No. SC84267

STATE OF MISSOURI,

Plaintiff-Respondent,

vs.

JARED R. DERENZY,

Defendant-Appellant

APPEAL TO THE MISSOURI SUPREME COURT
AFTER TRANSFER FROM THE
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

APPELLANT'S SUBSTITUTE REPLY BRIEF

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Appellant Jared Derenzy files this reply brief in response to the state's substitute brief. This brief discusses only those issues raised in the state's brief which, in the belief of appellant, require a response. The failure to reurge any contention made in the opening brief is not intended as a waiver of that contention, and appellant relies on each and every point and contention in his opening brief.

REPLY POINTS

REPLY POINT I

THE COURT OF APPEALS PROPERLY HELD THAT KNOWLEDGE OF THE DISTANCE IS REQUIRED

FOR A CONVICTION FOR DELIVERY OF MARIJUANA WITHIN 2000 FEET OF A SCHOOL.

REPLY POINT II

A LESSER INCLUDED OFFENSE INSTRUCTION WAS REQUIRED BY THE EVIDENCE AND SHOULD HAVE BEEN GIVEN.

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ARGUMENT AND AUTHORITIES

REPLY POINT I

THE COURT OF APPEALS PROPERLY HELD THAT KNOWLEDGE OF THE DISTANCE IS REQUIRED FOR A CONVICTION FOR DELIVERY OF MARIJUANA WITHIN 2000 FEET OF A SCHOOL.

Introduction

The state argues that *State v. White*, 28 S.W.3d 391, 397 (Mo. App. 2000), holding that to convict a defendant of delivery of marijuana within 2000 feet of a school, the state must prove that the defendant knew that the delivery location was within 2000 feet of a school, should be overruled. The state should not be heard to make this argument. Even if the argument could be considered, it is without merit because, by amending Mo. Rev. Stat. §562.021 before amending Mo. Rev. Stat. §195.214, the legislature demonstrated its intent to require knowledge of the distance.

A. The state waived its right to assert this claim when it failed to object to the trial court instructions.

As the state concedes, the jury in this case was instructed that, in order to convict Mr. Derenzy, they must find beyond a reasonable doubt that he knew the delivery was made within 2000 feet of a school. L.F. p. 28. The state failed to object to this instruction, and assumed the burden to prove Mr. Derenzy's knowledge. It has therefore waived the contention that the statute does not require knowledge.

Sup. Ct. R. 28.03 requires a party to object to an instruction before the jury retires to consider its verdict in order to assign appellate error in the giving or refusal of an instruction. While objections which were not made at trial may be reviewed for plain error, the state has not requested plain error review here or in the court of appeals. See *State v. Wurtzberger*, 40 S.W.3d 893 (Mo. banc 2001); *State v. Knifong*, 53 S.W.3d 188 (Mo. App. 2001). Because the state did not object at trial, it cannot be heard to contend here

that its burden of proof was less than that provided in the instruction given to the jury.

In an apparent attempt to excuse the state's failure to object to the verdict-directing instruction, the state asserts that the instruction that the jury must find that the defendant knew that he was within 2000 feet of a school is mere "surplusage." In so holding, the state cites only one case decided since the amendment of Sup. Ct. R. 28.03 in 1995 to require contemporaneous objections to jury instructions. That case, the Southern District decision of *State v. Condict*, 65 S.W.3d 6, 14-15 (Mo. App. 2001), relies on this court's 1990 decision in *State v. Livingston*, 801 S.W.2d 344 (Mo. banc 1990). In *Condict*, the defendant contended that, because the instruction given to the jury required an element concededly not in the statute, the state had assumed the burden to prove it. The *Condict* court held that the state did not have to prove the additional element where the defendant was not harmed by the addition of the extraneous element. But the *Condict* court misread

Livingston, and failed to consider the effect of the 1995 amendment to Rule 28.03.

In *Livingston,* the defendant asserted that an instruction was erroneous because it lessened the state's burden of proof. This Court held that the instruction actually *increased* the burden of proof and was therefore not prejudicial to the defendant:

> Defendant argues the additional language in instruction No. 5 lessened the state's burden of proof. It is equally arguable that the instruction as given imposed upon the state a greater burden by requiring the state to prove defendant was the actual perpetrator of the crime. A criminal jury instruction that puts an additional burden on the state beyond that which is legally required in order to establish guilt, is not prejudicial to the defendant. *State v. Livingston*, 801 S.W.2d 344, 350 (Mo. banc 1990).

Livingston dealt with a *defense* objection to a jury instruction. It is simply inapplicable to a situation where the *state* is contending on appeal that a jury instruction was incorrect. And, since the time that *Livingston* was decided, this Court has mandated that specific objections to jury instructions must be made at time of trial. Sup. Ct. R. 28.03. This rule is as applicable to the state as to the defense. The state's argument that it did not have to prove everything in the instruction should not be considered by this Court.

B. Knowledge of the distance to the school is an element of the offense.

1. *Wheeler* and *Hatton* did not construe the statute.

In support of its contention that knowledge is not an element, the state first cites *State v. Wheeler*, 845 S.W.2d 678 (Mo. App. 1993) and *State v. Hatton*, 918 S.W.2d 790 (Mo. banc 1996). Those cases, however, stand for a different proposition altogether. In neither case did the defendant

move for acquittal on the ground that the state had failed to meet its burden of proof.

In fact, appellants Wheeler and Hatton conceded that the state statute, as it existed at that time, did not require proof that the defendant knew the sale took place within the specified distance of the specified premises. The appellants in *Wheeler* and *Hatton* argued that the statutes were unconstitutional because they did not contain such a requirement; this Court and the court of appeals held the statute constitutional, but, did not do construe the statute as neither case called upon them to do so.

2. The intent of the legislature cannot be presumed from the reenactment of Mo. Rev. Stat. §195.214.

The state next contends that, because the legislature reenacted Mo. Rev. Stat. §195.214 in substantially the same language after *Hatton*, the legislature must have intended to adopt the construction of the statute enunciated in *Hatton*. Of course, since *Hatton* did not construe the statute, this

argument must fail. In any event, the intent of the legislature must be viewed in light of the intervening amendment, in 1997, of Mo. Rev. Stat. §562.021.

In its ruling that the state was required to prove Mr. Derenzy's knowledge of the distance, the Court of Appeals relied on MAI-CR 3d 325.30 (10-1-98), an instruction given in both *White* and this case. That instruction requires that the jury be instructed to find the defendant guilty only if it found beyond a reasonable doubt that he "(1) delivered a controlled substance, (2) within 2000 feet of a school, and (3) defendant did so knowingly with regard to all of the facts and circumstances." *State v. White*, 28 S.W.3d 391, 396 (Mo. App. 2000).

The instruction was revised after the 1997 amendment of Mo. Rev. Stat. §562.021. Before that time, the instruction did not require the jury to find that the defendant *knew* the property was within the prescribed distance of the premises. It required only that the jury find that the location *was* within the prescribed distance of the premises. The court in

Wheeler noted specifically that the verdict-directing instruction "did not require that the jury find that defendant have knowledge that he was within one thousand feet of a school." *State v. Wheeler,* 845 S.W.2d 678, 681 (Mo. App. 1993). However, the current instruction DOES require such knowledge.

This change in the instruction was required by amendments to Mo. Rev. Stat. §562.021.3, enacted in 1997 after the *Hatton* decision. As amended, Mo. Rev. Stat. §562.021 provides in pertinent part:

> § 562.021. Culpable mental state, application
>
> 1. If the definition of any offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state applies to each such material element.
>
> 2. If the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed

> culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the offense.
>
> 3. Except as provided in subsection 2 of this section and section 562.026, if the definition of any offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly; but reckless or criminally negligent acts do not establish such culpable mental state.

At the time of the *Hatton* decision, Mo. Rev. Stat. §562.021 did not include subsections 2 and 3 quoted above.[1] Therefore, the *Hatton* court did not decide whether

[1] Those sections were added in 1997 in response to this Court's opinion in *State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997), which noted, "By its repeal of §562.021.2, the

Mo. Rev. Stat. §195.214 was subject to the requirements of Mo. Rev. Stat. §562.021.2 and §562.021.3. Because the legislature amended Mo. Rev. Stat. §562.021 before reenacting Mo. Rev. Stat. §195.214 in 1998, any presumption that it relied on the *Hatton* construction as authoritative evaporates.

The plain language of the statutes at issue here indicate no reason to believe that the legislature intended to exclude the element of distance from the school from the culpable mental state requirement. Penal statutes are strictly construed in favor of the defendant. *State v. Rowe*, 63 S.W.2d 647, 650 (Mo. banc 2002). Further, because the Missouri legislature does not provide legislative history records, the court must look primarily to the plain meaning of the statute to determine the legislature's intent. And any

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General Assembly has made the required culpable mental state unclear for many crimes within the Criminal Code, and it should promptly address this confusion."

doubt about such intent must be resolved in favor of Mr. Derenzy. *Forbes v. Haynes*, 465 S.W.2d 485, 490 (Mo. 1971).

As this Court observed in *Rowe*, "the legislature may wish to change the statute. . . but this Court under the guise of discerning legislative intent, cannot rewrite the statute." *State v. Rowe*, 63 S.W.2d 647, 650 (Mo. banc 2002).

3. Under Mo. Rev. Stat. §562.021, the state must prove knowledge that the sale occurred within 2000 feet of a school.

The state next argues that of §562.021.3 does not apply to Mo. Rev. Stat. §195.214 because that statute does not contain a "definition of an offense." The state has neglected to read the portion of Mo. Rev. Stat. §195.214 which refers to Mo. Rev. Stat. §195.211 for the elements of the underlying offense of delivery. Since Mo. Rev. Stat. §195.211, like Mo. Rev. Stat. §195.214, contains no culpable mental state, Mo. Rev. Stat. §562.021.3 applies to provide one.

The state next points out that Mo. Rev. Stat. §562.021.3 requires a culpable mental state only as to the "elements" of an offense. But even if Mo. Rev. Stat. §195.214 does not create a separate offense from Mo. Rev. Stat. §195.211 , it does add an element. In order to convict a defendant under Mo. Rev. Stat. §195.214, the prosecutor must allege by indictment or information, and the jury must find, that the delivery occurred within 2000 feet of a school. This jury finding is required in both the pre-1998 and post-1998 versions of the verdict-directing instruction. It is clear that the proximity to a school is an element of the offense.[2]

This result is reinforced by Mo. Rev. Stat. §562.016, which has survived untouched through the various permutations of Mo. Rev. Stat. §562.021. Under §562.016.1, "a person is not guilty of an offense unless he acts with a culpable mental state. . ." The only exception to this

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[2] Under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), decided the day before the trial began in this case, a jury finding on the proximity issue is constitutionally required.

requirement is found in Mo. Rev. Stat. §562.026, which provides that a culpable mental state is not required if "no culpable mental state is prescribed by the statute defining the offense, and imputation of a culpable mental state to the offense is clearly inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result."

While the addition of a knowledge requirement to the element of proximity clearly increases the state's burden, it does not lead to an absurd or unjust result. Many methods could be used to prove that the defendant knew the distance. Further, the use of such devices as "Drug Free School Zone" signs provides a method for the state to show that a defendant had actual knowledge.

Had the legislature wished to exclude this element from the culpable mental state requirement, it could have done so, under §562.021.2. *That* subsection permits the legislature to specify that a culpable mental state applies only to particular elements of the offense. Unless a specific exclusion is made, however, the culpable mental state

applies to all of the "conduct, attendant circumstances or result[s]" which constitute the "material element[s] of the offense. Mo. Rev. Stat. §562.021.1. Because the distance of the site of delivery from the school is a material element, the culpable mental state of knowledge applies to it.

If the legislature had wished to exclude the element of proximity from the knowledge requirement imputed to §§195.211 and 195.214, it had ample opportunity to do so when it amended Mo. Rev. Stat. §195.214 in 1998. That it did not do so further supports the correct decision of this Court to alter the approved instruction to conform to Mo. Rev. Stat. §562.021.3.[3]

Finally, this Court should construe Mo. Rev. Stat. §195.214 to include a knowledge requirement so as to avoid the constitutional infirmity discussed in *United States v. X-*

[3] The state cites cases construing the arson and burglary statutes as analogous. Like *Hatton*, these cases were decided before the 1997 amendment of Mo. Rev. Stat. §562.021 and therefore do not help the state.

Citement Video, Inc., 513 U.S. 64, 78 (1994). There, the court construed a child pornography statute to require knowledge of the age of the performer, stating,

> Cases . . . [citations omitted] suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress.

To avoid this constitutional problem, this Court should uphold *White* and find that the statute requires knowledge of the distance between the delivery and the school.

C. The evidence does not support the verdict.

Finally, the state contends that proof that Mr. Derenzy had been a student at Westminster College met the statutory requirement of knowledge. However, the statute does not require that a defendant know *where the school is*. It

requires that he know that the place of the delivery is *within 2000 feet of the school*. Knowledge of location and distance are two different things. While it may be impossible to know the distance without knowing the location, it is not necessarily true that someone who knows the location of a property also knows its distance from another location. Members of the Missouri legislature would likely know the location of the Jefferson City Correctional Center a few blocks from the Capitol. But if they were asked to state the distance in feet from the prison to the Capital, they might give very different estimates, or none at all.

The state suggests that the difficulty of proving that the defendant was aware of the distance proves the "absurdity" of the defendant's contention that knowledge is required. Certainly, the state's burden to show knowledge was significantly increased when the legislature increased the radius of the forbidden area from 1000 to 2000 feet. But that was the decision of the legislature, and this Court should not second-guess the legislature.

The state did not prove that Mr. Derenzy knew the distance between any part of the Westminster College property and his house. It proved only that he knew where the college was. Because of this failure of proof of a material element of the offense, Mr. Derenzy is entitled to a judgment of acquittal.

REPLY POINT II

A LESSER INCLUDED OFFENSE INSTRUCTION WAS REQUIRED BY THE EVIDENCE AND SHOULD HAVE BEEN GIVEN.

A. No waiver of error.

Again, the state seeks to claim the benefit of an error to which it did not object at trial. It contends that because of an inconsequential error in the requested instruction, Mr. Derenzy is not entitled to have his claim that he was entitled to a lesser included offense instruction considered by this Court.

The state first argues that Mr. Derenzy asked for his "Proposed Instruction A," not for a generic lesser-included

offense instruction. Of course, Proposed Instruction A *was* a lesser included offense instruction. This Court need not even presume that the trial court read the requested instruction; the colloquy between the court and the attorneys clearly indicates that she understood that what was being requested was a lesser included offense instruction on the offense of possession of marijuana.

The state then goes on to argue that the motion for new trial, which also referred to Proposed Instruction A, did not preserve the point for review by this Court. This again exalts form over substance. Mr. Derenzy's "right to defend should not depend on a formal 'ritual . . . [that] would further no perceivable state interest.'" *Lee v. Kemna*, 532 U.S. 362, 122 S.Ct. 877, 880 (2002), citing *Osborne v. Ohio*, 495 U.S. 103, 124 (1990).

Finally, the state notes that plain error review was not requested. Mr. Derenzy contends that plenary review, not plain error review, is appropriate. But if this Court disagrees that the issue was preserved, then this case is one in which

plain error review under Sup. Ct. R. 30.20 is appropriate and necessary. Such review is more freely afforded where, as here, the issue sought to be reviewed was presented fully to the trial court.

In *State v. Westfall*, 2002 Mo. LEXIS 64 (Mo. banc May 29, 2002), this Court held that the failure to give a self-defense instruction was reversible plain error despite the fact that the requested instruction might not have been in proper form. Similarly, in *State v. Beeler*, 12 S.W.3d 294, 300 (Mo. banc 2000), this Court reversed for failure to instruct the jury fully as to self-defense despite the lack of a proper objection, holding, "Instructional error constitutes plain error when it is clear the trial court so misdirected or failed to instruct the jury so that it is apparent the error affected the verdict." Following *Beeler*, the courts in *State v. Reynolds*, 72 S.W.3d 301, 306 (Mo. App. 2002), and *State v. Gaskins*, 66 S.W.3d 110, 115 (Mo. App. 2001) found that the failure to apply a self-defense instruction to the lesser included offense was plain error despite the fact that trial

counsel made no contemporaneous objection to the instruction. In *State v. Harney*, 51 S.W.3d 519, 536 (Mo. App. 2001), the court found plain error in the submission of an erroneous verdict director despite the lack of a contemporaneous objection.

While the error in this case concerned a lesser-included offense instruction rather than an instruction on a statutory defense, the result should be the same here. In *State v. Dexter*, 954 S.W.2d 232, 344 (Mo. banc 1997), this Court refused to "convict the trial court of plain error" for failing to submit a lesser included offense in the absence of a request for an instruction. This Court reasoned that the lack of a request suggested a trial strategy on the part of defense counsel. Here, of course, defense counsel submitted a requested instruction on a lesser included offense, albeit one with an error in the introductory paragraph. Mr. Derenzy's counsel clearly had no trial strategy which would preclude the submission of the lesser offense. Hence, plain error review is appropriate here.

See also State v. Barriner, 34 S.W.3d 139 (Mo. banc 2000) (Plain error required reversal where evidence was improperly admitted despite a "late objection" to the evidence); *State v. Withrow*, 8 S.W.3d 75, 77 (Mo. banc 1999) (Plain error required reversal for insufficient evidence despite the fact that the issue was not raised on appeal in the court of appeals); *State v. Thompson*, 985 S.W.2d 779, 792 (Mo. banc 1999) (Plain error required new penalty phase because of improper admission of evidence); *State v. Dexter*, 954 S.W.2d 332, 340 (Mo. banc 1997) (Plain error required reversal despite lack of objection to the prosecution's comments on post-arrest silence); *State v. Golatt*, 2000 Mo. App. LEXIS 1157*25 (Mo. App. 2002) (Plain error required reversal of finding that the defendant was a prior and persistent offender).

B. The lesser included offense instruction was required.

The state argues that a lesser included offense instruction was not required here because entrapment, if proven, was a defense both to possession and to delivery. The state cites no Missouri law. Instead, it relies on cases from other jurisdictions. Those cases do not support the state's position.

Several of the state's cases are factually distinguishable from this case. One of the defendants in *United States v. Martinez*, 979 F.2d 1424, 1433 (10th Cir. 1992) offered an entrapment defense to an allegation that he possessed with intent to deliver over five kilograms of cocaine. The defendant was arrested while attempting to consummate the sale of the cocaine, which was supplied by a confidential informant. At the time of his arrest, the defendant had in his wallet a small additional amount of cocaine. He sought a lesser included offense instruction for the offense of possession of *that* cocaine, not the cocaine he was charged

with possessing. The court denied the request, reasoning that both the unlawful possession and distribution of the *charged* cocaine were negated by the entrapment defense. In *Farris v. Commonwealth*, 836 S.W.2d 451, 454 (Ky. App. 1992), the evidence showed that the defendant obtained the drugs at the request of the officer who he claimed had entrapped him. If he was entrapped, then, he was entrapped into possession as well as delivery. If he was not, then he was guilty as charged.

Two cases cited by the state contain insufficient factual information for this Court to determine whether their reasoning might apply to Mr. Derenzy. The *per curiam* opinion in *United States v. Hill*, 973 F.2d 652 (8th Cir. 1992), which does not contain the facts of the case, does not resolve the issue here. Like *Hill*, the opinion in *Garrick v. State*, 589 So.2d 760, 764 (Ala. Crim. App. 1991) does not include the facts of the case, so it is not possible to determine whether Mr. Garrick was contending that he was entrapped into

obtaining *and* distributing the drug or, as here, simply entrapped into distributing it.

Other cases simply do not supply a sufficient rationale to be helpful to this Court. *United States v. James*, 257 F.3d 1173, 1183-1184 (10th Cir. 2001), which purports to rely on *Martinez*, upheld the refusal of a lesser included offense instruction where the defendant admitted possession and delivery, but said he was entrapped into making the delivery near a school. Without explanation, the court ruled that a lesser included offense instruction was not required because the jury could not have acquitted the defendant of the greater offense and convicted him of the lesser offense. This holding is puzzling in light of the facts in *James* and provides little guidance for this Court. *Moore v. State*, 471 N.E.2d 684, 687-688 (Ind. 1984), and *People v. Humphries*, 630 N.E.2d 104, 110 (Ill. App. 1994) provide no rationale for the rule advocated here.

The remaining cases cited by the state construe the law of the states in which they were decided, not Missouri law. In

People v. Henry, 742 N.E.2d 893, 896 (Ill. 2001), the court considered an Illinois statute which proscribed delivery of a controlled substance and provided different penalty ranges depending on whether the substance was distributed near a school. The court held that under Illinois law, entrapment is not available as a defense to only certain elements of a crime. Here, the lesser included offense request was for a distinct offense, and was made under Missouri and not Illinois law. Similarly, the court in *State v. Monsoor*, 203 N.W.2d 20, 23-24 (Wis. 1973), relied on "the long settled law of this state" for the proposition that entrapment, if found, requires an entire acquittal. Missouri has no such "long settled law" and this Court is not bound by Wisconsin precedent.[4]

Missouri law provides for the entrapment defense in Mo. Rev. Stat. §562.066:

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[4] *State v. Jansen*, 543 N.W.2d 552 (Wis. App. 1995) similarly relies on Wisconsin entrapment law.

> 1. The commission of acts which would otherwise constitute an offense is not criminal if the actor engaged in the proscribed conduct because he was entrapped by a law enforcement officer. . .
>
> 2. An "entrapment" is perpetuated if a law enforcement officer. . ., for the purpose of obtaining evidence of the commission of an offense, encourages or otherwise induces another person to engage in conduct when he was not ready and willing to engage in such conduct.

"Lesser included offense" is defined in Mo. Rev. Stat. §556.046,[5] which provided, at the time of trial:

> 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when

[5] The statute was amended in 2001, but the amendment is not germane to this case.

(1) It is established by proof of the same or less than all the facts required to establish the conviction 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.

2. The court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

Neither of these statutes state, or even suggest, that an entrapment defense precludes a lesser included offense charge. Mr. Derenzy asserted at trial that Trooper Ferrari induced him to engage in the conduct of delivering marijuana to him. He made no claim that he *possessed* the marijuana at issue because he was entrapped. There is no suggestion in the evidence that he obtained the marijuana

because Trooper Ferrari wanted it. Rather, he claims that he possessed it for his own personal use and was entrapped into *transferring* it.

Missouri's entrapment statute focuses on the conduct which was induced, not on the definition of an offense. This definition is inconsistent with the notion of other states that entrapment is a complete defense to *any* offense in which the defendant was involved. As required by §556.046, the lesser included offense instruction was supported by evidence that Mr. Derenzy was guilty only of that offense; he admitted to freely possessing the marijuana.

This Court has never decided that the submission of an entrapment defense forecloses the submission of a lesser included offense instruction, and the reasoning of this Court's cases on lesser included offenses do not support such a construction. In *State v. Redmond*, 937 S.W.2d 205, 210 (Mo. banc 1996) the state argued that a lesser included offense instruction was inconsistent with the self defense instruction which had been requested. The court noted that

the jury may believe all or part of the evidence, and found the lesser included offense instruction was required, holding, "Each instruction should be evaluated separately and should be given if supported by the evidence, without regard to whether the other instruction is also being given."

In *State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999), this Court reversed a conviction for failure to give a lesser-included offense instruction. The Court held that the jury should be permitted to draw all reasonable inferences from the evidence, and added, "If a reasonable juror could draw inferences from the evidence presented that the defendant acted recklessly, the trial court should instruct down." This expansive view of the use of lesser included offense instructions was also followed in *State v. Yacub*, 976 S.W.2d 452, 454 (Mo. banc 1998), where this Court expressly held that a defendant was not required to submit "alternative evidence" in order to warrant a lesser included offense instruction.

Because Missouri law is liberal with regard to lesser included offense instructions, it would be inappropriate for this Court to adopt the rigid requirement of other jurisdictions that the submission of an entrapment instruction necessarily precludes the submission of a lesser included offense instruction. Where, as here, the evidence required both the entrapment and lesser included offense instructions but only the entrapment instruction was given, reversible error occurred and a new trial is required.

REPLY POINT III[6]

THE STATE CANNOT MEET ITS BURDEN TO SHOW THAT MR. DERENZY WAS NOT ENTRAPPED SIMPLY BY NOT PRESENTING EVIDENCE OF ENTRAPMENT.

Once the issue of entrapment is raised by the evidence, the state has the burden to prove beyond a reasonable doubt

[6] This Reply Point corresponds to Point IV of the opening brief.

that no entrapment occurred. *State v. Willis*, 662 S.W.2d 252, 255 (Mo. banc 1983); *State v. Mitchell*, 897 S.W.2d 187, 192 (Mo. App. 1995).

Willis also holds, and the state contends here, that the defendant is not entitled to an acquittal as a matter of law on the basis of entrapment if the state's case does not include evidence of entrapment. This holding violates the Due Process Clause of the United States Constitution.

Under *Jackson v. Virginia*, 443 U.S. 307 (1979), a defendant must be discharged if the court finds that no rational trier of fact could convict based on all of the evidence presented. The case law makes no distinction about the source of that evidence. Thus, if this Court finds that, despite the fact that the state's evidence does not include entrapment, no rational trier of fact could have found that the state disproved entrapment beyond a reasonable doubt, Mr. Derenzy is entitled to discharge.

Two other contentions of the state require brief response. First, the state argues that the tape recording

refutes Mr. Derenzy's entrapment defense. However, the tape recording contains only the transaction at Mr. Derenzy's home, not the transaction at the bar where the entrapment occurred. And the quality and accuracy of the tape recording were challenged before the trial court, as the recording is at times inaudible and muffled.

Finally, the state suggests that Mr. Derenzy waived his right to offer an entrapment defense when he successfully objected to certain "other crimes" evidence. Of course, the state made no such contention at trial, although it did oppose the entrapment instruction on other grounds. Waivers of substantial rights are not to be presumed from a silent record. *Barker v. Wingo*, 407 U.S. 514 (1972); *Boykin v. Alabama*, 395 U.S. 238 (1969). The disputed "other crimes" evidence involved possession of marijuana, not delivery; it was therefore irrelevant to predisposition. And, once again, the state should not be permitted to offer theories which were not presented at trial.

CONCLUSION

For the foregoing reasons and the reasons adduced in his opening brief, Mr. Derenzy prays the Court:

For the reasons discussed under Points I and IV of the opening brief and Reply Points I and III, to reverse his conviction and sentence and remand for the entry of a judgment of acquittal; or

In the alternative, for the reasons discussed under Points II and III of the opening brief, and Reply Point II, to reverse his conviction and grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the limitations contained in Sup. Ct. R. 84.06(b). It contains 6,218 words.

The disk submitted with this brief has been scanned for viruses and is virus-free.

ELIZABETH UNGER CARLYLE

I hereby certify that a copy of the foregoing brief was served upon Phillip Koppe, counsel for respondent, by U.S. Mail on June 17, 2002.

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Elizabeth Unger Carlyle