No. SC93108

In the Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

DENFORD JACKSON,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit
The Honorable Michael F. Stelzer, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49672
MARY H. MOORE
Assistant Attorneys General
Missouri Bar No. 39717
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3700
Fax: (573) 751-5391
Shaun.mackelprang@ago.mo.gov

ATTORNEYS FOR RESPONDENT

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STATEMENT OF FACTS

The Appellant, Mr. Jackson, appeals his convictions of robbery in the first degree, § 569.020, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000. Mr. Jackson asserts that he is entitled to a new trial because (1) the transcript of his trial is incomplete, and (2) the trial court erred in refusing to submit an instruction for the lesser-included offense of robbery in the second degree (App.Sub.Br. 14, 16).

In a light favorable to the verdict, the evidence adduced at trial was as follows: On the morning of August 27, 2009, Leslie Shifrin was the only person working at Laclede Coffee Shop (Vol.I 166, 167).[1] She arrived at 7:00 a.m. to open the store, make coffee, and set out pastries (Vol.I 167). The store was not busy (Vol.I 167). There was a fundraiser at the store, and there were two people for that event, Jenna and Sara Schoenborn[2] (Vol.I 167, 168; Vol.II 4). Jenna was the marketing events manager for St. Louis Efforts for Aids (Vol.II 4). When Jenna arrived, Sara was setting up a display (Vol.II 5).

When Appellant entered the store, Sara welcomed him and explained

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[1] "Vol.I" refers to the transcript of proceedings on May 3-4, 2011; "Vol.II" refers to the transcript of May 5, 2011.

[2] Since Jenna and Sara Schoenborn have the same last name, they will be referred to by their first names to avoid confusion.

the fundraising effort (Vol.II 6). Appellant left them and went behind the counter where he stood very close to Ms. Shifrin (Vol.II 9). Because he was behind the counter and so close to the victim, Sara thought he worked there (Vol.II 30-31). Appellant and Ms. Shifrin looked like they were counting the money in the cash drawer (Vol.II 31).

Ms. Shifrin was preparing things in the kitchen when Appellant came into the kitchen area (Vol.I 172). She approached him and asked if she could help him (Vol.I 172). Appellant grabbed her arms and took her in the opposite direction (Vol.I 172). Ms. Shifrin felt something in her back; she looked down and saw it was a "silverish" revolver with a six-inch barrel (Vol.I 172, 173). Appellant told her to take him to the cash drawer (Vol.I 173). She complied with his demands and gave him the money from the cash drawer (Vol.I 173). Appellant asked where the rest of the money was, and she told him there was no other cash drawer (Vol.I 173). Appellant instructed her to go to the back of the store (Vol.I 174). She thought he meant the office, so she started that way, but he directed her into the kitchen (Vol.I 174). Appellant told her to lie on the floor and to count to twenty before getting up (Vol.I 174, 175).

When Ms. Shifrin heard Appellant leave the store, she got up and grabbed the phone (Vol.I 175). She gave the phone to Sara to call 911 because she was shaking too much to dial (Vol.I 175; Vol.II 10).

A surveillance video showed that Appellant had what appeared to be a

gun in his hand which he pressed against the victim's back during the robbery (State's Exhibit 1). Ms. Shifrin, Jenna, and Sara independently identified Appellant in a photo lineup and in court (Vol.I 179, 180-181; Vol.II 12, 16, 38, 41).

Appellant was found guilty of both counts (Vol.II 133). Appellant was sentenced to thirty years for robbery and ten years for armed criminal action with the sentences to be served concurrently (Sent.Tr.5).

On appeal, the Court of Appeals affirmed Appellant's conviction and sentence. This Court granted Appellant's application for transfer.

ARGUMENT

I. (incomplete transcript)

The trial court did not err in declining to vacate Appellant's convictions and sentences due to an incomplete transcript.

In his first point, Appellant asserts that he is entitled to a new trial because the transcript of his trial is incomplete (App.Sub.Br. 18). But because the transcript is substantially accurate and Appellant did not suffer any prejudice, a new trial is not warranted.

A. The standard of review

To be entitled to a new trial due to an incomplete transcript, the appellant is required to demonstrate that the transcript is inaccurate, that he exercised due diligence in trying to correct the transcript, and that the inaccuracies in the transcript prejudiced his appeal. *State v. Middleton,* 995 S.W.2d 443, 466-467 (Mo. banc 1999).

B. Appellant was not prejudiced by the errors and omissions in the transcript

The court reporter's equipment failed at several points pre-trial and during voir dire, resulting in the loss or partial loss of a statement, question, or answer on several occasions (Vol.I 5, 10-16, 42, 51, 95, 110, 113, 140, 143). It also failed five times during the examination of Ms. Shifrin before it completely failed. The first time was when Ms. Shifrin was testifying about

her current employment, the second time was when she was responding to a question about what type of business was Laclede Coffee, and the third time was when Ms. Shifrin was answering a question about the purpose of the fundraiser, the fourth time was during a question about how comfortable she was with her identification of Appellant, and the fifth time was during a series of question about the location of a door (Vol.I 166, 167, 179, 186).

Aside from noting where these brief omissions occur in the transcript, Appellant does not assert that these omissions were material or that he was prejudiced by them (*see* App.Sub.Br. 7, 21). And a review of the record reveals that nothing material was lost. Thus, these various errors do not warrant a new trial. *See Middleton v. State*, 995 S.W.2d at 466 (thirty-four omissions in the transcript did not prejudice the defendant).

