

ORIGINAL

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED
Motion filed
JUN 14 2011

LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ROLLEN WILLIAMS,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

Appeal No. ED95386

92250

FILED

APR 10 2012

CLERK, SUPREME COURT

APPEAL TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT
FROM THE CIRCUIT COURT OF THE CITY OF SAINT LOUIS, MISSOURI
THE HONORABLE BRYAN L. HETTENBACH,
JUDGE AT TRIAL AND POST-CONVICTION PROCEEDINGS

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

Alexandra Johnson
Missouri Bar No. 53689
1010 Market Street, Suite 1100
St. Louis, MO 63101
Phone 314-340-7662 x247
Fax 314-340-7685
Alexandra.Johnson@MSPD.mo.gov

ATTORNEY FOR APPELLANT

SCANNED

INDEX

<u>TABLE OF AUTHORITIES</u>	3
<u>JURISDICTIONAL STATEMENT</u>	6
<u>STATEMENT OF FACTS</u>	7
<u>POINTS RELIED ON</u>	
POINT I	10
POINT II	11
<u>ARGUMENT</u>	
POINT I	12
POINT II	17
<u>CONCLUSION</u>	26
<u>CERTIFICATE OF SERVICE</u>	27
<u>CERTIFICATE OF COMPLIANCE</u>	27
<u>APPENDIX</u>	28

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1972)	16, 23
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	10, 15
<i>Cole v. State</i> , 223 S.W.3d 927 (Mo. App. S.D. 2007)	24
<i>Dudley v. State</i> , 903 S.W.2d 263 (Mo. App. E.D. 1993)	13, 18
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985)	24
<i>Frederick v. State</i> , 754 S.W.2d 934 (Mo. App. E.D. 1988)	13, 18
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	16, 23
<i>In re Winship</i> , 397 U.S. 358 (1970)	11, 19
<i>Jackson v. Virginia</i> , 443 U.S. 316, 320 (1979)	19
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986)	16, 23
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995)	16, 24
<i>McMann v. Richardson</i> , 397 U.S. 759 (1970)	16, 23
<i>Moss v. State</i> , 10 S.W.3d 508 (Mo. banc 2000)	24
<i>Mouse v. State</i> , 90 S.W.3d 145 (Mo. App. S.D. 2002)	12, 17
<i>Nix v. Whiteside</i> , 475 U.S. 157 (1986)	24
<i>Reeder v. State</i> , 712 S.W.2d 431 (Mo. App. E.D. 1986)	16
<i>Seales v. State</i> , 580 S.W.2d 733 (Mo. banc 1979)	23
<i>Sederes v. State</i> , 776 S.W.2d 479 (Mo. App. E.D. 1989)	16
<i>State v. Bohlen</i> , 284 S.W.3d 714 (Mo. App. E.D. 2009)	23

<i>State v. Davis</i> , 71 S.W.3d 659 (Mo. App. W.D. 2002)	22
<i>State v. Guenther</i> , 744 S.W.2d 564 (Mo. App. W.D. 1988)	19
<i>State v. Isom</i> , 660 S.W.2d 739, 740 (Mo. App. E.D. 1983)	18
<i>State v. Johnson</i> , 741 S.W.2d 70 (Mo. App. S.D. 1987)	11, 13, 19
<i>State v. Luker</i> , 873 S.W.2d 316 (Mo. App. S.D. 1994)	11, 21
<i>State v. Lutjen</i> , 661 S.W.2d 845 (Mo. App. W.D. 1983)	9, 19, 21
<i>State v. McAusland</i> , 829 S.W.3d 34 (Mo. App. E.D. 1992)	22
<i>State v. Pelz</i> , 845 S.W.2d 561 (Mo. App. W.D. 1992)	22
<i>State v. Purlee</i> , 839 S.W.2d 584 (Mo. banc 1992)	22
<i>State v. Wahby</i> , 775 S.W.2d 147, 154 (Mo. banc 1989)	18
<i>State v. Williams</i> , 119 S.W.3d 674 (Mo. App. S.D. 2003)	10, 15
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	23
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	16, 24
<i>Vernor v. State</i> , 894 S.W.2d 209 (Mo. App. E.D. 1995)	13, 18
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	10, 15

Other Authority

Missouri Supreme Court Rule 29.15	6, 7, 10, 11, 13, 18
Mo. Constitution, Article I, Section 10	10, 11, 12, 16, 17, 19, 25
Mo. Constitution, Article I, Section 18(a)	10, 11, 12, 15, 16, 17, 19, 25
Mo. Constitution, Art. V, § 3	5

Section 477.050, RSMo (2000)	5
Section 491.050	14
Section 571.030	6, 7, 11, 21
U.S. Constitution, Fifth Amendment	10, 11, 12, 16, 17, 19, 25
U.S. Constitution, Sixth Amendment	10, 11, 12, 16, 17, 19, 23, 25
U.S. Constitution, Fourteenth Amendment	10, 11, 12, 16, 17, 19, 25

JURISDICTIONAL STATEMENT

On July 10, 2008, Appellant Rollen Williams was convicted by jury under Cause No. 0622-CR00836 of robbery in the first degree (§ 569.020), armed criminal action (§ 571.015), and unlawful use of a weapon (§ 571.030).¹ On September 26, 2008, he was sentenced to a total of thirty year terms by the Honorable Bryan L. Hettenbach of the 22nd Judicial Circuit. Mr. Williams' direct appeal proceeded under Cause No. ED91998. The mandate on the direct appeal issued on November 13, 2009. On October 13, 2009, Mr. Williams filed a *pro se* motion pursuant to Missouri Supreme Court Rule 29.15, denominated Cause No. 0922-CC09454. Post-conviction counsel was appointed on December 18, 2009 and was subsequently granted an additional thirty (30) days in which to file an amended motion, which was filed on March 18, 2010. On July 13, 2010, the motion court denied post-conviction relief without an evidentiary hearing. Mr. Williams filed his Notice of Appeal to this Court on August 23, 2010. This appeal presents no questions reserved for the exclusive jurisdiction of the Missouri Supreme Court; thus, jurisdiction properly lies in this Court. Mo. Const., Art. V, § 3, 477.050.

