

Sup. Ct. # 84130

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,

Respondent,

v.

VICTOR M. CRUZ,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit, Division 12
The Honorable John C. Andrews, Circuit Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Victor Cruz, was convicted after a jury trial in the Circuit Court of Jackson County of one count of assault in the second degree, Section 565.060, RSMo 2000, and one count of armed criminal action, Section 571.015, RSMo 2000. On June 14, 2000, the jury recommended a fine for the assault in the second degree and three years in prison for the armed criminal action. On August 11, 2000, the Honorable John C. Andrews sentenced Mr. Cruz to the jury-recommended sentences and imposed a fine in the amount of \$2500.

Notice of appeal was timely filed on August 21, 2000. On October 9, 2001, the Missouri Court of Appeals, Western District, affirmed Mr. Cruz's armed criminal action conviction. On October 24, 2001, Mr. Cruz timely filed a motion for rehearing or, in the alternative, application for transfer, which was denied on December 4, 2001. On December 12, 2001, Mr. Cruz timely filed an application for transfer with this Court. On January 22, 2002, this Court sustained Mr. Cruz's application for transfer. Therefore, the Missouri Supreme Court has jurisdiction to review this case.

STATEMENT OF FACTS

On April 12, 2000, Victor Cruz was charged with one count of assault in the second degree, Section 565.060, RSMo 2000, for recklessly causing physical injury to James Mygatt, one count of armed criminal action, Section 571.015, RSMo 2000, for using a deadly weapon to commit the assault, and one count of unlawful use of a weapon, Section 571.030, RSMo 2000, for knowingly exhibiting a shotgun in an angry or threatening manner, in the presence of one or more persons (L.F. 13-14).¹

A trial was held on June 12, 2000 (Tr. 1). Outside the presence of the jury, the alleged victim, James Mygatt, attempted to assert his Fifth Amendment right not to testify against himself (Tr. 141). Mr. Mygatt, however, told the court that he did not believe that he would be incriminating himself if he testified truthfully (Tr. 141, 142). Mr. Mygatt explained that he did not want to testify against Mr. Cruz because Mr. Mygatt had raised Mr. Cruz since he was 12 years old, and he would not do anything that would bring harm to Mr. Cruz (Tr. 141). The trial court found that Mr. Mygatt did not prove that he had a right to invoke the Fifth Amendment (Tr. 146).

The state called Mr. Mygatt to testify as a hostile witness (Tr. 147). The state established that Mr. Mygatt did not want to answer any questions regarding

¹ The record on appeal consists of a trial transcript (“Tr.”), and a legal file (“L.F.”).

the alleged assault that took place on May 6, 1998 (Tr. 147-48). Mr. Mygatt testified that he could not recall if, in May 1998, Mr. Cruz shot him in the foot (Tr. 150-151). The prosecutor asked Mr. Mygatt if he pulled the trigger and shot himself in the foot (Tr. 151). Mr. Mygatt stated, "It may have been that way. I don't recall" (Tr. 151). Mr. Mygatt did remember being in the hospital, but he did not remember how he got hurt (Tr. 152-53). The prosecutor asked, "[Y]ou don't want to tell the jury how you hurt your foot, do you?" (Tr. 153). Mr. Mygatt stated, "I don't remember" (Tr. 153).

The prosecutor brought into evidence Mr. Mygatt's preliminary hearing testimony (Tr. 157). Mr. Mygatt testified at the preliminary hearing that Mr. Cruz came to where Mr. Mygatt was staying and started an argument with Mr. Mygatt (Tr. 157). Mr. Mygatt said that "tempers flared and I ended up shot" (Tr. 158). Mr. Mygatt added that Mr. Cruz shot him (Tr. 158). Mr. Mygatt explained at the preliminary hearing that Mr. Cruz only shot him once, but he did not believe it was on purpose (Tr. 159). He believed that Mr. Cruz mistakenly shot him when Mr. Cruz was trying to scare him (Tr. 159). Mr. Mygatt testified at the preliminary hearing that he personally did not have a weapon when this occurred (Tr. 159). When Mr. Mygatt was asked at trial about his preliminary hearing testimony, he stated that he did not remember (Tr. 158-159).