The court reporter's equipment also failed entirely during the latter part of Ms. Shifrin's testimony, and the court reporter was unable to retrieve all of her testimony, including the entire cross-examination (Vol.I 187). Based on this omission, Appellant asserts that he is entitled to a new trial.

"An incomplete record on appeal does not necessarily warrant reversal, as relief is only appropriate if the appellant can demonstrate that due diligence was employed in an attempt to correct the shortcomings and that the incomplete nature of the record prejudiced him." *Skillicorn v. State*, 22 S.W.3d 678, 688 (Mo. banc 2000); *see State v. Middleton,* 995 S.W.2d at 466.

Here, Appellant asserts that he was prejudiced because "through Ms. Shifrin's cross-examination answers (the video tape notwithstanding) the trial court would have been obligated to instruct jurors on the lesser-included instruction of robbery in the second degree"(App.Sub.Br.21). But there are two basic flaws in this allegation. First, the video tape was admitted into evidence, and as Appellant appears to acknowledge by his reference to it, it showed that Appellant displayed what appeared to be a gun or dangerous instrument during the commission of the robbery. Second, in determining whether to submit a lesser-offense instruction, the trial court did not depend on the transcript as it heard all the evidence, including the cross-examination of Ms. Shifrin, before it determined that the lesser-offense instruction was not warranted.

Additionally, Appellant's speculative assertion is not borne out by the available record. To the contrary, it appears from the record that the victim steadfastly maintained that she had seen a gun, and that defense counsel's argument that the jury might conclude that there was no gun was based on still photographs taken from the video recording and defense counsel's belief that the jury could simply disbelieve the victim's testimony about the presence of a gun (Sent.Tr. 2). At no point did defense counsel argue that the victim had, on cross-examination, admitted that Appellant might not have had a gun. In fact, in his motion for new trial, Appellant alleged that defense

exhibits A-F "provided support for a finding that a theft occurred but no gun was used to accomplish that theft" (L.F. 77-78). There was no mention of any testimony by the victim supporting the lesser offense; rather, the motion for new trial asserted that the defense exhibits "gave the jury reason to disbelieve" the victim (L.F. 78).

At sentencing, defense counsel made arguments consistent with the allegations in motion for new trial, namely, that Appellant was entitled to a lesser-offense instruction because "the jury could disbelieve" the victim and conclude that there was no gun (Sent.Tr. 2). There was no allegation then (or at any point during trial, *e.g.*, in defense counsel's closing argument) that the victim ever stated that there was no gun. Rather, defense counsel pointed out that still photographs he had pulled from the video did not show a gun in Appellant's hand (Sent.Tr. 2).

But the prosecutor pointed out that the remainder of the video plainly showed a gun; thus, defense counsel's selective choice of a few still photographs was not substantial evidence of the absence of a gun (Sent.Tr. 3). In fact, the prosecutor stated (without ever being contradicted) that "at no time did [the victim] ever vacillate on there was a chrome – I believe she described it 'chrome-plated revolver' in the defendant's hand that she saw it, she felt it in her back" (Sent.Tr. 3). Thus, there is no reason to believe that the victim's testimony on cross-examination would have provided support for

the submission of a lesser-offense instruction.

Appellant further claims he was prejudiced because he is at a "major disadvantage" on appeal (App.Sub.Br.21). But this conclusory allegation fails to show any real possibility of prejudice. Appellant has not alleged that the evidence was insufficient, and he has not identified any element of robbery or armed criminal action that was not supported by substantial evidence. In fact, viewed in the light most favorable to the verdict, it is apparent that the evidence was sufficient to convict based solely on the victim's testimony on direct examination (Vol.I Tr. 172-180). Appellant has made no allegation that the victim recanted her testimony on cross-examination, and there is nothing in the record (*e.g.*, defense counsel's closing argument (Vol.I 113-123)) to suggest that the victim's testimony was destroyed on cross-examination by any contradictions.

Appellant also does not assert that any objection by the prosecutor during cross-examination was sustained, or that defense counsel was not allowed to pose certain questions. Likewise, there is no claim in the motion for new trial asserting that defense counsel's cross-examination of the victim was erroneously curtailed, or that any ruling by the trial court during the cross-examination was erroneous (L.F. 77-81). Had trial counsel believed that cross-examination of the victim was erroneously curtailed, or that the trial court made an erroneous ruling during cross-examination, it is probable that

such claims would have been included in Appellant's motion for new trial.

Finally, Appellant asserts that the incomplete transcript has denied him his right to due process, right to access to the Courts, and right to meaningful appellate review (*see* App.Sup.Br. 21, 35-36). He asserts that if he had a transcript of the cross-examination, that he "would have raised a Sixth Amendment confrontation issue, a challenge to the trial court's ruling on counsel's motion to suppress Ms. Shifrin's identification,[3] or any number of other viable and meritorious issues" (App.Sub.Br. 21). But there is nothing in the record to suggest that any of these claims would have had any merit, and if Appellant believed that such 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.

On the available record, it is apparent that Appellant was given the opportunity to confront and cross-examine the victim (even if it was not transcribed), and Appellant makes no factual assertion suggesting otherwise. The mere fact that no transcript was made does not negate the fact that confrontation and cross-examination occurred.

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[3] This specific basis for asserting error (the admissibility of the victim's identification) was not asserted in the Court of Appeals (*see* App.Br. 19).