* * *

The Record on Appeal will be cited to as follows: Legal File as "L.F." For the record transferred from the direct appeal, Cause No. ED91998, the Legal File will be cited to as "Trial L.F." and the transcript as "Trial Tr."

¹ Mr. Williams was also charged with but acquitted of domestic assault in the third degree (§ 565.074).

STATEMENT OF FACTS

On July 10, 2008, Appellant Rollen Williams was convicted by jury under Cause No. 0622-CR00836 of robbery in the first degree (§ 569.020), armed criminal action (§ 571.015), and unlawful use of a weapon (§ 571.030) (L.F. 59). On September 26, 2008, he was sentenced to two terms of thirty years and one term of seven years, to run concurrently, for a total of thirty years by the Honorable Bryan L. Hettenbach of the 22nd Judicial Circuit (L.F. 59). Mr. Williams' direct appeal proceeded under Cause No. ED91998. The mandate on the direct appeal issued on November 13, 2009. On October 13, 2009, Mr. Williams filed a *pro se* motion pursuant to Missouri Supreme Court Rule 29.15, denominated Cause No. 0922-CC09454 (L.F. 3-22). Post-conviction counsel was appointed on December 18, 2009 and was subsequently granted an additional thirty (30) days in which to file an amended motion, which was filed on March 18, 2010 (L.F. 24, 25-58).

In his amended motion for post-conviction relief, Mr. Williams raised *inter alia*:

8(a). Prior to trial, Movant informed his trial attorney that one of the complaining witnesses, Timothy Russo aka Timothy Smith, had some criminal history. Throughout the trial and particularly during closing argument, the prosecutor emphasized that Mr. Russo/Smith and his brother, Bryan Zach, were "good boys" who had no motive no lie, no blemish on their credibility (Tr. 289-91). Mr. Earnest Basic was once arrested with Mr. Russo/Smith for a felony marijuana case and also knew

of an incident involving a fine for possession of marijuana, when Mr. Russo/Smith was caught by a park ranger in the area of Salem, Missouri, in a van with drugs. Mr. Basic should have been called as a witness. This witness was readily available and willing to testify at trial, and this testimony would have provided a viable defense for Movant, as it would have impeached the credibility of a key witness, Mr. Russo/Smith. Trial counsel knew or should have known that this witness' testimony would have been significant at trial; a reasonably competent attorney would have called Mr. Basic to testify on Movant's behalf. There is a reasonable probability that had trial counsel called this witness, the result of Movant's trial would have been different.

(L.F. 27-28).

8(i). Count III was unlawful use of a weapon. The third element is that the gun was readily capable of lethal use. No evidence was adduced at trial on this issue, as the weapon was never recovered, e.g., a ballistics expert to testify as to the testing that the weapon underwent. This issue was not raised on appeal. A reasonably competent appellate attorney would have raised this issue on appeal as it is plain from the record. There is a reasonable probability that had appellate counsel done so, the result of Movant's appeal would have been different.

(L.F. 31).

On July 13, 2010, the motion court denied post-conviction relief without an evidentiary hearing (L.F. 59-67). As to the claim regarding Mr. Basic, the court denied relief indicating in essence that it did not believe the outcome of the trial would have changed had Mr. Basic testified, and that a witness may not be impeached with a mere arrest or criminal charge not yet resulting in a conviction (L.F. 61). As to the claim regarding Count III, the court found the claim to be without merit because a firearm is a deadly weapon under § 566.061 (10) and MAI-CR 3d 333.00, and further relied on *State v. Lutjen*, 661 S.W.2d 845, 848 (Mo. App. W.D. 1983), that held a weapon was readily capable of lethal use even when unloaded, because it would be capable of ready function by the insertion of bullets (L.F. 65).

Mr. Williams' motion to proceed *in forma pauperis* was granted and filed his Notice of Appeal to this Court on August 23, 2010 (L.F. 70-72). This appeal follows. To avoid unnecessary repetition, additional facts may be adduced in the argument portion of this Brief as needed.

POINTS RELIED ON

I.

The motion court clearly erred when it denied Mr. Williams motion for post-conviction relief without a hearing because Mr. Williams' alleged facts that were not conclusively refuted by the record and which, if proven, would entitle him to relief in that Mr. Williams was denied his rights to due process and effective assistance of counsel, as guaranteed by the V, VI, and XIV Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution because trial counsel failed to call Mr. Earnest Basic as a witness at trial. The motion court's ruling leaves a definite and firm impression that a mistake was made, because Mr. Williams' claim states who the witness would have been, that he would have testified as to the bias of the accusing witnesses, that Mr. Williams had given his attorney information about this witness prior to trial, and that the witness was readily available to testify. Absent counsel's error, there is a reasonable probability that the outcome of the trial would have been different.

Chambers v. Mississippi, 410 U.S. 284 (1973);

State v. Williams, 119 S.W.3d 674 (Mo. App. S.D. 2003);

Washington v. Texas, 388 U.S. 14 (1967);

U.S. Constitution, Amendments V, VI, and XIV;

Missouri Constitution, Article I, Section 10 and 18(a);

Missouri Supreme Court Rules 29.15.

II.

The motion court clearly erred when it denied Mr. Williams' motion for post-conviction relief without a hearing because Mr. Williams alleged facts that were not conclusively refuted by the record and which, if proven, would entitle him to relief in that Mr. Williams' was denied his rights to due process and effective assistance of counsel, as guaranteed by the V, VI, and XIV Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution because appellate counsel failed to raise a meritorious issue on appeal, specifically that appellate counsel failed to raise sufficiency of the evidence as to an element of Count III, Unlawful Use of a Weapon. The motion court's ruling leaves a definite and firm impression that a mistake was made, because this issue was clear from the record and a reasonably competent attorney would have raised it. Absent counsel's error, there is a reasonable probability that the outcome of the appeal would have been different.

In re Winship, 397 U.S. 358 (1970);

State v. Johnson, 741 S.W.2d 70 (Mo. App. S.D. 1987);

State v. Luker, 873 S.W.2d 316 (Mo. App. S.D. 1994);

Section 571.030.1(4);

U.S. Constitution, Amendments V, VI, and XIV;

Missouri Constitution, Article I, Section 10 and 18(a);

Missouri Supreme Court Rules 29.15.

ARGUMENT

I.

The motion court clearly erred when it denied Mr. Williams motion for post-conviction relief without a hearing because Mr. Williams' alleged facts that were not conclusively refuted by the record and which, if proven, would entitle him to relief in that Mr. Williams was denied his rights to due process and effective assistance of counsel, as guaranteed by the V, VI, and XIV Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution because trial counsel failed to call Mr. Earnest Basic as a witness at trial. The motion court's ruling leaves a definite and firm impression that a mistake was made, because Mr. Williams' claim states who the witness would have been, that he would have testified as to the bias of the accusing witnesses, that Mr. Williams had given his attorney information about this witness prior to trial, and that the witness was readily available to testify. Absent counsel's error, there is a reasonable probability that the outcome of the trial would have been different.

Preservation

Mr. Williams raised this claim in his Amended Motion (L.F. 27-28). Because the claim was included in the amended motion, it has been preserved for appellate review. *Mouse v. State*, 90 S.W.3d 145, 152 (Mo. App. S.D. 2002) (to be preserved for appellate review, the claim raised on post-conviction appeal must have been either raised in

amended post-conviction motion or tried by implicit consent of the parties at the evidentiary hearing).

Standard of Review

Appellate review of decisions under Rule 29.15 is limited to whether the findings, conclusion, and judgment of the motion court are clearly erroneous. *Vernor v. State*, 894 S.W.2d 209, 210 (Mo. App. E.D. 1995); Rule 29.15. The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the firm and definite impression that a mistake has been made. *Dudley v. State*, 903 S.W.2d 263, 265 (Mo. App. E.D. 1993). In reviewing the motion court's dismissal, this Court is required to assume every pleaded fact as true and to give the pleader the benefit of every favorable inference which may be reasonably drawn therefrom. *Frederick v. State*, 754 S.W.2d 934 (Mo. App. E.D. 1988) (citations omitted).

Analysis

The bias of an accusing witness is never a "collateral" matter but is directly and intimately involved in the issues of the case. *State v. Johnson*, 700 S.W.2d 815, 817 (Mo. banc 1985). Motive for false accusation of one charged with a crime by a witness for the state is a proper subject for inquiry in a criminal prosecution, and evidence to prove the motive may be developed either by cross-examination or by impeachment. *State v. Lampley*, 859 S.W.2d 909, 911 (Mo. App. E.D. 1993). The danger that the trial will become bogged down in collateral issues and the jury distracted and confused does not

outweigh defendant's interest in showing the accusing witness' bias. *State v. Hedrick*, 797 S.W.2d 823, 827 (Mo. App. W.D. 1990).

In the instant case, Mr. Earnest Basic would have testified that he knew Mr. Timothy Russo/Smith; that he (Mr. Basic) was once arrested with Mr. Russo/Smith for a felony marijuana case; and that he knew of an incident involving a fine for possession of marijuana, when Mr. Russo/Smith was caught by a park ranger in the area of Salem, Missouri, in a van with drugs. Prior to trial, Movant informed his trial attorney that one of the complaining witnesses, Timothy Russo aka Timothy Smith, had some criminal history. Throughout the trial and particularly during closing argument, the prosecutor emphasized that Mr. Russo/Smith and his brother, Bryan Zach, were “good boys” who had no motive no lie, no blemish on their credibility (Tr. 289-91).

As to this claim, the motion court denied relief indicating in essence that it did not believe the outcome of the trial would have changed had Mr. Basic testified, and that a witness may not be impeached with a mere arrest or criminal charge not yet resulting in a conviction (L.F. 61). The issue is that a fine would have been the result of a conviction, and that is proper impeachment material. See § 491.050, RSMo. Even if no conviction has resulted, a plea may be used for impeachment purposes. *State v. Brooks*, 694 S.W.2d 851 (Mo. App. E.D. 1985).

Mr. Basic should have been called as a witness. As stated above, bias is never collateral, and the prosecutor directly commented on Mr. Russo/Smith's credibility and motive to lie, or lack thereof. This witness was readily available and willing to testify at

trial, and this testimony would have provided a viable defense for Mr. Williams, as it would have impeached the credibility of a key witness, Mr. Russo/Smith.

Mr. Williams was denied an important witness on his behalf because trial counsel failed to call Mr. Basic to the stand. Due process demands that a person accused of a crime be allowed to present witnesses in his defense so that the jury has his version of the facts as well as the state's. *Washington v. Texas*, 87 S. Ct. 1920, 1923 (1967). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 93 S. Ct. 1038, 1049 (1973).

Towards this end, the Missouri Constitution specifically provides "[t]hat in criminal prosecutions, the accused shall have the right to appear and defend, in person and by counsel; to have process to compel the attendance of witnesses in his behalf." Mo. Const. Art. I, § 18(a). The best evidence Mr. Williams could have offered to the jury in support of his defense that Mr. Russo/Smith was biased and had a motive to lie was the testimony of Mr. Basic. See *State v. Williams*, 119 S.W.3d 674 (Mo. App. S.D. 2003) (case reversed where trial court excluded the best evidence in support of defendant's theory of defense). Trial counsel's failure to call Mr. Williams' defense witness essentially denied him his right to present witnesses and resulted in the denial of his rights to due process. This was fundamentally unfair and reasonably competent counsel would have called Mr. Basic to testify on Mr. Williams' behalf. The exclusion of this evidence substantially altered the outcome of Mr. Williams' trial and justice demands a new trial.

Alternatively, this Court may remand for an evidentiary hearing. Having not heard from Mr. Basic, the motion court cannot say with certainty that the witness' testimony would not have been material to the trial. The standard for determining whether Mr. Williams is entitled to an evidentiary hearing requires that he plead facts, not conclusions, which if true would entitle him to relief, and that such factual allegations are not refuted by the record in the case. *Sederes v. State*, 776 S.W.2d 479, 480 (Mo. App. E.D. 1989) *citing Reeder v. State*, 712 S.W.2d 431, 432[1] (Mo. App. E.D. 1986). These criteria have been met here.

All defendants have the right to "effective" assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Argersinger v. Hamlin*, 407 U.S. 25 (1972), *Kimmelman v. Morrison*, 477 U.S. 365 (1986), *McMann v. Richardson*, 397 U.S. 759 (1970). To prove prejudice, the question is whether the deficiency "undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

Both error and prejudice have been proven here. Mr. Williams was denied his rights to due process and effective assistance of trial counsel (Fifth, Sixth, and Fourteenth Amendments, U.S. Const.; Article I, §§ 10 and 18(a), Missouri Const.). A review of the complete record leaves a definite and firm impression that a mistake was made by the motion court; Mr. Williams respectfully requests this Court grant his motion for post-conviction relief and grant a new trial, or alternatively, remand for an evidentiary hearing.

II.

The motion court clearly erred when it denied Mr. Williams' motion for post-conviction relief without a hearing because Mr. Williams alleged facts that were not conclusively refuted by the record and which, if proven, would entitle him to relief in that Mr. Williams' was denied his rights to due process and effective assistance of counsel, as guaranteed by the V, VI, and XIV Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution because appellate counsel failed to raise a meritorious issue on appeal, specifically that appellate counsel failed to raise sufficiency of the evidence as to an element of Count III, Unlawful Use of a Weapon. The motion court's ruling leaves a definite and firm impression that a mistake was made, because this issue was clear from the record and a reasonably competent attorney would have raised it. Absent counsel's error, there is a reasonable probability that the outcome of the appeal would have been different.

Preservation

Mr. Williams raised this claim in his Amended Motion (L.F. 31). Because the claim was included in the amended motion, it has been preserved for appellate review. *Mouse v. State*, 90 S.W.3d 145, 152 (Mo. App. S.D. 2002) (to be preserved for appellate review, the claim raised on post-conviction appeal must have been either raised in amended post-conviction motion or tried by implicit consent of the parties at the evidentiary hearing).

Standard of Review

Appellate review of decisions under Rule 29.15 is limited to whether the findings, conclusion, and judgment of the motion court are clearly erroneous. *Vernor v. State*, 894 S.W.2d 209, 210 (Mo. App. E.D. 1995); Rule 29.15. The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the firm and definite impression that a mistake has been made. *Dudley v. State*, 903 S.W.2d 263, 265 (Mo. App. E.D. 1993). In reviewing the motion court's dismissal, this Court is required to assume every pleaded fact as true and to give the pleader the benefit of every favorable inference which may be reasonably drawn therefrom. *Frederick v. State*, 754 S.W.2d 934 (Mo. App. E.D. 1988) (citations omitted).

Analysis

There was no evidence that Mr. Williams' gun was readily capable of lethal use, and this Court must therefore discharge Mr. Williams on Count III. Defense counsel made a motion for judgment of acquittal (Trial Tr. 261, 268, Trial L.F. 53-54, 55-56). The issue is included in the motion for new trial (Trial L.F. 84), and was thus preserved for appellate review. Rule 29.11. In reviewing the sufficiency of the evidence, the court must consider as true the evidence most favorable to the State, together with the reasonable inferences to be drawn therefrom, and must disregard evidence and inferences to the contrary. *State v. Wahby*, 775 S.W.2d 147, 154 (Mo. banc 1989); *State v. Isom*, 660 S.W.2d 739, 740 (Mo. App. E.D. 1983). The judgment is to be affirmed if it is supported by substantial evidence. *Id.*

To support a conviction, the State must prove beyond a reasonable doubt that the defendant committed each element of the offense charged. *In re Winship*, 397 U.S. 358 (1970); *State v. Johnson*, 741 S.W.2d 70, 73 (Mo. App. S.D. 1987). The State's proof must be sufficient to justify a rational trier of fact in finding that each element was proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 316, 320 (1979); *State v. Guenther*, 744 S.W.2d 564, 565 (Mo. App. W.D. 1988). Here, the State failed to prove that Mr. Williams exhibited a firearm that was readily capable of lethal use. Due to that failure, the trial court erred in entering judgments against Mr. Williams and sentencing him on Count III, in violation of his rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

As to this claim, the motion court found the claim to be without merit because a firearm is a deadly weapon under § 566.061 (10) and MAI-CR 3d 333.00, and further relied on *State v. Lutjen*, 661 S.W.2d 845, 848 (Mo. App. W.D. 1983), that held a weapon was readily capable of lethal use even when unloaded, because it would be capable of ready function by the insertion of bullets (L.F. 65).

To prove the elements of the Count III, the State had to prove the elements as submitted in its verdict directors. the verdict director on Count III read:

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

First, that on or about June 21, 2006, in the State of Missouri, the defendant exhibited in the presence of one or more persons a gun, and

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

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

Fourth, that 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.

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.

As used in this instruction “readily capable of lethal use” means readily capable of causing death. If the weapon is a firearm, it is readily capable of lethal use whether loaded or unloaded.

(Trial L.F. 63).

Mr. Williams was charged in Count III with having “exhibited, in the presence of one or more persons, a silver pistol, a weapon readily capable of lethal use, in an angry or threatening manner.” (Trial L.F. 19). At trial (viewed in the light most favorable to the verdict), evidence was adduced that Mr. Williams came to the shared residence to pick up his belongings; when there were only two bags left for him to load into his car, Mr.

Williams walked into the kitchen where Ms. Deborah Williams, the complaining witness, was standing (Trial Tr. 192-93, 196, 211, 240-41). Mr. Williams approached her and pulled out what was allegedly a “little gun” and put it against the right side of her head (Trial Tr. 198, 214, 228, 241). One of Ms. Williams’ sons came into the kitchen with a baseball bat; Mr. Williams pointed the gun at him and asked him if he was going to use the bat (Trial Tr. 200-01, 229). No shots were fired (Trial Tr. 201, 247).

Despite the testimony regarding a gun, the evidence is insufficient to support all the elements of the charge. In order to convict Mr. Williams of Count III, the State was required to prove the weapon was *readily capable of lethal use*. Here, this burden was not met because the gun was never recovered (Trial Tr. 103-04). While the State need not prove the gun was loaded, *Lutjen*, 661 S.W.2d at 847, the statute requires the gun to be “readily capable” of lethal use. Section 571.030.1(4); *State v. Luker*, 873 S.W.2d 316, 318 (Mo. App. S.D. 1994). The State adduced no evidence as to the guns alleged capability of lethal use at trial.

Mr. Williams recognizes that *Lutjen*, on which the motion court relies in denying post-conviction relief, stands for the proposition that an unloaded weapon is “readily capable” of lethal use because it can be quickly loaded. 661 S.W.2s at 847. *Lutjen* is distinguishable, however. Here, no evidence was presented as to whether the gun was loaded, whether there was readily accessible ammunition nearby, or any other evidence that it was “readily capable” of lethal use at the point it was exhibited.

A number of cases have examined the issue of sufficiency of the evidence as to the element of “readily capable” of lethal use – in all of them, *some* evidence of the weapon’s functionality was presented. Although this may not be a fully comprehensive list, such cases include: *State v. Pelz*, 845 S.W.2d 561 (Mo. App. W.D. 1992), discusses facts in which the defendant's conviction for unlawful use of weapon was supported by evidence that defendant told police that there would be a shoot-out involving him and his neighbors, that defendant threatened to shoot his neighbors and pointed gun at one of neighbors, and that, after his arrest, defendant threatened neighbors with harm if they did not drop charges against him, aimed his rifle at them, and *fired shots into the air.* (emphasis added). Similarly, the court in *State v. Purlee*, 839 S.W.2d 584 (Mo. banc 1992) found that defendant's conviction for unlawful use of weapon was supported by evidence that the revolver *was loaded and operational* (emphasis added).

In *State v. Davis*, 71 S.W.3d 659 (Mo. App. W.D. 2002), the appellant attacked the sufficiency of the evidence but lost on appeal, because an officer testified that after he returned to police station he loaded defendant's gun using seized ammunition and *the gun fired without any problem* (emphasis added). This Court in *State v. McAusland*, 829 S.W.3d 34 (Mo. App. E.D. 1992), also held that the unlawful use of weapon conviction was supported by evidence that the handgun was found hidden from view under defendant's seat in automobile, the weapon was *loaded and operational, bullets were found on seat*, and arresting officer saw defendant remove something from his waistband and place it under seat where weapon was found (emphasis added).

In the instant case, no such evidence was adduced – the alleged weapon was never recovered and the State brought in nothing further as to this element of Count III. Under these circumstances and given these facts, a reasonably effective appellate attorney would have challenged the exclusion of this evidence. This error was so obvious from the record that competent counsel would have asserted it. *See State v. Bohlen*, 284 S.W.3d 714, 720 (Mo. App. E.D. 2009) (finding ineffective assistance of appellate counsel for failing to raise double jeopardy claim).

For the reasons set forth above, this Court must reverse the judgment of the motion court and order Mr. Williams discharged on Count III. The Sixth Amendment to the Constitution of the United States established the right to counsel, a fundamental right of all criminal defendants through the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Argersinger v. Hamlin*, 407 U.S. 25, 29-33 (1972). This right is designed to assure fairness, and thus to give legitimacy to the adversary process. To fulfill its role of assuring a fair trial, the right to counsel must be the right to “effective” assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365 (1986); *McMann v. Richardson*, 397 U.S. 759 (1970).

When a criminal defendant seeks post conviction relief on a claim of ineffective assistance of counsel, he shoulders a heavy burden to establish first, that his attorney’s performance was deficient and second, that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687-689 (1984); *Seales v. State*, 580 S.W.2d 733, 735-736 (Mo. banc 1979). To prove prejudice, a “defendant need not establish that the attorney’s

deficient performance more likely than not altered the outcome in order to establish prejudice.” *Nix v. Whiteside*, 475 U.S. 157, 157 (1986). Rather, the question is whether the deficiency “undermines confidence in the outcome of the trial.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

Mr. Williams enjoys the same rights to effective assistance of counsel from his appellate counsel as he does from his trial counsel. Defendants in Missouri have an appeal of right after a final judgment on an Indictment or Information. Mo. Rev. Stat. § 547.070. The United States Constitution’s Due Process Clause guarantees effective assistance of counsel on a first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 393-94, 105 S. Ct. 830, 836-37 (1985). To allege and prove ineffective assistance of appellate counsel, the error overlooked must have been “so obvious from the record that a competent and effective lawyer would have recognized and asserted it.” *Moss v. State*, 10 S.W.3d 508, 514-15 (Mo. banc 2000).

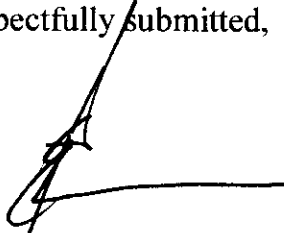
This defect was obvious from the record; although this is a legal issue, recent cases have required post-conviction counsel to adduce evidence in the form of appellate counsel’s testimony when raising a claim against appellate counsel. *See Cole v. State*, 223 S.W.3d 927, 931-32 (Mo. App. S.D. 2007). Therefore, if this Court does not wish to reverse and remand for a new appeal, the Court should grant an evidentiary hearing for appellate counsel to explain the reasoning for failing to raise a meritorious issue on appeal.

Appellate counsel's failure was obvious from the record, and Mr. Williams was prejudiced by the appellate counsel's failure to raise this meritorious issue. Mr. Williams pled facts, which were supported by the record and which entitled him to relief. Therefore, the motion court clearly erred when it denied this claim in Mr. Williams' amended motion. This Court should, therefore, reverse the judgment of the motion court and remand this case for a new appeal with competent counsel or remand this case for an evidentiary hearing on Mr. Williams' claims. Mr. Williams was deprived of his rights to due process of law and effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

CONCLUSION

WHEREFORE, for the foregoing reasons, Mr. Williams prays this Honorable Court to reverse the denial of his post-conviction motion, vacate, set aside, and correct the judgment and sentences, and remand the case for further proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Alexandra E. Johnson', written over a horizontal line.


Alexandra E. Johnson
Missouri Bar No. 53689
1010 Market Street, Suite 1100
St. Louis, MO 63101
(314) 340-7662, ext. 247
Fax: (314) 340-7685
Alexandra.Johnson@mpsd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATES OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on this 14th day of June, 2011, a true and correct copy of the foregoing brief was mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. I also hereby certify that an electronic copy of this brief has been served upon the court and opposing counsel via e-mail pursuant to Local Rule 363, to Shaun.Mackelprang@ago.mo.gov, designated by the Missouri Attorney General's Office as the appropriate email address.

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word and line specifications of Rule 84.06(a) and (b) and Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 15,500 words or 1,100 lines of text. The word-processing software identified that this brief, in its entirety, contains 5,828 words and 591 lines. In addition, I hereby certify that the emailed document was scanned for viruses with McAfee Anti-Virus software and found to be virus-free.



Alexandra E. Johnson
Missouri Bar No. 53689
1010 Market Street, Suite 1100
St. Louis, MO 63101
(314) 340-7662, ext. 247
Fax: (314) 340-7685
Alexandra.Johnson@mpsd.mo.gov

ATTORNEY FOR APPELLANT

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ROLLEN WILLIAMS)	
)	
Appellant,)	
)	
vs.)	Appeal No. ED95386
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

APPENDIX

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND JUDGMENT	A1
Section 491.050	A10
Section 571.030	A11
Instruction No. 7 (Trial L.F. 63)	A15

FILED
JUL 13 2010

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

ENTERED

JUL 13 2010

CRY

Movant now seeks relief pursuant to Rule 29.15. Counsel was appointed to represent movant and counsel has filed an amended motion. Having examined the records and files in this case, the Court now finds as follows:

Al
000059

CONCLUSIONS OF LAW

1. Movant has requested an evidentiary hearing. To be entitled to an evidentiary hearing the movant must plead facts, not conclusions, which are not refuted by the record, which if true would entitle movant to relief, and the matters complained of must have resulted in prejudice. Woolridge v. State, 239 S.W.3d 151, 154 (Mo.App.E.D. 2007); Mosby v. State, 236 S.W.3d 670, 675 (Mo.App.S.D. 2007). A movant is not entitled to a hearing where the motion, files and record of the case conclusively show that the movant is not entitled to relief. Rule 29.15(h); State v. Fraction, 782 S.W.2d 764, 769 (Mo.App. 1989); Welch v. State, 770 S.W.2d 441 (Mo.App. 1989). This Court has reviewed the files and transcript in this case and finds that movant has failed to allege grounds that would entitle him to relief if true and that are not refuted by the record. Movant is therefore not entitled to an evidentiary hearing.

2. The first two claims in movant's amended motion are related. The first claim is that his attorney, Jolene Taaffe, was ineffective for failing to call Earnest Basic, who allegedly would have testified that one of the State's witnesses was arrested for a marijuana case and had also been fined for possession of marijuana. Movant states the prosecutor "[t]hroughout the trial and particularly during closing argument" emphasized that Mr. Russo and his brother were "good boys" who had no motive to lie, "no blemish on their credibility." Movant

claims this testimony would have impeached the credibility of the witness, Mr. Timothy Russo. The second claim is that counsel was ineffective for not confronting the witness with regard to this criminal history.

The Court finds this claim is without merit. The mere failure to impeach a witness does not automatically entitle a movant to relief. The movant must establish the impeachment would have provided a defense or changed the outcome of the trial. Lebbing v. State, 242 S.W.3d 761, 765-766 (Mo.App.S.D. 2008). The Court does not believe the outcome of movant's trial would have been changed, assuming the defense could have presented competent evidence that the witness paid a fine for possession of marijuana or that the witness would have admitted to the fine.

A witness generally may not be impeached with a mere arrest or criminal charge not yet resulting in a conviction unless one of three exceptions is shown: (1) where the inquiry would demonstrate a specific interest of the witness; (2) where the inquiry would demonstrate a witness's motivation to testify favorably for the State; or (3) where the inquiry would demonstrate that the witness testified with an expectation of leniency from the State. State v. Moore, 252 S.W.3d 272, 276 (Mo.App.S.D. 2008). Movant has not directed the Court to any testimony at trial that would have opened the door to testimony regarding the witness' arrest for marijuana possession.

3. Movant next claims counsel was ineffective for failing to seek the exclusion of Mr. Russo as a witness because he failed to appear for his deposition. Movant does not contend the State had control over the witness or that his failure to appear could be attributed to misconduct on the part of the State. Movant also does not specifically allege prejudice. Movant does not state the defense did not have other statements by the witness such that the defense was aware of his likely testimony. See, State v. Mease, 842 S.W.2d 98 (Mo.banc 1992).

4. Movant claims counsel was ineffective for failing to cross-examine witness Deborah Williams with a 1991 conviction for making a false declaration claim. Movant claims the outcome of his trial would probably have been different had counsel done so.

During the course of her cross-examination of the witness, Ms. Taaffe stated: "Okay. Let's talk about your fourteen felony convictions." (Tr. 207) She then asked the witness about her three assault convictions, a stealing from 1998, a stealing from 1990, several convictions for possession of drugs in 1990, a misdemeanor stealing, another stealing with an assault third degree in 1991, another stealing in 1991, and another case with two stealings in 1991. The witness said the assaults "were related to the shoplifting because it was struggling with security..." (Tr. 210). The Court does not see how the failure to mention during cross-examination the conviction referenced in the amended motion could have possibly had any impact on the

outcome of the case, in light of the extensive criminal history of the witness that was adduced.¹

5. Movant claims he had a witness, Paul Adams, who had known both movant and Ms. Williams for many years. He claims this witness had knowledge of her extensive problems with drugs and criminal activities and he could have testified as to the motive of her two sons to lie on behalf of their mother.

This claim is without merit because Ms. Williams' criminal record, including drug convictions, was brought out during the cross-examination of Ms. Williams. Any testimony about the motive of the sons to lie on behalf of their mother would have amounted to mere speculation on the part of Mr. Adams.

6. Movant claims his attorney was ineffective for failing to establish, through her cross-examination of Ms. Williams, that this witness had a motive to lie about movant. Movant claims her mental health issues, her jealous and possessive nature, her knowledge that her relationship with movant was over, and her anger that movant told her son that she was using drugs again, should have been elicited. This claim is without merit as the transcript reflects that the cross-examination by Ms. Taaffe was thorough and could not be considered ineffective.

The extent of cross-examination is generally a matter of trial strategy. Kelley v. State, 24 S.W.3d 228, 233 (Mo.App.S.D. 2000). See also, Thomas v. State, 761 S.W.2d 246, 252 (Mo.App.

¹ The Court notes that the Case.net minutes for the case movant references, indicate a 1993 guilty plea to a 1991 charge of felony stealing. It is not entirely clear that this conviction was not referenced by Ms. Taaffe.

1988); Swearingin v. State, 629 S.W.2d 560, 563 (Mo.App. 1981). The mere failure to impeach a witness does not automatically entitle a movant to relief. The movant must establish the impeachment would have provided a defense or changed the outcome of the trial. Lebbing v. State, 242 S.W.3d 761, 765-766 (Mo.App.S.D. 2008).

Ms. Taaffe cross-examined the witness about a mental health issue that affected her memory and she brought out her extensive criminal record including drug convictions. She asked the witness about whether they had an argument about movant not being able to come back and live with her and whether she was sad that he was leaving her. Ms. Taaffe also questioned her about the alleged gun and the lack of threats when movant later came back to the house a second time.

7. Movant next claims counsel was ineffective for failing to bring out evidence that Timothy Russo owed movant money and that Mr. Zych and Ms. Williams had agreed to repay the debt to movant. Movant suggests that when he pointed a gun to Ms. Williams' head and Mr. Zych asked what he could do to settle the argument, and movant demanded money, that movant was merely trying to collect on the debt.

This claim is without merit because the evidence would not have provided a defense. Movant has not alleged facts that would have created a legal obligation on the part of Mr. Zych and Ms. Williams to repay the debt of another person, and movant's use of a gun to force Mr. Zych to turn money over constituted a robbery.

8. Movant claims counsel should have objected when the prosecutor argued that movant's t-shirt had been long enough to hide the gun he allegedly brandished. Movant claims there had been no evidence regarding his clothing.

This claim is without merit because the prosecutor's statement about the t-shirt (Tr. 291) was in response to defense counsel's argument about the t-shirt. (Tr. 279-280).

9. The final claim in movant's amended motion is that there was no evidence adduced at trial that the gun was readily capable of lethal use, which is an element of unlawful use of a weapon.

This claim is without merit. A firearm is a deadly weapon. § 566.061(10); MAI-Cr 3d 333.00. Section 571.030.1(1) provides that a person commits the crime of unlawful use of a weapon if he carries concealed upon his person "a knife, a firearm, a blackjack or any other weapon readily capable of lethal use." This language suggests that a knife, firearm or blackjack is necessarily "a weapon readily capable of lethal use." Subsection (4) provides that a person also commits the crime of unlawful use of a weapon when he exhibits "any weapon readily capable of lethal use in an angry or threatening manner." The language of the prior statute, § 571.115, which used the terminology "dangerous and deadly weapon," was replaced by the language "weapon readily capable of lethal use," "to conform to the sense of judicial opinion that an unloaded gun, capable of ready function by insertion of bullets, was nevertheless a dangerous and deadly weapon." State v. Lutjen, 661 S.W.2d 845, 848

(Mo.App.W.D. 1983). The Court does not believe that in the case of a firearm, that is used in the manner movant used the gun, the State must prove the gun was "readily capable of lethal use" to make a submissible case. Rather, this language makes it clear the State does not have to prove the gun was loaded.

10. Counsel has attached a copy of movant's pro se motion to the amended motion and asks that the Court address the claims. Movant claims his attorney was ineffective for failing to object to a line of questioning during voir dire in which the prosecuting attorney asked whether any of the panel members would require the State to produce the gun in order to consider a guilty verdict. The Court of Appeals in its Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 30.25(b), said the question "was nothing more than an attempt to discover whether the potential jurors could convict somebody without physical evidence." The Court of Appeals considered the issue under a plain error standard, but the Court's analysis leads to the same conclusion in this proceeding. The questioning was not improper and movant was not prejudiced by any failure of counsel to object.

11. Movant claims his appellate counsel was ineffective for failing to challenge the robbery indictment. Movant claims the State failed to prove every element of robbery in the first degree because the evidence demonstrated that Mr. Zych offered the money and not that it was taken by force. This appears to be a claim of insufficiency of the evidence, as movant does not

allege any defect in the indictment. The Court finds this claim is without merit because the evidence supported a reasonable inference that movant obtained property of another, one hundred dollars, through the threatened use of the gun.

12. Movant's final claim is that his attorney was ineffective for failing to compel the production of criminal records of Deborah Williams and arrest records of Tim Smith. This claim is without merit as Ms. Williams was thoroughly questioned at trial regarding her criminal record. The claim regarding the arrest records of Mr. Smith is without merit for the reasons stated in paragraph No. 2 above.

ORDER

The Court has considered each allegation set forth in movant's Rule 29.15 Motion. The Court finds that movant has failed to allege facts which entitle him to relief.

THEREFORE, the Court orders, adjudges and decrees that Movant's request for a hearing is DENIED and that the Motion made pursuant to Supreme Court Rule 29.15 is DENIED.

SO ORDERED:


Bryan L. Hettenbach, Judge

Dated: 7/13/10

cc: Alexandra Johnson, Attorney for Movant ✓
Jennifer Szczucinski, Assistant Circuit Attorney ✓ C ✓

V.A.M.S. 491.050 Convicts competent witnesses--convictions and certain pleas may be proved to affect credibility

Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

V.A.M.S. 571.030 Unlawful use of weapons--exceptions--penalties

1. A person commits the crime of unlawful use of weapons if he or she knowingly:

(1) Carries concealed upon or about his or her person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use; or

(2) Sets a spring gun; or

(3) Discharges or shoots a firearm into a dwelling house, a railroad train, boat, aircraft, or motor vehicle as defined in section 302.010, RSMo, or any building or structure used for the assembling of people; or

(4) Exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner; or

(5) Has a firearm or projectile weapon readily capable of lethal use on his or her person, while he or she is intoxicated, and handles or otherwise uses such firearm or projectile weapon in either a negligent or unlawful manner or discharges such firearm or projectile weapon unless acting in self-defense;

(6) Discharges a firearm within one hundred yards of any occupied schoolhouse, courthouse, or church building; or

(7) Discharges or shoots a firearm at a mark, at any object, or at random, on, along or across a public highway or discharges or shoots a firearm into any outbuilding; or

(8) Carries a firearm or any other weapon readily capable of lethal use into any church or place where people have assembled for worship, or into any election precinct on any election day, or into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof; or

(9) Discharges or shoots a firearm at or from a motor vehicle, as defined in section 301.010, RSMo, discharges or shoots a firearm at any person, or at any other motor vehicle, or at any building or habitable structure, unless the person was lawfully acting in self-defense; or

(10) Carries a firearm, whether loaded or unloaded, or any other weapon readily capable of lethal use into any school, onto any school bus, or onto the premises of any function or activity sponsored or sanctioned by school officials or the district school board.

2. Subdivisions (1), (3), (4), (6), (7), (8), (9) and (10) of subsection 1 of this section shall not apply to or affect any of the following when such uses are reasonably associated with or are necessary to the fulfillment of such person's official duties:

(1) All state, county and municipal peace officers who have completed the training required by the police officer standards and training commission pursuant to sections 590.030 to 590.050, RSMo, and who possess the duty and power of arrest for violation of the general criminal laws of the state or for violation of ordinances of counties or municipalities of the state, whether such officers are on or off duty, and whether such officers are within or outside of the law enforcement agency's jurisdiction, or all qualified retired peace officers, as defined in subsection 10 of this section, and who carry the identification defined in subsection 11 of this section, or any person summoned by such officers to assist in making arrests or preserving the peace while actually engaged in assisting such officer;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of crime;

(3) Members of the armed forces or national guard while performing their official duty;

(4) Those persons vested by article V, section 1 of the Constitution of Missouri with the judicial power of the state and those persons vested by Article III of the Constitution of the United States with the judicial power of the United States, the members of the federal judiciary;

(5) Any person whose bona fide duty is to execute process, civil or criminal;

(6) Any federal probation officer or federal flight deck officer as defined under the federal flight deck officer program, 49 U.S.C. Section 44921;

(7) Any state probation or parole officer, including supervisors and members of the board of probation and parole;

(8) Any corporate security advisor meeting the definition and fulfilling the requirements of the regulations established by the board of police commissioners under section 84.340, RSMo;

(9) Any coroner, deputy coroner, medical examiner, or assistant medical examiner; and

(10) Any prosecuting attorney or assistant prosecuting attorney or any circuit attorney or assistant circuit attorney who has completed the firearms safety training course required under subsection 2 of section 571.111.

3. Subdivisions (1), (5), (8), and (10) of subsection 1 of this section do not apply when the actor is transporting such weapons in a nonfunctioning state or in an unloaded state when ammunition is not readily accessible or when such weapons are not readily accessible. Subdivision (1) of subsection 1 of this section does not apply to any person twenty-one years of age or older transporting a concealable firearm in the passenger compartment of a motor vehicle, so long as such concealable firearm is otherwise lawfully possessed, nor when the actor is also in possession of an exposed firearm or projectile weapon for the lawful pursuit of game, or is in his or her dwelling unit or upon premises over which the actor has possession, authority or control, or is traveling in a continuous journey peaceably through this state. Subdivision (10) of subsection 1 of this section does not apply if the firearm is otherwise lawfully possessed by a person while traversing school premises for the purposes of transporting a student to or from school, or possessed by an adult for the purposes of facilitation of a school-sanctioned firearm-related event.

4. Subdivisions (1), (8), and (10) of subsection 1 of this section shall not apply to any person who has a valid concealed carry endorsement issued pursuant to sections 571.101 to 571.121 or a valid permit or endorsement to carry concealed firearms issued by another state or political subdivision of another state.

5. Subdivisions (3), (4), (5), (6), (7), (8), (9), and (10) of subsection 1 of this section shall not apply to persons who are engaged in a lawful act of defense pursuant to section 563.031, RSMo.

6. Nothing in this section shall make it unlawful for a student to actually participate in school-sanctioned gun safety courses, student military or ROTC courses, or other school-sponsored firearm-related events, provided the student does not carry a firearm or other weapon readily capable of lethal use into any school, onto any school bus, or onto the premises of any other function or activity sponsored or sanctioned by school officials or the district school board.

7. Unlawful use of weapons is a class D felony unless committed pursuant to subdivision (6), (7), or (8) of subsection 1 of this section, in which cases it is a class B misdemeanor, or subdivision (5) or (10) of subsection 1 of this section, in which case it is a class A misdemeanor if the firearm is unloaded and a class D felony if the firearm is loaded, or subdivision (9) of subsection 1 of this section, in which case it is a class B felony, except that if the violation of subdivision (9) of subsection 1 of this section results in injury or death to another person, it is a class A felony.

8. Violations of subdivision (9) of subsection 1 of this section shall be punished as follows:

(1) For the first violation a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony;

(2) For any violation by a prior offender as defined in section 558.016, RSMo, a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony without the possibility of parole, probation or conditional release for a term of ten years;

(3) For any violation by a persistent offender as defined in section 558.016, RSMo, a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony without the possibility of parole, probation, or conditional release;

(4) For any violation which results in injury or death to another person, a person shall be sentenced to an authorized disposition for a class A felony.

9. Any person knowingly aiding or abetting any other person in the violation of subdivision (9) of subsection 1 of this section shall be subject to the same penalty as that prescribed by this section for violations by other persons.

10. As used in this section "**qualified retired peace officer**" means an individual who:

(1) Retired in good standing from service with a public agency as a peace officer, other than for reasons of mental instability;

(2) Before such retirement, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest;

(3) Before such retirement, was regularly employed as a peace officer for an aggregate of fifteen years or more, or retired from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency;

(4) Has a nonforfeitable right to benefits under the retirement plan of the agency if such a plan is available;

(5) During the most recent twelve-month period, has met, at the expense of the individual, the standards for training and qualification for active peace officers to carry firearms;

(6) Is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

(7) Is not prohibited by federal law from receiving a firearm.

11. The identification required by subdivision (1) of subsection 2 of this section is:

(1) A photographic identification issued by the agency from which the individual retired from service as a peace officer that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the standards established by the agency for training and qualification for active peace officers to carry a firearm of the same type as the concealed firearm; or

(2) A photographic identification issued by the agency from which the individual retired from service as a peace officer; and

(3) A certification issued by the state in which the individual resides that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the state to meet the standards established by the state for training and qualification for active peace officers to carry a firearm of the same type as the concealed firearm.

INSTRUCTION NO. 7

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

First, that on or about June 21, 2006, in the State of Missouri, the defendant exhibited in the presence of one or more persons a gun, and

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

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

Fourth, that 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.

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.

As used in this instruction "readily capable of lethal use" means readily capable of causing death. If the weapon is a firearm, it is readily capable of lethal use whether loaded or unloaded.

JUL 18 2006
MARIANO V. FAVILZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY