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

CROSS-APPELLANT'S SUBSTITUTE REPLY 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

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III. (Cross-appeal)

The trial court erred by holding that assault in the first degree of one victim is a lesser-included offense of murder in the first degree of another because, under the statutory elements test, assault first is not always a lesser-included offense of murder first, such as when the shooter is unaware of the presence of the murder victim when firing at the assault victim.

Defendant contends that the elements of assault in the first degree are always present in a murder in the first degree case, and that therefore, under the statutory elements test, assault one is a lesser-included offense of murder one and both may not be prosecuted without violating double jeopardy. However, the *mens rea* of "purposefully" required for a first-degree assault conviction requires that the defendant at least be aware of the presence of the person alleged to be the assault victim, whereas the *mens rea* of "knowingly" killing after deliberation required for a first-degree murder conviction does not. Thus, an element is required for first-degree assault that is not an element of first-degree murder; and first-degree assault is not a lesser-included offense for purposes of double-jeopardy analysis under the statutory-elements test.

A. The *mens rea* element of first-degree assault is different than the *mens rea* element of first-degree murder.

In *State v. Whalen*, 49 S.W.3d 181, 186 (Mo. banc 2001), this Court held that first-degree assault requires that "a defendant has to act purposefully as to the person defendant is charged with assaulting." *Id.*

This is because first-degree assault requires a jury to find that the defendant attempted to kill or to cause serious physical injury to another person, which "requires proof of a very specific intent on the part of the actor to accomplish that objective." *State v. Gonzales*, 652 S.W.2d 719, 722 (Mo. App. W.D. 1983). The inchoate crime requires "a firm purpose" and is limited to "purposive conduct" or "specific intent" to commit the crime allegedly attempted. *Id.* (quoting Model Penal Code § 5.01, comment at 27).

In analyzing the *mens rea* requirement for first-degree assault, this Court emphasized in *Whalen* that while a defendant needn't know the name of the person he assaulted or to have specifically decided to injure each person who was injured or threatened with injury, a defendant may only be guilty of first-degree assault as to persons whom the defendant was aware

were present when he engaged in his criminal conduct. *Whalen*, 49 S.W.3d at 186-187.[1]

"By contrast, the person will not be guilty of purposely causing or attempting to cause [serious physical injury] if the person is unaware of the likely presence of the injured person at the time the person acts, although the person may be guilty of criminally reckless or negligent conduct, depending on the state of his knowledge." *Id.* at 187.

Consequently, in *Whalen*, this Court reversed two first-degree assault convictions because the defendant was unaware of the presence of two officers in a doorway when the defendant fired a gun. *Id*. at 183-184, 187. The Court affirmed the first-degree assault conviction for firing at the officer

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[1] Put another way, while a defendant is presumed to intend the natural and probable consequences of his acts, which in the case of firing a handgun at a victim standing near known bystanders "is, at the very least, great bodily harm[,]" a defendant cannot intend to hit someone he does not know is there or deem it "natural and probable" that he will hit someone he does not know is there. *See*, *State v. Pulley*, 356 S.W.3d 187, 190 (Mo. App. E.D. 2011); *State v. Scott*, 769 S.W.2d 149, 151 (Mo. App. W.D. 1989) (affirming first-degree assault conviction and rejecting claim that shot intended for someone else in a group defendant shot into negated the required *mens rea*).

whom the defendant could see in the doorway. *Id*. The Court explained that the defendant "cannot be found guilty of first-degree assault as to the other two officers. The evidence is not sufficient to permit the jury to find beyond a reasonable doubt that Mr. Whalen was aware of the presence of the other two officers and that he attempted to cause them serious physical injury at the time that he shot Corporal Cummines or that he acted with the purpose of causing them serious physical injury or purposely engaged in conduct that he was aware would cause him serious physical injury." *Id*. at 187.[2]

Similarly, in *State v. Martin*, 119 S.W.2d 298, 301 (Mo. 1938), this Court held that where persons in a car threw an acid bomb into a taxi, and could clearly see the driver and one passenger but not a third person sitting on the far side of the rear seat, the defendant's conviction for attempting to cause serious physical injury to the person he was unaware of had to be reversed "because the State did not make a submissible case that the

[2] The Court reduced the other two convictions to second-degree assault, which required only that the defendant "recklessly cause[d] physical injury to another person by means of discharge of a firearm." *Id*. at 188.

throwers knew of the third person's presence." *Id*. *See, Whalen*, 49 S.W.3d at 187.[3]

In contrast to the "purposefully" *mens rea* required by the first-degree assault statute, the *mens rea* of the first-degree murder statute requires only that the defendant "knowingly" cause the death of "another person" after

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[3] *State v. Arellano*, 736 S.W.2d 432 (Mo. App. W.D. 1987), does not hold to the contrary. *Arellano* holds that in some cases where a bystander is an unintended victim of an assault directed at another, the defendant's intent may be transferred "for the purpose of fixing the grade of the offense" and for determining whether a self-defense instruction is warranted. *Id*. at 434. Conduct may recklessly cause serious physical injury, or physical injury may be caused by criminal negligence in the use of a deadly weapon, which would render the defendant guilty of second-degree or third-degree assault, respectively, even without having a particular person as a target. *See*, *id*. at 435-436. However, there was no death of the unintended victim in *Arellano*, so that case did not address the scenario where the defendant is unaware of a murder victim's presence, the situation in which the *mens rea* requirements diverge for first-degree murder and first-degree assault (even if it is accepted that intent may transfer for first-degree assault to victims of whose presence the defendant was aware).

deliberation. Section 565.020.1. Thus, it is undisputed that in a transferred intent case, a defendant may be guilty of first-degree murder where, as here, his bullet kills a person whose presence he was not aware of. *State v. Nathan*, 404 S.W.3d 253, 267 (Mo. banc 2013). However, a defendant could not be charged with first-degree assault of that victim because defendant cannot possess specific intent or a purpose to kill someone he does not know is there. *See*, *Whalen*, 49 S.W.3d at 186-187.

Because the statutory elements test requires that all the elements of first-degree assault be included in the elements of first-degree murder, and they are not because murder does not require awareness of the presence of the victim when the shot is fired, first-degree assault is not a lesser included offense of first-degree murder for purposes of double jeopardy analysis.

"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).

Because it is possible to commit first-degree murder of a victim whose presence the defendant is unaware of without committing first-degree

assault, the statutory elements are different and the lesser-included offense exception to the legislature's general policy of permitting multiple punishments for multiple offenses committed in a single transaction does not apply. There is no double jeopardy.

B. The statutory elements are deemed different where there are two victims of crimes against "another person."

"The overwhelming weight of authority holds that a single act of assault by the defendant which affects two or more persons constitutes multiple offenses." *State v. Bowles*, 754 S.W.2d 902, 911 (Mo. App. E.D. 1988), 911 (citing 8 A.L.R. 4th 960 (1981)).

Defendant's argument is, essentially, that two assault-first charges may be brought and two punishments imposed where there are two victims, but if one dies, only one punishment may be imposed. Could the legislature have intended that a murder accompanied by an assault be subject to more lenient multiple-punishment analysis than an assault accompanied by another assault? Could the legislature have intended that the second assault be, in essence, excused from punishment if the first assault victim dies, but not if that victim doesn't? Should a shooter who has inflicted one fatal shot (of an unintended victim whose presence he was unaware of) be granted a second, non-fatal shot which paralyzes a second (intended) victim with

impunity once he realizes he can be charged with the murder of the first victim? Of course not.

Missouri courts recognize that the legislature intends to punish each crime against "another person." The existence of separate persons who are separate victims results in separate elements for purposes of double-jeopardy analysis.

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**." *Id.* (emphasis added).

"A person is guilty of attempt to commit an offense when, with the **purpose** of committing the offense, he does any act which is a substantial step towards the commission of the offense. A '**substantial step'** is conduct which is strongly corroborative of the firmness of the actor's **purpose** to complete the commission of the offense." Section 564.011 (emphasis added).

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." *Id.* (emphasis added).

Defendant's analysis requires the Court to construe the phrase, "another person" as constituting the same element even where there are different "another persons." This would require that the legislature have

intended the absurd scenarios discussed above where the second crime goes unpunished even if there is a different victim.

The legislature did not so intend, and case law makes that clear.

In *State v. Barraza*, 238 S.W.3d 187 (Mo. App. W.D. 2007), the Court 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. *Id.* at 194. 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 in *Barraza* considered proof of an act directed at a second victim to be proof of a separate element. *See*, *id.* The Court observed that "the State had to prove (once each for [victim one] and [victim two]): (1) that Barraza or another person knowingly shot a firearm at a motor vehicle, and (2) that as a result of this conduct, [the victim] suffered injury or death." *Id.* Because each required proof "of a fact which the other does not" under *Blockburger v. U.S.*, 284 US 299, 304 (1932), "both counts of unlawful use of a

weapon required proof of a separate element" and they were separate offenses for purposes of double-jeopardy analysis. *Id*.

Under the statute at issue in *Barraza*, proof of the charged class A felony required that the act result "in injury or death to another person." *Id*. *See*, §§ 571.030.1(9) & 571.030.7, RSMo (2000). The holding therefore rests on the ground that each "another person" constitutes a separate element of proof under the statute.

As in the unlawful use of a weapon statute at issue in *Barraza*, the first-degree murder and first-degree assault statutes require proof of an intent to kill or cause serious physical injury to "another person" (assault) or that the defendant knowingly cause after deliberation death to "another person" (murder). If each such "another person" creates a separate element, there are separate crimes under the statutory-elements test here, as in *Barraza*.

This Court unanimously held in *State v. Sanchez*, 186 S.W.3d 260 (Mo. banc 2006), that where "the crime is defined with reference to confining 'another' and there is more than one victim, [the kidnapping statute] allows for more than one allowable unit of prosecution." *Id*. at 267 (citing *Thompson*, 147 S.W.3d at 160, which dealt with a statute referencing "any other person"). "The instructions required two separate persons to be victimized in

different ways" where one victim was confined and the other used as a shield or hostage. *Id.*

At bottom, the same reasoning is applied in the other "multiple crimes from a single bullet" cases, such as *State v. McAllister*, 399 S.W.3d 518 (Mo. App. E.D. 2013). "Evidence of a single gunshot can support multiple convictions for assault if the shooter was aware of multiple targets." *Id.* at 522. Whether understood as resulting from the proposition that each is a "separate unit of prosecution"[4] or from the fact that proof of each "another

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[4] Defendant contends that "unit of prosecution" analysis is only appropriate in a single-statute context. However, in both *State v. Liberty*, 370 S.W.3d 537, 547 (Mo. banc 2012), and *State v. Sanchez*, 186 S.W.3d 260, 267 (Mo. banc 2006), this Court used the plural in reciting the rule that, "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." *Id.* (emphasis added). Although each was admittedly a single-statute case, the latter dealt with separate sections defining different ways to commit a violation. In any event, "unit of prosecution" analysis is a framework for deducing legislative intent, which is the real issue. Where crimes against persons are at issue, a single act violating a statute defining a crime against the person may result in as many

person" is a separate element, the logical basis is the same: where there are two victims of crimes against persons, there are two crimes and each is intended by the legislature to be entitled to justice. *See also*, *State v. Thompson*, 147 S.W.3d 150, 160 (Mo. App. S.D. 2004) (no double jeopardy where negligent operation of a vessel caused physical injury to two passengers because reference in statute to a victim as "any other person" allowed for more than one allowable unit of prosecution).

As the Court of Appeals held in *Bowles*, *supra*, "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.*, 754 S.W.2d 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.*

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offenses as there are victims. *Horsey v. State*, 747 S.W.2d 748, 752 (Mo. App. S.D. en banc 1988) (citing *State v. Mills*, 671 S.W.2d 437, 439 (Mo. App. E.D. 1984)). If the legislature does not intend for charges involving multiple victims to violate double jeopardy in a single-statute context, there is no reason to infer that the legislature intended for charges which arise under multiple statutes defining crimes against "another person" to violate double jeopardy in the multiple-victim context.

This holding is consistent with this Court's holding in *State v. Hardin*, 429 S.W.3d 417, 424 (Mo. banc 2014), that there is an intent by the legislature to punish each of two offenses under the statutory elements test where 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.

If the elements differ on their face, as a matter of law (e.g., the *mens rea* requirement), or require a separate item of proof, there is no double jeopardy because it is possible to commit one offense without commiting the other. *See, id.*

C. The legislature could not logically have intended to make first-degree assault subject to cumulative punishment in a second-degree murder case but not in a first-degree murder case.

Defendant does not appear to contest that both felony second-degree murder and conventional second-degree murder may be punished cumulatively with first-degree assault. *See*, *State v. Wolford*, 754 S.W.2d 875, 880 (Mo. App. W.D. 1988) (intent of the Missouri legislature to prescribe separate punishment for the crimes of assault and murder is apparent and there is no statutory or constitutional prohibition against the imposition of consecutive sentences for these offenses).

This Court should not presume that the legislature irrationally believed that second-degree murder should permit a harsher sentencing or double-jeopardy analysis than first-degree murder in this context.

While Defendant relies on overruled case law which held that double jeopardy once applied to felony murder and the underlying felony, that rule has been abandoned for a reason by both the legislature and the courts. And even in *Morgan* and *Williams* (cited by Defendant)--which are no longer good law--the basis of the holding was that the felony substituted for the *mens rea* requirement of the murder statute; therefore, it was impossible to commit felony murder without committing the felony. *See*, *State v. Morgan*, 592 S.W.2d 796, 801, 803 (Mo. banc 1980) (stealing and second-degree felony murder); *Williams v. State*, 646 S.W.2d 848, 849-850 (Mo. App. E.D. 1982) (robbery and first-degree felony murder, which no longer exists).[5] The enactment of a statute by the legislature following those holdings which does not permit such an interpretation supports the State's position that the legislature intends for both offenses to be punished, particularly in the multiple-victim context.

[5] Notably, neither case stands for the proposition that any felony, much less first-degree assault, is subsumed in conventional first-degree murder (or even conventional second-degree murder).

In contrast to Defendant's cases, the first-degree assault statute contains a *mens rea* (awareness of the victim's presence) that is not subsumed in the present first-degree murder statute (which does not include felony murder) in the transferred-intent context. Those cases therefore are distinguishable.

The public policy subjecting criminals who shoot people in the course of committing felonies, or who commit second-degree murder while committing other assaults to multiple punishments, applies with even greater force where first-degree murder is involved. If it did not, even assassins need not worry about hitting unknown bystanders in public places while shooting at their targeted victim, for no additional punishment could result.

Case law has recognized that the public policy of protecting the safety of innocents from flying bullets may be taken into account when analyzing double-jeopardy issues which turn on the intent of the legislature. *See*, *e.g.*, *State v. Morrow*, 888 S.W.2d 387, 392-393 (Mo. App. S.D. 1994) (each shot fired into a dwelling house is a separate crime because intent of the legislature is to protect occupants from a danger which recurs with each shot).

This is the prototypical case illustrating why the legislature intended that both crimes be punished. Defendant opened fire near a crowded

playground filled with children in the middle of the day, and killed one he did not know was there, despite missing his intended target with multiple shots.

The legislative intent is clear from the different statutory elements, from the fact that there were multiple victims of crimes against persons, and from the irrefutable public policy of the legislature concerning lesser-degrees of murder and first-degree assault. Because multiple punishments are intended by the legislature, there can be no double jeopardy violation in punishing both the first-degree murder of one victim and the first-degree assault of another under *Missouri v. Hunter*, 459 U.S. 359, 366 (1983) and *State v. Hardin*, 429 S.W.3d at 421.

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 3,515 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and

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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