IN THE SUPREME COURT OF MISSOURI

Case No. SC85355

STATE OF MISSOURI,

Respondent,

v.

PAUL WILLIAMS,

Appellant.

APPEAL FROM JACKSON COUNTY CIRCUIT COURT
SIXTEENTH JUDICIAL CIRCUIT
THE HONORABLE PEGGY STEVENS McGRAW

SUBSTITUTE BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES, RULES, REGULATIONS

JURISDICTIONAL STATEMENT

Appellant Paul E. Williams appeals from the Judgment of the Circuit Court of Jackson County, Missouri, convicting him of assault in the second degree, in violation of Section 565.060 R.S. Mo. (2000), and of armed criminal action, in violation of Section 571.015 R.S. Mo. (2000). (L.F. at 15-16).[1] On December 5, 2001, Appellant timely filed his notice of appeal. (L.F. at 51-53). On appeal to the Missouri Court of Appeals, Western District, Appellant argued that the information in this case was insufficient with respect to each count of conviction; that the evidence was insufficient to sustain his conviction of armed criminal action; that the trial court erred in failing, sua sponte, to dismiss the armed criminal action charge; and that the prosecuting attorney violated Appellant's right to due process of law by failing to produce exculpatory evidence to Appellant's trial counsel.

The Western District entered Judgment affirming the judgment of the trial court, and Appellant applied for transfer to this Court. Pursuant to Mo. Sup. Ct. Rule 83.04, this Court entered an order transferring this case from the Court of Appeals on July 1, 2003. Therefore, jurisdiction of this appeal is vested in this Court.

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[1] References herein to the trial transcript will be by page number, designated "(TTr at __)". References to the transcript of sentencing will be by page number, designated "(STr at __)". References to the legal file will be by page number, designated "(L.F. at __)".

STATEMENT OF FACTS

On July 27, 2001, Defendant-Appellant Paul E. Williams was charged in a three-count amended information with assault in the second degree, in violation of Section 565.060 R.S. Mo. (2000); assault in the third degree, in violation of 565.070 R.S. Mo. (2000); and with armed criminal action, in violation of Section 571.015 R.S. Mo. (2000). (L.F. at 11-12). Mr. Williams was also charged as a prior, persistent and dangerous offender under Sections 558.016 and 557.036 R.S. Mo. (2000), thereby subjecting him to a possible extended term of imprisonment upon conviction of the charged offenses. (L.F. at 12).

The amended information charged Mr. Williams, in relevant part, as follows:

> **Count 1. Assault Second Degree (13031)**
>
> The Prosecuting Attorney of the County of Jackson, State of Missouri hereby charges that the defendant, **Paul E. Williams**, in violation of Section 565.060, R.S. Mo., committed the **Class C Felony of Assault in the Second Degree**, punishable upon conviction under Sections 558.011 and 560.011, R.S. Mo., in that on or about 05/09/2001, in the County of Jackson, State of Missouri, the defendant attempted to cause physical injury to Marva Mosley by means of a dangerous instrument, to wit: a car.
>
> * * *

Count 3. Armed Criminal Action (31010)

> The Prosecuting Attorney of the County of Jackson, State of Missouri hereby charges that the defendant, **Paul E. Williams**, in violation of Section 571.015, R.S. Mo., committed the **Felony of Armed Criminal Action**, punishable upon conviction under Section 571.015, R.S. Mo., in that on or about 05/09/2001, in the County of Jackson, State of Missouri, the defendant committed the felony of Assault charged in Count One, all allegations of which are incorporated herein by reference, and the defendant committed the foregoing felony of Assault by, with and through the use, assistance and aid of a dangerous instrument and on June 1, 1994, in Division 6 of the Circuit Court of Jackson County, Missouri the defendant was convicted of armed criminal action.

(L.F. at 11-12). Notably absent from Count Three of the amended information – charging Mr. Williams with armed criminal action – was any allegation that Mr. Williams "knowingly" committed the offense charged in Count One with and through the use, assistance and aid of a dangerous instrument, or indeed, that Mr. Williams acted with any culpable mental state with respect to his alleged use of a dangerous instrument. (L.F. at 11-12). Furthermore, Count One of the amended information fails to allege that Mr. Williams, in purportedly committing assault in the second degree, engaged in an act which constituted a "substantial step" toward causing physical injury to the alleged victim, or that said act was done with the purpose of causing physical injury. (L.F. at 11).

Mr. Williams appeared for trial on August 20, 2001, in the Circuit Court of Jackson County, Missouri, the Honorable Peggy Stevens McGraw, presiding. (TTr at 4-5). Pursuant to the advice of his trial counsel, Vincent Esposito, Mr. Williams waived his right to a trial by jury, consenting to be tried before the bench. (TTr at 6-8). The evidence presented at Mr. Williams' trial was as follows:

On May 9, 2001, at approximately 11:10 p.m., Officers Howard Periman and Greg Harmon of the Kansas City, Missouri Police Department were dispatched to the scene of a reported disturbance at 3018 Highland, in Kansas City. (TTr. at 21; 55). Within five minutes, the officers arrived at Highland Street (TTr. at 21; 55), which is three lanes wide, with parked cars on both sides of the street, leaving space for one lane of one-way traffic. (TTr at 21-22). As the officers proceeded down Highland, using the spotlight affixed to their vehicle to locate the address of the reported disturbance, the officers observed, from three to four houses away, a black male in a white T-shirt running from the front door of a house. (TTr at 23-24; 55). Shortly thereafter, the officers witnessed a female run from the house after the male. (TTr at 24-25; 55).

The black male reached the street and got into a vehicle, which was parked along the street in front of the house, behind a van. (TTr at 25-26; 56-57). The female who followed him out of the house ran between the vehicle and the van in front of it, into the middle of the street. (TTr at 26). The female began to wave her arms at the officers' car, apparently trying to get the officers' attention. (TTr at 26; 56). At that time, the black male apparently started the car, and began to attempt to drive away. (TTr at 26-27). The driver executed a three-point

turn, in order to get out from behind the van. (TTr. at 27). At this point, the vehicle was pointed at the female, who was still standing in the middle of Highland Street, waving her arms at the officers, who were approaching from behind the black male's vehicle. (TTr at 27; 57).

The vehicle "nudged" forward, toward the female, and she put her hands on the hood of the car. (TTr. at 56-57). She began backpedaling as the car moved forward, and the vehicle accelerated, causing her to roll on to the hood of the vehicle. (TTr at 27-28; 57). The vehicle continued forward down the street, and the female rolled off the hood toward the passenger side, where she fell to the street. (TTr. at 28; 57). After the female fell to the street, the vehicle accelerated away. (TTr. at 28; 58).

The officers called an ambulance to attend to the fallen female, and gave chase. (TTr at 30; 59). After a short pursuit of approximately two to three blocks, the vehicle pulled over. (TTr at 30; 59). The officers approached the parked vehicle, demanding that the driver turn off the ignition and exit the vehicle. (TTr. at 30; 59). The driver did not immediately comply, and the officers forced him from the vehicle and to the ground, where they placed him under arrest. (TTr at 31-32; 59). At that juncture, the officers were able to identify the driver as the Appellant herein. (TTr at 36; 60). The officers then returned with Mr. Williams in their custody to 3018 Highland, the scene of the disturbance. (TTr at 33; 59). Upon returning to 3018 Highland, the officers found the female, whom they identified as Marva Mosley, inside of the residence at that address. (TTr. at 33-34). Ms. Mosely was sitting in a chair, being attended to by responding emergency medical personnel. (TTr at 34). Officer Periman observed that Ms. Mosely had some minor injuries to her hand, foot, and face. (TTr at 34).

Ms. Mosley told the officers, upon their arrival, that she and Mr. Williams had an argument that evening. (TTr at 100). She indicated that, after the argument, she wanted Mr. Williams to wait outside while she gathered his belongings, and that she locked the door to keep him out. (TTr at 100). She told the officers that Mr. Williams kicked the door open, entered the home, struck her in the mouth, and then ran to his vehicle. (TTr. at 100). The officers wrote a narrative of these statements. (TTr at 101; 115).

The next day, on May 10, 2001, Ms. Mosley spoke with Detective Steve Shaffer at the Kansas City Police Department, and gave a formal statement. (TTr at 102). In the statement, Ms. Mosley indicated that on the previous night, Mr. Williams had kicked in the front door, and struck her with his fist. (TTr at 104). She stated that, after doing so, Mr. Williams ran out to his car. (TTr at 104). She indicated also that she told him not to leave, because the police were coming, and she stood in front of his car. (TTr at 105). Finally, she stated that "Paul drove the car into the street and ran into me. I landed on top of the hood and he just kept on going." (TTr at 105). Ms. Mosely acknowledged this statement in writing, in the presence of Detective Shaffer. (TTr at 105-06).

After speaking with Detective Shaffer, Ms. Mosley immediately applied for an *ex parte* order of protection, seeking a restraining order against Mr. Williams. (Tr at 106). In the petition for that order, Ms. Mosley certified that she was physically injured by Mr. Williams, and that he tried to run her over in his car. (Tr at 106).

Approximately a week later, Ms. Mosley informed an assistant prosecutor with the Jackson County Prosecuting Attorney's office, Amy Riederer, that her statements to the police

regarding the events of May 9, 2001, were not true, and that she was recanting those statements. (STr at 16). Later, she gave a sworn statement, in the form of an affidavit, to Mr. Williams' attorney at the public defender's office, recanting her prior statements to police. (STr at 17). It is not mentioned anywhere in that affidavit that she had recanted to any member of the prosecutor's office soon after the incident. (STr at 17). In fact, it was not reflected anywhere in the public defender's file pertaining to Mr. Williams that the office was ever informed by the State that Ms. Mosley had recanted to Ms. Riederer soon after the events of May 9, 2001, and said that her prior statements to authorities were a lie. (STr at 23; 25). Nor is it apparent, from the record, that Mr. Williams' trial counsel, Vince Esposito, was ever informed by the prosecutors' office of the fact that Ms. Mosley had, a week after the events of May 9, 2001, told a specific member of the prosecutors office that she had lied to the police.

