and struck her with the front of his automobile certainly constituted evidence from which the trial judge could reasonably have inferred that the appellant meant to kill or seriously injure Ms. Mosley. See State v. Hayes, 572 S.W.2d 882, 884 (Mo.App., St.L.D. 1978)(sufficient evidence of assault with intent to kill without malice where the defendant accelerated his vehicle towards an officer, who then had to jump out of the way); State v. Davis, No. WD60762 (Mo.App., W.D. April 1, 2003)(sufficient evidence of murder in the first degree where defendant killed a child with a motor vehicle); State v. Smith, 891 S.W.2d 461, 467 (Mo.App., W.D. 1995)(sufficient

evidence of murder in the second degree where defendant drove his car into a crowd of people). Thus, the evidence was sufficient to support the appellant's conviction of armed criminal action even if the State was required to prove such an intent.

However, in order to establish that the appellant's vehicle was a "dangerous instrument" the State was merely required to prove that he intended to strike Ms. Mosley with it, and that the vehicle, as driven by the appellant, was "readily capable" of causing death or serious physical injury. Since the appellant, in effect, concedes that the vehicle, as driven, was "readily capable" of killing or seriously injuring Ms. Mosley, his arguments under Point IV of his brief are legally infirm and must be rejected.

For all of the reasons previously outlined, Point IV of the appellant's brief has no merit and must be overruled.

CONCLUSION

For the reasons presented under Points I through III of the State’s brief, the appellant’s convictions and concurrent seven-and five-year sentences, as a “persistent offender” and a “dangerous offender” (§§558.016.3, 558.016.4, RSMo 2000), for assault in the second degree (§565.060, RSMO 2000) and armed criminal action (§571.015.1, RSMo 2000), respectively, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this _____ day of August, 2003, to:

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APPENDIX

§ 556.061, RSMo 2000 A1-A3

§ 571.015, RSMo 2000 A4

Judgment A5-A6