SC 94865

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

CHRISTOPHER SANDERS,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
16th Judicial Circuit
The Honorable Edith L. Messina, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant Christopher Sanders incorporates by reference the Jurisdictional Statement as set forth in his opening substitute brief on page 4.

STATEMENT OF FACTS

Appellant Christopher Sanders incorporates by reference the Statement of Facts as set forth in his opening substitute brief on pages 5-16.

ARGUMENT

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.

Respondent agrees that this Court reviews *de novo* a trial court's decision whether to give a requested jury instruction pursuant to Section 556.046, RSMo Supp. (2001). (Rs. Brief 16, citing *State v. Jackson*, 433 S.W.3d 390, 395 (Mo. banc 2014)). Respondent agrees that involuntary manslaughter is a lesser-included offense of murder in the second degree. (Rs. Brief 17-18, citing Section 565.025.2(s)(b) RSMo (2000)). Respondent also agrees that the trial court is generally obligated to give an instruction on a lesser offense when: 1) a party timely requests the instruction; 2) there is a basis in the evidence for acquitting the defendant of the charged offense; and 3) there is a basis in the

evidence for convicting the defendant of the lesser-included offense. (Rs. Brief 18, citing *Jackson*, 433 S.W.3d at 396).

Instructional Error

Respondent concedes that Mr. Sanders met the first and second requirements, but takes issue with the third- that there was a basis in the evidence for convicting Mr. Sanders of involuntary manslaughter. (Rs. Brief 18-24). Respondent notes that Mr. Sanders was charged with murder in the second degree, with the jury instructed to determine if he knowingly "caused the death of the victim by kicking her and strangling her but not under the influence of sudden passion." (Rs. Brief 18; L.F. 18). Respondent also points out the instruction given to the jury on voluntary manslaughter included the language "kicking her and strangling her." (Rs. Brief 19; L.F. 20).

Respondent takes issue with Mr. Sanders' proposed instruction on involuntary manslaughter because it instructed the jury to consider whether Mr. Sanders recklessly caused Sherilyn Hill's death by kicking her but did not include the phrase "kicking and strangling her" found in the murder and voluntary manslaughter instructions. (Rs. Brief 19-20).

This argument easily fails. As Respondent acknowledges, the jury could believe or disbelieve any or all of the evidence, including whether Ms. Hill was strangled and, if the jury believed that she had been, whether Mr. Sanders was the one who strangled her. (Rs. Brief 23-24). There was a basis in the evidence to acquit Mr. Sanders of murder in the second degree and voluntary manslaughter, and to convict Mr. Sanders of recklessly causing Ms. Hill's death by kicking her (specifically, Mr. Sanders' testimony, along with

the testimony of the only eye-witness to the interaction between Mr. Sanders and Ms. Hill). Further, the appropriate remedy would be for the trial court to add the language to the proposed instruction, rather than reject the instruction all together. That is the purpose of an instruction conference outside of the hearing of the jury. However, nothing in the record suggests that the trial court's rejection of the instruction was based upon the language of the proposed instruction. Instead it was based upon a rejection of instructing the jury on involuntary manslaughter. (Tr. 701-02).

Prejudice

Respondent next argues that even if the trial court did err by refusing to instruct on involuntary manslaughter, there was no prejudice to Mr. Sanders. (Rs. Brief 24-25). This argument also fails easily. As previously argued, involuntary manslaughter is a nested, lesser-included offense of murder in the second degree and voluntary manslaughter, since the only difference between murder in the second degree, voluntary manslaughter, and involuntary manslaughter is the mental element (knowing, sudden passion, and reckless). *See State v. Randle*, 465 S.W.3d 477, 480 (Mo. banc 2015). Further, since all the statutory requirements were met for giving an instruction on involuntary manslaughter, prejudice is presumed. *Jackson*, 433 S.W.3d at 395.

Although prejudice is presumed, Respondent urges this Court to evaluate whether Mr. Sanders was prejudiced. (Rs. Brief 25-26). This argument is not supported by the current case law. The first several cases cited by Respondent all pre-date *State v. Pierce* (433 S.W.3d 424 (Mo. banc 2014)) and *Jackson.* (Rs. Brief 26). To the extent that those cases conflict with *Pierce* and *Jackson*, they have been overruled.

Respondent then argues that because Mr. Sanders was convicted of murder in the second degree, and voluntary manslaughter was submitted to the jury, no prejudice can be inferred from the trial court's failure to instruct the jury on involuntary manslaughter. (Rs. Brief 26). Even if prejudice is not presumed, which it is, to hold that no prejudice occurred would run counter to the holdings of *Pierce* and *Jackson*. As stated by the Western District Court of Appeals in its opinion in this case, in response to the same argument:

> "The State next cites several cases pre-dating *Jackson* and *Pierce* for the proposition that the failure to give an additional lesser-included offense is neither erroneous nor prejudicial when instructions for the greater offense and one lesser-included offense are given and the defendant is found guilty of the greater offense. We seriously question whether those holdings have survived *Jackson* and *Pierce*, but assuming arguendo that they have, an exception applies 'where the lesser offense that was actually submitted at trial did not 'test' the same element of the greater offense that the omitted lesser offense would have challenged.'"

State v. Sanders, WD76452, February 3, 2015, pg. 9, citing *Briggs v. State*, 446 S.W.3d 714, 720 (Mo.App. W.D. 2014); *State v. Nutt*, 432 S.W.3d 221, 224-25 (Mo.App. W.D. 2014); *State v. Frost*, 49 S.W.3d 212, 219-20 (Mo.App. W.D. 2001).

Along those lines, Respondent also urges this Court to reconsider the prejudice analysis is *State v. Frost*. The Western District Court of Appeals rejected Respondent's exact argument in *Frost*. 49 S.W.3d at 218. As noted by Court of Appeals in *Frost*, the instructions for second degree murder and voluntary manslaughter are virtually identical,

except that the second degree murder instruction requires that the defendant did not act under the influence of sudden passion. *Id.* Both instructions require knowing conduct. *Id.* Involuntary manslaughter, however, requires a finding of different elements that are not tested by the instructions given for murder in the second degree or voluntary manslaughter. *Id* . As such, the defendant suffers prejudice when the trial court fails to submit an instruction on involuntary manslaughter when there is a reasonable basis to do so. *Id*. This is true even when the jury has the option of voluntary manslaughter and murder in the second degree and convicts the defendant of the higher offense. *Id.*

Respondent has offered no compelling reason to reconsider *Frost*, or to dilute the holdings of *Jackson* and *Pierce*. What has been made clear by those cases, as well as other recent cases before this Court, is that the jury is always the ultimate finder of fact. This Court has firmly stated that it will not speculate as to what is reasonable or unreasonable for a jury to find or infer. *Randle*, 465 S.W.3d at 479; *Jackson*, 433 S.W.3d at 401. To weigh prejudice would require this Court to do exactly that. Prejudice cannot be evaluated without looking at the evidence in the record and deciding what a reasonable jury must have been thinking or would have been thinking had it been properly instructed. For this Court to determine prejudice would be to substitute its own judgment and interpretation of the facts for that of the jury, which runs completely contrary to the holdings in *Jackson* and *Pierce*.

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. This Court should not presume a proper or just verdict from an improperly instructed jury.

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). 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 elements of involuntary manslaughter were never tested by a jury. 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 is entitled to a new trial.

CONCLUSION

Based on the foregoing Argument, Christopher Sanders respectfully requests that this Court reverse his conviction and sentence and remand this cause for a new trial.

Respectfully submitted,

/s/ Jeannette L. Wolpink

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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 1,614 words.

2. This brief has been scanned for viruses using a Symantec Endpoint Protection program, which the Public Defender System updated on October 18, 2016. According to that program, the electronically-filed copy provided to this Court and to the Attorney General is virus-free.

3. A true and correct copy of the attached brief was sent through the e-filing system on October 18, 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 .

/s/ Jeannette L. Wolpink

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