IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
RESPONDENT,	)	
	)	
VS.	)	NO. SC85955
	)	
MARK ANTHONY GILL,	)	
	)	
APPELLANT.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF NEW MADRID COUNTY
THE HONORABLE FRED W. COPELAND, JUDGE

APPELLANT'S REPLY BRIEF

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CORRECTIONS AND CLARIFICATIONS

1. In appellant's argument pertaining to his Point I, App.Br.[1] 56-57, appellant incorrectly refers to "Point III" and the corresponding argument; the reference should be to Point IV and the corresponding argument at pages 69-84 of appellant's brief.[2]

2. Referring to State's Exhibit 92 – Mark's videotaped statement – respondent incorrectly asserts that "the only transcript [StEx-93] of the confession is found at Def. App. A27-A57" (Resp.Br. 14-15, n. 3). Sgt. Gregory testified that he had someone prepare a transcript of the video (Tr. 832-33). The prosecutor's office gave a copy of the transcript to undersigned counsel which she included in the appendix to appellant's brief. Counsel believes the prosecutor's office retains the original transcript (Tr. 832-33).

3. Since receiving respondent's brief, counsel has several times

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[1] Citations are as follows: App.Br. = Appellant's Initial Brief; Ap'x = Appendix to App.Br.; ReplyAp'x = Appendix accompanying Apellant's Reply Brief Resp.Br. = Respondent's Brief; StEx- = State's Exhibit;

[2] Counsel called opposing counsel on March 3, 2005, and advised him of the mistake.

reviewed the transcript of Mark Gill's statement (StEx-93) and the videotaped statement itself (StEx-92). Having repeatedly reviewed these exhibits, counsel believes there are several significant, substantive mistakes in the transcript[3].

Accordingly, counsel respectfully requests that the Court and opposing counsel view, and carefully listen to, Mark's recorded statement and rely on Mark's actual statement - not the transcript. In particular, counsel directs the Court and opposing counsel to the following spots where the transcript and the videotape appear to differ:

Page 7, lines 12-13 (Ap'x, A33): Mark says he got some shovels and very quietly put them in the back of the truck, and Sgt. Gregory asks:

"Why did you do it quiet?"

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[3] Mark speaks very softly and many of his words are difficult to understand. At the suppression hearing, Sgt. Gregory (who took Mark's statement) testified that Mark's statement was recorded on both a videotape and a CD Rom. The state used the videotape at trial (StEx-92) and provided each member of the jury with a copy of the transcript for "assistance in following the tape" (Tr.834). Counsel does not have a copy of the CD Rom that was made and has not listened to it. Possibly the CD Rom is of better quality and easier to understand.

According to the *transcript*, Mark answered:

"Cause I knew what I was fixin' to do, I was going to kill him I knew I had already I had already messed up."

Careful review of the *videotape* reveals Mark actually said:

"Cause I knew what I was fixin' to do. I was going to hell. I knew I had already I had already messed up."

That Mark was prejudiced by this inaccurate transcription is shown by the fact that at least twice in its brief, the state uses it as evidence that Gill may have shot Lape and therefore the identity of the shooter is unclear (Resp.Br. 21, 25).

Page 10, line 1 (Ap'x, A36): Mark describes digging the hole.

According to the *transcript*, Mark then said,

"We got Ralph out of the truck."

Careful review of the *videotape* reveals Mark actually said:

"He carried Ralph out of the truck."

Page 10, line 17 (Ap'x, A36): Mark says that Ralph did not fit into the hole so Justin stepped on his head.

According to the *transcript*, Mark said,

"Justin did. Stepped on it with force with sandles, stepped on his head."

Careful review of the *videotape* reveals Mark actually said:

"Justin did. Stepped on it, he was wearing some sandles. Stepped on his head."

4. Respondent incorrectly states, "Gill drew about $16,000 from Lape's account on the trip" (Resp.Br. 17 citing Ap'x, A46-A47, A49). Mark actually estimated the amount at "[a]bout sixteen hundred, seventeen hundred dollars" (Ap'x, A49).

REPLY ARGUMENT

Respondent's Argument I, that the disjunctive first degree murder verdict director was correct, lacks support in the evidence and in the law.

Respondent's argument that the judge correctly submitted the disjunctive verdict director – because had the verdict director attributed the shooting to Justin Brown, the jurors would have had to *acquit* Mark if they did not believe Justin Brown shot Ralph Lape – must fail because it is unsupported by any authority. The law requires instructions to be based on the evidence. *State v. Taylor*, 422 S.W.2d 633, 638 (Mo.1968). Respondent has not cited any authority supporting its claim that instructions may be based on the possibility that the jurors might or might not believe the evidence; appellant is not aware of any such authority.

Respondent does not dispute or challenge appellant's point – that in determining whether the evidence concerning the conduct element of the offense is clear or unclear and whether the evidence supports requested instructions, it is the *evidence admitted at trial* pertaining to the conduct in question that is determinative. *See* App.Br. 47-48. Discounting the evidence adduced by the state at trial, respondent now simply insists the identity of the shooter is unclear.

The state appears to argue that unless the defendant (Mark) can point to evidence disproving that he committed the conduct element of the offense (shooting Mr. Lape) or proving that another person committed the conduct element (co-defendant Justin Brown shot Lape), the evidence is unclear as to the identity of the shooter and requires a disjunctive instruction.[4] Again, respondent cites no authority for this claim, and appellant is unaware of any authority that would support such a claim. It would be odd, indeed unconstitutional, to hold appellant had the burden of disproving his own guilt or proving another person's responsibility.

Essentially, respondent's argument for the disjunctive verdict director does not rest on the evidence *of the shooting* adduced *by the state* at trial. Respondent supports its argument with the notion that because the jury could disbelieve the state's evidence (Mark's statement that Justin shot Mr. Lape), the disjunctive verdict was necessary to

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[4] "This is not a situation in which there was forensic evidence such as fingerprints on a murder weapon that might have made it clear whether Gill or Brown was the shooter … There was no physical evidence that disproved that Gill was the shooter … And it was obvious that Gill had an incentive to blame someone else" (Resp.Br. 20-21).

ensure a conviction.

Appellant is unaware of any authority supporting respondent's argument – that a jury's potential disbelief of the evidence is sufficient to give an instruction – and respondent cites to none. Nor is appellant aware of any authority suggesting a disjunctive verdict director may be given to ensure the state will obtain a conviction.[5]

The law is this: "State witnesses may know facts that support the defense, because the State, like any party, must take its witnesses as it finds them." *State v. Thompson*, 68 S.W.3d 393, 394 (Mo.banc 2002). State evidence in the form of a defendant's confession may contain evidence supporting the defense that the state, if it wishes to use the confession, must take "as it finds" it. The "state's own evidence" may supply facts supporting an instruction requested by the defense. *State v. Crenshaw*, 14 S.W.3d 175, 178 (Mo.App.E.D. 2000).

Respondent worries that without the disjunctive verdict director, the state runs the great risk that the jury will acquit the defendant. The

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[5] Appellant's initial brief discussed the law concerning evidence required to support an instruction, and to avoid repetition, appellant respectfully refers the Court an opposing counsel to appellant's brief at pages 41, and 47-51.

state's specific concern is with the evidence of the shooting the state actually used at trial: Mark's statement that Justin shot Ralph Lape. The state fears that if this evidence requires the jury to be instructed that to convict Mark, it must find that Justin shot Ralph Lape, then a jury with "a reasonable doubt" as to whether Justin shot Lape would have to acquit Mark.

But this is precisely the burden the state bears in taking a case to trial: the burden that the jury will not believe its evidence of guilt beyond a reasonable doubt. In taking a case to trial instead of resolving the case with a plea bargain, the state always bears the risk that the jury will not believe its evidence and will acquit the defendant.

The state's concern that the jury may not believe its evidence is not a reason to change the law: while a jury's disbelief in the state's evidence may require an acquittal, it does not give rise to affirmative evidence of any kind. *State v. Achter*, 448 S.W.2d 898, 900 (Mo. 1970). Nor does a state's concern that the jury may not believe its evidence allow a trial court to give an instruction that eases the state's burden of proof over the rough terrain of its bad facts. Having chosen to use Mark Gill's statement to obtain his conviction and sentence of death, the state must take the statement's bad facts with its good facts.

Respondent, attempting to establish that the evidence was not clear

concerning who shot Ralph Lape, tries to distinguish *State v. Thompson*, 112 S.W.3d 57 (Mo.App.W.D. 2003). Unfortunately, respondent fails to cite to those portions of the *Thompson* opinion that he claims distinguish it from Mr. Gill's case (Resp.Br. 27-28). Respondent resorts to asserting that "*Thompson* involved a highly unusual situation that has no application here" (Resp.Br. 27-28). As in the present case, the error in *Thompson* was in submitting the verdict director "in the disjunctive: 'defendant *or* other persons [Justin Brown] caused the death…'" because "there was no evidence that Thompson [Mark Gill] committed any of the conduct elements of first degree murder." *Thompson*, 112 S.W.3d at 70-71.

Still trying to show the evidence in the present case was unclear, respondent makes much of *State v. Gilbert*, 103 S.W.3d 743 (Mo.banc 2003). Respondent fails to recognize that the facts of *Gilbert* are distinguishable from those of the present case.

Here, Sgt. Gregory, who took the statements from Mark, testified that he could not recall any way in which Mark's two statements about the charged offense differed (T. 60). In *Gilbert*, however, the defendant made inconsistent statements about what occurred when the victim was shot. 103 S.W.3d at 748. In addition, although Mr. Gilbert claimed his co-defendant shot both victims, "when asked if he was

'solely responsible for the murders in Missouri,' Gilbert answered that 'it was a 50/50 deal.'" *Id.* at 749.

Unlike *Gilbert*, the evidence of the shooting in the present case is consistent. The fact that Mark was involved in the offense does not make the evidence of the shooting unclear.

State v. Shurn, 866 S.W.2d 447 (Mo.banc1993) is an additional example of a case in which the evidence of who shot the victim was unclear. Mr. Shurn claimed the verdict director should have ascribed "all the elements of the offense" to his codefendant, Weaver, because "the conduct of the offense was committed *entirely* by Weaver. *Id.* at 462. This Court disagreed:

> Contrary to Shurn's claim, the evidence is not clear that Weaver alone murdered Taylor. Both Shurn and Weaver chased Taylor behind the apartment complex; one witness testified that she saw both Shurn and Weaver running with their hands up as if both were carrying guns; persons living in the complex heard gunshots; Shurn and Weaver returned to the car; Weaver then went behind the complex again; witnesses heard more shots; Weaver returned to the car, which left the complex.

Id. Unlike *Shurn*, in the present case, the evidence of the shooting is

consistent. The evidence of the shooting is that Justin Brown shot Ralph Lape (StEx-92; StEx-93).

The state relies on §§ 562.036 and 562.041 in support of its argument that under the law of accomplice liability, it doesn't matter whether Mark or Justin Brown shot Ralph Lape (Resp.Br. 21; ReplyAp'x, A1). But these statutes must be read in conjunction with §562.051: "Except as otherwise provided, when two or more persons are criminally responsible for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating or mitigating fact or circumstance" (ReplyAp'x A1).

Read together, these statutes mean that a person may be responsible for the conduct of another person but is not necessarily responsible *to the same degree*. In a case such as the present case, in which only one person did the shooting, a properly instructed jury could find that the non shooter, while responsible for the death of the victim, was not responsible to the same degree as the shooter.

Had Mark's jury been properly instructed, according to the evidence, the jury could have found that Mark, the non shooter, did not coolly reflect and was not guilty of first degree murder. But even if Mark's jury had found him guilty of first degree murder, a correct instruction

at the guilt phase could have made a difference in the outcome at penalty phase. By not instructing the jurors at guilt phase that they could find that Mark was the shooter, the jurors could not have gone into penalty phase with that finding. The jurors could have found the Mark not being the shooter was a mitigating fact. As opposing counsel and the Court will see when they listen to and view Mark's videotaped statement, he took responsibility for Mr. Lape's murder and was remorseful (StEx-92). These are all mitigating facts that a jury, properly instructed at guilt phase that Mark was not the shooter, could have found and used to determine that Mark's punishment should be life imprisonment without probation or parole.

Respondent disagrees that the disjunctive verdict director "allowed the jury to find that Gill was the shooter" (Resp.Br. 21). Respondent, without citation to authority, claims "the instruction given merely allowed the jury to **refrain from making a finding** as to who shot the victim Lape" (Resp.Br. 21 citing Def.Br. 56; emphasis in Resp.Br.).

The language of the instruction itself disproves respondent's argument. The pertinent portion of the instruction reads:

> "As to Count I, if you find and believe from the evidence beyond a reasonable doubt:
>
> First that on or about July 7, 2002, the defendant or

> Justin M. Brown caused the death of Ralph L. Lape, Jr., by shooting him... ."

(Ap'x, A12). This language, included in the verdict director given at Mark's trial, creates three reasonable possibilities:

1) The jurors could believe "the defendant … caused the death of Ralph L. Lape, Jr. by shooting him…," or

2) The jury could believe "Justin M. Brown caused the death of Ralph L. Lape, Jr. by shooting him…," or

3) The jury could believe that "the defendant or Justin M. Brown caused the death of Ralph L. Lape, Jr., by shooting him.

Although the disjunctive verdict director allowed the jury to choose the third option, it also allowed the jury to find the first option: that Mark Gill caused Ralph Lape's death by shooting him.

Respondent argues that attributing the conduct element to the person who committed the conduct "would end up being a back-door method of requiring the State to determine, beyond a reasonable doubt, the identity of the shooter in cases where doing so is difficult or impossible, contrary to the statute" (Resp.Br. 21). Appellant respectfully disagrees. Note 5 of the Notes on Use to MAI-CR3d 304.04 provides an alternative that covers the situation described by the state: where the identity of the shooter is unknown or the evidence as to the

shooter is unclear (Reply Ap'x, A5-A9).

Respondent also argues that neither the MAI nor the Notes on Use "state that the disjunctive instruction can 'only' be given when there is uncertainty as to the conduct elements" (Resp.Br. 31). While this may be true, a careful reading of the Notes on Use to MAI-CR3d 304.04 reveals that the choice of the options and alternatives provided by the pattern instruction and Notes is to be *guided by the evidence*.

At trial, Mr. Gill argued that Note 5(a) – "Where the conduct elements are committed entirely by another person or persons" – controlled. But it should be noted that even under 5(b) – "Where the defendant and other person(s) are joint actors in the commission of the offense" – Note (1) directs that "all the elements of the offense should be ascribed respectively, *as supported by the evidence,* to (a) the defendant, (B) the defendant and the other person or persons, C) the defendant or the other person or persons, or D the other person or persons,..." Missouri's pattern instructions and Notes on Use follow the rule: the instructions must be supported by the evidence.

The real problem for the state in this case was not that the evidence was unclear or that the identity of the shooter was unknown. The real problem was that the state used and relied on Mark's statements which clearly and consistently said that Justin Brown shot Ralph Lape.

In fact, respondent, conceding that the prosecutor knew that Mark and Justin's statements could not both be true because each said the other shot Mr. Lape, claims that the disjunctive verdict director is the only way to avoid the ethical dilemna of two juries returning inconsistent verdicts (Resp.Br. 31-32). Respondent asserts:

> Justin Brown, too, confessed, but he accused Gill of being the shooter... Thus, under Gill's theory, at the trial of Brown the jury would be asked to find beyond a reasonable doubt that **Gill** was the shooter, and at the trial of Gill another jury would be asked to find beyond a reasonable doubt that **Brown** was the shooter...
>
> Gill's arguments would also put prosecutors in ethical quandaries in situations in which two suspects name each other as the shooter or person who committed the act in question. The prosecutor here knew that one of two defendants pulled the trigger, and knew that one of the two defendants lied in his confession by accusing the other of doing the shooting. Under Gill's position, the prosecutor would be required to ask two juries to find inconsistent facts—that a different person fired the single shot that killed the victim... .

(Resp.Br. 31-32; emphasis in original).

Respondent is incorrect: it is not appellant's insistence that the instructions in his case be supported by the facts that causes the prosecutor's ethical dilemma. Any ethical problem facing the state is a problem of the state's own making created by the prosecutor's use of Mark's statement - a statement which respondent now claims might not be true.

What respondent fails to mention is that it is the state's use of the inconsistent evidence that creates the possibility of inconsistent verdicts. If the prosecutor does not use the inconsistent statements, the problem of inconsistent verdicts never arises.

Moreover, if the prosecutor persists in using the inconsistent statements, the disjunctive verdict director will not solve the state's ethical problem. This is because, as explained *supra*, the juries will have the same three choices as to who was the shooter. The juries can, based on the state's evidence – the statements – reach inconsistent conclusions about the identity of the shooter.

Further, even knowing Mark's statement was as likely false as true, the prosecutor used it as state's evidence to convict him and obtain a death sentence. The state disavowed the truth of the statement to the jurors to obtain a conviction and sentence of death, and induced the

trial court to ignore the content of this statement – Justin Brown shot Ralph Lape – to obtain a disjunctive verdict director that diminished the state's burden of proof by allowing the jury to go beyond the evidence to find Mark guilty and to sentence him to death. The state's use of a statement that the prosecutor had good reason to believe might be false violated Mark's rights to due process of law, fair jury trial, fundamental fairness, and reliable sentencing. U.S.Const., Amend's V, VI, VIII, and XIV. Especially here, where the state has both relied on and disavowed the statement, defendant's right to a fair trial and reliable sentencing have been violated.

"[A]n instructional error 'will be held harmless only when the court can declare its belief that it was harmless beyond a reasonable doubt.'" *State v. Ferguson*, 887 S.W.2d 585, 587 (Mo.banc 1994) *quoting State v. Erwin,* 848 S.W.2d 476, 484 (Mo.banc 1993).

The error here cannot be declared harmless beyond a reasonable doubt. The cause must be reversed and remanded for a new trial, or in the alternative, for a new penalty phase trial.

CONCLUSION

For the foregoing reasons, appellant affirms the Conclusion of his initial brief and prays that this Court will reverse the judgment of the circuit court and remand for a new trial or, alternatively, a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, the undersigned attorney, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). According to the "Word Count" function of Microsoft "Word," the brief contains a total of 3,660 words.

The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program and according to that program is virus-free.

A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed this 26th day of April, 2005, to Erwin O. Switzer, III, Special Chief Counsel, Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102, and a copy of the same was emailed to: erv.switzer@ago.mo.gov.

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