Similarly, Appellant makes no allegation suggesting that the victim admitted on cross-examination that the police suggested to her which person she should pick out of a line-up. Moreover, to the extent that the defense challenged the admissibility of the victim's identification, there was a sufficient available record—including a deposition and the testimony of the victim and the testimony of the officer who conducted the line-up—for Appellant to raise such a claim on appeal. The issue was discussed pre-trial, and the court made its preliminary ruling at that time based on the information provided to it (Vol.I 6-10).

Moreover, if Appellant believed that the trial court's ruling was incorrect, he could have raised the claim, and the lack of a sufficient record might have warranted relief. But because Appellant has not raised these claims, he is not entitled to relief. *See State v. Clark*, 263 S.W.3d 666, 674 (Mo.App. W.D. 2008), *overruled on other grounds recognized in State v. Reando*, 313 S.W.3d 734, 740 n. 3 (Mo.App. W.D. 2010); *see generally State v. Christian*, 184 S.W.3d 597, 604-605 (Mo.App. E.D. 2006).

In short, Appellant has not shown a violation of his right to due process or access to the courts. Appellant was afforded his rights at trial, and he has every right to maintain this appeal and assert whatever claims he believes are meritorious. And if there were a claim that could not be reviewed due to the incomplete transcript, Appellant would be entitled to a new trial.

Appellant relies on *State v. Barber*, 391 S.W.3d 2 (Mo.App. W.D. 2012), to support his claim that without a complete transcript, appellate review is impossible in his case (App.Sup.Br. 26). The missing parts of the transcript in *Barber* included Barber's entire direct testimony and much of his cross-examination, which was the bulk of Barber's case in chief. *Id.* at 5, 6. Barber's claims on appeal included a claim that his conversation with another witness should have been excluded under attorney-client privilege. *Id.* at 6. The Court found that it was unable to review this claim without Barber's testimony about his belief that he had entered into an attorney-client relationship with that witness. *Id.* Appellant acknowledges that *Barber*'s holding was limited to the Court's ability to consider a specific claim, but he requests that this Court expand that holding to lessen Appellant's burden to establish that he suffered prejudice (App.Sup.Br. 26, 27). This Court should reject the invitation and continue to require a defendant to demonstrate prejudice.

Appellant cites to *United States v. Margetis*, 975 F.2d 1175, 1176-1177 (5th Cir. 1992), and *United States v. Preciado-Cordobas*, 981 F.2d 1206 (11th Cir. 1993), and argues that, because appellate counsel was not present at trial, Appellant should not be required to show "specific prejudice" (App.Sup.Br. 28). Appellant concedes that these cases represent "a minority view," but even if they were not contrary to Missouri case law, they would not necessarily compel reversal in Appellant's case. In *Margetis*, the court

"eschewed a mechanistic approach requiring an automatic reversal" and advocated a case-by-case review that requires reversal only when a "substantial and significant portion of the transcript is missing." *Id*. at 1177. The court in *Margetis* held that the reviewing court must consider whether the missing portion of the transcript prejudiced the defendant. *Id.* The court affirmed although part of a witness's testimony was missing.[4] *Id.*

Appellant also cites three cases out of Florida (App.Sub.Br. 32), and he urges this Court to adopt the dissent from *Jones v. State*, 923 So.2d 486 (Fla. 2006),[5] because it "makes the most sense, particularly in the posture Mr. Jackson's case comes to this Court" (App.Sup.Br.32). The *Jones* Court held

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[4] The court reporter testified that the computer disk that contained the testimony was defective and that her shorthand notes were missing a page. *Id.* at 1176. The trial court found no prejudice from the missing portion of the record. *Id.*

[5] The other two cases were *Jones v. State,* 870 So.2d 904 (Fla. 4th Dist. 2004), and *Vargas v. State*, 902 So.2d 166 (Fla. 3d Dist. 2004). The first case was the district appellate court decision that was then transferred to the Florida Supreme Court in *Jones v. State*, 923 So.2d 486, and *Vargas* was the case disapproved in *Jones v. State*, 923 So.2d 486.

that the Appellant was required to demonstrate prejudice. *Id.* at 487-490. Appellant instead relies on the dissenting opinion in that case, but even the dissent argued for a balanced approach and agreed with the majority that there must be "some showing that the defendant is prejudiced by the missing record." *Id.* at 494.

In short, Appellant failed to establish that he suffered any prejudice as a result of the incomplete transcript. This point should be denied.

II. (lesser-included offense instruction)

The trial court did not err in refusing to submit an instruction for the lesser-included offense of robbery in the second degree.

In his second point, Appellant asserts that the trial court erred in refusing to submit an instruction for the lesser-included offense of robbery in the second degree (App.Sub.Br. 37). But because there was no basis to acquit Appellant of robbery in the first degree, as required by § 556.046, the trial court did not err in refusing the proffered instruction.

A. The standard of review

"At the close of the evidence, or at such earlier time as the court may direct, counsel shall submit to the court instructions and verdict forms that the party requests be given." Rule 28.02(b). "The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes On Use shall constitute error, the error's prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 28.03." Rule 28.02(f). *State v. Williams*, 313 S.W.3d 656, 659 (Mo. banc 2010).

B. A trial court is obligated to instruct on a lesser offense if there is "a basis for a verdict acquitting" of the greater offense

Under section 556.046, "[a] defendant may be convicted of an offense

included in an offense charged in the indictment or information." § 556.046.1 RSMo Cum. Supp. 2012. Here, it is not disputed that robbery in the second degree is a lesser-included offense of robbery in the first degree.

The question, rather, is whether the evidence in this case obligated the trial court to submit the lesser offense. "The court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." § 556.046.2, RSMo Cum. Supp. 2012; *see also* § 556.046.4, RSMo Cum. Supp. 2012. A threshold issue, then, is what constitutes "a basis" to acquit of the greater offense.

Missouri courts have devoted considerable analysis to the meaning of "a basis for a verdict" to acquit. In *State v. Olson*, 636 S.W.2d 318, 321 (Mo. banc 1982), *overruled in part by State v. Santillan*, 948 S.W.2d 574 (Mo. banc 1997), the Court rejected the idea that "a basis" to acquit could be derived solely from the jury's disbelief of evidence necessary to establish an element of the greater offense:

> The key phrase of [section 556.046.2] is "a basis for a verdict". It could be argued that the jury's disbelief of the evidence necessary to establish an element of the greater offense is such a basis. However, such a construction would require an instruction on a lesser included offense in the vast majority of cases. It is

> appropriate to construe a statute with reference to the comment accompanying that statute when enacted. … The applicable comment indicates that it is an adoption of the existing general rule and cites *State v. Craig*, 433 S.W.2d 811 (Mo. 1968). *Craig* declares: "In order to require the giving of an instruction on the included or lesser offense there must be evidentiary support in the case for its submission." *Craig*, 433 S.W.2d at 815. *Also see State v. Achter*, 448 S.W.2d 898 (Mo. 1970). Even if the jury were to "disbelieve some of the evidence of the State, or decline to draw some or all of the permissible inferences, (this) does not entitle the defendant to an instruction otherwise unsupported by the evidence, on the issue of accidental homicide pursuant to § 559.050,...." *Achter*, 448 S.W.2d at 900. It has consistently been held that an instruction on a lesser included offense is required only where there is evidence with probative value which could form the basis of an acquittal of the greater offense and a conviction of the lesser included offense.

State v. Olson, 636 S.W.2d at 321. The Court distilled its holding as follows: "Section 556.046.2 limits the requirement of instructing down to those instances where there is some affirmative evidence of a lack of an essential element of the higher offense which would not only authorize acquittal of the

higher but sustain a conviction of the lesser." *Id.* at 322.

In *State v. Santillan*, 948 S.W.3d 574 (Mo. banc 1997), the Court partly overruled *Olson*, but only to the extent that it could be read to support an argument asserted by the state. In that case, the defendant was charged with murder in the first degree, and he requested an instruction on the lesser offense of murder in the second degree. *Id.* at 574-575. The state relied on *Olson* and *State v. Chambers*, 884 S.W.2d 113 (Mo.App. W.D. 1994), and argued that because the defendant's defense "was limited to evidence of his innocence, he was not entitled to a second degree instruction." *Santillan*, 948 S.W.3d at 576. In other words, the state apparently relied on *Olson* and *Chambers* to argue that unless the *defendant* presented some evidence to support an acquittal of the greater offense, the defendant was not entitled to the lesser-offense instruction.

The Court rejected the state's argument and observed that § 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." *Id.* The Court, thus, held that "[i]f a reasonable juror could draw inferences from the evidence presented that the defendant did not deliberate, the trial court should instruct down." *Id.* The Court then clarified that "[t]he defendant is not required to put on affirmative evidence as to lack of deliberation to obtain submission of a second degree murder instruction." *Id.*

And, finally, the Court stated that "[t]o the extent that *Olson* and *Chambers* may be read to require a defendant to put on affirmative evidence as to the lack of an essential element of the higher offense, they are overruled." *Id.*

Importantly, however, the Court did not reject *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. In fact, the Court expressly acknowledged the ongoing validity of *State v. Mease*, 842 S.W.2d 98 (Mo. banc 1992)—a case in which second-degree murder had not been submitted—and stated, "This is not to say that a second degree murder instruction is required in every case in which first degree murder is charged." *Santillan*, 948 S.W.2d at 576. Instead, the Court held that if the evidence gave rise to an inference that the defendant did not deliberate, then the trial court was obligated to instruct on the lesser offense.

The Court observed that "[a] jury may draw different inferences from the facts on the issue of whether the defendant deliberated." *Santillan*, 948 S.W.2d at 576 (citing *State v. Stepter*, 794 S.W.2d 649, 653 (Mo. banc 1990)). And, having considered the evidence in Santillan's case, the Court concluded that "[a]lthough the evidence of mental state could be interpreted by a jury as evidence of deliberation, a reasonable juror could also find that the evidence did not prove deliberation beyond a reasonable doubt but was sufficient to

find that the appellant had the requisite mental state for second degree murder." *Id.* at 576.[6] The Court explained that Santillan's case was not like *Mease* because "none of the other evidence approaches the level of evidence in *Mease* so as to compel a determination that no rational fact finder could conclude that the defendant acted without deliberation." *Id.* at 577. The Court concluded that "the evidence in this case to establish deliberation can support that inference, but that inference is not imperative." *Id.* In short, the Court held that "a reasonable juror could have found that appellant did kill [the victim] but did so without deliberation." *Id.*

At no point did the Court in *Santillan* suggest that "a basis for a verdict acquitting the defendant of the offense charged" could rest solely on the jury's decision to disbelieve a piece of evidence. Rather, the Court made plain that a lesser-offense instruction was required in *Santillan* because the jury could have inferred from the evidence that the defendant did not deliberate—*i.e.*, there was some evidence that supported an inference that the defendant did not commit the greater offense.

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[6] As an example, the Court observed that the relationship between defendant, the victim, and a woman that both men wanted to date, gave rise to more than one possible inference, including that the defendant did not deliberate and only knowingly killed the victim. *Santillan*, 948 S.W.2d at 576.

Since *Santillan*, the Court has repeatedly restated the general requirement that there be "some evidence" to acquit of the charged offense before the trial court would be obligated to instruct down. *See e.g. State v. Thomas*, 161 S.W.3d 377, 380-381 (Mo. banc 2005) (there was a basis to acquit the defendant of acting knowingly because "Thomas testified that she did not intend to stab Jefferson, but instead jerked the knife at him to ward him off and protect herself from getting hit again"); *State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004) (" 'In order for there to be a basis for an acquittal of the greater offense, there must be some evidence that an essential element of the greater offense is lacking and the element that is lacking must be the basis for acquittal of the greater offense and the conviction of the lesser.' "); *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002) ("If a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established, the trial court should instruct down."); *State v. Hibler*, 5 S.W.3d 147, 149 (Mo. banc 1999) ("A reasonable jury could have believed that appellant did not attempt to kill the victim or cause her serious physical injury. Therefore, there was a basis for acquitting appellant of first degree assault as charged in count one."); *see also State v. Westfall*, 75 S.W.3d 278, 281 (Mo. banc 2002) ("This Court has also recognized that jury instruction, as to all potential convictions and defenses, is so essential to ensure a fair trial that if a reasonable juror could draw inferences

from the evidence presented the defendant is not required to put on affirmative evidence to support a given instruction."); *State v. Beeler*, 12 S.W.3d 294, 299 (Mo. banc 2000) (Section 556.046.2 "provides that lesser included offense instructions are permitted, but the court is not obligated to [submit them] unless there is a basis for acquitting the defendant of the offense charged and convicting him of the included offense").[7]

The Court has also made plain, however, as it did in *Santillan*, that the defendant need not present any evidence to be entitled to a lesser-offense instruction. *See*, *e.g.*, *State v. Pond*, 131 S.W.3d at 794. In *Pond*, the greater offense of statutory sodomy in the first degree required the jury to find that the defendant's fingers penetrated the victim's vagina, and the evidence presented at trial was sufficient to support that finding. 131 S.W.3d at 794. But the defendant pointed out that other evidence supported the conclusion that the defendant had only touched the victim's vagina without penetrating

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[7] In at least one case, however, the Court used language that varied from the statutory language and, in a shorthand fashion, collapsed the test into a single inquiry of whether the evidence would have supported a conviction on the lesser offense. *See State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999) ("If a reasonable juror could draw inferences from the evidence presented that the defendant acted recklessly, the trial court should instruct down.").

it. *Id.* Specifically, there was evidence that the victim "originally told her mother that Pond 'touched' her and did not say he penetrated her." *Id.* Additionally, the victim had previously said that "Pond 'pushed on her private area," that "Pond 'touched her private area, vagina area," and that "Pond 'was touching her at a bad spot.' " *Id.*

As in *Santillan*, the state again argued that "because Pond presented no affirmative evidence" at trial, he was not entitled to a lesser-offense instruction. *Id.* at 794.[8] The Court again rejected the state's argument, pointing out that the state's argument was based on cases from the Court of Appeals that had relied on *Olson*. *Id.* The Court then reiterated its holding in *Santillan* and stated, "Like *Olson*, the cases cited by the State are overruled, to the extent they require affirmative evidence from the defendant." *Id.* The Court then analyzed the question of whether there was evidence to acquit the defendant of the greater offense. And in light of the victim's prior statements, the Court held that there was a basis to acquit of the greater offense and, thus, that the lesser offense should have been submitted. *Id.* ("A reasonable jury could find the prior statements more believable than those at trial.").

In reaching its conclusion, the Court observed that "[a] defendant is

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[8] In support of its argument, the state cited four cases that had relied on *Olson*—three of which had been decided after *Santillan*.

entitled to an instruction on any theory the evidence establishes." *Id.* at 795 (citing *Hibler*, 5 S.W.3d at 150). The Court also pointed out that "[t]his Court leaves to the jury determining the credibility of witnesses, resolving conflicts in testimony, and weighing evidence." *Id.* (citing *Rousan v. State*, 48 S.W.3d 576, 595 (Mo. banc 2001)). And, finally, the Court stated that "[a] jury may accept part of a witness's testimony, but disbelieve other parts." *Id.* (citing *State v. Redmond*, 937 S.W.2d 205, 209 (Mo. banc 1996)).

In other words, because the jury was not bound to accept the state's version of the facts, and because there was affirmative evidence of touching without penetration (the victim's prior statements), the trial court was obligated in *Pond* to submit an instruction for the lesser offense. The Court did not, however, hold that "a basis for a verdict acquitting" of the greater offense could be premised solely on the jury's ability to disbelieve part of the victim's trial testimony. Rather, as set forth above, the Court reiterated the general rule and found that the victim's prior statements provided the requisite "basis" to acquit.

Similarly, in *State v. Williams*, 313 S.W.3d 656, 659 (Mo. banc 2010), the Court reiterated the general rule that there must be "a basis" to acquit of the greater offense. The Court then outlined the general principles that govern the jury's consideration of evidence and concluded that "[t]he jurors could have believed [the defendant] was complicit in the taking of money

from [the victim], believed [the victim's] testimony that no gun or knife was used, and disbelieved [the victim's] testimony about the use of physical force." In short, as in *Pond*, the jury was not required to accept the state's theory of the case, and the defendant was entitled to any instruction that the evidence supported. *Id.* at 660. Moreover, although *Williams* employed language implying that the jury's ability to disbelieve evidence provided "a basis" to acquit, it was not merely the jury's ability to disbelieve the state's evidence of forcible stealing that obligated the trial court to give the lesser-offense instruction—or at least the opinion should not be construed in that manner. Rather, as the Court outlined in its opinion, there was an affirmative basis in the record to find that no force had been used. *See id.* at 657 (defendant testified that "he did not see [his co-actor] forcibly take marijuana or money from [the victim]," and that "he had not personally taken or forcibly taken the marijuana, money or anything from [the victim]").

