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*In the  
Supreme Court of Missouri*

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**ROBERT WILLIAMS,**

**Appellant.**

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**Appeal from the City of St. Louis Circuit Court  
Twenty-Second Judicial Circuit  
The Honorable Lisa S. Van Amberg, Judge**

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**RESPONDENT’S SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

This appeal is from a conviction for the class B felony of robbery in the second degree, § 569.030, obtained in the Circuit Court of the City of St. Louis, the Honorable Lisa S. Van Amberg presiding. For this offense, Appellant was sentenced as a prior and persistent offender to fifteen years imprisonment. The Missouri Court of Appeals, Eastern District, affirmed Appellant's conviction. *State v. Williams*, No. ED91994 (Mo.App., E.D. February 22, 2009). On December 22, 2009, this Court sustained Appellant's application for transfer; thus, this Court has jurisdiction. Article V, § 10, Missouri Constitution (as amended 1982).

## STATEMENT OF FACTS

Appellant, Robert Williams, was convicted of robbery in the second degree in the Circuit Court of the City of St. Louis. Viewed in the light most favorable to the verdict, the evidence adduced at trial was as follows:

On October 17, 2006, Timothy Wagner was at home with his girlfriend and their newborn son (Tr. 153-154). At about 10:00 p.m., he took a break from watching the World Series (Tr. 154-155). He went to the front porch to have a cigarette and a beer (Tr. 155). Appellant and his accomplice<sup>1</sup> pulled up in a car driven by Appellant (Tr. 157, 160). Appellant's accomplice approached Mr. Wagner and asked him for a cigarette (Tr. 157). Mr. Wagner walked down the steps to give this person a cigarette (Tr. 158-159). Appellant's accomplice shoved Mr. Wagner to the ground (Tr. 159). While Mr. Wagner was on the ground, Appellant held Mr. Wagner down by placing his knee or elbow into Mr. Wagner's back (Tr. 160). Appellant's accomplice went through Mr. Wagner's pockets and took between two and three hundred dollars (Tr. 161,162).

After getting the money, Appellant and his accomplice ran to the car and left (Tr. 164, 165). Mr. Wagner tried to get the license plate number and a good look at the car (Tr. 164). He was able to get all but one letter of the license plate (Tr. 164-165). The car belonged to

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<sup>1</sup> Appellant's accomplice was never positively identified. Appellant identified his accomplice as "Sweets" at trial and as his cousin, Anthony Cates, in his statement to the police (Tr. 260, 264).

Appellant's girlfriend, and only the owner and Appellant were authorized to drive that car (Tr. 213). Mr. Wagner called 911 (Tr. 165). An officer responded and took a report (Tr. 166).

In mid-November, Mr. Wagner was at a convenience store near his home when a car pulled in next to him (Tr. 169, 170). Appellant was driving that car (Tr. 170, 263). When he saw Mr. Wagner, Appellant immediately drove away (Tr. 170). It was the same car with the same license plate as used in the robbery (Tr. 170). Mr. Wagner called the police and told them about this incident (Tr. 171). On November 13, 2006, Appellant was arrested while driving the same car used in the robbery of Mr. Wagner (Tr. 223). Mr. Wagner identified Appellant in a photo lineup, a physical lineup, and in court (Tr. 163, 167, 172).

The jury found Appellant guilty of robbery in the second degree (Tr. 301). He was sentenced as a prior and persistent offender to fifteen years in prison (Tr. 254-255, 313).

Appellant unsuccessfully appealed his conviction to the Missouri Court of Appeals, Eastern District. *State v. Williams*, No. ED91994 (Mo.App., E.D. February 22, 2009). Appellant requested that this case be transferred to this Court, and on December 22, 2009, this Court sustained Appellant's application for transfer.

