IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC93108
	)	
DENFORD JACKSON,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 29
THE HONORABLE MICHAEL F. STELZER, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Denford Jackson, adopts the jurisdictional statement set out in Appellant's Substitute Brief, filed on April 2, 2013, in this Court in SC93108.

STATEMENT OF FACTS

Appellant, Denford Jackson, adopts the jurisdictional statement set out in Appellant's Substitute Brief, filed on April 2, 2013, in this Court in SC93108. Appellant will cite to the record on appeal as follows: "(L.F.)" for the legal file; "(Vol. I: Tr.)" for the May 3-4, 2011 trial transcript; "(Vol. II: Tr.)" for the May 5, 2011 trial transcript; "(S.Tr.)" for the sentencing transcript of July 22, 2011; "(Appx.)" for the appendix; and "(M. Remand)" for appellant's motion to remand for a new trial, or alternatively to supplement transcript record, filed in the Court of Appeals (*See* ED97113).

REPLY ARGUMENT – I

Prejudice, in the context of a missing transcript, should take into account the objective importance of the missing transcript, whether the defendant was represented by the same or a different attorney at trial, and possible reversible error identified from the existing record.

Respondent asserts that "if Appellant believed that such [possible] claims had merit, he should have raised them and either pointed to something in the record to support his claim or made allegations that the victim's cross-examination actually contained useful information for evaluating such claims" (Resp. Br., at 13). Respondent's point ignores Appellant's fundamental argument concerning the unfairness of being required to complete an allegation of error on an incomplete record (*See* App. Br., at 18-36).

Respondent's approval of *State v. Clark*, 263 S.W.3d 666, 674 (Mo. App. W.D. 2008) and Respondent's suggestion to raise claims or make allegations in the face of an incomplete record – because the lack of a sufficient record in such a case might warrant relief – raises more serious concerns that those addressed in the cases cited in Appellant's brief (Resp. Br., at 12-15; App. Br., at 28-32). Such an approach would encourage the drafting of claims that could not be refuted by the record.

Instead, Appellant urges this Court to consider the importance of the missing portion of the transcript, whether the defendant is represent on

appeal by a different counsel from trial, and potential reversible error, here including a challenge to the trial court's ruling on defense counsel's motion to suppress Ms. Shifrin's identification, and the court's failure to instruct on the lesser-included instruction of robbery in the second-degree.

REPLY ARGUMENT – II

Videotape evidence of a crime that is susceptible to different interpretations about whether an object in a person's hand is, or reasonably appears to be, a weapon and videotape evidence that shows the observer's ability or inability to perceive that object, as well as the observer's cross-examination testimony (though now missing) each provided a "basis" for the trial court to give a lesser-included instruction in this case.

Respondent traces the evolution of lesser-included instructions in Missouri, from *Olson*[1] to *Williams*,[2] and concludes that Missouri has never wavered from "*Olson*'s basic premise that 'a basis for a verdict acquitting' must be comprised of some evidence (as opposed to mere disbelief of evidence) either showing or giving rise to an inference that an element of the greater offense is lacking" (Resp. Br., 18-21, 22). Respondent acknowledges that under *State v. Santillan*,[3] a defendant is not required to put on affirmative evidence negating an element of the higher offense, but goes on to argue that, in *Santillan*, this Court never suggested that the basis for acquitting the

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[1] *State v. Olson*, 636 S.W.2d 318 (Mo. banc 1982).

[2] *State v. Williams*, 313 S.W.3d 656 (Mo. banc 2010).

[3] 948 S.W.2d 574 (Mo. banc 1997).

defendant of the charged offense "could rest solely on the jury's decision to disbelieve a piece of evidence" (Resp. Br., at 21-23).

Despite whatever may or may not have suggested by this Court's opinion in *Santillian*, however, it is clear that this Court has unequivocally rejected an argument that the basis for a lesser-included instruction could not derive from jurors' disbelief of evidence. In *Williams*, this Court wrote:

> While the State acknowledges that after *Santillan*, the defendant was not required to put on affirmative evidence, it nonetheless argues that Williams was not entitled to a lesser included offense instruction because there was no affirmative evidence supporting his instruction. Therefore, the State contends, Williams was not entitled to the instruction on the sole basis that the jury might disbelieve some of the State's evidence. This Court rejected that same argument in *Pond*, a post- *Santillan* case. Here, as in *Pond*, the State relies on pre- *Santillan* cases and argues that "a defendant is not entitled to a lesser-included offense instruction merely because a jury might disbelieve some of the State's evidence." [*State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004)]. In *Pond*, this Court rejected the State's argument, stating, "A defendant is entitled to an instruction on any theory the evidence establishes." *Id*. at 794.

313 S.W.3d at 661.

In considering when it is appropriate to instruct on a lesser-included offense, this Court has held that:

> "A defendant is entitled to an instruction on any theory the evidence establishes." *State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004). "Section 556.046.2 ... requires only that there be a *basis* for the jury to acquit on the higher offense in order for the court to submit an instruction for the lesser included offense." *State v. Santillan*, 948 S.W.2d 574, 576 (Mo. banc 1997) (emphasis added). "If the evidence supports differing conclusions, the judge must instruct on each." *Pond*, 131 S.W.3d at 794.

