

SC 94865

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

CHRISTOPHER M. SANDERS,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
The Honorable Edith L. Messina, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Christopher Sanders was convicted, after a jury trial in the Circuit Court of Jackson County, of one count of the class A felony of murder in the second degree, Section 565.021, RSMo (2000)¹. On May 10, 2013, the Honorable Edith Messina sentenced Mr. Sanders to life in prison.

Jurisdiction over this cause was originally in the Missouri Court of Appeals, Western District. Mo. Const., Article V, Section 3; Section 477.070. This Court thereafter granted the State's application for transfer, so this Court now has jurisdiction. Mo. Const., Article V, Section 10, and Rule 83.04.

¹ All statutory references are to RSMo (2000), unless otherwise noted.

STATEMENT OF FACTS

On December 7, 2011, Alejandro Jaramillo was working as a maintenance man at the Royale Inn located at 600 Paseo in Kansas City, Missouri. (Tr. 259)². Mr. Jaramillo went to the basement area of the hotel to clean some debris. (Tr. 260). As he started to clean the debris, Mr. Jaramillo saw a human foot. (Tr. 264). Mr. Jaramillo went upstairs and told the manager to call the police. (Tr. 265).

The police arrived and found the deceased body of an unknown woman. (Tr. 284). The body was located underneath a stairwell on the basement level of the hotel. (Tr. 284). The stairwell was centrally located within the building and there was an open access stairwell leading to the basement. (Tr. 284). The lobby of the hotel was located just north of the stairwell. (Tr. 284). The woman had a sheet and towel wrapped around her neck and lower face area. (Tr. 293).

Detective Danny Thomas arrived at the scene and participated in an area canvass with other detectives. (Tr. 309). As part of that canvass, Detective Thomas went to the Hotel Capri, which was across the street from the Royale Inn.

² The Record on Appeal consists of the legal file (L.F.), the supplemental legal file (Supp. L.F.), and one volume of transcript. (Tr.).

(Tr. 309-10)³. At the Hotel Capri, Detective Thomas talked to a woman named Annette Davis. (Tr. 311). Ms. Davis was concerned that the deceased woman might be a woman named “Meche” and told Detective Thomas that she knew someone named “Peanut” that might have information on the case⁴. (Tr. 310-11).

Detective Thomas told Ms. Davis that he needed to speak with Peanut in person. (Tr. 312). Ms. Davis left and shortly returned with Peanut, whose real name was Timothy Murphy. (Tr. 312). Mr. Murphy told Detective Thomas that he had encountered someone trying to sell him a room at the Royale Inn around Thanksgiving. (Tr. 313). Mr. Murphy went to Room 206 at the Royale Inn with the man to inspect it, but it looked like there was blood in the room. (Tr. 314). Mr. Murphy also recognized clothing and part of a hair weave in Room 206 as items that belonged to his friend Shay⁵. (Tr. 314, 389-90). Mr. Murphy told Detective Thomas that the man who rented the room to him was possibly named Christopher Plummer. (Tr. 316).

³ Throughout the transcript, the Royale Inn is referred to by various witnesses as either the Royale Inn, the Motel Royale, or the Royale Hotel. For ease of reading and consistency, it will be referred to as the Royale Inn.

⁴ “Meche” and “Peanut” were the street names associated with Zonia Brown and Timothy Murphy, respectively. (Tr. 311-12, 315, 386).

⁵ “Shay” was the street name of Sherilyn Hill. (Tr. 428).

Based upon this information, the police tried to identify people who had rented Room 206 at the Royale Inn around Thanksgiving. (Tr. 316). Police learned that a man named Christopher Sanders had rented Room 206 during that time frame. (Tr. 319-20). Detective Thomas prepared a line up with Mr. Sanders' picture and showed it to Mr. Murphy. (Tr. 319-20). Mr. Murphy tentatively identified Mr. Sanders as the man who had rented Room 206 to him. (Tr. 321).

Mr. Murphy testified that around Thanksgiving in 2011, he had an encounter with a man at a 7-11 store. (Tr. 387). Mr. Murphy said he had never met this man before. (Tr. 387). This man was later determined to be Christopher Sanders. (Tr. 397). Mr. Murphy and Mr. Sanders discussed "renting" a room at the Royale Inn. (Tr. 387). It was a common street practice in the area for someone to rent a room, do drugs in the room, and once the drugs were gone, to sell the rest of the time in the room to another person. (Tr. 387-88). Mr. Sanders offered to sell Mr. Murphy the remainder of his time in Room 206 in exchange for crack cocaine. (Tr. 387). Mr. Murphy said he wanted to see the room and went to the Royale Inn with Mr. Sanders to look at it. (Tr. 388).