## **ARGUMENT**

**The trial court did not err in refusing Appellant's proffered instruction for the crime of stealing because there was no basis that would support both an acquittal of second degree robbery and a conviction of stealing.**

Appellant claims the trial court erred in refusing to submit his proffered instruction on stealing. He claims that the evidence was not sufficient to prove that force was used (App.Br. 11). To support his claim, Appellant relies solely on his own testimony. But while Appellant's testimony, if believed, may have resulted in an acquittal of second degree robbery, it would not have resulted in him being found guilty of stealing, and there was no other evidence, from any source, that would support an acquittal of second degree robbery and a conviction of stealing.

### **A. Standard of Review**

In determining whether there was a basis to support the giving of an instruction on a lesser-included offense, the appellate court reviews the evidence in the light most favorable to Appellant. *State v. Battle*, 32 S.W.3d 193, 195 (Mo.App.E.D. 2000).

### **B. Relevant Facts**

Appellant gave two different versions of the robbery to the police and he presented a third version during his testimony.

First, Appellant said that as he drove down the street, he saw his friend, Sweets, talking to someone (Tr. 270). Appellant parked and Sweets came over to the car and told Appellant he was going to rob the victim of marijuana (Tr. 271). Then Sweets robbed the

victim and ran off (Tr. 271). Appellant drove around the block and came back to tell the victim that he had nothing to do with the robbery (Tr. 271). At trial, Appellant admitted that this story was a lie (Tr. 277).

Appellant's second story was that he drove Sweets and Anthony Cates, Appellant's cousin, to the victim's home (Tr. 274). Sweets and Anthony Cates robbed the victim of marijuana, and they all left in the car driven by Appellant (Tr. 274). Appellant admitted at trial that this second story was also a lie (Tr. 278).

At trial, Appellant's story was that that he and Sweets were at a convenience store (Tr. 259). The victim approached Sweets and told him he had the marijuana Sweets wanted (Tr. 259, 261). The victim told Sweets where he lived and said that Sweets should come by in about ten minutes to buy the marijuana (Tr. 260). Appellant drove Sweets to the victim's home, and Sweets went inside to get the marijuana while Appellant waited in the car parked around the corner (Tr. 260, 261, 269). Sweets returned to the car, and they left (Tr. 261). Later Sweets told Appellant that he stole the marijuana (Tr. 261, 262).

Appellant requested that the jury be instructed on the lesser included offense of stealing (Tr. 281). He argued that based on Appellant's trial testimony that he drove Sweets away from Mr. Wagner's home after Sweets took the marijuana, the jury might find him guilty of stealing (Tr. 282). The trial court denied Appellant's request to submit the stealing instruction because it found that Appellant's version of the events did not support a charge of stealing (Tr. 281-282). The court found that in Appellant's version of the events, he did not have the intent required for stealing (Tr. 282).

### **C. Discussion**

Appellant contends he was entitled to an instruction on stealing because the jury may have believed that he participated in stealing money from the victim but not believed that physical force was used (App.Br. 19). The instruction offered by Appellant was as follows:

A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

If you do not find the defendant guilty of robbery in the second degree as submitted in Instruction No. 5, you must consider whether he is guilty of stealing under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about October 17, 2006, in the State of Missouri, the defendant or another took money, which was property owned by Timothy Wagner, and

Second, that defendant or another did so for the purpose of withholding it from the owner permanently, and

Third, that the property was physically taken from the person of Timothy Wagner,

then you are instructed that the offense of stealing has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the commission of that stealing, the defendant acted together with or aided another person in committing the offense,

Then you will find the defendant guilty of stealing under this instruction.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(L.F. 51-52).

As construed by this Court, §556.046 limits the requirement of a lesser included offense instruction to those cases where there is a basis for an acquittal of the greater offense and a conviction of the lesser included offense. *State v. Yacub*, 976 S.W.2d 452, 453 (Mo. banc 1998). “In order for there to be a basis for an acquittal of the greater offense, there must be some evidence that an essential element of the greater offense is lacking and the element that is lacking must be the basis for acquittal of the greater offense and the conviction of the lesser.” *State v. Barnard*, 972 S.W.2d 462, 466 (Mo.App.1998); *State v. Santillan*, 948 S.W.2d 574, 576 (Mo. banc 1997). The affirmative evidence need not be offered by Appellant. *State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004).

A decision on whether a particular offense must be instructed upon as a lesser included offense must be made on a case-by-case basis. *State v. Warrington*, 884 S.W.2d 711, 716 (Mo.App., S.D. 1994). "Error occurs only upon failing to instruct on lesser included offenses that are supported by the evidence." *State v. Booker*, 631 S.W.2d 854, 857 (Mo. 1982). A defendant is not entitled to a lesser included offense instruction merely

because the jury might disbelieve some of the state's evidence or decline to draw some or all of the permissible inferences. *Warrington*, 884 S.W.2d at 717. See *State v. Arbuckle*, 816 S.W.2d 932, 935(Mo.App.1991); *State v. Pruett*, 805 S.W.2d 724, 725-26 (Mo.App. E.D. 1991).

In the case at bar, there was no reasonable basis in the evidence for acquitting Appellant of robbery in the second degree and convicting Appellant of stealing. The state contended that Appellant robbed the victim when his accomplice, Sweets, knocked the victim to the ground and Appellant held him down while Sweets took money from the victim's pockets, which satisfied the elements of robbery in the second degree. The defense contended Appellant's friend, unbeknownst to Appellant, stole marijuana from the victim in a drug deal. Appellant's version of the events does not constitute a lesser included offense of the charge submitted by the state. Moreover, even if believed, while Appellant's version of the events could have resulted in an acquittal of robbery, it would not support a conviction of stealing as submitted in the instruction offered by Appellant.

To begin, Appellant was charged with second degree robbery in that he took currency (L.F. 13). The instruction offered by the state as well as the lesser included instruction offered by Appellant involved the taking of money (L.F. 47, 51). But Appellant's testimony was that any stealing that may have occurred was of marijuana, not money. The general rule concerning whether an offense is a lesser-included offense necessarily implies that the lesser crime must be included in the higher crime with which the accused is specifically charged, and that the averment of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, to

sustain a conviction of the latter offense. *State v. Hibler*, 5 S.W.3d 147, 150 (Mo. 1999). Since Appellant was charged with taking money he could not be convicted of taking marijuana which is what he admitted to in his testimony. Therefore, while Appellant's testimony, if believed, provided a basis for acquittal of robbery, it did not provide a basis for conviction of the lesser included offense, stealing money, as proffered in Appellant's instruction.

In fact, if Appellant's version of events, as presented at trial, was true, then Appellant did not commit any offense at all. Appellant testified under oath that he and Sweets were at a convenience store when the victim approached Sweets and told him he had the marijuana Sweets wanted (Tr. 259, 261). Appellant testified that the victim told Sweets where he lived and said that Sweets should come by in about ten minutes to buy the marijuana (Tr. 260). Appellant said that he drove Sweets to the victim's home and Sweets went inside to get the marijuana while Appellant waited in the car parked around the corner (Tr. 260, 261, 269). Later Sweets told Appellant that he stole the marijuana (Tr. 261, 262). Appellant's evidence, if true, showed that he did not commit the crime of stealing anything from the victim, even as an accomplice. His testimony was that Sweets stole marijuana from the victim without Appellant's knowledge. As set forth previously, the lesser included instruction offered by Appellant required that Appellant intended to steal money. Moreover, under Appellant's version of events, Appellant did not act with the purpose of promoting stealing anything from Mr. Wagner in that he did not even know that Sweets was stealing anything until after the fact. Appellant cannot promote an act that he did not know was occurring. Thus, under Appellant's version of the events, he was not guilty of stealing either marijuana or money.

While Appellant may have been guilty as an accomplice of buying drugs under his version of the events, the evidence did not support the crime of stealing either money or marijuana.