At Mr. Williams trial, Ms. Mosley was not called to testify during the State's case-in-chief. Mr. Williams called her as a witness in his behalf, and she testified that, on the evening of May 9, 2001, she and Mr. Williams had been arguing about the fact that Mr. Williams continued to speak with a woman that he dated before meeting Ms. Mosley. (TTr 81-82). She testified that Mr. Williams' continued relationship with the woman made her very angry. (TTr at 82; 83-84).

She testified that, contrary to her prior assertions to police, when she asked Mr. Williams to leave the house, he left and went home. (TTr at 85). He then called Ms. Mosley on the telephone. (TTr at 85). She told him that she would gather his belongings from her

home, and set them out on the porch. (TTr at 85). He apparently then proceeded back to Ms. Mosley's house, to retrieve his belongings from her porch. (TTr at 86).

Then, according to Ms. Mosley, Mr. Williams arrived at her house, and he began to gather his belongings. (TTr at 88-89). Ms. Mosley testified that she was very angry with Mr. Williams, and that she "wanted him to get in trouble," so she called the police. (TTr at 87; 90). She apparently called 911, and, at trial, she admitted that she lied when she told the dispatcher that Mr. Williams had struck her, and that he had a gun. (TTr at 90).

Ms. Mosley testified that, by the time the police arrived, Mr. Williams was already in his car. (TTr at 91). She wanted the police to "get him" before he left the area, apparently because she was "really mad at him for betraying [her]." (TTr at 90). Therefore, she testified, she ran out into the street, waving to the police, and as he tried to drive away, she jumped onto the hood of his car. (TTr at 91).

Ms. Mosley finally testified that she had lied to the police on the night of the incident because she was angry with Mr. Williams, and "wanted him to get into trouble." (TTr at 87). But, she stated that she had no idea, at the time, "to what extent he would get into trouble," (TTr at 87), and that "after [she] spoke with the prosecuting attorney and [the prosecutor] told [her] that they were going for 30 years . . . it really bothered [her] because [she] knew Paul [Williams] was innocent, and [she] couldn't let a (sic) innocent person spend that much time in jail." (TTr at 94).

At the close of all the evidence, Mr. Williams was convicted of assault in the second degree, in violation of Section 565.060 R.S. Mo. (2000), and of armed criminal action, in

violation of Section 571.015 R.S. Mo. (2000).[2] The case was continued for sentencing. (TTr at 129).

Mr. Williams then hired the undersigned counsel to pursue his rights at sentencing. Mr. Williams filed a motion for arrest of judgment pursuant to Rule 29.13, alleging error in the failure of the State to include in the amended information all elements of the charged offenses. (L.F. at 20). Also, at Mr. Williams sentencing hearing, counsel made an oral motion to reverse the convictions based upon the State's failure to disclose to Mr. Williams all exculpatory evidence in its possession. (STr at 15).[3] On November 26, 2001, Mr. Williams' motions were denied by the trial court, and the court sentenced him to seven years imprisonment on Count One, and to five years imprisonment on Count Three, to be served concurrently. (STr at 61).

Mr. Williams timely filed a notice of appeal on December 5, 2001, and his appeal from his convictions follows.

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[2] The Court, upon Mr. Williams' motion, entered a directed verdict acquitting Mr. Williams of the third-degree assault charges made in Count Two of the Amended Information. (Tr at 80).

[3] Counsel raised the issue of the prosecution's failure to disclose exculpatory evidence orally at sentencing, in reliance upon Missouri Supreme Court Rule 29.11(e)(2)(A), which indicates that, in cases tried without a jury "[a] motion for new trial is not necessary to preserve any matter for appellate review."

POINTS RELIED ON

I. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN OVERRULING APPELLANT'S MOTION TO ARREST JUDGMENT ON COUNT ONE OF THE AMENDED INFORMATION, BECAUSE COUNT ONE, CHARGING DEFENDANT WITH SECOND DEGREE ASSAULT, DID NOT CONTAIN ALL THE ESSENTIAL ELEMENTS OF THE OFFENSE, AND FURTHER DID NOT APPRISE APPELLANT OF THE FACTS CONSTITUTING THE CHARGE, IN VIOLATION OF MO. SUP. CT. RULE 23.01(b)(2), AND OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE I, SECTIONS 10, 18(a), AND 19 OF THE MISSOURI CONSTITUTION TO DUE PROCESS OF LAW AND NOTICE OF CHARGES, IN THAT THE AMENDED INFORMATION FAILED TO ALLEGE THAT APPELLANT ENGAGED IN A "SUBSTANTIAL STEP" TOWARD THE COMMISSION OF THE ALLEGED OFFENSE, AND FURTHER DID NOT DESCRIBE THE CONDUCT BY WHICH THE ATTEMPT WAS ALLEGEDLY MADE, WHICH PREJUDICED APPELLANT'S ABILITY TO PREPARE A DEFENSE, AND TO PLEAD FORMER JEOPARDY.

State v. Hasler, 449 S.W.2d 881 (Mo. App. 1969)

State v. Parkhurst, 845 S.W.2d 31 (Mo. banc 1992)

State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001)

State v. Withrow, 8 S.W.3d 75 (Mo. banc 1999)

II. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN OVERRULING APPELLANT'S MOTION TO ARREST JUDGMENT ON COUNT THREE OF THE AMENDED INFORMATION, BECAUSE COUNT THREE, CHARGING DEFENDANT WITH ARMED CRIMINAL ACTION, DID NOT CONTAIN ALL THE ESSENTIAL ELEMENTS OF THE OFFENSE, AND FURTHER DID NOT APPRISE APPELLANT OF THE FACTS CONSTITUTING THE CHARGE, IN VIOLATION OF MO. SUP. CT. RULE 23.01(b)(2), AND APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE I, SECTIONS 10, 18(a), AND 19 OF THE MISSOURI CONSTITUTION TO DUE PROCESS OF LAW AND NOTICE OF CHARGES, IN THAT THE AMENDED INFORMATION FAILED TO ALLEGE THAT APPELLANT KNOWINGLY COMMITTED A FELONY BY, WITH AND THROUGH THE USE, ASSISTANCE AND AID OF A DANGEROUS INSTRUMENT, AND FURTHER DID NOT DESCRIBE THE CONDUCT BY WHICH THE OFFENSE WAS ALLEGEDLY COMMITTED, WHICH HINDERED APPELLANT'S ABILITY TO PREPARE A DEFENSE, AND TO PLEAD FORMER JEOPARDY.

State v. Parkhurst, 845 S.W.2d 31 (Mo. banc 1992)

State v. Gilpin, 954 S.W.2d 570 (Mo. App. W.D. 1997)

State v. Pogue, 851 S.W.2d 702 (Mo. App. S.D. 1993)

State v. Idlebird, 896 S.W.2d 656 (Mo. App. W.D. 1995)

III. THE TRIAL COURT ERRED IN FAILING TO GRANT MR. WILLIAMS A NEW TRIAL, BECAUSE THE STATE FAILED TO DISCLOSE MATERIAL, EXCULPATORY EVIDENCE IN ITS POSSESSION TO MR. WILLIAMS IN VIOLATION OF MR. WILLIAMS' RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION, IN THAT THE STATE FAILED TO DISCLOSE THAT THE ALLEGED VICTIM HAD TOLD A MEMBER OF THE PROSECUTING ATTORNEY'S OFFICE, SHORTLY AFTER THE ALLEGED OFFENSE TOOK PLACE, THAT SHE HAD LIED TO POLICE CONCERNING THE ALLEGED EVENTS FOR WHICH MR. WILLIAMS WAS CHARGED.

Brady v. Maryland, 373 U.S. 83 (1963)

Kyles v. Whitley, 115 S. Ct. 1555 (1995)

State v. Albanese, 9 S.W.3d 39 (Mo. App. W.D. 1999)

State v. Bell, 936 S.W.2d 204 (Mo. App. W.D. 1996)

IV. THE TRIAL COURT ERRED IN FAILING TO SUSTAIN MR. WILLIAMS' MOTION FOR JUDGMENT OF ACQUITTAL WITH RESPECT TO COUNT THREE AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF ALL THE EVIDENCE, AND IN CONVICTING MR. WILLIAMS OF ARMED CRIMINAL ACTION, IN VIOLATION OF MR. WILLIAMS' RIGHTS TO DUE PROCESS

GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, SECTIONS 10 AND 18(A), OF THE MISSOURI CONSTITUTION, BECAUSE THE STATE'S EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO DEMONSTRATE THAT MR. WILLIAMS EMPLOYED HIS VEHICLE AS A "DANGEROUS INSTRUMENT," AS CONTEMPLATED UNDER THE ARMED CRIMINAL ACTION STATUTE, IN THAT THERE WAS NO ALLEGATION OR EVIDENCE OF MR. WILLIAMS' INTENT OR MOTIVE TO CAUSE DEATH OR SERIOUS PHYSICAL INJURY TO THE ALLEGED VICTIM, MARVA MOSLEY.

Jackson v. Virginia, 443 U.S. 307 (1979)

State v. Dowdy, 60 S.W.3d 639 (Mo. App. W.D. 2001)

State v. Idlebird, 896 S.W.2d 656 (Mo. App. W.D. 1995)

State v. Pogue, 851 S.W.2d 702 (Mo. App. S.D. 1993)

V. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN NEGLECTING TO DISMISS, *SUA SPONTE*, COUNT THREE OF THE AMENDED INFORMATION, BECAUSE COUNT THREE DID NOT, BY ANY REASONABLE CONSTRUCTION, CHARGE APPELLANT WITH ARMED CRIMINAL ACTION IN VIOLATION OF MO. SUP. CT. RULE 23.01(a)(2), AND THE APPELLANT'S DUE PROCESS RIGHTS GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, SECTIONS 10, 18(a),

AND 19, OF THE MISSOURI CONSTITUTION, IN THAT THE ALLEGATIONS OF THE AMENDED INFORMATION, TAKEN AS TRUE, WOULD NOT DEMONSTRATE THAT APPELLANT'S VEHICLE CONSTITUTED A "DANGEROUS INSTRUMENT" FOR PURPOSES OF THE STATUTE PROSCRIBING ARMED CRIMINAL ACTION, BECAUSE THE ALLEGATIONS OF THE AMENDED INFORMATION WOULD NOT DEMONSTRATE THAT APPELLANT USED THE VEHICLE WITH THE PURPOSE OF CAUSING DEATH OR SERIOUS PHYSICAL INJURY.

State v. Idlebird, 896 S.W.2d 656 (Mo. App. W.D. 1995)

State v. McCullum, 63 S.W.3d 242 (Mo. App. S.D. 2001)

State v. Parkhurst, 845 S.W.2d 31 (Mo. banc 1992)

State v. Pogue, 851 S.W.2d 702 (Mo. App. S.D. 1993)

ARGUMENT

I. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN OVERRULING APPELLANT'S MOTION TO ARREST JUDGMENT ON COUNT ONE OF THE AMENDED INFORMATION, BECAUSE COUNT ONE, CHARGING DEFENDANT WITH SECOND DEGREE ASSAULT, DID NOT CONTAIN ALL THE ESSENTIAL ELEMENTS OF THE OFFENSE, AND FURTHER DID NOT APPRISE APPELLANT OF THE FACTS CONSTITUTING THE CHARGE, IN VIOLATION OF MO. SUP. CT. RULE 23.01(b)(2), AND OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE I, SECTIONS 10, 18(a), AND 19 OF THE MISSOURI CONSTITUTION TO DUE PROCESS OF LAW AND NOTICE OF CHARGES, IN THAT THE AMENDED INFORMATION FAILED TO ALLEGE THAT APPELLANT ENGAGED IN A "SUBSTANTIAL STEP" TOWARD THE COMMISSION OF THE ALLEGED OFFENSE, AND FURTHER DID NOT DESCRIBE THE CONDUCT BY WHICH THE ATTEMPT WAS ALLEGEDLY MADE, WHICH PREJUDICED APPELLANT'S ABILITY TO PREPARE A DEFENSE, AND TO PLEAD FORMER JEOPARDY.

1. Introduction and Standard of Review

The information in this case failed to charge Mr. Williams with all the essential elements of the offense of second-degree assault, and failed to apprise Mr. Williams of the

facts constituting the charges against him, because (1) it failed to specify that he committed an act that constituted a "substantial step" toward causing physical injury to Marva Mosley; and (2) it failed to describe, with any degree of particularity, the conduct which purportedly constituted the assault. The failure of the information to so charge Mr. Williams violated his rights to notice of charges and due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and under Article I, Sections 10, 18(a) and 19 of the Missouri Constition. As such, Mr. Williams is entitled to a reversal of his conviction and a remand to the trial court, with instructions to dismiss the information.

A charging instrument serves three constitutional purposes: (1) inform the defendant of the charges against him or her, so that he or she may prepare an adequate defense; (2) allow the defendant to plead former jeopardy in the event of an aquittal; and (3) permit the trial court to decide whether sufficient facts are alleged to support a conviction. *See State v. Gilmore*, 650 S.W.2d 627, 628 (Mo. banc 1983); *State v. McCullum*, 63 S.W.3d 242, 249 (Mo. App. S.D. 2001). *See also Hamling v. United States*, 418 U.S. 87, 117 (1974). Accordingly, the general test for sufficiency of a charging instrument is whether it contains all essential elements of the offense, and clearly appraises the defendant of facts constituting the offense. *State v. Briscoe*, 847 S.W.2d 792, 794 (Mo. banc 1993). Only if all essential elements are included in the charging instrument will the constitutional requirements of the Fifth Amendment's due process clause, and the Sixth Amendment's requirement that the accused be informed of the nature of the accusations against him or her be fulfilled. *See State v. Schaeffer*, 782 S.W.2d 68, 70 (Mo. App. 1989). *See also Russell v. United States*, 369 U.S.

749, 761; 765 (1962) (declaring requirement of all essential elements in indictment part of Fifth Amendment due process rights, and Sixth Amendment rights to notice of charges); *United States v. Cruikshank*, 92 U.S. 542, 558 (1874). Further, Missouri Supreme Court Rule 23.01(b)(2) provides that "[t]he indictment or information shall . . . [s]tate plainly, concisely, and definitely the essential facts constituting the offense charged."

But, as noted in *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992), a failure to allege an essential element in the indictment does not automatically require reversal. Rather, where, as here, the accused does not challenge the sufficiency of the charging instrument until after his or her conviction, "an information will be deemed insufficient only if it is so defective that (1) it does not by any reasonable construction charge the defendant with the offense of which the defendant was convicted or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of an acquittal are prejudiced." *Id.* *See also State v. Briscoe*, 847 S.W.2d 792, 794 (Mo. banc 1993). Here, Mr. Williams submits that both his ability to prepare a defense and his ability to plead former jeopardy were impacted by the State's failure to sufficiently charge him in Count One of the Amended information, and accordingly, even under the stringent standard articulated in *Parkhurst*, he is entitled to relief.

2. Discussion

The amended information in this case charged Mr. Williams, in relevant part, as follows:

Count 1. Assault Second Degree (13031)

> The Prosecuting Attorney of the County of Jackson, State of Missouri hereby charges that the defendant, **Paul E. Williams**, in violation of Section 565.060, R.S. Mo., committed the **Class C Felony of Assault in the Second Degree**, punishable upon conviction under Sections 558.011 and 560.011, R.S. Mo., in that on or about 05/09/2001, in the County of Jackson, State of Missouri, the defendant attempted to cause physical injury to Marva Mosley by means of a dangerous instrument, to wit: a car.

(L.F. at 11). Count One, purportedly charging Mr. Williams with assault in the second degree, did not charge that Mr. Williams engaged in a "substantial step" toward causing physical injury to Marva Mosley, or that such conduct was "done for the purpose of committing such assault." Further, the information does not specify, with any degree of particularity, the conduct which purportedly comprised the assault. In failing to so allege, the information was fatally defective, in that it omitted essential elements of the offense of attempt-based assault in the second degree.

> In *State v. Withrow*, this Court declared that one "attempts" to commit an offense when: with the purpose of committing the offense, he does any act which is a substantial step towards commission of the offense. A "substantial step" is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

State v. Withrow, 8 S.W.3d 75, 78 (Mo. banc 1999). *Withrow*'s definition of "attempt," set out in Section 564.011 R.S. Mo., applies "regardless whether the attempt is under sec. 564.011

or under separate provisions proscribing attempting a specified crime." *State v. Whalen*, 49 S.W.3d 181, 186 (Mo. banc 2001). As the Court noted in its appendix to the *Withrow* case, this includes use of the word "attempt" in Section 565.060 R.S. Mo., proscribing second-degree asault. *See, e.g.*, *Whalen*, 49 S.W.3d at 186 (citing the enumerated statutes contained in the appendix to *Withrow* as being amongst those "separate provisions proscribing attempting a specified crime" to which the "substantial step" definition of attempt applies).[4]

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[4] In *Whalen*, this Court implicitly acknowledged that the "substantial step" definition of "attempt" was engrafted upon all statutes that "proscribe attempting a specified crime," which are set forth in the appendix to *Withrow*. *Whalen*, 49 S.W.3d at 186. The court noted that the *Withrow* holding engrafted the "substantial step" definition of "attempt" onto Section 565.050 R.S. Mo., stating that, in the wake of *Withrow*, "in order to be found guilty of first-degree assault for attempting to kill or attempting to cause serious physical injury, one must, with the purpose of committing that offense, take a substantial step toward committing it." *Whalen*, 49 S.W.3d at 186. Lower courts have similarly acknowledged the import of the *Withrow* holding. *See State v. Gray*, 24 S.W.3d 204, 207 (Mo. App. W.D. 2000) (holding that, under Section 565.050, the common law definition of "attempt" no longer applied, in light of *Withrow*, and that "attempt," in the context of the first degree assault statute, required proof of a "substantial step" toward the commission of an offense). *See also McCullum*, 63 S.W.3d at 248.

Withrow unambiguously held that "substantial step" is an *element* of any alleged "attempt" under Missouri law, declaring that "[a]ttempt . . . has only two *elements*: (1) the defendant has the purpose to commit the underlying offense, and (2) the doing of an act which is a substantial step toward the commission of that offense." *Withrow*, 8 S.W.3d at 78 (emphasis added).[5] Therefore, a "substantial step" toward the commission of the underlying offense is doubtlessly an "element" of attempt-based second-degree assault under Section 565.060 R.S. Mo., which must be included in a charging instrument to render it sufficient to charge an offense. *State v. Briscoe*, 847 S.W.2d at 794 (the general test for sufficiency of a charging instrument is whether it contains all essential *elements* of the offense, and clearly appraises the defendant of facts constituting the offense).[6] Because Count One of the amended

[5] The Court further clarified its position that "substantial step" is an *element* requiring proof to sustain a conviction of "attempt," reasoning that "[t]he . . . premise . . . that sec. 564.011 does not define an element of any offense is not quite correct. Nearly every statute declaring a specified conduct to be a crime necessarily defines the elements of an offense. Section 564.011 is no exception." *Withrow*, 8 S.W.3d at 79.

[6] The notion that "substantial step" is an element of the offense of second-degree assault finds further support in this Court's decision in *State v. Wurtzberger*, 40 S.W.3d 893 (Mo. banc 2001). In *Wurtzberger*, the Supreme Court of Missouri held that, pursuant to Withrow, it was error for a trial court to have failed to instruct the jury, in a case where the defendant was charged with attempt to manufacture methamphetamine in violation of Section 195.211.1 R.S. Mo. (1994), that the essential element of a "substantial step toward the

information in this case failed to expressly allege that Mr. Williams engaged in a "substantial step" toward inflicting physical injury upon Ms. Mosely, and that the "substantial step" was made with the purpose to commit the underlying offense, which are essential elements of second-degree assault, the information was insufficient.

In addition to failing to charge that Mr. Williams engaged in a "substantial step" with the purpose of causing physical injury to Ms. Mosley, the information fails to specify what activity or conduct of Mr. Williams constituted the alleged "substantial step." As such, the information does not clearly set forth the facts constituting the alleged offense, which is a necessary characteristic of a sufficient charging document. *See State v. Pride*, 1 S.W.3d 494, 502 (Mo. App. W.D. 1999); *State v. Hyler*, 861 S.W.2d 646, 649 (Mo. App. 1993).

Considered either individually or cumulatively, these errors rendered Count One of the amended information prejudicially insufficient, requiring reversal, even under the rigorous standards for reversal set forth in *State v. Parkhurst*.

First, Mr. Williams' ability to prepare a defense to the charges was impaired, in that Count One failed to specify the conduct for which he was being charged, i.e., to identify the facts constituting the "substantial step" toward commission of the underlying offense. As such, Mr. Williams could not know the allegations or evidence, precisely, against which he

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commission of the offense" was required to find the defendant guilty. *Id.* at 897. By analogy to *Wurtzberger*, it can be inferred that it is similarly erroneous, in this case, to fail to require the charging instrument to contain such an essential element of the offense.

should be prepared to defend. Even under the stringent standards of *Parkhurst*, if the substantial rights of the defendant to prepare a defense are affected, the defendant may be afforded relief from an insufficient indictment. *See Parkhurst*, 845 S.W.2d at 35; *Pride*, 1 S.W.3d at 502-03.

Further, the State's neglect, in Count One, to describe in any particularized detail the conduct for which Mr. Williams was being charged could impact his ability to plea former jeopardy. "Although an information or indictment contains all the essential elements of an offense identified in the statute, it must clearly apprise a defendant of the facts constituting the offense . . . to bar future prosecution for the same offense." *State v. Larson*, 941 S.W.2d 847, 851 (Mo. App. W.D. 1997). To this end, the charging instrument should be "sufficiently specific that there would be no difficulty in determining what evidence would be admissible under the allegations, and so the court and jury may know what they are to try and for what the are to acquit or convict." *State v. Hasler*, 449 S.W.2d 881, 885 (Mo. App. 1969). Here, the information did not state any facts detailing Mr. Williams' purported commission of a "substantial step" toward the completion of the offense, and as such, he could not prepare for what evidence would be adduced by the State, and further, there existed no internal safeguards in the charging instrument against multiple prosecutions of Mr. Williams for the same offense.

Particularly instructive on this point is *State v. Hasler*, 449 S.W.2d 881 (Mo. App. 1969), in which a public official was charged under a statute making it a misdemeanor for persons in public office to engage in "willful and malicious oppression, partiality, misconduct,

or abuse of authority." *Id.* at 885. The charging instrument tracked the language of the statute, i.e., charged the official with "oppression, partiality, misconduct, and abuse of authority," without stating specifically what conduct constituted the offense. *Id.* The court of appeals held that the charging instrument was insufficient to allow the defendant to prepare a defense, and to plead former jeopardy in the event of an acquittal, in that it constituted "no more than a conclusory statement that defendant violated a statute by some unspecified acts." *Id.* Here, similarly, the State's failure to include both the element of "substantial step," and a description of conduct constituting a "substantial step," renders Count 1of the amended information no more than a conclusory statement that Mr. Williams violated Section 565.060 R.S. Mo..

In the court below, in support of its assertion that Count 1 of the amended information was sufficient, the State relied upon precedent standing for the proposition that "[g]enerally, it is enough to charge the offense in the language of the statute alleged to be violated if the statute sets forth all the constituent elements of the offense." *See, e.g., State v. Allen*, 905 S.W.2d 874, 879 (Mo. banc 1995). It was the State's position that, because the information simply tracked the language of Section 565.060 R.S. Mo., charging that Mr. Williams "attempted to cause physical injury," the information was sufficient under *Allen* and cases like it. But, the State's argument presupposes that Section 565.060 R.S. Mo., proscribing second-degree assault, indeed "sets forth all the constituent elements of the offense," *see Allen*, 905 S.W.2d at 879, despite *Withrow's* clear declaration that "substantial step" is an element of attempt under Missouri Law. *See Withrow*, 8 S.W.3d at 78. The statute does not set forth all

constituent elements of the offense as declared in *Withrow*, and as such, the doctrine enunciated in *Allen* cannot save the charging instrument in this case.[7]

Moreover, the State may urge that the Information was sufficient because it conformed with MACR-CR 19.04, at it was worded at the time the charges were filed. But, despite the language contained in Rule 23.01(e), stating that "all . . . informations which are substantially consistent with the forms . . . which have been approved by this Court shall . . . comply with the requirements of this Rule," the omission of the "substantial step" element of attempt-based second-degree assault from the information in this case constitutes reversible error of constitutional dimension. The Missouri Supreme Court has held that when an approved pattern instruction conflicts with the substantive law, a court should decline to follow the pattern

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[7] The principle discussed in *Allen*, and cited by the State, is entirely consistent with federal case law stating that a charging document may be deemed insufficient – under a defendant's constitutional rights to due process and notice of charges – even though it tracks the language of a statute, when it omits an element that is implied, but not expressly mentioned, in the statutory language. *See United States v. Jackson*, 72 F.3d 1370, 1380 (9th Cir. 1995) ("An indictment that tracks the words of the statute violated is generally sufficient, but implied, necessary elements, not present in the statutory language, must be included in an indictment."); *United States v. Kufrovich*, 997 F.Supp. 246, 255 (D.Conn. 1997) (indictment which tracks the language of a statute is usually sufficient unless it omits an element which is implied, but not expressly mentioned, in the statutory language).

instruction and its notes on use, and instead rely upon the substantive law. See *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997). By analogy, it is clear that the same doctrine applies to approved charges, or MACH-CR's. Therefore, despite Rule 23.02(e)'s admonitions, MACH-CR 19.04's conflict with the substantive law – i.e., *Withrow* and its progeny – require that the MACH-CR be disregarded, and *Withrow* accorded the weight it deserves.

In sum, the information in this case was prejudicially insufficient to put Mr. Williams on notice of the charges against him, and also was insufficient to allow him to plea former jeopardy, should the need arise. As such, his conviction on Count 1 should be reversed, and the case should be remanded to the trial court with instructions to dismiss the information in this case. *See Gilmore*, 650 S.W.2d at 628. In the alternative, Mr. Williams is entitled to a new trial.[8]

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[8] A reversal of Mr. Williams' conviction of assault in the second degree under Count One would also require a reversal and remand of his conviction of armed criminal action under Count Three, because a conviction of armed criminal action requires the commission of an underlying felony. *See State v. Albanese*, 920 S.W.2d 917, 924 (Mo. App. W.D. 1996). Accordingly, because Count Three, the armed criminal action count, was predicated upon the allegations of Count One, the second degree assault count, a reversal by this Court of Mr. Williams' conviction on Count One necessarily requires a reversal on Count Three.

II. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN OVERRULING APPELLANT'S MOTION TO ARREST JUDGMENT ON COUNT THREE OF THE AMENDED INFORMATION, BECAUSE COUNT THREE, CHARGING DEFENDANT WITH ARMED CRIMINAL ACTION, DID NOT CONTAIN ALL THE ESSENTIAL ELEMENTS OF THE OFFENSE, AND FURTHER DID NOT APPRISE APPELLANT OF THE FACTS CONSTITUTING THE CHARGE, IN VIOLATION OF MO. SUP. CT. RULE 23.01(b)(2), AND APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE I, SECTIONS 10, 18(a), AND 19 OF THE MISSOURI CONSTITUTION TO DUE PROCESS OF LAW AND NOTICE OF CHARGES, IN THAT THE AMENDED INFORMATION FAILED TO ALLEGE THAT APPELLANT KNOWINGLY COMMITTED A FELONY BY, WITH AND THROUGH THE USE, ASSISTANCE AND AID OF A DANGEROUS INSTRUMENT, AND FURTHER DID NOT DESCRIBE THE CONDUCT BY WHICH THE OFFENSE WAS ALLEGEDLY COMMITTED, WHICH HINDERED APPELLANT'S ABILITY TO PREPARE A DEFENSE, AND TO PLEAD FORMER JEOPARDY.

1. Introduction and Standard of Review

Count Three of the amended information in this case, purportedly charging Mr. Williams with armed criminal action in violation of Section 571.015 R.S. Mo., was insufficient in that it failed to state all essential elements of the crime of armed criminal action, and further failed to apprise Mr. Williams of the facts constituting the charges against him. More specificially, the amended information (1) failed to specify that Mr. Williams "knowingly" committed the offense charged in Count One with and through the use, assistance and aid of a dangerous instrument, or indeed, that Mr. Williams acted with any culpable mental state with respect to his alleged use of a dangerous instrument (L.F. at 11-12); and (2) failed to allege, with particularity, the conduct which purportedly constituted the underlying attempted second-degree assault. The failure of the State to so charge Mr. Williams in Count Three of the amended information violated his rights to notice of charges and due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and under Article I, Sections 10, 18(a) and 19 of the Missouri Constitution. As such, Mr. Williams is entitled to a reversal of his conviction and a remand to the trial court, with instructions to dismiss the information.

A charging instrument serves three constitutional purposes: (1) inform the defendant of the charges against him or her, so that he or she may prepare an adequate defense; (2) allow the defendant to plead former jeopardy in the event of an aquittal; and (3) permit the trial court to decide whether sufficient facts are alleged to support a conviction. *See State v. Gilmore*, 650 S.W.2d 627, 628 (Mo. banc 1983); *State v. McCullum*, 63 S.W.3d 242, 249 (Mo. App.

S.D. 2001). *See also Hamling v. United States*, 418 U.S. 87, 117 (1974). Accordingly, the general test for sufficiency of a charging instrument is whether it contains all essential elements of the offense, and clearly appraises the defendant of facts constituting the offense. *State v. Briscoe*, 847 S.W.2d 792, 794 (Mo. banc 1993). Only if all essential elements are included in the charging instrument will the constitutional requirements of the Fifth Amendment's due process clause, and the Sixth Amendment's requirement that the accused be informed of the nature of the accusations against him or her be fulfilled. *See State v. Schaeffer*, 782 S.W.2d 68, 70 (Mo. App. 1989). *See also Russell v. United States*, 369 U.S. 749, 761; 765 (1962) (declaring requirement of all essential elements in indictment part of Fifth Amendment due process rights, and Sixth Amendment rights to notice of charges); *United States v. Cruikshank*, 92 U.S. 542, 558 (1874). Further, Missouri Supreme Court Rule 23.01(b)(2) provides that "[t]he indictment or information shall . . . [s]tate plainly, concisely, and definitely the essential facts constituting the offense charged."

But, as noted in *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992), a failure to allege an essential element in the indictment does not automatically require reversal. Rather, where, as here, the accused does not challenge the sufficiency of the charging instrument until after his or her conviction, "an information will be deemed insufficient only if it is so defective that (1) it does not by any reasonable construction charge the defendant with the offense of which the defendant was convicted or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of an acquittal are prejudiced." *Id.* *See also State v. Briscoe*, 847 S.W.2d 792, 794 (Mo. banc 1993). Here, Mr. Williams

submits that both his ability to prepare a defense and his ability to plead former jeopardy were impacted by the State's failure to sufficiently charge him in Count Three of the amended information, and accordingly, even under the stringent standard articulated in *Parkhurst*, he is entitled to relief.

2. Discussion

The amended information in this case charged Mr. Williams, in pertinent part, as follows:

> **Count 3. Armed Criminal Action (31010)**
>
> The Prosecuting Attorney of the County of Jackson, State of Missouri hereby charges that the defendant, **Paul E. Williams**, in violation of Section 571.015, R.S. Mo., committed the **Felony of Armed Criminal Action**, punishable upon conviction under Section 571.015, R.S. Mo., in that on or about 05/09/2001, in the County of Jackson, State of Missouri, the defendant committed the felony of Assault charged in Count One, all allegations of which are incorporated herein by reference, and the defendant committed the foregoing felony of Assault by, with and through the use, assistance and aid of a dangerous instrument and on June 1, 1994, in Division 6 of the Circuit Court of Jackson County, Missouri the defendant was convicted of armed criminal action.

(L.F. at 11-12). A thorough reading of Count Three, which purportedly charged Mr. Williams with armed criminal action, reveals no allegation that Mr. Williams "knowingly" committed

the offense charged in Count One with and through the use, assistance and aid of a dangerous instrument, or indeed, that Mr. Williams acted with any culpable mental state with respect to his alleged use of a dangerous instrument. Further, Count Three merely incorporates the allegations of Count One, which, as noted previously, does not specify with sufficient particularity the conduct which purportedly constituted the alleged assault. In failing to so allege, the information was prejudicially defective, in that it omitted essential elements of the offense of armed criminal action.

It is well-settled in the lower courts that "a culpable mental state is an element of the armed criminal action charge and, pursuant to Section 561.021.2, armed criminal action requires a culpable mental state of acting purposely, knowingly, or recklessly." *State v. Gilpin*, 954 S.W.2d 570, 580 (Mo. App. W.D. 1997). *See also State v. Rowe*, 838 S.W.2d 103, 109 (Mo. App. E.D. 1992); *State v. Hernandez*, 815 S.W.2d 67, 72 (Mo. App. S.D. 1991). Moreover, MACH-CR 32.02 – the applicable MACH-CR for charging armed criminal action under Section 571.015 R.S. Mo. – expressly provides the following mandatory language as part of any armed criminal action charge:

> The defendant *knowingly* committed the foregoing felony of [name of felony] by, with and through the use, assistance and aid of a (dangerous instrument) (deadly weapon).

MACH-CR 32.02, "Armed Criminal Action" (emphasis added). Further, the Notes on Use to MACH-CR 32.02 indicate that "since the statute does not prescribe a culpable mental state,

the crime is committed if the defendant acted 'knowingly.' The mental state of 'recklessly' is not sufficient." MACH-CR 32.02, Note on Use 3.

Therefore, because the amended information in Mr. Williams' case omitted an essential element of the crime of armed criminal action – i.e., that Mr. Williams acted "knowingly" in using, or in employing the assistance and aid of, a dangerous instrument to commit the crime of second degree assault – the information was insufficient under prevailing standards. *See State v. Briscoe*, 847 S.W.2d at 794 (general test for sufficiency of information is, in part, whether information contains all essential elements of the offense).

In addition to failing to charge that Mr. Williams acted "knowingly" with respect to his alleged use of a dangerous instrument, Count Three further fails to specify with sufficient particularity what activity or conduct of Mr. Williams constituted the alleged criminal act. As such, the information does not clearly set forth the facts constituting the alleged offense, which is a necessary characteristic of a sufficient charging document. *See State v. Pride*, 1 S.W.3d 494, 502 (Mo. App.W.D. 1999); *State v. Hyler*, 861 S.W.2d 646, 649 (Mo. App. 1993).

Of course, under *Parkhurst*, the prejudicial effect of such errors in the charging instrument must be assessed in any case where, as here, a challenge to the sufficiency of the charging instrument is not raised until after the verdict. *See Parkhurst*, 845 S.W.2d at 35. But, as with the errors complained of with respect to Count One of the amended information, the errors with respect to Count Three require reversal, in that the failure to charge essential elements of the offense prejudiced defendant's ability to prepare an adequate defense. *Id.*

The State's failure to allege the element of a culpable mental state impaired Mr. Williams' ability to prepare an adequate defense, because, as read, the charges did not apprise Mr. Williams of the potential defense that he lacked the requisite mental state for a conviction. As read, the charges seem to allow for a conviction irrespective of whether Mr. Williams *knowingly* employed his vehicle with a *purpose* to cause serious injury. Rather, the language of the charges would seem to permit a conviction despite the absence of malice, knowledge, purpose, recklessness, or intent of any kind on the part of Mr. Williams. (L.F. at 11-12).

Had Count Three accurately charged Mr. Williams, it would have fully apprised him that the Government was required to prove, as an element of the offense, that he knowingly used his car in a manner calculated to cause serious physical injury. If such were the case, Mr. Williams could have made a materially informed decision concerning whether or not to testify in a case where, seemingly, whether or not he possessed the requisite *mens rea* was the central issue in the case. (STr at 6-7). As it stands, however, the omission to charge that he acted "knowingly" resulting in a materially uninformed decision not to testify (TTr at 116-17). Accordingly, Mr. Williams' ability to defend himself against the charge of armed criminal action was prejudicially impaired by the State's failure to include all elements of the offense in the charging document.

State v. Pogue, 851 S.W.2d 702 (Mo. App. S.D. 1993) is illustrative of why it was so critical, in this case, that the State charge Mr. Williams with a "knowing" use of his vehicle to commit the crime of armed criminal action. In *Pogue*, the Southern District considered whether, under the armed criminal action statute, an automobile operated under the

circumstances of that case could qualify as a "dangerous instrument" for the purposes of that statute. *Id.* at 704. The court ultimately reasoned that whether an automobile was a "dangerous instrument" for the purposes of Section 571.015 is a case-by-case inquiry, which is inextricably tied to an assessment of the defendant's intent and motive in using the automobile. *Id.* at 706 ("The statute requires more than a showing that an article is readily capable of causing death or serious physical injury. . . . In determining the circumstances in which defendant used his automobile . . . the user's intent and motive must be considered). In so reasoning, the Court held that "in order for an automobile to become a dangerous instrument for purposes of § 571.015, the operator or user of the automobile must possess an intent and motive for the automobile to be an instrument of harm." *Id.*[9] Importantly, the court also held, under its analysis, that "[m]ere recklessness in the operation of a automobile does not give rise to armed criminal action." *Id.*

[9] The same rationale was applied by the Missouri Court of Appeals, Western District, in *State v. Idlebird*, 896 S.W.2d 656 (Mo. App. W.D. 1995), in which the court decided whether fire could constitute a "dangerous instrument" for the purposes of the armed criminal action statute. *Id.* at 663-65. The Western District, in holding that fire could indeed constitute a dangerous instrument, noted that the statute defined "dangerous instrument" according to the purpose for which the instrument was used by the defendant, rather than according to whether it would constitute a weapon when used for ordinary purposes. *Id.*

Accordingly, the State's failure to apprise Mr. Williams, in Count Three, of the necessity of proving "knowing" use of the vehicle, almost certainly impacted adversely his ability to defend himself, in that he was not given sufficient notice of the burden of proof the State would have to sustain with respect to his intent. Had he been sufficiently notified – through an allegation that he acted "knowingly" – that mere recklessness or negligence would not suffice, Mr. Williams would have been able to make a materially informed decision on whether or not to testify in his own behalf. Because, however, he was not so notified, he chose not to testify regarding his intent, in a case where intent was likely the only issue for trial. Thus, the State's omission of the *mens rea* element from the charging instrument prejudiced Mr. Williams in a manner that requires reversal, even under *State v. Parkhurst*.

Therefore, Mr. Williams' conviction on Count Three should be reversed, and the case should be remanded to the trial court with instructions to dismiss the information without prejudice. *See Gilmore*, 650 S.W.2d at 628. In the alternative, Mr. Williams is entitled to a new trial.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT MR. WILLIAMS A NEW TRIAL, BECAUSE THE STATE FAILED TO DISCLOSE MATERIAL, EXCULPATORY EVIDENCE IN ITS POSSESSION TO MR. WILLIAMS IN VIOLATION OF MR. WILLIAMS' RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE I, SECTIONS 10 AND 18(a) OF THE MISSOURI CONSTITUTION, IN THAT THE STATE FAILED TO DISCLOSE THAT THE ALLEGED VICTIM HAD TOLD A MEMBER OF THE PROSECUTING ATTORNEY'S OFFICE, SHORTLY AFTER THE ALLEGED OFFENSE TOOK PLACE, THAT SHE HAD LIED TO POLICE CONCERNING THE ALLEGED EVENTS FOR WHICH MR. WILLIAMS WAS CHARGED.

1. Introduction and Standard of Review

After Mr. Williams' conviction, the trial court heard evidence concerning a failure by the State, in this case, to reveal certain information to Mr. Williams or his trial counsel prior to trial. The trial court denied Mr. Williams' oral motion for new trial on this basis. This Court's review of the trial court's denial of a motion for a new trial on the basis of a *Brady* violation is for an abuse of discretion. *State v. Albanese*, 9 S.W.3d 39, 45 (Mo. App. W.D. 1999). "Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.*

The evidence adduced before the trial court on the oral motion for new trial was as follows:

On or about the evening of May 9, 2001, Marva Mosley, the alleged victim in this case, made a statement to responding officers that Mr. Williams assaulted her with his car. (TTr. at 100). The next day, May 10, 2001, Ms. Mosley spoke with Detective Steve Shaffer at the Kansas City Police Department, and gave a formal statement. (TTr at 102). In the statement, Ms. Mosley indicated that on the previous night, Mr. Williams had kicked in the front door, and struck her with his fist. (TTr at 104). She stated that, after doing so, Mr. Williams ran out to his car. (TTr at 104). She indicated also that she told him not to leave, because the police were coming, and she stood in front of his car. (TTr at 105). Finally, she stated that "Paul drove the car into the street and ran into me. I landed on top of the hood and he just kept on going." (TTr at 105). Ms. Mosely acknowledged this statement in writing, in the presence of Detective Shaffer. (TTr at 105-06).

After speaking with Detective Shaffer, Ms. Mosley immediately applied for an ex parte order of protection, seeking a restraining order against Mr. Williams. (Tr at 106). In the petition for that order, Ms. Mosley certified that she was physically injured by Mr. Williams, and that he tried to run her over in his car. (Tr at 106).

Approximately a week later, however, Ms. Mosley informed an assistant prosecutor with the Jackson County Prosecuting Attorney's office that her statements to the police regarding the events of May 9, 2001, were not true, and that she was recanting those statements. (STr at 16). Later, she gave a sworn statement, in the form of an affidavit, to Mr.

Williams' attorney at the public defender's office, recanting her prior statements to police. (STr at 17). It is not mentioned anywhere in that affidavit that she had recanted to any member of the prosecutor's office soon after the incident. (STr at 17). In fact, it was not reflected anywhere in the public defender's file pertaining to Mr. Williams that the office was ever informed by the State that Ms. Mosley had recanted to Ms. Riederer soon after the events of May 9, 2001, and said that her prior statements to authorities were a lie. (STr at 23; 25). Nor is it apparent, from the record, that Mr. Williams trial counsel, Vince Esposito, was ever informed by the prosecutors office of the fact that Ms. Mosley had, a week after the events of May 9, 2001, told a specific member of the prosecutors office that she had lied to the police.

Nonetheless, at trial, when Marva Mosley testified on behalf of Mr. Williams, the State's cross-examination of Ms. Mosley was, understandably, calculated to demonstrate that her testimony was a product of recent fabrication, and that her prior statements, given to police, were, in fact, an accurate account of the events of May 9, 2001. (TTr at 98-112).

The assistant prosecutor on the case later admitted that, though she believed she had told Mr. Williams' trial counsel that Ms. Mosely was recanting her prior story (Tr at 34-35), she "may have not" told Mr. Williams trial counsel specifically that, a short time after the alleged incident took place, Mosley had spoken with Amy Riederer, a member of the Jackson County Prosecuting Attorney's office, and told Riederer that she had lied to police concerning the events of May 9, 2001. (STr at 39).

2. Discussion

The State's failure to disclose the fact that Ms. Mosley, only a few short days after the incident, admitted to a specific member of the Jackson County Prosecuting Attorney's office that she lied to police on the night of the alleged incidents, requires reversal under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Said failure to disclose information violated Mr. Williams' rights to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States, and under Article I, Sections 10 and 18(a) of the Missouri Constitution.

The command of *Brady* is simple and straightforward: the prosecutor has an affirmative duty to disclose evidence favorable to the Defendant. *Kyles v. Whitley*, 115 S. Ct. 1555, 1565 (1995). This requirement rests on the Due Process Clause of the Fourteenth Amendment and is dictated by "prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984).[10] The *Brady* guarantee is one of a "group of constitutional privileges" that delivers exculpatory evidence into the hands of the accused, thereby helping to protect "the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *Id.* As noted in *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966), a "criminal trial is a quest for truth," *id.* at 188, and the *Brady* guarantees are crafted to further such a quest.

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[10] Article I, Section 10 of the Missouri Constitution provides the same guarantees as the federal constitutional due process rights, *see State v. McCullum*, 63 S.W.3d 242, 249 (Mo. App. S.D. 2001), and accordingly, the federal precedent cited herein is equally applicable to the an analysis of Mr. Williams' claims under the Missouri Constitution.

The suppression by the prosecution of material evidence favorable to an accused violates due process "irrespective of the good faith or bad faith of the prosecution." *Kyles*, 115 S. Ct. at 1565 (citing *Brady*, 373 U.S. at 87). Over the years, the Supreme Court has further defined the contours of the *Brady* doctrine. The obligation of disclosure "now encompasses not only exculpatory evidence, but also evidence that might be valuable in impeaching government witnesses." *United States v. Pou*, 953 F.2d 363, 366 (8th Cir. 1992), *cert. denied*, 504 U.S. 926 (1992) (citing *United States v. Bagley*, 473 U.S. 667 (1985)). Further, the prosecutor's duty to produce such material arises even where defense counsel's request is "non-specific," or even if there is no request at all. *Pou*, 953 F.2d at 366 (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)).

To prove a *Brady* violation, defendant must show that the prosecution: (1) suppressed the evidence; (2) the evidence was favorable to the accused; and (3) the evidence was material to the issue of guilt or punishment. *United States v. Duke*, 50 F.3d 571, 577 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 224 (1995). Under *Brady* and its progeny, evidence is considered "material" if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 115 S. Ct. at 1565 (quoting *Bagley*, 473 U.S. at 682).

The *Bagley* materiality standard does not require that the defendant demonstrate by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in his acquittal. *Kyles*, 115 S. Ct. at 1566. Nor must the defendant show that it is more likely than not that he would have received a different verdict had the evidence been made available

to him. *Id*. Rather, a "reasonable probability" of a different result is shown when the government's failure to produce material evidence "undermines confidence in the outcome of the trial." *Kyles*, 115 S. Ct. at 1566 (citing *Bagley*, 473 U.S. at 678).

In this case, the record reflects that the State knew of an incident in which Marva Mosley, the alleged victim in this case, had told a member of the Prosecuting Attorney's Office, shortly after the alleged crime took place, that she had lied to police concerning the events of the evening of May 9, 2001. The State did not inform Mr. Williams or his counsel of the particulars of this incident. And, despite the fact that the State informed Williams or his counsel that Ms. Mosley refused to testify for the State, or that she had recanted her statement, the State nonetheless failed to inform Mr. Williams or his counsel of evidence of Mosley's recanting soon after the alleged events took place. Such a failure constitutes suppression of evidence for the purposes of *Brady* and its progeny, "irrespective of the good faith or bad faith of the prosecution." *Kyles*, 115 S. Ct. at 1565 (citing *Brady*, 373 U.S. at 87).

Such evidence was clearly favorable to Williams in this case, because after Mosley was vigorously impeached by the State through use of her prior inconsistent statements, the statement made to Riederer could have been used to rehabilitate Mosley on redirect examination. *See, e.g.*, *State v. Bell*, 936 S.W.2d 204, 206 (Mo. App. W.D. 1996) (prior consistent statement is admissible to rehabilitate a witness who has been impeached by a prior inconsistent statement; such a statement is admissible for purposes of rehabilitating credibility, and is not properly characterized as improper "corroboration" evidence). It was also "material," in that, had such evidence been properly disclosed to the defense and admitted

at trial, there is undoubtedly "a reasonable probability that . . . the result of the proceeding would have been different." *Kyles*, 115 S. Ct. at 1565 (quoting *Bagley*, 473 U.S. at 682). An admission by the alleged victim to an attorney for the State – soon after the alleged assault took place – that her initial statement to police had been a lie, would squarely rebut any argument by the State that the victim's testimony was the product of recent fabrication, which was precisely the argument advanced by the State in the trial court below. To illustrate, the State, during cross-examination of Ms. Mosley, attempted to raise an inference of "recent fabrication" by asking Ms. Mosley whether she was engaged to Mr. Williams on the night of the alleged incident, and then adducing evidence that she later became engaged to Mr. Williams. (Tr. at 110-11). As such, evidence of Mosley's conversation with Ms. Riederer – which occurred prior to Ms. Mosley's engagement to Williams – would clearly be material, and could reasonably have an impact on the outcome of the trial.

Therefore, the State's failure to call this conversation to the attention of Mr. Williams or his counsel constituted a violation of *Brady*, in that the State – whether advertently or inadvertently – suppressed evidence that was both favorable and material to Williams' defense. *See, e.g., United States v. Duke*, 50 F.3d 571, 577 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 224 (1995). Accordingly, Mr. Williams' conviction should be reversed, and a new trial granted.

IV. THE TRIAL COURT ERRED IN FAILING TO SUSTAIN MR. WILLIAMS' MOTION FOR JUDGMENT OF ACQUITTAL WITH RESPECT TO COUNT THREE AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF ALL THE EVIDENCE, AND IN CONVICTING MR. WILLIAMS OF ARMED CRIMINAL ACTION, IN VIOLATION OF MR. WILLIAMS' RIGHTS TO DUE PROCESS GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, SECTIONS 10 AND 18(A), OF THE MISSOURI CONSTITUTION, BECAUSE THE STATE'S EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO DEMONSTRATE THAT MR. WILLIAMS EMPLOYED HIS VEHICLE AS A "DANGEROUS INSTRUMENT," AS CONTEMPLATED UNDER THE ARMED CRIMINAL ACTION STATUTE, IN THAT THERE WAS NO ALLEGATION OR EVIDENCE OF MR. WILLIAMS' INTENT OR MOTIVE TO CAUSE DEATH OR SERIOUS PHYSICAL INJURY TO THE ALLEGED VICTIM, MARVA MOSLEY.

1. Introduction and Standard of Review

At the close of the State's case-in-chief and at the close of all the evidence, Mr. Williams moved the trial court to enter a judgment of acquittal on Count Three, which purportedly charged Mr. Williams with armed criminal action, and the trial court denied his motions. (Tr at 76; 80; L.F. at 17). The trial court's failure to sustain Mr. Williams' motions for judgment of acquittal was erroneous, in that the evidence at trial was insufficient to

demonstrate Mr. Williams' intent to cause either death or serious physical injury to Ms. Mosley, through the use of his vehicle. As such, Mr. Williams' conviction of armed criminal action violated his right to due process guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, Sections 10 and 18(a) of the Missouri Constitution, because a conviction on insufficient evidence violates the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979).

In reviewing whether the evidence adduced at trial was sufficient to sustain a conviction, the court of appeals must view all the evidence and reasonable inferences to be drawn therefrom in the light most favorable to the verdict and ignore all evidence and inferences to the contrary. *See State v. Dowdy*, 60 S.W.3d 639, 641 (Mo. App. W.D. 2001); *State v. Trimmer*, 849 S.W.2d 725, 727 (Mo. App. E.D. 1993). The court of appeals "must determine whether the state introduced evidence sufficient to allow a reasonable trier of fact to find each element of the charged offense beyond a reasonable doubt." *Dowdy*, 60 S.W.3d at 642 (citing *State v. Clay*, 975 S.W.2d 121, 139 (Mo. banc 1998)). If this court determines that the State failed to adduce sufficient evidence on each element of the charge, it must reverse the verdict of conviction and an acquittal is mandated on that charge. *See Dowdy*, 60 S.W.3d at 642 (citing *State v. Wood*, 596 S.W.2d 394, 398 (Mo. banc 1980)).

2. Discussion

The evidence adduced by the State was insufficient to sustain Mr. Williams' conviction of armed criminal action, because neither the allegations of the amended information nor the

evidence at trial demonstrated that Mr. Williams used his vehicle – an otherwise innocuous instrument – as a "dangerous instrument," as that term is defined under Section 571.015 R.S. Mo. As it was charged in this case, it is an element of armed criminal action, under Section 571.015, that the accused be proven to have committed a felony by, with and through the use, aid, and assistance of a "dangerous instrument." *See* Section 571.015 R.S. Mo. (2000). But, it is well-settled that a "utilitarian instrument," such as an automobile, becomes a "dangerous instrument" for the purposes of Section 571.015 only under circumstances in which it is used with an intent and motive "to cause death or serious harm to a person." *State v. Pogue*, 851 S.W.2d 702, 706 (Mo. App. S.D. 1993) (citing Section 556.061(9), which defines "dangerous instrument" as "any instrument . . . which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury"). Thus, a motor vehicle cannot be a "dangerous instrument" for the purposes of armed criminal action, "absent [proof of] its being used with a purpose to cause death or serious injury." *Id.* at 707. *See also State v. Idlebird*, 896 S.W.2d 656, 664 (Mo. App. W.D. 1995) (acknowledging that, in determining whether "fire" is a "dangerous instrument," key issue is "whether the instrument . . . is capable of causing death or serious physical injury by the manner of use, and whether the circumstances of the use demonstrate an intent and motive to cause such death or serious harm").[11]

[11]Courts in other states have similarly held that an automobile – or other "utilitarian instruments" – qualify as "dangerous instruments" or "deadly weapons" only under circumstances in which the automobile or object is used with purpose, motive, and intent to

But, in the case at bar, it was neither charged nor proven that Mr. Williams acted with an intent to cause "death or serious physical injury" to Ms. Mosley. Indeed, the second- degree assault charge against Mr. Williams, which supplied the predicate offense for the charge of armed criminal action, charged only that Mr. Williams attempted to cause "physical injury," rather than "serious physical injury" or "death" to Ms. Mosley. (L.F. at 11).

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cause death or serious physical injury. *See, e.g., State v. Cappe*, 594 P.2d 115, 116-17 (Ariz. Ct. App. 1979) (under "assault with deadly weapon" statute – which is analogous to "armed criminal action" statute – burden is that state must show that defendant actually intended to harm victim with automobile, and intended to use it as a "deadly weapon"; wanton recklessness in driving automobile is insufficient.); *State v. Riley*, 703 A.2d 347, 352 (N.J. Ct. App. 1997) (whether otherwise innocuous instrument constitutes "deadly weapon" depends on defendant's intent in so using instrument; "it is the intended use that makes the otherwise lawful implement a weapon."). *See also State v. Ashley*, 57 S.E.2d 654, 655 (North Carolina 1950) ("assault with deadly weapon by an automobile" requires proof that defendant had purpose to injure by means of an automobile; evidence that defendant tried to "drive around" officers in close quarters not sufficient to sustain conviction); *Genry v. State*, 767 So.2d 302, 312 (Miss. Ct. App. 2000) (purpose to intentionally run over another person with motor vehicle renders motor vehicle "deadly weapon" for purposes of "aggravated assault" statute). But see *Commonwealth v. Waite*, 665 N.E.2d 982, 985 n.2 (Mass. 1996) (specific intent to do bodily harm with automobile not required to show that automobile constituted "dangerous weapon.").

The distinction between "physical injury" and "serious physical injury" is not merely rhetorical; "serious physical injury" is a statutorily defined term of art, and the degree of difference between "physical injury" and "serious physical injury" defines the difference between a first-degree and a second-degree assault charge. To illustrate, as it is defined in Section 556.061 R.S. Mo., "serious physical injury" is "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body." Section 556.061(28) R.S. Mo. (2000). Alternatively, mere "physical injury" is "physical pain, illness, or any impairment of physical condition." Section 556.061(20) R.S. Mo. (2000). If an individual can be proven to have attempted to cause "serious physical injury," as it is defined in Section 556.061, then a conviction can be sustained for assault in the first degree under Section 565.050 R.S. Mo.. If, rather, it can only be proven that the charged individual intended to cause "physical injury," then a first-degree assault charge is not appropriate, and second-degree assault is the only sustainable charge.

The same can be said of armed criminal action, when the otherwise innocuous article employed by the accused is alleged to be a "dangerous instrument." For the article to rise to the level of a "dangerous instrument," it must be proven that it was employed with an intent to cause "death or serious physical injury," rather than merely "physical injury." *See Pogue*, 851 S.W.2d at 706; *Idlebird*, 896 S.W.2d at 664. Absent such allegations or proof, a conviction for armed criminal action cannot be sustained.

Here, the State did not allege that Mr. Williams used his vehicle with an intent to cause "death or serious physical injury;" instead, the information alleged only that he "attempted to

cause physical injury." (L.F. at 11). And, in a manner consistent with the charge on Count One, the proof at trial failed to rise to the level of demonstrating an attempt to cause serious physical injury. The evidence was that, while Ms. Mosely stood between Mr. Williams vehicle and the van in front of it, Mr. Williams executed a three-point turn, in an effort to get his vehicle out from behind the van. (Tr at 27). If he intended to use the vehicle to cause "death or serious physical injury" to Ms. Mosley, he had the perfect opportunity to pin her between his own vehicle and the van in front of it. Yet, the evidence was that he did not. Instead, the evidence was that the vehicle was seen to execute a three-point turn, in an effort to go around Ms. Mosely, which would not appear to prove a charge of purpose to cause death or serious physical injury.

Moreover, the evidence was that the officers observed Ms. Mosley to have suffered only minor scratches to her hand, foot, and face. (Tr at 34). These types of injuries are certainly not injuries which "create[] a substantial risk of death," or which "cause[] serious disfigurement or protracted loss or impairment of the function of any part of the body," as provided in the definition of "serious physical injury" provided in Section 556.061 R.S. Mo..

Simply put, the armed criminal action charge leveled against Mr. Williams was a classic "overcharge," in that the evidence did not rise to the level of showing that Mr. Williams intended to use his vehicle to cause "death or serious physical injury." As such, the evidence did not support a conclusion that he employed his vehicle as a "dangerous instrument," as defined by statute. Accordingly, his conviction of armed criminal action must be vacated, and a judgment of acquittal on Count Three should be entered.

V. THE TRIAL COURT ERRED TO APPELLANT'S PREJUDICE IN NEGLECTING TO DISMISS, *SUA SPONTE*, COUNT THREE OF THE AMENDED INFORMATION, BECAUSE COUNT THREE DID NOT, BY ANY REASONABLE CONSTRUCTION, CHARGE APPELLANT WITH ARMED CRIMINAL ACTION IN VIOLATION OF MO. SUP. CT. RULE 23.01(a)(2), AND THE APPELLANT'S DUE PROCESS RIGHTS GUARANTEED UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, SECTIONS 10, 18(a), AND 19, OF THE MISSOURI CONSTITUTION, IN THAT THE ALLEGATIONS OF THE AMENDED INFORMATION, TAKEN AS TRUE, WOULD NOT DEMONSTRATE THAT APPELLANT'S VEHICLE CONSTITUTED A "DANGEROUS INSTRUMENT" FOR PURPOSES OF THE STATUTE PROSCRIBING ARMED CRIMINAL ACTION, BECAUSE THE ALLEGATIONS OF THE AMENDED INFORMATION WOULD NOT DEMONSTRATE THAT APPELLANT USED THE VEHICLE WITH THE PURPOSE OF CAUSING DEATH OR SERIOUS PHYSICAL INJURY.

1. Introduction and Standard of Review

The trial court erred in failing to dismiss, *sua sponte,* Count Three of the amended information, which purportedly charged Mr. Williams with armed criminal action. This allegation of error is raised for the first time on appeal. As such, the inquiry herein is governed by *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992), which mandates that where,

as here, the accused does not challenge the sufficiency of the charging instrument until after his or her conviction, "an information will be deemed insufficient only if it is so defective that (1) it does not by any reasonable construction charge the defendant with the offense of which the defendant was convicted or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of an acquittal are prejudiced." *Id.* at 35. *See also State v. Briscoe*, 847 S.W.2d 792, 794 (Mo. banc 1993). Here, Count Three of the amended information was so defective that it did not, by any reasonable construction, charge Mr. Williams with armed criminal action, and as such, his conviction must be reversed, and the case remanded with instructions to the trial court to dismiss Count Three of the amended information.

2. Discussion

A charging instrument serves three constitutional purposes: (1) inform the defendant of the charges against him or her, so that he or she may prepare an adequate defense; (2) allow the defendant to plead former jeopardy in the event of an aquittal; and (3) permit the trial court to decide whether sufficient facts are alleged to support a conviction. *See State v. Gilmore*, 650 S.W.2d 627, 628 (Mo. banc 1983); *State v. McCullum*, 63 S.W.3d 242, 249 (Mo. App. S.D. 2001). *See also Hamling v. United States*, 418 U.S. 87, 117 (1974). Accordingly, the general test for sufficiency of a charging instrument is whether it contains all essential elements of the offense, and clearly appraises the defendant of facts constituting the offense. *State v. Briscoe*, 847 S.W.2d 792, 794 (Mo. banc 1993). Only if all essential elements are included in the charging instrument will the constitutional requirements of the Fifth

Amenmdment's due process clause, and the Sixth Amendment's requirement that the accused be informed of the nature of the accusations against him or her be fulfilled. *See State v. Schaeffer*, 782 S.W.2d 68, 70 (Mo. App. 1989). *See also Russell v. United States*, 369 U.S. 749, 761; 765 (1962) (declaring requirement of all essential elements in indictment part of Fifth Amendment due process rights, and Sixth Amendment rights to notice of charges); *United States v. Cruikshank*, 92 U.S. 542, 558 (1874). Further, Missouri Supreme Court Rule 23.01(b)(2) provides that "[t]he indictment or information shall . . . [s]tate plainly, concisely, and definitely the essential facts constituting the offense charged."

In the case at bar, Count Three alleged, by reference to Count One, that Mr. Williams attempted to cause "physical injury" to Ms. Mosley through the use of his vehicle. This allegation, taken as true, does not allege facts sufficient to sustain a conviction of armed criminal action. As noted previously, it is well-settled that a "utilitarian instrument," such as an automobile, becomes a "dangerous instrument" for the purposes of Section 571.015 only under circumstances in which it is used with an intent and motive "to cause <u>death</u> or <u>serious</u> harm to a person." *State v. Pogue,* 851 S.W.2d 702, 706 (Mo. App. S.D. 1993) (citing Section 556.061(9), which defines "dangerous instrument" as "any instrument . . . which, under the circumstances in which it is used, is readily capable of causing death or other <u>serious physical injury</u>") (emphasis added). Thus, a motor vehicle cannot be a "dangerous instrument" for the purposes of armed criminal action, "absent [proof of] its being used with a purpose to cause death or serious injury." *Id.* at 707. *See also State v. Idlebird*, 896 S.W.2d 656, 664 (Mo. App. W.D. 1995) (acknowledging that, in determining whether "fire" is a "dangerous

instrument," key issue is "whether the instrument . . . is capable of causing death or serious physical injury by the manner of use, and whether the circumstances of the use demonstrate an intent and motive to cause such death or serious harm.").

But, in the case at bar, the State did not charge that Mr. Williams acted with an intent to cause "death or serious physical injury" to Ms. Mosley. Instead, the second- degree assault charge against Mr. Williams, which supplied the predicate offense for the charge of armed criminal action, charged only that Mr. Williams attempted to cause "physical injury." (L.F. at 11).

The distinction between "physical injury" and "serious physical injury" is not merely rhetorical; "serious physical injury" is a term of art that is defined by statute, and the degree of difference between "physical injury" and "serious physical injury" defines the difference between a first-degree and a second-degree assault charge. To illustrate, as it is defined in Section 556.061 R.S. Mo., "serious physical injury" is "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body." Section 556.061(28) R.S. Mo. (2000). Alternatively, "physical injury" is "physical pain, illness, or any impairment of physical condition." Section 556.061(20) R.S. Mo. (2000). If an individual can be proven to have attempted to cause "serious physical injury," as it is defined in Section 556.061, then a conviction can be sustained for assault in the first degree under Section 565.050 R.S. Mo.. If, rather, it can only be proven that the individual intended to cause "physical injury," then a first-degree assault charge is not appropriate, and second-degree assault is the only sustainable charge.

The same can be said of armed criminal action, when the otherwise innocuous article employed by the accused is alleged to be a "dangerous instrument." For the article to rise to the level of a "dangerous instrument," it must be proven that it was employed with an intent to cause "death or serious physical injury," rather than merely "physical injury." *See Pogue*, 851 S.W.2d at 706; *Idlebird*, 896 S.W.2d at 664. Absent such allegations or proof, a conviction for armed criminal action cannot be sustained.

Count Three of the amended information should have been dismissed, due to its failure to, "by any reasonable construction," *see Parkhurst*, 845 S.W.2d at 35, allege facts sufficient to sustain the State's burden of proving that Mr. Williams employed a "dangerous instrument" to commit the felony of second-degree assault. Accordingly, this Court should reverse Mr. Williams' conviction of armed criminal action, and remand to the trial court with instructions to dismiss Count Three of the amended information or, in the alternative, grant him a new trial.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, considered either singularly or cumulatively, Mr. Williams prays that this Court reverse his convictions for second degree assault and armed criminal action, and remand this case to the Circuit Court of Jackson County with instructions to dismiss the information, or in the alternative grant a judgment of acquittal, or in the alternative grant him a new trial, and for such other and further relief which the Court deems proper in the circumstances of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two correct copies of the above and foregoing was sent by First Class Mail on this ____ day of July, 2002, to:

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Jefferson City, Missouri 65102

_____

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellant's Brief in the above-captioned matter complies with Rule 84.06(b); was prepared using WordPerfect 9.0, printed in Times New Roman proportionally space type font at 13 point. I further certify that the above brief contains 15,057 words, excluding the cover page, signature block, certificate of service, and certificate pursuant to Rule 84.06(c). I further certify that the computer diskette provided herein contains two files: Williams Substitute Brief (00020652.WPD) and Williams Substitute Brief Title (00020633.WPD). I further certify that the computer diskette was new out of the box and that, after the brief was copied thereon, the diskette was scanned for viruses using OfficeScan NT, and no virus was detected.

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ATTORNEY FOR APPELLANT