Mr. Murphy testified that he and Mr. Sanders went to Room 206 at the Royale Inn. (Tr. 388). Mr. Murphy saw bloody prints on the wall and part of a hair weave on the floor. (Tr. 389). Mr. Murphy recognized the weave and some clothing in the room as belonging to his friend Sherilyn Hill. (Tr. 389-90). Mr. Murphy and Ms. Hill were life-long friends, and he had seen Ms. Hill that day at the 7-11 store. (Tr. 390).

When Mr. Murphy and Mr. Sanders got to the hotel, a different man named “Chris” was there. (Tr. 399). “Chris” was African- American and Mr. Murphy thought he was “creepy.” (Tr. 400). Mr. Murphy gave Mr. Sanders some crack in exchange for the key to Room 206. (Tr. 391-92). Mr. Murphy then took the key to the office and returned it in order to get the five dollar deposit back. (Tr. 392).

Mr. Murphy said that he ran into Zonia Brown later that night. (Tr. 398). Ms. Brown told him that she left Room 206 and that a fight had happened there. (Tr. 398). Ms. Brown said that Ms. Hill was getting beaten up by a “white boy.” (Tr. 404-05). Mr. Murphy did not take Ms. Brown seriously and he did not call the police. (Tr. 398).

Police put out a questioning advisory for Zonia Brown. (Tr. 483). Ms. Brown was arrested a few weeks later and made a statement to the police. (Tr. 484). Ms. Brown testified at trial. (Tr. 425). During 2011, Ms. Brown worked as a prostitute and used crack, marijuana, and alcohol. (Tr. 426). In November 2011, Ms. Brown was frequenting the Hotel Capri and the Royale Inn, looking for customers. (Tr. 427). Ms. Brown said that she went by the street name Meche. (Tr. 427-28).

On November 22, 2011, Ms. Brown was knocking on doors at the Hotel Capri, looking for a customer. (Tr. 431). She ran into her friend Sherilyn Hill, or Shay, in the parking lot. (Tr. 430-31). Ms. Hill was with Mr. Sanders. (Tr. 430). A man named Montay was also with them. (Tr. 431). Montay was a drug dealer.

(Tr. 431). The group invited Ms. Brown to accompany them to the Royale Inn.

(Tr. 431).

The group went to the Royale Inn and got a room. (Tr. 432). All four of them went into the room, but Montay did not stay long because Mr. Sanders did not want to buy anything from him. (Tr. 435). Ms. Brown said she went there hoping to smoke crack. (Tr. 436). She had smoked crack four to five hours earlier that day, and Ms. Brown had been awake for one week due to the large amounts of crack she had been consuming. (Tr. 437, 464). Ms. Hill was trying to get Mr. Sanders to give her some crack, but Mr. Sanders was being “stingy” with it. (Tr. 439). Ms. Hill pulled a knife on Mr. Sanders, pointed it at him, and told him he “better give me some crack.” (Tr. 440-41). Mr. Sanders did not give Ms. Hill any crack, nor did he respond to her in any way. (Tr. 442). Mr. Sanders started smoking crack, and Ms. Hill put the knife away. (Tr. 441, 443).

At this point, Mr. Sanders was standing next to the bed, by Ms. Brown. (Tr. 443). Ms. Hill moved to the area of the room by the bathroom, where the mirror was. (Tr. 443). Mr. Sanders gave both Ms. Brown and Ms. Hill a small piece of crack. (Tr. 445-46). Ms. Hill came over to Mr. Sanders and again asked him to give her some crack. (Tr. 446). Mr. Sanders said no, and Ms. Hill pulled a knife again, put it in Mr. Sander’s face, and told him he better give her some crack. (Tr. 447, 470-71). Mr. Sanders told Ms. Hill to put the knife away and did not give her anything. (Tr. 447).

Ms. Hill went back to the area by the mirror. (Tr. 448-49). A short time later she came back to where Mr. Sanders was and again asked for crack. (Tr. 448-49). When Mr. Sanders still refused, Ms. Hill pulled the knife on Mr. Sanders a third time. (Tr. 448-49). Mr. Sanders still did not give her any crack. (Tr. 449-50). Ms. Hill went back to the area near the mirror and tried to hit her pipe again. (Tr. 450). Ms. Hill put the knife on the sink. (Tr. 452). Mr. Sanders looked at Ms. Brown and asked her if she was ready. (Tr. 453). Mr. Sanders then went up to Ms. Hill and kicked her in the left side of the head. (Tr. 455). Ms. Hill fell against the wall and then fell to the floor. (Tr. 456). When she tried to get up, Mr. Sanders kicked Ms. Hill again. (Tr. 456). Mr. Sanders continued to kick Ms. Hill and kicked her at least ten times. (Tr. 455).

Ms. Brown was on the bed when this was happening. (Tr. 457). She eventually told Mr. Sanders to stop kicking Ms. Hill. (Tr. 457). Mr. Sanders told Ms. Brown to shut up and that he was not going to hurt Ms. Brown, but Ms. Hill should not have pulled a knife on him. (Tr. 457). After she had been kicked by Mr. Sanders, Ms. Hill laid on the floor, making “snorting” sounds. (Tr. 458). Mr. Sanders took a sheet off the bed and wrapped Ms. Hill up in it. (Tr. 458). While Mr. Sanders was doing this, Ms. Brown ran out of the room. (Tr. 458).

Ms. Brown made contact with some people in a white vehicle in the parking lot, and she told them that a girl in the hotel room was hurt. (Tr. 459). Ms. Brown did not call the police or tell the hotel staff that Ms. Hill was hurt. (Tr.

460). Ms. Brown did not talk to the police until she was arrested two weeks later. (Tr. 462, 484).

Christopher Sanders testified in his own defense at trial. (Tr. 601). On November 22, 2011, Mr. Sanders was returning from work when he got off the bus at Independence Avenue. (Tr. 602-03). He met up with Ms. Hill at the 7-11 store and decided to hire her as a prostitute. (Tr. 606). As the two left the 7-11 together, they ran into a man named Montay. (Tr. 607). Ms. Hill needed to get permission from Montay to go with Mr. Sanders. (Tr. 607). Montay accompanied Mr. Sanders and Ms. Hill to make sure that everything was okay. (Tr. 607). The group met up with Ms. Brown later that night. (Tr. 607).

The group went to the Royale Inn, and Mr. Sanders rented a room there. (Tr. 609). Another man showed up, and he and Montay left about thirty minutes later. (Tr. 610). Before Montay left, Mr. Sanders bought crack from him to give to the girls. (Tr. 611). Mr. Sanders said crack was “not really his thing” but the girls needed to get high in order to have sex with him. (Tr. 611). Mr. Sanders did take a few hits of crack that night. (Tr. 611).

Mr. Sanders said that Ms. Hill first pulled the knife on him when he was watching television. (Tr. 613). Ms. Hill was waving the knife around and talking about how they were out of drugs. (Tr. 613). At this point, Mr. Sanders was not afraid. (Tr. 614). Ms. Hill put the knife away, and Mr. Sanders kept drinking. (Tr. 614).

Ms. Hill pulled the knife on Mr. Sanders again about ten to fifteen minutes later. (Tr. 614-15). This time, Ms. Hill was “all up on him” and had the knife in his face. (Tr. 615). She told Mr. Sanders that he was going to buy her more crack. (Tr. 615). Mr. Sanders started to get apprehensive. (Tr. 615). Mr. Sanders felt like he might be getting hustled and told Ms. Hill that she could just leave. (Tr. 616).

Ms. Hill did not leave, and she pulled the knife on Mr. Sanders a third time. (Tr. 617). This time, Ms. Hill came up behind Mr. Sanders and held the knife to his throat. (Tr. 617). The knife cut Mr. Sanders, and he started to bleed. (Tr. 617). She told him that she would take his stuff and reached into his pants and pulled out his wallet. (Tr. 617). Ms. Hill threw the wallet to Ms. Brown, and told Ms. Brown to get the money. (Tr. 618). When Ms. Hill turned, Mr. Sanders grabbed her wrist and hit her in the head. (Tr. 618). Ms. Hill stumbled and started to swing wildly. (Tr. 618).

As she was swinging at him, Ms. Hill still had the knife in her hand. (Tr. 620). Mr. Sanders thought he was going to get stabbed, so he kicked Ms. Hill in the chest, knocking her on her back. (Tr. 620). Mr. Sanders then kicked Ms. Hill in the mouth, and Ms. Hill fell back and hit her head on the sink. (Tr. 620). She fell to the ground and was on all fours, and the knife slid in front of her. (Tr. 620). Mr. Sanders kicked the knife away from Ms. Hill, and when he did so he accidentally kicked Ms. Hill in the face as well. (Tr. 621). This caused Ms. Hill

to flip backward and hit her head on the wall. (Tr. 621). Ms. Hill then lost consciousness. (Tr. 621).

Ms. Brown was standing and had a knife and Mr. Sanders' wallet. (Tr. 622). Ms. Brown grabbed something off the table and left. (Tr. 622). Mr. Sanders retrieved his wallet and discovered that all the cash was gone. (Tr. 622). Mr. Sanders did not know that Ms. Hill was seriously injured. (Tr. 624). He did not wrap her in a towel or sheets. (Tr. 623).

Mr. Sanders took Ms. Hill and put her on the top of the stairs on the landing outside. (Tr. 626). Mr. Sanders knocked on room 106, where he thought Montay was, but no one answered. (Tr. 626-27). He thought he heard Ms. Brown's voice, so Mr. Sanders started kicking the door. (Tr. 627). After this, Mr. Sanders walked off the property, looking for Montay or Peanut or someone who knew the girls. (Tr. 628).

Mr. Sanders returned and told the office that a girl was passed out. (Tr. 628). He then returned to the room to make sure that he had everything. (Tr. 629). He ran into a man named Chris, who acted like he was looking for Ms. Hill. (Tr. 630). He showed Chris around the room, and then they both left. (Tr. 630). When Mr. Sanders left, Ms. Hill was no longer on the landing. (Tr. 630). Mr. Sanders left with Chris to look for Ms. Brown. (Tr. 630). Mr. Sanders once again returned to the room, and Chris decided to take a nap. (Tr. 632). Mr. Sanders went to look for Ms. Brown or Montay one last time. (Tr. 632).

Eventually, Mr. Sanders ended up back at 7-11, where he ran into Timothy Murphy. (Tr. 632-33). He tried to sell the room to Mr. Murphy. (Tr. 633-34). He went back to the room with Mr. Murphy. (Tr. 634). Chris was still at the room. (Tr. 634). Mr. Sanders got two dollars from Mr. Murphy and walked home. (Tr. 636). When he got home, Mr. Sanders realized that he did not have his house key. (Tr. 636). He thought it must have fallen out of his pocket when Ms. Hill took his wallet. (Tr. 636). Mr. Sanders walked back to the Royale Inn to look for the key. (Tr. 636).

Mr. Sanders said Mr. Murphy would not let him into the room to look for the key. (Tr. 637). The door was cracked, and Mr. Sanders saw movement inside. (Tr. 637). He noticed that the sheets were no longer on the bed. (Tr. 636). Mr. Sanders saw a black female inside the room. (Tr. 637). Mr. Sanders left and went home. (Tr. 637).

Mr. Sanders acknowledged that he did not tell the police the truth about what happened when they interrogated him. (Tr. 645). He did not tell them about the drug use, the robbery, or the prostitution. (Tr. 645). When he was first interrogated, Mr. Sanders did not know that Ms. Hill had died. (Tr. 644). Mr. Sanders did not learn that until the end of his interrogation with the police. (Tr. 644). Mr. Sanders did not tell the police everything that happened because of his embarrassment at being robbed by a woman, and because he did not think that it was connected to any homicide investigation, since he did not know that Ms. Hill had died. (Tr. 645-46).

Andrew Atkinson of the Kansas City Police Department Crime Lab did DNA testing on various items submitted to him. (Tr. 577-89). Mr. Atkinson analyzed blood from a clothes rod recovered from Room 206. (Tr. 587). He testified that the major contributor of that blood was Ms. Hill. (Tr. 587). A minor profile developed from the clothes rod was consistent with Mr. Sanders' DNA. (Tr. 587). Samples of blood taken from the wall were also a match to Ms. Hill's DNA. (Tr. 588). Blood was also found on a pair of boots taken from Mr. Sanders' apartment. (Tr. 376, 589). Ms. Hill was determined to be the major source of this blood. (Tr. 589).

Julia Synder worked in the latent print section of the Kansas City Crime Lab. (Tr. 512). She testified about fingerprints she analyzed that had been collected from the area near where the body was found. (Tr. 512-518). Ms. Synder found five prints of value. (Tr. 518). Of those five prints, none matched either Mr. Sanders or Ms. Hill. (Tr. 519).

Dr. Diane Peterson performed the autopsy of Ms. Hill. (Tr. 526-27). Ms. Hill had both cocaine and methamphetamine present in her system. (Tr. 557). Ms. Hill had several abrasions on the left side of her head and body. (Tr. 531-35, 542). She had a torn upper lip. (Tr. 536). Ms. Hill had hemorrhages in multiple areas of her scalp and had subarachnoid hemorrhages in different areas of her brain. (Tr. 552-54).

Ms. Hill also had injuries to her neck that occurred while she was still alive. (Tr. 540). The right side of the thyroid cartilage was broken, and there was

hemorrhaging between the esophagus and the trachea. (Tr. 555). These injuries were caused by strangulation. (Tr. 555). Dr. Peterson determined that Ms. Hill died from strangulation and blunt force trauma to the head. (Tr. 558-89). While Dr. Peterson did not believe it was the drug use alone that killed Ms. Hill, she did believe that the drugs were a contributing factor. (Tr. 559).

The jury was submitted instructions on murder in the second degree and voluntary manslaughter. (Tr. 697-700; L.F. 18-21). The defense also moved to submit an instruction on involuntary manslaughter to the jury. (Tr. 701-03). This request was denied. (Tr. 703).

The jury found Mr. Sanders guilty of murder in the second degree. (Tr. 752; L.F. 32-34, 49-50). After a sentencing hearing, the jury recommended a sentence of life in prison. (Tr. 780-81). On May 10, 2013, the Honorable Edith Messina followed the jury's recommendation and sentenced Mr. Sanders to life in prison. (Tr. 810; L.F. 5, 49-50).

POINT RELIED ON

The trial court erred in refusing to instruct the jury on the offense of involuntary manslaughter, pursuant to defense counsel’s proposed Instruction “A,” in violation of Mr. Sanders’ rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that involuntary manslaughter is a nested lesser-included offense to murder in the second degree and the jury could have found either that Mr. Sanders recklessly caused the death of Sherilyn Hill or that Mr. Sanders acted in self-defense but in doing so recklessly used a degree of force that was a gross deviation from what a reasonable person would do to protect himself. The court’s refusal to submit Instruction “A” prejudiced Mr. Sanders because the jury was precluded from considering the nested lesser-included offense of involuntary manslaughter and whether Mr. Sanders acted recklessly was never determined by a jury.

State v. Frost, 49 S.W.3d 212 (Mo. App. W.D. 2001);

State v. Jackson, 433 S.W.3d 390 (Mo. banc 2014);

State v. Pierce, 433 S.W.3d 424 (Mo. banc 2014);

State v. Randle, 465 S.W.3d 477 (Mo. banc 2015);

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

Mo. Const., Art. I, Sections 10 and 18(A);

Sections 562.016, 565.021, 565.023, 565.024, 565.025, and 556.046.

ARGUMENT I

The trial court erred in refusing to instruct the jury on the offense of involuntary manslaughter, pursuant to defense counsel’s proposed Instruction “A,” in violation of Mr. Sanders’ rights to present a defense, to due process of law, and to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that involuntary manslaughter is a nested lesser-included offense to murder in the second degree and the jury could have found either that Mr. Sanders recklessly caused the death of Sherilyn Hill or that Mr. Sanders acted in self-defense but in doing so recklessly used a degree of force that was a gross deviation from what a reasonable person would do to protect himself. The court’s refusal to submit Instruction “A” prejudiced Mr. Sanders because the jury was precluded from considering the nested lesser-included offense of involuntary manslaughter and whether Mr. Sanders acted recklessly was never determined by a jury.

Standard of Review

The trial court is required to instruct the jury on a lesser-included offense if there is a basis for acquitting the defendant of the offense charged and for convicting the defendant of the lesser-included offense. Section 556.046.2, RSMo Supp. (2001). When looking at alleged instructional error, the evidence should be viewed in the light most favorable to the defendant. *State v. Thomas*, 161 S.W.3d

377, 380 (Mo. banc 2005), citing *State v. Craig*, 33 S.W.3d 597, 601 (Mo.App. E.D. 2000). This Court reviews the trial court's decision to refuse a requested jury instruction under the *de novo* standard of review. *State v. Jackson*, 433 S.W.3d 390, 395 (Mo. banc 2014). If all the statutory requirements are met for giving an instruction, and the trial court fails to do so, reversible error has occurred. *Jackson*, 433 S.W.3d at 395.

Preservation

In the present case, the defense submitted proposed Instruction "A," for the lesser-included offense of involuntary manslaughter. (Tr. 701-03; Supp. L.F. 1-2). Proffered jury Instruction A, patterned after MAI-CR3d 314.10, read as follows:

If you do not find the defendant guilty of voluntary manslaughter, you must consider whether he is guilty of involuntary manslaughter in the first degree under this instruction.

If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 23, 2011, County of Jackson County, State of Missouri, the defendant caused the death of Sherilyn Hill by kicking her, and

Second, that defendant recklessly caused the death of Sherilyn Hill, then you will find the defendant guilty of involuntary manslaughter in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of involuntary manslaughter in the first degree under this instruction.

In determining whether the defendant recklessly caused the death of Sherilyn Hill, you are instructed that a person acts recklessly as to causing the death of another person when there is a substantial and unjustifiable risk he will cause death and he consciously disregards that risk, and such disregard is a gross deviation from what a reasonable person would do in the circumstances.

(Supp. L.F. 1-2).

Defense counsel argued that there was sufficient evidence to submit this lesser-included offense to the jury. (Tr.701-03). The trial court denied this request. (Tr. 703). Defense counsel raised this objection in the motion for new trial. (L.F. 39). The issue is preserved for appellate review.

Argument

Lesser-included offenses are separated from the greater offense by one differential element, for which the State bears the burden of proof, and are called “nested lesser-included offenses.” *State v. Randle*, 465 S.W.3d 477, 479 (Mo. banc 2015). “ ‘ The jury’s right to disbelieve all or any part of the evidence and its right to refuse to draw any needed inference, is a sufficient basis in the evidence to justify giving any lesser-included offense instruction when the offenses are

separated by one differential element for which the state bears the burden of proof.’ ” *Randle*, 465 S.W.3d at 479, quoting *State v. Jackson*, 433 S.W.3d at 401. A nested lesser-included offense consists of a subset of the elements of the greater offense, such that it is impossible to commit the greater without necessarily committing the lesser. *Randle*, 465 S.W.3d at 479, quoting *State v. Jackson*, 433 S.W.3d at 404. As such, upon proper request, a defendant is entitled to an instruction on a nested lesser-included offense, even if no affirmative evidence is introduced. *Randle*, 465 S.W.3d at 479, quoting *State v. Jackson*, 433 S.W.3d at 401-02.

To support a conviction for murder in the second degree, a person must act “knowingly,” in that he is aware that his conduct is practically certain to cause a specific result. Sections 565.021; 562.016.3(2). Voluntary manslaughter requires the same “knowing” element as murder in the second degree, but occurs when a person causes the death of another under the influence of sudden passion arising from adequate cause. Sections 565.023; 565.023.1(1). To support a conviction for involuntary manslaughter, a person must act “recklessly,” in that he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care a reasonable person would exercise in the situation. Sections 565.024; 562.016.4. As such, only the mental state separates murder in the second degree from either voluntary manslaughter or involuntary manslaughter.

As this Court recently held in *State v. Randle*, when the only difference between two charges is a different intent or mental state (but the same action), the different *mens rea* requirements are differential elements on which the State bears the burden of proof and as such, the lesser offense is a nested lesser-included offense. 465 S.W.3d 477, 480 (Mo. banc 2015). In *Randle*, this Court held that third-degree assault is a nested lesser-included offense of second-degree assault since the only element that is different between second-degree assault and third-degree assault is whether the defendant knowingly or recklessly inflicted physical injury. *Id.* This Court reached the same conclusion in *State v. Roberts*, 465 S.W.3d 899, 902 (Mo. banc 2015).

Since the only difference between murder in the second degree, voluntary manslaughter, and involuntary manslaughter is the mental element (knowing, sudden passion, and reckless), both voluntary manslaughter and involuntary manslaughter are nested lesser-included offenses of murder in the second degree. As such, when Mr. Sanders submitted a proper request to the trial court for the instruction on involuntary manslaughter, that request should have been granted.

State v. Frost is controlling and has facts very similar to the case at hand. 49 S.W.3d 212 (Mo.App. W.D. 2001). In that case, the defendant, Ms. Frost, was alone with the victim, Mr. Fingers. *Frost*, 49 A.W.3d at 217. Mr. Fingers approached Ms. Frost for sex several times, in spite of her repeated refusals. *Id.* Mr. Fingers became angry and ultimately struck Ms. Frost. *Id.* Ms. Frost went to the kitchen to get a knife, and she noticed that the exit to the house was locked.

Id. Ms. Frost sat down with the knife and warned Mr. Fingers to stay away from her. *Id.* When he again approached her, Ms. Frost kicked at Mr. Fingers. *Id.* When Mr. Fingers reached for her, Ms. Frost stood up and stabbed Mr. Fingers once in the chest. *Id.*

The jury was instructed on murder in the second degree, voluntary manslaughter, and self-defense. *Id.* at 216. The Court of Appeals held that the trial court erred in refusing to instruct the jury on the lesser-included offense of involuntary manslaughter. *Id.* at 213. The Court noted that the jury could have reasonably found that Ms. Frost recklessly, rather than knowingly, caused Mr. Fingers' death in that she stabbed him in an attempt to defend herself, not to kill him. *Id.* at 216. The jury could have further believed that this action was reckless, in that the degree of force used by Ms. Frost was a gross deviation from the force that a reasonable person would use under the same circumstances. *Id.*

The Court of Appeals rejected the State's argument that, because the jury found Ms. Frost guilty of murder in the second degree in lieu of voluntary manslaughter, that there was no reason to believe the jury would have convicted her of the lesser crime of involuntary manslaughter. *Id.* at 218. Because a reasonable basis existed upon which the jury could have convicted Ms. Frost of involuntary manslaughter, and the jury was precluded from considering this option, Ms. Frost suffered prejudice. *Id.* at 220.

As noted by the Court of Appeals, the instructions for second degree murder and voluntary manslaughter were virtually identical, except that the second

degree murder instruction required that Ms. Frost did not act under the influence of sudden passion. *Id.* Involuntary manslaughter, however, required a finding of different elements that were not tested by the instructions given. *Id.* Ms. Frost suffered prejudice by the trial court's failure to submit the instruction on involuntary manslaughter, and the Court of Appeals reversed her conviction and remanded the case for a new trial. *Id.*

Similarly, there was a basis to believe that Mr. Sanders acted recklessly, rather than knowingly, in causing Ms. Hill's death. In the present case, there was a basis upon which the jury could acquit Mr. Sanders of murder in the second degree and voluntary manslaughter and convict him of involuntary manslaughter. Looking at the evidence in the light most favorable to Mr. Sanders, a jury could have believed that Mr. Sanders hit Ms. Hill several times but that he did not strangle her. Mr. Sanders testified that he hit Ms. Hill several times but did so because he was acting in self-defense. (Tr. 618-21). Mr. Sanders denied strangling Ms. Hill or wrapping the towel and sheet around her neck. (Tr. 623).

Mr. Sanders testified that he did not carry Ms. Hill to the basement, where her body was ultimately found. (Tr. 626). None of the fingerprints recovered from the basement area matched Mr. Sanders. (Tr. 518-19). All of the physical evidence that matched Mr. Sanders came from the hotel room itself or from Mr. Sanders' shoes, which would be expected since Mr. Sanders agreed that he had been in the hotel room, and he said that he had kicked Ms. Hill. (Tr. 587, 589).

Mr. Sanders testified that he left Ms. Hill on the landing outside the stairwell. (Tr. 626). This was a high crime neighborhood, where people had to be careful or they could get beaten up for drugs. (Tr. 388). Ms. Brown was present when Mr. Sanders hit Ms. Hill, yet she did not call the police or an ambulance. (Tr. 460). A jury could have believed that Mr. Sanders did not believe that Ms. Hill was seriously injured when he left her on the landing. Further, based upon the time of day, the location, and the illegal activities that Ms. Hill was involved in, the jury could have believed that someone else assaulted Ms. Hill after Mr. Sanders left her there.

Given all of these facts, the jury could have believed that Mr. Sanders acted recklessly, rather than knowingly, in causing Ms. Hill's death. There was evidence that Mr. Sanders hit Ms. Hill, not with the purpose of causing her great harm, but in order to defend himself from a person swinging a knife at him. (Tr. 620). Both Mr. Sanders and Ms. Brown testified that Ms. Hill had pulled a knife on Mr. Sanders at least three times. (Tr. 440, 447-48, 466-71, 613-17). The jury could find that Mr. Sanders defended himself but recklessly used an amount of force that was a gross deviation from what a reasonable person would use under the circumstances.

Alternatively, even if the jury did not believe that Mr. Sanders was acting in self-defense, the jury could have still believed that Mr. Sanders recklessly caused the death of Ms. Hill. The jury could have found that kicking Ms. Hill in the head constituted a substantial and unjustifiable risk to Ms. Hill, and that it was

a gross deviation from the standard of care that a reasonable person would use, but that Mr. Sanders did not intentionally cause Ms. Hill's death. Mr. Sanders testified that he himself had often been hit in the head multiple times and had lost consciousness. (Tr. 668). Based upon his own life experiences, Mr. Sanders did not think that getting hit in the head, even very hard, was life threatening. (Tr. 668). The jury could have believed that Mr. Sanders did not act knowingly, in that he did not realize that kicking Ms. Hill was practically certain to cause Ms. Hill's death. Rather, that jury could have found that his actions were reckless in that he should have been aware of the risk to Ms. Hill that he was creating.

A jury could also find it reckless behavior to leave an injured woman in the stairwell. Based on the time of day and the neighborhood itself, the jury could have found that Mr. Sanders recklessly caused Ms. Hill's death by injuring her, then leaving her, without any help, in a vulnerable position that ultimately led to her death.

It was up to the jury to determine whether Mr. Sanders acted recklessly and in doing so caused the death of Ms. Hill. To overturn *State v. Frost* would run counter to this Court's recent line of cases that make it clear that the finder of fact is always the jury, and that every fact or inference to be drawn from the evidence

is left to the sole province of the jury⁶. “All decisions as to what evidence the jury must believe and what inferences the jury must draw are left to the jury, not to judges deciding what reasonable jurors must and must not do.” *Jackson*, 433 S.W.3d at 399. Even when no affirmative evidence is presented, a defendant is entitled to an instruction on lesser-included offenses since the jury can always believe or disbelieve any part of the evidence, and the only thing the defendant has to do to hold the state to its burden of proof or put the elements in dispute is plead not guilty. *State v. Pierce*, 433 S.W.3d 424, 432 (Mo. banc 2014).

The holdings in *Jackson*, *Pierce*, *Randle*, and *Roberts* only strengthen the holding of *Frost*. As noted by the Court of Appeals in *Frost*, the instructions for murder in the second degree and voluntary manslaughter do not test the element of recklessness. *Frost*, 49 S.W.3d at 220. Only a jury can determine whether Mr. Sanders acted recklessly. That lack of finding cannot be inferred from anything else the jury found, since recklessness was not before the jury, no matter how logical the State finds that argument or inference to be.

The jury should have been allowed to consider whether Mr. Sanders was guilty of involuntary manslaughter. Mr. Sanders suffered prejudice by the failure of the trial court to submit an instruction on involuntary manslaughter because the

⁶ See eg. *State v. Jackson*, 433 S.W.3d 390 (Mo. banc 2014); *State v. Pierce*, 433 S.W.3d 424 (Mo. banc 2014); *State v. Randle*, 465 S.W.3d 477 (Mo. banc 2015); *State v. Roberts*, 465 S.W.3d 499 (Mo. banc 2015).

element of recklessness was never tested by a jury. As stated in *Jackson*, “no matter how strong, airtight, inescapable, or even absolutely certain the evidence and inferences in support of the differential element may seem to judges and lawyers, no evidence ever proves an element of a criminal case until all 12 jurors believe it.” *Jackson*, 433 S.W.3d at 400. It must be the jury itself, and the jury alone, that decides what is reasonable to believe or what is reasonable to infer. In this case, it was for the jury decide whether Mr. Sanders acted recklessly when he caused Ms. Hill’s death.

The jury should have been instructed on involuntary manslaughter. Because it was not, prejudice is presumed. *Jackson*, 433 S.W.3d at 395. Mr. Sanders respectfully requests that this Court reverse his conviction and sentence and remand the case for a new trial.

CONCLUSION

Based on the foregoing Argument, Christopher Sanders respectfully requests that this Court reverse his conviction and sentence for murder in the second degree and grant him a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Jeannette L. Wolpink, hereby certify as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, this brief contains 6,309 words. This brief does not exceed the 31,000 words allowed for an appellant's brief .

2. This brief has been scanned for viruses using a Symantec Endpoint Protection program, which the Public Defender System updated on September 13, 2016. According to that program, the electronically-filed copy provided to this Court and to the Attorney General is virus-free. This brief was completed and electronically filed on September 13, 2016.

3. A true and correct copy of the attached brief was sent through the e-filing system on September 13, 2016, to Shaun J. Mackelprang, Chief Counsel, Criminal Appeals Division, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, at Shaun.Mackelprang@ago.mo.gov .

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