In *State v. Neil*, 869 S.W.2d 734 (Mo. banc 1994), this Court rejected Appellant's contention that the jury should have been instructed on robbery in the second degree as a lesser included offense of robbery in the first degree. *Id.* at 739. This Court held that a trial court is not required to instruct the jury with respect to a lesser included offense unless there is a basis for acquitting the defendant of the offense charged and convicting him of a lesser included offense. *Neil* at 739, citing *State v. Mease*, 842 S.W.2d 110-111 (Mo. banc 1992). This Court emphasized that, "Here, defendant's testimony did not provide the basis for the lesser included offense. His defense was alibi. When defendant denies the commission of the charged offense and there is no evidence to mitigate the offense or provide a different version of the offense, instructing down is not required." *Neil* at 739, citing *State v. Petary*, 781 S.W.2d 534, 544 (Mo. banc 1989), *vacated*, 494 U.S. 1075, *aff'd*, 790 S.W.2d 243 (Mo. banc). "Under the evidence of this case, defendant was either guilty of robbery in the first degree or he was not guilty of any crime." *Neil* at 739. The trial court did not err in refusing to give the proffered instruction. *Id.*

The present case is similar to *Neil* in that the evidence that would provide a basis for acquittal of the greater offense did not provide a basis for convicting Appellant of the lesser included offense, but rather suggested that Appellant was not guilty of anything. Therefore the trial court was not required to instruct the jury with respect to the alleged lesser included offense. Appellant was either guilty of robbery or he was not guilty of any crime.

To establish that there was a basis for the Appellant's acquittal of the crime of robbery and a basis which would sustain a conviction of stealing, Appellant argues that "jurors could have believed Mr. Williams was complicit in the taking of money from Mr. Wagner, believed Mr. Wagner's testimony that no gun or knife was used, and disbelieved Mr. Wagner's testimony about the use of physical force" (App. Br. 19). The only element of robbery which Appellant challenges is whether force was involved. Mr. Wagner testified that force was involved and there is no evidence to contradict this evidence.

Appellant's argument fails because it would require that the jury disbelieve some of the evidence of the state, or decline to draw some or all of the permissible inferences. This does not entitle the defendant to an instruction otherwise unsupported by the evidence. *State v. Achter*, 448 S.W.2d 898, 900 (Mo.1970); *Warrington*, 884 S.W.2d at 717. *See State v. Arbuckle*, 816 S.W.2d at 935; *State v. Pruett*, 805 S.W.2d at 725-26. Appellant's argument does not point to any affirmative evidence from any source demonstrating that no force was used.<sup>2</sup> While it is certainly not incumbent upon Appellant to put on such evidence, *State v. Pond*, 131 S.W.3d at 794, the law still requires affirmative evidence from some source to

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<sup>2</sup> Respondent acknowledges that Appellant testified that he did not restrain the victim (Tr. 263). But there remains no affirmative evidence that his accomplice did not use force in forcing the victim to the ground; which is all that was necessary to prove second degree robbery (L.F. 9). Thus there was still no affirmative evidence to acquit Appellant of second degree robbery.

support acquittal of the greater offense. *supra*; *State v. Barnard*, 972 S.W.2d at 466; *State v. Santillan*, 948 S.W.2d at 576.

In sum, there was no basis for the lesser included offense instruction. The trial court is required to instruct on a lesser included offense if the evidence, in fact or by inference, provides a basis for both an acquittal of the greater offense, and a conviction of the lesser offense. *State v. Redmond*, 937 S.W.2d 205, 208 (Mo. banc 1996). The evidence and the inferences from the evidence in this case did not provide a basis for both an acquittal of the greater offense and conviction of the lesser offense. Appellant denied the commission of the charged offense and there was no basis in the state's evidence or in the three versions of the crime offered by Appellant to support instructing down. The trial court did not err in refusing the proffered instruction. Appellant's point should be denied.

## CONCLUSION

Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 3285 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 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 this 22<sup>nd</sup> day of February, 2010, to:

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**APPENDIX**

Sentence and Judgment ..... A1