With regard to the evidence presented in *Williams*, the state had taken the position that there was no affirmative evidence to acquit of the greater offense and convict of the lesser because the defendant's testimony (if believed) had seemingly described a simple drug sale that involved neither robbery nor stealing (*i.e.*, the testimony may have provided a basis to acquit, but it did not provide a basis to convict of the lesser offense). *See id.* at 657, 660-661. The state, thus, argued that the only other way to acquit of the

greater offense was for the jury to disbelieve part of the state's case. *See id.* at 661 (the state argued that the defendant "was not entitled to the instruction on the sole basis that the jury might disbelieve some of the State's evidence"). The Court rejected this argument as a repetition of the argument that the state had made in *Pond*, and the Court reiterated both that the defendant need not present any evidence, and that " 'A defendant is entitled to an instruction on any theory the evidence establishes.' " *Id.*

In other words, similar to *Pond*, the jury was not bound to accept the state's version of the facts without exception. Rather, because the defendant's testimony provided a basis for concluding that there was no forcible stealing, and because there was otherwise evidence of stealing, there was a basis to acquit of robbery and to convict of stealing. Thus, although there is language in *Williams* implying that the jury's ability to disbelieve evidence can provide "a basis" to acquit of the greater offense, *Williams* should not be read as holding that the jury's ability to disbelieve evidence is, standing alone, "a basis" to acquit that obligates the trial court to instruct down. Indeed, if the jury's ability to disbelieve 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.

Any suggestion that the trial court must always instruct down upon

request is not consistent with § 556.046 or this Court's precedents. In *State v. Lowe*, 318 S.W.3d 812, 817 (Mo.App. W.D. 2010), the Court of Appeals applied this Court's precedents and recognized that "a lesser included instruction is not required in every case." *Id.* "A defendant is not entitled to an instruction on a lesser included offense unless the instruction is supported by 'evidence of *probative value*' and 'inferences which *logically flow* from the evidence.' " *Id.* (quoting *State v. Deckard*, 18 S.W.3d 495, 499 (Mo.App. S.D. 2000)). "A lesser included instruction need not be given unless a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established." *Id.* (citing *Williams*, 313 S.W.3d at 660).

Moreover, while the court acknowledged that a defendant is entitled to any instruction supported by the evidence, the court observed that "this does not mean that *any* evidence, no matter how limited or lacking in probative value, will support the giving of an instruction on a lesser included offense." *Id.* at 821. Instead, Missouri courts "apply the reasonable juror standard, requiring that an instruction be given for a lesser included offense only '[if] a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established.' " *Id.* (quoting *Williams*, 313 S.W.3d at 660).

In sum, this Court has never abandoned the basic premise set forth in

Olson (and stated in § 556.046), that "a basis for a verdict acquitting the defendant" of the greater offense must consist of "some evidence" that casts doubt on an element of the greater offense. Thus, while the jury is not bound to accept a particular set of facts, the mere fact that the jury can disbelieve evidence of the greater offense does not, in itself, obligate the trial court to instruct down. There must be some affirmative evidence, or a reasonable inference from the evidence, that would support a verdict of acquittal on the greater offense.

C. There was no "basis for a verdict acquitting" Appellant of robbery in the first degree

At the instructions conference, Appellant offered two lesser-included offense instructions—one for robbery in the second degree, and one for stealing (Vol.II 94). Appellant argued that robbery in the second degree should be submitted because the jurors could consider the evidence in the surveillance video as supporting his claim that there was no gun and then "not only disbelieve [the victim] and disbelieve that there is a gun, but disbelieve her that she believed that there was a gun" (Vol.II 95). Appellant asserted, "They may believe that she was completely mistaken, and therefore it was not a reasonable belief" (Vol.II 95).

The prosecutor argued that the victim's testimony concerning a gun was "uncontradicted and uncontroverted" (Vol.II 96). He argued that the

video showed that there was something in Appellant's hand that was consistent with a gun (Vol.II 96). The prosecutor said that the video even appeared to show Appellant checking the gun to ensure that it was loaded (Vol.II 96).

After considering the parties' arguments, the trial court concluded that there was no evidence that would "support a reasonable finding that there is no robbery first, but in fact a robbery second." (Vol.II 97). The trial court stated, "I think to submit this instruction here would basically mean that any time there's a robbery first you, by definition, have at least a robbery second, so I don't think that the – this type of instruction is meant to be given every time we have a robbery first" (Vol.II 97-98). The trial court did not err.

In relevant part, to find Appellant guilty of robbery in the first degree, the jury was required to determine whether Appellant, "in the course of taking the property . . . displayed or threatened the use of what appeared to be a deadly weapon or dangerous instrument" (L.F. 59). The question, then, is whether there was any evidence that cast doubt upon the victim's testimony that Appellant apparently put a gun to her back during the robbery. There was not.