Williams, 313 S.W.3d at 659-660.[4]

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[4] *See also* MAI–CR 3d 304.11.G, which provides as follows: Instructions on lesser included offenses and lesser degree offenses require a written request by one of the parties. Section 565.025.3, RSMo Supp.2004. Moreover, such an instruction will not be given unless there is a basis for acquitting the defendant of the higher offense and convicting him of the lesser offense. Section 556.046, RSMo Supp.2004 (citation omitted). A defendant is entitled to an instruction on any theory the evidence establishes. A jury may accept part of a witness's testimony, but disbelieve other parts. If the evidence supports differing conclusions, the judge must instruct on each.

Additionally, in this context, this Court has recognized that the courts "leave[] to the jury determining the credibility of witnesses, resolving conflicts in testimony, and weighing evidence," and that "[t]he jury is permitted to draw such reasonable inferences from the evidence as the evidence will permit and may believe or disbelieve all, part, or none of the testimony of any witness" *Williams*, 313 S.W.3d at 660 (citations omitted).

Once these propositions of law are followed, it is clear that irrespective of at whose direction evidence is introduced, or how it makes its way into trial, evidence from which jurors could conclude that an element of the higher charge is missing, but present for the lower charge, provides a basis to instruct down.

In this case, the defense waived opening statement so the defense theory, at that point, could not be determined (*See* Vol. I: Tr. 165). In his cross-examination of the two witness present in the coffee shop, however, defense counsel questioned them about whether they had ever saw a gun or a weapon of any sort, or anything that looked like a gun; both indicated that they had not (Vol. II: Tr. 20, 44). In his cross-examination of a police officer, defense counsel questioned him regarding whether the object depicted in the video could be a cell phone (Vol. II: Tr. 87-88). The defense theory, by the time of the instruction conference, clearly included that Ms. Shifrin was mistaken or not believable on the issues of whether a weapon existed and

whether she reasonably believed one existed (*See* Vol. II: Tr. 95; *see also* Vol. II. Tr.: 113-123). Counsel requested a lesser-included instruction in writing (*See* Appx. A6; Vol. II: Tr. 94-95). In his argument to the court for the lesser-included instruction for robbery in the second degree, defense counsel set out precisely that which has been recognized by this Court – that jurors may not believe part of the testimony of a witness. Counsel stated:

> . . . the jury could take that video evidence and not only disbelieve her and disbelieve that there is a gun, but disbelieve her that she believed there was a gun. They may believe that she was completely mistaken, and therefore it was not a reasonable belief. . .

(Vol. II: Tr. 95).

The video in this case supported differing conclusions, and the lesser-included instruction for robbery in the second-degree should have been given.

Moreover, Respondent's brief does not address Appellant's argument that Ms. Shifrin's cross-examination testimony may have provided an additional basis for the court to have instructed down. (*See* Resp., Br., at 18-41; App. Br., at 42, 47). Analogous to *Pond*, *supra*, had Ms. Shifrin given, for example, inconsistent or vague answers during her cross-examination testimony, that may have provided a further basis for the court to have instructed down – though her testimony is now missing.

Certainly if this Court's precedent, and MAI–CR 3d 304.11.G, were to be consistently followed by lower courts, there may likely be more instances of trial court's giving lesser-included instructions, but that is no argument against that practice.[5] Jurors are the fact-finders in criminal trials, and in any case where there is evidence that reasonably could support an acquittal of a higher offense and the conviction of the lower, they should be given the option to find those facts. Such a practice appropriately recognizes the role of a jury in a trial and "leaves to the jury determining the credibility of witnesses, resolving conflicts in testimony, and weighing evidence." *Williams*, 313 S.W.3d at 660 (citations omitted).

CONCLUSION

WHEREFORE, based on his argument in Point I, Appellant, Denford Jackson, requests this Court to vacate and set aside his convictions and sentences, and remand his case for a new trial or for other such relief that this

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[5] *See* (Resp. Br., at 29-30), where Respondent argues that if jurors' disbelief of evidence "were, in itself, sufficient, then subsections 2 and 4 of section 556.046 – outlining when the trial court is 'obligated' to instruct down – would have little meaning, as there would always be 'a basis' to acquit of the greater offense. Appellant disagrees with Respondent's reading of *Williams* that in every case there would be "a basis" for an acquittal on the higher offense.

Court deems just and fair; and in Point II, he requests that this Court reverse the judgment of the trial court, and remand his case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on July 1, 2013 a true and correct copy of the foregoing brief was sent via the Efiling System to Shaun J. Mackelprang and Mary H. Moore, Office of the Attorney General, using the emails registered with the System. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word limitations of Rule 84.06. This brief was prepared with Microsoft Word for Windows, uses Cambria 13 point font, and contains 1,633 words, excluding the cover page, signature block, and certificates of service and of compliance.

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