Officer Katherine Kennedy testified that she was on patrol on May 6, 1998, when a dispatch came over her radio for a pick-up of a suspect who was wanted in

regard to a shooting/assault (Tr. 167-68). The dispatch gave a vehicle description with a specific license number, a description of the driver, and the direction the vehicle was headed (Tr. 169). Officer Kennedy drove to the area indicated by the dispatch (Tr. 169). Officer Kennedy spotted a vehicle that matched the description and had the same license plate (Tr. 170). Officer Kennedy stopped the vehicle and arrested the driver, Victor Cruz (Tr. 172). Officer Kennedy testified that Mr. Cruz said, "I shot my stepfather because he was hitting my car's windshield" (Tr. 175). Officer Kennedy found an unloaded shotgun, along with some bullets, in the passenger seat of Mr. Cruz's car (Tr. 176).

Detective Jan Wallace testified that she went to Independence Regional Hospital to talk to James Mygatt (Tr. 183-84). She observed a gunshot wound to his left foot (Tr. 185). Detective Wallace asked Mr. Mygatt what had happened (Tr. 187). Detective Wallace testified that Mr. Mygatt told her:

Mr. Cruz was already there when he arrived and they got into a verbal confrontation over a gun. And during the argument that Mr. Victor Cruz went to his car, which was a white Beretta and obtained a 12 gauge shotgun and responded back to his location, pointed the shotgun at him and threatened to kill him and then pointed the shotgun at his father and threatened to kill him. And then he pointed the shotgun down towards this area, but downward and shot into the grass area and then shot a second time, shooting him in the foot.

(Tr. 187).

Detective Wallace also took a formal statement from Mr. Cruz (Tr. 188). Mr. Cruz told Detective Wallace that on May 6, 1998, he was at his mother's house when Mr. Mygatt telephoned (Tr. 195). Mr. Mygatt was upset because Mr. Cruz's mother went over to Mr. Mygatt's house with her boyfriend to take her license plates off of Mr. Mygatt's truck (TR. 195-96). Mr. Cruz asked Mr. Mygatt if they could talk this out (Tr. 196). Mr. Mygatt told Mr. Cruz to tell his mother's boyfriend that this was his last breath (Tr. 196). Mr. Mygatt kept arguing with Mr. Cruz on the telephone and Mr. Cruz became scared about what Mr. Mygatt might do (Tr. 196). Mr. Cruz went over to Mr. Mygatt's house to try to talk to him (Tr. 196).

Mr. Cruz parked at Mr. Mygatt's house and began to walk away from his car (Tr. 197). Mr. Mygatt came "flying down the hill" in a car, headed toward his house (Tr. 197). Mr. Mygatt hit Mr. Cruz's car (Tr. 197). The two men started yelling at each other, nose-to-nose (Tr. 197). Mr. Cruz pushed Mr. Mygatt away and Mr. Mygatt began to grab something in the back of his waist-band (Tr. 197). Mr. Cruz thought that Mr. Mygatt had a gun (Tr. 197). After Mr. Mygatt shot at Mr. Cruz's feet, Mr. Cruz went to his car to get his gun (Tr. 197). Mr. Cruz put one shell in the gun as Mr. Mygatt got "in his face"(Tr. 197).

Mr. Cruz pointed the gun at Mr. Mygatt and told him to step back (Tr. 197). Mr. Cruz stated, "I shot at his feet, not intentionally, but I happened to shoot him" (Tr. 198). Mr. Cruz explained that he was just trying to shoot at the ground to get Mr. Mygatt to back away from him, but he accidentally hit Mr. Mygatt's foot (Tr.

198). Believing that Mr. Mygatt was going to shoot him, Mr. Cruz got into his car and drove away (Tr. 198). Mr. Cruz drove over to a house and called the police to report the shooting (Tr. 198-99). Mr. Cruz told the police to meet him at his house in Raytown (Tr. 198-99).

Gary Duncan and Steve Sparks testified that on May 6, 1998, they were putting a steering column in a truck and listening to the radio when they heard a gunshot (Tr. 216-17, 232-34). They walked toward the direction of the sound (Tr. 217, 234). Mr. Duncan and Mr. Sparks testified that they saw a man shoot at another man, who was standing in a driveway (Tr. 218). The man who was shooting got into his car and started backing toward Mr. Duncan and Mr. Sparks (Tr. 221, 238). The man stopped his car, pulled out a gun on the passenger side, and said to Mr. Duncan and Mr. Sparks, "Do you want some?" (Tr. 221). The man drove off (Tr. 221, 238). Mr. Duncan identified the man who was shooting as "Jimmy's stepson" (Tr. 218). Mr. Sparks did not know who the man was (Tr. 234).

Officer James Trout testified that on May 6, 1998, he received a dispatch about a shooting at 626 Fuller, in Jackson County, Missouri (Tr. 247). Officer Trout testified that while the ambulance people were taking care of "James," he noticed a few holes under James' toes on the ball of his foot (Tr. 251). He observed a hole in the grass and a couple of shotgun shells (Tr. 252). One shell was in the street and the other was in the grass (Tr. 252). Officer Trout did not find any other bullets (Tr. 253).

The trial court overruled Mr. Cruz's motions for judgment of acquittal at the close of the state's evidence and at the close of all the evidence (Tr. 261, 264). At the instruction conference, the state submitted Instruction No. 9 (Tr. 265). This instruction stated, in part:

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that defendant committed the offense of assault in the second degree as submitted in Instruction No. 7, and

Second, that defendant committed the offense by or with or through the use, assistance or aid of a deadly weapon,

then you will find the defendant guilty under Count II of armed criminal action.

(L.F. 29).

Defense counsel objected to this instruction as not being supported by the evidence (Tr. 265-66). The trial court overruled the objection and submitted Count 2 to the jury under Instruction No. 9 (Tr. 266, L.F. 29).

In closing, the prosecutor argued:

We're trying to say what is reckless is going over to a confrontation that you know is going to occur, having that confrontation, the argument starts, you go back to your car and then you get this gun and then you approach somebody and then you say I'm going to kill you, you motherfucker and then I'm going to point at your father and

I'm going to point at his head and say I'm going to kill you, you motherfucker and then pulling the trigger twice. That is reckless.

(Tr. 291).

Mr. Cruz's attorney argued in closing:

Victor messed up. Nobody's denying that. Jimmy got hurt. He got shot in the toe. But Victor didn't mean to shoot him. This was no assault in the second degree and certainly wasn't any kind of armed criminal action. It was an accident.

(Tr. 284).

The jury found Mr. Cruz guilty of assault in the second degree and armed criminal action, but found him not guilty of unlawful use of a weapon (Tr. 296-97). The jury recommended that Mr. Cruz receive a fine for committing assault in the second degree and three years in prison for armed criminal action (Tr. 296).

On August 11, 2000, the trial court overruled Mr. Cruz's motion for a new trial (L.F. 43-44; Tr. 300). The trial court sentenced Mr. Cruz to three years in prison for armed criminal action, and imposed a fine of \$2500 for assault in the second degree (Tr. 305).

Notice of appeal was timely filed on August 21, 2000 (L.F. 49). On March 7, 2001, Mr. Cruz filed a brief with the Missouri Court of Appeals, Western District, arguing that the trial court erred in submitting to the jury an armed criminal action instruction that did not contain the required mental state of knowingly. On October 9, 2001, the Court affirmed Mr. Cruz's armed criminal

action conviction. See *State v. Cruz*, Slip Op. No. 58943 (Mo.App.,W.D. October 9, 2001). The Court reasoned that the Missouri Approved Instruction that required a mental state of knowingly went against the substantive law as provided in Missouri Revised Statute Sections 562.021 and 571.015 (2000). Slip Op., at 9-12.

On October 24, 2001, Mr. Cruz timely filed a motion for rehearing or, in the alternative, application for transfer, which was denied on December 4, 2001. On December 12, 2001, Mr. Cruz timely filed an application for transfer with this Court. On January 22, 2002, this Court sustained Mr. Cruz's application for transfer.

POINT RELIED ON

The trial court plainly erred in submitting Instruction No. 9 on armed criminal action to the jury without the mental element of “knowingly” as required by MAI-CR 3d 332.02, its Notes on Use, and Missouri Revised Statute section 562.021.3 (2000), because Instruction No. 9 so misdirected the jury that it affected the jury’s verdict, in violation of Victor Cruz’s rights to due process of law and to a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 18(a) of the Missouri Constitution, in that the trial court’s failure to include the mental state of “knowingly” permitted the jury to find Mr. Cruz guilty of armed criminal action based on the underlying felony’s lesser mental state of “recklessness.”

State v. Juarez, 26 S.W.3d 346 (Mo.App.,W.D. 2000);

State v. Barbee, 822 S.W.2d 522 (Mo.App. E.D. 1991);

State v. Hyman, 37 S.W.3d 384 (Mo.App.,W.D. 2001);

State v. Beeler, 12 S.W.3d 294 (Mo. banc 2000);

Missouri Supreme Court Rules 28.02, 28.03, and 30.20;

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Sections 10 and 18(a);

MAI-CR 3d 332.02 (10/01/98).

ARGUMENT

The trial court plainly erred in submitting Instruction No. 9 on armed criminal action to the jury without the mental element of “knowingly” as required by MAI-CR 3d 332.02, its Notes on Use, and Missouri Revised Statute section 562.021.3 (2000), because Instruction No. 9 so misdirected the jury that it affected the jury’s verdict, in violation of Victor Cruz’s rights to due process of law and to a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 10 and 18(a) of the Missouri Constitution, in that the trial court’s failure to include the mental state of “knowingly” permitted the jury to find Mr. Cruz guilty of armed criminal action based on the underlying felony’s lesser mental state of “recklessness.”

The trial court was required to include the mental element of “knowingly” in Instruction No. 9 on armed criminal action (L.F. 29). MAI-CR 3d 332.02, Notes on Use No. 2 (10/01/98); Section 562.021.3 (2000). The trial court, however, failed to include the required mental state of “knowingly” in this instruction (L.F. 29). The trial court’s failure to include the correct mental element of “knowingly” allowed the jury to convict Mr. Cruz of armed criminal action based on the underlying felony’s lesser mental element of “recklessness” (L.F. 26, 29). This violated Mr. Cruz’s rights to due process of law and to a fair trial. U.S. Const., Amends. V, VI, and XIV; Mo. Const. Art.I, Section 10 and 18(a).

It is clear from the record that the jury did not believe that Mr. Cruz acted “knowingly” when he used the deadly weapon (Tr. 141-296). As a result, Instruction No. 9 so misguided the jury on the correct mental element required for a conviction of armed criminal action that it affected the jury’s verdict. Accordingly, Mr. Cruz requests that this Court reverse his conviction and sentence for armed criminal action and order the Missouri Department of Corrections to discharge Mr. Cruz from custody. See State v. Beeler, 12 S.W.3d 294 (Mo. banc 2000)(record showed that the instructional plain error required the defendant to be discharged).

Mr. Cruz was charged with assault in the second degree, Section 565.060, RSMo 2000, for recklessly causing physical injury to James Mygatt by discharging a firearm (L.F. 13). He was additionally charged with armed criminal action, Section 571.015, RSMo 2000, for committing the reckless assault with a deadly weapon (L.F. 13). Lastly, the state charged Mr. Cruz with unlawful use of a weapon, Section 571.030, RSMo 2000, for knowingly exhibiting a lethal weapon in the presence of one or more persons in an angry or threatening manner (L.F. 13-14).

All of the evidence that the state presented at trial pertaining to the assault in the second degree and armed criminal action charges was directed toward the mental element of “recklessness.” Mr. Mygatt and Mr. Cruz were the only witnesses who could testify about the actual shooting (Tr. 141-244). Through Mr. Mygatt’s preliminary hearing testimony, Mr. Mygatt stated that Mr. Cruz

mistakenly shot him when Mr. Cruz was trying to scare him (Tr. 159). Mr. Cruz told the police that, “I shot at his feet, not intentionally, but I happened to shoot him” (Tr. 198). Additionally, in closing argument the prosecutor summed up the case as:

We’re trying to say what is reckless is going over to a confrontation that you know is going to occur, having that confrontation, the argument starts, you go back to your car and then you get this gun and then you approach somebody and then you say I’m going to kill you, you motherfucker and then I’m going to point at your father and I’m going to point at his head and say I’m going to kill you, you motherfucker and then pulling the trigger twice. That is reckless.

(Tr. 291). The prosecutor went on to direct the jury’s attention to the instruction on armed criminal action to help guide them on the meaning of armed criminal action (Tr. 292).

In contrast, Mr. Cruz argued that the incident was an accident (Tr. 284). In closing, Mr. Cruz’s attorney argued that because of Mr. Mygatt’s threats over the phone, Mr. Cruz felt that he needed to go over to Mr. Mygatt’s house to attempt to calm him down (Tr. 283). Knowing that Mr. Mygatt had guns, Mr. Cruz brought his gun with him (Tr. 284). Mr. Cruz’s attorney stated:

Victor messed up. Nobody’s denying that. Jimmy got hurt. He got shot in the toe. But Victor didn’t mean to shoot him. This was no assault in the

second degree and certainly wasn't any kind of armed criminal action. It was an accident.

(Tr. 284).

Instructions guiding the jury on the elements of each charge were submitted (Tr. 264-68). Instruction No. 7 on assault in the second degree required that the jury find Mr. Cruz guilty if he acted recklessly (L.F. 26). This instruction provided the legal definition of "recklessly" (L.F. 26). Instruction No. 11 on unlawful use of weapon required that the jury find Mr. Cruz guilty if he acted knowingly (L.F. 32). Instruction No. 9 on armed criminal action, however, did not provide a culpable mental element (L.F. 29). Instruction No. 9 read, in pertinent part:

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that defendant committed the offense of assault in the second degree as submitted in Instruction No. 7, and

Second, that defendant committed the offense by or with or through the use, assistance or aid of a deadly weapon,

then you will find the defendant guilty under Count II of armed criminal action.

(L.F. 29).

Missouri Approved Instruction 332.02 is the required criminal jury instruction for a charge of armed criminal action. MAI-CR 3d 332.02 (10/01/98). The second element of this required instruction provides:

Second, that the defendant **knowingly** committed that offense (by) (or) (with) (or) (through) the (use) (or) (assistance) (or) (aid) of a (dangerous instrument) (deadly weapon), then you will find the defendant guilty under Count ____ of armed criminal action.

MAI-CR 3d 332.02 (10/01/98) (emphasis added). The Notes on Use following this instruction cite to Missouri Revised Statute section 562.021 (Supp. 1997) for the authority that the offense of armed criminal action requires a knowing mental state. MAI-CR 3d 332.02, Notes on Use No. 2 (10/01/98). The Notes on Use explain:

Since the statute does not prescribe a culpable mental state, the crime is committed if the defendant acted “knowingly.” The mental state of ‘recklessly’ is not sufficient.

This language mirrors the language in Section 562.021.3. Section 562.021.3, RSMo 2000. Section 562.021 provides guidelines for the application of mental states to statutory offenses. Section 562.021, RSMo 2000. In particular, subsections 2 and 3 of this section provide:

2. If the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of the offense, the prescribed culpable mental state shall be required only as to

specified element or elements, and a culpable mental state shall not be required as to any other element of the offense.

3. Except as provided in subsection 2 of this section and section 562.026², if the definition of an offense does not expressly prescribe a culpable mental state, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly, but reckless or criminally negligent acts do not establish such culpable mental state.

Section 562.021, RSMo 2000.

The offense of armed criminal action is defined as:

[A]ny person who 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 is also guilty of the crime of armed criminal action.

² Section 562.026, RSMo 2000, states that “[a] culpable mental state is not required: (1) If the offense is an infraction and no culpable mental state is prescribed by the statute defining the offense; or (2) If the offense is a felony or misdemeanor and no culpable mental state is prescribed by the statute defining the offense, and imputation of a culpable mental state to the offense is clearly inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result.”

Section 571.015, RSMo 2000.

The Missouri Court of Appeals, Western District found that the definition of armed criminal action provided a culpable mental state, “as envisioned by [Section] 562.021.2, such that [Section] 562.021.3 had no application.” Slip Op. at

11. The Court stated:

[B]y definition, [Section] 571.015.1 implicitly prescribes a culpable mental state as to its first element of proof, the *mens rea* of the underlying felony.

Slip Op.at 11.

Questions of statutory interpretation are reviewed *de novo*. *State v. Harney*, 51 S.W.3d 519, 532 (Mo.App., W.D. 2001), citing *Martinez v. State*, 24 S.W.3d 10, 15 (Mo.App. 2000). When interpreting statutes, the primary responsibility is to ascertain the legislative intent from the plain and ordinary meaning of the language used. *Id.*, quoting *State v. Rousseau*, 34 S.W.3d 254, 259 (Mo.App. 2000). In other words, the legislature is presumed to have intended what the statute says leaving no room for construction. *Id.*, quoting *State v. Haskins*, 950 S.W.2d 613, 615 (Mo.App. 1997).

The Court Of Appeals’ interpretation that the underlying felony, “implicitly” provides for a culpable mental state, goes against the presumption that the legislature “intended what the statute says.” *Id.*

Missouri Revised Statute section 571.015 merely includes “any felony”; it does not state anything about a required mental state for the “any felony.” Section

571.015, RSMo 2000. Moreover, even though armed criminal action could not be committed without committing the underlying felony, case law has repeatedly rejected the argument that the classification, statutory rules, and regulations that apply to the underlying felony also apply to the armed criminal action offense. See, *State v. Hyman*, 37 S.W.3d 384 (Mo.App.,W.D. 2001); *State v. Juarez*, 26 S.W.3d 346 (Mo.App.,W.D. 2000); and *State v. Barbee*, 822 S.W.2d 522 (Mo.App. E.D. 1991). Instead, armed criminal action is viewed to be “an offense separate from its underlying felony.” *Hyman*, 37 S.W.3d at 392, citing *Juarez*, supra; and *Barbee*, supra.

For example, in *Juarez*, the Court found that it was reversible error for the trial court to not allow duress as an affirmative defense to the offense of armed criminal action even though the underlying felony was murder, which statutorily barred duress as defense. *Juarez*, 26 S.W.3d at 363. The *Juarez* Court reasoned that on whatever felony armed criminal action is based, it nonetheless still carried a separate and distinct sentence. *Id.*

In other words, armed criminal action is not a chameleon offense that changes its appearance with the change of the underlying felony. In both *Hyman* and *Barbee*, the Courts rejected the argument that the offense of armed criminal action becomes a “sex offense” just because the underlying felony is one. *Hyman*, 37 S.W.3d at 392-393; *Barbee*, 822 S.W.2d at 527. Similarly, armed criminal action does not change its required mental state with the change of the underlying felony.

The core of armed criminal action is the use of the deadly or dangerous weapon, not the commission of a felony. Felonies can be committed without a deadly or dangerous weapon, but armed criminal action cannot. Section 571.015, RSMo. It follows then, that for a culpable mental state to have any meaning in an armed criminal action offense, the mental state requirement must modify the action of using a deadly or dangerous weapon, rather than the underlying felony. And in general, armed criminal action would lose its separate and distinct offense status if the culpable mental state was dictated by the underlying felony. In one case armed criminal action may require recklessness; in another, criminal negligence; and in another, no mental state at all. This is not what the legislature intended.

Accordingly, since the plain and ordinary meaning of the armed criminal action definition does not provide for a culpable mental state, subsection 3 of Section 562.021 applies. As such, the offense of armed criminal action requires a mental state of “knowingly,” just as Missouri Approved Instruction 332.02 provides. MAI-CR3d 33202 (10/01/98). Therefore, the trial court plainly erred when it submitted Instruction No. 9 on armed criminal action to the jury without including the required mental state of “knowingly.”³

³ If this Court chooses to construct 571.015, RSMo, in such a novel and unexpected fashion despite the existing substantive law, the application of this interpretation to Mr. Cruz’s case violates his right to the due process of law as

Missouri Supreme Court Rule 28.02 governs the use of instructions and verdict forms. Mo. Sup. Ct. Rule 28.02 (2000). It requires that:

Whenever there is an MAI-CR instruction or verdict form applicable under the law and Notes on Use, the MAI-CR instruction or verdict form shall be given or used to the exclusion of any other instruction or verdict form.

Rule 28.02(c). According to this rule, the proper form for Instruction No. 9 was the revised MAI-CR 3d 332.02 (10/01/98).

Failure to follow Rule 28.02 or the Notes on Use is error. Rule 28.02(f).

The rule provides:

The giving or failing to give an instruction or verdict form in violation of this Rule 28.02, or any applicable Notes on Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03.

guaranteed by the Fifth and Fourteenth Amendments under the United States Constitution, and by Article I, Section 10, under the Missouri Constitution. See, *Rodgers v. Tennessee*, 532 U.S. 454 (2001) (The due process clause restricts the retroactive application of judicial interpretations when the interpretation is unexpected and indefensible by reference to the prior expressed law).

Rule 28.02(f). Missouri Supreme Court Rule 28.03 requires that counsel make specific objections to instructions or verdict forms considered erroneous. Mo. Sup. Ct. Rule 28.03 (2000).

In Mr. Cruz's case, defense counsel objected to Instruction No. 9 on armed criminal action, but based his objection on insufficient evidence rather than on the failure to follow the Notes on Use in the revised version of the criminal Approved Instruction 332.02 (Tr. 265-66; L.F. 43-44). Despite defense counsel's failure to state the correct objection, this error may be reviewed for plain error under Missouri Supreme Court Rule 30.20. *State v. Nolan*, 872 S.W.2d 99, 103 (Mo. banc 1994). Plain error is shown when the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict. *Id.*

In Mr. Cruz's case, it is apparent that Instruction No. 9 so misguided the jury that it affected the jury's verdict. The underlying charge of assault in the second degree only required the mental element of "recklessly" (L.F. 26). Mr. Cruz was found guilty of recklessly causing physical injury to James Mygatt (Tr. 296). In contrast, Mr. Cruz was found not guilty of unlawful use of a weapon for **knowingly** exhibiting a lethal weapon in an angry or threatening manner in the presence of one or more persons (L.F. 32; Tr. 296-297).

The unlawful use of a weapon charge was for knowingly exhibiting a shotgun during the same course of events that resulted in the reckless assault (L.F. 32). Instruction No. 11 on unlawful use of a weapon provided in part:

As to Count III, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about May 6, 1998 in the County of Jackson, State of Missouri, the defendant exhibited in the presence of one or more persons a shotgun, and

Second, that he did so in an angry or threatening manner, and

Third, that the shotgun was readily capable of lethal use, and

Fourth, that the defendant acted knowingly with respect to the facts and conduct submitted in this instruction,

then you will find the defendant guilty under Count III of unlawful use of a weapon.

(L.F. 32).

In comparing the facts presented at trial to the elements of unlawful use of a weapon, the jury undoubtedly would have found the first three elements to be true (Tr. 216-217, 187, 232-234, 157, 221, 176, 197). The evidence presented showed that Mr. Cruz waved a shotgun at James Mygatt, "James' father," Gary Duncan, and Steve Sparks (Tr. 216-17, 187, 232-34). The evidence presented showed that Mr. Cruz waved the shotgun while he was arguing with James Mygatt, and that he said, "Do you want some?" as he waved the shotgun at Gary Duncan and Steve Sparks (Tr. 157, 221). Lastly, the evidence presented showed that Mr. Cruz had bullets in his car and had loaded the shotgun (Tr. 176, 197). Therefore, the only question that was not answered by the evidence was whether Mr. Cruz had done

this “knowingly.” The jury found that he did not, and acquitted him of unlawful use of a weapon (Tr. 296).

Approved Instruction 332.02 required that the jury find that Mr. Cruz acted knowingly in order to find him guilty of armed criminal action. MAI-CR 3d 332.02 (10/01/98). In contrast, Instruction No. 9 on armed criminal action failed to include the mental element of “knowingly” (L.F. 29). It stated:

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that defendant committed the offense of assault in the second degree as submitted in Instruction No. 7, and

Second, that defendant committed the offense by or with or through the use, assistance or aid of a deadly weapon,

Then you will find the defendant guilty under Count II of armed criminal action.

(L.F. 29).

Clearly, the jury found the first element in this instruction since Mr. Cruz was found guilty of reckless assault (Tr. 296). But the jury clearly did not believe Mr. Cruz acted knowingly when he used the shotgun as evidenced by the not guilty verdict on the unlawful use of a weapon charge (Tr. 298).

Furthermore, there was no evidence presented that Mr. Cruz knowingly used the shotgun to cause physical injury to Mr. Mygatt (Tr. 141-296). The testimony of the only two witnesses to the shooting, Mr. Mygatt and Mr. Cruz,

provided that the shooting of Mr. Mygatt was not intentional (Tr. 159, 198). Furthermore, in closing, the prosecutor characterized Mr. Cruz's conduct as reckless (Tr. 291). Therefore, all the evidence presented merely provided for a conclusion that Mr. Cruz acted recklessly (Tr. 141-296).

Briefly stated, this Court explained that the difference between reckless conduct and knowing conduct:

Recklessness resembles knowing conduct in one respect, in that it involves awareness, but it is an awareness of risk, of a probability less than a substantial certainty. By contrast, to act knowingly is to be aware that the conduct is practically certain to cause a result.

State v. Beeler, 12 S.W.3d at 299, citing Section 562.016.3, RSMo 2000. In applying these standards to Mr. Cruz's case, the evidence provides for an argument that Mr. Cruz was aware that his conduct of shooting at the ground in front of Mr. Mygatt could possibly cause physical injury to Mr. Mygatt (Tr.141-296). There is no evidence, however, that Mr. Cruz was aware that his conduct was practically certain to cause physical injury to Mr. Mygatt (Tr. 141-296).

Accordingly, the jury did not believe Mr. Cruz acted knowingly, but only that he acted recklessly. The only instruction that provided the mental state of "recklessly" was Instruction No. 7 on assault in the second degree (L.F. 26). The first element of Instruction No. 9 on armed criminal action referred the jury's attention back to Instruction No. 7 (L.F. 29). By referring back to Instruction No.

7, the jury would have been directed to the mental element of “recklessly” because Instruction No. 9 failed to provide a mental element of its own (L.F. 29).

Instruction No. 9 on armed criminal action should have included the mental element of “knowingly.” If the correct instruction on armed criminal action had been given to the jury, Mr. Cruz would not have been found guilty of armed criminal action; nor would he have been sentenced to three years in prison. Instruction No. 9, as given, misdirected the jury as to the proper mental state for armed criminal action. The trial court plainly erred when it gave an instruction that allowed the jury to convict Mr. Cruz of armed criminal action based on the lesser mental state of “recklessness.” Therefore, Mr. Cruz respectfully requests that this Court reverse his conviction and sentence for armed criminal action and order that the Missouri Department of Corrections discharge him from custody.

CONCLUSION

Based on the foregoing argument, Victor Cruz respectfully requests that this Court reverse his conviction and sentence for armed criminal action and order that the Missouri Department of Corrections discharge him from custody.

Respectfully submitted,

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Certificate of Compliance and Service

I, Sarah Weber Patel, hereby certify as follows:

1. The attached brief complies with the limitations contained in this Court's Special Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification and the certificate of service, the brief contains 6,547 words, which does not exceed the 31,000 words allowed for an appellant's brief.
2. The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which the Public Defender System installed on January 30, 2002. According to that program, this disk is virus-free.
3. Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid, to Ms. Linda Lemke, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 on the 7th day of February, 2002.

Sarah Weber Patel