As set forth above, the victim testified that during the robbery, she felt something in her back, and when she looked down, she saw that it was a "silverish" revolver with a six-inch barrel (Vol.I 172-173). Under this threat of

force, the victim complied with Appellant's demands and gave him the cash from the coffee shop cash drawer (Vol.I 173). The victim also complied with Appellant's demands that she move in various directions and engage in conduct designed to enable him to escape (*e.g.* lying on the floor so that she could count to twenty) (Vol.I 173-175). A surveillance video showed that Appellant had what appeared to be a gun in his hand which he pressed against the victim's back during the robbery (State's Exhibit 1).

When the victim heard Appellant leave the store, she got up and grabbed the phone (Vol.I 175). She gave the phone to one of the other women in the shop to call 911 because she was shaking too much to dial (Vol.I 175; Vol.II 10). At no point did the victim testify that she had not seen a gun, and there was no evidence that the victim ever stated that Appellant had not used a gun.

A police officer who viewed the video testified that Appellant's hand appeared "to be either in his pocket or at his waistband the entire time," and that the location of his hand was "indicative of somebody trying to hide something, like a gun or other contraband" (Vol.II 63). The officer also testified that in Defense Exhibit D (a still photograph from the video), Appellant's hands were "in the small of [the victim's] back" (Vol.II 84). The officer further testified that "[i]t appears that there's an object in his hand"—an object that "dark colored" and "not the same color as his hand" (Vol.II 84).

When asked what he saw in Defense Exhibit C (another still photograph), the officer testified, "I see what would appear at first glance that he's holding a small pistol to her back" (Vol.II 85). The officer testified that Defense Exhibit A showed the same thing (Vol.II 85). The officer also testified that the video showed Appellant "pulling a handgun out of [his] shorts and checking to see if it's loaded" (Vol.II 86). The officer testified that the video showed "an object" in Appellant's hands—a "[d]ark colored" object that was "[b]lue or black" (Vol.II 86). The officer further testified that the outline of the object was "consistent" with a small revolver (Vol.II 86). The officer testified that it appeared that Appellant checked to see whether the gun was loaded by popping the cylinder out of the side of the gun (Vol.II 86).

On cross-examination of the officer, defense counsel asked the following question: "[I]t's possible that a person could pull something out that appears to be a gun to you on this blurry video, but could be a cell phone; isn't that possible?" (Vol.II 87). The officer agreed that "It's possible" (Vol.II 87). At no point did the officer testify, however, that it appeared that Appellant had not displayed a gun.

Based on this record, Appellant argues that "a questionable essential element" was whether he used a gun (App.Sub.Br. 42). He argues that the video "at least provided a question for reasonable jurors to use their eyes and determine that question of fact," namely, whether Appellant used a gun

(App.Sub.Br. 42). But this argument does not address the relevant question that the trial court had to resolve in determining whether to instruct on the lesser offense. The state did not have to prove that Appellant used a gun, and the jury was not asked to determine whether there was, in fact, a gun or other dangerous instrument. Rather, the state had to prove that Appellant displayed what appeared to be a deadly weapon or dangerous instrument. And, as outline above, there was no evidence that Appellant did not use what appeared to be a gun.

Appellant next argues that the video also raised the factual question of "the reasonableness of whether that object could have appeared to be a gun or a dangerous or deadly weapon to [the victim], and whether she had the ability to perceive the object" (App.Sub.Br. 42-43). But the video, which was made part of the record on appeal, confirmed the victim's testimony that she saw what appeared to be a gun. The video did not refute the victim's testimony, and it did not support a reasonable inference that Appellant was displaying something that did not appear to be a deadly weapon or dangerous instrument. To the contrary, as the officer testified, Appellant's actions in the video were entirely consistent with a person who was using a gun.

Appellant next argues that "[i]n keeping with case law that provides that jurors are to weigh the evidence, that jurors can believe some testimony and evidence but disbelieve other testimony and evidence, that jurors are to

make inferences, and that any doubt about whether to provide an instruction should be resolved by providing the instruction, the instruction should have been given in this case" (App.Sub.Br. 43, citing *Pond*, 131 S.W.3d at 794.). But, as discussed above, while it is certainly true that the jury is not bound to accept any witness's historical account, there must still be some evidence, or an inference from the evidence, that calls into question an element of the greater offense. Here, Appellant has not identified any evidence from any source that indicates that Appellant did not display what appeared to be a deadly weapon or dangerous instrument.

Appellant argues that the trial court apparently believed that Appellant "would need to present affirmative evidence that the object was not a gun" (App.Sub.Br. 43, citing Vol.II 97). But the trial court never suggested that Appellant had to produce the evidence. The trial court merely correctly stated the law—that there had to be "a basis" to acquit of the greater offense; the trial court stated:

> I think then there has to be evidence that would negate one of the elements and then support, and I think – because of the way the language is worded in the instruction, I just don't think the facts as submitted here would support a reasonable finding that there is no robbery first, but in fact a robbery second.

(Vol.II 97). This was exactly consistent with § 556.046.

