No. SC94313

In the

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent/Cross-Appellant,

v.

ELVIS SMITH,

Appellant/Cross-Respondent.

Appeal from the City of St. Louis Circuit Court

Twenty-Second Judicial Circuit

The Honorable Julian L. Bush, Judge of Division Four

APPELLANT'S/CROSS-RESPONDENT'S SUBSTITUTE REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

Statutes

JURISDICTIONAL STATEMENT

Appellant Smith adopts the jurisdictional statement set out in Appellant's Brief, Statement and Argument.[1]

STATEMENT OF FACTS

Appellant Smith adopts the statement of facts set out in Appellant's Brief, Statement and Argument.

[1] Appellant Elvis Smith (Mr. Smith) will cite to the appellate record and briefs as follows: Trial Transcript, "(Tr.)"; Legal File, "(L.F.)"; Appellant's Brief, "(App. Br.)"; Cross-appellant/Respondent's Brief, "(Resp. Br.)." All statutory references are to RSMo 2000 unless otherwise stated.

REPLY POINT – I.

The trial court clearly erred in refusing the defense's self-defense instruction A because Mr. Smith's assertion that the shooting death of Jnylah Douglas was accidental, and not intentional, did not preclude the submission of a self-defense instruction on Count I of murder in the first degree under the theory of transferred intent, and substantial evidence from the defense and the State supported submission of a self-defense instruction on Count I of murder in the first degree and Count III of assault in the first degree for the accidental, unintentional killing of Jnylah Douglas by a random shot fired at Martez Williams and for shooting at Martez Williams. The trial court's failure to submit the proffered self-defense instruction prejudiced Mr. Smith. The trial court's error denied Mr. Smith's right to due process of law, to present a defense, and to a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution. This Court must reverse Mr. Smith's convictions and remand for a new trial.

State v. Avery, 120 S.W.3d 196 (Mo. banc 2003)

State v. Arellano, 736 S.W.2d 432 (Mo. App. W.D. 1987).

POINT – II.

The trial court did not clearly err in dismissing Count III of assault in the first degree and Count IV of armed criminal action after the jury's verdicts because Mr. Smith's conviction of Counts III and IV violated his right to be free from double jeopardy as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and section 556.041, in that Mr. Smith's convictions of Count I of murder in the first degree and Count II of armed criminal action were predicated on proof of the same conduct of shooting at Martez Williams that underlie Mr. Smith's conviction of Count III of assault in the first degree and Count IV of armed criminal action, such that it was impossible to commit the charged murder and concomitant armed criminal action in Counts I and II without committing the assault and armed criminal action in Counts III and IV. Because Counts III and IV were lesser-included offenses of Counts I and II the trial court properly refused the jury's verdicts.

Williams v. State, 646 S.W.2d 848 (Mo. App. E.D. 1982);

State v. King, 748 S.W.2d 47 (Mo. App. E.D. 1988);

U.S. Const., Amend. V and XIV;

§§ 556.041, 556.046, 565.020, 565.021, & 565.050.

REPLY ARGUMENT – I.

In its brief, respondent first contends that because Mr. Smith's testimony was that the shooting was an accident, Mr. Smith was not entitled to an instruction on self-defense under the "standard" announced in *State v. Avery*, 120 S.W.3d 196, 201 (Mo. banc 2003) (Resp. Br. 22). In *Avery*, this Court acknowledged the general rule that "if a defendant takes the position at trial that a killing was accidental, as did Ms. Avery . . . , the defendant normally may not also submit self-defense." 120 S.W.3d at 201.

This general rule, does not apply, however, if inconsistent evidence of self-defense is offered by the State or by the defendant through the testimony of a third party. *Id.* "The rule in this state is that the testimony of a defendant against interest does not rise to the dignity of a conclusive judicial admission and hence, if justified by other evidence, he is entitled to an instruction on self-defense even though inconsistent with his own testimony." *State v. Baker*, 277 S.W.2d 627, 629-630 (Mo. 1955). Such inconsistent evidence of self-defense was admitted at trial (App. Br. 29-32).

Yet, respondent argues the contrary and in doing so, offers its summaries of the majority, but not all, of the testimony and evidence at trial (Resp. Br. 22-34). Respondent omitted the testimony of Detective Dan Fox and the entirety of Mr. Smith's videotaped statement from its summaries, both of which presented the

jury with evidence that was the most inconsistent with the State's case and which supported the submission of self-defense. Detective Fox's testimony and the videotaped statement provided the jury with evidence that Martez Williams, the alleged victim, was, in fact, armed with a deadly weapon and that he had used it to threaten Mr. Smith on the day of the offense.

Detective Fox testified that Mr. Smith initially told him that Martez Williams had drawn a gun on him, robbed him of his money, and fired shots as he [i.e., Mr. Smith] ran away (Tr. 212, 392; State's Ex. 10). Although Mr. Smith disavowed this initial statement on videotape and in his trial testimony, the jury was free to disbelieve Mr. Smith's disavowal and to believe the initial statement. "A jury may accept part of a witness's testimony, but disbelieve other parts." *State v. Jackson*, 433 S.W.3d 390, 399 (Mo. banc 2014).

For a jury who had received an instruction on self-defense, Mr. Williams' possession of a gun and display of it to Mr. Smith might have provided the reason for Mr. Smith to fear death or could have established the real or apparent necessity for Mr. Smith to kill to save himself from an immediate danger of serious bodily injury or death, which respondent argued in its brief are missing (Resp. Br. 29, 35). Such evidence would have provided support for the self-defense instruction that respondent argues is unwarranted (Resp. Br. 34-37).

As further support for its argument that no self-defense instruction was warranted, respondent notes that witnesses at trial testified that Mr. Smith shot in the direction of Josh (Resp. Br. 22). Respondent overlooks that there was overwhelming evidence that Mr. Smith was shooting at Mr. Williams, and not at Josh. *See*, *e.g.*, (Tr. 213, 241, Mr. Williams a.k.a. "Terrell" was the target); (Tr. 239, focused on Terrell); (Tr. 295, 299, aimed at Terrell); (Tr. 314, shot fired towards Terrell); (Tr. 339, shot came towards Mr. Williams).

To the extent that other evidence conflicted with this overwhelming evidence, it was a question of fact for the jury to determine. *State v. Chambers*, 671 S.W.2d 781, 782 (Mo. banc 1984). To justify the submission of self-defense to the jury, the evidence does not have to be so unequivocal as to mandate a directed verdict of acquittal. *Chambers*, 671 S.W.2d at 784. There need only be substantial evidence putting the matter of self-defense in issue. *State v. Weems*, 840 S.W.2d 222, 226 (Mo. banc 1992); § 563.031.5, RSMo Cum. Supp. 2010.

Respondent argues that there is not substantial evidence putting the matter of self-defense at issue because the evidence shows Mr. Smith shot at Mr. Williams after he had fled (Resp. Br. 22, 35-37). In support, respondent cites *State v. Arellano*, 736 S.W.2d 432 (Mo. App. W.D. 1987), in which the Western District held there was no error in the refusal of a self-defense instruction (Resp. Br. 20-22).

In *Arellano*, the intended victim ran away after the first shot fired and "[a]ll the evidence" established that it was not the first shot but shots fired after the intended victim fled that had hit the unintended assault victim. *Arellano*, 736 S.W.2d at 434-435.

There, the Western District noted that self-defense is unavailable when the victim is in "headlong retreat" and no longer poses an imminent threat. *Id.* at 435. Since the first shot – which didn't hit the unintended victim and that fired before the intended victim fled – was the only shot arguably fired in self-defense, the Western District held self-defense was not available to the defendant. *Id.* at 434-435.

Here, there was evidence showing that at least one shot fired before the victim, Mr. Williams, took flight (Tr. 295-296, 306-307, 358, 369-371). But in contrast to *Arellano*, there was also evidence that the first shot, which was arguably fired in self-defense, may have been the very shot that hit and killed the unintended victim; there was testimony that the first shot went towards the playground area where the unintended victim was shot and killed (Tr. 358, 366-367). This evidence significantly distinguishes Mr. Smith's case from that of *Arellano*.

Also, as distinguished from *Arellano*, there was evidence in Mr. Smith's case that the victim, Mr. Williams, cut short his retreat, stopped at the dumpsters,

turned around, faced Mr. Smith, and performed actions that led Mr. Smith to believe that he was arming himself (Tr. 378, 397). Mr. Smith testified:

> He ran so far, and then he stopped over by the dumpsters that was right there by the parking lot. I don't know what he was doing. A guy his age. He's young. They hide guns around there. I figured that he was looking for a gun.

(Tr. 378).

Mr. Smith further testified that in response, he fired two additional shots at Mr. Williams while Mr. Williams was over by the dumpsters, facing him (Tr. 378-379, 397). This testimony, which mirrored the statements Mr. Smith made on videotape, indicates the threat to Mr. Smith did not end when the victim fled, and that each shot fired was arguably fired in self-defense. Consequently, in Mr. Williams' case, unlike in *Arellano*, the evidence raises a substantial issue of self-defense for resolution by the jury.

Viewed in the light most favorable to the defense, the evidence shows: Mr. Williams was the initial aggressor; Mr. Williams was armed with a gun with which he had threatened Mr. Smith or Mr. Williams was arming himself with a gun; Mr. Smith needed to use deadly force to defend himself from immediate danger of serious bodily injury or death from Mr. Williams; Mr. Smith reasonably

believed in such necessity; and he did all he could consistent with his personal safety to avoid the danger. Thus, the trial court clearly erred in refusing the defense's self-defense instruction A.

RESPONSE TO CROSS-APPEAL ARGUMENT – II.

Cross-appellant states that Count III of assault in the first degree is not a lesser-included offense of Count I of murder in the first degree, and that as a consequence, there is no double jeopardy from Mr. Smith's conviction of both offenses.

Whether one's right to be free from double jeopardy has been violated is a question of law, which the appellate court reviews *de novo*. *State v. Horton*, 325 S.W.3d 474, 477 (Mo. App. E.D. 2010).

Double jeopardy protection is found in both the United States and Missouri constitutions." *State v. Barriner*, 210 S.W.3d 285, 307 (Mo. App. W.D. 2006). The Fifth Amendment to the United States Constitution provides that no person "shall be subject for the same offense to be twice put in double jeopardy of life or limb." *U.S. Const., Amend. V*. This amendment applies to Missouri governmental action by virtue of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992) (citing *Benton v. Maryland*, 395 U.S. 784 (1969)). "[It] guarantees that one will not be subjected to multiple punishments for the same offense, and it prevents the state from splitting a single crime into separate parts and pursuing several prosecutions." *State v. Barber*, 37 S.W.3d 400, 403 (Mo. App. E.D. 2001); *see also*

Missouri v. Hunter, 459 U.S. 359, 365-366 (1983); *Whalen v. United States*, 445 U.S. 684, 688 (1980).

This protection against cumulative punishments is "designed to ensure that the sentencing discretion of the court is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Hunter*, 459 U.S. at 366.

To determine whether the legislature intended multiple punishments for the same conduct, this Court looks first to the statutes under which the defendant was convicted. *State v. Garnett*, 298 S.W.3d 919, 922 (Mo. App. E.D. 2009). If a specific statute under which the defendant was convicted authorizes cumulative punishments, then that specific statute controls. *State v. Dudley*, 303 S.W.3d 203, 207 (Mo. App. W.D. 2010).

For instance, the second-degree murder statute, § 565.021.1(2), which became effective in 1984, specifically authorizes cumulative punishment for second-degree (felony) murder with any related felony, other than murder or manslaughter. As a result, under § 565.021.1(2), a defendant may be convicted of murder in the second degree (i.e., killing a person in the perpetration or attempted

perpetration of a felony or the flight therefrom) and the underlying felony (i.e., the felonious offense the defendant committed).

Yet, neither § 565.020, the first-degree murder statute, nor § 565.050, the first-degree assault statute, specifically authorizes cumulative punishment for offenses where one offense is a lesser included of the other. The statutes are silent on whether defendants may be convicted of first-degree murder and an underlying felony that is the lesser included of first-degree murder. §§ 565.020 & 565.050.

In the absence of specific statutory authority answering this question, this Court must next look to the general cumulative punishment statute, § 556.041, and its corollary, § 556.046. *State v. Angle*, 146 S.W.3d 4, 11 (Mo. App. W.D. 2004).

Section 556.041 provides that a defendant whose conduct may establish the commission of more than one offense may not be convicted of more than one offense if "[o]ne offense is included in the other, as defined in section 556.046."

An offense is a lesser-included offense when (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged, (2) it is specifically denominated by statute as a lesser degree of the offense charged, or (3) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein. § 556.046.1.

In *State v. Hibler*, 5 S.W.3d 147, 150 (Mo. banc 1999), this Court noted that in defining what constitutes a lesser-included offense, "[t]he drafters of the Code

adopted the majority rule." "The majority rule . . . is that a lesser crime is an included offense when it consists of legal elements which must always be present for the greater crime to have been committed *in the manner in which the greater crime is charged in the accusatory pleading.*" *Hibler*, 5 S.W.3d at 150 (*citing* Jerrold H. Barnett, *The Lesser–Included Offense Doctrine: A Present Day Analysis For Practitioners*, 5 CONN. L.REV. 255, 291 (1972) (emphasis added).

In *Hibler*, this Court noted that this has long been the law in Missouri: "The lesser crime must be included in the higher crime *with which the accused is specifically charged*, and the averment of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, to sustain a conviction of the latter offense." *Id.*

When the law espoused in *Hibler* is used in analyzing whether Count III of assault in the first degree is a lesser-included offense of Count I of murder in the first degree, Count III is a lesser-included offense of Count I. In Count III of its substitute information in lieu of indictment, the State charged Mr. Smith committed assault in the first degree by attempting to kill or cause serious physical injury to Martez Williams *by shooting at him* (L.F. 22) [emphasis added.]

Count I of murder in the first degree, charged in the same substitute information in lieu of indictment, by its terms, specifically included Count III in its charge. In Count I, the State charged Mr. Smith "after deliberation, knowingly

caused the death of Jnylah Douglas by shooting her w*hen he was shooting at Martez Williams*" (L.F. 22) [emphasis added.]

By charging that Mr. Smith committed Count I of murder in the first degree "*when he was shooting at Martez Williams*," the State made proof of the charged Count III of assault an essential element of the charged Count I of murder. As a consequence, it was impossible for Mr. Smith to commit the charged offense of Count I of murder in the first degree without necessarily committing the lesser offense of Count III of assault in the first degree. "An offense is a lesser-included offense if it is impossible to commit the charged offense without necessarily committing the lesser." *State v. Smith*, 229 S.W.3d 85, 91-92 (Mo. App. W.D. 2007) (citing *State v. Coker*, 210 S.W.3d 374, 380 (Mo. App. S.D. 2006)). [2]

[2] The verdict directors also followed the State's charge. The verdict director for Count III of assault in the first degree, instruction 11, instructed the jury to find Mr. Smith guilty if it found beyond a reasonable doubt (1) "that . . . on or about May 22, 2011, in the City of St. Louis, State of Missouri, the defendant attempted to kill or cause serious physical injury to Martez Williams *by shooting at him*" (L.F. 55) [emphasis added.] The verdict director for Count I of murder in the first degree, instruction five, also instructed the jury to find Mr. Smith guilty if it found beyond a reasonable doubt that Mr. Smith had committed the selfsame act –

But recently in *State v. Hardin*, 429 S.W.3d 417, 423-424 (Mo. banc 2014), without expressly overruling *Hibler*, this Court rejected outright an indictment-based analysis of whether an offense is included within another, and stated that the determination of whether an offense is a lesser included of another does not depend on how the latter offense is indicted, proved, or submitted to the jury. Instead, this Court advocated use of the statutory-elements test in making such a determination. *Id.* at 423-424.

The elements test provides: "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Yates v. State*, 158 S.W.3d 798, 802 (Mo. App. E.D. 2005) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

This Court noted in *Hardin* that "[i]f each offense requires proof of a fact that the other does not, then the offenses are not lesser included offenses, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Hardin*, 429 S.W.3d at 422 (citing *McTush*, 827 S.W.2d at 188). If each offense

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"*shooting at Martez Williams*" – on the same date at the same location (L.F. 49) [emphasis added.]

contains an element not contained in the other, then the offenses are not lesser-included offenses; if not, then the Double Jeopardy Clause bars successive prosecution. *State v. Daws*, 311 S.W.3d 806, 808 (Mo. banc 2010) (citing *State v. Burns*, 877 S.W.2d 111, 112 (Mo. banc 1994)).

First-degree assault is a lesser-included offense of first-degree murder under the statutory elements test. It is possible to commit first-degree assault without causing a death and thereby, committing murder. But it is impossible to commit first-degree murder without committing first-degree assault.

Assault in the first degree is defined "as an action which would constitute murder if death should result." *State v. Richardson*, 674 S.W.2d 161, 164 (Mo. App. E.D. 1984) (discussing § 565.050, RSMo 1978). The action that constitutes assault in the first degree is either attempting or completing injury to another person. *State v. Rollins*, 321 S.W.3d 353, 358 (Mo. App. W.D. 2010). "A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person." § 565.050.1.

When death results from the commission of first-degree assault, it is punishable as murder. *Richardson*, 674 S.W.2d at 164. "A person commits murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter." § 565.020.1.

Death and deliberation are elements that first-degree murder contains that first-degree assault does not. But first-degree assault does not contain any element that is not already included in first-degree murder. Proof of first-degree assault is established by the same or less than all the facts required to establish first-degree murder. Clearly, in order to inflict the type of injury that would result in another person's death, one must attempt to kill or knowingly cause or attempt to cause serious physical injury.

Cross-appellant argues that the additional element in first-degree assault that is not contained in first-degree murder is the "specific intent to assault the actual victim." (Resp. Br. 59). But this argument is legally unsound. "Specific intent to assault the actual victim," or the person injured or threatened with injury, is not an element of first-degree assault.

In *State v. Whalen*, this Court held that conviction of first-degree assault for an attempt to kill or to cause serious physical injury requires proof of a very specific intent on the part of the actor to accomplish that objective. 49 S.W.3d 181, 186 (Mo. banc 2001) (citing *State v. Gonzales*, 652 S.W.2d 719, 722 (Mo. App. W.D. 1983)). The Court held that "a defendant has to act purposefully as to the person defendant is charged with assaulting." *Id.* at 186.

The Court clarified, however, that "[b]y stating that a defendant must act purposely or with purpose as to the result of his or her conduct, *this Court does not*

mean to suggest that the actor must be specifically aware of the name of the person injured or that the actor must have specifically decided to injure each particular person who was in fact injured or threatened with injury." *Id.* [emphasis added.]

The defendant need not have had the specific intent to assault the "actual victim," or the person who was in fact injured or threatened with injury. *Whalen*, 49 S.W.3d at 186. The defendant's intent toward the target is transferred to unintended victims of whose presence the defendant is aware. *State v. Arellano*, 736 S.W.2d 432, 434 (Mo. App. W.D. 1987). *Whalen*, 49 S.W.3d at 187 (stating defendant will not be guilty of purposely causing or attempting to cause such injury if the defendant is unaware of the likely presence of the injured person at the time the defendant acts). Specific intent to assault the actual victim, or the person injured or threatened with injury, is not an element of first-degree assault.

The specific intent to kill or cause serious physical injury is an element of first-degree assault. *State v. Chambers*, 998 S.W.2d 85, 90 (Mo. App. W.D. 1999) (discussing intent to cause serious physical injury); *England v. State*, 85 S.W.3d 103, 107 (Mo. App. W.D. 2002) (discussing specific intent to cause the victim's death); *see also State v. McAllister*, 399 S.W.3d 518, 521-522 (Mo. App. E.D. 2013).

Moreover, assault in the first degree and murder share this element. Proof of intent to kill or to cause serious physical injury is required for conviction of conventional second-degree murder, a lesser-included offense of first-degree

murder. *State v. Lett*, 715 S.W.2d 557, 558 (Mo. App. E.D. 1986); MAI-CR 3d 313.04, Note on Use 3; §§ 565.021.1(1) & 565.025.2(1)(a). For conviction of the greater offense of first-degree murder, proof of the more deadly intent to kill is required. *State v. Roe*, 6 S.W.3d 411, 414 (Mo. banc 1999).

All elements of the offense of assault in the first degree are subsumed in the offense of murder in the first degree and no matter the analysis, whether the statutory-elements test or the indictment-based application, Count III of assault in the first degree is a lesser-included offense of Count I of murder in the first degree. And, when § 556.041's prohibition against cumulative punishment for offenses where one is included in another is applied here, Mr. Smith's conviction of both Counts I and III cannot stand.

Cross-appellant argues the contrary and argues use of the allowable unit of prosecution measure and cases applying it to achieve a different result (Resp. Br. 48-54). The "allowable unit of prosecution" measure, however, is generally used in the single-statute context, where the issue is whether double jeopardy prohibits multiple punishments under the same statute for offenses committed in a single transaction. *See Sanabria v. United States*, 437 U.S. 54, 70 n. 24 (1978); *see also Bell v. United States*, 349 U.S. 81 (1955). Here, Mr. Smith is challenging convictions under not one, but two different statutes as violative of double jeopardy, and in this context, the statutory elements (i.e., *Blockburger*) test is utilized. *See, e.g., Albernaz v.*

United States, 450 U.S. 333, 345 (1981). The circumstance presented in Mr. Smith's case fails the statutory-elements test because each charged offense does not contain an element that the other does not.

Mr. Smith's conviction of Count III of assault in the first degree and Count I of murder in the first degree violated his right to double jeopardy. It follows also that Count III's corresponding Count IV of armed criminal action, was likewise included in Count I's corresponding Count II of armed criminal action because commission of Count IV was dependent upon the commission of Count III. *State v. Weems*, 840 S.W.2d 222, 228 (Mo. banc 1992). The conviction of Count IV of armed criminal action required the commission of the underlying felony of Count III (L.F. 56). *Id.*

Under the circumstances, the trial court did not clearly err in dismissing Count III of assault in the first degree and Count IV of armed criminal action after the jury's verdicts. In the absence of legislative authority, double jeopardy prohibits the defendant's conviction of more than one offense based on the same conduct where proof of one crime supplies an essential element of the other. *See, e.g.*, *see also State v. King*, 748 S.W.2d 47, 50 (Mo. App. E.D. 1998).

In the absence of legislative authority specifically providing punishment for both the underlying felony and murder in the first degree, this Court must reach a conclusion similar to the one that courts reached about conviction of both second-

degree murder and the underlying felony in the years prior to the enactment of § 565.021.1(2). Before the legislature's amendment of the second-degree murder statute to provide for punishment for both the underlying felony and second-degree murder, conviction of both the underlying felony and the second-degree murder violated double jeopardy even where there were different victims of the underlying felony and the murder. *State v. Morgan*, 612 S.W.2d 1 (Mo. banc 1981), *superseded by statute as stated in Jones v. Thomas*, 491 U.S. 376, 379 n. 1 (1989).

Mr. Smith's conviction of first-degree murder and assault in the first degree similarly violated double jeopardy even though there are different victims of the assault and the murder. *See, e.g., Williams v. State*, 646 S.W.2d 848, 850 (Mo. App. E.D. 1982) (holding conviction of first-degree murder and underlying felony violated double jeopardy).

CONCLUSION

WHEREFORE, Appellant Smith respectfully requests that this Court affirm the trial court's judgment dismissing Counts III and IV, reverse his convictions and sentences for Counts I and II, and remand for a new trial. In the alternative, Mr. Smith respectfully requests remand for correction of his written sentence and judgment *nunc pro tunc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on Monday, December 01, 2014, a true and correct copy of the foregoing was e-filed with this Court and sent to Gregory Barnes at Greg.Barnes@ago.mo.gov, the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 per the Missouri E-Filing System Clerk. In addition, I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Californian FB 14 point font, and contains 5,159 words.

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