No. SC90501

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ROBERT WILLIAMS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant Robert Williams adopts the first paragraph of the jurisdictional statement set out in Appellant's Brief, Statement and Argument, filed on June 6, 2009, in the Missouri Court of Appeals, Eastern District, in appeal no. ED91994. To his initial jurisdictional statement, Mr. Williams adds that the Missouri Court of Appeals, Eastern District, affirmed Mr. Williams' conviction in *State v. Williams*, No. ED91994 (Mo. App. E.D. February 22, 2009). On December 22, 2009, this Court sustained Mr. Williams' application for transfer, and transferred this case to this Court. Consequently, this Court has jurisdiction over Mr. Williams' appeal. Mo. Const., Art. V, § 10 (as amended 1982); Rule 83.04.

STATEMENT OF FACTS

Appellant Robert Williams adopts the statement of facts set out in Appellant's Brief, Statement and Argument, filed on June 6, 2009, in the Missouri Court of Appeals, Eastern District, in appeal no. ED91994. Appellant Williams will cite to the appellate record as follows: Trial Transcript, "(Tr.)"; Legal File, "(L.F.)"; Appellant's Brief, "(App. Br.)"; and, Respondent's Brief (SC90501), "(Resp. Br.)."

REPLY POINT

The trial court erred in failing to submit instruction A on the lesser-included offense of felony stealing from a person as requested because a defendant is entitled to an instruction on any theory the evidence establishes, evidence establishing the submission of a lesser-included instruction may come from the defendant's testimony alone, or from other evidence and the inferences drawn from it, and if the evidence supports differing conclusions, then the trial court should err on the side of caution and instruct on each, even in situations where the defendant testifies at trial, proclaiming his innocence. Because the evidence provided a basis for a jury finding that a theft, or taking, occurred but that no force was used to accomplish the taking as required for conviction of the greater offense of robbery in the second degree, the trial court erred and prejudiced Mr. Williams.

State v. Santillan, 948 S.W.2d 574 (Mo. banc 1997);

State v. Pond, 131 S.W.3d 792 (Mo. banc 2004);

State v. Edwards, 980 S.W.2d 75 (Mo. App. E.D. 1998);

State v. Hibler, 5 S.W.3d 147 (Mo. banc 1999); and

§ 556.046.2, RSMo.

REPLY ARGUMENT

The trial court erred in failing to submit instruction A on the lesser-included offense of felony stealing from a person as requested because a defendant is entitled to an instruction on any theory the evidence establishes, evidence establishing the submission of a lesser-included instruction may come from the defendant's testimony alone, or from other evidence and the inferences drawn from it, and if the evidence supports differing conclusions, then the trial court should err on the side of caution and instruct on each, even in situations where the defendant testifies at trial, proclaiming his innocence. Because the evidence provided a basis for a jury finding that a theft, or taking, occurred but that no force was used to accomplish the taking as required for conviction of the greater offense of robbery in the second degree, the trial court erred and prejudiced Mr. Williams.

A. The defendant is entitled to an instruction on any theory the evidence establishes.

In its brief, Respondent made much ado about the number of versions of the incident Mr. Williams gave to police before trial and the jury at trial (Resp. Br. 10-11). In determining whether the evidence supports the submission of a lesser-included instruction, however, this Court leaves to the jury determining

the credibility of witnesses, resolving conflicts in testimony, and weighing evidence. *State v. Coker*, 210 S.W.3d 374, 384 (Mo. App. S.D. 2006) (citing *Rousan v. State*, 48 S.W.3d 576, 595 (Mo. banc 2001)). This Court, instead, views evidence of those differing versions in the light most favorable to the defendant, and determines whether that evidence provides a basis for acquittal of the higher offense, and conviction of the lesser-included offense. *State v. Thomas*, 161 S.W.3d 377, 380 (Mo. banc 2005); *State v. Pond*, 131 S.W.3d 792, 793 (Mo. banc 2004); § 556.046.2, RSMo. The defendant is entitled to an instruction on any theory the evidence establishes. *State v. Hopson*, 891 S.W.2d 851, 852 (Mo. App. E.D. 1995); *State v. Hibler*, 5 S.W.3d 147, 150 (Mo. banc 1999).