Appellant cites *State v. Hineman*, 14 S.W.3d 924 (Mo. banc 1999), as an analogous case (App.Sub.Br. 45). In *Hineman*, the defendant was charged with assault in the first degree against a small child, and "the nature of the injury and the other evidence" supported an inference that the defendant acted knowingly. *Id*. at 928. But there was other evidence from which it could have been inferred that the defendant did not act knowingly and instead acted recklessly. The evidence showed, for example, that the defendant and his fiancée "related stories of several 'accidents' that had occurred." *Id*. at 925. The defendant admitted in an interview with a detective that "he might have caused the leg injury the night before by pulling on [the victim's] leg." *Id*. at 926. An expert testified that the injury suffered by the victim could have been "inflicted or accidental." *Id*. at 926. The defendant testified at trial and "denied any responsibility for [the victim's] injuries, stating that the injuries were the result of a series of accidents." *Id*. The Court summarized the evidence supporting the inference that the defendant did not act knowingly and instead acted recklessly, as follows:

> Various explanations were introduced into evidence as to how the victim was injured. There was testimony that Hineman pulled on the victim's leg: (1) because it was caught in a blanket; (2) because he was angry at his fiancée's stepmother; and (3) out to the side, not hard at all. As previously noted, there was

> testimony that Hineman demonstrated how he had placed two hands on the leg and pulled it out to the side. There was testimony that the injury occurred when Hineman "scooted" the victim down in his crib after moving the blankets. There was testimony that Hineman did not try to hurt Dakota. There was expert testimony that injuries such as the injury in this case can be accidental. There was testimony that Hineman was loving and caring towards the child.

Id. at 927. Given the evidence in *Hineman*, the Court found that there was a basis to acquit of the greater offense and convict of the lesser offense. *Id.* at 927-928. Here, by contrast, there was no evidence showing that Appellant did not display a deadly weapon or dangerous instrument.[9]

Appellant's case is more closely analogous to *State v. Neil*, 869 S.W.2d

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[9] Appellant's reliance on *State v. Coker*, 210 S.W.3d 374 (Mo.App. S.D. 2006) is similarly misplaced. There, as in *Pond*, where the defendant was charged with a sexual offense that involved penetration, the victim's various statements about the defendant touching his "butt" included statements indicating that the defendant had merely "touched" the victim's anus without penetrating the anus. *Id.* at 383-384. Thus, there was a basis to acquit of the greater offense and convict of the lesser.

734 (Mo. banc 1994). There, the Court rejected the defendant's contention that the jury should have been instructed on robbery in the second degree. *Id.* at 739. The Court stated the rule that a trial court is not obligated to instruct the jury on a lesser offense unless there is a basis for acquitting the defendant of the offense charged and convicting him of a lesser offense. *Id.* at 739 (citing *State v. Mease*, 842 S.W.2d at 110-111). The Court stated: "Here, defendant's testimony did not provide the basis for the lesser included offense. His defense was alibi." *Id.* The Court then concluded that "[w]hen defendant denies the commission of the charged offense and there is no evidence to mitigate the offense or provide a different version of the offense, instructing down is not required." *Id.* (citing *State v. Petary*, 781 S.W.2d 534, 544 (Mo. banc 1989), *vacated,* 494 U.S. 1075, *aff'd*, 790 S.W.2d 243 (Mo. banc)). In short, in *Neil*, "[u]nder the evidence . . ., defendant was either guilty of robbery in the first degree or he was not guilty of any crime." *Id.* Here, while Appellant did not testify, there was no evidence that provided a different version of the offense, and, specifically, there was no evidence that supported an inference that Appellant did not display what appeared to be a deadly weapon or dangerous instrument. Thus, as in *Neil*, the trial court did not err in refusing the lesser-offense instruction.

Appellant's argument ultimately comes down to his assertion that the victim's testimony that she saw a gun might not have been believable

(App.Sub.Br. 45-47). But the mere fact that the jury might have disbelieved that part of the victim's testimony was not sufficient to require the trial court to instruct down. Instead, consistent with § 556.046 and this Court's prior cases, there had to be some evidence drawing an element of the greater offense into question. There had to be some evidence from which jurors could have reasonably inferred that Appellant did not display what appeared to be a deadly weapon or dangerous instrument.

As the Court of Appeals stated in *State v. Lowe*, 318 S.W.3d at 817, "[a] defendant is not entitled to an instruction on a lesser included offense unless the instruction is supported by 'evidence of *probative value*' and 'inferences which *logically flow* from the evidence.' " *Id.* (quoting *State v. Deckard*, 18 S.W.3d at 499). "A lesser included instruction need not be given unless a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established." *Id.* (citing *Williams*, 313 S.W.3d at 660).

"[T]his does not mean that *any* evidence, no matter how limited or lacking in probative value, will support the giving of an instruction on a lesser included offense." *Id.* at 821. Instead, Missouri courts "apply the reasonable juror standard, requiring that an instruction be given for a lesser included offense only '[if] a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not

been established.' " *Id*. (quoting *Williams*, 313 S.W.3d at 660).

Here, there was no evidence that negated the essential element that Appellant displayed what appeared to be a deadly weapon or dangerous instrument. The victim testified that she saw a gun, the video and still photographs confirmed the victim's testimony that Appellant was holding an object that appeared to be a gun, and the video and still photographs confirmed that Appellant engaged in conduct that was entirely consistent with an armed robber. There was no evidence or reasonable inference suggesting the contrary. This point should be denied.

CONCLUSION

The Court should affirm Appellant's convictions and sentences.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

MARY H. MOORE
Assistant Attorney General
Missouri Bar No. 39717

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3700
Fax: (573) 751-5391

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 9,036 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; that the electronic copy of this brief was scanned for viruses and found to be virus free; and that notice of the filing of this brief was sent through the Missouri eFiling System this 5th day of June, 2013, to:

ANDREW E. ZLEIT
1010 Market Street, Suite 1100
St. Louis, MO 63101
Tel.: (314) 340-7662
Fax: (314) 340-7685
Andy.Zleit@mspd.mo.gov

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov