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, Division Four
The Honorable Julian L. Bush, Judge

RESPONDENT/CROSS-APPELLANT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
greg.barnes@ago.mo.gov

ATTORNEYS FOR RESPONDENT/ CROSS-APPELLANT STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

JURISDICTIONAL STATEMENT

The State concurs in Appellant's/Cross-Respondent's Jurisdictional Statement as to why the Court has jurisdiction over the direct appeal.

The State cross-appeals the trial court's grant in part of Defendant's "Motion for Judgment of Acquittal Notwithstanding the Jury's Verdict," which overturned the jury's verdicts finding Defendant guilty of the class B felony of assault in the first degree in violation of § 565.050, and guilty of a related armed criminal action count in violation of § 571.015. The trial court held that convictions for assaulting an intended victim and murdering an unintended victim (by transferred intent) violated the "multiple punishment" theory of double jeopardy, as the offenses were charged.

Where, as here, the jury returns a verdict of guilty but the trial court thereafter enters a judgment of acquittal, an appeal by the State of that final judgment is permitted and the appellate court has jurisdiction because "a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by entry of judgment on the verdict." *State v. Maglif*, 131 S.W.3d 431, 433-434 (Mo. App. W.D. 2004) (quoting *United States v. Jenkins*, 420 U.S. 358, 365 (1978)); Rule 30.01(a); § 547.200, RSMo 2000.

Defendant filed his notice of appeal on October 2, 2012 (L.F. 67-69). The State filed its timely notice of cross-appeal on October 5, 2012 (Appendix A).

After the Missouri Court of Appeals, Eastern District, affirmed the trial court's judgment, Respondent/Cross-Appellant, State of Missouri, filed an Application for Transfer, which this Court sustained on August 19, 2014. This Court therefore has jurisdiction over both the direct and cross-appeals. MO. CONST., art. V, § 10 (as amended 1982); Rule 83.04.[1]

[1] The transcript will be cited as "Tr.," and the legal file as "L.F." All statutory references are to RSMo 2000 (as amended through 2010) unless otherwise indicated.

STATEMENT OF FACTS

Defendant was found guilty following a jury trial in the Circuit Court of the City of St. Louis of first-degree murder, assault in the first degree, and two counts of armed criminal action. §§565.020; 565.050; 571.015.[2] The trial court initially accepted all four verdicts, but later granted Defendant's post-trial Motion for Judgment of Acquittal on the first-degree assault and related armed criminal action counts on the grounds that accepting those verdicts would have ostensibly violated Defendant's double jeopardy rights by inflicting multiple punishments for the same conduct as the murder and related armed criminal action counts. (Tr. 455-456; L.F. 63). Defendant was sentenced by the court to life imprisonment without the possibility of parole for murder and 30 years in prison for armed criminal action (Tr. 458; L.F. 63-65).[3]

---

[2] The court granted Defendant's Motion for Judgment of Acquittal on a fifth count, unlawful possession of a firearm by a felon.

[3] Neither the oral pronouncement nor the written Judgment specify whether the sentences are to be served concurrently or consecutively. Rule 29.09 therefore provides that the sentences shall run concurrently. Rule 29.09; *State ex rel. Zinna v. Steele*, 301 S.W.3d 510, 514 (Mo. banc 2010).

The sufficiency of the evidence to convict is not at issue. Viewed in the light most favorable to the jury's verdicts, the evidence and reasonable inferences therefrom at trial established the following facts:

Defendant, whose street name was "Little D," sold drugs for Wilber Hardwrict (aka "Thorough" or "Daryl") (Tr. 290, 375, 393-394). On May 21, 2011, Defendant gave three heroin pills to Martez Williams ("Williams" or "Terrell"), who had previously purchased Dormin pills from Hardwrict in February 2011 believing them to be heroin (Tr. 282, 322, 326). Williams refused to pay Defendant for the three heroin pills on May 21, explaining that it was his understanding that Hardwrict gave him those pills through Defendant to make up for the previous incident (Tr. 327, 375).

Defendant and Hardwrict were both angry that Williams had not paid for the pills (Tr. 394, 396, 398). Defendant believed that he had been "played," although he allowed at trial that Williams "did what he had to do." (Tr. 394). Hardwrict gave Defendant a revolver (Tr. 395).

Later that day, Defendant and Hardwrict spoke to Jesse White, for whom Williams was somewhat of a protégé; Defendant told White that he would get Williams (Tr. 280-281, 282-283, 285, 289). David Thomas ("Baby D") also heard Defendant say in reference to Williams, "Motherfucker is going to learn about playing" (Tr. 298, 303, 305, 310, 320).

The next day (May 22, 2011), a Sunday afternoon, Defendant and Hardwrict encountered Williams and another man (referenced as "Josh," "Jay," or "Jake" by witnesses) in the Peabody Housing Complex as they rounded an apartment building (Tr. 212, 291, 376). Defendant demanded the $30 he claimed Williams owed him (Tr. 325-326, 377). Williams asked Defendant whether he wanted to fight (Tr. 293, 308-310, 325, 328, 377, 396). Williams did not put up his fists or do anything other than make that statement, which was in response to how Defendant approached him (Tr. 328).[4]

Defendant handed his cigarette and bag to Hardwrict, raised up his shirt, and pulled out a gun (Tr. 250-251, 256, 259, 292-293, 310, 319, 328, 350, 353, 377-378). Defendant tried to aim the weapon at Williams, who grabbed his companion and used him as a human shield (Tr. 328). Hardwrict told Defendant to shoot, "pop," or kill Williams (State's Ex. 10). As Defendant went back and forth and raised the gun in the air and Williams's companion fell to the ground, Williams ran in a diagonal or zigzag pattern to avoid being hit (Tr. 294-295, 317, 329-330, 334-335, 337).

Defendant fired at least 3 shots at Williams as he fled towards a nearby playground and parking lot, then hid behind dumpsters, and ultimately ran

---

[4] Witness accounts varied, but this Statement of Facts applies the standard of review and views the evidence in the light most favorable to the verdicts.

towards an Amoco station; one of these shots hit a child, Jnylah Douglas ("Victim"), who had been playing on the playground with approximately a dozen other children when the gunfire erupted (Tr. 213, 233-234, 239, 241, 242, 243, 271-273, 300, 315-316, 317, 330, 339, 349, 350, 353-355, 378-379, 397).

Jnylah died from a bullet wound to the head on June 7, 2011 (Tr. 233-234, 343-344, 348). An autopsy determined that the bullet hit Jnylah behind her right ear and traveled right to left and slightly forward, exiting her head (Tr. 344-348).

Williams identified Defendant as "Little D," the shooter, in an interview, both photo and physical lineups, and at trial (Tr. 203-208, 330-333). Eyewitness David Thomas identified Defendant in a photo lineup and at trial. (Tr. 236-237, 318). Eyewitness Juan House identified Defendant with 100% certainty in a physical lineup and at trial. (Tr. 255-256). Eyewitness Penny Griffin identified Defendant as the shooter at trial. (Tr. 354).

Defendant was arrested, waived his *Miranda* rights, and gave a statement to a homicide detective (Tr. 211-212; State's Ex. 10). Defendant initially claimed that on the day of the shooting, Williams had drawn a gun, robbed him of his money, and fired shots as he ran away (Tr. 212, 392; State's Ex. 10). Defendant later admitted that this story was false, both to police and at trial; he changed his story and claimed that Williams took drugs from him the day before the shooting and that there was a confrontation on the day of the shooting (Tr. 212-

213, 392-393; State's Ex. 10). Defendant contended that he was afraid of Williams, that he was defending himself from Williams, that he was "focused on" Williams, that the "target" was Williams, and that he didn't know where he was shooting (Tr. 239, 241-242; State's Ex. 10).

At trial, Defendant testified that he was angry about Williams having taken the pills without payment and about Williams having challenged him to a fight (Tr. 398-399). He testified that he was focused on Williams and fired the shots because he was trying to scare Williams away from him (Tr. 389-390, 398-399). Defendant claimed that he fired one shot to his left or into the ground and two shots into the air, none of which he intended to hit anyone (Tr. 378-379, 389-390, 393, 396-398).

The jury found Defendant guilty of first-degree murder, first-degree assault, and two counts of armed criminal action; the trial court initially accepted all of the verdicts, but later granted a Motion for Judgment of Acquittal on the assault count and the related armed criminal count on the grounds that conviction on those counts violated Defendant's right to be free of double jeopardy (Tr. 444-445, 454-456 ; L.F. 27-30, 63-65).

On September 28, 2012, the court sentenced Defendant to life imprisonment without the possibility of parole for first-degree murder and 30 years in prison for armed criminal action (Tr. 458; L.F. 63-65).

Defendant filed his notice of appeal on October 2, 2012 (L.F. 67-69). The State filed its notice of cross-appeal on October 5, 2012 (Appendix at A14-A19).

On April 29, 2014, the Missouri Court of Appeals, Eastern District affirmed the trial court judgment but remanded for entry of an order *nunc pro tunc* reflecting that the convictions followed a jury trial. *State v. Smith*, 2014 WL 1686935 (Mo. App. E.D. April 29, 2014).

On August 19, 2014, this Court granted the State's Application for Transfer, which focused on the cross-appeal issue pertaining to the double-jeopardy ruling.

POINT RELIED ON

(Cross-Appeal)

III.

The trial court erred by granting (in part) Defendant's post-trial motion for judgment of acquittal and overturning the jury's guilty verdicts on the counts of assault in the first degree and armed criminal action for the assault upon Martez Williams because the convictions on these counts did not violate the Double Jeopardy Clause of either the United States or Missouri Constitutions in that multiple punishments for the same conduct are permissible if intended by the legislature. The legislature intended to punish both the murder of one victim and the assault of another because: a) there are separate units of prosecution where there are separate victims of crimes against persons; and b) application of the statutory-elements test demonstrates that it is possible to commit assault in the first degree without committing murder in the first degree, and vice-versa. The legislature has expressly provided for multiple punishments for armed criminal action and the underlying felony. Moreover, two of the bullets fired at Williams were not involved in the murder, so the punishment is not for the same conduct.

State v. Hardin, 429 S.W.3d 417 (Mo. banc 2014)

Missouri v. Hunter, 459 U.S. 359 (1983)

State v. McTush, 827 S.W.2d 184 (Mo. banc 1992)

Nunn v. State, 824 S.W.2d 63 (Mo. App. E.D. 1991)

Section 565.020, RSMo (2000)

Section 565.050, RSMo (2000

Section 556.041**,** RSMo (2000)

Section 556.046, RSMo (Cum. Supp. 2010

MO. CONST. art. I, sec. 19

U.S. CONST. amend. V

U.S. CONST. amend. XIV

ARGUMENT

I.

The trial court did not clearly err by refusing the defense's proffered self-defense instruction because Defendant was not entitled to such an instruction where there was no evidence entitling him to use deadly force, and his theory was that he lacked the intent to shoot at anyone and that the killing of Victim was accidental. Moreover, Defendant testified and the evidence established that his intended target fled but Defendant continued to fire shots and Defendant is not entitled to exercise self-defense (let alone deadly force) against a person who has fled the scene.

Defendant contends that the trial court clearly erred by denying his proffered instruction on self-defense. Defendant contended at trial that he was afraid of Martez Williams and therefore shot into the ground or towards a playground, and then into the air, to merely scare him although he admitted he continued to fire shots after Williams fled behind a dumpster. The trial court denied the instruction on the basis that Defendant had not produced evidence that would entitle him to use deadly force and had testified that he had no intent to shoot at anyone and that the shooting was accidental.

A. Standard of review

In determining whether a refusal to submit an instruction was error, "the evidence is viewed in the light most favorable to the defendant." *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003) (quoting *State v. Westfall*, 75 S.W.3d 278, 280 (Mo. banc 2002)). "If the evidence tends to establish the defendant's theory, or supports differing conclusions, the defendant is entitled to an instruction on it." *Id.*

A self-defense instruction must be submitted "when substantial evidence is adduced to support it, even when that evidence is inconsistent with the defendant's testimony." *State v. Avery*, 120 S.W.3d at 200. Failure to submit a self-defense instruction when required by the evidence constitutes reversible error. *Id.* "Substantial evidence" is evidence putting a matter in issue. *Id.*

B. Requirements for use of deadly force

Where, as here, the defender killed the victim, evidence of four elements is required to make a submissible claim of self-defense: (1) absence of aggression or provocation on the defender's part; (2) real or apparent necessity for the defender to kill to save himself from immediate danger of serious bodily injury or death; (3) reasonable cause for the defender's belief in such a necessity; and (4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life. *Id.* at 200-201. *See*, §563.031.2 (deadly force may only be used to protect the defender or another

against death, serious physical injury, or any forcible felony, or when a dwelling, residence, vehicle or private property is unlawfully entered).[5]

The defendant has the burden of injecting the issue of justification or self-defense. §563.031.5. Self-defense may not be claimed if the actor was the initial aggressor unless he has withdrawn from the encounter and effectively communicated such withdrawal to the other person but the latter persists in continuing the incident by the use or threatened use of unlawful force, unless the aggressor is a law enforcement officer or there is some other statutory or legal exception. §563.031.1.

As a general rule a defendant is not entitled to an instruction on self-defense if the defendant claims accident. *Id.* at 201. This is because self-defense constitutes an intentional, but justified, killing, whereas accident connotes an unintentional killing. *Id.* Self-defense and accident are therefore inconsistent.

---

[5] Section 563.011(3) defines "forcible felony" as "any felony involving the use or threat of physical force or violence against any individual, including but not limited to murder, robbery, burglary, arson, kidnapping, assault, and any forcible sexual offense." Here, Defendant's proposed self-defense instruction cited only the fear of death or serious physical injury as justifications for the use of lethal force. Appendix at A-12-A13.

Id. So, if a defendant takes the position at trial that a killing was accidental, the defendant normally may not also submit self-defense. *Id.*; *State v. Randolph*, 496 S.W.2d 257, 262 (Mo. banc 1973); *State v. Peal*, 463 S.W.2d 840, 842 (Mo. 1971).

Self-defense is submissible, even where defendant testifies that the killing was an accident, if the inconsistent evidence of self-defense is offered by the State or by defendant through the testimony of a third party. *Avery*, 120 S.W.3d at 201.

C. Defendant was not entitled to a self-defense instruction.

Here, Defendant sought an instruction that he acted in lawful self-defense if he "reasonably believed that the use of deadly force was necessary to protect himself from death or other serious physical injury from the acts of Martez Williams[.]" Defendant's Appendix at A-2.[6]

The facts of this case are similar to those of *State v. Arellano*, 736 S.W.2d 432 (Mo. App. W.D. 1987), in which the Court of Appeals affirmed the denial of a self-defense instruction.

In *Arellano*, the defendant claimed that he was approached by a person with whom he had had previous fistfights and that that person had a knife in

---

[6] Defendant did not seek an instruction premised on protecting himself from any forcible felony.

his hand; the defendant claimed he fired a gun at the ground and then shot a second time in the air, intending only to scare the person who had approached him and not to aim at him. *Id.* at 434. The person who allegedly approached him was not hit, but one of the shots struck a young girl and inflicted a serious wound. *Id.* The testimony was that the man who approached the defendant had tripped and fallen down, then gotten up and fled; the defendant ran after him, firing the gun at least three times. *Id.*

The Court of Appeals held that the defendant's own testimony was that the person who approached him was running away after the first shot. *Id.* at 434-435. "Self-defense furnishes a defense only when the danger to be warded off is imminent; it is not available when the victim is in headlong retreat." *Id.* at 435. *See*, 6A C.J.S Assault & Battery § 88 at 476 (1975).

In the alternative, the Court held that before resorting to deadly force, one must retreat as far as feasible to do so. *Id.* at 435. The defendant could have gotten back in his car and closed the door rather than picking up a gun while remaining outside of the car and firing bullets. *Id.*[7]

---

[7] While subsequent statutory changes have eliminated the duty to retreat "from a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining" or "from private property that is owned or leased by such individual[,]" those circumstances are not present here. *Cf.* §563.031.3.

The Court concluded that there was no error in the trial court's failure to give a self-defense instruction on either assault charge (one based upon the assault of the man who approached him, and the other based upon the assault of the unintended victim). *Id.*

In the case at bar, Defendant testified that he did not intend to shoot at anyone but merely fired shots at the ground or in the air in an attempt to scare Williams. His testimony therefore was that the shooting was an accident and, under the standard announced in *Avery*, *supra*, he was not entitled to an instruction on self-defense. *Avery*, 120 S.W.3d at 201.

Moreover, other bystanders testified that Defendant shot at Williams as he fled and/or shot in the direction of Josh, whom Defendant never claimed threatened him in any way. Thus, the testimony of the State's witnesses did not support an instruction on self-defense.

1. Testimony of Juan House

Juan House testified that he saw no fists and saw no one hit anybody, heard yelling but no threats of any nature, and saw no one put their hands on each other except when Williams pulled Josh in front of him after Defendant pulled the gun out. (Tr. 257-258).

House testified that the first shot hit the ground while Williams was running away, the second shot hit the Chouteau building, and the third shot was fired straight down Castle in the direction of St. Ange, went through a bush that

Josh was already past, and hit Jnylah. (Tr. 251, 253-254, 260, 265, 270, 272). According to House, none of the bullets came close to hitting Williams. (Tr. 274, 276). The first shot was not fired at Williams; the second was fired when Williams was running out of the complex; and the third was not fired at Williams. (Tr. 260, 270, 271).

House's testimony does not support the need to use lethal force against Williams to prevent death or serious physical injury.

2. Testimony of Jesse White

Jesse White testified that Defendant told him the day before the shooting that he "was going to get" Martez Williams. (Tr. 280, 281). On the day of the shooting, he looked out his window on Castle Lane after hearing the first shot and saw Williams running across the parking lot. (Tr. 279).

If anything, White's testimony establishes that the shooting was premeditated, and that Williams was in flight at the time any shots were directed at him. This testimony does not support a self-defense instruction, or Defendant's need to use lethal force.

3. Testimony of David Thomas

David Thomas testified that while Williams[8] told Defendant something like, "We can fight" when he ran into him, there "was no physical fighting at all." (Tr. 293-294). Before the shooting, Thomas heard Defendant say, "Motherfucker is going to learn about playing." (Tr. 298, 303, 305, 310, 320).[9] Defendant handed a bag and a cigarette to Hardwrict ("Thorough") and pulled out a gun. (Tr. 293-294). Thomas told Defendant to "put that away. You're tripping. There's kids out here." (Tr. 294, 299). Williams grabbed "Josh" and used him as a human shield. (Tr. 294).

According to Thomas, "Josh" spun Williams off and both "Josh" and Williams were on the ground with Defendant standing over them when Thomas heard Defendant fire the first shot. (Tr. 295). Thomas saw Williams run between

---

[8] Throughout his testimony, Thomas referred to Williams by his street name, "Terrell."

[9] The quotation is from page 305 of the transcript—the substance of the other citations is the same, although the words and/or grammar vary slightly. One portion of Thomas' testimony places the statement in the conversation just after Williams' offer to fight and just prior to Defendant pulling out the gun. (Tr. 310). Later, Thomas references this statement as taking place two or three days prior to the shooting. (Tr. 310-311).

cars and then diagonally and saw Defendant aiming the gun in Williams' direction. (Tr. 295-296). Thomas thought he heard four shots, but one could have been an echo. (Tr. 296-297). There was a pause after the first shot and then two more shots, after which he saw the little girl falling. (Tr. 297).

According to Thomas, the first shot was aimed towards Williams, the second shot "towards the playground area," and the third shot went through a bush; he then saw the little girl falling. (Tr. 299-300). Thomas had seen Williams "take off running." (Tr. 301).

On cross-examination, Thomas testified that Williams was on the ground approximately three or four feet from Defendant when Defendant fired the first shot, which hit the ground. (Tr. 306-307, 313). The shot after the first shot "was being fired towards [Williams.] [Williams] had ran between these cars." (Tr. 314). Williams took off and ran between cars and behind a dumpster. (Tr. 314). Williams was running diagonally towards some apartments. (Tr. 314-315). After Williams was behind one dumpster, he ran behind the other dumpster, and then diagonally toward St. Ange, somewhere by Chouteau and the Amoco. (Tr. 316, 317). The second or third shot "went towards the area where the kids was at. [Williams] was running diagonal toward Chouteau." (Tr. 316). The second shot was fired towards Williams' direction and hit something although he couldn't tell what it hit. (Tr. 317). After the final shot, he saw the little girl fall. (Tr. 317).

Thomas testified on redirect that he saw no other weapons out there that day, that Williams never touched Defendant, that there was no fistfight, and that Defendant was the shooter. (Tr. 318).

None of the facts as recited by Thomas established a right of Defendant to use lethal force against an unarmed Williams. According to Thomas, Williams never touched Defendant despite his offer to fight or "bang," and Williams was either on the ground or in flight from Defendant when each of the shots was fired.

4. Testimony of Martez Williams

Williams testified that he was hanging out on Castle Lane with David Thomas and "Jay"[10] when Defendant and "Thorough" came around the building and Defendant approached him, asking if he had "it," which he took to mean the heroin pills he hadn't paid for the day before (because he thought they were to make up for a fraudulent purchase he had made from "Thorough" in February) (Tr. 325-327). Williams asked Defendant, "What do you want to do, fight?" (Tr. 325, 336). Defendant passed his bag and cigarette to "Thorough," raised up his shirt, and pulled out a gun. (Tr. 328). Defendant tried to aim the gun at

[10] Williams uses the name, "Jay" for the person other witnesses called "Josh" or "Jake." Police were unable to locate or establish the true name of that person.

Williams, so Williams grabbed "Jay" or "Jake" and used him as a human shield in front of him. (Tr. 328). Defendant kept telling "Jay" to move (Tr. 334).

When Defendant raised the gun up in the air, Williams ran. (Tr. 329, 334). The first shot was fired "as soon as I turned and ran." (Tr. 337).

Williams heard three or four shots. (Tr. 329). He ran in a zigzag pattern so he wouldn't get hit. (Tr. 329-330). After he stopped running when he got past the trash can, he heard "Thorough" say, "Get that [N word]." (Tr. 330). Defendant raised the gun back up, and Williams ran again. (Tr. 330). Shots were fired again. (Tr. 330).

On cross-examination, Williams testified that he stopped after running between two dumpsters and turned around. (Tr. 339). At that point, "Thorough" said, "Get that nigger." (Tr. 339). Defendant aimed the gun at him, and Williams turned around and ran. (Tr. 339). Based on the way Defendant's arm came towards him, the shot "was coming for me." (Tr. 339). No more shots were fired in his direction after that. (Tr. 340).

Nothing in Williams' testimony supported a self-defense instruction. Although he had offered to fight over the drug dispute if that was what Defendant wanted, Defendant immediately pulled a gun and, once the human shield was out of the way, began shooting multiple times at Williams as he ran away. Nothing that Williams testified to justified the use by Defendant of lethal

force. Williams was in flight from Defendant during each of the shots fired in his direction.

5. Testimony of Penny Griffin

Penny Griffin testified that she was outside playing with her four kids and Jnylah Douglas, who was like a niece to her. (Tr. 349-350). She saw and heard an argument, which "wasn't loud." (Tr. 350). Griffin estimated that 13 children were on the playground. (Tr. 353). When she saw the gun, Griffin told all the kids to "come on" and waited for them to "get in." (Tr. 353). Ms. Griffin saw one shot and heard three; Defendant was doing the shooting. (Tr. 354).

Griffin saw no other weapons that day, no physical fighting, and no violence other than the shooting. (Tr. 354).

Griffin saw Williams running between cars, past the playground, and towards the Amoco. (Tr. 355). After the shooting, Defendant and his companion walked past her house "like ain't nothing happened." (Tr. 353). Griffin saw Jnylah looking at her on the ground on her front porch, reaching for her door. (Tr. 353, 355).

On cross-examination, Griffin testified that Williams was walking as if he was ready to fight, and that he was in Defendant's face and arguing. (Tr. 357). Defendant pulled out a gun and fired the first shot as Williams was standing directly in front of him; after the first shot, Williams ran. (Tr. 357). Griffin

testified that the first shot went towards the playground where all the kids were and away from Williams. (Tr. 358, 362, 366, 371).

Griffin testified at trial that she didn't know where the second and third shots were fired and that she was confused by the defense attorney at her deposition when she testified that the second and third shots were "in the air." (Tr. 358-361). On redirect, Griffin agreed that at her deposition she testified she thought the second shot could have hit Williams. (Tr. 366-367). On recross, Griffin confirmed that the second shot could have hit Williams. (Tr. 367).

Nothing in Griffin's testimony supported a self-defense instruction. The only shot fired before Williams ran was away from Williams. Moreover, as with the other witnesses, Griffin testified that Defendant pulled out a gun in response to Defendant's offer to fight and recounted no actual blows, fighting, or reason for the armed Defendant to fear death or serious physical injury at the hands of the unarmed Williams.

6. Testimony and closing argument of Defendant

Defendant testified that he went to the area with a bag of groceries when he was approached by Williams, Thomas, and "Josh." (Tr. 376). Defendant asked Williams if he had the $30 he owed him. (Tr. 377). Williams responded that he didn't and asked what he wanted to do about it and whether he wanted to fight. (Tr. 377). Defendant said he wasn't going to fight Williams, and Williams tore off his cap and threw it down, which made Defendant "kind of scared." (Tr. 377).

"Jake" told them both to "cool it;" Defendant claimed he "backed up off of" Williams, and that Jake said, "Let me go. Let me go. This nigger he want to do something." (Tr. 377).

According to Defendant, when Williams "snatched away from Jake," Defendant handed the bag to Hardwrict, and continued to say that he didn't want to fight and wasn't going to fight Williams. (Tr. 378). Defendant thought Williams seemed like he got more aggressive "because he kept trying to get around Jake. So I felt threatened." (Tr. 378).

Defendant then stepped back two to three feet from Williams, pulled out the gun, held it for a second, then shot to his left side. (Tr. 378).[11] "That's when [Williams] took off. He ran." (Tr. 378).

Defendant claimed:

> Martez ran. 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. I immediately shot up in the air. I shot to my left. I shot to my right. He ran again.

---

[11] Although elaboration was cut off by defense counsel, Defendant later volunteered, "I'm not sure which way that the first shot I fired [sic]. I shot to my left. It could have been--" (Tr. 379).

* * *

Terrell he ran off again.

(Tr. 378).

Defendant testified that when the second and third shots were fired up in the air, Williams was "still over there by the dumpsters" and "facing me." (Tr. 379). After these shots, Williams ran again. (Tr. 379).

After the above testimony, there was a bench conference at which the court stated that Defendant had not yet made a submissible case of self-defense, based on the fact that there was no evidence that Williams had used deadly force, and that Defendant claimed the incident was an accident rather than an intentional shooting. (Tr. 381). However, the court emphasized, "It doesn't mean it won't be injected in the case by the time you sit down." (Tr. 382). The court pointed out that it hadn't sustained the prosecutor's objection to reputation evidence concerning Williams, that it hadn't heard all of the defense evidence yet, and reiterated that the defense might succeed in injecting the issue by the time it concluded. (Tr. 382).

The defense contended during the bench conference that the Defendant "didn't use deadly force. He fired a shot in the air." (Tr. 387). The prosecutor retorted that, "He obviously did. He killed somebody." (Tr. 387).

Defendant then testified that he told the police that he was aware that Williams had been to the penitentiary for robbery and that Williams was known for robbing people. (Tr. 388-389).

Defendant testified, "[Williams] is the reason why I had the gun from the beginning. The incident prior to the shooting that I was afraid of [Williams] [sic]. I was afraid because of the reputation he had." (Tr. 389). Asked a second time whether he was intending to hit anyone with the gun, Defendant testified, "[Williams] was the reason I pulled the gun out. The little girl or anyone else had nothing to do with that. I wasn't trying to hit anyone." (Tr. 389). Defendant testified that he fired the shots because he was trying to scare or get Williams away from him, and that he wasn't trying to hit Williams. (Tr. 389, 390).

On cross-examination, Defendant again testified that he wasn't trying to hit anyone when he fired the gun, and that it was an accident. (Tr. 390). Defendant admitted that after the "accident," he walked to Hardwrict's aunt's house, gave the gun to Hardwrict, and that someone named Bobby got rid of it. (Tr. 391).

Defendant did not contact police. (Tr. 391). Defendant admitted that none of the initial story he told the police--which claimed that Williams approached him, pulled a gun on him, demanded his money and caused Defendant to drop his money and run away, and that Williams fired a shot after him--was true. (Tr. 392-393).

Defendant reiterated his claim that he fired up in the air. (Tr. 393).

Defendant admitted that he was angry about being "played" by Williams, and that he did not see Williams with a gun. (Tr. 394). Williams had not used a gun to take the pills from him. (Tr. 394).

Defendant could name no specific person that Williams had robbed. (Tr. 395). Defendant claimed that Williams told him that he robbed people, but admitted Williams didn't say he did so with a gun. (Tr. 395).

Defendant admitted that Hardwrict was also angry that Defendant hadn't collected the money from Williams. (Tr. 396).

Defendant then testified as follows:

Q So you meet up with [Williams], and he says, "Let's fight," right?

A Yeah.

Q Doesn't pull out a gun?

A No.

Q Doesn't ever hit you, does he?

A No.

Q Doesn't do anything but take off his hat according to you?

A Right.

(Tr. 396).

Defendant admitted that he fired one shot into the ground and Williams ran away. (Tr. 396-397). Defendant later equivocated about whether he knew

that the first shot he fired to his left had gone into ground, but said it could have. (Tr. 397).

Defendant testified that he fired the gun in the air while Williams was by the dumpsters. (Tr. 397-398). Both the second and the third shots were fired in the air, according to Defendant. (Tr. 397-398).

Defendant admitted that in his videotaped statement to the police, which was in evidence, he said that Williams was his "vision" and that he was focused on Williams. (Tr. 398). He was mad that Williams had taken money from Defendant and Thorough and mad that Williams had challenged him to a fight. (Tr. 398-399).

Nonetheless, Defendant contended at trial that, "I had no intention to shoot him." (Tr. 399).

During closing argument, Defendant contended that he fired one shot towards the playground and two shots in the air, all as warning shots, and never intended to shoot Williams at all, let alone in self-defense. (Tr. 427-432, 436-437). Defendant admitted he was guilty of involuntary manslaughter for recklessly disregarding the fact that other people were out there and he might hit them, but contended he lacked the intent to commit murder. (Tr. 437).

7. None of the evidence supported a self-defense instruction.

Viewed in the light most favorable to Defendant, the most the evidence established was that Defendant was afraid of Williams; that Williams offered to

fight him, took his shirt off, and threw his cap on the ground; that Defendant knew that Williams had prior robbery convictions and had been in the penitentiary; that Williams was a younger man; and that Williams was attempting to come around Josh towards Defendant. The testimony uniformly established that Williams was unarmed and that no blows were exchanged prior to the gunshots. Defendant further admitted that Williams retreated behind dumpsters, but Defendant continued to shoot.

None of this testimony established the real or apparent necessity for the Defendant to kill to save himself from an immediate danger of serious bodily injury or death, much less reasonable cause for Defendant's belief in such a necessity, or an attempt by Defendant "to do all within [his] power consistent with [his] personal safety to avoid the danger and the need to take a life." *Avery*, 120 S.W.3d at 200-201. This is especially true where it was conceded that Williams had fled the scene of the allegedly imminent altercation, yet Defendant did not avail himself of the opportunity and duty to do all within his power to avoid the necessity to take a life by withdrawing from the scene himself.[12] *State*

---

[12] Defendant's claim that he believed Williams might be searching for a gun with which to respond to Defendant's gun because young guys sometimes hide guns by dumpsters, even if believed and found reasonable, applied only after the victim had fled from the confrontation, and Defendant had failed to do all within

v. Davidson, 941 S.W.2d 732, 735 (Mo. App. E.D. 1997); 32 Mo. Prac., Missouri

---

his power to avoid the necessity to take a life by withdrawing from the scene himself. If the defendant has provoked or initiated the altercation, he may not invoke the self-defense privilege unless he has both withdrawn from the initial confrontation and effectively communicated that withdrawal to the other party. It is not an effective withdrawal to depart from the scene temporarily, and then return for the purpose of renewing the confrontation. 32 Mo. Prac., Missouri Criminal Law § 9.3 at 4. "When an accused has an opportunity to decline or abandon the altercation and does not, he then becomes an aggressor, whether or not he initiated the initial altercation." *State v. Gheen*, 41 S.W.3d 598, 606 (Mo. App. W.D. 2001). "One who is the aggressor in the difficulty in which he has killed another cannot claim self-defense unless he previously withdrew from the altercation so as to have shown his intention in good faith to decline further combat." *Id*. Taking two or three steps back and verbally saying he did not wish to fight did not constitute withdrawal where Defendant used that time to pull out a gun with which to threaten the unarmed Williams. Whether or not Defendant initially provoked the altercation by demanding payment of an illegal debt while armed (as his own testimony suggested), Defendant was not entitled to claim self-defense by the time Williams had fled to the dumpsters.

Criminal Law § 9.3 (2d ed.) at 4 ("self-defense is not a viable issue when the victim is no longer threatening the defendant, but rather is retreating from the confrontation"). *See also*, *State v. Crawford*, 904 S.W.2d 402, 404-406 (Mo. App. E.D. 1995) (defendant's fear that victim was "reaching for something" insufficient to support self-defense instruction and showed no reasonable cause to believe it was necessary to kill victim).

Because the trial court did not err in refusing Defendant's self-defense instruction, Defendant's first point should be rejected.

II.

The State concurs that the written sentence and judgment should be remanded for entry of an order *nunc pro tunc* to correct a clerical error which incorrectly stated that Defendant pleaded guilty rather than that he was found guilty after a trial.

The State concedes Defendant's second point, and agrees that the case should be remanded for entry of an order *nunc pro tunc* reflecting that Defendant was found guilty following a trial.

III.

(Cross-Appeal)

The trial court erred by granting (in part) Defendant's post-trial motion for judgment of acquittal and overturning the jury's guilty verdicts on the counts of assault in the first degree and armed criminal action for the assault upon Martez Williams, because the convictions on these counts did not violate the Double Jeopardy Clause of either the United States or Missouri Constitutions in that multiple punishments for the same conduct are permissible if intended by the legislature. The legislature intended to punish both the murder of one victim and the assault of another because: a) there are separate units of prosecution where there are separate victims of crimes against persons; and b) application of the statutory-elements test demonstrates that it is possible to commit assault in the first degree without committing murder in the first degree, and vice-versa. The legislature has expressly provided for multiple punishments for armed criminal action and the underlying felony. Moreover, two of the bullets fired at Williams were not involved in the murder, so the punishment is not for the same conduct.

The jury found Defendant guilty of assaulting Martez Williams and committing armed criminal action by shooting at him. The trial court granted

Defendant's post-trial motion for judgment of acquittal on these counts because it believed that these convictions (in addition to the murder and armed criminal action convictions for the killing of Jnylah Douglas during the shooting) would subject Defendant to multiple punishments for the same conduct.

The trial court erred because it applied the wrong test and thereby reached the wrong result.

A. Overview of analysis

In *Missouri v. Hunter*, *infra*, the United States Supreme Court held that multiple punishments for the same conduct are permissible if a state legislature intends to punish both offenses.

Missouri legislation incorporates the separate or several offense rule rather than the same transaction rule. Absent an exception, multiple offenses committed within a single transaction may be subject to multiple punishments.

While an exception exists for lesser-included offenses whose statutory elements overlap entirely with those of a greater offense, the statutory elements test of legislative intent does not analyze the evidence or charging document of any specific case (as the trial court did); it compares the statutory elements of the offenses to determine whether it is possible to commit one offense without committing the other. As this Court recently reemphasized in *State v. Hardin*, *infra*, only if it is impossible to commit one offense without committing the other *in all instances* does the exception (and thus double jeopardy) apply.

Here, the offenses were distinct because two different victims of crimes against persons were offended; both are entitled to justice, as the legislature intended. The offense against each victim is a separate "unit of prosecution" because both assault and murder are crimes against persons, and the legislative intent is that there be as many crimes as there are victims.

First-degree assault is not a lesser-included offense of first-degree murder for purposes of double-jeopardy analysis because it is possible to commit first-degree assault without committing first-degree murder; and it is also possible to commit first-degree murder without committing first-degree assault (which requires a specific intent to assault the actual victim) within the same unit of prosecution (under the doctrine of transferred intent).[13]

Nor is an armed criminal action charge linked to an assault charge a lesser-included offense of either assault or murder. The legislature has specifically provided that armed criminal action may be charged along with the underlying felony.

---

[13] The unit of prosecution is important because it defines the scope of the legislative intent to punish a given crime. Here, both assault and murder are crimes against persons, so the offense against each victim is a separate unit of prosecution, and the legislature intended each offense to be punished.

Therefore, neither first-degree assault nor armed criminal action is a lesser-included offense of first-degree murder, and multiple punishments are intended.

Moreover, in the case at bar, there were at least two shots fired at the assault victim (Williams) that did not kill the murder victim (Jnylah Douglas); therefore, Defendant's conviction for assaulting Williams does not constitute punishment for the same conduct as the murder.

B. Standard of review

An appellate court reviews a judgment of acquittal to determine whether the State adduced sufficient evidence to make a submissible case. *State v. Kalk*, 299 S.W.3d 43, 46 (Mo. App. E.D. 2009). In determining whether the evidence is sufficient to support a conviction, a reviewing court accepts as true all reasonable inferences drawn from the evidence and disregards all evidence and inferences to the contrary. *Id*.

Claims of double jeopardy are questions of law reviewed *de novo*. *State v. Werner*, 9 S.W.3d 590, 595 (Mo. banc 2000); *State v. Barraza*, 238 S.W.3d 187, 193 (Mo. App. W.D. 2007).

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," a protection which applies to State prosecutions because it is incorporated in the Due Process Clause of the 14th Amendment. U.S. CONST. amend. V; U.S.

CONST. amend. XIV; *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Barraza*, 238 S.W.3d at 193.

The Double Jeopardy Clause of the U.S. Constitution protects defendants not only from successive prosecutions for the same offense after either an acquittal or a conviction, but also from multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 802 (1989).

The protections afforded are distinct. *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992). "In contrast to the double jeopardy protection against multiple trials," protection against cumulative punishments "is designed to ensure that the sentencing discretion of the courts 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." *State v. Hardin*, 429 S.W.3d 417, 421 (Mo. banc 2014) (quoting *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)). "Double jeopardy regarding multiple punishments is, therefore, limited to determining whether cumulative punishments were intended by the legislature." *McTush*, 827 S.W.2d at 186-187; *Hardin*, 429 S.W.3d at 421; *Missouri v. Hunter,* 459 U.S. at 366-69.

Where a state legislature authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the "same conduct," the prosecution may seek and the court may impose cumulative punishment under those statutes in a single proceeding without offense to the Double Jeopardy Clause. *Missouri v. Hunter*, 459 U.S. at 368; *McTush*, 827 S.W.2d at 186. "Legislatures, not courts, prescribe the scope of punishments." *Hunter*, 459 U.S. at 369.

Missouri follows the separate or several offense rule rather than the same transaction rule. *State v. Treadway*, 558 S.W.2d 646, 651 (Mo. banc 1977); *Horsey v. State*, 747 S.W.2d 748, 750 (Mo. App. S.D. en banc 1988). "Multiple convictions are permissible if the defendant has in law and in fact committed separate crimes." *State v. Foster*, 838 S.W.2d 60, 66 (Mo. App. E.D. 1992); *Barraza*, 238 S.W.3d at 193.

Because the inquiry turns upon determination of whether the legislature intended to provide cumulative sentences for the same conduct, the analysis first requires this Court to examine the statutes under which the defendant was convicted. *McTush*, 827 S.W.2d at 187. Typically, to determine whether multiple charges constitute the same offense, courts consider whether each offense necessitates proof of a fact which the other does not. *State v. Liberty*, 370 S.W.3d 537, 546 (Mo. banc 2012).

"But when a defendant's conduct is continuous, involves more than one item or involves more than one victim, the test more appropriately is focused on the conduct the legislature intended to proscribe under the statute." *Id*; *see also*, *Horsey v. State*, 747 S.W.2d at 751.

"To determine whether the legislature intended multiple punishments, a court looks first to the 'unit of prosecution' allowed by the statutes under which the defendant was charged." *Liberty* at 547 (quoting *State v. Sanchez*, 186 S.W.3d 260, 267 (Mo. banc 2006)); *State v. Roggenbuck*, 387 S.W.3d 376, 381 (Mo. banc 2012); *State v. Thompson*, 147 S.W.3d 150, 160 (Mo. App. S.D. 2004).

Where the charging statute is silent as to the unit of prosecution, recourse must be made to Missouri's general cumulative punishment statute, Section 556.041, RSMo. *State v. French*, 79 S.W.3d 896, 899 (Mo. banc 2002); *Thompson*, 147 S.W.3d at 160. In the absence of an offense-specific indication of legislative intent, the legislature's general intent, expressed in §556.041, RSMo (2000), states that "[w]hen the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense." *Hardin* at 422.[14]

---

[14] The Missouri Constitution provides protection against double jeopardy only in the case of a retrial after an acquittal. MO. CONST. art. I, sec. 19; *State v. Walker*, 352 S.W.3d 385, 387 n. 1 (Mo. App. E.D. 2011). Some cases hold that double-

B. The legislature intended cumulative punishments for the murder of one victim and assault of another.

1. The Missouri legislature's general intent is to punish for all crimes committed in a single transaction.

In the absence of an offense-specific indication of legislative intent, the legislature's general intent, expressed in § 556.041, RSMo (2000), states that "[w]hen the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense." *State v. Hardin*, 429 S.W.3d at 422; *McTush*, 827 S.W.2d at 187. "The double jeopardy doctrine is directed to the identity of the offense, and not to the act." *State v. Bowles*, 754 S.W.2d 902, 908 (Mo. App. E.D. 1988).

Section 556.041 provides:

---

jeopardy protections in Missouri are nonetheless coextensive with those of the Fifth Amendment to the United States Constitution because "Missouri enforces the common law rule that no person shall, for the same offense, be twice put in jeopardy." *State v. Morrow*, 888 S.W.2d 387, 389-390 (Mo. App. S.D. 1994) (citing *State v. Richardson*, 460 S.W.2d 537, 538 (Mo. banc 1970)). *See also*, *Liberty*, 370 S.W.3d at n. 12.

When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(1) One offense is included in the other, as defined in § 556.046; or

(2) Inconsistent findings of fact are required to establish the commission of the offenses; or

(3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(4) The offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

See, *McTush*, 827 S.W.2d at 187.

The Comment to this statute states, "This section follows the general proposition that the state may prosecute and convict for separate offenses even though they arise out of the same conduct." § 556.041, V.A.M.S., Comment to 1973 Proposed Code.

2. Both first-degree murder and first-degree assault are crimes against the person, so there are as many offenses (or "units of prosecution") as there are victims.

A single act violating a statute defining a crime against the person may result in as many offenses as there are victims. *Horsey*, 747 S.W.2d at 752 (citing *State v. Mills*, 671 S.W.2d 437, 439 (Mo. App. E.D. 1984)).

Both murder in the first degree and assault in the first degree are statutes defining crimes against the person, incorporated in Chapter 565 of the Revised Statutes of Missouri ("Offenses Against the Person"). §565.020.1 (murder in the first degree); §565.050.1 (assault in the first degree). Both the first-degree murder and first-degree assault statutes prohibit violence against "another person;" each permits prosecution for each such "another person" victimized in a single transaction, as demonstrated in the case law below. By syllogism, there are two "units of prosecution" where "another person" #1 is murdered and "another person" #2 is assaulted in the same transaction.

Where a crime is defined with reference to a victim and where there is more than one victim, statutes allow for more than one allowable unit of prosecution. *Thompson*, 147 S.W.3d at 160 (negligent operation of a vessel causing physical injury or property damage to "any other person" allowed for more than one allowable unit of prosecution; double jeopardy not violated by

conviction for two counts of negligent operation because two separate passengers were injured).

As in *Thompson*, the legislature has defined each offense with reference to a victim, and there was more than one victim; the legislature therefore intended two units of prosecution in this case. *Id*. The murder was committed against Jnylah Douglas; the assault was committed against Martez Williams. Section 565.050.1 prohibited Defendant from attempting to kill or knowingly causing or attempting to cause serious physical injury to "another person[,]" here Martez Williams. Section 565.020.1 prohibited Defendant from "knowingly causing the death of another person," here Jnylah Douglas, "after deliberation upon the matter."

These were separate offenses, defined in separate statutes, against separate victims, whether or not they occurred in the same transaction. *See*, *id*.

Had the same bullet penetrated Williams' body prior to killing Douglas, would the State have been prohibited from charging the assault of Williams in addition to the murder of Douglas? Of course not. There were two crimes against two persons (each defined as a crime against the person). *See*, *Horsey*, 747 S.W.2d at 752; *Mills*, 671 S.W.2d at 439.

Previous cases confirm that multiple offenses (each a separate unit of prosecution) may be charged as the result of a single shooting.

In *State v. Barraza*, 238 S.W.3d 187 (Mo. App. W.D. 2007), the Western District Court of Appeals held that where the defendant alleged that he shot two people with one bullet (injuring one and killing another), he was guilty of two counts of unlawful use of a weapon because the offense against each victim required proof of an element which the other did not, and the two charges were not, as the defendant contended, a single unit of prosecution. *Id.* at 194.

The Court rejected a double jeopardy claim based on the fact that both convictions allegedly arose from the same act. *Id.* The Court did "not need to reach the issue of whether the State proved that only one bullet injured [victim one] and killed [victim two], since both counts of unlawful use of a weapon required proof of a separate element." *Id.* at 194. "There were two victims here regardless of whether one shot or different shots (the evidence was not clear) caused both the death and the injury." *Id.* The Court denied relief under the plain error standard. *Id.*

In the case at bar, there were two victims. As in *Barraza*, there are separate units of prosecution even if, *arguendo*, a single bullet was responsible for each crime; as in *Barraza*, each count required proof pertaining to a different victim, which the Court characterized as a different element. *Id.*

Similarly, the Eastern District Court of Appeals held in *State v. McAllister*, 399 S.W.3d 518 (Mo. App. E.D. 2013) that, "Evidence of a single

gunshot can support multiple convictions for assault if the shooter was aware of multiple targets." *Id.* at 522.

In *McAllister*, the defendant fired a revolver at a police vehicle on a freeway entrance ramp. *Id.* On appeal, the defendant contended that while he intended to shoot the driver of the police vehicle, there was insufficient evidence to support that he had the specific intent to assault the officer in the passenger seat. *Id.*

The Court held, "Common sense dictates that firing a bullet at the driver of a vehicle on a highway creates a high likelihood that both people inside the vehicle will be injured or killed. That the events took place on a ramp where they could not evade the path of the bullet increases this likelihood even further." *Id.* (citing *State v. Stewart*, 859 S.W.2d 913, 914, 920 (Mo. App. E.D. 1993) (affirming conviction for felony assault on passenger of car who was injured when vehicle crashed after driver was fatally shot)). Thus, the Court affirmed the defendant's conviction on two counts of assault of a law enforcement officer, recognizing that only one shot may have been involved, even though "conviction for assault on a law enforcement officer requires proof of specific intent to kill or to cause serious physical injury." *Id.* at 521-522.

In *State v. Applewhite*, 771 S.W.2d 865 (Mo. App. E.D. 1989), the Eastern District rejected a double jeopardy claim based on multiple assaults that occurred during an escape attempt, including a claim that they were part of a

continuing course of conduct. *Id*. at 870. Each separate assault was a separate crime because Missouri follows the "separate or several offense rule," which allows a defendant to be convicted of several offenses that arise from the same transaction. *Id*. at 870-871. *See also*, *State v. Jackson*, 410 S.W.3d 204, 216-218 (Mo. App. W.D. 2013) (multiple partial penetrations constituted multiple rapes and multiple acts of sodomy constitute separate acts even if they arose from the same transactions; "we do not find that having a singular goal is the same as committing a singular crime").

In *State v. Bowles*, 754 S.W.2d 902 (Mo. App. E.D. 1988), the Eastern District Court of Appeals rejected a double jeopardy claim where a defendant had been convicted of five counts of third-degree assault and one count of first-degree attempted arson after attempting to burn a house that contained five individuals. *Id*. at 904-911. In determining whether several charges from one act or transaction are identical, our courts look to "whether each offense necessitates proof of an essential fact or element not required by the other; if so, there is no identity of offense." *Id*. at 909 (internal quotation marks omitted). "Identification of lesser included offenses requires that the greater of the two offenses encompass all of the legal and factual elements of the lesser crime." *Id*. at 910. "A lesser offense is not included in the greater offense unless it is impossible to commit the greater offense without first committing the lesser." *Id*.

The double jeopardy claim that third-degree assault was a lesser-included offense of attempted first-degree arson was rejected because each statute contained an element which the other did not. *Id.* at 910-911. The claim that double jeopardy was violated by the multiple assault counts emanating from the single act because each was a lesser-included offense of the other was rejected because "[t]he overwhelming weight of authority holds that a single act of assault by the defendant which affects two or more persons constitutes multiple offenses." *Id.* at 911 (citing 8 A.L.R. 4th 960 (1981)).

It is undeniable that there are two units of prosecution when two victims are murdered in a single transaction (including by a single bullet). Similarly, under the line of assault cases previously discussed, there are two units of prosecution when two victims are assaulted, even by a single bullet.

Two units of prosecution cannot become one only in the case where one, but not both assault victims later dies, transmogrifying one (but not both) of the assault counts into a murder count.[15] It defies credulity to believe that the

---

[15] The State could have charged the murder of Jnylah Douglas in one case, and the assault of Martez Williams in another. The fact that the charges were joined does not impact the analysis.

legislature intended a different unit of prosecution analysis only in the event of such a happenstance.

Under the lower court's logic, Defendant could have paralyzed the assault victim had he hit him and killed the murder victim with the same bullet, and escaped any consequence for the assault on the assault victim. This is manifestly wrong, as demonstrated.

Indeed, the murder victim did not die immediately in this case. Up until that time, Defendant's jailhouse interview made clear he was to be charged only with assaulting her.[16]

The crimes against the assault victim and the murder victim were separate crimes against persons and constituted separate "units of prosecution;" therefore, under the rule announced in the above cases, there was no double jeopardy in charging distinct crimes committed in a single transaction.

3. The lesser-included offense exception requires application of a "statutory elements" test.

An exception to the rule that multiple offenses may be prosecuted based upon the same transaction exists if one offense is included in the other, as defined in § 556.046. *Hardin*, 429 S.W.3d at 422 (citing § 556.041(1)). As

---

[16] The assault charge would have to have been a lesser-degree than first, because specific intent was lacking as to the actual victim.

discussed below, in determining whether this exception applies, the reviewing court applies a "statutory elements test" to the multiple units of prosecution to determine whether it is impossible in all instances to commit the greater offense without committing the lesser. *Id.*, 429 S.W.3d at 422-424.

Section 556.046.1 provides that an offense is an 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; or
>
> (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.

See, *McTush*, 827 S.W.2d at 187-198.

This Court has observed that § 556.046.1(1) appears to codify the lesser-included offense definition announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *State v. Hardin*, 429 S.W.3d 417, 424 (Mo. banc 2014); *McTush*, 827 S.W.2d at 188. "Analysis under either § 556.046.1(1) or *Blockburger* focuses on the statutory elements of the offenses rather than upon the evidence actually adduced at trial." *McTush*, 827 S.W.2d at 188. "If each offense requires proof of a fact that the other does not, then the offenses are not lesser included offenses,

not withstanding a substantial overlap in the proof offered to establish the crimes." *Id.*

"[A]n indictment-based application of this definition has been expressly rejected." *State v. Hardin*, 429 S.W.3d 417, 424 (Mo. banc 2014). Courts are not to "compare the Charge or averment of the greater offense with the legal and factual elements of the lesser offense." *Id.* (quoting *State v. Smith*, 592 S.W.2d 165, 166 (Mo. banc 1979)).

In *Hardin*, this Court reaffirmed that the statutory elements test employed to determine whether the "lesser-included offense" exception applies is "focused on the statutes defining each offense[,]" rather than the charging document or the specific proof. *Id.* at 424.

Application of § 556.046.1(1) "is straightforward. The elements of each offense are gleaned from the statutes or common law definitions and then compared." *McTush*, 827 S.W.2d at 188. "If each offense is established by proof of an element not required by the other offense, then neither offense is an included offense within the meaning of § 556.046.1(1), and the limitation on convictions for multiple offenses codified at § 556.041(1) does not apply." *Id.*

"An offense is a lesser included offense if it is **impossible** to commit the greater without necessarily committing the lesser." *Hardin*, 429 S.W.3d at 422 (quoting *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002) (emphasis added)). "A lesser included offense is not included in the greater unless it is

impossible to commit the greater without first committing the lesser." *Nunn v. State*, 824 S.W.2d 63, 65 (Mo. App. E.D. 1991) (emphasis added). Thus, the test is whether **in all instances** the lesser crime is included in the greater crime because of its statutory elements. *See*, *Hardin, supra; Nunn, supra.*

In *Hardin*, the defendant was convicted of both aggravated stalking where "[a]t least one of the acts constituting the course of conduct is in violation of an order of protection and the person has received actual notice of such order," and of violation of an order of protection. *Hardin*, 429 S.W.3d at 422; §565.225.3(2); *see*, §455.085.2 (a person violates an order of protection when "a party, against whom a protective order has been entered and who has notice of such order entered, has committed an act of abuse in violation of such order"). The lesser crime was arguably included in the greater under the facts as charged and submitted.

However, this Court held that there was no Double Jeopardy violation because it was possible under other facts to employ other ways to commit the lesser offense. "It *is* possible to commit aggravated stalking without violating an order of protection: a defendant may commit aggravated stalking by making a credible threat, for example, or by violating a condition of his probation or parole." *Id*. (emphasis original). This Court rejected the defendant's claim that "whether the offense of violating a protective order is included in the offense of

aggravated stalking depends on how the latter offense is indicted, proved, or submitted to the jury." *Id.*

Because while aggravated stalking "*may* be established by proof of a protective order violation, but it may also be established by proof of other facts[,]" a "protective order violation is not a fact proof which is required to establish commission of aggravated stalking. Aggravated stalking does not, therefore, include the offense of violating a protective order." *Id.* at 424. Thus, the **statutory** elements did not make the lesser offense a lesser-included offense of the greater offense, and there was no double jeopardy when the defendant was convicted of both aggravated stalking and violating a protective order. *Id.*

4. First-degree murder and first-degree assault each have an element not included in the other statute.

In the case at bar, the trial court mistakenly analyzed the charging document, the case-specific evidence, and the specific verdict director submitted, rather than determining, as this Court held that it should in *Hardin, supra,* whether the statutory elements of the two offenses made it "impossible" to commit one without committing the other.

Section 565.050.1 provides that, "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."

Section 565.020.1 provides that, "A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter."

Murder requires an element that assault does not: death of the victim. *Compare*, § 565.020.1 & § 565.050.1, RSMo (2000). Similarly, assault in the first degree requires an element that murder does not: specific intent to assault the actual victim. *State v. Whalen*, 49 S.W.3d 181, 185-186 (Mo. banc 2001).

Obviously, it is possible to commit a first-degree assault without committing a first-degree murder when no victim dies.

It is equally possible to commit a first-degree murder of a victim without committing first-degree assault within the same "unit of prosecution" in a transferred intent case, since first-degree assault requires the specific intent to assault the victim in question. *State v. Whalen*, 49 S.W.3d at 185-186. Here, for example, no one contended that Defendant had the specific intent to assault Jnylah Douglas (who was shot by a bullet intended for another while behind a bush).[17]

---

[17] It is also possible to commit first-degree murder of one victim without committing a first-degree assault of a second victim, and to commit first-degree assault without shooting and killing someone else.

The fact that the proof in this specific case overlapped is not relevant to the legal analysis, which depends upon a comparison of the two statutes and whether proof of the element would overlap in all instances. *Hardin*, 429 S.W.3d at 423-424.

Hence, there is an intent by the legislature to punish each of these two offenses under the statutory elements test because the conduct is proscribed by both statutes and it is not "impossible" to commit each without committing the other. *Hardin*, 429 S.W.3d at 422.[18]

---

[18] Indeed, the trial court itself acknowledged that it would be possible to charge and submit both crimes without implicating double jeopardy, demonstrating that had it applied the proper test, it would have reached the proper result:

> The case, at least in theory, could have been submitted based on the bullet was from bullet A (sic). There was separate bullets fired at the little girl that was fired at the intended victim that didn't hit the actual victim (sic). It would have been theoretically possible to find the defendant guilty of murdering the little girl bullet one and assaulting the defendant—the intended victim bullet two. It wasn't submitted that way.

(Tr. 455).

Here, assault in the first degree is not *always* a lesser-included offense of murder in the first degree because the offenses could, under certain facts, support two convictions. *Hardin*, 429 S.W.3d at 423. *See*, Dierker, 28 MOPRAC § 28:7 (2013) (listing murder in the second degree, voluntary manslaughter, and involuntary manslaughter as lesser-included offenses of murder in the first degree, but not including assault in the first degree as such). The proper analysis is neither evidence-specific, nor case-specific, but rather a comparison of the statutory elements. If, as the trial court found, it is "theoretically possible" to charge both as the result of the same conduct or course of conduct, there is no double jeopardy, as *Hardin* and other case law cited establishes.

Murder requires an element that assault does not: death of the victim. *Compare*, § 565.020.1 & § 565.050.1, RSMo (2000). Similarly, assault in the first degree requires an element that murder does not: specific intent to assault the actual victim. *State v. Whalen*, 49 S.W.3d at 185-186.

Here, the unit of prosecution involving the murder of Jnylah Douglas did not contain first-degree assault as a lesser-included offense because specific intent to assault the murder victim is not an element of that offense. Indeed, while the elements of the offenses and not case-specific evidence are the *gravamen* of the test, in this case, Defendant was unaware of Jnylah's presence behind a bush and lacked the specific intent required to assault her. The fact that the murder of Jnylah Douglas could have been prosecuted (had the assault

of Martez Williams not been prosecuted) without first-degree assault as a lesser-included offense plainly reveals the error in the trial court's analysis under the statutory elements test.

Thus, under the statutory elements test, the lesser-included offense exception to the rule that all crimes committed within a single transaction may be prosecuted did not apply. Therefore, no Double Jeopardy results from the punishment of both offenses.[19]

Because each offense requires proof of an element which is not an element of the other offense, there is no double jeopardy resulting from prosecution of two crimes against persons committed against two different victims stemming from the same act. *See*, *Hardin*, 429 S.W.3d at 423.

Moreover, all witnesses agreed there were multiple shots fired and only one struck the murder victim. Defendant himself acknowledged to police that his target was Williams and that he continued shooting at him after he fled. Thus,

---

[19] While it is possible that the trial court in the case at bar believed that under the statutory elements test, *someone* would have to be a first-degree assault victim in every first-degree murder case (even one based upon transferred intent), that it is irrelevant to the analysis here, where there were two separate victims of separate crimes against persons and therefore distinct "units of prosecution." *See*, e.g., *Barraza*, *supra*.

separate bullets were fired at Williams that did not hit the murder victim. The assault perpetrated by these bullets was not a lesser-included offense of the murder.

Because the lesser-included offense exception does not apply, the general intent of the legislature permits the prosecution and punishment of more than one offense resulting from the same conduct. *Id*. at 422.

Defendant suffered no double jeopardy when the jury convicted him of assaulting and committing armed criminal action against Martez Williams.

5. Case law permits the prosecution of both assault and murder.

In *State v. Wolford*, 754 S.W.2d 875 (Mo. App. W.D. 1988), the Court of Appeals expressly held that "[t]he intent of the Missouri legislature to prescribe separate punishment for the crimes of burglary, **assault and murder** is apparent and there is no statutory or constitutional prohibition against the imposition of consecutive sentences for these offenses." *Id*. at 880 (emphasis added).

In *Wolford*, the defendant shot his estranged wife's boyfriend when he attempted to rescue her from an attack by the defendant, who was armed with a sawed-off shotgun. *Id*. at 877. The evidence established that defendant intentionally pulled the trigger, and was therefore guilty of murder. *Id*. at 878-879. The Court observed that:

> The offenses for which defendant was convicted—murder in the second degree, assault in the first degree and burglary in the first degree—are all separate crimes with different constituent elements of proof. *See State v. Moore*, 711 S.W.2d 533, 538 (Mo. App. 1986). Although these elements may have occurred during a continuous course of conduct within a relatively short period of time, the state is not prohibited from charging three separate crimes. *State v. Olsen*, 636 S.W.2d 318, 320 (Mo. banc 1982); *State v. Whitehead*, *supra*, 675 S.W.2d [939] at 943-944 [Mo. App. 1984].

Wolford, 754 S.W.2d at 880.

While the assault and burglary counts took place as to a third victim at a residence to which the wife fled, the key to the holding is the analysis of the assault and murder statutes under the statutory elements test. While the defendant was convicted of the lesser-included offense of second-degree murder rather than first-degree murder, the difference is not material. There, as here, the jury was required to find the defendant intentionally fired the gun—even without the additional element of deliberation required for first-degree murder, the two crimes did not implicate double jeopardy. *See*, *id*. There, as here, there were multiple victims and the Court found a legislative intent to impose multiple punishments despite the defense argument that the events were part of a continuous course of conduct because the elements differed. *See*, *id*.

This is the same result reached by other appellate courts in similar circumstances. In *U.S. v. Rentz*, 735 F.3d 1245 (10th Cir. 2013), the Tenth Circuit found no double jeopardy violation where the defendant was charged with the murder of one victim and the assault of another with a single bullet. The Court held that the two counts required different *mens rea*: the murder count required "malice aforethought" whereas the assault with intent to cause serious bodily injury count required that the defendant "knowingly assaulted" a different victim "causing him serious bodily injury." *Id.* at 1253. Each statute required proof of an element that the other did not. *Id. See also*, *State v. Good Bird*, 197 F.3d 1203, 1204-1205 (8th Cir. 1999) (no double jeopardy because second-degree murder and assault resulting in serious bodily injury had different elements); *U.S. v. Cavanaugh*, 948 F.2d 405, 407, 410 (8th Cir. 1991) (defendants indicted for first-degree murder, convicted of second-degree murder; assault resulting in serious bodily injury was not a lesser-included offense of murder because different elements).

In the case at bar, the evidence of a single gunshot that attempted to kill or cause serious physical injury to Williams, which in fact killed Douglas, supported both convictions. Defendant's intent to shoot at Martez Williams was sufficient, under the theory of transferred intent, to support the conviction for murder in the first degree of Jnylah Douglas. The jury found that Defendant also had the specific intent to assault Williams. Thus, two different crimes were

committed, for which the legislature has prescribed two different punishments and, under the holding of *Missouri v. Hunter*, there is no violation of the Double Jeopardy Clause.

6. The "continuing course of conduct" exception does not apply.

The trial court thought that the case, *as submitted*, involved a continuing course of conduct.[20]

However, the "continuing course of conduct" exception does not apply because Defendant had time to form a separate intent each time he pulled the trigger. In *State v. Gray*, 347 S.W.3d 490 (Mo. App. E.D. 2011), the Court of Appeals rejected a claim of double jeopardy where second-degree murder and child abuse resulting in death were charged pursuant to a single course of conduct, emphasizing, "The act of striking someone is distinguishable from those offenses that intrinsically involve a continuing course of conduct such as false imprisonment, bigamy, and operating a house of prostitution." *Id.* at 507. *See*

---

[20] The Court opined that while it "would have been theoretically possible to find the defendant guilty of murdering the little girl bullet one and assaulting the . . . intended victim bullet two[,]" the case "was submitted as one crime, one continuous act. Because it was submitted that way, I don't think it's possible for me to parse out bullet A for the murder, bullet B for the assault first degree." (Tr. 455-456).

also, *State v. Jackson*, 410 S.W.3d 204, 216-218 (Mo. App. W.D. 2013) (multiple partial penetrations constituted multiple rapes and multiple acts of sodomy constitute separate acts even if they arose from the same transactions; "we do not find that having a singular goal is the same as committing a singular crime"); *State v. Tyler*, 196 S.W.3d 638, 641 (Mo. App. W.D. 2006) (separate assaults may be charged from a single set of facts because defendant commits an offense each time he forms an intent to attack the victim); *State v. Morrow*, 888 S.W.2d 387, 392-393 (Mo. App. S.D. 1994) (each act of firing into a dwelling house an allowable unit of prosecution).

As the trial court observed and Defendant conceded in closing argument, there were three shots fired, and viewed in the light most favorable to the verdicts, they were fired at Williams.[21] Two of those bullets did not murder Jnylah Douglas. Because, according to even Defendant's confession, his "target" was Williams, Williams was assaulted by these bullets, but Jnylah was not murdered by them.

There are thus separate "units of prosecution" for the shots which assaulted Williams but did not kill Jnylah, and the convictions for the assault

---

[21] While every witness did not testify consistently with this theory, the evidence and inferences, viewed in the light most favorable to the verdicts, disregarding all contrary evidence and inferences, support it.

and armed criminal action upon Williams did not subject Defendant to multiple punishments for the same conduct. *See*, *Morrow*, 888 S.W.2d at 392-393 (because each shot creates a danger to public safety and the occupants of a dwelling, each act of firing into a dwelling house is an allowable unit of prosecution).

7. The legislature has specifically authorized prosecution of armed criminal action and the underlying felony.

The legislature has specifically authorized cumulative punishment for armed criminal action and the felony which underlies it, as the United States Supreme Court held in *Missouri v. Hunter*, 459 U.S. at 368-369. Hence no double jeopardy arises from the cumulative punishment of the armed criminal action count linked to the assault conviction. *Id*.

8. *Reductio ad absurdum*

The lower court in essence concluded that two "units of prosecution" under the assault statutes morphed into one when the murder victim died. This is simply not the law.[22]

---

[22] In essence, the court attempted to resuscitate the long-dead "merger" doctrine under which an underlying felony "merged" into a felony murder charge when a victim died. As the result of this Court's ruling in *State v. McTush*, 827 S.W.2d at 186, which teaches that double jeopardy analysis regarding multiple punishments "is now limited to determining whether cumulative punishment

It is crystal clear that both species of second-degree murder may be prosecuted along with an assault without violating double jeopardy. Could the legislature have intended a more lenient outcome for a first-degree murder resulting from an assault of a second victim than for a second-degree murder, particularly where an additional statutory element (deliberation) is required?

The Missouri legislature has expressly provided that punishment for second-degree murder "shall be in addition" to the punishment for the underlying felony. § 565.021.2; *State v. Owens*, 849 S.W.2d at 584; *Coody*, 867 S.W.2d at 666. Were this a second-degree felony murder case, there is no question that the Court would hold that cumulative punishments for the murder count and the assault count would not violate double jeopardy.[23]

---

was intended by the legislature," merger principles "no longer have a place in double jeopardy analysis." *State v. Coody*, 867 S.W.2d 661 (Mo. App. S.D. 1993). Moreover, the merger doctrine only applied to felony murder and would not have applied in this case. *Coody*, 867 S.W.2d. at 664 n.1 & 665. In *McTush*, this Court also abrogated the "single act of force rule" to the extent that it conflicted with the holding of that case. *McTush*, 827 S.W.2d. at 188-189.

[23] In *Owens*, the Court of Appeals affirmed convictions for second-degree felony murder, attempted robbery in the first degree, and armed criminal action where the felonies were perpetrated with a deadly weapon, and held that the

Were this a conventional second-degree murder case, such as *Wolford*, *supra*, the same result would be reached under the statutory elements test.

If first-degree assault were always a lesser-included offense of first-degree murder, there would be two units of prosecution when the jury convicts the defendant of the lesser-included offense of second-degree murder, but double jeopardy would attach if the jury convicted the defendant of the greater offense as to the murder victim. That is an illogical and unsound application of the statutory elements test.

This is not a far-fetched scenario. Had the jury believed Defendant's story that he only shot into the air and the ground, and had no intent to hit the assault victim (Williams), he could have been convicted of felony second-degree murder instead of first-degree murder.[24] The manifest legislative intent would then have required the lower court to impose multiple punishments for both

---

sentences imposed "are within the express authority of the statutes and hence do not subject Owens to double jeopardy." *Id.* at 585. *See also*, *State v. Dudley*, 303 S.W.3d 203, 206 (Mo. App. W.D. 2010).

[24] Admittedly the jury was instructed only on conventional second-degree murder rather than felony murder, but the point remains valid for purposes of analysis under the statutory-elements test. (L.F. 50).

murder and assault, and would undeniably not have violated double jeopardy under *Owens*, *supra*.

Similarly, if the jury believed that Defendant shot at Williams knowing that his conduct was practically certain to cause his death, but did not do so after deliberation, Defendant could have been convicted of conventional second-degree murder, and there would have been no double jeopardy under the holding of *Wolford*, *supra*.

If the statutory elements are different for conventional second-degree murder, it follows that they must also be different for first-degree murder, which contains the additional element of deliberation that is not an element of first-degree assault.

Any other holding would produce absurd results. If the lower court is right, a defendant who fires a bullet at a father shielding a child which the shooter did not see, which passed through the father and killed the child, if prosecuted for the first-degree murder of the child, could not be prosecuted for the intentional assault on the father (no matter how egregious his injuries). He could, however, be prosecuted for second-degree murder and assault, if he had not deliberated.

If the lower court is right, a defendant who attempts to set off a car bomb to kill a specific victim, causing him serious physical injury (including loss of a limb) and killing a passenger, could not be prosecuted for the first-degree

assault of the victim he tried to kill and seriously maimed if he is prosecuted for the first-degree murder of the other victim.

Such results are absurd. The legislature did not create an exception to the murder statute for cases in which a defendant has assaulted a different victim with the same bullet. Nor did the legislature intend to give defendants a pass for assault cases in which they shoot into crowded areas and risk killing someone other than the person they are assaulting, which is precisely what happened here.

Both Jnylah Douglas and Martez Williams were victims of conduct proscribed by the legislature, and as the multiple-victims-from-the-same-bullet scenario discussed in *State v. Arellano*, 736 S.W.2d 432 (Mo. App. W.D. 1987), *Barraza*, and *McAllister* makes plain, the assault of one victim is not excused by the assault of another resulting in death.

It is an absurdity to suggest that the legislature intended otherwise. There were two wrongs, two victims, two crimes, and two units of prosecution.

The trial court erred by applying a "continuing course of conduct"[25] analysis, and by misapplying the statutory elements test by looking to the

---

[25] As noted above, the "continuing course of conduct" exception does not apply to crimes such as assault or murder, which are based upon distinct blows, distinct targets, or distinct bullets.

specific charging document and case-specific proof, an approach this Court condemned and reversed in *Hardin*.

Where Defendant committed offenses against both Martez Williams and Jnylah Douglas, the legislature did not intend for one victim to receive justice and the other not. Defendant's double jeopardy rights were not violated under the test established by *Missouri v. Hunter*, as applied to the relevant Missouri statutes.

This Court should remand the case for entry of a judgment consistent with the verdicts of the jury, which found Defendant guilty of assault in the first degree and of the related charge of armed criminal action, and for sentencing on those counts.

CONCLUSION

Defendant's convictions and sentences for first-degree murder and the related armed criminal action count should be affirmed. The case should be reversed and remanded in part, for entry of a judgment reinstating the jury's guilty verdicts on the counts of assault in the first degree and the related count of armed criminal action; for sentencing on those counts; and for an order *nunc pro tunc* reflecting that Defendant was convicted on each count following a jury trial.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Gregory L. Barnes
GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
greg.barnes@ago.mo.gov

ATTORNEYS FOR RESPONDENT/
CROSS-APPELLANT, STATE OF
MISSOURI

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 14,953 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 31st day of October, 2014, to:

Gwenda Robinson
1010 Market Street, Ste. 1100
St. Louis, Missouri 63101
Gwenda.Robinson@mspd.mo.gov

/s/ Gregory L. Barnes
GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946
P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
greg.barnes@ago.mo.gov

ATTORNEY FOR RESPONDENT/
CROSS-APPELLANT
STATE OF MISSOURI