B. Evidence establishing the submission of a lesser-included instruction may come from the defendant's testimony alone, or from other evidence and the inferences drawn from it.

Respondent argued that there was no reasonable basis in the evidence for acquitting Mr. Williams of robbery in the second degree and convicting him of stealing because "[Mr. Williams'] version of the events [or trial testimony] does not constitute a lesser included offense of the charge submitted by the state" (Resp. Br. 14). Respondent overlooked that a defendant is not required to put on affirmative evidence as to the lack of an essential element of the higher offense in order to be entitled to a lesser-included offense instruction. *State v. Santillan*,

948 S.W.2d 574, 576 (Mo. banc 1997); *State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999).

Evidence establishing the submission of a lesser-included instruction may come from the defendant's testimony alone, or from other evidence and the inferences drawn from it. The defendant's testimony alone may support the submission of a lesser-included offense instruction. *State v. Sims*, 684 S.W.2d 555, 557-558 (Mo. App. E.D. 1985) (finding defendant's trial testimony warranted submission of a lesser-included instruction on robbery in the second degree). But the defendant need not testify at trial in support of the lesser-included offense instruction to warrant submission of it. *See Santillan,* 948 S.W.2d at 576; *see*, *e.g.*, *State v. Barnard*, 972 S.W.2d 462, 466 (Mo. App. W.D. 1998) (finding the defendant was entitled to a lesser-included instruction, despite that he had not testified at trial).

Nor is it necessary that the defense present any evidence supporting the submission of the lesser-included offense instruction. Evidence presented by the state at trial may justify submission of the lesser-included offense instruction. *Barnard*, 972 S.W.2d at 466 (reversing because "there is evidence, adduced by the state, that would provide a basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense") (citation omitted). Inferences drawn from the evidence presented by the state may also warrant

submission of the lesser- included offense instruction. *State v. Moore*, 729 S.W.2d 239, 240-241 (Mo. App. E.D. 1987) (reversing because, from the evidence, jurors could have inferred an absence of the mental state required for conviction of the greater offense).

"A defendant is entitled to a requested instruction which is supported by the evidence and any inferences which logically flow from the evidence." *State v. Hill*, 17 S.W.3d 157, 159 (Mo. App. E.D. 2000) (citing *Hopson*, 891 S.W.2d at 853). "If a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established, the trial court should instruct down." *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002).

While Respondent acknowledged much of the case law cited in the preceding paragraphs of this brief, Respondent argued that instruction on the lesser-included offense of felony stealing was unwarranted in Mr. Williams' case because "[Mr. Williams'] argument would require that the jury disbelieve some of the evidence of the state, or decline to draw some or all of the permissible inferences" (Resp. Br. 17-18). Respondent cited *State v. Warrington*, 884 S.W.2d 711, 717 (Mo. App. S.D. 1994), S*tate v. Arbuckle*, 816 S.W.2d 932, 935 (Mo. App. S.D. 1991), and *State v. Pruett*, 805 S.W.2d 724, 725-726 (Mo. App. E.D. 1991) in support of the proposition that the defendant is not entitled to a lesser-included

offense instruction merely because a jury might disbelieve some of the state's evidence.

These cases, however, rely on *State v. Olson*, 636 S.W.2d 318 (Mo. banc 1982). In *Olson*, this Court formerly established that "[s]ection 556.046.2 limit[ed] the requirement of instructing down to those instances where there is some affirmative evidence of a lack of an essential element of the higher offense which would not only authorize acquittal of the higher but sustain a conviction of the lesser." 636 S.W.2d at 322.

But years later in *Santillan*, this Court abandoned the rule established in *Olson*, and overruled *Olson* and its progeny. 948 S.W.2d at 576; *see also Pond*, 131 S.W.3d at 794. In *Santillan*, this Court held instructing down requires only a *basis* for the jury to acquit of the higher offense. 948 S.W.2d at 575-576.

Post-*Santillan*, the state relied on pre-*Santillan* case law in making much the same argument to this Court that Respondent made here. In *Pond*, as support for its contention that the defendant was not entitled to a lesser-included instruction at trial, the state argued "that a defendant is not entitled to a lesser-included instruction merely because a jury might disbelieve some of the State's evidence." 131 S.W.3d at 794. There, as in Mr. Williams' case, the state supported its argument by citing case law that relied on *Olson*. *Id*.

In response to the state's argument, this Court noted its holding in *Santillan*, expressly overruled the contrary cases cited by the state, and disregarded Respondent's argument in reversing and remanding for a new trial. *Id*. In *Pond*, this Court held that the defendant, who was convicted of sodomy, was entitled to an instruction on the lesser-included offense of child molestation because the jury could have believed part of the victim's testimony but disbelieved the state's evidence of penetration. *Id*. at 794-795. As it did in *Pond*, this Court should disregard any arguments that Respondent has advanced in reliance upon *Olson* and its progeny, and hold that Mr. Williams was entitled to a lesser-included instruction on felony stealing from a person (*see* App. Br. 19).

C. If the evidence supports differing conclusions, then the trial court should err on the side of caution and instruct on each, even in situations where the defendant testifies at trial, proclaiming his innocence.

Respondent argued to the contrary that Mr. Williams was not entitled to the lesser-included offense instruction because Mr. Williams testified that Sweets stole marijuana, not money, as hypothesized in defense instruction A, and Mr. Williams denied acting with Sweets or with the purpose of promoting the commission of the offense of stealing (Resp. Br. 15-16). Respondent overlooked that the defendant's denial of the commission of the offense is not dispositive of the issue of whether a lesser-included offense instruction is required. According

to *State v. Neil*, 869 S.W.2d 734, 739 (Mo. banc 1994), upon which Respondent relied, the defendant's denial of the commission of the offense is one of two factors that courts should consider in determining whether a lesser-included instruction is warranted, and instructing down is required unless both factors are met (Resp. Br. 16). In *Neil*, this Court found, "[w]hen 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*, instruction down is not required." (emphasis added.) 869 S.W.2d at 739. If the jury could reject the defendant's trial testimony proclaiming his innocence, and believe portions of the state's evidence while disbelieving other portions, then instruction down as provided by § 556.046.2 may be required.

For example, in *State v. Edwards*, 980 S.W.2d 75, 76 (Mo. App. E.D. 1998), the State offered the victim's testimony that the defendant robbed him at knife-point, and an officer's testimony that the defendant told him he had robbed the victim without use of a weapon, but the defendant testified at trial denying committing any robbery. There, the State argued that the defendant was not entitled to a lesser-included instruction based on one version of the State's evidence, and that the defendant was not entitled to present defenses that were inconsistent with his theory of innocence. *Edwards*, 980 S.W.2d at 76-77. The Missouri Court of Appeals, Eastern District, relied on *Neil* in rejecting the State's

arguments, and held that although the defendant denied any wrongdoing at trial, there was evidence to mitigate the offense or provide a different version of the offense. *Id*. at 77. Because the jury could reject the defendant's testimony proclaiming his innocence but believe he truthfully told the officer that he had robbed the victim without the use of a weapon, the Missouri Court of Appeals, Eastern District, held the defendant was entitled to instruction on the lesser-included offense of robbery in the second degree at trial. *Id*.

Similarly, Mr. Williams was entitled to instruction on the lesser-included offense of felony stealing from a person. The evidence at trial told four different versions of the charged offense – the prosecution's version and at least three others.

Timothy Wagner's version

At trial, Timothy Wagner testified two men shoved him face down to the ground, held him down, rifled through his pockets, and took two to three hundred dollars before releasing him (Tr. 159-164, 185, 187-190). He testified that his robbers used no guns, knives, or other weapons in the robbery and that he was not "incredibly hurt" (Tr. 185, 191, 194). He said that he "might have had a scrape on [him] or something" (Tr. 185).

Mr. Williams 'two statements to police

When police interrogated Mr. Williams, they obtained statements from him containing two different versions of the incident (Tr. 271). Mr. Williams' first statement to police stated that Mr. Williams happened to drive by and stop to talk to Sweets who told him that he was planning to rob a man for some marijuana (Tr. 270-271, 273). The statement indicated that Sweets walked over to the man, took something, and ran, but that Mr. Williams later drove by and told the man that he had nothing to do with what Sweets had done (Tr. 271).

The second written statement said, however, that Mr. Williams drove Mr. Cates and Sweets to Mr. Wagner's neighborhood where they *robbed* Mr. Wagner, got back into the car, and rode away (Tr. 274-275).

Mr. Williams' trial testimony

At trial, a third version emerged during Mr. Williams' testimony. Mr. Williams told the jury that his friend, Sweets, had taken marijuana from Mr. Wagner at Mr. Wagner's apartment during a drug transaction that Mr. Wagner had arranged (Tr. 261-262).

Mr. Williams told the jury that from his seat in the car, he watched Sweets enter Mr. Wagner's apartment, saw Mr. Wagner place something on a scale, and saw hands go down on the table (Tr. 264-265, 269-270, 280). Mr. Williams testified that he did not see Sweets forcibly take marijuana or money from Mr. Wagner (Tr. 265).

He said five to ten minutes later, Sweets ran out of the apartment and got into the car with the marijuana (Tr. 261). Mr. Williams started the car and left (Tr. 261, 271). Mr. Williams told the jury that when he dropped Sweets off, Sweets gave him a bag of the marijuana and told him how he had stolen it (Tr. 261-262, 280); *see also* (Resp. Br. 11, "Later Sweets told Appellant that he stole the marijuana").

Jurors at Mr. Williams' trial could have believed the version of the incident to which Mr. Williams testified, or believed one of the other versions, or believed only portions of one or more of the versions while disbelieving other portions. Because the jury could have concluded from these versions that Mr. Williams had acted with another person in taking money from Mr. Wagner, and that neither Mr. Williams nor the other person used force in doing so, the evidence supported the submission of the requested lesser-included instruction on felony stealing from a person. If the evidence supports differing conclusions, then the trial court should err on the side of caution and instruct on each. *Pond*, 131 S.W.3d at 794 (citing *Hibler*, 5 S.W.3d at 150).

Here, from Mr. Wagner's version and the version in Mr. Williams' second statement to police, jurors could have inferred that Mr. Williams acted together with or aided another person in committing an offense against Mr. Wagner.

Additionally, jurors could have concluded that the offense that occurred was stealing from . . .

(1) Mr. Wagner's testimony that there were no guns, knives, or other weapons used in the robbery and that he was not significantly hurt; and

(2) Mr. Williams' testimony that an arrangement for a drug transaction precipitated the offense, that he did not see Sweets forcibly take marijuana or money from Mr. Wagner, and that he did not personally take anything from Mr. Wagner by force.

Consequently, because the evidence provided a basis for a jury finding that a theft, or taking, occurred but that no force was used to accomplish the taking as required for conviction of the greater offense of robbery in the second degree, the trial court erred and prejudiced Mr. Williams.

CONCLUSION

WHEREFORE, based on the arguments in Appellant's Statement, Brief, and Argument, filed on June 6, 2009, and on the arguments in this Reply Brief, Appellant Robert Williams requests that the Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Rule 84.06, I hereby certify that on Monday, March 08, 2010, a true and correct copy of the foregoing reply brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Assistant Attorney General, Mary H. Moore, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, and uses Californian FB 14 point font. The word-processing software identified that this brief contains _____words. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software and found virus-free.

_____

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APPENDIX

Sentence and Judgment A1-4

Defense Instruction A A5-6