

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE

STATE OF MISSOURI,

Respondent,

v.

RICKY EUGENE McCABE,

Appellant.

DOCKET NUMBER WD72495

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: June 28, 2011

APPEAL FROM

The Circuit Court of Boone County, Missouri
The Honorable Jodie C. Asel, Judge

JUDGES

Division Two: Smart, P.J., and Pfeiffer and Martin, JJ.

ATTORNEYS

Chris Koster, Attorney General
Mary H. Moore, Assistant Attorney General
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Attorneys for Respondent,

Craig A. Johnston, Assistant State Public Defender
Columbia, MO

Attorney for Appellant.



MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI,)
)
Respondent,)
v.) **OPINION FILED:**
) **June 28, 2011**
RICKY EUGENE McCABE,)
)
Appellant.)

WD72495

Boone County

Before Division Two Judges: James M. Smart, Jr., Presiding Judge, and
Mark D. Pfeiffer and Cynthia L. Martin, Judges

Ricky Eugene McCabe appeals his conviction after a jury trial for the class B felony of possessing a prohibited article of property in or about the premises of a county jail that may be used in such manner as to endanger the safety or security of the institution, section 221.111.1(4), RSMo Cum. Supp. 2009. McCabe moved for a judgment of acquittal notwithstanding the verdict, or in the alternative, a motion for new trial. The motion was overruled, and the trial court sentenced McCabe as a prior and persistent offender to twenty-five years in the Missouri Department of Corrections. On appeal, McCabe argues that: (1) the State failed to present sufficient evidence to support his conviction; and, (2) the trial court erred in refusing to instruct the jury on a lesser included offense.

AFFIRMED.

DIVISION TWO HOLDS:

1. The State presented sufficient evidence from which a reasonable juror could conclude beyond a reasonable doubt that McCabe knew the altered drain cover could be used to endanger the safety or security of the institution.

2. The trial court did not abuse its discretion in refusing to give McCabe's proffered lesser included offense instruction because the class A misdemeanor of knowing possession of an article prohibited by law or rule in or about the premises of a county jail, § 221.111.1(3), is not a lesser included offense of the class B felony of possessing a gun, knife, weapon, or other

article that may be used in such manner as to endanger the safety or security of the institution, § 221.111.1(4), which was the charged offense.

OPINION BY: Mark D. Pfeiffer, Judge

June 28, 2011

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